U.S. Customs and Border Protection

Slip Op. 15–24

CP KELCO OY AND CP KELCO US, INC., Plaintiffs, v. UNITED STATES, Defendant, and ASHLAND SPECIALTY INGREDIENTS, G.P., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 13–00079
PUBLIC VERSION

Dated:

Matthew L. Kanna, Nancy A. Noonan, and *Tina Termei,* Arent Fox LLP, of Washington, DC, for plaintiff.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Joyce R. Branda,* Acting Assistant Attorney General, *Jeanne E. Davidson,* Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of counsel on the brief was *Aman Kakar*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Edward M Lebow, Haynes and Boone, LLP, of Washington, DC, for defendant-intervenor Ashland Specialty Ingredients, G.P.

OPINION

Goldberg, Senior Judge:

This case returns after a succinct remand. In its previous opinion, the court invalidated the decision of the Department of Commerce ("Commerce" or "the agency") to calculate antidumping duties for plaintiffs CP Kelco Oy and CP Kelco US, Inc. (collectively "Kelco") using the average-to-transactional methodology. The court found Commerce acted arbitrarily by failing to explain why Kelco's "targeted" sales were sufficient to merit the average-to-transactional treatment. *See CP Kelco Oy v. United States*, 38 CIT __, __, 978 F. Supp. 2d 1315, 1327–29 (2014). Now the agency has furnished the explanation required, and the court sustains the decision to use the average-to-transactional method to craft Kelco's antidumping rate.

BACKGROUND

The court presumes familiarity with its prior opinion, including the exposition of Commerce's margin calculation methods and the targeted dumping test. The abridged facts that follow will suffice for the sake of this decision.

In 2011, Commerce began an administrative review of an antidumping duty order on carboxymethylcellulose from Finland. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 76 Fed. Reg. 53,404, 53,405 (Dep't Commerce Aug. 26, 2011). During the review, Commerce considered whether to apply its default average-to-average methodology ("A-A"), or its exceptional average-to-transactional methodology ("A-T"), to render Kelco's dumping margins. To guide its decision, Commerce followed the statutory framework in § 777A(d)(1)(B) of the Tariff Act of 1930, 19 U.S.C. § 1677f-1(d)(1)(B) (2012). *See Purified Carboxymethylcellulose from Finland*, 78 Fed. Reg. 11,817, 11,817 (Dep't Commerce Feb. 20, 2013) (final admin. review) ("*Final Results*"); Issues & Decision Mem. ("I & D Mem.") at 6, 8–10, PD 80 (Feb. 6, 2013).

That provision, known colloquially as the "targeted dumping" statute, reads as follows:

> (B) Exception
>
> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if--
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii) [i.e., the A-A or transactional-to-transactional methods].

19 U.S.C. § 1677f-1(d)(1)(B).

To perform this inquiry, Commerce first applied the so-called *Nails* test to Kelco's U.S. sales. The *Nails* test identifies targeted transactions, or patterns of export prices that differ significantly among purchasers, regions, or time periods. *See id.* § 1677f-1(d)(1)(B)(i); *Mid Continent Nail Corp. v. United States*, 34 CIT __, __, 712 F. Supp. 2d

1370, 1373í74 (2010) (explaining the *Nails* test). Then, after finding that Kelco targeted [[ ]] percent of its sales by quantity and [[ ]] percent by value, Commerce concluded that the targeting was more than *de minimis*, comprising a fraction of total U.S. sales sufficient to merit further analysis. *See* Analysis of Data Submitted by CP Kelco Oy & CP Kelco U.S. Inc. at 2, CD 195 (Feb. 11, 2013) (naming ratios of Kelco's targeted to total U.S. sales); I & D Mem. at 9–10 (finding sufficient volume of sales passed *Nails* test). The agency did not name the quantum of sales needed to clear the *de minimis* bar.

Despite this ambiguity, Commerce moved to the second step of the statutory inquiry, which asks whether A-A cannot account for targeted sales. *See* 19 U.S.C. § 1677f-1(d)(1)(B)(ii). The agency found it could not. A-A yielded a "meaningfully" lower antidumping rate than A-T, so Commerce, in its discretion, applied A-T to Kelco's sales to form a 12.06 percent final rate. *Final Results* at 11,817 (final rate); I & D Mem. at 9 (meaningful difference test).

Kelco filed suit at the Court of International Trade on February 26, 2013. Summons, ECF No. 1. In its brief Kelco raised a host of claims, only one of which survived judicial review. After dismissing Kelco's arguments regarding Commerce's authority to conduct targeting inquiries in reviews and the legality of the *Nails* test, the court invalidated Commerce's *de minimis* finding as arbitrary. *Kelco*, 38 CIT at __, 978 F. Supp. 2d at 1327–29. The court's criticism was twofold. First, the court noted that "Commerce never explained what purpose the *de minimis* test serves in the statutory scheme." *Id.* at __, 978 F. Supp. 2d at 1328. It was unclear from the record whether the *de minimis* analysis helped to identify a pattern of targeting under § 1677f-1(d)(1)(B)(i), or whether the test guided the agency's discretion under § 1677f1(d)(1)(B)(ii) to use A-T once targeting was found. Second, the court faulted Commerce for failing to identify "the quantum of an exporter's sales that must be targeted to fall above or below the *de minimis* threshold." *Id.* Because Commerce never articulated "the basis on which the [agency] exercised its expert discretion," the court remanded for Commerce to explain its construction and application of the *de minimis* test. *Id.* at __, 978 F. Supp. 2d at 1327 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962)) (internal quotation marks omitted).

On remand, Commerce provided the explanation required. *See* Final Results of Redetermination Pursuant to Ct. Remand, ECF No. 72 ("Remand Results"). First, Commerce said the *de minimis* test served both to identify a pattern of targeting, as required under § 1677f1(d)(1)(B)(i), and to guide Commerce's discretion to apply A-T, as allowed under § 1677f1(d)(1)(B)(ii). *Id.* at 9–15. Second, in response to

the court's request to identify the quantum of sales that cleared the *de minimis* bar, Commerce declared that targeted sales were more than *de minimis* if they comprised more than five percent of total U.S. sales during the review period. *Id.* at 15–19. Commerce drew this threshold from statutory provisions and regulations that use the same figure in other contexts, and noted that the threshold corroborated with Commerce's experience in administering the targeted dumping test. *See id.* at 18–19.

Having rendered this explanation, Commerce again held that Kelco targeted its sales in a volume sufficient to merit consideration of the A-T remedy. After comparing Kelco's A-A rate with its A-T rate, and finding a meaningful difference between the two, Commerce applied A-T to all of Kelco's sales for a 12.06 percent final rate. *See id.* at 9–10, 16, 20–21.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will sustain the agency's decisions 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).

DISCUSSION

The court now sustains the Remand Results. In its previous opinion, the court invalidated Commerce's targeted dumping decision not because of patent flaws in the agency's reasoning, but because the agency offered no reasoning at all regarding the *de minimis* test's quantitative contours and role in the statute. *Kelco*, 38 CIT at __, 978 F. Supp. 2d at 1327–29. Now Commerce has explained itself to the court's satisfaction, and though reasonable minds may differ over the wisdom of Commerce's choice, the decision merits deference.

I. Commerce Reasonably Explained the *De Minimis* Test's Role

To begin, the court holds that Commerce reasonably "explained what purpose the *de minimis* test serves in the statutory scheme." *Id.* at 1328. In the agency's view, the role is twofold. First, the inquiry helps to identify "a pattern of prices that differ significantly by purchaser, region or period of time" among respondent's U.S. sales. Remand Results 9. Of course, the statute does not say whether Commerce must search out the pattern among all reviewed sales, as it did below, or only among sales to alleged targets. *See* 19 U.S.C. § 1677f1(d)(1)(B)(i). Commerce has taken conflicting positions on this

issue in the past.[1] But whatever its prior views, the agency acted sensibly here to require that the volume of targeted sales comprise more than a token part of U.S. sales. To form a "pattern," a "mode of behavior or series of acts," such as selective low-cost sales, must be "recognizably consistent." Black's Law Dictionary 1308 (10th ed. 2014). By checking to *see* whether Kelco's targeting encompassed more than a *de minimis* share of total sales, Commerce carried its duty to find a recognizable, and hence remediable, pattern of targeting among all reviewed transactions.

Second, the agency explained that the *de minimis* inquiry informs its choice to impose AT after finding targeting. Remand Results 13í15. Under the statute, Commerce "may determine" dumping margins using A-T if a respondent's sales meet the criteria in § 1677f1(d)(1)(B)—in short, the law commits the decision to apply A-T to the agency's judgment. *See Timken Co. v. United States*, 38 CIT __, __, 968 F. Supp. 2d 1279, 1287–88 (2014). But even given this discretion, it was wise for Commerce to consider the ratio of targeted to untargeted sales before invoking A-T. Having withdrawn a regulation called the limiting rule in 2008, Commerce applied A-T to all sales, both targeted and untargeted, during the review in question. *See* I & D Mem. at 9–10; *see also Apex Frozen Foods Private Ltd. v. United States*, 38 CIT __, __, 37 F. Supp. 3d 1286, 1301–03 (2014) (explaining that Commerce applied A-T to all sales after 2008). To avoid imposing A-T on untargeted sales without cause, the agency first ensured that Kelco's targeting was more than *de minimis*, or sufficient to merit a broad remedy. This was a fair approach, which Kelco does not protest as a general matter. *See* Pls.' Objections to Remand Redetermination 2–5, ECF No. 80 ("Pls.' Objections") (objecting to the five-percent threshold, not the *de minimis* test itself). The court sustains the *de minimis* test as a reasonable interpretation of the law and a prudent guide to Commerce's discretion.

[1] In some proceedings, Commerce found a pattern of significantly differing prices only where targeted sales comprised a sufficient part of total U.S. sales. *See, e.g.*, *Certain Stilbenic Optical Brightening Agents from Taiwan*, 77 Fed. Reg. 17,027, 17,027–28 (Dep't Commerce Mar. 23, 2012) (final determination); *Ball Bearings and Parts Thereof from France, Germany, and Italy*, 77 Fed. Reg. 73,415 (Dep't Commerce Dec. 10, 2012) (final admin. review) and accompanying I & D Mem at cmt. 1 ("*Ball Bearings*"). In other proceedings, Commerce found a pattern of prices without regard to the ratio of targeted sales to total sales. *See, e.g.*, *High Pressure Steel Cylinders from the People's Republic of China*, 77 Fed. Reg. 26,739 (Dep't Commerce May 7, 2012) (final determination) and accompanying I & D Mem. at cmt. IV; *Certain Steel Nails from the United Arab Emirates*, 77 Fed. Reg. 17,029 (Dep't Commerce Mar. 23, 2012) (final determination) and accompanying I & D Mem. at cmt. 3. The latter formula is not under scrutiny here, however, and the former approach is reasonable in its own right.

II. Commerce Reasonably Defined the De Minimis Threshold at Five Percent

The court also sustains the five-percent threshold Commerce chose for its *de minimis* test. *See* Remand Results 15í19; *Kelco*, 38 CIT at __, 978 F. Supp. 2d at 1330 (ordering agency to define quantum of sales that are more than *de minimis*). One should recognize, of course, that this threshold is a line in the sand: Commerce might have picked a different number to effectuate the statute's purpose, with reasonable results. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984) (warning courts not to substitute their own interpretation of statute for agency's reasonable construction). Yet because the agency's choice does not run afoul of the statute and is not arbitrary, the court will defer to Commerce despite the possibility of alternatives. *See Mid Continent Nail*, 34 CIT at __, 712 F. Supp. 2d at 1378–79.

On remand, Commerce reported that it measures significance with five-percent tests in many contexts. Remand Results 15–16. For example, it uses a five-percent threshold to decide whether home market sales can make a viable normal value. *See* 19 U.S.C. § 1677b(a)(1)(C). If a respondent's home market sales amount to less than five percent of its U.S. sales by volume or value, then Commerce normally deems that market too thin to use in finding dumping margins. If home market sales amount to five percent or more of U.S. sales by volume or value, however, then the agency presumes the home market prices are comparable to U.S. export prices. *See id.*; Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 821–22 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4161–62 ("SAA"). The statute outlines a similar test to use when Commerce assembles normal value from third-country data. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(II); SAA at 822. In like manner, it was reasonable for Commerce to find a representative "pattern" of targeting when targeted sales exceed five percent of total U.S. sales by volume. *See* 19 U.S.C. § 1677f-1(d)(1)(B).

Other five-percent tests support this view. The regulations, for instance, permit Commerce to set normal value using home-market data from an exporter's affiliate, but only if the affiliate's sales make up five percent or more of all home sales. 19 C.F.R. § 351.403(d) (2015); *see also China Steel Corp. v. United States*, 28 CIT 38, 46, 306 F. Supp. 2d 1291, 1300 (2004) (allowing use of affiliate data to form normal value where affiliate sales exceeded five percent, "a significant percentage"). Commerce also uses a five-percent threshold to ferret out targeting under the *Nails* test. If Commerce locates a "pattern" of prices below one standard deviation of the mean by control number, it

calls those price differences "significant" if the gap between the weighted-average price to the alleged target and the weighted-average price to the next higher untargeted group exceeds the average gap between untargeted groups for five percent of sales to the alleged target. *See* I & D Mem. at 9. Commerce sensibly used a similar test to decide if Kelco's sales formed a pattern of differing prices meriting the A-T remedy.[2]

Kelco counters that it would have been more appropriate for Commerce to set the *de minimis* threshold at twenty percent. Pls.' Objections 5. Under 19 U.S.C. § 1677b(b)(1), Commerce may exclude from its normal value calculation any below-cost home market sales made "within an extended period of time in substantial quantities." The statute defines "substantial quantities" of below-cost sales as transactions encompassing twenty percent "or more of the volume of sales under consideration for the determination of normal value." 19 U.S.C. § 1677b(b)(2)(C)(i). Yet as the United States suggests in its response on remand, the twenty-percent threshold does not measure the representativeness of normal value data, like 19 U.S.C. § 1677b(a)(1) (market viability) or 19 C.F.R. 351.403(d) (affiliate sales). Def.'s Resp. to Pls.' Cmts. on Final Results of Remand Redetermination 8–9, ECF No. 84. Instead, the twenty-percent threshold indicates whether below-cost sales render home market prices *unrepresentative* of normal value. *See NSK Ltd. v. United States*, 28 CIT 1535, 1551–53, 346 F. Supp. 2d 1312, 1327–29 (2004) (suggesting that purpose of cost-of-production provision is to "evaluate the rationality of exporters [sic] pricing practices"). Furthermore, even if a twenty-percent threshold correctly identified significant targeting, that would not mean Commerce's choice was unreasonable. When Commerce is met with equally plausible alternatives, it may choose the approach that it

[2] Commerce adds that it forged its five-percent threshold in past cases. If it did, the court has no way of knowing. In prior proceedings, Commerce scrupulously avoided naming the quantum of targeted sales needed to clear the *de minimis* bar. The agency also failed to reveal the ratio of targeted to total U.S. sales from individual companies, probably to preserve confidentiality. *See, e.g.*, *Corrosion-Resistant Carbon Steel Flat Products from the Republic of Korea*, 78 Fed. Reg. 16,247 (Dep't Commerce Mar. 14, 2013) (final admin. review) and accompanying I & D Mem. at cmt. 1(C)(6); *Polyethylene Terephthalate Film, Sheet, and Strip from India*, 78 Fed. Reg. 9670 (Dep't Commerce Feb. 11, 2013) (final admin. review) and accompanying I & D Mem. at cmt. 1; *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China*, 78 Fed. Reg. 3396 (Dep't Commerce Jan. 16, 2013) (final admin. review) and accompanying I & D Mem. at cmt. 1; *Ball Bearings*, 77 Fed. Reg. at 73,415 and accompanying I & D Mem. at cmt. 1; *Circular Welded Carbon Steel Pipes and Tubes from Turkey*, 77 Fed. Reg. 72,818 (Dep't Commerce Dec. 6, 2012) (final admin. review) and accompanying I & D Mem. at cmt. 1. Because none of these proceedings revealed the contours of Commerce's *de minimis* test, they do little to aid judicial review. *See Burlington*, 371 U.S. at 167.

thinks best effectuates the statute's purpose. *See Chevron*, 467 U.S. at 844–45. Here, the agency used a five-percent test instead of a twenty-percent test to identify a pattern of targeting, and the court will defer to the agency's reasonable preference.

III. Kelco Waived Any Argument Regarding the Meaningful Difference Test

Finally, Kelco claims that the agency failed to explain the "meaningful difference" test conducted on remand. Pls.' Objections 5–6. After finding that a sufficient number of Kelco's U.S. sales were targeted, Commerce had to decide whether A-A could account for that targeting under 19 U.S.C. § 1677f-1(d)(1)(B)(ii). *See* Remand Results 16. To do so, Commerce compared Kelco's weighted-average dumping margin as rendered under A-A and A-T. Then, after discovering a meaningful difference between the two rates, the agency applied A-T to yield a final rate. *See id.* Kelco claims that Commerce acted arbitrarily by neglecting to define what "meaningful" means in this context.

The court will not consider this claim, however, because Kelco did not raise it before the agency, in the complaint, or in the original briefs. *See* I & D Mem. at 7–8; Complaint 6–7, ECF No. 4; Mem. of L. in Support of Pls.' R. 56.2 Mot. For J. upon Agency R. 1–2, ECF No. 28. Commerce made similar "meaningful difference" findings in the post-preliminary results and *Final Results*, *see* Post-Prelim. Targeted Dumping Analysis Mem. at 3, PD 68 (Dec. 26, 2012); I & D Mem. 9–10, and if Kelco wished to challenge the test, it should have done so at the earliest opportunity, *see* 28 U.S.C. § 2637(d) (requiring exhaustion of administrative remedies); *Casa de Cambio Comdiv S.A., de C.V. v. United States*, 291 F.3d 1356, 1366 (Fed. Cir. 2002) (rejecting claim not raised in complaint).

The court also disagrees that the meaningful difference test became "subject to judicial review" when Commerce used it to set a rate on remand. Pls.' Objections 6. Though Kelco claims otherwise, remand is not the time to litigate new claims that could have been raised in prior proceedings. *See Bridgestone Americas, Inc. v. United States*, 34 CIT __, __, 710 F. Supp. 2d 1359, 1365–67 (2010) (rejecting argument raised after remand). What is more, the court did not ask Commerce to revisit the meaningful difference test in the remand order. *See Kelco*, 38 CIT at __, 978 F. Supp. 2d at 1330. The court thus declines

to entertain Kelco's meaningful difference argument—whatever its merits—because it was made too late.[3]

CONCLUSION

In its prior opinion, the court faulted Commerce for failing to explain the purpose and contours of the *de minimis* test. Commerce has now provided an explanation that is in harmony with the law and evidence. The court sustains the agency's remand redetermination, and judgment will enter accordingly.

Dated: March 25, 2015
New York, New York

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

Slip Op. 15–25

UNITED STATES, Plaintiff, v. NYCC 1959 INC., Defendant.

Before: Donald C. Pogue, Senior Judge
Court No. 14–00045

ORDER

Upon consideration of Plaintiff's Motion to Set Aside the Default Judgment, Reopen This Action, and Grant Leave for Plaintiff to File Corrected Motion for Default Judgment, ECF No. 11 ("Pl.'s Mot."), in which the United States reveals that, following the entry of default judgment in this case, *see* Judgment, ECF No. 10, Government counsel discovered inaccuracies contained in evidence submitted by the United States in support of its claim, which was relied on by the court in ordering judgment against the defaulted Defendant and quoted in the court's opinion, *see* Slip Op. 15–13, ECF No. 9, at 5–6; Pl.'s Mot., ECF No. 11, at 5; upon consideration of all other filings and proceedings had in this action; and upon due deliberation, it is hereby

ORDERED that Plaintiff's motion, ECF No. 11, is granted; and it is further

ORDERED that Slip Opinion 15–13, ECF No. 9, 2015 WL 480180 (CIT Feb. 6, 2015), and Judgment, ECF No. 10, are vacated and withdrawn; and it is further

[3] Kelco's meaningful difference challenge would fail in any event. The court has found that the disparity between A-A and A-T rates is "meaningful" if it is more than *de minimis*, *see Apex*, 38 CIT at __, 37 F. Supp. 3d at 1299–1300 (sustaining "meaningful difference" of 0.5 percentage points), and the difference between Kelco's A-A rate and A-T rate (applied to all sales) certainly clears this bar, *see Final Results* at 11,817 (giving Kelco's A-T rate); Pls.' Objections 6 (giving Kelco's A-A rate); Remand Results 9–10 (noting Commerce applies A-T to all sales when finding A-T rate).

ORDERED that Plaintiff's Corrected Motion for Default Judgment, ECF No. 11–1, shall be docketed as filed on the date of this order.
Dated: March 25, 2015
New York, NY

/s/ Donald C. Pogue
DONALD C. POGUE, SENIOR JUDGE

Slip Op. 15–26

KIROVO-CHEPETSKY KHIMICHESKY KOMBINAT, JSC, PART OF URALCHEM, OJSC, Plaintiff, v. UNITED STATES, Defendant, and CF INDUSTRIES, INC. AND EL DORADO CHEMICAL COMPANY, Defendant-Intervenors.

Before: Gregory W. Carman, Senior Judge
Court No. 13–00324

[Affirming Commerce's final scope ruling that Plaintiff's NS 30:7 imports are covered by the antidumping duty order on solid fertilizer grade ammonium nitrate from Russia.]

John M. Gurley, *Diana Dimitriuc-Quaia*, and *Tina Termei*, Arent Fox LLP, of Washington, DC, for Plaintiff.

Veronica M. Onyema, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendant. With her on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Claudia Burke*, Assistant Director. Of counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Valerie A. Slater and *Margaret C. Marsh*, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, for Defendant-Intervenors.

OPINION AND ORDER

Carman, Senior Judge:

Before the Court is the motion of Plaintiff Kirovo-Chepetsky Khimichesky Kombinat, JSC, part of Uralchem, OJSC ("Uralchem") for judgment on the agency record pursuant to USCIT Rule 56.2. Mem. of Law in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("*Mot.*"), ECF No. 25. Uralchem challenges a ruling by the Department of Commerce ("the Department" or "Commerce") that Uralchem's solid fertilizer product known as NS 30:7 is covered by the scope of an antidumping duty order on solid fertilizer grade ammonium nitrate products from the Russian Federation. *See id.* at 1 (citing Mem. from E. Eastwood, to G. Taverman, re: Final Scope Ruling—NS 30:7 Solid Fertilizer Grade Ammonium Nitrate from the Russian Federation (Russia) (A-821–811) (Aug. 6, 2013), ECF No. 27

Tab 19, P.R.[1] 66 ("*Final Scope Ruling*"). Defendant United States ("the government") opposes the motion. *See* Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("*Opp.*"), ECF No. 30. Defendant-Intervenors CF Industries, Inc. and El Dorado Chemical Company (collectively "CF Industries") also oppose the motion. *See* Def.-Intervenor's Resp. in Opp'n to Pl.'s Rule 56.2 Mot. for J. on the Agency R. ("*CF Industries Opp.*"), ECF No. 31.

For the reasons that follow, the Court affirms Commerce's decision that Plaintiff's NS 30:7 product is within the scope of the antidumping duty order on solid fertilizer grade Russian ammonium nitrate products. Judgment will issue accordingly.

Background

On April 27, 2011, Commerce issued an antidumping duty order on solid fertilizer grade ammonium nitrate products from the Russian Federation. *See Termination of Suspension Agreement on Solid Fertilizer Grade Ammonium Nitrate From the Russian Federation and Notice of Antidumping Duty Order*, 76 Fed. Reg. 23,569 (Dep't Commerce Apr. 27, 2011) ("*ADD Order*").

On September 21, 2012, Uralchem requested that the Department issue a scope ruling "that Uralchem's ammonium sulfate nitrate identified as NS 30:7 . . . is not within the scope of" the *ADD Order*. Uralchem's Request for a Scope Ruling at 1 ("Scope Ruling Request"), ECF No. 19, P.R. 1; *see also* Public App. to Pl.'s Mem. in Supp. of Rule 56.2 Mot. for Summary J. on the Agency R., Tab 1, ECF No. 27, App. of Docs. Supp. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. upon the Agency R., Tab 1, ECF No. 32–1. Uralchem described NS 30:7 as "an ammonium sulfate nitrate, a solid fertilizer designed to provide a balanced ratio of nitrogen and sulfur nutrients to sulfur-deficient areas and sulfur-sensitive crops." Scope Ruling Request at 2. According to chemical testing results submitted by Uralchem, NS 30:7 is a granular white or grey-yellow dry solid consisting predominantly of "a pair of double salts of ammonium nitrate and ammonium sulfate" that account for 59.1% of the product by weight. *Id.*at 4; *see also id.*, Ex. 1. The next major component of NS 30:7 is "uncombined ammonium nitrate," comprising 32.2% of the product by weight. *Id.* Finally, NS 30:7 is rounded out by 8.7% of uncombined ammonium sulfate and less than one percent each of additives, trace elements, and water. *Id.*

Uralchem noted in its Scope Ruling Request that NS 30:7 differs from other ammonium nitrate fertilizers "because its nitrogen content is derived from both ammonium nitrate and ammonium sulfate."

[1] "P.R." refers to the public administrative record of this proceeding.

Id. at 2. Uralchem distinguished NS 30:7 on the grounds that its total nitrogen content "attributable to ammonium nitrate (both as double salts and in uncombined form) is only about 23%, which is a significantly smaller percentage of nitrogen than any known ammonium nitrate product on the U.S. market (the nitrogen content of 'pure' ammonium nitrate is 35%)." *Id.* Uralchem also pointed out that NS 30:7 contains "60% more ammonia nitrogen than nitrate nitrogen," dissimilar from "subject merchandise under" the *ADD Order*. *Id.* at 2–3. Instead, Uralchem claimed, NS 30:7 is "designed to provide a balanced ration of two nutrients required for amino acid and protein synthesis in crops—sulfur and nitrogen—in a product that acts in a slower manner than the typical ammonium nitrate product." *Id.* at 3. In sum, according to Uralchem, "differences in crystal structure, chemical composition and uses show that NS 30:7 is not ammonium nitrate covered by the scope" of the *ADD Order. Id.* Uralchem argued in the alternative that even if a plain reading of the scope did not exclude NS 30:7 due to lack of clarity, NS 30:7 should be excluded under the so-called *Diversified Products* criteria in 19 C.F.R. § 351.225(k). *See id.* at 3–4.

Commerce initiated a scope inquiry to determine whether NS 30:7 fell within the scope of the *ADD Order* and, after accepting submissions from the interested parties, found NS 30:7 to be within scope. *See generally Final Scope Ruling*. Plaintiff thereafter filed this suit to appeal the *Final Scope Ruling*. By its Rule 56.2 motion, Uralchem argues that the *Final Scope Ruling* is unsupported by substantial evidence, based upon a misapplication of legal standards governing scope determinations, flawed due to the illegal rejection of certain factual evidence, and arbitrary and capricious in that it ignored relevant evidence and arguments. *Mot.* at 1–3.

Jurisdiction & Standard of Review

The Court of International Trade exercises jurisdiction over scope determinations pursuant to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c). In such proceedings, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also NSK Ltd. v. United States,*481 F.3d 1355, 1359 (Fed. Cir. 2007) (internal quotations and citations omitted). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Crawfish Processors Alliance v. United States*, 483 F.3d 1358, 1361 (Fed. Cir. 2007) (internal citations omitted). Substantial evidence may be "less than the weight of the evidence,"

and a decision may still be supported by substantial evidence even where there is "the possibility of drawing two inconsistent conclusions from evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966). However, the Court must also ensure that the agency's decision is reasonable in the face of the record as a whole, including evidence which detracts from the agency's conclusion. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

The legal framework by which Commerce conducts scope determinations stems from the agency's regulations, which provide that "[a]ny interested party may apply for a ruling as to whether a particular product is within the scope of an order." 19 C.F.R. § 351.225(c). Rulings on scope ruling requests are governed by a three-step analysis. First, Commerce examines the scope language contained in the at-issue order to *see* if it is ambiguous and open to interpretation. *Mid Continent Nail Corp. v. United States*, 725 F.3d 1295, 1302 (Fed. Cir. 2013) (internal citations omitted). Where Commerce finds the order's scope language not to be ambiguous, Commerce "states what it understands to be the plain meaning of the language" and may terminate the scope proceeding without further action. *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82, 84 (Fed. Cir. 2012). When Commerce finds that the scope language is ambiguous, it turns to the second step of its analysis. *See* 19 C.F.R. § 351.225(k)(1)-(2) and *Mid Continent Nail*, 725 F.3d at 1302. At the second step, Commerce seeks to interpret the ambiguity in the scope by reference to "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1) (commonly called "(k)(1) materials" or "(k)(1) factors" in reference to this regulatory subsection.) Commerce will end the inquiry if it is able to interpret the scope at this second step. Only if the second step cannot resolve the ambiguity may Commerce move on to the third step of its analysis, at which it takes into consideration the following factors: "[t]he physical characteristics of the product," "[t]he expectations of the ultimate purchasers," "[t]he ultimate use of the product," "[t]he channels of trade in which the product is sold," and "[t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2) (commonly called "(k)(2) materials" or "(k)(2) factors"); *see Mid Continent Nail*, 725 F.3d at 1302.

In reviewing scope determinations, the Court must give Commerce "substantial deference with regard to its interpretation of its own antidumping duty orders," which are "particularly within the expertise and special competence of Commerce." *King Supply Co., LLC v. United States*, 674 F.3d 1343, 1348 (Fed. Cir. 2012) (citations and

quotations omitted); *accord Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1094–95 (Fed. Cir. 2002). Despite this deference, the Court must ensure that Commerce does not "interpret an antidumping order so as to change the scope of that order" nor "interpret an order in a manner contrary to its terms." *Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1072 (Fed. Cir. 2001) (quotations and citations omitted). This is because the language of the scope in the antidumping duty order is the ultimate touchstone of a scope ruling. Thus "Commerce may not place merchandise within the scope of an order if the scope language may not reasonably be interpreted to include that merchandise." *Peer Bearing Co.-Changshan v. United States*, 38 CIT ___, ___, 986 F. Supp. 2d 1389, 1397 (2014). A similar principle of deference applies when the Court reviews Commerce's interpretation of its own regulations: the Court will uphold the interpretation at issue unless it is plainly erroneous or inconsistent with the language of the regulation. *See Torrington Co. v. United States*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998) (citations omitted).

Discussion

Plaintiff attacks the *Final Scope Ruling* on several grounds, each discussed in turn below.

I. *Ambiguity in the Scope Language*

A. Contentions of the Parties

The parties agree that the first step in Commerce's scope ruling process must be consideration of whether the scope language in the *ADD Order* unambiguously covers NS 30:7. *See Mot.* at 10; *Opp.* at 10; *CF Industries Opp.* at 15–16. However, they differ on the conclusion Commerce should have reached.

The scope of the *ADD Order* states:

> The products covered by the order include solid, fertilizer grade ammonium nitrate products, whether prilled, granular or in other solid form, with or without additives or coating, and with a bulk density equal to or greater than 53 pounds per cubic foot. Specifically excluded from this scope is solid ammonium nitrate with a bulk density less than 53 pounds per cubic foot (commonly referred to as industrial or explosive grade ammonium nitrate). The merchandise subject to this order is classified in the Harmonized Tariff Schedule of the United States ("HTSUS") at subheading 3102.30.00.00. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise within the scope is dispositive.

ADD Order, 76 Fed. Reg. at 23,569–70.

Plaintiff claims that "the determinative language is 'ammonium nitrate products,' and therefore, the subject NS 30:7 only falls within the scope of the *Order* if it is determined to be an 'ammonium nitrate product[].'" *Mot.* at 11 (quoting *ADD Order*, 76 Fed. Reg at 23,569). Plaintiff argues that "[t]he only question relevant to the first step is whether NS 30:7 is AN." *Id.* Stating that "NS 30:7 contains some ammonium nitrate as a minority component, but it is simply not an AN product," Uralchem contends that NS 30:7 "is predominantly a double salt product of ammonium nitrate and ammonium sulfate—and not an AN product." *Id.* at 11–12. Uralchem claims that Commerce reached its incorrect conclusion because it failed to take the record evidence into account as it "made no serious attempt to understand" the product or review the scientific evidence in the record, instead relying only on CF Industries' interpretation of the *ADD Order*. *Id.* at 11. Uralchem also argues that Commerce erred in reasoning that NS 30:7 might be included in the scope on the grounds that no minimum ammonium nitrate content is specified by the scope language. *See id.* at 12. Uralchem argues that Commerce may not include merchandise in the scope of an order simply due to the absence of a particular exclusion. *Id.*

Commerce notes that the law requires only that Commerce find "language in the order that is subject to interpretation" before moving to step two of its scope analysis by examining the record of the antidumping investigation. *Opp.* at 12 (citing *Duferco*, 296 F.3d at 1089); *see also CF Industries Opp.* 16.[2] The Court has said there is "a low threshold" to justify this finding. *Id.*(citing *Laminated Woven Sacks Comm. v. United States*, 34 CIT ___, ___, 716 F. Supp. 2d 1316, 1325 (2010) (internal citations omitted). Commerce points out that it found that the "ammonium nitrate products" referred to in the scope were not necessarily "merely pure ammonium nitrate," leaving it ambiguous what amount of ammonium nitrate content would qualify a product as an ammonium nitrate product. *Id.* at 13 (citing *Final Scope Ruling* at 3–4); *see also CF Industries Opp.* at 18. Arguing that "Uralchem merely assumes—without support rooted in the language of the order—the answer to the fundamental question of what constitutes an 'ammonium nitrate product,'" Commerce calls Uralchem's contention "circular and unpersuasive." *Id; see also CF Industries Opp.* at 17. Commerce asserts that in step one of the scope inquiry it merely "could not exclude or include NS 30:7 solely on the basis of this

[2] In general, and except as otherwise specified, the Court has examined Defendant-Intervenors brief and found it to raise arguments and authorities materially similar to those raised by the government.

ambiguous scope language." *Id.*

B. Commerce Reasonably Found the Scope Language Ambiguous

The Court upholds Commerce's step-one finding that the scope language was ambiguous and justified moving on to the second step and examining the (k)(1) factors. Commerce is correct that the bar to justify a finding of ambiguity in the scope language is a low barrier. *See Novosteel SA v. United States*, 284 F.3d 1261, 1272 (Fed. Cir. 2002). The inquiry boils down to whether the phrase "ammonium nitrate products" in the scope of the order can only mean pure ammonium nitrate, and, if not, how much ammonium nitrate a product must contain to constitute an ammonium nitrate "product." Commerce reasonably took these to be real questions and concluded that the plain language of the antidumping duty order's scope did not make the answers a foregone conclusion. The Court therefore concludes that Commerce acted reasonably in finding the scope language ambiguous and seeking to interpret it with (k)(1) materials.

II. *Consideration of the (k)(1) Factors*

Following its first-step determination, Commerce moved to step two: examining the petition and the record of the antidumping investigation, pursuant to 19 C.F.R. § 351.225(k), in order to apply the scope language. *See id.* at 1270.

A. Contentions of the Parties

Uralchem claims that Commerce erred in its step two determination in a number of ways. First, Uralchem contends that Commerce's finding that NS 30:7 is an ammonium nitrate product was unsupported by the record evidence, which in Uralchem's view demonstrates conclusively that NS 30:7 is chemically distinct from ammonium nitrate. *See Mot.*at 13–22. Second, Uralchem claims that Commerce applied a new and incorrect legal standard in the scope determination, examining the condition of NS 30:7 after application by end users rather than the condition of the product at importation. *See id.* at 22–25. Third, Uralchem contends that Commerce improperly rejected certain material Uralchem attempted to submit with its comments on the preliminary scope ruling on the grounds that they constituted untimely filed factual information. *See id.* at 25–28. Finally, Uralchem argues that Commerce's *Final Scope Ruling* is arbitrary and capricious, and therefore not in accordance with law, due to the flaws previously described. *See id.* at 28–30.

1. *The Chemistry of NS 30:7*

Addressing the record evidence about the chemical nature of NS 30:7, Uralchem accuses Commerce of having "completely misunderstood the subject product" and "blindly ignoring the overwhelming evidence" to rely solely on "the opinion of one of [Petitioner]'s employees in the face of the vast amount of evidence that disproves his position." *Id.* at 14. The specific Commerce finding that Uralchem focuses on is this: "NS 30:7 is 70 percent AN when both the combined and uncombined AN content are taken into account. While there may be a point at which a product containing AN is no longer considered in-scope merchandise . . . we disagree that a product comprised predominantly of AN falls below that threshold such that it is excluded from the scope." *Final Scope Ruling*at 4.

Uralchem points to independent laboratory testing in the record that "NS 30:7 is an ammonium sulfate nitrate (ASN) solid fertilizer *containing only 32% ammonium nitrate.*" *Mot.* at 15 (emphasis in original). Uralchem notes that "[t]he main substance in the formulation of NS 30:7, accounting for 59.1% of the product, is a pair of double salts of ammonium nitrate and ammonium sulfate," which Uralchem claims have "unique, identifiable crystal and chemical structures that are distinct from each other and from those of AN." *Id.* at 15–16. Uralchem contends that, in the form in which NS 30:7 is imported, "***the double salts contain no discrete units of either ammonium nitrate or ammonium sulfate.***" *Id.* at 18 (emphasis in original). As confirmation that the chemical composition of NS 30:7 differs from AN, Uralchem points to lab analyses, published studies, and affidavits from three independent chemistry experts, all of which Uralchem placed on the record of the scope proceeding. *See id.* at 16–18.

Uralchem also points to the Chemical Abstracts Service ("CAS") Registry run by the American Chemical Society, which assigns a distinct numerical code to each chemical substance. *See id.* at 19–20. Uralchem argues that the different CAS Registry numbers assigned to the two double salts in NS 30:7, and to AN, indicate that they are chemically-distinct compounds. *See id.* at 20. Uralchem also points to the nitrogen content of NS 30:7, which is 30%, and argues that "AN has continuously been demonstrated to be a chemical compound containing a *minimum* of 34% of nitrogen." *Id.*(emphasis in original).

Commerce notes that at the second stage of the scope proceeding, in order to determine whether NS 30:7 was an AN product, "Commerce first determined the amount of ammonium nitrate that is present in NS 30:7." *Opp.* at 16 (citing *Final Scope Ruling* at 10). In order to answer this question, Commerce examined "competing record evidence": on the one hand, Uralchem's evidence that NS 30:7's AS/AN

double salt structure was chemically-distinct from AN; and, on the other hand, evidence (including an affidavit from an expert employed by Defendant-Intervenors) that the AN present in combined form in the double salts was relevant for purposes of the antidumping duty order. *Id.* at 16–17. In deciding whether to count only the 32% of uncombined AN in NS 30:7, as urged by Uralchem, or to also count the AN present in the double salts in combined form, Commerce looked to the petition. *Id*. The plain language of the petition indicated that "it is the Petitioner's intention to include within the petition all solid ammonium nitrate for agricultural use," and that Commerce must consider the agricultural application of any given fertilizer. *Id.* at 17 (citing *Final Scope Ruling* at 10 (internal citation omitted)).

Analyzing the second step of the scope determination in the context of the petition, Commerce therefore considered whether the combined AN in the double salts of NS 30:7 was agriculturally-distinct from AN. *See id.* What Commerce found to be relevant was "whether the combined AN in the double salts functions as AN." *Id.* (citing *Final Scope Ruling* at 11.) Because a plant will respond to the AN in the double salts of NS 30:7 in the same manner as it will respond to pure AN, Commerce concluded that "combined and uncombined ammonium nitrate function in the same way" and that the amount of AN in both forms "is relevant to the total ammonium nitrate content" of NS 30:7. *Id.* at 16. Commerce added the 32% of uncombined AN in NS 30:7 to the 38% of AN in combined form in the double salts to calculate a total AN content of 70% for NS 30:7 for purposes of the scope determination. *Id.* at 18.

As for the CAS Registry numbers of the double salts in NS 30:7 and AN, Commerce acknowledges them but found that "it does not follow that [the double salts] themselves contain no AN or that it is inappropriate to consider their AN content." *Id.* at 20 (citing *Final Scope Ruling* at 17). Absent any reference to the CAS Registry in the petition or scope language, Commerce argues that they are not relevant to the scope proceeding. *See id.* Similarly, Commerce rejects Uralchem's argument that only products with 34% or more of nitrogen can fall within the scope, pointing out that the scope and other (k)(1) materials contain no minimum nitrogen requirements. *See id.* In addition, Commerce noted that the nitrogen content of NS 30:7 actually falls within the range of nitrogen content in products Commerce found to be within scope in other proceedings. *See id.*at 20–21.

2. *The Legal Standard Applied by Commerce*

Uralchem claims that "Commerce departed from established law and agency practice by employing what appears to be a new legal

test." *Mot.* at 22. The crux of this argument is Uralchem's contention that the new test was "to determine scope coverage based on how the product dissolves in water and that it is the dissolved *ions* which reach the plant that count," contrary to the ordinary principle that "duties attach to merchandise in its condition upon importation into the United States." *Id.* at 22, 23. In Uralchem's view, Commerce violated this principle when, for purposes of the scope determination, it analyzed the amount of AN that NS 30:7 would make available to plants upon use, rather than the amount of AN in NS 30:7 in its imported state. *See id.* Uralchem states that "Commerce cites no authority for its new test" and claims that this "departure from law and practice without a valid explanation" renders the scope determination "arbitrary and capricious." *Id.* at 23–24 (internal citation omitted).

Commerce counters that Uralchem is offering a distorted mischaracterization of its reasoning which "incorrectly claims that Commerce focused on how NS 30:7 dissolves in water rather than its physical state before importation." *Opp.* at 22–23. Commerce claims that it counted the ammonium nitrate in the double salts because "both the petition and the ITC report emphasize the intended use of ammonium nitrate," so "NS 30:7's qualities as a fertilizer are relevant to the question of how much ammonium nitrate NS 30:7 contains." *Id.* at 23 (citing *Final Scope Ruling* at 11). Commerce states that "this analysis does not depend on what happens to NS 30:7 after importation." *Id.* In Commerce's view, Uralchem has misunderstood its analysis, since "in no way does Commerce's determination hinge on some alteration to the physical properties of NS 30:7," but rather relies on physical characteristics of the product that are unchanged by importation. *Id.* Commerce "did not dissolve NS 30:7 into water when considering the product's ammonium nitrate content" but rather considered whether the AN in the double salts of NS 30:7 functions as AN and is therefore necessary to consider in determining whether NS 30:7 is an AN product. *Id.* at 23–24.

3. *Rejection of Factual Material Submitted by Uralchem*

It is undisputed that Commerce rejected Uralchem's initial brief on the preliminary scope determination on the grounds that it contained new factual information filed on May 29, 2013, after the December 21, 2012 deadline for factual submissions. *Mot.* at 25 (citing *Rejection Letter*, P.R. 50). Uralchem claims that the rejected material (consisting of comments from the electronic docket of the *Ammonium Nitrate Security* Program rulemaking) was not new factual information un-

der the definition of factual material given at 19 C.F.R. § 351.102(b)(21) because it was "a response to Commerce's application of its []new test." *Id.* at 25–26. Uralchem also contends that the deadline mentioned by Commerce in its letter rejecting the factual material at issue was set without authority, and that the act of rejecting factual material in a scope inquiry on grounds of lateness has no basis in statute or Commerce regulations. *Id.* at 26–27. Finally, Uralchem claims that it filed comments on December 21, 2012 challenging petitioner's December 12, 2012 brief, and that Commerce accepted new factual information submitted in reply by petitioners on January 14, 2013. *Id.* at 27. Uralchem points out that Commerce later relied on material from petitioner's late submission to justify its new test, and argues that doing so while rejecting Uralchem's post-December 12, 2012 submission was arbitrary and capricious. *Id.* at 28.

Commerce contends that it acted in accordance with law when it rejected Uralchem's May 30, 2013 submission of new information. *Opp.*at 25. According to Commerce, it is entitled to set deadlines for the submission of factual information in scope cases (as a type of antidumping duty proceeding) under 19 C.F.R. § 351.301. *Id.*at 26–27. Commerce also points to 19 C.F.R. § 351.302(d)(1)(i), requiring Commerce to reject "[u]ntimely filed factual information" as the basis on which it rejected the Uralchem submission as issue. *Id.*at 25. Commerce suggests that Uralchem is arguing that the § 351.302(d) deadline provision does not apply to scope rulings, but points out that the deadline provision there applies to "antidumping and countervailing duty proceedings." *Id.* at 26–27 (quoting 19 C.F.R. § 351.301(a)). A proceeding, Commerce notes, consists of "one or more segments" pursuant to 19 C.F.R. § 351.102(b)(47)(i), and "a scope inquiry . . . would constitute a segment of a proceeding" according to 19 C.F.R. § 351.102(b)(47)(ii). *Id.*at 24. Thus Commerce interprets the language of its own regulations to mean that "section 351.301 applies to scope rulings" and that its December 12, 2012 deadline for factual information was legitimate. *Id.*

Commerce also counters Uralchem's allegation that Commerce treated Uralchem and petitioners differently by rejecting Uralchem's May 29, 2013 factual submission but accepting (and relying upon) petitioner's January 14, 2013 factual submission. Commerce notes that on January 4, 2013, petitioners timely requested an extension of a deadline for factual submissions, which Commerce granted with an extension until January 14, 2013. *Id.* at 28–29. Uralchem did not challenge petitioner's stated reasons for the extension at that time.

Id. at 29. Commerce points out the context: Uralchem submitted factual materials on December 21, 2012, and petitioners' January 14, 2013 letter was submitted pursuant to the extension of time and 19 C.F.R. § 351.301(c) to "rebut, clarify or correct" those materials. *Id.* Commerce argues that it was entitled to treat the petitioner's submission of rebuttal and clarification material, submitted pursuant to regulation and within an extended deadline, differently from Uralchem's May 29, 2013 submission, which contained no rebuttal or clarification material and was not submitted within the deadline (extended or otherwise). *Id.* at 29–30.

4. *Whether the Final Scope Ruling Is Arbitrary and Capricious*

Uralchem argues that Commerce's *Final Scope Ruling* is arbitrary and capricious, and therefore not in accordance with law, because (a) Commerce failed to explain why a new test was being applied; (b) Commerce treated Uralchem and petitioners differently with respect to the acceptance of filings made after the December 12, 2012 cutoff date for submitting factual information; and (c) Commerce ignored scientific and expert evidence that NS 30:7 is ASN, not AN. *Id.* at 29–30.

B. Commerce's *Final Scope Ruling* Was Supported by Substantial Evidence and Otherwise According to Law

For the reasons that follow, the Court finds that Commerce had the support of substantial evidence in reaching its scope determination, that Commerce reasonably considered all of the relevant evidence including that which conflicted, that Commerce did not incorrectly apply the governing legal standards, that Commerce acted properly in rejecting certain late-submitted factual material, and that Commerce did not reach its conclusions in an arbitrary and capricious manner. Therefore the Court will affirm Commerce's *Final Scope Ruling*.

1. *Commerce Reasonably Determined the AN Content of NS 30:7*

The Court holds that Commerce made a reasonable choice based on substantial evidence in the record when it decided to count the combined AN in NS 30:7 toward the product's total AN content and thereby concluded that NS 30:7 consisted of 70% AN for scope purposes.

In the appeal of a scope determination, the Court does not replace Commerce as the factfinder but instead reviews Commerce's factfinding decisions to ensure that they are reasonable and supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *see also Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989).

Commerce was faced in this case with a record in which it was uncontested that NS 30:7 was comprised of 32% uncombined AN and 59.1% of a pair of double salts of ammonium nitrate and ammonium sulfate. In examining the evidence to determine how to treat these double salts that were admittedly composed in part of AN, Commerce reviewed Uralchem's evidence which indicated that the double salts had crystalline structures distinct from AN, unique CAS Registry numbers, and a different nitrogen content from AN. Commerce also reviewed Defendant-Intervenors' evidence, indicating that despite differences in chemical structure, the AN held in a combined form inside the double salts of NS 30:7 gave it the agricultural function of an AN fertilizer. Commerce chose to rely on the Defendant-Intervenors' expert and consequently chose to count the AN in combined form inside the double salts toward the total AN content of NS 30:7. Uralchem's argument can be summarized as saying that Commerce should have confined itself to examining the chemical packaging inside NS 30:7 (i.e. the double salts) and ignored the AN content of that chemical packaging.

In challenging this decision, Uralchem disputes how Commerce resolved factfinding issues and, in essence, requests that the Court substitute its own factfinding judgment for that of the agency. This the Court cannot do under the standard of review. There is evidence on the record to support the choice made by Commerce, and evidence to the contrary does not demonstrate that no reasonable decisionmaker could decide as Commerce did.

2. *Commerce Did Not Apply a "New Test"*

The Court finds that Commerce correctly examined NS 30:7 in light of the (k)(1) sources (scope language, petition, and prior ITC and Commerce decisions) in order to determine whether it was an ammonium nitrate product, and did not impose a "new test" to do so. Uralchem accuses Commerce of having ignored the requirement that it examine NS 30:7 as imported when determining whether it falls inside the scope of the *ADD Order* and instead considering NS 30:7 in its condition after application to crops and dissolution by water. This is not a fair characterization of Commerce's scope determination analysis.

Commerce was obligated to take into consideration the "descriptions of the merchandise contained in the petition, the initial investigation, and [prior] determinations." 19 C.F.R. § 351.225(k)(1). Commerce noted that the petition and ITC report described the use to which the subject merchandise would be put, and thus Commerce considered the use or function of NS 30:7 when considering whether it was covered merchandise. Doing so did not constitute a new test, which would comprise a new manner of analyzing evidence for its relevance. Instead, Commerce analyzed the evidence regarding NS 30:7 for its relevance in terms dictated by the regulation (i.e. with reference to the (k)(1) sources). Commerce did not ignore the physical state of NS 30:7 at the time of import, or hinge the scope decision on the condition that NS 30:7 would one day have if used as fertilizer. Commerce instead examined the physical state of NS 30:7 at import and, informed by the (k)(1) materials that spoke of the importance of the agricultural use of an imported fertilizer, determined that the AN contained in NS 30:7's double salts was relevant to calculating its total AN content since it was an agriculturally-functional component of NS 30:7.

To the extent that Uralchem seeks to make a legal argument here that would call for a different interpretation of how the (k)(1) sources should be integrated into a scope analysis, the Court rejects Uralchem's contention. Commerce is entitled to deference in interpreting its own regulations, and the Court finds nothing unreasonable or erroneous about the manner in which Commerce applied 19 C.F.R. § 351.225(k) here.

3. *Commerce Properly Rejected Late Factual Information from Uralchem*

Commerce is entitled to set deadlines for the submission of factual information in antidumping duty proceedings. *See* 19 C.F.R. § 351.301; *see also SKF USA Inc. v. United States*, 33 CIT 1866, 1876, 675 F. Supp. 2d 1264, 1274 (2009) ("Commerce has broad authority to set, and extend, its deadlines for submission of requested information."), *Maui Pineapple Co., Ltd. v. United States*, 27 CIT 580, 595, 264 F. Supp. 2d 1244, 1257 (2003) ("Commerce [] has broad discretion to fashion its own rules of administrative procedure, including the authority to establish and enforce time limits concerning the submission of written information and data.") (internal citation omitted). In the context of questionnaire responses in an antidumping duty investigation, the Court has stated that "Commerce necessarily must exercise discretion in setting, extending, and enforcing deadlines for the

submission of requested information." *Artisan Mfg. Corp. v. United States*, 38 CIT ___, ___, 978 F. Supp. 2d 1334, 1342 (2014) (reviewing Commerce's decision to sanction missed deadlines under an abuse of discretion standard).

Uralchem advances a theory about the proper interpretation of Commerce's regulations, taking the view that the regulations regarding deadlines, 19 C.F.R. § 351.301 and 19 C.F.R. § 351.302(d)(1)(i), do not apply to scope determinations. Commerce regulations do not provide a model of clarity regarding the deadlines applicable to scope proceedings. Many of the familiar types of antidumping duty proceedings are referenced in ways practitioners can easily understand in the deadline regulation at 19 C.F.R. § 351.301 (e.g. final determinations of investigations at (b)(1), final results of administrative reviews at (b)(2), final results of changed circumstances and sunset reviews at (b)(3), final results of new shipper reviews at (b)(4), and final results of expedited antidumping reviews at (b)(5)), but scope determinations are not specifically mentioned. The helpful charts of deadlines provided at Annexes I-IV to Part 351 of the Commerce regulations also do not mention scope proceedings by name.

Commerce is entitled to deference regarding the interpretation of its own regulations unless that interpretation is plainly erroneous or inconsistent with the plain language of the regulation. *See Torrington*, 156 F.3d at 1363–64 (citations omitted); *see also Mid Continent Nail Corp. v. United States*, 38 CIT ___, ___, 999 F. Supp. 2d 1307, 1327 (2014) (stating that the Court will defer to Commerce's interpretation of its own regulation where the interpretation is "reasonable"). The regulations in 19 C.F.R. § 351.301 do not explicitly refer to scope reviews, but Commerce points out that its time limits apply to the submission of factual information "in antidumping and countervailing duty proceedings," which consist of one or more segments, and the regulations specify that a scope inquiry constitutes a segment of a proceeding. 19 C.F.R. § 351.102(b)(47)(i)-(ii). There can be no doubt that a scope proceeding is a segment of an antidumping proceeding. *Opp.* at 26–27 (quoting 19 C.F.R. § 351.301(a)). The regulations specify that Commerce may "request any person to submit factual information at any time during a proceeding." 19 C.F.R. § 351.301(c)(2). And, as argued by Commerce, 19 C.F.R. § 351.302(d)(i) mandates that Commerce reject "[u]ntimely filed factual information." The Department reasonably interprets the language of these regulations as authorizing the setting of deadlines and rejection of factual information submitted outside the deadlines in scope proceedings. The Court therefore must and will defer to Commerce's reasonable construction of its own regulations. Additionally, the scope ruling

regulation contemplates that Commerce will issue "[a] schedule" and explains when submissions will "normally" be due. 19 C.F.R. § 351.225(f)(iii) ("A schedule for submission of comments [] normally will allow interested parties 20 days in which to provide comments on, and supporting factual information relating to, the inquiry, and 10 days in which to provide any rebuttal to such comments"); *see also* § 351.225(f)(iii)(3) (Commerce "will notify all parties . . . of the preliminary scope ruling, and will invite comment" which will be due in 20 days unless otherwise specified). Unless Commerce can enforce a schedule, there would be little point in Commerce being authorized to issue one.

The enforcement of scope ruling deadlines is an exercise of Commerce's discretion, and should therefore be examined to ensure against abuse of discretion. *See Artisan*, 978 F. Supp. 2d at 1345–49. The Court cannot say that Commerce abused its discretion in rejecting Uralchem's late submitted factual information. Unlike in *Artisan*, where the party's submission was late by less than a single business day, 978 F. Supp. 2d at 1347, Uralchem's May 29, 2013 submission was late by more than five months. To this late submission, Commerce attached only the most logical consequence: rejection of the late material. This rejection did not have a single, obvious negative impact on the scope decision. This contrasts with *Artisan*, where Commerce used a very brief filing delay to impose a duty rate at the non-market economy all-others rate, based on an adverse inference, and resulting in an approximate doubling of antidumping duties. *Id*.In addition, here Commerce was exercising its authority under 19 C.F.R. § 351.225, and deserves latitude because that regulation provides Commerce flexibility with its deadlines in scope proceedings (using terms such as "normally" and "unless otherwise specified" in relation to the deadlines). Commerce also rejected Uralchem's late factual information in compliance with 19 C.F.R. § 351.302(d). While there can be exceptions to enforcement of that rule, the parties do not argue them here and in any case such exceptions are inapplicable.

The Court also rejects Uralchem's argument that Commerce treated it arbitrarily and capriciously by rejecting its late filed factual information while accepting allegedly late submitted factual information from petitioners. As Commerce makes clear, petitioners requested and received an extension of time for submission of the documents in question (rebuttal comments from petitioners), and thereafter filed the submission within their extended deadline. *See Opp.* at 28–29. Additionally, petitioners' materials consisted of *rebuttal* material, *not* new factual information, which was a crucial difference because rebuttal material is subject to the deadlines of 19 C.F.R.

§ 351.301(c). It appears that Commerce applied that regulation to petitioners' filing, but did not apply it to Uralchem's later filing of new factual information. (Even if Uralchem's submission were interpreted to be rebuttal commentary, it fell far outside the 19 C.F.R. § 351.301(c) timeframe and was not permitted by an extension of time.) The Court finds that Commerce has articulated a reason for treating the two submissions differently that is reasonable, and the Court therefore holds that the rejection of Uralchem's May 29, 2013 filing was not arbitrary and capricious.

For these reasons, the Court defers to Commerce's interpretation of its regulations regarding deadlines in scope rulings and upholds Commerce's rejection of Uralchem's late filed factual information.

4. *The Final Scope Ruling Was Not Arbitrary and Capricious*

Uralchem's argument that the *Final Scope Ruling* was arbitrary and capricious rests largely on grounds that the Court has already considered and rejected. Uralchem claims that Commerce acted arbitrarily and capriciously in failing to announce its "new test," but the Court finds Commerce did not employ a new test at all. And Uralchem claims Commerce acted arbitrarily and capriciously by treating Uralchem and petitioners differently regarding late filings, but the Court finds that Commerce correctly applied its regulations in doing so and had a reasonable basis for distinguishing the two submissions. Finally, Uralchem claims it was arbitrary and capricious for Commerce to ignore scientific and expert evidence that NS 30:7 is ASN, not AN. However, Commerce responded at length to Uralchem's evidence regarding the chemical and crystalline structure of NS 30:7's double salts, and rejected the notion that these double salts were more like ASN than AN. *Opp.* at 19 (citing *Final Scope Ruling* at 19–20). The Court has already found that Commerce gave adequate consideration to Uralchem's scientific and expert submissions and reached a decision supported by the record evidence. For these reasons, Uralchem's contention that the *Final Scope Ruling* was arbitrary and capricious is rejected.

CONCLUSION

As discussed above, the Court finds that Commerce's *Final Scope Ruling* was supported by substantial evidence and otherwise in accordance with law. Therefore, Plaintiff's motion is denied.

The Court will separately issue judgement upholding the *Final Scope Ruling*.

Dated: March 26, 2015
New York, NY

/s/ *Gregory W. Carman*
GREGORY W. CARMAN, SENIOR JUDGE

Slip Op. 15–27

CP KELCO US, INC., Plaintiff, v. UNITED STATES, Defendant, and NEIMENGGU FUFENG BIOTECHNOLOGIES CO., LTD., AND SHANDONG FUFENG FERMENTATION, CO., LTD., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge
Court No. 13–00288
PUBLIC VERSION

[The court remands the final determination in an antidumping investigation of xanthan gum from the People's Republic of China.]

Dated: March 31, 2015

Nancy A. Noonan and *Matthew L. Kanna*, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief was *Matthew J. Clark*.

Alexander O. Canizares, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, and *L. Misha Preheim*, Senior Trial Counsel. Of counsel on the brief was *Melissa M. Brewer*, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, Washington, DC.

Mark E. Pardo, Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, of Washington, DC, argued for defendant-intervenors Neimenggu Fufeng Biotechnologies Co., Ltd. and Shandong Fufeng Fermentation Co., Ltd. With him on the brief were *Andrew T. Schutz*, *Dharmendra Choudhary*, and *Kavita Mohan*.

OPINION

Goldberg, Senior Judge:

CP Kelco US ("Kelco"), Neimenggu Fufeng Biotechnologies, Co., Ltd., and Shandong Fufeng Fermentation Co., Ltd. (collectively, "Fufeng") challenge the final determination of the Department of Commerce ("Commerce") in its antidumping investigation of xanthan gum from the People's Republic of China. *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 33,351 (Dep't Commerce June 4, 2013) (final determ.) and accompanying Issues & Decision Mem. ("I&D Mem."); *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't Commerce July 19, 2013) (am. final determ.); *see also* Final Determination Analysis Mem. for Neimenggu Fufeng Biotechnologies Co., Ltd. ("Fufeng Final Determination Analysis Mem."), PD 432 (May 28, 2013).

Together, Kelco and Fufeng claim that Commerce made several incorrect decisions: (1) Commerce's decision to treat the bacterial strain *Xanthomonas Campestris* ("X. Campestris") as an asset, rather than as a direct material input, (2) Commerce's selection of the Thai Ajinomoto financial statements over the Thai Fermentation statements for calculating surrogate financial ratios, (3) Commerce's selection of the *Doing Business 2013: Trading Across Borders* ("*Doing Business 2013*") report over competing data from a website called Dxplace for valuing Fufeng's truck freight, (4) Commerce's decision to value Fufeng's corn as a direct input, instead of valuing the cornstarch milk produced therefrom as an intermediate input, (5) Commerce's decision to value Fufeng's corn as corn imported under the Thai tariff heading for corn "fit for animal feed," (6) Commerce's decisions, when allocating energy at Fufeng's Neimenggu facility, (a) to include all of the energy consumed at Neimenggu's cornstarch workshop in the numerator of Neimenggu's xanthan-gum energy-consumption rate, and (b) to use the full amount of unfinished xanthan gum produced at Neimenggu as the denominator of Neimenggu's xanthangum energy-consumption rate. The court remands the second of these decisions for further explanation. As for the last two ((6)(a) and (b)), the government has requested voluntary remand, which the court grants. The court sustains the agency's reasoning on the remaining four decisions.

GENERAL BACKGROUND

When foreign exporters sell their goods in the United States at less than fair value and to the detriment of U.S. industry, the U.S. Government imposes duties on those goods. *See* 19 U.S.C. § 1673 (2006). These duties are called "antidumping duties." Antidumping duties are calculated by subtracting the foreign product's "export price," or the product's price in the United States, from its "normal value" ("NV"), or the product's price in the exporting country. *See id.*

Commerce's method for calculating the NV of goods depends on whether the goods come from a country with a market economy ("ME") or from a country with a nonmarket economy ("NME"). For market-economy goods, Commerce generally uses the goods' price in the exporting country as NV. *See id.*§ 1677b(a)(1)(B)(i). For NME exports, however, the export-country price cannot be used: The law presumes that government intervention distorts prices in the home market. *See Blue Field (Sichuan) Food Indus. Co. v. United States*, 37 CIT __, __, 949 F. Supp. 2d 1311, 1317 (2013). Nor can Commerce calculate the NV of NME exports by adding the cost of the resources used to make those goods (called "inputs"), because input costs may

be just as distorted as the final costs of the goods. *See id.* To calculate NV for goods made in NME countries, then, Commerce assigns each of the goods' direct material inputs an artificial market price or surrogate value. *See* 19 U.S.C. § 1677b(c)(1). Commerce selects sources for artificial market prices based on which ones provide the "best available information." The prices generally come from a market-economy country that Commerce has selected because it produces significant amounts of subject or similar merchandise and is economically comparable to the NME country. 19 C.F.R. § 351.408(c)(2). Commerce then totals the surrogate cost of the inputs used, and adds to this total input cost an amount intended to capture any noninput costs of production, such as factory overhead, selling, general, and administrative expenses ("SG&A"), and profit. *Id.* § 1677b(c)(1); 19 CFR § 351.408(c)(4). These noninput costs are added through the application of a series of ratios known as the "surrogate financial ratios." The ratios, like inputs, are selected from sources deemed to provide the "best available information." *See* 19 U.S.C. § 1677b(c)(1).

In the investigation underlying this case, Commerce sought to determine the appropriate antidumping duty to impose upon Chinese xanthan-gum manufacturers, including Fufeng. In a preliminary determination, Commerce chose Thailand as the surrogate country from to draw input values, and reached several tentative conclusions about the proper antidumping duty to impose on Chinese exporters. Prelim. Surrogate Value Determination, PD 306 (Jan. 9, 2013); Prelim. Surrogate Country Determination, PD 307 (Jan. 9, 2013). Kelco and Fufeng contested Commerce's initial conclusions, and Commerce revised some of them in its final determination. Kelco and Fufeng filed separate suit, each challenging Commerce's final-determination conclusions on various grounds. *See* Order, ECF No. 23. The court consolidated the cases into one action. *Id.*

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction to hear this appeal under 28 U.S.C. § 1581(c). The court will uphold the agency's decisions unless those decisions are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

In light of these standards, the court remands three decisions to Commerce. First, the court remands Commerce's selection of the Thai Ajinomoto financial statements over the Thai Fermentation statements for calculating surrogate financial ratios. Commerce has also requested remand as to two other decisions, both having to do with

the allocation of energy at Fufeng's Neimenggu facility. The court remands both per Commerce's request, and sustains the agency as to all other decisions.

I. Commerce's Decision to Treat Bacterial Strain X. Campestris as an Asset Rather than a Direct Material Input Is Supported by Substantial Evidence and Otherwise in Accordance with Law

Commerce treated the bacterial strain X. Campestris as an asset accounted for in the surrogate financial ratios, rather than as a direct material input. Kelco challenges Commerce's approach. Kelco makes three claims: (1) the decision did not attune to statute, (2) the decision was unsupported by substantial evidence, and (3) the decision was out of accord with past agency practice. Pl. CP Kelco US, Inc.'s Mem. of Law in Support of R. 56.2 Mot. for J. on Agency R. 11–18, ECF No. 29 ("Pl. Kelco's Br."). All three of Kelco's claims fail.

A. Background

Before recounting the reasons that Commerce gave for treating X. Campestris as an asset to be compensated for in the surrogate financial ratios, it is first helpful to outline the purpose of the surrogate financial ratios and how assets are accounted for therein. Commerce uses surrogate financial ratios to account for those production inputs that cannot be wholly attributed to a finite batch of subject merchandise. For example, a honey factory's jars and corks might not be wholly attributable to subject honey produced at the factory, if the factory also makes use of the jars and corks when producing other goods. *See Shanghai Eswell Enter. Co. v. United States*, 32 CIT 1233, 1242–44 (2008). Similarly, the factory's honey machines are assets that can be used over and over to produce honey, so—unlike the raw honey inputs—the machines' costs do not correspond to any standalone batch of honey. *See id.* at 1235–40 (discussing raw inputs). As such, the costs of the jars, corks, and honey machines need to be priced into the NV of the honey in some other way than by simply tallying their full cost. That is part of what surrogate financial ratios are for.[1]

[1] *Compare* 19 U.S.C. § 1677b(c)(1) (instructing Commerce to include in NV "an amount for general expenses and profit"), *with* 19 C.F.R. § 351.408(c)(4) (redescribing this amount as accounting for "manufacturing overhead, general expenses, and profit"), *and, e.g.*, *Seamless Refined Copper Pipe and Tube from the People's Republic of China*, 75 Fed. Reg. 60,725 (Dep't Commerce Oct. 1, 2010) (final determ.) and accompanying I&D Mem. at cmt. 2 (explaining Commerce's practice of using surrogate financial ratios to cover the amount described in statute and regulation).

Surrogate financial ratios account for asset costs (such as the cost to acquire honey machines) through depreciation[2] or amortization[3] figures. *See Seamless Refined Copper Pipe and Tube from the People's Republic of China*, 75 Fed. Reg. 60,725 (Dep't Commerce Oct. 1, 2010) (final determ.) ("*Copper Pipe and Tube*") and accompanying I & D Mem. at cmt. 2. These figures can be itemized under factory overhead or SG&A.

As noted, Commerce chose to classify X. Campestris as an asset, rather than as a direct material input. I&D Mem. at 35–37. Commerce reasoned that a certain physical property of X. Campestris—its capacity to self-regenerate—made the bacteria look like an asset. The bacteria's self-regeneration meant that it was never "used up" in the production of xanthan gum: Although manufacturing xanthan gum required fermenting X. Campestris cells—a process that killed individual cells—the cells grew back. *Id.*; Pl. Kelco's Br. 4 –5, 12–13. This property allowed Fufeng to acquire its X. Campestris before the period of investigation ("POI") had even started, via a one-time payment. I & D Mem. at 36. Because Fufeng paid for its X. Campestris only once, the bacteria's cost was not attributable to any discrete batch of xanthan gum. Commerce concluded that the bacteria was therefore best classified as an asset.

Commerce also rebutted an argument previously made by Kelco, that classifying X. Campestris as an asset impermissibly omitted certain asset-related costs from the xanthan-gum NV. *Id.* at 37. In making this argument, Kelco had noted that asset-related costs were normally deemed accounted for in the surrogate financial ratios. Yet, argued Kelco, the ratios chosen by Commerce—drawn from a company called Thai Ajinomoto, which also produced a bacteria-based product, monosodium glutamate ("MSG")—did not account for two particular asset-related costs. Namely, the Thai Ajinomoto ratios did not cover (1) research-and-development costs and (2) bacterial acquisition costs. *Id.*

Commerce responded that Fufeng's X. Campestris did not have any research and development costs, because Fufeng simply bought it once and kept it. *Id.* As for the cost to acquire X. Campestris, Commerce noted that there was simply no good way to account for this cost. The bacteria's self-regeneration imparted it with an indefinite

[2] "Depreciation is defined as the accounting process of allocating the cost of tangible assets to expense in a systematic and rational manner to those periods expected to benefit from the use of these assets." *Fuyao Glass Indus. Grp. Co. v. United States*, 27 CIT 1892, 1908 (2003) (internal quotation marks omitted).

[3] Amortization is the same as depreciation, only with respect to intangible assets. *See Hyundai Elecs. Indus. Co. v. United States*, 28 CIT 517, 536 n.7, 342 F. Supp. 2d 1141, 1158 n.7 (2004).

useful life. This made attributing the acquisition cost over any finite period of time (that is, depreciating the cost) inaccurate. In sum, Commerce concluded that X. Campestris was best treated as an asset fully accounted for in the Thai Ajinomoto surrogate financial ratios. *Id.*

B. Analysis

Kelco first claims that Commerce decision to classify X. Campestris as an asset did not accord with its statutory mandate. Pl. Kelco's Br. 12–14, 16; 19 U.S.C. § 1677b(c). One of the reasons Commerce gave for classifying X. Campestris as an asset was that Fufeng had acquired the bacteria before the POI had started, via a one-time payment. Yet, Kelco argues, the statute precluded Commerce from considering "the frequency or amount of . . . [Fufeng's] payments" when deciding how to classify X. Campestris. Pl. Kelco's Br. 16.

This claim fails. Section 1677b(c)(4) requires Commerce to value factors of production ("FOPs") using surrogate data, thereby implicitly disallowing Commerce from using subject producers' actual payments or costs for valuation purposes. But the statute in no way forbids Commerce from using payment data to decide whether a particular input is better described as an asset or as a direct material *prior to* attaching the appropriate surrogate value (a question determined, in part, by whether an input is an asset or a direct material). Because the statute simply does not say whether or not using subject producers' payments at this prior step is permissible, Commerce's only statute-based obligation is to comport itself reasonably. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). It was reasonable for Commerce to use the time that Fufeng paid for the X. Campestris as evidence that the bacteria was an asset: Fufeng's one-time purchase and the bacteria's self-regenerating properties made it look like an asset. Kelco's first statutory argument therefore fails.

Kelco next makes a substantial-evidence claim, taking issue with Commerce's conclusion that Fufeng "acquired" its stock of X. Campestris before the POI. Pl. Kelco's Br. 14–16.[4] Kelco points out that Fufeng did not own the bacteria outright, but rather licensed the "rights to exploit" it. Pl. Kelco's Br. 15 (quoting Case Br. Rebuttal of Neimenggu Fufeng Biotechnologies Co., Ltd. ("Fufeng's Administrative Rebuttal Br.") at 43, PD 416 (Mar. 20, 2013). Kelco then argues that the undisputed fact of Kelco's licensing controverted Commerce's

[4] In its substantial-evidence claim, Kelco does not quibble with Commerce's conclusion that Fufeng paid for its X. Campestris just once; Kelco's substantial-evidence challenge is limited to Commerce's conclusion that Fufeng "acquired" the bacteria by paying for it. Pl. Kelco's Br. 14–16.

conclusion that Fufeng had "acquired" the bacteria, rendering Commerce's decision unsubstantiated in evidence. Pl. Kelco's Br. 15; Pl. CP Kelco US, Inc.'s R. 56.2 Reply Br. for J. on Agency R. 11–12, ECF No. 60 ("Pl. Kelco's Reply Br.").[5]

Kelco's substantial-evidence claim fails. It is coherent to acknowledge that Fufeng licensed its X. Campestris, but to nonetheless conclude that Fufeng had acquired the license that it owned before the POI. And that is precisely what Commerce did when it noted that Fufeng's acquisition "included the right to further grow and exploit" the bacteria. I & D Mem. at 36.

In any case, identifying the precise rights that Fufeng had in its X. Campestris—a license versus full ownership—was not essential to Commerce's ultimate conclusion that the bacteria was an asset. Commerce reached that conclusion on grounds that the bacteria self-regenerated, such that Fufeng only needed to pay for the bacteria once. *Id.* It was this set of features that rendered X. Campestris unlike direct material inputs used up in the production process. Kelco's substantial-evidence claim therefore fails.

Kelco's final claim is that Commerce's past practice mandates treating X. Campestris as an FOP, and that 19 U.S.C. § 1677b(c) requires Commerce to assign all FOPs a surrogate value. Pl. Kelco's Br. 12–16. According to Kelco, Commerce has consistently applied a five-factor test to determine whether an alleged input is in fact a direct material input or something else (like an asset), but that the agency did not proceed through these factors in its analysis below. *Id.* Kelco's proposed test was set forth in *Copper Pipe and Tube* :

> [T]he Department will typically value a material as a direct material input if it is 1) consumed continuously with each unit of production, 2) required for a particular segment of the production process, 3) essential for production, 4) not used for "incidental purposes," or 5) otherwise a "significant input into the manufacturing process rather than miscellaneous or occasionally used materials."

Copper Pipe and Tube and accompanying I&D Mem. at cmt. 7. Had Commerce applied this five-factor test, it would have found that X. Campestris was a direct material input, for which a surrogate value was statutorily required. *See* Pl. Kelco's Br. 13.

Kelco's claim fails. When an agency establishes a consistent prac-

[5] In its reply, Kelco raises another substantial-evidence claim: If classifying X. Campestris as an asset meant that the bacteria's acquisition cost would not be priced into the xanthangum NV (because the bacteria's indefinite useful life made cost depreciation inaccurate) then asset classification was unreasonable. Pl. Kelco's Reply Br. 8–10. Kelco did not make this argument in its lead brief, so the argument is waived. USCIT R. 81(l).

tice, this can bind it to at least explain any departure therefrom. *E.g.*, *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003) (holding that agency acts arbitrarily and capriciously when it "consistently followed a contrary practice in similar circumstances and provide[s] no reasonable explanation for the change in practice"). However, contrary to Kelco's claim, Commerce has not used one monolithic test to evaluate whether or not an item is a direct material input or not, but has instead proceeded case by case. In *Copper Pipe and Tube*, Commerce did provide a list of considerations "typically" made. *Copper Pipe and Tube* and accompanying I & D Mem. at cmt. 7. But this was simply an aggregation of different methods used in various past cases.[6] And Commerce avoided ossifying those methods into a practice by designating them as typical, thus welcoming the possibility of other considerations (such as, for example, frequency of payment). *Id.* In sum, then, Commerce's past practice did not require it to consider the five factors listed in *Copper Pipe and Tube*. Those factors therefore could not compel Commerce to conclude that X. Campestris was a direct material input, for which a surrogate value was statutorily required. Commerce's past-practice claim as to Commerce's valuation of X. Campestris fails and Commerce's decision to treat the bacteria as an asset withstands this court's review.

II. Commerce's Decision to Use Thai Ajinomoto's Financial Statements to Calculate Surrogate Financial Ratios Was Unsubstantiated in Evidence

Fufeng challenges Commerce's decision to calculate the surrogate financial ratios using Thai Ajinomoto's financial statements, rather than those of Thai Fermentation, another Thai MSG producer. Commerce rejected Thai Fermentation's financial statements on grounds that two paragraphs in one footnote of the statements were left untranslated. I&D Mem. at 16 & n.70; *see* Pl. Fufeng's Br. in Support of Pls.' Mot. for J. on Agency R. 19–20, ECF No. 26 ("Pl. Fufeng's Br."); Def.'s Resp. to Pls.' Mot. for J. on Agency R. 17, ECF Np. 43 ("Gov't Resp. Br."). Once Commerce had rejected the Thai Fermentation statements, it then accepted the Ajinomoto statements as the only statements left on record, despite evidence that Ajinomoto had re-

[6] *Compare Copper Pipe and Tube* and accompanying I&D Mem. at cmt. 7 & nn.97–101 (citing as the primary authority for the list of considerations a similar listing set forth in *Certain New Pneumatic Off-the-Road Tires from the People's Republic of China*, 73 Fed. Reg. 40,485 (Dep't Commerce July 15, 2008) (final determ.) and accompanying I&D Mem. at cmt. 27), *with Bridgestone Americas, Inc. v. United States*, 710 F. Supp. 2d 1359, 1364 (2010) (describing the listing from *Pneumatic Off-The-Road Tires* as "merely a survey of various criteria taken into consideration in different past determinations," as opposed to a "hard-and-fast four-prong standard")

ceived subsidies from the Thai government. Fufeng claims that Commerce broke with past agency practice when it rejected the Thai Fermentation statements on grounds of incompleteness alone. Fufeng further claims that Commerce's decision to adopt the Thai Ajinomoto statements was contrary to substantial evidence.

The court remands to Commerce for further explanation. Commerce never addressed why the weakness of the Thai Fermentation statements—incompleteness—was worse than the weakness of the Thai Ajinomoto statements: evidence of subsidies. Rather, by first considering (and rejecting) the Thai Fermentation statements and then subsequently accepting the Thai Ajinomoto statements for lack of an alternative, Commerce effectively ignored the weakness of the Thai Ajinomoto statements. The substantial-evidence standard does not permit such one-sided evaluation of potential data sources. *See Blue Field*, 37 CIT at __, 949 F. Supp. 2d at 1328–31.

A. Background

As noted above, surrogate financial ratios are calculated by drawing upon the financial statements of an appropriate company, usually a producer of similar goods from the surrogate country. Commerce's statutory task in selecting the surrogate-ratios company is to ensure that the company provides the "best available information." 19 U.S.C. § 1677b(c)(1)(B). In the investigation below, Commerce had three potential surrogate-ratio companies to choose from: Thai Ajinomoto, Thai Fermentation, and Thai Churos. I&D Mem. at 14–16. Commerce rejected the financial statements of Thai Churos and Thai Fermentation on grounds of incompleteness. The Thai Churos statements were "missing several footnotes" and the Thai Fermentation statements lacked "complete English translations." *Id.* at 16. Although Commerce did not go into detail about what exactly was missing from the Thai Fermentation statements, the record undisputedly shows that they were incomplete insofar as two paragraphs at the bottom of accounting note twelve, concerning depreciation of assets, were untranslated. Pl. Fufeng's Br. 19–20; Gov't Resp. Br. 17. Accounting note twelve nonetheless contained a fully translated depreciation schedule, complete with a line item for "Depreciation in statement income" for 2011: 140,861,456.76 Thai baht. Pl. Fufeng's Br. Attach. 2.

After rejecting the Thai Fermentation and Thai Churos statements, Commerce then found Thai Ajinomoto's statements to be the best available. Commerce reasoned that, although the Thai Ajinomoto statements were imperfect insofar as they showed "evidence of the receipt of countervailable subsidies," they were the only statements left to use. I&D Mem. at 16–17. Commerce acknowledged that it had

a general practice of disregarding such statements, but cited a past instance in which it had resorted to subsidy-affected statements given nothing better on record. *Id.* (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China*, 77 Fed. Reg. 63,791 (Dep't Commerce Oct. 17, 2012) (final determ.) and accompanying I&D Mem. at cmt. 2)

B. Analysis

Fufeng claims that Commerce's rejection of the Thai Fermentation financial statements was contrary to both past agency practice and substantial evidence. *See* Pl. Fufeng's Br. 13–24. According to Fufeng, Commerce's past practice is to "only disregard incomplete financial statements . . . where the statement is missing key sections . . . that are vital to [Commerce's] analysis and calculations." Pl. Fufeng's Br. 17 (quoting *Galvanized Steel Wire from the People's Republic of China and Mexico*, 76 Fed. Reg. 23,548, 23,551 (Dep't Commerce Apr. 27, 2011) (initiation of investigation) ("*Galvanized Steel Wire*")). Fufeng argues that Commerce's decision to reject the Thai Fermentation financial statements was out of accord with this past practice because Commerce never explained why the information missing from the Thai Fermentation statements was vital. *See id.* at 17–22.

Fufeng also makes a substantial-evidence claim. Fufeng argues that, by eliminating the Thai Fermentation financial statements and then accepting the Thai Ajinomoto statements as the only ones available, Commerce effectively ignored the weakness in the Ajinomoto statements: evidence that Ajinomoto had received countervailable subsidies. *Id.* at 22–24.

The court accepts Fufeng's substantial-evidence claim, and remands to Commerce to further explain why it selected the Thai Ajinomoto financial statements. When presented with multiple imperfect potential surrogate-data sources, Commerce must faithfully compare the strengths and weaknesses of each before deciding which to use. *Blue Field*, 949 F. Supp. 2d at 1328–31. Nor is this general rule of any less import when it comes to selecting the best set of financial statements to use for surrogate financial ratios. *See, e.g., Tianjin Magnesium Intern. Co., Ltd. v. United States*, 34 CIT __, __, 722 F. Supp. 2d 1322, 1340 (2010) (remanding Commerce's financial-statement choice on grounds that Commerce insufficiently explained why it rejected one imperfect set of statements, yet accepted another). In this case, Commerce rejected the Thai Fermentation financial statements because two paragraphs at the bottom of accounting note twelve were left untranslated. But Commerce then accepted the Thai Ajinomoto financial statements despite evidence that Ajinomoto had

received countervailable subsidies. Commerce's only reason for accepting the Thai Ajinomoto statements was that there were no other financial statements left on record. I&D Mem. at 17. That was a conundrum created by Commerce itself, when the agency chose to preemptively reject the Thai Fermentation statements. Rather than fashioning itself a pigeonhole by considering and then rejecting the Thai Fermentation statements before ever reaching the Thai Ajinomoto statements, Commerce should have compared the two side-by-side. On remand, Commerce must explain why, on the whole, the Thai Ajinomoto statements were a better source than the Thai Fermentation statements.

Fufeng also claims that Commerce's decision to reject the Thai Fermentation financial statements was out of accord with a past practice of *only* rejecting incomplete financial statements when the missing information is "vital." Pl. Fufeng's Br. 17–22. As already noted, an agency's consistent practice can bind it to explain departures. *See, e.g.*, *Consol. Bearings*, 348 F.3d at 1007. But Commerce has not bound itself to a practice of *only* rejecting financial statements when they are missing vital information. To be sure, Commerce has occasionally characterized its rule as such—even before this court. *Ass'n of Am. Sch. Paper Suppliers v. United States*, 35 CIT __, __, 791 F. Supp. 2d 1292, 1304 (2011) (recounting Commerce's argument that the agency had the aforementioned past practice, wherein Commerce cited *Galvanized Steel Wire* at 23,551). Notwithstanding these characterizations, the fact remains that Commerce has often rejected incomplete financial statements without finding that the statements lacked vital information. *See id.* at __ & n.15, 791 F. Supp. 2d at 1302–03 & n.15 (citing several such instances). These examples show that Commerce does not really reject financial statement as sparingly as Fufeng claims, even though Commerce has sometimes suggested otherwise. And, perhaps precisely for this reason, this court has before declined the invitation to tie Commerce's hands to a practice of rejecting incomplete financial statements only when they lack vital information. *See id.* at 1304 (holding only that Commerce does *not* have a practice of *always* rejecting incomplete financial statements).

In keeping with this court's own past rulings, then, the court will not now hold that Commerce rejects financial statements only when missing vital information. As such, on remand, Commerce will not be bound to either accept the Thai Fermentation financial statements or else to specifically find the statements to be lacking vital information: Rather, Commerce's only duty will be to compare and contrast the

Thai Fermentation and Thai Ajinomoto financial statements, and to explain why the Thai Ajinomoto statements constitute a better source.[7]

III. Commerce's Selection of the World Bank's *Doing Business 2013: Trading Across Borders Thailand* as its Surrogate Source for Valuing Fufeng's Truck Freight Is Supported by Substantial Evidence and Otherwise in Accordance with Law

Next, Fufeng challenges Commerce's decision to value Fufeng's truck-freight costs using data from *Doing Business 2013* rather than competing data from a website called Dxplace. To select *Doing Business 2013*, Commerce considerations included a multifactor test that the department has established through past practice. *See Xiamen Intern. Trade and Indus. Co., Ltd. v. United States* (*XITIC*), 37 CIT __,__, 953 F. Supp. 2d 1307, 1312–13 (2013): Commerce concluded that *Doing Business 2013* better satisfied this test than the competing data from Dxplace. Commerce reached this conclusion by tallying each factor in the multifactor test that the data sources met or did not meet. Because *Doing Business 2013* met more factors, Commerce selected it. I&D Mem. 38–39.

Fufeng claims that Commerce's tallying approach to the multifactor test was unsupported by substantial evidence because it ignored qualitative differences in the degree to which *Doing Business 2013* and the Dxplace data satisfied one of the test's factors. Fufeng also claims that Commerce's selection of *Doing Business 2013*was contrary to past agency practice. Pl. Fufeng's Br. 24–36.

The court rejects Fufeng's claims. Commerce's tallying approach was reasonable in this particular case. And Commerce's decision-

[7] Alternatively, if Commerce finds that the Thai Fermentation statements are missing "vital information," then Commerce should follow its past practice of rejecting such statements. *See, e.g.*, *Wooden Bedroom Furniture from the People's Republic of China*, 71 Fed. Reg. 70,739 (Dep't Commerce Dec. 6, 2006) (final results of new shipper review) ("*Wooden Bedroom Furniture*") and accompanying I&D Mem. at cmt. 2. (Although Commerce does not have a past practice of *only* rejecting financial statements that are missing key sections of vital information, *see Ass'n of Am. Sch. Paper Suppliers*, 35 CIT at __ & n.15, 791 F. Supp. 2d at 1302 & n.15, Commerce *does* have a past practice of rejecting those statements that *are* missing such information. *Id.*) In keeping with this practice, Commerce has often deemed financial statements to be unusable when they are missing all or many accounting notes. *See Floor-Standing Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 77 Fed. Reg. 14,499 (Dep't Commerce Mar. 12, 2012) and accompanying I&D Mem. at cmt. 2; *Certain Steel Nails from the People's Republic of China*, 75 Fed. Reg. 34,425 (Dep't Commerce June 17, 2010) (final new shipper review) and accompanying I&D Mem. at cmt. 4; *Wooden Bedroom Furniture* and accompanying I&D Mem. at cmt. 2; *Silocomanganese from Kazakhstan*, 67 Fed. Reg. 15,535 (Dep't Commerce Apr. 2, 2002) (final determ.) and accompanying I&D Mem. at cmt. 3.

making did not run afoul of past practice, because Fufeng has not established that there was any practice.

A. Background

In its preliminary determination, Commerce used a report called *Costs of Doing Business in Thailand* as its source for surrogate truck-freight values. I&D Mem. at 38. But both Fufeng and Kelco objected to the use of this report, and put on record alternate data sources: Fufeng, the Dxplace data, and Kelco, the *Doing Business 2013* report. So, to make its final determination, Commerce had to choose which of the two sources to use. After administrative briefing on the matter, Commerce concluded that *Doing Business 2013* was the better source because it met more factors of the multifactor test than did Dxplace. *See id.* at 38–39.

In its multifactor test, Commerce considers whether each source (1) provides a broad market average covering a range of prices, (2) is publicly available, (3) is specific to the input in question, (4) is tax and duty exclusive, and (5) is contemporaneous with the review period. *XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1312–13. Applying this test, Commerce found that "[b]oth the 2010 Dxplace and [*Doing Business 2013*] data satisfy the criteria of public availability, broad market average and tax and duty exclusivity," but that the *Doing Business 2013* report was more contemporaneous than the Dxplace data. I&D Mem. at 38–39. In other words, *Doing Business 2013*satisfied four factors in the multifactor test, whereas the Dxplace data satisfied only three.

Commerce also provided an extended explanation of why both data sets satisfied the broad-market-average criterion:

> [T]he *Doing Business 2013: Thailand* report provides information for the inland freight cost of shipping a container on a route from Bangkok to the port 133 kilometers away. On the other hand, the 2010 Dxplace data provide price points for three types of trucks from multiple companies and include the cost to ship from Bangkok to 76 different cities throughout the country, yielding a total of 228 price points. However, the Dxplace data come from a single date in June 2010 and it is unclear if these prices are six-month averages or a snapshot in time. Additionally, it appears that the Dxplace website is still currently used for shipping rates, but no other historical data are provided. . . . Additionally, as stated in *Certain Polyester Staple Fiber*, the Department prefers *Doing Business 2013: Thailand* despite the fact that it provides freight costs solely from the main city to the port because it reflects freight costs for multiple vendors and

users (*i.e.*, shipping lines, customs brokers and banks).

I & D Mem. at 38–39 (footnotes omitted). Put more succinctly, Commerce believed that both data sets satisfied the broad-market-average criterion, but with different kinds of breadth. Dxplace data satisfied the broad-market-average criterion because it included multiple truck types, multiple companies, and multiple routes. On the other hand, it was unclear whether the Dxplace data was temporally broad. *Doing Business 2013* satisfied the broad-market-average factor because it included multiple vendors and users.

B. Analysis

In making its substantial-evidence claim, Fufeng argues that Commerce's tallying approach ignored differences in the degree to which *Doing Business 2013* and the Dxplace data satisfied the broad-market-average factor. Pl. Fufeng's Br. 29–36. According to Fufeng Dxplace featured a much broader market average than *Doing Business 2013*, but tallying ignored this strength. As for its past-practice claim, Fufeng cites three past investigations where Commerce took a different approach, and argues that these investigations evidence binding past practice. *Id.* at 32–33; Pl. Fufeng's Reply Br. 15–16, ECF No. 59.

Both of Fufeng's claims fail. With respect to Fufeng's substantial-evidence claim, the court cannot hold that Commerce's tallying approach was unreasonable in this particular case. As a general matter, "Commerce has not identified a hierarchy among the[multifactor test's] factors, and the weight accorded to a factor varies depending on the facts of each case." *XITIC*, 37 CIT at __, 953 F. Supp. 2d at 1313. The tallying approach was reasonable in this case because the supposed difference in the extent to which the two data sources satisfied broad market average was not as extreme as Fufeng claims. To be sure, Dxplace was far more geographically broad than *Doing Business 2013*, and Commerce acknowledged as much. I&D Mem. at 39. But it was unclear whether Dxplace featured temporal breadth, and *Doing Business 2013* boasted breadth of a different kind: it tracked "multiple vendors and users." *Id.* Therefore, the facts of this case do not clearly indicate a discrepancy in broad market average so grave that Commerce could not take a tallying approach.[8]

[8] Fufeng also supports its substantial-evidence claim with three other arguments: (1) Commerce unreasonably ignored the specificity factor, a factor that would have favored Dxplace, Pl. Fufeng's Br. at 30–31, (2) Commerce unreasonably focused "almost entirely" on the contemporaneity factor, *id.* at 31–33, and (3) Commerce unreasonably discussed its use of *Doing Business 2013* in other investigations, *id.* at 33–36.

Fufeng's past-practice claim also fails. Fufeng offers three investigations as evidence of three different purported past practices that it argues contravene Commerce's selection. Pl. Fufeng's Br. 32–33; Pl. Fufeng's Reply Br. 15–16. But citing isolated investigations does not prove the existence of past practices; it just proves that Commerce thought differently on different facts at different times. Fufeng's past-practice claim is therefore as unavailing as its substantial-evidence claim, and Commerce's decision to use *Doing Business 2013* to value truck freight stands.

IV. Commerce's Decision to Value Fufeng's Corn as a Direct Input, Rather Than to Value Cornstarch as an Intermediate Input, Is Supported by Substantial Evidence and Otherwise in Accordance with Law

Kelco claims that Commerce's decision to value Fufeng's corn as a factor of production was unsupported by substantial evidence. According to Kelco, Commerce should have instead applied its intermediate-input method, treating the product that Kelco made out of its corn, cornstarch milk, as an input. Commerce declined to apply the intermediate-input method because Commerce found that neither of the method's predicate elements was met, and Kelco argues this finding was unreasonable. *See*Pl. Kelco's Br. 18–20. The court rejects Kelco's claim.

The court declines to address Fufeng's first argument that Commerce unreasonably ignored the specificity criterion. Fufeng did not exhaust its administrative opportunity to raise specificity as a concern. 28 U.S.C. § 2637(d); *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1381 (Fed. Cir. 2013); *see* Case Br. of Neimenggu Fufeng Biotechnologies Co., Ltd., PD 401 (Mar. 12, 2013); Fufeng's Administrative Rebuttal Br. Fufeng argues that it had no opportunity to voice its objection, because Commerce did not adopt *Doing Business 2013* until its final determination. Pl. Fufeng's Reply Br. 12. But Fufeng was on notice that *Doing Business 2013* was under consideration by Commerce, such that it even took administrative briefing as an opportunity to the compare *Doing Business 2013* with Dxplace. Fufeng's Administrative Rebuttal Brief at 36–40. In its comparison, Fufeng analyzed other of the factors in the multifactor test. There is therefore no reason Fufeng could not have analyzed the specificity of *Doing Business 2013* versus Dxplace. It did not do so then, so it cannot now.

Fufeng's second argument fails because its premise is false. Commerce did not focus "almost entirely" on the contemporaneity factor. Pl. Fufeng's Br. 31–33. As discussed, contemporaneity was one of four factors Commerce weighed. Furthermore, Commerce's most in-depth explanation went to the broad-market-average factor—not contemporaneity.

Fufeng's third and final argument—that Commerce unreasonably discussed the fact that it had used *Doing Business 2013* in other investigations—also fails. Even assuming that Commerce should not have discussed its prior use of *Doing Business 2013*, Commerce provided a *de novo* multifactor analysis of *Doing Business 2013*. Commerce's use of *Doing Business 2013* was justified on the basis of this first-impression analysis.

A. Background

In determining what counts as a factor of production, Commerce's general policy is to follow producers' actual production experience. *See Drill Pipe from the People's Republic of China*, 76 Fed. Reg. 1966 (Dep't Commerce Jan. 11, 2011) and accompanying I&D Mem. at cmt. 12. So, if a producer self-manufactures one of the products used to construct the export, then Commerce will value the items used to manufacture the intermediate product as inputs. By contrast, if a producer buys a necessary product readymade, then Commerce will value the product itself as an input. But there is an important exception to this rule: the intermediate-input method. Under the intermediate-input method, Commerce will occasionally treat a self-produced product as an input even though it has been made in house. *Id.* Commerce applies this exception when "it is clear that attempting to value the factors used in a production process yielding an intermediate product would lead to an inaccurate result because a significant element of cost would not be adequately accounted for in the overall factors buildup." *Id.* In short, Commerce uses the intermediate-input method when (1) certain costs are not accounted for in the input buildup and (2) those costs are significant.

In administrative briefing, Kelco asked that Commerce apply the intermediate-input approach to Fufeng's cornstarch milk, which Kelco manufactured in house from off-grade corn it had purchased. Case Brief of CP Kelco US, Inc. ("Kelco's Case Br.") at 4–10, PD 407–09 (Mar. 13, 2013). Kelco argued that the intermediate-input method was appropriate because (1) the overhead costs of wet-milling the corn (to produce the cornstarch milk) would not be captured in the Thai Ajinomoto surrogate financial ratios, and (2) those wet-milling costs were significant. As evidence of cornstarch milk's significant, unaccounted-for costs, Kelco offered an Energy Star report. But, notably, the Energy Star report detailed the costs of producing different products: dried cornstarch (made by drying cornstarch milk), as well as more complex products like ethanol and corn-based sweeteners. I&D Mem. at 50. Relatedly, Kelco suggested that Commerce remedy the alleged undervaluation by treating dried cornstarch—not cornstarch milk—as the input in Fufeng's xanthan-gum-production process. *See* Kelco's Case Br. at 4–10 (designating "cornstarch"—not cornstarch milk—as the proper intermediate input); *see also* I&D Mem. at 49.

Commerce addressed Kelco's intermediate-input proposal in its final determination. Commerce first pointed out that, even were it to find both of the intermediate-input elements met, the appropriate intermediate input to supply would be cornstarch milk, not dried

cornstarch. I&D Mem. at 49. Having so specified, Commerce then considered the elements of the intermediate-input test.

Addressing the second element first, Commerce found no evidence that the overhead costs of producing cornstarch milk were significant. To evaluate overhead-cost significance, Commerce compared the amount of capital equipment and energy used to produce cornstarch milk to the amount used to produce xanthan gum. I&D Mem. at 49. If producing cornstarch milk used a low proportion of capital-equipment and energy, then the cornstarch-milk production process was likely to be simple relative to the xanthan-gum process. And if cornstarch milk's production process was relatively simple, then the overhead costs of the process were likely to be relatively low (or, in other words, insignificant).

Commerce obtained the capital-equipment and energy-usage figures needed for this comparison from Fufeng's data submissions. I&D Mem. at 49 n.215. That is, Commerce did not accept Kelco's suggestion that it use figures from the Energy Star Report. Commerce explained that the Energy Star report addressed the production of a different product—dried cornstarch—whose production carried additional overhead costs. *Id.* at 50. Looking to Fufeng's data submissions, then, Commerce found that "Fufeng's starch-making facility require[d] less capital equipment and less electricity to operate than d[id] the rest of the xanthan gum production process"; in fact, producing cornstarch milk required less than four percent of the total energy needed to produce xanthan gum. *Id.*at 49 & n.215 (citing Section D Resp. for Neimenggu Fufeng Biotechnologies Co., Ltd. ("Section D Resp.") at 5–6, PD 118 (Sept. 27, 2012)); *see also* Def.-Intervenor Fufeng's Resp. Br. in Opp'n to CP Kelco US, Inc.'s R. 56.2 Mot. for J. on Agency R. 19, ECF No. 41 ("Def.-Intervenor Fufeng's Resp. Br."). Given these proportions, Commerce could not conclude that the overhead costs to produce cornstarch milk were significant.

Turning to the first element of the intermediate-input test, Commerce also found that the overhead costs of producing cornstarch milk were accounted for in the Thai Ajinomoto surrogate financial ratios. *Id.* at 49–50. Commerce admitted that Thai Ajinomoto did not have an analogous starch-making process in its MSG plant (Thai Ajinomoto started with tapioca starch, rather than with unprocessed cassava root), but noted that Thai Ajinomoto also faced a number of production costs that Fufeng did not. Commerce's point was that any failure of the Thai Ajinomoto surrogate to match cornstarch-production costs specifically was offset by overcompensation in other cost centers. In sum, Commerce concluded that applying the

intermediate-input exception was unwarranted, because neither of the two elements necessary to trigger it had been met.

B. Analysis

Kelco now claims that Commerce's decision to value corn as a direct input, rather than cornstarch milk as an intermediate input, was unsupported by substantial evidence. According to Kelco, record evidence demonstrated that both intermediate-input factors were met, such that Commerce was bound by its intermediate-input method to treat cornstarch milk as a factor of production. Pl. Kelco's Br. 18–20. In making this claim, Kelco essentially repeats its administrative claim below, except that it replaces cornstarch milk with cornstarch as the intermediate input it seeks.[9]

Kelco's claim must fail, because Commerce had the support of substantial evidence when it concluded that neither element of the intermediate-input test was met. With respect to the second element, Commerce concluded that the overhead costs of cornstarch milk were insignificant because producing cornstarch milk required less capital equipment, and far less energy, than producing finished xanthan gum. I&D Mem. at 49; *see also* Def.-Intervenor Fufeng's Resp. Br. 19. Commerce's logic—that a production process with relatively low capital-equipment and energy costs was likely to be relatively simple, and therefore to bear insignificant overhead costs—was reasonable.

In any case, Kelco does not take issue with Commerce's logical approach, at least not directly.[10] Rather, Kelco second-guesses its factual underpinnings, suggesting that Commerce was wrong to conclude that starch-making really uses less capital equipment and energy than the rest of the xanthan-gum process. *See* Kelco's Reply Br. 16. Kelco again commends the Energy Star report, which suggests that the entire xanthan-gum-production process uses just 88% of the energy that producing *dried cornstarch* does, and surmises that producing cornstarch milk must be similarly energy intensive. But, as

[9] It is far from clear that exhaustion doctrine permits Kelco to switch claims like this. Whether or not Kelco *meant* to directly ask Commerce to use cornstarch milk as an intermediate input, it did not. Because Kelco did not do so, Kelco's license to seek such a remedy from this court is at best suspect. 28 U.S.C. § 2637(d).

[10] In its reply, Kelco offers a number of alternative measures of the overhead costs of producing cornstarch milk, which Kelco believes show such costs to be significant. Kelco references (1) the amount of capital equipment used to produce cornstarch milk (apparently viewed in isolation, without comparison to the amount used to produce xanthan gum), (2) the number of steps in the cornstarch-milk production process versus in the xanthan-gum process, and (3) the amount of labor used in each process. Pl. Kelco's Reply Br. 13–16. But Kelco failed to make any argument about these indicia either before Commerce or in its lead brief before this court. Therefore, any potential argument is both unexhausted and waived. *See* 28 U.S.C. § 2637(d); USCIT R. 81(l).

Commerce has already pointed out, this is question begging. *See* I&D Mem. at 50. Dried cornstarch requires further processing than cornstarch milk, and the energy consumption involved in producing dried cornstarch could well come from this additional work. Kelco has provided no evidence to the contrary, and there is no reason to doubt Commerce's conclusion that the first element of the intermediate-input test was not met.[11]

Even assuming Kelco had so undermined Commerce's first-element conclusion, Commerce's overarching intermediate-input finding would still stand. That is because it was reasonable for Commerce to find, under the first intermediate-input element, that the cost of converting corn to cornstarch milk was assimilated in other NV factors. As discussed above, Commerce found that the conversion cost was accounted for in the Thai Ajinomoto surrogate financial ratios—not because those ratios included an analogous cost for tapioca production, but instead because it included offsetting costs that Fufeng did not face. I&D Mem. at 49–50. Nothing in Kelco's briefing undermines this reasoning: Kelco emphasizes that the Thai Ajinomoto ratios did have a tapioca-conversion cost in particular, Pl. Kelco's Br. 19–20, but Commerce never said it did, choosing instead to rely on other offsetting costs. Therefore, Kelco has failed to convince the court that Commerce's first-prong and second-prong findings were unsupported by substantial evidence. Kelco's substantial-evidence claim is accordingly rejected in full.

V. Commerce's Decision to Value Fufeng's Corn as Corn Imported Under the Thai Tariff Heading for Corn "Fit for Animal Feed" Is Supported by Substantial Evidence and Otherwise in Accordance with Law

Kelco claims that Commerce's decision to value Fufeng's corn as corn imported under the "fit for animal feed" heading of the Thai Tariff Schedule was unsupported by substantial evidence.[12] According to Kelco, Commerce's selection of the "animal feed" heading was unreasonable because the [[

]]. Pl. Kelco's Br. 21. Kelco further argues that Commerce

[11] At oral argument, Kelco provided an additional argument against Commerce's conclusion that producing cornstarch milk was less energy intensive than the rest of xanthan-gum production. According to Kelco, Commerce made this relativistic finding using energy data from the preliminary determination, even though it had changed its energy methodology by the time the final determination came around. Had Commerce used its final-determination energy data, says Kelco, it would not have found the energy costs of cornstarch production to be lower than general production costs. Whether or not this argument has merit, Kelco raised it neither in its lead nor its reply briefing. It is therefore waived. USCIT R. 81(l).

[12] Commerce determined the value of corn imported under the "fit for animal feed" heading of the Thai Tariff Schedule, as well as under other corn headings, by consulting the Global Trade Atlas. Prelim. Surrogate Value Determination at 2, 7.

unreasonably rejected Kelco's suggestion that Commerce consult the Thai Agricultural Standard for Maize ("Thai Corn Standard") before deciding how to value Fufeng's corn. Pl. Kelco's Br. 23–25. Kelco's claim fails because Commerce's selection of the "animal feed" heading was reasonable.

A. Background

After determining that Fufeng's corn could be valued as a direct input, Commerce was left with the task of assigning a surrogate value for the input. In order to choose the surrogate value, Commerce needed to match the actual corn used by Fufeng with the value that it would have in the surrogate country, Thailand. *See* 19 U.S.C. § 1677b(c)(1), (4); Pl. Kelco's Br. 28 (describing the relevant corn as the "*actual* corn consumed by Fufeng"). Commerce's source for potential surrogate values was the Thai Tariff Schedule. According to that schedule, corn imported under tariff heading 1005.90.90001, entitled "Maize Corn, Fit For Human Consumption," had an average unit value ("AUV") of $0.897 per kilogram, ("/kg"), corn imported under HTS 1005.90.90090, entitled "Maize Corn, Other," had an AUV of $0.726/kg, and corn imported under HTS 1005.90.90002, entitled "Maize Corn, Fit For Animal Feed," had an AUV of $0.114/kg. Fufeng's Post-Prelim. Surrogate Value Rebuttal Submission ("Fufeng's Post-Prelim. Surrogate Values") at Ex. 1, PD 387 (Mar. 5, 2013). Commerce had to choose which heading's AUV (or combination of heading AUVs) best captured the value of Fufeng's corn.

In its preliminary determination, Commerce valued Fufeng's corn according to the AUV of HTS 1005.90.90002, the heading designated to corn "fit for animal feed." Prelim. Surrogate Value Determination at 5. As noted, the "animal feed" AUV was $0.114/kg, the lowest of the three tariff-heading AUVs. Fufeng's Post-Prelim. Surrogate Values at Ex. 1. Commerce chose this heading "based on Fufeng's description of the corn it purchase[d]." Prelim. Surrogate Value Determination at 5 (citing Supplemental Section D Resp. for Neimenggu Fufeng Biotechnologies Co., Ltd. at 3–4 and Ex. SD-8, PD 257 (Nov. 28, 2012) ("Supplemental Section D. Resp.")). Fufeng had described its corn as "off grade," and noted that the [[

]]. Supplemental Section D Resp. at 3–4 and Ex. SD-8.

Kelco objected to Commerce's preliminary selection of the "animal feed" heading. Kelco's Case Br. at 10–26. Kelco argued that Fufeng's corn description (upon which Commerce had based its selection of the "animal feed" heading) was misleading. In Kelco's own words,

> Notwithstanding [[ ]], Fufeng has continued throughout this investigation to publicly refer to its corn as "off-grade," [[ ]]
> By using the technical term "off-grade" in its filings (while simultaneously disavowing that the term "off-grade" conveys any information regarding the nature of its corn inputs, [[ ]], to position its corn inputs to be valued as "feed-grade" by [Commerce] in its normal value calculation, in an attempt to reduce [Fufeng's] calculated margin.

Id. at 11–12. Put another way, Kelco was concerned that Fufeng had publicly described its corn as "off grade" to imply that Fufeng's corn [[ ]]. Then, in its confidential submissions, Fufeng had [[ ]]. Commerce had chosen to value Fufeng's corn using the "animal feed" AUV because of Fufeng's deceptive description, not because the AUV actually matched the quality of Fufeng's corn. Commerce's decision to use the "animal feed" heading was therefore erroneous in Kelco's view.

To remedy the problem, Kelco proposed valuing Fufeng's corn through a weight-averaging of the tariff-heading AUVs. *Id.* at 23. Each tariff-heading AUV would be weighted according to how much of Fufeng's corn could actually be imported under the relevant tariff heading. *See id.* at 19–24. Kelco said Commerce could determine which corn matched which heading by referring to a third source, the Thai Corn Standard. The Thai Corn Standard is a voluntary certification standard: It sets out a series of four corn categories along with the criteria corn-selling merchants must meet if they want their corn to be certified within a particular category. *Id.*at 22 (citing Post-Prelim. Surrogate Value Submission at Ex. 10 §1 & tbl.2, PD 357 (Feb. 22, 2013); *see also* Pl. Kelco's Br. 23–26. The categories do not expressly align with the Thai tariff headings: That is, the categories are not labeled as covering corn for "human consumption," "animal feed," and "other corn," but are instead enumerated one through four. Post-Prelim. Surrogate Value Submission at Ex. 10 tbl.2. However, the standard's standalone scope provision does specify that the standard covers corn "for human consumption, feed, [and] food and feed raw materials," and the table setting forth the corn categories bears the following note: "Maize kernels for food or food raw material shall not be lower than class 2." *Id.* at Ex. 10 § 1 & tbl.2.

Kelco argued that the categories in the Thai Corn Standard correlated with the Thai tariff headings, such that Commerce could deter-

mine which tariff heading corn would enter under by categorizing the corn under the standard. Kelco's Case Br. at 19–24. Kelco based this argument on the standard's scope provision and note: Reading those sources together, Kelco inferred that the two more stringent certification categories were reserved for human-consumption corn, while the two less stringent categories were for feed-grade corn. *Id.* at 22–23. So interpreted, the standard's categories dovetailed with the tariff headings. Corn certifiable under the standard's two more-stringent human-consumption categories would be imported under the "fit for human consumption" heading, while corn certifiable under the feed categories would be imported as corn "fit for animal feed." *Id.* And corn too poor in quality to be certified under any of the Thai Corn Standard's four categories would be imported under the "other corn" heading. *Id.* Kelco further argued that [[ ]] of Fufeng's corn would fail certification under any of the Thai Corn Standard's four categories. *Id.* Therefore, using the Thai Corn Standard to decide what portion of Fufeng's corn would enter under each tariff heading, and weight-averaging accordingly, would result in a corn value [[ ]] the AUV for [[ ]]. *See* Fufeng's Post-Prelim. Surrogate Values at Ex. 1.

In the final determination, Commerce stood by its choice to value Fufeng's corn according to the "animal feed" AUV, and accordingly rejected Kelco's proposed weight-averaging approach. *See* Fufeng Final Determination Analysis Mem. at 9–10. Commerce explained that, contrary to Kelco's contention, it had not selected the "animal feed" heading based on a mistaken belief that Fufeng's corn satisfied any tier of the Chinese commercial standard (including the "off grade" or "feed grade" tiers). Rather, Commerce had chosen the "animal feed" heading based on the fact that the "[[ ]]." *Id.* at 9. In other words, Commerce intended the "animal feed" AUV to reflect the fact that Fufeng's corn was of such poor quality that it did not satisfy the Chinese commercial standard in any respect.

Commerce further explained that Kelco's proposed weight-averaging approach was "distortive." *Id.* As just noted, Kelco's methodology resulted in a corn value [[ ]] the AUV of corn imported under the [[ ]]. Yet Commerce did not know what corn was actually imported under this heading. *Id.* And Commerce did not agree with Kelco that the Thai Corn Standard proved that the "other corn" heading was for low-quality corn that could not enter under the "human consumption" or

"animal feed" headings: It was not clear to Commerce that there was any correlation whatsoever between the Thai Corn Standard and the Thai tariff headings—much less one whereby the "human consumption" and "animal feed" tariff headings were reserved for standard-certifiable corn and the "other corn" heading covered only uncertifiable, lower quality remains. *Id.* As Commerce put it,

> Petitioner has not demonstrated that [[ ]] is reasonable or that there is a correlation between the [[ ]]. . . .
>
> [R]ecord evidence shows that the[] standard[is] voluntary. There is also no record evidence on what type of corn is required to produce xanthan gum in Thailand, so the voluntary Thai standard[is] not determinative and do[es] not support Petitioner's argument of using the[] standard[] as a basis for selecting the appropriate [surrogate value] for Fufeng's corn input.

Id. at 9–10. Commerce accordingly disregarded the Thai Corn Standard and the weight-averaging approach, instead continuing to value Fufeng's corn using the "animal feed" AUV.

B. Analysis

Kelco now claims that Commerce's decision to value Fufeng's corn using the "animal feed" AUV was unsupported by substantial evidence. Pl. Kelco's Br. 21–29. Kelco makes two arguments in support of this claim: (1) Commerce's selection of the "animal feed" AUV was unreasonable because the [[ ]], Pl. Kelco's Br. 21; *see id.* at 22–23, 27–29, and (2) Commerce's decision to reject the Thai Corn Standard was unreasonable because Commerce's stated reasons for doing so were inadequate, *id.* at 26–28. Both arguments fail.

Kelco's first argument fails because Commerce selected the "animal feed" AUV *precisely to account for* the low quality of Fufeng's corn, and Commerce's decision to do so was reasonable. Fufeng Final Determination Analysis Mem. at 9–10. Put another way, Commerce did not select the "animal feed" AUV because it mistakenly believed that Fufeng's corn was of sufficient quality to be fed to animals; rather, Commerce selected the AUV because it matched the low quality of Fufeng's corn. *Id.* This made sense, because the "animal feed" AUV, at $0.114/kg, was the lowest of the three available AUVs. Fufeng's Post-Prelim. Surrogate Values at Ex. 1. By valuing Fufeng's corn using the "animal feed" AUV, Commerce matched corn of the lowest quality with the lowest available AUV. This approach was reasonable, such that Kelco's first argument fails.

Kelco's second argument—that Commerce's stated reasons for rejecting the Thai Corn Standard were inadequate—also fails. As already noted, Commerce rejected the Thai Corn Standard because (1) it was not clear to Commerce that there was any correlation between the Thai Corn Standard and the Thai tariff headings, (2) the Thai Corn Standard is voluntary, and (3) there was no record evidence of the type of corn used to produce xanthan gum in Thailand. Fufeng Final Determination Analysis Mem. at 9–10. As to the first of these reasons, Kelco argues that the correlation between the Thai Corn Standard and the Thai tariff headings should have been clear to Commerce because the standard offered specific corn criteria where the headings did not. Pl. Kelco's Br. 27. As to the second, Kelco argues that the standard's voluntariness did not prevent it from being the "most relevant standard available" for choosing between tariff-heading AUVs. *Id.* at 26. Finally, as to Commerce's third reason, Kelco argues that information on *Thai* corn was irrelevant to Commerce's inquiry: Commerce's task was to determine the surrogate value of Fufeng's *Chinese* corn. *Id.* at 27–28.

Kelco's second argument fails because even the first of Commerce's reasons for rejecting the Thai Corn Standard, standing alone, was adequate to support Commerce's decision: There was no clear correlation between the Thai Corn Standard and the Thai tariff headings, and therefore no reason to use the standard to decide which tariff-heading AUV applied to Fufeng's corn. According to Kelco, the Thai Corn Standard and the Thai tariff headings dovetailed in such a way that the "other corn" heading was reserved for lowest quality corn like the [[ ]]. Pl. Kelco's Br. 23–25; Kelco's Case Br. at 22–23. Yet the "other corn" AUV was $0.726/kg, nearly six-and-a-half times the "animal feed" AUV that Commerce ultimately used to value Fufeng's corn. Fufeng's Post-Prelim. Surrogate Values at Ex. 1. If the Thai Corn Standard in fact correlated with the tariff headings in the way that Fufeng claimed— such that the "other corn" heading was reserved for lowest quality corn—then it is unclear why the "other corn" AUV would be so high. As such, there was no clear correlation between the Thai Corn Standard and the Thai tariff headings. Kelco's second substantial-evidence argument therefore fails, and Commerce'sdecision to value Fufeng's corn using the "other corn" AUV survives this court's review.[13]

[13] Kelco also raises additional claims, in its reply brief only: (1) Past practice and substantial evidence required Commerce to mimic the tariff-classification process when choosing which heading to use for valuing Fufeng's corn, and (2) past practice required Commerce to value Fufeng's corn input using a simple (not weighted) average of the available tariff headings. Pl. Kelco's Reply Br. 16–17, 19–20. Kelco failed to raise either claim any time before reply, so both are waived, neither exhausted. 28 U.S.C. § 2637(d); USCIT R. 81(l).

VI. Commerce's Requests for Remand to Reconsider its Methodology for Allocating Energy at Fufeng's Neimenggu Facility Are Granted

Both Fufeng and Kelco take issue with Commerce's methodology for allocating energy at Fufeng's Neimenggu facility. Fufeng's Neimenggu facility self-produced energy, such that Commerce chose to value Neimenggu's energy inputs as factors of production to the extent that Neimenggu used its energy for xanthan gum. *See* Section D Resp. at 6. Valuing the inputs was complicated by the fact that Neimenggu self-produced two different kinds of energy, steam and electric. Commerce tried one methodology in its preliminary determination, but eventually chose a different path in the final determination: The agency (1) calculated the rate at which Neimenggu consumed energy inputs in the production of all steam and electric energy (whether used for xanthan gum or for other production), (2) calculated the rate at which Neimenggu consumed steam and electric energy in the production of xanthan gum, and (3) multiplied the rates from (1) and (2) together to calculate the rate at which Neimenggu consumed energy inputs in the production of xanthan gum. Fufeng Final Determination Analysis Mem. at 2–3. Commerce valued the energy inputs according to the rate from (3). *Id.*

Both Fufeng and Kelco take issue with Commerce's calculation of the xanthan-gum energy-consumption rate. Pl. Fufeng's Br. 6–13; Pl. Kelco's Br. 8–10. To calculate the rate, Commerce divided the amount of energy used to produce Neimenggu's xanthan gum by the amount of unfinished xanthan gum that Neimenggu produced. In the numerator (energy used to produce xanthan gum), Commerce included all of the energy consumed at Neimenggu's cornstarch workshop, even though only some of Neimenggu's cornstarch was actually used in xanthan-gum production. This, according to Fufeng, was inaccurate.

For its part, Kelco points out that Fufeng's Neimenggu facility manufactured both finished and unfinished xanthan gum: That is, Neimenggu did not finish all of the gum that it started producing, but instead sent some xanthan gum to another facility (Shandong) for finishing. Kelco argues that Commerce therefore should have used the finished-gum amount as the denominator for its xanthan-gum energy-consumption rate. Pl. Kelco's Br. 8–10.

In the alternative, Kelco raises a procedural claim. Kelco argues that Commerce never had the procedural chance to address its substantive grievance. *Id.* at 10–11. This is because Commerce changed its methodology in the final determination, leaving Kelco without a chance to brief the merits. When Kelco tried to raise concerns through

a 19 C.F.R. § 351.224(g) ministerial-error submission, Commerce rejected the claim as a substantive grievance. Thus, according to Kelco, its first opportunity to fully debate Commerce's methodology was before this court. Kelco ventriloquizes concern for Commerce, arguing that the agency should have a chance to address its substantive argument before this court does.

Commerce requests voluntary remand to consider both claims, without presently admitting error as to either. Gov't Resp. Br. 32–33; Def.'s Mot. for Partial Voluntary Remand, ECF No. 66. Neither Kelco nor Fufeng object to the substantive grounds of the other's claim. Pl. Fufeng's Reply Br. 1–2 ("Kelco did not address [our remand request] at all in its [r]esponse."); Def.-Intervenor Fufeng's Resp. Br. 5–6. When Commerce requests remand to "reconsider its previous position" but does not admit error, whether to remand is in the court's discretion. *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001). However, remand will generally be granted so long as Commerce has a "substantial and legitimate" concern. The court holds that Commerce's concerns as to both claims are substantial and legitimate for the reasons set forth in Kelco's and Fufeng's briefing, respectively, and so remands each to Commerce for reconsideration.

On remand, Commerce should consider whether or not it was appropriate to include all of the energy consumed at Neimenggu's cornstarch workshop in the numerator of Neimenggu's xanthan-gum energy-consumption rate. If so, Commerce should explain why. Commerce should also consider whether or not it was appropriate to use the full amount of unfinished xanthan gum produced at Neimenggu as the denominator of Neimenggu's xanthan-gum energy-consumption rate and, if so, explain why.

CONCLUSION AND ORDER

After carefully reviewing the parties' briefs and the administrative record, the court remands Commerce's selection of the Thai Ajinomoto financial statements over the Thai Fermentation statements for further explanation by Commerce. The court also remands Commerce's energy allocation. The court sustains Commerce's reasoning in all other respects.

Upon consideration of all papers and proceedings herein, it is hereby:

ORDERED that the final determination of the International Trade Administration, United States Department of Commerce ("Commerce"), published as *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 33351 (Dep't Commerce June 4, 2013) (final

determ.), as amended by *Xanthan Gum from the People's Republic of China*, 78 Fed. Reg. 43,143 (Dep't Commerce July 19, 2013), be, and hereby is, REMANDED to Commerce for redetermination; it is further

ORDERED that Plaintiffs' Rule 56.2 Motions for Judgment on the Agency Record be, and hereby are, GRANTED as provided in this Opinion and Order; it is further

ORDERED that Commerce must issue a redetermination ("Remand Redetermination") in accordance with this Opinion and Order that is in all respects supported by substantial evidence, in accordance with law, and supported by adequate reasoning; it is further

ORDERED that Commerce shall reevaluate whether the Thai Ajinomoto or Thai Fermentation financial statements constitute the better source for surrogate financial ratios, explicitly comparing the imperfection in the Thai Ajinomoto statements (evidence of subsidies) with that in the Thai Fermentation statements (incompleteness), and shall recalculate the surrogate financial ratios consistent with this decision; it is further

ORDERED that Commerce shall reevaluate whether or not it was appropriate to include all of the energy consumed at the Neimenggu facility's cornstarch workshop in the numerator of Neimenggu's xanthan-gum energy-consumption rate, and shall recalculate Neimenggu's energy-input factor-of-production values consistent with this decision; it is further

ORDERED that Commerce must reevaluate whether or not it was appropriate to use the full amount of unfinished xanthan gum produced at the Neimenggu facility as the denominator of Neimenggu's xanthan-gum energy-consumption rate, and shall recalculate Neimenggu's energy-input factor-of-production values consistent with this decision; it is further

ORDERED that Commerce shall recalculate Fufeng's weighted-average dumping margins consistent with any recalculation of the surrogate financial ratios, and of Neimenggu's energy-input factor-of-production values; it is further

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

Dated: March 31, 2015
New York, New York

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

Slip Op. 15–28

TOSCELIK PROFIL VE SAC ENDUSTRISI A.S., Plaintiff, v. UNITED STATES, Defendant, and WHEATLAND TUBE COMPANY AND UNITED STATES STEEL CORPORATION, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 13–00371

[Sustaining administrative redetermination of land subsidy benchmarks.]

Dated: April 1, 2015

David L. Simon, Law Offices of David L. Simon, of Washington DC, for the plaintiff.

L. Misha Preheim, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. With him on the brief were *Stuart F. Delery*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Franklin E. White, Jr.*, Assistant Director. Of Counsel on the brief was *David P. Lyons*, Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Gilbert B. Kaplan and *Jennifer D. Jones*, King & Spaulding LLP, of Washington DC, for the defendant-intervenor Wheatland Tube Company.

Jeffrey D. Gerrish and *Robert E. Lighthizer*, Skadden Arps Slate Meagher & Flom, LLP, of Washington DC, for the defendant-intervenor United States Steel Corporation.

OPINION

Musgrave, Senior Judge:

The prior decision on the case, *Toscelik Profil ve Sac Endustrisi A.S. v. United States,* 38 CIT ___, Slip Op. 14–126 (Oct. 29, 2014) ("*Toscelik I*"), familiarity with which is here presumed, remanded *Circular Welded Carbon Steel Pipes And Tubes From Turkey: Final Results of Countervailing Duty Administrative Review; Calendar Year 2011*, 78 Fed. Reg. 64916 (Oct. 30, 2013) and accompanying issues and decision memorandum ("*IDM*") (together, "*2011 CVD Review*"), to the International Trade Administration, U.S. Department of Commerce ("Commerce" or "Department") for additional proceedings not inconsistent with that decision. The results of remand, dated February 13, 2015, are now before the court. *Final Results of Redetermination Pursuant to Court Ordered Remand*, Ct. No. 13–00371, ECF No. 60 ("Remand").

According to those results, Commerce determined that Toscelik's overall net subsidy rate changed from 0.83% to 0.44% and was *de minimis*. On remand of the *2011 CVD review*, Commerce's reaction to the remand order is that "changes to an allocation stream may be appropriate under certain circumstances" but it determined on remand "that this is not one of those circumstances." Remand at 5 (footnote omitted). For the 2008 land subsidy, therefore, Commerce revised the benchmark to the weighted-average benchmark that had

been utilized for it in the *2010 CVD Review.*[1]

For the 2010 land subsidy, Commerce first removed all duplicative land quotes from the 2010 land benchmark prices. *Id.* at 6. It then reviewed the 2010 land benchmark calculations and found "no evidence that any of the underlying data points should be considered . . . outliers or otherwise distortive.[ ] Specifically, the allegedly comparatively expensive and developed land values identified by Toscelik and by the Court --*e.g.*, Istanbul and Yalova -- which are contained in the 2008 benchmark, are not in fact contained in the data set used to value the 2010 land subsidy." *Id.* (footnote omitted). Concerning the court's comments regarding Turkish Law 5084 being limited to Turkey's 49 underdeveloped provinces, Commerce responds as follows:

> [A]s an initial matter such general, regional classifications by the GOT, as indicated by Turkish Law 5084, do not provide us with sufficient information about how the level of development in the 49 provinces in question relate to land prices. When considering factors that may speak to regional comparability for purposes of its land for LTAR benefit calculation, Commerce looks at, for example, the comparability of population density in the regions in question.[ ] In addition, when examining regional comparability between the regions in question, Commerce may also examine evidence that support differences in land pricing, such as industrial property reports, availability of data on prices, investment flows, availability of land, and industry density.[ ] There is no record evidence of this type regarding the regional classifications provided by the GOT.
>
> Additionally, as explained below, in these final results we limited the 2010 land benchmark calculation to the available land price data that correspond to calendar year 2010. Upon closer review, we find that none of these data reflects land prices from within the 49 underdeveloped provinces that were the intended beneficiaries of this subsidy program.[ ] As such, the issue of whether Commerce should restrict land prices used to develop the 2010 land benchmark to Turkey's 49 underdeveloped[ ] provinces is moot.
>
> We also continued to reject the use of the land values calculated by the GOT (e.g., the land prices charged by the GOT in connection with Toscelik's 2008 purchase of land in the Organized

[1] Remand at 2, referencing *Circular Welded Carbon Steel Pipes and Tubes From Turkey: Final Results of Countervailing Duty Administrative Review*, 77 Fed. Reg. 46713 (Aug. 6, 2012) and accompanying issues and decision memorandum (together, "*2010 CVD Review*"); *see also* Remand at 5.

> Industrial Zone) when deriving the 2010 land benchmark. First, as explained below, for the 2010 land benchmark, in these final results [Commerce] limited our benchmark to land prices corresponding to calendar year 2010. Further, we find that land purchased from Turkish government authorities cannot serve as an appropriate benchmark for land values under 19 CFR 351.511 (a)(2)(i), because it pertains to prices charged by the very provider of the good at issue. Our approach in this regard is consistent with our practice in this proceeding as well as with other CVD proceedings.[ ]

Id. at 6–7 (footnotes omitted). Next, concerning the court's comments in *Toscelik I* that Commerce inconsistently used land prices from 2009, 2010, and 2011 to calculate the 2008 land benchmark in the *2010 CVD Review*, Commerce determined, while solely relying on land prices from 2010 for the 2010 benchmark,

> that in the *2010 CVD Review* in which Commerce examined the GOT's 2008 sale of land to Toscelik, Commerce lacked benchmark prices that corresponded to the year in which the land transaction at issue occurred, which would otherwise have been our preferred choice.[ ] Thus, Commerce determined to rely upon benchmark land prices for years 2009, 2010, and 2011 (indexed to 2008) for purposes of calculating the 2008 land benchmark. In contrast, in the 2011 review, in which Commerce was examining the GOT's 2010 sale of land to Toscelik, Commerce had at its disposal land benchmark prices for 2010 and, thus, consistent with our preference for using benchmark prices that correspond to the year of the land transaction, relied solely on data points from 2010 when calculating the 2010 land benchmark.

Id. at 7–8 (footnote omitted). Concerning the relevance of contemporaneity when determining if a data point is comparable for purposes of the LTAR benchmark, Commerce explained that it

> views contemporaneity as an important factor when determining whether a data point is comparable for purposes of the LTAR benchmark, since contemporaneous data are more likely to reflect the same prevailing market conditions with regard to the government transaction, as prescribed under section 771(5)(E)(iv) of the [Tariff]Act [of 1930]. Thus, as a matter of practice, Commerce generally limits its LTAR benchmarks to prices that match the year in which the government transaction took place when such data are available.[ ] We find no reason to treat land transactions any differently in this regard, given that

> land is similarly susceptible to temporal fluctuations in price. Thus, in these final results, we are continuing to measure the benefit from the GOT's sale of land to Toscelik in 2010 using available 2010 land prices to derive a contemporaneous land benchmark that reflects market conditions prevailing during the year of the government sale.

Id. at 8–9 (footnote omitted).

The court also asked for further clarification on the advantages and disadvantages of simple versus weighted averages in the context of land benchmarking. Commerce explains that with regard to land the Department has "generally departed" from weight averaging and that its "normal practice" is now to rely on a simple-averaging method, and it points to comment 4 of the *IDM* for its articulated rationale:

> Specifically, we said we lacked sufficient detail regarding the characteristics of the various parcels of land underlying the benchmark data- in particular, the extent to which the composition of our reference data set reflected the broader market-and that, therefore, we had no basis to assume that any one parcel of land among the reference set was more representative than any other parcel for the purpose of deriving a market price by which to determine adequate remuneration. [ ] Moreover, we stated that obtaining more detailed information beyond the general comparability factors such as land-use classification would be impracticable for the Department to undertake.[ ] We hereby provide further clarification on these points. By "the broader market," we simply mean the overall market of comparable land in Turkey, the exact parameters and composite functions of the properties (access to electricity, water, *etc*.) of which were not knowable to the Department and for which the available price data the Department was able to find could only be a partial sample which was solely based on the size and location of the properties. Accordingly, the Department felt it appropriate to qualify the use of such data by stating that we had no additional information as to the extent to which they might be representative of that overall market. Whether this particular set of sample price data, as opposed to any other set of data, was or was not reflective of that overall market, we simply did not and could not know.[ ]
>
> Unlike pricing on other commodity goods that are more widely traded, such as hot-rolled steel or wire rod, land prices are

> susceptible to more varied and more complex factors, *e.g.* , location, soil condition, prevailing climate, the level and quality of nearby public infrastructure, the composition and quality of other nearby commercial land uses, *etc*. Obtaining sufficient information regarding all these factors is not feasible for the Department to undertake with its resources, nor is it necessarily a requirement to determining the benchmark for our purposes.[ ] In this sense, the Department was not setting a requirement that "the composition of the reference data set must constitute proportional representation" of the overall market, as the Court implied. Rather, given the many unknowns behind the available data in terms of the exact factors affecting pricing and, thus, the lack of assurance that this data sample would be representative of the overall comparable market, the Department concluded that a simple average of the prices would be appropriate.
>
> In the first instance, there was no record evidence that a direct relationship existed between price and parcel size such that size should be factored in especially as opposed to any of the other variables.[ ] Weighting the average by size would accord the prices of the larger parcels in the sample with greater significance in the benchmark, even if, in reality, those particular parcels were less comparable in terms of other factors that might influence price than the other parcels of smaller size.[ ] By using a simple average, the Department in effect accorded equal weight to all the pricing variables that may have affected the pricing of land in the available sample. Given the imperfect information regarding the parameters of the overall comparable market, we concluded that this was the appropriate approach.

Id. at 10–12 (footnotes omitted).

Toscelik filed comments supporting the outcome of the draft remand results, but requested that the final remand results explicitly indicate the revised program final rates. Commerce obliged. *See supra*. The petitioners filed no comments.

The parties' joint status report of February 21, 2015, adheres to those same positions, and the plaintiff and the defendant indicate that the remand results be sustained. ECF No. 61.

Conclusion

The results of remand appearing in compliance with the prior decision's orders of remand and supported by substantial evidence, and there appearing no opposition to sustaining them at this time, in

view of the foregoing the remand results will be sustained and a separate judgment with this opinion entered to that effect.

Dated: April 1, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slop Op. 15–29

COALITION OF GULF SHRIMP INDUSTRIES, Plaintiff, v. UNITED STATES, Defendant, and VIETNAM ASSOCIATION OF SEAFOOD EXPORTERS AND PRODUCERS, ZHANJIANG GUOLIAN AQUATIC PRODUCTS, CO., LTD., SEAFOOD EXPORTERS ASSOCIATION OF INDIA, NATIONAL CHAMBER OF AQUACULTURE (ECUADOR), EASTERN FISH COMPANY, INC., MAZZETTA COMPANY LLC, ORE-CAL CORPORATION, SEAFOOD EXCHANGE OF FLORIDA, SEA PORT PRODUCTS CORPORATION, STAVIS SEAFOODS, INC., TRI UNION PROZEN PRODUCTS D/B/A CHICKEN OF THE SEA FROZEN FOODS, AQUATECH VENTURE SDN BHD, HK FOOD (M) SDN BHD, KIAN HUAT FISHERY SDN BHD, OCEAN FAMOUS SDN BHD, OCEAN PIONEER FOOD SDN BHD, SANJUNE SDN BHD, SUNLIGHT SEAFOOD SDN BHD, AND TM FOODS SDN BHD, Defendant-Intervenors.

Before: Gregory W. Carman, Senior Judge
Court No. 13–00386

[Denying Plaintiff's Motion for Judgment on the Agency Record and sustaining the International Trade Commission's negative final injury determination.]

Dated: April 3, 2015

Terence P. Stewart, Elizabeth J. Drake, *Philip A. Butler, Stephanie M. Bell,* and *Jennifer M. Smith,* Stewart and Stewart, of Washington, DC, and *Edward T. Hayes*, Leake & Andersson, LLP, of New Orleans, LA, for plaintiff.

Robin L. Turner, Attorney, Office of the General Counsel, U.S. International Trade Commission, of Washington, DC, for defendant. With her on the brief were *Dominic L. Bianchi*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Warren E. Connelly and *Jarrod M. Goldfeder*, Akin, Gump, Strauss, Hauer & Feld, LLP, of Washington, DC, for defendant-intervenors National Chamber of Aquaculture (Ecuador), Eastern Fish Company, Inc., Mazzetta Company LLC, Ore-Cal Corporation, Seafood Exchange of Florida, Sea Port Products Corporation, Stavis Seafoods, Inc., and Tri Union Frozen Products d/b/a Chicken of the Sea Frozen Foods.

Matthew R. Nicely, *Robert L. LaFrankie*, *II*, and *Alexandra B. Hess*, Hughes Hubbard & Reed LLP, of Washington, DC, for defendant-intervenor Vietnam Association of Seafood Exporters and Producers.

Mark P. Lunn and *Daniel Morris*, Dentons US LLP, of Washington, DC, for defendant-intervenor Seafood Exporters Association of India.

Robert G. Gosselink and *Jonathan M. Freed*, Trade Pacific, PLLC, of Washington, DC, for defendant-intervenor Zhanjiang Guolian Aquatic Products Co., Ltd.

Kelly A. Slater, *Edmund W. Sim*, and *Jay Y. Nee*, Appleton Luff Pte Ltd., of Washington, DC, for defendant-intervenors Aquatech Venture Sdn Bhd, HK Food (M) Sdn Bhd, Kian Huat Fishery Sdn Bhd, Ocean Famous Sdn Bhd, Ocean Pioneer Food Sdn Bhd, Sanjune Sdn Bhd, Sunlight Seafood Sdn Bhd, and TM Foods Sdn Bhd.

OPINION AND ORDER

Carman, Senior Judge:

Before the Court is Plaintiff Coalition of Gulf Shrimp Industries' ("Plaintiff" or "COGSI" or "Petitioner") Motion for Judgment on the Agency Record ("Pl.'s Mot."), pursuant to USCIT Rule 56.2, challenging the U.S. International Trade Commission's ("Defendant" or "ITC" or "Commission") negative final determination in the countervailing duty ("CVD") investigation concerning frozen warmwater shrimp from various countries published as *Frozen Warmwater Shrimp from China, Ecuador, India, Malaysia, and Vietnam*, 78 Fed. Reg. 64,009 (ITC Oct. 25, 2013) (final determination) ("*Final Determination*"), P.R.[1] 393, and the accompanying views of the Commission, USITC Pub. 4429, Inv. Nos. 701-TA-491–493, 495 and 497 (final) (Oct. 2012) ("Views"), P.R. 382, C.R. 1282.[2] For the reasons stated below, the Court denies Plaintiff's motion and sustains the ITC's negative final injury determination.

BACKGROUND

On December 28, 2012, COGSI filed CVD petitions with the ITC and the U.S. Department of Commerce ("Commerce"), alleging that exports of frozen warmwater shrimp[3]

from China, Ecuador, India, Indonesia, Malaysia, Thailand and Vietnam were receiving countervailable subsidies, and that the domestic industry was suffering material injury, and threatened with

[1] P.R. stands for public administrative record and C.R. for confidential administrative record. Plaintiff and Defendant-Intervenors use these citations. Defendant denotes the public documents with the number "1" and confidential documents with the number "2." *See* Def. Int'l Trade Comm'n's Opp'n to Pls.' [*sic*] Mot. for J. on the Agency Record ("Def.'s Opp'n") at 1, n.2. For ease of reference, the Court will only refer to P.R. and C.R. in this opinion.

[2] This confidential version of the Views consolidates the ITC's majority views and confidential report. *See* Def.'s Opp'n at 1, n.2.

[3] The product description, which is not contested, is, in pertinent part:

[c]ertain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

Views at 7. This abbreviated description is provided merely for convenience's sake because the scope is "virtually identical to that in the prior investigations and reviews regarding frozen warmwater shrimp" and familiarity is presumed. *Id*.

material injury, by reason of these subsidized imports. *See* Pl.'s Mot. at 2 (citing P.R. 382 at I-1). The ITC initiated investigations with a period of investigation ("POI") starting in 2009 and ending after the third quarter of 2012. *See id.* at 3. On February 15, 2013, the ITC issued an affirmative preliminary injury determination. *See Frozen Warmwater Shrimp from China, Ecuador, India, Malaysia, and Vietnam*, 78 Fed. Reg. 11,221 (ITC Feb. 15, 2013) (preliminary determination), P.R. 110.[4] During the final phase of the investigations, despite Plaintiff's plea, the ITC decided to start the POI in 2010 rather than 2009. *See* Pl.'s Mot. at 3. COGSI argues that the POI should start in 2009 because the April 10, 2010 Deepwater Horizon oil spill in the Gulf of Mexico by British Petroleum ("BP Oil Spill") "seriously disrupted domestic production in 2010." *Id*. (citing P.R. 141 at 2–6).

On September 20, 2013, the ITC found by a 4–2 vote that the domestic industry was neither materially injured nor threatened with material injury by reason of subsidized imports from the five subject countries. *See id*. (citing P.R. 382 at 3, n.1, I-1). On November 22, 2013, COGSI appealed the ITC's *Final Determination* in this court. *See Summons*, ECF No. 1.

JURISDICTION & STANDARD OF REVIEW

The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c) (2012).[5] The court will uphold an agency determination that is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 156a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotation and citation omitted). Substantial evidence review requires consideration of "the record as a whole, including any evidence that fairly detracts from the substantiality of the evidence," *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F.3d 1319, 1323 (Fed. Cir. 2010) (internal quotation and citation omitted), and asks, in light of that evidence, "is the determination unreasonable," *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (internal quotation and citation omitted).

The possibility of "drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 523 (1981). Under the substantial evidence

[4] With the ITC's preliminary finding of injury, Commerce published affirmative subsidies for China, Ecuador, India, Malaysia and Vietnam, with all-others' margins ranging from 4.52% to 54.4%. *See* Pl.'s Mot. at 3 (citing P.R. 382 at I-5-I-6). Challenges to those margins have also been filed with the court, but those actions are stayed pending the outcome of this one.

[5] All references to the United States Code refer to the 2012 edition, unless otherwise stated.

standard, the court will not "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488. The court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004).

DISCUSSION

COGSI challenges the ITC's negative final injury determination. Under 19 U.S.C. §1671d(b), the ITC issues an affirmative determination only if it finds "present material injury or a threat thereof" and makes a "finding of causation." *Hynix Semiconductor, Inc. v. United States*, 30 CIT 1208, 1210, 431 F. Supp. 2d 1302, 1306 (2006) (internal quotation and citation omitted). In making a material injury determination, the ITC considers "the volume of imports of the subject merchandise, "the effect of imports of that merchandise on prices in the United States for domestic like products," and "the impact of imports of such merchandise on domestic producers of domestic like products . . . in the context of production operations within the United States." 19 U.S.C. § 1677(7)(B)(i)(I)-(III). The ITC "shall explain its analysis of each factor considered." 19 U.S.C. §1677(7)(B). The Commission may also "consider such other economic factors as are relevant to the determination" but must identify each of these other factors and "explain in full its relevance to the determination." *Id*.

I. Volume

When evaluating the volume of imports of subject merchandise, the ITC "shall consider whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i).

A. Contentions

COGSI contends that the ITC's volume determination was unsupported by substantial evidence and contrary to law. *See* Pl.'s Mot. at 17–21, Pl.'s Reply Br. ("Pl.'s Reply") at 6–10. COGSI agrees that the Commission "correctly determined subject imports were significant in absolute terms, relative to consumption, and relative to domestic production, and that the volumes increased over the POI" but contests the Commission's conclusion that "the rate of subject imports' increase was not significant because the domestic industry also experienced gains in shipments and market share in the two years after

the [BP] Oil Spill." Pl.'s Mot. at 18. COGSI asserts that "[t]his singular focus on the rate of increase is inconsistent with the statutory structure, which directs the Commission to determine whether *either* the volume of subject imports, *or* any increase in that volume, is significant, either in absolute terms or relative to domestic production or consumption." *Id*. (emphasis in original). COGSI propounds that "subject imports gained shipments and market share" more rapidly than domestic producers, who were "struggling to recover from the [BP] Oil Spill." *Id*. at 20.

In a footnote in its motion, COGSI also asserts that the Commission "failed to fully address the fact that the increases experienced by both subject imports and domestic producers coincided with a 'substantial decline in nonsubject imports' due a disease outbreak [Early Mortality Syndrome ("EMS")[6]] in those countries." *Id*., n.5 (citing P.R. 382 at 27, n.141). Accordingly, COGSI asserts that the ITC's negative volume determination is unsupported by substantial evidence.

The ITC counters that its volume determination was supported by substantial evidence and in accordance with law. *See* Def.'s Opp'n at 6–7, 16–20; *see also* Joint Resp. Br. of Def.-Intervenors in Opp'n to Pl.'s Mot. for J. on the Agency R. ("Def.-Ints.' Opp'n") at 6–15.[7] In its *Final Determination*, the ITC found that "the volume of subject imports was significant both in absolute terms and relative to consumption and production in the United States." Def.'s Opp'n at 7. However, the Commission concluded that the "increases in that volume and market share were not significant" because the domestic industry's market share also increased during the POI. *Id*. The Commission also reasoned that "any increases in subject imports' volumes and market share came at the expense of nonsubject imports, not at the expense of the domestic industry." *Id*. at 6 (citing Views at 37–38). The ITC noted that "the increases in subject imports did not prevent the domestic industry from also experiencing gains in shipments and market share in a declining U.S. market during the POI." *Id*. at 16–17.

Regarding COGSI's allegation that it relied solely on the rate of increase in its volume analysis, the Commission counters that it "clearly considered all of the statutory factors relating to subject

[6] At the time of the ITC's investigation, the outbreak of EMS was "affecting farm-raised shrimp in three subject countries (China, Malaysia and Vietnam) and nonsubject country Thailand." Views at 31. The specific cause of EMS was identified in the spring of 2013 but no reliable test had been created to identify the affected shrimp at the time the *Final Determination* issued. *See id*.

[7] The Court notes that Defendant-Intervenors make essentially the same arguments as Defendant throughout their brief and thus references to the ITC's contentions throughout the opinion also represent Defendant-Intervenor's contentions.

import volume." Def.'s Opp'n at 17. Upon consideration of the absolute volume and market share and the increases in the volume and market share of subject imports, the ITC found that "the absolute volumes and market share of subject imports" were significant but that "the *increases* in the volumes and market share of subject imports" were not significant because "they were not made at the expense of the domestic industry[,] whose shipment and market share also increased." *Id*. at 17–18 (citing Views at 37–38). The ITC found that both subject imports and shipments by the domestic industry increased during the POI at the expense of the nonsubject imports, particularly from Thailand, which had a "devastating outbreak of EMS." *Id*. at 20 (quoting Views at 38, n.141). The Commission concluded that "it was precisely because [ ] subject imports did not fully offset this substantial decline in nonsubject imports that the [domestic] industry was able to increase its shipments and market share during the POI, which suggests that the industry was not significantly affected by the increases in subject imports." *Id*.

The ITC avers that both the statute and case law make abundantly clear that it has "discretion to weigh the importance of the various factors identified in the statute and to determine whether these factors indicate, as a whole, that subject imports are having a significant adverse effect on the industry's volume, market share and condition." *Id*. at 18–19. The ITC asserts that "the Court should [ ] reject COGSI's invitation to reweigh the evidence and should affirm this aspect of the Commission's analysis." *Id*. at 20.

B. Analysis

The relevant statute directs the ITC to consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant." 19 U.S.C. § 1677(7)(C)(i). A review of the record and the ITC's *Final Determination* and Views demonstrate that the ITC considered the statutory requirements of volume in both absolute and relative-to-production terms, and the increases thereof.

The Court finds the Commission not only complied with statutory requirements but also took into consideration atypical events that affected production during the POI, such as the BP Oil Spill and EMS. *See* Views at 30–32. Upon weighing these factors, the ITC determined that the increase in volume of subject imports was not significant because COGSI's domestic shipments also increased, and both increases occurred at the cost of nonsubject imports. *See* Views 37–38. The Court finds that the Commission's conclusion is reasonable and

grounded in evidence on the record. The mere fact that COGSI did not agree with this conclusion does not make it unreasonable. The ITC is afforded much discretion on how it weighs the relevant factors, and the Court "may not reweigh the evidence or substitute its own judgment for that of the agency." *Usinor,* 342 F. Supp. 2d at 1272 (citation omitted). Thus, the Court will not disturb the ITC's conclusion that the increases in the volumes and market share of subject imports were not significant because the Court finds that the volume conclusion was not unreasonable.

For the foregoing reasons, the Court affirms the volume aspect of the *Final Determination*.

II. Price Effects

When evaluating the effect of imports of subject merchandise, the ITC must consider whether: (1) "there has been significant price underselling by the imported merchandise as compared with the price of domestic like products of the United States" and (2) "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. §1677(7)(C)(ii)(I)-(II).

A. Underselling

The underselling component of the ITC investigation considers whether the subject merchandise has significantly undersold domestic like products in the United States. *See* 19 U.S.C. § 1677(7)(C)(ii)(I).

1. Contentions

COGSI contends that the ITC's underselling determination was inconsistent with prior determinations and unsupported by substantial evidence. *See* Pl.'s Mot. at 21–23, Pl.'s Reply at 10–13. COGSI claims that the data "showed subject imports underselling domestic product in 166 of 258 comparison since 2010, or 64% of the time," and also "showed the frequency and intensity of underselling increasing over the POI as the volume of imports rose," citing an underselling rate jump from 40.7% at the beginning of the POI in 2010 to 84.2% by the end of the POI in interim 2013. *Id*. at 21 (citing P.R. 305 at 7, Ex. 3). COGSI further claims that the ITC's refusal to use the National Marine Fisheries Service ("NMFS") pricing data "is an unexplained departure from a prior determination." *Id*. at 22 (referencing a 2005 changed circumstances review of shrimp from Thailand and India). COGSI asserts that the ITC "did not address the price-sensitivity of the domestic shrimp market and the fact that both purchasers and processors reported imports were priced lower than domestic prod-

uct." *Id*. at 26.

The ITC counters that its conclusion that price underselling was mixed but not significant was reasonable. *See* Def.'s Opp'n at 22–28; *see also* Def.-Ints.' Opp'n at 18–26. First, the Commission "conducted a thorough analysis of the record evidence pertaining to substitutability and the importance of price" in the frozen shrimp market and "concluded that price was at least a moderately important factor." Def.'s Opp'n at 22–23 (citing Views at 20–21, 32–36 and 39, n.144). The Commission then "collected a comprehensive pricing data base" from the questionnaire responses and upon analysis found that the "record showed a pattern of mixed underselling and overselling and not significant price underselling by subject imports." Def.'s Opp'n at 23 (citing Views at 40 and C.R. 1284 at V-11). The ITC declined to use the alternative data series proffered by Plaintiff, which included the prices of frozen seafood in New York reported by NMFS and data from the Urner Barry market news service. *Id*. at 23–24. The Commission found the questionnaire responses more specific, comparable and reliable, and explained that in "every prior investigation and review involving frozen shrimp in which the Commission collected pricing data in its questionnaires, the Commission has relied on pricing data compiled from questionnaire responses rather than alternative pricing series" and thus its "decision to rely on its own questionnaire data . . . was entirely reasonable." *Id*. at 24–25.

Regarding the inclusion of Product 1 data, the ITC highlights that Product 1 was "specifically included" in "its questionnaires in the preliminary investigations at the request of Plaintiff." *Id*. at 26 (citing Views at 40, n. 149). The ITC notes that "[s]ince Plaintiff itself asked the Commission to obtain pricing data for Product 1, [it] reasonably chose not to exclude Product 1 from its underselling analysis or minimize the weight that it gave to pricing comparisons including that product." *Id*. at 27. Further, the ITC claims that Plaintiff thus "failed to seek a change in the definition of pricing Product 1 when requested in the final investigation" during the comment period. *Id*. at 26. Accordingly, the ITC asserts that Plaintiff "failed to exhaust its administrative remedies on this issue before the Commission in a timely manner" and claims the "Court should not allow it to raise this issue now." *Id*. at 27.

2. Analysis

When evaluating challenges to the ITC's methodology, the court will affirm the chosen methodology as long as it is reasonable. *See U.S. Steel Group v. United States*, 96 F.3d 1352, 1361–62 (Fed. Cir. 1996). COGSI challenges certain decisions regarding the ITC's methodology,

such as data selection, and the Court reviews these decisions for reasonableness. The ITC has discretion to select a data set that it will use in its investigation, and in the instant case, the ITC explained that it "collected a comprehensive pricing data base" from the questionnaire responses and decided to use that data set. Def.'s Opp'n at 23 (citing V-11). The Commission stated that when it "has reliable, comprehensive pricing data obtained from its questionnaire responses, as it did in the underlying investigations," it has "consistently relied on that data, rather than rely on alternative public source data series." Def.'s Opp'n at 25. The ITC provides case law supporting its position that it is within its discretion "to select a particular methodology to assess significance of evidence of price undercutting." *Id*. at 25 (quoting *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1067 (1995). The fact that the ITC declined to use alternative pricing data does not negate the reasonableness of the pricing data that it selected.

The Court finds that COGSI's allegation that the ITC's refusal to use the NMFS data is a departure from a prior determination is inapposite. That prior determination relied upon by COGSI is a changed circumstance review, not an investigation, and the ITC need not justify using different data for an entirely different type of review.[8] The Court agrees with the ITC that its chosen methodology—relying on its questionnaire responses—was reasonable.

The Court also finds that the Commission's decision to include Product 1 in its pricing analysis is reasonable. The Commission specifically included Product 1 in its questionnaires in the preliminary investigations at COGSI's behest, and COGSI declined to seek a change in the definition of pricing Product 1 when requested in the final investigations. *See* Views at 40, n.149. Consequently, the ITC's decision to include Product 1 is reasonable. Further, the ITC explained that it treated this product similarly in 2005, choosing "neither [to] give controlling weight to the data for product 1 nor to disregard it." Def.'s Opp'n at 27 (internal quotation and citation omitted). Plaintiff's allegation that the Commission's "failure to address the probative value of Product 1 pricing data" when it "failed to place less weight" on it "rendered [the] negative price effects determination unsupported by substantial evidence" cannot prevail because the ITC's inclusion of Product 1 is supported by evidence on the

[8] However, the ITC did provide an explanation: it used "alternative pricing data," not data from questionnaire responses, in the changed circumstance review of 2005 because the reviews were "conducted immediately after the tsunami that devastated India and Thailand" and it "decided not to collect pricing data in the questionnaires to reduce the burden on questionnaire recipients" because the Commission had just collected data for the preliminary and final investigations in the immediate prior 18 months. Def.'s Opp'n at 24–25, n.20.

record and the Court cannot assign probative value or reweigh the evidence. Pl.'s Mot. at 25. Similar to the volume aspect, the Court will not disturb the ITC's conclusion that the price underselling of subject imports was not significant because the Court finds that the price underselling conclusion was not unreasonable. Since Plaintiff's contention does not prevail on the merits, the Court need not address Defendant's exhaustion defense.

For the foregoing reasons, the Court affirms the underselling aspect of the *Final Determination*.

B. Price Suppression

When evaluating the effect of imports of subject merchandise, the ITC must consider whether "the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)((II).

1. Contentions

COGSI contends that the ITC's price suppression determination is unsupported by substantial evidence and otherwise contrary to law. *See* Pl.'s Mot. at 29–36, Pl.'s Reply at 13–17. COGSI asserts that the ITC's exclusion of "2012 data for one processor" and reliance on a negative underselling finding to support a negative price suppression finding" are contrary to law. Pl.'s Mot. at 29, 31. Plaintiff also argues that the ITC's "negative price suppression determination was [ ] unsupported by substantial evidence." *Id*. at 32. COGSI asserts that by excluding one processor's 2012 data, the ITC violated the statutory mandate to define industry as "the producers as a whole of the domestic like product." *Id*. at 20 (quoting 19 U.S.C. §§1671d(b)(1), 1677(4)(A)). In addition, Plaintiff purports that the ITC's decision to exclude 2012 data for one processor "minimized the full extent of price suppression being suffered by the domestic industry" and alleges that the processor "did not meet any of the criteria for exclusion under 19 U.S.C. § 1677(4)(B)." Pl.'s Mot. at 29 & n.8.

The ITC counters that its price suppression determination was supported by substantial evidence and in accordance with law. *See* Def.'s Opp'n at 28–33; *see also* Def.-Ints.' Opp'n at 27–32. The ITC "found that subject imports did not significantly suppress domestic prices during the POI." Def.'s Opp'n at 28. The Commission acknowledged that the domestic industry's COGS/net sales ratio slightly increased over the POI but determined that this increase "was significantly affected by the substantial increases in one producer's COGS/net sales that were associated with a factory relocation and

machinery/equipment upgrade [ ] in 2012." *Id*. The ITC contends that it used this producer's "own testimony that its factory relocation was the reason for its huge losses and its high costs relative to net sales in 2012," and thus its conclusion that "the bulk of the increase in the industry's COGS to net sales ratio in 2012 was due to the costs associated with" this producer's relocation and upgrade is reasonable. *Id*. at 29.

Further, the Commission explains that "the domestic producers reported their cost components in an inconsistent manner in their questionnaire responses," and accordingly the Commission "chose to focus on the industry's overall COGS data rather than on individual elements of that category, which varied between producers." *Id*. at 30, 31. The ITC posits, contrary to COGSI's contention, that it "did not improperly require[ ] that the subject imports undersell the domestic shrimp significantly as a required element of its price suppression finding" because the Commission based its price suppression conclusion on the evidence that the domestic industry's "COG/net sales ratio increased only 'slightly' and were significantly affected by the one-time factory relocation cost increase for" one processor. *Id*. (citing Views at 41).

2. Analysis

When evaluating challenges to the ITC's methodology, the court will affirm the chosen methodology as long as it is reasonable. *See U.S. Steel Group*, 96 F. 3d at 1361–62. The Court examines "not what methodology [Plaintiff] would prefer, but . . . whether the methodology actually used by the Commission was reasonable." *JMC Steel Group v. United States*, 38 CIT __, __, 24 F. Supp. 3d 1290, 1300 (2014) (internal quotation and citation omitted). COGSI challenges certain decisions regarding methodology, such as data selection, and the Court reviews these decisions for reasonableness.

The Court finds that the ITC's decision to exclude a processor that had a one-time relocation expense which skewed the data is supported by record evidence. The ITC delineated that the domestic industry's slight increase in COGS/net sales was "significantly affected by the substantial increases in one producer's COGS/net sales that were associated with" a one-off event of "a factory relocation and machinery/equipment upgrade" in 2012. Def.'s Opp'n at 2829 (internal quotation omitted). This processor's one-off relocation and upgrade was "not related to subject imports." *Id*. at 29 (citing C.R. 1112, Response at 1). The Court finds reasonable the ITC's decision to exclude this processor. Further, because individual data was inconsistent, the ITC's decision to focus on the industry's overall COGS

data was also reasonable. *See id*. at 31.

Upon a review of the relevant statute regarding price suppression, the Court agrees with the ITC that the statute requires that the Commission determine whether subject imports "prevent price increases, which otherwise would have occurred, to a significant degree." 19 U.S.C. § 1677(7)(C)(ii)(II). Defendant argues that Plaintiff's price suppression challenge hinges on the statutory language "to a significant degree," and the Commission determined that "the record showed that any price suppression was minimal during the POI," not rising to the level of significant. Def.'s Opp'n at 32. The Court finds that the ITC's price suppression conclusion was supported by record and within its statutory discretion.

For the foregoing reasons, the Court sustains the price suppression aspect of the *Final Determination*.

III. Impact on affected domestic industry

When examining the impact of imports of subject merchandise on domestic producers of domestic like products in the context of production operations, the ITC must consider, in relevant part, (1) "actual and potential decline in output, sales, market share, profits, productivity, return on investment, and utilization of capacity"; (2) "factors affecting domestic prices"; (3) "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment"; and (4) "actual and potential negative effects on the existing development and production efforts of the domestic industry." 19 U.S.C. § 1677(7)(C)(iii)(I)(IV).

A. Contentions

COGSI contends that the ITC's impact determination is inconsistent with prior practice and unsupported by substantial evidence. *See* Pl.'s Mot. at 36–41, Pl's Reply at 17–21. COGSI alleges "as subject imports rose from 2010 to 2012, fishermen's number of workers, hours worked, days at sea, and operating income all declined, and their already high ratio of operating expenses to net sales increased." Pl.'s Mot. at 36. Further, "[s]hrimp processors' operating income was marginal and also declined" during the POI. *Id*. COGSI alleges the ITC appeared to improperly rely on non-operating "other" income, such as BP Oil settlement payments and CDSOA[9] distributions, despite the fact that COGSI admits the ITC "correctly classified [these items] as 'other income' and properly distinguished [this other income] from the industry's primary operations," in reaching a negative injury deter-

[9] CDSOA stands for Continued Dumping and Subsidies Offset Act of 2000 and is commonly called the Byrd Amendment. It was repealed effective October 1, 2007.

mination. *Id*. at 37. "Reliance on such non-operating income is an unexplained departure from the Commission's longstanding prior practice," according to COGSI. *Id*. at 37.

COGSI also alleges that the ITC failed to address "improvements the domestic industry saw after provisional relief was imposed," further indicating "the injury the domestic industry was suffering was by reason of subject imports." *Id*. at 40. COGSI argues that the ITC never "addressed [the] evidence that subsidized imports prevented the domestic industry from making needed capital investments." *Id*. at 40. Finally, COGSI argues that the ITC ignored the "improvements in the domestic industry post-preliminary relief" which supports an affirmative injury determination. *Id*. at 41.

The ITC counters that its impact determination was supported by substantial evidence and in accordance with law. *See* Def.'s Opp'n at 7–8, 33–41; *see also* Def.-Ints.' Opp'n at 33–38. The ITC "reiterated that the volume and market share of subject imports had been significant during the POI," but that "subject imports had not had significant price effects during the POI," noting that "in conducting its impact analysis, it was required to consider whether any injury to the domestic industry is by reason of the subject imports and ensure that it does not attribute injury from other factors to subject imports." Def.'s Opp'n at 35.

The ITC reasoned that a "notable feature of the U.S. processors' financial results was that, for every year, their net income was positive and exceeded operating income on both an absolute basis and as a share of net sales . . . due to the amount 'other income' reported by the industry, which ranged a from a low of $21.4 million in 2010 to a high of $95.8 million in 2012." *Id*. (citing Views at 47–48). The ITC explained that it "adopted Plaintiff's approach and treated the 'other income' resulting from CDSOA payments or BP Oil Spill compensation as nonrecurring items" and did not include this as operating income in its impact analysis.[10] *Id.* at 35–36. Upon examination of all the statutory factors, the ITC concluded that "subject imports had not had a significant adverse impact on the domestic industry." *Id*. at 36.

B. Analysis

The ITC has a variety of statutory factors that it must consider in an impact analysis. *See* 19 U.S.C. § 1677(7)(C)(iii)(I)-(IV). The Court finds that the ITC considered the relevant statutory factors and drew

[10] The record elucidates that the domestic industry received the following in BP Oil Spill compensation: $14.8 million in 2010, $22.6 million in 2011, $70.6 million in 2012, and $22.4 million in interim 2012, and zero in interim 2013; and the following in CDOSA distributions: $5.8 million in 2010, $17.7 million in 2011, $17.0 million in 2012, $716,000 in interim 2012, and $1.4 million in interim 2013. *See* C.R. 1284 at VI-17, n.47.

reasonable conclusions. The ITC provided its findings: the landing levels fluctuated but were comparable to those that occurred during the five-year period examined in the 2011 antidumping reviews; shrimp harvest fluctuated but overall increased; financial results fluctuated annually but remained positive throughout the POI; processors' shipments and U.S. shipments fluctuated during the POI but increased from 2010 to 2012; processors' ending inventory quantities fluctuated annually but increased overall from 2010 to 2012; number of production and related workers, hourly wages and labor productivity fluctuated annually but increased overall from 2010 to 2012; and hours worked and total wages paid increased each year of the period. Def.'s Opp'n at 34 (citing Views at 43–46).[11]

When examining the factors of net income and operating margins, the ITC noted that this case presented an atypical circumstance for the ITC: "the net income of fishermen and processors was positive throughout the POI and exceeded their operating income each year." *Id*. at 38. The ITC admitted that the evidence shows that "the domestic industry's financial performance continued at a marginal level and declined at the end of the POI," but determined that "as a whole," the record "showed that the domestic industry was not materially injured by reason of the subject imports." *Id*. at 36. The ITC noted that "[d]ue to this unusual circumstance," it decided "to perform a more detailed analysis of the industry's overall financial results." *Id*. Upon examination, the ITC found that the industry's net income levels had benefitted from the industry's receipt of the BP Oil Spill compensation and from CDSOA distributions. *Id*. (citing Views at 47–48).

The ITC states that it reasonably took into account the impact of BP Oil Spill on the industry but it "simply chose to place a different interpretation on the impact of the spill and its related settlement than plaintiff would have preferred." *Id*. It appears that the BP Oil Spill's detrimental damage and subsequent settlement can be used as both a sword and a shield, and perhaps the ITC could have gone equally either way. The Court, however, reviews for reasonableness of a determination and not whether it would have favored another outcome. *See Universal Camera,* 240 U.S. at 488. Accordingly, the Court finds that the ITC's chosen interpretation and conclusion regarding impact on the affected domestic industry is supported by record evidence and in accordance with law.

For the foregoing reasons, the Court sustains the impact aspect of the *Final Determination*.

[11] For a complete list of impact findings, *see* Views at 43–49.

IV. Period of Investigation

The ITC must "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii). However, there is no statutory requirement for a POI so the ITC has broad discretion when it comes to choosing the POI. *See Nucor v. United States*, 414 F.3d 1331, 1337 (Fed. Cir. 2005) ("the Commission has broad discretion with respect to the period of investigation that it selects for purposes of making a material injury determination . . . because the statute does not expressly command the Commission to examine a particular period of time") (internal quotation and citation omitted).

A. Contentions

COGSI contends that the Commission erred by starting the POI in the year of the BP Oil Spill and failed to factor this extraordinary event into its analysis. *See* Pl.'s Mot. at 8–16, Pl.'s Reply at 1–5. Because the BP Oil Spill "was the worst in U.S. history" and "significantly disrupted domestic shrimp production in 2010," COGSI claims that the ITC should have started the POI in 2009 rather than 2010. Pl.'s Mot. at 8. Plaintiff further claims that by selecting a three-year POI here, the Commission "departed without explanation from its use of a four-year POI in prior decisions presenting similar factual scenarios." *Id*. at 13 (citing P.R. 382 at 21, n.95). While admitting that "the Commission typically considers data for the three most recently completed calendar years, plus applicable interim periods," COGSI argues that "the Commission has [ ] used a four-year POI where other significant one-time events disrupted the domestic industry's production or the market during the first year of what would otherwise be a three-year POI." *Id*. at 11, 12.

COGSI declares that the BP Oil Spill "was an extraordinary, short-lived, and once-in-alifetime event that significantly impacted the domestic shrimp market in 2010." *Id.* at 13. Thus, COGSI surmises that "[u]sing a four-year POI that includes the pre-spill year of 2009 was necessary to allow the Commission to understand the conditions in the market and provide it with a broader perspective of the industry." *Id*. COGSI submits that the Commission's conclusion for selecting a three-year POI is unsupported by substantial evidence. *Id*. at 14. Plaintiff challenges the Commission's conclusion that "landings historically have fluctuated from year to year and in some prior years have been at levels somewhat comparable to 2010" and instead postulates that landings in 2010 were "the lowest level of landings in 35 years." *Id*. at 14.

The ITC counters that its selection of a three-year POI was reasonable. *See* Def.'s Opp'n at 11–16; *see also* Def.-Ints.' Opp'n at 2–6. The ITC explains that its normal practice is to choose a three year POI, which it did, because upon review of the number of landings over an eight year period (2005–2012), it noted that the number of landings in 2010 was comparable to the prior levels. *See* Def.'s Opp'n at 11. The Commission notes that it "addressed and reasonably rejected COGSI's request in the final investigation to add a fourth year (2009) to the POI, which COGSI asserted was necessary to reflect the supply disruption caused by the BP Oil Spill." *Id*. The ITC maintains that situations warranting a four-year POI are "relatively rare and reflect the unique circumstances in the markets involved." *Id*. at 12. The ITC declared that "the industry's landings in 2010, though low, were in fact somewhat comparable to the levels seen in other years, particularly in 2008" and therefore concluded that "expansion of [the] typical POI was not warranted here." *Id*. at 13 (internal quotation and citation omitted).

B. Analysis

The Commission's selection of a POI is not statutorily mandated, and it is well settled that the Commission has broad discretion when it comes to choosing the POI. *See Nucor*, 414 F.3d at 1337. The only statutory limitation regarding the POI is that the Commission "evaluate all relevant economic factors . . . within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii).

The Court finds that the ITC evaluated all relevant economic factors within the context of the business cycle and conditions of competition that were distinctive to the affected industry, in compliance with 19 U.S.C. § 1677(7)(C)(iii). In the instant case, the record shows that the ITC considered the BP Oil Spill in its selection of the three-year POI. The Court further finds that the ITC's choice of a three year POI is not unreasonable and consistent with its prior practice. The ITC normally choses a three year POI for investigations. *See* Def.'s Opp'n at 11–12. In fact, the prior shrimp investigations had a three year POI. *Id*. at 11. In its reasoning of why it rejected Petitioner's request to expand the POI to four years, the ITC explained that while looking "at the 2010 data in the light of the BP Oil Spill, we also note that landings historically have fluctuated from year to year and in some prior years have been at levels somewhat comparable to 2010." *Id*. at 11 (quoting Views at 28, n.95).

COGSI takes issue with the ITC's conclusion of "somewhat comparable" level of landings in 2010 and offers the conclusion that 2010

reflected "the lowest level of landings in 35 years." Pl.'s Mot. at 14. Even though there may be a possibility of "drawing two inconsistent conclusions from the evidence," this does not prevent the ITC's "finding from being supported by substantial evidence." *Am. Textile Mfrs. Inst.*, 452 U.S. at 523. The Court cannot say that the Commission's conclusion is not supported by the evidence.

The ITC points out Plaintiff's conceded that "the domestic shrimp production in any given year is subject to one-off events." *Id*. at 13 (internal quotation and citation omitted). The ITC stated that "such events are not entirely unique to this industry." *Id*. To take into account the one-off of the BP Oil Spill of 2010, the ITC considered data from 2005 to 2012, which highlighted that the "industry's landings fluctuated widely, ranging from a low of 199.0 million pounds in 2010 to a high of 294.8 million pounds in 2006. The second highest level at 261.8 million pounds occurred in 2009." *Id*. at 14. Thus, the ITC concluded that "using 2009 as a starting point would have resulted in an unrepresentative reference point because 2009 generally reflected the industry's second highest landings and shipment levels during the 2005–2012 period." *Id*. The ITC compiled a table from its Views to demonstrate this historical data. *See id*., Table 1.

As previously noted, the ITC not only considered typical factors, such as supply, demand, and substitutability, found in every investigation or review but also considered conditions distinctive to this investigation, such as the BP Oil Spill and EMS, in its investigation. *See* Views at 27–37. In the context of the business cycle and conditions of competition, the ITC determined that the number of landings did not prove that 2010 was a year of "extraordinary supply disruption" as COGSI describes. Pl.'s Reply at 2. The ITC exercised its broad discretion in its finding that the BP Oil Spill was not "unique" enough to select a four-year POI. Def.'s Opp'n at 12. Under the substantial evidence standard, the Court may not "substitute its own judgment for that of the agency." *Usinor,* 342 F. Supp. 2d at 1272. Accordingly, the Court will not displace the ITC's conclusion that the one-off event of the BP Oil Spill did not warrant the expansion of typical three-year POI. The Court finds that the ITC fulfilled its statutory obligation under 19 U.S.C. §1677(7)(C)(iii) to consider the conditions of competition that are distinctive to the affected industry.

For the foregoing reasons, the Court sustains the POI selection of the *Final Determination*.

V. Threat

When determining whether an industry in the United States is threatened with material injury by reason of imports (or sales for

importation) of the subject merchandise, the ITC must consider, among other relevant economic factors—

(I) if a countervailable subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the countervailable subsidy is a subsidy described in Article 3 or 6.1 of the Subsidies Agreement), and whether imports of the subject merchandise are likely to increase,

(II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,

(III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,

(IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports, (V) inventories of the subject merchandise,

(VI) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products, (VII) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1671d (b)(1) or 1673d (b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both),

(VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and

(IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of

> imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F).

A. Contentions

COGSI contends that the Commission's threat determination is unsupported by substantial evidence and contrary to law. *See* Pl.'s Mot. at 41–45, Pl.'s Reply at 21–24. COGSI alleges that the ITC failed to consider the nature of subsidies provided and the evidence of vulnerability in its threat determination. S*ee* Pl.'s Mot. at 41, 45. COGSI asserts that "the Commission provided no discernible reasoning indicating it considered the fact that many of the subsidies Commerce found were export subsidies, or the extent to which such subsidies are more likely to affect future import volumes and to threaten injury." *Id*. at 42 (citing P.R. 382 at 37-40). However, COGSI concedes that "the Commission need not discuss each of the threat factors it is required to consider" so long as its reasoning is clear enough to be easily discerned. *Id*. at 42. COGSI also argues that "the Commission's negative threat determination was based on its flawed volume, price effects, and present material injury conclusions," and thus "cannot be sustained on the basis of these findings." *Id*.

In the alternative, COGSI asserts that should the Court sustain the volume, price effects and material injury conclusions, the threat conclusion is still unsupported because those factors alone cannot sustain the ITC's negative threat determination. *See id*. at 43. COGSI alleges the ITC ignored evidence of excess capacity in favor of sole reliance on "subject producers own low projections." *Id*. (citing P.R. 382 at 38 & n.211). COGSI argues that the "evidence seriously undermines the Commission's conclusion that subject producers' significant excess capacity does not indicate a likelihood of significantly increased imports, and its sole reliance on subject producer's capacity projections in light of this evidence is unreasonable." *Id*. at 43–44. Plaintiff also argues that the Commission "failed to address evidence of declining demand and new import barriers in the [EU], Japan and other export markets." *Id*. Finally, COGSI alleges that "the Commission did not address the evidence of capital expenditures delayed and foregone by the domestic industry due to import competition." *Id*.

The ITC counters that its threat determination was supported by substantial evidence and in accordance with law. *See* Def.'s Opp'n at 41–46; *see also* Def.-Ints.' Opp'n at 39–44. In its analysis, the ITC found that "there were many positive trends in [the domestic industry's] performance . . . [and t]here was no indication these factors

would change in the imminent future." *Id*. at 41 (citing Views at 53–54). The ITC stated that "[s]ubject imports had not adversely affected the condition of the domestic industry, as the industry was able to increase its market share and shipments in a declining U.S. market and to increase prices overall for its products." *Id*. at 41. The ITC found that because the EMS crisis "was not expected to be resolved soon," the "resulting limitation on supplies due to EMS" and in "improvements in the industry's shipments, market share and prices would likely continue in the imminent future." *Id*. at 42 (citing Views at 53).

Another factor in its negative threat determination is that subject producers "only reported a small increase in their projected capacity through 2014." *Id*. at 42. As a result, the ITC concluded that subject producers' "excess capacity did not threaten significant increased volumes for the subject imports." *Id*. Further, the ITC found that "it was unlikely" that subject producers' "steady focus on the U.S. market" would be increased in the imminent future because "increases in subject imports had been at the expense of nonsubject imports and because EMS issues would likely continue to constrain supply from several subject countries." *Id*. The ITC notes that other factors it considered in its threat analysis, such as import prices and inventories, did not support an affirmative threat finding. *See id*. at 43.

The ITC also notes that the existence of "outstanding U.S. antidumping duty orders on shrimp" which were "likely to have a disciplining effect on the volume and prices of imports from [China, India and Vietnam] at least for the imminent future." *Id*. According to the ITC, subject imports had "no significant actual or potential negative effects on the existing development and production efforts" of the domestic industry. *Id*. Therefore, the ITC concludes that it "reasonably exercised its discretion to weigh the evidence relating to the statutory threat factors in its analysis." *Id*.

B. Analysis

The threat statute requires that the ITC consider certain factors but not does specify the weight that each factor should receive. The Court reviews to ensure that the requisite statutory factors were considered and that the analysis was reasonable. The relevant factors required by the statute include subject import volume, subject countries' excess capacity, rate of increase of subject imports, subject import prices, subject merchandise inventories, potential for product shifting, actual and potential negative effects on the existing development and production efforts of the domestic industry, and other

adverse trends. Upon review of the record, the Court finds that the ITC fulfilled its statutory obligation and considered the requisite statutory factors. *See* Views at 52–58. Further, the Court finds that the Commission's analysis of these statutory factors was reasonable.

For the foregoing reasons, the Court sustains the negative threat finding of the *Final Determination*.

CONCLUSION

There is no question that the domestic industry suffered a tragedy of enormous proportions during this POI. However, a finding of injury requires that the domestic industry suffer "material injury by reason of [subject] imports" under 19 U.S.C. § 1677(7)(B), and in the case at bar, the ITC did not make that requisite finding of causation. *See Hynix Semiconductor*, 431 F. Supp. 2d at 1306. Upon review of the record, the Court finds reasonable the ITC's conclusion that COGSI's suffering during this POI was mainly caused by the BP Oil Spill and not by reason of subject imports. Subject imports supplied the void in the market demand caused by a third party, and the foreign producers were merely taking advantage of a business opportunity. This does not constitute unfair trade. The antidumping and countervailing duty framework is a remedy for harm caused by unfair trade, not for lost business caused by a disastrous accident. The remedy sought by COGSI in the case at bar has statutory limitations regarding causation, and the Court cannot say that the Commission was unreasonable in its rendering of those limitations.

For the foregoing reasons, the Court denies Plaintiff's motion for judgment on the agency record and sustains the ITC's *Final Determination*. Judgment will follow.

Dated: April 3, 2015
New York, New York

/s/ Gregory W. Carman
GREGORY W. CARMAN. SENIOR JUDGE

Slip Op. 15–30

PLASTICOID MANUFACTURING INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 12–00407

ORDER OF DISMISSAL

Upon consideration of Plaintiff's submission of March 25, 2015, which advises that Plaintiff's ownership has changed and that the successor entity, FSM Technologies, has not filed comments on the U.S. Department of Commerce's Draft Results of Redetermination

Pursuant to Court Remand (dated March 18, 2015) and does not plan to pursue this action; and after conferring with both parties, and with their consent, it is hereby

ORDERED that this action is dismissed with prejudice, with each party to bear its own expenses; and it is further

ORDERED that Defendant's Consent Motion to Stay or Suspend Remand Redetermination Schedule is denied as moot.

Dated: April 3, 2015

New York, New York

/s/ *Delissa A. Ridgway*

DELISSA A. RIDGWAY JUDGE