Slip Op. 05–29

TIANJIN TIANCHENG PHARMACEUTICAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

BEFORE: Pogue, Judge
Consol. Court No. 03–00654
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record denied; judgment entered for Defendant.]

Decided: March 9, 2005

Lafave & Sailer LLP (*Francis J. Sailer* & *Arthur J. Lafave III*), for Plaintiffs.
Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Assistant Director, *Stephen C. Tosini*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *James K. Lockett*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

OPINION

POGUE, Judge: This action requires the Court to review certain determinations in the "new shipper" review of Plaintiff's imports of glycine from the People's Republic of China. Defendant, the U.S. Department of Commerce ("Commerce"), rescinded its review of Plaintiff's imports after concluding that the sale upon which the review was based was not *bona fide*. Because the Court finds that Defendant's conclusions are supported by substantial record evidence, the Court denies Plaintiff's motion and enters judgment for Defendant.

BACKGROUND

Commerce published an antidumping duty order on glycine from the People's Republic of China in 1995. *Glycine from the People's Republic of China*, 60 Fed. Reg. 16,116 (Dep't Commerce Mar 29, 1995) (antidumping duty order). An exporter may request a "new shipper review" of its products that are subject to an antidumping duty order

if it began shipment of the products after the order was imposed. *See* 19 U.S.C. § 1675(a)(2)(B) (2000). This statute enables the new shipper to demonstrate that it should be accorded a dumping rate specific to itself, and not the "all-others" rate, which is usually higher than a firm-specific rate would be.

In this case, Commerce received a request for a new shipper review from Plaintiff on March 29, 2002. Plaintiff refiled its request on May 1, 2002, after having been informed by Commerce that its original request did not comply with the applicable statutes and regulations. *See* Pl.'s Conf. Mem. Supp. R. 56.2 Mot. J. Agency R. at 2–3 ("Pl.'s Conf. Br."); Final Results of Determination Pursuant to Court Remand ("Remand Determ."), CRR Doc. No. 13 at 2 (Apr. 23, 2004).[1]

In response to a Commerce questionnaire issued pursuant to the new shipper review, Plaintiff indicated that on January 25, 2002, it sold 1000 kilograms of glycine to a U.S. importer of pharmaceuticals, denoted here for confidentiality purposes as Company X. The goods were sold at a price of [ ][2] per kilogram, and the accompanying customs documentation did not indicate that the goods were subject to antidumping duties. *See* Additional Copy of CF 7501, Sales Contract, Exs. S–1 & S–3 to Response of Tianjin Tiancheng Pharmaceutical Co., Ltd. to the Supplemental Questionnaire in the New Shipper Review of the Antidumping Duty Order on Glycine from the People's Republic of China, Attach. to Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *First Supplemental Questionnaire Response of Tianjin Tiancheng Pharmaceutical Co. Ltd. in the New Shipper Review of Glycine from the People's Republic of China*, CR Doc. No. 11 (Dec. 9, 2002).

In response to a supplemental questionnaire, Plaintiff disclosed that although payment on the sale to Company X had been due one month after the date of sale, the payment was not made until over nine months later. *See* Pl.'s Conf. Br. at 23–24. This was confirmed by Commerce during verification procedures. *See* Memorandum from Matthew Renkey & Scott Fullerton, Analysts, Office of AD/CVD Enforcement VII, to The File, Re: *New Shipper Review of Glycine from the People's Republic of China: Sales and Factors Verification Report for Tianjin Tiancheng Pharmaceutical Co., Ltd.*, CR Doc. No. 19 at 5 (Mar. 6, 2003). Commerce also ascertained that Company X had previously purchased products other than glycine from Plaintiff for im-

---

[1] The record in this case consists of the record amassed by Commerce prior to its first, voluntary remand, *see infra* p. 6, in both public and confidential formats, and the supplemental record which was created during the voluntary remand. The Court will cite to documents in the pre-remand record's confidential version as CR, followed by the document number. The Court will cite to documents in the confidential versions of the record on remand as CRR, followed by the corresponding document number.

[2] Throughout this opinion, brackets designate information held confidential by the parties and thus not publicly divulged by the Court.

portation. *See id.* Finally, Commerce learned that during the period corresponding to Plaintiff's sale into the United States, Plaintiff had sold the same product to a third-country market for [ ]. *See* October 10, 2001 Invoice, Spot Checks of Other Sales, Ex. 7. to CR Appendix 1.

Commerce then issued questionnaires to Plaintiff's importer, Company X. *See Glycine from the People's Republic of China*, 68 Fed. Reg. 49,434 (Dep't Commerce Aug. 18, 2003) (notice of rescission of antidumping duty new shipper review). The responses confirmed that the January 25, 2002 invoice was paid nine months after the invoice date. *See* Bank Statement 11/01/02 – 11/29/02, Attach. B to Glycine from PRC (A–570–836) Questionnaire Response, CR Doc. No. 25 (April 28, 2003) (showing that an international funds transfer from Company X to Plaintiff was made on Nov. 22, 2002.) Company X also reported that it had been late in making payment to Plaintiff on previous occasions, but that this transaction represented the longest delay. *See* Glycine from PRC (A–570–836); Questionnaire Response, CR Doc. No. 35 at Answer 3 (July 17, 2003). In response to questions about Customs irregularities, Company X averred that it had improperly filed documentation because its broker was unaware of the antidumping duties on the goods. *Id.* at Answer 2.

On August 18, 2003 Commerce rescinded Plaintiff's new shipper review. Commerce stated that it was taking this action because the questionnaire responses from both Plaintiff and its importer indicated that the sale upon which the review was based was not *bona fide* — that is, it was not typical of normal commercial transactions in the industry. Commerce based its finding that the sale was not *bona fide* on four considerations: (1) the price at which the goods were sold was not "commercially reasonable," (2) the sales were made outside Plaintiff's normal U.S. sales channels, (3) the extent to which late payment was made by Company X, the importer, and (4) inconsistencies in the import documentation. *See Glycine from the People's Republic of China*, 68 Fed. Reg. 49,434, 49,435 (Dep't Commerce Aug. 18, 2003) (notice of rescission of antidumping duty new shipper review).

Plaintiff consequently filed suit, seeking review of the determination to rescind the new shipper review. *See* Remand Determ., CRR Doc. No. 13 at 4 (Apr. 23, 2004). Plaintiff challenged Commerce's use of factual information upon which the parties had had no opportunity to comment in the determination to rescind. *Id.* at 4–5. On November 19, 2003, Commerce requested that the Court remand the determination so that the record could be reopened to allow the parties to comment on the two new pieces of factual information: (1) publicly available U.S. Customs and Border Protection ("Customs") data on average unit values for glycine and (2) proprietary data from a Customs query regarding U.S. imports of glycine from the People's Republic of China. *Id.* at 5.

After hearing comments and rebuttals from the parties, as well as after issuing a new questionnaire to Company X, Commerce issued a new determination. *See id.* at 34–35. In this new determination, Commerce found that Plaintiff's sale had not been *bona fide* for the same reasons stated in its earlier determination, except that Commerce now found that the sale had been within Plaintiff's normal U.S. sales channels. *Id.* Commerce still maintained, however, that the price, payment timing, and import documentation all revealed a sale that was not reflective of "normal commercial realities," such that it was not "a reliable indicator of future activity." *Id.* Therefore, Commerce found that the sale was not *bona fide* for purposes of a new shipper review. *Id.*

Plaintiff now challenges this remand determination before the Court.

STANDARD OF REVIEW

This Court reviews Commerce's determinations in antidumping duty proceedings, including new shipper reviews, to determine whether 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)(2000).

DISCUSSION

In conducting a new shipper review, Commerce is essentially conducting a new antidumping review that is specific to a particular producer. To conduct such a review, Commerce must determine the "normal value and export price (or constructed export price) of each entry of the subject merchandise." *See* 19 U.S.C. 1675(a)(2)(A). However, pursuant to the rulings of the Court, Commerce may exclude sales from the export price calculation where it finds that they are not *bona fide*. A sale is not *bona fide*, and therefore may be exluded from export price, where it is "unrepresentative or extremely distortive." *See Am. Silicon Techs. v. United States*, 24 CIT 612, 616, 110 F. Supp. 2d 992, 995 (2000) (quoting *FAG U.K. Ltd. v. United States*, 20 CIT 1277, 1282, 945 F. Supp. 260, 265 (1996)). Accordingly, where a new shipper review is based on a single sale, exclusion of that sale as non-*bona fide* necessarily must end the review, as no data will remain on the export price side of Commerce's antidumping duty calculation.

To determine whether a sale in a new shipper review is "unrepresentative or extremely distortive," and therefore excludable as non-*bona fide*, Commerce employs a "totality of the circumstances" test, *see* Memorandum from Joseph A. Spetrini, Deputy Assistant Sec'y for Imp. Admin. Group III, to James J. Jochum, Assistant Sec'y for Imp. Admin., Re: *Glycine from the People's Republic of China: the Bona Fide Issue in the New Shipper Review of Tianjin Tiancheng*

Pharmaceutical Co., Ltd. ("*Bona Fide* Memo")[3], CR Doc. No. 39 at 3 (Aug. 8, 2003), focusing on whether or not the transaction is "commercially unreasonable" or "atypical of normal business practices." *See Freshwater Crawfish Tail Meat from the People's Republic of China*, 68 Fed. Reg. 1,439, 1,440 (Jan. 10, 2003) (notice of final results of antidumping duty new shipper review, and final rescission of antidumping duty new shipper review); *see also* Remand Determ., CRR Doc. No. 13 at 34 (Apr. 23, 2004) (finding that the sale was not reflective of "normal commercial considerations"); *Bona Fide* Memo, CR Doc. No. 39 at 3 (Aug. 8, 2003) (finding that the value of and practices surrounding the sale were "atypical of normal, commercial transactions in the industry"). In evaluating whether a sale is commercially reasonable or not, Commerce has considered, *inter alia*, such factors as (1) the timing of the sale, (2) the price and quantity, (3) the expenses arising from the transaction, (4) whether the goods were resold at a profit, (5) and whether the transaction was at an arms-length basis. *See Am. Silicon Techs. v United States*, 24 CIT 612, 616 110 F. Supp. 2d 992, 995 (2000); *see also Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 224–25, 193 F. Supp. 2d 1303, 1307 (2002). However, because the ultimate goal of the new shipper review is to ensure that the U.S. price side of the antidumping calculation is based on a realistic figure, any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant. *See id.* Otherwise, the producer may unfairly benefit from an atypical sale to obtain a lower dumping margin than the producer's usual commercial practice would dictate. *See* Memorandum from Richard W. Moreland, Deputy Assistant Sec'y, Group I, to Faryar Shirzad, Assistant Sec'y for Imp. Admin., Re: *Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.*, available at http://ia.ita.doc.gov/frn/summary/prc/02-6076-2.txt (last accessed Feb. 28, 2005) (incorporated by reference into *Fresh Garlic from the People's Republic of China*, 67 Fed. Reg. 11,283, 11,283 (Dep't Commerce Mar. 13, 2002) (final results of antidumping administrative review and rescission of new shipper review.)

Turning to the particular sale at issue here, Plaintiff argues that Commerce's determination that its sale to Company X was not typical of its future sales to the U.S. is unsupported by substantial evidence. Specifically, Plaintiff argues that Commerce has not demonstrated, by substantial evidence, that (1) the price of its sale was atypical, (2) that the payment timing demonstrated that the sale was atypical, (3) that the inconsistencies in the import documentation demonstrate that the sale was atypical, or (4) that even to the

---

[3] This memorandum was incorporated by reference into Commerce's original detetermination. *See Glycine from the People's Republic of China*, 68 Fed. Reg. 49,434, 49,435 (Dep't Commerce Aug. 18, 2003).

extent that all three factors are shown, they constitute substantial evidence to support the determination that the sale was non-*bona fide*. The Court will address each contention in turn.

1. SUBSTANTIAL EVIDENCE SUPPORTS COMMERCE'S DETERMINATION THAT THE PRICE OF THE SALE SUPPORTED A FINDING THAT THE SALE WAS ATYPICAL.

In making its determination on the *bona fide* issue, Commerce relied on its finding that the price at which the product was sold was not typical of industry practice or of Plaintiff's own pricing practices. *See* Remand Determ., CRR Doc. No. 13 at 4, 34 (Apr. 23, 2004). The Court will first review the data with which Commerce supported its finding, and then consider Plaintiff's arguments that these data do not constitute substantial evidence, or ignore other contradictory evidence.

To support the finding that the price charged by Plaintiff to Company X was not a typical or commercially reasonable one, Commerce first looked to data from Customs that showed the monthly Average Unit Values ("AUV") for imports of glycine from China for the year previous to Plaintiff's sale. *See id.* at 16–17, *Bona Fide* Memo, CR Doc. No. 39 at 3–4 (Aug. 8, 2003). After discounting the AUV for October of 2001 as an obvious outlier,[4] Commerce averaged the monthly prices, including the AUV for the month in which Plaintiff imported its goods, to calculate a yearly average of $2.27 per kilogram for Chinese glycine. *See* POR Glycine Imports from China, Attach. 1 to *Bona Fide* Memo, CR Doc. No. 39 (Aug. 8, 2003). The price of the sale under consideration was [ ] per kilogram, significantly higher than the AUV.[5] *Id.*

Having found that Plaintiff's sales price did not appear to be in conformity with the benchmark of other Chinese glycine producers' sales into the market, Commerce also looked to see what prices Plaintiff charged for the same product in third-country markets. Commerce found evidence of another sale by Plaintiff during the pe-

---

[4] The Court notes that while the particular value that Commerce threw out was in this instance so substantially greater than the other monthly prices as to appear to be an obvious outlier, a simple modal analysis would have allowed Commerce to show its reasons for disregarding that month's value with greater precision. *See* Laurence C. Hamilton, *Data Analysis for Social Scientists* 78–82 (Duxbury Press, 1996). Furthermore, such an analysis would have shown that, given how tightly clustered the monthly AUVs were, the value for March of 2001 was also an outlier, and should have been excluded from the average. Exclusion of this value as an outlier would have driven the average yearly AUV down still farther, to $2.21. However, as even without the exclusion of the March 2001 AUV from the calculations, Plaintiff's sale price was over [ ] more than the yearly average, the Court does not find the error important.

[5] The invoice price was [ ] per kilogram, but Customs deducted certain non-dutiable charges, making the AUV for Plaintiff's sale to Company X [ ] per kilogram. *See* POR Glycine Imports from China, Attach. 1 to *Bona Fide* Memo, CR Doc. No. 39 (Aug. 8, 2003).

riod of review ("POR") to a third-country importer. *See* October 10, 2001 Invoice, Spot Checks of Other Sales, Ex. 7 to CR Appendix 1. In this sale, Plaintiff charged [ ] per kilogram for pharmaceutical grade glycine, an amount in line with the AUV. *Id*.[6] Accordingly, Commerce found that Plaintiff's price was out of line with both the benchmark of other Chinese exporters' sales of glycine to the United States, and with Plaintiff's own pricing practice as it applied to third-country sales. *Bona Fide* Memo, CR Doc. No. 39 at 3–4 (Aug. 8, 2003). Commerce therefore concluded that the price was not one which would be typical Plaintiff's future sales into the United States. *See id*.

Plaintiff challenges this finding with a variety of arguments. Briefly listed, Plaintiff's arguments on the price factor are: (i) that Commerce cannot reconcile a finding that its price was too high for *bona fide* purposes with its finding that Plaintiff should be accorded a 43.44% dumping margin, (ii) that the AUV data were not reliable because they included sales of all forms of Chinese glycine, and not just the pharmaceutical grade glycine that Plaintiff sold to Company X, (iii) that Company X's pricing data provide a more reliable benchmark than the AUV data, (iv) that to the extent the AUV data provide a reliable benchmark, they do so in a different way from that expounded by Commerce, (v) that the fact that Company X resold the goods for a profit establishes that the price was commercially sound, (vi) that Plaintiff's product was "granular" glycine and thus commanded a higher price than other pharmaceutical grade glycine, and (vii) that third-country sales reflected different market considerations and different grades of glycine. The Court will discuss each argument in turn.

(i) *Plaintiff's argument that Commerce cannot reconcile a finding that its price was too high for bona fide purposes with its finding that Plaintiff should be accorded a 43.44% dumping margin is waived*.

Plaintiff argues that Commerce cannot reconcile a finding that its price was too high for *bona fide* purposes with its finding that Plaintiff should be accorded a 43.44% dumping margin. *See* Pl.'s Conf. Br. at 14. Commerce did not address this contention in its *Bona Fide* Memo, or in its Remand Determ. Commerce's omission is hardly surprising, as Plaintiff did not make this particular contention at the administrative level. *See generally* Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Remand Rebuttal Info and Comments*, CCR Doc. No. 3 (Jan. 14, 2004); Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Com-

---

[6] Commerce also found evidence of a sale to a different third-country for the same price, but this sale was made outside the POR. *See* August 14 Invoice, Payment Training, Ex. 14 to CR Appendix 1.

merce, Re: *Glycine from the PRC; Comments on Draft Results of Determination Pursuant to Court Remand*, CCR Doc. No. 8 (April 13, 2004).

Therefore, the Court finds that the argument is waived. Any possible contradiction between Commerce's pre-rescission finding that Plaintiff should be assessed a dumping margin of 43.44% and Commerce's later determination that Plaintiff's sale was non-*bona fide* because of its high price was apparent at the time of the rescission. Plaintiff's argument was therefore available and open to it as of the time of rescission. Moreover, although the record was reopened for the sole purpose of allowing the parties to comment on evidence that Commerce relied upon to demonstrate that the sale price was not commercially reasonable, Plaintiff never advanced this particular contention until briefing before the Court. "If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision." *See McDonnell Douglas Corp. v. U.S. Dep't of the Air Force*, 375 F.3d 1182, 1187–88 (D.C. Cir. 2004) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)). Plaintiff may not, at this late date, to present Defendant, and this Court, with new arguments that were better made below.[7]

(ii) *Plaintiff's argument that the AUV data were not reliable because they included sales of all forms of Chinese glycine, and not*

---

[7] Even to the extent such an argument was not waived, it is highly unpersuasive. The "all others" rate for the antidumping order on glycine from China is over 155%. *Glycine from the People's Republic of China*, 60 Fed. Reg. 16,116, 16,116 (Dep't Commerce Mar. 29, 1995) (antidumping duty order). Commerce found that Plaintiff's individual dumping margin should be 43.44%. *See Glycine from the People's Republic of China*, 68 Fed. Reg. 13,669, 13,672 (Dep't Commerce Mar. 20, 2003) (notice of preliminary results of antidumping duty new shipper review). Commerce, in effect, found that while Plaintiff was dumping, it was dumping far less than other Chinese producers; that is, rather than being "too low," its price was far higher than many other Chinese producers' prices. The *bona fide* analysis also found that Plaintiff's price was high. *See Bona Fide* Memo, CR Doc. No 39 at 3–4 (Aug. 8, 2003); Remand Determ., CCR Doc. No. 13 at 17 (Apr. 23, 2004). In this case, the combination of a high "all others" rate and the Plaintiff's high price compared to other import prices could mean two things: either Plaintiff truly means to replicate the high price sale upon which it predicated the review, or, Plaintiff will take advantage of one high price sale to secure a lower-than-average dumping margin, and then typically charge a far lower price (low enough to undercut the competition that has a higher dumping margin, but still high enough to make a hefty profit which would otherwise be unavailable). Considering that the latter is a far more profitable avenue, and that, because of the extended timelines of antidumping reviews, Plaintiff could have more than two years to enjoy an extremely advantageous, and possibly predatory, market position predicated entirely on an atypical sale, the weight of the evidence is in Commerce's favor in holding that the scenario above is likely indicative of an atypical, or non-*bona fide*, sale. *See* Pl.'s Conf. Br. at 9, 18 (describing Plaintiff as "a profit maximizer" and appearing to admit that Plaintiff was in fact dumping by not accounting for various factors of production in its export price). Moreover, given that the dumping margin calculation and the *bona fide* analysis address different concerns, there is nothing inherently contradictory in Commerce's finding that a price was low enough to be dumped, and yet so high when compared to other prices in the U.S. market as to be unlikely to be sustained in the future, especially where the motives for not sustaining the price are so clear.

just the pharmaceutical grade glycine that Plaintiff sold to Company X is waived.

Plaintiff argues that the AUV data are not a reliable indication of what a commercially reasonable price for Plaintiff's product might be, because the AUV data includes all grades and forms of glycine, whereas Plaintiff only sells pharmaceutical grade glycine, which is more refined, and hence, more expensive to produce. *See* Pl.'s Conf. Br. at 16–18, Pl.'s Conf. Reply Br. at 7. In response, Commerce first points to the fact that the AUV data represent all sales of glycine from China into the United States during the POR, that they cover importation of over 100 metric tons of glycine, and that, therefore, the data provide a large sample that enables Commerce to have confidence that the prices represented in the AUV data are representative of prices for Chinese glycine during the POR. *See* Remand Determ., CCR Doc. No. 13 at 16–17 (Apr. 23, 2004). Commerce acknowledges that the AUV data represent sales of all grades of glycine, but notes that in its analysis of Plaintiff's factors of production, the total value of the labor, energy, and materials needed to produce the pharmaceutical grade glycine was [ ] per kilogram, only [ ] of which was attributable to the processes needed to refine the glycine from industrial grade to pharmaceutical grade. *See id.* at 17–18. Even were Commerce to add this amount, [ ], to the yearly AUV average of $2.27,[8] Plaintiff's sale price would still be significantly higher than the average yearly price. *See id.* at 18.

Although Plaintiff does not appear to have argued this point before Commerce, *see generally* Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Remand Rebuttal Info and Comments*, CCR Doc. No. 3 (Jan. 14, 2004); Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Comments on Draft Results of Determination Pursuant to Court Remand*, CCR Doc. No. 8 (April 13, 2004), Plaintiff now challenges the notion that adding the specified amount, [ ], to the AUV is sufficient, arguing that the amount, [ ], only accounts for extra labor, energy, and materials, and does not take into account other factors of production, such as factory overhead, selling, general, and administrative expenses, and profit. *See* Pl.'s Conf. Br. at 17–18.

The Court holds that the argument is waived. Commerce first analyzed the increased costs associated with producing pharmaceutical grade, rather than industrial grade, glycine in its draft remand results. *See* Draft Results of Determination Pursuant to Court Re-

---

[8] Commerce, in its Remand Determ., does not specifically state that adding [ ] to the AUV for the POR would compensate for the expenses of pharmaceutical grade glycine, but Plaintiff argues that this is what Commerce means for the reader of the determination to do. *See* Remand Determ, CCR Doc. No. 13 at 18 (Apr. 23, 2004); Pl.'s Conf. Br. at 17–18.

mand, CCR Doc. No. 7 at 10–11 (Apr. 9, 2004). Plaintiff was able to submit comments on this draft, and in fact did so. *See* Letter from Francis J. Sailer, Lafave & Sailer LLP, to Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Comments on Draft Results of Determination Pursuant to Court Remand*, CCR Doc. No. 8 (April 13, 2004). It failed, however, to take exception to the government's calculation.[9] *See id.* Again, the Court will not entertain arguments that were not made before the agency when the Plaintiff had a clear opportunity to make them on the record.

(iii) *Company X's pricing data does not provide a more reliable benchmark than the AUV data.*

Plaintiff argues that even to the extent that the AUV data have some measure of reliability, they should have been discounted in favor of a more reliable indicator of the market price of glycine: five invoices from Company X. *See* Pl.'s Conf. Br. at 19–20; Pl.'s Conf. Reply Br. at 7. Plaintiff argues the price at which Plaintiff sold its goods was typical of the price that Company X paid for similar goods during the POR. The evidence shows that Company X paid at least [ ] per kilogram for domestically sourced glycine purchased during the POR. *See* Ex. A. to Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Remand Rebuttal Info and Comments*, CCR Doc. No. 3 (Jan. 14, 2004). Moreover, because these were invoices for purchases of glycine of a similar grade to Plaintiff's, Plaintiff argues

---

[9] To the extent this argument was not waived, Plaintiff's contentions do not help it achieve its desired result. In essence, Plaintiff argues that Commerce did not include in its calculation all the factors of production which should have been included to account for the refining process. *See* Pl.'s Conf. Br. at 17. Commerce's calculation results in enlarging the AUV by [ ]; under Plaintiff's calculation, [ ] should be added, resulting in a figure that makes Plaintiff's export price appear more reasonable. *See id.* at 17–18. Nonetheless, even assuming, as Plaintiff would, that the AUV data represent only industrial grade glycine and that all the factors Plaintiff proffers should be accounted for, Plaintiff's price exceeds the AUV data by approximately [ ]. *See id.* Moreover, Plaintiff's argument rests on the supposition that the AUV represents nothing but industrial grade glycine. *See id.* at 18. There is no evidence on the record by which Plaintiff has shown that this is actually the case. *See* Remand Determ., CCR Doc. No. 13 at 17 n.2 (Apr. 23, 2004) (admitting that the AUV includes "various grades of glycine"). On the contrary, the Harmonized Tariff Schedule of the United States ("HTSUS") does not distinguish between glycine of different grades; therefore, it would appear that Customs does not keep records as to what grades of glycine are imported. *See* subheading 2922.49.4020, HTSUS (2003). Thus, the record does not reveal what proportion of the AUV data represents industrial grade glycine and what proportion represents food or pharmaceutical grade glycine. *See* Remand Determ., CCR Doc. No. 13 at 17. The fair inference is that there is a mixture of the two. It is hardly likely that the demand for pharmaceutical grade glycine in the United States is so small that Plaintiff's shipment represented the entire universe of such imports during the POR. It is just as reasonable, in fact, to assume that only pharmaceutical grade glycine was shipped, and that, therefore, there is no reason to add anything at all to the AUV. In such case, Plaintiff's price exceeds the AUV by approximately [ ]. *See* Remand Determ., CCR Doc. No. 13 at 17. The actual percentage likely falls somewhere in between. Only one thing remains clear: no matter how the AUV data is manipulated to account for differences in grade, Plaintiff's price remains above the AUV, and is likely higher above the AUV than Plaintiff claims.

that they are more reliable overall than the AUV data, which included various grades of glycine. *See* Pl.'s Conf. Br. at 20; Pl.'s Conf. Reply Br. at 7.

Commerce argues in response that four invoices from a single purchaser of glycine do not represent a large enough sample for Commerce to be sure that these prices accurately reflect typical glycine transactions. *See* Remand Determ., CCR Doc. No. 13 at 16–17. Moreover, Commerce argues that it has no means by which to evaluate these invoices so as to determine their reliability. *Id*. The Court agrees with Commerce. While the invoices from Company X may be sufficient to show how a typical future domestic sale to Company X might be priced, there is no reason for Commerce to believe that all of Plaintiff's future sales would be to Company X or that, indeed, Company X represents a typical customer. Company X might be selling glycine in a niche market where higher prices dominate, or buying in comparatively small amounts, and therefore paying a higher price. While, as Plaintiff contends, these invoices might be probative of the price that Company X is willing to pay, *see* Pl.'s Conf. Br. at 20, they cannot tell Commerce or this Court much, if anything, about how much other domestic purchasers of glycine are willing to pay. Certainly they do not go as far as the AUV data in showing the typical U.S. price for Plaintiff's product.

(iv) *The AUV data provide a reliable benchmark in the manner expounded by Commerce.*

Plaintiff argues that to the extent the AUV data provide a reliable benchmark, they do so in a different way from that expounded by Commerce. *See* Pl.'s Conf. Br. at 21; Pl.'s Conf. Reply Br. at 5–6. Specifically, Plaintiff alleges that the AUV data should be disaggregated by month, because this would show that Plaintiff's price was within the range of the individual monthly AUVs. *See id*. Plaintiff alternatively argues that its sale should only be compared with the AUVs of months with similar volumes of sales, contending that months with smaller volumes "reflect FOB prices at a spot basis (as compared to a generic, long-term basis) likely more reflective of a few individual transactions than other months in which 'larger' volumes consisting of multiple shipments of various different grades of product were imported." Remand Determ. at 19–20 (quoting Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Comments on Draft Results of Determination Pursuant to Court Remand*, CCR Doc. No. 8 at 8 (April 13, 2004)); *see also* Pl.'s Conf. Br. at 21, n.61; Pl.'s Conf. Reply Br. at 6 & n.17.

On the first count, Commerce argues that to disaggregate the monthly AUVs would amount to "cherry-picking" the data, and would therefore be contrary to *Shanghai Foreign Trade Enters. Co. v. United States*, slip op. 04–33 (CIT Apr. 9, 2004). *See* Remand

Determ., CCR Doc. No. 13 at 18 (Apr. 23, 2004). Commerce also argues that the yearly average "smooths out" monthly variations and allows for a more reliable figure covering a longer period of time and a greater volume of merchandise. *Id.* Finally, Commerce notes that even were it to consider only data for the month in which Plaintiff's product was imported, once Plaintiff's shipment is eliminated from the data for that month, the resulting AUV for that month was [ ] per kilogram, over a [ ] less than Plaintiff's selling price. *Id.* Commerce argues that this differentiates the instant case from *Fresh Garlic from the People's Republic of China*, 68 Fed. Reg. 11,368 (Dep't Commerce Mar. 10, 2003) (notice of amended final results of antidumping duty administrative review), in which a sale was held to be *bona fide* when it was shown to be in line with the AUV data for both the entire POR and the month of importation. *See id.* at 19. As to Plaintiff's argument on comparing months of similar volumes, Commerce argues that Plaintiff's FOB contention is pure speculation, and that no record evidence was introduced to suggest that larger volume months do not reflect spot basis sales, that glycine companies other than Plaintiff ship in similar volumes, or that larger volume months necessarily indicate dissimilar grades of glycine. *See id.* at 19–20.

The Court agrees with Commerce that disaggregation of the data is not required. Larger sample sizes are generally preferable when the goal is, as here, to generalize from a sample to a population, because the larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance. *See, e.g.*, Laurence C. Hamilton, *Data Analysis for Social Scientists* 203 (Duxbury Press, 1996) ("Larger samples permit more precise estimates of unknown population parameters . . . a larger sample is always better"). Plaintiff's arguments ignore this fundamental rule of statistics without providing any evidence beyond mere speculation for the contention that months with lower volumes reflect spot basis sales containing similar grades of glycine. Commerce cannot be required to disaggregate the data without a more substantive basis for Plaintiff's claim. Without such a basis, disaggregation on Commerce's part would violate the long-standing rule that administrative agency determinations must evince "a rational connection between the facts found and the choices made." *See Shanghai Foreign Trade Enters. Co.* at 13 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1968). Moreover, Commerce is correct in stating that, even were Commerce to only compare Plaintiff's sale price with the prices of other imports entered in the same month, once Plaintiff's sale is removed from that data, what remains is a monthly AUV of [ ], which is still over [ ] less than Plaintiff's price. *See* Remand Determ., CCR Doc. No 13 at 18.

(v) *The fact that Company X resold the goods for a profit does not establish that the price was commercially sound.*

Plaintiff alleges that the fact that Company X resold the goods for a profit establishes that the price was commercially sound. *See* Pl.'s Conf. Br. at 14–15; Pl.'s Conf. Reply Br. at 2. Commerce, in turn, acknowledges that the merchandise was resold at a profit, although not at such a large one as Plaintiff initially alleged. *See* Remand Determ., CCR Doc. No. 13 at 17. Commerce does not address the argument further, resting on its other evidence suggesting that the sale was unusually priced. *See id.*

The Court agrees with Commerce's implicit contention that a profit on resale cannot establish the *bona fides* of the sale where there is other evidence suggesting that the sale is not *bona fide*. Company X's profits on the sale may indicate that the particular price agreed upon was not such as to be utterly uncommercial, or that the two companies were not colluding to arrive at it; nonetheless, the existence of a profit does not provide significant evidence of whether the sale price is typical for the market as a whole, or for Plaintiff's future practice in particular. It is true that a non-profit making price would likely invalidate a new shipper sale as atypical for the market. *See Am. Silicon Techs. v. United States*, 24 CIT 612, 616, 110 F. Supp. 2d 992, 996 (2000); *see also Certain Cut-to-Length Carbon Steel Plate from Romania*, 63 Fed. Reg. 47,232, 47,234 (Dep't Commerce Sept. 4, 1998) (rescission of antidumping duty administrative review). Sales made at a loss, in normal circumstances, could reasonably be viewed as likely not being market-price sales. But the converse – a profit-enabling price – is not an automatic basis for conferring typicality upon the sale. Consequently, resale at a profit is not the alpha and omega of a *bona fide* analysis.

(vi) *The record does not contain substantial evidence to show that Plaintiff's product was "granular" glycine and thus commanded a higher price than other pharmaceutical grade glycine.*

Plaintiff contends that the glycine it sold to Company X was granular, and therefore commands a higher price than powdered glycine of a similar grade. *See* Pl.'s Conf. Br. at 15. Commerce notes that there was no evidence to substantiate the claim that granular glycine is more expensive than powdered glycine. *See* Remand Determ., CCR Doc. No. 13 at 18 (Apr. 23, 2004).

The Court agrees that the record does not contain substantial evidence to demonstrate that granular glycine was more expensive than powdered glycine. Commerce here somewhat overstated its point in saying that there was no record evidence to that effect, *see id.* 18, when in fact Company X averred in a questionnaire response that Plaintiff's "granular powder" glycine has a bigger market and better quality than "fine powder" glycine purchased from other companies. *See* Pl.'s Conf. Br. at 15; Glycine From PRC A–570–836; Questionnaire Response, CR Doc. No. 22 at para. 7 (Mar. 12, 2003).

However, no other evidence on the record supports the existence of "granular powder" glycine, as differentiated from "fine powder" glycine. Plaintiff has put forth no evidence specifically stating the price differences incurred in creating this "granular powder" or suggesting that purchasers of glycine are typically willing to pay a premium for such a good. Accordingly, Company X's single statement is insufficient to refute Commerce's finding that the amount by which Plaintiff's price exceeded the AUV and its own third-country practice cannot be accounted for by the expenses associated with "granular powder" glycine.

(vii) *Plaintiff's third-country sales reflected different market considerations and different grades of glycine.*

Plaintiff argues, albeit briefly, that its third-country prices were not evidence of its future pricing practices, and hence not relevant. *See* Pl.'s Conf. Br. at 19; Pl.'s Conf. Reply Br. at 9. Plaintiff alleges that there is no reason to believe that the third-country sales were of pharmaceutical grade glycine, and that the absence of dumping orders on Chinese glycine in the thirdcountry markets means that the pricing in those countries is dissimilar to what would be typical of its U.S. price. *Id.* Plaintiff did not appear to take issue with the third-country data before the agency, despite it having been mentioned in the Draft Remand Results. *See* Draft Results of Determination Pursuant to Court Remand, CCR Doc. No. 7 at 11 (April 9, 2004); *see also* Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Comments on Draft Results of Determination Pursuant to Court Remand*, CCR Doc. No. 8 (April 13, 2004). Before the Court, Commerce responds to Plaintiff's argument, stating that there was no evidence on the record suggesting that the market conditions in the third-countries were significantly different from those in the U.S. Def.'s Conf. Br. at 17–18 (citing to *Anshan Iron & Steel Co. v. United States*, slip op 03–83 (CIT July 16, 2003).

The Court agrees that there is no reason to discount the third-country data. First, Plaintiff waived this argument when it did not bring it up before the agency. Second, while it might be possible to show that the third-country markets and the U.S. market were significantly different, no evidence to support that contention appears on the records. Finally, contrary to Plaintiff's supposition, Commerce found at least two third-country invoices for pharmaceutical grade glycine, *see* Pl.'s Conf. Br. 19, one of which showed that Plaintiff had priced the identical product at [ ] per kilogram during the POR, an amount in line with the AUV. *See* October 10, 2001 Invoice, Spot Checks of Other Sales, Ex. 7 to CR Appendix 1; August 14, 2002 Invoice, Payment Training, Ex. 14 to CR Appendix 1. Accordingly, the Court finds that (i) Plaintiff's argument that there is an inherent contradiction between the margin calculation and the *bona fide* analysis is waived, (ii) that even when the AUV is adjusted to ac-

count for different grades of glycine, Plaintiff's price is still comparatively high, (iii) that despite its flaws, the AUV data is a more reliable benchmark than Company X's five invoices, (iv) that the AUV data was best viewed in the aggregate, and not in disaggregation, (v) that the mere fact that Company X resold the product at a profit does not answer the question of whether the transaction was typical for the market, (vi) that Plaintiff's evidence that it sold "granular" glycine, and thereby commanded a premium is insufficient to rebut Commerce's finding that Plaintiff's price was too high (vii), that third-country sales were relevant to the determination and demonstrated that Plaintiff had priced the product in a manner more reflective of the AUV data during the POR. Moreover, the Court agrees with Commerce that the evidence in the record demonstrates that Plaintiff's price was neither in line with prices in the U.S. market nor with Plaintiff's third-country pricing. Accordingly, the Court finds that substantial evidence supports Commerce's determination that the Plaintiff's price indicated that its sale was not a typical sale for the U.S. market and would not be predictive of future sales.

2. SUBSTANTIAL EVIDENCE SUPPORTS COMMERCE'S DETERMINATION THAT THE PAYMENT TIMING OF THE SALE SUPPORTED A FINDING THAT THE SALE WAS ATYPICAL

In addition to finding that the price of Plaintiff's sale was such that future sales were unlikely to be similarly priced, Commerce also found that the payment timing involved in Plaintiff's sale did not reflect commercial reality. *See* Remand Determ., CCR Doc. No. 13 at 29–30 (Apr. 23, 2004). Commerce found that the terms of sale required payment within 30 days of the invoice date of January 25, 2002. *Bona Fide* Memo, C.R. Doc. No. 39 at 4–5 (Aug. 8, 2003). However, payment was not actually made until nine months later. *Id*. at 5. Moreover, Commerce could find no evidence that any attempt at collection had been made on Plaintiff's part until November 1, 2002. *Id*. at 6. While Commerce found that Company X had been late in making payments to Plaintiff before, it had never failed to make payment for such a long period of time. *See* Remand Determ., CCR Doc. No. 13 at 29 (Apr. 23, 2004). Moreover, Commerce found that Company X continued to make payments to Plaintiff for other sales. *Id*. Commerce found that allowing payment to go uncollected departed from "normal, commercial" business practices. *Bona Fide* Memo, CR Doc. No. 39 at 6 (Aug. 8, 2003).

Plaintiff argues that the record evidence demonstrates that Company X had long engaged in a "regular commercial pattern" of failing to pay in a timely manner, but that payment was always eventually received. Letter from Francis J. Sailer to the Hon. Donald L. Evans, Sec'y of Commerce, Re: *Glycine from the PRC; Comments on Draft*

Results of Determination Pursuant to Court Remand, CCR Doc. No. 8 at 13–14 (April 13, 2004); *see also* Pl.'s Conf. Br. at 23.

Plaintiff points out that during verification, it stated that it had several times made telephone contact with Company X in an attempt to collect payment. *See* Pl.'s Conf. Br. at 23. Moreover, at least one other customer had been as late as Company X in making payment, lending credence to the idea that allowing late payments was part of Plaintiff's normal commercial practice. *See id.* To further its argument before Commerce, Plaintiff cited *Certain Cold Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea*, 64 Fed. Reg. 12,927, 12,929 (Dep't Commerce Mar. 16, 1999) (final results of antidumping duty administrative reviews), claiming that it is not unusual for respondents in dumping cases to receive late payments, and not to receive recompense for such late payment. *See* Letter from Francis J. Sailer to the Hon. Donald L. Evans, Sec'y of Commerce, Re: Glycine from the PRC; *Comments on Draft Results of Determination Pursuant to Court Remand*, CCR Doc. No. 8 at 14–15 (Apr. 13, 2004). However, in its briefs before the Court, Plaintiff now cites instead to a memorandum written in conjunction with *Certain Preserved Mushrooms from the People's Republic of China*, 68 Fed. Reg. 10,694, 10,696 (Dep't Commerce Mar. 6, 2003) (preliminary results and partial rescission of the fourth new shipper review and preliminary results of the third antidumping duty administrative review). *See* Pl.'s Conf. Br. at 24. Plaintiff argues that this memorandum stands for the proposition that late payment timing alone is not enough to demonstrate that a sale was atypical and therefore non-*bona fide*. *See id.* Finally, Plaintiff argues that to the extent that Plaintiff received payments from Company X in a more timely fashion in the past, these sales had been made by Plaintiff's U.S. subsidiary, whereas the sale at issue was made directly from China.[10] *See id.* at 23–24.

While the Court agrees with Plaintiff that this late payment on its own might not be enough to support a finding of a non-*bona fide* sale, the late payment here accompanies a price that is inconsistent with the U.S. market, with Plaintiff's own practice, and which is unlikely to repeat itself. Thus, while the evidence on payment timing may be supportive rather than primary in the *bona fide* analysis undertaken here, the issue is not irrelevant or unsuggestive. Moreover, to the extent that the issue of payment timing could support Commerce's finding that the sale at issue here was non-*bona fide*, it does so here.

---

[10] Prior to the draft remand results, it appears that Plaintiff argued that Company X did not timely pay because it did not have available funds. *See* Remand Determ., CCR Doc. No 13 at 26 (Apr. 23, 2004). However, Plaintiff appears now to have waived this argument, as it is addressed neither in Plaintiff's comments subsequent to the draft remand results, or in its briefs to the Court.

It is undisputed on the record that Company X did not make payment until nine months after the invoice date. *See* Pl.'s Conf. Br. at 23. While Company X had made late payments to Plaintiff before, none of its former payments were as late as this. Plaintiff argues that these other payments were made more timely because they were on sales made by a U.S. subsidiary, "which presumably has a regular procedure for following up with customers," rather than directly by Plaintiff's Chinese headquarters. *Id.* Although it could be true that "follow-up may be more difficult from China," *id.* at 24, such speculation does not pass as evidence.

Finally, as regards Plaintiff's citation to a memorandum accompanying *Certain Preserved Mushrooms from the People's Republic of China*, 68 Fed. Reg. 10,694, 10,696 (Dep't Commerce Mar. 6, 2003) (preliminary results and partial rescission of the fourth new shipper review and preliminary results of the third antidumping duty administrative review) ("*Certain Preserved Mushrooms*"), Plaintiff has not provided that memorandum to the Court and the Court has been unable to find it. *See* App. of Docs. Cited in Br. of Pl. Supp. of Its R. 56.2 Mot. J. Agency. R. Nevertheless, the Court has located the issues and decision memorandum accompanying the final results of that antidumping duty new shipper review. *See* Memorandum to Joseph A. Spetrini, Acting Assistant Sec'y, from Jeffrey May, Deputy Assistant Sec'y for Imp. Admin., Re: *Issues and Decision Memorandum for the Final Results of the Antidumping Duty New Shipper and Administrative Reviews on Certain Preserved Mushrooms for the People's Republic of China – February 1, 2001 through January 31, 2002*, (July 11, 2003), available at http://ia.ita.doc.gov/frn/summary/prc/03-17628-1.pdf ("Mushroom Memo"). The second issue presented by that memorandum relates to the *bona fides* of a new shipper, Shenzhen Qunxingyuan. *Id.* at 1. Petitioners noted that the payment on the new shipper's sole sale into the United States did not occur until six months after the sale. *Id.* at 16. While acknowledging that this argument had been made, Commerce did not cite it as part of its determination that the sale was non-*bona fide*, resting instead on other factors that the agency found of greater significance.[11] *Id.* at 17. This does not reflect, however, on the issue's importance here. As Commerce put it in the issues and decision memorandum in *Certain Preserved Mushrooms*, "[w]hile some *bona fides* issues may share commonalities across various Department cases, each one is company-specific and may vary with the facts surrounding each sale." Mushroom Memo at 20.

Given the unusual sale price involved, it was not unreasonable for Commerce to look beyond the price to determine whether other char-

---

[11] Indeed, in *Certain Preserved Mushrooms*, there was strong evidence to suggest that not only was the sale itself non-*bona fide*, but that the company that made it was entirely fictitious. Mushroom Memo at 20.

acteristics of the sale were such as to demonstrate that the sale as a whole, was atypical. Late payment may be such an aspect, especially where the payment is so late. In this case, Plaintiff has demonstrated that at least one other customer has been delinquent for a comparable amount of time, and that its customer in this sale, Company X, has also been late in paying before. However, Company X has never been quite this late, while Plaintiff has little evidence to suggest that it was assiduous in its efforts at collection. These factors provide a reasonable basis for the conclusion that this sale was viewed by both parties as outside their normal business practice. Accordingly, Commerce had substantial evidence to consider the payment timing as a factor that counseled against a finding that the sale was typical, representative, and therefore *bona fide.*

3. SUBSTANTIAL EVIDENCE SUPPORTS COMMERCE'S DETERMINATION THAT INCONSISTENCIES IN THE IMPORT DOCUMENTATION OF THE SALE SUPPORTED A FINDING THAT THE SALE WAS ATYPICAL

The third factor that Commerce cited to in support of its determination that the sale was non-*bona fide* relates to inconsistencies in the import documentation accompanying the goods when they entered the United States. *See* Remand Determ., CCR Doc. No. 13 at 30, 33 (Apr. 23, 2004). Company X, the importer in this transaction, filed with Customs a copy of Customs Form 7501 in which it stated that the goods were listed as "Entry Type 1, "free and dutiable," rather than subject to antidumping duties. *See id*. at 30 (Apr. 23, 2004); Entry Summary, Ex. A–4 to Response of Tianjing Tiancheng Pharmaceutical Corp. Ltd. and its Supplier to Section A of the Department's Antidumping Questionnaire, Attachment to Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, CR Doc. No. 3 (July 11, 2002). Company X also marked that the rate of antidumping duties owed on the goods was "Free" rather than 155.89 %. *See* Remand Determ., CCR Doc. No 13 at 31 (Apr. 23, 2004); Entry Summary, Ex. A–4 to Response of Tianjing Tiancheng Pharmaceutical Corp. Ltd. and its Supplier to Section A of the Department's Antidumping Questionnaire, Attachment to Letter from Francis J. Sailer, Lafave & Sailer LLP, to the Hon. Donald L. Evans, Sec'y of Commerce, CR Doc. No. 3 (July 11, 2002). In its questionnaire responses, Company X indicated that its customs broker did not know the details of the antidumping order when it filed the form, and that Company X was working with Customs to sort out the error. *See* Glycine from PRC (A–570–836); Questionnaire Response, CR Doc. No. 35 at Answer 2 (July 17, 2003).

Commerce argues that, where Plaintiff predicates its new shipper review on the *bona fides* of this sale, Plaintiff has no excuse for failing to inform its customer of the antidumping duty due on the sale. *See* Remand Determ., CCR Doc. No. 13 at 32–33 (Apr. 23, 2004). The

fact that it did not suggests, at least under Commerce's argument, that Plaintiff was seeking to manipulate the terms of the sale so as to receive a lower margin than it would obtain under a sale made under more typical circumstances. *See id.* at 33. Commerce also appears to argue that it is unusual, at least, for Company X to employ a customs broker who, by its own admission, was unaware of antidumping orders on glycine when Company X was, as it stated "in the business of importing and reselling glycine." *See* Def.'s Br. at 24 (quoting Glycine from PRC A–570–836; Questionnaire Response, CR Doc. No. 22 at Answer 1 (Mar. 12, 2003)).

Plaintiff states that it has no control over the import documentation that its importer filed, and that therefore this error cannot be used to demonstrate that it entered into the sale in a manner inconsistent with its typical practice. *See* Pl.'s Conf. Br. at 25. Moreover, Plaintiff notes that Company X correctly coded the goods for their proper tariff classification; because the goods were properly classified, Plaintiff claims that there is little reason to believe that Company X was actively trying to avoid paying antidumping duties. *Id.* at 25–26. Plaintiff also argues that there is no "rational connection" between the fact that dumping duties were not paid and the conclusion that the sale is atypical or non-*bona fide*, *id.* at 26, and points out that Commerce concluded that this factor, were it to stand alone, would not be sufficient to demonstrate that the sale was atypical for purposes of the *bona fide* analysis. *Id.* at 27.

The Court agrees with both Plaintiff and Commerce that, were this factor to stand alone, it would not be substantial evidence for the proposition that the sale was non *bona fide.* However, this evidence, in this case, does not stand alone. Rather, it is one, small factor that weighs against a finding that the sale was *bona fide.* Divorced from the larger context of the review, the evidence on this issue could be said to point in either direction: to a simple mistake, as Plaintiff alleges, or to some collusive endeavor to manipulate the sale, as Commerce alleges. However, Commerce has already established that the price and payment timing of the sale were unusual. It is also somewhat unusual that no antidumping duties would be paid. Therefore, there is at least some rational connection between a finding that duties were not paid and a finding that the sale was atypical.

In disavowing a duty to inform Company X of the duty applicable to the goods, Plaintiff appears to be forgetting that this sale was to serve a very special purpose – as the predicate of a new shipper review. Plaintiff never alleges that it informed its customer as to the fact of the duties, or that their existence formed part of the sales negotiations. Had they done so, it would buttress the claim that a mistake was made, and that this mistake should not reflect at all on the conditions of Plaintiff's sale. Plaintiff was, of course, under no obligation to place this information into the record or make such an ar-

gument here. However, as the record stands, with an unusual sales price and atypical payment timing, the record evidence cuts both ways: Commerce could have reasonably and rationally decided the point in either direction. This does not mean that there is not substantial evidence for the direction Commerce did take. The mere fact that two inconsistent conclusions could be drawn from a piece of evidence does not render an agency's decision unsupported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

Accordingly, the Court finds that substantial evidence supports Commerce's finding that the import documentation factor supported the overall finding that the sale at issue was atypical, and hence, *non-bona fide*.

4. SUBSTANTIAL EVIDENCE SUPPORTS COMMERCE'S DETERMINATION THAT THE SALE WAS NON-*BONA FIDE*

Commerce found, on the basis of the three factors discussed above, that Plaintiff's sale was not *bona fide* for purposes of the new shipper review. Plaintiff argues that, even to the extent the three factors weigh against Plaintiff, the factors do not add up to substantial evidence demonstrating that the sale was non-*bona fide*. *See* Pl.'s Conf. Br. at 27. In support of its argument, Plaintiff cites to various other circumstances surrounding the sale, such as the fact that the sale was at arm's length, and that the sale was for a commercial quantity, that there was no unusual transportation of the shipment (such as air, rather than sea transport), and that a profit was earned on resale. *See* Pl.'s Conf. Br. at 28.

Commerce argues that while a single sale is not inherently commercially unreasonable, the fact that only one sale was made will be taken into account in Commerce's *bona fide* analysis. *See Bona Fide* Memo, CR Doc. No. 39 at 2 (Aug. 8, 2003). In one-sale reviews, there is, as a result of the seller's choice to make only one shipment, little data from which to infer what the shipper's future selling practices would look like. This leaves the door wide to the possibility that the sale may not, in fact, be typical, and that any resulting antidumping duty calculation would be based on unreliable data. *See* Remand Determ., CCR Doc. No. 13 at 7, 34 (Apr. 13, 2004).

Commerce also argues that the *bona fide* analysis involves consideration of the totality of the circumstances regarding the sale. *See* Remand Determ., CCR Doc. No. 13 at 34 (Apr. 13, 2004). The inquiry, then, consists not merely of a checklist of factors, in which if six factors are found unusual and seven are found to be typical, the new shipper's sale as a whole is found typical. Rather, the weight given to each factor investigated will depend on the circumstances surrounding the sale.

The Court agrees with Commerce. While a single sale is not inherently commercially unreasonable, *Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 231, 193 F. Supp. 2d 1303, 1313 (2002), it will be carefully scrutinized to ensure that new shippers do not unfairly benefit from unrepresentative sales. *See* Memorandum from Richard W. Moreland, Deputy Assistant Sec'y, Group I, to Faryar Shirzad, Assistant Sec'y for Imp. Admin., Re: *Issues and Decision Memorandum: New Shipper Review of Clipper Manufacturing Ltd.*, available at http://ia.ita.doc.gov/frn/summary/prc/02-6076-2.txt (incorporated by reference into *Fresh Garlic from the People's Republic of China*, 67 Fed. Reg. 11,283 (Dep't Commerce Mar. 13, 2002) (final results of antidumping duty administrative review and rescission of new shipper review.)

In this case, the sale price was shown to be both atypical of the market as a whole, and of Plaintiff's own prices. Therefore, the price factor has significant weight, and cannot necessarily be offset by a recitation of other factors by which the sale could be considered typical, such as the fact that the shipment term (CIF) was normal for this type of transaction. *See* Pl.'s Conf. Br. at 28. The transaction must be "normal" as a whole, and price must be a large part of what produces "normal" sales in the context of an antidumping determination.

Accordingly, the Court finds that substantial evidence supports Commerce's conclusion that the totality of the circumstances surrounding the sale supported a finding that the sale was non-*bona fide*.

CONCLUSION

The Court finds that substantial evidence demonstrates that the price, payment timing, and import documentation surrounding the sale at issue were all unusual with regard to the U.S. market, Plaintiff's own practice, and good business practice generally. The Court also finds that all three factors supported a conclusion that the sale was unlikely to be a good future indicator of Plaintiff's future sales in the market. Accordingly, Plaintiff's motion is denied and judgment entered for the Defendants.

Slip Op. 05–30

AL TECH SPECIALTY STEEL CORP., CARPENTER TECHNOLOGY CORP., REPUBLIC ENGINEERED STEELS, TALLEY METALS TECHNOLOGY, INC. and UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.

ACCIAIERIE VALBRUNA S.R.L. and ACCIAIERIE DI BOLZANO S.P.A., *Plaintiffs*, v. UNITED STATES OF AMERICA, *Defendant*.

Consol. Court No. 98–10–03061

[U.S. Department of Commerce's Final Results of Redetermination on Remand are sustained.]

Decided: March 9, 2005

Collier Shannon Scott, PLLC (*David A. Hartquist, Laurence J. Lasoff*, and *R. Alan Luberda*), for Plaintiffs/Defendant-Intervenors AL Tech Specialty Steel Corporation *et al.*

White & Case LLP (*Walter J. Spak, Gregory J. Spak*, and *Richard J. Burke*), for Plaintiffs/Defendant-Intervenors Acciaierie Valbruna S.r.l. *et al.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); *Robert E. Nielsen*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant United States of America.

OPINION

RIDGWAY, Judge:

In these consolidated actions, both the domestic parties (hereinafter collectively "AL Tech")[1] and two Italian producers/exporters of stainless steel wire rod have challenged various aspects of a Final Determination rendered by the U.S. Department of Commerce ("Commerce"), which found that the Government of Italy, the Province of Bolzano, and the European Union ("EU") provided countervailable subsidies to the two Italian producers – Acciaierie Valbruna S.r.l. ("Valbruna") and Acciaierie di Bolzano S.p.A. ("Bolzano") (hereinafter collectively "Valbruna/Bolzano"),[2] and which resulted in the imposition of a countervailing duty order.[3] *See Cer-*

---

[1] The domestic parties – AL Tech Specialty Steel Corp., Carpenter Technology Corp., Republic Engineered Steels, Talley Metals Technology, Inc., and the United Steelworkers of America, AFL-CIO/CLC – are Plaintiffs in the first of the two consolidated actions, as well as Defendant-Intervenors in the second.

[2] Valbruna and Bolzano are Defendant-Intervenors in the first of the two consolidated actions, as well as Plaintiffs in the second.

[3] Commerce may impose countervailing duties where it determines that a government or public entity in another country is providing a countervailable subsidy (*i.e.*, a financial contribution that confers a benefit on the recipient). Such subsidies may take the form of, *inter*

tain Stainless Steel Wire Rod from Italy, 63 Fed. Reg. 40,474 (Dep't Commerce July 29, 1998) ("*Final Determination*"); *Stainless Steel Wire Rod from Italy*, 63 Fed. Reg. 49,334 (Dep't Commerce Sept. 15, 1998) (countervailing duty order).

As explained in *AL Tech I*, Commerce's original investigation identified 10 types of government action considered to confer "subsidies," which collectively resulted in a calculated subsidy rate of 1.28% – a rate only marginally above the statutory *de minimis* one percent threshold.[4] Valbruna/Bolzano here challenged Commerce's determinations as to six of the 10 alleged subsidies, emphasizing that its success in even a single one of its six challenges[5] could potentially shave off enough to drop the subsidy rate below the *de minimis* threshold, rendering the countervailing duty order, in essence, void *ab initio*.[6] *See AL Tech Specialty Steel Corp. v. United States*, 28 CIT ___ , ___ , 2004 WL 2011471 at * 1 ("*AL Tech I*").[7]

---

alia, grants, loans, goods, or services, as well as less tangible forms (such as the foregoing of revenue – *e.g.*, rent or taxes – that would otherwise be due). 19 U.S.C. §§ 1671(a), 1677(5).

To be countervailable, a subsidy must be "specific" – that is, it must not be generally available. A subsidy may be deemed specific if its availability is limited to, for example, certain enterprises, certain industries, or certain geographical regions. 19 U.S.C. § 1677(5A). Where the availability of a subsidy is limited expressly by legislation or by the subsidy-granting authority, the subsidy may be considered specific as a matter of law (*de jure* specific). Where, for example, the actual number of recipients is limited, or where a particular enterprise or industry is a predominant user of a subsidy, the subsidy may be considered specific as a matter of fact (*de facto* specific). 19 U.S.C. § 1677(5A)(D).

[4] Under the statute, Commerce can make an affirmative determination in an original countervailing duty investigation (and issue a countervailing duty order) only if the aggregate net countervailable subsidy equals or exceeds one percent *ad valorem*. *See* 19 U.S.C. § 1671d(a)(3).

[5] Each of those six asserted challenges concerned a different subsidy rate: (1) lease for less than adequate remuneration (0.16%); (2) two-year rent abatement (0.38%); (3) Law 25/81 grants to Bolzano (0.28%); (4) Law 193/84 capacity reduction payments to Bolzano's former parent company, Falck (0.04%); (5) Law 193/84 capacity reduction payments to Valbruna (0.10%); and (6) European Social Fund assistance (0.05%). *See generally AL Tech Specialty Steel Corp. v. United States*, 28 CIT ____ , ____ n.5, 2004 WL 2011471 at * 1 n.5 ("*AL Tech I*") (explaining how Valbruna/Bolzano's success on as few as one of its challenges (*i.e.*, the two-year rent abatement or the Law 25/81 grants), or on various combinations of its challenges, could suffice to drop the subsidy rate below the one percent *de minimis* threshold).

[6] As *AL Tech I* noted, Commerce previously published notice of its revocation of the countervailing duty order at issue, effective retroactively to September 15, 2003, based on the agency's determination that revocation of the order would not likely "lead to continuation or recurrence of a countervailable subsidy" – *i.e.*, that any future "net countervailable subsidy likely to prevail is *de minimis*." However, entries of the subject merchandise from Valbruna/Bolzano were subject to Commerce's countervailing duty order and the 1.28% countervailing duty deposit requirement from the publication date of the agency's affirmative Preliminary Determination until October 15, 2002 (when Commerce calculated the countervailing duty rate to be *de minimis*, in an administrative review). Commerce's action left outstanding the question of the rate at which countervailing duties should be finally assessed on those entries. *See AL Tech I*, 28 CIT at ____ n.6, 2004 WL 2011471 at * 1 n.6.

[7] *AL Tech I* expressly reserved judgment on one of Valbruna/Bolzano's arguments challenging Commerce's determinations on assistance provided under Laws 25/81 and 193/84 – specifically, Valbruna/Bolzano's contention that Commerce erred in finding that certain sub-

Two of Valbruna/Bolzano's six challenges disputed aspects of Commerce's analysis of the adequacy of the remuneration paid as rent for the Bolzano Industrial Site under Valbruna's Lease Agreement with the Province of Bolzano. The other four challenges disputed Commerce's determination that countervailable subsidies were conferred by assistance received under three government programs – Law 25/81, Law 193/84, and the European Social Fund.[8]

AL Tech I sustained Commerce's determination that the Province of Bolzano's purchase of the Bolzano Industrial Site did not confer a subsidy, as well as Commerce's decision to use a nationwide (rather than a region-specific) benchmark to measure the adequacy of the rent paid under Valbruna's Lease Agreement with the Province of Bolzano. Commerce's determination that its "tying" practice was inapplicable to plant closure assistance provided under Law 193/84 was similarly upheld.[9]

However, a number of other issues were remanded to Commerce for the agency's further consideration. Now pending before the Court are Commerce's Final Results of Redetermination on Remand ("Remand Results"), together with the comments of all parties. *See* Valbruna's Comments on Department of Commerce Final Results of Redetermination on Remand Pursuant to Slip Op. 04–114 ("Valbruna Comments"); Comments of AL Tech Specialty Steel Corp. Et Al. on the Final Results of Redetermination on Remand ("AL Tech

---

sidies paid to Bolzano and its former parent, Falck, were "passed through" to Valbruna/Bolzano when Valbruna purchased Bolzano. That issue had been previously remanded to Commerce, and then – at the request of all parties – stayed. *See AL Tech I*, 28 CIT at _____ n.7, 2004 WL 2011471 at * 1 n.7.

Now, as a result of its reconsideration of other issues on remand, Commerce has recalculated the net subsidy rate for Valbruna/Bolzano (as discussed in greater detail below). Because that revised rate is *de minimis*, Valbruna/Bolzano's "pass through" argument is moot.

[8] Like Valbruna/Bolzano, AL Tech too challenged Commerce's determination concerning the rent paid under Valbruna's Lease Agreement with the Province of Bolzano. But, while Valbruna/Bolzano maintained that Commerce erred in finding that the Lease Agreement gave rise to *any* subsidy, AL Tech argued that Commerce erred in the other direction – by, in effect, *understating* the benefit conferred. AL Tech similarly contested Commerce's determination that, judged against prevailing market conditions, the Province's purchase of the Bolzano Industrial Site was not for more than adequate remuneration, and thus could not have conferred a countervailable subsidy on Valbruna/Bolzano. Both of AL Tech's claims were rejected in *AL Tech I*. *See generally AL Tech I*, 28 CIT at _____ , 2004 WL 2011471 at * 4–15.

As discussed in greater detail below, although AL Tech participated fully in the initial briefing in this action (defending Commerce's original Final Determination to the hilt, except as to the two arguments specified immediately above) (*see AL Tech I*, 28 CIT at _____ , 2004 WL 2011471 at * 2, noting AL Tech's "vigorous defense of Commerce's Final Determination"), AL Tech declined to participate substantively in post-remand briefing before the Court, and failed to participate at all in the remand proceedings before the agency.

[9] *See generally AL Tech I*, 28 CIT at _____ , 2004 WL 2011471 at * 12 (purchase of Bolzano Industrial Site); 28 CIT at _____ , 2004 WL 2011471 at * 13–15 (use of nationwide benchmark for rental rate); 28 CIT at _____ , 2004 WL 2011471 at * 24 ("tying" practice as applied to plant closure assistance under Law 193/84).

Comments"); Defendant's Response to Plaintiffs' Comments Concerning the Remand Results ("Gov't Response").

As a result of its reconsideration of certain issues (summarized below), Commerce recalculated the *ad valorem* net subsidy rate for Valbruna/Bolzano. The revised net subsidy rate is 0.65%, which is *de minimis*. See Remand Results at 10. Commerce therefore plans to revoke the countervailing duty order with respect to Valbruna/Bolzano effective as of the date of publication of that order – *i.e.*, September 15, 1998. *See* Remand Results at 9.[10]

As discussed more fully below, the Remand Results filed by Commerce comply with *AL Tech I*. The Remand Results are therefore sustained.

I. *Analysis*

Seven discrete issues were remanded to Commerce in *AL Tech I*. Commerce's redetermination on just two of those seven issues – specifically, the two-year rent abatement and aid paid under Law 25/81 – sufficed to lower the original net subsidy rate (1.28%) to a revised rate of 0.65%.

A. *The Two-Year Rent Abatement and Aid Under Law 25/81*

As explained in *AL Tech I*, Commerce's original Final Determination in this matter found that the two-year rent abatement which the Province granted to Valbruna under their Lease Agreement constituted a subsidy, resulting in a subsidy rate of 0.38%. Valbruna/Bolzano disputed the agency's determination, maintaining that the rent abatement was part of a "bargained-for exchange" in which Valbruna agreed to assume the Province's responsibility for certain specific, urgent, initial extraordinary maintenance and environmental remediation projects related to the buildings that it leased from the Province. *See generally AL Tech I*, 28 CIT at ___, 2004 WL 2011471 at * 15–18.

AL Tech I also considered Valbruna/Bolzano's protest of Commerce's decision to treat as a countervailable subsidy (with a calculated subsidy rate of 0.28%) certain restructuring assistance and long-term, low interest loans made to Bolzano under Provincial Law

---

[10] In its comments on the draft remand results, Valbruna/Bolzano urged that, upon dissolution of the injunction of liquidation, Commerce should instruct the Bureau of Customs and Border Protection to liquidate all unliquidated entries without regard to countervailing duties, and to refund – with interest – all countervailing duty deposits made since the suspension of liquidation on January 7, 1998 (the date of Commerce's Preliminary Determination in the original investigation). Commerce generally concurs in Valbruna/Bolzano's request. However, as Commerce notes, the interest provisions of 19 U.S.C. § 1677g do not apply to entries prior to the issuance of an order. *See* Remand Results at 9–10 (*citing* 19 U.S.C. § 1671f).

25/81.[11] Although Commerce itself conceded that Falck had repaid the aid at issue (as ordered by the European Commission), Commerce's original countervailing duty analysis ignored that repayment, reasoning that – because Falck had appealed the European Commission's order – the repayment was not legally final. *See generally AL Tech I*, 28 CIT at ____ , 2004 WL 2011471 at * 21–23.

On remand, Commerce reevaluated the record and reversed its determination on the two-year rent abatement. Specifically, Commerce concluded "that the balance of the record evidence indicates that the Province of Bolzano was legally obligated to undertake . . . [certain] initial, extraordinary maintenance and environmental remediation projects," which Valbruna – in turn – agreed to assume under its Lease Agreement with the Province as *quid pro quo* for a two-year rent abatement. Accordingly, Commerce determined on remand that "the two-year lease abatement was a bargainedfor exchange of obligation[s] for consideration and, therefore, does not constitute a countervailable subsidy." As a result of its redetermination, Commerce revised the subsidy rate associated with the rent abatement from 0.38% to 0%. As the Remand Results observe, the effect of that change alone suffices to reduce the total net subsidy rate to 0.90% – which is, as Commerce noted, "a rate that is below the statutory *de minimis* one percent threshold." *See* Remand Results at 2–3.

In the course of the remand, Commerce also reevaluated its treatment of the Law 25/81 aid paid to Falck, revising its position on that issue as well. With all of Falck's avenues of appeal exhausted (and the repayment thus final), Commerce made adjustments to its calculations, to exclude all post-1985 grants.[12] The effect was to drop the

---

[11] Provincial Law 25/81 is "a general aid measure that provides grants to companies with limited investments in technical fixed assets. It targets advanced technology, environmental investment, [and] restructuring projects." Remand Results at 5; *see also AL Tech I*, 28 CIT at _____ n.53, 2004 WL 2011471 at * 21 n.53.

[12] Although Commerce elected – on remand – to factor into its countervailing duty analysis Falck's repayment of Law 25/81 aid, the agency takes pains to note in the Remand Results that it "do[es] not necessarily agree that it is appropriate to take into consideration, in a redetermination on remand, events that occurred subsequent to the period of investigation or even the date on which the original investigation was completed." Remand Results at 5.

As an initial matter, it is worth noting that *AL Tech I* did not mandate that Commerce take any particular action on remand. The remand was intentionally cast quite broadly – as an opportunity for the agency to "reconsider its treatment of the Law 25/81 aid in light of the repayment of that aid, as well as any other related issues," and then to fully articulate the rationale for whatever position it chose to take. *See AL Tech I*, 28 CIT at _____ , 2004 WL 2011471 at * 23. The door thus was open for Commerce to reach any result on remand – provided, of course, that the result was both reasoned and supported by the record.

More fundamentally, however, Commerce's articulation of the central legal issue oversimplifies it a bit. As *AL Tech I* observed, any attempt to characterize the repayment issue for analytical purposes rapidly devolves into "an exercise in metaphysics." *See AL Tech I*, 28 CIT at _____ n.56, 2004 WL 2011471 at * 22 n.56. In the Remand Results, Commerce intimates that a countervailing duty determination is, in essence, predicated on a "snapshot" taken at the close of "the period of investigation" or, in any event, no later than "the date on

subsidy rate associated with the Law 25/81 aid from 0.28% to 0.03%. *See* Remand Results at 5–6.

B. *The Five Remaining Issues*

Because its revised determination on the treatment of Valbruna's two-year rent abatement (as well as its revised determination on the

---

which the original investigation was completed." But, even assuming that Commerce's "snapshot" theory is correct as a general principle, applying that concept to the circumstances presented here is like trying to nail jello to the wall.

Commerce emphasizes only the *timing* of the snapshot. However, any photographer knows that the resulting "photo" depends not only on *when* you take a snapshot, but also (and even more importantly) on the *focus* of that snapshot – *i.e.*, what you take the snapshot of. Here, is the proper focus the law requiring repayment (which gave rise to Falck's obligation to make repayment)? The repayment itself? Or the legal proceedings concerning Falck's obligation?

In this case, it is – in any event – undisputed that the European Commission's order requiring repayment was issued well before the close of "the period of investigation." *See* Commission Decision 96/617/ECSC, 1996 O.J. (L 274) 30 (July 17, 1996), discussed in Letter to Court from Counsel for Valbruna/Bolzano (Feb. 22, 2000). Moreover, Falck in fact made repayment before "the date on which the original investigation was completed." Indeed, in its Final Determination, Commerce itself expressly acknowledged that Falck had already made repayment. *See AL Tech I*, 28 CIT at _____ , 2004 WL 2011471 at * 21.

In short, even under Commerce's "snapshot" theory, there is a compelling case that the agency's initial Final Determination should have treated the Law 25/81 aid as repaid – whether because repayment already had been ordered *before the close of the period of investigation*, or because repayment had in fact already been made *by the date on which the original investigation was completed*.

Commerce's initial analysis ignored the repayment only because the European Commission's order was being appealed. But it is unclear why – in taking any "snapshot" – Commerce would focus on the speculative potential *future* outcome of a judicial appeal, rather than on the *existing* status of the repayment itself. It is even less clear why one would assume, as Commerce did, that the status quo – here, the European Commission's order requiring repayment – would be overturned on appeal, particularly in light of the track record in such cases. *See* Letter to Court from Counsel for Valbruna/Bolzano (May 31, 2001), Att. 2 at 2 (noting that court challenges to decisions of the European Commission in such cases are rarely successful, that – of the 13 court decisions rendered in such cases between 1997 and the end of the 2000 – there was only one successful challenge, and that, in that one particular case (unlike this case), the applicant was challenging the granting of aid to a competitor). Nor is it clear why, after Falck lost its initial appeal, Commerce reversed its position and found (in an administrative review) that the Law 25/81 aid was not countervailable – notwithstanding the fact that an appeal to a higher court was then pending. *See AL Tech I*, 28 CIT at _____ , 2004 WL 2011471 at * 22. (At least on this record, Commerce's treatment of the repayment and the related legal proceedings is arguably not only inadequately reasoned, but also inconsistent.)

Finally, as *AL Tech I* indicated, the law requiring repayment was itself already in existence at the time of Commerce's "snapshot," without regard to either the order mandating repayment, or the status of the repayment itself, or the pendency of any appeals. Thus, metaphysically speaking, to the extent that the "snapshot" was intended to focus on Falck's legal obligation to make repayment, that legal obligation was already in existence before the end of the period of investigation – even if there had not yet been a final, non-appealable judicial determination on its application to Falck. *See AL Tech I*, 28 CIT at _____ n.56, 2004 WL 2011471 at * 22 n.56.

Whatever the merits of the agency's position, the subject of Commerce's treatment of Law 25/81 aid (including all underlying legal issues) is now largely academic. As discussed above, Commerce's remand determination on the two-year rent abatement issue is alone sufficient to render a total net subsidy rate below the statutory *de minimis* one percent threshold.

Law 25/81 aid) rendered the overall total subsidy rate *de minimis*, Commerce found it unnecessary to reach the merits of the five remaining issues that *AL Tech I* had remanded to the agency.[13]

As to each of those five issues, Commerce concluded that the issue was moot, since – no matter how the particular issue was resolved – the overall total net subsidy rate would nevertheless remain *de minimis*. *See generally* Remand Results at 9 ("even if [Commerce] decided each of the remaining five issues against Valbruna, the net subsidy rate would be *de minimis* and, therefore, [Commerce] need not address the issues"). *See also* Remand Results at 3–4 (finding no need to reconsider whether the national benchmark rate of return of 5.7% used by the agency to evaluate the adequacy of the remuneration paid as rent by Valbruna to the Province assumed that responsibility for extraordinary maintenance was borne by lessor, or by lessee); *id*. at 4–5 (finding no need to reconsider whether depreciation of buildings should have been factored into the agency's analysis of the adequacy of the remuneration paid by Valbruna under the Lease Agreement); *id*. at 6 (finding no need to reconsider the methodology for application of the "small grants" test used in analyzing certain grants under Law 193/84); *id*. at 7 (finding no need to reconsider whether EU/European Social Fund ("ESF") Objective 4 funding was regionally specific to Italy); *id*. at 8 (finding no need to reconsider whether Italian ESF Objective 4 funding was regionally specific to the Province of Bolzano).[14]

C. *The Parties' Comments on the Remand Results*

Valbruna/Bolzano endorses Commerce's revised determinations on both the rent abatement issue and the Law 25/81 issue, and concurs that – in light of those determinations and the resulting revised net subsidy rate, which is below the *de minimis* threshold – there is no need for the agency to reconsider the five other issues remanded in

---

[13] As a basis for declining to reach the merits of the five remaining issues, the Remand Results specifically cite only to Commerce's revised determination on the two-year rent abatement; they do not expressly reference the revised determination on aid under Law 25/81. *See, e.g.*, Remand Results at 4 (noting that, due to the revised determination on the two-year rent abatement, the agency need not reach either of the issues concerning proposed adjustments to the "benchmark" used to evaluate the adequacy of the rent paid by Valbruna under its Lease Agreement with the Province).

[14] *Compare AL Tech I*, 28 CIT at ____ , 2004 WL 2011471 at * 18–19 (remand to determine whether the benchmark rate of return assumes that responsibility for ongoing extraordinary maintenance is borne by lessor, or by lessee); 28 CIT at ____ , 2004 WL 2011471 at * 19–21 (remand to reconsider the treatment of depreciation of buildings in analyzing the adequacy of remuneration paid by Valbruna under the Lease Agreement); 28 CIT at ____ , 2004 WL 2011471 at * 23–25 (remanding to reconsider the methodology for application of the "small grants" test in analyzing certain grants under Law 193/84); 28 CIT at ____ , 2004 WL 2011471 at * 25–29 (remand to reconsider the "specificity" of certain ESF funding).

AL Tech I.[15] Valbruna/Bolzano therefore urges that the Remand Results be sustained. *See* Valbruna Comments at 2. The Government's comments are to the same general effect. *See* Gov't Response at 4 (asserting that "the Court should sustain the Remand Results").[16]

AL Tech is a different story. In its comments filed with the Court, AL Tech states that it "respectfully disagrees" with the Remand Results, but does not substantively brief its position. *See* AL Tech Comments at 2. Moreover, as the Government pointedly observes, AL Tech failed to participate at all in the remand proceedings:

> No party objected to Commerce's determinations during the administrative proceedings on remand although they were provided with an opportunity to comment. *Indeed, AL Tech declined to participate. See* Index to Administrative Record (reflecting absence of *any* communications from AL Tech).

Gov't Response at 2 (emphasis added). Thus, as the Government emphasizes, AL Tech voiced its disagreement with the Remand Results *for the first time* in its comments filed with the Court. *See* Gov't Response at 2 ("Valbruna supports the Remand Results. AL Tech, for the first time, in its comments to the Court, does not.").

Asserting that the opinion in *AL Tech I* "drives the results of the Remand Determination," AL Tech apparently seeks to excuse its failure to participate in the remand proceedings by implying that participation would have been futile. Taking particular exception to Commerce's revised determination on the two-year rent abatement,

---

[15] In its comments on the Remand Results, Valbruna/Bolzano "specifically reserves the right to submit further comments on all issues subject to remand" if Commerce's remand determinations on the two-year rent abatement and the Law 25/81 aid are modified. As Valbruna/Bolzano notes, "[i]n the event of such modification, the remaining five issues may not be moot." *See* Valbruna Comments at 2.

[16] The Government's Response to the comments on the Remand Results confuses certain aspects of the Remand Results relating to the Lease Agreement between Valbruna and the Province. *See generally* Gov't Response at 3 (asserting that "Commerce further concluded that [two] issues . . . concerning . . . *the rent abatement agreement* were rendered moot . . .") (emphasis added).

Commerce found, on remand, that the two-year rent abatement which the Province granted to Valbruna under the Lease Agreement did not confer a subsidy. Because the rent abatement issue alone was enough to reduce the overall net subsidy rate below the *de minimis* threshold, Commerce elected not to reach two other issues arising out of the Lease Agreement – specifically, (a) whether the national benchmark rate of return of 5.7% that Commerce used to evaluate the adequacy of the rent specified in the Lease Agreement assumed that responsibility for extraordinary maintenance was borne by lessor, or by lessee, and (b) whether depreciation of buildings should have been factored into the agency's analysis of the adequacy of the rent specified in the Lease Agreement.

Contrary to statements in the Government's Response, the latter two issues do not concern the two-year rent abatement. Rather, they concern the adequacy of the amount of rent due under the Lease Agreement in those years when rent was required to be paid (*i.e.*, in all years other than the two years when rent was abated). Although both the two-year rent abatement and the adequacy of the amount of rent relate to the Lease Agreement, they are in fact distinct.

and asserting broadly that "[t]he Remand Determination on [that] issue appears to be consistent with the Court's opinion," AL Tech states that it "will not repeat the arguments previously made to [the] Court," and will instead "reserve all future argument for appeal, if any, to the Court of Appeals." AL Tech Comments at 2.

Contrary to AL Tech's implications, however, *AL Tech I* did not mandate that Commerce reverse its original determination that the Province had no legal obligation to undertake the initial, extraordinary maintenance and environmental remediation projects at issue.[17] Rather, that opinion merely highlighted various discrepancies in the agency's logic (*see, e.g.*, 28 CIT at ___ , 2004 WL 2011471 at * 16–17), and noted the absence of citations to record evidence to substantiate various aspects of the agency's analysis (28 CIT at ___ , 2004 WL 2011471 at * 16 nn.38–39). Nor did *AL Tech I* direct Commerce to find that the two-year rent abatement was the *quid pro quo* (much less an appropriate one) for Valbruna's agreement to take responsibility for those projects. To the contrary, the remand on the two-year rent abatement issue was deliberately framed in the broadest possible terms, giving Commerce an unusually wide berth "to reconsider its determination and to fully articulate the rationale for that determination, taking into consideration the record evidence as well as all parties' arguments, both at the administrative level and in this forum." *AL Tech I*, 28 CIT at ___ , 2004 WL 2011471 at * 18. Simply stated, nothing in *AL Tech I* ruled out the possibility that Commerce could have reached the same result on the two-year rent abatement that it reached in the original Final Determination, albeit on an expanded record – or even on the same record, with a more clearly articulated and supported rationale.

In sum, there can be no suggestion that *AL Tech I* dictated Commerce's determination on remand, obviating the domestic industry's need to participate (at least in some limited fashion) in the remand proceedings. Ultimately, of course, it will be for the Court of Appeals to determine whether AL Tech's failure to participate in the remand proceedings (and to file any substantive comments on the Remand Results with the Court) effectively waived any of its rights, should AL Tech seek to take an appeal. However, it is black letter law that – to properly preserve an issue for appeal – a party generally must first exhaust its remedies by making its argument before the agency, then brief that argument before the trial court. Arguments that are

---

[17] See *AL Tech I*, 28 CIT at ____ , 2004 WL 2011471 at * 16 (citing Commerce's original Final Determination, and noting that "based on its analysis of the two main projects that Valbruna completed," Commerce concluded there "that the bargain struck between the Province and Valbruna was meaningless, because (according to Commerce) the measures that Valbruna undertook were not obligations of the Province, and thus could not have constituted 'consideration' for the rent abatement granted to Valbruna").

not properly preserved are waived. *See generally Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002).

When a party elects to passively sit on the sidelines throughout remand proceedings, it is – "[a]s a matter of litigation fairness and procedure" (284 F.3d at 1274) – generally unreasonable to expect the agency (and the other parties) to try to guess how any arguments that the silent party may have previously advanced would apply to the agency's draft remand results. Under these circumstances, the agency (and the other parties) may well be entitled to assume that the silent party has decided, on reflection, that it concurs in the agency's draft remand results (or that, for some other reason, the party is abandoning its arguments). A party that chooses to absent itself from proceedings – whether at the administrative level or in a judicial forum – does so at its peril.

II. *Conclusion*

For the reasons set forth above, the Final Results of Redetermination on Remand in this matter are sustained. Judgment will enter accordingly.

Slip Op. 05–31

Before: Judge Judith M. Barzilay

Gilda Industries, Inc., Plaintiff, v. United States, Defendant.

Consol. Court. No. 03–00203

[Plaintiff's motion to set aside judgment denied.]

Decided: March 10, 2005

(*Peter S. Herrick*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; (*David M. Cohen*), Director; (*Jeanne E. Davidson*), Deputy Director, (*David S. Silverbrand*), Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *William Busis*, Office of General Counsel, Executive Office of the President, Office of the United States Trade Representative, of counsel; *Yelena Slepak*, International Trade Litigation, Bureau of Customs and Border Protection, of counsel, for Defendant.

MEMORANDUM ORDER

BARZILAY, JUDGE:

On December 1, 2004, this court entered a Judgment Order denying Plaintiff Gilda Industries, Inc.'s ("Gilda") Motion for Writ of Mandamus and Declaratory Relief, and granting the United States' ("Defendant") Motion to Dismiss. *Gilda Industries, Inc. v. United States*,

Slip Op. 2004–150.[1] In the present motion, Gilda seeks to set aside the above-mentioned Judgment Order and to reinstate its cause of action pursuant to USCIT Rule 60(b)(2). Because Gilda's motion fails to meet the requirements of USCIT R. 60(b)(2), this motion is denied.

USCIT Rule 60 provides for relief from a judgment or order of this Court where certain requirements have been met. Rule 60(b)(2) provides that "the court may relieve a party from a final judgment where new evidence has been discovered, which could not have been discovered by due diligence in time to move for a rehearing under USCIT R. 59(b)." In its motion, Gilda claims that through Freedom of Information Act ("FOIA") litigation and requests, the United States Trade Representative ("USTR") has produced new records, and that this new evidence warrants reinstatement of its action.

I. Class Certification

Regarding the court's decision to deny its motion for class certification, Gilda now identifies one pending case, *Café Rico, Inc. v. United States*, USCIT Case No. 04–00127, and indicates that Café Rico is an importer of toasted breads from Spain paying 100% duties. Gilda also states that there is a FOIA lawsuit pending in the U.S. District Court for the District of Columbia for the names and addresses of importers who are paying the 100% duties.

In its December 1, 2004 Slip Opinion, the court stated that because no other potential class members could be identified by either of the parties or the court, the court found that it could not determine whether certain requirements of USCIT Rule 23(c) had been met. The court went on to state, however, that "even assuming that Plaintiff's claims to the contrary are true and a class of plaintiffs does exist, as a discretionary matter a class action should not be maintained." Although Plaintiff's counsel indicated at oral argument that *Café Rico* concerned toasted breads subjected to 100% duties, neither was any information regarding the claim or issues in that case offered, nor was any argument made that USCIT Rule 23 had been satisfied. Moreover, the court indicated during oral argument that although "we know that even when there are hundreds and perhaps thousands of potential plaintiffs such as in the Harbor Maintenance Tax cases, this Court has been very reluctant to certify a class for predominance," and explained the reasons for this reluctance. Because the court found that regardless of whether there existed other litigation concerning the same subject matter pending, as a discretionary matter, a class action should not be maintained, Gilda's citation to *Café Rico* is unavailing. Additionally, the fact that Gilda's current FOIA litigation, pending in the District of Columbia District

---

[1] Familiarity with this prior opinion is presumed.

Court, "could lead to additional litigation" is speculative at best, and provides this court with no new information to satisfy the requirements of Rule 60(b).

II. Inclusion On the Retaliatory List

With respect to the court's rejection of Gilda's claim that its products should not have been included on the retaliatory list, Gilda has submitted an index to 830 pages of comments received by the USTR from the domestic industry, many of which Gilda characterizes as supporting the notion that the bulk, if not all, of the products included on retaliatory list should be reciprocal products. Based on these comments from various domestic producers, Gilda argues that the court wrongly concluded that the law does not limit the retaliatory list to only reciprocal products.

Contrary to Gilda's contentions, the comments of various companies are not relevant to the issue of whether the USTR acted in contravention of 19 U.S.C. § 2416. Rather, the statute itself is controlling. The comments that Gilda presents have no bearing on the court's interpretation and application of clear statutory language – that the Trade Representative shall *include* reciprocal goods on the retaliation list. Thus, the new information offered by Gilda has no relevance to the court's decision and does not justify disturbing its Judgment Order. *See* USCIT R. 60(b).

III. Removal From the Retaliatory List

Challenging the court's determination that the USTR is not required to publish or revise the Hormones list, Gilda takes issue with the court's decision that the exception provided for in 19 U.S.C. 2416(b)(2)(B)(ii)(I) has been satisfied. Specifically, Gilda challenges the USTR's determination, which the court accepted, that it (the USTR) believes a solution with the European Community ("EC") is imminent. Gilda then defines for the court the meaning of imminence and argues that because a number of months have passed since the USTR's initiation of talks with the EC, a resolution is neither imminent nor impending. Gilda goes on to cite to an EC press release, which was publicly available before Slip Op. 04–150 was issued, indicating that the EC opposes the United States' maintenance of sanctions in the context of the beef hormone dispute.

USCIT Rule 60 does not provide a forum for parties to relitigate decided issues before the Court. Merely stating that "the new evidence here is that as of the date of the filing of this motion, it has now been approximately 55 months since the USTR has refused to implement the Carousel provision" does not satisfy the requirement that a movant proffer "newly discovered evidence which by due diligence could not have been discovered in time to move for a rehearing." USCIT R. 60(b)(2). Similarly, citing to a press release that provides no new information and that was available nearly one month

before the court's opinion was issued, does not fulfil even the minimum requirements of Rule 60. *Id*. (requiring *newly discovered* evidence which *by due diligence could not have been discovered* in time to move for a rehearing) (emphasis added). Moreover, the court stated in its Slip Opinion that because neither money damages nor refunds are available, Gilda's arguments both for removal from the Hormones list as well as for a refund of the 100% duties it has paid must fail. Any "new" information now provided by Gilda is not relevant to this holding.

IV. Due Process

Finally, regarding the court's rejection of its due process claim, Gilda cites to new evidence that putative members of the class did request removal of toasted breads from the Beef Hormone Retaliation List, availing themselves of the notice and comment opportunity provided in the May 31, 2000 Federal Register Notice. Because this court denied Gilda's motion for class certification, the fact that other companies took advantage of the process made available by the USTR is not relevant to this court's holding that Gilda was afforded sufficient due process, but did not take advantage of these opportunities.

In conclusion, upon consideration of Plaintiff's Motion to Set Aside the Judgment Order, Defendant's response in opposition, and all other pertinent documents, it is hereby

ORDERED that the motion is DENIED.

Slip Op. 05–32

HEBEI METALS & MINERALS IMPORT & EXPORT CORPORATION AND HEBEI WUXIN METALS & MINERALS TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Court No. 03–00442

[Antidumping duty redetermination remanded for reconsideration of surrogate coal values.]

Dated: March 10, 2005

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP, (*Bruce M. Mitchell, Mark E. Pardo,* and *Paul Figueroa*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*), *Ada Bosque*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

RESTANI, Chief Judge:

In *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, No. 03–00442, Slip Op. 04–88 (Ct. Int'l Trade July 19, 2004) [hereinafter *Hebei Metals I*], the court remanded to the United States Department of Commerce two issues pertaining to its calculation of the antidumping duty margin for lawn and garden steel fence posts from the People's Republic of China ("PRC"), a country designated by Commerce as having non-market economy ("NME").[1] Each issue involved the use of surrogate data from India because 19 U.S.C. § 1677b(c)(1)(B) (2000) requires that an antidumping duty on a product from a NME country be calculated using surrogate values from an appropriate market economy country or countries.

First, with regard to Commerce's use of Indian import data for surrogate coal value, *Hebei Metals I* instructed Commerce either to "provide further explanation based on record evidence" that the Indian import data was more accurate than the available Indian domestic data or to "conduct further investigations to determine whether Indian import or domestic data provides a value that more accurately reflects the coal consumption patterns of producers in the relevant industry." *Hebei Metals I*, Slip Op. 04–88 at 16–17. Second, with regard to the removal of internal consumption from the denominators but not the numerators of the surrogate financial ratios, the court issued a series of instructions that essentially required Commerce to explain its decision on the basis of record evidence or to adopt an alternative method for surrogate ratio calculations based on record evidence. *Id.* at 35–36.

Now before the court is Commerce's remand determination, *Final Results of Redetermination Pursuant to Remand, Hebei Metals & Minerals Imp. & Exp. Corp. and Hebei Wuxin Metals & Minerals Trading Co., Ltd. v. United States* (Dep't Commerce Oct. 20, 2004) [hereinafter *Remand Determination*]. In the *Remand Determination*, Commerce discussed these two issues at greater length and redetermined that the surrogate coal value and the surrogate financial ratios had been calculated properly in the *Final Determination*.[2] The

---

[1] The court assumes familiarity with *Hebei Metals I*, which reviewed the margin calculations made in *Final Determination of Sales at Less Than Fair Value: Lawn and Garden Fence Posts from the People's Republic of China*, 68 Fed. Reg. 20,373 (Dep't Commerce April 25, 2003) [hereinafter *Final Determination*], and explained in *Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Lawn and Garden Steel Fence Posts from the People's Republic of China* (Dep't Commerce April 18, 2003), P.R. 158, Pls.' App., Ex. 2 [hereinafter *Decision Memorandum*].

[2] The *Remand Determination* also discusses the surrogate steel pallets calculation that was addressed in *Hebei Metals I*. *See Remand Determ.* at 5–7, 15–18. Commerce complied with the court's instructions regarding the surrogate steel pallets calculation, *see id.* at 15, and the issue is not now before the court. If Commerce disagreed with the court and had

explanations as to the calculation of the surrogate financial ratios are adequate. The *Remand Determination*, however, falls short of the requirements imposed on Commerce by statute as interpreted by the federal courts and articulated in *Hebei Metals I* with respect to the surrogate coal value. Accordingly, the court must remand again.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i). Commerce's antidumping duty calculation shall be sustained if it is supported by substantial evidence and is otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B).

BACKGROUND

I. COMMERCE'S USE OF INDIAN IMPORT DATA FOR THE SURROGATE COAL VALUE

A. Commerce's Investigation and Determination

Coal is used in the production of the subject fence posts to generate heat that aids in the drying of coating materials. *Decision Mem.*, at cmt. 4, Pls.' App., Ex. 2, at 11. Commerce's questionnaire asked Plaintiffs Hebei Metals & Minerals Import & Export Corporation and Hebei Wuxin Metals & Minerals Trading Co., Ltd. (referred to collectively hereinafter as "Hebei") to "[r]eport the energy used to produce one unit of the subject merchandise. If you used a fuel to generate electricity, please report the fuel actually used." *Letter from Commerce to Grunfeld, Desiderio* (July 15, 2002), attachment at sec. D, sixth page, P.R. Doc. 16 [hereinafter *Questionnaire*]. Hebei responded as follows:

> The . . . factory has reported the consumption of coal consumed, including the coal used by its subcontractor, in metric tons required to produce one metric ton of Fence Posts. . . . Coal usage was determined by allocating the coal consumed from the monthly workshop record for coal consumption to the products produced in the factory based on their respective weight.

Letter from Grunfeld, Desiderio (Sept. 11, 2002), at Part B, p. 15, P.R. Doc. 88 [hereinafter *Questionnaire Response*]. Shortly thereafter, Hebei submitted publicly available surrogate coal data but did not state that it used a particular category and grade of coal. In the main text of the *Hebei First Surrogate Data Submission*, the brief

---

valid reasons for not fully addressing this issue in its original brief, it should have asked for reconsideration, but it may not add new information or argument on remand as to an issue that was not remanded for reconsideration or re-explanation.

discussion of coal refers initially to "steam coal" and then to "non-coking steam coal:"

> Steam Coal should be valued using data from the Teri Energy Data Directory & Yearbook for 2000/2001. The value is derived from price for non-coking steam coal as of April 20, 2000. These steam coal prices are based on grades for non-coking coal that are determined by coals UHV ("Useful Heat Value"). The UHV is measured by a range of kcal/kg. The average values for non-coking steam coal are as follows:
>
> | | |
> |---|---|
> | GRADE A (UHV over 6200 kcal/kg.) | 1109.26 RS/MT |
> | GRADE B (UHV 5600–6200 kcal/kg.) | 1017.89 RS/MT |
> | GRADE C (UHV 4940–5600 kcal/kg.) | 870.42 RS/MT |
> | GRADE D (UHV 4200–4940 kcal/kg.) | 742.95 RS/MT |

Source documents for these surrogate values have been provided in Exhibit 9. *Letter from Grunfeld, Desiderio* (Sep. 18, 2002), at 6, P.R. Doc. 67, Def.'s App., Tab 7 [hereinafter *Hebei First Surrogate Data Submission*]. Exhibit 9 to the *Hebei First Surrogate Data Submission* provides pages from the Tata Energy Research Institute's Energy Data Directory & Yearbook for 2000/2001, P.R. Doc. 67, Ex. 9, at 44, Def.'s App., Tab 7 [hereinafter "TERI data"]. The TERI domestic statistics submitted by Hebei provide prices for seven grades and three categories of non-coking coal in all Indian states other than Assam, Arunachal Pradesh, Meghalaya, and Nagaland. *Id.*

In its preliminary determination, Commerce stated only that it valued coal using import prices for an "others" basket of coal corresponding to article code "27011909" as published in the 2001–2002 Monthly Statistics of Foreign Trade of India Volume II: Imports [hereinafter "Indian Import Statistics"]. *See Memorandum Regarding Factors of Production Valuation for the Preliminary Results* (Dep't Commerce Nov. 27, 2002), at 5–6 and Ex. Y, at 113–15, P.R. Doc. 104, Def.'s App., Tab 12 [hereinafter *Preliminary FOP Mem.*]; Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Lawn and Garden Steel Fence Posts from the People's Republic of China, 67 Fed. Reg. 72,141, 72,145 (Dep't Commerce Dec. 4, 2002) [hereinafter Preliminary Determination], amended by Correction: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Lawn and Garden Steel Fence Posts from the People's Republic of China, 68 Fed. Reg. 8,737 (Dep't Commerce Feb. 25, 2003) (correcting the scope of the investigation to correspond with the International Trade Commission's preliminary determination). In the subsequent comment period, Hebei challenged Commerce's use of the Indian import price for imported coal. See Br. from Grunfeld, Desiderio to Commerce (Mar. 13, 2003), at 9–11, P.R. Doc. 147.

In the *Final Determination*, Commerce continued to use the "others" data from the Indian Import Statistics. *Decision Mem.*, at cmt. 4, Pls.' App., Ex. 2. Commerce rejected Hebei's contention that coal should be valued using Indian domestic prices for four grades of "steam coal" as listed among the many prices contained in the TERI data. Commerce supported its choice on the grounds that the Indian Import Statistics data was contemporaneous and "free of taxes and duties," id., while, in comparison, Hebei failed to supply evidence showing that "steam coal, which is suitable for use in boiler generating steam and most often used for electricity generation, was used in the production process;" and failed to "demonstrate the 'useful heat value' (UHV) of the coal used in the production." *Id.*

B. *Hebei Metals I*

Hebei Metals I, recognizing the normal practice and conditional presumption in favor of domestic prices, concluded that "Commerce used the Indian import price for the surrogate coal value, but failed to provide substantial evidence demonstrating why imported coal yielded a more accurate surrogate value than domestic coal." Slip Op. 04–88 at 2. Commerce did not explain why an Indian manufacturer would pay for imported coal. The court reached its conclusion in *Hebei Metals I* despite the deficiencies in the alternative value offered by Hebei. The court instructed that, on remand, "Commerce must either provide further explanation based on record evidence or conduct further investigations to determine whether Indian import or domestic data provides a value that more accurately reflects the coal consumption patterns of producers in the relevant industry." Slip Op. 04–88 at 16–17.

C. The *Remand Determination*

In the *Remand Determination*, Commerce again used the "others" coal provision from the Indian Import Statistics. Commerce supported its position on the grounds that: (1) Commerce found the value submitted by Hebei to be "more distorted and less accurate than the coal value in the Indian import statistics which the Department used in the original investigation," *Remand Determ.* at 10; and (2) the use of import data assures that taxes and duties will not be included in the surrogate calculations. *Id.* at 13.

Commerce identified four types of "distortions" in the domestic data submitted by Hebei. First, the *Remand Determination*, citing *Hebei Metals I*, reiterated its position from the *Final Determination* that Hebei failed to provide record evidence to explain why domestic coal prices should be drawn from TERI data for the category "steam coal and rubble," grades A through D, but not steam coal grades E through G or other categories of coal. According to Commerce, this failure rendered the proposed value "unclear and arbitrarily limited in scope." *Remand Determ.* at 11.

Second, in comparing the Indian import statistics to the TERI data selected by Hebei, Commerce determined that the import category was broader and therefore "more appropriate for use." *Id.* at 11–12.

Third, in comparing the Indian import statistics to all the prices listed in the TERI domestic data (i.e., both the prices Hebei used to construct its proposed surrogate value and other prices), Commerce found that the highest price in the TERI data was over 560 percent greater than the lowest TERI price, while the highest Indian import statistics price was only 274 percent greater than the lowest Indian import statistics price. This led Commerce to find that "[o]verall, . . . the TERI data had a greater variance of coal prices with a greater proportion of aberrational and inconsistent gaps in data." *Id.* at 12. No further explanation was given as to the nature of the "aberrational and inconsistent gaps in the data." *Id.*

Fourth, Commerce claimed that the selection of the import data accords with its preference "to use data which comes from the same source, where possible, for all factors of production." *Id.* at 29.

In addition to the distortions it identified, Commerce rejected Hebei's domestic data in part because it might contain taxes or duties. In the absence of "record evidence or any clarifying information about the TERI data" pertaining to whether the TERI data included Indian excise and sales taxes, Commerce "determined that the domestic coal prices may not be free of taxes and duties." Id. at 13. Because Commerce's policy is to use surrogate value prices that are tax–exclusive, Commerce chose the import data. *Id.* ("The Department chose to use the Indian import statistics knowing that the values were free of taxes and duties.").

Taken together, these considerations led Commerce to find "substantial record evidence indicating that the domestic coal values in the TERI data are distorted, arbitrary, and unreliable." *Id.* at 14. Commerce found that, in comparison, the import values "approximate the cost incurred by Indian fence-post producers better than the domestic coal values in the TERI data." *Id.*

II. COMMERCE'S CALCULATION OF SURROGATE FINANCIAL RATIOS

In the *Final Determination*, Commerce calculated surrogate ratios for selling, general and administrative expenses ("SG&A"), and factory overhead using the 2001 Annual Report of Surya Roshni Ltd., an Indian manufacturer of lighting products and steel tube. *See Decision Mem.*, at cmt. 8, Def.'s App., Ex. 2. In the denominators of the ratios, Commerce deducted the amount listed for internal raw material consumption on Surya's profit and loss statement. *Id.* Commerce did not, however, address the possibility that removal of internal raw material consumption from the denominators warrants removal

of internally-related SG&A and overhead expenses from the numerators.

Hebei Metals I concluded that Commerce's explanation of its surrogate ratio calculations was inadequate both in terms of (1) its determination that the "internal consumption" values on Surya's financial statements should be removed from the denominators of the surrogate ratios, and (2) its failure to explain why internally-related SG&A and overhead expenses should not be removed from the ratios' numerators. Slip Op. 04–88 at 33–35. Accordingly, the court remanded the issue to Commerce for further explanation and, if necessary, further investigation along with these instructions:

> If Commerce is able to explain adequately the rationale for removing internal raw material consumption from the denominator of the surrogate ratios, then Commerce shall: (1) determine to what extent, if any, SG&A and factory overhead expenses are attributable to internal raw material consumption; and (2) remove appropriate amounts from the numerators of the SG&A and factory overhead surrogate ratios. If Commerce is unable to obtain sufficient evidence for this task, Commerce shall: (a) include internal raw material consumption in the denominator of the SG&A, factory overhead, and profit surrogate ratios; or (b) provide a rational explanation why more accurate surrogate ratios result from the removal of internal raw material consumption from the ratios' denominators only.

Id. at 35–36.

In terms of the removal of "internal consumption" from the denominators of the surrogate ratios, the *Remand Determination* provided the following responses to the issues raised in *Hebei Metals I*: (1) "internal consumption" in Surya's financial statements "reflects the transfers of components from one facility to another facility," *Remand Determ*. at 21; (2) "double counting" occurs in the recognition of sales "when inter-facility transfers are recognized as sales by the transferring facilities, the total sales revenue for the consolidated corporate entity are inflated artificially," *id*. at 22; (3) double counting occurs similarly in the recognition of manufacturing costs, such that "both sides of the income statement are adjusted equally," *id*. at 22–23; and (3) removal of internal consumption from the denominator of the ratios is appropriate "because Surya has not incurred this amount in its sales to outside parties." *Id*. at 24; *see also id*. at 25 ("Surya neither incurred this expenditure nor earned this income.").

In redetermining that removal of any internally–related general costs from the ratios' numerators was inappropriate, Commerce made the following findings: (1) "based upon its study of the Surya's financial statements and the company's history, the evidence indicates that there are no SG&A or factory overhead expenses attributable to internal raw material raw [sic] consumption," and (2) "a re-

duction to the numerators of the SG&A and factory overhead surrogate ratios is not warranted because our purpose here is to derive a ratio that allocates the entire amount of SG&A and factory overhead expense to the products produced and sold by the company to outside parties." *Remand Determ.* at 25–26.

DISCUSSION

I. COMMERCE'S USE OF INDIAN IMPORT DATA FOR THE SURROGATE COAL VALUE IS ARBITRARY AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE

Hebei Metals I remanded the surrogate coal value issue for two reasons. First, Commerce failed generally to provide a reasonable basis for selecting the "others" data from the Indian Import Statistics, even though Hebei's proposed surrogate value was similarly flawed. Second, Commerce lacked substantial evidence for its position that, because the import data was free of taxes and duties, it represented a more accurate value than the domestic data on the record. Slip Op. 04–88 at 14–17. The Remand Determination does not address these failings adequately. Commerce, without an evidentiary basis, continues to make an arbitrary distinction between the import data—the breadth of which it presumed to encompass the coal used by Hebei—and the narrower value proposed by Hebei, which was derived from the TERI domestic data.[3] In the arguments that accompany this arbitrary "broad versus narrow" distinction, Commerce again fails to cite substantial evidence to demonstrate the superior accuracy of the import data.

A. Commerce's "Broad Versus Narrow" Distinction Is Arbitrary Because Commerce Failed to Determine The Category of Coal Used In Production of the Subject Merchandise

Commerce has certain core investigatory duties, which cannot be avoided. The "best available information" standard set forth in 19 U.S.C. § 1677b(c)(1)(B) does not permit Commerce to choose be-

---

[3] In discussing its continued use of the Indian Import Statistics "others" provision for the surrogate coal value, the *Remand Determination* focuses on establishing that the "others" provision provides a more reliable surrogate value than the prices Hebei extracted from the domestic TERI data. This was unnecessary; *Hebei Metals I* established that "[w]ithout additional evidence, it is a matter of speculation whether [the steam coal cited by Hebei] is used in the production of the subject fence posts." Slip Op. 04–88 at 14. Commerce's task on remand was not to reiterate that Hebei's proposed surrogate value was unsupported by the record; it was for Commerce to demonstrate affirmatively that use of either the "others" import category or some other value fulfills its statutory duty to calculate normal value as accurately as possible. *See id.* at 14 n.3 ("Even where a party opposing Commerce's position has submitted information that ultimately proves inadequate, Commerce is not relieved of the requirement that it support its antidumping duty calculation with substantial evidence.").

tween two unreasonable choices, i.e., two surrogate coal values that have an unexplained relation to the coal used by Hebei. See *Anshan Iron & Steel Co., Ltd. v. United States*, No. 02–00088, Slip Op. 04–121 at 13 (Ct. Int'l Trade Sept. 22, 2004) ("This court has consistently held that deference is not due an agency determination which relies upon an inadequate factual basis or is inconsistent with congressional intent."). On the contrary, the objective of establishing antidumping margins as accurately as possible "is achieved only when Commerce's choice of what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents." Shandong Huarong Gen. Corp. v. United States, 159 F. Supp. 2d 714, 719 (Ct. Int'l Trade 2001). In *Shandong Huarong*, the Court affirmed on the basis of "little more than the barest support" in the record Commerce's use of an Indian HTS category for forged steel bars "that most closely reflected the type of steel imported by the respondent" because one of the respondents had imported forged steel bars. *Id.* at 722. Here, there is not even a bare indication of the specific type of coal used by Hebei or by other producers of the subject merchandise, yet Commerce nevertheless selected a surrogate coal value.[4]

The Remand Determination failed to identify the type of coal used by Hebei or by other producers of the subject merchandise and, even if it had done so, it failed to establish that the coal used in the production process corresponds to the "others" Indian import value selected by Commerce. Commerce was not obligated to help Hebei obtain information that would allow Hebei to add into the record a reasonable domestic surrogate coal value, but Commerce was required to obtain adequate evidence for the value it selected.

The record does not indicate that Commerce asked Hebei explicitly to identify the specific type and grade of the coal it uses. *See Questionnaire*, attachment at sec. D, sixth page, P.R. Doc. 16. If some of Commerce's requests for information could be construed as requiring specific coal information, Commerce, contrary to its statutory obligation, did not inform Hebei that its responses were inadequate. Section § 1677m(d) of title 19 requires Commerce to take action in response to a party's deficient submission: "[Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this title." 19 U.S.C. § 1677m(d). Commerce's first

---

[4] In its comments to the Remand Determination, Hebei asserts that "[t]he record plainly shows that Hebei does not import its coal," but does not cite the record to support this view. Pls.' Remand Cmts. at 5. On the other hand, Hebei correctly observes that "there is absolutely no record evidence suggesting that Indian fence post producers use imported coal in their operations." *Id.*

supplemental questionnaire does not appear in the record, but Hebei's response and the second supplemental questionnaire indicate that Commerce requested additional information on numerous issues but not the type and grade of coal. *See Letter from Grunfeld, Desiderio* (Nov. 1, 2002), P.R. Doc. 88; *Letter from Commerce to Grunfeld, Desiderio* (Nov. 6, 2002), P.R. Doc. 92.

Contrary to Commerce's contention, Hebei's unsupported use of some, but not all, of the TERI data does not lead inexorably to the conclusion that the "others" import data is the best available information. Instead of explaining how the "others" provision relates to the coal used by Hebei, Commerce implies that it is better to use an import category that may be broader than a narrow domestic category on the theory that the broader import category is more likely to capture some of the coal types used by Hebei:

> When comparing the TERI data to that of the Indian import statistics, the Department finds that the definition of coal in the Indian import statistics indicates a value for a basket category of coal rather than grades of coal specifically selected and presented by the respondent. Thus, the Department defends its assertion that the coal value in the Indian import statistics was more appropriate for use in the *Final Determination*.

Remand Determ. at 11–12.

Although it may be evident that the Indian Import Statistics "others" provision is a broader category than four grades of "steam coal and rubble," it is not evident that the "others" provision even includes a type of coal comparable to that used by Hebei, nor is it evident that such coal cannot be found within the TERI data.

Hebei used only a portion of the TERI data to derive its proposed domestic coal value; it did not exhaust the domestic data in the record. In the comments to the draft redetermination, Hebei proposed that Commerce could value coal "using the prices for all grades and all types of coal contained in the TERI data." *See id*. at 27. Commerce apparently rejected this proposal because of the same lack of specific information: "The categories in the TERI data include domestic coal value categorized by '*steam coal and rubble*,' '*slack coal and washery middlings*,' and '*run–of–mine coal*.' The Department has no record evidence demonstrating that any of these coal values would be more accurate than the coal value within the Indian import statistics on the record in this proceeding." *Id*. at 28. The Government tells the court that Hebei's proposal to derive a surrogate value by aggregating all the TERI data fails because "the TERI data sets forth over 110 potential values for coal. It is not proper to simply calculate a value from coal from all the [TERI] values." Def.'s Remand Resp. at 7. The Government provides no authority for this argument. Rather, both the *Remand Determination* and the Government's brief ignore the fact that "Commerce's decision to use the Indian Import

Statistics suffers from the same flaw that Commerce alleges as a basis for rejecting plaintiffs' alternatives." *See Shanghai Foreign Trade Enters. Co. v. United States*, 318 F. Supp. 2d 1339, 1351–52 (Ct. Int'l Trade 2004).

Commerce's position is further undermined by the fact that, even if Commerce knew the specific type of coal Hebei used, Commerce would still lack sufficient record evidence to show that such coal corresponds to the "others" import statistics provision. To illustrate, Commerce stated that the "others" provision excluded "higher value coal products (i.e., anthracite, bituminous metallurgical coal)," *Decision Mem.* at 11, but both the HTSUS and the Indian HTS "others" provisions seem to exclude *all* bituminous coal. The Indian Import Statistics appear to use the Indian Harmonized Tariff System headings, not those of the HTSUS, as the HTSUS does not provide a subheading corresponding to 270111909. *Cf.* HTSUS 2701.19.00. HTSUS subheading 2701.19.00 encompasses "other coal," i.e., coal that is not anthracite, bituminous, or bituminous-metallurgical. *See* HTSUS 2701.19.00. Although the record does not contain any version of the Indian HTS, the current Indian HTS provides subheadings for "Anthracite coal" (2701 11 00), "Bituminous coal" (2701 12 00), and, under the 2101 19 heading for "Other coal," "Coking coal" (2701 19 10), "Steam coal" (2701 19 20), and "Other" (2701 12 90). *See* India First Schedule Import–Tariff, *available at* http://www.cbec.gov.in/cae/customs/cs-abc.html. Neither the Government nor Hebei contends that Hebei would have used higher value bituminous metallurgical coal for the purpose of generating heat to aid in the drying of coating materials, *see Decision Mem.*, at cmt. 4, Pls.' App., Ex. 2, at 11 (describing the role of coal in the production process), but it is not evident that no bituminous coal was used. This raises the possibility that, if non-metallurgical bituminous coal was used in the production process, the "others" provision would not encompass it.

In sum, Commerce cannot reasonably assume that, by using the Indian Import Statistics values listed for "others coal" under article code "27011909," it was using a category of coal imports that covered the type of coal used in Hebei's production process. A broad and unsupported coal value falls short of a substantial evidentiary basis just as a narrow and unsupported coal value does. During its investigation or upon remand, Commerce should have established the category of coal used by Hebei or at least established the category or categories of coal normally used to produce the subject merchandise. Commerce's failure to do so leaves no basis for favoring import data. Because Commerce drew no rational connection between its surrogate value and the coal used in production of the subject merchandise, its broad versus narrow distinction is arbitrary. See Allied Tube

& Conduit Corp. v. United States, 24 CIT 1357, 1370, 127 F. Supp. 2d 207, 219 (2000) ("Commerce may not act arbitrarily . . .").[5]

B. Commerce's Other Explanations Fail to Overcome the Preference for Domestic Surrogate Data

In addition to the breadth-versus-narrowness explanation refuted above, Commerce prefers the "others" import provision because it is contemporaneous with the POI, contains a smaller variation between it high and low prices, derives from the same source as other surrogate values, and excludes taxes and duties. These explanations are irrelevant because Commerce failed to show that the "others" coal import category relates to the production of the subject merchandise. Assuming for the sake of argument, however, that Commerce could reasonably choose between the "others" import provision and all the TERI domestic data on the record, these explanations are insufficient to reverse the conditional presumption in favor of domestic surrogate data. A domestic price is preferred for the calculation of surrogate values by prior practice, policy, and logic.

All else being equal, tax- and duty-free domestic data is clearly preferable over import data, but, as all things are rarely equal, this preference is subject to conditions. *See Rhodia, Inc. v. United States*, 185 F. Supp. 2d 1343, 1352 (Ct. Int'l Trade 2001) ("*Rhodia I*") ("Rhodia notes that Commerce has a stated preference for the use of the domestic price over the import price, all else being equal. This preference . . . does not require Commerce to use the domestic price in all circumstances."); *see also Sulfanilic Acid From the P.R.C.*, 63 Fed. Reg. 63,834, 63,838 (Dep't Commerce Nov. 17, 1998) (final admin. rev.) (acknowledging that "domestic prices are preferred only if both domestic and import prices are available on a tax- and duty-exclusive basis, all else being equal."); *Ferrovanadium and Nitrided Vanadium from the Russian Federation*, 62 Fed. Reg. 65,656, 65,661 (Dep't Commerce Dec. 15, 1997) ("The Department has also articulated a preference for a surrogate country's domestic prices over import values.") (citation omitted). Because the paramount goal in nor-

---

[5] The Government cites *Raoping Xingyu Foods Co., Ltd. v. United States*, No. 02–00550, Slip Op. 04–111 (Ct. Int'l Trade Aug. 31, 2004), to support the proposition that the failings in Hebei's proposed surrogate coal value allow Commerce to use the Indian Import Statistics data. *Raoping* is distinguishable from the instant case, however. In *Raoping*, the Court affirmed Commerce's choice of values for "furnace oil" used by an Indian producer as the surrogate liquid fuel value. The respondent failed to supply adequate record evidence to establish the fuel oil used in its production process. *Id.*, Slip Op. 04–111 at 9. Commerce found that the Indian furnace oil it used as a surrogate was comparable to the furnace oil used by the respondent, id. at 8.

In the instant case, Commerce made no such finding, nor would such a finding be warranted from the record. While the review in *Raoping* selected a fuel oil type clearly used by a comparable producer of mushrooms, here there is not record evidence that the import coal data used by Commerce corresponds to a category of coal comparable to that used by Hebei or any other producer.

mal value calculations is to calculate as accurately as possible the product's normal value as "it would have been if the NME country were a market economy country," the preference in favor of using domestic data does not require that domestic data be used in circumstances where it would conflict with the goal of accuracy. *See Rhodia I*, 185 F. Supp. 2d at 1351–52. Most notably, Commerce may select import data over domestic data where the record shows that taxes distorted the domestic price. *See, e.g.*, Nation Ford Chem. Co. v. United States, 166 F.3d 1373, 1377–78 (Fed. Cir. 1999); *Taiyuan Heavy Mach. Imp. & Exp. Corp. v. United States*, 23 CIT 701, 709–10 (1999).

Conversely, the preference for domestic data is most appropriate where the circumstances indicate that a producer in a hypothetical market would be unlikely to use an imported factor in its production process. The most obvious circumstance occurs where the import price is significantly greater than the domestic price. In *Yantai Oriental Juice Co. v. United States*, No. 00–07–00309, Slip Op. 02–56 (Ct. Int'l Trade June 18, 2002) ("*Yantai I*"), the Court concluded that, even though the import coal data might have been "more contemporaneous" and not aberrational, these considerations did not compensate for the fact that Commerce had failed to explain "how the use of seemingly more expensive imported coal data is the best available information establishing the actual costs incurred by Indian . . . producers." *Id.*, Slip Op. 02–56 at 23. In *Creatine Monohydrate from the P.R.C.*, 67 Fed. Reg. 10,892 (Dep't Commerce Mar. 11, 2002), Commerce found that the domestic prices, net of taxes, were "lower than or roughly equal to the import prices," which made it clear that "the domestic prices [were] not distorted by reason of high tariffs." *Id.* at 10,893. On this basis, Commerce used the domestic prices. *Id.*[6]

In addition to being a Commerce policy in accordance with precedent, the conditional preference for domestic data is a logical starting point for achieving the objective set by Congress. In a hypothetical world of a NME country as a market economy country from

---

[6] The Government does not contest the existence of this preference directly. *See* Def.'s Remand Resp. at 6 ("Even if a presumption in favor of export data existed . . ."). Although Commerce has sometimes emphasized the preference's conditional nature, its past practice nevertheless acknowledges the existence of the preference:

> In *Creatine*, the Department stated that it does not have an unconditional preference for using domestic prices over import prices to value factors of productions. Further, the Department explained that it may reject domestic prices if there is evidence that the domestic prices are distorted by certain factors, such as high tariffs. If no distortion exists, the Department would use domestic prices for valuing the input.

Non-Frozen Apple Juice Concentrate from the P.R.C., 67 Fed. Reg. 68,987, 68,989 (Dep't Commerce Nov. 14, 2002) (final admin. rev.) (citations omitted); *see also Certain Preserved Mushrooms from the P.R.C.*, 67 Fed. Reg. 46,173, 46,176 (Dep't Commerce July 12, 2002) (final admin. rev.) ("In *Creatine*, the Department explained that it may reject domestic prices if there is evidence that the domestic prices are distorted by certain factors, such as high tariffs.") (citation omitted).

which taxes, duties, and other governmental interference have been excluded, it is reasonable to assume that a domestic price reflects the value of a factor of production more accurately than an import price. This assumption may be undermined by record evidence showing how an import price more accurately reflects the actual costs incurred by a producer of the relevant product, but this must be explained reasonably by Commerce. Here, Commerce fails to establish the relative merits of the import value in terms of the actual costs incurred by a producer. Instead, Commerce's explanation—once the broad versus narrow distinction is discarded (see above)—consists of abstract data comparisons and speculation regarding the inclusion of taxes in the domestic prices.

In terms of abstract data comparisons, Commerce explained in the *Final Determination* that the import data is contemporaneous with the POI, which ran from October 1, 2001, through March 31, 2002. *See* Decision Mem., at cmt. 4, Pls.' App., Ex. 2; *Notice of Initiation of Antidumping Duty Investigation: Lawn & Garden Steel Fence Posts From the People's Republic of China*, 67 Fed. Reg. 37,388, 37,389 (Dep't Commerce May 29, 2002) (stating the POI). The Indian Import Statistics for 2001/2002 cover the period from April 2001 through December 2001, which overlaps with the POI by three months. The TERI domestic data reflects prices as of April 20, 2000, which is one year removed from the start of Indian Import Statistics' coverage. While the contemporaneity of data is one factor to be considered by Commerce, *see Union Camp Corp. v. United States*, 20 CIT 931, 939, 941 F. Supp. 108, 116 (1996), three months of contemporaneity is not a compelling factor where the alternative data is only a year-and-a-half distant from the POI. In addition, the Court has previously found contemporaneity to be insufficient to explain why an import price is the best available information for establishing the actual costs incurred by a producer. *See Yantai I*, Slip Op. 02–56 at 23.

Second, Commerce explained in the *Remand Determination* that the TERI data had "a greater variance of coal prices," with a 560 percent difference between the highest and lowest prices compared to a 274 percent variation in the Indian Import Statistics. Hebei observes that the variance actually favors the TERI data in absolute terms, with price range of 1,119 Rs per metric ton compared to 1,682.1 Rs for the import data. Pls.' Remand Cmts. at 4. Just as with the issue of contemporaneity, price variance is an inadequate basis to explain Commerce's surrogate value selection.

Third, Commerce claims that the selection of the import data accords with its preference "to use data which comes from the same source, where possible, for all factors of production." *Remand Determ.* at 29. To support its claim of past practice, Commerce cites *Floor-Standing, Metal-Top Ironing Tables from the P.R.C.*, 69 Fed. Reg. 35,296 (Dep't Commerce June 24, 2004) (final determ.),

but *Ironing Tables* acknowledged a past preference for using WTA Indian Import Statistics over unofficial statistics from InfodriveIndia.com, not a past preference for using the same data source for all inputs. *See id.* at 35,304–05. Accordingly, this is not a valid basis for selecting the import data.

As for Commerce's speculation as to the inclusion of taxes in the TERI domestic data, the *Remand Determination* asserted that, because "the Department had no way of knowing whether [Indian excise and sales taxes] are included," Commerce may choose "Indian import statistics knowing that the values were free of taxes and duties." *Remand Determ.* at 13. Although Commerce has a clear preference for values that are tax-exclusive, *see id.* at 30 (citing *Manganese Metal From the P.R.C.*, 63 Fed. Reg. 12,441 (Dep't Commerce Mar. 13, 1998) (final admin. rev.)), Commerce's position here conflicts with its statutory obligation to base its determinations on substantial evidence.

As discussed in *Hebei Metals I*, Slip Op. 04–88 at 15–16, federal courts have recognized Commerce's prerogative to select import data over domestic data on the grounds of taxexclusivity only where domestic tax distortions were evident from the record. *See, e.g.*, Nation Ford, 166 F.3d at 1377–78 ("NFC does not explain why Commerce should have used the Indian domestic price, a price admittedly distorted by the Indian tariff"); *Taiyuan Heavy Mach.*, 23 CIT at 709–710 (citing record evidence that India "had price controls on coal," and Commerce's practice of using "import statistics when the domestic prices appeared to be governed by price controls."). The Government does not cite, nor is the court aware of, any Commerce determination adopting the *Remand Determination's* position that import values may be used where there is no record evidence of domestic taxes or prices that would make an imported price more reliable than a domestic price. This is not surprising, as such a position is contrary to the statutory requirement that Commerce's determinations be supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

C. Remand Instructions

Although Commerce claims to have done "the best it can to value coal," *Remand Determ.* at 30, *Hebei Metals I* anticipated that the record might be an inadequate basis for any surrogate coal value calculation and therefore offered Commerce the opportunity to conduct further investigations that would allow Commerce "to determine whether Indian import or domestic data provides a value that more accurately reflects the coal consumption patterns of producers in the relevant industry." *Hebei Metals I*, Slip Op. 04–88 at 17. Apparently, the record is devoid of such information. Commerce neglected the opportunity to correct their problem, making another remand necessary. If Commerce does not complete the investigation at this stage,

the court will have no choice but to direct the use of Hebei's values, as it merely erred. Hebei did not obstruct the investigation.

On remand, Commerce shall re-open the record to add evidence. Commerce may add any relevant evidence, but it must either:

(1) seek evidence of the type of coal used by Hebei in its production process, and nonaberrational price data that best relates to this coal type, if the record does not already contain such data;

or, if that is deemed impractical at this stage,

(2) obtain evidence of the type or types of coal normally used for drying steel fence posts in China or India and non-aberrational price data that best relates to such coal type(s), if the record does not already contain such data.

In either scenario, Commerce shall adhere to its conditional preference for domestic surrogate data or Commerce shall state that it is deviating from this practice and provide a rational explanation for doing so.

If Commerce again decides to use the "others" provision of coal in the Indian Import Statistics, it must (1) provide record evidence that this provision at least roughly corresponds to the type of coal used to dry steel fence posts; (2) determine whether the type of coal used by Hebei or a reasonably comparable type is reflected in the TERI domestic data, and (3) provide a reasonable explanation as to why the "others" import data more accurately reflects the costs incurred in producing the subject merchandise. In any event, Commerce may not support the use of import data in the surrogate coal value on the basis of tax-exclusivity if there is no record evidence to indicate that the Indian coal market prices are distorted by taxes and/or duties. Further, the other reasons thus far offered for Commerce's choice of import coal data have been found insufficient and will not sustain the choice.

II. COMMERCE'S CALCULATION OF SURROGATE FINANCIAL RATIOS IS SUSTAINED

The *Remand Determination* provides a reasonable explanation as to why Surya's internal raw consumption figure should be removed from the denominators of the SG&A and factory overhead surrogate ratios and that a reduction to the numerators was unwarranted.[7]

---

[7] Commerce uses surrogate ratios to implement the provision in 19 U.S.C. § 1677b(c)(1)(B) which requires that the normal value for products of NMEs include amounts for "general expenses and profit" in addition to the cost of the surrogate values for the factors of production. The amounts for general expenses and profit are typically obtained by applying the following surrogate ratios to the surrogate FOP values: selling, general and administrative expenses ("SG&A"), factory (or manufacturing) overhead, and profit. *Shanghai Foreign Trade Enters.*, 318 F. Supp. 2d at 1341. These three ratios derive from the financial statements of one or more surrogate companies that produce merchandise in the surrogate country that is identical or comparable to the subject merchandise. *Id.*

A. Removal of Internal Consumption from the Surrogate Ratios' Denominators Is Reasonable and Substantially Supported

In the *Final Determination*, Commerce's determination as to the meaning of Surya's "internal consumption" figures was ambiguous; "internal consumption" was said to represent the production of internal assets or inter-facility transfers. *Decision Mem.*, at 15; Pls.' App., Ex. 2; *see also Hebei Metals I*, Slip Op. 04–88 at 29. On remand, Commerce clarified this ambiguity by determining that "internal consumption" represented only inter-facility transfers, which would be double-counted if not removed from the expense values in the surrogate ratios' denominators. *Remand Determ.* at 21–22.

In the *Remand Determination*, Commerce's principal bases for its continued adherence to its surrogate ratio calculations in the *Final Determination* are its "accounting experience and judgment," *Remand Determ.* at 21, and its "accounting experience with record evidence in past cases." *Id.* at 33. In its brief to the court, the Government explains that, based on this accounting experience and judgment, Surya's financial statements made it "evident" that "the 'internal consumption' notation reflected components consumed internally to produce finished products (i.e., lamps and luminaries) for external sales." Def.'s Remand Resp. at 11. The Government cited prior investigations in which Commerce deducted internal consumption in order to avoid double-counting. *Id.* at 12 (citing *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 Fed. Reg. 6,889 (Dep't Commerce Feb. 11, 2003) (final admin. rev.), and *Structural Steel Beams from Spain*, 66 Fed. Reg. 67,207 (Dep't Commerce Dec. 28, 2001) (preliminary determ.)). Despite Hebei's contention that Commerce's explanation represents nothing more than "unsupported speculation," Pls.' Remand Cmts. at 7, the court concludes that Commerce's explanation is supported by reasonable inferences from the record. In making its determination, Commerce explained

---

The ratios are calculated and incorporated into the normal value calculation in the following manner:

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

Id. (citation omitted).

Because direct manufacturing expenses are a component in the denominator of each ratio, each ratio requires data for raw material costs. To this end, Commerce utilized the "Raw Material Consumed" line-item from the "EXPENDITURES" column in the *Surya Roshni P&L Statement*.

what it meant by "double-counting," and this explanation accords with the discussion of internal consumption, inter-facility transfers, and double-counting in *Hebei Metals I*. *See Hebei Metals I*, Slip Op. 04–88 at 33 ("Assuming internal consumption represents intracompany transfers . . . then Commerce expressed a valid concern that the inclusion of internal consumption would overvalue raw material costs in the surrogate ratios.").

B. The Determination Not to Remove Internal Consumption from the Surrogate Ratios' Numerators Is Reasonable and Substantially Supported

Hebei argues that, if internal consumption is to be removed from the surrogate ratios' denominators, expenses related to internal transfers should be deducted from the SG&A and factory overhead expenses reflected in the ratios' numerators. Pls.' Remand Cmts. at 10. The *Remand Determination*, however, provides a reasonable explanation as to why the SG&A and factory overhead figures should be left intact.

According to Commerce, "SG&A and factory overhead expenses are not attributable to the internal raw material consumption stated on Surya's financial statements *per se*. Rather they should be attributed to the raw material only once." *Remand Determ.* at 25. Hebei understands Commerce to mean that internal transfers "were performed without incurring any factory overhead or SG&A expenses." Pls.' Remand Cmts. at 8. This is not Commerce's position. Commerce's position is that SG&A and factory overhead expenses reflect costs incurred by a company as it produces and sells its products, and such costs may come from the transfer of raw material inputs among company facilities as well as transactions involving entities outside the company. *See id.* at 26 ("our purpose here is to derive a ratio that allocates the entire amount of SG&A and factory overhead expense to the products produced and sold by the company to outside parties."). The Government elaborates: "Commerce did not conclude that there were no overhead or administrative costs associated with the internal transfer. Rather, Commerce found there were no '*uncaptured*' overhead or administrative costs. . . ." Def.'s Remand Resp. at 12. According to this logic, overhead and administrative costs associated with internal transfers were "captured" by allocation to finished products sold to outside parties.

In describing SG&A and factory overhead costs in this manner, Commerce provides a reasonable basis for removing internal raw material expenditures from the surrogate ratios' denominators without making a corresponding adjustment to the numerators. Commerce's double-counting rationale, which supported its treatment of the denominators, does not apply to the numerators. SG&A and factory overhead expenses do not raise a double-counting concern because internally-related SG&A and factory overhead costs represent

actual costs to the company. If a raw material input is transferred between two business units of a company, this may incur some actual factory overhead costs, but it will not incur any actual raw material costs because the company already owns the input. The factory overhead costs would be actual in the sense that, all else being equal, a company with a production process requiring many interfacility transfers would incur higher factory overhead costs than to a company that makes no interfacility transfers.

Because the *Remand Determination* provides a reasonable explanation as to why it is not appropriate to remove any amounts from the numerators of the SG&A and factory overhead surrogate financial ratios, Commerce's determination as to this issue is sustained.[8]

CONCLUSION

Commerce's selection of Indian Import Statistics data for the surrogate coal value was arbitrary and unsupported by substantial evidence. Accordingly, the case is remanded for reconsideration and action consistent with this opinion, and it is hereby

ORDERED that the Department of Commerce shall file its remand determination with the court on or before May 9, 2005;

ORDERED that Plaintiffs are granted 25 days from the date of the remand determination to file comments; and

---

[8] Commerce did not address the treatment of the ratios' numerators in the *Final Determination*, when it offered two different explanations—production of internal assets or interfacility transfers—for its decision to recalculate the surrogate financial ratios using Surya's raw materials consumption net of internal consumption. *See Decision Mem*., at cmt. 8, Pls.' App., Ex. 2, at 15. The first explanation seemed to make a strong case for removing amounts from the numerators, and the second explanation left the matter unclear.

In its briefing for *Hebei Metals I*, the Government did not improve the situation by taking the position that internal consumption of raw materials did not incur SG&A and factory overhead expenses. *See* Def.'s Br. at 37. *Hebei Metals I* demonstrated that, in at least one circumstance (calculation of the indirect selling expenses ratio for the United States price), Commerce attributed expenses to sales that "can be construed as a routine transfer of merchandise." Slip Op. 04–88 (quoting *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 Fed. Reg. 6,889, 6,891). *Hebei Metals I* also cited Fuyao Glass Industry Group Co., Ltd. v. United States, No. 02–00282, Slip Op. 03–169 (Ct. Int'l Trade Dec. 18, 2003), which, although it involves the distinct issue of general expenses incurred by the sale of trade goods, addressed the evidentiary problems involved in deducting amounts from the numerators of surrogate ratios. Slip Op. 03–169 at 40.

With the *Remand Determination*, Commerce has settled finally on the inter-facility transfers/double-counting rationale for removing internal raw materials consumption from the denominator, and has explained for the first time how the double-counting rationale does not require an adjustment to the numerators. This is adequate, and, because this case bears significant factual differences from *Stainless Steel Sheet and Strip in Coils from Mexico*, 68 Fed. Reg. at 6,891, it is not necessary to specifically address the methodology used in that review for United States price as it bears on arbitrariness in the calculation of normal value here.

ORDERED that the Department of Commerce is granted 15 days to respond to any comments filed.

Slip Op. 05–33

ANSHAN IRON & STEEL COMPANY, LTD., *et al.*, Plaintiffs, v. UNITED STATES OF AMERICA Defendant, and UNITED STATES STEEL CORPORATION, and GALLATIN STEEL COMPANY, *et al.*, Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No. 02–00088

JUDGMENT ORDER

Upon consideration of the Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand ("Remand Determination"), filed pursuant to this court's decision and Order in *Anshan Iron & Steel Co. v. United States*, Slip Op. 04–121 (September 22, 2004); the parties having filed no comments contesting Commerce's Remand Determination; the Court having reviewed Commerce's Remand Determination and all pleadings and papers on file herein, and good cause appearing therefore, it is hereby

ORDERED that Commerce's Remand Determination is in accordance with this Court's decision and Order of September 22, 2004; and it is further

ORDERED that Commerce's Remand Determination is sustained.