Slip Op. 05–64

SIDERCA, S.A.I.C., Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Before: Pogue, Judge
Court No. 01–00603

[Plaintiff's motion for judgment on the agency record is denied. The Court sustains the International Trade Commission's sunset review determination.]

Decided: June 9, 2005

White & Case, LLP (*David P. Houlihan, Gregory J. Spak, Richard J. Burke, Lyle B. Vander Schaaf, Joanna M. Ritcey-Donohue*) for Plaintiff.

James M. Lyons, Acting General Counsel, *Peter L. Sultan*, Attorney Advisor, United States International Trade Commission, for Defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer, John J. Mangan, James C. Hecht, Stephen P. Vaughn*) for Defendant-Intervenor.

OPINION

Pogue, Judge: Plaintiff, Siderca S.A.I.C. ("Siderca"), challenges the remand determination of Defendant, the U.S. International Trade Commission ("the ITC"), in the sunset review of antidumping orders on certain standard, line, and pressure pipe ("SLP") from Argentina, Brazil, Germany, and Italy. Plaintiff alleges that aspects of the ITC's determination are unsupported by law or substantial record evidence.

BACKGROUND

In August of 1995, pursuant to the ITC's finding that U.S. producers of SLP were being materially injured by competition from dumped imports, the United States Department of Commerce imposed antidumping orders on SLP from Argentina, Brazil, Germany, and Italy. *See Certain Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Argentina*, 60 Fed. Reg. 39,708 (Dep't Commerce Aug. 3, 1995) (notice of antidumping duty

order), *Certain Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Brazil*, 60 Fed. Reg. 39,707 (Dep't Commerce Aug 3, 1995) (notice of antidumping duty order and amended final determination), *Certain Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Germany*, 60 Fed. Reg. 39,704 (Dep't Commerce Aug. 3, 1995) (notice of antidumping duty order and amended final determination), *Certain Small Diameter Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Italy*, 60 Fed. Reg. 39,705 (Dep't Commerce Aug. 3, 1995) (notice of antidumping duty order). Five years later, pursuant to 19 U.S.C. § 1675(c) (2000), the ITC instituted a sunset review to determine whether revocation of the antidumping orders would likely lead to the recurrence of material injury to U.S. SLP producers within a reasonably foreseeable period of time. See 19 U.S.C. § 1675a(a)(1)[1]; *Seamless Pipe from Argentina, Brazil, Germany, and Italy*, 65 Fed. Reg. 41,090 (ITC July 3, 2000) (institution of five-year reviews concerning the countervailing duty and antidumping duty orders on seamless pipe from Argentina, Brazil, Germany, and Italy). The ITC cumulated the volume and effect of imported SLP from three of the four reviewed countries; having so done, the ITC found that these cumulated imports would likely cause recurrence of material injury to U.S. SLP producers within a reasonably foreseeable time. *See Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Brazil, Germany and Italy*, Investigations Nos. 701–TA–362 and 731–TA–707–710 (Review) (July 2001), CR List 2, Doc. 78 at 30 ("Commission's Views").

Plaintiff, an Argentine producer of SLP, challenged these determinations before the Court. The Court upheld the ITC's cumulation determination, but remanded its finding that revocation of the order would likely cause recurrence of material injury within a reasonably foreseeable time.[2] Specifically, the Court remanded the determination so that the agency could (1) explain how it understood and applied the statutory term "likely" in making its determination, (2) address whether certain aspects of its "likely volume" determination were in accordance with law and supported by substantial evidence, (3) address whether certain aspects of its "likely price effects" determination were supported by substantial evidence, (4) address record

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[1] Title 19 U.S.C. § 1675a(a)(1) states, in part:

(1) In general.

In a [sunset review], the Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated.

[2] *Siderca, S.A.I.C. v. United States*, 28 CIT ____ , 350 F. Supp. 2d 1223, 1243 (2004). Familiarity with this opinion is presumed.

evidence suggesting that the domestic industry might not be vulnerable to injury upon revocation of the antidumping order on subject producers' SLP. On remand, the ITC again found likely the recurrence of material injury to the domestic industry in the event of revocation of the antidumping order. Plaintiff now challenges that remand determination.

STANDARD OF REVIEW

The Court reviews the ITC's determinations in sunset reviews to ascertain whether they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* 19 U.S.C. § 1516a(a)(2)(B)(iii).

DISCUSSION

Plaintiff challenges the ITC's determinations on all four issues upon which the Court predicated its remand order. The Court will address the issues in turn.

1. *The "Likely" Standard.*

In its earlier opinion, the Court found that the ITC's determination did not indicate fidelity to the plain meaning of the statutory term "likely." That term is the fulcrum upon which most of the determinations that the agency is required to make in a sunset review turn. For example, the ITC must determine whether material injury is "likely" to continue or recur. *See* 19 U.S.C. § 1675a(a)(1).

Various opinions of the Court have held that the term "likely" should be interpreted to mean "probable," or, to put it another way, "more likely than not." *See, e.g., A.G. der Dillinger Huttenwerke v. United States*, 26 CIT 1091, 1101 n.14 (2002) (explaining that in a countervailing duty sunset review, to satisfy a "likely" standard, a thing must be shown to be "probable," or "more likely than not"); *Usinor Industeel, S.A. v United States*, 26 CIT 367, 474–75 (2002) ("*Usinor I*"), *Usinor Industeel, S.A. v United States*, 26 CIT 1402, 1403–04 (2002), affirmed after remand at 112 Fed. Appx. 59 (Fed. Cir. 2004) (rejecting argument that "likely" means something between "possible" and "probable"). In light of previous cases dealing with contemporaneous reviews finding that the ITC may have employed the wrong standard, contemporaneous statements by the ITC arguing for or advancing a "possible," rather than a "probable" standard, and the lack of discussion of the issue in the determination itself, the Court directed the agency on remand to indicate what standard it had actually used, and if the standard used was incorrect, to revisit its determinations accordingly.

In its remand determination, the ITC states "[i]n our original views in these reviews we applied a 'likely' standard that is consistent with how the Court has defined that term in [its opinion re-

manding the original views] as well as in prior opinions addressing this issue." Views of the Commission on Remand, CR List 2, Doc. No. 147R at 5 ("Remand Determ."). The Court will accept this statement as an assertion that the evidence amassed and cited by the agency is such as to meet or surpass the burden under the "probable" standard. Therefore, at this juncture, the only way in which the agency's statement can be measured is by the sum of record evidence that the agency provides as the rationale for its determinations here.

2. *The likely volume analysis.*

In evaluating whether material injury is likely to recur, the ITC is statutorily required to evaluate three factors and to determine whether they support a finding that revocation would lead to material injury in a "reasonably foreseeable" period of time. *See* 19 U.S.C. § 1675a(a)(1). The first factor concerns the likely volume of subject imports in the event of revocation. This factor itself has four non-exclusive sub-factors: (1) any likely increase in the production capacity or existing unused production capacity in the exporting country; (2) existing inventories of the subject merchandise; or likely increases in inventories; (3) the existence of barriers to the importation of such merchandise into countries other than the United States; and (4) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products. *See* 19 U.S.C. § 1675a(a)(2). In its pre-remand determination, the ITC appears to have considered two additional subfactors, for a total of six subfactors: (5) the extent to which the exporting countries' SLP production was export-driven; and (6) the international business affiliations of the manufacturers in the exporting countries. *See* Commission's Views, CR List 2, Doc. No. 78 at 25–27. In its prior opinion, the Court found that the ITC's evidence on the six subfactors was "minimal at best," but particularly remanded the ITC's evaluation of the product-shifting subfactor and the international business affiliation subfactor, finding that the ITC appeared to rely heavily on both, that the ITC's product-shifting analysis was not in accordance with law, and that its reliance on business affiliations was unsupported by substantial evidence. *Siderca, S.A.I.C.*, 28 CIT at ___, 350 F. Supp. 2d at 1238. The Court will address the ITC's remand discussion of the two subfactors in turn.

i. *Product-shifting.*

The product-shifting subfactor directs the ITC to consider the potential for product-shifting "if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products." 19 U.S.C. § 1675a(a)(2)(D). In its pre-remand determination, the ITC found that the potential for product-shifting was such as to support a de-

termination that the likely volume would be so great as to cause recurrence of material injury. The ITC rested this finding on the fact that subject producers reported that product-shifting was physically possible; i.e, it was possible to adjust machines being used to produce other products so as to produce SLP. *See* Commission's Views, CR List 2, Doc. No. 78 at 24. The Court found, however, that such physical possibility was only the prerequisite for a positive finding as to the product-shifting subfactor, and that the ITC must also find that such shifting would make economic sense for the subject producers.[3] The Court therefore remanded this issue to the ITC. *Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1237–38 (2004). On remand, the ITC again attempts to show that the potential for product-shifting is great enough to support a finding that the likely price effects of revocation will be such as to cause material injury to recur. To this end, the ITC refers the Court to a series of tables representing the subject producers' overall capacity, production, and capacity utilization for the years of the POR. Remand Determ., CR List 2, Doc. No. 147R at 9. The tables reveal that each producer concentrated on a different part of the market: Argentina – small-diameter pipe, Brazil – large-diameter SLP, Germany – other large diameter pipe. *See Certain Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Argentina, Brazil, Germany, and Italy*, Staff Report to the Commission on Investigations Nos. 701–TA–362 and 731–TA–707–710 (Review), CR List 2, Doc. No. 76 at Tables IV–4, IV–6, & IV–8 (May 24, 2001) ("Staff Report"). The data also indicate that overall capacity remained constant during the POR,[4] that capacity utilization was generally high, and that overall production remained fairly steady except for 1999, when total production fell drastically for all subject producers. *Id.* Finally, the data shows that the amount of each product manufactured by each producer – SLP, oil country tubular goods ("OCTG"), mechanical tubing, etc. – varied from year to year. *Id.*

The ITC's efforts to use this evidence to show past product-shifting require the Court to review the meaning of the term "product-shifting." Title 19 § U.S.C 1675a(a)(2)(D) directs the ITC to consider "the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise,

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[3] While the ITC provided evidence to support the notion that prices for SLP are generally higher in the U.S. than elsewhere, the Court found that this fact alone was not sufficient to support a finding that product-shifting was economically rational. *Siderca, S.A.I.C.*, 28 CIT at ____ n.16, 350 F. Supp. 2d at 1237 n.16 (CIT Oct. 27, 2004). The Court noted that in response to an ITC query directly on point, the majority of the foreign producers indicated that they could not product-shift "in response to a relative price change" for SLP vis-a-vis other products because it was not economically feasible. *See id.* The ITC responds to this statement in its remand determination. *See infra* note 7.

[4] While Argentina and Brazil's overall capacity remained the same, Germany's overall production capacity declined slightly during the POR.

are currently being used to produce other products." While the Court's prior opinion in this case did not explicitly state an interpretation of the term "product-shifting" as it occurs in this provision, the Court's understanding has been that product-shifting cannot occur unless machinery or facilities dedicated to the production of a certain good are rededicated to the production of subject merchandise. This understanding is grounded in the idea that the term "product-shifting" is framed and defined by its context: because the provision references "facilities . . . currently being used to produce other products," and "which can be used to produce the subject merchandise," "product-shifting" must refer to using these otherwise-occupied facilities to produce subject merchandise.

It is clear that while the ITC's proffered evidence of varying product-mix is not incompatible with changing the use of machinery so as to produce SLP, the evidence does not clearly show the occurrence or likely occurrence of rededication of facilities, rather than mere fluctuations in capacity utilization amongst already adapted facilities. The ITC has not indicated what the subject producers' capacity to produce each of their products was each year; thus, it is impossible to know what capacity was "dedicated" to a given product only to be later reassigned.[5] While capacity utilization levels for the subject producers are generally high, they are not so high that the fluctuations in product-mix presented here could not be explained by a simple decision to make more or less of a given product on machines already dedicated to those products.[6] The rededication of ma-

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[5] The ITC takes issue in its supplemental briefing with the Court's use of the word "dedicated" to describe machinery used to produce a particular product. The ITC points out that the statute requires only that the ITC look at actual use of machinery that could be used to produce subject-merchandise in producing other products; not at whether machinery is "formally devoted" to the production of non-subject merchandise. ITC's Supp. Br. at 1–2. The Court appreciates the distinction that the ITC is attempting to make between actual use and "formal dedication" to a particular use, but, given the facts of this case, it is too nice a distinction. A machine may be said to be dedicated to the production of a particular product while it is used to produce that product alone. It may be readjusted and thus, rededicated to production of a different product. Depending on the machinery and the products, this process may be a quick and simple one. Here it is clear that such rededication is possible because the foreign producers at issue produce other products on the same machinery and equipment used to produce SLP. *See* Siderca S.A.I.C.'s Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Attach. 2 to Letter from David P. Houlihan & Lyle B. Vander Schaaf, White & Case LLP, to Christopher Cassie, U.S. Int'l Trade Comm'n, Office of Investigations, *Re: Certain Seamless Carbon and Alloy Steel Standard Line, and Pressure Pipe from Argentina et al., Inv. Nos. 701–TA–362 & 731–Ta–707–710 (Review)*, CR List 2, Doc. No. 79 at Question II–6 (Mar. 19, 2001); Vallourec & Mannesman Tubes SA's Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Germany, CR List 2, Doc. No. 82 at Question II–6 (Mar. 19, 2001) (Vallourec & Mannesman Tubes SA, although headquartered in France, produces SLP in Germany and Brazil, and exports SLP from those facilities).

[6] The ITC notes in its remand determination that the subject producers' method of reporting capacity was suspect, and appears to be based on sales or production, rather than available facilities. *See* Remand Determ., CR List 2, Doc. No. 147R at 11. The fact that

chinery, it seems to the Court, would not be necessary to achieve the production figures documented by the ITC. The fact that the ITC believes that this evidence shows product-shifting occurred in the past leads the Court to believe that the ITC's interpretation of product-shifting refers to nothing other than subject producers' ability to vary product mix, regardless of whether this varying mix relies on actual rededication of machinery, or whether it simply reflects varying capacity utilization on dedicated lines.

While it appears to the Court that the ITC is mistaken in this belief, it also appears to the Court that the agency nevertheless has provided sufficient evidence to show that rededication of machinery would be likely in this case. In its prior opinion, the Court asked the ITC to show that product-shifting would be "potentially a rational economic option" for the subject producers in light of revocation of the antidumping order. *Siderca, S.A.I.C.*, 28 CIT at ___, 350 F. Supp. 2d at 1238. Accordingly, the ITC must show that if the U.S. market were attractive enough that subject producers would want to take advantage of it, a rational option for doing so would be to shift production away from less profitable lines and into SLP.

Thus, the necessary elements to this proof are (a) strong U.S. demand and high U.S. price such that the market is attractive (b) subject producers having shown themselves responsive to market pressures in the past, (c) subject producers' physical ability to rededicate machinery, (d) factors counseling that product-shifting away from less profitable products would be an attractive option for entering the U.S. market. The Court finds that the ITC has shown all of these factors.

First, the ITC established in its earlier determination that the price in the U.S. is high, and that there is some consensus that demand will remain strong for the foreseeable future. *See* Commission's Views, CR List 2, Doc. No. 78 at 24–25; Staff Report, CR List 2, Doc. No. 76 at Pages V–17 to V–18. Second, the ITC has directed the Court, on remand, to evidence showing that subject producers have varied their production in the past, ostensibly in response to market changes. Thus, subject producers have shown themselves willing and able to react to changing market conditions. *See* Remand Determ., CR List 2, Doc. No. 147R at 9; Staff Report, CR List 2, Doc. No. 76 at Tables IV–4, IV–6, & IV–8. Third, subject producers ap-

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Siderca calculated its capacity as based on its sales or production, rather than on the number of facilities dedicated to the production of each good, suggests that its production of other products was integrated with its SLP production. Moreover, it was reasonable for Commerce to rely on Siderca's own reporting, assuming that such reporting would present the Plaintiff's practices in the light most favorable to it. Finally, the ITC notes that high fixed costs in the SLP industry require both subject and domestic producers to keep their mills working at high levels. *Id.* It would appear, then, that even if the subject producers' method of reporting capacity might be suspect, their capacity utilization must necessarily be high, as is reflected in the record compiled by the ITC. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–4, IV–6, & IV–8.

pear to be physically capable of rededication of machinery. While the majority of subject producers reported, in their questionnaire responses, that it would not be economically feasible for them to product-shift, *See Siderca, S.A.I.C.*, 28 CIT at ___ n.16, 350 F. Supp. 2d at 1237 n.16, none of them reported that they were not physically able to do so. As the ITC reasonably points out here, their responses should be taken to an extent as "self-serving."[7] *See* Remand Determ., CR List 2, Doc. No. 147R at 12. Fourth, the ITC also determined that there is an antidumping order in place on OCTG, another high-priced product which subject producers make, and in which Plaintiff specializes. The ITC therefore determined that because of the antidumping order on OCTG, there would be an extra incentive to transfer production away from OCTG toward SLP in order to take advantage of the newly opened market for the latter good. *See* Commission's Views, CR List 2, Doc. No. 78 at 25 n.151.[8] Moreover, on remand, in its discussion of subject producers' past behaviors, the ITC directs the Court to charts showing that capacity utilization is generally high among subject producers. *See* Remand Determ., CR List 2, Doc. No. 147R at 9; Staff Report, CR List 2, Doc. No. 76 at Tables IV–4, IV–6, & IV–8. Accordingly, it would appear that the ITC has demonstrated thatupon revocation of the orders, the U.S. market would be an attractive one: given high capacity utilization rates,

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[7] In particular, the ITC reviews Plaintiff's response to the question of whether it could product-shift in response to relative price changes. *See* Remand Determ., CR List 2, Doc. No. 147R at 12. Plaintiff checked the box for "No," and then explained its position by stating that its business strategy, which sought to establish long-term contracts, offering a complete range of products to consumers, made it unlikely that it would be able to shift production in response to the opening of the U.S. market. *See* Siderca S.A.I.C.'s Response to Foreign Producers'/Exporters' Questionnaire: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina, Attach. 2 to Letter from David P. Houlihan & Lyle B. Vander Schaaf, White & Case LLP, to Christopher Cassie, U.S. Int'l Trade Comm'n, Office of Investigations, *Re: Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from Argentina et al., Inv. Nos. 701–TA–362 & 731–TA–707–710 (Review)*, CR List 2, Doc. No. 79 at Question II–9 (Mar. 19, 2001). The ITC notes, however, that as it found, and the Court recognized, a significant portion of Plaintiff's sales of all goods are not bound to any contracts. *See* Remand Determ., CR List 2, Doc. No. 147R at 12; *Siderca, S.A.I.C.*, 28 CIT at ____ n.14, 350 F. Supp. 2d at 1235 n.14.

[8] In its prior opinion in this case, the Court noted that while the ITC claimed that Plaintiff would have a special incentive for switching production over to SLP, as there is a U.S. antidumping order in place on Argentine OCTG, it failed to indicate whether the amount of SLP that would likely supplant OCTG would be significant. *See Siderca, S.A.I.C.*, 28 CIT at ____ n.18, 350 F. Supp. 2d at 1238 n.18. However, it appears to the Court that the agency has remedied this deficiency on remand. First, by demonstrating on remand that Plaintiff is responsive to changing market conditions, the agency has indicated that there is more than a mere physical possibility of product-shifting. Second, by pointing to the relative importance of OCTG to Siderca's business, the agency furnishes a rationale for product-shifting given the current order on OCTG. *See* Remand Determ. at 9 n.36. Because its capacity utilization for all products is high and because OCTG would be subject to a dumping order, were Siderca to decide to make the attempt to import large quantities of SLP to the United States, one of the more obvious ways to accomplish this goal without sacrificing extant SLP production would be to increase production through product-shifting.

ability to rededicate facilities, and the inability to import other types of merchandise without facing dumping duties, product-shifting away from those other types of merchandise and toward SLP is at least "potentially a rational economic option" for subject producers.

It is true that the agency does not engage in any analysis so concise as that above. However, the agency provides all the necessary elements. While the determination is not one of "ideal clarity," the agency's path may still be reasonably discerned, *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974), and sufficient evidence is provided to show what the Court demanded previously – that product-shifting is at least potentially economically rational – if not, as the agency tried to demonstrate, that such shifting has occurred in the past. Thus, the Court here affirms the agency's determination regarding product-shifting.

ii. *Transnational corporate affiliations.*

In its prior opinion, the Court found that the ITC gave weight in its analysis of the likely volume of imports to the finding that the subject producers' transnational corporate affiliations were such as to "enhanc[e] their ability to supply seamless pipe customers with operations in the United States and abroad through flexible supply arrangements, including global contracts." *See Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1238 (quoting Commission's Views, CR List 2, Doc. No. 78 at 26–27). The ITC supported its reliance on the subject producers' transnational corporate affiliations with a citation to the Staff Report, which in turn cited mixed responses on the question of whether there is "an increasing trend on the part of some end users toward using global contracts." Staff Report, CR List 2, Doc. No. 76 at Page V–7. The Court held that this citation did not provide substantial evidence to support the position that the corporate affiliations would allow for a greater volume of subject merchandise to enter the U.S. market, and therefore remanded the issue for clarification. *Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1238–39.

On remand, the ITC states that each subject producer is affiliated with a larger transnational group, and that these affiliations came into existence after the imposition of the antidumping order on SLP in 1995. Remand Determ., CR List 2, Doc. No. 147R at 13–14. The ITC also cites the testimony of several domestic producers that, as part of these transnational groups, the subject producers have "the means and distribution networks in place to start shipping immediately," and that because the transnational groups are already selling other products in the U.S., there would be no lag time upon the revocation of the order during which subject producers would need to slowly build up networks and customer contracts. *Id.* Finally, the ITC notes that after the order on SLP went into effect, one of the

transnational groups began shipping SLP into the U.S. from France, which is not covered by the order, rather than from Brazil or Germany. *Id*.

These additional citations are sufficient to allow the Court to find that the agency has shown a rational basis "between the facts found and the choices made." *Burlington Truck Lines Co. v. United States*, 371 U.S. 156, 168 (1962). From the testimony cited by the ITC on remand, it now becomes apparent that the ITC means to show that, were the orders lifted, the subject producers could use the distribution networks, marketing expertise, and customer contacts of their corporate affiliates already in the United States to enable their reentry into the U.S. market at an accelerated pace. Prior to remand, this was not made clear; while the ITC stated that global corporate affiliations were "such" as to support its likely volume analysis, it made no effort to explain how. The ITC has rectified this problem in its remand determination.

Moreover, Plaintiff has not pointed to any contrary record evidence on this point. Rather, Plaintiff limits its arguments to the claim that, to the extent subject producers' global corporate affiliations indicate that some of these transnational groups have been importing subject merchandise during the POR from non-subject country producers, it is unlikely that the lifting of the orders would create a new influx of imports. *See* Siderca's Comments on ITC's Views of the Commission on Remand Pursuant to Slip Op. 04–133 at 18 ("Pl.'s Remand Comments"). Plaintiff's argument goes not to whether such affiliations could mitigate barriers to entry, but to whether it would be rational for subject producers' transnational affiliates to encourage further shipments into the U.S. However, the ITC appears to have considered the subject producers' transnational affiliations simply as a matter of whether, to the extent that further shipments would occur, barriers to entry (such as establishing sales offices, advertising, hiring, etc.) would be mitigated for the subject producers because of their extant relations with companies already present in the United States. Finally, Plaintiff's "rationality" argument ignores the fact that an increase in imports from the subject producers could be beneficial to the global firms of which subject producers form a part. The price of SLP would be driven down, and the global firms would be in a position to supply the market with extra SLP at the new, competitive price, whereas it appears that domestic producers would be hard-pressed to do so.

Accordingly, the Court holds that the ITC's remand discussion of global corporate contacts and the record evidence upon which it is based support the agency's overall volume finding.

3. *The likely price-effects analysis.*

The ITC is statutorily required to consider two subfactors in evaluating the likely price effects. These are (1) whether there is

likely to be significant price underselling by the subject imports as compared with the domestic like product, and (2) whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of domestic like products. *See* 19 U.S.C. § 1675a(a)(3). In its prior opinion, the Court remanded the ITC's price-effects analysis so that the agency might reconsider both factors in light of the remand analysis of likely volume, and because both factors were independently unsupported by substantial evidence. *Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1242. The Court will now consider the ITC's remand analysis of those two subfactors, in turn.

i. *Likely underselling.*

In its determination prior to remand, the ITC based its analysis of likely underselling on its findings that (1) subject merchandise had outsold domestic merchandise prior to the imposition of the antidumping order, and (2) that questionnaire responses indicated that price was a very important factor in purchasing decisions in the U.S. market. *See* Commission's Views, CR List 2, Doc. No. 78 at 27–28. The Court found no problem with the first finding, but remanded on the finding that the questionnaire responses supported a view that price was an important factor in purchasing. *Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1242.

In making this finding, the ITC relied on the answers to a particular question in its purchasers' questionnaire. *See* Commission's Views, CR List 2, Doc. No. 78 at 27–28. ; *see also* Staff Report, CR List 2, Doc. No. 76 at Table II–1. In this question, the ITC asked purchasers of SLP to list, in order of importance, the three most important factors affecting the choice of a supplier of SLP. *See, e.g.*, Company X Purchasers Questionnaire, CR List 2, Doc. No. 111 at Question III–23 (Feb. 12, 2001). The ITC provided SLP purchasers with a list of example factors, including "current availability, extension of credit, prearranged contracts, price, quality of product, range of supplier's product line, traditional supplier, etc." *Id.* Out of the nineteen purchasers responding to the question, six rated price as the number one factor, six rated price as the number two factor, five rated price as the number three factor, and two did not rate price as one of the top three factors in making purchasing decisions. *See* Staff Report, C.R. List 2, Doc. No 76 at Table II–1.

The ITC also asked purchasers of SLP another question, in which purchasers were invited to rank fourteen purchasing factors as either very important, somewhat important, or not important. *See, e.g.*, Company X Purchasers Questionnaire, CR List 2, Doc. No. 111 at Question IV–10 (Feb. 12, 2001). The ITC then took note of how many purchasers noted each factor as "very important." Five factors were rated as "very important" more often than price. *See* Staff Report, CR List 2, Doc. No. 76 at Page II–13 and Table II–2. Of the five

factors rated more important than price – product quality, product consistency, reliability of supply, delivery time, and availability - SLP purchasers indicated that the domestic product was superior to foreign SLP on delivery time and availability, as good or better on reliability of supply, and generally comparable on product consistency and quality. *See* Staff Report, CR List 2, Doc. No. 76 at Table II–7.

The Court found that the ITC's determination did not account for the fact that while the first survey appeared to show that price was an important factor in purchasing, the answers to the second survey appeared to show that price was less important than a variety of other factors upon which the domestic product was rated comparable or superior. It therefore remanded the issue to the ITC for further clarification. *Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1242.

In its remand determination, the ITC acknowledges that purchaser responses to the second survey indicated that five factors had a higher average "importance rating" than price. Remand Determ., CR List 2, Doc. No. 147R at 19. However, on the two factors with the highest average "importance rating" – product consistency and product quality – both domestic and foreign product were rated by producers as comparable. *Id*. This is hardly surprising, as both must meet the ASTM standards for SLP in order to be acceptable in the U.S. market. *Id*. With respect to the factor with the third highest "importance rating" – reliability of supply – only six out of thirteen producers indicated that the domestic product was superior. *Id*. at 20. Thus, the domestic product and subject merchandise can be considered to be comparable or equal on these three factors.

With respect to the two remaining factors that were considered more important than price – availability and delivery time – the domestic product was rated as superior to subject merchandise. *Id*. Plaintiff appears to have waived any argument that domestic product enjoys a premium because of this superiority – at least no record evidence appears to have been proffered to support the idea. Moreover, The ITC found that the domestic product was generally ranked as inferior to subject merchandise on the issue of price. *Id*. Finally, the ITC found that, of the six purchasers who ranked "price" as only "somewhat important," rather than "very important," in their responses to the second survey, all six ranked price as one of the top three factors in making purchasing decisions in response to the ITC's first survey. Remand Determ., CR List 2, Doc. No. 147R at 20 n.72. The only purchaser to rank price as "not important" during the second survey ranked price among its top three purchasing decision factors in responding to the first survey. *Id*.

The Court finds that this information cures the deficiencies of the ITC's prior determination. The ITC has now squarely confronted the apparent differences between the two surveys and has indicated that, even to the extent given respondents' answers resulted in some

factors being given more weight than price in the tabulation of the results of the second survey, the first survey appears to more clearly indicate the real importance of price to the purchasers. In tandem with the ITC's earlier finding that the subject imports outsold domestic product prior to the imposition of the orders,[9] Remand Determ., CR List 2, Doc. No. 147R at 21–22, the Court holds that the ITC's underselling analysis appears sufficient to support a finding of adverse price-effects in the event of revocation.

ii. *Price suppression and depression.*

In its discussion of the second subfactor, the ITC notes that the original investigation found significant "price depressing and suppressing effects." *See* Commission's Views, CR List 2, Doc. No. 78 at 27. The ITC then notes that given the likely volume of subject imports, the lower prices for foreign SLP reported by purchasers, and a record of consistent underselling in the original investigation, the revocation of the antidumping orders will lead to exports with likely significant price depressing and suppressing effects. *See id.* at 28.

In its prior opinion, the Court found that this finding –that both price depression and suppression would likely occur – was insufficiently explained. *Siderca, S.A.I.C.*, 28 CIT at ___, n.20, 350 F. Supp. 2d at 1239, n.20.

On remand, the ITC explains that when it stated that it was likely that both price suppression and depression would likely occur in the result of revocation of the orders, it did not mean to ambiguously imply that both would happen, across the industry, simultaneously. Rather, it is likely that both would happen, not across the board and simultaneously, but to various companies as they individually varied their business strategies in response to the revocation of the order. Remand Determ., CR List 2, Doc. No. 147R at 22–23. This is to say, it is likely that, given the likelihood of significant underselling by subject imports, some domestic producers would lower their prices, and some would refrain from raising their prices in the future. *Id.* Various companies might employ each strategy in turn. *Id.* If demand for SLP in the U.S. market remains strong, price suppression would be more likely; if demand is weak, depression would more likely occur. *Id.*

The ITC notes that, in its determination in the original investigation of SLP from subject producers' countries, it found that there had been varying reactions of suppression and depression in response to competition from subject producers' imports. *Id.* at 23. The ITC ar-

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[9] The ITC also notes that after the imposition of the orders, purchasers switched away from subject merchandise toward non-subject imports. *See* Remand Determ., CR List 2, Doc. No. 147R at 21; Staff Report at IV–1 n. 1. Presumably, these non-subject imports were more cheaply priced than domestic product, as an antidumping order was placed on many of the countries from which they emanated in 1999.

gues that this fact supports its determination that in the event that the orders are lifted, there will be variable price effects across the market. The ITC states that it believes that, given that the U.S. price for SLP was increasing toward the end of the POR, suppression would be the most likely first response to the revocation of the orders, followed by depression as imports become established in the market. *Id.* at 24.

The Court finds that this explanation is sufficient to meet the ITC's burden to show a "rational basis" between the facts found and the choices made. The remand determination makes clear the ITC's position on the question of suppression and depression.

4. *Likely Impact of Subject Imports.*

_____ The ITC's findings on the likely impact of subject imports necessarily rest on its findings that the likely volume of imports is such as will have an impact, and the likely price effects such as to disrupt the U.S. industry. The Court in its prior opinion also specifically asked the ITC to address whether the ITC's likely impact analysis properly accounted for apparent indicators of "new-found strength" in the U.S. SLP industry. *Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1243.

Pursuant to statute, in addition to evaluating the likely volume and price effects of subject imports in the event of revocation, the ITC must also examine the likely impact of such imports on domestic producers. *See* 19 U.S.C. § 1675a(a)(4). In its initial, pre-remand determination, the ITC found that the domestic SLP industry's financial condition improved after the imposition of the antidumping orders in 1995, but substantial losses were sustained in 1999. *See* Commission's Views, CR List 2, Doc. No. 78 at 28–29.[10] The industry recovered somewhat in 2000. *Id.* at 29. However, between 1995 and 2000, the domestic industry's U.S. shipments, capacity to produce, capacity utilization, and actual production all declined. *Id.*

At the same time, the Court found that the record appeared to show that apparent U.S. consumption of SLP increased significantly in 2000 and that industry prognostications indicate that the market will continue to grow. *See* Commission's Views, CR List 2, Doc. No. 78 at 29 n.180. Respondent domestic SLP firms indicated that they were commissioning new operations, and that operating margins were increasing despite parallel increases in raw material costs.

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[10] The Court notes that 1999 appears to have been a bad year for seamless pipe manufacturers globally. Subject producers' actual production of seamless pipe and capacity utilization slumped in 1999, only to recover markedly in 2000. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–4, IV–6, and IV–8. Total shipments were also smaller than in previous years, although for the Brazilian producer, shipments in 1999 were slightly higher than in 1998, albeit far below shipments in 1997. *See* Staff Report, CR List 2, Doc. No. 76 at Tables IV–3, IV–5, and IV–7.

Moreover, antidumping orders were placed on SLP imports from the Czech Republic, Japan, Romania, and South Africa. *Id.*

While the ITC's determination made some attempt to explain away these developments, its analysis was not sufficient to provide a reasonable basis for discounting them. Therefore, the Court remanded the likely impact analysis to the agency for a fuller discussion of why improving industry indicators did not affect the ITC's determination. *See Siderca, S.A.I.C.*, 28 CIT at ___ , 350 F. Supp. 2d at 1243.

On remand, the ITC explains that while the industry's progress in the year 2000 was very good, it was only so as compared to its state in 1999, a year in which SLP producers around the world suffered. Remand Determ., CR List 2, Doc. No. 147R at 27. While compared to 1999, the 2000 figures were excellent, they showed that the industry was in many respects even weaker than it had been in 1995, the year that the antidumping orders on SLP from subject producers went into effect. *Id.* For example, production levels, market share, domestic shipments, and net sales were all lower in 2000 than they had been in 1995 and industry's 2000 operating income was not sufficient to cover 1999's losses. *Id.* Furthermore, U.S. SLP consumption in 2000 was barely higher than it had been in 1995, and prognostications for the future were mixed. *Id.* at 28. Finally, the ITC notes that the imposition of dumping orders on SLP from countries other than subject producers during the POR is evidence that the domestic industry remained vulnerable to import competition during that time. *Id.* at 29.

There is, of course, as Plaintiff argues, record evidence suggesting a sunnier picture for the industry. Operating income in 2000 was the second highest yearly operating income since 1992. *See* Staff Report, C.R. List 2, Doc. No. 76 at Table I–1. Certain indicators, such as end-of-year inventories, were very good. *Id.* Some indicators suggested that U.S. demand was likely to remain strong. *See* Pl.'s Remand Comments at 26. In point of fact, the record evidence for each view of the industry – as either vulnerable to material injury or strong enough to withstand import competition, even from possibly dumped imports – is strong enough that prior to the remand, the Commissioners split 3–3 on the issue. *See* Commission's Views, C.R. List 2, Doc. No. 78 at 29 n.180.

Such a split in the evidence, however, is not fatal to the ITC's determination. It is well-established that there may be substantial evidence on an administrative record to support two inconsistent determinations. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citation omitted). Substantial evidence, after all, need only be"such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). Reasonable minds may differ. The Court finds that the ITC's remand discussion of the likely impact of

subject imports adequately explains why the ITC found that the industry would be adversely impacted by the lifting of the orders, despite the existence of positive industry indicators. Here, as opposed to its pre-remand determination, the ITC has squarely stated why it feels that those indicators belie the turbulent recent history of the domestic SLP producers, which faced major losses in 1999 and which were harmed by imports from non-market producers. Moreover, even if Plaintiff is correct in stating that demand for SLP is likely to remain strong, it is not at all certain that, given the industry's recent history, U.S. producers would be in a position to capture much of that demand if they were faced with competition from subject producers.

Accordingly, the Court holds that the ITC's analysis of the likely impact of subject imports is supported by substantial evidence.

CONCLUSION

The Court affirms the ITC's use of the term "likely" as applied throughout its remand determination. The Court likewise affirms the agency's findings on the likely volume, price effects, and impact of subject imports in the event of revocation of the antidumping orders on SLP from Argentina, Brazil, and Germany.

SLIP OP. 05–65

BEFORE: RICHARD K. EATON, JUDGE

WUHAN BEE HEALTHY CO., LTD., PLAINTIFF, v. UNITED STATES, DEFENDANT, AND SIOUX HONEY ASSOC. AND AMERICAN HONEY PRODUCERS ASSOC., DEF.-INTERVENORS.

COURT NO. 03–00806

[Commerce's Final Determination on honey sustained in part and remanded in part]

Dated: June 10, 2005

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Bruce M. Mitchell*, *Jeffrey S. Grimson*, *Adam M. Dambrov*, and *Paul G. Figueroa*) for plaintiff Wuhan Bee Healthy Co., Ltd.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*) for defendant United States.

Collier Shannon Scott, PLLC (*Michael J. Coursey*) for defendant-intervenors Sioux Honey Assoc. and American Honey Producers Assoc.

OPINION AND ORDER

EATON, *Judge*. This action is before the court on a Rule 56.2 motion for judgment upon the agency record filed by plaintiff Wuhan Bee Healthy Co., Ltd. ("Wuhan"). By its motion, Wuhan contests certain aspects of the final results of the United States Department of Commerce's ("Commerce") antidumping duty administrative review of honey from the People's Republic of China ("P.R.C.") for the period December 2001 through May 2002. *See* Honey from the P.R.C., 68 Fed. Reg. 62,053 (ITA Oct. 31, 2003) (final results) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons Commerce's final determination is sustained in part and remanded in part.

STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(I) (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987) (citing *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984); *Abbott v. Donovan*, 6 CIT 92, 97, 570 F. Supp. 41, 47 (1983)).

BACKGROUND

When merchandise that is the subject of an antidumping investigation is exported from a nonmarket economy ("NME")[1] country,

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[1] A "nonmarket economy" country is "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19

Commerce determines its normal value by valuing the factors of production utilized in producing the merchandise. Commerce generally values the factors of production by using prices from a market economy country, or surrogate. 19 U.S.C. § 1677b(c)(1). To the extent possible, Commerce is directed to select market economy countries that (1) are at a level of economic development comparable to that of the NME country; and (2) are significant producers of comparable merchandise. 19 U.S.C. § 1677b(c)(4). Commerce is also directed 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." 19 U.S.C. § 1677b(c)(1).

DISCUSSION

I. *The Tribune Article*

As it has in previous cases, Commerce selected India as the surrogate country for valuing the factors of production. Plaintiff makes no objection to this selection. Wuhan does argue, however, that Commerce erred by valuing the factor of production raw honey based on a March 2000 article entitled, "Apiculture, a Major Foreign Exchange Earner," which appeared in *The Tribune*, a Chandigarh, India newspaper. Wuhan urges as being more probative another article, also from *The Tribune*, entitled, "Honey No Longer a Sweet Business." Wuhan's article appeared in the March 2001 edition of the newspaper.[2]

Commerce maintains that it rejected Wuhan's proffered article for three reasons. First, Commerce contends that the article "appears to be limited to raw honey prices in the [n]orthern part of India, rather than country-wide honey prices." A. R. Doc. 770, Issues and Decision Mem. for the Final Results of the New Shipper Rev. of the Antidumping Duty Order on Honey from the P.R.C. ("Issues and Decision Mem.") at 18. Commerce explains:

> Initially, the 2001 article references only areas located in northern India (that is, Punjab, Himacahl Pradesh, and Haryana) and is only specific to two honey processors in a particular region of India. Moreover, the author of the article is from a northern part of India and is a northern Indian beekeeper. Thus, based upon the evidence upon the record, Commerce

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U.S.C. § 1677(18)(A). "Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i).

[2] Wuhan also submitted two honey pricing series, from Jallowal and Tiwana Bee Farms, and defendant-intervenors submitted eleven honey prices from individual companies in India, all of which Commerce rejected. Wuhan's argument as to valuing raw honey, however, focuses solely on the March 2001 article it submitted.

> found that the article does not fairly represent quality country-wide data.

Def.'s Resp., in Opp'n, to Pl.'s Mot. J. Agency R. ("Def.'s Resp.") at 14–15.

Second, Commerce states that "it is not clear whether the raw honey pricing information in respondent's article refers to all raw honey sold in India, or only that sourced from China, Argentina, Germany, and Australia." Issues and Decision Mem. at 18. Commerce maintains that "[t]he plain language of the 2001 *Tribune of India* article references honey prices sourced from" those countries. Def.'s Resp. at 16.

Finally, Commerce expresses concern about the reliability and quality of the purported facts in the March 2001 article, since some of its information "contradict[s] [Indian] honey import data submitted by petitioners." *Id*. Commerce explains:

> Substantial evidence supports Commerce's finding that import information in the 2001 *Tribune of India* article is contradicted by actual Indian import data. In particular, the article attributes a statement to Dr. Gill, Chairperson of the northern India Beekeepers Association, that honey imported from China, Argentina, Germany, and Australia arrived in India "at a price varying between Rs 20 to 25 per kgm." However, Indian Export Import Bank Data placed upon the record by petitioners indicates that no honey was imported into India between April 2000 and March 2001 from Argentina, Germany, or China. These statistics undermine the 2001 *Tribune of India* article's assertion that imports from these countries affected Indian honey prices.

Id. (internal citations omitted).

Wuhan first takes issue with Commerce's assertion that the March 2001 *Tribune* article "appears to be limited to raw honey prices in the Northern part of India, rather than country-wide honey prices." Issues and Decision Mem. at 18. Wuhan argues:

> When the words of the article are read in their entirety, [Commerce's] interpretation contradicts the record evidence. The person interviewed in the article, Dr. Gill, stated:
>
> > The production cost of honey ***in India*** is near Rs. 23 per kg and procurement price is only Rs. 24. Honey is procured by private traders. Moreover, while the production per box in America is near 70 kg per year, ***in India*** it is just 20 to 25 kg.
>
> There is absolutely no rational basis for [Commerce] to suggest that Dr. Gill was talking about prices anywhere but "in India." He did **not** say, "in *my part* of India" or "in *Northern* India."

> [Commerce's] conclusion that it "appears" that Dr. Gill's pricing information was "limited to raw honey prices in the Northern part of India, rather than country-wide honey prices" is completely contradicted by the record.

Br. Supp. Pl.'s R. 56.2 Mot. J. Agency R. ("Pl.'s Br.") at 10 (internal citation omitted) (emphases in original).

Next, Wuhan disputes Commerce's contention that "it is not clear whether the raw honey pricing information in respondent's article refers to all raw honey sold in India, or only that sourced from China, Argentina, Germany, and Australia." Issues and Decision Mem. at 18. The article states in relevant part:

> Dr. Madhu Gill, Chairperson of the Northern India Beekeepers Association[,] says that the honey from China, Argentina, Germany, [and] Australia is landing in the country at a price varying between Rs 20 to 25 per kg. It has affected the beekeepers in a big way. The production cost of honey in India is near Rs 23 per kg and procurement price is only Rs 24.

A. R. Doc. 473, Pl.'s Ex. 4. Wuhan maintains that the article makes clear which honey Dr. Gill was referring to when discussing prices. Wuhan explains:

> A plain reading of the article demonstrates that this is "not clear" only if the actual words of Dr. Gill in the article are ignored. Dr. Gill discussed import prices "landing in the country at a price varying between Rs 20 to 25 per kg." He then stated that the "production cost of honey in India is near Rs 23 per kg and the procurement price is only Rs 24." This is in a *different* sentence as Dr. Gill's discussion of the imports. . . . Dr. Gill's point regarding price depression caused by imports only makes sense if the price range of the imports (Rs. 20 to 25/kg) is contrasted with the procurement prices "in India" (Rs. 24/kg). This reading is consistent with Dr. Gill's point (and the title of the article[,] "Honey No Longer a Sweet Business") since it demonstrates that imported honey could undercut Indian honey by up to Rs 4/kg.

Pl.'s Br. at 12 (internal citations omitted) (emphasis in original).

Finally, with respect to Commerce's stated concerns about the reliability and quality of the March 2001 article, Wuhan claims that Commerce "ignored record evidence that fairly detracted from this conclusion. . . ." *Id.* at 13. Wuhan explains that it

> submitted official export statistics from China and Germany showing that both of those countries did, in fact, export honey to India during the period preceding the March 2001 article. If [Commerce] had considered this evidence, then the record

> would have confirmed Dr. Gill's statement as to honey from three of four foreign sources.

Id.

In addition to disputing Commerce's stated reasons for rejecting the March 2001 *Tribune* article, Wuhan further argues that Commerce should have accepted that article, instead of the March 2000 article, because the March 2001 article is more contemporaneous with the period of review (December 2001 through May 2002) (the "POR"). Wuhan maintains that Commerce's rejection of the March 2001 article, despite its contemporaneity with the POR, was contrary to Commerce's "practice to use data that are the most contemporaneous with the POR when selecting from two or more equally valid surrogate values." *Id*. at 15 (citing Sebacic Acid From the P.R.C., 65 Fed. Reg. 49,537 at Issue 9 (ITA Aug. 14, 2000) (final results)).

Here, the court finds sufficient evidence to support Commerce's rejection of Wuhan's article. First, although it might appear from the wording of the article that Dr. Gill was referring to honey prices in India generally, the article itself references only areas located in northern India and specifically mentions only two honey processors, both located in a particular region of India. For Commerce to conclude that prices from other parts of India would be mentioned if Dr. Gill were really referencing prices from the whole country is a reasonable inference. *See Hebei Metals & Minerals Import & Export Corp. v. United States*, 29 CIT ___ , ___ , slip op. 05–32 at 14 (Mar. 10, 2005) ("Commerce's general mandate . . . to calculate normal value as accurately as possible on the basis of the best available information . . . . allows Commerce to draw reasonable inferences from the record. . . ."). Moreover, the author of the article is from the northern part of India and is a northern Indian beekeeper. A. R. Doc. 473, Pl.'s Ex. 4. Second, Commerce is also justified in finding that it is not clear whether the article's pricing information "refers to all raw honey sold in India, or only that sourced from China, Argentina, Germany, and Australia." Def.'s Resp. at 16 (citing Issues and Decision Mem. at 18). It is indeed unclear how Dr. Gill arrived at a procurement price of Rs. 24 and this lack of clarity is compounded by the reference to selected countries. Though the information conveyed may be in two separate sentences, the sentences are part of a three-sentence string of related, if confusing, information. Finally, Commerce provided evidence tending to show that the prices stated in the article were not reliable. In particular, Commerce found that "no honey was imported into India between April 2000 and March 2001 from Argentina, Germany, or China" and that "these same statistics also contradict the landed prices referenced in the 2001 article." Def.'s Resp. at 17 (citing A. R. Doc. 510, Ex. 2). Although Wuhan produced evidence tending to call some of these facts into question, it is

not sufficient to overcome the totality of the evidence cited by Commerce of the proffered article's lack of utility.

Based on this evidence, the court finds that Commerce reasonably determined that the article submitted by Wuhan was not the best available source for country-wide data. Finally, Wuhan has not provided any affirmative evidence to show that the March 2001 article it placed on the record is more country-wide or more reliable than the March 2000 article. Where there exists on the record "alternative sources of data that would be equally or more reliable . . . it is within Commerce's discretion to use either set of data." *Geum Poong Corp. v. United States*, 26 CIT 322, 326, 193 F. Supp. 2d 1363, 1369 (2002). Thus, the court finds that Commerce is justified in using the March 2000 article to value raw honey.

II. Commerce's Use of Inflator

In addition to the March 2001 *Tribune* article, Wuhan submitted two pricing series for valuing raw honey: one from Jallowal, and the other from Tiwana Bee Farms. Commerce rejected both pricing series for valuing raw honey because they did not represent country-wide prices. Nevertheless, Commerce relied on the pricing series to calculate the necessary inflator[3] for valuing raw honey. As Commerce explained in its Issues and Decision Memorandum:

> Specifically, we relied on the [wholesale price index, or "WPI"] as an inflator for those months when the WPI was representative of inflation of raw honey in India (i.e., to December 2001, the first month of the POR). For those months when the WPI was not representative of raw honey inflation in India, we instead applied as the monthly inflator the average monthly price increase (percentage) of the raw honey prices submitted by respondent (i.e., average of the POR monthly raw honey purchase prices from the Tiwana and Jallowal Bee Farms).

Issues and Decision Mem. at 19. Wuhan argues that Commerce's "use of the Jallowal and Tiwana Bee Farms' data to adjust the surrogate value for raw honey cannot be reconciled with its rejection of that same data as not 'country-wide.' " Pl.'s Br. at 19. In other words, Wuhan argues that Commerce cannot reject the pricing series as not "country wide" for one purpose, yet use the same pricing series for another purpose where country-wide data would also be preferred.

Commerce maintains that "the Jallowal and Tiwana Farms pricing information, though limited to a particular region of India, demonstrates conclusively that raw honey prices increased during several months of the POR." Def.'s Resp. at 23. Commerce explains that

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[3] Because the prices from the March 2000 article correlate to a period prior to the POR, Commerce used an inflator to calculate the raw honey price during the POR.

"record information submitted by respondent clearly indicate[s] that inflating the March 2000, *Tribune of India* price data only by the WPI does not appropriately reflect the significant increase in Indian raw honey prices during the POR." Issues and Decision Mem. at 19. Commerce further points out that the Jallowal and Tiwana Bee Farms data supplied "the only documented raw honey values from actual Indian producers on the record completely contemporaneous with the POR." *Id.* Thus, Commerce states, that information constitutes the best available information for inflating the average raw honey value.

Commerce further maintains that it is not precluded from rejecting this data for one purpose, while using it for another:

> Wuhan has not cited to any statutory, regulatory, or judicial authority providing that Commerce is precluded from using submitted company-specific pricing information to calculate a *rate* of increase simply because Commerce determined that this same information was not suitable for use as the underlying surrogate values. In adhering to its mandate to calculate dumping margins as accurately as possible, Commerce could not ignore the significant rate at which Tiwana's and Jallowal's documented raw honey purchase costs increased during the POR.

Def.'s Resp. at 24 (emphasis in original)

Commerce is given broad discretion "to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1443 (Fed. Cir. 1994). Here, the Jallowal and Tiwana Bee Farms data indicated that raw honey prices increased at a significantly greater rate during the POR than did the WPI. Because this data was the only information on the record demonstrating the extent to which prices had increased, it was therefore the best available information. Moreover, Commerce's decision to reject the Jallowal and Tiwana Farms data for use in calculating the surrogate value for raw honey was based on separate criteria from its decision to use the data to calculate the inflator. In the absence of any other pertinent information on the record, the court finds reasonable Commerce's decision to use the Jallowal and Tiwana Farms data for this limited purpose.

III. Commerce's Use of MHPC's Financial Statements

A. Commerce's Decision to Use MHPC's Financial Statement

Next, Wuhan argues that Commerce's decision to reject the financial statement of Coorg Honey and Wax Producers Cooperative ("Coorg") and instead use that of Mahabaleshwar Honey Producers' Cooperative ("MHPC") was not the best available information. Commerce had two financial statements on the record to choose from to supply the surrogate values for factory overhead; selling, general,

and administrative expenses; and profit ratios. The first was MHPC's 2001–2002 financial statement; the second was Coorg's 2001–2002 financial statement. Both of the financial statements were audited. In its Issues and Decision Memorandum, Commerce explained why it rejected the Coorg statement:

> While Coorg's financial statement is contemporaneous with the POR, we find that it is not the best information in terms of quality or specificity. . . . In particular, we note that the Auditor's Report prefacing Coorg's financial statement identifies the absence of critical information not available for auditing purposes such as governmental loans and subsidies, and discrepancies between specific funds noted in the Auditor's Report and funds listed in Coorg's financial statements. Moreover, because MHPC's financial data is based on subject merchandise while Coorg's financial data includes a significant amount of non-subject merchandise, we find that MHPC's financial data is more reliable.

Issues and Decision Mem. at 27.

Wuhan first argues that Commerce's "conclusion that Coorg's financial statement was unreliable because of accounting discrepancies noted by Coorg's auditor ignores the fact that Coorg's auditor gave the company an 'A class' rating – the same rating granted to MHPC, the company whose financial data [Commerce] deemed to be 'more reliable.' " Pl.'s Br. at 23. Wuhan maintains that the problems cited by Coorg's auditor are "far from being the types of discrepancies that would render a financial statement unreliable (especially one that received an "A class" rating). . . ."[4] *Id.* at 24. Wuhan further argues that while Commerce cites discrepancies between specific funds noted in the Auditor's Report and funds listed in Coorg's financial statements, it "provides absolutely no explanation of what those funds are or why such a discrepancy, if it exists, would render the Coorg financial statement unusable."[5] *Id.* at 24–25.

Next, Wuhan claims that Commerce's finding that the usefulness of Coorg's financials was diminished by the inclusion of a significant amount of non-subject merchandise "is based on a misleading argu-

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[4] These problems include:

1. In many members' accounts, the member's specimen signature and his nominee's name was not taken.
2. Share letters to members were not given.
3. Confirmation letter regarding Balance of Payment to board was not obtained.
4. Entire welfare fund was not deposited.

A.R. Doc. 603, Ex. 3 ¶7.

[5] Specifically, one of the funds listed in the auditor's report, the Depreciation Fund, is not found in Coorg's financial statement.

ment made by the petitioners below, rather than substantial evidence on the record." *Id.* at 25. As Wuhan's counsel explained at oral argument:

> They [petitioners] say that only 55 percent of Coorg sales come from honey. That's extremely misleading when you look at the way they came up with that calculation. They blew out sales through two branches of Coorg [Nagra and Gonigappal]. . . . they pulled them out because the auditor's letter mentioned that sales through one of these branches included some steel products. . . . But when you look at what Coorg buys, only ten percent of its purchases were bullets and cutting instruments. So to completely blow out all honey sales through two branches is really not fair. If you add those back in, 95 percent of Coorg's revenue comes from honey, 95 percent.

Id. (internal citation omitted). In other words, given the low percentage of steel products purchased (10%), Wuhan maintains that significantly more than 55% of Coorg's sales would come from honey (Wuhan estimates 95%). In its papers, Wuhan makes similar observations concerning the methodology defendant-intervenors use to support their argument that the sales through Coorg's Nagra branch consisted of steel products:

> [P]etitioners subtracted Rs. 1,083,598.30 from Coorg's total sales of Rs. 4,821,847.50. Whether it is reasonable to assume, as petitioners did, that all product sold through the Nagra branch was product other than honey, can be tested by Coorg's financial data. According to Coorg's purchases appearing on its 2001–2002 income and expenses schedule, only 10% of Coorg's *purchases* of all raw materials consisted of anything that could possibly be deemed to be "steel." In addition, only 2.6% of Coorg's sales consisted of these same items. Yet Coorg's sales through the Nagra Branch represented 22.5% of Coorg's total sales. This demonstrates that it is not reasonable to assume, as [did] the petitioners and [Commerce], that *all* sales through . . . Coorg's Nagra Branch must consist of "steel products."

Id. at 26 (internal citations omitted) (emphases in original). Wuhan then urges a recalculation: "When the Nagra Branch sales and the Gonigappal Branch sales are added back in, then the record reflects that 95.5%[6] of Coorg's business consists of honey-related activities.

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[6] Wuhan arrived at this figure by subtracting the sales income that Coorg received for "22 gun bullets" (13,175 Rs), "12 bore gun bullets" (111,708 Rs), "cutting instruments" (225 Rs), and "fertilizers" (88,483 Rs) (totaling 213,591), from the amount of total sales (4,821,847.50 Rs), to obtain a figure of 4,608,256.50 Rs. *See* Pl.'s Br. at 25–26. It then divided that number by total sales, resulting in a percentage figure of 95.5%. *See* A. R. Doc. 603, Ex. 3.

Therefore, [Commerce's] conclusion that Coorg's data 'includes a significant amount of non-subject merchandise' is not supported by the record." *Id*. at 27. Moreover, Wuhan claims that its conclusion should have led Commerce to choose the Coorg financials over that of MHPC:

> When compared with MHPC, the company [Commerce] selected, Coorg's percentage of honey-related business is much higher. According to MHPC's financial statement, honey-related activity represented only 55% of MHPC's total sales. The other 45% comes from "fruit canning." Yet, [Commerce] concluded that . . . MHPC's financial data is more reliable. However, [Commerce's] conclusion does not square with the record evidence, which shows that MHPC's honey operations contributed only 55% to MHPC's total sales, a far lower number than Coorg's 95.5 percent.

Id. at 27–28.

Initially, Commerce maintains that it "properly identified and documented the existence of unexplained accounting irregularities in COORG's financial statements," and determined that the irregularities "undermined the reliability of COORG's financial statements." Def.'s Resp. at 27. These "irregularities" include the absence of information needed by the auditor, such as the amount of governmental loans and subsidies and discrepancies between specific funds noted in the Auditor's Report and funds listed in Coorg's financial statements. *See* Issues and Decision Mem. at 27.

With respect to Commerce's finding that Coorg's financial data contained a significant amount of non-subject merchandise, Commerce explains:

> This conclusion is consistent with Commerce's normal practice, which favors the use of financial data to calculate SG&A and profits "that are more narrowly limited to a producer of comparable merchandise than data based on a producer of a wider range of products when the former data are available." Wuhan seeks to discredit Commerce's use of MHPC's financial data by pointing out that MHPC also produces non-subject merchandise. Although . . . MHPC produces non-subject merchandise, Wuhan fails to reveal that MHPC segregates profits and losses in its financial statements by product line. . . . Thus, Commerce's surrogate profit calculation only uses the relevant financial information derived from MHPC's honey operations.

Def.'s Resp. at 28–29 (internal citations omitted).

The antidumping statute "grants Commerce broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Peer Bearing Co. v. United States*, 25 CIT 1199, 1208, 182 F. Supp. 2d 1285, 1298 (2001) (internal citation omitted).

Commerce has explained that its normal practice is to select, where available, data from producers of comparable merchandise over data from producers of a wider range of products. *See* Issues and Decision Mem. for Synthetic Indigo from the P.R.C., 65 Fed. Reg. 25,706 at Comment 6 (ITA May 3, 2000) (final determination). Here, Commerce was justified in finding that Coorg's financial statement was not the best available information on the record. First, Coorg's financials contained irregularities such as missing information (the "Depreciation Fund") and discrepancies with the auditor's report ("Entire welfare fund not deposited"). Next, although both MHPC and Coorg derived income from non-subject merchandise, only MHPC's financial statement separately accounted for the income and expenses related to the non-subject merchandise, by segregating it from the subject merchandise. Thus, even if Plaintiff's recalculation were to be accepted, 5% of Coorg's income would be derived from non-subject merchandise, whereas using MHPC's financials, 100% of income would be from raw honey. *See* A. R. Doc. 503. Thus, Commerce was justified in finding MHPC's financial statement to be more reliable that Coorg's, since Coorg's financials contained irregularities that MHPC's did not, and MHPC's financial statement allowed Commerce to derive profit using only the financial information relevant to honey operations.

B. Commerce's Adjustment of MHPC's Profit Figures

Next, Wuhan argues that "[e]ven if it was lawful to use the MHPC financial data, [Commerce] erred in ignoring the company's stated profit and relying, instead, on a hypothetical calculation to arrive at a profit figure 600% higher than realized by MHPC." Pl.'s Br. at 31. In its Final Results, Commerce explained its reasoning:

> [T]he net profit value listed in MHPC's financial statement appears to reflect a disbursement of gross profit and accruals recorded in a special profit and loss "reserve account," indicating that the amounts recorded in this account are not actual expenses. Inclusion of these amounts from the profit and loss "reserve account" in our profit calculation would cause us to understate MHPC's actual profit for its honey processing operations.

Issues and Decision Mem. at 28.

Wuhan makes two main arguments against Commerce's methodology. First, it argues that Commerce's

> decision to ignore MHPC's stated net profit in favor of a hypothetical construct runs contrary to past determinations of [Commerce]: "[i]n calculating overhead and SG & A, it is [Commerce's] practice to accept data from the surrogate producer's financial statements in toto, rather than performing a line-by-

> line analysis of the types of expenses included in each category."

Pl.'s Br. at 32–33 (internal citation omitted). Second, Wuhan argues that Commerce's decision to exclude the "reserve account" from its profit calculation "runs contrary to its conclusion that MHPC's data is 'reliable.' " *Id.* at 33. Wuhan explains:

> Nowhere did MHPC's auditors complain that, under Indian Generally Accepted Accounting Principles ("GAAP"), deducting reserves from gross profit prior to calculating net profit is either inappropriate or prohibited. There is no mention of such reserves from prior years being spent during the 2001–2002 period in a manner not in accordance with Indian GAAP or that would distort the company's financial picture.

Id. at 34.

For its part, Commerce maintains that while it prefers not to engage in a line-by-line evaluation of overhead accounts, "nothing in [the two Commerce determinations cited by Wuhan][7] indicates [that] Commerce may not undertake such an analysis of *profit* accounts if it has reason to do so." Def.'s Resp. at 31 (emphasis in original).

Commerce "has broad authority to interpret the antidumping statute." *Sigma Corp. v. United States*, 117 F.3d 1401, 1405 (Fed. Cir. 1997). "[T]he critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible." *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Here, Commerce reasonably determined that the amounts recorded in the "reserve account" were not actual expenses and, therefore, including them in its profit calculation would result in an understated profit figure for MHPC's honey processing operations. Although Wuhan cites several determinations indicating that it is not Commerce's practice to undertake an item-by-item analysis of overhead, it cites no such restrictions on Commerce's decision to analyze profit figures and make a single adjustment, nor does it otherwise claim that MHPC's financials are unreliable. Therefore, the court finds that it was reasonable for Commerce to recalculate MHPC's profit based its examination of the financials.

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[7] Wuhan cites the Issues and Decision Mem. for Pure Magnesium in Granular Form From the P.R.C., 66 Fed. Reg. 49,345 (ITA Sept. 27, 2001) (final determination), as evidence of Commerce's past practice: "In calculating overhead and SG & A, it is the Department's practice to accept data from the surrogate producer's financial statements in toto, rather than performing a line-by-line analysis of the types of expenses included in each category." *Id.* at Comment 4. Wuhan further cites Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the P.R.C., 67 Fed. Reg. 45,451, 45,452 (ITA July 9, 2002) (prelim. results), in which Commerce explains that it uses surrogate companies' "reported profit," rather than imposing a profit figure.

IV. Coal Prices

Finally, Wuhan contends that Commerce should have used domestic Indian coal prices for "non-coking steam coal" published in the TERI Energy Data Directory and Yearbook for 2000/2001 ("Teri Data"). Commerce instead used Indian import values, which included charges for the international freight required to ship the coal to India. In objecting to this data, Wuhan explains:

> [The TERI data] provided local prices as of April 20, 2000 for various grades of non-coking coal from regions throughout India. Despite . . . this published and comprehensive pricing information on the record . . . Commerce opted to value coal using Indian import values for a basket category of coal products taken from the Monthly Statistics of the Foreign Trade of India ("MSFTI"). This import value, which included international freight from the exporting countries to India, was *twice as high* as the average domestic price for non-coking coal reported in the TERI Energy Data Directory.

Pl.'s Br. at 36. Wuhan also disputes Commerce's characterization of the Teri Data as being derived from a single producer in India. Wuhan maintains that "[t]he Teri Data reflects prices for 11 subsidiaries of Coal India Ltd. located in almost every state of India. Consequently, Commerce's conclusion that the Teri Data does not represent a country-wide price is not supported by the record." *Id.* at 39. Wuhan relies on the Court's decision in *Yantai Oriental Juice Co. v. United States*, 26 CIT 605 (2002) (not reported in the Federal Supplement), to support its position that Commerce should have used the Teri Data instead of an imported value. In *Yantai*, the Court determined that it

> cannot find Commerce's conclusion that imported steam coal data is the "best available information" is supported by the record because: (1) there is no indication that the domestic Indian coal market was distorted . . . such that the use of import data was preferred; and (2) there is no indication that the use of imported coal values "best approximate the cost incurred" for Indian [subject merchandise] production.

Id. at 617.

Commerce contends that "[t]he *Yantai* decision does not stand for the proposition that Commerce can never rely upon imported coal prices for purposes of its NME surrogate valuations. Rather, *Yantai* states that Commerce must explain why the use of import prices is more accurate than the use of domestic coal prices." Def.'s Resp. at 32. Commerce also states that it specifically considered but rejected the Teri Data because it "is derived from a single producer in India, CIL [Coal India Ltd.]." Issues and Decision Mem. at 31.

Commerce is correct that *Yantai* requires it to explain why the use of imported coal prices best approximates the actual coal costs incurred by the Indian surrogate. However, the court finds that Commerce has failed to adequately explain its reasoning here. First, Commerce determined that the MSFTI data was the best available information to value coal because "it is quality, country-wide data specific to steam coal prices imported into India during the POR, and is representative of competitive market prices." *Id.* Yet, there is no reason given as to why imported coal provides the best surrogate value. In addition, it appears that Wuhan is correct that many regions of India are represented in the Teri Data.[8] Thus, Commerce has not demonstrated that the value used is the best available information or that the Teri Data is unrepresentative of competitive market prices throughout India. Although the court is mindful that Commerce does not have an "unconditional preference" for using domestic prices over import prices when valuing surrogates, on remand, it must provide an explanation that reasonably supports its decision. *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT ___ , ___ , slip op. 05–32 at 11 (Mar. 10, 2005) (ordering Commerce to either "adhere to its conditional preference for domestic surrogate data or . . . state that it is deviating from this practice and provide a rational explanation for doing so.").

CONCLUSION

For the foregoing reasons, the court remands this action to the Department of Commerce for further action with respect to its decision to value coal using Indian import values.

Remand results are due on September 8, 2005, comments are due on October 10, 2005, and replies to such comments are due on October 21, 2005.

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[8] The Teri Data classifies "[n]on-coking coal produced in all states other than Assam, Arunachal Pradesh, Meghalaya, and Nagaland." A. R. Doc. 473, Pl.'s Br. Ex. 4. There are a total of 25 states in India. The Teri Data also contains a chart representing the "[s]elling price of coal in . . . the CIL (Coal India Ltd.) and subsidiaries." *Id.* According to a map provided on CIL's Web site, CIL's subsidiaries are located in various regions of India, including the states of Jharkhand, Madhya Pradesh, Orissa, Assam, and West Bengal. *See* www.coalindia.nic.in (last visited May 25, 2005).

SLIP OP. 05–66

BEFORE: RICHARD K. EATON, JUDGE

FORMER EMPLOYEES OF ERICSSON, INC., PLAINTIFF, v. UNITED STATES SECRETARY OF LABOR, DEFENDANT.

CONSOL. COURT NO. 02–00809

JUDGMENT

Upon consideration of the Revised Determination on Remand ("Remand Results") filed by the United States Department of Labor (the "Department") pursuant to the Court's second remand; upon Plaintiffs' written comments stating that they are satisfied with the Remand Results, the Department's Status Report, and the Department's Supplemental Status Report; upon all other papers filed herein; and upon due deliberation, it is hereby

ORDERED that the Remand Results are sustained in all respects.

Slip Op. 05–67

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

SNR ROULEMENTS; SKF USA INC., SKF FRANCE S.A. and SARMA, Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN U.S. CORPORATION, Defendant-Intervenor.

Consol. Court No. 97–10–01825

ORDER

This matter comes before the Court pursuant to the decision of the Court of Appeals for the Federal Circuit ("CAFC") in *SNR Roulements v. United States*, 402 F.3d 1358 (Fed. Cir. 2005), and the CAFC's mandate of May 31, 2005, reversing and remanding the judgment of the Court in *SNR Roulements v. United States*, 24 CIT 1130, 118 F. Supp. 2d 1333 (2000).[1]

The CAFC held that the United States Department of Commerce's ("Commerce") interpretation of 19 U.S.C. § 1677a in calculating total expenses is permissible. The CAFC reasoned, however, to ensure a fair and equitable dumping margin, Commerce may account for

[1] The Torrington Company was acquired by the Timken Company in 2003, and is now known as Timken U.S. Corporation. The Court refers to defendant-intervenor as Timken U.S. Corporation in the caption.

credit and inventory carrying costs using imputed expenses in total United States expenses and using actual expenses in total expenses "provided that Commerce affords a respondent who so desires the opportunity to make a showing that the amount of imputed expenses is not accurately reflected or embedded in its actual expenses." *SNR Roulements*, 402 F.3d at 1361. Accordingly, pursuant to said decision by the CAFC, the Court hereby

REMANDS this case to Commerce to allow Plaintiffs an opportunity to show that its dumping margin was incorrectly determined because Commerce's use of actual expenses did not account for United States credit and inventory carrying costs in the calculation of total expenses; and it is hereby

ORDERED that the remand results are due within ninety (90) days of the date that this order is entered. Any responses are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

Slip Op. 05–69

Thomas J. Aquilino, Jr., Senior Judge

ALLOY PIPING PRODUCTS, INC., FLOWLINE DIVISION, MARKOVITZ ENTERPRISES, INC., GERLIN, INC., and TAYLOR FORGE STAINLESS, INC., Plaintiffs, v. UNITED STATES OF AMERICA and THE UNITED STATES DEPARTMENT OF COMMERCE, Defendants.

Consolidated Court No. 02–00124

J U D G M E N T

The plaintiffs having interposed a motion pursuant to CIT Rule 56.2 for judgment upon the record compiled by the International Trade Administration, U.S. Department of Commerce ("ITA") *sub nom. Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Final Results of Antidumping Duty Administrative Review*, 66 Fed.Reg. 65,899 (Dec. 21, 2001); and the court in slip op. 04–134, 28 CIT ___ (Oct. 28, 2004), having granted that motion to the extent of remand to the ITA to reopen the record, seek additional relevant information regarding employee bonuses, and recalculate the general and administrative expenses of Ta Chen Stainless Steel Pipe, Ltd. and also to reconsider its U.S. indirect selling expenses; and the agency having reopened proceedings and considered input from the other parties in furtherance thereof; and the defendants having filed herein the ITA's *Final Results of Determination Pursuant to Court Remand* (Feb. 14, 2005); and the court having now reviewed those

results; and none of those other parties having expressed any opposition thereto; Now therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the ITA's *Final Results of Determination Pursuant to Court Remand* (Feb. 14, 2005) be, and they hereby are, affirmed.

Slip Op. 05–70

HEBEI NEW DONGHUA AMINO ACID CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Restani, Chief Judge
Court No. 04–00409
PUBLIC VERSION

[Plaintiff's motion for judgment on the agency record denied; judgment entered for Defendant.]

Dated: June 15, 2005

Hume & Associates PC, (*Robert T. Hume*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*), *Barbara J. Tsai*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

OPINION

RESTANI, Chief Judge:

Plaintiff Hebei New Donghua Amino Acid Co., Ltd. ("New Donghua") challenges the decision of the United States Department of Commerce to rescind its new shipper review of New Donghua as an exporter of glycine into the United States. *See Glycine from the People's Republic of China: Notice of Recision of Antidumping Duty New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd.*, 69 Fed. Reg. 47,405 (Dep't Commerce Aug. 5, 2004) [hereinafter "*Recision Notice*"]. New Donghua claims that Commerce improperly rejected its lone U.S. sale as not bona fide, contesting both the statutory basis for Commerce's bona fide sales analysis and the evidentiary basis for its decision. Because Commerce's decision was in accordance with law and supported by substantial evidence, New Donghua's motion for judgment on the agency record is denied and judgment is entered for Defendant.

BACKGROUND

On March 29, 1995, Commerce published an antidumping duty order on imports of glycine from China, which currently imposes an antidumping duty of 155.89 percent on nearly all Chinese glycine imports to the United States. *See Glycine from the People's Republic of China*, 60 Fed. Reg. 16,116 (Dep't Commerce Mar. 29, 1995) (antidumping duty order).[1]

New Donghua's first sale of glycine to a customer in the United States, the sale at issue in the instant proceeding, entered on February 10, 2003 (referred to hereinafter as the "U.S. sale" or the "new shipper sale"). Pursuant to 19 U.S.C. § 1675 (a)(2)(B) (2000), and 19 C.F.R. § 351.214(d), New Donghua filed a new shipper review request on March 26, 2003, certifying it was both an exporter and producer of glycine and did not export glycine to the United States during the original period of investigation. Section 1675(a)(2)(B) of title 19 enables a new shipper "to demonstrate that it should be accorded a dumping rate specific to itself, and not the 'all-others' rate. . . ." *Tianjin Tiancheng Pharm. Co. v. United States*, No. 03–00654, Slip Op. 05–29 at 2 (Ct. Int'l Trade March 9, 2005).

Commerce initiated a new shipper review to determine whether New Donghua was entitled to its own antidumping duty rate and to calculate a weighted average margin for New Donghua. *See Notice of Initiation of Antidumping Duty New Shipper Review: Glycine from the People's Republic of China*, 68 Fed. Reg. 23,962 (May 6, 2003) [hereinafter "*Notice of Initiation*"]. The period of review covered sales of glycine by New Donghua from March 1, 2002, through February 28, 2003 (the "POR").

I. NEW DONGHUA'S GLYCINE BUSINESS AND THE U.S. SALE

New Donghua began producing glycine in 2000. *New Donghua Sections A, C, D Questionnaire Response* (July 11, 2003), at A–3, P. R. Doc. 11, C.R. Doc. 2, Pl.'s Conf. App. at tab 1. As reported in its questionnaire responses to Commerce, New Donghua sold a small quantity of glycine to a customer in the United States on January 2, 2003. *Id.* at Ex. 1.[2] New Donghua describes the U.S. sale as a "test sale" in which the U.S. importer was attempting "to ascertain whether a dumping margin would apply to the sale so it could determine what prices it could sell glycine for in the United States market." Pl.'s Conf. Op. Br. at 4 (citing *New Donghua First Supp. Questionnaire*

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[1] One Chinese exporter, Nantong Dongchang Chemical Industry Corp., has a separate antidumping duty rate of 18.60 percent. *See Glycine from the Peoples [sic] Republic of China*, 66 Fed. Reg. 13,284, 13,285 (Mar. 5, 2001) (amended final results of new shipper review).

[2] [
]

Response (Dec. 19, 2003), Supp - 21, C. R. Doc. 5, Pl.'s Conf. App. at tab 3).

II. THE PRELIMINARY RESULTS OF THE NEW SHIPPER REVIEW

Commerce issued the preliminary results of the new shipper review on March 2, 2004. *Notice of Preliminary Results of Antidumping Duty New Shipper Review: Glycine from the People's Republic of China*, 69 Fed. Reg. 9,804 (Dep't Commerce Mar. 2, 2004) [hereinafter "*Preliminary Results*"]. The *Preliminary Results* calculated a preliminary dumping margin of 8.89 percent, based in part on adverse inferences made from New Donghua's failure to report factors of production data to the best of its ability. *Preliminary Results*, 69 Fed. Reg. at 9,808. For the purpose of calculating U.S. price, Commerce made a preliminary finding that New Donghua's single U.S. sale was bona fide—i.e., not commercially unreasonable—with the qualification that the bona fide sale issue would be considered further. *Id.* at 9,807.

In the memorandum explaining the preliminary bona fide sale finding, Commerce found a large differential between New Donghua's U.S. sale price and the average unit values ("AUVs") for U.S. imports of glycine from China over the three-year period from 2001 through November 2003 ($2.54) and U.S. glycine imports from all countries ($2.67). *Mem. from Matthew Renkey to Barbara E. Tillman Re: Bona Fide Nature of the Sale in the New Shipper Review of Hebei New Donghua Amino Acid Co., Ltd.* at 3 (Dep't Commerce Feb. 24, 2004) [hereinafter "*Preliminary Bona Fides Memo*"]. Commerce declined to make a preliminary not bona fide finding on the basis of these price comparisons, explaining that New Donghua's U.S. sale was for food grade glycine while the comparison AUVs did not differentiate among the different grades of glycine. *See id.*

Commerce remained concerned about the bona fide nature of the sale, however. It viewed the large price differential between the new shipper sale and the comparison AUVs as "significant." *Id.* Commerce noted "that the quantity of New Donghua's sale is low in comparison with other entries of glycine from the PRC, and is also low in comparison with the quantities of its other international sales to third country markets." *Id.* Commerce also remained "concerned about the fact that this merchandise has not been resold by the importer." *Id.*

III. THE RECISION OF THE NEW SHIPPER REVIEW

Ultimately, Commerce did not adopt the preliminary position it took in the *Preliminary Results* and *Preliminary Bona Fides Memo.* Instead, Commerce rescinded the new shipper review on August 5, 2004, citing three factors as leading to the conclusion that "New Donghua's single sale to the United States is not a bona fide commercial transaction":

A) the pricing of the sale is artificially high and otherwise commercially unreasonable;
B) the quantity of the single shipment is extremely low in comparison with other sales from the People's Republic of China (PRC); and
C) the importer has not resold the merchandise and has otherwise not acted in a commercially reasonable manner.

Mem. re: Bona Fides Analysis for Hebei New Donghua Amino Acid Co., Ltd.'s Sale in the New Shipper Review of Glycine from the People's Republic of China at 5 (Dep't Commerce July 23, 2004), Pl.'s Conf. App., Ex. 7 [hereinafter "*Final Bona Fides Memo*"]; *see also Recision Notice*, 69 Fed. Reg. 47,405.

Commerce explained its decision not to maintain a bona fide sale finding on the ground that the price differential "could not reasonably be accounted for solely by the difference between food and industrial grade glycine." *Final Bona Fides Memo* at 13. In reaching its conclusion as to price, Commerce compared New Donghua's U.S. sale price to (1) the weighted AUV of all Chinese glycine entries during the POR that were of the types covered by the antidumping duty order and not clearly aberrational, based on proprietary data in the United States Customs & Border Protection ("CBP") database;[3] (2) the weighted AUV of all Chinese imports of glycine during the POR based on public import statistics; and (3) the weighted AUV of U.S. imports of glycine from all countries during the POR based on publicly available U.S. import data. *Id.* at 11 (citing *Preliminary Bona Fides Memo* at 2 and attachments 2, 3). In reaching its conclusion as to quantity, Commerce compared New Donghua's U.S. sale quantity to quantities it sold to other markets during the POR and quantities of entries made by other Chinese glycine exporters during the POR. *Final Bona Fides Memo* at 16. In reaching its conclusion regarding the actions of the U.S. importer, Commerce relied on information provided by New Donghua. *Id.* at 17–18.

JURISDICTION

New Donghua timely filed a summons challenging Commerce's decision to rescind the new shipper review on August 13, 2004. New Donghua timely filed its complaint on August 26, 2004. The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a) and 28 U.S.C. 1581(c) (2004).

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[3] [
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STANDARD OF REVIEW

As with other antidumping duty proceedings, the court reviews Commerce's determinations in new shipper reviews to determine whether they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000); *Tianjin Tiancheng Pharm.*, Slip Op. 05–29 at 7.

DISCUSSION

New Donghua contends that (1) Commerce lacked the authority to determine whether New Donghua's sales of glycine were bona fide, and (2) even if Commerce possessed such authority, Commerce misapplied its bona fide sale test.

I. COMMERCE HAS STATUTORY AUTHORITY TO CONDUCT A "TOTALITY OF THE CIRCUMSTANCES" BONA FIDE SALE TEST IN THE COURSE OF A NEW SHIPPER REVIEW

New Donghua challenges the bona fide sale test conducted by Commerce as an unreasonable interpretation of the statute. According to New Donghua, Commerce's practice is contrary to Congress' intent because, without any direction from the statute, Commerce wields the bone fide sale test like an anti-fraud test, imposing the maximum antidumping duties on new shippers whose transactions are deemed not bona fide. *See* Pl.'s Conf. Op. Br. at 17. New Donghua also challenges the act as unreasonably vague in its application, with no parameters to indicate in advance how Commerce will treat a sale. *See id.* at 17–18. Both arguments fail.

A. Commerce's Bona Fide Sale Test Is Consistent With Its Statutory Authority

The court analyzes New Donghua's challenge pursuant to the two-step analysis prescribed by *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If so, the court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If not, the court addresses the second question of whether Commerce's interpretation "is based on a permissible construction of the statute." *See id.*; *see also Koyo Seiko Co. v. United States*, 258 F.3d 1340, 1346 (Fed. Cir. 2001).

Under 19 U.S.C. § 1675(a)(2)(B), Commerce is required to conduct periodic administrative reviews "for new exporters and producers" who submit a properly documented request for review. *See id.* These reviews require Commerce to determine the normal value, export price, and resulting dumping margin for "each entry" of the subject merchandise. *See* 19 U.S.C. § 1675(a)(2)(A)(i), (ii). Although the

term "each entry" seems all-inclusive, this court has recognized that it does not "compel inclusion of all sales, no matter how distorting or unrepresentative." *American Permac v. United States*, 16 C.I.T. 41, 44, 783 F. Supp. 1421, 1424 (1992). Thus, and as New Donghua concedes, the statute does not address specifically the issue of whether, in the course of reviews for new shippers, Commerce is authorized to determine whether the new shippers' sales into the United States are bona fide or commercially reasonable. Pursuant to the second step in the *Chevron* analysis, the issue, then, is whether Commerce has engaged in a permissible construction of the latent ambiguity in the statute's use of the term "each entry." This inquiry is principally to determine whether Commerce's construction was reasonable. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1043 (Fed. Cir. 1996). New Donghua "bear[s] the burden of showing that the agency's approach is arbitrary or otherwise unreasonable." *Koyo Seiko*, 258 F.3d at 1347.

Commerce has articulated the bona fide sale test in the course of its new shipper reviews. *See, e.g.*, *Freshwater Crawfish Tail Meat from the People's Republic of China*, 68 Fed. Reg. 1,439, 1,440 (Dep't Commerce Jan. 10, 2003) (notice of final results and recision of new shipper review); *Fresh Garlic from the People's Republic of China*, 67 Fed. Reg. 11,283 (Dep't Commerce Mar. 13, 2002) (final results and recision of new shipper review). Commerce's reasonable interpretations of its statutory authority in the course of new shipper reviews are entitled to deference. *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("statutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*.").[4]

Commerce's use of a "totality of the circumstances" bona fide sale test in new shipper reviews constitutes a permissible construction of the statute. The reasonable inference from the statutory term "each entry" is that it does not mandate the use of unrealistic, commercially unreasonable sales prices in the calculation of U.S. price. *See Tianjin Tiancheng Pharm.*, Slip Op. 05–29 at 9 ("[T]he ultimate goal of the new shipper review is to ensure that the U.S. price side of the antidumping calculation is based on a realistic figure. . . ."); *see also American Permac*, 16 CIT at 42–43, 783 F. Supp. at 1423 ("Fair (apples to apples) comparison is the goal of the price comparisons required by the antidumping laws, as the courts have stated time and again.") (citing *U.H.F.C. Co. v. United States*, 916 F.2d 689, 697 (Fed. Cir. 1990); *Smith-Corona v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983); *AOC International, Inc. v. United States*, 13 CIT 716, 718,

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[4] Commerce's regulations for new shipper reviews are set forth in 19 C.F.R. § 351.214. These regulations, like the statute, do not discuss a bona fide sale test. *See* 19 C.F.R. § 351.214(b)(2)(iv)(C) (mandating only that a request for a new shipper review establish "[t]he date of the first sale to an unaffiliated customer in the United States.").

721 F. Supp. 314, 317 (1989)). In accordance with the goal of ensuring a realistic U.S. price figure, it is reasonable that Commerce uses the bona fide sale test to exclude sales that are "not typical of normal commercial transactions in the industry." *Tianjin Tiancheng Pharm.*, Slip Op. 05–29 at 5. Accordingly, the court continues to recognize the bona fide sale test as a valid exercise of Commerce's authority. *See, e.g.*, *id.*, Slip Op. 05–29 at 7; *Windmill Int'l Pte., Ltd. v. United States*, 193 F. Supp. 2d 1303, 1312 (Ct. Int'l Trade 2002); *Am. Silicon Techs. v. United States*, 24 CIT 612, 616, 110 F. Supp. 2d 992, 995 (2000).

Apparently conceding a statutory gap, New Donghua argues that Commerce's statutory authority to conduct new shipper reviews is confined to preventing fraud. *See* Pl.'s Conf. Op. Br. at 20. As New Donghua cites no explicit statutory language to this effect, this argument implies that Commerce's duty to calculate antidumping margins based on "each entry" necessarily excepts fraudulent sales but not sales that are unrepresentative of commercial conduct and extremely distortive. Logic does not dictate such a conclusion. Commerce must calculate a realistic U.S. price so that a fair comparison may be made with normal value, and a commercially unreasonable sale may undermine this objective even if Commerce is unable to determine that such sale resulted from fraud. *See Windmill*, 193 F. Supp. 2d at 1312. Accordingly, Commerce acts within its statutory authority when it excludes atypical and distortive transactions without establishing the civil or criminal law elements of fraud.

B. Commerce's Bona Fide Sale Test Is Not Unreasonably Vague

Next, New Donghua argues that Commerce's bona fide sale test "is unreasonable because there are no parameters." Pls' Op. Br. at 17. On the contrary, parameters exist. Because the bona fide sale test derives from a seemingly all-inclusive statutory term, Commerce's authority to exclude sales as not bona fide is limited to "exceptional circumstances when those sales are unrepresentative and extremely distortive." *Am. Silicon Techs.*, 24 CIT at 616, 110 F. Supp. 2d at 995 (quoting *FAG U.K. Ltd., v. United States*, 20 CIT 1277, 1281–82, 945 F. Supp. 260, 265 (1996)); *see also FAG U.K.*, 20 CIT at 1282, 945 F. Supp. at 265 ("In essence, a sale is excluded only when its inclusion would lead to an unrepresentative price comparison, thus frustrating the 'apples to apples' comparison goal of the antidumping laws."). In determining whether a sale is representative of a new shipper's commercial behavior, Commerce applies a "totality of circumstances" test focusing on whether or not the transaction is "commercially reasonable" or "atypical of normal business practices." *Windmill*, 193 F. Supp. 2d at 1313; *see also Tianjin Tiancheng Pharm.*, Slip Op. 05–29 at 8. In evaluating whether or not a sale is "commercially reasonable," Commerce has considered the following factors, among others:

(1) the timing of the sale, (2) the price and quantity; (3) the expenses arising from the transaction, (4) whether the goods were resold at a profit, (5) and whether the transaction was at an arm's length basis. See Windmill, 193 F.Supp. 2d at 1310; Am. Silicon Techs., 24 CIT at 616, 110 F. Supp. 2d at 995. Commerce's practice makes clear that it is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. Thus, a prospective new shipper is on notice that it is unlikely to establish the bona fides of a sale merely by claiming to have sold in a manner representative of its future commercial practices.

New Donghua apparently seeks either prospective guidance or "bright-line rules" regarding bona fide sales. Prospective guidance would conflict with the statutory requirement that antidumping duties be calculated on the basis of entries of subject merchandise, *see* 19 U.S.C. § 1675(a)(2)(A), a requirement reflected in the pertinent Commerce regulation. *See* 19 C.F.R. § 351.212(a) ("the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported."). Similarly, to the extent that New Donghua seeks "bright-line rules" that would give clearer guidance than already exists, it makes the unreasonable demand that Commerce anticipate every circumstance under which any sale of any type of merchandise would be "unrepresentative and extremely distortive." *See Am. Silicon Techs.*, 24 CIT at 616, 110 F. Supp. 2d at 995. Even if such an enterprise were practicable and not contrary to law, the court doubts that the result would offer clearer guidance to a particular shipper of a particular good. *See Tianjin Tiancheng Pharm.*, Slip Op. 05–29 at 32–33.[5]

II. COMMERCE PROPERLY APPLIED THE BONA FIDE SALE TEST

New Donghua contends that, even if Commerce had authority to apply a bona fide sale test considering the totality of the circumstances, Commerce lacked substantial record evidence to support its determination that New Donghua's sale was not bona fide. As noted above, Commerce based its determination on three factors: (1) the

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[5] In *Tianjin Tiancheng Pharm.*, the court noted that Commerce's practice is to evaluate the bona fide nature of a sale on a case-by-case basis: "[w]hile some *bona fides* issues may share commonalities across various Department cases, each one is company-specific and may vary with the facts surrounding each sale." Slip Op. 05–29 at 33 (quoting *Issues & Dec. Mem. to Final Results of the Antidumping Duty New Shipper and Administrative Reviews on Certain Preserved Mushrooms for the People's Republic of China - February 1, 2001 through January 31, 2002*, (July 11, 2003), available at http://ia.ita.doc.gov/frn/summary/prc/03-17628-1.pdf). The court upheld Commerce's exclusion of a single sale as not bona fide: "Given the unusual sale price involved, it was not unreasonable for Commerce to look beyond the price to determine whether other characteristics of the sale were such as to demonstrate that the sale as a whole, was atypical." Slip Op. 05–29 at 33. Atypical or non-typical in this context means unrepresentative of a normal business practice. *See Am. Silicon Techs.*, 24 CIT at 616, 110 F. Supp. 2d at 995.

price was aberrationally high in comparison with Chinese prices and the world price; (2) the quantity of the sale was extremely low in comparison with other shipments of glycine from China; and (3) the importer's behavior was inconsistent with good business practices. *See Final Bona Fides Memo* at 5–21.

A. New Donghua's Sale Price Was Aberrationally High

Commerce determined that New Donghua's sale price was aberrational by comparing the New Donghua price to (1) the weighted AUV of all covered Chinese glycine entries during the POR that were not clearly aberrational, based on proprietary data in the CBP database; (2) the weighted AUV of all Chinese imports of glycine during the POR, based on public import statistics; and (3) the weighted AUV of U.S. imports of glycine from all countries during the POR, based on publicly available U.S. import data. *Final Bona Fides Mem.* at 11.[6] New Donghua's sale price was substantially higher than the three comparison values.[7] These price comparisons constitute substantial evidence for Commerce's conclusion that New Donghua's sale price was "substantially higher than any observed value." *Id.* at 11.

New Donghua challenges Commerce's findings as to price comparisons on several grounds. First, New Donghua argues that, in establishing a benchmark with the AUV of Chinese glycine prices based on proprietary import data, Commerce improperly excluded as aberrational unit values that were higher than New Donghua's price. New Donghua cites three examples of Chinese glycine sales during the POR in which the unit-values of were higher than New Donghua's price. However, the sales cited by New Donghua pertain to a non-glycine product or a type of glycine not subject to the antidumping duty order. *See Rebuttal Brief of Petitioners Dow Chemical Company and Chattem Chemicals, Inc.* (June 23, 2004) at 4 n.11, C. R. Doc. 22. (hereinafter "*Pet'rs Rebuttal Br.*").[8] New Donghua does not challenge directly Commerce's methodology of excluding entries not covered by the antidumping duty order.

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Regarding the prices actually used in the comparison, Commerce excluded only one entry for the POR of the relevant type.[9] This excluded entry exceeded the closest relevant type unit-value for an entry not originating with New Donghua by over 750 percent, making it an obvious outlier. Commerce reasonably excluded the sale as aberrational.

Second, New Donghua contends Commerce contradicted itself by finding New Donghua's price to be artificially high in the bona fides analysis after finding the price to be too low in the *Preliminary Results* antidumping duty calculations, wherein Commerce calculated an dumping margin of 8.89 percent for New Donghua. *See Prelim. Results*, 69 Fed. Reg. at 9,808. No contradiction exists, however. The inconsistency identified by New Donghua is based on mistaken comparisons between two different analyses, each with its own objective. *See Tianjin Tiancheng Pharm.*, Slip Op. 05–29 at 15 n.7. Commerce performs dumping calculations to identify and assess duties upon foreign merchandise that is, or is likely to be, "sold in the United States at less than its fair value." 19 U.S.C. § 1673. Numerous rules apply to dumping margin calculations that are irrelevant to the bona fide sale analysis. For instance, New Donghua's preliminary dumping margin was based, in part, upon adverse inferences made from New Donghua's failure to cooperate to the best of its ability. *Prelim. Results*, 69 Fed. Reg. at 9,805–06. In contrast, a bona fide sale analysis seeks to exclude those sales designed to appear less harmful than sales from other subject producers in the hope of securing a competitive advantage for the subsequent period of review. This distinction between dumping margin calculations and bona fide sales analyses was explained in *Tianjin Tiancheng Pharm.*:

> the combination of a high "all others" rate and the [p]laintiff's high price compared to other import prices could mean two things: either [p]laintiff truly means to replicate the high price sale upon which it predicated the review, or, [p]laintiff will take advantage of one high price sale to secure a lower-than-average dumping margin, and then typically charge a far lower price (low enough to undercut the competition that has a higher dumping margin, but still high enough to make a hefty profit which would otherwise be unavailable). Considering that the latter is a far more profitable avenue, and that, because of the extended timelines of antidumping reviews, [p]laintiff could have more than two years to enjoy an extremely advantageous, and possibly predatory, market position predicated entirely on an atypical sale, the weight of the evidence is in Commerce's favor in holding that the scenario above is likely indicative of an

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> atypical, or non-bona fide, sale. Moreover, *given that the dumping margin calculation and the bona fide analysis address different concerns, there is nothing inherently contradictory in Commerce's finding that a price was low enough to be dumped, and yet so high when compared to other prices in the U.S. market as to be unlikely to be sustained in the future, especially where the motives for not sustaining the price are so clear.*

Slip Op. 05–29 at 15 n.7 (citation omitted, emphasis added). If New Donghua's argument were accepted, a firm intent on unfair competition would be free to manipulate the antidumping duty regime by selling at a price between normal value and the export prices of other subject firms and then lowering its price after obtaining an advantageous cash deposit rate. This is not to say that a new shipper seeking review of a single sale is destined to receive the country-wide rate; price alone would likely be an insufficient basis on which to exclude a transaction. Rather, the bona fides analysis encompasses factors beyond price to assess whether the sale(s) under review are indicative of future commercial behavior. *See Final Bona Fides Memo* at 4 ("Although single sales, even those involving small quantities, are not inherently commercially unreasonable, those factors taken together with other aspects of a transaction may support a conclusion that a transaction is not bona fide."); *see also Issues and Decision Mem.: New Shipper Review of Clipper Manufacturing Ltd.* in *Fresh Garlic from the PRC: Final Results of Administrative Review and Recision of New Shipper Review*, 67 Fed. Reg. 11,283 (Dep't Commerce March 13, 2002) (stating that, in bona fide sales analyses, Commerce examines "a number of factors, all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.").

Third, New Donghua argues that the use of "dumped" Chinese glycine import prices for comparison purposes is inconsistent with legislative history and precedent. Pl.'s Conf. Op. Br. at 24–25. To support its contention, New Donghua cites the conference report on the 1988 amendments to the Tariff Act of 1930, *see* 1998 U.S.C.A.A.N. 1547, 1623, *Omnibus Trade and Competitiveness Act of 1988*, Conf. Rep. to Accompany H.R. 3, H. Report No. 576, as well as precedent. *See Kerr-McGee Chem. Corp. v. United States*, 21 CIT 1353, 1366, 985 F. Supp. 1166, 1177 (1997); *Technoimportexport, UCF America, Inc. v. United States*, 16 CIT 13, 16–17, 783 F. Supp. 1401, 1405 (1992). These authorities do not pertain to Commerce's bona fide sales analyses; they refer to the requirement that Commerce avoid using dumped prices in the calculation of surrogate factors of production in non-market economy antidumping cases. As discussed above, there is no statutory basis for imposing the full spectrum of dumping margin calculation rules on Commerce's bona fide sale test. *See Final Bona Fides Memo* at 12 ("[T]he question being addressed is not what the U.S. price of glycine should be, but

whether the price of glycine determined by New Donghua for a single sale is an artificial one, arrived at largely for the purposes of establishing a new cash deposit rate.").

Apparently, New Donghua would prefer its sale be compared with the AUVs of Chinese glycine that include antidumping duties. This position presumes that AUVs inclusive of dumping duties reflect realities in the U.S. market because all but one of the subject entries for the POR were subject to the same cash deposit rate of 155.59 percent *ad valorem*. Neither New Donghua's price nor the weighted AUV comparison prices for the POR, however, include the cash deposit paid. If Commerce were to compare the price of New Donghua's sale, which does not include the value of cash deposits paid, with weighted AUV data inclusive of cash deposits paid as a contingent liability, the result would be a distorted comparison of two different data types. Without running afoul of New Donghua's legislative intent argument, Commerce, of course, could add cash deposit values to New Donghua's price and the comparison prices, which would not alter the price differentials.

B. The Quantity of the Sale Was Extremely Low

The second factor underlying Commerce's determination is that the quantity of New Donghua's sale was found to be "atypical of the company's normal business practices (its sales to other markets were of significantly larger quantities), as well as the business practices of other Chinese exporters of glycine, which also tend to sell in larger quantities." *Final Bona Fides Memo* at 16.[10] Substantial record evidence exists for both conclusions.

Some of New Donghua's exports during the POR were made through an affiliate. As noted by New Donghua, the affiliate made three glycine shipments during the POR involving small quantities. *See* Pl.'s Conf. Op. Br. at 28.[11] These quantities contradict the parenthetical statement made in Commerce's conclusion, i.e., that New Donghua's "sales to other markets were of significantly larger quantities," but only if the statement is understood to include individual sales involving New Donghua's affiliate. This apparent contradiction

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is, by itself, insufficient to deprive Commerce of an evidentiary basis for its conclusion that the U.S. sale's quantity was atypical of New Donghua's normal business practices. As Commerce stated in the *Final Bona Fides Memo*, the quantity of New Donghua's U.S. sale is "very low when compared to its other international sales of glycine," and the company "made only one shipment to the United States during the POR." *Final Bona Fides Memo* at 16. New Donghua's affiliate made three shipments to a third country during the POR. Aside from these three shipments, all related individual shipment quantities to other markets were indeed significantly higher than the U.S. sale quantity. *See New Donghua Add'l Information for Response to Fourth Supp. Questionnaire* at Exs. 3, 4 (May 20, 2004). There is no basis for requiring Commerce to give more weight to an affiliate's behavior than the principal's.

Commerce's conclusion as to the U.S. sale's atypical quantity is also supported by comparisons to other Chinese glycine exporters' quantities. Commerce found New Donghua's U.S. sale quantity to be the "lowest quantity among glycine entries from China during the POR." *Final Bona Fides Memo* at 16.[12] New Donghua identifies three sales from the PRC by other firms involving relatively small quantities, but, similar to its flawed argument regarding price, these quantities do not pertain to types of entries covered by the antidumping duty order. *See id.*[13]

C. The Actions of New Donghua's U.S. Customer Indicate the Transaction Was Not Commercially Reasonable

Commerce's third basis for rescinding the review was the background and conduct of New Donghua's U.S. customer. Commerce found that the customer (1) "had no previous experience in the glycine business, nor in the chemicals business in general," (2) "paid far above the prevailing import price for glycine from China, and also far above the import price for glycine from all markets," (3) held the glycine so long that 75 percent of its 24-month shelf-life had expired, and (4) had no prospects for a sale at the time of Commerce's decision to rescind the review. *Final Bona Fides Memo* at 19–20. New Donghua does not contest these findings. Because these facts suggest that the new shipper sale's only purpose was to secure an advantageous cash deposit rate, they support Commerce's conclusion that the transaction was not conducted in a commercially reasonable manner.

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New Donghua challenges Commerce's interpretation of the customer's post-sale behavior, describing as reasonable the customer's "express intention of obtaining the results of the new shipper review in order to set a proper resale price." *See* Pl.'s Conf. Op. Br. at 29 (citing *New Donghua First Supp. Questionnaire Response* (Dec. 19, 2003), Supp - 20–21, Pl.'s Conf. App. at tab 3). Similarly, New Donghua's general position is that the circumstances of the sale—including price and quantity—are entirely consistent with its position that the U.S. sale was a test sale and should have been evaluated as such. Commerce acknowledged New Donghua's position, but invocation of the term "test sale" does not have a talismanic effect, negating all indications of an atypical transaction. When a purported test sale is under review, Commerce is not obligated to overlook evidence suggesting that the U.S. sale "was made solely for the purpose of establishing a new antidumping deposit rate, without regard to the commercial reasonableness of the sale." *See Final Bona Fides Memo* at 20. Indeed, the artificial appearance of the U.S. sale is New Donghua's fault:

> In one-sale reviews, there is, as a result of the seller's choice to make only one shipment, little data from which to infer what the shipper's future selling practices would look like. This leaves the door wide to the possibility that the sale may not, in fact, be typical, and that any resulting antidumping duty calculation would be based on unreliable data.

Tianjin Tiancheng Pharm., Slip Op. 05–29 at 38.

New Donghua attempts to support its test sale argument by citing *Am. Silicon Techs.*, which upheld Commerce's decision to conduct a new shipper review on the basis of a test sale. *See* 24 CIT at 619, 110 F. Supp. 2d at 998. In that case, however, Commerce was presented with verifiable indications of the bona fide nature of the test sale. The seller did not request a review, lessening concerns about the seller's motives for a small, high-priced sale. *Id.* The buyer was "an end-user of the silicon metal and did not resell the merchandise at a loss." *Id.* (contrasting the buyer's conduct with the unprofitable sale in *Cut-to-Length Carbon Steel Plate from Romania*, 63 Fed. Reg. 47,232 (Dep't Commerce Sept 4, 1998) (notice of recision of review)). The stated purpose of the test sale—to test the quality of the merchandise—was specific and germane to the buyer's business, which used the merchandise. *See Am. Silicon Techs.*, 24 CIT at 619, 110 F. Supp. 2d at 998.

Here, on the other hand, New Donghua made a single sale and then requested the new shipper review. The U.S. customer is not an end-user and has no previous experience with glycine or the chemicals business in general. As an aspiring middleman in the glycine business, it could reasonably be expected to seek a profitable resale. Its declared intention for not selling the merchandise—to wait for

the final results of the review—is generic and consistent with a desire to obtain a favorable cash deposit rate before lowering prices.

CONCLUSION

The court realizes that when there are very high antidumping duty margins, it may be very difficult for any affected company to enter or reenter the U.S. market. Nonetheless, Commerce is not amiss in trying to avoid creating an unfair playing field and seeking evidence of a bit more of a genuine investment as a show of good faith by the new shipper. Otherwise, circumvention is too likely. On the other hand, the standard for what is a non-bona fide sale must remain relatively stringent, as Commerce's bona fide sales analysis merely fills a gap left by Congress with regard to the exceptional case.

Commerce's decision to rescind New Donghua's new shipper review was supported by substantial evidence and in accordance with the law. Accordingly, New Donghua's motion for judgment on the agency record is denied and judgment is entered for Defendant.

IT IS SO ORDERED.

Slip Op. 05–71

BEFORE: CARMAN, JUDGE

INTERNATIONAL CUSTOM PRODUCTS, INC, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No. 05–00341

[Judgment is entered for Plaintiff after hearings and full consideration of the pleadings, papers, record, and briefs submitted by the parties. Plaintiff's Motion for Summary Judgment is granted. Defendant's Motion to Dismiss is denied. Defendant's Motion for Judgment on the Agency Record is denied.]

Dated: June 15, 2005

Mayer, Brown, Rowe & Maw, LLP (Simeon Munchick Kriesberg), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; *Edward F. Kenny*, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, for Defendant.

OPINION

CARMAN, JUDGE: This case is before this Court pursuant to the following motions of the parties: Plaintiff's Motion for Summary

Judgment[1]; Defendant's Motion to Dismiss Plaintiff's Action for Lack of Subject Matter Jurisdiction and for Failing to State a Claim upon which Relief Can Be Granted ("Defendant's Motion to Dismiss"); and Defendant's Motion for Judgment on the Agency Record Pursuant to Rule 56.1 of the Rules of the United States Court of International Trade ("Defendant's Motion for Judgment on the Agency Record"). Plaintiff contested the imposition of a rate advance by the Bureau of Customs and Border Protection ("Customs") on certain imported product referred to as "white sauce." Based upon the findings of fact and conclusions of law set forth below, this Court enters final judgment in favor of Plaintiff.

BACKGROUND

Plaintiff – International Custom Products, Inc. ("ICP" or Plaintiff) – is an importer and distributor of dairy ingredients. It is not presently a manufacturer but has made a multimillion dollar investment in a manufacturing facility that is under construction in Pennsylvania. Plaintiff imported a product referred to as "white sauce," which is the imported article that is the subject of this litigation. White sauce is a milkfat based product that is used as a base for other products (for example, sauces, salad dressings, and processed cheeses).

Between 1988 and 1994, Plaintiff purchased imported white sauce in domestic transactions. In 1998, in anticipation of itself becoming an importer of white sauce, Plaintiff sought a binding tariff classification ruling from the United States Customs Service (now the Bureau of Customs and Border Protection ("Customs")). On January 20, 1999, Customs issued New York letter ruling D86228, which classified the product described in Plaintiff's ruling request in Harmonized Tariff Schedule of the United States ("HTSUS") tariff subheading 2103.90.9060.[2] HTSUS tariff subheading 2103.90.9060 has since been renumbered and is currently tariff subheading 2103.90.9091.[3]

Plaintiff has been entering white sauce in reliance upon ruling NY D86228 since 1999. In that time, Plaintiff has not altered the ingredients of the imported white sauce. As confirmed by laboratory results, Customs also agrees that Plaintiff has not altered the composition of the imported white sauce.

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[1] At the time Plaintiff's Motion for Summary Judgment was filed, the administrative record in this case was not available. Because the administrative record is now available and is the basis for a decision on the merits in this case, this Court will treat Plaintiff's Motion for Summary Judgment as a motion for judgment on the agency record.

[2] HTSUS (1999) tariff subheading 2103.90.9060 provided for "[s]auces and preparations therefor; . . . : [o]ther: [o]ther: [o]ther: [o]ther" at a duty rate of 6.6% *ad valorem*.

[3] HTSUS (2005) tariff subheading 2103.90.9091 provides for "[s]auces and preparations therefor; . . . : [o]ther: [o]ther: [o]ther: [o]ther" at a duty rate of 6.4% *ad valorem*.

In March 2004, Customs requested information regarding an importation of Kosher white sauce. Plaintiff cooperated with the request for information, responded to specific questions about its white sauce, provided samples of the white sauce, and supplied its customer list. Customs continued its investigation of Plaintiff's importation of white sauce and queried Plaintiff's primary customer about its use of Plaintiff's white sauce. In November 2004, that customer responded that it used all white sauce purchased from Plaintiff in the manufacture of various cheese products.

Based upon the results of its investigation, Customs concluded that the white sauce Plaintiff had been importing was not accurately described by ruling NY D86228. Customs further determined that Plaintiff's white sauce was classifiable in HTSUS tariff subheading 0405.20.3000.[4] On April 18, 2005, Customs issued a Notice of Action reclassifying unliquidated entries and all future shipments of Plaintiff's white sauce in HTSUS tariff subheading 0405.20.3000. The Notice of Action covers approximately 86 entries of Plaintiff's white sauce and specifies that "action has been taken" to rate advance the imported white sauce. The net result of Customs' reclassification of Plaintiff's imported white sauce is an estimated 2400% increase in duty. In addition, the Notice of Action states that "all shipments of this product must be classified as above."

When it received the Notice of Action, Plaintiff immediately ceased importing white sauce. All merchandise then on the water has been placed in a customs bonded warehouse.

On May 6, 2005, Customs liquidated sixty (60) of the entries included on the Notice of Action. On May 9, 2005, Plaintiff filed a summons and complaint with this Court, alleging jurisdiction pursuant to 28 U.S.C. § 1581(h) (2000).[5] Plaintiff requested – among other things – a declaratory judgment that the Notice of Action is null and void because Customs failed to follow its own administrative procedures by revoking or modifying ICP's ruling other than pursuant to 19 U.S.C. § 1625(c) (2000).[6]

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[4] HTSUS (2005) tariff subheading 0405.30.3000 provides for "[b]utter and other fats and oils derived from milk; dairy spreads: . . . [d]airy spreads: [b]utter substitutes, whether in liquid or solid state: [c]ontaining over 45 percent by weight of butterfat: [o]ther." Goods imported under tariff subheading 0405.20.3000 are subject to duty at $1.996 per kilogram and an additional safeguard duty under tariff subheadings 9904.05.47 through 9904.05.47 based on the "CIF" price per kilogram.

[5] 28 U.S.C. § 1581(h) states that

> [t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

[6] 19 U.S.C. § 1625(c) states that

PARTIES' CONTENTIONS

I. *Plaintiff's Contentions*

A. *Jurisdiction*

Although ICP initially pleaded that this Court had jurisdiction over this matter pursuant to 28 U.S.C. § 1581(h), it altered its position and embraced the Court's suggestion that jurisdiction was available under 28 U.S.C. § 1581(i)(4) (2000). In support of the position that the other subsections of § 1581 were manifestly inadequate,[7] Plaintiff argued that it could not be assured – under another subsection of § 1581 – that it would be heard on the merits of its case in time to provide meaningful relief. (Pl.'s Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss and Def.'s Mot. for J. on the Agency R. and in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Reply") at 5.) Plaintiff stated that it would be unable to meet contractual commitments with its principal customer if its importations of white sauce did not resume by the end of May 2005. (Pl.'s Reply at 6.) Further, ICP replied that it faces millions of dollars of tax liability if it is unable to finalize the purchase and installation of the equipment for its manufacturing plant. (Pl.'s Reply at 6.) If the Notice of Action is allowed to stand, ICP alleged that it will breach its contract with its principal supplier. (Pl.'s Reply at 6.) Plaintiff further argued that jurisdiction was proper under § 1581(i)(4) because it would allow the Court to provide a prospective remedy, which a traditional case under § 1581(a) would not.[8] (Pl.'s Reply at 7.)

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[a] proposed interpretive ruling or decision which would –

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or
(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

[7] See the Jurisdiction section of this opinion, *infra*, for the analysis of the requirements to acquire jurisdiction under 28 U.S.C. § 1581(i).

[8] While Plaintiff is technically correct on this point, the Court does not base its jurisdiction decision on the prospectiveness of the relief available under § 1581(i)(4). Although ICP prayed for declaratory relief with regard to future imports of its white sauce, it presented a wolf in sheep's clothes. In fact, ICP couched injunctive relief in declaratory relief terms. Plaintiff failed to properly move for injunctive relief. Therefore, future entries of Plaintiff's white sauce are not before this Court.

B. *Exhaustion of Administrative Remedies*

In response to Customs' argument that Plaintiff's claims be dismissed because it failed to exhaust its administrative remedies, Plaintiff asserted that its claims are ripe for adjudication and that exhaustion of administrative remedies is not appropriate as a matter of law in this case. (Pl.'s Reply at 9.) In support of its position, Plaintiff offered that its issues are fit for judicial decision (because the issues are purely legal, were posed concretely, and relate to a final agency action) and because ICP would suffer hardship if the court withheld its consideration. (Pl.'s Reply at 9 (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–151 (1967)).) Further, Plaintiff cited 28 U.S.C. § 2637(d) (2000) for the proposition that exhaustion of administrative remedies under § 1581(i) is required only "where appropriate." (Pl.'s Reply at 9.)

C. *Unlawful Notice of Action*

ICP also set forth the reasons that the Notice of Action issued by Customs was not lawful. First, ICP stated that Customs' conclusion that the principal use of the white sauce had changed was incorrect as a matter of law because Customs did not properly apply the rule for determining principal use. (Pl.'s Reply at 13.) According to ICP, Customs failed to determine the class or kind of goods to which its imported white sauce belongs (Pl.'s Reply at 15–16) and incorrectly relied upon the actual use of the imported white sauce to establish principal use (Pl.'s Reply at 16–18). ICP further argued that even if the actual use of the imported white sauce were different from the principal use of the class or kind of goods to which the white sauce belongs the binding ruling would remain valid because principal use provisions contemplate that some goods classified thereunder may be put to atypical uses. (Pl.'s Reply at 18–22.)

D. *§ 1625 Applies to the Notice of Action*

ICP next argued that Customs' Notice of Action is an "interpretive ruling or decision" within the scope of 19 U.S.C. § 1625(c). (Pl.'s Reply at 22.) In support of the argument, Plaintiff asserted that Customs' consistent treatment of ICP's white sauce for more than ten (10) years was sufficient to establish at "treatment" within the scope of § 1625(c). (Pl.'s Reply at 23.) In addition, ICP asserted that the Notice of Action satisfied the requirements of an "interpretive ruling" as the term has been defined by this Court and in accordance with Congressional intent. (Pl.'s Reply at 24–30.) Regardless of whether the Notice of Action is an interpretive ruling, Plaintiff urged the Court to rule that the Notice of Action is a "decision" as contemplated by § 1625(c) based on the common meaning of the term and other courts' interpretations. (Pl.'s Reply at 30–34.) Even if the principal use of ICP's white sauce had changed, Plaintiff submitted that

Customs was nonetheless bound to follow the administrative procedures to revoke or modify ICP's ruling. (Pl.'s Reply at 34.)

E. *Other Issues*

Customs challenged Plaintiff's causes of action pursuant to the Administrative Procedure Act (APA) and the Due Process Clause of the United States Constitution.[9] In its brief, Plaintiff refuted Customs' assertions and repeated the validity of ICP's claims. (Pl.'s Reply at 36–37.)

II. *Defendant's Contentions*

In response to Plaintiff's First Amended Complaint and Motion for Summary Judgment, the government filed a Motion to Dismiss and a Motion of Judgment on the Agency Record. The arguments set forth therein are summarized below.

A. *Motion to Dismiss*

1. Lack of subject matter jurisdiction

Defendant contended that this Court lacks subject matter jurisdiction because another subsection – other than that pleaded by Plaintiff or adopted by this Court – of the jurisdictional statute provides an adequate remedy for Plaintiff's claims. (Mem. in Supp. of Def.'s Mot. to Dismiss and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s MTD Mem.") at 4.) The government suggested that because Plaintiff failed to satisfy the administrative prerequisites to qualify for jurisdiction under 28 U.S.C. § 1581(a) (2000), this Court lacks subject matter jurisdiction. In addition, Defendant argued that Plaintiff failed to establish that the other subsections of the jurisdictional statute were manifestly inadequate as required to obtain jurisdiction under 28 U.S.C. § 1581(i). (Def.'s MTD Mem. at 7–12.) Specifically, Defendant insisted that economic or financial harm that may occur as a result of pursuing a traditional jurisdictional subsection is insufficient to demonstrate that the other subsections are manifestly inadequate.

2. Ripeness and failure to exhaust administrative remedies

Defendant urged that this Court rule that Plaintiff's case is not ripe because ICP's issues are not yet fit for judicial review and because ICP would not suffer unreasonable hardship if consideration were delayed. (Def.'s MTD Mem. at 13.) Defendant suggested that Customs had not yet completed its decision making process. As such, according to Defendant, the issues about which Plaintiff complained were not yet properly before the Court.

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[9] The Court need not reach Plaintiff's APA and Constitutional claims. The case is resolved in Plaintiff's favor on other grounds.

3. Failure to state claim

In its Motion to Dismiss, Defendant advanced two positions in support of its contention that Plaintiff failed to state a claim upon which relief could be granted. Each is addressed below.

a. No interpretive ruling or decision

Defendant insisted that Plaintiff failed to point to "proposed interpretive ruling or decision" that modified or revoked an existing ruling or decision as required by 19 U.S.C. § 1625(c). (Def.'s MTD Mem. at 16–17.) Defendant advocated that the Notice of Action does not contain a complex written analysis that might trigger the notice and comment period mandated by § 1625(c). (Def.'s MTD Mem. at 17–18.) Further, Defendant noted that, by regulation, the Notice of Action is "simply a notice to the importer of a *proposed* Customs action." (Def.'s MTD Mem. at 19 (emphasis added).)

b. Other claims

Defendant noted that Plaintiff's Complaint alleged a cause of action for Customs having modified ICP's ruling concerning white sauce absent a "compelling reason." (Def.'s MTD Mem. at 20.) Defendant argued that even "sharp breaks" in agency practice are allowed so long as they are rational under the statutory framework. (Def.'s MTD Mem. at 20–21.) Because its actions were rational – as urged by Defendant, they did not violate the "compelling reason" test.

With regard to the Plaintiff's APA and Due Process claims, Defendant asserted that they must fail because the claims rest on the theory that the Notice of Action modified ICP's ruling. (Def.'s MTD Mem. at 20.) Because Defendant contended that the Notice of Action was merely informational, it could not be the basis for a claim that Plaintiff's rights under the APA or Constitution had been violated. (Def.'s MTD Mem. at 21–22.)

B. *Motion for Judgment on the Agency Record*

After arguing that this Court's decision in this matter must be made on the Administrative Record, Defendant posited one argument in support of Customs' decision that ICP's ruling on white sauce did not govern the entries at issue. (Mem. in Opp'n to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Mot. for J. upon the Agency R. ("Def.'s MJAR Mem.").) Defendant asserted that because its actions were rational and supported by evidence in the administrative record, Plaintiff is unable to overcome the arbitrary and capricious standard of review. (Def.'s MJAR Mem. at 12.) Defendant pointed to four (4) alleged changes to the imported product upon which Customs relied in determining that the imported white sauce was not covered by ruling NY D86228:

1. The country of origin of the imported white sauce was New Zealand rather than Israel as stated in the ruling. (Def.'s MJAR Mem. at 12.)
2. The consistency of the white sauce changed from a "thick liquid" (Admin. R. at 95) to a soft material "capable of being spread in a fashion similar to butter or mayonnaise" (Admin. R. at 10). (Def.'s MJAR Mem. at 13.)
3. The imported white sauce requires processing beyond that described in the ruling request. (Def.'s MJAR Mem. at 13.)
4. The use of the white sauce changed. (Def.'s MJAR Mem. at 13.)

Because of these changes, Customs argued its decision to not apply ICP's ruling to the imports at issue was rational. (Def.'s MJAR Mem. at 15–16.)[10]

JURISDICTION

As in all cases, the first issue for the court to determine is whether it has jurisdiction. On May 12 and 13, 2005, the parties were heard in open court in regard to the jurisdiction of this Court to proceed in this case. After full consideration of the matter and the arguments presented, the Court ruled on May 13, 2005, in open court, that jurisdiction was not proper under § 1581(h) but does lie under § 1581(i).[11] For the following reasons, this Court reaffirms its decision to allow this matter to proceed under § 1581(i)(4).[12]

Federal courts have limited jurisdiction. *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992). Congress defined the jurisdiction of the Court of International Trade in 28 U.S.C. § 1581 (2000). "Subsections (a)–(h) delineate particular laws over which the Court of International Trade may assert jurisdiction." *Id.* "Subsection § 1581(i) is a 'catch-all' provision, allowing the [Court of International Trade] to take jurisdiction over designated causes of

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[10] Customs also suggested that ICP acquired its ruling by making material false statements. (Def.'s MJAR Mem. at 17–18.) Because absolutely nothing in the Administrative Record supports this contention, this Court finds no reason to examine the issue further.

[11] Plaintiff filed an amended complaint on May 18, 2005, alleging jurisdiction pursuant to 28 U.S.C. § 1581(i)(4).

[12] 28 U.S.C. § 1581(i)(4) states that

> [i]n addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
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> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.
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> . . .

action founded on other provisions of law." *Id.* at 359. However, the jurisdiction of this Court pursuant to § 1581(i) is strictly limited. The provision is not intended to create new causes of action; it only confers subject matter jurisdiction on the court. Customs Courts Act of 1980, Pub. L. no. 96–417, § 1581(i), 1980 U.S.C.C.A.N. 3759 (codified at 28 U.S.C. § 1581(i)).

Section 1581(i)(4) "grants the court residual jurisdiction of any civil action arising out of the enforcement or administration of the customs laws." *Thyssen Steel Co. v. United States*, 13 CIT 323, 328, 712 F. Supp. 202 (1989) (quotation and citation omitted). Normally, "[w]here a litigant has access to the court by traditional means, such as under § 1581(a), it must avail itself of that avenue of approach and comply with all relevant prerequisites." *Id.* A litigant "cannot circumvent the prerequisites [of another jurisdictional subsection] by invoking jurisdiction under § 1581(i), *unless* the remedy provided under another subsection of § 1581 would be *manifestly inadequate* or when necessary, because of special circumstances, to avoid extraordinary and unjustified delays caused by the exhaustion of administrative remedies." *Id.* (quotation and citation omitted) (emphasis added).

Determining whether § 1581(i) jurisdiction lies requires a close examination of the particular facts of the moving party. The party asserting § 1581(i) jurisdiction has the burden of demonstrating the manifest inadequacy of the remedies available in subsections (a) through (h). *Id.* In the matter before the Court, Plaintiff made sufficient showing of the manifest inadequacy of the other subsections of § 1581 to justify retaining jurisdiction under subsection § 1581(i)(4).

ICP's matter is distinguishable from that addressed in *Am. Air Parcel Forwarding Co., Ltd. v. United States*, 718 F.2d 1546 (Fed. Cir. 1983) ("*Am. Air Parcel II*"). American Air Parcel was a Hong Kong-based company that shipped made-to-measure clothing to the United States. At the urging of American Air Parcel, Customs issued an internal advice ruling that valued the imported clothing on the basis of the manufacturers' transactions rather than the much higher resale price to the U.S. customer. One year later, Customs revoked the internal advice upon which American Air Parcel had relied and retroactively assessed duty on unliquidated entries at the higher U.S. customer price. The importer sought to challenge the retroactivity of the ruling revocation before the Court of International Trade. After Customs liquidated entries pursuant to the ruling revocation and after the time to file protests therefor had expired, plaintiffs[13] brought their case under 28 U.S.C. §§ 1581(h) and (i). American Air Parcel argued that the "greatly increased duties it

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[13] American Air Parcel was joined as a plaintiff by its customs broker, E.C. McAfee Co.

must pay" drove it into bankruptcy. *Id.* at 1549. The Court of International Trade dismissed the plaintiffs' case for lack of jurisdiction. *Am. Air Parcel Forwarding Co., Ltd., v. United States*, 5 CIT 8, 557 F. Supp. 605 (1983). The Court of Appeals affirmed, stating that "the traditional avenue of approach to the court under 28 U.S.C. § 1581(a) was not intended to be so easily circumvented, whereby it would become merely a matter of election by the litigant." *Am. Air Parcel II*, 718 F.2d at 1550.

Unlike American Air Parcel, ICP did not sleep on its rights and miss its opportunity to seek administrative and judicial review of its case. On the contrary, ICP filed its summons and complaint before this Court within three (3) weeks after the Notice of Action was issued, well within the deadline for filing a protest had ICP's circumstances not made the traditional protest route completely inadequate. Further, in the present matter, there is an allegation that Customs deliberately violated a statute and its own regulations. Plaintiff alleged, and the evidence will later substantiate, that Customs' actions were illegal – or *ultra vires*. Review of an agency action "to determine whether such action falls within the agency's congressionally-delegated authority and whether the statutory language authorizing the agency action has been properly construed" is within this Court's jurisdiction. *Pac Fung Feather Co., Ltd. v. United States*, 19 CIT 1451, 1456, 911 F. Supp. 529 (1995), *aff'd*, 111 F.2d 114 (Fed. Cir. 1997) (discussing this Court's jurisdiction under § 1581(i) to review Customs' promulgation of textile origin rules).

In *Pac Fung*, the importers were not challenging the application of the rules to specific merchandise but were challenging the rules themselves. *Id.* Similarly, ICP is not challenging the underlying application of Customs' decision to its merchandise. In other words, Plaintiff is not disputing Customs' classification of its white sauce as enunciated in the Notice of Action. ICP objects to the Notice of Action itself and Customs' authority to issue it. This Court agrees that "[i]t is properly within the jurisdictional province of the court to declare ultra vires and void, agency action that is beyond the scope of its defined statutory authority." *Id.*

The present case is more like *Dofasco Inc. v. United States*, 326 F. Supp. 2d 1340 (CIT 2004), *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004). In *Dofasco*, the plaintiff contested the Department of Commerce's administrative review of Dofasco's antidumping duty order based upon an untimely request for such by a domestic producer. "Dofasco claim[ed] that being required to participate in an unlawfully commenced and burdensome review provide[d] sufficient reason to invoke the Court's residual jurisdiction." *Id.* at 1342. The court agreed and took jurisdiction under § 1581(i). The court stated that it was clear that the plaintiff's desired objective could not be secured through a judicial challenge mounted after the administrative review was complete. *Id.* at 1343 (quoting *Asociacion Colombiana de*

Exportadores de Flores v. United States, 13 CIT 584, 586, 717 F. Supp. 847 (1989), *aff'd*, 903 F.2d 1555 (Fed. Cir. 1990)). In *Dofasco*, the plaintiff's action would be moot by the time the administrative review was complete. *Id*. The court stated that "[t]his Court has repeatedly found section 1581(i) jurisdiction in cases where, as here, the review that the plaintiff seeks to prevent will have already occurred by the time relief under another provision of section 1581 is available, rendering such relief manifestly inadequate." *Id*. at 1346 (citations omitted).

Although no antidumping review is at issue in the case at bar, Plaintiff sought to avoid similarly burdensome – and on these facts, manifestly inadequate – procedures that would be unnecessary but for Customs' deliberate violation of statue and regulations. Those procedures would require multiple protests directed to the current and, in all likelihood, future liquidations of plaintiff's import entries and also are likely to require multiple judicial challenges to protest denials. It is manifestly inadequate to force a litigant into "costly and time-consuming," *id*. at 1345, administrative processes where the government has deliberately circumvented the statute, its mandate, and the agency's own regulations. Like in *Dofasco*, the remedy[14] ICP sought before this Court would be moot if ICP were required to await the very liquidations it endeavored to thwart.

Plaintiff has presented unrebutted evidence that it is on the brink of bankruptcy. It is unable to meet substantial purchase contract commitments because it is economically infeasible for ICP to import white sauce at the rate of duty imposed by Customs in the rate advance. ICP is also unable to meet its considerable contractual sales obligations because its supply of white sauce has effectively been cut off. Further, Plaintiff has had to cease construction on its plant, which was due to begin operations in August 2005 and employ two hundred fifty (250) people. In addition, Plaintiff is at serious risk of defaulting on loans it secured to build the plant and purchase equipment because ICP cannot import the white sauce necessary to begin operations at its facility.

All Customs had to do to revoke the binding ruling was to follow the procedures outlined in 19 U.S.C. § 1625. The ruling could have been revoked by early 2005 had Customs adhered to those procedures. Had Customs acted as Congress intended, Plaintiff would not have been lulled into a false sense of security and continued its imports while it believed legitimately that it could rely upon the previously obtained binding ruling. Instead, Customs internally decided to revoke the binding ruling and did so – in effect – by issuing the Notice of Action. Customs purposefully ignored its own regulations as well as the specific requirements of § 1625, which were specifi-

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[14] ICP sought a declaration that the Notice of Action is null and void and, therefore, a halt to liquidations thereunder.

cally required by Congress. If Customs' actions were the law, Congress would clearly have to re-examine this entire area. The sleight of hand used by Customs in this matter does not serve to augment the transparency sought by Congress in enacting § 1625. NAFTA Implementation Act, HR 103–361(I), Pub.L. No. 103–182, 1993 U.S.C.C.A.N. 2674 (codified at 19 U.S.C. § 1625(c)).

Customs had more than one year to conduct its investigation, prepare its case, and hone its arguments against Plaintiff. On the other hand, ICP carried on its operations as normal, making plans and commitments, unaware that Customs was questioning the classification of its product, and in reliance upon the binding ruling it secured from Customs. In the past year while Customs questioned internally the classification of Plaintiff's imported white sauce, ICP relied to its detriment on Customs to fulfill the agency's statutory obligation to follow the administrative procedure to revoke or modify a ruling deemed no longer applicable. That procedure requires a period for notice and comment and an implementation for the new ruling.

Plaintiff has shown that it will suffer irreparable financial harm if Customs is allowed to proceed with enforcing the Notice of Action. Any recourse that may be available to ICP by pursuing a traditional administrative action of filing a protest or protests would be manifestly inadequate because it is likely that Plaintiff's business will no longer exist by the time the administrative and judicial processes are completed. It would be a hollow victory indeed if Plaintiff were able to prevail after the administrative process and lengthy litigation before this Court long after having filed for bankruptcy protection.

Even in light of the expedited protest review now permitted by the recently revised 19 U.S.C. § 1515(b) (2000, as amended by Pub. L. No. 108–429),[15] the administrative process (of filing a protest) followed by judicial review would be manifestly inadequate under the special circumstances in this case. Section 1581(a) cases, under which jurisdictional subsection this matter normally would fall, re-

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[15] 19 U.S.C. § 1515(b) states

> [a] request for accelerated disposition of a protest filed in accordance with section 1514 of this title may be mailed by certified or registered mail to the appropriate customs officer any time *concurrent with or* following the filing of such protest. For purposes of section 1581 of Title 28, a protest which has not been allowed or denied in whole or in part within thirty days following the date of mailing by certified or registered mail of a request for accelerated disposition shall be deemed denied on the thirtieth day following mailing of such request.

(Emphasis added.) Text is as amended in 2004 by Subsection (b), Pub. L. No. 108–429, § 2104, which struck out "after ninety days" and inserted "concurrent with or" preceding "following the filing of such protest."

quire *de novo* review. 28 U.S.C. § 2640(a) (2000).[16] Such review is preceded by the creation of a record before this Court. Discovery, motions, and any necessary hearings would eat away at the precious little time Plaintiff has before the collapse of its business. Even with an expedited schedule before this Court, the matter could scarcely be heard on the merits in less than five (5) months after filing. Under the present circumstances, Plaintiff will be out of business before the merits of the case could be heard.

In contrast, as the government has pointed out, the case presently before this Court must be decided on the Administrative Record. That record is prepared and on file. As no facts are in dispute, this Court is able decide the matter within one month from the date of filing. Any greater delay would be manifestly inadequate.

Having found sufficient justification that jurisdiction under any other subsection of 28 U.S.C. § 1581 would be manifestly inadequate, this Court affirms its previous ruling on May 13, 2005, that the jurisdiction of this Court to rule on this matter lies under 28 U.S.C. § 1581(i)(4). Further, the Court denies Defendant's Motion to Dismiss Plaintiff's First Amended Complaint for lack of subject matter jurisdiction.

STANDARD OF REVIEW

I. *Motion to Dismiss*

A court should not dismiss a complaint for failure to state a claim upon which relief may be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957); *see also United States v. Inn Foods, Inc.*, 264 F. Supp. 2d 1333, 1334 (CIT 2003), *rev'd on other grounds & remanded*, 383 F.3d 1319 (Fed. Cir. 2004). "On a motion to dismiss for failure to state a claim, any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1376 (Fed. Cir. 2000). Nevertheless, the "plaintiff must plead specific facts, and not merely conclusory allegations." *Inn Foods*, 264 F. Supp. 2d at 1335.

II. *Motion for Judgment on the Agency Record*

The scope of the Court's review in this case is limited to the administrative record before it. *Ammex, Inc. v. United States*, 341 F. Supp. 2d 1308, 1311 (CIT 2004) (citation omitted). For matters within the ambit of 28 U.S.C. § 1581(i), the standard of review is found in 28 U.S.C. § 2640, which directs this Court to 5 U.S.C.

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[16] 28 U.S.C. § 2640 states that the "Court of International Trade shall make its determinations upon the basis of the record made before the court" in "actions contesting the denial of a protest."

§ 706.[17] *See Duty Free Int'l, Inc. v. United States*, 19 CIT 679, 681 (1995) ("The court reviews an action under 28 U.S.C. § 1581(i) as provided in 5 U.S.C. § 706."); *see also Consol. Bearings Co. v. United States*, 348 F.3d 997, 1004 (Fed. Cir. 2003) ("[T]his Court will apply the standard of review set forth in 5 U.S.C. § 706 to an action instituted pursuant to 28 U.S.C. § 1581(i)."). Section 706 provides the standard of review for the APA and in relevant part reads

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of the an agency action. The reviewing court shall–
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be–
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
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> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

Section 706 sets forth six separate standards. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971), *rev'd on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In *Overton Park*, the United States Supreme Court offered guidance on when to apply these various standards. *Id.* at 413–14. The Supreme Court directed that when reviewing agency actions, subsections A through D always apply but subsections E and F should only be applied in narrow, limited situations. *Id.*; *see also Hyundai Elecs. Indus. Co., Ltd. v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204, 1208 (Fed. Cir. 1990).

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[17] 28 U.S.C. § 2640(e) (2000) states that "[i]n any civil action not specified by this section, the Court of International Trade shall review the matter as provided in section 706 of title 5."

Since the agency action in question in this case neither arises out of a rulemaking provision of the APA nor is based on a public adjudicatory hearing, subsection E does not apply. *Overton Park*, 430 U.S. at 414. Subsection F *de novo* review is applicable only when (1) "the action is adjudicatory in nature and the agency factfinding procedures are inadequate," or (2) "issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory agency action," *id.* at 415, which section is also inapposite.

Regardless of the inapplicability of subsections E and F, the "generally applicable standards of section 706 require the reviewing court to engage in a substantial inquiry," which means that the review must be "thorough, probing, in-depth." *Id.* at 415. This does not mean, however, that the court is "empowered to substitute its judgment for that of the agency." *Id.* at 416; *see also Duty Free Int'l*, 19 CIT at 681. This Court notes that the "ultimate standard of review is a narrow one." *Overton Park* at 416.

The other four standards articulated in section 706 are all relevant in this matter. Because Plaintiff asserted statutory violation and due process claims, subsections B through D are invoked: (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitation; (D) without observance of procedure required by law. 5 U.S.C. § 706(B)–(D). In addition to these three standards, the residual standard, subsection A, also applies. *See In re Robert J. Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) ("courts have recognized that the 'arbitrary, capricious' standard is one of default"). The "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law" standard is deemed the most deferential. *Id.* ("this standard is generally considered to be the most deferential of the APA standards of review"). Courts have noted that "the 'touchstone' of the 'arbitrary, capricious' standard is rationality." *Id.* (citing *Hyundai*, 899 F.2d at 1209). Thus, if any of the subsections A through D is not satisfied, this Court will set aside the agency action.

DISCUSSION

In the following sections, the Court addresses the several procedural and substantive issues before it. In rendering its decision herein, the Court engaged in no judicial fact finding. The substantive decision is based entirely on the administrative record before the Court. The fundamental issue before this Court is the validity of Customs' action in issuing the Notice of Action to ICP on April 18, 2005, which reclassified unliquidated entries of ICP's white sauce and directed that all future shipments of white sauce be classified in

tariff subheading 0405.20.3000. For the reasons that follow, the Court holds that the Notice of Action is null and void.[18]

I. *Plaintiff Stated a Cause of Action upon Which Relief May Be Granted.*

The APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to judicial review of the agency action. 5 U.S.C. § 702. Plaintiff stated a cause of action under the APA in its First Amended Complaint. (First Am. Compl. at paras. 36–39.)[19] Plaintiff directly challenged an "agency action," *i.e.*, the issuance by Customs of the Notice of Action, and alleged that it was adversely affected thereby. This Court finds insufficient reason to hold that Plaintiff "can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley*, 355 U.S. at 45–46. Accordingly, this Court denies Defendant's Motion to Dismiss Plaintiff's First Amended Complaint for failure to state a claim upon which relief may be granted.

II. *Plaintiff Was Not Required to Exhaust Its Administrative Remedies.*

Although Defendant argued that this matter must be dismissed because Plaintiff has failed to exhaust its administrative remedies, this Court does not agree. "[T]he Court of International Trade shall, where appropriate, require exhaustion of administrative remedies." 28 U.S.C. § 2637(d). This Court does not find exhaustion to be appropriate in this case. Where, as here, jurisdiction under another subsection of § 1581 is manifestly inadequate, exhaustion of administrative remedies is not required. *See Pac Fung*, 19 CIT at 1456. Accordingly, this Court rules that Plaintiff was not required to exhaust its administrative remedies before seeking redress here.

III. *Plaintiff's Issues Are Ripe for Judicial Determination.*

Defendant also argued that Plaintiff's claims are not ripe for judicial review. The Court disagrees. The ripeness inquiry is designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial inter-

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[18] The underlying classification of the white sauce is not before the Court and will not be addressed herein.

[19] Plaintiff's First Amended Complaint references the APA in paragraphs 3 and 10. Paragraph 10 of Plaintiff's First Amended Complaint incorrectly refers to § 702 in connection with jurisdiction, rather than cause of action. The APA does not grant "subject matter jurisdiction permitting federal judicial review of agency action." *Califano v. Sanders*, 430 U.S. 99, 107 (1977); *see also Am. Air Parcel*, 718 F.2d at 1552 ("[T]he APA is not a jurisdictional statute and does not confer jurisdiction on a court not already possessing it."). This error in pleading is not fatal.

ference until an administrative decision has been formalized and its effects felt in concrete way by the challenging parties." *Abbott Labs.*, 387 U.S. at 148–49, *rev'd on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). Ripeness must be evaluated in terms of "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. *Abbott* defined "fitness" by determining whether the issues presented for review were "purely legal" and whether the agency action was final. *Id.*

In the present matter, the issues before the Court are purely legal. The parties agree on all relevant facts and disagree only as to the application of the law to those facts. Further, on its face, the Notice of Action presents a final decision because it states that "action has been taken." Certainly, ICP has also felt the effects of Customs' action in the form of the Notice of Action in a "concrete way": its importations were immediately halted; it faces defaulting on purchase and supply contracts; it ceased construction of its processing facility, which was to have opened in August 2005; and it is will likely be forced to seek bankruptcy protection. For these same reasons, Plaintiff will suffer hardship if this Court's consideration is withheld. Therefore, this Court finds that Plaintiff's claims are ripe for judicial determination.

IV. *The Notice of Action Is Null and Void.*

Having resolved the issue of jurisdiction, the Court may now turn its attention to the substantive issues presented by the parties. First and foremost is determining whether the issuance of the Notice of Action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without procedure required by law." 5 U.S.C. § 706. This Court finds that it was all of these. As such, this Court rules that the Notice of Action issued to Plaintiff by Customs dated April 18, 2005, is null and void.

A. *Both statute and Customs' regulations require adherence to formal administrative procedures to revoke or modify an existing binding ruling.*

Both parties agree that Plaintiff obtained a binding tariff classification ruling and that the ruling remains valid for the merchandise it describes. Plaintiff argued that Customs must adhere to ruling modification or revocation procedures to rescind Plaintiff's right to rely upon the ruling. Customs argued that the imported product is not described by ICP's tariff classification ruling. Specifically, Customs asserted that "changed circumstances" warrant the ruling not being applied to Plaintiff's imported white sauce.

Customs regulations state that "a ruling letter issued by . . . Customs . . . represents the official position of . . . Customs . . . with respect to the particular transaction or issue described therein and

is *binding* on . . . Customs . . . until modified or revoked." 19 C.F.R. § 177.9(a) (emphasis added). The regulations further state that "[i]n the absence of a change of practice or other modification or revocation which affects the *principle* of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances." *Id.* (emphasis added).

If a Customs field office determines that a ruling should be modified or revoked, the findings and recommendations of that field office must be forwarded to Customs Headquarters for consideration. 19 C.F.R. § 177.9(b)(1). "Otherwise, if the transaction described in the ruling letter and the actual transaction are the same, and any and all conditions set forth in the ruling letter have been satisfied, the ruling will be applied to the transaction." *Id.* Tariff classification rulings "will be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter." 19 C.F.R. § 177.9(b)(2).

When an interpretive ruling is "found to be in error or not in accord with the current views of Customs," it "may be modified or revoked by an interpretive ruling." 19 C.F.R. § 177.12(a). Both statute and regulation govern the method by which Customs may modify or revoke a ruling.

The statute states that "[a] proposed interpretive ruling or decision which would – (1) modify . . . or revoke a prior interpretive ruling or decision . . . ; or (2) have the effect of modifying the treatment previously accorded by . . . Customs . . . to substantially identical transactions" must be published in the Customs Bulletin. 19 U.S.C. § 1625(c) Thereafter, interested parties must be given an opportunity to comment on the proposed ruling or decision. Customs is then required to publish the final ruling or decision, which will become effective sixty (60) days after publication. *Id.* As such, ruling revocations or modifications pursuant to this statute may have *only* prospective effect. The purpose of this section is to "provide *assurances of transparency* concerning Customs rulings." NAFTA Implementation Act, HR 103–361(I), Pub.L. 103–182, 1993 U.S.C.C.A.N. 2674 (emphasis added).

Customs may argue that § 1625 controls only those interpretive rulings or decisions that are proposed, not those that are final. Under such a statutory construction, Customs, by issuing a final Notice of Action or similar such decision, could accomplish what is effectively a retroactive revocation of any binding ruling, dispensing entirely with the procedures for notice and comment and sixty (60)-day delayed effective date that Congress specified in § 1625. This Court will not adopt a construction of § 1625 that, contrary to congressional intent, treats the statutory procedures as avoidable at the whim of Customs and thus renders them meaningless.

Further, the regulations require that Customs follow the procedures outlined in 19 U.S.C. § 1625 when the agency "*contemplates* the issuance of an interpretive ruling that would modify or revoke an interpretive ruling." 19 C.F.R. § 177.12(b). The Administrative Record is replete with communications among various Customs officials who were contemplating the possibility and need to revoke or modify Plaintiff's classification ruling. These discussions culminated in a document referred to on Customs' own time line for this matter as a "ruling." (Admin. R. at Index B para.1; 295–99) This document states that Plaintiff's ruling was "based on an erroneous assertion of facts as to the use of the product." *Id.* As such, the document concluded that the ruling "may not be relied upon by the importer." *Id.* Defendant now concedes that the ruling is valid; such a concession is inconsistent with any assertion that the ruling was invalidated by a misrepresentation in the ruling request. Moreover, as discussed *infra*, the administrative record demonstrates that repeated laboratory analyses conducted by Customs concluded that the merchandise imported on the entries addressed by the Notice of Action does not differ in any physical respect from the merchandise on which the ruling was obtained. Under such circumstances, the action and course required by Customs' own regulations was to modify or revoke the interpretive ruling. As a reminder, Customs regulations state that "when Customs contemplates the issuance of an interpretive ruling that would modify or revoke an interpretive ruling" the formal ruling modification and revocation procedures apply. 19 C.F.R. § 177.12(b).

B. *The Notice of Action was a "decision" within the context of 19 U.S.C. § 1625(c).*

Seemingly to circumvent the statute and its own regulations, Customs issued a Notice of Action reclassifying Plaintiff's unliquidated white sauce entries in a tariff provision carrying a much higher duty rate than had previously been assessed pursuant to Plaintiff's binding ruling. If the Notice of Action is a "proposed interpretive ruling or decision" within the scope of § 1625(c), Customs' action in issuing such was without observance of procedure required by law, in excess of the government's statutory authority, and not in accordance with law.

Although it was not issued in the form of a ruling, the Notice of Action is, on its face, a "decision." Defendant did not address the meaning of "decision" in its briefs. The Court can only deduce from such silence that Defendant reads the statute's language – "proposed interpretative ruling or decision" – in the collective, in other words, as meaning only one thing. This interpretation of the statute is flawed. In construing a statute, the Court is obligated to give effect, if possible, to every word used. *Len-Ron Mfg. Co., Inc. v. United States*, 24 CIT 948, 964, 118 F. Supp. 2d 1266 (2000), *aff'd*, 334 F.3d 1304

(2003). Further, "[c]annons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise." *Id.* (quotation and citation omitted). Accordingly, this Court interprets § 1625 as applying to (1) proposed interpretive rulings, and (2) decisions.

"Decision" is not defined by the statute. A basic principle of statutory construction is that courts give undefined terms their common and ordinary meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Dictionaries are a suitable resource for adducing the common meaning of a term. *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994); *see also Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation, however, that undefined terms in a statute are deemed to have their ordinarily understood meaning. For that meaning, we look to the dictionary." (citations omitted)).

Black's Law Dictionary defines "decision" as "[a] determination arrived at after consideration of facts, and, in legal context law." *Black's Law Dictionary* 407 (6th ed. 1990). The Oxford English Dictionary defines "decision" as "1.a. [t]he action of deciding (a contest, controversy, question, etc.); settlement, determination" and as "b. (with *a* and *pl.*[ural]) [t]he final and definite result of examining a question; a conclusion, judgement [sic]: *esp.* one formally pronounced in a court of law." IV *The Oxford English Dictionary* 332 (2d ed., J. A. Simpson & E. S. C. Weiner eds., Clarendon Press 1989) (emphasis in original). Similarly, *Webster's* defines "decision" as "a: the act or process of deciding[;] b: a determination arrived at after consideration: conclusion." *Webster's New Collegiate Dictionary* 291 (G & C. Merriam Co. 1981).

The Administrative Record provides ample evidence of Customs' "act or process of deciding." It is further clear from the Administrative Record that the Notice of Action is the "final and definite result" of Customs having considered the question of the correct classification of ICP's white sauce and the effect of ICP's ruling therefor. Moreover, the Court received nearly three hundred (300) pages of Customs' "consideration of facts" and law.

In August 2004, Customs personnel discussed ICP's ruling in several internal communications. In one such communication, the writer stated that the Customs National Import Specialist[20] ("NIS") supported her position that "because of the binding ruling, we cannot just RA [rate advance] the recent entries." (Admin. R. at 66.) The same communication continued and stated that before a rate advance Customs must have the binding ruling revoked by Customs Headquarters. (Admin. R. at 66.) In December 2004, the Chief of the Special Products Branch of Customs National Commodity Specialist

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[20] Incidentally, this National Import Specialist is the same individual who drafted ICP's white sauce ruling.

Division stated in a letter to the Director of the Commercial Rulings Divisions at Customs Office of Regulations and Rulings ("OR&R") that "we believe the ruling [NY D86228] is flawed and should be *revoked*." (Admin. R. at 277 (emphasis added).) Incongruously, the same letter postulated that "the ruling cannot be used as the basis for classification" of ICP's white sauce. (Admin. R. at 277.) The Court further notes that in December 2004 one Customs official stated that Customs "did not have time to go through the 625 procedures"[21] and that Customs knew "from the discussions we have had in branch meetings that our superiors have been all over the place on 625 issues[22] and the courts have been of no help in resolving the problems but have simply added to them."[23] (Admin. R. at 290.)

By March 2005, Customs had seemingly abandoned the idea of modifying or revoking ICP's ruling on white sauce.[24] On March 10, 2005, Customs Chief of the Special Products Branch of the National Commodity Specialist Division issued a memorandum to Customs Associate Chief Counsel "on the product for which a tariff classification has been requested." (Admin. R. at 295.) The writer stated that because ICP's ruling "was based on an erroneous assertion of facts as to the use of the product, the classification of the product under a principal use provision, which relied on those erroneous facts, is also erroneous, and may not be relied upon by the importer." (Admin. R. at 296.) Nevertheless, just five (5) days before Customs issued the Notice of Action on April 18, 2005, another Customs official was unconvinced and stated that based on his experience

> . . . unless we [Customs] can demonstrate that the company committed fraud when requesting the ruling, OR&R is going to have to revoke the ruling, issue public notice, and give the company time to adjust their [sic] import practices based on the changed classification. In other words, I doubt that they will be supportive of a rate advance, when the importer can claim they [sic] were relying on a ruling issued by Customs.

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[21] The reference in the communication to "625 procedures" appears to be a reference to the procedures required by section 625 of the Tariff Act of 1930, as amended, which are codified as 19 U.S.C. § 1625.

[22] The reference in the communication to "625 issues" appears to be a reference to the procedures required by section 625 of the Tariff Act of 1930, as amended, which are codified as 19 U.S.C. § 1625.

[23] This Court trusts that this opinion resolves some of the uncertainty within Customs that Customs cannot avoid the requirements of 19 U.S.C. § 1625 because it is not convenient or is time-consuming ("we do not have the time"). This Court will not abide such blatant attempts to violate clear statutory mandate.

[24] It is not lost on this Court that had Customs initiated revocation or modification procedures when it first began serious discussion of the matter in August 2004 the entire process could have been completed by March 2005.

(Admin. R. at 192.) Whether "they will be supportive" is – at this juncture – irrelevant; this Court is not supportive of Customs' action in issuing the Notice of Action.

Because, as the Administrative Record clearly indicates, the Notice of Action is a "determination [albeit an erroneous one] arrived at after consideration of facts" and law and is the "final and definite result of examining a question," this Court rules that it is a "decision" for purposes of 19 U.S.C. § 1625. The Notice of Action is not only a decision for purposes of 19 U.S.C. § 1625(c), it is also a ruling revocation. It states that "action has been taken" to reclassify white sauce, which had heretofore been subject to a binding ruling, imported on the included entries. Further, the effect of the Notice of Action is both retroactive, by reclassifying all unliquidated entries of Plaintiff's white sauce, and prospective, by stating that "***all*** shipments of this product must be classified as above." (Admin. R. at 16. (emphasis added).)

Retroactive modification or revocation of a ruling or treatment previously accorded is not permitted by Customs regulation, 19 C.F.R. § 177.12, or statute, 19 U.S.C. § 1625(c). Accordingly, Customs exceeded its statutory authority by issuing the Notice of Action and did not observe its own legal procedure. Furthermore, the issuance of the Notice of Action was not in accordance with law. Therefore, the Notice of Action must be declared null and void.

C. *Even if the regulations and statute requiring revocation or modification of the existing ruling did not apply, Customs did not undertake the correct analysis concerning the allegedly changed circumstances of white sauce importations.*

The Customs laboratory analyzed ICP's white sauce on at least three (3) occasions: in 2001, in 2004, and in 2005. On each occasion, the laboratory concluded that the imported white sauce was identical to that described in the ruling request and ruling. Thus, it would appear that the ruling request should remain in effect and apply to Plaintiff's imported white sauce.

Customs has made spurious reference to four (4) factors that warrant its decision that Plaintiff's binding classification ruling does not apply to the imported white sauce: 1) the country of origin has changed; 2) the consistency of the product has changed,[25] 3) the post-importation processing changed,[26] and 4) the use of the product has

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[25] Customs urged this point despite its own laboratory reports that confirmed that ICP's white sauce has remained the same in all material respects. (Admin. R. at 5 ("analyses confirmed ingredients to be as stated by importer"), 10, 54.)

[26] The Court notes that post-importation processing is not mentioned in ruling NY D86228. Customs' argument that the alleged change in post-importation processing is so important to warrant the ruling not being applied to Plaintiff's imported white sauce is disingenuous if processing was not important enough to include in the ruling letter.

changed. The first three factors are without merit. None is relevant to the "principle of the ruling," 19 C.F.R. § 177.9(a), which was a determination of the classification of the white sauce.[27] Customs cannot point to factors irrelevant to classification to justify disregarding a binding tariff classification ruling.[28] As for the alleged change in use, Customs failed to perform the requisite analysis to determine such and further failed to follow its own procedures for revoking or modifying an existing binding ruling.

Tariff subheading 2103.90.9091 is a use provision. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (1998). On this, the parties agree. Additional U.S. Rule of Interpretation (AUSRI) 1(a), Harmonized Tariff Schedule of the United States, is statutory and governs tariff classification of imported goods under use provisions. The rule states that

> tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.

AUSRI 1(a). "The purpose of 'principal use' provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use." *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999).

At a minimum, AUSRI 1(a) requires Customs to determine (1) the "class or kind to which the imported goods belong" and (2) the principal use of that class or kind of goods at or immediately prior to the date of importation. "The scope of the 'class or kind' inquiry should be narrowly tailored to 'the particular species of which the merchandise is a member.' " *Brother Int'l Corp. v. United States*, 248 F. Supp. 2d 1224, 1230 n.7 (CIT 2002) (quoting *Primal Lite*, 182 F.3d at 1364); *see also USR Optonix, Inc. v. United States*, 362 F. Supp. 2d 1365,

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[27] It is worth noting that ICP made no assertions in its ruling request with regard to either the consistency or viscosity of the white sauce or its country of origin. The ruling request was silent as to consistency or viscosity. As to origin, the ruling request stated that the white sauce "may be imported [from] Israel" but that "[i]t is possible that imports will come from other countries as well." (A.R. at 98.) ICP did not claim and the ruling request does not address the Israel-U.S. Free Trade Agreement. Therefore, the ruling does not contain a contingency with regard to a special duty program.

[28] ICP's situation is analogous to a T-shirt importer who requested a classification ruling for its T-shirts, without specifying the possible colors that may be imported. Suppose the importer provided a sample of a red T-shirt. If Customs issued a ruling request that the importer's "red" T-shirts were classifiable in a particular tariff subheading, it is incomprehensible that Customs would argue that the importer could not rely upon that ruling in the importation of blue, orange, or green otherwise identical T-shirts, when color has no bearing on the classification of the imported article.

1381 (CIT 2005). To determine the class or kind to which the imported goods belong, Customs must determine the class of goods with which the imported goods are "commercially fungible." *Primal Lite*, 182 F.3d at 1364, 1365; *Len-Ron Mfg.*, 24 CIT at 965–66; *cf. United States v. Carborundum Co.*, 63 CCPA 98, 102, 536 F.2d 373 (1976)[29] ("Factors which have been considered by courts to be pertinent in determining whether imported merchandise falls within a particular *class or kind* include the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, and the recognition in the trade of this use." (citations omitted) (emphasis added)).[30] "Susceptibility, capability, adequacy, or adaptability of the import to the common use of the class is not controlling." *Carborundum*, 63 CCPA at 102; *Minnetonka Brands, Inc. v. United States*, 24 CIT 645, 652, 110 F. Supp. 2d 1020 (2000); *USR Optonix*, 362 F. Supp. 2d at 1381.

Once the class or kind to which the imported article belongs has been ascertained, Customs must determine the principal use of that class or kind at or immediately prior to importation. This Court has defined "principal use" as "the use 'which exceeds any other *single*

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[29] This Court notes that *Carborundum* was decided prior to the introduction of the HTSUS. The case interpreted statutory provisions of the predecessor to the HTSUS – the Tariff Schedules of the United States (TSUS). While the TSUS rule at issue was similar to AUSRI 1(a), it was not identical:

> [A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of the articles of that class or kind to which the imported articles belong, and the controlling use is the *chief use, i.e., the use which exceeds all other uses (if any) combined*.

Carborundum, 63 CCPA at 101 (quoting TSUS General Interpretive Rule 10(e)(i)) (emphasis added).

Decisions under the TSUS are not controlling on decisions made under the HTSUS, but TSUS decisions are instructive when interpreting similar HTSUS provisions. *See E.M. Chems. v. United States*, 20 CIT 382, 386 n.5, 923 F. Supp. 202 (1996).

[30] The Court notes that Defendant incorrectly interpreted the *Carborundum* factors.

> [T]he general physical characteristics of the merchandise, the expectation of the ultimate purchasers, and the use, if any, in the same manner as merchandise which defines the class are essential factors in ascertaining the *principal use* of the imported merchandise under *Carborundum*. . . .

(Def.'s MJAR Mem. at 14 (emphasis added). In fact, the *Carborundum* factors Customs cited apply to determining the *class or kind* of goods to which the imported merchandise belongs – not principal use. *Carborundum*, 63 CCPA at 102. Customs completely ignored the class or kind step in its so-called principal use analysis.

use' " of the article. *Lenox Collections v. United States*, 20 CIT 194, 196 (1996) (citing *Conversion of the Tariff Schedules of the United States Annotated Into the Nomenclature Structure of the Harmonized System: Submitting Report* at 34–35 (USITC Pub. No. 1400) (June 1983)) (emphasis in original); *see also Minnetonka Brands*, 24 CIT at 651; *USR Optonix*, 362 F. Supp. 2d at 1381. This Court has long-recognized that AUSRI 1(a) requires Customs to determine "the principal use of the *class or kind of goods to which the imports belong and not the principal use of the specific imports*." *Group Italglass U.S.A., Inc. v. United States*, 17 CIT 1177, 1177, 839 F. Supp. 866 (1993) (emphasis in original); *see also Lenox Collections v. United States*, 19 CIT 345, 346 (1995); *Minnetonka Brands*, 24 CIT at 651; *USR Optonix*, 362 F. Supp. 2d at 1381.

> Evidence of the actual or principal use of the specific imports standing alone could not, absent their constituting the entire class or kind of goods under consideration, make a prima facie case on the issue of principal use where the controlling issue is the principal use of the class or kind to which the merchandise belongs.

Group Italglass, 17 CIT at 1177 n.1. Accordingly, actual use of an imported item is irrelevant to classification in a principal use provision. *See Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1467 (1998) ("[A] principal (or chief) use provision . . . may function as a controlling legal label, in the sense that even if a particular import is proven to be actually used inconsistently with its principal use, the import is nevertheless classified according to its principal use.")

It is clear from the Administrative Record that Customs failed to conduct the requisite analysis required by AUSRI 1(a) before it effectively revoked ICP's binding classification ruling for white sauce. In fact, Customs had the temerity to state that the "only known use of white sauce is in the making of processed cheese." (Def.'s MJAR Mem. at 13.) Customs' statement is duplicitous because the *only* inquiry Customs made as to the use of white sauce – *any*, not just ICP's, white sauce – was to *one* of Plaintiff's customers.

Moreover, the Administrative Record is devoid of any effort by Customs to define the "class or kind" of goods to which the imported white sauce belongs. Without a defined class or kind, Customs certainly could not undertake the next step in the AUSRI 1(a) analysis: a determination of the principal use of the class or kind of goods to which the imported white sauce belongs. Customs restricted its review to the use of ICP's white sauce. Customs further limited its examination to the *actual* use of the imported white sauce by one of Plaintiff's customers. As previously noted, the use – actual or principal – of the specific import in question is not determinative in a AUSRI 1(a) analysis.

Of course, even if Customs had conducted a thorough principal use analysis, the proper course, which is mandated by statute and its own regulations, was for Customs to modify or revoke Plaintiff's existing ruling. Customs exceeded its statutory authority and did not observe its own procedures by issuing the Notice of Action reclassifying Plaintiff's imported white sauce. Further, Customs' actions were not in accordance with law. Accordingly, this Court holds that the Notice of Action is null and void.

V. *The Entries of ICP's White Sauce Liquidated Pursuant to the Notice of Action under Tariff Heading 0405 Must Be Reliquidated Consistent with Ruling D86228.*

Because this Court has declared the Notice of Action null and void, ICP's position must be returned to that which existed prior to the illegal action by Customs. Ergo, Plaintiff's entries of white sauce must be reliquidated consistent with the binding tariff classification ruling NY D86228. Such reliquidation must be effected no later than June 27, 2005.

VI. *ICP's White Sauce Ruling NY D86228 Remains in Full Force and Effect.*

Because Customs failed to adhere to the statute and its own regulations applicable to revoking or modifying an existing ruling, this Court further declares that binding tariff classification ruling NY D86228 remains in full force and effect until such time as Customs modifies or revokes the ruling in compliance with its regulations and procedures set forth by statute.

VII. *Judgment in This Case is Stayed in Accordance with USCIT Rule 62(a).*

Plaintiff demonstrated that any unnecessary delay will cause further economic hardship and damage to its business interests. Due to the exigent circumstances in this case, in the interest of justice, and pursuant to Court of International Trade Rule 62(a), stay of execution of this judgment is limited to ten (10) business days from June 2, 2005. This period of stay is consistent with Federal Rule of Civil Procedure 62(a).

CONCLUSION

For the foregoing reasons, this Court holds: (1) jurisdiction lies under 28 U.S.C. § 1581(i)(4); (2) Customs acted not in accordance with law, exceeded its statutory authority, and failed to observe its own legal procedures in issuing the Notice of Action to ICP reclassifying certain entries of ICP's white sauce; (3) therefore, the Notice of Action is null and void; (4) Customs must reliquidate the entries of ICP's white sauce that were liquidated pursuant to the Notice of Action; (5) ICP's tariff classification ruling for its white sauce – NY

D86228 remains in full force and effect until properly modified or revoked by Customs in a manner consistent with the applicable statute and regulations; and (6) judgment in this case is stayed for ten (10) business days from June 2, 2005. Accordingly, Plaintiff's Motion for Summary Judgment, which was treated by this Court as a motion for judgment on the agency record, is granted, and Defendant's Motions to Dismiss and for Judgment on the Agency Record are denied.