U.S. Customs and Border Protection

Slip Op. 11–44

JIAXING BROTHER FASTENER CO., LTD., A.K.A. JIAXING BROTHER STANDARD PARTS CO., LTD., IFI & MORGAN LTD., and RMB FASTENERS LTD., Plaintiffs v. UNITED STATES, Defendant, and VULCAN THREADED PRODUCTS, INC., Defendant-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 09–00205

[*The Department of Commerce's Final Results of Redetermination on Remand is SUSTAINED. Judgment will enter for Defendant accordingly.*]

Dated: April 21, 2011

deKieffer & Horgan (*Gregory Stephen Menegaz* ; *James Kevin Horgan*) for Plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*; Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Delisa M. Sánchez*); *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

Vorys Sater Seymour and Pease LLP (*Frederick P. Waite*, *Kimberly R. Young*) for Defendant-Intervenor.

OPINION & ORDER

CARMAN, JUDGE:

Plaintiffs Jiaxing Brother Fastener Co., Ltd. (also known as Jiaxing Brother Standard Parts Co., Ltd.) IFI & Morgan Ltd., and RMB Fasteners Ltd. (collectively, "Brother Companies" or "Plaintiffs") filed a motion pursuant to U.S.C.I.T. R. 56.2 challenging the Department of Commerce's ("Commerce" or "the Department") final determination of sales at less than fair value in *Certain Steel Threaded Rod from the People's Republic of China*, 74 Fed. Reg. 8,907 (Feb. 27, 2009) ("*Final Determination*").

In deciding Plaintiffs' R. 56.2 Motion, the Court upheld all aspects of the *Final Determination* except for one, which centered on whether Commerce chose the "best available information," as required by 19 U.S.C. § 1677b(c)(1),[1] when it rejected the financial statements of the

[1] All citation to the United States Code are to the 2006 edition.

Indian company Rajratan Global Wire Ltd. ("Rajratan") as a surrogate source of data for calculating the normal value of the subject merchandise, steel threaded rod ("STR") from China. *Jiaxing Brother Fastener Co., Ltd. v. United States*, 34 CIT ___, ___ F. Supp. 2d ___, 2010 WL 4791811 at *11–12 (2010). The Court found that "Commerce's rejection of Rajratan's financial statement was based on the mistaken finding that Rajratan manufactured an upstream product used as an input in the production of STR," a finding which the Court found not to be "supported by substantial evidence on the record, which shows that Rajratan produces p.c. [prestressed concrete] wire and tyre bead wire, not steel rod." *Id.* at *12. Since Commerce had rejected Rajratan's financial information based on the mistaken conclusion "that Rajratan's product was an input used in Plaintiffs' STR manufacture," the Court remanded that aspect of the *Final Determination* for Commerce "to reconsider the appropriateness of using Rajratan's financial statement by analyzing the comparability of Rajratan's merchandise to the subject merchandise." *Id.*

Commerce filed its *Final Results of Redetermination Pursuant to Jiaxing Brother Fastener Co., Ltd., et al. v. United States, Consol. [sic] Court No. 09–00205, Slip Op. 10–128 (November 16, 2010)* ("*Remand Results* ") on December 16, 2010. (ECF No. 42.) Upon reconsideration and after hearing from all parties, the Department determined that Rajratan's products were comparable to STR, and found that "its production experience, and therefore financial experience, is comparable to that of STR producers," and "included [Rajratan's] financial ratios in the average calculation of surrogate financial ratios." (*Id.* at 12.) As a result, Plaintiffs' dumping margin was revised from 55.16% to 47.37% for the period of investigation. (*Id.* at 13.) As discussed below, the Court now sustains the *Remand Results*.

I. *Positions of the Parties*

The Brother Companies indicated by letter to the Court that they had "no further comments on the Department's Redetermination," and therefore did not object or argue against affirming the *Remand Results*. (ECF No. 43.)

The United States filed a brief response to the Plaintiffs' comments, briefly arguing that the *Remand Results* were supported by substantial evidence and urging that they be sustained in the absence of any objection from Plaintiffs. (ECF No. 46.)

Vulcan Threaded Products, Inc. ("Vulcan"), Defendant-Intervenor, filed its *Response to Plaintiffs' Comments Regarding the U.S. Department of Commerce's Remand Determination* ("*Vulcan's Comments*")

contesting the *Remand Results* on the basis that Commerce failed to explain or cite to substantial record evidence supporting the finding that "the wire produced by [Rajratan] is comparable to threaded rod." (*Vulcan's Comments* at 3.) Vulcan also argued this point in the administrative proceeding on remand, noting "that STR is a value-added product which requires that wire rod first be drawn into wire and straightened, cut to length, threaded and zinc coated." (*Remand Results* at 5.) Vulcan argued that Rajratan made "only wire products" which were "not comparable to STR." (*Id.*)

During the remand proceeding, Commerce rejected Vulcan's argument and found that Rajratan's products were comparable to STR. (*Id.* at 5–6.) The sole issue to be resolved here is therefore whether substantial evidence on the record supports Commerce's decision that Rajratan manufactured end-products comparable to STR.

II. *Commerce's Analysis of the Similarity of STR and Rajratan's Products*

Both STR (the product made by Vulcan and Plaintiff) and p.c. wire and tyre bead wire (the products made by Rajratan) share the same initial manufacturing step: an input known as wire rod is drawn into steel wires. No party contests this conclusion and the record supports it.

Rajratan's financial statement describes one benefit of its R&D efforts as the "ability to draw wire at higher speeds," and plans in the future to "lower energy cost . . . of bead wire by . . . high-speed drawing." (*Vulcan Comments*, Tab 1 at 7.) The same document describes Rajratan's raw materials as consisting of primarily "Wire Rod," as well as a small amount of "Ancillary Raw Material," which are listed as its only "Raw Materials Consumed" in the production of its two products, "P.C. Wire" and "Tyre Bead Wire." (*Id.* at 22, 27.)

The Brother Companies describe their production process as beginning with "drawing the wire rod or round bars into wires," a process that consumes only "wire rod or round bars and drawing powder." (*Id.*, Tab 2 at 3.)

Vulcan's objections arise here; it argues that "wire production is merely the first stage of the production process used by Vulcan and Plaintiffs to make [STR]," but that Rajratan's operations end there. (*Vulcan's Comments* at 3–4.) Vulcan emphasized that to make STR, the drawn wire must be straightened, cut to length, threaded and zinc coated. (*Id.* at 4.) No party contests this description of STR manufacture.

Commerce, however, rejected Vulcan's argument that these steps distinguished STR production from p.c. wire and tyre bead produc-

tion, since "careful review of the Rajratan financial statement indicates that Rajratan . . . [also] produces 'spring wires' with high end applications and has the capability to pickle its products." (*Remand Results* at 5 (*citing* Rajratan Financial Statement (located in *Vulcan Comments*, Tab 1) at 7).) Based on these facts, Commerce found "that Rajratan further manufactures wire rod into finished (or semi-finished) steel products, a process comparable to that of producing STR." (*Id.* at 5–6.) In other words, Commerce found that Rajratan's additional processing of its wire by pickling and by the manufacture of spring wires was comparable to the additional processing of wire (cutting to length, threading, and galvanizing) to produce STR. It is the reasonableness of this finding that Vulcan attacks.

III. *Standard of Review*

The Court must uphold Commerce's decision, unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law," in which case the Court must overturn the decision. 19 U.S.C. § 1516a(b)(1)(b)(i); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1371 (Fed. Cir. 2010). "Substantial evidence" is proof that "a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotations omitted). The Court is not to substitute its own decision for that of Commerce, as the mere "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" as long as the finding is rationally connected to the factual record. *Consolo v. Fed. Maritime Comm'n.*, 383 U.S. 607, 620 (1966) (citations omitted)

When reviewing Commerce's decision as to what constitutes the "best available information" under 19 U.S.C. § 1677b(c)(1), the Court does not "evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available information.'" *Dorbest Ltd. v. United States*, 30 CIT 1671, 1676, 462 F. Supp. 2d 1262, 1269 (2006), *aff'd-in-part, vacated-in-part, and remanded on other grounds*, 604 F.3d 1363.

IV. *Analysis*

The Court, applying its standard of review, finds that a reasonable mind could easily conclude that Commerce chose the best available information in deciding to use Rajratan's financial ratios because its conclusion that Rajratan's products are comparable to STR was rational. The Court therefore affirms the *Remand Results*.

While Vulcan attempts to distinguish p.c. wire and tyre bead wire from STR by stating that their production is completed immediately after drawing, the record does not support such a conclusion. First, as Commerce points out, Rajratan's financial statements indicate that Rajratan also pickles its wire and has developed the capacity to produce high-end spring wires. Commerce could reasonably conclude that such post-drawing steps are comparable to the relatively simple STR production steps of cutting to length, threading, and galvanizing.

Since the steps involved in manufacturing STR, p.c. wire, and tyre bead wire are all relatively simple and rudimentary processes in which there is significant crossover, the Court finds that Commerce acted reasonably and well within its discretion and authority in determining that those processes were similar. The Court is therefore compelled to sustain the *Remand Results*.

V. *Conclusion*

For the above reasons, and having given full consideration to the *Remand Results*, the comments and responses of all parties, and to the administrative record and all other papers and proceedings in this case, the Court affirms the Remand Results and denies Plaintiffs' motion for judgment upon the agency record. Judgment for Defendant will be entered accordingly.

Dated: April 21, 2011
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN,

Slip Op. 11–45

SHANDONG RONGXIN IMPORT & EXPORT CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Gregory W. Carman, Judge
Court No. 09–00316

[*Remand results sustained in part and remanded in part*]

Dated: April 21, 2011

deKieffer & Horgan (*John J. Kenkel*, *James K. Horgan*, *Gregory S. Menegaz*), for Plaintiff.

Tony West, Assistant Attorney General, *Jeanne E. Davidson ,* Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S.

Department of Justice (*Carrie A. Dunsmore*); *Daniel J. Calhoun*, International Office of the Chief Counsel for Import Administration, Department of Commerce, of counsel, for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

INTRODUCTION

This action is before the Court following the final results of redetermination pursuant to remand ("Remand Results"), filed by the Department of Commerce ("Commerce") on December 20, 2010. (ECF No. 43.) Plaintiff Shandong Rongxin Import & Export Company ("Shandong") challenges the Remand Results only with respect to the value Commerce assigned to the wage rate factor of production in constructing the normal value of the subject merchandise. (Pl.'s Cmts. on Final Results of Redetermination Pursuant to Remand ("Pl.'s Cmts.") at 1.) For the reasons set forth below, the Remand Results are sustained in part and remanded in part.

BACKGROUND

In *China First Pencil Co. v. United States*, 34 CIT __, 721 F. Supp. 2d 1369 (2010), the Court sustained-in-part and remanded-in-part Commerce's final determination in the 2006–2007 administrative review of the antidumping duty order on Certain Cased Pencils from the People's Republic of China ("PRC"). The above captioned case was consolidated with *China First* shortly before the Court issued its opinion; after Commerce issued the Remand Results, Shandong was the only party seeking to challenge the Remand Results. Accordingly, the Court severed the cases and issued a judgment in *China First Pencil Co. v. United States*, Court No. 09–00325. Shandong now proceeds on its own.

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). [1] By statute, when reviewing Commerce's determination, 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); *see also China First*, 721 F. Supp. 2d at 1372.

[1] All citations to the United States Code refer to the 2006 edition.

DISCUSSION

In determining the dumping margin in this case, Commerce calculated the normal value of the subject merchandise on the basis of the values of certain factors of production in "a market economy country or countries considered to be appropriate by [Commerce]." 19 U.S.C. § 1677b(c)(1). The purpose of this statute is "to assess the price or costs of factors of production of [the subject merchandise in a surrogate market economy country,] in an attempt to construct a hypothetical market value of that product in [the nonmarket economy country]." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999) (internal quotations omitted). In deciding how to appropriately value factors of production, Commerce is required to "utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—(A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). When Commerce elects to calculate normal value pursuant to this method, one of the factors of production for which it must establish a value is labor, or the wage rate. 19 U.S.C. § 1677b(c)(3).

In *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372 (Fed. Cir. 2010), the Court of Appeals for the Federal Circuit ("CAFC") invalidated the regulation in which Commerce had established its preferred method for valuing labor as a factor of production. The CAFC held that the agency's regression-based methodology produced a value for labor that failed to utilize data only from countries that are at a level of economic development comparable to that of the nonmarket economy country, and that are significant producers of comparable merchandise, as required by 19 U.S.C. § 1677b(c)(4). *See id.* Because the final determination challenged in *China First* was issued prior to the CAFC decision in *Dorbest*, the Court remanded this case to Commerce with instructions to "adjust the surrogate value for labor to conform with the statutory requirements [of 19 U.S.C. § 1677b(c)(4)], as explained in *Dorbest*." *China First*, 721 F. Supp. 2d at 1382. The value Commerce subsequently assigned to the wage rate is the only aspect of the Remand Results presently challenged by Shandong.

A. Commerce's Wage Rate Determination on Remand

As a threshold matter, Commerce determined that when valuing labor as a factor of production, data from several countries is preferable to data from a single country. While the agency normally values

most other factors of production by using figures from a single surrogate country, Commerce continues to find, as it did before the CAFC invalidated its regression-based analysis in *Dorbest*, that labor is different. *Remand Results* at 10–11; *see also* 19 C.F.R. § 351.408(c)(2). According to Commerce, labor is distinguished from other factors of production because it demonstrates wide variability, even between countries with similar gross national income per capita ("GNI"). *Remand Results* at 10. Commerce justifies this view by citing "many socio-economic, political and institutional factors, such as labor laws and policies unrelated to the size or strength of an economy, that cause significant variances in wage levels between countries," and by noting that "labor is not traded internationally." *Id.* at 11 (*citing International Labor Organization, Global Wage Report: 2009 Update*, at 5, 7 and 10 (2009), *available at* http://www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/documents/publication/wcms_116500.pdf (last visited April 21, 2011).) Accordingly, Commerce valued labor by calculating a simple average of certain specific wage rate data from the group of countries the agency determined to be both economically comparable to the PRC and significant producers of comparable merchandise. *Id.*; *see also Remand Determination of 2006–2007 Administrative Review of the Antidumping Duty Order on Certain Cased Pencils from the People's Republic of China: Industry-Specific Wage Rate Selection* ("Wage Rate Memo"), October 13, 2010 (AR 2707) at 4–5.

1. *Economic Comparability*

To identify which countries are at a level of economic development comparable to the PRC, Commerce began with the Surrogate Country Memo, in which it had identified five countries as potential surrogates from which the agency would be able to derive values for all the other factors of production, besides labor. *Wage Rate Memo* at 2. Commerce ranked the five countries in order of ascending GNI: India, the Philippines, Indonesia, Colombia, and Thailand. *Id.* Using the lowest-GNI country (India) and highest-GNI country (Thailand) as "bookends," Commerce turned to the World Bank's 2009 World Development Report to identify every country with a GNI between the two, thus establishing the first and broadest basket of countries—44 that the agency deemed to be economically comparable to the PRC. *Id.*; *see also id.* at Attach. 2.

2. *Significant Producers of Comparable Merchandise*

Commerce then determined which of these 44 countries were significant producers of comparable merchandise by identifying every country that exported any quantity of comparable merchandise (defined as exports under HTS 9609.10.00) between 2005 and 2007. *Id.* at 3. This produced a narrower basket of countries—30 that, in the agency's view, satisfy the dual requirements of 19 U.S.C. § 1677b(c)(4). *Id.*; *see also id.* at Attach. 2.

3. *Selecting and Sorting Reliable Wage Data*

The next step in Commerce's process was to assess which of these 30 countries had made available adequate data that could be averaged together to produce a single surrogate value for labor. Deciding which data would suffice for this purpose required the agency to make a series of choices. First, Commerce decided that it would rely on earnings or wages data reported to the International Labor Organization ("ILO").[2] *Id.* at 3. Second, Commerce decided to prefer industry-specific data over data that did not reflect the different incomes associated with different types of work. *Id.* Thus, noting that industry-specific wages and earnings data were available in "Chapter 5B: Wages in Manufacturing" of the ILO Yearbook of Labor Statistics, Commerce decided to use Chapter 5B as the wages and earnings data source. *Remand Results* at 13; *see also LABORSTA, ILO Labor Statistics Database 1998–2010*, *available at* http://laborsta.ilo.org/applv8/data/c5e.html (last visited April 21, 2011).

When countries report any type of industry-specific data to the ILO, including the wages and earnings data of interest in this proceeding, they do so according to a uniform code known as the ISIC.[3] But there are different revisions of the ISIC code, and not all countries report industry-specific data under the same revision. Thus, Commerce faced a third choice, to determine which revision of the ISIC code it

[2] "Wages" refer to "direct wages and salaries", while "earnings" encompass both wages and "bonuses and gratuities." *Antidumping Methodologies in Proceedings Involving Non-Market Economies*, 76 Fed. Reg. 9,544, 9,545 (Feb. 18, 2011).

[3] The International Standard Industrial Classification of all Economic Activities ("ISIC code") is aptly named. It is a uniform, periodically updated system for the classification of economic activity, not unlike what the Harmonized Tariff Schedule is for the classification of imported merchandise. All economic activities are divided into "Sections." For instance, Section D covers all manufacturing. Sections are separated into "Divisions," which are identified by a two-digit number. Divisions are further separated into three-digit "Groups" or four-digit "Classes." *See* http://unstats.un.org/ unsd/cr/registry/regcst.asp?Cl=2&Lg=1 (last visited April 21, 2011). In the *Wage Rate Memo* and the *Remand Results*, Commerce refers to two-digit Divisions interchangeably as "Sub-Classifications" and "Classifications." For consistency, the Court will identify all groupings within the ISIC code by the formal nomenclature.

preferred. No countries had reported data under the most recent revision of the code, ISIC-Rev.4 , but many countries had reported data under ISIC-Rev.3. *Wage Rate Memo* at 3. Moreover, many countries reporting under ISIC-Rev.3 had provided specific wages and earnings data for Division 36, which covers "[m]anufacture of furniture; manufacturing not elsewhere classified ("n.e.c.")," and encompasses pencil manufacturing, which is explicitly included in Class 3699 "Other manufacturing n.e.c." ISIC Rev.3 Class 3699, *available at* http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=2&Lg=1&Co=3699 (last visited April 21, 2011). *Id.* Commerce did not address in the *Wage Rate Memo* or in the *Remand Results* whether any countries reported data under ISIC-Rev.2, or if so, whether those countries had reported data for a 2-digit Division under that revision that might also include pencil manufacturing. This series of decisions left Commerce with 10 countries that, in the agency's view, satisfied the dual requirements of 19 U.S.C. § 1677b(c)(4), and that had reported adequate industry-specific wages and earnings data for use in this case.[4] *Id.* at 4.

Finally, Commerce filtered and, in some cases, adjusted the data provided by these 10 countries, in order "to arrive at a single earnings or wage rate for each country." *Id.* at 4–5. First, the agency prioritized the use of earnings data when available, and wages data when not. *Id.* at 5. Second, the agency only considered data with combined male and female coverage. *Id.* Third, the agency used earnings or wages data most contemporaneous to 2007; if it had to use data from an earlier year, the agency inflated it with the use of the relevant Consumer Price Index to approximate 2007 price levels. *Id.* Fourth, Commerce "selected from the following categories [of workers], in the following hierarchy: 1) wage earners; 2) employees; 3) salaried employees; and 4) total employment." *Id.* Finally, Commerce chose hourly data where available; if a country reported data only on a daily, weekly, or monthly basis, the agency converted that data to an hourly figure assuming "8 working hours per day, 5.5 working days a week, and 24 working days per month." *Id.* After massaging the data in accordance to the foregoing parameters, Commerce calculated a final simple average industry-specific wage rate of $0.97 per hour. *Id.*

Well, it was almost final. Before issuing the Remand Results, Commerce noticed that three of the countries it had included in the final group of 10 (because they met the dual requirements of § 1677b(c)(4), and had provided all relevant data in the right ISIC code revision)

[4] Confusingly, the Wage Rate Memo identifies 11 countries that supposedly reported adequate data and meet the dual requirements of 19 U.S.C. § 1677b(c)(4), before noting that one of those countries, Armenia, did not meet the dual requirements because it was not a significant producer of comparable merchandise. *Wage Rate Memo* at 4.

were nonmarket economies. *Analysis Memorandum*, December 6, 2010 (AR 2753) at 3. Because the surrogate value for labor in an NME proceeding cannot be based on labor values from other nonmarket economies, Commerce reduced the final group to seven countries, with a simple average wage rate of $1.07/hour.[5]

B. Shandong's Contentions

Shandong's primary argument is that Commerce should have only used wage data from India, rather than from a basket of countries, to value labor as a factor of production. (Pl.'s Cmts. 4–20.) Plaintiff argues that by valuing labor from a group of countries, while valuing all other factors of production from a single surrogate country, "Commerce has acted in an arbitrary and capricious manner." (*Id.* at 6.) Plaintiff cites 19 C.F.R. § 351.408(c)(2) and claims that "Commerce has a clear policy of obtaining as many surrogate values from *a single* country as possible." (*Id.* at 12 (emphasis in original).) What Plaintiff does not acknowledge, however, is that this regulation explicitly identifies labor as an exception to the "normal" approach. 19 C.F.R. § 351.408(c)(2) ("Except for labor, [Commerce] normally will value all factors in a single surrogate country.")

While Shandong's only explicit argument is that Commerce was required to use labor data from one country (India) rather than a group of countries, there are portions of its brief which might be read to argue in the alternative that even if using a basket of countries to value labor was permitted, the omission of Indian data from such a basket was unlawful. For instance, Plaintiff suggests that the only reason Indian wage and earnings data from the ILO were not chosen by Commerce is that India had reported its data under ISIC-Rev.2, rather than ISIC-Rev.3. (Pl.'s Cmts. at 6.) Plaintiff argues that Commerce did not identify any reason why the Indian data was "intrinsically unreliable and arbitrary," and asserts that Indian ILO data is at least as reliable as the data chosen by Commerce. (*Id.* at 6–7.) Plaintiff highlights Commerce's data standards of "quality, specificity, and contemporaneity," arguing that the agency failed to apply these tests "to the seven countries and India equally." (*Id.* at 9.) Shandong points out that the Indian ILO data is available for a 3-digit Section (390), which is arguably more specific to the pencil industry than the 2-digit Divisions utilized by Commerce from the other countries. (*Id.* at 13.) Also, Shandong points out that the Indian ILO data comes from 2006, nearly contemporaneous with the period of review,

[5] In preparing the Remand Results, Commerce rewrote the process described in the *Wage Rate Memo*, eliminating nonmarket economies from the initial group of economically comparable countries, and accordingly diminishing the number of countries left at each subsequent stage of the process. *Remand Results* 11–14.

whereas data from several of the countries used by Commerce were several years older, and required the use of inflators to approximate period of review levels. (*Id.* at 14.)

Shandong's other major dispute with the Remand Results is on the issue of which countries constitute "significant producers of comparable merchandise" within the meaning of 19 U.S.C. § 1677b(c)(4)(B). (*Id.* at 20.) Plaintiff argues that Commerce's interpretation of the term "significant producers" to include any country with *any quantity* of exports in the relevant time period is an impermissible construction of the statute. (*Id.* at 21.) Plaintiff states that for Commerce "to conclude that any country that registers exports of a product, no matter how commercially inconsequential, represents a 'significant producer' of that product . . . simply cannot withstand any real scrutiny." (*Id.* at 21.) Plaintiff points to the fact that the share of world trade held by many of the countries Commerce deemed "significant producers" is astonishingly minuscule, including, for instance, .00266% for Ukraine, .00356% for Ecuador, and .00756% for Egypt. (*Id*. at 22.) Plaintiff also notes that according to the statute's legislative history, "the term 'significant producer' includes any country that is a significant net exporter," (*quoting* Conference Report to the 1988 Omnibus Trade & Competitiveness Act, H.R. Rep. No. 100–576, at 590 (1988)), and points out that Commerce "has previously relied on countries being a net exporter in order to qualify as a significant producer," (*citing Certain Non-Forzen Apple Juice Concentrate from the People's Republic of China*, 69 Fed. Reg. 65, 148 (Nov. 10, 2004) and accompanying Issues and Decision Memo). (*Id.* at 24.)

C. Defendant's Response

Defendant responds to Shandong's first argument by maintaining that Commerce's reliance on data from multiple countries to produce a surrogate value for labor is supported by substantial evidence on the record and is otherwise in accordance with law. (Def.'s Resp. to Remand Cmts. by Pl. Shandong Rongxin Import & Export Co. Ltd ("Def.'s Resp.") 5–12.) Defendant points to the record evidence, which demonstrates wide variability of wages among countries with relatively comparable gross national income, and notes that Commerce cited several characteristics which distinguish labor from other production inputs. (*Id.* at 7.) Defendant highlights that Shandong's position that Commerce must use a single country to value labor is explicitly contradicted by statute, regulation, and CAFC case law. (*Id.* at 8–9 (*citing* 19 U.S.C. § 1677b(c)(4), 19 C.F.R. § 351.408(c)(2), and

Dorbest Ltd. v. United States, 604 F.3d 1363, 1372 (Fed. Cir. 2010)).) Defendant concludes by dismantling Shandong's remaining arguments as to why Commerce should have exclusively relied on Indian wage data. (*Id.* at 9–12.) Picking up on Shandong's possible argument that Indian labor data should have been included with the basket of countries Commerce utilized, Defendant merely reiterates that Commerce did not want to "mix and match data that can cover different industry groupings from different ISIC Revisions." (*Id.* at 15 (internal quotation and bracketing omitted).)

The United States also defends Commerce's view that a country is a "significant producer" if it exports any quantity of comparable merchandise in the relevant period. (*Id.* at 12–16.) Arguing under a *Chevron* framework, Defendant asserts that the term "significant producer" is ambiguous and undefined in the statute. (*Id.* at 13 (*citing Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).) Defendant's view is that the legislative history is unhelpful, because it only indicates that the term "significant producer *includes* " a net exporter, but offers no specific metric or definition. (*Id.* (emphasis added and internal quotation omitted).) Thus, moving to the second prong of *Chevron*, Defendant asserts that Commerce is entitled to substantial deference. Defendant explains that Commerce's motivation for defining "significant producer" in this way was "to maximize the size of the ultimate basket of countries for data purposes while still accounting for this criterion." (*Id.* at 14.) But, pointedly, Defendant does not explain how treating a country with *any* quantity of exports actually accounts for this criterion.

D. Analysis

The Court finds groundless Shandong's argument that Commerce was obligated to utilize data from a single country to value labor. This argument is untenable in the face of a statute, agency regulation, and CAFC case law which all explicitly permit the agency to utilize data from multiple countries. 19 U.S.C. § 1677b(c)(4) (instructing Commerce to "utilize, to the extent possible, the prices or costs of factors of production in *one or more market economy countries* ") (emphasis added); 19 C.F.R. § 351.408(c)(2) (explicitly excepting labor from Commerce's normal approach of valuing factors of production in a single surrogate country); *and Dorbest*, 604 F.3d at 1372 (describing a possible "subset of . . . countries" that would satisfy the dual requirements of §1677b(c)(4)). Additionally, Commerce is well justified in averaging wage rates to produce a single surrogate value, with record evidence establishing both the existence of variation in wages among similarly economically developed countries, and the reasons for it.

(*See* Remand Results at 10–11 (*citing International Labor Organization, Global Wage Report: 2009 Update*, (2009) at 5, 7, and 10.) Commerce is therefore acting reasonably when it treats labor differently from other factors of production. Accordingly, Commerce's decision to utilize data from multiple countries is supported by substantial evidence on the record, and is otherwise in accordance with law.

The Court is less sanguine, however, about the reasons Commerce cites for excluding Indian labor data, which was reported under ISIC-Rev. 2, from the group of countries ultimately providing the labor rate, all of which reported data under ISICRev.3. While the agency has made clear that it prefers "to use data from a single ISIC revision to ensure consistency of the industry category," the Court finds Commerce's justification for this preference lacking and inconsistent. The Indian wages and earnings data reported to the ILO appears to meet all other criteria identified by the agency, including quality, specificity, and contemporaneity. Indian ILO labor data was reported for a year close to the period of review—2006—and was reported at a more specific 3 digit level of the ISIC than the 2-digit-level data relied on by Commerce. Also, India reported a combined earnings figure for men and women, in accordance with Commerce's preference, and the agency does not dispute that the ISIC-Rev. 2 Indian labor data includes the pencil industry. To dismiss such apparently valuable data without further explanation is unjustified. Moreover, refusing to use ISIC-Rev. 2 data contradicts what the agency has repeatedly identified as a paramount interest: generating the broadest basket of countries possible to value labor. Commerce has cited the need for a broad basket of countries to justify using less contemporaneous data, *Remand Results* at 28, and to attempt to justify the inclusion of labor data from countries with minuscule amounts of exports, (Def.'s Resp. at 14.). The inconsistency with which Commerce has asserted the need for a broad basket of countries warrants a remand.

Commerce has broad discretion to determine which criteria it will use to sort and prioritize the data it uses in making its determination. The Court's role is to ensure that Commerce's sorting and prioritizing decisions are reasonable and consistently applied. In this case, the Court finds that most of Commerce's sorting and prioritizing decisions are well justified, such as the decision to use earnings data if available, and wages data if not, and the choice only to utilize data reported for both sexes. The decision to insist that data be reported under a common ISIC revision, however, is not supported by substantial evidence on the record. On remand, if Commerce still wishes to omit all labor data that a qualifying country reported under ISIC-Rev.

2, it must explain why the need for consistency across ISIC revisions predominates over the need for a broad basket of countries to value labor. Alternatively, if Commerce determines that the chief value is to have the broadest feasible basket of countries, Commerce is instructed to review which qualifying countries have reported data under a prior ISIC revision which satisfy the agency's other requirements.[6]

The final issue of concern for the Court is Commerce's construal of the term "significant producer" to mean any country with any level of exports under the relevant HTS subheading. *See Remand Results* at 20. Commerce's justification for this is pure speculation: the agency claims that "a country's ability to export comparable merchandise is indicative of substantial production because it is likely producing merchandise at a level that surpasses its internal consumption." *Id.* There is nothing on the record to support this theory—no evidence about domestic pencil manufacturing in these countries, nor even any evidence about the level of imports of comparable merchandise for comparison purposes. While the inference that exports implies significant domestic production is somewhat palatable in the case of a country such as Indonesia, which had between $40 million and $53 million of exports in each year between 2005 and 2007, it is increasingly absurd and implausible as the quantity of exports in any given country approaches zero. In fact, many of the economically comparable countries that Commerce identified as "significant producers" had little or no exports in the years in question. For instance, Maldives had $67 of exports in 2005, and no exports in 2006 or 2007, and yet was considered a significant producer. *Wage Rate Memo* at Attachment 2. Similarly, Cape Verde and Swaziland were considered significant producers despite never exporting more than $159 and $218 of pencils, respectively, in any year between 2005 and 2007. *Id.* The idea that Guyana, which exported a total of $43 of pencils between 2005 and 2007, is a "significant producer" that manufactured $43 of pencils more than domestic consumption for that period is imaginative, but wholly unsupported. Ultimately, wage rates from Maldives, Cape Verde, Swaziland, Guyana and other countries with similarly low levels of exports were not included in Commerce's final

[6] For instance, the Court notes that Nicaragua, a country Commerce identified as an economically comparable significant producer of comparable merchandise, reported hourly, male- and female-employee earnings data in 2006 for Division 39 of ISIC Rev.2. *See* http://laborsta.ilo.org (select wages, follow Main statistics (annual); on following page select country Nicaragua, select first year 2002, select last year 2007, select table 5B Wages in manufacturing; press "Go!", then select view) (last visited April 21, 2011). If Commerce determined that such data comported with the agency's other requirements, including it would broaden the basket of countries that Commerce can utilize to value labor.

labor calculation because these countries failed to report relevant labor data to the ILO. That coincidence, however, does not cure the ailment arising from Commerce's absurd construction of the term "significant producer."

The term "significant" in 19 U.S.C. § 1677b(c)(4) is not statutorily defined, and is inherently ambiguous. Significant has among its definitions "having meaning" and "having or likely to have influence or effect." *Webster's Third New International Dictionary* 2116 (1993). Because the term is ambiguous, Commerce is entitled to broad deference in its construal of the term, and the Court's question "is whether [Commerce's] answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842–43. Commerce's interpretation of "significant" encompasses countries which almost certainly have no domestic production—at least not any meaningful production, capable of having influence or effect—and is therefore an impermissible construction of 19 U.S.C. § 1677b(c)(4). On remand, if Commerce wishes to continue to rely on export statistics as a proxy for significant production, it must include some additional mechanism to ensure that it does not propagate the fiction that countries with a few dollars of exports are engaged in significant production. Alternatively, Commerce is free to adopt an altogether different approach to identifying significant production.

CONCLUSION

In conclusion, for the reasons stated herein, the Court affirms Commerce's decision to rely on data from multiple countries to value labor as a factor of production pursuant to 19 U.S.C. § 1677b(c), and it is hereby

ORDERED that this case is remanded to Commerce, and it is further

ORDERED that Commerce must reevaluate, in accordance with this opinion, the decision to omit labor data simply because it was reported under a previous revision of the ISIC, and it is further

ORDERED that Commerce must modify, in accordance with this opinion, the way in which it determines whether a country is a significant producer of comparable merchandise within the meaning of 19 U.S.C. § 1677b(c)(4), and it is further

ORDERED that Commerce must provide the results of its redetermination pursuant to remand to the Court no later than **June 21, 2011**, and it is further

ORDERED that Plaintiff shall file its comments on the remand results no later than **June 28, 2011** , and it is further

ORDERED that Defendant shall file any responses to Plaintiffs comments no later than **July 6, 2011**.

Dated: April 21, 2011
New York, NY

/s/ *Gregory W. Carman*
GREGORY W. CARMAN, JUDGE

Slip Op. 11–47

SHANDONG MACHINERY IMPORT & EXPORT COMPANY., Plaintiff, v. UNITED STATES, Defendant, and AMES TRUE TEMPER AND COUNCIL TOOL COMPANY, INC., Defendant-Intervenors.

Before: Richard K. Eaton, Judge
Court No. 07–00355

[United States Department of Commerce's Results of Redetermination Pursuant to Remand affirmed.]

Dated: April 26, 2011

Hume & Associates LLC (*Robert T. Hume*), for plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Department of Justice, Commercial Litigation Branch, Civil Division (*Michael D. Panzera*); Office of Chief Counsel for Import Administration, U.S.Department of Commerce (*Shana Hofstetter*), of counsel, fordefendant.

Wiley Rein LLP (*Alan H. Price, Timothy C. Brightbill, Maureen E. Thorson*), for defendant-intervenor Ames True Temper.

Kelley Drye & Warren (*Eric McClafferty*), for defendant-intervenor Council Tool Company, Inc.

MEMORANDUM OPINION

Eaton, Judge:

INTRODUCTION

This matter is before the court following a second remand to the Department of Commerce (the "Department" or "Commerce"). *See* Final Results of Redetermination Pursuant to Court Remand (Dep't of Commerce Dec. 2, 2010) ("Remand Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006). For the reasons set forth below, the Remand Results are sustained.

STANDARD OF REVIEW

When reviewing Commerce's final antidumping determinations, the court "shall hold unlawful any determination, finding, or conclu-

sion 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).

BACKGROUND

The case arises out of the Department’s fifteenth administrative review of the antidumping duty orders covering heavy forged hand tools (“HFHTs”) from the People’s Republic of China (the “PRC”) for the period of review February 1, 2005 through January 30, 2006. *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 72 Fed. Reg. 51,787 (Dep’t of Commerce Sept. 11, 2007) (final results). The relevant facts are set forth fully in the court’s previous opinions in this case, familiarity with which is presumed. *See Shandong Mach. Imp. & Exp. Co. v. United States,* 32 CIT __, Slip Op. 09–64 (June 24, 2009) (not reported in Federal Supplement) (“*Shandong I* ”); *Shandong Mach. Imp. & Exp. Co. v. United States*, 33 CIT __, Slip Op. 10–88 (Aug. 11, 2010) (not reported in Federal Supplement) (“*Shandong II* ”).

In *Shandong I*, the court held that the adverse facts available (“AFA”) rate of 45.25 percent Commerce assigned to the PRC-wide entity, including plaintiff Shandong Machinery Import and Export Company (“SMC”), was not corroborated, as required by 19 U.S.C. § 1677e(c). *Shandong I*, Slip Op. 09–64 at 19–20. Accordingly, the court remanded the matter to the Department to select a corroborated AFA rate, in accordance with § 1677e(c). On remand, Commerce noted that it could corroborate the 45.25 percent AFA rate using SMC’s sales data from the previous administrative review. Final Results of Redeterm. Pursuant to Court Remand (Dep’t of Commerce Jan. 7, 2010) (“Shandong I Remand Results”) at 9. Because the court in *Shandong I* instructed Commerce to select a “different” rate, however, the Department determined that it could not apply the 45.25 percent rate, and selected a new PRC-wide rate of 109.16 percent. Shandong I Remand Results 9–10. According to Commerce, the 109.16 percent rate was based on SMC’s single transaction margin from the previous administrative review that was closest to the 45.25 percent rate. *See Shandong II*, Slip Op. 10–88 at 5.

In *Shandong II*, the court found that the 109.16 percent AFA rate was punitive, and remanded the matter to Commerce to calculate a new AFA rate. In remanding the matter to Commerce, the court noted that:

> If Commerce is capable of corroborating the 45.25 percent rate, then it may endeavor to do so on remand. The Department shall be mindful, however, that whatever rate it finds must be in

> accord with its previous finding that the rate of 45.25 percent is sufficient to ensure compliance. Should the Department wish, it may reopen the record and calculate an AFA rate to be applied to the PRC-wide entity for sales of hammers/sledges, with an additional amount to deter future non-compliance.

Shandong II, Slip Op. 10–88 at 11.

On remand, Commerce selected the 45.25 percent AFA rate. Remand Results at 12. Commerce found that the highest weighted-average dumping margin for any respondent under the order on HFHTs was 34.56 percent, which was also SMC's own rate in the fourteenth administrative review. The Department determined that 45.25 percent was, therefore, an appropriate rate because

> [t]his rate complies both with the order of the Court to assign a non-punitive rate to hammers/sledges that has been 'corroborated according to its reliability and relevance to the country-wide entity as a whole' and the requirement that we ensure the PRC-wide entity (and SMC as a part of it) does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. This was a calculated rate reflecting the commercial activities of SMC just one year prior to the administrative review currently at issue here.

Remand Results at 11.

Neither SMC nor the defendant-intervenors challenge Commerce's Remand Results.

DISCUSSION

I. Legal Framework

Where, as here, Commerce determines that a respondent in an antidumping investigation has failed to cooperate to "the best of its ability," it may calculate the dumping margin for that respondent based on AFA. *See* 19 U.S.C. § 1677e(b). In determining a PRC-wide rate based on AFA, Commerce may use information from a source identified in 19 U.S.C. § 1677e(b), which includes information derived from the petition, a final determination in the investigation, any prior administrative review, or any other information placed on the record. If Commerce relies on secondary information such as calculated rates from previous reviews, it must "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." *Id.* at § 1677e(c).

To corroborate secondary information means to "examine whether the secondary information to be used has probative value." *See* 19 C.F.R. § 351.308(d) (2010). A rate has probative value when it is both reliable and relevant. *See Ferro Union, Inc. v. United States,* 23 CIT 178, 202, 44 F. Supp. 2d 1310, 1333 (1999). Thus, "[i]n order to corroborate an AFA rate, Commerce must show that it used 'reliable facts' that had 'some grounding in commercial reality.'" *PSC VSMPO-AVISMA Corp. v. United States*, 34 CIT __, Slip Op. 2011–25, at 6 (2011) (quoting *Gallant Ocean (Thail.) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010)).

Although Commerce is given broad discretion in selecting an AFA rate, this discretion is "not unbounded." *See F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). As the Federal Circuit has explained:

> the purpose of section 1677e(b) is to provider espondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins. It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement.

Id.

II. The Department's Application of the 45.42 Percent AFA Rate

The 45.42 percent rate was originally derived from the petition in connection with the original less-than-fair-value investigation in 1991. The Department, however, demonstrated the reliability and relevance of that rate by using transaction specific rates for SMC during the immediately preceding fourteenth administrative review. Remand Results at 10. In doing so, Commerce found that "the majority of positive individual transaction margins from the [fourteenth administrative review] are higher than 45.42 percent." Remand Results at 11. Therefore, 45.42 percent represents a reasonable AFA rate, which is reflective of the PRC-wide entity's, including SMC's, actual commercial activity.

CONCLUSION

For the foregoing reasons, the court finds that Commerce's selection of 45.42 percent as the AFA rate for the PRC-wide entity, including plaintiff SMC, is supported by substantial evidence and in accordance with law. Therefore, the Remand Results are sustained, and judgment will be entered accordingly.

Dated: April 26, 2011
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON