Slip Op. 08–61

WUHAN BEE HEALTHY CO., LTD. and PRESSTEK INC., Plaintiffs, v. UNITED STATES, Defendant, and THE AMERICAN HONEY PRODUCERS ASSOCIATION and THE SIOUX HONEY ASSOCIATION, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 05–00438

[United States Department of Commerce's final remand results sustained.]

Dated: May 29, 2008

Kalik Lewin (*Martin J. Lewin* and *Brenna Steinert Lenchak*), for plaintiffs.
Gregory A. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jane C. Dempsey*), for defendant.
Kelley Drye Collier Shannon (*Michael J. Coursey* and *R. Alan Luberda*), for defendant-intervenors.

OPINION

Eaton, Judge: In *Wuhan Bee Healthy Co. v. United States*, 31 CIT ___ , Slip Op. 07–113 (July 20, 2007) (not reported in the Federal Supplement) ("*Wuhan*"), this court sustained, in part, and remanded, in part, the final results of the United States Department of Commerce's ("Commerce" or the "Department") second administrative review of the antidumping duty order on imports of honey from the People's Republic of China ("PRC") made between December 1, 2002 and November 30, 2003. *See* Honey from the PRC, 70 Fed. Reg. 38,873 (Dep't of Commerce July 6, 2005) (final results) and the accompanying Issues and Decision Memorandum (June 27, 2005), Pub. Doc. 341 ("Issues & Dec. Mem.") (collectively, "Final Results").

Commerce has now issued remand results pursuant to the court's order. *See* Final Results of Determination Pursuant to Court Remand, *Wuhan Bee Healthy Co., Ltd. and Presstek Inc. v. United States*, Court No. 05–00438, Slip Op. 07–113 (July 20, 2007), (Oct. 16, 2007) Pub. Doc. 3378 ("Remand Results").

In turn, the court has reviewed the Remand Results and the filings in support thereof. *See* Def.-Ints.' Comments on Remand Results; Def.'s Reply to Comments. It is worth noting at the outset that, although they have been afforded two opportunities to comment on the Remand Results, plaintiffs have declined to do so. Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the reasons discussed below, the court sustains Commerce's remand results.

STANDARD OF REVIEW

When reviewing a final antidumping determination from Commerce, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Wage Rate Calculation

The cost of labor (or wage rate) is a factor of production used to construct normal value. As this Court has observed, "Commerce treats the wage rate differently from all other factors of production[.] [F]or [the cost of] labor, Commerce employs regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries." *Wuhan*, 31 CIT at ___ , Slip Op. 07–113 at 34 (citing *Dorbest Ltd. v. United States*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1262, 1291 (2006)). In *Wuhan*, plaintiffs challenged as unsupported by substantial evidence Commerce's determination with respect to the wage rate calculation. Plaintiffs have not challenged the wage rate methodology itself. After its review, the court directed Commerce, on remand, to explain its decisions, (1) to include data from high-wage countries in its nonmarketeconomy ("NME") wage rate calculation, and (2) to exclude from that calculation data from twenty-two low-wage countries placed on the record by plaintiffs. *Wuhan*, 31 CIT at ___ , Slip Op. 07–113 at 40. In addition, Commerce asked for a voluntary remand. Thus, the court also instructed Commerce to recalculate the PRC wage rate using the data set out in its remand request. *Id*. at ___ , Slip Op. 07–113 at 41.[1]

In its Remand Results, Commerce expanded the "basket of countries" used in the determination of NME wage rates to include "all countries for which data are available" and which "meet the Depart-

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[1] Commerce sought a voluntary remand "with respect to the calculation of the wage rate because it mistakenly relied upon income data from two different years (*i.e.*, 2001 and 2002) in its calculation of the surrogate wage rate." Remand Results at 24 (quotation omitted).

ment's suitability requirements." Remand Results at 5. The suitability requirements include "the availability and contemporaneity of the data, and earnings data [that] cover both men and women and all reporting industries in the country." *Id*. Thus, Commerce has added new data from both low-wage and high-wage countries. This broader data set, according to Commerce, "better ensures accuracy and fairness" for purposes of calculating the regression. *Id*.

For Commerce, the expansion of the data set, when combined with an explanation of why such expansion was useful, is sufficient to address the court's concerns about the use of data from high-wage countries. The Department states that "restricting the basket of countries to include only countries that are economically comparable to each NME is not feasible and would undermine the consistency and predictability of the Department's regression analysis." Remand Results at 16. A basket of "economically comparable" countries could be extremely small, and a regression based on an extremely small basket of countries "would be highly dependent on each and every data point." *Id*.

> Relative basket size would not be such a critical factor if there were a perfect correlation between GNI [Gross National Income ("GNI")] and wage rates. If this were the case, a precise regression line could be derived from suitable data from only two countries. However, as the Department has noted repeatedly, while there is a strong world-wide relationship between wage rates and GNI, there is nevertheless variability in the data. For example, in the data relied upon for the Department's revised 2004 calculation for purposes of this remand, observed wage rates did not increase in lockstep with increases in GNI in the five countries with GNI less than [ ] $1000. . . .

Remand Results at 17. Therefore, according to Commerce, using a larger basket of countries, including high-wage countries, "minimizes the effects of any single data point, and thereby, better captures the global relationship between wage rates and GNI." Remand Results at 17.

As to plaintiffs' proposed addition of twenty-two low-wage countries, Commerce evaluated the data from each of those countries against its new selection criteria, i.e., its suitability requirements, and determined that twenty-one countries should remain excluded from its analysis. *Id*. at 6. Specifically, Commerce found that fourteen countries[2] lacked contemporaneous data for either 2001 or

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[2] Algeria, Bangladesh, Belgium, Bolivia, Gambia, Greece, Kenya, Kuwait, the Philippines, Portugal, Rwanda, Saudi Arabia, Swaziland, and Venezuela.

2002. *Id*. at 7, 7 n. 4. Commerce excluded five countries[3] because no earnings data were available for them. *Id*. at 7. Two countries[4] were excluded because no exchange rates were available in the International Monetary Fund's ("IMF") International Financial Statistics.[5] *Id*. at 8. Commerce excluded Zimbabwe because it lacked GNI data for 2002, the base year.[6] *Id*. at 9.

Finally, pursuant to the voluntary remand, Commerce recalculated the NME wage rates using the most current data available, from December 2004, and corrected its erroneous calculation of the PRC wage rate based on the non-current GNI and wage rate data for the market economies from 2001. *Id*. at 28–29. The recalculated PRC wage rate, using the revised data set, reduced the rate from $0.93 per hour to $0.77 per hour. *See* Remand Results at 29.

The court finds that Commerce has provided a reasonable explanation for its Remand Results and supported those results with substantial evidence. First, Commerce's explanation that data from high-wage countries was necessary, because the imperfect correlation between wage rates and GNI was rendered more accurate by the inclusion of more data, appears reasonable. Thus, Commerce's explanation of its expansion of the data set used to determine NME rate is consistent with the court's remand instruction to explain its decision to include data from high-wage countries in its wage rate calculation. Remand Results at 17. Including data from high-wage countries is reasonable if the results more accurately reflect the relationship between wage rates and GNI under Commerce's regression methodology. Commerce has represented that the inclusion of high-wage countries does provide greater accuracy and no party has disputed this representation.

Second, Commerce did a thorough analysis of the data from the twenty-two countries plaintiffs hoped to add to those used in the regression analysis. Commerce has thus given an adequate explanation for including or excluding each country's data. As a result, Commerce has complied with the court's remand instruction to explain why it excluded twenty-one of the twenty-two countries' data from its calculation.

Finally, with respect to its request for voluntary remand, Commerce recalculated the wage rate using the correct, most current,

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[3] Cambodia, Indonesia, the Netherlands, Thailand, and Peru.

[4] Serbia and Montenegro.

[5] Although plaintiffs introduced exchange rate data from The World Fact Book, the Department found it inappropriate to deviate from its standard practice of relying on IMF data and "cherry-pick" data from alternative sources. *See* Remand Results at 8.

[6] "The 'Base Year' is the year upon which the regression data are based and is two years prior to the year in which the Department conducts its regression analysis." Remand Results at 6.

wage rate data. "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Shieldalloy Metallurgical Corp. v. United States*, 20 CIT 1362, 1368, 947 F. Supp. 525, 532 (1996) (quotations and citations omitted). Commerce's explanation reveals its data selection on remand to be reasonable and that it has supported its findings with substantial evidence. *See United Steel, Paper and Forestry, Rubber, Manufac., Energy, Allied Industr. and Service Workers Int'l Union v. United States Sec'y of Labor*, 32 CIT ____ , ____ , Slip Op. 08–45, at 7 (April 30, 2008) ("A fundamental requirement of administrative law is that an agency set forth its reasons for decision.") (quotation and citation omitted). Thus, Commerce's results regarding its wage rate calculation are sustained.

II. Antidumping Duty Assessment

The court in *Wuhan* also directed Commerce to provide plaintiffs "the opportunity to submit further comments on whether Commerce should calculate assessment and cash deposit rates on an *ad valorem* basis or a per kilogram basis" and allow plaintiffs to "place evidence on the record, should it find it necessary to do so, specifically with respect to how an *ad valorem* methodology furthers, or does not further, the collection of total duties owed." *Wuhan*, 31 CIT at ____ , Slip Op. 07–113 at 55–56. The court further instructed Commerce to "fully explain its decision [on remand] to use a per kilogram or *ad valorem* methodology by reference to evidence placed on the record." *Id.* at __ , Slip Op. 07–113 at 56.

Pursuant to the court's remand instruction, Commerce opened the administrative record and sought comments on whether the Department's change in methodology to a per kilogram basis ensured the proper collection of total duties due. Remand Results at 18. The Department provided the parties ten days to submit comments. *Id*. Defendant-intervenors timely submitted comments, however, plaintiffs neither submitted any comments nor requested an extension to the ten-day period. *Id*. at 19.

Commerce on remand determined that "it continues to be appropriate to assess antidumping duties on a per-kilogram basis in this case" because "the use of a per-kilogram assessment rate is in accordance with the Department's regulations and past practice, and [is] based on the evidence on the record." Remand Results at 21. Commerce "normally [ ] calculates the assessment rate by dividing the dumping margin . . . by the entered value of [the] merchandise for normal customs duty purposes" and applies this ad valorem rate to the entered value of the merchandise to calculate total antidumping

duties due. *Id*. at 20, 22. In this case, however, Commerce found thatplaintiffs were reporting an entered value of $1.05 – $1.50 per kilogram, an amount that was approximately half of the U.S. sales price at $2.20 – $2.30 per kilogram. *Id*. at 23. According to Commerce, such discrepancy translated into a potential for under-collecting duties by more than 50 percent because the *ad valorem* dumping margin percentage would be applied to the lower entered value. *Id*. at 23. Because it believed that the *ad valorem* method would allow plaintiffs to avoid the total duties due, Commerce concluded that "the application of the revised [per-kilogram] methodology will result in the more accurate collection of duties in this case." *Id*. at 23.

The court finds that Commerce has complied with the court's instructions regarding the antidumping duty assessment methodology. Commerce provided a ten-day comment period to all parties and addressed the court's concern that plaintiffs were prejudiced by the inadequate time to fully review and comment on the Department's duty assessment methodology change. Commerce also provided a reasonable explanation for its decision on remand to maintain the per-kilogram rate.

With respect to the rate itself, although Commerce normally calculates assessment rates on an *ad valorem* basis, it has discretion to revise the assessment methodology and adopt a reasonable method for ensuring an accurate collection of total duties due. *See Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1346 (Fed. Cir. 2001) quoting *Torrington Co. v. United States*, 44 F.3d 1572, 1578 (Fed. Cir. 1995) ("[T]he antidumping statute . . . 'merely requires that . . . the difference between foreign market value and United States price serves as the basis for the assessment rate.' ").

Because Commerce's method of determining the antidumping duty assessment and cash deposit rates is reasonable and follows the court's remand instructions, Commerce's remand results on this issue are sustained.

III. Plaintiffs' Failure To Raise Objections To Remand Results

Commerce revised its Final Results pursuant to the court's order in *Wuhan* and released its draft Remand Results to interested parties for comment on September 7, 2007. Remand Results at 2. Defendant-intervenors submitted comments in support of the Department's draft Remand Results, stating that the Department explained in detail why its methodology was "both lawful and rational." Remand Results at 2. Plaintiffs provided no comments. Remand Results at 2. Upon the release of Commerce's final Remand Results, plaintiffs failed again to provide any comments. Under such circumstances, Commerce "may well be entitled to assume that the

silent party has decided, on reflection, that it concurs in the agency's [remand results]," and the court will uphold the parties' concurrence. *Al Tech Specialty Steel Corp. v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1236, 1245 (2005).

CONCLUSION

For the reasons stated, Commerce's Remand Results are sustained. Judgment shall be entered accordingly.

Slip Op. 08–62

HUSTEEL COMPANY, LTD. and SEAH STEEL CORPORATION, LTD., Plaintiffs, v. UNITED STATES, Defendant, and IPSCO TUBULARS, INC., LONE STAR STEEL COMPANY, INC., and MAVERICK TUBE CORPORATION, Defendant-Intervenors.

Before: Gregory W. Carman, Judge
Court No. 06–00075

[*Commerce's final remand results are remanded for further consideration; Plaintiffs' motion for oral argument denied.*]

June 2, 2008

Troutman Sanders LLP (Donald B. Cameron, Julie C. Mendoza, Jeffrey S. Grimson, R. Will Planert, and *Brady W. Mills)* for Plaintiffs.

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David D'Alessandris*), and *David W. Richardson*, of counsel, Office of Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Schagrin Associates (*Roger B. Schagrin* and *Michael J. Brown*) for Defendant-Intervenors.

OPINION & ORDER

CARMAN, JUDGE: This case returns to the Court following a remand to the United States Department of Commerce pursuant to the Court's order in *Husteel Co., Ltd. v. United States*, 31 CIT ___ , ___ , 491 F. Supp. 2d 1283, 1296 (2007) (remanding *Oil Country Tubular Goods, Other Than Drill Pipe, from Korea*, 71 Fed. Reg. 13,091 (Dep't Commerce Mar., 14, 2006) and associated Issues & Decision Mem.) ("*Husteel I*"). Plaintiffs, Husteel Company, Ltd. and SeAH Steel Corporation, Ltd. (together, "Respondents"), challenge the results of Commerce's remand, in which Commerce continues to exclude certain of Respondents' sales from the calculation of normal value. *See Results of Redetermination on Remand Pursuant to*

Husteel Co., Ltd. & SeAH Steel Corp., Ltd. v. United States ("*Remand Results*"). Because Commerce's Remand Results suffer from the same shortcomings as the original results that they were intended to rectify, the Court remands the Remand Results for further consideration.

BACKGROUND

Respondents, who are Korean producers of Oil Country Tubular Goods ("OCTG"), participated in the ninth administrative review of the antidumping order on OCTG from Korea, covering the 2003–2004 period of review. In the final results to the administrative review, Commerce excluded certain of Respondents' sales from the calculation of their respective normal values. The sales that Commerce excluded were made by each Respondent to independent trading companies located in Korea, who in turn resold the merchandise to buyers located in the People's Republic of China ("China" or "PRC"), a nonmarket economy. At the time Respondents negotiated these sales with the trading companies, Respondents knew that the trading companies intended to resell the merchandise to buyers located in China. As a result, Respondents classified these sales as sales to China when they reported them to Commerce. Respondents' characterization of these sales as Chinese was correct and is not at issue in this case.

What is at issue is Commerce's exclusion of the sales from the calculation of Respondents' normal values.[7] In the final results of the administrative review, Commerce excluded the sales on the grounds that the prices for the sales may not be "representative," a statutory requirement for inclusion. *See* 19 U.S.C. § 1677b(a)(1)(B)(ii)(I) (2000). In the Court's first decision in this matter, the Court affirmed that Commerce's interpretation of representative as meaning, "determined on the basis of market principles" was permissible. *Husteel I*, 31 CIT at ___ , 491 F. Supp. 2d at 1290. Yet, the Court held that

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[1] To calculate normal value, Commerce first looks to the home-market price of the merchandise. Where, as here, there is no viable home market, Commerce uses the sales price from the respondent to a third-country. If there are multiple viable third-country markets, Commerce will select the third-country where the greatest amount of merchandise was sold that is most similar to that sold to the United States. If there are no viable third-country markets, Commerce will use a constructed normal value. 19 U.S.C. § 1677b(a)(1), (a)(4) (2000).

Here, China was the largest third-country market for both Respondents. In fact, China was the only potentially viable third-country market for Respondent Husteel. After excluding sales to China, Commerce calculated Husteel's normal value using a constructed normal value, and, for Respondent SeAH, Commerce used the third-country market with the next-largest volume of sales, Canada. If China's sales had not been excluded, Commerce would have calculated Husteel's normal value using China as the third-country comparison market. For SeAH, however, Commerce would have needed to determine whether the merchandise sold to China or Canada was more similar to that sold to the United States to determine which third-country market would be used for this calculation.

Commerce failed to adequately explain and support with substantial evidence on the record its decision to exclude Respondents' sales as being unrepresentative. *Id*. at 1293.

Commerce's explanation for excluding these sales rested on two assumptions: (1) that domestic prices in an nonmarket economy are not determined on the basis of market principles; and (2) that foreign suppliers to nonmarket economies compete with domestically-set prices. Based on these assumptions, Commerce concluded that sales from a market-economy seller to a buyer located in a nonmarket economy "may very well not be at prices that reflect the fair value of the merchandise." *Issues & Decision Mem. for the Final Results of the Admin. Rev. on OCTG from Korea* 8 (Dept' Commerce Mar. 7, 2006).

The Court identified two problems with Commerce's explanation. First, the Court questioned why Commerce treated Respondents' sales as sales into a nonmarket economy. *Husteel I*, 31 CIT at ___ , 491 F. Supp. 2d at 1291. Respondents sold OCTG to independent trading companies located in Korea; the trading companies then resold the merchandise to buyers located in China. The price data Respondents wanted to use was from the sales between Respondents and the Korean trading companies. Though it was correct to refer to the sales as Chinese as a matter of characterization, Commerce failed to explain why it was applying presumptions about conditions of sale in nonmarket economies to an arm's-length sale between two independent entities both operating in a market economy – facts which had been separately verified by Commerce.

The second problem the Court identified centered around Commerce's assumption that foreign suppliers to nonmarket economies compete with domestically-set prices in the nonmarket economy, and therefore sell merchandise at distorted, nonmarket prices. Commerce's assumption in this case appeared to contradict the agency's position in a related line of antidumping duty investigations, where the producer being investigated for dumping is itself located in a nonmarket economy (referred to here as "NME-Producer cases"). In NME-Producer cases, Commerce regularly accepts sales price data from a market-economy supplier to a nonmarket-economy buyer (the respondent in those cases) to calculate normal value, *see* 19 C.F.R. § 351.408(c)(1) (2007), and Commerce did not give a persuasive explanation for why Respondents here should be treated differently.

On remand, Commerce attempted to address the Court's concerns. Regarding the question of why Commerce treated Respondents' sales as though they were made to nonmarket buyers, Commerce explained that knowledge of the trading companies' intent to resell the merchandise to buyers in China influenced the price at which Respondents sold the merchandise to the trading companies. "Because Plaintiffs had knowledge of the destination country, Plaintiffs . . .

priced the OCTG sold to the trading companies based on the conditions in the PRC." (*Remand Results* 17.)

Regarding the question of why Commerce did not accept Respondents' Chinese sales data to calculate normal value when it regularly does so in NME-Producer cases, Commerce offered a two-fold response. The primary answer rehashed an argument that the Court rejected in the first decision: that the two situations are not analogous because different standards apply to the admissibility of evidence in the two types of cases. The second answer was that even if the two situations are analogous, Commerce does not accept sales price data if those sales might be distorted (i.e., dumped or subsidized). Commerce stated that it has reason to believe that Respondents' merchandise may have been subsidized, with the implication being that Commerce need not use the price data from their Chinese sales to calculate normal value. (*Remand Results* 7.)

Commerce also presented evidence on two subjects to support the determination that Respondents' sales where not "representative": (1) data on average prices for Chinese OCTG as compared to average world prices for OCTG; and (2) analysis of the Chinese oil and gas industry, the sector of the Chinese economy that uses OCTG.

In the results to the remand, Commerce continued to conclude that Respondents' sales were not representative, and therefore did not recalculate Respondents' normal values or dumping margins. Respondents argue that Commerce did not comply with the Court's remand order and that Commerce's Remand Results are not supported by substantial evidence; Commerce and Defendant-Intervenors contend that the agency did so comply and that the Remand Results are in accordance with the Court's order.

STANDARD OF REVIEW

The Court reviews Commerce's Remand Results under the substantial evidence test. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000) ("The court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.").

DISCUSSION

I. *Commerce may not presume that sales made from market-economy sellers to buyers located in nonmarket-economies are made at distorted, nonmarket prices.*

The first question raised by this case is whether Commerce can assume that when a buyer located in a nonmarket economy purchases merchandise from a seller located in a market economy, the sales are made at distorted, nonmarket prices. The answer is that Commerce may not.

A. Commerce's Presumption is Inconsistent With Its Practice in NME-Producer Cases.

As discussed in the Court's first opinion, in NME-Producer cases, Commerce "regularly calculates normal value using price data from sales between market-economy sellers and nonmarket-economy buyers." *Husteel I*, 31 CIT at ____ , 491 F. Supp. 2d. at 1293. Commerce regulations state that "where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier" to calculate normal value for the nonmarket-economy buyer (the respondent). 19 C.F.R. § 351.408(c)(1) (2007). The Court of Appeals for the Federal Circuit affirmed this practice. *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("accuracy, fairness, and predictability are enhanced by using" the sales price) (citation omitted).

Here, however, Commerce excluded similar data submitted by Respondents.[8] Commerce argues that there are valid reasons to treat the sales price data submitted by Respondents differently than that submitted in NME-Producer cases. First, Commerce argues that data must meet a higher standard to be used in this case than is required to be used in NME-Producer cases. (*Remand Results* 9.) Second, Commerce argues that Respondents' sales price data would be excluded under rules applying to NME-Producer cases, because Commerce suspected that Respondents' prices might be distorted due to broadly available export subsidies in Korea. (*Remand Results* 7 n.9, 28–29.) Each point will be refuted below.

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[2] As mentioned above, Respondents did not directly sell to buyers located in China; they sold to Korean trading companies who resold the OCTG to Chinese buyers. Commerce argues that Respondents' sales are different from an ordinary sale between two market participants because Respondents knew, at the time they negotiated their sales, that the trading companies intended to resell the merchandise to China. Commerce argues that because of that knowledge, the market conditions in China are relevant to Respondents' sales, and cite as support the "knowledge test" developed by the agency. (*Remand Results* 4.)

The "knowledge test" is used where a producer sells to a middleman who in turn resells to a purchaser in the United States, and states that Commerce will use the price between the producer and unrelated middleman as purchase price, if the producer knew that the merchandise was intended for sale to an unrelated buyer in the United States. Commerce argues that the knowledge test "hinges on the belief that a producer . . . might sell at a lower price if it knows that the merchandise is to be exported than if the merchandise is intended for domestic consumption." (*Id.*)

The Court first notes that Respondents propose using the price from them (the producer) to the trading companies (the middlemen), which is consistent with the "knowledge test." Insofar as Commerce argues that the price Respondents negotiated with the trading companies was distorted by virtue of their knowledge, the Court does not find that the "knowledge test" supports that conclusion, and rejects the argument for the reasons stated in Section I of the Discussion.

1. "Representative" Data v. "Best Available Information"

The first point Commerce raises is that Respondents should be treated differently because, for their sales price data to be used, they need to be "representative," while data in NME-Producer cases need only be the "best available information." (*Remand Results* 9; Def.'s Resp. 9.) Commerce explains that it is reasonable to apply different standards to the data because in NME-Producer cases the data are used to value "a single input used in the calculation of normal value," whereas here the data are "used as the entire basis for normal value."[9] (*Remand Results* 9.)

Commerce is correct that the statute governing use of sales price data in the two types of cases use different words, "representative" in this case and "best available information" in NME-Producer cases. *Compare* 19 U.S.C. § 1677b(a)(1)(B)(ii)(I), *with* 19 U.S.C. § 1677b(c)(1). Yet, the argument misses the crux of the problem identified by the Court in the first opinion, which was that Commerce's inconsistent treatment rests on two incompatible views of how the world works.

On the one hand, in the NME-Producer methodology, Commerce implicitly acknowledges that there are at least some instances where a buyer located in a nonmarket economy purchases merchandise from a market-economy seller at a market price. We know this to be true because Commerce may not use data that is distorted, and must verify that the purchases are "arm's-length, *bona fide* sales." (*See Remand Results* 9 (*citing Shakeproof*, 268 F.3d at 1382).) Accordingly, Commerce must acknowledge that in those instances, the nonmarket-economy buyer cannot, merely by virtue of being located in a nonmarket economy, dictate the price it will pay based on the domestic price of the merchandise inside the nonmarket economy. In fact, the domestic economic conditions are irrelevant to such a transaction. Instead, the nonmarket-economy buyer must pay the price the merchandise fetches on the world market.[10]

On the other hand, in this case Commerce presumed that the entire chain of transactions between Respondents, the trading companies, and the ultimate Chinese buyers was somehow tainted by the domestic economic conditions in China. As Commerce explained it,

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[3] In the first opinion, the Court rejected as "a distinction without a difference," Commerce's claim that the two types of cases should be treated differently because the data is used to value a single input in NME-Producer cases but the entirety of normal value here. *Husteel I*, 31 CIT at ____, 491 F. Supp. 2d at 1294. The Court is not persuaded by Commerce's repetition of this argument.

[4] Respondents apply a similar reasoning to the facts of this case: [M]arket economy participants like Plaintiffs and their unrelated trading company customers are not required to sell into the PRC. If the price they could receive from a customer in the PRC was artificially low (i.e., not based on market principles) due to PRC government policies, they could just make the decision to sell to other markets or make no sales at all.
(Pl. Br. 22.)

"sales of any product are directly impacted by conditions in the country into which it is sold. There is no viable domestic market for OCTG in Korea." (*Remand Results* 2..) "As such, price conditions in the PRC impacted the prices that Plaintiffs ultimately negotiated for these sales." (*Id*. at 5.)

Setting aside the problem of Commerce glossing over the fact that Respondents actually sold their merchandise to unrelated trading companies located in Korea – a market economy[11] – Commerce never considers the possibility that this could be one of those situations where a nonmarket-economy buyer purchases the subject merchandise at the world, or market, price. Given this possibility, it does not make sense for Commerce to start from the presumption that the Chinese buyers dictated a distorted, nonmarket price to Respondents. As a result, the Court will not allow Commerce to exclude Respondents' sales price data as unrepresentative without presenting evidence to support that conclusion.

In Section II of the Discussion, the Court evaluates the evidence cited by Commerce, and concludes that Commerce's determination that Respondents' sales are not representative is not supported by substantial evidence on the record. But first, the Court addresses a red herring argument made by Commerce regarding subsidies.

2. Commerce's Suspicion that Korea Provides Export Subsidies is Not a Valid Reason to Exclude Respondents' Sales.

A secondary reason that Commerce provides for not accepting Respondents' sales price data is that they might be distorted due to the availability of subsidies in Korea. Sales will be excluded from the calculation of normal value in NME-Producer cases if Commerce has reason to believe the sales were subsidized. The agency states here that it has "found in other proceedings that South Korea maintains broadly available, non-industry-specific export subsidies and, therefore, it is reasonable to infer that all exports to all markets from South Korea may be subsidized." (*Remand Results* 7 n.9.) Although Commerce does not explicitly state as much, the implication is that it was justified in excluding the sales.

However, the Court has reason to doubt Commerce's suspicion. If Commerce was truly concerned that the price of Respondents' sales was distorted as a result of export subsidies, this concern would not be export-country specific. Based on Commerce's description, South Korea's export subsidy programs do not appear to be limited to cer-

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[5] Commerce attempts to negate the significance of the sale between Respondents and the trading companies by stating in a conclusory fashion: "Since the OCTG at issue was sold for consumption in the PRC, the trading companies necessarily acted as the representatives of their PRC customers. . . . Under the facts of this case, the trading companies are a conduit, not an end customer." (*Remand Results* 6.)

tain export countries. (*See id*.) Under such a premise, Commerce would not be able to use price data for subsidized sales, regardless of export-country. *See* 19 U.S.C. § 1677b(b). Yet, Commerce used data from Respondent SeAH's sales to Canada without noting a concern that those sales were subsidized. As a result, the Court wonders if subsidization is truly such a concern here.

Furthermore, as a factual matter, it is unclear to the Court that Respondents were eligible for export subsidies for the relevant sales because it was the unrelated trading companies who exported the OCTG to China, not Respondents. On the record as it stands, there is not sufficient evidence to affirm Commerce's implied determination that Respondents' sales were subsidized. The Court now turns to the evidence Commerce presented to support its determination that Respondents' sales were not representative.

II. *Commerce's Evidence Does Not Support the Conclusion that Respondents' Sales are Not Representative.*

Commerce presents evidence on two subjects as support for its determination that Respondents' sales are not representative: (1) average price data for imports of OCTG into China as compared to the rest of the world; and (2) analysis of the Chinese oil and gas industry, the sector of the economy that uses OCTG imports. Because of problems with the evidence presented, the Court holds that Commerce's determination that Respondents' sales are not representative is unsupported by substantial evidence on the record.

A. The OCTG Price Data is Not Detailed Enough to Support Commerce's Conclusion.

Commerce presents empirical evidence that the price of OCTG sold to China is less than the price of OCTG sold to the rest of the world. Specifically, Commerce presents two graphs, one comparing "average OCTG import prices into the PRC in 2003 and 2004 [the period of review spans those two years] and average OCTG import prices into the rest of the world for the same period." (*Remand Results* 11.) In the second graph, Commerce compares "Korean OCTG export prices to the PRC and Korea's export prices to the rest of the world" during the same period. (*Id*.) Commerce indicates that the prices in both comparisons are "significantly different" and concludes that "the PRC prices are not representative of the prices found in the rest of the world." (*Id*. at 11, 33.)

The Court does not find there to be sufficient evidence contained in the *Remand Results* to evaluate Commerce's conclusion. The primary problem with the data is that Commerce has included only *average* world price as a comparison to Chinese price. With a world average, the distribution of prices across countries is hidden. As a result, the Court cannot evaluate whether Chinese OCTG prices are "significantly different" than those in the rest of the world. For ex-

ample, the distribution of country-prices might cluster around the Chinese price, but a single, large outlier would result in the average world price appearing "significantly different."[12]

The second issue with the data is that the mere fact that the prices are different is not in and of itself legally significant. Commerce does not indicate that the agency generally suspects the validity of a sale merely because the price for it differs from average world price. The difference in prices matters here because Commerce argues that it shows that the Chinese government is setting the price of OCTG inside China, and the distorted domestic price in China led Respondents to sell OCTG for export to China at distorted, nonmarket prices. However, Respondents raised a persuasive argument that the average price data relied on by Commerce actually undermines the agency's claim.

Respondents claimed that "the data shows significant variation in [average prices] for all source countries for OCTG into the PRC, and this should not happen if, as Commerce alleges, prices for OCTG are set by the government." (*Remand Results* 32 (Commerce summarizing Respondents' argument).) Commerce responded that it "expects this type of variation to be found for all of the countries that collect this type of data." (*Id*.) But why? If the nonmarket economy government sets the price, why would it differ from export country to export country? To explain the variation, Commerce relies on the very market considerations (volume of sales, specific grade of merchandise, etc.) that it argues are not present in sales to a nonmarket-economy buyer.[13] Commerce has not adequately dealt with the objection to the average price data raised by Respondents.

On remand, Commerce should (a) compare Chinese price to individual country prices of OCTG to determine whether the prices are "significantly different," and (b) meaningfully address Respondents' objections to the average price data.

B. The Evidence Regarding Government Control Over the Oil and Gas Industry in China is Irrelevant.

Commerce also presents evidence that the sector that uses OCTG in China, the oil and gas industry, is owned and controlled by the Chinese government. (*Remand Results* 10–11, Attach. 1.) Commerce

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[6] A numerical illustration might be helpful. Imagine that there are 5 countries included in the world average. The Chinese price is $100, and in 4 of the other 5 countries, the price is also $100. In the fifth country, the price is $1600. Average world (minus China) price would be $400 ((100 + 100 + 100 + 100 + 1600 = 2000) / 5 = 400). In this example, a comparison of Chinese price to average world price ($100/$400) would mislead, because it would hide the fact that 4 of the 5 countries had the same price as China.

[7] Respondents also argued that prices in China were sometimes lower (like in 2003 and 2004) and sometimes higher (2005 and 2006) than average world price, which also should not happen if Chinese buyers were able to dictate nonmarket prices to market-economy sellers. (*See* Pl. Br. 25.)

believes that the Chinese government's control of the oil and gas industry necessarily means that the prices for Respondents' sales are not based on market conditions. The Court disagrees. The Chinese government's control of the oil and gas industry, within China, does not inform on whether Respondents sold OCTG at representative prices. As Respondents explain:

> Even assuming that the PRC government has complete control over the oil and gas sector in China and sets the prices for the sale of oil and gas in China, this begs the question as to how this PRC government control of the oil and gas sector *within China* impacts the pricing decisions of market economy companies *outside of China* making steel products.

(Pl. Br. 21.) The relevant question is not whether the Chinese government controls the oil and gas industry within China, but whether its control over the oil and gas industry means that Chinese buyers of OCTG can dictate distorted, nonmarket prices to Respondents. And it is not enough to conclude that this is so; this is the issue on which Commerce must present evidence.

Because the evidence presented by Commerce does not show what Commerce purports it does, the Court cannot affirm Commerce's determination that Respondents' sales are not representative. If Commerce has persuasive evidence that the sales are not representative, it should be presented on remand. If Commerce does not, it may not exclude Respondents' sales on that basis.[14]

CONCLUSION

Because Commerce's Remand Results are not supported by substantial evidence on the record, the Court remands the Remand Results to Commerce for further consideration. Upon consideration of the papers submitted by all parties, and upon due deliberation, it is hereby

ORDERED that Respondents' motion for oral argument is denied; and it is further

ORDERED that this case is remanded to Commerce for the agency to present persuasive evidence, if there is any, that Respondents' sales for export to the China are not "representative" within the meaning of 19 U.S.C. § 1677b(a)(1)(B)(ii)(I) (2000); and it is further

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[8] Although not addressed on remand, the Court notes that if Commerce determines that Respondents' sales for export to China are representative, the agency has the additional task of selecting among China and Canada as Respondent SeAH's third-country market to calculate normal value. Therefore, Commerce should evaluate the factors listed in 19 C.F.R. § 351.404(e) to determine which third-country market should be used if both are determined to be representative.

ORDERED that if Commerce cannot present persuasive evidence that Respondents' sales are not representative, Commerce will determine that the sales are representative; and it is further

ORDERED that if Commerce determines that the sales are representative, Commerce will determine pursuant to 19 C.F.R. § 351.404(e) whether China or Canada should be selected as SeAH Steel Corp., Ltd.'s third-country comparison market; and it is further

ORDERED that if Commerce determines that China should be used as the third-country comparison market, Commerce will recalculate Respondents' dumping margins accordingly; and it is further

ORDERED that the remand results shall be filed no later than September 2, 2008; that Respondents may file papers with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than October 15, 2008; that Defendant and Defendant-Intervenors may respond to Respondents' comments no later than November 19, 2008; and that Respondents may reply to the responses no later than December 10, 2008.