

**Public Document**

Atar, S.r.l. v. United States  
Court No. 07-86 Slip Op. 09-53 (CIT June 5, 2009)

**RESULTS OF REDETERMINATION**

**PURSUANT TO COURT REMAND**

**A. SUMMARY**

The Department of Commerce (the “Department”) has prepared these results of redetermination pursuant to the remand order from the U.S. Court of International Trade (“Court”) in Atar, S.r.l. v. United States, Court No. 07-86, Slip Op. 09-53 (CIT June 5, 2009). In its remand order, the Court directed the Department to reconsider its decision to exclude from the calculation of Atar, S.r.L.’s (“Atar”) constructed value (“CV”) indirect selling expense (“ISE”) and profit rates for home market sales data from the respondents in the prior administrative review<sup>1</sup> that were made outside the ordinary course of trade. As part of this reconsideration, the court directed the Department to provide in the remand determination a justification that sets forth reasons for the Department’s chosen methodology for calculating CV ISE and profit rates and explain why its redetermination satisfies the “reasonable method” requirement of section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended (“the Act”).

The Department issued its draft remand results to interested parties on August 21, 2009. On August 25, 2009, we received comments on the draft remand results. These comments are addressed in section “D. Comments on Draft Remand Results” below. For purposes of these results of redetermination, the Department has reconsidered its methodology. The Department

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<sup>1</sup> Notice of Final Results of Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy and Determination to Revoke In Part, 70 FR 71464 (November 29, 2005) (“Eighth Administrative Review”).

respectfully disagrees with the Court and continues to believe that the methodology used in the Final Results constitutes a “reasonable method” under 773(e)(2)(B)(iii) of the Act. However, in light of the Court’s order, the Department has redetermined the ISE and profit rates consistent with the Court’s statement that including all sales--whether made within or outside of the ordinary course of trade--in the Department's CV ISE and profit calculations in this case constitutes a “reasonable method.” Accordingly, the Department has recalculated Atar’s CV ISE and profit rate using home market sales data from the respondents’ that earned a profit in the Eighth Administrative Review after including sales that were both inside and outside the ordinary course of trade.

## **B. BACKGROUND**

On February 14, 2007, the Department published its final results in the administrative review of the antidumping duty order on certain pasta from Italy. Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 FR 7011 (Feb. 14, 2007) (“Final Results”), and accompanying Issues and Decision Memorandum (“Decision Memorandum”). The period of review (“POR”) covered the period July 1, 2004, through June 30, 2005.

A respondent in that review, Atar, challenged the Department’s Final Results. After a full briefing of all the issues, on June 5, 2009, the Court upheld the Department’s final results in part, particularly (a) the Department’s decision to base Atar’s normal value on something other than Atar’s sale to Angola, and (b) the figure the Department used to value certain services an Atar employee provided to the company. However, the Court remanded the Department’s calculation of Atar’s CV ISE and profit rate. In its remand order, the Court directed the Department to:

- reconsider, and redetermine as necessary, its calculations for Atar’s CV ISE and profit rate and its exclusion from those calculations of the data derived from home market sales of the six respondents in the Eighth Administrative Review that occurred outside the ordinary course of trade;
- support its redetermination by substantial record evidence;
- provide the reasons for the Department’s choices with respect to CV ISE and profit; and
- explain why the remand redetermination satisfies the reasonable method requirement of section 773(e)(2)(B)(iii) of the Act.

Pursuant to the Court’s remand instructions, we have revisited and revised the calculation of CV ISEs and profit for Atar for the reasons explained below.

## **C. ANALYSIS**

### CV ISE and Profit Calculation

Section 773(e)(2)(B) of the Act sets forth three alternative methodologies for calculating selling, general, and administrative expenses and profit when determining constructed value when actual data are not available. In the Final Results, the Department calculated Atar’s CV ISE and profit rates using the weighted-average ISE and profit rates of the respondents in the Eighth Administrative Review (i.e., (1) Barilla G.e.R. Fratelli, S.p.A. (“Barilla”) (formerly Barilla Alimentare, S.p.A.), (2) Corticella Molini e Pastifici S.p.A. and its affiliate Pasta Combattenti S.p.A., (3) Industrie Alimentare Colavita, S.p.A. and Fusco S.r.l. (“Indalco”), (4) Pastificio F.lli Pagani S.p.A. (“Pagani”), (5) Pastificio Antonio Pallante S.r.L. and its affiliate Vitelli Food LLC (“Pallante”), and (6) Pastificio Riscossa F.lli Mastromauro, S.r.L.) in

accordance with section 773(e)(2)(B)(iii) of the Act (i.e., the third alternative). The Department resorted to the third alternative in this case because viable evidence was not available on the record to permit the Department to rely on the other two alternatives. The third alternative allows the Department to use any reasonable method as long as the amount applied for profit is not greater than the amount normally realized by exporters or producers “in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise.” Section 773(e)(2)(B)(iii) of the Act; Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Ninth Administrative Review of Antidumping Duty Order on Certain Pasta from Italy, 71 FR 45017, 45022 (Aug. 8, 2006) (“Preliminary Results”). In its decision, the Court stated that Atar’s CV ISE and profit rates were not determined according to a “reasonable method” as required by the statute. Atar, S.r.L., at 31 (a “preference under which Commerce inflexibly excludes below-cost sales in all situations such as the one presented here cannot serve as a substitute for determining a ‘reasonable method’ for purposes of alternative (iii).”) Thus, the Court directed the Department to: 1) “reconsider its decision to exclude from {its CV ISE and profit} calculations the data derived from home market sales of the respondents in the eighth administrative review that occurred outside the ordinary course of trade”; and 2) explain why the remand redetermination satisfies the “reasonable method” requirement under section 773(e)(2)(B)(iii) of the Act.

As noted above, the Court upheld the Department’s determination that it would not use Atar’s sales to Angola for purposes of its dumping calculations. Additionally, Atar did not have a viable home market for pasta, nor did it have another viable third country market for the foreign like product. Therefore, in accordance with the statute, we based normal value for Atar

on CV. See section 773(a)(4) of the Act. Atar did not have a viable home market and, therefore, the Department could not use its preferred method for calculating CV ISE and profit based on Atar's "actual amount incurred and realized by the specific exporter or producer being examined in the investigation or review for selling, general and administrative expenses, and for profits, in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country." Section 773(e)(2)(A) of the Act. Therefore, the Department looked to a methodology that closely resembles the preferred method, under alternative (iii), which excludes sales made outside the ordinary course of trade. As mentioned above, the Department had data available from other respondents in the most recently completed review (i.e., Eighth Administrative Review) which permitted it to calculate Atar's ISE and profit in a manner that closely resembled the preferred method.

We respectfully disagree with the Court that our use of these data was not reasonable. In its opinion, the Court stated that Commerce excluded the below-cost sales of other respondents without relating that exclusion to any particular circumstances of Atar's. Atar, S.r.L., at 32. Further, the Court stated that the Department provided no finding and no record evidence, from which it could conclude that the partial sales experience of the six respondents in the preceding review (i.e., the sales experience of those respondents as limited to above-cost sales) was a reasonable approximation of what Atar's home market sales experience would have been had Atar had a viable home market for the foreign like product during the POR. Atar, S.r.L., at 30. However, here we do not know what Atar's sales experience would have been because Atar does not have a viable home market. Yet, record evidence shows that the six respondents in the prior review did have sales outside the ordinary course of trade. Further, if these six respondents had participated in this review or if more than one other respondent had

participated in this review with viable home markets, the Department would have had the option to calculate ISE and profit under alternative (B)(ii). Under that alternative, all sales made by these companies outside the ordinary course of trade would have been excluded from Atar's ISE and profit calculation. It is noteworthy that the only other respondent in this review, Corticella Molini e Pastifici S.p.A. and its affiliate Combatteni S.p.A. (collectively "Corticella"), made sales outside the ordinary course of trade. Preliminary Results, at 45021. Nonetheless, as upheld by the Court, the Department did not use Corticella data because to do so would have revealed proprietary information.

Despite our fundamental disagreement with the Court that the CV ISE and profit methodology which the Department used for Atar was unreasonable, we have complied with the Court's instructions to reconsider our CV ISE and profit calculations. In light of the Court's opinion, we conclude that we have no choice but to recalculate Atar's CV ISE and profit. Consistent with the Court's order to reconsider our decision, we calculated the profit using the home market sales data from the six respondents in the Eighth Administrative Review. In doing so, we found that several respondents did not earn a profit, while other respondents did earn a profit. Accordingly, consistent with our practice, upheld by the Court,<sup>2</sup> that CV profit must be a positive amount, we calculated profit for Atar based on data from respondents in the Eighth Administrative Review that earned a profit. Therefore, the Court should find this alternative methodology to be reasonable, in accordance with the statute.

Because the Court concluded that the Department's methodology for calculating the CV ISE and profit rates was unreasonable, it did not consider Atar's additional arguments concerning alleged differences between itself and certain respondents from the Eighth

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<sup>2</sup> Rhodia, Inc. v. United States, 240 F. Supp. 2d 1247, 1254-55 (CIT 2002) ("Rhodia, Inc. v. United States").

Administrative Review whose data was used in calculating CV ISEs and profit. The Court's opinion noted that on remand, if it so chooses, the Department may reconsider these additional arguments and exclude data from certain respondents in its calculations of the CV ISE and profit rates if deemed sufficient to support a conclusion that satisfies the reasonable method requirement. Atar, S.r.L. at 35. The Department, however, is not reconsidering its use of data from certain respondents in the Eighth Administrative Review as it believes that the Department's use of their data was reasonable for the reasons explained in the Decision Memorandum at Comment 2.

#### **D. COMMENTS ON DRAFT REMAND RESULTS**

On August 25, 2009, interested parties submitted comments on our draft remand results of redetermination. These comments are addressed below.

**Comment 1:** The Department's Calculation of Weighting Percentages and the Resultant ISE and Profit is in Error

Atar argues that the Department incorrectly weighted the ISE and profit ratios in its calculation.

Department Position:

We disagree with Atar. The Department properly calculated the weighting percentages, using the data of two respondents from the Eighth Administrative Review. Atar's contention that the Department miscalculated the weighting percentages is based on its incorrect assumption that the Department used data from six former respondents, rather than from two. However, as discussed in the remand redetermination, and in Comments 2 and 3 below, the Department intentionally decided to calculate weighted-average ISE and profit ratios using only the data

from the two companies with a profit. In our calculation memorandum, we have included a printout of the formulas used to calculate the weighted-average ISE and profit ratios.

Comment 2: The Department Improperly Excluded four out of six Producers in Calculating the Weighted-Average Profit

Atar disagrees with the Department's calculation of the weighted-average profit which excluded those entities for which the Department calculated a zero profit. Atar argues that the Department's reliance on Rhodia, Inc. v. United States is misplaced because the profit at issue in Rhodia, Inc. v. United States related to surrogate values presented in financial statements to be used for a non-market economy ("NME") case. According to Atar, this case differs from Rhodia, Inc. v. United States because the zero profits at issue here were calculated for purposes of determining dumping margins and were based on the actual experience of producers in Italy of the subject merchandise. Atar also asserts that a minimum profit requirement has not been established by the statute or the Department's regulations.

Department Position:

We disagree with Atar. As stated above, the Department's practice generally is to exclude those producers with a zero profit from the weighted-average profit calculation. See, e.g., Silicomanganese From Brazil; Final Results of Antidumping Duty Administrative Review, 62 FR 37869 (July 15, 1997). A company with zero profit has no profit and accordingly is not an appropriate surrogate for determining a respondent's profit for CV purposes. As noted in Silicomanganese from Brazil, at 37877, "{t}he {Statement of Administrative Action Accompanying the Uruguay Round Agreements Acts} (at page 839) states: 'because constructed value serves as a proxy for a sale price, and because a fair sales price would recover SG&A expenses and would include an element of profit, constructed value must include an

amount for SG&A and for profit.’’ Further, Barron’s Financial Guides: Dictionary of Finance and Investment Terms (New York: Barron’s Educational Series, 1987) defines profit as the “positive difference that results from selling products and services for more than the cost of producing these goods” and also the “difference that results from selling products and services for more than the cost of producing these goods” and also the “difference between the selling price and the purchase price of commodities or securities when the selling price is higher.” Thus, the general usage of the term “profit” explicitly refers to a positive figure. We disagree with Atar’s conclusion that Rhodia, Inc. v. United States does not support the Department’s practice or that it applies only to NME cases. In that case, the Court determined that it is reasonable for the Department to include only positive figures in the calculation of profit. Further, the Court discussed that the practice of excluding zero profits was derived from market economy cases and upheld the Department’s determination that the same principles for calculating profit apply to market and non-market economy producers.

Comment 3: In Calculating the Weighted-Average ISE the Department Erroneously Excluded Four of the Six Producers

Atar argues that the Department did not provide any rationale for excluding the ISE’s of those companies which did not make a profit. Furthermore, Atar argues that the cited authority for the Department’s decision only addresses profit. Atar states that the ISE amount for all six companies was neither zero nor negative and therefore, the Department had no reason to exclude these entities from the Department’s calculation.

Department Position:

We disagree with Atar. The use of an ISE ratio calculated from all six companies, regardless of whether the companies earned a profit would result in our applying an ISE ratio that

would bear no relationship to the profit ratio calculated for Atar, as explained in Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 68 FR 6712 (February 10, 2003), and accompany Issues and Decision Memorandum at Comment 9. Furthermore, we find that it would be inconsistent and possibly distortive for the Department to calculate a profit ratio based only on companies reporting a profit, yet utilize all companies' data (irrespective of whether they earned a profit or not) in the ISE ratio calculation, as a company's profit amount is a function of its total expenses. We further articulate this practice in Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal From the Russian Federation, 68 FR 6885 (February 11, 2003) and accompanying Issues and Decision Memorandum at Comment 9, where we state, "We also do prefer not to 'mix and match' financial ratios from different companies. In Persulfates from the PRC, we recognized that '{a} company's profit amount is a function of its total expenses.' Persulfates from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 64 FR 69494 (December 13, 1999) ('Persulfates from the PRC'). A company's profit amount is a function of its total expenses and, therefore, is intrinsically tied to the other financial ratios for that company." Therefore, we find that it is reasonable to conclude that profit is a function of ISE, and therefore, ISE would bear no relationship to the profit ratios used in our margin calculation, unless we use the data from the same companies to calculate profit and ISE.

Comment 4: The Department Should have Calculated the ISE and Profit Rates Using a Simple Average versus a Weighted-Average

Atar argues that the Department should have used a simple average, and not a weighted-average, in calculating the average ISE and profit rates. According to Atar, it is the Department's normal practice to use a simple average when combining data for overhead, general

expenses and profit, unless the facts warrant deviation from that practice. See Rhodia, Inc. v. United States. As such, Atar asserts that the facts in this case do not warrant the Department to deviate from its practice. The facts indeed support the Department's practice because using a simple average essentially avoids the problem of eliminating certain producers' contribution to the overall results due entirely to their relative size.

Department Position:

As an initial matter, it is noteworthy to point out that, here in the comments to a draft remand determination, it is the first time in this proceeding that Atar has raised any objections to the averaging method used (e.g., simple vs. weighted), although the Department has used the same weighted-average methodology to calculate CV ISE and profit for Atar in the preliminary and final results, as well as in the draft remand determination. Nonetheless the Department will address these objections here.

We disagree with Atar that in calculating the ISE and profit rates, using data from certain respondents in the Eighth Administrative Review, that the information should be combined using a simple average as opposed to a weighted-average. As noted above, in considering what constituted a reasonable method under alternative (iii), the Department looked to a methodology that resembles the preferred method. Section 773(e)(2)(A) of the Act. Consistent with its preferred methodology, the Department used amounts incurred and realized on home market sales made by producers of subject merchandise. In accordance with the preferred method promulgated in section 773(e)(2)(A) of the Act, in the Eighth Administrative Review the Department calculated the CV profit rates for the respondent's using each respondent's respective home market sales. The Department then used the same profit rates to calculate Atar's CV ISE and profit rates. Thus, the Department had data available from other

respondents in the Eighth Administrative Review which permitted it to calculate Atar's profit rate in a manner that resembles the preferred method.

In using the data available to the Department, as noted above, if the respondents from the Eighth Administrative Review had participated in this review or if more than one other respondent had participated in this review with viable home markets, the Department would have had the option to calculate ISE and profit under alternative (B)(ii) which also resembles the preferred method. Under that alternative, the statute mandates that selling, general, and administrative expenses and profit should be calculated based on the weighted-average of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review. In other words, by using a weighted-average, the Department's calculation of Atar's CV ISE and profit rates was fully consistent with alternative (ii), but for the fact that their profit was based on sales from the immediate preceding review. Thus, under "any other reasonable method" of calculating ISE and profit, it was reasonable for the Department to continue to weight average the ISE and profit rates of the respondent's in the Eighth Administrative Review that earned a profit as it closely resembles both the preferred method and alternative (ii).

Furthermore, using a simple average approach based on ISE and profit data for only two respondents' results in a situation where business proprietary data could be revealed. That is, either of the two companies whose data we are using could calculate the other company's information if we used a simple average approach.

Atar's reliance on Rhodia, Inc. v. United States is misplaced. In that case, protecting business proprietary information was not a concern as all of the profit and ISE data was public

information. In this case, we are relying on business proprietary data for only two companies and to use a simple average method, we risk disclosing business proprietary information.

Furthermore, the Court has recently upheld the Department's use of a CV profit rate that was calculated in the same manner (i.e., using a weighted-average) as the instant case. In Thai I-Mei Frozen Foods Co., Ltd. v. United States, Court No. 05-197, Slip Op. 09-65 (CIT June 24, 2009), the Court affirmed the Department's use of a CV profit rate under section 773(e)(2)(B)(iii) of the Act that was based on the weighted-average above- and below-cost sales data of two surrogate producers.

Comment 5: The Department Should have Considered Atar's Additional Arguments as to the Differences and Similarities Between Atar and the Possible Surrogates

Atar disagrees with the Department's decision not to consider the additional arguments raised by Atar regarding differences and similarities between the Atar and the surrogate producers (i.e., those producers whose data was used as a surrogate for Atar's ISE and profit). Atar notes that the chief argument raised was that one of the surrogate producers, whose data was included in the Department's ISE and profit calculations, is radically and differently situated from Atar. Atar emphasizes that this surrogate producer markets products at a different level of trade, owns its own name brands, and has a vastly different volume and product mix. For these reasons, Atar concludes that the Department's continued reliance on this surrogate producer's data will result in abnormal ISE and profit calculations.

Department's Position:

We disagree with Atar. The Court noted that on remand, the Department may choose to consider these additional comments. The Department believes that the use of the surrogate producers' data, including the producer referred to by Atar in its comments on the draft remand,

was reasonable as explained in the Decision Memorandum at Comment 2. Specifically, the financial data the Department used in this case was specific to producers of subject merchandise and therefore similar to Atar's selling expense and profit expense. Also, the Department's practice of weighing a number of factors in determining the most appropriate profit rate was specific to the facts and circumstances present in Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium from Israel, 66 FR 49349 (September 27, 2001), and accompany Issues and Decision Memorandum at Comment 8 ("Magnesium from Israel") and Notice of Final Determination of Sales at less Than Fair Value: Certain Color Television Receivers from Malaysia, 69 FR 20592 (April 16, 2004), and accompanying Issues and Decision Memorandum at Comment 26 ("Television Receivers from Malaysia"). Those cases differed from the instant case in that in Magnesium from Israel none of the numerous companies whose financial statements were on the record were producers of magnesium and in Television Receivers from Malaysia none of the financial statements on the record were from television producers. Because the record profit data for those cases was less than ideal, the Department weighed a number of factors in determining the most appropriate surrogate companies. In the instant case, the Department relied on respondents' specific foreign like product experience of the directly preceding review. Because such specific information was available on the record, the Department did not have to resort to relying on financial statements of companies that did not produce the subject merchandise as it did in Magnesium from Israel and Television Receivers from Malaysia. Therefore, the analysis suggested by Atar is not warranted. Moreover, we note that alternative (B)(ii), which allows the Department to rely on data from other respondents for surrogate ISE and profit calculations, does not require the Department to analyze the

similarity of the respondents' selling practices. As such, the Department chose not to consider the additional arguments made by Atar.

#### **E. CONCLUSION**

In conclusion, because this Court held that the Department's methodology of excluding sales made outside the ordinary course of trade from its CV ISE and profit calculations was unreasonable, for these draft remand results the Department recalculated Atar's CV ISE and profit rates using home market sales data from the respondents that earned a profit in the Eighth Administrative Review after including sales both inside and outside the ordinary course of trade. Because the Court found that the Department erred in excluding sales made outside the ordinary course of trade in its CV ISE and profit calculation, it should find a methodology that includes sales made both inside and outside the ordinary course of trade in its CV ISE and profit calculations to be reasonable. Therefore, we have used such a methodology to calculate Atar's CV ISE and profit. Based on our recalculation, which takes the interested party comments into consideration, we will assign a dumping margin of 14.45 percent to Atar.

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Ronald K. Lorentzen  
Acting Assistant Secretary  
for Import Administration

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Date