Slip Op. 22-103

UNITED STATES COURT OF INTERNATIONAL TRADE

THE MOSAIC COMPANY, Plaintiff, **PHOSAGRO PJSC, JSC APATIT,** Consolidated Plaintiff, **INDUSTRIAL GROUP PHOSPHORITE LLC,** Consolidated Plaintiff and Consolidated Plaintiff-Intervenor, v. **UNITED STATES,** Defendant, **THE MOSAIC COMPANY,** Consolidated Defendant, **PHOSAGRO PSJC, JSC APATIT, INDUSTRIAL GROUP PHOSPHORITE LLC,** Defendant-Intervenor	Before: Jane A. Restani, Judge Consol. Court No. 21-00117 **PUBLIC VERSION**

OPINION AND ORDER

Dated: September 2, 2022

[Commerce's final determination in the countervailing duty investigation of phosphate fertilizers from the Russian Federation is partially sustained and partially remanded for reconsideration consistent with this opinion.]

Patrick James McLain, David J. Ross, and Stephanie Ellen Hartmann, Wilmer, Cutler, Pickering, Hale and Dorr LLP, of Washington, DC, argued for Plaintiff The Mosaic Company. With them on the brief were Alexandra S. Mauer, Eliot Kim, and Natan Pinchas Lyons Tubman.

Meen Geu Oh, Commercial Litigation Branch, U.S. Department of Justice, of Washington, DC, argued for the Defendant. With him on the brief was Ebonie I. Branch. Of counsel on the brief was Jared Michael Cynamon, Office of Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, of Washington, DC.

Jonathan Thomas Stoel and Cayla Danielle Ebert, Hogan Lovells US LLP, of Washington, DC, argued for Defendant-Intervenors PhosAgro PJSC and JSC Apatit. With them on the brief were Harold Deen Kaplan, Jared Rankin Wessel, Maria Alejandra Arboleda Gonzalez, and Nicholas R. Sparks.

Peter J. Koenig, Squire Patton Boggs (US) LLP, of Washington, DC, argued for Defendant-Intervenor Industrial Group Phosphorite, LLC. With him on the brief was Jeremy William Dutra.

Restani, Judge: This action is a challenge to the final determination made by the United States Department of Commerce ("Commerce") in the countervailing duty ("CVD") investigation of phosphate fertilizers from the Russian Federation ("Russia") covering the period from January 1, 2019, through December 31, 2019.

Plaintiffs, Consolidated Plaintiffs, and Consolidated Plaintiff-Intervenors request that the court hold aspects of Commerce's final determination unsupported by substantial evidence or otherwise not in accordance with law. The United States ("Government") asks that the court sustain Commerce's final determination.

BACKGROUND

The Mosaic Company ("Mosaic") filed a CVD petition on June 26, 2020, concerning imports of phosphate fertilizers from Russia. Petitions for Imposition of Countervailing Duties: Phosphate Fertilizers from Morocco and Russia, P.R. 1-8, C.R. 1-8 (June 26, 2020). Commerce initiated the CVD investigation on July 23, 2020. Phosphate Fertilizers From the Kingdom of

Morocco and the Russian Federation: Initiation of Countervailing Duty Investigations, 85 Fed. Reg. 44,505 (Dep't Commerce July 23, 2020). On August 4, 2020, the U.S. International Trade Administration selected LLC Industrial Group Phosphorite ("EuroChem") and PhosAgro-Cherepovets ("PhosAgro") as mandatory respondents ("Plaintiffs") in this review. See Countervailing Duty Investigation of Phosphate Fertilizers from Russia: Respondent Selection, P.R. 55, C.R. 23 (Aug. 4, 2020).

Commerce published its preliminary results on November 30, 2020, see Phosphate Fertilizers From the Russian Federation: Preliminary Affirmative Countervailing Duty Determination, 85 Fed. Reg. 76,524 (Dep't Commerce Nov. 30, 2020), along with the accompanying Decision Memorandum for the Affirmative Preliminary Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation, C-821-825, POR 1/1/2019-12/31/2019 (Dep't Commerce Nov. 23, 2020) ("PDM").

Commerce published its final determination on April 7, 2021. See Phosphate Fertilizers From the Kingdom of Morocco and the Russian Federation: Countervailing Duty Orders, 86 Fed. Reg. 18,037 (Dep't Commerce Apr. 7, 2021) ("Final Results"); see also Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation, C-821-825, POR 1/1/2019-12/31/2019 (Dep't Commerce Feb. 8, 2021) ("IDM"). Commerce determined the countervailable subsidy rate to be 47.05 percent for EuroChem and 9.19 percent for PhosAgro. Final Results, 86 Fed. Reg. at 18,038. Relevant here, Commerce found subsidies based on the government of Russia's ("GOR") provision of natural gas for less than adequate remuneration ("LTAR"). IDM at 8–9. Additionally, as relevant here, Commerce found that a subsidy for phosphate mining rights for

LTAR did not yield a measurable benefit. Id. at 10. Mosaic, EuroChem, and PhosAgro raise challenges to the final determination.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(i). The court will uphold Commerce's determinations in a CVD proceeding 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

I. Rosneft as a Government Authority

In the final determination, Commerce applied adverse facts available ("AFA") to determine that Rosneft is a government authority such that its provision of natural gas to a cross-owned affiliate of EuroChem was a countervailable financial contribution. See IDM at 6, 9, 35–37. EuroChem challenges this determination.[1]

During the investigation, Commerce issued a questionnaire requesting that the GOR provide an Input Producer Appendix for any company or enterprise that is wholly or partially owned by the GOR, whether directly or indirectly. See Letter from USDOC to Embassy of Russian Federation Pertaining to GOR Initial Questionnaire, P.R. 56 (Aug. 4, 2020) ("Initial Qnaire to GOR"). In its initial questionnaire response, the GOR provided an appendix for Gazprom and PJSC Novatek. Response from Mayer Brown, LLP to Sec of Commerce

[1] In its brief, PhosAgro incorporates EuroChem's challenge to Commerce's determination that Roseneft was a government authority. PhosAgro Br. at 17.

Pertaining to Ministry, Initial QR at 41, P.R. 131, C.R. 305 (Sept. 25, 2020) ("GOR IQR"). EuroChem, however, reported that its cross-owned affiliate, Nak Azot purchased natural gas from Russian corporation Rosneft. Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Supp QR at 12–13, P.R. 229, C.R. 437 (Oct. 26, 2020) ("EuroChem 1st SQR"). It is undisputed that Rosneft's main shareholder, Rosneftegaz JSC ("Rosneftegaz"), is 100 percent owned by the GOR. Id. at 13, Ex. SQ-16.2. Commerce requested that the GOR provide an Input Producer Appendix for both Rosneft and Rosneftegaz, but the GOR declined, stating that neither entity was a vested government authority in the Russian natural gas market. See Letter from USDOC to Mayer Brown Pertaining to GOR 2nd Sec II Suppl Qnaire, P.R. 282 (Nov. 3, 2020) ("Suppl. 2d Qnaire to GOR"); Response from Mayer Brown, LLP to Sec of Commerce Pertaining to Ministry 2nd Suppl QR at 1–2, P.R. 300, C.R. 418 (Nov. 13, 2020) ("GOR 2d SQR"). Following the preliminary determination, Commerce again requested the Input Producer Appendices for Rosneft and Rosneftegaz from the GOR, but the GOR did not submit the requested information. See Letter from Mayer Brown, LLP Pertaining to GOR 2nd Supp Qnaire, P.R. 317, C.R. 489 (Nov. 25, 2020) ("GOR Post-Prelim. Qnaire"); Response from Mayer Brown, LLP to Sec of Commerce Pertaining to Ministry 3rd Suppl QR at 6–7, P.R. 331, C.R. 502 (Dec. 8, 2020) ("GOR 3rd SQR").

A subsidy is countervailable if the following elements are satisfied: (1) an authority has provided a financial contribution directly or entrusts a private entity to make a financial contribution; (2) a benefit is thereby conferred on a recipient of the financial contribution; and (3) the subsidy is specific to a foreign enterprise or foreign industry, or a group of such enterprises or industries. See 19 U.S.C. § 1677(5)(A)–(B), (D)–(E), (5A). Normally,

information from the foreign government is necessary for Commerce to make a reasonable determination about whether an entity is a government authority. See Fine Furniture (Shanghai) Ltd. v. United States, 748 F.3d 1365, 1369–70 (Fed. Cir. 2014) ("Fine Furniture"). If the record is missing necessary information to an investigation, Commerce may use facts otherwise available to fill in any gaps that are necessary to find that the elements of the CVD statute have been satisfied. See 19 U.S.C. § 1677e(a) (2015); see also Changzhou Trina Solar Energy Co. v. United States, 43 CIT __, __, 359 F. Supp. 3d 1329, 1325 (2019).

19 U.S.C. § 1677e specifically provides two avenues to fill in the gap for the missing information: "facts otherwise available" and "facts otherwise available" with "adverse inferences." See 19 U.S.C. § 1677e(a)–(b). Accordingly, the court has interpreted the two subsections in the statute to have slightly different purposes. See Mueller Commercial de Mexico v. United States, 753 F.3d 1227, 1232 (Fed. Cir. 2014). Facts otherwise available shall be used when necessary information is not available on record, or if an interested party or any other person fails to satisfactorily respond to Commerce's requests for "necessary information" by: (1) withholding requested information, (2) failing to provide information by the submission deadlines or in the form or manner requested, (3) significantly impeding a proceeding, or (4) providing information that cannot be verified. Id. § 1677e(a)(1)–(2). Separately, pursuant to § 1677e(b), Commerce is authorized to use an adverse inference when selecting from available facts if an interested party "has failed to cooperate by not acting to the best of its ability to comply with a request for information." Id. § 1677e(b). For the following reasons, the court holds that Commerce satisfied both prongs of the statutory requirement for AFA and lawfully determined that Rosneft is a government authority within the meaning of § 1677(5)(A).

A. The GOR's failure to provide the Input Producer Appendix resulted in a gap in the record and EuroChem's factual submission did not cure this gap

To apply AFA, Commerce must first identify a gap in the record. Zhejiang DunAn Hetian Metal Co. v. United States, 652 F.3d 1333, 1346 (Fed. Cir. 2011) ("The use of facts otherwise available . . . is only appropriate to fill gaps when Commerce must rely on other sources of information to complete the factual record."). Notably, the gap in the record must be relevant to the investigation and the use of AFA must fill in information that is actually missing. See e.g., Guizhou Tyre Co. v. United States, 42 CIT __, __, 348 F. Supp. 3d 1261, 1270 (2018).

Here, Commerce has made an affirmative showing that there was a relevant gap in the record created by the GOR's failure to provide the requested Input Producer Appendix for Rosneft and Rosneftegaz. See IDM at 36. Specifically, Commerce requested the following information: (1) a trace of all ownership in Rosneft back to the GOR; (2) an explanation of the history of government ownership in Rosneft; (3) an explanation of the corporate governance structure of each entity in Rosneft's chain of ownership and the role of minority shareholders; (4) an explanation of any obligations each entity is required to carry out on behalf of the state; and (5) a description of the role of the GOR in any restructuring. See GOR Post-Prelim. Qnaire at Section II. In the preliminary determination, Commerce identified that there was conflicting record evidence regarding the GOR's authority over Rosneft. See PDM at 9. Commerce sought Input Producer Appendices from Rosneft and Rosneftegaz to understand the corporate structures of state-sponsored enterprises and assess the level of governmental influence. See IDM at 6–7. Further, the GOR was able to provide this information for Gazprom and PJSC Novatek when it supplied Input Producer Appendices for both entities. See GOR IQR at 41. Thus, the

information requested was reasonably sought and the investigative questions issued by Commerce were reasonable.

After Commerce issued its preliminary determination, the GOR responded to the request for information and provided Rosneft's charter, which included information regarding shareholder rights, voting rights, and regulations surrounding composition and selection of board members and executives. See GOR 3rd SQR at Ex. TQ-I-6. The GOR's response, however, failed to include the requested information regarding the corporate history and the role of the GOR in any restructuring. Id. More importantly, the GOR's response did not include the requested Index Producer Appendix information for Rosneftegaz. Id. at 6–8.

EuroChem contends that it submitted supplementary information following the preliminary determination that cured any gap in the record. EuroChem Br. at 4. Indeed, although EuroChem provided additional information regarding Rosneft's corporate governance, the information provided was not responsive to Commerce's request for the Input Producer Appendix. See Letter from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Rebuttal Comments on Suppl QR, P.R. 340 (Dec. 17, 2020) ("EuroChem Factual Submission"). EuroChem's submission included a Rosneft affidavit and publicly available profiles for Rosneft's board of directors and management board, but remained silent on Rosneftegaz's corporate structure and the corporate history of both Rosneft and Rosneftegaz. Id. at Ex. 1–10. Thus, the Eurochem's submission did not provide sufficient information for Commerce to determine whether Rosneft is a government authority. Id.

Absent the necessary information from the GOR, Commerce was unable to determine the extent of governmental ownership and influence over Rosneft. Additionally, EuroChem's

submission did not cure the gap in the record created by the GOR's failure to submit the requisite information. Pursuant to § 1677e(a), Commerce was authorized to fill in the relevant gap in the record by selecting from facts available. See, e.g., Jindal Poly Films Ltd. of India v. United States, 44 CIT __, __, 439 F. Supp. 3d 1354, 1361 (2020); 19 U.S.C. § 1677e(a).

B. The GOR did not cooperate with Commerce's requests for information to the best of its ability

The second prong in the AFA statute authorizes Commerce to apply adverse inferences by selecting from facts otherwise available when "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." See 19 U.S.C. § 1677e(b)(1). An interested party, such as a foreign government, fails to meet the "best of its ability" statutory standard if it has not demonstrated "maximum effort." See Nippon Steel Corp. v. United States, 337 F.3d 1373, 1382 (Fed. Cir. 2003) (stating that "[c]ompliance with the 'best of its ability' standard is determined by assessing whether respondent has put forth maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation"). When a foreign government fails to respond to the best of its ability, Commerce may apply AFA to find that a government authority provided a financial contribution to a specific industry. Archer Daniels Midland Co. v. United States, 37 CIT 760, 769, 917 F. Supp. 2d 1331, 1342 (2013) ("Archer Daniels"). Although Commerce should seek to avoid collateral impact to a cooperating party in an investigation if relevant information exists elsewhere on the record, absent satisfactory record evidence, Commerce may lawfully apply AFA based on noncooperation. See, e.g., Fine Furniture, 748 F.3d at 1372–73.

Substantial evidence supports a finding that the GOR did not cooperate to the best of its ability during the investigation. Commerce requested, twice, that the GOR submit an Input Producer Appendix for both Rosneft and Rosneftegaz. See Suppl. 2d Qnaire to GOR at Attach. I; GOR Post-Prelim. Qnaire at Section II. After the first request, the GOR responded with a statement that neither Rosneft nor Rosneftegaz were vested government authorities. See GOR 2d SQR at 1. The GOR declined to provide any record evidence to support its statement. See id. at 1–2. After its preliminary determination, Commerce again requested the GOR to furnish the appendices, but the GOR refused to do so claiming that [[

]]. See GOR 3rd SQR at 6. [[

]]. Id. ([[

]]). Even if the GOR believed that the information was not relevant, the information sought was related to Commerce's proper investigatory purpose, and Commerce, not the GOR, determines what information is relevant to the investigation. See Ansaldo Componenti, S.p.A. v. United States, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986).

The court has held that Commerce must "tread carefully" when its use of an adverse inference would injure a cooperating party such that Commerce must provide respondents with a "meaningful opportunity" to submit factual evidence that weighs in their factor. See Yama Ribbons and Bows Co. v. United States, 43 CIT __, __, 419 F. Supp. 3d 1341, 1347, 1356 (2019) (holding that Commerce erred in applying AFA and "overlooked that there was a complete lack

of evidence that [the plaintiff] had obtained a benefit" through the Government of China's Export Buyer's Credit Program). Commerce provided both EuroChem and the GOR a meaningful opportunity to provide alternative evidence before the final determination. See, e.g., EuroChem Factual Submission; GOR 3rd SQR. Commerce did not simply ignore the factual evidence submitted; rather, Commerce explained that it preliminarily found conflicting record evidence and after the GOR's repeated failure to furnish the necessary information for Rosneft and Rosneftegaz, it lawfully substituted the missing information in accordance with 19 U.S.C. § 1677e(b). See IDM at 35–37.

Specifically, Commerce requested that the GOR explain the discrepancy between the GOR's contention that neither Rosneft nor Rosneftegaz are vested government authorities in the natural gas market in Russia and the factual submission by EuroChem which stated that the main shareholder of Rosneft is Rosneftegaz, which is 100 percent owned by the state. See, e.g., GOR 3rd SQR at 7–8; see also EuroChem 1st SQR at 13, Ex. SQ-16.2. The GOR's response merely emphasized that [[

]] See GOR 3rd SQR at 8 (emphasis in original). Even if the GOR deemed that Rosneftegaz was not directly engaged in the provision of oil or raw gas materials to EuroChem's cross-affiliate, the court has found that a holding company exerts indirect control when it entrusts or directs a private entity to make a financial contribution within the meaning of 19 U.S.C. § 1677(5)(B). Guangdong Wireking Housewares & Hardware Co. v. United States, 37 CIT 319, 333–34, 900 F. Supp. 2d 1362, 1377 (2013), aff'd, 745 F.3d 1194 (Fed. Cir. 2014) ("Commerce's interpretation of 'public entities' reflects the realities of corporate ownership and control and enables it to detect certain forms of subsidization which are not provided directly by

the government but instead pass through private or quasi-private channels."). Commerce explained in its final determination that the GOR failed to cooperate by not complying with Commerce's request for information because it did not respond by the deadline dates, nor did it adequately explain why it was unable to provide the requested information. See IDM at 35–37. Therefore, Commerce's use of AFA satisfies both prongs in identifying a relevant gap in the record and the GOR's failure to cooperate to the best of its ability. Accordingly, Commerce did not err in concluding that Rosneft was a government authority.

II. De Facto Specificity for the Provision of Natural Gas

EuroChem challenges Commerce's de facto specificity analysis for the provision of natural gas at LTAR, arguing that the fertilizer industry is not a predominant user of natural gas and therefore de facto specificity was lacking. EuroChem argues that Commerce's explanation does not support the specificity finding because Commerce relied only on the fact that "the Agro-chemistry industry is a predominant consumer of natural gas when compared to other industrial sectors." EuroChem Br. at 11 (internal citation omitted). EuroChem asserted that Bethlehem Steel[2] instructs that Commerce must rely on more than just "predominant usage" when a subsidy, such as natural gas in Russia, is available and widely used throughout the market. Id. at 11–12. EuroChem contends that the fertilizer industry must consume some natural gas, but it only consumed 4.7 percent of Russian natural gas, and thus, there was not de facto specificity. Id. at 12.

[2] Bethlehem Steel Corp. v. United States, 25 CIT 307, 322, 140 F. Supp. 2d 1354, 1369 (2001).

Under 19 U.S.C. § 1677(5A)(D)(iii), a subsidy is de facto specific if one or more of the following factors exist: (1) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number; (2) the enterprise or industry is a predominant user of the subsidy; (3) the enterprise or industry receives a disproportionately large amount of the subsidy; and (4) the manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others. 19 U.S.C. § 1677(5A)(D)(iii). "Because neither 'dominant' nor 'disproportionate' are defined in the relevant statute, [the court] is obligated to defer to Commerce's reasonable interpretation thereof." Bethlehem Steel, 25 CIT at 322, 140 F. Supp. 2d at 1369.

In Bethlehem Steel, the court found that it was reasonable for Commerce to consider an industry's relative usage of an alleged subsidy program in determining whether the industry was a "dominant" or "disproportionate" user of the program. Id. The alleged subsidy program at issue in Bethlehem Steel provided discounted electricity to large users that curtailed their usage by at least 20 percent during designated times. Id. at 1367. The court stated that although the Korean "steel industry received over 51 [percent] of the [] benefits [of the subsidy program], . . . there is nothing in the record to indicate this percentage was disproportionately higher than would be expected." See id. at 1369 (concluding that the large consumption of energy was inherent in the Korean steel industry; therefore, the discounted rate per unit resulted in a significant benefit overall). The court thus sustained Commerce's determination that the steel industry's usage was neither dominant nor disproportionate if indeed it was a subsidy. Id.

In its IDM here, Commerce affirmed its preliminary finding that the provision of natural gas for LTAR program was de facto specific. See IDM at 44–45; PDM at 12. Commerce asked

the GOR to provide purchase data for natural gas based on industrial classification, and the GOR responded that it did not maintain the requested statistics but referred Commerce to Gazprom's 2019 annual report. See Initial Qnaire at Section II, Provision of Natural Gas for LTAR (Questions Regarding the Natural Gas Industry, Question 8); GOR 2d SQR at 4–5. The report indicated that the agrochemical industry consumed 4.7 percent of all Russian natural gas provided in 2019. GOR 2d SQR at 4–6. The report showed that electricity, communal services, and households used greater amounts of natural gas, but in relation to other industrial uses the agrochemical industry used significantly more than any other industry. Id. at 6.[3]

In its final determination, Commerce relied on the annual report to conclude that the agrochemical industry was a predominant user of the subsidy because the agrochemical sector was the single largest industrial consumer of natural gas sold by Gazprom. See IDM at 44. Commerce explained that the next three largest industries accounted "for a small percentage less than half that of the agro-chemical industry." Id. Commerce excluded the natural gas consumption by households, services, and electricity because they were not industrial users. Id. Commerce explained that, when compared to other industrial users of natural gas, the

[3] Gazprom sold a total of [[ ]] million cubic meters of natural gas to Russian consumers in 2019. GOR 2d SQR at 6. Gazprom sold the Russian agrochemical industry [[ ]] million cubic meters of natural gas. Id. Electricity, households, and communal services purchased [[ ]], [[ ]], and [[ ]] million cubic meters respectively. Id. The agro-industrial complex purchased [[ ]] million cubic meters. Id. The oil industry, metallurgical industry, cement industry, and petrochemical industry purchased [[ ]], [[ ]], [[ ]], and [[ ]] million cubic meters respectively. Id. All other industries purchased [[ ]] million cubic meters. Id.

agrochemical industry used a predominant amount and, thus, the subsidy was de facto specific. Id.

Here, substantial evidence supports Commerce's determination that the provision of natural gas was de facto specific. Although the agrochemical industry purchased only a small percentage of Gazprom's total natural gas sales, that ratio included a comparison of all industrial and household, electrical, and communal services purchases. See GOR 2d SQR at 4–6. Commerce has discretion to determine what predominant means in the context of § 1677(5A)(D)(iii), and it reasonably chose to exclude certain users in order to evaluate predominate industrial use. See IDM at 44; Bethlehem Steel, 25 CIT at 322, 140 F. Supp. 2d at 1369. When comparing only industrial users' purchases, the record reflects that the agrochemical industry purchased a far greater amount than any other industrial user, perhaps because of the specific uses here of natural gas, not just for power, but in the production of ammonia (a component in the production of phosphate fertilizer) and fertilizer. See EuroChem 1st SQR at 8–9; GOR 2d SQR at 4–6. Thus, the agrochemical industry was "a predominant user of the subsidy." See 19 U.S.C. § 1677(5A)(D)(iii)(2). EuroChem wrongly points to Bethlehem Steel for support because it is distinguished by the kind of program at issue there (encouragement of off-hours electricity usage) and how increased consumption was part of the inherent nature of the program. See Bethlehem Steel, 25 CIT at 320, 140 F. Supp. 2d at 1367. Substantial evidence supports Commerce's de facto specificity determination here.

III. Natural Gas Benchmark Analysis

To calculate the benefit for the ad valorem subsidy rate, Commerce utilized a tier-three benchmark to assess the unsubsidized value of natural gas used by EuroChem and PhosAgro.

The parties argue that Commerce's use of tier-three benchmark, sourced from European Organisation for Economic Co-operation and Development ("OECD") natural gas export prices, was unlawful and unsupported by substantial evidence because: (1) Commerce should have used actual transaction prices in Russia as a tier-one benchmark, see PhosAgro Br. at 16–24; EuroChem Br. at 13–17; (2) Commerce erred by using OECD natural gas prices because they did not reflect prevailing market conditions and the information submitted by Plaintiffs was more accurate, see PhosAgro Br. at 26–31; EuroChem Br. at 17–23; and (3) Commerce did not properly adjust the selected benchmark, see PhosAgro Br. at 31–32; Mosaic Br. at 35–38.

A foreign government's provision of goods to a respondent for LTAR constitutes a benefit. 19 U.S.C. § 1677(5)(E)(iv). In such circumstances, Commerce determines the amount of the subsidy by comparing remuneration actually paid to a market-determined price for the goods or services, under "a three-tiered hierarchy" employed by Commerce "to determine the appropriate remuneration benchmark." Changzhou Trina Solar Energy Co. v. United States, 42 CIT __, __, 352 F. Supp. 3d 1316, 1332 (2018) ("Changzhou I"); see 19 C.F.R. § 351.511(a)(2)(i)–(iii).

The Brattle Report, submitted by the Plaintiffs, provided data proposed to be used as a benchmark price for natural gas from independent Russian natural gas producers. See Letter from Crowell & Moring to Sec of Commerce Pertaining to PhosAgro and EuroChem Benchmark Data at App. 2, P.R. 279, C.R. 464 (Nov. 2, 2020) ("Brattle Report"). The Brattle Report contained prices compiled from actual transactions in Russia during the POI. See id. at v. The Brattle Report stated that Gazprom's prices were higher than those of the unregulated Russian market, which it also stated were equal to or higher than regional European prices, and thus

consistent with market principles. Id. at v, viii. It concluded that the independent gas producers exerted market pressure on Gazprom. Id. at vi. The Brattle Report identified Rosneft as one of the two largest independent gas suppliers. Id. at v.

Mosaic, for its part, proposed International Energy Agency ("IEA") data regarding OECD and European countries' natural gas prices as a benchmark. Letter from Wilmer Hale Pickering Hale and Dorr LLP to Sec of Commerce Pertaining to Mosaic Benchmark Submission, Mosaic Russia at Ex. 14, Part II.B, P.R. 245 (Nov. 2, 2020) ("Petitioner's Benchmark Submission").

In its decision, Commerce determined that it was unable to rely on tier-one or tier-two benchmarks. See IDM at 49–52. First, in its analysis, Commerce reasoned that the market was distorted because the GOR provided "the majority, or a substantial portion of the market," when a substantial portion of the domestic production was attributable to companies the GOR directly or indirectly managed and Gazprom itself accounted for a majority of the production. Id. at 49. Commerce specifically noted that, in 2019, "Gazprom alone produced 68 percent of the natural gas consumed in Russia." Id. The GOR stated that there was a regulated and unregulated market. Id. Commerce, however, found that the regulated market "account[ed] for a majority of the domestic natural gas market," and only two percent of domestic consumption came from imported natural gas. Id. Commerce cited record evidence that the GOR made significant interventions into the market through a value added tax ("VAT") of 20 percent, an import tariff of 5 percent, an export duty of 30 percent, and by giving Gazprom the exclusive right to transport and export natural gas. Id. Commerce thus concluded that Russian prices could not be considered market-determined prices. Id. at 49–50. Commerce also stated that a tier-two

benchmark was not possible because the Russian natural gas pipelines were not capable of conveying imports into Russia. Id. at 51–52.

Next, Commerce moved through a tier-three analysis based on the OECD natural gas prices because any data from the Russian market was distorted, including unregulated private market. Id. at 53–54. Commerce explained that the OECD data was clearly related to industry use. Id. at 54. Commerce also explained that it did not use the Brattle Report because it was prepared at the request of the respondents for the investigation, did not contain the original source documentation or the methodology, and had not been used as a benchmark before, making it less reliable in comparison to the previously used benchmark source. Id. Regarding the OECD natural gas prices, Commerce did not remove sales of natural gas from Russia in Europe from the data because there was no record evidence of market distortion in Russian sales to European countries. Id. at 56. Finally, Commerce added VAT and import duties to the benchmark price in order to reflect the price a firm would pay if it imported natural gas from Europe into Russia. Id. at 57.

A. Tier-One Benchmark

Plaintiffs argue that Commerce erred in not employing a tier-one benchmark because supply and demand affected the Russian market, reflecting that actual transactions would have been the most reasonable benchmark. See PhosAgro Br. at 16–17; EuroChem Br. at 13–17. Further, Plaintiffs assert that Commerce erred by applying a "per se" rule of market distortion due to a government-owned supplier constituting a substantial portion of the market. See EuroChem Br. at 13–15. Plaintiffs contend that Commerce should have relied on the private market prices, those reported in the Brattle Report or prices otherwise available, because they are

not distorted, are lower than the Gazprom rates, and are independent from the GOR. See PhosAgro Br. at 24–26; EuroChem Br. at 16–17.

Commerce derives a tier-one benchmark "by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question." 19 C.F.R. § 351.511(a)(2)(i). Government involvement "will normally be minimal unless the government provider constitutes a majority or, in certain circumstances, a substantial portion of the market." Countervailing Duties, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998) ("Preamble"). If so, then Commerce may reasonably "conclude that actual transaction prices are significantly distorted as a result of the government's involvement in the market," and decline to apply a tier-one benchmark. Id. Commerce cannot, however, apply "what amount[s] to a per se rule of market distortion" after finding a government "controlled a substantial portion of the market." Maverick Tube Corp. v. United States, 857 F.3d 1353, 1362 (Fed. Cir. 2017) (discussing that the record evidence only established that a government authority accounted for a substantial portion of the market, not a majority of the market).

In Archer Daniels, the court upheld Commerce's rejection of a tier-one benchmark where the government controlled 56 percent of production and there was an export tax. See Archer Daniels, 37 CIT at 765–72, 917 F. Supp. 2d at 1339–45. And in Guangdong Wireking, the court upheld Commerce's finding of market distortion where the government controlled 47.97 percent of production, imports comprised only 1.53 percent of the market, and there was an export tax. See Guangdong Wireking, 37 CIT at 338–40, 900 F. Supp. 2d at 1380–82.

Similarly, here Commerce reasonably determined that GOR influence sufficiently distorted the Russian natural gas market to preclude identifying a market-based price for the

purposes of a tier-one benchmark. See IDM at 49. Government-owned or managed companies produced a majority of natural gas in 2017, 2018, and 2019, reflecting that the GOR played a significant role in the market. See GOR IQR at 42–44.[4] Contrary to Plaintiffs' arguments, however, Commerce did not rely exclusively on the amount of government production or create a per se rule. Compare EuroChem Br at 13–15, with IDM at 49. Commerce relied on record evidence showing that, in 2017, 2018, and 2019, 98 percent of Russian domestic consumption of natural gas came from Russian production. See GOR IQR at 43; see also IDM at 49. During the POI, Gazprom also held the exclusive right to transport and export natural gas, meaning that non-government producers could only sell to the Russian market, and the GOR imposed a VAT of 20 percent, import tariffs of 5 percent, and export duties of 30 percent. See IDM at 49–50; see also GOR IQR at 54–55. Substantial evidence supports Commerce's explanation that these restrictions would distort the Russian market because government authorities controlled the majority of the market and there existed restrictions on private natural gas companies. See Preamble, 63 Fed. Reg. at 65,377; Borusan Mannesmann Boru Sanayi ve Ticaret A.S. v. United States, 39 CIT __, __, 61 F. Supp. 3d 1306, 1327 (2015). Thus, Commerce did not err in disregarding sales data for natural gas from private Russian companies.

PhosAgro more specifically argues that Commerce should have accepted data about private Russian producers in the Brattle Report as a tier-one benchmark. See PhosAgro Br. at 24–26. Commerce, however, rejected the data in the Brattle Report and found it not "useable in

[4] Specifically, GOR companies produced [[ ]] billion cubic meters of natural gas in 2017, 2018, and 2019, respectively, when the total volume of domestic production was 691.1, 725.4, and 737.7 billion cubic meters for those corresponding years. See GOR IQR at 42–44.

the natural gas benchmark calculation" because PhosAgro had the report prepared for the investigation and it did not include the original documentation containing its sources, data, or methodology. See IDM at 54; see e.g., Brattle Report at 40–45. Commerce reasonably declined to use the data in the Brattle Report based on these flaws. Further, the Brattle Report's data on Russia's independent gas suppliers included Rosneft, contrary to Commerce's authority finding based on this record. See Brattle Report at v. Additionally, Commerce found the entire Russian natural gas market to be distorted, which would affect the independent gas suppliers as well. See IDM at 49. Thus, Commerce's decision not to rely on the data in the Brattle Report was reasonable as is its overall decision was not to use a tier-one benchmark.[5]

B. Tier-Three Benchmark

Plaintiffs argue that Commerce unlawfully rejected the data from the Brattle Report and the actual transactions in the private Russian market as a tier-three benchmark because private Russian companies operated on market principles. See PhosAgro Br. at 26–27. They also assert

[5] At oral argument, the court raised the issue of Commerce's treatment of the Brattle Report and any obligation to provide an opportunity to remedy deficits under 19 U.S.C. § 1677m(d). When Commerce determines requested information does not comply with a request, § 1677m(d) requires Commerce to inform the submitter of the deficit and provide an opportunity to remedy it. 19 U.S.C. § 1677m(d). Commerce argues that § 1677m(d) does not apply to benchmark submissions because they are not specifically requested in a questionnaire. Obviously, benchmark data is necessary to the LTAR determination and Commerce expects parties to provide it. Section 1677m(d) likely applies whenever a party has control of information that, if not provided, would result in a gap in the record. See id. Here, there is no gap in the record because benchmark data is not unique to respondents and Mosaic provided an acceptable alternative benchmark. See IDM at 54; see also Petitioner's Benchmark Submission at Ex. 14. Additionally, the Brattle Report contained numerous flaws, some of which could not be remedied by clarification of the missing sources, such as including Rosneft as an independent gas supplier when Commerce determined it was a government authority. See Brattle Report at v, 40–45; see also supra at 4–12. As a result, Commerce's treatment of the Brattle Report was not an improper disregard of § 1677(m).

that the IEA data was not reflective of prevailing market conditions because the prices were not available to Russian buyers, natural gas was difficult to import, and Russia was the lowest cost producer compared to the sources for the IEA data. See id. at 27–30. Finally, Plaintiffs contend that Commerce unnecessarily adjusted the benchmark upward to account for the European 20 percent VAT and Russian 5 percent import duty, which did not reflect prevailing market conditions in Russia, thus, the cost of importing natural gas and effectively double counted taxes already reflected in the benchmark. Id. at 31–32.[6] At the same time, Mosaic argues that Commerce erred by refusing to adjust the IEA benchmark by excluding Russian exports, which would be including alleged distorted prices, as Commerce did in Turkey Rebar[7]. See Mosaic Br. at 35–38.

In the absence of a tier-one benchmark, Commerce turns to a tier-two benchmark "by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question." 19 C.F.R. § 351.511(a)(2)(ii). "In measuring adequate remuneration under [tier-one benchmarks] or [tier-two benchmarks], [Commerce] will adjust the comparison price to reflect the price a firm actually paid or would pay if it imported the product." Id. § 351.511(a)(2)(iv). "If there is no world market price available to purchasers in the country in question," however, Commerce

[6] Plaintiffs do not meaningfully raise any challenge to Commerce's determination that there was no tier-two benchmark available. See PhosAgro Br. at 26.

[7] Steel Concrete Reinforcing Bar from the Republic of Turkey: Preliminary Results of Countervailing Duty Administrative Review; 2017, 84 Fed. Reg. 48,583 (Dep't Commerce Sept. 16, 2019) along with the accompanying Decision Memorandum for the Preliminary Results of Countervailing Duty Administrative Review: Steel Concrete Reinforcing Bar from the Republic of Turkey; 2017, C-489-830, POR 3/1/2017–12/31/2017 at 18, 23 ("Turkey Rebar IDM").

moves on to a tier-three analysis and "measures[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." Id. § 351.511(a)(2)(iii). If Commerce determines that the government price is not consistent with market principles it will look to construct an external benchmark. Canadian Solar Inc. v. United States, 45 CIT __, __, 537 F. Supp. 3d 1380, 1389 n.6 (2021). "It is within Commerce's discretion to weigh the relevant factors." Id. at 1391. "Commerce's goal in setting a benchmark rate is to best approximate the market rate … not to choose the rate respondents were most likely to pay" in a market Commerce finds is tainted by the government's interference. Changzhou I, 42 CIT at ___, 352 F. Supp. 3d at 1343.

"When Commerce is faced with the decision to choose between two alternatives and one alternative is favored over the other in [its] eyes, then [it has] the discretion to choose accordingly if [its] selection is reasonable." Timken Co. v. United States, 16 CIT 142, 147, 788 F. Supp. 1216, 1220 (1992) (internal citation omitted); see also Heze Huayi Chem. Co. v. United States, 45 CIT __, __, 532 F. Supp. 3d 1301, 1326 (2021) ("The record shows that Commerce exercised properly its broad discretion in selecting the best available information for the record from a reliable database."). Commerce may consider "other factors, such as price-setting and price discrimination (in a Tier 3 analysis), when market-based prices are unavailable." POSCO v. United States, 42 CIT __, __, 296 F. Supp. 3d 1320, 1356 (2018). The court has sustained Commerce's reliance on IEA European data in constructing a tier-three natural gas benchmark for Turkey. See Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. v. United States, 45 CIT __, __, 498 F. Supp. 3d 1345, 1371 (2021) (citing Rebar Trade Action Coal. v. United States, 43 CIT __, __, 389 F. Supp. 3d 1371 (2019)).

Here, Commerce's tier-three benchmark also is supported by substantial evidence. Commerce reasonably rejected the actual transaction prices in Russia as a tier-three benchmark for the same reasons as it rejected a tier-one benchmark. Specifically, Commerce reasonably determined the Brattle Report was unreliable and the Russian market was distorted. Regarding the IEA data, even where Commerce's explanation is "of less than ideal clarity," the court is obligated to "sustain a determination . . . where Commerce's decisional path is reasonably discernable." Rebar Trade Action Coal., 43 CIT at __, 389 F. Supp. 3d at 1381–82 (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). The IEA data was a reasonable benchmark selection because the data stated it was for industry users and would be comparable to natural gas for industrial use in Russia. See IDM at 54; Petitioner's Benchmark Submission at Ex. 15.

Further, Commerce reasonably declined to remove the Russian natural gas data from the IEA data for the benchmark. Commerce's explanation—that there was no evidence that natural gas produced in Russia and sold in Europe was distorted—was supported by substantial evidence. See IDM at 56. Commerce specifically distinguished the Turkey Rebar IDM because there was record evidence about Russian natural gas exports to Europe during that review that was not in the current administrative record. Id. The aim of the tier-three analysis was not to precisely estimate the price of natural gas, but to determine the market value for natural gas as consumed in Russia, relying on what data are available on the record. Commerce clearly explained its methodology in arriving at the tier-three benchmark, and the parties have not demonstrated that the record cannot reasonably be construed to support Commerce's determination.

Finally, Commerce may have erred in adjusting the benchmark price by adding the 20 percent VAT and 5 percent import duty. See IDM at 57. Commerce explained that it added "delivery charges and import duties" in order to "reflect the price that a firm actually paid or would pay if it imported the product." Id. This is the same language as § 351.511(a)(2)(iv), which expressly applies only to tier-one and tier-two benchmarks. See 19 C.F.R. § 351.511(a)(2)(iv). A tier-three benchmark, on the other hand, is used when "there is no world market price available," and reflects "market principles" in Russia. See id. § 351.511(a)(2)(iii). There appears to be no reason to treat the hypothetical market price here as an import price. Although the regulations give Commerce little guidance on how to conduct a tier-three analysis, it is important that Commerce's choices do not result in an unreasonable comparison between the benchmark price and the government price. It is unreasonable to rely only on a regulation pertaining to tier-one and tier-two benchmarks to adjust a tier-three benchmark price without some compelling reason. Further, the IEA benchmark price already included the European export VAT, and by adding the import costs, Commerce may have double counted VAT for the benchmark. See generally Petition Benchmark Submission at Ex. 14; see also IDM at 57 ("Therefore, to the monthly benchmark prices, we added import-specific VAT and the import duty in addition to the EU export VAT that was included in the IEA benchmark price to reflect the price that a firm would pay if it imported the product into Russia."). Thus, by trying to construct a tier-two type import price rather than a general market principle price under

tier-three, Commerce appears to have unlawfully added the 20 percent VAT and 5 percent import duty to the benchmark price.[8]

Accordingly, Commerce, in part, reasonably measured the adequacy of remuneration pursuant to 19 U.S.C. § 1677(5)(E)(iv) by using on IEA natural gas prices to constitute a tier-three benchmark. The court, however, remands to Commerce to remove the added VAT and import duties from the benchmark price or offer further explanation why, when tier-one and tier-two are rejected, it is reasonable to add additional VAT and import duties and why there is not double counting, particularly based on this record.

IV. Calculation of the Ad Valorem Subsidy Rate

At issue here is Commerce's calculation of the ad valorem subsidy rate and whether Commerce improperly inflated the rate. The ad valorem subsidy rate approximates the per unit manufacturing cost savings granted to the subject merchandise by dividing the benefit by the revenue generated from sales ("Total Sales").[9] Commerce calculates the benefit by subtracting the price actually paid for the input product from the benchmark price and multiplying the result by the number of units purchased. See 19 C.F.R. § 351.511(a)(2)(i) ("The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions . . . ."); see also IDM at 47–57. To calculate Total Sales for a domestic subsidy, Commerce finds the sales

[8] Note that as to the tier-three phosphate rock benchmark, Commerce made no similar adjustments for delivery charges or import duties. See infra at 39–41.

[9] See 19 C.F.R. § 351.525(a) ("The Secretary will calculate an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation or review by the sales value during the same period of the product or products to which the secretary attributes the subsidy under paragraph (b) of this section.").

value during the POI by summing the revenue from all sales external to a predefined group of companies which benefit from the subsidy. See 19 C.F.R. § 351.525(a). Delivery charges, surcharges, and taxes during the POI are included only as they relate to the costs and revenues of the company.

EuroChem contends that Commerce improperly inflated the ad valorem subsidy rate by adding VAT to the benchmark for the benefit but excluding VAT from the calculation of Total Sales.[10] In support of this contention, EuroChem cites Mannesmann-Sumerbank Boru Endustrisi T.A.S. v. United States which required Commerce to ensure both the benefit and Total Sales take into account "factors affecting value such as, in this case, inflation and foreign exchange movements." 23 CIT 1052, 1065, 86 F. Supp. 2d 1266, 1277 (1999); EuroChem Br. at 24.

EuroChem misunderstands the law. Mannesmann-Sumerbank applies to profits and losses that occurred as a result of changes in the foreign exchange rate during the POI, and other changes in value that depend on how Commerce choses to convert foreign currency into U.S. Dollars. See id. VAT does not fall into this category as it is a cost incurred rather than a factor affecting the exchange rate calculation. Furthermore, EuroChem's interpretation of Mannesmann-Sumerbank contradicts the plain reading of 19 C.F.R. § 351.511(a)(2)(iv) which adjusts tier-one and tier-two benchmark calculations to include VAT without adjusting the Total Sales calculation. If the benefit and the Total Sales are each calculated correctly, regardless of

[10] EuroChem does not contest the exclusion of delivery charges and surcharges from Total Sales despite their inclusion in the benefit.

costs included in one but not the other, then so is the ad valorem subsidy rate.[11] Thus Commerce did not err in this regard.

V. Commerce's Calculation of Total Sales

Commerce calculated the Total Sales for EuroChem and affiliates as part of its ad valorem subsidy rate calculation regarding the provision of natural gas for LTAR by the GOR. See PDM at 5. EuroChem presents three challenges to Commerce's calculation of Total Sales. First, EuroChem claims that Commerce should have collapsed the sales from all companies owned by Swiss parent company EuroChem Group ("Swiss EuroChem Group") as a single entity. See EuroChem Br. at 30. Second, EuroChem suggests that Commerce should have included external sales from two subsidiaries Commerce excluded from the calculation. See EuroChem Br. at 33–34. Finally, EuroChem claims that Commerce erred mathematically in the application of its stated methodology. See id.

19 C.F.R. § 351.525 instructs Commerce to "calculate an ad valorem subsidy rate by dividing the amount of the benefit allocated to the period of investigation . . . by the sales value during the same period of the product or products to which [Commerce] attributes the subsidy." TMK IPSCO v. United States, 41 CIT __, __, 222 F. Supp. 3d 1306, 1322 (2017) ("TMK IPSCO

[11] EuroChem also argues that Commerce erred in its calculation by not considering the "relative consumption of natural gas used in the production of subject merchandise." EuroChem Br. at 25 (citing IDM at 59–62). EuroChem interprets the statute wrongly. The regulations allow Commerce to attribute the subsidy to all input and downstream products produced by the company. See 19 C.F.R. § 351.252(5)(ii). As recently as 2021, the court has affirmed the practice, stating that it is "well-settled that Commerce is not required to examine the ultimate use of the subsidy." Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S., 45 CIT at __, 498 F. Supp. 3d at 1364 (citing Fabrique de Fer de Charleroi, SA v. United States, 25 CIT 567, 576, 166 F. Supp. 2d 593, 603 (2001)).

II") (citing 19 C.F.R. § 351.525(a)). To calculate Total Sales, or the sales value during the POI, the regulation generally requires Commerce to "attribute a subsidy to the products produced by the corporation that received the subsidy." 19 C.F.R. § 351.525(b)(6)(i).

Where Commerce finds cross-ownership between companies, § 351.525 provides specific guidance for Total Sales calculation. See id. § 351.525(b)(6). Cross-ownership "exists . . . where one corporation can use or direct the individual assets of the other corporation(s) in essentially the same ways it can use its own assets." Id. § 351.525(b)(6)(vi). This standard is typically met where the corporations share a majority voting interest or common ownership. See id.

Section 351.525 instructs Commerce how to calculate Total Sales given different relationships between cross-owned companies. See id. § 351.525(b)(6)(ii)–(iv). In the case of cross-owned subject merchandise producers, Commerce will "attribute subsidies received by either or both corporations to the products produced by both corporations." Id. § 351.525(b)(6)(ii). If the subsidy recipient is a holding or parent company, Commerce will "attribute the subsidy to consolidated sales of the holding company and its subsidiaries." Id. § 351.525(b)(6)(iii). If the subsidy recipient is an input supplier, Commerce will "attribute subsidies received by the input producer to the combined sales of the input and downstream products produced by both corporations (excluding the sales between the two corporations)." Id. § 351.525(b)(6)(iv).

If a subject merchandise producer is cross-owned with another company that neither produces the subject merchandise nor benefits from government subsidies, however, the non-benefitting corporation's sales do not factor into the total sales calculation. See generally id. §

351.525. Commerce employed this principle in Yama Ribbons, where Commerce calculated an ad valorem subsidy rate by attributing Chinese subsidies to the combined sales of two cross-owned subject merchandise producers, excluding sales by a Hong Kong affiliate that neither produced the subject merchandise nor benefitted from Chinese subsidies. See Yama Ribbons and Bows Co. v. United States, 36 CIT 1250, 1253–1254, 865 F. Supp. 2d 1294, 1298 (2012) ("Yama Ribbons").

Here, Commerce's stated methodology would correctly calculate Total Sales for EuroChem and affiliates in accordance with 19 C.F.R. § 351.525. The parties do not dispute that parent company Swiss EuroChem Group owns ten companies involved in the production, input supply, and distribution of the subject merchandise fertilizer. See PDM at 6–7; EuroChem Br. at 33; Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Cross Owned Affiliate QR at 7–8, P.R. 76, C.R. 25 (Aug. 18, 2020) ("EuroChem Affiliation Resp."). Mineral and Chemical Company EuroChem, JSC ("MCC EuroChem") holds and manages Russian assets for Swiss EuroChem Group. See PDM at 5; EuroChem Affiliation Resp. at 3. The three subject merchandise producers are EuroChem, EuroChem-BMU, LLC ("BMU"), and JSC Nevinnomyssky Azot ("Nevinka"). See PDM at 5; EuroChem Affiliation Resp. at 7.

Another five companies act as input suppliers for the subject merchandise producers. See PDM at 6; EuroChem Affiliation Resp. at 7. NAK Azot, JSC ("NAK Azot"); EuroChem Northwest, JSC ("EuroChem Northwest"); Joint Stock Company Kovdorksy GOK ("KGOK"); and EuroChem-Energo, LLC ("EuroChem Energo") sell inputs to EuroChem. See PDM at 6; EuroChem Affiliation Resp. at 3. EuroChem-Usolsky Potash Complex, LLC ("UKK") sells

inputs to BMU and Nevinka. See PDM at 6; Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to Eurochem Affiliates/Cross Owned QR at 2, P.R. 88 (Aug. 28, 2022). Finally, export trading company EuroChem Trading Rus, LLC ("Trading Rus") sells the Russian-produced fertilizer. See PDM at 6; EuroChem Affiliation Resp. at 2, 7.

First at issue is whether Commerce acted reasonably in declining to treat all subsidiaries of Swiss EuroChem Group as a collapsed entity in calculating Total Sales. EuroChem argues that Commerce unreasonably departed from its precedent in failing to do so. See EuroChem Br. at 30. EuroChem misunderstands the process required by 19 C.F.R. § 351.525(b). Although Commerce has attributed subsidies received by cross-owned affiliates to the collapsed sales of the combined corporate entity in previous determinations, collapsing the entirety of Swiss EuroChem Group in this case would be a misapplication of 19 C.F.R. § 351.525(b), which only calls for the collapsing of cross-owned affiliates related to the production and distribution of the subject merchandise.[12] See EuroChem Br. at 30–31; see, e.g., 19 C.F.R. § 351.525(b)(6)(iii) (excluding parent companies from the calculation of Total Sales if the company merely served as a conduit for the transfer of the subsidy from the government to a subsidiary); see also

[12] EuroChem also cites Ta Chen Stainless Steel Pipe as an example of Commerce's supposed pattern of treating companies as collapsed entities in sales denominator calculations. See EuroChem Br. at 30; Ta Chen Stainless Steel Pipe, Ltd. v. United States, Slip Op. 990117, 1999 WL 1001194, at *4 (CIT Oct. 28, 1999). In that case, the court affirmed Commerce's finding that two Taiwanese companies were affiliated for purposes of antidumping duties under 19 U.S.C. § 1677(33). Id. at *11. The court looked to evidence of shared control over subject merchandise production and pricing. Id. at *4. Although EuroChem cites this case as evidence that Commerce has long treated entities that "in substance and reality" operate as one company as a single entity, EuroChem's reliance is misplaced. EuroChem Br. at 30. Ta Chen does not concern subsidy calculations and is further distinguished on the issue of shared control of production. See Ta Chen Stainless Steel Pipe, Ltd., 1999 WL 1001194 at *4.

Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination, 81 Fed. Reg. 49,935 (Dep't Commerce July 29, 2016) ("Russia Cold-Rolled Steel"), and accompanying Issues and Decision Memorandum, Countervailing Duty Investigation of Certain Cold-Rolled Steel Flat Products from the Russian Federation: Issues and Decision Memorandum for the Final Determination, C-821-823, POR 1/1/2014-12/31/2014 at 10–11 (Dep't Commerce July 29, 2016) (applying 19 C.F.R. § 351.525(b)(6)(iii) to combine sales from a parent company and subsidiaries).

EuroChem further suggests that despite its legal divisions, Swiss EuroChem Group functions as a single entity, and it is thus unreasonable for Commerce to calculate Total Sales without including sales by all Swiss EuroChem Group subsidiaries. See EuroChem Br. at 30. Commerce responds that including sales by non-Russian Swiss EuroChem Group subsidiaries would be unreasonable, as these companies do not benefit from GOR subsidies. See IDM at 64. Commerce clearly explains the irrelevance of sales by Swiss EuroChem Group subsidiaries in countries like Lithuania and Kazakhstan—"Commerce is not investigating subsidies to entities outside of Russia, nor is Commerce investigating whether sales of subject merchandise to third countries are unfairly subsidized." IDM at 64; see EuroChem Affiliation Resp. at 7. In fact, excluding Swiss EuroChem Group's non-Russian affiliates from Total Sales aligns Commerce with its analysis in Yama Ribbons and with 19 C.F.R. § 351.525(b)'s mandate that Commerce generally attribute subsidies to the sales of subsidy recipients. See Yama Ribbons, 36 CIT at

1253–54, 865 F. Supp. 2d at 1298; 19 C.F.R. § 351.525(b)(6)(i).[13]

Finally at issue is whether Commerce erred in its mathematical calculation of Total Sales. See EuroChem Br. at 33–34. Commerce explains that it calculated Total Sales by combining all sales by the subject matter producers and input suppliers, minus intercompany sales among the eight subject matter producers and input suppliers, as required by 19 C.F.R. § 351.525(b)(6)(ii) and (iv). See PDM at 5–6. Commerce also confirms that according to its methodology MCC EuroChem and Trading Rus did not receive subsidies and should not be included in the calculation. See id. The court takes no issue with Commerce's asserted methodology. Nevertheless, Commerce's calculations do not reflect this methodology. In the calculation of intercompany sales, Commerce wrongly relied on a number provided by EuroChem that included sales from the eight subject matter producers and input suppliers to Trading Rus. See IDM at 8 (citing Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Suppl QR, P.R. 332, C.R. 494 (Dec. 8, 2020)). This inclusion failed to follow Commerce's stated methodology and artificially increased the ad valorem rate by subtracting the sales to Trading Rus from the total rather than adding them as external sales. In a letter to the court, Commerce confirmed this error. See Def.'s Resp. to the Ct.'s Post-Oral Arg. Questions at 2–3, ECF No. 91 (Aug. 10, 2022).

[13] EuroChem also argues that Commerce should have calculated Total Sales using the collapsed sales of two additional Swiss EuroChem Group subsidiaries, MCC EuroChem and Trading Rus. See EuroChem Br. at 30. Neither of these two affiliates received a benefit from GOR subsidies. See generally Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Sec III QR at 29, P.R. 114, C.R. 44 (Sept. 24, 2020) ("EuroChem IQR); see also PDM at 5–6. Thus, there is no benefit to attribute. See 19 C.F.R. § 351.525(b)(6)(iii), (c). Accordingly, Commerce reasonably declined to treat these subsidiaries as part of a collapsed entity.

Accordingly, although Commerce need not alter its stated methodology for calculating Total Sales, the court remands for Commerce to provide a correct Total Sales number and explanation of its calculation.[14]

VI. Refusal to Countervail Some Phosphate Mining Rights Licenses

Mosaic argues that Commerce should have countervailed all benefits for mining rights licenses issued by the GOR to EuroChem, cross-owned with KGOK and PhosAgro, cross-owned with JSC Apatit. See Mosaic Br. at 23; GOR IQR at Ex. II–1. KGOK reported receiving [[ ]] phosphate mining licenses in [[ ]], and JSC Apatit reported receiving [[ ]] licenses between [[ ]], [[ ]] in [[ ]], and [[ ]] in [[ ]]. Response from Squire Patton Boggs (US) LLP to Sec of Commerce Pertaining to EuroChem Sec III QR at 29, P.R. 114, C.R. 44 (Sept. 24, 2020); Response from Crowell & Moring LLP to Sec of Commerce Pertaining to PhosAgro Sec III QR at 9–12, P.R. 115, C.R. 45 (Sept. 24, 2020).

Commerce determined that it could not measure subsidies in the Russian economy before April 1, 2002, the date on which Russia was designated a market economy ("ME"). See IDM at 23; Russia Cold-Rolled Steel, 81 Fed. Reg. at 49,935, and accompanying memorandum, Market Economy Status for the Russian Federation, C-821-823, POR 1/1/2014-12/31/2014 (Dep't Commerce Sept. 14, 2015) ("ME Status for the GOR Memo"). Accordingly, Commerce declined to countervail [[ ]] of the licenses. See IDM at 24. Commerce further determined

[14] It is unclear whether this issue was completely exhausted before the agency. Exhaustion may have been waived. Further, as this matter is remanded for various reasons there is no point in perpetuating an error. Here, interests of finality would not be advanced.

that the benefits from the licenses could not be accounted for in the CVD calculations as the license had not undergone material alterations following the cut-off date. Id. at 24–25. Mosaic claims that Commerce's decision not to countervail benefits from all licenses deprived them of substantial relief, as JSC Apatit and KGOK mined [[ ]] tons of ore respectively during the POI. See Mosaic Br. at 27.

Mosaic challenges Commerce's cut-off date methodology on two primary grounds. See id. at 23–30. First, Mosaic argues that Commerce's cut-off date is inapplicable under these facts, as Commerce could identify and measure subsidies using the same methodology it utilized for the sole active license granted after the cut-off date. See id. at 23–26. Second, Mosaic argues that even if a cut-off date were appropriate, Commerce did not provide substantial evidence that it could only identify and measure subsidies in the Russian economy after April 1, 2002. See id. at 26–30. The application of a selected cut-off date may in fact be reasonable, but Commerce has not produced sufficient evidence in support of the date chosen or a viable explanation of the date's applicability to recurring benefits.[15]

In 2012, Congress amended Section 701 of the Tariff Act of 1930 to require that Commerce impose countervailing duties on merchandise imported from NME countries. See 19

[15] Mosaic further contends that the licenses at issue all materially changed following the cut-off date such that each license confers new and thus countervailable subsidies. See Mosaic Br. at 28–30. Commerce and the GOR concede that licenses underwent auto-renewals, technical changes such as [[ ]], and in one case, [[ ]]. See Response from Mayer Brown, LLP to Sec of Commerce Pertaining to Ministry 1st Suppl QR at 78, P.R. 234, C.R. 445 (Oct. 29, 2020); EuroChem IQR at 31–32. Because the court does not accept Commerce's cut-off date explanation in this case, the court is not required to decide today whether these changes are sufficient to constitute new agreements.

U.S.C. § 1671(f)(1). Commerce is only relieved of imposing CVDs where it cannot "identify and measure" subsidies because the NME country's economy is "essentially comprised of a single entity." Id. § 1671(f)(2). Following that amendment, the court has only permitted Commerce to apply a cut-off date given evidence of reforms permitting the identification and measurement of specific types of subsidies in a NME country. In TMK IPSCO, the court required Commerce to provide specific evidence justifying its use of the People's Republic of China's ("PRC") accession to the World Trade Organization as the cut-off date for applying CVD law. See TMK IPSCO v. United States, 40 CIT __, __, 179 F. Supp. 3d 1328, 1343 (2016) ("TMK IPSCO I"), aff'd on remand, TMK IPSCO II, 41 CIT at __, 222 F. Supp. 3d at 1314. Remanding for further explanation, the court required Commerce to "allocate subsidies beginning on the first date it could identify and measure the subsidy considering the particular program in question" and to identify "the impact of relevant economic reforms on that program." TMK IPSCO I, 40 CIT at __, 179 F. Supp. 3d at 1344.

The court subsequently upheld Commerce's cut-off dates when Commerce identified four types of subsidies and specific economic reforms that made each type identifiable and measurable. TMK IPSCO II, 41 CIT at __, 222 F. Supp. 3d at 1314–15. Commerce noted that the PRC's 1994 Company Law permitted private actors to freely participate in commercial activity, allowing Commerce to measure grant program subsidies in the Chinese economy. Id. at 1314. Commerce further identified laws passed in 1994, 1996, and 1999 that created unique cut-off dates for the measurement of credit, tax, and land-oriented subsidies. Id. at 1314–15. In so doing, the court held that Commerce fulfilled its duty under § 1671(f) by "articulat[ing] a rational relationship between specific legal reforms in China and the effect of such reforms on

Commerce's ability to identify and measure subsidies." Id. at 1314. Thus, although Commerce has "significant discretion in determining whether it can identify and measure subsidies . . . within the NME country," the court only found Commerce's cut-off date analysis reasonable after Commerce provided evidence of legal reforms impacting specific programs. See id. at 1313. Thus, with countries partially or fully transitioned to ME status, the issue is the measurability of particular subsidies.

Here, Commerce asserts that it cannot identify or measure mining rights subsidies from licenses granted prior to Russia's designation as a ME country "notwithstanding any methodology." See IDM at 24. This is plainly incorrect. There is no legal impediment to calculating subsidies for previously designated NME countries. Further, in measuring the subsidies that KGOK received from its only active mining license granted after the cut-off date, Commerce did not rely on the amount of KGOK's initial financial contribution at the time the license was granted, admittedly post-NME status. See IDM at 26. Instead, Commerce treated the license as a recurring subsidy because KGOK benefitted each year from its GOR-subsidized mining license.[16] See id. Thus, Commerce calculated the benefit that KGOK received using

[16] 19 C.F.R. § 351.524(c)(1) provides examples of recurring and non-recurring benefits, including the provision of goods and services for LTAR. See 19 C.F.R. § 351.524(c)(1). Commerce has historically treated mining rights as recurring subsidies as they confer an underlying good in the form of natural resources. See, e.g., Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review, 73 Fed. Reg. 40,295 (Dep't Commerce July 14, 2008), and accompanying Issues and Decision Memorandum, C-533-821, POR 1/1/06-12/31/06 at Comment 24 (Dep't Commerce July 14, 2008); Phosphate Fertilizers from the Kingdom of Morocco: Final Affirmative Countervailing Duty Determination, 86 Fed. Reg. 9,482 (Dep't Commerce Feb. 16, 2021), and accompanying Issues and Decision Memorandum for the Final Affirmative Determination of the Countervailing Duty Investigation of Phosphate Fertilizers from the Kingdom of Morocco, C-714-001, POR

evidence of "the actual per-unit cost build-up of KGOK's beneficiated phosphate rock" during the POI. See id. By Commerce's own logic, its methodology did not assume that KGOK received the license in a market-based auction, suggesting that Commerce can use the same methodology regardless of whether the mining licenses were granted under claimed market-economy principles. See id. at 17. Commerce can therefore identify and measure subsidies from all mining licenses in this way, regardless of whether the licenses were granted prior to its cut-off date. See id. Commerce's failure to do so contravenes 19 U.S.C. § 1671 and, to the extent it applies, § 1671(f)(1).

Furthermore, even if Commerce's cut-off date were applicable to the recurring subsidies at issue, Commerce's chosen cut-off date is unsupported by substantial evidence because there are no citations to specific reforms that justify the chosen cut-off date. See IDM at 24; TMK IPSCO II, 41 CIT at __, 222 F. Supp. 3d at 1314. Commerce does cite specific legal reforms underlying its determination that Russia became a ME country on April 1, 2002. See IDM at 23–24; see generally ME Status for the GOR Memo. For example, Commerce notes that the 2002 tax code revision boosted the earning potential of private businesses, and the 2002 labor code further liberalized wages and the market. See ME Status for the GOR Memo at 10–14. Nowhere in its support of this ME cut-off date, however, does Commerce reference legal reforms permitting the measurement of mining rights or similar subsidies in the Russian economy. See id.; IDM at 23–24. Although Commerce does explain that the 2001 Law on Privatization led to the denationalization of state-owned monopolies, the GOR merely leases ore-rich land for

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1/1/2019-12/31/2019 at Comment 8 (Dep't Commerce Feb. 16. 2021); Russia Cold-Rolled Steel, 81 Fed. Reg. at 49,935, and accompanying Issues and Decision Memorandum at Comment 9.

private companies to mine in this case—land privatization is inapplicable to these facts. See ME Status for the GOR Memo; see generally IDM. Thus, unlike in TMK IPSCO II where Commerce "articulated a rational relationship between specific legal reforms in China and the effect of such reforms on Commerce's ability to identify and measure subsidies," Commerce here fails to provide substantial evidence in support of its cut-off date considering the "particular type of subsidy" at issue. See TMK IPSCO II, 41 CIT at __, 222 F. Supp. 3d at 1314; IDM at 23–24.

The court finds that Commerce's cut-off methodology is inapplicable to the facts of this case, as Commerce can identify and measure subsidies from all mining rights using the same methodology applied to the lone analyzed mining license. Additionally, Commerce failed to provide substantial evidence supporting its decision to treat the date of Russia's ME designation as a cut-off for CVD law applicability. If Commerce needs to apply a cut-off date for the application of CVD law, Commerce must reference specific legal reforms that permit the identification and measurement of mining rights subsidies in the relevant state's economy. The court remands for Commerce to either abandon its cut-off date methodology or to explain why it is unable to countervail recurring subsidies from the contested licenses granted by the GOR prior to its designation as a ME.

VII. Mining Rights for Phosphate Rock Benchmark

Mosaic takes issue with Commerce's tier-three benchmark for phosphate rock. It argues that Commerce erred in refusing to adjust the benchmark price for the delivered prices including freight, import duties, and VAT. Mosaic Br. at 30–32. Mosaic asserts that there is no reasonable justification for not applying delivery charges through 19 C.F.R. § 351.11(a)(2)(iv) to a tier-three

benchmark when the benchmark is based on world market prices, in essence a tier-two benchmark. Id. at 32. It contends that Commerce's reasoning for refusing to use delivered prices was inapposite because the fact that KGOK did not itself purchase phosphate rock did not affect the benchmark calculation. Id. at 33.

As discussed above, Commerce applies a tier-three benchmark when "there is no world market price available" and instead "measures[s] the adequacy of remuneration by assessing whether the government price is consistent with market principles." 19 C.F.R. § 351.511(a)(2)(iii). Commerce "will adjust" benchmark prices to include "delivery charges and import duties" for tier-one and tier-two benchmarks. Id. § 351.511(a)(2)(iv).

In the post-preliminary decision memorandum, Commerce explained that it could not apply a tier-two benchmark for mining licenses because they were not goods that lent themselves comparison to a world market price. Decision Memorandum for the Post-Preliminary Analysis of the Countervailing Duty Investigation of Phosphate Fertilizers from the Russian Federation, C-821-825, POR 1/1/2019-12/31/2019 at 6–7 (Dep't Commerce Dec. 21, 2020) ("PPDM"). Commerce further explained that it could consider "world market prices for the underlying good that is conveyed with the mining rights, i.e., phosphate, under a 'tier three' anlaysis [sic]." Id. at 7 (emphasis in original). Thus, in its final determination, Commerce applied a tier-three benchmark comparing "the actual per-unit cost build-up of KGOK's beneficiated phosphate rock, inclusive of all taxes paid," to the "world market price of comparable phosphate rock." IDM at 26. Commerce used data submitted from Global Trade Atlas and UN Comtrade to determine the price of phosphate rock. Id. at 25–26. Commerce declined to adjust the benchmark to include freight, VAT, and import duties because KGOK did not purchase the

phosphate rock from a world market and would not have paid similar fees in the production of phosphate rock. Id. at 26–27.

Here, Commerce's exclusion of freight, VAT, and import duties appear reasonable and supported by substantial evidence. The regulations only require Commerce to include delivery charges and import duties for tier-one and tier-two benchmarks. See 19 C.F.R. § 351.511(a)(2)(iv). Although here the tier-three benchmark relies on world market prices for phosphate rock, Commerce reasonably distinguished its analysis from that of a true tier-two benchmark because KGOK never purchased phosphate ore. See IDM at 26–27; PPDM at 7. Commerce used the world market price merely to determine a reasonable price for the phosphate rock KGOK actually mined, and Commerce declined to use the benchmark to estimate what KGOK would have paid to import phosphate rock. See 19 C.F.R. § 351.511(a)(2); IDM at 26–27. In that light, Commerce was using the benchmark to compare the Russian price with prices established by market principles. Thus, Commerce was applying a tier-three benchmark only; § 351.511(a)(2)(iv) did not apply; and freight, VAT, and import duties did not need to be included. Accordingly, Commerce's determination regarding the benchmark for the mining rights appears to be supported by substantial evidence. On remand, however, if Commerce continues to add VAT and import duties to the natural gas benchmark, for a product that is not imported, Commerce must also explain why the methodology should be different for the phosphate rock benchmark.

CONCLUSION

The court sustains Commerce's determination regarding Rosneft as a government authority and the de facto specificity finding, and utilization of a tier-three benchmark for natural

gas. For the foregoing reasons, the court remands to Commerce for a determination consistent with this opinion on certain calculation issues and with regard to the phosphate rock input. The remand shall be issued within 60 days hereof. Comments may be filed 30 days thereafter and any response 15 days thereafter.

/s/ Jane A. Restani
Jane A. Restani. Judge

Dated: September 2, 2022
New York, New York