PUBLIC VERSION

Slip Op. 24-32

UNITED STATES
COURT OF INTERNATIONAL TRADE

Court No. 22-00122

DAIKIN AMERICA, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

GUJARAT FLUOROCHEMICALS LIMITED,

Defendant-Intervenor.

Before: M. Miller Baker, Judge

OPINION

[Granting Plaintiff's motion for judgment on the agency record and remanding to the Department of Commerce for further proceedings.]

Dated: March 14, 2024

Roger B. Schagrin and *Luke A. Meisner*, Schagrin Associates of Washington, DC, on the briefs for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Claudia Burke*, Assistant Director; and *Daniel Roland*, Trial Attorney, Commercial Litigation Branch, Civil

Division, U.S. Department of Justice of Washington, DC, on the brief for Defendant. Of counsel on the brief was *Leslie M. Lewis*, Attorney, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Jessica R. DiPietro, *Matthew M. Nolan*, and *John M. Gurley*, ArentFox Schiff LLP of Washington, DC, on the brief for Defendant-Intervenor.

Baker, Judge: In this case, a domestic chemical producer challenges the Department of Commerce's calculation of the dumping rate assigned to a compound imported from India. Concluding that the Department's decision is not supported by substantial evidence, the court remands for reconsideration.

I

A

At the request of Daikin America, Inc., a domestic producer of granular polytetrafluoroethylene resin, Commerce opened antidumping investigations of imports of that chemical. *Granular Polytetrafluoroethylene Resin from India and the Russian Federation: Initiation of Less-Than-Fair-Value Investigations*, 86 Fed. Reg. 10,926 (Dep't Commerce Feb. 23, 2021), Appx01026.

In its investigation as to India, the Department selected Gujarat Fluorochemicals Limited as the sole

mandatory respondent. Commerce asked the company to report its shipping-related expenses on a unit-cost basis. Appx03539–03542. Gujarat instead provided aggregated expense totals. *Id.* In its final determination, the Department accepted this information for purposes of calculating the company's antidumping margin. Appx01060–01061.

For purposes of calculating a constructed export price offset, Commerce also asked Gujarat to "support [its] claims regarding the level of intensity at which [it] performed sales activities." Appx01902–01904. The company responded by providing a table that rated, on an intensity scale from 1–10, the selling functions that it and an affiliated reseller perform. Appx01888, Appx01904, Appx04041. The Department also requested "a quantitative analysis showing how the expenses . . . made at different claimed levels of trade impact price comparability." Appx01910. Gujarat replied, referring to the same table. *Id.*

In a supplemental questionnaire to correct "deficiencies, omissions, and areas where further clarification is needed," Appx03299, the Department again requested "documentation supporting [the company's] methodology (*i.e.*, the quantitative analysis) used to report the levels of intensity . . . for each of the figures reported in [the table]." Appx03301. Gujarat answered by repeating its justification for each intensity rating,

but without providing any quantitative reasoning. *See* Appx03881.[1]

In its final determination, the Department found that "the quantitative analysis provided by [Gujarat] was inadequate in response to Commerce's initial questionnaire . . . ." Appx01063. Nor did the company provide the requested information in its supplemental questionnaire response, which the Department excused by finding that Gujarat "did not have an opportunity" under 19 U.S.C. § 1677m(d) "to remedy any deficiency in its quantitative analysis." Appx01064. Thus, the agency "accepted [the company's] information as sufficient for purposes of this segment of the proceeding" and granted it a constructed export price offset, *id*., which had the effect of reducing the ultimate antidumping margin. Commerce warned, however, "that a more detailed and robust quantitative analysis of [Gujarat's] selling functions will be required for us to evaluate whether a [constructed export price] offset is warranted in any future administrative reviews." *Id*.

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[1] Three months later, the company responded to a second set of supplemental questions from Commerce, although none of them requested quantitative evidence to support granting Gujarat a constructed export price offset. *See* Appx06695, Appx06701–06703.

B

Daikin brought this suit under 19 U.S.C. § 1516a(a)(2)(A)(i) and (B)(i) to challenge Commerce's final determination. *See* ECF 9. Subject-matter jurisdiction is conferred by 28 U.S.C. § 1581(c).

Gujarat intervened in support of the government. ECF 16. Daikin then moved for judgment on the agency record. ECF 24; *see also* USCIT R. 56.2. The government (ECF 28) and the Indian company (ECF 30) opposed, and Daikin replied (ECF 32).

In § 1516a(a)(2) actions, "[t]he 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). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

II

A

Daikin argues that the Department breached its duty under 19 U.S.C. § 1677e(a)(2) to apply facts otherwise available to the calculation of shipping expenses. ECF 24, at 15. The company asserts that Commerce was so obligated because Gujarat failed to provide that information in the form and manner requested—specifically, on a transaction-specific basis. *Id.* at 17 ("[Gujarat] knew that it was obligated to report transaction-specific movement costs . . . ."); *see also* 19 C.F.R. § 351.401(g)(1) (authorizing the agency to "consider allocated expenses and price adjustments when transaction-specific reporting is not feasible, provided the Secretary is satisfied that the allocation method used does not cause inaccuracies or distortions"); *id.* § 351.401(g)(2) (requiring that "[a]ny party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions"). As Gujarat was able to routinely associate product batch numbers with specific shipments, such as when dealing with customer complaints, ECF 24, at 19, Daikin contends that the

former "should not be able to benefit from the incompleteness of a record that it alone had a duty to create," *id.* at 27.

Commerce found that "the record does not indicate how [product] batch numbers are associated with specific shipments." Appx01061. As a result, the Department was unable to conclude that "allocating movement expenses by batch number would result in a more transaction-specific cost" than Gujarat's aggregated reporting. *Id.*

The problem with this finding is that the Department failed to address record evidence—the Export Customer Complaint Register—showing that Gujarat tracks merchandise batch numbers [[ ]] *See* Appx03913, Appx03925.[2] Similarly, Commerce dismissed Daikin's arguments that Gujarat's allocated reporting of shipping expenses is distortive, *see* Appx08612–08613, without any substantive analysis. *See* Appx01060 ("[T]here is no evidence that [Gujarat's] allocation methodology causes inaccuracies or is distortive.").

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[2] [[ ]] *See* Appx03925; Appx03932; Appx03935. According to Daikin, this information permitted Gujarat to calculate the shipping cost for each transaction associated with any given batch. *See* ECF 24, at 22–24.

As "[t]he substantiality of evidence must take into account whatever in the record fairly detracts from its weight," *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1373 (Fed. Cir. 2016), the court remands for Commerce to reconsider whether it was feasible for Gujarat to report its shipping-related costs on a transaction-specific basis. Insofar as the Department concludes that it was not so feasible, the agency must reconsider whether the company's expenses were calculated on as specific a basis as possible, *see* 19 C.F.R. § 351.401(g)(1), and whether its reporting of those expenses does not cause inaccuracies or distortions, *see id*.

B

Daikin argues Commerce's decision to grant Gujarat a constructed export price offset is not supported by substantial evidence because the company failed to establish "that the differences in selling activities performed in the home and U.S. markets are 'substantial.'" ECF 24, at 43 (citing *Hyundai Steel Co. v. United States*, 365 F. Supp. 3d 1294, 1300 (CIT 2019)).

The government concedes that Gujarat was required to establish "the amount and nature" of a constructed export price offset to the Department satisfaction. ECF 28, at 46 (quoting 19 C.F.R. § 351.401(b)(1)). As recounted above, Commerce found that the company failed to make that showing, Appx01063–01064, but excused it having determined

that Gujarat "did not have an opportunity" under 19 U.S.C. § 1677m(d) "to remedy any deficiency in its quantitative analysis," Appx01064.

Assuming that the first sentence of § 1677m(d) even applies when a respondent fails to carry its burden under 19 C.F.R. § 351.401(b)(1),[3] it is unclear why the Department concluded that the company had no opportunity to cure the deficiency. As noted above, the supplemental questionnaire referred to correcting "deficiencies, omissions, and areas where further clarification is needed," Appx03299, and it requested "documentation supporting [the company's] methodology (*i.e.*, the quantitative analysis) used to report the levels of intensity . . . for each of the figures reported in

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[3] Although the court does not decide the question, the first sentence of §1677m(d) is likely irrelevant here because it must be read in tandem with that provision's second sentence, which governs when Commerce may "disregard all or part of" a respondent's submissions and apply facts otherwise available under 19 U.S.C. § 1677e. *Cf.* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("Perhaps no interpretive fault is more common than the failure to follow the whole-text canon, which calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts."). There are no facts available, adverse or otherwise, for the Department to employ when a respondent fails to carry its burden of showing eligibility for a constructed export price offset. Instead, the agency's duty is to simply deny the offset.

[the table]," Appx03301. Gujarat's response to the supplemental questionnaire afforded it a chance to remedy the insufficiency insofar as § 1677m(d) required any such opportunity.

Commerce found that the company failed to carry its burden under 19 C.F.R. § 351.401(b)(1) of demonstrating eligibility for a constructed export price offset and then gave it a second chance, which Gujarat declined to use. The Department let the company off with a mere warning that a similar failure would not be tolerated in future administrative reviews. That's not substantial evidence showing that Gujarat qualified for the offset, and therefore the court remands for reconsideration.

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The court grants Daikin's motion for judgment on the agency record. A separate remand order will issue.

Dated: March 14, 2024
New York, NY

/s/ *M. Miller Baker*
Judge