U.S. Court of International Trade

Slip Op. 19–154

AUTOLIV ASP, INC., Plaintiff, v. UNITED STATES, Defendant, and ARCELORMITTAL TUBULAR PRODUCTS, MICHIGAN SEAMLESS TUBE, LLC, PTC ALLIANCE CORP., WEBCO INDUSTRIES, INC., ZEKELMAN INDUSTRIES, INC., and PLYMOUTH TUBE CO., USA, Defendant-Intervenors.

Before: Leo M. Gordon, Judge
Consol. Court No. 18–00037

[Sustaining final affirmative material injury determinations.]

Dated: December 6, 2019

Kenneth G. Weigel and *Chunlian Yang*, Alston & Bird LLP, of Washington, DC, for Plaintiff Autoliv Asp, Inc.

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

R. Alan Luberda, Kathleen W. Cannon, and *Melissa M. Brewer*, Kelley Drye and Warren LLP, of Washington, DC, for Defendant-Intervenors Arcelormittal Tubular Products, Michigan Seamless Tube, LLC, PTC Alliance Corp., Webco Industries, Inc., Zekelman Industries, Inc., and Plymouth Tube Co., USA.

OPINION

Gordon, Judge:

This consolidated action involves the final affirmative material injury determinations by the U.S. International Trade Commission ("ITC" or "Commission") in the countervailing duty ("CVD") and antidumping duty ("AD") investigations into imported cold-drawn mechanical tubing ("CDMT") from various countries. *See Cold-Drawn Mechanical Tubing from China and India*, 83 Fed. Reg. 4,269 (Int'l Trade Comm'n Jan. 30, 2018), and *Cold-Drawn Mechanical Tubing from China, Germany, India, Italy, Korea, and Switzerland*, 83 Fed. Reg. 26,088 (Int'l Trade Comm'n June 5, 2018), respectively ("*Final Determinations*"); *see also Cold-Drawn Mechanical Tubing from China and India*, Inv. Nos. 701-TA-576–577 (CVD Final), USITC Pub. 4755 (Jan. 2018), PD[1] 218 ("*Views*"), and *Cold-Drawn Mechanical Tubing from China, Germany, India, Italy, Korea, and Switzerland*, Inv. Nos. 731-TA-1362–1367 (AD Final), USITC Pub. 4790 (May 2018), PD 271.

[1] "PD" refers to a document in the public administrative record, which is found in ECF No. 22, unless otherwise noted. "CD" refers to a document in the confidential administrative record, which is found in ECF No. 21, unless otherwise noted.

Before the court is the USCIT Rule 56.2 motion for judgment on the agency record filed by Plaintiff Autoliv ASP, Inc. ("Autoliv"). *See* Pl.'s Mot. for J. on the Agency R., ECF No. 28 ("Pl.'s Mot."); *see also* Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 29 ("Def.'s Resp."); Def.-Intervenors Arcelormittal Tubular Products, Michigan Seamless Tube, LLC, PTC Alliance Corp., Webco Industries, Inc., Zekelman Industries, Inc., and Plymouth Tube Co., USA's Resp. Opp. Pl.'s Mot. for J. on the Agency R., ECF No. 30 ("Def.-Intervenors Resp."); Pl.'s Reply in Supp. of Mot. for J. on the Agency R., ECF No. 31 ("Pl.'s Reply"). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i),[2] and 28 U.S.C. § 1581(c) (2012). For the reasons set forth below, the ITC's final affirmative injury determinations are sustained.

I. Background

The statute governing unfair trade investigations requires a determination by the Commission on whether imported articles within the scope of a particular investigation (the "subject merchandise") have injured a domestic industry. *See* 19 U.S.C. §§ 1671, 1673. Domestic "industry" is defined as "the producers as a whole of the domestic like product...." 19 U.S.C. § 1677(4)(A). Three types of domestic injury are identified by statute: material injury, threat of material injury, or material retardation of the establishment of an industry. *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1). There must be a causal nexus between a type of injury and imports of the subject merchandise, *i.e.*, the injury must result "by reason of" imports of the subject merchandise. *Id.*

In order to make its determination, the Commission compares subject merchandise to its U.S. domestic counterpart, which by statute must be a product "which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 19 U.S.C. § 1677(10). The Commission relies on the "scope" of the subject merchandise provided by the U.S. Department of Commerce ("Commerce") to serve as the outside parameter for defining the domestic like product. *See Views* at 5 & n.13; *see, e.g., NEC Corp. v. Dep't of Commerce*, 22 CIT 1108, 1110 (1998) ("[a]lthough the Commission must accept the determination of Commerce as to the scope of the imported merchandise sold at less than fair value, the Commission determines what domestic product is like the imported articles Commerce has identified").

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

If subject merchandise involves a range of products, as here, the Commission generally does not consider each iteration of merchandise to be a separate like product. Instead, the Commission considers the grouping of products to constitute a single domestic like product, and it will disregard minor variations among them absent a "clear dividing line" between particular products in the group. *See Nippon Steel Corp. v. United States*, 19 CIT 450, 455 (1995) (the ITC "disregards minor differences, and looks for clear dividing lines between like products"); *see also Tapered Roller Bearings from China*, Inv. No. 731-TA-344 (Fourth Review), USITC Pub. 4824 at 5–14 (Sept. 2018) (describing variety of sizes specifications, and applications for tapered roller bearings but defining a single domestic like product without clear dividing lines between products).[3]

In determining the domestic like product here, the Commission relied on Commerce's definition of the scope, namely, all CDMT of carbon and alloy steel of circular cross-section, 304.8 mm or more in length, in actual outside diameters less than 331 mm, and regardless of wall thickness, surface finish, end finish, industry specification, production process (*e.g.*, welded or seamless), further heat treatment or cold-finishing operations, or dual/multiple certification to standards. *See Views* at 5–6. Commerce's scope definition broadly covered CDMT steel products in which (1) iron predominates, by weight, over each of the other contained elements, and (2) the carbon content is two percent or less by weight. *See id.* at 6. In reaching its conclusion regarding injury, the Commission determined that there was a single domestic like product "that is coextensive with the scope of investigations." *Id.* at 15.

Autoliv imported "airbag tubing" for use in the manufacture of automotive safety airbag systems during the respective periods of the investigations ("POIs") of imported CDMT. In its comments to the Commission on the definition of the domestic like product, Autoliv did not dispute that the scope conceptually covered airbag tubing. Nevertheless, Autoliv contended that airbag tubing was a critical component of its production of airbag safety systems and that there was a "clear dividing line" in terms of production process, chemical and mechanical properties, and uses, between airbag tubing and CDMT generally. *See, e.g., Views* at 10–11, 13–15; Pl.'s Mot. at 4 (citing Prehearing Brief of Autoliv at 3, PD 165, CD 524). Autoliv further

[3] The following factors are considered in the Commission's like-product analysis: (1) physical appearance, (2) interchangeability, (3) channels of distribution, (4) customer perceptions, (5) common manufacturing facilities and production employees, and where appropriate, (6) price. *See NEC Corp.*, 22 CIT at 1110. These factors are not exhaustive, as an investigation may give rise to other considerations relevant to the factual determination on the domestic like product, and the Commission's practice in defining domestic like product is on a case-by-case basis with no single factor considered dispositive. *See, e.g., Views* at 5.

maintained that airbag tubing must be extremely hard, and at the same time ductile, in order to meet its critical safety purposes, and that there was no production currently of the domestic equivalent of airbag tubing nor did the domestic industry have plans to produce it. *Id.* Autoliv argued that the absence of domestic production did not preclude the Commission from finding airbag tubing to be a separate domestic like product and that the Commission should have, in these circumstances, considered whether domestic production of airbag tubing was materially retarded under the third prong of the statute.

In response, the petitioners argued that Autoliv did not timely file comments requesting the Commission to collect separate data on U.S.-produced products like or most similar to airbag tubing. *See Views* at 10. Petitioners further contended that Autoliv's argument for a material retardation analysis was misplaced because Autoliv did not and could not allege the existence of material retardation, given that there is an established domestic industry producing CDMT that had previously produced airbag tubing and that retains the equipment to do so. *See id.* at 10, 14.

Ultimately the Commission agreed with the petitioners, explaining that the statute precluded it from considering airbag tubing as a separate domestic like product because there were no "like" domestic products or production of airbag tubing during the POIs. *See id.* at 14–15. The ITC observed that the domestic industry included U.S. producers who had previously manufactured airbag tubing and did not currently manufacture airbag tubing but retained the capacity to do so. *Id.* at 14. Accordingly, the Commission determined that imports of CDMT from China, Germany, India, Italy, Korea, and Switzerland caused material injury to a U.S. industry. *See Final Determinations*.

II. Standard of Review

The court sustains the Commission's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of evidence, and the

possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's findings from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting a reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." 8A *West's Fed. Forms*, National Courts § 3.6 (5th ed. 2019).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837. 842–45 (1984), governs judicial review of the Commission's interpretation of the Tariff Act. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (An agency's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

III. Discussion

Autoliv contends that, even though there was no U.S. production of airbag tubing during the POIs, the Commission's decision not to define airbag tubing as a separate domestic like product is unlawful. *See* Pl.'s Mot. at 3–14. Autoliv maintains that, given these circumstances, 19 U.S.C. §§ 1671d(b) and 1673d(b) require that the Commission conduct a material retardation analysis, which the Commission failed to do. *Id.* at 15–16. Autoliv also argues that it was unreasonable for the Commission to conclude that Autoliv did not identify a domestically produced variant that is most similar in characteristics and uses with airbag tubing. Lastly, Autoliv contends that the Commission has the burden to gather the requisite factual information and identify a suitable domestic like product for the purpose of determining whether airbag tubing constitutes a separate like product. *Id.* at 17–19.

A. Statutory Interpretation of "Domestic Like Product"

In considering the proper interpretation of "domestic like product" under 19 U.S.C. § 1677(10), the court applies the two-step framework of *Chevron*. Under step one of *Chevron*, the court considers whether Congressional intent on the issue is clear. *See Chevron*, 467 U.S. at 842–43 ("First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Con-

gress."). If the court cannot identify a clear expression of Congressional intent and concludes that the statutory provision is silent or ambiguous as to the contested issue, the court turns to the second prong and determines whether Commerce's interpretation of the statute is reasonable. *See id.*

Autoliv argues that "[t]he Commission's interpretation of the industry and domestic like product definitions is inconsistent with the text of the statute and Congress's purpose and intent in enacting the antidumping and countervailing duty laws." Pl.'s Mot at 7. Specifically, Autoliv maintains that:

> The statute, 19 U.S.C. § 1677(10), defines the domestic like product with reference to '*a product*... (importantly, not 'a domestic product' nor 'domestically manufactured product') which is like ... or most similar... with the article subject to an investigation.' Thus, the statute unequivocally defines the domestic like product with reference to 'a product' identical or most similar to the imported subject merchandise, and not to domestically produced items.

Id. at 9. Autoliv thus contends that "the plain language in the statute ... [requires] that the Commission must first determine the like product(s) subject to the investigations – here one of them is airbag tubing – and then the domestic 'like product' that is like or similar to airbag tubing and use that to define the U.S. industry to consider for Injury purposes." *Id.* at 10.

The Commission agrees with Plaintiff that the meaning of "domestic like product" is clear and unambiguous. However, it maintains that Autoliv's interpretation improperly relies on in-scope imports to define a non-existent "domestic" like product. *See Views* at 13. The Commission argues that Autoliv's proposed definition of like product ignores the "statute's mandate to identify a *domestic* item that is like or most similar to subject imports." *Id.* (emphasis added). The Commission explains that the statute provides that when material retardation is not an issue in an investigation and no like product is produced domestically, the Commission is to identify a domestic product that is "most similar in characteristics and uses" to subject merchandise:

> The ITC will examine an industry producing the product like the imported article being investigated, but if such an industry does not exist and the question of material retardation of establishment of such an industry is not an issue before the ITC, then the ITC will examine an industry producing a product most similar in characteristics and uses with the imported article.

Def.'s Resp. at 10 (quoting S. Rep. No. 96–249, at 90 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 476).

The precise question at issue here is whether the Commission may define a separate "domestic like product" that is not produced domestically. "In order to determine whether a statute clearly shows the intent of Congress in a *Chevron* step-one analysis, [the court] employ[s] traditional tools of statutory construction and examine[s] 'the statute's text, structure, and legislative history, and appl[ies] the relevant canons of interpretation.'" *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)).

Plaintiff highlights that the statutory definition of "domestic like product" does not refer to domestic production, thereby arguing that in circumstances where there is no domestic production of a particular subject import, the statute contemplates that the Commission "must first determine the like product(s) subject to the investigations ... and then the domestic 'like product' that is like or similar to airbag tubing and use that to define the U.S. industry to consider for Injury purposes." *See* Pl.'s Mot at 9–10. The court disagrees. The text, structure, and legislative history of § 1677(10) convey a clear Congressional intent that the Commission define a "domestic like product" with respect to a product that is produced domestically.

Notably, the statute does not expressly require or provide for any precise methodology by which the Commission is to identify an appropriate domestic like product. *See* 19 U.S.C. §§ 1677(4) & 1677(10). Rather, the statute simply states that the Commission shall identify "a product which is like, *or in the absence of like, most similar in characteristics and uses with*, the article subject to an investigation." *See* 19 U.S.C. § 1677(10) (emphasis added). As the Commission notes, the legislative history supports its interpretation that the term "domestic like product" was intended to cover only domestically produced merchandise. *See* Def.'s Resp. at 8 (noting that "when Congress in 1994 amended the term from 'like product' to 'domestic like product', the Senate report confirmed that 'like product' under U.S. law 'refers to U.S. production.'" (quoting S. Rep. 103–412, at 33, (1994))); *id.* at 10 ("The ITC will examine an industry producing the product like the imported article being investigated, but if such an industry does not exist and the question of material retardation of establishment of such an industry is not an issue before the ITC, then the ITC will examine an industry producing a product most similar in characteristics and uses with the imported article." (quoting S. Rep. No. 96–249, at 90 (1979))).

Plaintiff's argument that the term "domestic like product" in 19 U.S.C. § 1677(10) must be defined without reference to whether there is any domestic production of a proposed "like" product is misplaced. The Commission's interpretation of § 1677(10) comports with the statutory language's clear and unambiguous meaning. Autoliv's interpretation ignores the word "domestic" in the term "domestic like product" and runs contrary to Congressional intent. Accordingly, the court sustains the Commission's interpretation of the term "domestic like product" in the *Final Determinations*.

B. Material Retardation

Beyond its argument that the Commission must define "domestic like product" by reference to subject imports (without regard to whether there is actually domestic production of identical or similar products), Autoliv argues that in circumstances where there is no domestic production of merchandise identical or similar to certain subject imports, the Commission is statutorily required to consider whether subject imports were materially retarding the establishment of a domestic industry for production of those goods. *See* Pl.'s Mot. at 14–16 ("once [the Commission] found no U.S. production of airbag tubing or a similar product, [it] was required by statute to consider if the establishment of an industry in the United States is materially retarded."). Autoliv maintains that the use of the mandatory term "shall" in 19 U.S.C. §§ 1671d(b) and 1673d(b) demonstrates that "[w]hen there is no production of a domestic like product, the statute requires the Commission to proceed to the question of material retardation of establishment of an industry." *Id.* at 15. Other than noting that §§ 1671d(b) and 1673d(b) direct that the Commission "shall make a final determination" as to material injury to or material retardation of the establishment of a U.S. industry, Autoliv fails to explain how the statutory language of §§ 1671d(b) and 1673d(b) conveys a clear Congressional intent that answers the "precise question" of whether the Commission must proceed with a material retardation analysis in circumstances where there is no domestic production of an alleged separate like product. *See Chevron* 467 U.S. at 842–43.

Instead of presenting an argument under *Chevron* step one as it did with respect to 19 U.S.C. § 1677(10), Autoliv argues that certain commissioners, and even the Commission itself, have previously interpreted §§ 1671d(b) and 1673d(b) to provide for a material retardation analysis where there is no commercial domestic production of a particular product. *See* Pl.'s Mot. at 12–13, 15–16 (citing prior Commission decisions involving the use of a material retardation analysis

given the absence of domestic production of a separate like product). As a result, Autoliv appears to suggest that the Commission's refusal to conduct a material retardation analysis in this matter is unreasonable and violative of §§ 1671d(b) and 1673d(b) under *Chevron* step two. As explained below, the court concludes that Autoliv's reliance on certain Commission precedent is misplaced and rejects Autoliv's preferred statutory interpretation.

Importantly, in the subject investigations, the Commission determined that the statute did not mandate it to conduct a material retardation analysis since there was an established domestic CDMT industry that had produced airbag tubing in the past and which retained the productive capacity to produce airbag tubing.[4] *See Views* at 14. The Commission reminded interested parties in its preliminary determinations that "parties seeking a separate domestic like product for items not manufactured domestically must identify a domestically produced variant most similar in characteristics and uses to such items." *Id.* at 14–15. Given that Autoliv failed to identify any such domestically produced variant, the Commission proceeded to define "a single domestic like product that is coextensive with the scope of [Commerce's] investigations." *Id.* at 15.

The court agrees that the Commission reasonably interpreted the statute in deciding not to conduct a material retardation analysis. As described above, Congress plainly defined "domestic like product" in 19 U.S.C. § 1677(10) to encompass situations where merchandise identical to the imported subject merchandise is not produced in the U.S. domestically, *i.e.*, "or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this subtitle." *See supra* Part III.A. The Commission explained that its determinations in other investigations consistently demonstrate that "the Commission would not define a separate domestic like product for items not produced domestically and for which parties had not identified a domestic variant that was most similar in characteristics and uses." *Views* at 14. The Commission further clarified that the separate domestic like product inquiry is distinct from any obligation the Commission may have to consider material retardation of the establishment of a domestic industry. *See id.* at n.57 (quoting *Professional Electric Cutting and Sanding/Grinding Tools from Japan*, Inv. No. 731-TA-571, USITC Pub. 2536 (July 1992), at 6

[4] Autoliv responds regarding this point that "an industry that has not produced a product since 2012 would seem to be a nascent industry." Pl.'s Reply at 8. This response ignores the ITC's explanation as to why material retardation is not at issue in these investigations and why domestic airbag tubing production is not a "nascent industry" based on the information in the record. *See Views* at 14 ("Material retardation is not an issue in these investigations. Petitioners have confirmed that they have in the past manufactured airbag tubing and retain the capacity to do so.").

("A product not produced in the United States is not an appropriate candidate for a separate domestic like product determination, unless material retardation of the establishment of an industry in the United States is a genuine issue. It is not an issue in this investigation.")).

The court has previously observed that "the lack of domestic production of identical merchandise is not a basis for recognizing a separate domestic like product." *Hitachi Metals Ltd. v. United States*, 42 CIT ___, ___, 350 F. Supp. 3d 1325, 1342 (2018), *appeal docketed*, No. 19–1289 (Fed. Cir. Dec. 11, 2018). Autoliv fails to present any arguments that lead the court to reach a different conclusion here. And contrary to Autoliv's proposed statutory interpretation, there is nothing inherent about the absence of domestic production of identical "like" merchandise that necessitates that the Commission commence a material retardation inquiry. *See* 19 U.S.C. §§ 1671d(b)(1), 1673d(b)(1); *see also* S. Rep. No. 96–249, at 90 (1979). Accordingly, the court sustains the Commission's decision in the *Final Determinations* not to consider whether there was material retardation of the establishment of a domestic industry.

C. Airbag Tubing as a Separate Domestic Like Product

The Commission's analysis of the domestic like product entails finding the domestic product that corresponds to the subject imports, an inquiry that does not involve a comparison of in-scope imports with one another, as Autoliv advocates. Autoliv argues nonetheless that the onus was on the Commission to make that determination, and that Autoliv should not have to bear the burden of placing evidence on the record of the domestically produced product that is "most similar in characteristics and uses with" subject imports of airbag tubing. Autoliv argues that in other investigations the Commission itself has undertaken to ensure that the record contained information about a suitable domestically produced variant of subject imports. *See* Pl.'s Mot. at 17–18 (referencing *Ferrovanadium and Nitrided Vanadium from Russia*, Inv. No. 731-TA-702 (Review), USITC Pub. 3420 at 5–6 (May 2001) ("*Ferrovanadium*") & *Certain Frozen Fish Fillets from Vietnam*, Inv. Nos. 731-TA-1095, -1096, and -1097 (Preliminary), USITC Pub. 3533 at 5 (Aug. 2002) ("*Frozen Fish Fillets*")).

Autoliv's reliance on these prior determinations is misplaced. In *Ferrovanadium*, the Commission indicated that it was accepting the *domestic industry's* assertion that domestically-produced ferrovanadium was the product most similar to subject imports of nitride vanadium. *See Ferrovanadium* at 5 (citing testimony from counsel to domestic industry at ITC hearing). In *Frozen Fish Fillets*, the Com-

mission noted that the *domestic industry* had identified frozen catfish fillets as the domestically produced item most similar to subject imports. *See Frozen Fish Fillets* at 5 (highlighting that "[p]etitioners argue that the product 'most similar in characteristics and uses' to subject imports is frozen catfish fillets"). Read in context, both of these ITC determinations demonstrate that the Commission solicits and relies on information provided by interested parties in order to determine domestically produced articles that were "most similar in characteristics and uses" to subject imports. These determinations do not support Plaintiff's contention that the Commission maintains an independent responsibility to identify domestically-produced items to serve as the domestic like product in circumstances where there is no domestic production of certain subject imports.

As the Commission noted, 19 C.F.R. § 207.20(b) requires any and all "requests for collecting new information" to be made by "parties to the investigation" in their respective comments on the Commission's draft questionnaires. *See* Def.'s Resp. at 13. The Commission states that it "further reminded" parties of this obligation in its preliminary views, requesting that the "parties" identify with "specificity" any product for which they sought a separate domestic like product in comments on draft questionnaires, and that in the final analysis Autoliv did not avail itself of that opportunity. *Views* at 14–15 (referencing *Cold-Drawn Mechanical Tubing from China Germany, India, Italy, Korea, and Switzerland*, Inv. Nos. 701-TA-576–577 and 731-TA-1362–1367 (Preliminary), USITC Pub. 4700 at 10 n.22[5] (June 2017), PD 86 ("*Preliminary Views*")). Autoliv responds that § 207.20(b) begins by stating: "The Director shall circulate draft questionnaires for the final phase of an investigation ... for comment," and Autoliv complains that it "was not provided drafts even though its views were reflected in the Staff Report in the preliminary investigation." Pl.'s Reply at 10 (referencing *Preliminary Views* at II-12 & n.34). Autoliv also contends that the Commission's procedural argument implies that the Commission lacks data with respect to airbag tubing, but Autoliv maintains that "[t]he record is complete as to airbag tubing on both the import and domestic sides." *Id.*

Autoliv, however, leaves unchallenged the Commission's finding that airbag tubing was not produced domestically during the respective POIs, and Autoliv has failed to establish that the Commission acted unreasonably in refusing to define airbag tubing as a separate

[5] The court notes that the pincite in the *Views* is slightly inaccurate, and that the relevant reminder language that ITC references may be found in the text of the conclusion on page 13 of the *Preliminary Views*, as well as in footnote 22 on pages 8–9.

domestic like product. *See Hitachi Metals*, 350 F. Supp. 3d at 1342. The Commission does bear responsibility for making the ultimate legal determinations, but it cannot do so in a vacuum, without the assistance of interested parties. The Commission explained that it requires parties seeking a separate domestic like product determination for imported items not made domestically to identify a domestically-produced item most similar in characteristics and uses to the imported item. *See, e.g., Views* at 13 & n.52. Given the absence of domestic production of airbag tubing, Autoliv should have heeded the Commission's suggestion (made in addressing another party's similar argument) to propose the domestic product that is "most similar in characteristics and uses" to the subject merchandise that is imported airbag tubing and request the Commission to undertake data collection for it. *See Preliminary Views* at 8–9 n.22 ("Hubei Steel failed to identify any domestically manufactured product 'most similar in characteristics and uses with' imported cold-drawn alloy seamless tubing .... Even if there is no domestic production of the product, because Hubei Steel has not identified a domestically produced variant that is 'most similar in characteristics and uses with' this product, we determine not to define it as a separate domestic like product."). Autoliv is the party best positioned to understand and clarify the parameters of such a request, not the Commission.

Autoliv argues that it did not propose any comparable product beyond airbag tubing itself because "There is no U.S. Product Similar to Airbag Tubing." *See* Pl.'s Reply at 4–5. However, contradictorily, Autoliv also argues that it suggested to the Commission that the product most "like" airbag tubing is "other types of CDMT." *See* Pl.'s Mot. at 19; Pl.'s Reply at 5. Given that the Commission defined a "single domestic like product that is coextensive with the scope of the investigations," (*i.e.*, CDMT), the court cannot agree with Plaintiff's contention that the ITC's domestic like product determination was unreasonable.

III. Conclusion

Based on the foregoing, the court sustains the *Final Determinations*. Judgment will enter accordingly.

Dated: December 6, 2019
New York, New York

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

Slip Op. 19–155

GUIZHOU TYRE CO., LTD.; GUIZHOU TYRE IMPORT & EXPORT CO., LTD., Plaintiffs, and TIANJIN UNITED TIRE & RUBBER INTERNATIONAL CO., LTD.; WEIHAI ZHONGWEI RUBBER CO., LTD.; Consolidated Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Consolidated Court No. 18–00100

[The court remands to Commerce for a further analysis of the Export Buyer's Credit Program. All other determinations made by the Department are sustained.]

Dated: December 10, 2019

Matthew P. McCullough, Tung Nguyen, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington, D.C., for plaintiffs Guizhou Tyre Co., Ltd., and Guizhou Tyre Import & Export Co., Ltd.

John Todor, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With him on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of counsel on the brief was *Orga Cadet*, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.

OPINION AND ORDER

Goldberg, Senior Judge:

Now before the court are the Final Results of Redetermination Pursuant to Court Remand, ECF 46–1 (Aug. 27, 2019) ("Remand Results"), of the Department of Commerce ("the Department" or "Commerce") in the countervailing duty ("CVD") investigation of off-the-road tires from the People's Republic of China ("PRC") during the period of review between January 1, 2015 and December 31, 2015. *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 83 Fed. Reg. 16,055 (Dep't Commerce Apr. 13, 2018) (final results), *amended by Certain New Pneumatic Off-the-Road Tires from the People's Republic of China,* 83 Fed. Reg. 32,078 (Dep't Commerce July 11, 2018) (am. final results) ("*Amended Final Results*") and accompanying Issues & Decision Mem. ("I&D Mem."). Following the court's remand back to Commerce, *Guizhou Tyre Co. v. United States*, 43 CIT __, 389 F. Supp. 3d 1315 (2019) ("*Guizhou II*"), the Department reviewed its determination on the Export Buyer's Credit Program ("EBCP" or "the Program") and provided additional support for its findings on distortion in the synthetic rubber market in 2015. *See generally* Remand Results. Specifically, the Department affirmed its findings regarding the EBCP and doubled down on its decision to apply an adverse inference that Plaintiffs used and benefited from the Program. *Id*. at 3–14. Additionally, the Department further explained

its finding that the synthetic market was not distorted in 2015. *Id*. at 14–16. This additional explanation demonstrated that the composition of the synthetic rubber market in China changed significantly between 2014 and 2015. *Id*. at 15. Plaintiffs Guizhou Tyre Co. and Guizhou Tyre Import and Export Co., (collectively "Guizhou" or "Plaintiffs") oppose Commerce's Remand Results in its entirety. *See* Pls.' Comments on the Department of Commerce's Remand Redetermination, ECF No. 48 (Sept. 26, 2019) ("Pls.' Comments").

The Department has provided adequate support for its finding distortion in the synthetic rubber market. The evidence provided by Commerce indicates that market conditions in 2015 were not "nearly identical" to those in 2014, as Plaintiffs claim. For example, pursuant to Commerce's explanation, the synthetic rubber market underwent a significant increase in import penetration. Therefore, the court sustains Commerce's remand results as to the distortion analysis. However, the court is not satisfied with Commerce's remand results relating to the EBCP. Once again, substantial evidence does not support the requisite threshold finding that there is a gap in the record warranting the use of adverse facts available ("AFA"). The court remands this issue back to Commerce for reconsideration in accordance with this opinion.

DISCUSSION

The court exercises jurisdiction under 28 U.S.C. § 1581(c). The court must hold unlawful any determination, finding, or conclusion found "to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Further, "[t]he results of a redetermination pursuant to court remand are also reviewed 'for compliance with the court's remand order.'" *SolarWorld Ams., Inc. v. United States*, 41 CIT __, __, 229 F. Supp. 3d 1362, 1365 (2017) (quoting *Xinjiamei Furniture (Zhangzhou) Co. v. United States*, 38 CIT __, __, 968 F.Supp.2d 1255, 1259 (2014)).

The Department has failed to "compl[y] with the court's remand order," *id.*, as it relates to Commerce's application of the AFA statute to the EBCP. Therefore, the court remands that portion of the Department's determination back to Commerce for reconsideration consistent with this opinion. As for the Department's market distortion analysis, the court upholds Commerce's redetermination as now supported by substantial evidence on the record, in light of the reasoned explanation now available to the court.

I. Synthetic Rubber Market Distortion Analysis

The Department determined that the 2015 synthetic rubber market was not distorted during the period of review because state-owned

producers accounted for 23.97 percent of market consumption for synthetic rubber. Remand Results at 14. Therefore, Commerce used Tier 1 benchmarks for imports to measure the adequacy of remuneration for this input. Plaintiffs challenged this determination, arguing that the results were inconsistent with the Department's distortion findings in 2014 because similar market conditions existed in the two years. The court agreed, noting that the evidence in the record demonstrated that the synthetic rubber market between 2014 and 2015 was distinguished by only a few percentage points. *Guizhou II*, 43 CIT at __, 389 F. Supp. 3d at 1324. And so, the court concluded, the Department would be hard-pressed to justify a change in its distortion analysis, especially where it failed to provide much additional insight into its ultimate determination. *Id*. *See also Hussey Copper. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) ("It is 'a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure . . . . This rule is not designed to restrict an agency's consideration of the facts from one case to the next, but rather it is to insure [sic] consistency in an agency's administration of a statute.'") (citing *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988)).

On remand, the court ordered Commerce to "specifically explain how the market for synthetic rubber in the PRC changed between 2014 and 2015 and what aspects of those changes caused Commerce to find that the market was not distorted in 2015." *Guizhou II*, 43 CIT at __, 389 F. Supp. 3d at 1325. The Remand Results show that Commerce did just that. Commerce further explained how the "composition of the synthetic market in China showed significant change between 2014 and 2015," Remand Results at 15. The "significant change" is largely based on the dramatic increase in imports from 2014 to 2015 (a 33.36 percent jump).

Plaintiffs claim that the Remand Results do little to move the needle, because "Commerce is simply leveraging the law of small numbers to reach its 'significant' and 'substantial' findings, where very small absolute changes in small numbers may yield higher percentage changes, but objectively the changes are still incredibly small." Pls.' Br. 8. However, this contention seems to be based on Plaintiffs' fundamental misunderstanding of Commerce's data points and how percentages work. First, the data provided by the Department indicates that although total domestic consumption and the Government of China's ("GOC") production of synthetic rubber fluctuated only slightly between 2014 and 2015, the (substantial) 33.36 percent increase in import penetration strongly suggests lower overall government involvement. As Commerce explains, a decrease in

government production (8.7 percent decrease from 2014 to 2015) and a decrease in the GOC's production as a share of total consumption of the product (a 3.65 percent decrease)—*coupled with* the 33.36 percent increase in import penetration—supports the conclusion that the Chinese synthetic rubber market was not distorted by government involvement. And, the Department also noted in its Remand Results that there is no evidence on the record that the GOC had administered any policies that would have a "distorting effect on the market by maintaining an artificially high level of domestic supply, leading to artificially lower prices." Remand Results at 16.

Second, Plaintiffs claim that Commerce stills "fails to explain why a higher import penetration number . . . and a lower GOC market share . . . should necessarily alter its conclusion from 2014 that the market was distorted." Pls.' Br. 8. But unlike in its initial determination, Commerce now *does* explain how a higher import penetration number affects (at least, the perception of) government involvement. *See* Remand Results at 27 ("[T]he significantly higher level of imports in 2015 and the correspondingly lower level of the GOC share of consumption indicate a significant loss of government dominance in the market."). Additionally, Guizhou's concern that "Commerce is leveraging the law of small numbers" to manipulate its distortion findings, Pls.' Br. 8, is unsupported by the record. Indeed, the evidence as presented by Commerce's Remand Results demonstrates that the market circumstances did *not* remain unchanged from 2014. While some of the changes reflected minor percentage shifts, others yielded significant variations from 2014 to 2015—especially on data points that relate to distortion indicators. The fact that *Guizhou* considers the changes insignificant does not raise concerns with "the law of small numbers," *id*. The composition of the synthetic rubber market in China showed significant change due to an increase in imports, and this is a sufficient explanation for Commerce's distortion findings in 2015. The court now sustains the Department's findings on market distortion in the Chinese synthetic rubber market.

II. Export Buyer's Credit Program

For purposes of this opinion, familiarity with the facts on this issue is generally presumed. *See Guizhou II*, 43 CIT at __, 389 F. Supp. 3d at 1267–69. In this administrative review, Commerce examined whether Plaintiffs benefited from the EBCP, a loan program instituted by the GOC that provides loans to foreign companies to promote the export of Chinese goods. *See Clearon Corp v. United States*, 43 CIT __, 359 F. Supp. 3d 1344, 1347 (2019) (discussing the EBCP). Previously, in response to Commerce's questions regarding the Pro-

gram's operation, both the GOC and the Plaintiffs responded that because "none of Guizhou's customers used the Program," the respondents could not provide any further information about the Program's operations. *Guizhou II*, 43 CIT at __, 389 F. Supp. 3d at 1320. In support thereof, Guizhou submitted declarations from its U.S. customers confirming non-use. *Id*. at 1321.

As in nearly every recent administrative review of this Program, Commerce has requested information surrounding two 2013 revisions to the EBCP that now purportedly "limit[ed] the provision of Export Buyer's Credits to business contracts exceeding USD [two] million," and "use[d] third-party banks to disburse/settle Export Buyer's Credits." I&D Mem. at 14. The GOC has repeatedly refused to provide information about the 2013 revisions, stating that the revisions were "internal to the bank, non-public, and not available for release." Remand Results at 9. Based on this non-cooperation, the Department determined that the GOC both withheld requested information and significantly impeded the administrative proceeding. I&D Mem. at 14–15. According to Commerce, "[t]he GOC has not provided the requested information and documentation necessary for Commerce to develop a complete understanding of this program," and therefore, the Department could not verify Guizhou's submitted non-use declarations from its U.S. customers. *Id.* at 14. Through the application of AFA, Commerce found that the Plaintiffs had used and benefited from the Program, despite non-use declarations demonstrating the contrary. *Id*. at 14–15.

The court disagreed with Commerce on its first pass, and now Commerce's remand results fare no better. Below, the court found that "the Department's decision to apply AFA as to the EBCP based on an alleged lack of cooperation was unlawful because Commerce demonstrated no gap in the record, the respondents submitted evidence of non-use of the Program, and the Department's findings of unverifiability of necessary information was unsupported by record evidence." *Guizhou II*, 43 CIT at __, 389 F. Supp. 3d at 1329. Therefore, on the first remand, the court ordered Commerce to "reconsider its adverse inference that the [EBCP] was used by Guizhou's customers and reach a new determination on this issue based on findings supported by substantial record evidence[.]" *Id*.

Commerce continues to find that there is a gap in the record because the Department cannot verify the submitted non-use declarations without additional information surrounding the 2013 revisions to the EBCP. Remand Results at 9–11. One of the revisions involved routing EBCP loans through (undisclosed) third-party banks, and not through the Export-Import Bank of China ("EX-IM Bank") as Com-

merce originally thought. *Id*. at 9. As in the previous administrative review, the Department reiterated that "[t]he GOC once again refused to provide the sample application documents or any regulations or manuals governing the approval process [for the Program]." *Id.* at 4. Without this information, Commerce concluded that it could "not verify non-use of export buyer's credits" "in a manner consistent with its verification methods, which are primarily the methods of an auditor, attempting to confirm usage or claimed non-usage by examining books and records which can be reconciled to audited financial statements, or other documents." *Id*. at 5–6. Commerce asserts that the "completeness" principle is "an essential element of Commerce's verification methodology," *id*. at 6, and without the allegedly "missing" information, the Department's verification "would amount to looking for a needle in a haystack with the added uncertainty that Commerce might not even be able to identify the needle when it was found." *Id*. at 14. Therefore, Commerce continues to impute usage of the EBCP based on the application of adverse facts available.

The Department's (flawed) reasoning has remained unwavering—despite now *eleven* decisions from this Court urging Commerce to correct the repeated blatant deficiencies in its AFA analyses of the EBCP. *See, e.g., Changzhou Trina Solar Energy Co. et al. v. United States*, Slip Op. 19–143, 2019 WL 6124908 (CIT Nov. 18, 2019) ("*Changzhou V*"); *Changzhou Trina Solar Energy Co. et al. v. United States*, Slip Op. 19–137, 2019 WL 5856438 (CIT Nov. 8, 2019) ("*Changzhou IV*"); *Jiangsu Zhongji Lamination Materials Co. v. United States*, Slip Op. 19–122, 2019 WL 4467099 (CIT Sept. 18, 2019); *Guizhou Tyre Co. et al. v. United States*, Slip Op. 19–114, 2019 WL 3948913 (CIT Aug. 21, 2019) ("*Guizhou III*"); *Guizhou II*, 43 CIT __, 389 F. Supp. 3d 1315; *Clearon Corp.*, 43 CIT __, 359 F. Supp. 3d 1344; *Changzhou Trina Solar Energy Co. v. United States*, Slip Op. 18–167, 2018 WL 6271653 (CIT Nov. 30, 2018) ("*Changzhou III*"); *Changzhou Trina Solar Energy Co. v. United States*, 42 CIT __, 352 F. Supp. 3d 1316 (2018) ("*Changzhou II*"); *Guizhou Tyre Co. v. United States*, 42 CIT __, 348 F. Supp. 3d 1261 (2018) ("*Guizhou I*"); *Changzhou Trina Solar Energy Co. v. United States*, 41 CIT __, 255 F. Supp. 3d 1312 (2017) ("*Changzhou I*"); *SolarWorld Ams., Inc. v. United States*, 41 CIT __, 229 F. Supp. 3d 1362 (2017). In response to Commerce's dereliction, then, the Court's opinion today will also remain unwavering. The Department is ordered on remand to pursue verification of the non-use affidavits on record from Plaintiffs; otherwise, as it stands, the Department's use of adverse facts available to impute use of the EBCP is unlawful on the record of this case.

An adverse inference cannot be applied unless it is first appropriate to use facts otherwise available. *See* 19 U.S.C. § 1677e(b). And then, only if an interested party also "fail[s] to cooperate by not acting to the best of its ability to comply with a request for information" can Commerce use an adverse inference when choosing from those facts available. *Id*. § 1677e(b)(1). Otherwise, "[a]bsent a valid decision to use facts otherwise available" *and* a finding that a respondent failed to "act[] to the best of its ability," "Commerce may not use an adverse inference." *Shandong Huarong Machinery Co. v. United States*, 30 CIT 1269, 1282, 1301–02, 435 F. Supp. 2d 1261, 1274, 1289 (2006). Additionally, the adverse use of facts otherwise available can only be used fill gaps necessary to complete the factual record and ultimately to "find that the elements of the [CVD] statute have been satisfied," *Changzhou Trina Solar Energy Co. v. United States*, 43 CIT __, __, 359 F. Supp. 3d 1329, 1338 (2019). *See also Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011) ("[I]t is clear that Commerce can only use facts otherwise available to fill a gap in the record.").

In its redetermination, Commerce again invoked the authority to use an adverse inference based on the finding that the GOC did not act to the best of its ability in responding to the Department's request for "the 2013 administrative rules, as well as other information concerning the operation of the EBCP." Remand Results at 13. Here, the Department's investigation relates to whether the EBCP provides a countervailable subsidy to Plaintiffs. Under the CVD statute, this requires a finding that a specific financial contribution occurred, and a benefit was therefore conferred. *See* 19 U.S.C. § 1677(5). The gap then, must relate to either element of this inquiry. Just because Commerce resorted to adverse facts available "does not obviate the need for Commerce to affirmatively find that the elements of the statute have been satisfied." *Changzhou Trina Solar Energy Co.*, 43 CIT __, __, 359 F. Supp. 3d at 1338. But as it currently stands, the Department has assumed the conclusion—that a gap in the record exists as a result of the GOC's failure to cooperate—without addressing what "constitutes a 'gap' in the record," *Zhejiang DunAn Hetian Metal*, 652 F.3d 1333, 1347, and by pointedly closing its eyes on the evidence provided by Guizhou that would "fairly detract[]" from its ultimate conclusion, *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016). The law does not permit Commerce to circumvent the statutory requirements of the CVD statute just because a respondent fails to cooperate; nor is Commerce "relieve[d] [] from relying on *some* facts to make the requisite determinations to

satisfy the elements of 19 U.S.C. § 1677(5)." *Changzhou Trina Solar Energy Co.*, 43 CIT __, 359 F. Supp. 3d at 1340 (emphasis added). Stripped away of its misconceptions surrounding the AFA statute, the Department is left with the most compelling facts placed on the record: that Plaintiffs *did not use* the Program, and therefore, no specific benefit was conferred. Despite the court's instruction, there are still integral flaws in the Department's reasoning on remand. The court again concludes that Commerce erred in invoking its "adverse inference" authority with respect to the information (purportedly) missing from the record. Both the law and the record are clear, and there is more than enough reason to support the Plaintiffs' position.

For any use of AFA, "Commerce must still explain what information is missing and what adverse inferences reasonably lead[] to its conclusion." *Changzhou III*, 2018 WL 6271653, at *3. As before, the Department has failed to explain why information about the 2013 rule changes is relevant to verifying demonstrative claims of non-use; and, importantly, why the omission of this information constitutes a gap necessary to "complete the factual record," *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). The Department alleges that the GOC failed to cooperate to the best of its ability and therefore, the record lacks information concerning the use of the Program. According to the Department, this permits Commerce to use adverse facts available to fill in this "missing" information. But Commerce has the relationship backwards. *See Guizhou III,* Slip Op. 19–114, 2019 WL 3948913, at *4 ("Commerce does not know what the 2013 rule change was, and consequently, the court finds no record support for the Department's determination that the rule change is tied to verification."). There is evidence in the record that squarely detracts from Commerce's inference that Plaintiffs used and benefited from the EBCP. Commerce may not simply declare that the evidence cannot be verified and therefore, a gap exists. That is not how it works. Commerce must attempt verification *in order to conclude* that a gap exists related to that inquiry; and then only after Commerce finds that the "interested party has failed to cooperate by not acting to the best of its ability" can Commerce use an adverse inference to fill that gap. 19 U.S.C. § 1677e(b)(1). The AFA statute empowers Commerce to apply adverse inferences in those instances, but "it may not do so in disregard of information of record that is not missing or otherwise deficient." *Zhejiang DunAn Hetian Metal*, 652 F.3d at 1348. Here, information related to the CVD inquiry is neither missing nor demonstrably deficient, especially in light of the fact that the Department was once able to verify declarations from U.S. customers indi-

cating non-use of the EBCP. *See generally Changzhou I*, 41 CIT __, 255 F. Supp. 3d 1312.

The court recognizes the Department's quandary when it claims that verification might be particularly onerous if EX-IM credits were disbursed through (unnamed) intermediary banks. As Commerce explains, this is because there may "not necessary be an account in the name 'China Ex-Im Bank' in the books and records . . . of the U.S. customer." Remand Results at 11. But even with this supposed explanation (and indeed, the Department is only *assuming* verification here would be onerous based on those circumstances), Commerce has not explained why it cannot verify claims of non-use using a different method at its disposal. Just recently, the court addressed these potential verification difficulties in *Changzhou IV*, Slip Op. 19–137, 2019 WL 5856438 and *Changzhou V*, Slip Op. 19–143, 2019 WL 6124909. There, as here, the Department cited to records in earlier investigations, which gleaned at the various disbursement methods of EBCP funds—including some that would make verification more or less difficult. *See Changzhou IV*, 2019 WL 5856438 at *4; *Changzhou V*, 2019 WL 6124909 at *3. But as in *Changzhou IV* and *Changzhou V*, it is also "not entirely clear" to this court that "the missing information is required to effectively verify respondent's non-use of the program." *Id.* Commerce has more verification tools at its disposal than the Government would have this court believe, including "spot checks and viewing underlying documentation," as suggested by Plaintiffs. *See* Pls.' Br. 4. The Department must use these tools to attempt to verify the non-use declarations *before* concluding that the evidence is unverifiable, and a gap exists in the record.

Finally, Commerce has an "obligation when drawing an adverse inference based on a lack of cooperation by a foreign government [] to avoid collaterally impacting respondents to the extent practicable by examining the record for replacement information." *Guizhou I*, 348 F. Supp. 3d at 1271. This sentiment rings especially true where the record's inadequacies may have even originated with Commerce. "Fairness requires that Commerce, before invoking an adverse inference, must have communicated its information requests clearly and adequately" to the respondents. *Peer Bearing Co.-Changshan v. United States*, 36 CIT 1115, 1130, 853 F. Supp. 2d 1365, 1377–78 (2012). After countless investigations of the EBCP (particularly those initiated after Commerce's knowledge of the 2013 revisions to the Program), Commerce should be able to seek information that would aid in its verification process, which includes asking "necessary questions to determine whether a review of EXIM Bank's user database could sufficiently demonstrate non-use," Pls.' Br. 5. Instead, Com-

merce has focused its inquiry on the operation of the program rather than Guizhou's alleged use of it. Commerce had an opportunity to "clearly and adequately" request additional information that would help the Department to verify the submitted non-use declarations (or ascertain Plaintiffs' alleged use of the Program); it failed to do so, and the court will not fault Plaintiffs for the Department's own shortcomings. Therefore, based on the record and the demonstrative evidence available, Commerce has failed to "compl[y] with the court's remand order," *SolarWorld Ams., Inc.*, 41 CIT at __, 229 F. Supp. 3d at 1365, as it relates to Commerce's application of the AFA statute to the EBCP.

CONCLUSION

The court sustains the Department's additional explanation for its findings on market distortion in the Chinese synthetic rubber market. However, the Department has not complied with the court's previous remand order regarding the application of AFA to impute Plaintiffs' use of the EBCP. Therefore, on this round of remand and redetermination, Commerce is ordered to attempt verification using all reasonable tools at its disposal. And as in *Changzhou IV* and *Changzhou V*, in so doing, "Commerce should detail its process in its remand redetermination." 2019 WL 5856438, at *4; 2019 WL 6124908.

For the foregoing reasons, after careful review of all papers, it is hereby

ORDERED that Commerce's remand results as to Plaintiffs' use of the EBCP based on an alleged lack of cooperation and a gap in the record were unsupported by substantial evidence; and it is further

ORDERED that on remand, Commerce attempt verification of the submitted non-use declarations from Plaintiffs' U.S. customers, using all reasonable tools at its disposal, including methods suggested by Plaintiffs and by this court; it is further

ORDERED that Commerce detail its process in its remand redetermination as it relates to its verification of the non-use declarations; it is further

ORDERED that all other challenged determinations of Commerce are sustained; and it is further;

ORDERED that Commerce shall have ninety (90) days from the date of this Opinion and Order in which to file its redetermination, which shall comply with all directives in this Opinion and Order; that the Plaintiff shall have thirty (30) days from the filing of the redetermination in which to file comments thereon; and that the Defendant shall have thirty (30) days from the filing of Plaintiff's comments to file comments.

Dated: December 10, 2019
New York, New York

/s/ *Richard W. Goldberg*
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 19–156

NANTONG UNIPHOS CHEMICALS CO., LTD., NANJING UNIVERSITY of CHEMICAL TECHNOLOGY CHANGZHOU WUJIN WATER QUALITY STABILIZER FACTORY, and UNIPHOS, INC., Plaintiffs, v. UNITED STATES, Defendant, and COMPASS CHEMICAL INTERNATIONAL LLC, Defendant-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 17–00151

[United States Department of Commerce's remand results are sustained.]

Dated: December 10, 2019

David J. Craven, Craven Trade Law LLC, of Chicago, IL, argued for Plaintiffs.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of Counsel on the brief was *Christopher Hyner*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jeffrey S. Levin, Levin Trade Law, P.C., of Bethesda, MD, argued for Defendant-Intervenor.

OPINION

Eaton, Judge:

This case involves the United States Department of Commerce's ("Commerce" or the "Department") investigation, and final affirmative dumping determination, for imports of 1-Hydroxyethylidene-1, 1-Diphosphonic Acid ("HEDP")[1] from the People's Republic of China ("China"), and the results of Commerce's remand.[2] *See 1-Hydroxyethylidene 1, 1-Diphosphonic Acid From the People's Rep. of China*, 82 Fed. Reg. 14,876 (Dep't Commerce Mar. 23, 2017) ("Final

[1] HEDP "is a chemical used in water treatment, detergents, cosmetics, and pharmaceuticals." *1-Hydroxyethylidene-1, 1-Diphosphonic Acid (HEDP) from China*, USITC Publication 4686, Inv. Nos. 701-TA-558 and 731-TA-1316 (Final) (May 2017) at 6; *1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Rep. of China*, 81 Fed. Reg. 76,916, app. I (Dep't Commerce Nov. 4, 2016) (defining scope of investigation).

[2] On May 10, 2018, the court granted the parties' request to remand the matter to Commerce. *See* Order dated May 10, 2018, ECF No. 35.

Determination"), *amended by* 82 Fed. Reg. 22,807 (Dep't Commerce May 18, 2017) ("Amended Final Determination") and accompanying Issues and Dec. Mem. (Mar. 20, 2017), P.R.[3] 362 ("Final IDM"); Final Results of Redetermination Pursuant to Remand (Aug. 8, 2018), P.R.R. 11 ("Remand Results").

Plaintiffs are Nanjing University of Chemical Technology Changzhou Wujin Water Quality Stabilizer Factory ("Nanjing"), a producer and exporter of HEDP; its affiliate, Nantong Uniphos Chemicals Co., Ltd.[4] ; and Uniphos, Inc., a U.S. importer (collectively, "Plaintiffs"). They contend that the dumping determination lacks the support of substantial evidence because the Department failed to use the "best available information," as required by the antidumping statute, to calculate (1) surrogate financial ratios, and (2) a surrogate value for ocean freight. *See* Pls.' Cmts. Remand Results, ECF Nos. 50 ("Pls.' Cmts.").

The United States ("Defendant"), on behalf of Commerce, and Defendant-Intervenor Compass Chemical International LLC ("Compass"), the petitioner and a U.S. producer of HEDP, urge the court to sustain the Remand Results. *See* Def.'s Resp. Pls.' Cmts. Remand Results, ECF No. 54 ("Def.'s Resp."); *see also* Def.-Int.'s Resp. Pls.' Cmts. Remand Results, ECF No. 55.

Jurisdiction is found under 28 U.S.C. § 1581(c) (2012) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2012). For the reasons stated below, the court sustains the Remand Results.

BACKGROUND

On March 31, 2016, Compass filed an antidumping petition, asking Commerce to investigate imports of HEDP from China that allegedly were being sold, or were likely to be sold, at less than fair value. *See* Letter from Levin Trade Law, P.C. to Penny Pritzker, Sec'y of Commerce (Mar. 31, 2016), P.R. 1. On April 28, 2016, the Department commenced an investigation covering the period of July 1, 2015, through December 31, 2015, and selected two mandatory respondents to be investigated, one of which was Nanjing.[5] *See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid From the People's Rep. of China*, 81 Fed. Reg. 76,916 (Dep't Commerce Nov. 4, 2016) ("Pre-

[3] Record citations herein are to the public record ("P.R.") and the public remand record ("P.R.R.").

[4] Commerce collapsed Nanjing and Nantong Uniphos Chemicals Co., Ltd. into a single entity because of overlaps in the companies' operations and ownership. *See* Prelim. Dec. Mem. (Oct. 27, 2016), P.R. 314 at 14; 19 C.F.R. § 351.401(f)(1) (2016). In this opinion, references to Nanjing mean the collapsed entity.

[5] The other mandatory respondent, Shandong Taihe Chemicals Co., Ltd., is not a party to this action.

liminary Determination") and accompanying Prelim. Dec. Mem. (Oct. 27, 2016), P.R. 314 ("Prelim. Dec. Mem.") at 4.

I. Preliminary Determination

On November 4, 2016, the Department published its preliminary affirmative dumping determination. *See* Preliminary Determination, 81 Fed. Reg. at 76,916. In making its determination, Commerce selected Mexico as the primary surrogate country.[6] *See* Prelim. Dec. Mem. at 10.

To determine the normal value of the subject chemicals, Commerce valued Nanjing's factors of production[7] using Mexican surrogate data, to which it added an amount for "general expenses and profit." 19 U.S.C. § 1677b(c)(1)(B). To arrive at an amount for "general expenses and profit," Commerce calculated surrogate financial ratios (for factory overhead; selling, general, and administrative expenses; and profit) using the 2015 financial statements of two Mexican chemical companies: Grupo Pochteca, S.A.B. de C.V. ("Pochteca") and CYDSA S.A.B. de C.V. ("CYDSA").[8] *See* Surrogate Values for the Prelim. Determination (Oct. 27, 2016), P.R. 320 at 5. This amount, based on the ratios, was then added to the values of the factors of production, resulting in the normal value of the imported merchandise. *See* 19 U.S.C. § 1677b(c)(1).

To determine U.S. price, Commerce made deductions for movement expenses, including ocean freight. *See* Prelim. Dec. Mem. at 19; Prelim. Results Analysis Mem. for [Nanjing] (Oct. 27, 2016), P.R. 323 at 2. Commerce determined a surrogate value for the ocean freight deduction based on four shipping price quotes obtained from a publicly available database known as the Descartes Carrier Rate Re-

[6] In a nonmarket economy case, Commerce "shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit," using the "best available information" from a surrogate market economy country (or countries). 19 U.S.C. § 1677b(c)(1)(B). The surrogate country must be "at a level of economic development comparable to that of the nonmarket economy country, and . . . [a] significant producer[] of comparable merchandise." 19 U.S.C. § 1677b(c)(4).

[7] "[T]he factors of production utilized in producing merchandise include, but are not limited to . . . (A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3).

[8] The Pochteca and CYDSA financial statements were placed on the record by Petitioner and Defendant-Intervenor Compass. Nanjing did not place any surrogate financial statements from Mexico on the record. Early in the proceeding, the company argued in favor of selecting South Africa as the surrogate country and submitted financial statements from two South African companies. *See* Prelim. Dec. Mem. at 9. Although, ultimately, South Africa was not chosen, no party disputes Commerce's choice of Mexico as the surrogate country.

trieval Database.[9] *See* Prelim. Dec. Mem. at 24; Letter from Levin Trade Law, P.C. to Penny Pritzker, Sec'y of Commerce (Aug. 18, 2016), P.R. 147 Ex. 11 ("Descartes Data"). The Descartes database contained "international ocean freight rates offered by numerous carriers" for the period of investigation. *See* Prelim. Dec. Mem. at 24. Of the four Descartes price quotes, two listed several fees that were included in the quote, and two were less detailed, including only a "port surcharge fee." *See* Descartes Data.

II. Final Determination

On May 18, 2017, Commerce published the Final Determination, in which it continued to find that imports of HEDP from China were being sold, or were likely to be sold, in the United States at less than fair value during the period of investigation. *See* Final Determination, 82 Fed. Reg. at 14,876.

For normal value, Commerce again used both Pochteca's and CYDSA's financial statements as the "best available information" to calculate surrogate financial ratios. *See* Surrogate Values for the Final Determination (Mar. 20, 2016), P.R. 374 at 3 & 375 (exhibits). To determine a surrogate value for ocean freight, Commerce also continued to use the four quotes from the Descartes database. *See* Final IDM at 20. Ultimately, Commerce calculated an antidumping duty rate of 63.80 percent for Nanjing. *See* Am. Final Determination, 82 Fed. Reg. at 22,808.

On June 16, 2017, Plaintiffs commenced this action to dispute the Final Determination. *See* Summons, ECF No. 1. Subsequently, Defendant filed, with Plaintiffs' consent, a remand request, seeking an opportunity to reconsider the surrogate value determinations disputed by Plaintiffs. Specifically disputed were (1) the Department's use of CYDSA's financial statement to calculate surrogate financial ratios, and (2) the alleged double-counting of fees and charges that were included not only in the ocean freight surrogate value, but also in the surrogate value for brokerage and handling.[10] On May 10,

[9] For ocean freight, Commerce stated:

> We valued [ocean] freight from [nonmarket economy] carriers using the data obtained from Descartes. The Descartes data provides pricing information from different ports in [China] to different ports in the United States for different container sizes. We included any charges that were not accounted for elsewhere in the margin calculation. To calculate a USD per kg rate, we divided the container rate by the average weight of fully loaded refrigerated container, as reported by Maersk. Because these rates were contemporaneous, we did not inflate them.

Surrogate Values for the Prelim. Determination at 6. Commerce later "clarifie[d] that the price quote for [the] ocean freight [surrogate value] from Descartes is not for refrigerated freight," but for non-refrigerated containers. Final IDM at 20.

[10] Commerce valued brokerage and handling expenses using a World Bank publication, Doing Business 2016: Mexico. *See* Surrogate Values for the Prelim. Determination at 6; Surrogate Values for the Final Determination Ex. 1, P.R. 375.

2018, the court granted the motion and remanded the Final Determination to Commerce. *See* Order dated May 10, 2018, ECF No. 35.

III. Remand Results

A. Surrogate Financial Ratios

The Department calculates surrogate financial ratios: (1) for factory overhead, Commerce divides a surrogate company's total factory overhead expenses by its total direct manufacturing expenses; (2) for selling, general, and administrative expenses, Commerce divides the surrogate's selling, general, and administrative costs by its total cost of manufacture; and (3) for profit, Commerce divides the surrogate's before-tax profit by the sum of direct manufacturing expenses, overhead, and selling, general, and administrative expenses. *See Shanghai Foreign Trade Enter. Co. v. United States*, 28 CIT 480, 482, 318 F. Supp. 2d 1339, 1341 (2004). In the Remand Results, Commerce continued to use both Pochteca's and CYDSA's financial statements to calculate these ratios. *See* Remand Results at 3. The ratios for each company were converted into percentages, averaged, and then multiplied by the surrogate values for direct expenses, overhead, and selling, general, and administrative expenses. *See Shanghai Foreign Trade Enter. Co.*, 28 CIT at 482, 318 F. Supp. 2d at 1341. The resulting amounts were then added to surrogate values for the factors of production to determine normal value. *See* 19 U.S.C. § 1677b(c)(1), (4).

B. Ocean Freight

In the Remand Results, Commerce found that it was possible that it had double counted some fees that appeared not only in the Descartes database, but also in the World Bank Doing Business Report that Commerce used to value brokerage and handling:

> [Ocean] freight was valued using four price quotes [from the Descartes database] . . . . Two of the four price quotes contain a list of small fees associated with the shipment, fees which were included in the [surrogate value] calculation (*i.e.*, Suez Canal transit fee, Panama Canal transit fee, carrier security charge, high security seal charge, Gulf of Aden charge, equipment interchange receipt fee, OTHC – non-reefer,[11] bunker charge, documentation fee, advance manifest security charge, Customs importer security filing). [Plaintiffs have] argued that certain of these fees should be excluded from the calculation, because they

[11] "OTHC – non-reefer" means Export Terminal Handling Charges for non-refrigerated cargo. *See* Final IDM at 20; Pls.' Cmts. 4.

> claim these are already included in the brokerage and handling surrogate value. We note that these fees are not defined on the record. In addition, whereas these fees are very specific, the *Doing Business* charges are for general categories of fees. It is Commerce's practice to avoid double counting. As such, we have excluded two of the four international freight price quotes from the calculation of the international freight [surrogate value] in order to avoid any possibility of double counting.

Remand Results at 24. Commerce's revisions to its calculation resulted in a revision of the ocean freight value from 0.1833 USD/kg to 0.1962 USD/kg, and, thus, an increase in the amount deducted from U.S. price (*i.e.*, a lowering of U.S. price). *See* Surrogate Values for the Final Determination Ex. 1; Final Redetermination Analysis Mem. for [Nanjing] (Aug. 8, 2018), P.R.R. 12 ("Remand Analysis Mem.") at 2. Consequently, Nanjing's antidumping rate increased from 63.80 percent to 67.66 percent. *See* Remand Analysis Mem. at 1 (indicating cash deposit rate of 67.66 percent for Nanjing).

Dissatisfied with the Remand Results, Plaintiffs ask the court to again remand to Commerce with instructions "to recalculate the margins using only the financial statement of [Pochteca] as the basis for financial ratios." Pls.' Cmts. 26. Additionally, arguing that Commerce used the wrong two price quotes to make its ocean freight calculation, Plaintiffs ask the court to direct Commerce "to recalculate the [o]cean [f]reight [e]xpense . . . to avoid double counting." Pls.' Cmts. 26.

STANDARD OF REVIEW

The court will sustain a determination by Commerce unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

LEGAL FRAMEWORK

Under the antidumping statute, Commerce is charged with determining if goods are being sold, or are likely to be sold, in the United States at less than fair value. *See* 19 U.S.C. § 1673. This determination is based on a comparison of normal value (home market price) and export price (U.S. price). *See* 19 U.S.C. § 1677b(a). The Department calculates a dumping margin for the subject merchandise by finding the amount by which normal value exceeds export price. 19 U.S.C. § 1677(35)(A). Commerce then uses this margin to determine an antidumping duty rate.

When merchandise is exported from a nonmarket economy country,[12] such as China, the statute directs Commerce to calculate normal value using surrogate values rather than the values reported by the respondent. As this Court has explained:

> Commerce calculates the normal value by determining and aggregating "surrogate values" for various "factors of production" used in producing the subject merchandise, *to which it also adds an amount for general expenses and profit* as well as amounts for the cost of containers, coverings, and other expenses. . . . The statute requires Commerce to base its valuation of the factors of production on the "best available information regarding the values of such factors in a market economy country or countries considered appropriate by the administering authority [*i.e.*, Commerce]."

Shanghai Foreign Trade Enter. Co., 28 CIT at 482, 318 F. Supp. 2d at 1341 (emphasis added) (internal citations omitted). To determine an amount for "general expenses and profit," Commerce calculates three separate values for (1) factory overhead, (2) selling, general and administrative expenses, and (3) profit, using ratios derived from surrogate financial statements:

> For the [factory] overhead ratio, Commerce typically divides total [factory] overhead expenses by total direct manufacturing expenses. . . . To calculate the [selling, general, and administrative expense] ratio, the Commerce practice is to divide a surrogate company's [selling, general, and administrative] costs by its total cost of manufacturing. . . . Finally, to determine a surrogate ratio for profit, Commerce divides before-tax profit by the sum of direct expenses, [factory] overhead and [selling, general, and administrative] expenses. . . . These ratios are converted to percentages ("rates") and multiplied by the surrogate values assigned by Commerce for the direct expenses, [factory] overhead and [selling, general, and administrative] expenses.

Id. When calculating surrogate financial ratios, "[g]enerally, if more than one producer's financial statements are available, Commerce averages the financial ratios derived from all the available financial statements." *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1368 (Fed. Cir. 2010); *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319–20 (Fed. Cir. 2010) (citation omitted).

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[12] A "nonmarket economy country" is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

The "best available information" rule applies to the selection of financial statements. *See Dongguan Sunrise Furniture Co. v. United States*, 36 CIT 860, 882–83, 865 F. Supp. 2d 1216, 1240 (2012) (citing 19 U.S.C. § 1677b(c)(1)(B)). The statute does not define "best available information." The Federal Circuit, however, has endorsed the view that "while 'a surrogate value must be as representative of the situation in the [nonmarket economy] country as is feasible,'" the statute does not require that Commerce "'duplicate the exact production experience of the [Chinese] manufacturers at the expense of choosing a surrogate value that most accurately represents the fair market value of [the subject merchandise] in a [hypothetical] market-economy [China].'" *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999) (quoting *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1375–76, 985 F. Supp. 133, 137 (1997)) ("The 'best available information' concerning the valuation of a particular factor of production may constitute information from the surrogate country that is directly analogous to the production experience of the [nonmarket economy] producer . . . or it may not.").

Generally, when choosing the "best available" surrogate market economy data on the record, Commerce selects, to the extent practicable, surrogate data that is "publicly available, . . . product-specific, reflect[s] a broad market average, and [is] contemporaneous with the period of [investigation]." *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014); *see also* 19 C.F.R. § 351.408(c)(4) (2016) ("For manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country."). "Commerce's choice of the best available information 'must evidence a rational and reasonable relationship to the factor of production it represents' to be supported by substantial evidence." *Calgon Carbon Corp. v. United States*, 40 CIT __, __, 145 F. Supp. 3d 1312, 1323 (2016) (citation omitted) (noting statutory objective to "obtain[] the most accurate dumping margins possible"). The process of constructing normal value in nonmarket economy cases "is difficult and necessarily imprecise." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) (citation omitted). "[T]he critical question is whether the method[] used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible." *Id.* at 1382.

DISCUSSION

I. Because Commerce Used the Cost of Goods Sold Entry from CYDSA's Financial Statement to Determine the Denominators of the Surrogate Financial Ratios, the Complained-of Flaws, Even if Valid, Are of Little Importance

In order to calculate the amount for materials, labor, and energy ("MLE")—which was derived from the total cost of manufacture[13] and which was used to calculate the denominators in the financial ratios—Commerce used the cost of goods sold entry from CYDSA's financial statement.[14] *See* Remand Results at 4 ("[T]he cost of goods sold include[s] all the manufacturing costs and changes in the finished goods inventory."). The cost of goods sold "equals beginning inventory plus cost of goods purchased or manufactured minus ending inventory." SIDNEY DAVIDSON, CLYDE P. STICKNEY & ROMAN L. WEIL, FINANCIAL ACCOUNTING 805 (4th ed. 1985).

Plaintiffs contend that substantial evidence does not support Commerce's reliance on CYDSA's financial statement to calculate the surrogate financial ratios because it is "fatally flawed." *See* Pls.' Cmts. 8. For Plaintiffs, this fatal flaw is that the financial statement does not clearly delineate labor, energy, and selling and administrative expenses, and therefore "provides no reasonable way to allocate values" for these expenses. Pls.' Cmts. 8.

Commerce maintains that CYDSA's financial statement was the best available source of information to find an amount for the surrogate producer's total cost of manufacture, and then MLE, because it contained an entry for the cost of goods sold. The Department stated that it prefers using the entry for the cost of goods sold because it pertains solely to manufacturing, while an entry for, say, labor could pertain to the company's other functions, such as administration:

> Commerce prefers to use financial statements that list costs by function rather than by type of transaction, because expenses such as labor can relate to manufacturing, administration, and selling. In this investigation, CYDSA's income statement lists costs by functions (*e.g.*, cost of goods sold, selling, administration, *etc.*). Commerce's preference is to use financial statements

[13] The cost of manufacture is "the sum of material, fabrication and other processing costs incurred to produce the products under investigation . . . ." 1 JOSEPH E. PATTISON, ANTIDUMPING & COUNTERVAILING DUTY LAWS 1312 (2017 ed.).

[14] The lawfulness of the method Commerce used to arrive at the materials, labor, and energy amount is not in dispute.

> that include a line item for the cost of goods sold, because *we know that the cost of goods sold include[s] all the manufacturing costs and changes in the finished goods inventory. From the cost of goods sold amount, we can calculate the cost of manufacturing by accounting for the change in the finished goods inventory from the inventory amounts reported in the corresponding comparative balance sheets. From the cost of manufacturing, we deduct the depreciation costs reflected in the notes to the financial statements, with the residual classified as materials, labor and energy (MLE).* In this investigation, we made inventory adjustments consistent with our practice but because [CYDSA] reported no depreciation with respect to cost of goods sold, we made no adjustment for depreciation.

Remand Results at 4 (emphasis added). Thus, Commerce found that, from the cost of goods sold, it could determine the cost of manufacture, which, with adjustments, equaled MLE. That is, Commerce, using the normal rules of cost accounting, expressed its preference for deriving the cost of manufacture from the cost of goods sold entry on financial statements, rather than by adding various individual entries for items such as wages and salaries that may, or may not, relate to the manufacture of a product. By definition, the cost of goods sold entry captures all of the costs of manufacture. *See* DAVIDSON, STICKNEY & WEIL at 805 (defining cost of goods sold).

A. Claimed Flaws Related to Labor

While Commerce used the cost of goods sold entry from CYDSA's financial statement as the starting point for determining MLE, and thus the denominators in the financial ratios, it did make some adjustments, taking into consideration other line items in the financials, *e.g.*, the "wages and salaries" and executive pay entries. *See* Surrogate Values for the Final Determination Ex. 1.

Plaintiffs argue that Commerce's use of the wages and salaries entry from CYDSA's financial statement led to the unreasonable undervaluation of labor costs. Plaintiffs maintain that the wages and salaries entry (6,000,000 pesos) was the only line item that clearly pertained to labor and that the amount for the entry was insufficient to account for the cost of labor used to make CYDSA's chemicals.[15] Plaintiffs argue:

> With respect to the value of 6,000,000 pesos, the line item expressly for labor does *not* delineate the cost of labor associated

[15] In 2015, six million pesos was the equivalent of approximately $378,072, according to the exchange rate cited in CYDSA's financial statement. *See* Letter from Levin Trade Law, P.C. to Penny Pritzker, Sec'y of Commerce (Aug. 18, 2016), Ex. 17 (citing average exchange rate of 15.87 pesos per U.S. dollar in 2015).

> with the cost of goods sold; it is in the balance account as a liability and not in the cost account. This line item thus represents the amount owed or payable from an unknown period. This also explains why the labor amount is so small and immaterial and unrealistic—driving up the overhead and [selling, general, and administrative] ratios. If this line item actually accounted for the cost of labor, then labor would only account for *0.18%* of the costs of goods sold (6,000,000/3,378,000,000=[.]0018). This is not commercially feasible nor is it reasonable for a company which, as illustrated by the photograph s in the financial statement, does not have a fully automated production technology.

Pls.' Cmts. 9. Plaintiffs further contend that the "absurdity" of the six-million-peso figure is even more apparent when CYDSA's reported payments to the company's defined contribution plan are taken into consideration. *See* Pls.' Cmts. 10. According to Plaintiffs, the CYDSA financials shows that the company made payments into the defined contribution plan of at least 500 million pesos. *See* Pls.' Cmts. 10 (citing Letter from Levin Trade Law, P.C. to Penny Pritzker, Sec'y of Commerce (Aug. 18, 2016), Ex. 17 ("CYDSA's Financial Statement") at Note 16(f) ("The Company makes payments between 2% and 3% of its workers integrated wage limited to the defined contribution plan related to the established by the law system of retirement savings. Expenses for this item [were] [17,000,000 pesos] in 2015 and [14,000,000 pesos] in 2014."). Plaintiffs explain their calculations as follows: using 3%, 17,000,000 pesos times one divided by 0.03 equals 566,666,666 pesos (17,000,000 * 1/0.03 = 566,666,666); using 2%, 17,000,000 pesos times one divided by 0.02 equals 850,000,000 pesos (17,000,000 * 1/0.02 = 850,000,000). Thus, for Plaintiffs, Commerce's use of CYDSA's financial statement is not supported by substantial evidence, and CYDSA's financials do not constitute the "best available information" because the line item for wages and salaries is manifestly inadequate, *i.e.*, CYDSA must have spent much more on labor to make its products.

In the Remand Results, Commerce "agree[d] with [Plaintiffs] that 6 million pesos [was] not the full amount of labor cost incurred by CYDSA. However, in addition to the 6 million pesos reported as wages and salaries, Commerce included an additional 178 million pesos in the calculation of MLE, reported as wages for managers." Remand Results at 5. In addition to these amounts for wages, which totaled 184,000,000 pesos, Commerce found that a significant portion of the cost of goods sold entry amount was labor cost:

> [A]fter taking CYDSA's reported cost of goods sold, and making . . . adjustments . . . (*i.e.*, changes in inventory and depreciation) an additional 2 billion pesos is included in [materials, labor, and energy] which accounts for labor and other costs. In fact, CYDSA reports raw materials separately from the cost of goods sold, and indicates that it accounted for electricity as a raw material. *Because CYDSA lists raw materials and electricity separately from the cost of goods sold, we believe a significant portion of the 2 billion pesos figure of the cost of goods sold is labor cost*. Although labor is not specifically listed as an individual line item in the costs of goods sold, we disagree with [Plaintiffs] that labor is undervalued in our calculation of MLE.

Remand Results at 5 (emphasis added). In other words, from the information in CYDSA's financial statement on cost of goods sold (3,378,000,000 pesos) and raw materials, including electricity (1,060,000,000 pesos), Commerce drew the conclusion that a large portion of the two-billion-peso difference between those two figures represented labor. *See* CYDSA's Financial Statement at 1. Commerce's point is that if the two billion pesos was not labor, what else could it be, since the cost of goods sold entry necessarily captures all of the costs of manufacture.

Commerce nonetheless undertook to show how labor was accounted for and was reasonable in its conclusion that the presence of the small entry for wages and salaries does not render the CYDSA financials anything other than the best available information, or the calculation of the financial ratios unsupported by substantial evidence. In fact, Plaintiffs' argument is a little hard to follow. As has been discussed, Commerce did not find MLE by determining the sum of various individual entries on the financials. Rather, it started with the cost of goods sold entry, which accounted for the cost of labor along with the other costs of manufacture. While it made some adjustments to the cost of goods sold amount, the Department knew that it already had the vast majority of the costs of manufacture, because the cost of goods sold entry accounts for those costs.

Commerce's rationale for concluding that labor is adequately represented in the cost of goods sold entry is both reasonably discernable and reasonable itself. While agreeing that the wages and salaries entry was too low to account for the full cost of labor in the manufacture of CYDSA's products, Commerce reasonably found that the full cost of labor could (indeed must) have been accounted for elsewhere. By definition, the cost of goods sold entry represents one hundred percent of the cost of manufacture. That is, one hundred percent of the cost of material, labor, and energy. While Commerce

found that CYDSA accounted for at least some raw materials and electricity separately, it was apparent that the wages and salaries entry could not represent the full cost of labor used in manufacturing CYDSA's chemicals. This is where the two-billion-peso figure comes in. Since all of the costs of manufacture are captured in the entry for the cost of goods sold and the two billion pesos of unaccounted-for costs represented about two-thirds of the cost of goods sold, a large portion of it had to be labor. Based on the Department's explanation, the court finds that Commerce has reasonably supported its finding that labor was adequately represented in the MLE amount, and that the wages and salaries entry does not constitute a fatal flaw in the financials. *See Ceramica Regiomontana, S.A. v. United States*, 810 F.2d 1137, 1139 (Fed. Cir. 1987) (per curiam).

B. Claimed Flaws Related to Energy and Expenses for the Production of Electricity

Next, Plaintiffs argue that CYDSA's financial statement is not the best available information because necessary information is missing as to the cost of energy, and the amount of selling and administrative expenses associated with CYDSA's self-production of electricity:

> The CYDSA statement . . . does not have an energy line item; rather it appears that the Department has characterized that portion of the cost of goods produced which could not be tied to labor or raw material . . . as "energy." . . . Moreover, given the numerous costs of goods sold line items lacking from the CYDSA statement, such as actual labor costs[,] . . . this line [*i.e.*, the line item for cost of goods sold (3,378,000,000 pesos)] may not *only* include the costs of energy.

Pls.' Cmts. 11 (citing Remand Results at 6) (emphasis added). In other words, as with the wages and salaries entry, Plaintiffs insist that individual entries could not represent the costs Plaintiffs believe they should represent, so they claim that the financials are flawed. They make this argument even though these individual entries were not used to find MLE. Rather, the cost of goods sold entry was used to derive MLE.[16]

As with labor, it is worth reiterating that MLE is derived from the cost of goods sold entry and that the cost of goods sold is not the sum of individual financial statement entries. Rather, at bottom, the cost of goods sold is found by subtracting the cost of ending inventory from beginning inventory, plus additions. As has been noted, by definition,

[16] As noted, MLE (an amount for materials, labor, and energy) is derived from the cost of manufacture and is included in the denominators of the financial ratios. *See* Remand Results at 5.

the cost of goods sold captures all of the costs of manufacture. Thus, even if CYDSA's financials had an entry for energy, it would not enter into the calculation of MLE.

Nonetheless, for Plaintiffs, "at least a portion of the raw materials produced by CYDSA [*e.g.*, electricity] is directly tied to values which are reported in the selling and administrative expenses. . . . Absent a more detailed breakdown, however, it is impossible to determine the complete nature of such expenses." Pls.' Cmts. 12.

As part of its argument, Plaintiffs maintain that CYDSA self-produced "much" of the electricity it consumed during the period of investigation, but that its financial statement does not permit a complete understanding of the costs associated with starting up the company's first electricity co-generation plant:

> [A]s much of [CYDSA's] energy is self-produced, . . . the energy value would need to include a portion of depreciation for those [electricity co-generation] assets, the administrative charges to operate the facility and similar cost[s] for the self-production of the energy.

Pls.' Cmts. 11. Thus, for Plaintiffs, the cost of energy should be adjusted to reflect the costs to build and to run the co-generation plant.

In the Remand Results, Commerce found that energy was properly captured in the MLE amount, and not elsewhere, *i.e.*, in factory overhead, or selling, general, and administrative expenses:

> [Plaintiffs] speculate[] that CYDSA's energy production may be reported under overhead or [selling, general, and administrative expenses]; however, [they] provided no evidence showing that energy expenses are included in these categories. For our calculation of the overhead ratio, we have included only depreciation, with an adjustment for spare parts inventory. Our calculation of [selling, general, and administrative expenses] includes only amortization, selling expenses, administrative expenses and finance expenses, adjusted by certain types of income. As such, energy is not listed in any of the categories comprising overhead and [selling, general, and administrative expenses]. Moreover, just as [Plaintiffs] indicate[] that electricity may be considered a raw material, *CYDSA indicates that it reported electricity as a raw material*. We specifically included CYDSA's reported raw materials in our calculation of MLE. Thus, we find that electricity is included in MLE, and not in overhead or [selling, general, and administrative expenses].

Remand Results at 6 (emphasis added).

Commerce's decision to make an adjustment to the cost of goods sold by including the entry for raw materials when determining MLE was reasonable. It was also reasonable for the Department to find that, at least some of CYDSA's energy cost was covered by the raw materials entry. It cannot be disputed that CYDSA reported electricity as a raw material. *See* CYDSA's Financial Statement ("Gas and electricity are raw materials used in the production of chlorine and caustic soda . . . ."). Commerce made an adjustment to the cost of goods sold entry to reflect the inclusion of energy in the raw materials entry. And, while it is true, as Commerce acknowledged, that CYDSA self-produced electricity, it is also true that, as Plaintiffs argue, the information in the statement about the selling and administrative expenses associated with that self-production is not sufficiently itemized to be useful. It would have been unreasonable for Commerce to disregard the CYDSA financial statement based on speculation concerning the amount of energy it self-produced or the amount it purchased. This is particularly the case since the cost of goods sold covers the cost of manufacturing CYDSA's products. Thus, the court finds that Commerce has supported with substantial evidence and with a reasonable explanation its treatment of the cost of energy and CYDSA's self-production of electricity in its calculation of MLE.

C. Commerce's Use of CYDSA's Cost of Goods Sold Amount to Determine the Denominators of Surrogate Financial Ratios Is Sustained

The CYDSA financial statement satisfies Commerce's preference for financials that are publicly available, product-specific, and contemporaneous with the period of investigation. *See Qingdao Sea-Line Trading Co.*, 766 F.3d at 1386. Plaintiffs, however, say that entries either found in the financial statement or missing from it, render it fatally flawed. In making their argument, however, Plaintiffs do not question using the cost of goods sold as the basis for deriving MLE, or seriously dispute the adjustments made to the cost of goods sold to arrive at MLE, and, thus, the denominators used in calculating the financial ratios. Rather, Plaintiffs claim that the CYDSA financials are unusable because of (1) entries that are separate from the cost of goods sold entry, or (2) the lack of entries that, were they in the financials, would also be separate from the cost of goods sold entry. The overarching problem with Plaintiffs' claims is that, by definition, the cost of goods sold entry contains all of the costs of manufacture, including materials, labor, and energy. While Commerce's examination of CYDSA's financials caused it to make certain adjustments to the cost of goods sold number using individual entries, the resulting MLE number (3,203,000,000 pesos) is 94 percent of the cost of goods

sold amount (3,378,000,000 pesos). Plaintiffs' arguments, even if credited, simply are not sufficient to find CYDSA's financial statement fatally flawed. Indeed, it appears that Plaintiffs' disagreement is with the fundamentals of cost accounting rather than Commerce's decision to use the CYDSA financials.

II. Claimed Differences Between Plaintiffs' and CYDSA's Marketing and Branding Activities and Levels of Integration Did Not Render Unreasonable Commerce's Use of CYDSA's Financial Statement

Plaintiffs also challenge Commerce's decision to rely on CYDSA's financial statement on the grounds that Plaintiffs' marketing and branding expenses, and levels of integration, were sufficiently different from CYDSA's so as to distort the calculation of the financial ratios. *See* Pls.' Cmts. 18, 22 ("[Because] the operations of CYDSA and plaintiffs are radically dissimilar it is inappropriate to use CYDSA as the basis for financial ratios, particularly where, as here, another financial statement [*i.e.*, Pochteca's] which has not been challenged by any party, is of record.").

A. Claimed Differences in Marketing and Branding Activities

For Plaintiffs, the "record is clear" that "CYDSA and plaintiffs have significantly different marketing and branding expenses." Pls.' Cmts. 18. In the Remand Results, however, Commerce took a contrary view of the record:

> With respect to marketing, we do not find sufficient record information exists that would result in a finding that this expense distorts the surrogate ratios. We did not examine [Nanjing's] marketing and branding activities during the course of the investigation. Because [Nanjing] is located in [a nonmarket economy], and Commerce does not rely on prices in [nonmarket economy] countries,[17] any marketing in which [Nanjing] engages in its home market would be irrelevant for our dumping analysis, and we do not request this information from [nonmarket economy] respondents in the standard questionnaire. As such, the record contains no information with respect to [Nanjing's] marketing and branding, making a comparison to CYDSA futile. Although [Nanjing] states it engages in no marketing, has no brands and that its customers receive profits from the [sell-

[17] As has been noted, in a nonmarket economy country, Commerce relies on surrogate values to determine normal value. *See* 19 U.S.C. § 1677b(c).

> ing, general, and administrative expenses] they invest, there is no record information to support these assertions.
>
> Moreover, the record evidence conflicts with [Nanjing's] claim that CYDSA's marketing expenses are large. While the CYDSA statements discuss its [edible and industrial] salt business, its marketing and branding expenses are not broken out, and thus, we do not know what portion of CYDSA's selling expenses can be attributed to marketing and branding. As such, it is not clear that CYDSA's marketing and branding are necessarily the major contributors to its selling expenses. While [Nanjing] speculates that it and CYDSA have vastly different marketing and branding expenses, we find the record does not support such a finding.

Remand Results at 19–20. In other words, because Commerce sought no information on marketing and Nanjing itself placed no information on the record, there is simply no record evidence from which to determine if Nanjing had any marketing expenses or not. This being the case, there is no way to tell if Nanjing's and CYDSA's marketing expenses were similar or not. In addition, according to Commerce there is not enough record evidence with respect to CYDSA to make a reasoned assessment of the value of its marketing expenses in any event.

Notwithstanding that Commerce's questionnaire did not ask specifically for information on Nanjing's marketing and branding activities in China, and having placed on the record no relevant evidence themselves, Plaintiffs submit that there is information on the record that shows that Nanjing marketed and branded its products on a more limited scale than CYDSA. *See* Pls.' Cmts. 15 ("[W]hether or not the Department sought to expressly collect detailed information, it did collect information showing the very limited nature of the plaintiffs' marketing operations."). To make their case, Plaintiffs quote Nanjing's initial Section A questionnaire response, which asked for information regarding the company's independence from state control, in which it stated:

> [Nanjing] is independent in the price negotiations for the exports of the subject merchandise to the United States. . . . [Nanjing] conducted its price negotiations by phone . . . [but] the company does not keep phone logs of meetings conducted over the phone . . . . [Thus, it] . . . has no records of price negotiations.

Pls.' Cmts. 15–16. In addition, Plaintiffs quote a passage from their response stating that Nanjing "identified . . . potential customers through . . . [participation in an] exhibition show," through its web

site, and through personal contacts. Pls.' Cmts. 16. Plaintiffs also cite the 2014 and 2015 advertising expenses from the profit and loss statement of Plaintiff Uniphos, Nanjing's "U.S. sales arm," which, they submit, do not reflect "the marketing efforts of a sophisticated company." Pls.' Cmts. 16. Plaintiffs claim that, by comparison, CYDSA's financial statement shows that the company's salt business sells many brands of edible and industrial salt that are "sold in the consumer market with significant efforts spent on improving the brand image including in store product demonstrat[ions]." Pls.' Cmts. 17.

The court is not persuaded that the claimed dissimilarities between CYDSA's and Plaintiffs' marketing and branding expenses distorted surrogate financial ratios. First, it is difficult to see the usefulness of Nanjing's Section A response to Plaintiffs' argument regarding the scale of its marketing activities. The response states that Nanjing conducted customer negotiations by telephone. That the company negotiates prices over the phone says nothing, however, about the size of its advertising budget, or its efforts to seek new customers or continue the interest of existing customers. Likewise, it is difficult to draw any conclusion about the size of Nanjing's marketing budget from statements about attending an "exhibition show" and maintaining a web site to "identif[y] potential customers." Pls.' Cmts. 16. Regarding Plaintiff Uniphos' profit and loss statement, although Plaintiffs characterize the company as Nanjing's "U.S. sales arm," they cite no evidence to support the conclusion that Uniphos' marketing expenses, as reflected on its own profit and loss statement, may be properly imputed to Nanjing or that they represent Nanjing's sole marketing efforts.

Additionally, Plaintiffs make the argument that they sell their products to manufacturers that in turn use them to make their own products, which are then sold to end users. This argument appears to be just that—an argument. Plaintiffs do not point to record evidence that supports their contention. Indeed, the evidence they do cite could support a contrary finding, *i.e.*, that "one of the plaintiffs is the U.S. selling arm," which apparently markets to end users, just not as much as CYDSA does. *See* Pls.' Cmts.' 22 ("[Marketing] cost for [Plaintiff Uniphos] was slight and the operations minimal.").

Finally, Plaintiffs cannot seriously question the Department's finding that CYDSA's selling expenses are not clearly broken out in the company's financial statement, making it impossible to "know what portion of CYDSA's selling expenses can be attributed to marketing and branding." Remand Results at 20. Based on the foregoing, the court finds no error with respect to Commerce's finding that any

claimed differences in Plaintiffs' and CYDSA's marketing and branding expenses did not distort surrogate financial ratios.

B. Claimed Differences in Levels of Integration

Plaintiffs argue that CYDSA's and Nanjing's "levels of integration are very different." Pls.' Cmts. 21. According to Plaintiffs, whereas CYDSA self-produces raw materials, Nanjing procures its raw materials from third-party suppliers. When examining the two companies' production experiences, including whether and to what extent they self-produce raw materials, Commerce stated:

> [W]e disagree that CYDSA is integrated to the point that its financial experience is so dissimilar from [Nanjing's] that it cannot be used for surrogate ratio valuation purposes. . . . CYDSA lists two operation segments, and the production of electricity (and steam) is not listed among them. The CYDSA financial statements do not quantify the amount of electricity the company produced; however, it cannot be that CYDSA produced all of the electricity it consumed, because it continues to build electricity-producing plants, nor is electricity listed as one of its operating segments. In addition, [Plaintiffs] impl[y] that CYDSA mines salt and is, therefore, vertically integrated; however, the CYDSA statements indicate that the salt produced is from evaporation, not mines. While we examine how similar a proposed surrogate producer's production experience is to the [nonmarket economy] producer's production experience, our analysis is not dependent upon matching the exact production experience of the respondents. The statute directs . . . that Commerce shall utilize prices in one or more market economy countries that are "a significant producer of comparable merchandise," which in this case is chemicals. It does not provide that significant producers engage in business of only comparable merchandise. That CYDSA also produces some electricity is irrelevant as to whether it is also a significant producer of comparable merchandise, *i.e.*, chemicals.

Remand Results at 18. Thus, the statute directs that the financials be from "a significant producer" of merchandise that is comparable to that produced by Nanjing. That CYDSA is such a producer of comparable merchandise is not in dispute. In its Remand Results, Commerce found that although CYDSA self-produced some raw materials (including electricity), the record evidence did not show that its production experience was so dissimilar from Nanjing's that using the company's financial statement would lead to distorted ratios for overhead, selling, general, and administrative expenses, and profit.

Plaintiffs contest the Department's integration finding, attempting to draw distinctions between CYDSA's and Plaintiffs' production experiences:

> CYDSA withdraws from the ground some of its basic raw materials (salt brine) and produces other basic raw materials (electricity used as material). . . . In addition, CYDSA generates its own electricity and steam and uses a substantial quantity of each in the production process. . . . CYDSA is also integrated on the other side of the process, including direct interaction with the retail consumer in the marketplace including the promotion of brands at retail. . . . CYDSA is a huge company incorporating more than 20 subsidiaries located in 8 cities and serving customers in more than 20 countries with over 200 different products and numerous brand names. . . .
>
> In contrast, plaintiffs source[] [their] raw materials from other producers that have produced these raw materials. . . . Plaintiffs also do not generate [their] own electricity or steam, but rather purchase[] this material from independent suppliers. . . . Plaintiffs are also not integrated on the other side of the process, but rather sell[] [their] goods to other entities that use the materials [they] provide[] to manufacture other products and services sold to the ultimate end user. . . . [A]s the Department correctly notes, one of the plaintiffs is the U.S. selling arm, however . . . such cost for this affiliate was slight and the operations minimal.

Pls.' Cmts. 21–22 (internal citations omitted).

Plaintiffs' integration arguments are unpersuasive. When determining whether substantial evidence supports Commerce's selection of surrogate data, "while a surrogate value must be as representative of the situation in the [nonmarket economy] country as is feasible," the Department "need not duplicate the exact production experience of [the respondent] at the expense of choosing a surrogate value that most accurately represents the fair market value of [an input]." *Nation Ford Chem. Co.*, 166 F.3d at 1377 (citation omitted). Here, while the companies' production experiences may be different in terms of self-production of some raw materials (including electricity), Commerce reasonably concluded that using CYDSA's financial statement would not distort surrogate financial ratios. For example, there is no dispute that the record evidence does not establish the amount of electricity CYDSA produced during the period of investigation. *See* Remand Results at 18. And while, as Plaintiffs note, the company does get some salt brine from wells, there is no way of telling how much. Indeed, as stated in CYDSA's financial statement, "[t]he Com-

pany depends on its suppliers for the provi[sion] of raw materials. Gas and electricity are raw materials used in the production of chlorine and caustic soda, as well as salt . . . .” *See* CYDSA’s Financial Statement. Thus, while CYDSA’s manufacturing experience with respect to electricity and salt brine may be different from Plaintiffs’ experience, Plaintiffs have pointed to no record evidence from which it can be determined if these differences distort CYDSA’s financial statement so as to make it unusable. *See Heze Huayi Chem. Co. v. United States*, No. 17–00032, 2018 WL 2328183, at *7 (CIT May 22, 2018) (quoting *Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1377 (Fed. Cir. 2015)) (“[T]he court may not ‘reweigh the evidence or . . . reconsider questions of fact anew.”).

III. The Surrogate Value for Ocean Freight, as Revised in the Remand Results, Is Supported by Substantial Evidence

In the Final Determination, when making its dumping determination, Commerce compared the normal value of the subject chemicals to their U.S. price. When determining U.S. price, the Department made deductions for movement expenses, including ocean freight and brokerage and handling expenses.

For the ocean freight deduction, Commerce determined a surrogate value for ocean freight using four international shipping price quotes from the Descartes database. Two of the four quotes contained a list of fees associated with the shipment, which were included in the surrogate value:

> Suez Canal transit fee, Panama Canal transit fee, carrier security charge, high security seal charge, Gulf of Aden charge, equipment interchange receipt fee, OTHC – non-reefer, bunker charge, documentation fee, advance manifest security charge, [and] Customs importer security filing . . . .

Remand Results at 24. The other two quotes were less detailed, indicating only a “port surcharge fee.” *See* Descartes Data.

For the brokerage and handling deduction, Commerce calculated a surrogate value using the World Bank’s 2016 Doing Business Report for Mexico. *See* Letter from Levin Trade Law, P.C. to Penny Pritzker, Sec’y of Commerce (Aug. 18, 2016) Ex. 16, P.R. 146. Included in brokerage and handling were “border compliance” costs and “documentary compliance” costs. The report, however, did not identify, with specificity, the fees that might have been included in these costs.

On remand before the agency, Plaintiffs argued that some of the fees (*e.g.*, Suez Canal transit fee) should be excluded from the ocean freight calculation because they were already included in the surrogate value for brokerage and handling. In the Remand Results, Com-

merce agreed that there was a possibility of double counting, but rather than exclude particular fees, the Department excluded from its calculation the two price quotes that contained those fees:

> [Plaintiffs have] argued that certain . . . fees should be excluded from the [ocean freight] calculation, because they claim these [fees] are already included in the brokerage and handling surrogate value. We note that these fees are not defined on the record. In addition, whereas these fees are very specific, the *Doing Business* charges [*i.e.*, the brokerage and handling charges] are for general categories of fees. It is Commerce's practice to avoid double counting. As such, we have excluded two of the four international freight price quotes [*i.e.*, the Descartes quotes] from the calculation of the international freight [surrogate value] in order to avoid any possibility of double counting.

Remand Results at 24. In other words, because the fees listed in the two detailed quotes were not defined in the record, the Department decided to use the two less-detailed quotes, *i.e.*, the quotes that only listed a "port congestion surcharge," to calculate a surrogate value for ocean freight. That is, the Department "use[d] the two price quotes that most unequivocally demonstrate[d] that no double counting has occurred in an effort 'to avoid any possibility of double counting.'" Def.'s Resp. 18. These revisions resulted in a change to the surrogate value for ocean freight from 0.1833 USD/kg to 0.1962 USD/kg, and, thus, an increase in the amount deducted from U.S. price (*i.e.*, a lowering of U.S. price). Consequently, Nanjing's antidumping rate increased from 63.80 percent to 67.66 percent. *See* Remand Analysis Mem. at 1.

Here, Plaintiffs argue that the Department erred in its adjustment to the ocean freight value. Rather than exclude the price quotes that expressly included the fees that may have overlapped with brokerage and handling fees, Plaintiffs argue that Commerce should have excluded the two less-detailed quotes and then adjusted the remaining quotes by deducting fees that were likely included in brokerage and handling. *See* Pls.' Cmts. 4–5.

In their brief before the court, however, Plaintiffs fail to cite any record evidence to support their view that the two less-detailed quotes must have included fees that overlapped with the brokerage and handling charges. Rather, they cite pages of their own case brief before the agency, which assert the same arguments, verbatim, that they make in their brief before the court. Neither the case brief nor Plaintiffs' brief before the court contains record citations to support their arguments.

As with their arguments questioning the use of CYDSA's statement to value financial ratios, Plaintiffs urge the court to find Commerce's ocean freight determination unsupported by the record, despite failing to point to record evidence that directly supports their position. On the contrary, after this case was commenced Commerce took seriously Plaintiffs' claim that there was a risk that it had double counted certain fees. *See* Def.'s Resp. 18 ("Although Commerce maintains that there is no record evidence of double counting, Commerce heeded [Plaintiffs'] arguments and determined to use the two price quotes that most unequivocally demonstrate that no double counting has occurred in an effort 'to avoid any possibility of double counting.'"). Thus, where the Department could identify those potentially double-counted fees, it excluded the quote. *See* Remand Analysis Mem. at 2 ("In accordance with the final remand, in order to avoid any possibility of double counting, we excluded certain [ocean] freight price quotes from the [ocean] freight surrogate value. The revised [ocean] freight surrogate value is 0.1962 USD/kg."). Where it could not, it continued to use the Descartes quotes (the only surrogate information on the record for ocean freight). *See* Remand Results at 10 (noting that a "port congestion surcharge is not listed as one of the expenses included in [brokerage and handling]."). Plaintiffs have the burden of placing on the record the evidence to define the fees that they believe were double counted. *See* 19 C.F.R. § 351.301(a) ("The Department obtains most of its factual information in antidumping . . . proceedings from submissions made by interested parties during the course of the proceeding."); *see also QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) (citations omitted) ("Although Commerce has authority to place documents in the administrative record that it deems relevant, the burden of creating an adequate record lies with interested parties and not with Commerce."). In the absence of record information that shows the fees were, in fact, double counted, Commerce's exclusion of the two quotes that expressly identified the fees included in the ocean freight rate was reasonable.

CONCLUSION

Because Commerce's determination that CYDSA's financial statement was the best available information to calculate surrogate financial ratios and its determination of a surrogate value for ocean freight are supported by substantial evidence and otherwise in accordance with law, the court sustains the Remand Results. Judgment shall be entered accordingly.

Dated: December 10, 2019
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON, JUDGE