

UNITED STATES COURT OF INTERNATIONAL TRADE

YANGZHOU BESTPAK GIFTS
& CRAFTS CO., LTD.,

Plaintiff,

v.

UNITED STATES,

Defendant,

BERWICK OFFFRAY LLC,

Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge

Court No. 10-00295

[Commerce's separate rate calculation is sustained.]

Dated: March 22, 2012

Grinfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Bruce M. Mitchell, Mark E. Pardo, Ned H. Marshak and Andrew T. Schutz*), for Plaintiff Yangzhou Bestpak Gifts & Crafts Co., Ltd.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Renee Gerber*); and *Scott D. McBride*, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Pepper Hamilton LLP (*Gregory C. Dorris*) for Defendant-Intervenor, Berwick-Offray LLC.

OPINION

BARZILAY, Senior Judge: This case returns to the court following a partial remand of the final results of an antidumping duty investigation conducted by the U.S. Department of Commerce ("Commerce") covering narrow woven ribbons from the People's Republic of China

and Taiwan. See *Narrow Woven Ribbons With Woven Selvedge From the People's Republic of China*, 75 Fed. Reg. 41,808 (Dep't of Commerce July 19, 2010) ("*Final Results*"), as amended *Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, 75 Fed. Reg. 51,979 (Dep't of Commerce Aug. 24, 2010) (amended final determination); see also *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Narrow Woven Ribbons with Woven Selvedge from the People's Republic of China*, A-570-952 (July 12, 2010) ("*Decision Memorandum*"), available at <http://ia.ita.doc.gov/frn/summary/PRC/2010-17568-1.pdf> (last visited Mar. 22, 2012). Before the court are the Final Results of the redetermination (Sep. 26, 2011) ("*Remand Results*") filed by Commerce pursuant to *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 35 CIT ___, 783 F. Supp. 2d 1343 (2011) ("*Bestpak*"). The court has jurisdiction under Section 516A(a)(2)(B)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) (2006), and 28 U.S.C. § 1581(c). For the reasons set forth below, the court sustains Commerce's *Remand Results*.

I. BACKGROUND

The investigation involved nineteen respondents, which Commerce identified as a large number of companies pursuant to 19 U.S.C. § 1677f-1(c)(2). Commerce selected only two mandatory respondents to determine the weighted average dumping margins for the pool of twelve uninvestigated respondents who qualified for a separate rate. See § 1677f-1(c)(2)(B). The first mandatory respondent, Ningbo Jintian Import & Export Co., Ltd. ("*Ningbo Jintian*"), failed to cooperate in the investigation and was assigned an adverse facts available ("*AFA*") rate of 247.65%. The second, Yama Ribbons & Bows Co., Ltd. ("*Yama*"), fully cooperated in the investigation and was assigned a *de minimis* rate of 0%. Plaintiff Yangzhou Bestpak Gifts &

Crafts Co., Ltd.'s ("Bestpak") was not selected as a mandatory respondent but applied for separate rate status, successfully establishing an absence of *de jure* or *de facto* government control. To calculate the separate rate, Commerce took the simple average of the rates assigned to Ningbo Jintian (247.65%) and Yama (0%), yielding a rate of 123.83%, which Commerce assigned to Bestpak and the other eleven separate rate respondents. *See Final Results*, 75 Fed. Reg. at 41,811.

Bestpak then commenced this action challenging Commerce's separate rate calculation. *See Bestpak*, 783 F. Supp. 2d at 1345. Bestpak claimed that Commerce had violated the antidumping statute by factoring an AFA rate into the separate rate calculation. *Id.* Plaintiff also claimed that Commerce's separate rate calculation yielded a rate that did not reasonably reflect Bestpak's potential dumping margin. *Id.* The court, in turn, concluded that Commerce had not violated the statute by factoring an AFA rate into the separate rate calculation. *Id.* at 1349-50. The court, though, had reservations on the substantial evidence issue of the reasonableness of Commerce's decision-making given the administrative record. *Id.* at 1350-53. The court was concerned that Commerce's simple average of the two rates may have been too facile and perhaps did not "reasonably reflect" Bestpak's potential dumping margin. *Id.* The court remanded the case to Commerce for further explanation as to "how the separate rate of 123.83% relates to Bestpak's commercial activity." *Id.* at 1353.

In the *Remand Results* Commerce attempted to comply with the court's remand order by utilizing the limited information provided in the quantity and value ("Q&V") questionnaires to calculate estimated average unit values ("AUV") for the two mandatory respondents and Bestpak. *Id.* at 6-7. The AUV analysis conducted by Commerce relied on individually reported

Q&V data submitted by respondents during the antidumping investigation. *Id.* After comparing the AUV information to the dumping margins established during the investigation, Commerce again determined that “the separate rate assigned to [Bestpak] in the Final Determination reasonably reflects its potential dumping margin.” *Id.* at 7.

II. STANDARD OF REVIEW

When reviewing Commerce’s antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce’s “determinations, findings, or conclusions” unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350-51 (Fed. Cir. 2006). Substantial evidence has been described as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as “something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.” *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

III. DISCUSSION

In non-market economy investigations Commerce assumes that respondent companies operate under foreign government control. *See Sigma Corp. v. United States*, 117 F.3d 1401,

1405 (Fed. Cir. 1997). During the course of an antidumping investigation, Commerce affords non-investigated respondents the opportunity to establish an absence of government control and thereby secure a separate rate. *See Policy Bulletin 05.1: Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, at 2, 3–4, 6 (Apr. 5, 2005) (explaining separate rate practice and stating Commerce will calculate a separate rate for the “pool of non-investigated firms” in an NME proceeding) *available at* <http://ia.ita.doc.gov/policy/bull05-1.pdf> (last visited Mar. 22, 2012); *Sigma Corp.*, 117 F.3d at 1405.

In calculating a separate rate for non-individually investigated respondents in non-market economy investigations, Commerce normally relies 19 U.S.C. § 1673d(c)(5)(A), which defines the all-others rate used in market economy investigations. *See Bristol Metals L.P. v. United States*, 34 CIT __, __, 703 F. Supp. 2d 1370, 1378 (2010) (citation omitted). The statute instructs Commerce to weight-average the rates calculated for the investigated parties, excluding *de minimis* or zero rates and excluding rates based on facts available, to determine the separate rate. 19 U.S.C. § 1673d(c)(5)(A). However, “[i]f the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely [on the basis of facts available], the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.” § 1673d(c)(5)(B). The Statement of Administrative Action provides that the “expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined

pursuant to the facts available, provided that volume data is available.” Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 873 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4201 (“SAA”). It goes on to state that “if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.” *Id.*

Here, Commerce selected two mandatory respondents, Yama and Ningbo Jintian. Only Yama cooperated, receiving a *de minimis* 0% dumping margin. *See Final Results*, 75 Fed. Reg. 41,811. Ningbo Jintian stopped cooperating early, receiving an AFA rate of 247.65%. *See id.*; *see also Memorandum from Zhulieta Willbrand, RE: Ningbo Jintian*, Pub. Admin. R. Doc. No. 109 (Oct. 6, 2009). Bestpak, as an un-investigated respondent, did not submit responses to Commerce’s antidumping duty questionnaires. This resulted in an administrative record with limited data points that unfortunately yielded only a *de minimis* and an AFA rate. As a result, Commerce could not calculate a separate rate using individually investigated margins (excluding the *de minimis* and AFA rates) because they did not exist. *See* 19 U.S.C. § 1673d(c)(5)(A).

Instead, Commerce used “other reasonable methods”, SAA at 873, and took the simple average of what seem like extreme data points (0% and 247.65%) to calculate a separate rate for all twelve of the respondents that qualified for separate rate status, which included Bestpak. *See Preliminary Results*, 75 Fed. Reg. 7244, 7248-49 (Dep’t of Commerce Feb. 18, 2010). This is an approach Commerce has used in the past. *See 1-Hydroxyethylidene-1, 1-Diphosphonic Acid from the People's Republic of China: Final Determination of Sales at Less Than Fair Value*, 74 Fed. Reg. 10,545, 10,546 (Dep’t of Commerce Mar. 11, 2009) and accompanying *Issues and Decision*

Memorandum at Cmt. 6 (Mar. 5, 2009) (“[F]or purposes of determining the separate rate margins, because there are no rates other than *de minimis* or those based on AFA, we have determined to take a simple average of the AFA rate and the *de minimis* rate”) *available at* <http://ia.ita.doc.gov/frn/summary/PRC/E9-5237-1.pdf> (last visited Mar. 22, 2012); *see also Changzou Wujin Fine Chem. Factory Co. v. United States*, Slip Op. 10–85, 2010 WL 3239213, at *4 (Aug. 5, 2010) (“Likewise, Commerce followed its customary practice when it calculated the separate rate by averaging the revised AFA rate with the zero rate of the mandatory respondent.”).

The court originally remanded this case out of concern that Commerce’s separate rate calculation – taking the simple average of Yama’s *de minimis* 0% rate and Ningbo Jintian’s 247.65% AFA rate – was potentially too simplistic an approach given the administrative record. The court anticipated that the administrative record might contain enough available information to expand the menu of potential separate rates beyond the 123.83% as calculated and assigned by Commerce. After reviewing the *Remand Results*, however, the court must acknowledge that the administrative record does not contain sufficient sales data to support a more sophisticated separate rate calculation.

Bestpak, for its part, requests an order from the court directing Commerce to assign Bestpak a 0% rate. Pl.’s Comments 20. This request gives the court pause, especially when measured against the substantial evidence standard of review, which places certain limits on the court’s ability to replace, by affirmative injunction, a separate rate chosen by Commerce (123.83%) with another of the court’s choosing. To do so, the administrative record must support the alternative 0% rate urged by Bestpak as the one and only correct separate rate, not just for

Bestpak, but for all other separate rate respondents. To achieve that result, Bestpak would need to explain to the court how the administrative record supports using Yama alone as a proxy for all separate rate respondents, as opposed to a simple average of Yama and Ningbo Jintian. The administrative record, however, does not contain much sales data, meaning the court cannot have much confidence that one particular choice over another is in fact the one, true, correct answer for the separate rate margin. Additionally, Bestpak, in effect, wants the court to reject the AFA rate while fully embracing Yama's *de minimis* rate, a position that loses its appeal when read against the statutory guidance to exclude both facts available and *de minimis* margins (if possible) when calculating separate rates. *See* 19 U.S.C. § 1673d(c)(5)(A).

In *Bestpak* the court proceeded under a premise that assumed the administrative record contained more information about Bestpak's and the other separate rate respondents' potential dumping margins. In actuality, the administrative record contains very little specific sales information about Bestpak or the other separate rate respondents. *See, e.g., Quantity and Value Questionnaire Response for Yangzhou Bestpak Gifts & Crafts Co., Ltd.*, Pub. Admin. R. Doc. No. 57 (Aug. 19, 2009) ("*Q&V Response*"); *Separate Rate Application for Yangzhou Bestpak Gifts & Crafts Co., Ltd.*, Pub. Admin. R. Doc. No. 102 (Oct. 5, 2009) ("*Separate Rate Appl.*"). As a non-investigated respondent, Bestpak was not required to submit extensive sales data to qualify for a separate rate. *See Preliminary Determination*, 75 Fed. Reg. 7244. During the investigation Bestpak submitted to Commerce Q&V questionnaire responses (to provide Commerce with information to select mandatory respondents) and a separate rate application (to establish *de jure* and *de facto* independence from government control). *See Q&V Response*, Pub. Admin. R. Doc. No. 57; *Separate Rate Appl.*, Pub. Admin. R. Doc. No. 102; *Preliminary*

Determination, 75 Fed. Reg. 7244. Bestpak did not submit any additional information regarding its pricing practices.

The *Remand Results* underscore this point. On remand, Commerce did its best to identify record evidence that would provide some indication of Bestpak's potential dumping margins. Commerce used respondents' Q&V data (typically used to identify highest volume producers of the subject merchandise) to establish estimated AUVs, which, according to Commerce, represented the "only basis the Department has for a comparison between the companies." *Id.* at

16. In attempting to comply with the court's order, Commerce explained that an

estimated AUV is a ratio calculated by dividing a respondent's total value of sales by its total quantity of sales, which provides a rough, estimated snapshot of a respondent's pricing practices. A low estimated AUV in comparison to other exporters can indicate, all other things being equal, the existence of a larger dumping margin, while a high estimated AUV, again, presuming all other factors are equal, can indicate the reverse to be true.

Remand Results at 6.

Commerce's AUV analysis appears to be consistent with the dumping margins established in the *Final Results*. *Id.* at 6 and Attachment I (Estimated Average Unit Value Calculations). The AUV analysis itself, however, may be of limited utility. Commerce acknowledged the difficulties of relying on AUV data:

[T]here is no substitute for dumping margins determined by the Department in the context of its investigations and reviews; and AUVs are no substitute for the Department's determinations. Importantly, in this instance, there are no price adjustments made to AUVs and the Department does not have any information that would even indicate whether such sales were export price or constructed export price transactions. AUVs also provide no indication of the normal value side of the dumping equation. Therefore, we recognize the limited application of AUVs in this context.

Remand Results at 16. Having a better understanding of the limits of the administrative record, the court acknowledges that Commerce was doing the best that it could in response to the court's order. The AUV data merely provide a rough estimate of U.S. sales price and therefore do not provide much information about Bestpak's potential dumping margins. For example, it would be difficult for the court to draw meaningful inferences and conclusions about Bestpak's potential dumping margins from AUV data that does not account for normal value, price adjustments, or constructed export price transactions. This is a natural consequence of a limited administrative record. The problem here is not the AUV data or Commerce's attempted analysis of it, the real problem is the absence of enough sales data.

Apart from Commerce's AUV analysis, the record contains little information as to what Bestpak's (or the other separate rate respondents') potential dumping margin might be, or whether it is closer to 0% or 247.65%.¹ Likewise, the court, Commerce, and Bestpak simply cannot know on this administrative record whether the separate rate "reasonably reflects" commercial reality. *See SAA* at 873. In an investigation Commerce begins the process of data collection and margin calculation, relying on the cooperation of mandatory (and voluntary) respondents. With the benefit of the additional data and calculated margins in subsequent administrative reviews, Commerce develops an ever-evolving familiarity with industry pricing practices, which in turn permits Commerce to better evaluate (and the court to review) whether a

¹ Bestpak argues, for the first time, that Bestpak should be assigned a 0% rate because of a sales invoice it submitted as part of its application for separate rate status. Pl.'s Comments 20. Bestpak, however, failed to raise this argument before Commerce, depriving Commerce of the opportunity to address it. As such, the court will not entertain it now. *See* 28 U.S.C. § 2637(d); *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374-75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88-90 (2006)). Moreover, the court is not persuaded that one sales invoice is sufficient to demonstrate that the separate rate should be 0%.

separate rate “reasonably reflects” commercial reality. At the investigation stage, however, that ability to identify and measure whether a separate rate “reasonably reflects” commercial reality can be severely limited. This is the case here. The court initially viewed Commerce’s separate rate calculation as potentially too facile. What the *Remand Results* reveal is that Commerce had few, if any, reasonable options under the circumstances presented by a limited administrative record.

With that said, a separate rate respondent (like Bestpak) is not entirely without options. It may (1) challenge Commerce’s selection of a small a number of respondents from which a separate rate can be derived; as well as (2) request a voluntary investigation pursuant to 19 U.S.C. § 1677m(a). *See* 19 C.F.R. § 351.204(d). Although Bestpak challenged Commerce’s selection of a small number of mandatory respondents in its administrative case brief, Commerce rejected the argument because it was too late in the administrative proceeding. *See Decision Memorandum* at Cmt. 10 (“Put simply, given the statutory time constraints of an investigation, it is not feasible at this time to identify an additional respondent, provide that respondent with time to respond to our questionnaires, analyze the data and develop a preliminary determination, provide parties with an opportunity to comment upon the determination, solicit rebuttal comments, and then develop a final determination. These labor-intensive efforts take several months to complete and, because Bestpak first suggested that we consider an additional respondent in its case brief, less than three months remained in statutory time period to complete the investigation. . . . Bestpak did not present its suggestion that the Department investigate an additional respondent at a point in the proceeding where the Department could have acted upon its request. . . . Bestpak had ample opportunity to raise this issue as early as October 2009, when

Ningbo Jintian missed the deadline to respond to the Department's Sections C and D questionnaire."). Bestpak chose not to challenge this decision in its brief before the court.

Alternatively, Bestpak did not request a voluntary investigation pursuant to 19 U.S.C. § 1677m(a). *See Decision Memorandum* at 21 (“[W]e also note that no interested parties submitted a voluntary response to the Department’s full antidumping questionnaire.”); *see also Grobest & I-Mei Industrial (Vietnam) Co. v. United States*, Slip Op. 12-9, at 37 (Jan. 18, 2012) (“*Grobest*”). Considering Bestpak’s stance that it is entitled to a 0% dumping margin, this option could have supplied the necessary pricing information for Commerce to calculate an individual dumping margin for Bestpak. Rather than pursue its own individual rate, Bestpak instead seeks the full benefit of Yama’s 0% individual rate without incurring the same costs, effort, and risk that Yama assumed to obtain it. Even if Commerce rejected Bestpak’s request, Commerce would have been required to explain its decision under 19 U.S.C. § 1677m(a), which “plainly requires Commerce to conduct individual reviews unless such reviews would be unduly burdensome and inhibit the timely completion of the investigation.” *Grobest*, Slip. Op. 12-9, at 40; *see also Zhejiang Native Produce & Animal By-Prod. Import & Export Corp. v. United States*, 33 CIT __, __, 637 F. Supp. 2d 1260, 1264-65 (2009) (concluding that Commerce’s failure to review respondent that preserved its request for individual review when mandatory respondents withdrew was unreasonable).

Commerce’s separate rate margin calculated using a simple average of a *de minimis* and facts available margin may be unfortunate and even frustrating, but it is not unreasonable on this limited administrative record. The court issued a remand in the belief there might be additional choices from which Commerce could calculate the separate rate. In this case, however, those

additional choices apparently do not exist. For the foregoing reasons, Commerce's separate rate calculation is sustained. The court will enter judgment accordingly.

Dated: March 22, 2012
New York, NY

/s/ Judith M. Barzilay
Judith M. Barzilay, Senior Judge