U.S. Customs and Border Protection

Slip Op. 10–129

SHANDONG CHENHE INTERNATIONAL TRADING CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASSOCIATION, CHRISTOPHER RANCH LLC, THE GARLIC COMPANY, VALLEY GARLIC, AND VESSEY AND COMPANY, INC., Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 08–00373
Public Version

[Commerce's final determination rescinding plaintiff's new shipper review is sustained.]

Dated: November 22, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell, Ned H. Marshak, Elaine F. Wang*, and *Andrew T. Schultz*), for plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Reginald T. Blades, Jr.*, Assistant Director, Civil Division, United States Department of Justice (*Richard P. Schroeder*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Evangeline D. Keenan*), of counsel, for defendant.

Kelley Drye & Warren, LLP (*Michael J. Coursey* and *John M. Herrmann*), for defendant-intervenors.

OPINION

Eaton, Judge:

Introduction

This matter is before the court on the motion for judgment on the agency record of plaintiff Shandong Chenhe International Trading Co., Ltd. ("plaintiff" or "Chenhe"). *See* Br. In Supp. of Pl.'s Rule 56.2 Mot. For J. Upon the Agency R. ("Pl.'s Br."). Defendant the United States, and defendant-intervenors the Fresh Garlic Producers Association, Christopher Ranch LLC, The Garlic Company, Valley Garlic, and Vessey and Company, Inc. (collectively, "defendant-intervenors") oppose the motion. *See* Def.'s Mem. In Opp'n to Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. ("Def.'s Mem."); Def-Ints.' Br. In Resp. To Pl.'s Mot. For J. On the Agency R. ("Def.-Ints.' Br.").

By its motion, plaintiff challenges the final results of the United States Department of Commerce's ("Commerce" or the "Department") twelfth new shipper review of the antidumping duty order on fresh

garlic from the People's Republic of China ("PRC") for the period of review ("POR") beginning on November 1, 2006 and ending on April 30, 2007. *See* Fresh Garlic from the PRC, 73 Fed. Reg. 56,550 (Dep't of Commerce Sept. 29, 2008) (final results and rescission, in part, of twelfth new shipper review) and the accompanying Issues and Decision Memorandum (Dep't of Commerce Sept. 19, 2008) ("Issues & Dec. Mem.") (collectively, "Final Results"). Specifically, plaintiff insists that Commerce erred in rejecting its lone U.S. sale as not being bona fide. Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2006) and 19 U.S.C. § 1516a(a)(2)(B)(iii).

For the reasons set forth below, the court denies plaintiff's motion and sustains Commerce's Final Results.

Background

On May 17, 2007, plaintiff asked Commerce to initiate a new shipper review of its sale of fresh garlic. Fresh Garlic from the PRC, 72 Fed. Reg. 38,057, 38,057–58 (Dep't of Commerce July 12, 2007) (initiation of antidumping duty new shipper reviews) ("Initiation"). The purpose of a new shipper review is to determine whether an exporter or producer, whose sales were not examined in an investigation, is (1) entitled to its own antidumping duty rate under the order resulting from the investigation, and (2) if so, to calculate that rate. To calculate a rate, Commerce must determine the normal value,[1] export price,[2] and the antidumping duty margin[3] for each entry of the subject merchandise. 19 U.S.C. § 1675(a)(2)(A).

Commerce initiated the review on July 12, 2007. Initiation, 72 Fed. Reg. at 38,060. On May 1, 2008, the Department published its preliminary results. Fresh Garlic from the PRC, 73 Fed. Reg. 24,042, 24,042 (Dep't of Commerce May 1, 2008) (preliminary results of the 12th new shipper reviews) ("Preliminary Results"). In the Prelimi-

[1] Normal value is defined as:

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

[2] The "export price" is generally defined as "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . . ." 19 U.S.C. § 1677a(a).

[3] An antidumping duty margin is "the amount by which the normal price exceeds the export price or constructed export price of the subject merchandise." 19 U.S.C. § 1677(35)(A). If the price of an item in the home market (normal value) is higher than the price for the same item in the United States (export price), then the dumping margin comparison produces a positive number that indicates dumping has occurred.

nary Results, Commerce found that Chenhe had imported the subject merchandise into the United States in a bona fide sale at a non-dumped price. *Id*. at 24,047. Commerce then preliminarily calculated a dumping margin of zero for the company. *Id*.

After these results were published, defendant-intervenors filed a case brief alleging that Chenhe's purported sale was, in fact, not bona fide. The brief claimed that Commerce had made errors in its analysis and asserted that if Commerce had taken specific evidence into consideration it would have not concluded, in the Preliminary Results, that plaintiff was entitled to a separate rate. Conf. R. ("CR") Doc. No. 102 ("Def.-Int. Case Brief").

In its Final Results, the Department took defendant-intervenors' arguments into account and determined that Chenhe's sale was not bona fide. Commerce then rescinded the new shipper review as to the company. Final Results, 73 Fed. Reg. at 56,551.

Standard of Review

The court must uphold a final determination by the Department in an antidumping proceeding unless it is "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. Applicable Law

Under 19 U.S.C. § 1675(a)(2)(B), upon request, Commerce shall conduct administrative reviews "for new exporters and producers" and "establish . . . individual weighted average dumping margin[s]" for them. 19 U.S.C. § 1675(a)(2)(B)(i). Thus, the statute provides new exporters or producers the opportunity to establish that they are entitled to an individual rate under an existing order. It is Commerce's practice during these new shipper reviews to determine whether the new exporters and producers have conducted bona fide or commercially reasonable transactions. *See* 19 C.F.R. § 351.214(b)(2) (2009); *Hebei New Donghua Amino Acid, Co., Ltd. v. United States*, 29 CIT 603, 608, 374 F. Supp. 2d 1333, 1338 (2005) ("*Hebei*"). In conducting this test, Commerce's goal is to determine "whether the sale(s) under review are indicative of future commercial behavior." *Id*. at 613, 374 F. Supp. 2d at 1342.

This Court has, on a number of occasions, upheld Commerce's use of this analysis. *See, e.g.*, *Hebei*, 29 CIT at 608–09, 374 F. Supp. 2d at 1338; *Tianjin Tiancheng Pharmaceutical Co., Ltd., v. United States*, 29 CIT 256, 366 F. Supp. 2d 1246 (2005) ("*Tianjin* "); *Windmill International Pte., Ltd., v. United States*, 26 CIT 221, 193 F. Supp. 2d 1303

(2002) ("*Windmill*"). As laid out in *Hebei*, Commerce normally employs a totality of the circumstances test to determine whether the transaction is "commercially reasonable" or "atypical of normal business practices." 29 CIT at 610, 374 F. Supp. 2d at 1339 (quoting *Windmill*, 26 CIT at 231, 193 F. Supp. 2d at 1313). Commerce looks at, among other factors, "the price and quantity" of the goods sold. *Id*.

II. Commerce's Determination

Chenhe's request for an individual dumping margin was based on its sole entry during the POR. Initiation, 72 Fed. Reg. at 38,057. In the Final Results, Commerce found that "[b]ased on the totality of the circumstances . . . , the Department has determined that Chenhe's single POR sale is not a *bona fide* transaction, and subsequently has rescinded the new shipper review . . . ." Issues & Dec. Mem. at Comm. 1.

In making this determination, Commerce stated that its practice, when applying its totality of the circumstances test, is "to examine both the quantity and value of other POR entries of subject merchandise from the PRC as well as a respondent's sales to third countries, when available, in evaluating the price and quantity of a single POR sale for the purposes of the *bona fides* analysis." Issues & Dec. Mem. at Comm. 1. The Department further explained that its determination that Chenhe's sale was not bona fide was "based on a combination of factors including: [the entry's] high price, its low quantity, and the fact that it was atypical of Chenhe's U.S. customer's normal commercial practices." Issues & Dec. Mem. at Comm. 1.

With respect to quantity, Commerce found that Chenhe's sole sale of fresh garlic was: (1) smaller than the average sale amount for all Chinese exporters shipping to the United States during the POR; (2) markedly less than Chenhe's average sales to third countries during the POR; and (3) smaller than the average amount imported by Chenhe's U.S. customer during the POR.[4] Issues & Dec. Mem. at Comm. 1 ("[T]he Department finds that the quantity of Chenhe's sale . . . fell substantially below the average U.S. import quantities [from China] . . . . [T]he department notes that when the quantity of

[4] Commerce found that the quantity of Chenhe's sale was [[ ]] kilograms, and out of the [[ ]] entries from China during the POR, it was the [[ ]] entry. CR Doc. No. 109 ("BPI Memo") 2. The average quantity of all entries during the POR was [[ ]] kilograms and Chenhe's entry was [[ ]] than the average quantity for all entries. BPI Mem. 2 Commerce additionally found that Chenhe's average shipment to third countries was [[ ]] kilograms, which was [[ ]] than the quantities of Chenhe's single U.S. sale. BPI Mem. 2 Chenhe's U.S. purchaser made [[ ]] other purchases during the POR, with anaverage quantity of [[ ]] kilograms, thus the quantity Chenhe's entry was [[ ]] than the average quantity of the U.S. purchaser's other transactions. BPI Mem. 2

Chenhe's U.S. sales is compared to the average quantity of its third-country sales, the quantity is atypical. . . . Furthermore, . . . the quantity . . . of Chenhe's sale [was] atypical of the other purchases of subject garlic made by Chenhe's U.S. customer during the POR."). As a result of these findings, Commerce concluded that the small size of Chenhe's sale supported a finding that the entry was unrepresentative of sales during the POR and thus not indicative of future sales by the company. Issues & Dec. Mem. at Comm. 1.

With regard to sales price, the Department further found that the relatively high sales price of Chenhe's entry was an even greater indication that the sale was atypical of what Chenhe's future behavior would be:

> [T]he Department compared the per-unit price for Chenhe's single POR sale with the [Average Unit Value ("AUV")] for all entries under HTSUS 0703.20.0010:[5] FRESH WHOLE GARLIC BULBS, and found that the price of Chenhe's single POR sale was unusually high when compared to the weighted AUV of all other entries under this HTSUS subcategory. . . . The Department further note[d] that Chenhe's POR sale subject to this review was also a typical when compared to the AUV of Chenhe's third country sales. . . .

Issues & Dec. Mem. at Comm. 1.

In other words, Commerce found that the price paid for Chenhe's garlic was abnormally high[6] when compared to: (1) other Chinese entries during the POR; and (2) the price of the company's sales to third-country purchasers. In addition, the Department concluded that the price paid by Chenhe's U.S. customer was markedly higher than the customer paid to other Chinese exporters and producers during the POR.[7]

Based on these findings, Commerce determined that "[Chenhe's] sale does not provide a reasonable or reliable basis for calculating an

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[5] All parties agree that in the preliminary results, Commerce incorrectly used HTSUS category 0703.20.0020: Fresh Peeled Garlic to evaluate Chenhe's price and quantity data. Issues & Dec. Mem. at Comm. 1. In the Final Results, Chenhe's data was analyzed using HTSUS category 0703.20.0010: Fresh Whole Garlic Bulbs. *Id.* In doing so, Commerce re-evaluated Chenhe's submitted data using the correct HTSUS category and re-analyzed Chenhe's third-country sales and additional data put on the record.

[6] The price for Chenhe's single entry was [[ ]]. The average unit value for all of the entries from China during the POR was [[ ]]. Thus, Chenhe's price was [[ ]] than the average unit value for all entries. BPI Memo 2. The average unit value of Chenhe's third country sales was [[ ]]. BPI Mem. 2

[7] The U.S. purchaser had [[ ]] purchases from [[ ]] other exporters of the subject merchandise during the POR, the average unit value of these entries was [[ ]]. Chenhe's sale price was thus [[ ]] than the average unit value of other transactions made by the U.S purchaser. BPI Memo 2.

antidumping duty margin." Issues & Dec. Mem. at Comm. 1. Therefore, since Chenhe had only one entry during the POR, and that entry was determined, based on quantity and price, to be non-bona fide, Commerce rescinded Chenhe's new shipper review and did not calculate a separate antidumping duty for the company. *Id.*

III. Analysis

The issue before the court is whether Commerce erred in its decision to rescind the new shipper review based on its finding that Chenhe's sale was not bona fide. For its part, Chenhe maintains that, as a matter of law, the Department can reject its sale only if it was "unrepresentative and extremely distortive," and that substantial evidence did not support such a finding. Pl.'s Br. 12 (quoting *Hebei*, 29 CIT at 610, 374 F. Supp. 2d at 1339). Commerce counters that both the low quantity of Chenhe's entry and its high price lead to a conclusion that the single sale under review was not indicative of future commercial behavior. Issues & Dec. Mem. at Comm. 1.

The bona fide analysis conducted in new shipper reviews has been addressed by this Court on multiple occasions. The case that corresponds most closely to the facts before the court is *Hebei*, which involved Commerce's determination that a single entry of glycine into the United States was not a bona fide sale. *Hebei*, 29 CIT at 604, 374 F. Supp. 2d at 1334. The Court in *Hebei* upheld, as reasonable, Commerce's use of the "totality of circumstances" test to determine if a sale was bona fide, and rejected the plaintiff's call for "bright line rules" regarding what constituted an acceptable transaction. *Id.* at 610, 374 F. Supp. 2d at 1339.

In *Hebei*, the Department determined that the single entry at issue could not provide the basis for making a new shipper determination because "the pricing of the sale is artificially high and otherwise commercially unreasonable, . . . the quantity of the single shipment is extremely low in comparison with other sales from the People's Republic of China" and "the importer has not resold the merchandise and has otherwise not acted in a commercially reasonable manner." *Id.* at 606, 374 F. Supp. 2d at 1336. In reaching its holding, the *Hebei* Court found that the quantity of the questioned sale was "extremely low" when compared with: (1) sales of other Chinese exporters to U.S. purchasers; and (2) the exporter's own sales to other U.S. purchasers and to purchasers in third countries. *Id*. at 614–15, 374 F. Supp. 2d at 12 1342–43.

As to price, the Court found that Commerce had supported its conclusion that the price was abnormally high by a comparison of the

sales price with: (1) the price of all similar (clearly not aberrational) entries made from China; and (2) the price of all similar entries from whatever source. *Id*. at 611, 374 F. Supp. 2d at 1340 ("These price comparisons constitute substantial evidence for Commerce's decision that [Hebei's] sales price was 'substantially higher than any observed value.'").

Other cases have looked at similar factors when applying the totality of circumstances test. The *Tianjin* case also involved a single shipment of glycine from the PRC to the United States. *Tianjin*, 29 CIT at 256, 366 F. Supp. 2d at 1247. In that case, Commerce also rescinded the new shipper review, relying on its finding that "the price at which the goods were sold was not 'commercially reasonable.'" *Id.* at 258, 366 F. Supp. 2d at 1248. Commerce found the sales price to be atypical of both the market as a whole and of plaintiff's own sales prices.[8] *Id*. at 261, 366 F. Supp. 2d at 1251 ("Accordingly, Commerce found that Plaintiff's price was out of line with both the benchmark of other Chinese exporters' sales of glycine to the United States, and with Plaintiff's own pricing practice as it applied to third-country sales."). The *Tianjin* Court sustained Commerce's finding that in order to be bona fide, a transaction must be a "normal" sale in the context of good business practice generally and "a good future indicator of Plaintiff's future sales in the market." *Id.* at 276, 366 F. Supp. 2d at 1263.

Windmill involved a new shipper review for an exporter of cut-to-length carbon steel plate from Romania. *Windmill*, 26 CIT at 221, 193 F. Supp. 2d at 1304–05. In that case, Commerce looked at a number of factors in making its determination, including that the merchandise was shipped by air rather than by sea and that the purchaser re-sold the merchandise at a loss.[9] In addition, Commerce assigned great weight to its finding that "[t]he quantity of the sale was atypical of that which Windmill normally sells to the U.S. [purchaser]. . . ." *Id.* at 225, 193 F. Supp. 2d at 1307 (citations omitted).

The *Windmill* Court also found important Commerce's finding that "[s]ix months prior to and subsequent to the sale [at issue], Windmill made sales [of different merchandise] to the same U.S. purchaser that

[8] In addition to the atypical price, the single entry at issue in *Tianjin* was paid for nine months late, and there were irregularities in the Customs papers related to the entry, further supporting Commerce's finding that the sale was not bonafide. *Tianjin*, 29 CIT at 270, 366 F. Supp. 2d at 1259.

[9] In the proceedings before Commerce in *Windmill,* the Department also concluded that "[t]here [was] no evidence that any commercial factors that normally influence price negotiations played any role in setting the price for this sale." *Windmill*, 26 CIT at 231, 193 F. Supp. 2d at 1313 (citations omitted).

was substantially larger than the test case quantity." *Id*. at 229, 193 F. Supp. 2d at 1311 (citations omitted). Thus, the Court upheld Commerce's conclusion that the transaction "was not commercially reasonable and was atypical of the normal business practices between Windmill and the United States purchaser." *Id*.

Commerce's determination that Chenhe's sale was not bona fide is sustained. In reaching this holding, the court is aware that the size of an entry does not necessarily control Commerce's analysis. *See Windmill*, 26 CIT at 231, 193 F. Supp. 2d at 1313 ("[S]ingle sales, even those involving small quantities, are not inherently commercially unreasonable and do not necessarily involve selling practices atypical of the parties' normal selling practices.") (citations omitted). Nonetheless, the size of the sale can raise questions as to whether the purchaser would buy the merchandise in the future in the same quantity at the same price. *See Tianjin*, 29 CIT at 260, 366 F. Supp. 2d at 1250 ("[B]ecause the ultimate goal of the new shipper review is to ensure that the U.S. price side of the antidumping calculation is based on a realistic figure, any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant.").

In addition, while plaintiff's reliance on a single sale need not be fatal, a single sale leaves little to review. *See Tianjin*, 29 CIT at 275, 366 F. Supp. 2d at 1263 ("In one-sale reviews, there is, as a result of the seller's choice to make only one shipment, little data from which to infer what the shipper's future selling practices would look like. This leaves the door wide to the possibility that the sale may not, in fact, be typical, and that any resulting antidumping duty calculation would be based on unreliable data.").

As to Chenhe's legal argument that its shipment must be found "extremely distortive" in order for it to be rejected, the company seeks to set the bar too high. The purpose of a new shipper review is to determine if an exporter or producer is entitled to a separate rate and to *set that rate*. In order for Commerce to set an accurate rate, it must have before it a transaction from which it can reasonably determine a margin. Thus, a single transaction need not be "extremely distortive" in order to be found unsuitable. Rather, to be used as a basis for setting an individual rate, a sale must be typical of normal business practices. *See Windmill*, 26 CIT at 231, 193 F. Supp. 2d at 1313.

As to the evidence Commerce cites to justify its conclusion, Chenhe does not dispute that its entry contained one of the smallest quantities of goods of any entry from China during the POR. Nor does it dispute that the size of the shipment was small when compared to Chenhe's sales to other countries and other purchases by the U.S.

purchaser. Thus, it was reasonable for Commerce to conclude the small quantity of Chenhe's sale would not be indicative of typical future transactions.

As to the price paid for the shipment of merchandise, Commerce found it to be "unusually high when compared to the [average unit value] of all entries" during the POR. Issues & Dec. Mem. at Comm. 1. Commerce also found the price to be significantly higher than Chenhe's sales to third countries and higher than its buyer's other purchases. *Id.* Plaintiff contends that Commerce erred in its price analysis in comparing the price of the entry with the AUVs of the other Chinese entries during the POR. Chenhe insists that Commerce should have instead compared the price of the entry to other individual entries. Pl.'s Br. 23 ("The bona fides of the Chenhe sale is based on the Department's determination as to whether the price is commercially reasonable—a determination which requires a comparison of that price to other prices which fall within the norm, regardless of their relationship to the average").

If Commerce had done so, plaintiff argues, it would have found that the price of other entries that were not found to be atypical had prices closer to Chenhe's price than to the AUV. Pl.'s Br. 23. Put another way, plaintiff urges the court to find that Commerce should have compared the price of its single entry to other entries during the POR with prices more in line with the price of Chenhe's entry. Thus, plaintiff observes that a number of entries during the POR were relatively close to Chenhe's price, although no entry had a price as high as Chenhe's.[10] Pl.'s Reply Br. 10.

Chenhe's argument is unconvincing. Commerce's use of AUV data has been upheld by this Court in the past because "the larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance." *Tianjin*, 29 CIT at 267, 366 F. Supp. 2d at 1256. In other words, using the average of a large sample is a better indicator of normal activity than a comparison of a smaller number of selected sales. Here, Chenhe's price was dramatically higher than the AUV for other Chinese entries during the POR, as well as higher than the AUV for Chenhe's sales to third countries during the POR and its buyer's other purchases. While the sale price may well have been close to the high end of all Chinese sales during the POR, this evidence does little to detract from the conclusion that Chenhe's sale was atypical of normal business practices.

Finally, plaintiff argues that the price of its entry included a premium to compensate Chenhe for agreeing to pay any antidumping

[10] Plaintiff cites to prices of [[ ]] to support this argument. Pl.'s Reply Br. 10.

duties.[11] As such, Chenhe maintains that the purchase price should be reduced to account for this premium.[12] Pl.'s Br. 20. Chenhe's U.S. customer, however, would not respond to repeated questionnaires from Commerce and inquiries from Chenhe's counsel concerning the terms of the sale. As a result, Commerce could not substantiate the company's claim of an agreement relating to the antidumping duties. Ultimately, Commerce found that there was "no evidence on the record of this review supporting Chenhe's claim that its U.S. customer agreed to pay a higher premium in exchange for Chenhe's agreement to act as the [importer of record] and be responsible for the [antidumping duty] liability." Issues & Dec. Mem. at Comm. 1 n.14.

In disputing this conclusion, plaintiff insists that the terms of the sale themselves "constitute the best evidence that the buyer and seller understood the significance of the [antidumping duty] liability when they negotiated the material terms of this transaction" and that "[t]here was simply no reason . . . for Chenhe . . . to submit any additional documentation to support the self-evident fact that . . . the price will be influenced by a decision as to which party assumes responsibility for this liability." Pl.'s Br. 20. In other words, Chenhe claims that the high price paid for the merchandise is substantial evidence that it included an amount to compensate plaintiff for assuming the burden of the duties.

The court finds that Commerce's decision not to credit plaintiff's argument that the purchase price should be reduced to compensate for antidumping duties is supported by substantial evidence. During the course of the review, Chenhe's U.S. purchaser refused to respond to Commerce's questionnaires regarding the negotiations leading up to the sale, and as to the terms of sale themselves. *See* CR Doc. Nos. 52, 63 (responses from U.S. customer to Commerce and Counsel for Chenhe regarding additional questionnaires). Nor would the purchaser answer questions posed by Chenhe's counsel. CR Doc. Nos. 52, 63. As a result, Commerce had no information before it concerning: (1) whether the sales price was increased to account for any antidumping duties to be paid by the seller; or (2) the amount by which the sales price was increased. Thus, there is nothing on the record to support plaintiff's terms of sale contention.

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[11] Chenhe's transaction was the only transaction of all of the transactions during the POR that was under [Delivered Duty Paid ("DDP")] sales terms; all other transactions, including the other transactions by the U.S. purchaser were made under [FOB] sales terms. BPI Memo 3.

[12] It should be noted that Chenhe's putative agreement to reimburse the importer for any antidumping duties imposed on the imported merchandise might run afoul of the "absorption" provisions found in 19 C.F.R. § 351.402(f).

Further, the high price paid does not constitute evidence that there was an agreement to compensate plaintiff for assuming the antidumping duties, particularly because plaintiff has not made any representation as to the amount that plaintiff was supposed to be compensated. At oral argument, counsel for plaintiff was unable to offer the court any additional explanation of plaintiff's claim, nor a methodology by which to calculate the size of the claimed premium. Tr. of Conf. Or. Arg. at 47. As such, the court finds reasonable Commerce's decision not to reduce the entry's price in order to take the claimed terms of sale into account.

Ultimately, the court must hold that substantial evidence supports Commerce's finding that Chenhe's sale was not bona fide because it was not "a good future indicator of Plaintiff's future sales in the market." *Tianjin*, 29 CIT at 276, 366 F. Supp. 2d at 1263. The purpose of a new shipper review is to determine an individual antidumping margin for an importer that did not receive a separate rate under an antidumping duty order. In order to calculate an accurate antidumping duty margin for a new shipper, Commerce must examine sales data that is indicative of the respondent's normal business practices so as to judge its future commercial behavior. *Hebei,* 29 CIT at 613, 374 F. Supp. 2d at 1342. If the evidence of the entry on the record is not indicative of typical business practices, no accurate individual rate can be set. Accordingly, in this case, the low quantity and high price for the single sale constitutes substantial evidence that the transaction could not be used as a basis for a separate rate.

Conclusion

Plaintiff's motion for judgment on the agency record is denied and Commerce's decision to rescind the new shipper review as to Chenhe is sustained. Judgment shall be entered accordingly.

Dated: November 22, 2010
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 10–130

CARPENTER TECHNOLOGY CORPORATION AND VALBRUNA SLATER STAINLESS, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Judge
Court No. 09–00439
Public Version

[The court denies Plaintiffs' Motion for Judgment Upon the Agency Record.]

Dated: November 23, 2010

Kelley Drye & Warren, LLP (*Laurence J. Lasoff*, *Mary T. Staley*, *Grace W. Kim*) for Plaintiffs Carpenter Technology Corporation and Valbruna Slater Stainless, Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David D'Alessandris*); *George Kivork*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for Defendant.

OPINION

Barzilay, Judge:

I. Introduction

Plaintiffs Carpenter Technology Corporation ("Carpenter") and Valbruna Slater Stainless, Inc., (collectively, "Plaintiffs") move for judgment on the agency record, challenging aspects of the U.S. Department of Commerce's ("Commerce" or "the Department") determination in *Stainless Seel Bar from India*, 74 Fed. Reg. 47,198 (Dep't of Commerce Sept. 15, 2009) (final admin. review) ("*Final Results*").[1] Specifically, Plaintiffs present three arguments: (1) that the Department unlawfully refused to rely on certain double-bracketed business proprietary information in the *Final Results*; (2) that Commerce should have found foreign producer Venus Wire Industries Pvt. Ltd. ("Venus") and domestic purchaser AMS Specialty Steel ("AMS") to be affiliated during the period of review; and (3) that the agency should have applied adverse facts available ("AFA") to Venus. Pls. Br. 13–37. For the reasons below, Plaintiffs' arguments fail, and the court denies their motion for judgment on the agency record.

[1] The period of review runs from February 1, 2007 to January 31, 2008. *Final Results*, 74 Fed. Reg. at 47,198.

II. Background & Procedural History

In 1995, Commerce issued an antidumping duty order on stainless steel bar from India. *Stainless Steel Bar from Brazil, India and Japan*, 60 Fed. Reg. 9661 (Dep't of Commerce Feb. 21, 1995) (antidumping duty orders). Over a decade later, after receiving a timely request from Carpenter, the Department initiated an administrative review of Venus. *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part, and Deferral of Administrative Review*, 73 Fed. Reg. 16,837 (Dep't of Commerce Mar. 31, 2008).

As a part of its review, Commerce asked Venus to answer various questionnaires. In its responses, Venus, which has participated in the review without counsel, referred to AMS as an unaffiliated customer and reported the export price of the subject merchandise that it sold to AMS. J.A. 63, 117. In response, Carpenter submitted comments to the Department which averred that AMS acted as a sales agent for Venus, pointing to the presence of AMS's customer names on purchase orders sent to Venus. J.A. 130. Venus replied, stating that formatting purchase orders in this manner allows it to fulfill the technical specifications, labeling, and marketing requested by AMS's customers. J.A. 270–71. Venus also insisted that intermediate customers regularly provide steel suppliers with the names of the products' final third-party customers. J.A. 271. To eliminate confusion over its purported affiliations, Venus further highlighted that it had no commission agreement with AMS. J.A. 270.

Carpenter responded to this information by submitting 44 pages of comments, including 15 pages of double bracketed proprietary evidence that it believed demonstrated a principal/agent relationship between Venus and AMS. J.A. 325–69. Pursuant to 19 U.S.C. § 1677f(b)(1)(B) and 19 C.F.R. § 351.304(a)-(b), the Department could not release the proprietary information to Venus.[2] Consequently, the agency notified Carpenter that it would not base its determination on the double bracketed information because of due process concerns, since Venus could not respond to the allegations against it. *See* J.A. 522–25.

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[2] The statute states, in relevant part, that

> The administering authority . . . shall require that information for which proprietary treatment is requested be accompanied by . . .(ii) either (I) a statement which permits the administering authority or the Commission to release under administrative protective order, in accordance with subsection (c), the information submitted in confidence, or (II) a statement to the administering authority or the Commission that the business proprietary information is of a type that should not be released under administrative protective order.

§ 1677f(b)(1)(B). Section 351.304(a)-(b) parallels the statute's directives. *See* § 351.304(a)-(b).

In March 2009, Commerce published its preliminary results, *Stainless Steel Bar from India*, 74 Fed. Reg. 9787 (Dep't of Commerce Mar. 6, 2009) (prelim. admin. review), and issued its final results six months later.[3] *See generally Final Results*; *see also Issues and Decision Memorandum for 2007–2008 Antidumping Duty Administrative Review of Stainless Steel Bar from India*, A-533–810 (Dep't of Commerce Sept. 2, 2009) ("*Issues & Decision Mem.*"). The Department determined that AMS acted as an independent reseller and, therefore, did not qualify as an affiliate of Venus. *Final Results*, 74 Fed. Reg. at 47,199; *Issues & Decision Mem.* at 7–10. Commerce based its conclusions about the use of Carpenter's double bracketed information on the same due process concerns as before. *Issues & Decision Mem.* at 31–32. Finally, Commerce declined to apply AFA to Venus because the agency found that it had the relevant information necessary to make accurate calculations and that any minor deficiencies in Venus's submissions did not impede the review or show that the company failed to act to the best of its ability. *Id.* at 11–22.

III. Subject Matter Jurisdiction & Standard of Review

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c). The court will disturb a Commerce determination only when "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence on the record constitutes "less than a preponderance, but more than a scintilla." *Novosteel SA v. United States*, 25 CIT 2, 6, 128 F. Supp. 2d 720, 725 (2001) (citation & quotation marks omitted), *aff'd*, 284 F.3d 1261 (Fed. Cir. 2002). The requisite proof amounts to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" in light of the entire record, including "whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (footnote & quotation marks omitted). This standard necessitates that the Department thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation & quotation marks omitted); *accord Bando Chem. Indus., Ltd. v. United States*, 16 CIT 133, 136–37, 787 F. Supp. 224, 227 (1992). That the court may draw two inconsistent conclusions from the evidence does not preclude Commerce from

[3] During the intervening period, the Department again advised Carpenter that it would not use the substantive allegations contained in its double bracketed submissions in the *Final Results* because of due process concerns. J.A. 522–25.

supporting its determination with substantial evidence. *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).

IV. Discussion

A. Commerce's Refusal to Use Plaintiffs' Double Bracketed Submissions

A party to an administrative proceeding may submit two types of business proprietary information to Commerce. *See generally* 19 U.S.C. § 1677f(b); 19 C.F.R. § 351.304(a). If a submitting party sets off the proprietary information with single brackets, then Commerce discloses it during the course of the proceedings to all interested parties under an administrative protective order. § 1677f(b)(1)(B)(ii)(I) & (c); § 351.304(b)(1); *see Allied Tube & Conduit Corp. v. United States*, 898 F.2d 780, 783 (Fed. Cir. 1990). The Department does not release the second type of information, which a party submits with double brackets, to interested parties under any circumstances. § 1677f(b)(1)(B)(ii)(II); § 351.304(b)(2); *see Allied Tube & Conduit Corp.*, 898 F.2d at 783.

Plaintiffs challenge Commerce's refusal to consider the double bracketed information they submitted to demonstrate that Venus and AMS had a principal/agent relationship. Pls. Br. 27 (citing J.A. 325–69). Although Plaintiffs chose to make this information exempt from release under an administrative protective order, and therefore unavailable for Venus or any other interested party's viewing, Plaintiffs insist that "nothing in the statute or regulations permits the Department to disregard this information" once placed on the record. Pls. Br. 28.

This claim has no legal merit. Although the relevant statute and related regulations permit a party to submit business proprietary information not subject to release under an administrative protective order, Congress intended these exceptions "to be very narrow and limited" and "to be used rarely, in situations in which substantial and irreparable financial or physical harm may result from disclosure." *Allied Tube & Conduit Corp.*, 898 F.2d at 786 (quoting H.R. Rep. No. 100–576 at 85 (1988) (Conf. Rep.), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1656); *see Issues & Decision Mem.* at 31–32. In this case, however, Plaintiffs did not narrowly tailor their submissions to conceal, for example, the identity of market researchers, information sources, or customer names; rather, the submissions contained wholesale allegations challenging the truthfulness of Venus's questionnaire responses. *See, e.g.*, J.A. 346–47, 353–63, 365–67. This fact, in conjunction with Congess's mandate that substantive information sub-

mitted to Commerce during the course of the proceeding shall be subject to comment by other parties, supports the Department's refusal to countenance the information in the *Final Results*. 19 U.S.C. § 1677m(g); *accord Issues & Decision Mem.* at 31–32. If Commerce had relied upon Plaintiffs' double bracketed submissions, it would have unlawfully deprived Venus of its statutory right to comment on the allegations against it. *See* § 1677m(g); *Mid Continent Nail Corp. v. United States*, 34 CIT __, __, 712 F. Supp. 2d 1370, 1375 (2010) ("Congress has provided a fair process for commenting within the statutory language of 19 U.S.C. § 1677m." (citation omitted)); *cf. Atar, S.r.L. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1068, 1084 (2009) (affirming Commerce's decision not to use business proprietary information to make calculation when doing so would make information public). The Department's decision not to use Plaintiffs' double bracketed submissions in its determination comports with the relevant statute and controlling regulations, and the court affirms the Department's decision.

B. The Department's Finding of No Principal/Agent Relationship

In the antidumping context, Congress has defined "affiliated persons," in relevant part, as "[a]ny person who controls any other person and such other person." 19 U.S.C. § 1677(33)(G); *accord* 19 C.F.R. § 351.102(b)(3). The requisite control exists "if the person is legally or operationally in a position to exercise restraint or direction over the other person." § 1677(33); *accord Chia Far Indus. Factory Co. v. United States*, 28 CIT 1337, 1348 n.9, 343 F. Supp. 2d 1344, 1357 n.9 (2004) (citing *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103316, vol. 1, at 838 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4174–75). When determining whether parties qualify as affiliated in the absence of an explicit agency agreement, Commerce examines the totality of the circumstances and considers

> 1) the foreign producer's role in negotiating price and other terms of sale;
> 2) the extent of the foreign producer's interaction with the U.S. customer;
> 3) whether the agent/reseller maintains inventory;
> 4) whether the agent/reseller takes title to the merchandise and bears the risk of loss;
> 5) whether the agent/reseller further processes o[r] otherwise adds value to the merchandise;

> 6) the means of marketing a product by the producer to the U.S. customer in the pre-sale period; [and]
> 7) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transaction.

Chia Far Indus. Factory Co., 28 CIT at 1349 n.10, 343 F. Supp. 2d at 1358 n.10 (citation omitted); *see id.* at 1350, 343 F. Supp. 2d at 1358 (quotation omitted) (citing § 351.102) (listing similar set of four factors agency may consider in affiliated persons evaluation).

Plaintiffs contend that the Department improperly found no *de facto* principal/agent relationship between Venus and AMS.[4] *See* Pls. Br. 10–11, 16–24. In their brief, Plaintiffs trace the seven-part test delineated above and state that each factor suggests that such a relationship existed between the companies. On the first prong, they claim that "the only evidence on the record show[s] that Venus [] was actively involved in the negotiations by AMS with the ultimate U.S. customer." Pls. Br. 17. According to Plaintiffs, Venus [[had influence over AMS]]. Pls. Br. 18 (citing J.A. 345–69, 380–81, 491–500, 502–07). Plaintiffs next highlight, in examining the second prong, that Venus interacted with final, third-party U.S. customers, Pls. Br. 19 (citing J.A. 130, 143–62), and that Venus even directly contacted them on multiple occasions. Pls. Br. 19 (citing J.A. 364–69). To bolster their argument that Venus had significant interactions with AMS's domestic customers, Plaintiffs specifically point to AMS's custom of providing Venus with the names AMS's customers. Pls. Br. 19. Plaintiffs believe that AMS had "no commercial reason" to disclose its U.S. customers to Venus if the two companies truly conducted their transactions at arm's-length. Pls. Br. 19 n.29 ("[T]he only reason for AMS to divulge the customer's identity to Venus [] is that AMS was acting primarily for the benefit of Venus [] and not itself."). With respect to the third factor, Plaintiffs note that AMS did not maintain inventory of the subject merchandise and had it shipped to the ultimate U.S. customer, evidence that purportedly bolsters a finding of an agency relationship. Pls. Br. 24 (citing J.A. 374). On the fourth factor, Plaintiffs proffer that AMS faced minimal financial risk in these transactions because AMS did not take physical possession of the merchandise and because Venus retained liability for merchandise quality problems, even though AMS took proper title to the merchandise. Pls. Br. 23 (J.A. 374). Plaintiffs contend that

[4] Plaintiffs concede that Venus and AMS do not have a *de jure* principal/agent relationship, Pls. Br. 10, 16, 26, as "a written agency relationship and evidence of formal commission payments d[o] not exist on the record." Pls. Br. 10.

this risk minimalization should have led Commerce to find affiliation between the two companies. According to Plaintiffs, that AMS also did not process or add any value to the subject merchandise purchased from Venus supports the same affirmative affiliation conclusion on the fifth prong. Pls. Br. 24 (citing J.A. 271). Plaintiffs maintain on the sixth prong that AMS "clearly marketed the subject merchandise on behalf of Venus" because of AMS's status as [[a large seller of Venus products]]. Pls. Br. 21 (citing J.A. 364–69). Finally, on the last factor, Plaintiffs aver that U.S. consumers of the subject merchandise understood that AMS acted as Venus's domestic sales agent, pointing to, *inter alia*, Venus's letter notifying them that it would bypass AMS and begin working with them directly. Pls. Br. 21–22 (citing J.A. 345–69).

Notwithstanding Plaintiffs' lengthy arguments to the contrary, Commerce did not err when it concluded that the two companies had no agency relationship. The Department notes that nothing on the record shows that Venus played a role in price negotiations between AMS and its domestic customers or that Venus paid AMS commissions for its subject merchandise sales. *Issues & Decision Mem.* at 8 (citing J.A. 373–74, 441); *see* J.A. 306, 418, 984. Commerce also found that Venus had limited interaction with AMS's U.S. customers. *Issues & Decision Mem.* at 8–9. While Venus knew the names of these customers from purchase orders, Commerce determined that this standard industry practice simply allowed Venus to produce the subject merchandise to the ultimate customers' technical specifications and label/marking requirements. *Id.* at 8–9 (citing J.A. 372–73); *see* J.A. 270, 306. Moreover, the Department correctly concluded that Venus and AMS did not establish a principal/agent relationship when Venus notified AMS's customers by letter that it soon would begin selling its products through its new U.S. affiliate and no longer through AMS. *Issues & Decision Mem.* at 9. Although Venus may have implied that AMS acted as its agent, Commerce agreed that "because AMS had been servicing [Venus's] customers for quite a long time using Venus material, those customers may have had the *impression* that AMS represented Venus in the U.S. market." *Issues & Decision Mem.* at 9 (citing J.A. 372–73) (emphasis added). The letter's use of the term "agent" cannot alone demonstrate that such a legal relationship existed. In that vein, the Department recognized that Venus never engaged in conduct typical of a principal, such as contacting the customers for the purpose of sales negotiations, presale discussions, or marketing. *Issues & Decision Mem.* at 8–9; *see* J.A. 373. Finally, the Department noted that although AMS did not maintain an inventory

or add any non-service value to the subject merchandise after purchase, it took title of the subject merchandise and bore the risk of loss. *Issues & Decision Mem.* at 10 (citing J.A. 372–74); *see* J.A. 418. Examining the totality of these facts, the Department reasonably concluded that Venus and AMS did not have an agency relationship, and the court therefore affirms this determination.

C. The Department's Decision Not to Apply AFA to Venus

When conducting an antidumping duty administrative review, the Department uses facts otherwise available if a party, *inter alia*, withholds requested information, fails to timely or submit such information "in the form and manner requested," or "significantly impedes" the proceeding. 19 U.S.C. § 1677e(a)(2). After making this finding, Commerce "*may*" employ AFA against the party if the agency makes a separate finding that the "party has failed to cooperate by not acting to the best of its ability to comply with a request for information." § 1677e(b) (emphasis added); *accord Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 488, 149 F. Supp. 2d 921, 929 (2001). If a party does not submit complete and accurate information due to "simple inadvertence" despite its ability to do so, the Department may apply AFA only once it shows "willfulness on the part of the [party] or behavior below the standard of a reasonable respondent." *Steel Auth. of India, Ltd.*, 25 CIT at 489 n.11, 149 F. Supp. 2d at 930 n.11 (citation omitted).

Plaintiffs assert that Commerce should have applied AFA to Venus's antidumping duty margin calculation. In a laundry list of grievances, they allege that Venus wantonly violated the Department's procedural and regulatory requirements, filed numerous improper requests for extensions of time, and failed to place on the record necessary information which the agency requested. Pls. Br. 30–37. Plaintiffs, though not Commerce, argues that this purported behavior "[s]ignificantly [i]mpeded [t]he Department's [r]eview." Pls. Br. 35. *But see Issues & Decision Mem.* at 11–12, 14–15, 17–22; Def. Br. 25–31.

In light of the "particularly great" deference granted to the Department's factual determinations when deciding whether to apply AFA to allegedly uncooperative respondents, *F.Lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (citations omitted), and the near-frivolous quality of Plaintiffs' allegations, the court adopts Commerce's succinct and eloquent reasoning on this issue in full and affirms its refusal to apply AFA against Venus. *See Issues & Decision Mem.* at 10–22.

V. Conclusion

The court denies Plaintiffs' motion for judgment on the agency record.

Dated: November 23, 2010
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE