Slip Op. 07–167

HABAS SINAI VE TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., *Plaintiff*, v. UNITED STATES, *Defendant*, and NUCOR CORPORATION, GERDAU AMERISTEEL CORPORATION, and COMMERCIAL METALS COMPANY, *Defendant-Intervenors*.

Court No. 05–00613

[Granting in part Plaintiff's Motion for Judgment on the Agency Record; Remanding Final Results of U.S. Department of Commerce's administrative review of antidumping duty order for further action in accordance with opinion.]

Dated: November 15, 2007

Law Offices of David L. Simon (*David L. Simon*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); *Ada L. Loo*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Wiley Rein LLP (*Alan H. Price*, *John R. Shane*, and *Maureen E. Thorson*), for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. – a Turkish exporter of steel concrete reinforcing bars ("rebar") – contests the final results of the U.S. Department of Commerce's seventh administrative review of the antidumping duty order on Certain Steel Concrete Reinforcing Bars From Turkey. The period of review ("POR") is April 1, 2003 through March 31, 2004. *See generally* Certain Steel Concrete Reinforcing Bars From Turkey: Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 Fed. Reg. 67,665 (Nov. 8, 2005) ("Final Results").

Pending before the Court is Plaintiff's Motion for Judgment Upon the Agency Record, in which Habas challenges both the Commerce

Department's calculation of Habas' cost of production ("COP") on a single period ("POR") weighted-average basis, and the agency's use of invoice date as the date of sale.

Habas asserts that calculating its production costs on a POR weighted-average results in a mismatch of its sales and its costs, improperly inflating its dumping margin. *See generally* Principal Brief of Plaintiff Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. for Judgment Upon the Agency Record Pursuant to Rule 56.2 ("Pl.'s Brief") at 3–36, 39; Reply Brief of Plaintiff Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. In Support of Motion for Judgment Upon the Agency Record Pursuant to Rule 56.2 ("Pl.'s Reply Brief") at 1–11, 15. Habas further contends that its contract date – not the date of invoice – should be used as the date of sale in Commerce's antidumping duty calculations. *See generally* Pl.'s Brief at 4, 36–40; Pl.'s Reply Brief at 11–15.

Habas requests that this matter be remanded to the Department of Commerce with instructions to recalculate Habas' dumping margin using quarterly averages for COP, and using the contract date as the date of sale for the underlying transactions. *See* Pl.'s Brief at 36; Pl.'s Reply Brief at 1, 4, 13. Habas' motion is opposed by the Government and by Defendant-Intervenors Nucor Corporation, Gerdau Ameristeel Corporation, and Commercial Metals Company ("the Domestic Producers"). *See generally* Defendant's Response to Plaintiff's Motion For Judgment Upon the Agency Record ("Def.'s Brief"); Response Brief of Defendant-Intervenors ("Def.-Ints.' Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, Habas' Motion for Judgment Upon the Agency Record is granted in part, and this matter is remanded to the Department of Commerce for further proceedings in accordance with this opinion.

I. *Standard of Review*

In reviewing a challenge to Commerce's final determination in an antidumping case, the agency's determination must be upheld unless it is 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) (2000). "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

II. *Statement of Facts*

In April 1997, the Department of Commerce published an antidumping duty order covering rebar from Turkey. *See generally* Antidumping Duty Order: Certain Steel Concrete Reinforcing Bars From Turkey, 62 Fed. Reg. 18,748 (April 17, 1997) ("the Antidumping Order"). In April 2004, Commerce gave notice of the opportunity to request an administrative review of the Antidumping Order, for the period April 1, 2003 through March 31, 2004. *See generally* Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 69 Fed. Reg. 17,129 (April 1, 2004). At the request of the domestic industry, Commerce initiated an administrative review of Habas, among others, the following month. *See generally* Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 69 Fed. Reg. 30,282 (May 27, 2004).

Habas participated fully in the administrative review. In mid-August 2004, Habas filed its questionnaire response, seeking to explain, among other things, why its cost of production should be calculated on a quarterly basis, and how the company makes its U.S. sales (such that its contract dates should be treated as the dates of sales). And Habas submitted its first supplemental questionnaire response in December 2004, providing further support for its claim that the contract date is the date of sale.

In late January 2005, Habas responded to supplemental questions concerning the cost of production section of the questionnaire. Commerce posed no follow-up questions concerning Habas' position that its cost of production should be calculated on a quarterly basis. Nor did Commerce ask questions concerning the manner in which Habas reported its quarterly costs. Habas also filed a submission reconciling the total quantity and value of its sales databases to its financial statements, in February 2005.

In early May 2005, Commerce published the preliminary results of the administrative review. Commerce made a preliminary determination that the dumping margin for Habas was 26.07%. *See generally* Certain Steel Concrete Reinforcing Bars from Turkey; Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Notice of Intent to Revoke in Part, 70 Fed. Reg. 23,990 (May 6, 2005) ("Preliminary Results").

Following publication of Commerce's Preliminary Results, Habas filed a case brief and a rebuttal brief with the Department, and also participated in oral argument before the agency. Habas' presentations to the agency focused on the two issues that it now presses here – whether Commerce erred in using POR-average cost (rather than quarterly costs) in determining Habas' cost of production, and whether Commerce erred in using invoice date (rather than contract date) as the date of sale.

The final results of the administrative review were published in November 2005. Commerce rejected Habas' arguments as to quarterly costing and date of sale, and calculated Habas' final dumping margin as 26.07%. *See generally* Certain Steel Concrete Reinforcing Bars From Turkey: Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 Fed. Reg. 67,665 (Nov. 8, 2005) ("Final Results"); Issues and Decision Memorandum for the Antidumping Duty Administrative Review on Certain Steel Concrete Reinforcing Bars from Turkey - April 1, 2003, through March 31, 2004 ("Decision Memorandum").

III. *Analysis*

Habas here challenges two aspects of the Commerce Department's determination in the seventh administrative review of the antidumping duty order on rebar from Turkey. Specifically, Habas takes issue with Commerce's determination to use a single, cost-averaging period, contemporaneous with the period of review, in calculating Habas' dumping margin. In addition, Habas disputes Commerce's determination to use invoice date as the date of sale in its calculations. Both issues are discussed in turn below, and – for the reasons detailed there – are remanded to the agency for further consideration.

A. *Commerce's Calculation of Habas' Cost of Production*

Habas first challenges Commerce's determination to calculate Habas' cost of production using a single weighted-average period of review, rather than quarterly-average costs. *See generally* Pl.'s Brief at 1, 3–4, 5–36, 39–40; Pl.'s Reply Brief at 1–11, 15. Habas contends that "Commerce's use of a single average cost for the entire POR created a mismatch between sales and costs which distorted the comparisons between US price and normal value." Pl.'s Brief at 3–4. Specifically, Habas explains:

> Habas' HM [Home Market] prices move in lockstep with its cost of production, quarter by quarter. Habas had only three US sales in the POR, all made in June, July and August 2003. During the first three quarters of the period, Habas' costs fluctuated within a narrow band. In the fourth quarter of the POR (Q4–POR), Habas' cost of steel scrap, the raw material of rebar, increased by 44 percent. When Habas' cost of production is calculated on a POR-average basis, the surge in scrap cost in the Q–4 POR increases the Q2–POR cost by over 10 percent. This, in turn, causes all Q2–POR home market sales to be below cost. Consequently, the antidumping computer program matches Habas' US sales in June – August 2003 to a handful of HM sales in May 2003 which were the only sales within 90 days of the US sales that were above cost using the POR-average cost

> methodology. This distortion in the match between US sales and normal value is caused by the use of POR-average cost, and specifically by the surge in scrap cost in the fourth quarter.

Pl.'s Brief at 4.

According to Habas, the asserted "mismatch" between its sales and its costs renders Commerce's methodology in violation of "the principle of comparability and the goal of contemporaneity set forth in *Thai Pineapple Canning Ind. Corp. v. United States*, 273 F.3d 1077 (Fed. Cir. 2001) and similar judicial, administrative and WTO panel cases." *See* Pl.'s Brief at 4. Habas further asserts that "[m]ultiple averaging periods are the tool by which Commerce ensures that a respondent faced with a cost surge in the last quarter of the POR and sales only in the first portion of the POR can avoid a mismatch and be assured of contemporaneity among its databases." *Id*. at 40. Habas therefore concludes that, in the case at bar, Habas' cost of production should have been calculated based on its quarterly costs; and Habas urges that this matter be remanded to Commerce with specific instructions to do exactly that. *See* Pl.'s Brief at 36; Pl.'s Reply Brief at 4.

In a disarmingly candid (and succinct) response, the Government requests that Commerce be permitted a "do-over." *See* Def.'s Brief at 5–7. The Government readily admits that "Commerce's Final Results do not adequately address [Habas'] arguments," and that a proper response requires that the agency "go beyond its fundamental analysis laid out in its Final Results." Def.'s Brief at 6. The Government states that "[a] more in-depth analysis" is required "due to the technicality of Habas' argument and the cost methodology that Commerce employed in this determination." *Id*. The Government therefore asks "that the Court grant a remand to Commerce with respect to its calculation of Habas' cost of production," to allow the agency to further consider the arguments that Habas has advanced. *See id*. at 7.

For their part, the Domestic Producers devoted the bulk of their brief to a full frontal assault on Habas' challenges to Commerce's calculation of its cost of production, arguing that the agency's calculation should be sustained in all respects. *See generally* Def.-Ints.' Brief at 2–18, 24. *But see* Pl.'s Reply Brief at 4–11. In the course of oral argument, however, the Domestic Producers advised that they do not oppose the agency's request for a voluntary remand on the issue. *See* Recording of Oral Argument at 1:12:00 (Oct. 26, 2006).

Habas vehemently opposes remanding the issue to the agency for further consideration. *See generally* Pl.'s Reply Brief at 1, 4. In essence, Habas argues that the parties have been down this road before. According to Habas:

> During the administrative proceeding, Commerce issued a preliminary result based on a particular rationale. Habas' case

> brief addressed Commerce's rationale. Commerce then chose to keep the same result, but to formulate a new rationale [in its Final Results]. . . . In its principal brief [filed with the Court], Habas exposed the errors of Commerce's rationale. Now, having read Habas' principal brief, the government would like another chance before this court to formulate a more persuasive rationale.

Pl.'s Reply Brief at 2. Habas expresses concern that "[t]he government nowhere suggests that it is considering a change in position," and surmises that Commerce "simply wants another chance to come up with a rationale to support its previous decision." *See* Pl.'s Reply Brief at 1. Habas cautions against giving Commerce "yet another chance to find a theory that will support [its] predetermined result," and argues that Commerce is not entitled to yet "another bite at this apple." *See* Pl.'s Reply Brief at 3–4.

Habas concedes – as it must – that, under *SKF*, an agency is generally entitled to a voluntary remand to reconsider its position, "if the agency's concern is substantial and legitimate." *See* Pl.'s Reply Brief at 3–4 (quoting *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028–29 (Fed. Cir. 2001)). But Habas charges that Commerce's concern here is "wholly illegitimate." *See id*. at 4. According to Habas, "Commerce remains committed to its result," and "has a margin in search of a rationale." *See id*. Concluding that "[s]uch prejudgment is the very opposite of rule-based decision-making," Habas insists that the Government's request for a voluntary remand to once again revisit the calculation of Habas' cost of production "should be rejected out of hand." *Id*.

It is difficult not to sympathize with Habas' palpable frustration. But the government must be presumed to have acted in good faith. *See, e.g.*, *Clemmons v. West*, 206 F.3d 1401, 1403–04 (Fed. Cir. 2000) (*citing Sanders v. U.S. Postal Serv.*, 801 F.2d 1328, 1331 (Fed. Cir. 1986)). To overcome that presumption, the proof must be "almost irrefragable." *Clemmons v. West*, 206 F.3d at 1403–04; *see also Galen Medical Assoc., Inc. v. United States*, 369 F.3d 1324, 1330 (Fed. Cir. 2004). Here, Habas has pointed to no evidence to substantiate its assertions of prejudgment on the part of Commerce. And "[u]nsubstantiated suspicions and allegations are not enough." *Spezzaferro v. Federal Aviation Admin.*, 807 F.2d 169, 173 (Fed. Cir. 1986).

Moreover, although Habas is (arguably with some reason) skeptical of the outcome of the remand that Commerce requests, the Government indicates that the agency plans to use the proceeding to take a fresh look at the issue. The Government states that, "[u]pon remand, Commerce will reexamine the issue of how it calculated Habas' cost of production. Commerce will then issue a draft remand determination and accept comments from the parties upon the draft. At that point, taking into consideration and addressing all of the comments then upon the administrative record, Commerce will

make and file a remand determination with the Court." Def.'s Brief at 7; *see also* Recording of Oral Argument at 1:03:04 (Government counsel offers assurances that "Commerce will re-examine this issue on remand. It has not come to any definitive conclusion at this point").

In principle, a court must be chary of trespassing on an agency's mandate and discretion, by re-weighing facts and substituting its judgment for that of the agency. Indeed, as the Government observes, that is true in spades in cases such as this, as the Court of Appeals has emphasized that Commerce is the "master" of the antidumping law, and that "[f]actual determinations supporting antidumping margins are best left to the agency's expertise." *See* Def.'s Brief at 7 (*quoting F.lli De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1394 (Fed. Cir. 1997). Further, the instant case is not one where it can be said that a remand to the agency would be futile. *See generally Nippon Steel Corp. v. United States*, 458 F.3d 1345 (Fed. Cir. 2006).[1]

The Government's request for a voluntary remand must accordingly be granted. On remand, the Commerce Department shall consider anew the calculation of Habas' cost of production, fully articulate the rationale for its redetermination on the issue, and recalculate Habas' dumping margin, if appropriate.

B. *Commerce's Determination of the Date of Sale*

Habas argues that Commerce also erred in using the date of invoice as the date of sale in its antidumping duty calculations. Habas maintains that all material terms of its contracts were fixed as of the contract date, and that Commerce therefore should have based its calculations on that date. *See generally* Pl.'s Brief at 4, 36–40; Pl.'s Reply Brief at 11–15.

As discussed above, Commerce's Final Results pointed to a billing adjustment on one of Habas' invoices as proof that the material terms of sale were not established at the time of contract. *See* section II, *supra*; Decision Memorandum at 31 (comment 6). But, according to Habas, Commerce simply misread the record. Habas asserts that the billing adjustment at issue was a penalty for late delivery, and that the penalty was specifically provided for by the terms of the parties' contract. *See* Pl.'s Brief at 4, 37–38, 40; Pl.'s Reply Brief at 12, 15.

As a threshold matter, the Government asserts that Habas' challenge to Commerce's use of the date of invoice is barred by the doctrine of exhaustion of administrative remedies. The Government claims that Habas' submissions in the course of the underlying ad-

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[1] *But cf. F.lli De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 10–34–35.

ministrative proceeding made no mention of the contractual penalty for late delivery, and argues that Habas may not raise the issue for the first time in this forum. *See generally* Def.'s Brief at 2–3, 5, 8–10; *see also Woodford v. Ngo*, ___ U.S. ___ , ___ , 126 S.Ct. 2378, 2384–86 (2006) (discussing doctrine of exhaustion); *Parisi v. Davidson*, 405 U.S. 34, 37–38 (1972) (same); *McKart v. United States*, 395 U.S. 185, 193–95 (1969) (same).

But the Government overstates its case. In one of its questionnaire responses, Habas expressly noted that the billing adjustment was "a result of not making the shipment within the time limit set forth by Habas' customer." *See* Pl.'s Reply Brief at 12 (*citing* Habas response to questionnaire section C at C–15 (Aug. 16, 2004) (Conf. Doc. No. 2 at 416)).[2] At the same time that it filed that questionnaire response, Habas also submitted the relevant letter of credit, with the contract at issue which included the late delivery penalty clause. *See* Pl.'s Reply Brief at 12–13 (*citing* contract/letter of credit (Conf. Doc. No. 2 at 79–83)). Thus, contrary to the Government's implication, Habas' reliance on the late delivery penalty clause was a matter of record in the underlying administrative proceeding.

The Government's exhaustion argument is further undermined by the fact that Commerce, in effect, changed horses midstream. Commerce's Preliminary Results did not refer to the billing adjustment as a justification for rejecting the contract date in favor of the invoice date. Instead, Commerce declined to use the contract date based on its finding that "neither the actual unit price nor the actual quantity are set until the time of shipment (*i.e.*, when the actual quantity is known)." *See* Concurrence Memorandum – Preliminary Results of Antidumping Duty Administrative Review on Certain Steel Reinforcing Bars From Turkey at 6–7 (May 2, 2005) (Pub. Doc. No. 167 at 6–7). Commerce further noted that use of the invoice date "would be consistent with [the agency's] date of sale methodology." *Id*.

Habas responded to the agency's preliminary finding by seeking to demonstrate that, as to each of its sales, the quantity shipped was within the tolerances established in the contract, and the unit value was precisely as set forth in the contract. *See* Pl.'s Brief at 36 (*citing* Habas Case Brief at 26 *et seq*. (Pub. Doc. No. 186 at 33 *et seq*.)). Only in issuing its Final Results did Commerce point to the billing adjustment as the reason for its use of the date of invoice, rather than the date of contract, as the date of sale. *See* Decision Memorandum at 31 (comment 6). And Habas had no opportunity thereafter to brief the matter at the administrative level.

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[2] Because the administrative record in this action includes confidential information, two versions of that record were prepared. Citations to public documents are noted as "Pub. Doc. No. _____ ," while citations to the confidential versions are noted as "Conf. Doc. No. _____ ."

Because Commerce first cited the billing adjustment as the rationale for its use of the date of invoice as the date of sale when it issued the Final Results, Habas was not on notice of the need to highlight the late delivery penalty clause until that time. It would thus be unreasonable to expect Habas to have briefed the effect of that contract clause in its submissions to the agency any more extensively than it did. Under the circumstances, the Government cannot fairly be heard to complain that Habas failed to exhaust its administrative remedies; Habas had no real opportunity to do so.

Habas argues, on the merits, that the evidence of record establishes that the material terms of each of its sales were fixed as of the contract date. Habas further takes the position that the date of sale issue is now ripe for decision, and urges that – on the strength of the parties' briefs, and the existing administrative record – the Court should rule that the contract date is the date of sale, and remand the matter to Commerce with specific instructions to recalculate Habas' antidumping margin accordingly. *See* Pl.'s Reply Brief at 13 (noting that Habas "strongly opposes" remand to agency for further consideration of date of sale issue); *see generally* Pl.'s Brief at 4, 36–40; Pl.'s Reply Brief at 11–15.

The Domestic Producers argue, in contrast, that "[Commerce's] regulations express a marked preference for the use of invoice date, and that this preference has been upheld by the Court," that Habas "has failed to provide complete evidence regarding its sales," and that the evidence that has been presented by Habas "indicates that contract terms remained subject to change and renegotiation after the contracts were signed." *See generally* Def.-Ints.' Brief at 18–24. The Domestic Producers thus conclude that Commerce's use of the invoice date as the date of sale is supported by substantial evidence in the record, and should be sustained. *See* Def.-Ints.' Brief at 3, 24.[3]

As the Government points out, however, the appropriate course under the circumstances is a general remand to Commerce. *See generally* Def.'s Brief at 10–11. Litigation counsel's *post hoc* rationalizations are no substitute for the agency's own reasoned decisionmaking on the record. And an agency's action may be upheld, if at all, only on the grounds articulated by the agency itself. *See Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168–69 (1962).

Here, because Commerce did not consider Habas' explanation for the billing adjustment in reaching its determination on date of sale, the existing record provides no rationale to serve as a basis for judicial review of the agency's action. Considerations of judicial economy

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[3] In the course of oral argument, the Domestic Producers acknowledged that – if Commerce's use of the date of invoice as the date of sale were not sustained on the existing record – remand to the agency for further consideration of the issue would be appropriate. *See* Recording of Oral Argument at 1:12:00.

and deference to agency autonomy and expertise therefore counsel remand:

> Remand will allow all parties to fully exhaust their administrative remedies, and will afford Commerce the opportunity to consider [the parties' evidence and arguments on the issue], find facts, apply its expertise to the record, and explain the bases for its action. Remand also will protect agency autonomy, and allow Commerce to exercise the discretion granted it by Congress. Finally, by affording Commerce an opportunity to correct any errors it may have made, remand conceivably may obviate entirely the need for further judicial review [– at least on this issue].

Bethlehem Steel Corp. v. United States, 25 CIT 519, 531, 146 F. Supp. 2d 927, 939 (2001) (*citing* 2 K. Davis & R. Pierce, Jr., Administrative Law Treatise §§ 15.2 (*citing McKart v. United States*, 395 U.S. at 193–95), 15.12 (3d ed. 1994)).

Accordingly, the "date of sale" issue too must be remanded to Commerce, so that the agency may reconsider (anew) the use of contract date *versus* invoice date as the "date of sale," so that the agency may explain the rationale for its redetermination on the issue, and so that the agency may recalculate the dumping margin for Habas, if appropriate.[4]

IV. *Conclusion*

For all the reasons set forth above, Plaintiff's Motion for Judgment Upon the Agency Record is granted in part, and this matter is remanded to the Department of Commerce for further action not inconsistent with this opinion.

A separate order will enter accordingly.

HABAS SINAI VE TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., *Plaintiff*, v. UNITED STATES, *Defendant*, and NUCOR CORPORATION, GERDAU AMERISTEEL CORPORATION, and COMMERCIAL METALS COMPANY, *Defendant-Intervenors*.

Court No. 05–00613

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[4] Because Habas had no timely notice of Commerce's concern about the billing adjustment, the existing evidentiary record may not be sufficient to support a "substantial evidence" review of any relevant factual findings by the agency. Accordingly, it may be necessary for Commerce to reopen the administrative record on remand, to allow the submission of further evidence on point.

ORDER

In accordance with the opinion of the Court issued this date in this matter, it is hereby

ORDERED that this matter is remanded to the U.S. Department of Commerce for further proceedings not inconsistent with that opinion; and is further

ORDERED that the Department of Commerce shall file the results of this remand with the Court no later than February 15, 2008; and it is further

ORDERED that any comments on those results shall be filed no later than March 17, 2008; and it is further

ORDERED that the Department of Commerce's response to any comments shall be filed no later than 21 days after the filing of those comments.

Slip Op. 07–170

HUVIS CORPORATION, *Plaintiff*, v. UNITED STATES, *Defendant*, and DAK FIBERS, LLC and WELLMAN, INC., *Defendants-Intervenor*.

BEFORE: GREGORY W. CARMAN, JUDGE
Court No. 06–00380

[*Plaintiff's USCIT R. 56.1 Motion for Judgment upon the Agency Record is GRANTED; Plaintiff's Motion for Oral Argument is DENIED*.]

November 20, 2007

McDermott Will & Emery LLC (*Raymond Paretzky and Michael P. House*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*) for Defendant.

Mark D. Lehnardt, of Counsel, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Kelley Drye Collier Shannon (*David C. Smith, Jr.* and *Paul C. Rosenthal*) for Defendants-Intervenor.

OPINION & ORDER

CARMAN, JUDGE: The motion before this Court is Plaintiff Huvis Corporation's ("Huvis") USCIT R. 56.1 Motion for Judgment upon the Agency Record. Huvis challenges the final results of the fifth administrative review of the antidumping duty order on certain polyester staple fiber from Korea. *Certain Polyester Staple Fiber from Korea*, 71 Fed. Reg. 58,581 (Dep't Commerce Oct. 4, 2006) (final results) and the accompanying Issues and Decision Memorandum (Dep't

Commerce Sept. 28, 2006), Pub. Doc. 80 ("5AR Issues and Decision Mem.") (collectively, "Final Results"). For the reasons that follow, this Court remands the Final Results to the United States Department of Commerce ("Commerce") for further action consistent with this opinion.

BACKGROUND

Huvis is a Korean producer and exporter of polyester staple fiber ("PSF"), a synthetic fiber chiefly used for stuffing items such as clothing and pillows. *See Certain PSF from Korea*, 71 Fed. Reg. at 58,581. PSF is subject to an antidumping duty order, and Huvis has participated in many administrative reviews in connection therewith. The administrative review that is the subject of this action, the fifth, covered the period May 1, 2004, through April 30, 2005. *Id*.

PSF is made from chemical raw materials, the most important of which is terepthalic acid. Huvis uses three types (or grades) of terepthalic acid in its manufacture of PSF: qualified-grade terepthalic acid ("QTA"), middle terepthalic acid ("MTA"), and purified terepthalic acid ("PTA"). During the period of review, Huvis purchased all of the terepthalic acid it used from affiliated companies. Huvis purchased MTA from one of its two parent companies, SK Chemicals, while it purchased QTA and PTA from Samnam Petrochemical Company, Ltd. ("Samnam").[1] (Br. of Pl. Huvis Corp. in Supp. of Pl.'s Mot. for J. upon the Agency R. ("Pl. Br.") 3–4 (*citing* Confidential Record ("Confid. R.") Doc. 3 at App. D–4 at 1); *see also* Confid. R. Doc. 7 at 30.)

During the fifth administrative review, Commerce requested that Huvis submit three values for the purchases of terepthalic acid made during the period of review: (1) the price Huvis paid to its affiliated suppliers (the "transfer price"); (2) the affiliated producer's cost of production for the input; and (3) the price at which the affiliated producer made sales of the input to unaffiliated parties (the "market price"). For MTA, Huvis submitted all three of the requested measures: transfer price, cost of production, and market price. (Pl. Br. 4–5.) In contrast, for the inputs QTA and PTA, Huvis submitted only transfer price and cost of production, but not market price. (*Id*. at 4.) Huvis explained that its supplier of the QTA and PTA, Samnam, was not willing to provide market price data to Huvis because Samnam considered it proprietary. Further, Huvis explained to Commerce that it could not force Samnam to supply the market price data because neither Huvis nor its parent company, Samyang, exercised control over Samnam. As for the two measures that Huvis did sub-

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[1] Samnam is 40 percent owned by Huvis's other parent company, Samyang, but is 60 percent owned by two companies unaffiliated with Huvis — Mitsubishi Chemicals Company (40 percent) and LG-Caltex Oil Company (20 percent).

mit, the data showed that the average transfer price was higher than Samnam's cost of production for both QTA and PTA. (*Id*. at 6–7 (*citing* Confid. R. Doc. 7 at 31).)

In the preliminary results, Commerce calculated Huvis's cost of manufacture for PSF by adding together, *inter alia*, the values of the chemical inputs to that merchandise — QTA, MTA, and PTA. Because Huvis bought QTA, MTA, and PTA from affiliated suppliers, and because they constituted "major inputs" to PSF, Commerce applied the "Major Input Rule" to determine their values.[2] For the input MTA, Commerce compared the transfer price, market price, and cost of production. Because the transfer price was higher than both market price and cost of production, Commerce made no adjustments to the value of MTA. For the input PTA, market price was not on the record, and so Commerce compared only transfer price and cost of production. Because transfer price was higher, Commerce made no adjustment to the value of PTA. For the input QTA, Commerce followed the methodology it had used for that input in the previous administrative review. *Certain PSF from Korea*, 71 Fed. Reg. 30,867, 30,871 (Dep't Commerce May 31, 2006) (preliminary review results). After finding that QTA was "interchangeable" with MTA, Commerce filled in the missing QTA market price with the MTA market price Huvis had submitted. Because the MTA market price was higher than the QTA transfer price and cost of production, Commerce upwardly adjusted the value of QTA to reflect the arm's-length, or market, price.

Following Commerce's publication of the preliminary results, Huvis submitted information to Commerce that MTA and QTA were not, in fact, interchangeable. Commerce reevaluated its preliminary findings and agreed with Huvis that the two inputs were not interchangeable. Commerce also reevaluated its position regarding the missing market price for the input PTA. In the final results, Commerce applied facts available[3] to fill in market prices for both QTA and PTA. To fill in the missing market prices, Commerce calculated a profit rate taken from the supplier's, Samnam's, submitted financial statements. (5AR Issues and Decision Mem., Comment 1, Pub. Doc. 80.) Commerce added that profit rate to Samnam's cost of pro-

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[2] When a respondent purchases a major input from an affiliated party, Commerce applies the Major Input Rule to determine whether the input was purchased at arm's-length. 19 U.S.C. § 1677b(f)(2) and(3) (2000). Commerce has interpreted the Major Input Rule to allow the agency to "determine the value of a major input purchased from an affiliated person based on the higher [*sic*] of" (1) transfer price, (2) market price, and (3) cost of production, 19 C.F.R. § 351.407(b) (2005), and the Court of Appeals for the Federal Circuit ("CAFC") has sustained this interpretation, *NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1376 (Fed. Cir. 2004).

[3] Section 1677e of title 19, U.S. Code, addresses situations where information is missing from the record. "If . . . necessary information is not available on the record," Commerce shall "use the facts otherwise available in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a) (2000); *see also infra*, Section I.

duction data for QTA and PTA to come up with a calculated market value for each input. Because the calculated market prices were higher than the transfer prices (and, obviously, than the costs of production, as the market value was derived from the cost of production), Commerce upwardly adjusted the QTA and PTA values when calculating the cost of manufacture for Huvis's PSF. (*Id*.) Huvis argues that this had the effect of unfairly increasing the dumping margin applied to its imports. After Commerce published notice of the Final Results in the Federal Register, Huvis timely filed suit in this Court.

JURISDICTION

This Court has exclusive jurisdiction to review final results of administrative reviews pursuant to 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

When reviewing Commerce's final results of administrative reviews, this Court must sustain 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) (2000); *accord NTN Bearing Corp. of Am. v. United States*, 368 F.3d 1369, 1372 (Fed. Cir. 2004); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). To be in accordance with law, an agency's action or decision must be constitutional, and not contrary to statute, regulation, precedent, or procedures. *FCC v. NextWave Pers. Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) (*citing Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) ("In all cases agency action must be set aside if the action . . . failed to meet statutory, procedural, or constitutional requirements.").

DISCUSSION

Huvis challenges Commerce's application of facts available evidence to fill in the missing market prices for the inputs QTA and PTA. Huvis claims that Commerce's use of facts available evidence was not supported by substantial evidence on the record or otherwise in accordance with law for three reasons. Huvis claims that Commerce's use of facts available, first, violated 19 U.S.C. § 1677m(e), and second, was inconsistent with Commerce's established practice in the context of the Major Input Rule. (Pl. Br. 11–12.) Third, Huvis claims that the values Commerce selected to apply as facts available were "so high that they must be characterized as 'adverse' under the antidumping law." (*Id*. at 31.)

The Government and Defendants-Intervenor defend Commerce's application of facts available as consistent with statutory requirements and Commerce's prior practice, and contend that the particu-

lar values selected as facts available are supported by substantial evidence on the record. (Def.'s Resp. to Pl.'s Mot. for J. upon the Admin. R. ("Def. Br.") 8–14; Defs.-Intervenor's Br. in Resp. to Huvis'[s] Mot. for J. on the Agency R. ("Defs.-Int. Br.") 23–35.) This Court agrees with the Government and Defendants-Intervenor that Commerce's use of facts available was consistent with statutory requirements, and that the values Commerce applied as facts available were supported by substantial evidence. However, as explained below, this Court holds that Commerce's application of facts available was not consistent with the agency's established practice. As a result, this Court grants Huvis's Motion for Judgment upon the Agency Record, and remands the Final Results to Commerce for further action consistent with this opinion.

I. *Application of Facts Available in Accordance with Statute*

Section 1677e of title 19, U.S. Code, governs the use of facts available. Section 1677e provides that if "necessary information is not available on the record" Commerce "shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle." 19 U.S.C. § 1677e(a) (2000). To determine what information is necessary for Commerce to make its determination, this Court looks to the applicable substantive statutory provision, the Major Input Rule, 19 U.S.C. § 1677b(f)(2) and (3) (2000). As mentioned above, *supra*, footnote 2, the CAFC has affirmed that Commerce, in applying the Major Input Rule, may select as the value of a major input the highest of transfer price, market price, and cost of production. *NTN Bearing Corp. of Am.*, 368 F.3d at 1376. Accordingly, in the underlying administrative review, Commerce solicited from Huvis transfer price, market price, and cost of production information for Huvis's major inputs of QTA, MTA, and PTA.

Huvis — with explanation, but nonetheless — failed to submit market price data for the inputs QTA and PTA and there was therefore a gap in the record on this issue. Commerce may apply facts available whenever there is a gap in the record. *Id*. at 1377 ("All that is required [to apply facts available] is that necessary information be unavailable on the record."). The CAFC explained that, in applying facts available:

> [t]he focus . . . is [on a] respondent's failure to provide information. The reason for the failure is of no moment. The mere failure of a respondent to furnish the requested information — for any reason — requires Commerce to resort to other sources of information to complete the factual record on which it makes its determination.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (emphasis omitted). As a result, because there was a gap in

the record on the issue of market price for QTA and PTA, the statute gave Commerce the discretion to apply facts available evidence to Huvis.

Huvis argues that "Commerce violated [19 U.S.C. § 1677m(e)] by declining to consider . . . [the cost of production] evidence submitted by Huvis in this review," which Huvis argues "proved that Huvis's purchase prices [i.e., transfer prices] for the inputs PTA and QTA were legitimate, arm's-length prices." (Pl. Br. 19.) Section 1677m(e) provides that Commerce

> shall not decline to consider information that is submitted by an interested party and is necessary to the determination . . . if
>
> (1) the information is [timely] submitted . . . ,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information . . . , and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e) (2000). Yet, Commerce did not decline to consider Huvis's submitted cost of production data. On the contrary, Commerce accepted the cost of production data and relied on it to calculate proxy market prices for QTA and PTA. (*See* 5AR Issues and Decision Mem., Comment 1, Pub. Doc. 80)(Commerce "calculated the supplier's profit rate from the supplier's [fiscal year ending] 2004 financial statements, and added the amount for profit to the supplier's [cost of production] to arrive at a market value.") Undoubtedly, Huvis would have preferred Commerce to verify the arm's-length nature of the QTA and PTA transfer prices with cost of production data alone. However, Commerce's decision to fill in proxy market prices for those inputs, and compare all three values, does not constitute rejection of the cost of production data. As a result, Commerce's application of facts available was not inconsistent with 19 U.S.C. § 1677m(e).

II. *Facts Available Applied to Huvis Were Supported by Substantial Evidence*

Huvis also claims that the facts available market prices for QTA and PTA were "so high that they must be characterized as 'adverse' under the antidumping law." (Pl. Br. 31.) Huvis argues that Commerce did not establish that the company failed to cooperate, a prerequisite for applying adverse facts available to a respondent, and therefore, that the use of "adverse" facts available was not supported by substantial evidence on the record or otherwise in accordance with law. (*Id*.) Huvis is correct that before Commerce may apply adverse facts available to a respondent, it must find that the respondent "failed to cooperate by not acting to the best of its ability to

comply with a request for information from [Commerce]." 19 U.S.C. § 1677e(b). However, Huvis cites no statute, regulation, or case law for its claim that the facts available Commerce applied to Huvis were effectively "adverse."

All the statute requires in applying facts available is that Commerce select "information . . . which is reasonable to use under the circumstances." Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, at 869–70 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198. Here, Commerce calculated the facts available market prices for QTA and PTA from two verified sources, contemporaneous to the period of review: the supplier Samnam's Fiscal Year End 2004 financial statements, and Samnam's cost of production data from the period of review. Further, the methodology Commerce employed, adding together the supplier's cost of production and the supplier's reported profit level, is consistent with statutory instructions regarding calculation of constructed value. *See* 19 U.S.C. § 1677b(e) (constructed value calculated by adding together the cost of inputs, selling, general, and administrative expenses, and an amount for profits). While the constructed value provision is not directly applicable to the issue at hand, it is instructive on the question of the reasonableness of Commerce's methodological choice. The reasonableness of the methodology coupled with the verified data used establishes that the market price data Commerce selected as facts available are not unsupported by substantial evidence on the record.

III. *Application of Facts Available Not in Accordance with Commerce's Practice*

While Commerce may have the *statutory* discretion to apply facts available to a respondent like Huvis, that discretion can be curbed in the face of a consistent contrary agency *practice*. *See INS v. Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows — by rule or by settled course of adjudication — a general policy by which its exercise of discretion will be governed, an irrational departure from that policy . . . could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion. . . ."). Huvis contends that "Commerce's consistent prior practice, both in this proceeding and in other cases, has been to test the arm's-length nature of a transfer price for a major input based on market price or [cost of production] alone when only one of those variables was available." (Pl. Br. 11.) This Court must address two questions: (A) Does Commerce have an established practice of testing the arm's-length nature of a transfer price for a major input with market price or cost of production alone, when only one of those values is available?; and (B) If so, did Commerce adequately justify its departure from the established practice?

A. Commerce's Practice

This Court first addresses whether Commerce has an established practice of testing the arm's-length nature of a transfer price for a major input with market price or cost of production alone, when only one of those values is available. Huvis points out that in the second, third, and fourth administrative reviews of the antidumping duty order on PSF from Korea, as well as in the preliminary results of the fifth administrative review, Commerce verified transfer price with cost of production data alone for some of Huvis's major inputs. Huvis also cites to other antidumping proceedings where Huvis argues Commerce did the same thing.[4]

In contrast, the Government and Defendants-Intervenor insist that Commerce does not have such a consistent practice, either in the proceedings involving Huvis or otherwise. With respect to the proceedings involving Huvis, the Government contends that Commerce "has used four different methodologies for valuing major inputs over the course of the investigation and five administrative reviews." (Def. Br. 11.) Defendants-Intervenor similarly argue that Commerce does not have a consistent practice with respect to Huvis: "In the second and third [administrative] reviews, the Department compared *all three* elements of the major input rule for Huvis'[s] purchases of MTA from SK Chemicals, but only relied on *two of the three* elements . . . for Huvis'[s] purchases of QTA and PTA from Samnam (the transfer price and the affiliate's cost of production)." (Defs.-Int. Br. 18.)

The Government and Defendants-Intervenor essentially argue that in applying the Major Input Rule, Commerce did not *always* test Huvis's transfer prices with cost of production data alone. However, they misinterpret the relevant universe of facts. Huvis does not claim that in *every* application of the Major Input Rule to the company, Commerce has required only market price or cost of production data. Rather, Huvis claims that, when only market price or cost of production data was available, but not both, Commerce has verified the transfer price with whichever measure was available. This is correct.

In each of the three prior administrative reviews, Huvis failed to submit market price data for its major inputs QTA and PTA. If this Court describes each comparison of transfer price, market price, and

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[4] Commerce cites to *Carbon and Certain Alloy Steel Wire Rod from Mexico*, 67 Fed. Reg. 55,800 (Dep't Commerce Aug. 30, 2002) (final determination), *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448, 18456 (Dep't Commerce Apr. 15, 1997) (final review results), and *Certain Corrosion-Resistant Carbon Steel Flat Products from Korea*, 71 Fed. Reg. 53,370, 53,375 (Dep't Commerce Sept. 11, 2006) as examples of "Commerce's consistent practice" of "test-[ing] the arm's length nature of an input's transfer price based on market price or [cost of production] alone when only one of these values was available on the record of the proceeding." (Pl. Br. 13, 14–15.)

cost of production for each input as a separate instance, Commerce accepted cost of production data alone to verify the arm's-length nature of transfer prices in *five* out of *six* instances (for both inputs in the second and third administrative reviews, while only for PTA in the fourth administrative review).[5] In the one counterexample, Commerce explained that there was record evidence suggesting that QTA and MTA were interchangeable, and, therefore, filled in the missing QTA market price with Huvis's submitted MTA market price. Further, in the preliminary results of the instant administrative review, Commerce continued to test the arm's-length nature of the transfer price for PTA by comparing it to the affiliated supplier's cost of production alone.

"An action . . . becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the [particular action] or procedure." *Ranchers — Cattlemen Action Legal Found. v. United States*, 23 CIT 861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999). At one end of the spectrum, the court has held that "two prior determinations [in separate administrative proceedings] are not enough to constitute an agency practice that is binding on Commerce." *Shandong Huarong Machinery Co., Ltd. v. United States*, 30 CIT ___ , ___ , 435 F. Supp. 2d 1261, 1282 n.23 (2006). On the other hand, the court has held that a methodology used in five consecutive segments of an antidumping proceeding became the law of the proceeding, from which Commerce could not depart. *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 422 (1992).

Commerce's actions here are more analogous to those in *Shikoku Chemicals*, 16 CIT 382, 795 F. Supp. 417, than those in *Shandong Huarong Machinery*, 30 CIT ___ , 435 F. Supp. 2d 1261. While Com-

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[5] In the final results of the antidumping duty investigation, Commerce followed a similar course where the respondent Samyang (one of Huvis's parent companies) submitted transfer price and market price, but not cost of production, for its purchases of QTA and PTA. Because Commerce "determined that Samyang did, to the best of its ability, attempt to obtain the affiliates' [cost of production] data" the agency "valued PTA and QTA based on the higher of the transfer price or the market price for each input." *Issues and Decision Mem. for the Final Determination in the Antidumping Duty Investigation of Certain PSF from the Republic of Korea*, Comment 6 (Mar. 22, 2000), *available at http://ia.ita.doc.gov/frn/* (last visited November 10, 2007).

> It is not lost on this Court that the company Huvis now claims is unwilling to release market price data for the inputs QTA and PTA, Samnam, is the same company willing to give Samyang — one of Huvis's parent companies — market price data for the same inputs (but not cost of production data!). However, if Commerce is suspicious of Huvis's avowed inability to obtain market price data from Samnam, the agency must directly address this in its results. Commerce is not free to treat Huvis differently than it has in past administrative reviews without justification. *See Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) ("It is a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure.") (internal quotation and citation omitted).

merce has not exclusively accepted cost of production data alone to test transfer price, the history of the prior administrative reviews here establishes that Commerce has repeatedly and regularly done so, and Huvis could "reasonably . . . expect adherence to the" particular agency action. *Ranchers — Cattlemen Action Legal Found.*, 23 CIT at 885, 74 F. Supp. 2d at 1374. As a result, this Court finds that Commerce established a practice with its repeated acceptance of cost of production data alone to verify Huvis's transfer prices of major inputs when market price data was not available.[6]

Defendants-Intervenor cite *SKF USA Inc. v. United States*, 24 CIT 822, 116 F. Supp. 2d 1257 (2000), for the proposition that Commerce "has the discretion to determine how it will apply the major input rule in a particular review and from review-to-review." (Defs.-Int. Br. 19; *see also* Def. Br. 9.) In *SKF*, the plaintiff failed to report the market price of a major input in the form and manner requested by Commerce, and, therefore, Commerce was unable to verify the market price. As a result, Commerce applied partial facts available to fill in the gaps for the missing market price information. In the face of the plaintiff's argument that applying facts available for the missing market price data was contrary to the agency's practice in prior administrative reviews, the court held:

> Commerce properly determined that it had discretionary authority to use the highest of transfer price, market price or [cost of production] in valuing SKF's reported major inputs. . . . Moreover, the fact that Commerce may not have applied the provisions in prior . . . reviews, does not make Commerce's exercise of discretion to apply them in this review unreasonable.

SKF, 24 CIT at 834, 116 F. Supp. 2d at 1267.

Yet, *SKF* is distinguishable from the case at bar for two reasons. First, this was not a case where the plaintiff represented to Commerce that it was not able to report market price data because the company did not possess it. Rather, SKF had the market price data, but did not submit it in a form and manner that Commerce could use. On that ground alone, SKF is significantly different from Huvis. Furthermore, Commerce's actions in SKF were not contrary to an established agency practice, as is the case here. Consequently, *SKF* does not inform on this issue.

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[6] Because this Court has already determined that, within Huvis's administrative proceeding, Commerce tested the arm's-length nature of transfer price with cost of production or market price data alone when only one of those values was available, this Court need not address Huvis's allegations that Commerce also did so in other proceedings (Pl. Br. 11). *See Shikoku Chems. Corp.*, 16 CIT at 388, 795 F. Supp. at 422 (practice established by Commerce's actions within the plaintiff's proceeding).

B. Commerce's Explanation for Departing from its Established Practice

The second question for this Court is whether, in the Final Results, Commerce adequately justified the departure from its established practice. "When an agency decides to change course . . . it must adequately explain the reason for a reversal of policy." *Nippon Steel Corp. v. U. S. Int'l Trade Comm'n*, 494 F.3d 1371, 1378 n.5 (Fed. Cir. 2007); *see also Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983) ("an agency changing its course must supply a reasoned analysis") (internal quotation and citation omitted). The Government and Defendants-Intervenor contend that Commerce satisfied this burden by giving Huvis notice in the fourth administrative review that the agency would now require both cost of production and market price to test the arm's-length nature of transfer price. (Def. Br. 12; Defs.-Int. Br. 18.)

In the fourth administrative review, Commerce substituted-in MTA market price data for the missing QTA market price data. The Government and Defendants-Intervenor argue that, through this action, Commerce notified Huvis that cost of production data alone would no longer be sufficient to verify transfer price. Yet, in that very administrative review, Commerce continued to test the arm's-length nature of the PTA transfer price with cost of production data alone. Further, Commerce again accepted only cost of production data to verify the transfer price of PTA in the preliminary results of the fifth administrative review. Therefore, Commerce's assertion that it gave notice to Huvis that cost of production data alone would no longer suffice is not supported by substantial evidence on the record.

Furthermore, Commerce is required to explain *why* it is changing course, not merely *that* it is changing course. *See Nippon Steel Corp.*, 494 F.3d at 1378 n.5. "Commerce has the flexibility to change its position providing that it explains the basis for change and providing that the explanation is in accordance with law and supported by substantial evidence." *Cultivos Miramonte, S.A. v. United States*, 21 CIT 1059, 1064, 980 F. Supp. 2d 1268, 1274 (1997). Here, Commerce's proffered explanation for its change in practice with respect to Huvis falls short of the mark.

Commerce first tries to distinguish its treatment of Huvis in the Final Results from antidumping proceedings covering other merchandise. Commerce states that "unlike *Steel Wire Rod from Mexico* [, Fed. Reg. 67 Fed. Reg. 55,800,] and *Certain Carbon Products from Canada*, [62 Fed. Reg. 18,448,] the facts on the record in this case demonstrate that market prices do exist for the inputs at issue: Huvis stated that its supplier makes sales to unaffiliated customers." (5AR Issues and Decision Mem., Comment 1, Pub. Doc. 80.)

There are two problems with this justification. First, it is incorrect. In the above-cited administrative proceedings, the relevant fact was not that there was no market price data *in existence*, but rather that market price data was not *on the record. See Issues and Decision Mem. for the Final Determination of the Antidumping Duty Investigation: Carbon and Certain Alloy Steel Wire Rod from Mexico*, at 30, *available at* http://ia.ita.doc.gov/frn/ (last visited Nov. 10, 2007) ("In past cases where a comparable market price for an input purchased from an unaffiliated supplier was *unavailable*, the Department has accepted the actual [cost of production] incurred by the related supplier as a surrogate." (emphasis added)); *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448, 18,456 (Dep't Commerce Apr. 15, 1997) ("There is no market price *on the record* for this input. Therefore, the Department's analysis was focused on the transfer prices and cost of production." (emphasis added)). The second, and more fundamental, shortcoming is that the reasoning does not explain the disparate treatment of Huvis in the Final Results as compared to its treatment in the second, third, fourth, and preliminary results of the fifth administrative review, when market price data for QTA and PTA existed, but was not on the record.

Commerce's other purported explanation also falls short. Commerce says that it stopped accepting cost of production data alone to verify transfer price because "the second administrative review involved a shift from comparing an average [terepthalic acid] market price to evaluating each form of [terepthalic acid] separately." (5AR Issues and Decision Mem., Comment 1 , Pub. Doc. 80.) Yet, Commerce's change in practice occurred in the fifth, not the second, administrative review. If the change in methodology necessitated the change in Commerce's practice, one would expect the change in practice to coincide with the change in methodology, not to lag the change by three years. Moreover, Commerce failed to explain why the shift from comparing an average terepthalic acid market price to evaluating each form of terepthalic acid separately necessitates the change in practice. *See State Farm*, 463 U.S. at 43 (explanation needs "a 'rational connection between the facts found and the choice made.' " (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Because the reasons Commerce gave for its change in practice with respect to Huvis are not supported by substantial evidence, Commerce's change is arbitrary. *Cultivos Miramonte S.A.,* 21 CIT at 1064 n.7 ("A change is arbitrary if the factual findings underlying the reason for change are not supported by substantial evidence."); *see also SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001) ("[A]n agency action is arbitrary when the agency offers insufficient reasons for treating similar situations differently.") (internal quotation and citation omitted). As a result, the Final Results

are not in accordance with law. Therefore, this Court will remand the Final Results to Commerce to either (1) test the arm's-length nature of Huvis's major inputs of QTA and PTA with cost of production data alone, or (2) adequately explain the reason for treating Huvis differently in this administrative review than the agency has in prior administrative reviews.

CONCLUSION

Because the Final Results are inconsistent with Commerce's established practice, and Commerce failed to adequately explain why it departed from its established practice in this instance, the Final Results are not in accordance with law. As a result, this Court grants Huvis's USCIT R. 56.1 Motion for Judgment upon the Agency Record and remands the Final Results to Commerce for further action consistent with this Opinion and Order.

Upon consideration of the papers filed by the parties, and upon due deliberation, it is hereby

ORDERED that Plaintiff's Motion for Oral Argument is denied; it is further

ORDERED that Plaintiff's Motion for Judgment upon the Agency Record is granted; it is further

ORDERED that the Final Results are remanded to Commerce to either (1) test the arm's-length nature of Huvis's major inputs of QTA and PTA with cost of production data alone, or (2) adequately explain the reason for treating Huvis differently in this administrative review than the agency has in prior administrative reviews; it is further

ORDERED that the remand results shall be filed no later than February 11, 2008; it is further

ORDERED that Huvis may file papers with this Court indicating whether they are satisfied with the remand results no later than March 17, 2008; that the Government and Defendants-Intervenor may file responses to Huvis's comments no later than April 11, 2008.

SO ORDERED.