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Anshan Iron & Steel Company, Ltd., et al. v. United States of America and Bethlehem Steel Corporation, et al., and Gallatin Steel Company, et al.
Slip Op. 03-83 (CIT July 16, 2003)

FINAL RESULTS
PURSUANT TO REMAND

SUMMARY

The Department of Commerce ("the Department") has prepared these results of redetermination pursuant to the remand order of the Court of International Trade ("the Court") in Anshan Iron & Steel Company, Ltd., et al. v. United States of America, Bethlehem Steel Corporation, et al., and Gallatin Steel Company, et al., Slip Op. 03-83 (CIT July 16, 2003). In accordance with the Court's instructions, the Department has re-examined the remanded issues of the Final Determination. See Final Determination of Sales at Less Than Fair Value: Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China, 66 FR 49632 (September 28, 2001) ("Final Determination") and the accompanying Issues and Decision Memorandum for the Less Than Fair Value Investigation of Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China: April 1, 2000 through September 30, 2000 (September 21, 2001) ("Decision Memo"). Specifically, the Department has: (1) provided an explanation for its methodology in assigning surrogate values to Respondents' self-produced factors in this investigation; and (2) adjusted Baosteel's reported factors by adding the total amount of defective hot-rolled sheet produced during the period of investigation ("POI") to the total amount of merchandise under investigation in the denominator of the factor of production ratios.

BACKGROUND

On September 28, 2001, the Department published its Final Determination, covering the POI April 1, 2000 through September 30, 2000. The investigation involved Bethlehem Steel Corp., Gallatin Steel Corp., Ipsco Steel Inc., LTV Steel Corp., National Steel Corp., Nucor Corp., Steel Dynamics, Inc., U.S. Steel Group, Weirton Steel Corp., and the Independent Steel Workers Union (collectively "Petitioners"); and Anshan Iron & Steel Company, Ltd., New Iron & Steel Company, Ltd., and Angang Group International Trade Corporation ("Anshan"); Benxi Iron & Steel Company, Ltd., Benxi Steel Plate Company, Ltd., and Benxi Iron & Steel Group International Economic and Trade Company Ltd. ("Benxi"); and Shanghai Baosteel Group Corporation, Baosteel American, Inc., and Baosteel Group International Trade Corporation ("Baosteel") (collectively "Respondents"). Respondents contested various aspects of the Final Determination.

On July 16, 2003, the Court issued its opinion and remanded to the Department two aspects of its Final Determination for reconsideration: (1) with respect to the Department's decision to assign surrogate values to Respondents' self-produced factors, the Court ordered the Department to either provide an adequate explanation for its deviation from previous practice, or assign surrogate values to Respondents' inputs into its self-produced factors; and (2) with respect to the Department's decision not to treat defective hot-rolled sheet as a byproduct, the Court ordered the Department to adjust Baosteel's factors of production calculations by including defective sheet as merchandise under investigation.

I. VALUATION OF SELF-PRODUCED INTERMEDIATE INPUTS

In accordance with the Court's instructions, the Department has reconsidered its decision to assign surrogate values to Respondents' self-produced factors – electricity, argon, nitrogen, and oxygen – in the Final Determination. The Department has determined that its decision to assign surrogate values to these self-produced factors results in a more accurate calculation of normal value than assigning surrogate values to the inputs into the self-produced factors. Therefore, as explained below, no recalculation is necessary.

A. Goal of Accuracy

In cases before the Department a constant goal in the Department's decision-making process has always been the overriding factor of obtaining accuracy. As the Court recognized, the Department seeks to calculate the most accurate dumping margin. See Lasko Metal Products, Inc. v. United States 43 F.3d 1442, 1443 (1994) ("there is much in the statute that supports the notion that it is Commerce's duty to determine margins as accurately as possible..."); Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1191 (1993) ("statutory purpose is to facilitate the determination of dumping margins as accurately as possible..."); Rhone Poulenc Inc. v. United States, 899 F.2d 1185, 1190 (1991) ("The agency's presumption implements the basic purpose of the statute–determining current margins as accurately as possible"). Although we recognize that generating the most accurate dumping margin is not explicitly set forth in the statute, the courts have held that accuracy is a goal when determining dumping margins and the goal is "within the confines of the statutes, not in derogation of a statutory provision." See Viraj Group, Ltd. v. United States, No. 03-1061, 2003 WL 22076623, at *5 (C.A. Fed. Sept. 9, 2003).

In addition, the Court has found that "observing that § 1677b(c)(1) does not specify what constitutes best available information" when making decisions, but more importantly, that "the statute therefore, does not require Commerce to follow any single approach in evaluating data." See Timken Co. v. United States, 59 F. Supp.2d 1371, 1376, CIT 1999 (quoting Olympia Industrial Incorporated v. United States, 21 CIT 364, 368, (1997), 1997 WL 181529 and citing Lasko, 43 F.3d. at 1446).

B. Prior Practice in Valuation of Self-Produced Factors

In prior cases, the Department has valued factors differently, depending on the facts of the case. It has chosen to value the inputs into self-produced factors in some cases and also has chosen to value self-produced factors without considering the inputs into the self-produced factors in other cases. The Department's practice in valuing self-produced factors has been to examine the evidence on the record and determine the most accurate valuation of self-produced factors to generate the most accurate result.

For example, in the Notice of Final Determination of Sales at Less Than Fair Value: Coumarin from the People's Republic of China ("Coumarin from the PRC") 59 FR 66895, 66901 (December 28, 1994), the Department did not value self-production of phenol because the factor accounted for an "insignificant percentage of materials, based on quantity and value, to produce coumarin." See Coumarin from China, 59 FR 66900. In certain cases, any increased accuracy in our overall calculations that would result from valuing self-produced factors separately would be so small as to be insignificant, thus in those cases, the Department has not valued the self-produced factors.

However, in Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-

to-Length Carbon Steel Plate from the People's Republic of China ("CTL Plate from China") 62 FR 61964, 61998 (November 20, 1997), the Department valued the inputs to the self-produced factors (oxygen, nitrogen, argon and similar gases), where the data was available and verified, because the Department determined that this would produce a more accurate result.

Subsequently, the Department visited the issue of the proper valuation methodology of self-produced factors in Cold-Rolled from China I. See Notice of Preliminary Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from the People's Republic of China ("Cold-Rolled from China I") 65 FR 1117, 1127 (January 7, 2000). In Cold-Rolled from China I, the Department based the Respondents' self-produced energy costs on the surrogate company's energy costs because the Department "could not clearly determine what portion of the self-produced energy went into the direct steelmaking." See Cold-Rolled from China I at 1125.

In summary, the Department has valued both the inputs into self-produced factors and valued the self-produced factors directly. The driving factor behind the Department's decisions in valuing self-produced factors has been to determine which valuation of self-produced factors generates the most accurate result on a case-by-case basis based on the record evidence.

C. Methodology Employed in this Investigation

Following the Department's application of its valuation analysis in the abovementioned cases, the Department addressed the issue of valuation of self-produced factors in this case, in which the Department found that valuing the respondent's self-produced factors would generate an imbalance in the representative capital costs from the surrogate company, as applied to the Respondents. See Decision Memo at 17. Ordinarily, the Department is able to value labor,

energy, and raw materials while at the same time finding surrogate financial ratios (i.e., "representative capital costs") from a market economy company whose production method is similar to the respondent. However, in certain instances, the respondent may self-produce more factors than the surrogate financial ratio company. In these cases, if the Department were to attempt to achieve greater accuracy by valuing the inputs into the self-produced factors, the Department at the same time would not be accounting for significant capital costs and would thereby distort the overall margin calculation.

At its core, the Department's methodology in the Final Determination sought to balance the implications of valuing either the self-produced factors directly or, instead, valuing the inputs into those self-produced factors. While valuing the inputs into the self-produced factors might bring increased accuracy arising from a closer match to the respondents' production methods, inaccuracies may also result from such an analysis. These inaccuracies arise from two sources, the capital costs - as reflected in the surrogate financial ratios, and the valuation of the inputs to the self-produced factors themselves.

With respect to the surrogate financial ratios, the respondent incurs significant capital costs, whereas the surrogate financial ratio company does not, when the respondent self-produces more factors than the surrogate company. This mismatched situation will necessarily generate an inaccurate understatement in the financial ratios, and therefore an understatement of the respondent's normal value.

Regarding the valuation of the inputs to the factors themselves, certain of those inputs are inherently difficult to value with confidence, given that many are not commodities - and, therefore, are less likely to have numerous, contemporaneous and reliable transaction values

available. For example, the list of inputs to the self-produced factors may include (and often does include) such items as "air," the proper valuation of which defies standard valuation practice.

In contrast, valuing directly the self-produced factors would correct both the financial ratio mismatch and obviate the need to value such items as air. Although this approach may cause some dissimilarity between the respondent's actual production processes, the overall calculation is more accurate because fewer inaccuracies are introduced into the analysis.

Direct valuation of the self-produced factors resolves the financial ratio mismatch because such direct valuation relies on market prices. Market prices are properly presumed to be "fully loaded" prices in that they recover all costs for the seller, including any appropriate capital costs. As such, using those fully loaded costs to value directly the self-produced factors will necessarily account for the capital costs which otherwise would go unrecognized in the calculation, thereby improving accuracy. Similarly, direct valuation of the self-produced factors will obviate the necessity of attempting to value such inputs as air, and thus will prevent the attendant likely inaccuracy from entering the normal value calculation.

D. Analysis of Record Evidence

(1) Energy Factor Identification

The Department finds that electricity, argon, nitrogen, and oxygen are energy factors based on the record evidence in this case. The Court noted, regarding TATA's production of power, that "even if Commerce's conclusion regarding TATA's purchase of power were supported by substantial evidence, it would remain inapplicable to TATA's oxygen, argon, and nitrogen production capacity." See Anshan Iron & Steel Company, Ltd., v. United States, Slip-Op 03-83 (CIT July 16, 2003) ("Remand Order") at 17. However, the record evidence

demonstrates that Respondents themselves each consider oxygen, nitrogen, and argon, in addition to electricity, as energy factors.

In the Department's March 12, 2001 supplemental section D questionnaire (at 3 for Benxi and Anshan; at 12 for Baosteel), we requested that each Respondent "please explain in detail how you determined the total energy consumed during the POI at each production stage and provide your calculated worksheets." In Appendix 3 of Benxi's April 2, 2001 response, Benxi listed the following items as self-produced energy factors: steam, demineralized water, blast air, electricity, oxygen, nitrogen, argon, hydrogen, coke oven gas, blast furnace gas (emphasis added). In Appendix 6 of Anshan's April 2, 2001 supplemental section D response, Anshan listed the following items as self-produced energy factors: electricity, blast air, steam, oxygen, nitrogen, argon, air blast, compressed air, coke oven gas, blast furnace gas, recycled coke oven gas, recycled steam (emphasis added). On pages 33-34 of Baosteel's April 2, 2001 supplemental section D response, Baosteel makes direct references to electricity, argon, oxygen, nitrogen, water, and steam as being energy factors. Moreover, each of the Respondents reported electricity as an input into the self-produced energy factors. Consequently, the Respondents are asking the Department to value the inputs used to produce electricity **and** value electricity as an input into electricity. As a result, the Department has determined that, based on the record evidence in this case, electricity, argon, nitrogen, and oxygen are energy factors.

(2) Capital-Intensive Production

There is no evidence on the administrative record of this proceeding that the surrogate company, TATA, produced electricity, and no evidence that the surrogate company self-produced any of its argon, nitrogen, or oxygen. The production of electricity and industrial gases is a highly

capital-intensive activity due to the significant plant and equipment investments necessary for production, continual operation, and maintenance. Variable inputs, such as materials and labor, are often less significant than the capital equipment costs to the overall cost structure of an electricity or gas production facility. The large capital costs associated with investments necessary to produce electricity and industrial gases are ordinarily included in overhead, of which depreciation expense is typically a large component. Thus, for companies that produce their own electricity and gases, the significant depreciation costs associated with large capital investments in machinery, equipment, and maintenance would be reflected in the overhead ratio. As discussed below, this general description is supported by record evidence.

Commerce found in the Final Determination that the "respondents' own information indicates that their facilities dedicated to the production of these energy inputs are not insubstantial." See Decision Memo, Comment 2. For example, the amounts of electricity used to produce subject merchandise sold to the United States during the POI by each Respondent during the POI were: [* * *] M. KWH by Baosteel; [* * *] M. KWH by Benxi, and [* * *] M. KWH by Anshan. Therefore, if the Department were to value the inputs into the abovementioned self-produced factors in conjunction with financial ratios from TATA, its decision would create a significant distortion.

This distortion is created by the comparison of Respondents' capital intensive production on the one hand with the lack of self-production by the surrogate company on the other. Because the record shows that the Respondents' production of electricity and gases is capital intensive, and given that capital costs would ordinarily be captured in the normal value calculation as depreciation expense, which is included in the surrogate overhead ratio, the absence of capital

costs for the production of electricity and gases in the surrogate overhead ratio creates an inaccurate understatement in the normal value. This understatement results in the Department not capturing a significant element of capital costs in the normal value calculation. Therefore, the Department has determined that because valuing the inputs to produce electricity and gases would result in distortions and less accurate results, it would be unreasonable to make such a calculation.

Thus, instead, the Department has valued these factors directly, a valuation which implicitly captures the capital cost of producing electricity and gases in the fully-loaded surrogate prices. Through such a calculation, a more accurate result may be obtained then if the Department had valued the inputs to produce electricity and gases.

(3) Surrogate Company Production

Regarding the evidence the Department examined in the Final Determination, the Court noted that the Department relied on a single line in TATA's financial statements for the proposition that TATA did not produce electricity or the industrial gases. Remand Order at 15. Similarly, the Court noted that there was an additional line item regarding purchase of power and water to which the Department did not refer. See Remand Order at 16. However, the Department cited the sales of power line item to support the Department's conclusion that the financial statements on the record revealed no evidence that TATA produced electricity, argon, nitrogen, or oxygen.[1] In other words, having found no direct statements that the respondents produced these

[1] In this case, the record contains excerpts of the 2000-2001 TATA financial statement, which were timely submitted by Petitioners on June 19, 2001. The financial statement contains direct evidence that TATA purchased "power." See Decision Memo at 17. While "power" is not limited necessarily to electricity, the purchase of power was corroborating evidence supporting the Department's determination that there was no evidence of electricity self-production. The financial statement does not contain any statements that TATA self-produced any type of power, including electricity.

factors, the Department found that TATA purchased power. The salient fact for the Department was not that there is one line item noting purchases of power, and another noting sales of power and water, but instead, it was the absence of information in the excerpted financial statements on the record of this investigation which the Department found compelling.[2] This finding led the Department to conclude that it appeared TATA did not produce these four factors. While the Department recognizes that a company's purchase of power does not exclude the possibility that it also produces power, there is no record evidence to support that conclusion in this case.

The Department did not conduct a comparison of TATA's production of these four factors with their production by the Respondents because the record evidence does not indicate that there was production of those factors at TATA. Therefore, the Department did not compare TATA with the Respondents and then conclude that TATA's alleged production of the four factors in question was not capital-intensive; instead the capital-intensive nature of the production of these factors was based on observation of the Respondents' production facilities.

The Court noted that TATA's financial statement excerpts, which were submitted by Petitioners on June 19, 2001, indicate that it received income from the "Sale of power and water." See Remand Order at 16. However, as discussed above, the term "power" may not necessarily mean electricity, but could refer also to other power sources such as gasoline, coal, diesel oil, etc. In addition, the sale of power and water does not necessarily mean the sale of *self-produced* power and water.

Finally, the financial statement does not contain any information on what percentage of

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[2] We note, that it is possible for a respondent to purchase power in bulk and resell portions to which they committed, but are not using. This is another indicator that sales of power do not necessarily imply sales of self-produced power.

the sales were of power and what percentage were of water. Since TATA's financial statement information on the record of this case does not contain any evidence that the company produced the four factors other than TATA's sale of power, the Department cannot reasonably conclude that TATA self-produced electricity based on the record of the investigation. Thus, a tremendous disparity may exist because, while each of the Respondents has reported that it self-produced its electricity, the record of the present case contains no evidence that TATA produces its own electricity. Therefore, if the Department were to value the inputs into the self-produced factors in conjunction with financial ratios from TATA, it would create a mismatched situation that would distort the calculation of normal value.

(4) Non-Record Evidence

In its remand order, the Court cited a recent preliminary determination, Cold-Rolled from China II, which was made nearly eight months after the current Final Decision. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products From The People's Republic of China, 67 FR 31235, 31241 (May 9, 2002) ("Cold-Rolled from China II"). Cold-Rolled from China II includes the statement that TATA produced approximately fifty-four percent of its electricity, based on the company's 2000-2001 financial statement. However, the source of the information from the Cold-Rolled from China II investigation is the *complete* 2000-2001 TATA financial statement. The complete TATA financial statement for 2000-2001 is not on the record of the present case.

While the complete TATA financial statement on the Cold-Rolled from China II record contains evidence that the company both purchases and self-produces electricity, the excerpted

financial statements on the record of the present case, submitted by Petitioners on June 19, 2001, do not contain information supporting such a conclusion. Neither the full TATA 2000-2001 financial statements, nor the Cold-Rolled from China II Issues and Decision Memo are on the record of the present case, so the Department cannot apply the findings based on these statements to this investigation.[3]

In sum, then, the Department reviewed the entirety of the financial statements on the record and found no evidence that TATA produced these four factors. The Department observed large capital equipment installations being operated by the Respondents in their production of these factors, leading the Department to conclude that the Respondents' production of these factors is capital intensive. See Decision Memo at 17. As a result of these observations and review of the financial data on the record, the Department concluded that based on the record evidence, TATA does not produce these four capital intensive factors, unlike the Respondents. This disparity causes the generation of understated financial ratios and an understatement of normal value because the Department would not be capturing a significant element of cost.

E. Recent Practice in Valuing Self-Produced Factors of Production

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[3] In CTL Plate from China, the issue of the proper valuation of electricity, oxygen, argon, and nitrogen figured prominently. In addition, the self-produced energy inputs reported by the respondent in Cold-Rolled from China I were replaced based on the Indian surrogate company's energy costs. Baosteel and Angang were respondents in the CTL Plate from China investigation and Baosteel was the only respondent in the Cold-Rolled from China I investigation. Finally, in the preliminary determination of this investigation, the Department valued these self-produced factors directly, rather than valuing their inputs. See Notice of Preliminary Determination of Sales at Not Less Than Fair Value: Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China, 66 FR 22183 (May 3, 2001). As such, these respondents were on notice that the proper valuation of these four factors was controversial and that the submission of full TATA financial statements by the Respondents would have made them available for the Department's consideration. See Remand Order at 29 and Mannesmannrohren-Werke AG v. United States, 120 F. Supp. 2d 1075, 1085 (citing Chingsung Indus. Co. V. United States, 13 CIT 103, 106, 705 F. Supp. 598, 601 (1989).

Since the Final Determination in this case, the Department has sought to balance the implications of valuing either the self-produced factors directly or the inputs into those self-produced factors. As discussed above, the facts of each case determine which methodology is used.

In Structural Steel Beams from China, the Department determined that it avoided needless complications to the calculation of normal value and, by implication, any attendant inaccuracies by not valuing the inputs into the self-produced factors (electricity, argon, nitrogen and oxygen). See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams from the People's Republic of China ("Beams from China"), 66 FR 67197, 67201 (December 28, 2001). The decision to value these self-produced factors was upheld in the final determination. The Department noted that there was no record evidence that the surrogate companies produced argon, nitrogen, and oxygen. Therefore, the Department valued the self-produced gases to assure that capital costs associated with self-production were captured. While the Department also continued to value the self-produced electricity, the valuation of electricity was not an issue in the final determination. See Issues and Decision Memorandum for the Antidumping Duty Investigation of Structural Steel Beams From The People's Republic of China - October 1, 2000, through March 31, 2001 (May 20, 2002) at Comment 2.

In a another case featuring self-produced inputs and integrated steel producers, the Department concluded that if "the Department were to apply Respondent's methodology[4], NV

[4] The Respondent in this case argued that the Department should value the inputs which go into the mining of iron ore rather than value the iron ore. See Wire Rod from Ukraine at Comment 4.

would be exclusive of capital costs which would lead to an inaccurate calculation. Also, valuing certain self-produced energy inputs leads to a less accurate calculation." See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod from Ukraine and accompanying Issues and Decision Memorandum ("Wire Rod from Ukraine") 67 FR 55785 (August 30, 2002) at Comment 4.

In Frozen Fish from Vietnam, as in the present case, the Department was faced with a situation in which valuing the inputs into the self-produced factors would create increased accuracy arising from a closer match to the respondents' production methods, but would also create a financial ratio mismatch. See Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 FR 4986 (January 31, 2003) ("Frozen Fish from Vietnam"). In Frozen Fish from Vietnam, we affirmed and clearly articulated the Department's general policy on valuing self-produced factors. "Our general policy, consistent with section 773(c)(1)(B) of the Act, is to value the factors of production that a respondent uses to produce the subject merchandise." However, there are two clear exceptions to our general policy:[5]

> "First, in some cases a respondent may report factors used to produce an intermediate input that accounts for a small or insignificant share of total output. The Department recognizes that, in those cases, the increased accuracy in our overall calculations that would result from valuing (separately) each of those factors may be so small so as to not justify the burden

[5] These exceptions are the most common and the Department may also entertain other exceptions based on the evidence on the record of the individual proceedings. See Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam and accompanying Issues and Decision Memorandum, 68 FR 37116, 37121 (June 23, 2003) at Comment 3.

> of doing so. Therefore, in those situations, the Department would value the intermediate input directly.
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> Second, in certain circumstances, it is clear that attempting to value the factors used in a production process yielding an intermediate product would lead to an inaccurate result because a significant element of cost would not be adequately accounted for in the overall factors buildup. For example, in a recent case, we addressed whether we should value the respondent's factors used in extracting iron ore – an input to its wire rod factory. The Department determined that, if it were to use those factors, it would not sufficiently account for the capital costs associated with the iron ore mining operation given that the surrogate used for valuing production overhead did not have mining operations. Therefore, because ignoring this important cost element would distort the calculation, the Department declined to value the inputs used in mining iron ore and valued the iron ore instead. See Notice of Final Determination of Sales at Less Than Fair Value: Carbon and Certain Alloy Steel Wire Rod From Ukraine; 67 FR 55785 (August 30, 2002); Final Determination of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products From the People's Republic of China; 66 FR 49632 (September 28, 2001); Final Determination of Sales at Less Than Fair Value; Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China; 62 FR 61964 (November 20, 1997); and Notice of Final Determination of Sales at Less Than Fair Value; Furfuryl Alcohol From the People's Republic of China; 60 FR 22544 (May 8, 1995)."

See Frozen Fish from Vietnam at 4993-4994.

The articulation of the two exceptions above marked the first time that the Department clearly summarized and explained the reasons for its approach (in the present case, in Frozen Fish from Vietnam, and in other cases) of valueing self-produced factors instead of the inputs to the self-produced factors.

Conclusion

The Department's overriding goal in conducting its analyses is to achieve the greatest

degree of accuracy possible. In past efforts to achieve this goal, the Department did not uniformly value inputs into the self-produced factors. Instead, the Department addressed the issue on a case-by-case basis and at times a factor-by-factor analysis to determine the most accurate valuation of the self-produced factors.

In this case, we considered whether the greater amount of accuracy would be achieved through valuing directly the self-produced factors or instead valuing the inputs into the self-produced factors. As noted above, valuing the inputs into the self-produced factors, while seemingly more accurate, would result in a significant understatement of the Respondents' capital costs (i.e., financial ratios), as well as require the Department to value such factors as "air."

We find that the greater accuracy in this case is achieved through valuing the self-produced inputs. Initially such an approach avoids the inaccuracies of valuing the inputs to the self-produced factors. In addition, a proper valuation with respect to the financial ratios outweighs the gains to be achieved by valuing the inputs to the self-produced factors, because the financial ratios are applied to the summation of all materials, labor, and energy costs and moreover, are compounded. Accordingly, the Department has determined that its decision to value the self-produced factors is consistent with its mandate to select the best available information in constructing a nonmarket economy product's normal value.

II. ADJUSTMENTS TO BAOSTEEL'S FACTORS OF PRODUCTION FOR DEFECTIVE HOT-ROLLED SHEETS

The Department has determined that not including the amount of defective hot-rolled sheet

produced during the POI to the total amount of merchandise under investigation was a ministerial error. Pursuant to the Court's instructions, the Department has recalculated Baosteel's factors of production by adding the total amount of defective hot-rolled sheet produced during the POI to the total amount of merchandise under investigation in the denominator of the factor of production ratios, in line with its decision to treat Baosteel's defective hot-rolled sheet as non-prime merchandise under investigation sold in the home market.

WEIGHTED-AVERAGE DUMPING MARGIN

As a result of this redetermination, the Department has recalculated the dumping margins for Baosteel. The weighted-average dumping margins are as follows:

Manufacturer/exporter	**Weighted-average margin (percent)**	
	Determination on Remand	Final
Baosteel	63.45%	64.20%
Benxi	90.83%	90.83%
Angang	69.85	69.85%
PRC-Wide Rate	90.83%	90.83%

These final results pursuant to remand are being issued in accordance with the order of the CIT in Anshan Iron & Steel Company, Ltd., et al. v. United States of America, Bethlehem Steel Corporation, et al., and Gallatin Steel Company, et al., Slip Op. 03-83 (CIT July 16, 2003).

COMMENTS

Comment 1: The Department Does Not Address Prior Practice In A Meaningful Way

Respondents Anshan and Benxi contend that the antidumping law requires the Department to construct the value of the subject merchandise manufactured by an NME producer using the factors of production actually utilized by that producer, citing 19 USC 1677b(c)(1), and argue that the CIT embraced this position and described how the Department's practice is to value the factors of production for self-produced intermediate inputs, citing Anshan Iron & Steel Co., Ltd., et al. v. United States, et al., Slip Op. 03-83 (July 16, 2003) ("Slip Op") at 7-13. Respondents Anshan and Benxi argue that the Department does not dispute this conclusion, adverting instead to a single case (Coumarin from the PRC) where the Department did not value the respondent's self-production of a material that accounted for an "insignificant percentage of materials, based on quantity and value, to produce coumarin." See Coumarin from the PRC 66895, 66900. Respondents Anshan and Benxi argue that Coumarin from the PRC, which starts from the proposition that the Department "agrees . . . that under section 773 of the Act it is appropriate to value all of the factors of production, including intermediate inputs captively-produced by the responding producer" (see *id.* at 66899), does not stand for the proposition that the Department undertakes such a short-cut for the sake of accuracy as the Department implies. See Draft Redetermination at 4. Respondents Anshan and Benxi contend that this is simply an acknowledgment that minor adjustments with no significance to the normal value calculation may be overlooked. See Coumarin from the PRC at 66900; cf. 19 USC 1677f-1(a)(2) ("for purposes of determining . . . normal value . . . administering authority may - * * * decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise").

Respondents Anshan and Benxi argue that this hardly affects the accuracy of the dumping calculation.

Petitioner U.S. Steel Corporation contends that the Department explained in its Draft Redetermination (at 4-5) that "the driving factor behind the Department's decisions in valuing self-produced factors has been to determine which valuation of self-produced factors generates the most accurate result on a case-by-case basis based on the record evidence." Petitioner U.S. Steel Corporation argues that the Department further explained that its preexisting practice in valuing self-produced factors has been to examine the record evidence in each case, and to value the inputs into self-produced factors or value the self-produced factors directly. Petitioner U.S. Steel argues that the Department provided examples of how it has applied its preexisting valuation methodology to self-produced factors on a case-by-case basis, along with a detailed explanation of its general policy on valuing self-produced factors.

Department's Position:

We disagree with Anshan and Benxi, and agree with Petitioner U.S. Steel Corporation. Although Respondents Anshan and Benxi claim that we only cited one prior case, in fact, in our redetermination we cited three prior cases: CTL Plate from China, Cold-Rolled from China I, and Coumarin from China, to demonstrate that the Department's practice was not uniform in valuing the inputs into self-produced factors, rather than the self-produced factor itself. In so doing, the Department presumed the Court's familiarity with the cases which respondents cited in their pleadings. In citing the above cases, two of which were for basic steel mill products from the PRC itself, the Department described and demonstrated its underlying rationale in the determination of which factor to value: evaluation of record evidence on a case-by-case basis to

determine the most accurate valuation of self-produced factors to generate the most accurate result. In addition, our redetermination cites three recent cases: Frozen Fish from Vietnam, Wire Rod from Ukraine, and Steel Beams from China, to demonstrate that this is the Department's continuing practice as well. In the present case, the Department has valued the Respondents' actual self-produced factors of production, consistent with 19 USC 1677b(c)(1). It is also consistent with the Department's mandate in 19 USC 1677b(c)(1) to select the best available information in constructing a nonmarket economy product's normal value which will produce the most accurate result.

Comment 2: The Facts Do Not Support The Department's Re-Written Justification For Not Valuing Respondents' Intermediate Inputs

Respondents Anshan and Benxi contend that the Department continues to rely on its conclusion that oxygen, nitrogen, and argon are energy (as opposed to production materials essential to the steel production process) even though it knows this to be in error. Respondents Anshan and Benxi argue that the Department has relied instead on the alleged references to these elemental gases as energy in response to the Department's questions (see Draft Redetermination at 7-8), but the imprecise reference to certain gases as energy, even if it did occur, is hardly a responsible response from an agency that is considered the "master of the dumping law" and which has gained mastery from hundreds of steel antidumping investigations involving virtually every steel-producing country in the world. Respondents Anshan and Benxi contend that such a simplistic approach overlooks the accurate portrayal by respondents of the use, for example, of oxygen as a material input into the direct steel-making process. See, e.g., Anshan Section D response of February 26, 2001 at D-6 and Benxi Section D response of February 26, 2001 at D-5.

Respondents Anshan and Benxi argue that it simply defies logic for the Department to conclude that if respondents called these gases "energy," it will consider them inalterably as energy no matter what it knows. Respondents Anshan and Benxi contend that the Department also continues to rely on an unsupported assertion that a respondent incurs significant capital costs with respect to self-production of intermediate inputs, causing a mismatch in the financial ratios of the respondent as compared to the surrogate company, which does not produce its own electricity. Respondents Anshan and Benxi argue that nowhere in the record is there any indication of the significance, size, or value of the facilities used by Anshan and Benxi in producing electricity, no matter what the Department may have learned about another respondent. Respondents Anshan and Benxi contend that, aside from the fact that the Department's conclusions remain naked statements, they also ignore the CIT's express judicial recognition that the surrogate company self-produces electricity, thus incurring similar capital costs. See Slip Op. at 16-17. Respondents Anshan and Benxi argue that the Department closed its eyes to the TATA's self-production of electricity, and that it cannot make that critical fact go away, especially given the incomplete website version of the TATA financial statement upon which it relied.

Petitioner U.S. Steel contends that while Anshan and Benxi allege that the Department cannot treat argon, nitrogen, and oxygen as energy factors, the Department found in its Draft Redetermination (at 7) that argon, nitrogen and oxygen are energy factors because Anshan and Benxi consider these factors, in addition to electricity, as energy factors. Petitioner U.S. Steel argues that the Department cited record evidence that both Anshan and Benxi listed oxygen, nitrogen and argon as self-produced energy factors in their supplemental Section D questionnaire

responses. See Draft Redetermination at 8. Petitioner U.S. Steel notes that while Anshan and Benxi contend that their responses were an "imprecise reference to certain gases as energy" which should be ignored even if it did occur, the Department correctly noted in its Draft Redetermination (at 7-8) that Anshan and Benxi's characterization of the gases as self-produced energy did occur and is a matter of record, not conjecture. Petitioner U.S. Steel argues that the purported "imprecision" on the part of Anshan and Benxi is a *post hoc* characterization belied by the Department's findings, and the Department did not *sua sponte* list the gases as self-produced energy factors, because Anshan and Benxi expressly listed oxygen, nitrogen and argon as self-produced energy factors.

Petitioner U.S. Steel notes that Anshan and Benxi contend that the Department should have drawn from its vast experience in steel antidumping investigations and re-characterized oxygen, nitrogen and argon, but that in the subsequent paragraph Anshan and Benxi criticize the Department for its "unsupported assertion" that the self-production of intermediate inputs incurs significant capital costs. Petitioner U.S. Steel contends that Anshan and Benxi seek to have it both ways, demanding the Department to draw on its experience to re-characterize oxygen, nitrogen and argon, while criticizing the Department for its "unsupported" recognition that energy production is a capital-intensive undertaking. Petitioner U.S. Steel notes that Anshan and Benxi allege that there is nothing in the record regarding the facilities they used in the production of electricity, but in fact, the Department in its Draft Redetermination (at 8) cited record evidence that both Anshan and Benxi reported that they self-produce electricity, and moreover the Department specified in detail (at 9) the amounts of electricity used by Anshan and Benxi during the POI to produce subject merchandise sold to the United States.

Petitioners Gallatin Steel Company, ISPCO Steel Inc., Nucor Corporation, Steel Dynamics, Inc., and Weirton Steel Corporation (collectively, "Petitioners II") argue that the record contained verified information on the quantities of inputs of energy and certain gases, and the Department was able to value those inputs. According to Petitioners II, the Department properly states in its Draft Redetermination (at 7) that "direct valuation relies on market prices" and thus provides "fully loaded" values that include the seller's costs (including any capital costs) which would otherwise go unrecognized in the calculation, thereby improving accuracy. Petitioners II contend that accordingly, they believe that the Department's Draft Redetermination is supported by substantial evidence and in accordance with law, citing Pacific Giant, Inc. v. United States 223 F.Supp. 2d 1336 (CIT 2002) ("the statute plainly focuses upon the quantity of inputs for factors of production rather than the costs associated with them"); and 19 U.S.C. § 1677b(c)(3) (referring to "quantities of raw material" and "amounts of energy and other utilities consumed").

Petitioners II contend that, regarding the gas inputs, as the Department points out, any confusion as to their characterization arises from Respondents' own submissions, and that regardless of the nomenclature applied to the gases, identification of the factors as energy or input gases had no effect on the Department's valuation. See Decision Memo at Comment 2. Petitioners II argue that the Department properly recognized that the production of the gas inputs required a substantial investment in dedicated gas inputs production facilities, and contend that nothing on the record indicated that TATA had made the distinct and substantial investment necessary for production of the gases at issue. Therefore, Petitioners II argue, if the Department were to simply assume that TATA had made this capital investment, its determination would be

unsupported by substantial evidence and not in accordance with law. In contrast, according to Petitioners II, the record did contain information on the gas inputs themselves and surrogate values could be obtained for those gases.

Petitioners II contend that the issue of electricity production is similar, as the record here does not indicate that TATA self-produced electricity, and indeed the only record evidence regarding electricity production indicates that TATA produced electricity. Petitioners II argue that any contrary evidence, which is not part of the record, is not properly considered by the Department, and the Department made the best possible determination based on the record evidence in this investigation.

Department's Position:

We disagree with Respondents Anshan and Benxi, and agree with Petitioners. This redetermination clearly cites at page 7 to record evidence in which Respondents classify oxygen, argon, and nitrogen as energy factors. In addition, the Department itself considers these factors to be energy factors, despite Anshan's and Benxi's assertions to the contrary, which, as we noted in our draft results, changed in litigation from their self-described characterizations of these factors in the underlying less than fair value investigation. As a result, in this case, the record shows that during the investigation, all parties independently classified these factors to be energy factors.

However, the classification of these inputs is irrelevant to whether or not Respondents incur significant capital costs in their production of these inputs. Respondents Anshan and Benxi argue that the record does not indicate the significance, size, or value of the facilities used by Anshan and Benxi. The Department instructed Respondents in the supplemental Section D questionnaire, dated March 12, 2001 for Baosteel, and dated March 28, 2001 for Anshan and

Benxi:

> "For all major equipment used in the production of subject merchandise, please submit the following information:
> (1) When the machines used to produce subject merchandise were purchased;
> (2) the cost of the machines of the time of purchase;
> (3) how the machines were depreciated;
> (4) the capacity of these machines; and,
> (5) total production output 2000.

In Baosteel's response, dated April 2, 2001, Baosteel only provided general information related to the groups of equipment used in its "Iron-Making", "Steel-Making", and "Rolling" cost centers. Baosteel failed to directly provide information regarding the equipment or group of equipment used in its "Power Plant" cost center. Boasteel also failed to address parts (1), (2), or (4) of the above question for any of its capital equipment.

Separately, in response to another question of the same supplemental questionnaire at page 34, Boasteel identified certain equipment used in the self-production of energy factors: three electricity generators, a gas turbine, "air separating equipment", and boilers. Boasteel was not more specific regarding the capital costs incurred for this equipment.

Finally, in Baosteel's verification report (See Memorandum from Carrie Blozy, Verification of Sales and Factors of Production for Shanghai Baosteel Group Corporation ("Baosteel Group") in the Antidumping Duty Investigation of Certain Hot-Rolled Carbon Steel Flat Products from the People's Republic of China ("PRC"), dated July 16, 2001, at 17), we noted that Boasteel uses three plants which produce argon, nitrogen, and oxygen. Exhibit 16 of Baosteel's verification report includes certain cost ledgers related to these air separation facilities. In the same report, we noted that Boasteel has four electricity generators. Exhibit 22 of Baosteel's verification report details a schematic map of the electricity system, including the power plants, and certain cost ledgers for the production of electricity.

Benxi's response to the above question regarding capital equipment, dated April 9, 2001, included certain information regarding the capital equipment involved in the production of electricity and gases. We note that Benxi's capital depreciation costs for Benxi's electricity plant in 2000 were [* * *]% of Benxi's total reported capital costs, including for the steel-making plant, the iron-making plant, and the coke-making plant, but not including the oxygen making plant, for which Benxi failed to report the capital depreciation expenses for 2000. Benxi failed to provide a more detailed narrative description of the facilities or equipment, and did not fully answer parts (2) and (5) of the above question in regards to its electricity and gas production.

In response to a separate inquiry by the Department, Benxi provided certain information identifying certain capital equipment used in the self-production of electricity and gases. Benxi specifically identified the following equipment: a boiler, "chemical facilities," a filter, a muffler, a blower, a steam turbine, a "power generator," and an "oxygen-making machine." Separately, in Benxi's Section D questionnaire response, dated February 26, 2001, Benxi noted that its facilities include "electricity generation, water purification, and gas concentration facilities." We also note that record evidence shows that Benxi's "power generator" produces 100% of the electricity used in the production of subject merchandise, as indicated in Benxi's verification report (See Memorandum from Doreen Chen, Verification of Sales and Factors of Production for Benxi Iron and Steel (Group) International & Economic Trading Co., Ltd, Bengang Steel Plates Co., Ltd., and Benxi Iron & Steel Group Co., Ltd/ ("Benxi") in the Antidumping Duty Investigation of Certain Hot-Rolled Steel Products from the People's Republic of China, dated July 18, 2001, at 9). Further, Benxi's verification report indicated that it had four sets of oxygen machines, typically using a capacity of 10,000 cubic meters. Benxi produces enough excess oxygen to sell

oxygen to unaffiliated parties.

In Anshan's response to the above question regarding capital equipment, dated April 9, 2001, Anshan provided depreciation schedules for its two electricity facilities and its oxygen plant. We note that the capital depreciation for these facilities in 2000 was [* * *]% of the total depreciation costs incurred on all equipment used in the production of subject merchandise during 2000, including equipment and property used in the iron-making stage, coke-making stage, steel-making stage, hot-rolling stage, and sintering stage. While Anshan reported the depreciation costs for groups of equipment at its power facilities and oxygen plant and the total output in 2000 for these groups, it specifically did not address parts (1), (2), and (4) of the above question.

However, in its April 2, 2001 response to a separate Department inquiry, Anshan did identify certain equipment used in the self-production of electricity and gases: a boiler, a coal "powder-making facility", a steam turbine, an air purifier, a compressor, an air separator, "heat-exchange equipment", and a distill tower. In addition, Anshan's verifiaciton report (See Memorandum from Catherine Bertrand, Verification of Sales and Factors of Production for Angang Group International Trade Co. Ltd., New Iron & Steel Co., Ltd., Angang Group Hong Kong Co., Ltd. ("Angang") in the Antidumping Duty Investigation of Hot-Rolled Carbon Steel Flat Products from the People's Republic of China, dated June 28, 2001, at 11) indicates that Anshan has six oxygen producing machines and two power plants, a facility which is even greater than that of Benxi, which itself has facilities extensive enough to completely meet its own considerable needs.

Further, an examination of the labor hours per unit of electricity and gases produced, as reported by all three Respondents, clearly shows that the production of electricity and gases is

indeed not labor-intensive. For example, Baosteel reported [* * *] hours of labor to produce [* * *]KwH of electricity ([* * *] seconds of labor per KwH). Benxi reported [* * *] hours of labor to produce [* * *] KwH of electricity ([* * *] seconds of labor per KwH). Similarly, Benxi reported [* * *] hours of labor to produce [* * *] cubic meters of oxygen ([* * *] seconds per cubic meter of oxygen). Anshan reported [* * *] hours of labor to produce [* * *]KwH of electricity ([* * *] seconds of labor per KwH), and [* * *] hours of labor to produce [* * *]cubic meters of oxygen ([* * *] seconds of labor per cubic meter of oxygen).

Comparatively, Anshan's reported capital depreciation costs for 2000 at the electricity plants amount to [* * *] RMB. Converted to U.S. dollars at the current exchange rate of $0.12/RMB[6], this is $ [* * *] or $ [* * *] of capital depreciation costs per KwH of electricity for the total electrical output of [* * *] KwH produced during 2000. Compared to the [* * *] of a second of labor Anshan reported per KwH of electricity output during the POI, the production of electricity is indeed capitally-intensive. Benxi's April 9, 2001 response reveals that Benxi's capital depreciation costs for 2000 were [* * *] RMB, or $ [* * *]. However, Benxi did not provide the output of electricity in 2000 in response to the Department's request, denying the Department the possibility of a similar comparison of Benxi's capital-intensity and labor-intensity. An equivalent comparison is also not possible for Boasteel, given that it failed to fully respond to the Department's March 12, 2001 request for capital depreciation costs.

In summary, the information contained in Respondents' responses identify numerous components of the extensive capital facilities and equipment used to produce electricity and gases. The verification reports identify multiple electricity and/or gas facilities at each of the

[6]Chinese RMB have been pegged to the U.S. dollar since 1994.

Respondents' production sites, and the Respondents have reported significant capital depreciation costs during 2000 for the production of electricity and gases. In addition, an analysis of record evidence allows the Department to decisively conclude that these processes are indeed not labor-intensive.

Combined, this record evidence amply speaks to the extensive scale of the Respondents' electricity and gas production facilities, providing substantial evidence in support of the Department's observation regarding the capital intensive nature of production of these factors, despite any explicit confirmation thereof by the Respondents. Moreover, given that all three respondents failed to fully answer direct questions as to the scope of their production facilities, and given the evidence cited above, we do not find convincing Respondents' Anshan's and Benxi's claim that a paucity of information on this topic exists.

As expressed in our redetermination at pages 9-10, record evidence in this case does not indicate that the surrogate company self-produced any electricity or gases. As such, record evidence does not indicate that the surrogate company incurred the associated significant capital costs. As explained in our redetermination, the Department has valued Respondents' actual self-produced electricity and gases to assure that the full value of these factors, including capital costs, is included in the normal value calculation.

Comment 3: The Department Has Sidestepped Its Failure To Address the Statutory Requirement That It Value Respondent's Factors of Production

Respondents Anshan and Benxi contend that, as it noted in previous comments, the Department does not address the fact that the statute requires it to determine an NME respondent's factors of production. Instead, argue Respondents Anshan and Benxi, the

Department falls back on a false sense of security that it derives from its "overriding goal in conducting its analyses . . . to achieve the greatest degree of accuracy possible." See Draft Redetermination at 16. Respondents Anshan and Benxi contend that the irony of the application of this overarching principle in this case is beyond belief, and that the Department apparently believes that accuracy is achieved by burying its head in the sand and ignoring the facts as they know them to be and the facts as the CIT declared them to be.

Petitioner U.S. Steel contends that Anshan and Benxi's allegation that the Department has sidestepped the statutory requirement regarding the valuation of an NME respondent's factors of production fails for the same reasons as their assertion regarding the Department's purported failure to explain its NME valuation methodology. Petitioner U.S. Steel argues that, as it noted in previous comments, the Department explained in its Draft Redetermination (at 4-5) that the Department's preexisting practice in valuing self-produced factors is to examine the record on a case-by-case basis to determine the most accurate valuation, and that depending on the specific facts and circumstances of the case, the Department either values the inputs into self-produced factors or the self-produced factors directly. Petitioner U.S. Steel contends that in this case the Department correctly chose the latter methodology because it produced the most accurate result, and the Department has not sidestepped anything, but rather has made a methodology selection contrary to Anshan and Benxi's liking.

Department's Position

We disagree with Respondents Benxi and Anshan. Section 773(c)(1)(B) of the Act, cited by Benxi and Anshan, states:

"the administering authority shall determine the normal value of the subject merchandise

on the basis of the value of the factors of production utilized in producing the merchandise..."

However, the statute, the regulations, and the Department's Statement of Administrative Action are all silent on the issue of the proper valuation of self-produced factors *per se.* The Department therefore is faced with three choices for proper valuation in this situation: the first is to not value the self-produced factors or the inputs into the self-produced factor, which is unacceptable as doing so would clearly understate the normal value. The second is to value both the self-produced factor and the inputs into the self-produced factor, which is similarly unacceptable, because in so doing, the Department would be double counting and thus overstating normal value. The final choice is to value either the self-produced factor or the inputs into the self-produced factor. As the statute is silent on this issue, the proposition which the Department advances in this remand determination is that in making the determination as to which set of factors to value, the Department will determine which valuation will produce the most accurate result given the totality of the evidence on the record at the time of the decision. By letting accuracy guide its determination, the Department is implementing its analysis consistent with its responsibility to calculate the most accurate normal value possible.

Comment 4: The Department Has Not Provided Any New Evidence or Citation to Law to Explain Its Deviation from Practice

Respondent Baosteel contends that the Department chose to "recycle" its explanation from its original final determination rather than provide any new evidence or citation to law to support its deviation from practice. Respondent Baosteel argues that the Court's opinion left no ambiguity regarding the deficiencies in the original determination and its analysis of the original

determination was clear: "Commerce's Valuation of Plaintiffs' Intermediate Inputs is Unsupported by the Evidence and Not in Accordance With Law." See Slip Op at 6. Respondent Baosteel claims that the Department's Draft Redetermination fails to provide any new factual evidence to support its discredited original final determination and ignores the Court's ruling, and that this defect alone renders the Draft Redetermination inadequate and non-responsive to the Court's opinion.

Petitioner U.S. Steel contends that, as it has explained in previous comments, "the driving factor behind the Department's decisions in valuing self-produced factors has been to determine which valuation of self-produced factors generates the most accurate result on a case-by-case basis based on the record evidence." See Draft Redetermination at 5 (emphasis added). Petitioner U.S. Steel contends that based on its case-by-case examination, the Department in this investigation valued the self-produced factors directly, because that methodology produced the most accurate result. Petitioner U.S. Steel argues that the Department did not "recycle" its explanation from the Final Determination; rather, it provided a detailed explanation of its preexisting valuation methodology, along with illustrative examples drawn from Department investigations of ways in which the methodology is applied, and provided a detailed explanation of why it elected to value Baosteel's self-produced energy factors through direct valuation.

Department's Position:

We agree with Respondent Baosteel that the Department provided no new evidence to support our redetermination. In fact, the court has not instructed the Department to open the record of this investigation such that any new evidence may be permissible. Accordingly, we cannot and shall not refer to evidence that is not on the record of this case. However, as indicated

by Petitioner U.S. Steel, we have directly cited to evidence already on the record of this case which has not previously been cited. On page 7 of the redetermination, we cited Anshan and Benxi's classification of oxygen, nitrogen, argon, and electricity as energy factors. In our redetermination at 9, we specified in detail the amounts of electricity used by Anshan and Benxi during the POI to produce subject merchandise sold in the United States.

We disagree with Respondent Baosteel that the Department provided no new citations to the law to support our redetermination. In fact, the Department directly cited to seven previous court decisions and eight antidumping duty investigations in support of our redetermination conclusions. Among these, only two of the antidumping duty investigations were cited for the Final Determination in this case. Finally, this comment ignores the extensive discussion the Department provided regarding the goal of accuracy as underpinning the case-by-case analysis of record evidence used to determine which set of factors to value, either self-produced or inputs to self-produced.

Comment 5: The Department Has Continued to Ignore the Statutory Mandate to Value Baosteel's Factors of Production

Respondent Baosteel argues that the Department has offered no new factual evidence or legal analysis to explain its failure to use Baosteel's submitted and verified factors of production, contrary to the Court's opinion:

> Commmerce's failure to rely on Plaintiffs' submitted and verified factors of production is . . . inconsistent with the statute's directive to use the best available information to construct an nonmarket economy ("NME") product's normal value as it would have been if the NME were a market economy country.[7]

[7] See Slip Op at 6-7.

Respondent Baosteel contends that the Department's Draft Redetermination lacks any explanation of how its decision is consistent with its "'statutory mandate to accurately estimate the actual experiences of an NME respondent as if it were a market economy.'" See Slip Op at 9. Respondent Baosteel also contends that the Department provided no explanation of how Baosteel's inputs for electricity and industrial gases are not the appropriate factors for valuation.

Petitioner U.S. Steel argues that Baosteel's allegation – that by failing to use its submitted factors of production, the Department has ignored its statutory mandate to accurately estimate Baosteel's actual experience and has also failed to explain why Baosteel's submitted factors are not the appropriate factors for valuation – is incorrect. Petitioner U.S. steel contends that the Department's Draft Redetermination did not ignore the statutory mandate, but adhered to it, and with respect to accuracy, the Department explained in detail (at 5-7) why it valued Baosteel's self-produced energy factors directly and found that "the overall calculation is more accurate because fewer inaccuracies are introduced into the analysis." See Draft Redetermination at 7 (emphasis added). Furthermore, according to Petitioner U.S. Steel, the Department did not fail to explain why Baosteel's submitted factors were not the appropriate factors for valuation in this case, but rather, the Department in its Draft Redetermination (at 6) explained that in the Final Determination, it "sought to balance the implications of valuing either the self-produced factors directly or, instead, valuing the inputs into those self-produced factors." Petitioner U.S. Steel argues that the fact that the Department ultimately determined that direct valuation produced a more accurate result in this case does not mean that Baosteel's submitted factors were not considered.

Department's Position:

We disagree with Baosteel that the Department has failed to use Baosteel's submitted and verified factors of production. In Baosteel's April 2, 2001 Section C & D questionnaire response, Baosteel reported the electricity and gas factors of production that have been used in the redetermination. We verified these factors of production on location at Baosteel's production facility in May of 2001. We note that we have made no adjustments or alterations to Respondents' actual reported and verified electricity and gas factors.

We disagree with Respondent Baosteel that the Department has not provided any explanation of how our decision is consistent with the statutory mandate to accurately estimate the actual experiences of an NME respondent. Section I.A. of our redetermination, titled "Goal of Accuracy," explains the Department's overriding goal of obtaining accuracy. Section I.D. of our redetermination, titled "Analysis of Record Evidence," explains how the methodology employed in this redetermination achieves the most accurate estimate of normal value. We found in our redetermination at 7 that "the overall calculation is more accurate because fewer inaccuracies are introduced into the analysis."

Comment 6: The Department's Reasoning for Its Change of Practice Remains Unsupported by the Evidence and Not in Accordance With Law

Respondent Baosteel argues that the Department has chosen to rehash explanations already rejected by the Court, rather than explain why it was necessary to deviate from its practice without giving parties an opportunity to comment, and that this does not respond to the Court's instructions that the Department provide an adequate explanation for its actions.

Respondent Baosteel asserts that the Court summarized the Department's analysis in the

original final determination as follows:

> Commerce reasoned that the use of Plaintiffs' factors of production data would result in a mathematically incorrect result and understate normal value.
>
> Commerce also reasoned that Plaintiffs' self-generation of the energy inputs in question . . . is a heavily capital intensive process. According to Commerce, Plaintiffs' capital intensive process would result in further inaccuracies . . .[8]

Respondent Baosteel argues that the Draft Redetermination simply repackages these purported justifications, which the Court already has dismissed, and has offered no new explanation or factual evidence addressing the Court's concern that the Department (i) had no basis for finding that TATA does not produce power and (ii) the subsequent reasoning that TATA's purported production experience precluded the Department from valuing Baosteel's factors of production for intermediate inputs:

> The fact that TATA purchases power, however, does not negate the possibility that it produces power as well . . . Nowhere in the Final Determination does Commerce address this issue, nor does it provide any further explanation as to its rationale that a company's purpose of power excludes the possibility of its production.[9]

Respondent Baosteel contends that the Department has failed to address the Court's concerns regarding industrial gases, and that whatever conclusions the Department might draw regarding power (i.e., electricity), the Court noted that such conclusions cannot extend to industrial gases:

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[8] See Slip Op at 14.

[9] See Slip Op at 15-16.

> Even if TATA did not produce power, no implication would arise regarding its use of oxygen, argon, and nitrogen. Commerce fails to provide any explanation as to why TATA would treat such elemental gases as power inputs, nor how they could be used to "produce power" . . . Consequently, even if Commerce's conclusion regarding TATA's purchase of power were supported by substantial evidence, it would remain inapplicable to TATA's oxygen, argon, and nitrogen production.[10]

Respondent Baosteel argues that the Department's draft redetermination does not address the Court's clear admonition, but instead focuses on issues not cited by the Court.

Petitioner U.S. Steel contends that Baosteel's assertion that the Department has chosen to "rehash" and "repackage" its rationale is wrong because the predicate is wrong. According to Petitioner U.S. Steel, the Department did not deviate from its valuation practice, but instead applied the direct valuation methodology after correctly concluding that direct valuation produced the most accurate result. See Draft Redetermination at 4-7. Petitioner U.S. Steel argues that the Draft Redetermination is not a rehash, because the Department explained its practice in valuing self-produced factors and the alternative methodologies available to it, gave a detailed explanation of why it selected the methodology used in this investigation, and analyzed the record accordingly.

Department's Position:

We disagree with Respondent Baosteel that we have not explained our practice and our methodology in this case. The redetermination explains the Department's case-by-case practice of valuing intermediate factors A) prior to this case (See I.B. "Prior Practice in Valuation of Self-Produced Factors"), B) in this case (See I.C. "Methodology Employed in this Investigation"), and C) after this case (See I.E. "Recent Practice in Valuing Self-Produced Factors of Production"). Further, we disagree with Respondent Baosteel that we have not given parties an opportunity to

[10] See Slip Op at 17.

comment. Comments herein from Respondents Baosteel, Anshan, and Benxi, and Petitioner U.S. Steel Corporation are evidence of such opportunity.

Finally, we agree with Respondent Baosteel's assertion that we have provided no new factual evidence. In fact, the court has not instructed the Department to open the record of this investigation such that new factual evidence may be permissible. However, as commented by Petitioner U.S. Steel and detailed in the Department's position at Comment 4, we have directly cited to evidence already on the record of this case which has not previously been cited.

Comment 7: The Draft Redetermination Continues to Place the Burden of Appropriate Surrogate Valuation on Respondents When the Department Itself Did Not Explain the Rationale for Its Change in Methodology or Use the "Best Information Available" to Value Factors of Production

Respondent Baosteel argues that the Department, and not the parties to the investigation, is the entity charged by the Statute and the Department's regulations to create the factual record for valuing factors of production. Respondents cite the Statute:

> The valuation of the factors of production shall be based on the best information available regarding the values of such factors in a market economy country or countries considered appropriate by the administering authority.[11]

Respondent Baosteel contends that the Department's standard practice in non-market economy cases is to invite, but not require, parties to submit surrogate value information to assist the Department in compiling the "best available information" for factor valuation, and that the Department's continued reliance on information it now acknowledges to be false cannot be

[11] See 19 U.S.C. § 1677b(c)1.

considered a decision based on the "best information available."

Respondent Baosteel argues that the Department's decision not to value all of the inputs Baosteel used in producing subject merchandise is based on neglect of its obligation to use the "best information available" and is inconsistent with the Court's instructions. Respondent Baosteel contends that because the Department did not provide parties with notice of its intention to change its methodology for calculating normal value before the final determination, parties did not have the opportunity to assess the potential significance of a methodological adjustment that hinged on whether or not TATA produces electricity.

Respondent Baosteel argues that only the Department was privy to its intentions and, therefore, only the Department knew of the significance of the issue of whether TATA self-produced electricity, and that furthermore, the Department should not hide behind the cloak of the parties' surrogate value submissions when the Department itself is charged with using the "best information available." Respondent Baosteel contends that the Department has significant experience in Indian steel cases and was examining TATA in a parallel proceeding while it was examining Baosteel, and that given the Department's extensive experience with steel producers in India, it should be well aware that TATA (as do most integrated steel producers), self-produces electricity. Respondent Baosteel claims that, despite the Department's knowledge of TATA's operations, it dismisses its responsibility in one sentence rather than addressing the Court's concerns:

> There is no evidence on the administrative record of this proceeding that the surrogate company, TATA, produced electricity, and no evidence that the surrogate company self-produced any of its argon, nitrogen, or oxygen.[12]

[12] See Draft Redetermination at 8.

Department's Position:

We agree with Respondent Baosteel that the Department is charged by the statute to create a factual record. We also agree with Baosteel that the Department should invite, but not require parties to submit surrogate value information to assist the Department in its task of compiling the record, as we have done in this case. However, while the Department has the responsibility to administratively create and maintain the record, the Department and interested parties share the ability to develop the content of the record. In this situation, Baosteel and other interested parties were on notice that the proper valuation of electricity and gases was controversial and that the submission of full TATA financial statements would have made them available for the Department's consideration. (See footnote 3 at page 10 of this redetermination). Further, we note that the 19 USC 1677b(c)(1) also charges the Department with using the best available information on the record to calculate normal value. In our redetermination at 4, we indicate that 19 USC 1677b(c)(1) does not specify what constitutes the best available information, and that the statute does not require the Department to follow any single approach in evaluating data. As we explained in our redetermination at 3, we adhere to an overriding goal of accuracy our calculation in choosing what information is the "best information available".

We disagree with Respondent Baosteel that we did not use the best information available on the record. We explained our approach to evaluating the data to use the best available information on the record of this case in our redetermination at 6.

Comment 8: The Draft Redetermination Fails to Acknowledge the Court's Recognition that TATA Produces Electricity

Respondent Baosteel contends that the Court warned the Department that the deference

normally afforded to it in judicial reviews of Department decisions is not warranted when the Department has made a determination based on incorrect factual determinations. Respondent Baosteel cites the Court:

> Although Commerce issued (the Cold-Rolled Carbon Steel from the People's Republic of China) determination subsequent to the determination under review in the present case, this court may take judicial notice of subsequent events that are properly brought to the court's attention.[13]

Respondent Baosteel asserts that the Court then warned that "deference is not owed to a determination that is based on data that the agency generating those data indicates are incorrect" (see Slip Op at 16), and that the Draft Redetermination fails to address the Court's concerns, instead attempting to explain away the Department's actual knowledge that TATA self-produced electricity. Respondent Baosteel asserts that the Court noted: "Indeed, Commerce acknowledged TATA's electricity production capabilities in a recent determination." See Slip Op at 16. Respondent Baosteel claims that the Department itself spent nearly two pages discussing "non-record evidence" of TATA's self production of electricity (see Draft Redetermination at 11-13), and that rather than heed the Court's treatment of this issue, the Department hid behind its record in the original investigation. Respondent Baosteel contends that the Department's failure to acknowledge that TATA self-produces electricity forces the Department to attempt to explain its decision by way of circular logic based on flawed assumptions, and that this falls far short of the "adequate explanation" required by the Court's remand order, especially in light of the Court's clear statements in its opinion.

Respondent Baosteel argues that the Department claims that its "overriding goal in conducting its analyses is to achieve the greatest degree of accuracy possible" (see Draft

[13] See Slip Op at 16.

Redetermination at 16), but that the Department has fallen far short of this goal in the present case, preferring to rely on information it has already acknowledged to the Court to be false, citing Slip Op at 17: "Commerce's decision in the present case therefore directly contradicts its previous acknowledgment that, during the year in question, TATA produces a significant amount of electricity it consumed." Respondent Baosteel contends that the Department's failure to acknowledge in both its original Final Determination and Draft Redetermination that TATA self-produced electricity renders its "finding" that TATA did not produce electricity non-responsive to the Court's concerns.

Department's Position:

We disagree with respondent Baosteel. The court instructed the Department to "either (1) provide an adequate explanation for its deviation from previous practice, or (2) assign surrogate values to Plaintiff's factors of production for its self-produce intermediate inputs." In order to comply with the court's remand instructions, the Department's remand determination carefully reviewed the evidence on the record of this investigation, as well as providing a detailed and comprehensive discussion of the methodology used to reach the conclusions in the Final Determination, thereby providing the explanation sought by the court.

Comment 9: The Draft Redetermination Does Not Address the Court's Concern that the Department's Rationale for Assigning Surrogate Values to Some Intermediate Inputs, But Not All, Is Arbitrary

Respondent Baosteel contends that the Draft Redetermination does not respond to the Court's concern that the Department has applied an inconsistent methodology to intermediate inputs:

> The alleged difficulty of determining factors of production for intermediate inputs stands in sharp contrast to Commerce's treatment of other intermediate inputs in the present case . . . Commerce's rationale would unfairly disadvantage any NME producer wishing to produce its own inputs. The conclusion is contrary to the statute's directive to use the "best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority."[14]

Department's Position

We disagree with Respondent Boasteel. Other self-produced factors that Respondent Baosteel has reported in this investigation include quick lime, powder calcium carbonate, mixed calcium carbonate, dolomite, processing heavy oil, pure water, industrial water, filtered water, and soft water. The Department does not presume that the production of these materials A) incurs significant capital depreciation costs, nor that B) the capital depreciation costs incurred in the production of these materials would amount to a significant portion of Baosteel's total capital costs for the production of hot-rolled steel. Furthermore, there is no evidence on the record to suggest that Baosteel's production of these materials includes separate facilities that house major capital equipment or groups of equipment. If such is the case, Baosteel failed to report such equipment or facilities in its April 2, 2001 response to the Department's specific request for this information (See Comment 2). The Department recognizes that Baosteel also failed to provide

[14] See Slip Op at 18, quoting 19 U.S.C. § 1677b(c)(1).

information regarding its electricity and gas capital equipment in its April 2, 2001 response. However, additional information exists on the record that indicates that Baosteel's capital equipment for electricity and gas production is indeed significant (See Comment 2), despite having not directly reported it to the Department.

If the production of these secondary input materials such as mixed calcium carbonate and filtered water were indeed an important aspect in identifying and modeling the capital structure of a steel company for purposes of calculating normal value, the Department would not hesitate to reconsider its choice of valuing the inputs to produce these intermediate factors, rather than valuing the intermediate factors themselves. However, the record does not support such a finding in this case.

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James J. Jochum
Assistant Secretary
for Import Administration

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Date