U.S. Customs and Border Protection

Slip Op. 10–43

ATAR, S.R.L., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN ITALIAN PASTA COMPANY, DAKOTA GROWERS PASTA COMPANY, AND NEW WORLD PASTA COMPANY, Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 07–00086

[Ordering a second remand on redetermined final results by the United States Department of Commerce in an administrative review of an antidumping duty order on certain pasta from Italy]

Dated: April 20, 2010

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Kelley Drye & Warren LLP (*David C. Smith, Jr.* and *Paul C. Rosenthal*) for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge:

I. Introduction

In this action, plaintiff Atar S.r.l. ("Atar"), an Italian producer and exporter of pasta products, contested the final determination ("Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department"), in the ninth administrative review of an antidumping duty order on certain pasta from Italy. *Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7011 (Feb. 14, 2007) ("Final Results"). The court's June 5, 2009 opinion and order affirmed the Final Results in part and issued a remand order directing Commerce to redetermine the profit and indirect selling expense ("ISE") components of the calculation of the constructed value ("CV") of Atar's subject merchandise. *Atar, S.r.l. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1068, 1092 (2009)

("*Atar I*"). In determining constructed value profit and indirect selling expense in the Final Results, Commerce used a weighted average of the sales of the six respondents in the previous (eighth) administrative review of the order (which did not include Atar) that were made in the ordinary course of trade, *i.e.*, that were not made below cost. *Issues & Decisions for the Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy & Determination to Revoke in Part* 14 & n.5, 18–21 (Feb. 5, 2007) ("*Decision Mem.*"). *Atar I* held that Commerce had not demonstrated the reasonableness of its method of determining constructed value profit and indirect selling expense and, on remand, must reconsider, *inter alia*, its decision to exclude the below-cost sales from the profit and indirect selling expense calculations. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1092.

Before the court is Commerce's decision upon remand ("Remand Redetermination"), issued September 3, 2009, in which Commerce calculated Atar's constructed value profit and indirect selling expense using a weighted average of the sales of two of the six respondents in the prior review, which Commerce chose because they were the only respondents that earned an overall profit on their sales subject to that review. Results of Redetermination pursuant to Ct. Remand 6, 8–9 ("Remand Redetermination"). Plaintiff raises various objections to the Remand Redetermination. Comments on First Remand Determination 2–14 ("Pl. Comments"). Concluding that Commerce's method of redetermining constructed value profit was incomplete and contrary to 19 U.S.C. § 1677b(e)(2)(B)(iii) (2006) in failing to adhere to the statutory profit cap requirement, the court again remands the matter to Commerce for corrective action.

II. Background

The background of this case, as set forth in *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1072–73, is summarized briefly herein and augmented with a discussion of events occurring since the issuance of the court's opinion and order on June 5, 2009.

Commerce published the final results of the ninth administrative review in February 2007, assigning Atar a weighted-average dumping margin of 18.18%. *Final Results*, 72 Fed. Reg. at 7012. The review covered two manufacturer/exporters, one of which was Atar, and

pertained to entries of certain non-egg dry pasta[1] (the "subject merchandise") made during theperiod July 1, 2004 through June 30, 2005 ("period of review" or "POR"). *See Notice of Prelim. Results & Partial Rescission of Antidumping Duty Admin. Review: Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 71 Fed. Reg. 45,017, 45,018 (Aug. 8, 2006) ("*Prelim. Results*"). In response to the court's Opinion and Order dated June 5, 2009, Commerce's Remand Redetermination, filed September 3, 2009, recalculated the constructed value profit and indirect selling expense for Atar's subject merchandise and thereby lowered Atar's margin to 14.45%. Remand Redetermination 15. Plaintiff filed comments on October 5, 2009. Pl. Comments. Defendant and defendant-intervenor filed comments responding to plaintiff's comments on November 9, 2009. Def.'s Reply to Pl.'s Comments upon the Remand Redetermination ("Def. Reply"); Reply to Pl.'s Comments on Remand Redetermination Filed on Behalf of Def.-Intervenors American Italian Pasta Co., New World Pasta Co. & Dakota Growers Pasta Co. ("Def. Intervenor Reply"). On December 16, 2009, plaintiff moved for leave to file an additional submission, which motion defendant opposed on December 22, 2009. Mot. for Leave to File Resp. 1; Opp'n to Pl.'s Mot. to File a Resp. 1.

III. *DISCUSSION*

The court exercises jurisdiction over this case according to 28 U.S.C. § 1581(c), under which the court reviews actions brought under 19 U.S.C. § 1516a, including actions contesting the final results of an administrative review issued under 19 U.S.C. § 1675(a). 19 U.S.C. §§ 1516a, 1675(a) (2006); 28 U.S.C. § 1581(c) (2006). Upon review, the court will determine whether the Remand Redetermination complies with the remand order in *Atar I* and will hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i).

As discussed in *Atar I*, the court could not conclude that Commerce, in determining constructed value profit and indirect selling expense according to a weighted average of the sales of the six respondents in the eighth review, had employed a "reasonable method" as required by 19 U.S.C. § 1677b(e)(2)(B)(iii) ("alternative (iii)"). *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1092. Alternative (iii) authorizes Commerce to

[1] Imports covered by the order "are shipments of certain non-egg dry pasta in packages of five pounds four ounces or less, whether or not enriched or fortified or containing milk or other optional ingredients." *See Notice of Final Results of the Ninth Admin. Review of the Antidumping Duty Order on Certain Pasta from Italy*, 72 Fed. Reg. 7011, 7012 (Feb. 14, 2007) ("*Final Results*").

determine constructed value selling, general, and administrative expenses, and profits, based on “any other reasonable method” but limits the amount determined for profits according to a “profit cap,” under which the amount allowed for profit “may not exceed the amount normally realized by exporters or producers . . . in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.” 19 U.S.C. § 1677b(e)(2)(B)(iii).

The court’s remand order directed Commerce to reconsider, and redetermine as necessary, Atar’s constructed value profit and indirect selling expense. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1092. In response, Commerce on remand has revised Atar’s margin by basing constructed value profit and indirect selling expense on the data of two of the six respondents in the eighth review, which Commerce chose because these two respondents were the only respondents in the eighth review to have realized a profit. Remand Redetermination 6, 8–9. In the Remand Redetermination, Commerce cited to a practice of considering unprofitable companies unsuitable for determining constructed value profit. *Id.* at 8 (“A company with zero profit has no profit and accordingly is not an appropriate surrogate for determining a respondent’s profit for CV purposes.”). Commerce did not exclude the below-cost sales of the two chosen respondents. *Id.* at 15. Commerce used the data of these same two respondents in determining a ratio for constructed value indirect selling expense, reasoning that a company’s profit is a function of its indirect selling expense. *Id.* at 9–10.

Commerce chose to use all sales of the two respondents it selected from the eighth review as its way of addressing a problem the court identified in the Department’s previous determination of constructed value. That problem identified by the court in *Atar I* was Commerce’s arbitrarily excluding data of sales made outside the ordinary course based only on a generally-applicable “preferred methodology” rather than on a case-by-case decision grounded in circumstances relevant to Atar. *See Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1086–87. The court stated that “[a] default policy or preference under which Commerce inflexibly excludes below-cost sales in all situations such as the one presented here cannot serve as a substitute for determining a ‘reasonable method’ for purposes of alternative (iii).” *Id.* at __, 637 F. Supp. 2d at 1087.

Atar raises several objections to the Remand Redetermination, including that Commerce should not have excluded the data of the four unprofitable respondents. Pl. Comments 4–7. Atar argues that excluding these data “in essence, establishes a minimum profit re-

quirement, which is not part of the antidumping statute or regulations" and "would also appear to be contrary" to the decision of the Court of International Trade in *Floral Trade Council v. United States*. *Id.* at 5 (citing *Floral Trade Council v. United States*, 23 CIT 20, 30, 41 F. Supp. 2d 319, 329–30 (1999)) (further arguing at page 14 of Pl. Comments that "[t]he rejection of this [*sic*] data essentially establishes a statutory minimum profit contrary to the dictates of the statute, legislative history and judicial precedent."). In arguing against a "minimum profit requirement" as discussed in *Floral Trade Council*, Atar quotes language in *Floral Trade Council* observing that Congress, as indicated in the Statement of Administrative Action ("SAA") accompanying the Uruguay Round Agreements Act, did not intend that Commerce, when determining a profit cap, would analyze whether sales in the same general category as the subject merchandise are above-cost or otherwise in the ordinary course of trade. Pl. Comments 5 (quoting *Floral Trade Council*, 23 CIT at 30, 41 F. Supp. 2d at 329–30 (quoting *The Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316 (Vol. 1), at 839, 841 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4175, 4177 ("*SAA*"))).

In *Floral Trade Council*, the Court of International Trade rejected Commerce's determination of constructed value profit under alternative (iii), concluding that alternative (iii) "does not mandate the creation of a positive amount where all available evidence indicate[s] non-profitable sales." 23 CIT at 33, 41 F. Supp. 2d at 332. This case is not analogous in all respects to *Floral Trade Council*, which resulted from a profit cap of zero profit that was based on record data on home market sales of flowers that were in the same general category as the subject merchandise. *See id.* Nevertheless, in this case, as in *Floral Trade Council*, the record data pertaining to the home market include a significant level of non-profitable selling activity. Plaintiff's reliance on *Floral Trade Council* is warranted because here, as in that case, Commerce is determining constructed value profit under alternative (iii), which imposes the profit cap as an express limitation on Commerce's determination of constructed value profit.

In the ordinary circumstance, the statute requires Commerce to determine a profit cap that places a ceiling on constructed value profits, regardless of what "reasonable method" Commerce chooses to apply. *See* 19 U.S.C. § 1677b(e)(2)(B)(iii). Unlike the method used to determine selling, general, and administrative expenses, which is governed by a reasonableness requirement, the method used to determine profits must be reasonable *and* be subjected to the profit cap

provision. *See id.* The SAA contemplated that Commerce might have to apply alternative (iii) on the basis of the facts otherwise available, due to the absence of record data from which to calculate the profit normally realized by other companies on sales of the same general category of products. *See SAA* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177; 19 U.S.C. § 1677e(a) (2006). But even the exception for absence of record data does not allow Commerce to ignore the profit cap requirement entirely when determining constructed value profit. Where the record lacks data on profit normally realized by other companies on sales of the same general category of products, Commerce still must attempt to comply with the profit cap requirement through the use of facts otherwise available. *See SAA* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177; *Geum Poong Corp. v. United States*, 25 CIT 1089, 1096–97, 163 F. Supp. 2d 669, 678–79 (2001). In the Remand Redetermination, Commerce acknowledged that alternative (iii) imposes the profit cap as a limitation on its determination of CV profits but neither identified a profit cap nor made a finding that available data did not allow it to do so.[2] *See* Remand Redetermination 4. Nor is there any discussion in the Remand Redetermination of a profit cap calculated according to facts otherwise available. *See id.*

Although Commerce did not determine a profit cap in the Remand Redetermination, it stated in the Preliminary Results that the data it used to determine constructed value profit based on the weighted average of ordinary-course sales of all respondents in the eighth review also serve as the profit cap. *See Prelim. Results*, 71 Fed. Reg. at 45,022 ("As such, in accordance with [19 U.S.C. § 1677b(e)(2)(B)(iii)], the weighted-average profit rate of the respondents in the *Pasta Eighth Review Final Results* establishes a profit cap."); *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1088–89. Commerce did not indicate in the Remand Redetermination that it was relying upon the profit cap described in the Preliminary Results. *See* Remand Redetermination. Because the court in *Atar I* held that Commerce's overall method of determining constructed value profit was not a

[2] The Remand Redetermination expressly acknowledges that

> [t]he third alternative allows the Department to use any reasonable method *as long as the amount applied for profit is not greater than the amount normally realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise."*

Results of Redetermination pursuant to Ct. Remand 4 (quoting 19 U.S.C. § 1677b(e)(2)(B)(iii)) (emphasis added) ("Remand Redetermination"). The Remand Redetermination contains no discussion of whether or how the profit cap obligation affected the constructed value profit determination contained in the decision. *See id.*

"reasonable method" under alternative (iii), the court did not reach the question of whether the profit cap Commerce identified in the Preliminary Results was lawful. *See Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1088–89; *see Geum Poong*, 25 CIT at 1096–97, 163 F. Supp. 2d at 678–79. Because the court decided *Atar I* on another ground, *i.e.*, that use of a reasonable method had not been shown, *Atar I* cannot be construed to mean that Commerce could issue a decision on remand that fails to adhere to the statutory profit cap requirement.

Without deciding the issue, *Atar I* questioned whether the data used to calculate constructed value profit also could serve as a valid profit cap, but the case neither allowed nor disallowed this profit cap. *Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1088–89. The court recognizes that there may be instances, due to the lack of data on the record, in which the profit cap determination, or facts available profit cap determination, and the constructed value profit determination might be based on the same data. Although the court is not required to address whether, upon a second remand, Commerce could decide to adopt the profit cap described in the Preliminary Results, the court observes that the requirements of the statute would not allow it to sustain such a decision. As suggested by the language of alternative (iii) and confirmed by the SAA, Congress did not intend for Commerce to exclude data on below-cost sales from its calculation when determining a profit cap. *See* 19 U.S.C. § 1677b(e)(2)(B)(iii); *SAA* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177 ("Likewise, the Administration does not intend that Commerce would engage in an analysis of whether sales in the same general category are above-cost or otherwise in the ordinary course of trade."). The Court of International Trade emphasized this point in *Floral Trade Council*, 23 CIT at 29–31, 41 F. Supp. 2d at 329–30.

Defendant comments that Atar's reliance on *Floral Trade Council* is misplaced, arguing that the case before the court is distinguishable because the record here, unlike that in *Floral Trade Council*, includes profitable sales. Def. Reply 6–7. According to defendant, *Floral Trade Council* "recognized that the statute normally required a positive profit value under 19 U.S.C. § 1677b(e)(2)(B)(iii), [*i.e.*, alternative (iii),] but carved a presumptive and narrow exception to this positive profit requirement 'where the record indicates that profitable sales do not exist.'" *Id.* at 7 (quoting *Floral Trade Council*, 23 CIT at 32, 41 F. Supp. 2d at 331). Defendant-intervenor makes a similar argument. Def.-Intervenor Reply 5. These arguments overlook the basic problem posed by the Remand Redetermination, which is that Commerce failed to comply with the profit cap provision, which formed the basis

for the holding in *Floral Trade Council*. This problem arises because Commerce failed to adhere to a statutory requirement and thus would exist even were the court to accept defendant's strained reading of *Floral Trade Council*. Moreover, even had the Remand Redetermination expressly adopted the profit cap described in the Preliminary Results (which the Remand Redetermination did not do), such an action would have contravened the congressional intent that a profit cap not be based on a selective database that excludes below-cost sales of "same general category" products that occurred in the home market. *See SAA* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177.

Although arguing that the Remand Redetermination unlawfully applies a "minimum profit requirement" that is contrary to the holding in *Floral Trade Council*, 23 CIT at 31, 33, 41 F. Supp. 2d at 330–32, plaintiff's comments do not raise expressly the objection that Commerce, in the Remand Redetermination, failed to attempt to determine a profit "cap." *See* Pl. Comments. It can be argued, therefore, that plaintiff has waived any such objection. The court might be within its discretion were it to decide, based on a waiver theory, that Commerce need not comply with the profit cap requirement on remand, but the court declines to take such an approach. By basing its objection to Commerce's applying a minimum profit requirement on *Floral Trade Council*, plaintiff impliedly relies on the reasoning of that case, under which a profit cap of zero profit was the justification for the holding that a minimum profit requirement is inconsistent with alternative (iii). Pl. Comments 5; *Floral Trade Council*, 23 CIT at 30, 41 F. Supp. 2d at 329–30. It is noteworthy also that plaintiff's comments quote language from *Floral Trade Council* discussing the profit cap requirement. Pl. Comments 5 (quoting *Floral Trade Council*, 23 CIT at 30, 41 F. Supp. 2d at 329–30). Here, considering the full implications of plaintiff's *Floral Trade Council* argument requires the court to consider the profit cap provision of alternative (iii) as an entirety. Congress intended Commerce to comply with that provision even if Commerce must do so using facts otherwise available, *see SAA* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177, and *Geum Poong*, 25 CIT at 1097, 163 F. Supp. 2d at 679, and the court will not overlook this requirement in the circumstances of this case. Even had Atar failed to allude to the profit cap requirement in any respect (which does not describe the circumstance here), "a court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief." *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447

(1993) (quoting *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990)); *see also Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

A second question is whether the court should disregard the profit cap issue based on an exhaustion theory. It appears from the record that Atar did not raise expressly the profit cap issue during the ninth review. The court is to exercise discretion to determine whether requiring exhaustion of administrative remedies is appropriate. 28 U.S.C. § 2637(d) (2006) (stating that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."). Courts have recognized an exception to the requirement to exhaust administrative remedies where a pure question of law is involved. *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007). The narrow issue of whether Commerce, in all cases in which it applies alternative (iii), must endeavor to comply with the profit cap requirement is a pure question of law. Commerce is subject to this obligation whenever it applies alternative (iii), regardless of the particular facts before it. The issue of whether Commerce is ever free to apply alternative (iii) absent an attempt to comply with the profit cap obligation may be resolved by "statutory construction alone." *See id.* (quoting *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (internal quotation marks and brackets omitted)). In addition, Commerce having revealed in the Remand Redetermination its awareness that its profit calculation on remand is subject to the profit cap provision, it is not appropriate in these circumstances for the court to overlook the Department's failure to comply with that provision. *See* Remand Redetermination 4. The doctrine of exhaustion of administrative remedies, for these reasons, does not preclude the court from requiring that Commerce, on a second remand, effectuate the statutory profit cap requirement in this case in accordance with alternative (iii). *See* 19 U.S.C. § 1677b(e)(2)(B)(iii).

In summary, the statute directs Commerce to determine constructed value profit according to a method that satisfies both the reasonable method requirement and the profit cap requirement as embodied in alternative (iii). Because the Remand Redetermination is contrary to the statute in disregarding the profit cap requirement, a further remand is required in this proceeding. In solving the profit cap problem presented by this case, Commerce should take heed of

the congressional intent, recognized in the SAA, that Commerce not exclude data on below-cost sales from the database used to calculate a profit cap. *See SAA* at 841, *reprinted in* 1994 U.S.C.C.A.N. at 4177.

Atar raises various other objections in its comments on the Remand Redetermination. *See* Pl. Comments 4–14. The court has considered these objections, and the comments of the other two parties thereon, but does not perceive a need to rule on these other objections because it would be premature to do so as these objections may be moot once Commerce has submitted its decision in response to this Opinion and Order. Below, the court discusses its specific reasons for declining to rule on each of the other objections set forth in plaintiff's comments.

Atar objects to Commerce's limiting its profit and indirect selling expense determinations to the two eighth review respondents on the ground that Commerce considered the use of data of all six respondents to be acceptable in the Final Results. Pl. Comments 4–5. Atar argues that, nothing having changed as to the record, it was arbitrary and capricious for Commerce to limit the number of respondents whose data is considered. *Id.* at 4. The court does not reach this issue with respect to the determination of constructed value profit, which the court rejects on other grounds.[3]

Atar objects, further, that even if it was appropriate to exclude the data of the profitless eighth review respondents from the constructed value profit calculation, Commerce erred in excluding these data from the constructed value determination of indirect selling expense. Pl. Comments 6–7. Atar's rationale is that if a company fails to realize a profit, "either the expenses of the company are too high or the selling prices are too low," *id.*, and "[i]n either case, using the ISE ratio . . . would, as a result, be adverse to the respondent." *Id.* at 7. Plaintiff adds that "[i]f either the expenses were lower or the selling price were higher, which would be the case with a higher profit[,] [t]he resultant ISE ratio would, in fact be lower." *Id.* Plaintiff further adds that "if there is any distortion, it would be adverse to Atar." *Id.*

In the Remand Redetermination, Commerce reasoned that because a company's profit is a function of its total expenses, "it would be inconsistent and possibly distortive . . . to calculate a profit ratio based only on companies reporting a profit" while calculating indirect selling expense based on all companies' data. Remand Redetermination 10. The court is requiring Commerce to redetermine constructed value profit in a way that adheres both to the profit cap requirement and the reasonable method requirement as stated in alternative (iii).

[3] With respect to indirect selling expense, the court is reserving decision, for reasons discussed *infra*.

The relationship between the two constructed value determinations that are addressed in alternative (iii) was alluded to by Commerce in the Remand Redetermination. *See id.* It is possible, if not likely, that on remand Commerce will change its determination of constructed value indirect selling expense. The court will review Commerce's second remand redetermination to ensure that both the profit and indirect selling expense ratios, as Commerce may describe and explain them therein, comply with 19 U.S.C. § 1677b(e)(2)(B)(iii). The court reserves any ruling on the constructed value indirect selling expense that Commerce applied to Atar in the Remand Redetermination.

Atar also objects that Commerce erred in determining constructed value profit and indirect selling expense by calculating quantity-based weighted averages, and not simple averages, from the data of the two eighth review respondents. Pl. Comments 7–10. Atar maintains that it is Commerce's normal practice to use a simple average when combining data "unless the facts warrant deviation from that practice," *id.* at 7, and that Commerce's stated reasons for using a weighted average do not warrant a departure. *Id.* at 7–9 (citing *Rhodia, Inc. v. United States*, 26 CIT 1107, 1111, 240 F. Supp. 2d 1247, 1251 (2002)). The practice to which plaintiff refers, which was discussed in the opinion in *Rhodia,* issued in 2002, is apparently no longer a practice. As the Remand Redetermination and defendant's comments mention, Commerce used a weighted average to determine constructed value profit in the antidumping investigation resulting in *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 33 CIT __, Slip. Op. 09–65, at 5 (June 24, 2009) ("*Thai I-Mei IV*"), which Commerce conducted in 2004–2005, and used this methodology again following the court's remand order in that case. *See* Remand Redetermination 13; Def. Reply 8; *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 31 CIT 334, 336–37, 339, 477 F. Supp. 2d 1332, 1335–36, 1338 (2007) ("*Thai I-Mei I*"); *see also Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 33 CIT __, Slip. Op. 09–6 (Jan. 21, 2009) ("*Thai I-Mei III*"); *Thai I-Mei Frozen Foods Co., Ltd. v. United States*, 32 CIT __, 572 F. Supp. 2d 1353 (2008) ("*Thai I-Mei II*").

In support of Commerce's choice to use a weighted average of the data, the Remand Redetermination states that a simple average of the data of the two chosen respondents could risk the disclosure of those respondents' proprietary information. Remand Redetermination 12–13. Atar disagrees that such a risk exists. Pl. Comments 8–9. In further support of its argument, Atar contends that use of a weighted average distorts results, in particular where Commerce

averages data from a producer larger than the producer being examined to determine constructed value profit and indirect selling expense. *Id.* at 9–10.

There may be individual circumstances in which Atar's position that a simple average produces a more reasonable result than a weighted average is correct, but the court declines to hold that methods of determining constructed value profit and indirect selling expense employing weighted averages are impermissible *per se*. Because alternative (iii) imposes a general requirement that any methods used under alternative (iii) be reasonable, any such inflexible rule would be inconsistent with the measure of discretion Congress granted. Therefore, questions such as whether a straight or weighted average is more appropriate must be considered on a case-by-case basis. Upon receipt of the second remand results ordered herein, the court will consider the issue of the overall reasonableness of the method Commerce uses to determine profit and indirect selling expense ratios as components of the constructed value of Atar's subject merchandise. If appropriate in the context of the decision Commerce puts forth, the court's review will include the issue of whether that method was reasonable in the choice of an averaging method.

Plaintiff's final objection is that Commerce erred in the Remand Redetermination by failing to consider Atar's earlier argument that the eighth review respondents Commerce chose as surrogates are not representative of Atar, even though the court invited Commerce to consider this argument in ordering the first remand. Pl. Comments 10–14; *see Atar I*, 33 CIT at __, 637 F. Supp. 2d at 1089. Plaintiff renews this objection with respect to Commerce's choice of the two respondents in the Remand Redetermination. Pl. Comments 10–14.

The exclusion of the data of four of the six respondents in the eighth review stemmed from Commerce's stated preference for using as a surrogate only the data of profitable respondents. Remand Redetermination 6, 8–9. Because the court concludes that Commerce must resolve the profit cap issue, the court need not, and does not, decide whether Commerce's stated preference constitutes a reasonable method under alternative (iii) in the particular context of this case, where a respondent had no home market sales and no acceptable comparison market and where Commerce concluded that, because of the need to protect proprietary information, it could not base its determinations on the home market sales data of the other respondent in the review. The court is compelled to point out, nevertheless, that part of Commerce's rationale for applying that preference in the Remand Redetermination, the decision of the Court of International

Trade in *Rhodia*, 26 CIT at 1114–15, 240 F. Supp. 2d at 1254–55, is not binding precedent and, equally important, is inapposite. Remand Redetermination 6 & n.2. *Rhodia* involved profit determined according to the non-market economy provisions in the statute, 19 U.S.C. § 1677b(c)(1), not profit determined according to alternative (iii), which is subject to different considerations, including the profit cap limitation. *See Rhodia*, 26 CIT at 1108, 1113–15, 240 F. Supp. 2d at 1248, 1253–55. The dicta in *Rhodia* referencing the determination of profit in a market economy antidumping proceeding does not address the particular circumstances of a respondent such as Atar. *See id.*

The court also points out that a factor weighing against Commerce's preference in this case is the limiting effect on the database that this preference caused. By excluding the data on four of the six respondents, Commerce determined constructed value profit and indirect selling expense according to a database that necessarily was less representative of the home market situation considered as a whole than a database consisting of all available data on the home market sales of all eighth review respondents. Examination of that narrowed database reveals that on remand Atar's profit and indirect selling expense, as a consequence of the use of a weighted average, were determined principally according to the data of the larger of the two chosen respondents. That respondent's profit ratio was substantially greater than the profit ratio of the only other respondent that realized a profit. *See* Pl. Comments 9–10. In addition, because this smaller respondent accounted for a very small percentage of the combined sales quantities of the two chosen respondents, the data pertaining to it had little effect on the resulting profit and indirect selling expense ratios. Based on record evidence, Atar objects that the larger respondent, due to size and other factors, is not representative of a company such as Atar. *Id.* at 9–14.

Atar's objections concerning the unsuitability of the larger of the two chosen eighth review respondents may have merit. As it concludes with respect to other objections lodged by Atar, the court considers it premature and unnecessary to rule on these objections at this time. Commerce, on remand, must redetermine constructed value profit and, in the process, likely will redetermine constructed value indirect selling expense as well. In fashioning a second set of remand results in this case, Commerce should give due consideration to the representativeness of the data of any eighth review respondents it chooses as surrogates, the more so because those data will have a substantial effect on Atar's margin. In doing so, Commerce

must be mindful of its obligation to achieve a fair and accurate result that complies fully with the obligations imposed by alternative (iii) and related statutory provisions.

IV. *Conclusion*

The Remand Redetermination is not in accordance with law because of Commerce's failure to comply with the profit cap requirement as set forth in 19 U.S.C. § 1677b(e)(2)(B)(iii). In a second remand proceeding, Commerce must reconsider the matter and redetermine constructed value profit for Atar in a way that satisfies both the profit cap and reasonable method requirements of that provision of the statute. Commerce may redetermine the constructed value indirect selling expense at that time.

Order

Upon review of the Results of Redetermination pursuant to Court Remand ("Remand Redetermination"), the parties' comments, and all other papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the Remand Redetermination, as filed on September 3, 2009, be, and hereby is, set aside as contrary to law; it is further

ORDERED that Commerce will submit to the court a second remand redetermination that complies with 19 U.S.C. § 1677b(e)(2)(B)(iii), and related statutory provisions, in all respects and that is in accordance with all directives and conclusions set forth in this Opinion and Order; it is further

ORDERED that Commerce shall submit its second remand redetermination within sixty (60) days of the date of this Opinion and Order; it is further

ORDERED that plaintiff may submit to the court comments on the second remand redetermination within thirty (30) days of the date on which the second remand redetermination is filed with the court; it is further

ORDERED that defendant and defendant-intevenor may submit comments on the second remand redetermination, and on plaintiff's comments thereon, within twenty (20) days of the date on which plaintiff files its comments with the court; and it is further

ORDERED that plaintiff's Motion for Leave to File Response to the comments of defendant and defendant-intervenor on the Remand Redetermination, filed December 16, 2009 be, and hereby is, denied because the argument plaintiff makes in support of that motion, which pertains to dispositive motions, lacks merit when viewed in the context of the court's review of the Remand Redetermination.

Dated: April 20, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–44

BRISTOL METALS L.P., FELKER BROTHERS CORP., MARCEGAGLIA USA INC., AND OUTOKUMPU STAINLESS PIPE, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 09–00127

[Final remand results sustained.]

Dated: April 20, 2010

Schagrin Associates (*Roger B. Schagrin*), *Michael J. Brown*) for Plaintiffs Bristol Metals, LP, Felker Brothers Corp., Marcegaglia USA Inc., and Outokumpu Stainless Pipe Co. Inc.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Action, U.S. Department of Justice (*Joshua E. Kurland*, Trial Attorney); and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*David W. Richardson*, of counsel) for Defendant United States.

OPINION

Gordon, Judge:

I. Introduction

This action involves the final less than fair value determination of the U.S. Department of Commerce ("Commerce") in the antidumping investigation covering circular welded austenitic stainless pressure pipe from the People's Republic of China. *See Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China*, 74 Fed. Reg. 4913 (Dep't of Commerce Jan. 28, 2009) (final determ.) ("*Final Determination*"), and accompanying Issues and Decision Memorandum for Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China, A–570–930 (Jan. 21, 2009), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E9–1827–1.pdf ("*Decision Memorandum*") (last visited Apr. 20, 2010). Before the court are the Final Results of Redetermination (Jan. 5, 2010) ("*Remand Results*") filed by Commerce pursuant to *Bristol Metals L.P. v. United States*, Court No. 09–00127 (Oct. 23, 2009) (remand order).

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

II. Background

Respondents Zhejiang Jiuli Hi-Tech Metals Co., Ltd. ("Jiuli") and Winner Machinery Enterprise Co., Ltd ("Winner") submitted separate rate applications during the antidumping investigation. *Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China*, 73 Fed. Reg. 51,788 (Dep't of Commerce Sept. 5, 2008) (prelim. determ.). Although Jiuli and Winner each qualified for separate rates (apart from the China-wide rate), *id.* at 51,792, Commerce chose to individually investigate only Winner, who accounted for the largest volume of subject merchandise. Commerce preliminarily calculated a company-specific dumping margin for Winner (22.03 percent), which it then assigned to Jiuli. *Id.*

At verification Winner withdrew from the investigation and refused to further cooperate. 74 Fed. Reg. at 4913. In the *Final Determination* Commerce applied adverse facts available to Winner pursuant to 19 U.S.C. § 1677e, treating Winner as part of the China-wide entity, which Commerce assigned an adverse facts available rate of 55.21 percent, the highest computer control number ("CONNUM") specific calculated dumping margin from Winner's unverified data. *Id.* at 4914–15. Commerce assigned Jiuli, an otherwise willing and cooperative respondent not selected for individual investigation, a separate sample pool rate that Commerce calculated from the margins contained in the antidumping petition (10.53 percent). *Id.* at 4914.

Plaintiffs could not challenge the assignment of Jiuli's sample pool rate during the administrative proceeding because the events with Winner unfolded after the preliminary determination and Commerce first assigned Jiuli a separate sample pool rate in the *Final Determination*. It was not until their brief before the court that Plaintiff had the first opportunity to challenge Commerce's (1) decision to assign Jiuli a sample pool rate (as opposed to the China-wide rate), Pls.' Mot. J. Agency R. 3–8, and (2) Commerce's surrogate valuation of stainless steel to calculate the sample pool rate. *Id.* at 8–10. Defendant, in turn, requested a voluntary remand to address Plaintiffs' arguments in the first instance, which the court granted. *Bristol Metals L.P. v. United States*, Court No. 09–00127 (Oct. 23, 2009) (remand order). In their

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

comments on the *Remand Results*, Plaintiffs continue to challenge Commerce's surrogate valuation of stainless steel, and the assignment of a sample pool rate to Jiuli.

III. Standard of Review

When reviewing Commerce's antidumping determinations, the court sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). *See also Dorbest Ltd. v. United States*, 30 CIT 1671, 1675–76, 462 F. Supp. 2d 1262, 1268 (2006) (providing a comprehensive explanation of the standard of review in the nonmarket economy context). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 10.3[1] (2d. ed. 2009). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms*, *National Courts* § 13342 (2d ed. 2009).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont*, 407 F.3d at 1215; *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statu-

tory interpretation is entitled to deference pursuant to *Chevron*.”).

IV. Discussion

A. Commerce’s Surrogate Valuation of Stainless Steel Inputs

Valuation of factors of production in a nonmarket economy (“NME”) case is governed by 19 U.S.C. § 1677b(c), which directs Commerce to use the “best available information” in determining surrogate values. 19 U.S.C. § 1677b(c)(1)(B). The antidumping statute also directs Commerce to use values from an appropriate surrogate country to the extent possible. 19 U.S.C. § 1677b(c)(4). Commerce’s regulations provide that surrogate values should normally be “publicly available” and (other than labor costs) from a single surrogate country. 19 C.F.R. § 351.408(c) (2007). In addition to the statutory and regulatory preference for using surrogate country data, Commerce prefers data that is publicly available, reflects a broad market average, is contemporaneous with the period of review, is specific to the input in question, and is exclusive of taxes on exports. *See, e.g.*, *Certain New Pneumatic Off-the-Road Tires from the People’s Republic of China*, 73 Fed. Reg. 40,485 (Dep’t of Commerce July 15, 2008) and accompanying Issues and Decision Memorandum, at cmt. 10.

Here, as is sometimes the case, no data set from the record perfectly satisfies Commerce’s preferences. After reviewing the information available in the record, Commerce determined that the “best available information” for the surrogate value of the stainless steel input used in the subject merchandise was World Trade Atlas Indian Import data for HTS 7219 and 7220 (“WTA data”), which are the two HTS categories that include grades 304 and 316 stainless steel that Plaintiffs cited in the petition. *See Remand Results* at 7; *Circular Welded Austenitic Stainless Pressure Pipe from the People’s Republic of China*, 73 Fed. Reg. 10,221, 10,224 (Dep’t of Commerce Feb. 26, 2008) (init. notice) (“*Initiation Notice*”). Commerce’s selection of the WTA data was reasonable because Commerce determined, and the record supports, that the data substantially satisfies the criteria Commerce applies in identifying an appropriate surrogate value. Commerce also determined (and the record supports) that its only weakness (coverage of a broader range of steel than the two grades used by Plaintiffs) did not negate its superiority to the alternative data sets advocated by Plaintiffs.

Specifically, as explained in the *Remand Results*, Commerce determined that the WTA data was from a reliable, publicly available source that Commerce regularly uses for surrogate values. *Remand Results* at 7. Commerce next determined that the WTA data matched its criteria because the data consists of average, tax exclusive values.

Id. Commerce also determined that the data reflected the prices paid in actual transactions (as opposed to offers that may vary significantly from final prices). *Id.* In addition, Commerce determined the WTA data was contemporaneous with the period of investigation. *Id.* Finally, Commerce acknowledged that the WTA data was not a perfect complement to the particular grades of stainless steel cited in the petition, but explained that the WTA data did represent "an import category that covers imports of the type of steel for which Plaintiff has provided alternative surrogate values."[2] *Id.* ; *see also id.* at 10 (stating "the WTA import data . . . reflects actual prices paid for imports under an HTS category applicable to the stainless steel grades offered for sale on the [Steel Authority of India Ltd.] price list. . . . Therefore, while the WTA import data . . . may not distinguish between grades of stainless steel, we continue to find that it is more appropriate as the source of a surrogate value given the faults of the data proposed by Plaintiffs.").

Equally important, the WTA data comes from India, the primary surrogate country advocated by Plaintiffs, and chosen by Commerce for use in valuing factors of production. *Remand Results* at 7. Hence, in using the WTA data, rather than data sets that were not from a surrogate country or of unknown origin, Commerce adhered to the statutory mandate to use surrogate country data to the extent possible, as well as its regulatory preference for valuing inputs from a single surrogate country. *See* 19 U.S.C. § 1677b(c)(4); 19 C.F.R. § 351.408(c)(2). As Commerce noted: "given that the remainder of the surrogates used by [Commerce] to value the factors of production were from India, we find it even more appropriate to not use a surrogate value from the United States to value stainless steel." *Remand Results* at 10 (citing 19 C.F.R. § 351.408(c)(2)).

Commerce also explained its basis for rejecting the alternative data sets advocated by Plaintiffs. First, Plaintiffs argue that Commerce should have calculated the surrogate values using either Plaintiffs' own costs for grades 304 and 316 or those reported by the American Metal Market. Pls.' Cmts. at 2. Commerce explained, however, that these data sets are poor surrogates for metal prices in China because the United States is not an acceptable surrogate country for China. *See Remand Results* at 10. Although Commerce has occasionally used United States data as a last resort when the record lacks surrogate country data, in this case the WTA data came from India, the surro-

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[2] The record also indicates that there is a viable market in India for the stainless steel used in Plaintiffs' product, as evidenced by Plaintiffs' advocacy of India as a surrogate country because it is a "significant producer" of the product. *See Initiation Notice*, 73 Fed. Reg. at 10,223 (citing Petition, at 6–7); Petitioners Comments on Surrogate Selection, Pub. Rec. Doc. 66, at 2–3.

gate country that Plaintiffs advocated and Commerce selected. Commerce's decision to use the Indian WTA data rather than the United States data is consistent with the statutory and regulatory provisions requiring Commerce to use surrogate country data to the extent possible. *See* 19 U.S.C. § 1677b(c)(4); 19 C.F.R. § 351.408(c). *See also Remand Results* at 10. In addition, Plaintiffs' suggestion that Commerce use Plaintiffs' own cost data fails to satisfy Commerce's preference to use publicly available information.

The next data set Plaintiffs advocate, grades 304 and 316 steel prices from Management Engineering & Production Services ("MEPS"), suffers from similar deficiencies. As Commerce explained, the MEPS data provide no information regarding the countries from which it was derived. *Remand Results* at 7, 10. The data potentially includes prices from non-surrogate countries; it also potentially includes prices from nonmarket economy countries and those that maintain broadly available export subsidies that are inappropriate for use in valuing factors of production. *Id.* Commerce concluded that use of such data would thus not provide reliable information on which to calculate a surrogate value for stainless steel from China and would conflict with Commerce's statutory preference for data from a single, appropriate surrogate country.

The final alternative data set that Plaintiffs advocate is a price list from the Steel Authority of India Ltd. ("SAIL"). Pls.' Cmts. at 2. Commerce explained that it prefers actual prices over price lists because price lists may not reflect the prices paid in actual transactions. *Remand Results* at 7, 10. Price lists, which constitute a producer's opening offer, may be just the starting point in a negotiation that could result in a significantly different final sale price. They also represent the experience of a single producer, rather than a broad market average. *See Laminated Woven Sacks from the People's Republic of China*, 73 Fed. Reg. 35,646 (Dep't of Commerce June 24, 2008) and accompanying Issues and Decision Memorandum, cmts. 2 & 3. Unlike the SAIL price list, the WTA data report actual prices paid for stainless steel imports throughout India (including grades 304 and 316). *Remand Results* at 10. Hence, Commerce reasonably determined that the WTA data better met its criteria.

The issue here closely resembles one decided by the court in *Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT 1418, 1436–45 (2005). In *Polyethylene Retail* a party challenged Commerce's use of Indian HTS data to calculate the surrogate value of an input in an antidumping investigation because the data was not as specific as alternatives that party proposed. As in this case, Commerce determined that the less-specific HTS data was still the "best

available information" because of more serious flaws with the proposed alternatives. The court recognized that the "broad [Indian HTS] basket provisions include a large number of products Plaintiffs did not use to produce the subject merchandise," *id.* at 1437, but nonetheless upheld Commerce's determination that the Indian HTS data was still the best data available, stating that it would not "substitute its own evidentiary evaluation for Commerce's." *Id.* at 1445.

Here, Commerce provided a reasoned basis for determining that the WTA data it used both met its criteria for selecting surrogate values and constituted better data than the alternatives proposed by Plaintiffs. As in *Polyethylene Retail*, the court is reluctant to "substitute its own evidentiary evaluation for Commerce's," *id.*, and to substitute its own judgment for the agency's in considering and weighing the relative importance of the various criteria applied. The important point is that Commerce carefully considered each of its announced criteria against the alternative data sources on the record, and proffered a reasoned explanation for its ultimate choice. With that said, Commerce's surrogate value selection for stainless steel inputs is reasonable, and therefore supported by substantial evidence.

B. Whether Jiuli Is Entitled to a Separate Rate

An exporter may "affirmatively demonstrate its entitlement to a separate, company-specific margin by showing an absence of central government control, both in law and in fact, with respect to exports." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997) (citation omitted); Pls.' Cmts. at 7 (quoting *Sigma*). Jiuli made such a showing in this case. *Id.* at 10. Nonetheless, Plaintiffs argue that Jiuli may only qualify for a separate margin if it submitted "company-specific price and cost data to [Commerce] . . . in addition to showing an absence of government control." *Id.* at 7; *see also id.* at 8–9. Plaintiffs' arguments are unpersuasive.

Commerce has a well-established administrative practice of calculating a separate rate for those responsive companies that are part of the "sample pool" for an investigation and for which Commerce lacks the resources to investigate individually. Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries, at 2, 3–4, 6 (Apr. 5, 2005), available at http://ia.ita.doc.gov/policy/bull05–1.pdf (explaining separate rate practice and stating Commerce will calculate a separate rate for the "pool of non-investigated firms" in an NME proceeding). *See also Certain Kitchen Appliance Shelving and Racks From the People's*

Republic of China, 74 Fed. Reg. 9591, 9596–97 (Dep't of Commerce Mar. 5, 2009) (applying separate rate to pool of cooperating, non-investigated respondents); *Sodium Hexametaphosphate From the People's Republic of China*, 73 Fed. Reg. 6479, 6480–81 (Dep't of Commerce Feb. 4, 2008) (same).

The court, in turn, has upheld Commerce's practice of calculating this kind of rate. *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermkt. Mfrs. v. United States*, 23 CIT 88, 111, 44 F. Supp. 2d 229, 251 (1999) (explaining that Commerce's approach has the "weight of fairness and common sense"). Although *Brake Drum* did not use the precise term "sample pool rate," it involved the exact same kind of rate Commerce applied here. *See Brake Drums and Brake Rotors from the People's Republic of China*, 62 Fed. Reg. 9160, 9162 (Dep't of Commerce Feb. 28, 1997) (stating Commerce applied a separate rate to exporters that "cooperated with our investigations but which were not selected as respondents").

The court cannot identify any support in the statute or case law to substantiate Plaintiffs' argument that companies like Jiuli may not qualify for a separate rate unless they meet an additional requirement of submitting company-specific price and cost data, even if Commerce makes no such request. Such a requirement would eviscerate Commerce's separate rate policy. *See* Policy Bulletin 05.1, at 4 (separate rate application "will replace the requirement that [non-selected firms] respond to Section A of the Department's questionnaire").

In the *Remand Results* Commerce explained the difference between "all others" rates and "sample pool" rates: once established in an investigation, an "all others" rate does not change in subsequent administrative proceedings, whereas a "sample pool" rate may change from one review to another (or not be calculated at all). *Remand Results* at 2, 3, 12. In NME proceedings, Commerce typically need not calculate an "all others" rate because Commerce presumes that all producers and exporters either qualify for a rate separate from the NME entity or are assumed to be part of the entity. *Remand Results* at 2–3, 13 (citing *Brake Drum*, 23 CIT at 107, 44 F. Supp. 2d at 248. Nevertheless, when calculating an NME "sample pool" rate, Commerce is guided by the "all others rate" provision, 19 U.S.C. § 1673d(c)(5). *Amanda Foods (Vietnam) Ltd. v. United States*, 33 CIT ___, ___, 647 F. Supp. 2d 1368, 1379 (2009) ("To determine the dumping margin for non-mandatory respondents in NME cases (that is, to determine the "separate rates" margin), Commerce normally relies on the 'all others rate' provision of 19 U.S.C. § 1673d(c)(5).").

Plaintiffs contend that Commerce is prohibited from calculating a separate rate for Jiuli because 19 U.S.C. § 1673d(c)(5) first requires Commerce to have calculated an individually-investigated rate for another respondent that demonstrated its independence from government control. Pls.' Cmts. at 9, 12. Commerce, though, has never found such a precondition within the statute. *Remand Results* at 4 ("[T]he statute does not require the existence of an individually examined rate for a rate to be assigned to the sample pool."). Commerce explained that, consistent with 19 U.S.C. § 1673d(c)(5), it will normally base its sample pool rate on the margins "established for exporters and producers individually examined, excluding *de minimis* margins or margins based entirely on [adverse facts available]," and that, because in this case it assigned the China-wide entity it investigated a dumping margin based entirely on adverse facts available, it would use another reasonable calculation method for Jiuli. *Remand Results* at 4. Commerce also explained that it determined both that the China-wide entity's rate was not reasonably reflective of Jiuli's dumping rates and that it was inappropriate to assign a cooperative respondent like Jiuli an antidumping margin based entirely on adverse facts available due to another respondent's failure to cooperate. *Id.* at 4, 6, 15. These are reasonable conclusions.

Commerce's chosen methodology of applying an average of the initiation margins is also consistent with what Commerce has done in other NME investigations in which the individually investigated rates are based entirely on adverse facts available, and with what Commerce has done in market economy proceedings in which the individually investigated rates are zero, *de minimis*, or based entirely on adverse facts available. *See Sodium Hexametaphosphate*, 73 Fed. Reg. 6479 (assigning average of the initiation margins as sample pool rate); *Glycine from Japan*, 72 Fed. Reg. 67,271 (Dep't of Commerce Nov. 28, 2007) (calculating all-others rate based upon average of the petition rates); *Certain Cold-Rolled Flat-Rolled Carbon-Quality Steel Products From Argentina, Japan, and Thailand*, 65 Fed. Reg. 5,520 (Dep't of Commerce Feb. 4, 2000) (same); *Stainless Steel Plate in Coils from Canada*, 64 Fed. Reg. 15,457 (Dep't of Commerce Mar. 31, 1999) (same).

Finally, in the *Remand Results* Commerce addressed Plaintiffs' arguments that Commerce should have used the "expected methodology" specified in the Statement of Administrative Action. *Remand Results* at 5–6, 15–16. The expected methodology is a calculation in which Commerce "weight-average[s] the zero and *de minimis* margins and the margins determined pursuant to the facts available." The Uruguay Round Agreements Act, Statement of Administration

Action ("SAA"), H.R. Doc. No. 103–826(I), at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201. Commerce explained: "given that, in this case, there are no zero or *de minimis* margins on the record of this proceeding, calculating Jiuli's margin according to the expected methodology is not applicable." *Remand Results* at 5. Commerce further explained that the SAA expressly states that if Commerce determines the expected methodology "'would not be reasonably reflective of potential dumping margins for non-investigated exporters and producers'" it has discretion to "'use other reasonable methods'" in calculating the rate for these companies. *Id.* at 6 (quoting SAA).

Here, as discussed above, Commerce made that determination. It found that the China-wide entity's adverse facts available rate was not reasonably reflective of potential dumping margins for Jiuli because the adverse facts available rate was higher than the adjusted petition rates upon which Commerce initiated the investigation, and that it would be unreasonable to apply the adverse facts available rate to Jiuli as a result of Commerce's administrative resource constraints. *Remand Results* at 6. Given the available margins in the record, Commerce reasonably assigned Jiuli a rate based upon an average of the petition rates, and corroborated the rate to the extent practicable using the mandatory respondent's unverified data, which was the only other data in the record.

V. *Conclusion*

Commerce's *Remand Results* are supported by substantial evidence, and otherwise in accordance with law. Accordingly, the court will sustain Commerce's *Remand Results* and enter judgment for the United States.

Dated: April 20, 2010
New York, New York

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