Slip Op. 08–136

NATIONAL FISHERIES INSTITUTE, INC., ET AL., Plaintiffs, v. **UNITED STATES BUREAU OF CUSTOMS AND BORDER PROTECTION,** Defendant.

Before: Timothy C. Stanceu, Judge

Court No. 05–00683

[Denying, without prejudice, plaintiffs' motion to substitute parties]

Dated: December 17, 2008

Steptoe & Johnson LLP (*Eric C. Emerson*, *Gregory S. McCue*, and *Michael A. Pass*) for plaintiffs.

Gregory G. Katsas, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); *Chi S. Choy*, Office of Assistant Chief Counsel, International Trade Litigation, Customs and Border Protection, United States Department of Homeland Security, of counsel, for defendant.

PUBLIC OPINION & ORDER

Stanceu, Judge: Plaintiffs move under USCIT Rule 25(c) to substitute a party in this litigation. Defendant opposes the motion, arguing that the substitution plaintiffs propose is prohibited by the Anti-Assignment Act, 31 U.S.C. § 3727 (2000). The court will deny plaintiffs' motion because plaintiffs have not alleged facts under which the proposed substitution of parties would be permissible.

PUBLIC

Plaintiffs seek to substitute High Liner Foods Incorporated ("High Liner") for current plaintiff Ocean Cuisine International, a division of FPI Limited ("FPI"). Mot. to Substitute Party (Public) 1 ("Pls.' Mot. (Public)"). In support of the motion, plaintiffs cite FPI's December 20, 2007 press release announcing that High Liner purchased

certain of FPI's assets, specifically, FPI's "North American Marketing and Manufacturing business, including value added processing facilities in Danvers, Massachusetts and Burin, Newfoundland and Labrador." *Id.* at 1–2. Plaintiffs also state that FPI's importer numbers were terminated on January 14, 2008 and that thereafter, imports of subject merchandise were made using High Liner's importer number and continuous entry bond. *Id.* at 2. Plaintiffs state that "[t]his substitution in no way seeks to enlarge or amend Plaintiffs' amended complaint to include bonds other than those listed" and that they "seek only to substitute FPI with High Liner with respect to those bonds already subject to this proceeding . . . ." *Id.*

USCIT Rule 25(c) provides that "[i]n case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." USCIT R. 25(c). To grant plaintiffs' motion, the court first must identify an interest that has been transferred from FPI to High Liner and that stands to be affected by the outcome of this litigation. On the facts plaintiffs have stated in their motion, the court is unable to identify such an interest.

This case involves, *inter alia*, challenges to bond sufficiency determinations by United States Customs and Border Protection. Plaintiffs acknowledge that High Liner's participation in this case would be confined to bonds already subject to this litigation. Plaintiffs, however, have not informed the court whether High Liner is now obligated to the United States on the entries that are covered by those bonds, on which entries High Liner was not the importer of record. Nor have plaintiffs explained whether, or how, High Liner became the principal on those bonds.[1]

Although plaintiffs state that "[t]he name Ocean Cuisine International has been retired," it appears to the court that the interest in question may still reside with FPI. The court notes, in this regard, that plaintiffs state a fact causing the court to conclude that Ocean Cuisine International may not have capacity to sue in this case. Plaintiffs have represented that Ocean Cuisine International is an operating division of FPI, formerly known as Fishery Products International Ltd. Pls.' Mot. (Public) 1; Form 13, Feb. 24, 2006. An operating division of a corporation, which is not a separate legal entity, would not have the capacity to sue. *See EEOC v. St. Francis Xavier Parochial School*, 77 F. Supp. 2d 71, 75–76 (D.D.C. 1999) (discussing "a line of precedent holding that unincorporated divisions of a corpo-

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[1] Plaintiffs state in their motion that "High Liner has [ ]." Mot. to Substitute Party (Confidential) 2. Plaintiffs' statement, [ ] does not resolve the court's questions concerning High Liner's interest in this litigation.

ration lack legal capacity to be sued"); USCIT R. 17(b). On the facts as stated by plaintiffs in support of their motion, the court has no reason to conclude that FPI is no longer the principal on the bonds at issue. The fact that the name Ocean Cuisine International is no longer in use does not lend support to plaintiffs' motion.

In conclusion, the facts stated in plaintiffs' motion do not afford the court a basis to conclude that the proposed substitution of High Liner for FPI would satisfy USCIT Rule 25(c). The court, therefore, does not reach the issue of whether the proposed assignment would violate the prohibitions in 31 U.S.C. § 3727 with respect to assignment of claims against the United States.

For the foregoing reasons, and in consideration of all submissions and proceedings herein, it is hereby

ORDERED that plaintiffs' Motion to Substitute Party, filed on October 14, 2008, is hereby DENIED without prejudice.

Slip Op. 09–34

CHINA PROCESSED FOOD IMPORT & EXPORT COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 07–00303

[Plaintiff's Motion for Judgment on the Agency Record is DENIED and the Agency's Determination is AFFIRMED.]

Dated: April 30, 2009

Trade Pacific PLLC (*Robert G. Gosselink* and *Ji Hyun Tak*) for Plaintiff China Processed Food Import & Export Company.

Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Richard P. Schroeder*); and *Deborah King*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
INTRODUCTION

Plaintiff China Processed Food Import & Export Company ("COFCO") appears before the court on a motion for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging determinations of the United States Department of Commerce ("Com-

merce" or "Department") in *Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 44,827 (August 9, 2007), Plaintiff's Appendix, Tab 1, Public Record ("P.R.") 162 ("*Final Results*"). This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Because the challenged determinations are supported by substantial evidence and in accordance with law, they are sustained and judgment is entered for the Defendant United States.

II
BACKGROUND

In April 2006, Commerce initiated the seventh administrative review of the antidumping order on certain preserved mushrooms from the People's Republic of China ("PRC"). *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Deferral of Administrative Reviews*, 71 Fed. Reg. 17,077, 17,077−78 (April 5, 2006). The period of review ("POR") was February 1, 2005 through January 31, 2006. *Id*. at 17,078. COFCO is an exporter of preserved mushrooms from the PRC subject to the administrative review. *Id*. During the POR, a portion of the merchandise that COFCO exported was produced and supplied by Fujian Yu Xing Fruit & Vegetable Foodstuff Development Co. ("Yu Xing") using glass jars and caps that were provided free of charge by COFCO's U.S. customers. *Certain Preserved Mushrooms From the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 64,930, 64,936−37 (November 6, 2006), Plaintiff's Appendix, Tab 2, P.R. 138 ("*Preliminary Results*").

Commerce considered the PRC a non-market economy ("NME") for purposes of the underlying review and selected India as a comparable market economy country from which to calculate normal value for the subject merchandise.[1] *Preliminary Results*, 71 Fed. Reg. at 64,936. Among its preliminary determinations, Commerce valued the Yu Xing glass jars using the February 2005 to January 2006 Indian import data for glass jars from the World Trade Atlas ("WTA"). *Id*. at 64,936−37; Memorandum from David M. Spooner, Assistant Secretary for Import Administration, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, U.S. Department of Commerce, Re: Issues and Decision Memorandum for the Final Results of the 2005−2006 Administrative Review of Certain Preserved Mushrooms from the People's Republic of China (August 3, 2007), Plaintiff's Appendix, Tab 8, P.R. 157 ("*Final Decision Memo*") cmt. 2,

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[1] Plaintiff China Processed Food Import & Export Company ("COFCO") does not challenge the designations by the U.S. Department of Commerce ("Commerce" or "Department") of either the People's Republic of China as a non-market economy or India as an appropriate surrogate market economy.

at 8. Commerce relied on data classified by the Harmonized Tariff Schedule of India ("HTS-I") in its surrogate glass jar valuation. *Final Decision Memo* cmt. 2, at 8.

Commerce preliminarily used financial information from Indian producers including Agro Dutch Industries Limited ("Agro Dutch") to derive overhead and profit ratios for purposes of calculating normal value. *Preliminary Results*, 71 Fed. Reg. at 64,937. For the overhead ratio, Commerce included the "material handling charges" ("MHC") line item in Agro Dutch's financial statement in the overhead expense calculation. *Final Decision Memo* cmt. 6, at 14−15. This resulted in "a comparatively higher overhead ratio" than if Commerce had treated MHC as material acquisition costs. Defendant's Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record at 20. Additionally, in its calculation of normal value, Commerce preliminarily included the value of the glass jars and caps that were provided free of charge to Yu Xing by COFCO's U.S. customers. *Preliminary Results*, 71 Fed. Reg. at 64,936; *Final Decision Memo* cmt. 7, at 16.

COFCO challenged numerous aspects of the *Preliminary Results*. *See* COFCO Case Brief, Case No. A−570−851, U.S. Department of Commerce, Import Administration (March 13, 2007), Plaintiff's Appendix, Tab 10, P.R. 153 ("COFCO Administrative Case Brief"). Commerce made certain changes in response to COFCO's concerns. *See Final Results*, 72 Fed. Reg. at 44,828−29. However, the August 2007 *Final Results* retained the following preliminary designations: (1) glass jar valuation based on WTA data, (2) treatment of MHC in the Agro Dutch overhead ratio, and (3) normal value that was increased to account for free inputs. *Final Decision Memo* cmt. 2, at 10−11; cmt. 6, at 15−16; cmt. 7, at 17. Dissatisfied with these three aspects of the *Final Results*, COFCO timely initiated the present challenge.

III
STANDARD OF REVIEW

This court will uphold an administrative antidumping determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." *SKF USA, Inc. v. INA Walzlager Schaeffler KG*, 180 F.3d 1370, 1374 (Fed. Cir. 1999) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i)). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Aimcor, Ala. Silicon, Inc. v. United States*, 154 F.3d 1375, 1378 (Fed. Cir. 1998) (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984)). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."

Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966).

In determining the existence of substantial evidence, a reviewing court must consider "the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487−88, 71 S. Ct. 456, 95 L. Ed. 456 (1951)).

When evaluating Commerce's statutory interpretation the court uses a two step analysis, first examining whether Congress has "directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If this is the case, courts then must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842−43; *see Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239, 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004). If instead Congress has left a "gap" for Commerce to fill, the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843−44.

In matters of statutory construction this court will show "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). The agency's construction need not be the only reasonable one or even the same result this court would have reached had the question arisen in the first instance in a judicial proceeding. *Id.* (citing *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 91 L. Ed. 136 (1946)). It is not the court's duty to "weigh the wisdom of, or to resolve any struggle between, competing views of the policy interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute." *Suramericana de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

IV
DISCUSSION

COFCO challenges three aspects of the *Final Results* as unsupported by substantial evidence. Memorandum of Points and Authorities in Support of COFCO's Motion for Judgment Upon the Agency

Record ("Plaintiff's Motion") at 1−2. First, COFCO claims the glass jars used by Yu Xing should have been valued using an available domestic Indian source as opposed to what it characterizes as "overinclusive" Indian import data. *Id.* at 1, 9. Second, COFCO challenges Commerce's use of MHC in the Agro Dutch overhead ratio. *Id.* at 1, 18. Third, COFCO claims that Commerce improperly increased normal value to account for the glass jars and caps provided free of charge without evidence that COFCO profited from those free inputs. *Id.* at 1−2, 20. As set forth in turn below after a statutory overview, each of these challenged Commerce determinations is supported by substantial evidence and in accordance with law.

A
Statutory Overview

In an antidumping proceeding, Commerce must make "a fair comparison . . . between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a). In the NME context, Commerce calculates the normal value of foreign merchandise considering the value of each input used to produce the subject merchandise subject to certain adjustments. *Id.* § 1677b(c)(1). In relevant part, the statute provides that Commerce

> shall determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise and to which shall be added an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. . . . [T]he valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by [Commerce].

Id. "[T]he process of constructing foreign market value for a producer in a[n] [NME] country is difficult and necessarily imprecise." *Sigma Corp. v. United States*, 117 F.3d 1401, 1408 (Fed. Cir. 1997).

The statute "accords Commerce wide discretion in the valuation of factors of production." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). "However, Commerce's discretion in calculating surrogate prices is not limitless." *Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 608−09 (2008) (citations omitted). This court has described Commerce's discretion to calculate normal value for merchandise from an NME country as follows:

> Despite the broad latitude afforded Commerce and its substantial discretion in choosing the information it relies upon, the agency must act in a manner consistent with the underlying objective of 19 U.S.C. 1677b(c) — to obtain the most accurate dumping margin possible. This objective is achieved only when

> Commerce's choice of what constitutes the best available information evidences a rational and reasonable relationship to the factor of production it represents. . . .
>
> Since the statute does not specify what constitutes the best available information, these decisions are within Commerce's discretion. Accordingly, Commerce need not prove that its methodology was the only way or even best way to calculate surrogate values for factors of production as long as it was reasonable. When Commerce's method is challenged, the Court's proper role is to determine whether the methodology is in accordance with law and supported by substantial evidence. Assuming both criteria are satisfied, the Court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology.

Shandong Huarong Gen. Corp. v. United States, 25 CIT 834, 838, 840, 159 F. Supp. 2d 714 (2001) (citation omitted).

B

Commerce Properly Used WTA Import Data To Calculate Surrogate Value For The Glass Jars

Throughout the administrative process, COFCO asserted that Commerce should not use what it described as "overinclusive, unreliable, and unrepresentative" WTA import data for India to calculate surrogate value for the glass jars. Plaintiff's Motion at 10. HTS-I 7010, the category used by Commerce in deriving glass jar value from the WTA import data, is titled: "Carboys, Bottles, Flasks, Jars, Pots, Phials, Ampoules and Other Containers, of Glass, of a Kind Used for the Conveyance or Packing of Goods; Preserving Jars of Glass; Stoppers, Lids and Other Closures, of Glass." COFCO's Publicly Available Information Submission (March 30, 2007), Plaintiff's Appendix, Tab 4, P.R. 151 Ex. 11, *Customs Tariff 2006–07*, Import Tariff and Chapter-wise Exemption Notifications, Chapter 70, at 1052. The specific subcategory used by Commerce, HTS-I 7010.90.00, is titled: "Other." *Id.*; *Final Decision Memo* cmt. 2, at 8, 10. COFCO relied upon this nomenclature to support its position that Commerce employed a " 'catch-all' category" that is "overly broad, making the WTA data unreliable for surrogate value usage . . . because the glass jars used by Yu Xing are only ordinary glass jars." COFCO Administrative Case Brief at 14.

COFCO provided Commerce with Indian import information from the subscription service Infodrive India. Plaintiff's Motion at 13. COFCO cites to precedent of this court endorsing the use of Infodrive India information in determining surrogate values for merchandise from the PRC. *Id.* at 14 (citing *Dorbest Ltd. v. United*

States, 462 F. Supp. 2d 1262, 1284–86 (CIT 2006)).[2] According to COFCO, here "the Infodrive India data provides . . . specific evidence that the average Indian import price derived from HTS-I category 7010.90 is based on an overly broad array of glass items that are not comparable in any way to the glass jars used by Yu Xing." *Id.* at 16 (emphasis omitted). COFCO claims that "Commerce ignored the data" and this "failure to consider the Infodrive India import data exposes the illegitimacy of Commerce's surrogate glass value." *Id.* at 13.

Commerce specifically addressed COFCO's argument based on the Infodrive India data prior to formalizing the use of WTA data to calculate surrogate value for the glass jars. *See Final Decision Memo* cmt. 2, at 11. Commerce concluded that although the "HTS category is a basket category which may include glass articles besides glass jars, it nevertheless includes glass jars, and therefore is a reliable surrogate value source. Moreover, the *WTA* data used in the Preliminary Results are contemporaneous, publicly available, and representative of a broad market average." *Final Decision Memo* cmt. 2, at 10. Commerce reinforced its decision to use WTA data by explaining that "no other usable information is available on the record which is more specific to the glass jars used by the respondent." *Id.* cmt. 2, at 11.[3]

COFCO provided financial information from the Indian producer Jagatjit Industries Limited ("Jagatjit") that it claims should have been used to calculate surrogate value for the glass jars instead of WTA data. This information states that Jagatjit's "major business activity" is manufacturing of alcoholic beverages. COFCO's Publicly Available Information Submission (March 30, 2007), Plaintiff's Ap-

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[2] COFCO's reliance on this precedent is misplaced because, as explained by Defendant, here "Commerce did not ignore the Infodrive data and was fully aware that the World Trade Atlas [WTA] data included products other than glass jars." Defendant's Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Defendant's Opposition") at 13 (citing Memorandum from David M. Spooner, Assistant Secretary for Import Administration, to Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, U.S. Department of Commerce, Re: Issues and Decision Memorandum for the Final Results of the 2005–2006 Administrative Review of Certain Preserved Mushrooms from the People's Republic of China (August 3, 2007), Plaintiff's Appendix, Tab 8, Public Record ("P.R.") 157 ("*Final Decision Memo*") cmt. 2, at 9 nn.18, 20, 11). *Cf. Globe Metallurgical, Inc. v. United States*, Slip Op. 08–105, 2008 Ct. Int'l Trade LEXIS 105 (October 1, 2008), which, while it reaches a different result is distinguishable by its reliance on a unique record.

[3] Commerce further stated that "the Department's normal practice is not to use *Infodrive India* to analyze which portion of the *WTA* data included in the HTS subheading is specific to the input at issue, given that the *Infodrive India* data do not account for all of the Indian imports which fall under a particular HTS subheading." *Final Decision Memo* cmt. 2, at 11 (citation omitted). COFCO emphasizes the first part of this statement. Memorandum of Points and Authorities in Support of COFCO's Motion for Judgment Upon the Agency Record ("Plaintiff's Motion") at 13. However, the statement in its entirety does not support COFCO because it demonstrates that Commerce did address the Infodrive India data, and COFCO acknowledges that the difference between the data sets is approximately five percent. *See id.* at 15.

pendix, Tab 7, P.R. 151 Ex. 17, Jagatjit Annual Report for the year ended 31st March, 2006, at 5. The Jagatjit glass container division, while contributing to overall revenue generation, "basically caters [to] the internal demand." *Id.* Although "glass bottles and jars" is listed third of Jagatjit's three principal products, *id.* at 34, the Jagatjit information contains only this single reference to jars, and does not reference jars in its relevant table of financial data, *see id.* at 32 (providing Jagatjit financial information for glass bottles, tins and other containers, and plastic containers, but not jars). *See* Defendant's Opposition at 11. Commerce rejected the Jagatjit glass jar value as unreliable. *Final Decision Memo* cmt. 2, at 10. The Department explained that this information

> is not specific to the glass jars used by the respondent in this review. Specifically, data contained in Jagatjit's financial report indicate that this Indian company's main business is the sale of alcoholic beverages; consequently, the glass container value obtained from its financial report is non-specific for purposes of valuing the input in question.

Id.

Commerce properly used WTA Indian import data to calculate surrogate value for glass jars. There is no support for COFCO's assertion that the Jagatjit financial information comprises "a more product-specific value available on the record." *See* Plaintiff's Motion at 11. COFCO does not provide any record evidence that establishes the Jagatjit information as comparable with respect to glass jars. Defendant is correct that Commerce, "faced with the choice of selecting among imperfect alternatives," reasonably declined to employ "the vague and inconclusive information in Jagatjit's annual report." Defendant's Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Defendant's Opposition") at 11. The time period covered by the Jagatjit report does not fully correspond to the POR in this case, *id.* at 11 n.6, in contrast with the WTA data dates that precisely correlate, *see Final Results*, 72 Fed. Reg. at 44,827. Given the lack of more suitable data, Commerce justifiably resorted to its general preference for using WTA data over company financial information.[4] *See Final Decision Memo* cmt. 2, at 10. For these rea-

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[4] Commerce explained that "where product-specificity is not a critical factor in the Department's surrogate value determination, the Department has shown a general preference for *WTA* data over company financial statements because *WTA* data are contemporaneous, publicly available, and representative of a broad market average." *Final Decision Memo* cmt. 2, at 10. COFCO seeks to undermine this conclusion by emphasizing that Commerce additionally found "that product specificity (*i.e.*, the species of mushroom) is . . . . critical to the Department's determination as to the best available information on this record to value [fresh mushrooms]." *See Final Decision Memo* cmt. 1, at 7−8; Reply Brief in Further Support of COFCO's Motion for Judgment Upon the Agency Record ("Plaintiff's Reply") at 3−4 (citing *Final Decision Memo* cmt. 1, at 8). However, because Commerce independently de-

sons, Commerce's valuation of glass jars using WTA Indian import data instead of the Jagatjit information is supported by substantial evidence.

COFCO further challenges Commerce's ability to use import data in the surrogate valuation of the Yu Xing glass jars by claiming a lack of record evidence that the subject industry used imported inputs. Plaintiff's Motion at 16−17. Defendant counters that this argument is barred because COFCO failed to exhaust its administrative remedies. Defendant's Opposition at 13−14. COFCO replies that at the administrative level it "discussed at length the general legal principle that Commerce should consider whether the industry in question would use imported inputs when deciding the appropriate surrogate values for those inputs." Reply Brief in Further Support of COFCO's Motion for Judgment Upon the Agency Record ("Plaintiff's Reply") at 7−8 (citing COFCO Administrative Case Brief at 4−6). COFCO's lengthy submission to Commerce set forth multiple bases challenging the use of WTA import data to construct surrogate value for glass jars. COFCO Administrative Case Brief at 13−18. COFCO stated that these were the exclusive "reason[s] the Department should calculate a new surrogate value for glass jars." *See id.* at 17. However, COFCO did not argue for preclusion based upon an alleged lack of evidence that the subject industry imported glass jars.[5] *See id.* at 13−18.

An agency law precept is that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Agro Dutch Indus., Ltd. v. United States*, 30 CIT 320, 330 (2006) (quoting *McKart v. United States*, 395 U.S. 185, 193, 89 S. Ct. 1657, 23 L. Ed. 2d 194 (1969)). If a party does not first seek available recourse before the agency, "judicial review of administrative action is inappropriate." *Sharp Corp v. United States*, 837 F.2d 1058, 1062 (Fed. Cir. 1988). As the Supreme Court explains, "[a] reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S.

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termines the importance of product specificity for each input, the designation for fresh mushrooms does not cast doubt upon the designation for glass jars.

[5] COFCO argued in the administrative proceedings that "[b]ecause no domestic industry in India or China uses imported fresh mushrooms to produce subject merchandise . . . the Department choice of import data to value fresh mushroom inputs is not reasonable." COFCO Case Brief, Case No. A−570−851, U.S. Department of Commerce, Import Administration (March 13, 2007), Plaintiff's Appendix, Tab 10, P.R. 153, at 6 ("COFCO Administrative Case Brief"). However, because COFCO did not make this argument with respect to glass jars, its citation to Commerce's conclusion concerning the value of fresh mushrooms does not support its having exhausted administrative remedies for the same argument as applied to glass jars. *See* Plaintiff's Reply at 8 (citing *Final Decision Memo* cmt. 1, at 6).

143, 155, 67 S. Ct. 245, 91 L. Ed. 136 (1946). This court will require exhaustion where the plaintiff both fails to raise an issue at the administrative level on which "Commerce could have conducted further analysis" and does "not show[ ] that any exception to the exhaustion doctrine applies." *China First Pencil Co., Ltd. v. United States*, 427 F. Supp. 2d 1236, 1244 (CIT 2006); *see* 28 U.S.C. § 2637(d).

COFCO cannot now raise its new argument that Commerce is precluded from using import data to calculate surrogate glass jar value. Its failure to raise this issue during the administrative proceedings deprived Commerce of the "opportunity to consider the matter, make its ruling, and state the reason for its action." *See Aragon*, 329 U.S. at 155. COFCO does not establish the applicability of an "exception to the exhaustion doctrine." *See China First Pencil*, 427 F. Supp. 2d at 1244. Moreover, even considering this argument, Commerce acted within its discretion. The obligation for Commerce to use domestic data over import data is not an absolute requirement but rather a conditional preference that can be overcome through reasoned explanation.[6] *See Wuhan Bee Healthy Co. v. United States*, 29 CIT 587, 601, 374 F. Supp. 2d 1299, 1311 (2005) ("Although . . . Commerce does not have an 'unconditional preference' for using domestic prices over import prices when valuing surrogates, . . . it must provide an explanation that reasonably supports its decision.") (citing *Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 303, 366 F. Supp. 2d 1264, 1277 (2005)). Commerce explained its decision not to use the Jagatjit financial information that it found neither reliable nor specific to the input at issue. *Final Decision Memo* cmt. 2, at 10. The substantial evidence supporting this conclusion, described above, rebuts each of COFCO's challenges to the use of WTA Indian import data in the valuation of glass jars.

C
Commerce Properly Calculated The Agro Dutch Surrogate Overhead Ratio

In NME antidumping proceedings, Commerce is to include in its normal value calculation "an amount for general expenses." 19 U.S.C. § 1677b(c)(1). Commerce does this by employing a ratio "with the surrogate companies' manufacturing overhead expenses as the ratio's numerator" and "the material acquisition, direct labor, and energy costs of the surrogate companies . . . in the ratio's denomina-

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[6] COFCO relies upon precedent from this court in arguing that "before Commerce can eliminate import statistics as a surrogate value option, the record must contain domestic surrogate values." Plaintiff's Motion at 17 (citing *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1279 (CIT 2006)). However, *Dorbest* does not support this proposition. *See Dorbest*, 462 F. Supp. 2d at 1279 ("If it is unlikely that the domestic industry would use imported inputs, and there is domestic data available, then Commerce's choice of import data to value factor inputs *may* not be reasonable.") (emphasis added).

tor." Defendant's Opposition at 19 (citing *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2004−2005 Administrative Review and Partial Rescission of Review*, 71 Fed. Reg. 75,936 (December 19, 2006), and accompanying Issues and Decision Memorandum cmt. 2). Here, Commerce preliminarily determined an overhead ratio using financial information from the Indian producer Agro Dutch. *Preliminary Results*, 71 Fed. Reg. at 64,937. COFCO requested that Commerce revisit the Agro Dutch surrogate overhead ratio calculation that included MHC in the numerator, claiming that "[t]he Department's practice is to exclude material-related charges from overhead expenses, and instead to include such expenses in the materials, labor and energy denominator, because these costs are related to material acquisition costs." COFCO Administrative Case Brief at 23 (citations omitted).

Commerce did not adjust the Agro Dutch overhead ratio as COFCO requested. Commerce instead formalized the ratio used in the *Preliminary Results*, explaining the rationale as there being "no indication in Agro Dutch's 2005−2006 financial report that the [MHC] line item relates to material acquisition costs. . . . Agro Dutch's financial report does not indicate whether the [MHC] line item also includes freight. Therefore, this line item expense may in fact only include charges associated with moving materials within the factory."[7] *Final Decision Memo* cmt. 6, at 15. Commerce further noted that "Agro Dutch treats its [MHC] as part of an expenditure category called 'Manufacturing Expenses' in its profit and loss statement." *Id.* n.29.

This explanation by Commerce of its inclusion of MHC in the Agro Dutch surrogate overhead ratio numerator is sufficient and comprises substantial evidence supporting the determination. Defendant is correct that "COFCO has pointed to no record evidence that the [MHC] related to the purchase of materials. Also, COFCO has cited no record evidence rendering Commerce's interpretation unreasonable." Defendant's Opposition at 20. COFCO has, at most, demonstrated that Commerce could have included MHC in the denomina-

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[7] COFCO emphasizes this use of the word "may" to support its position that "Commerce merely presented its own hypothesis. Speculation, however, cannot constitute substantial evidence." Plaintiff's Motion at 19−20. COFCO provides neither record evidence that detracts from the reasonableness of Commerce's interpretation nor support for its position that the "approach contradicts past practice and the very authority upon which Defendant relies." *See* Plaintiff's Reply at 10. Commerce having previously commented upon its "practice to include in the denominator only those costs associated with materials, labor and energy" does not here render unreasonable its inclusion of material handling costs in the numerator, because these costs can plausibly be classified as manufacturing overhead expenses. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2004−2005 Administrative Review and Partial Rescission of Review*, 71 Fed. Reg. 75,936 (December 19, 2006), and accompanying Issues and Decision Memorandum cmt. 2.

tor. However, "[t]he possibility of drawing two inconsistent conclusions from the evidence does not prevent [Commerce's] finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). Commerce may, as it did here, permissibly select among different possible factual interpretations of a surrogate company's financial information. *See Dorbest, Ltd. v. United States*, 547 F. Supp. 2d 1321, 1346 (CIT 2008) ("[I]t is not for the court to decide between two, equally plausible factual interpretations. As such, the court cannot find unreasonable Commerce's determination.").

D

Commerce Properly Accounted For Free Inputs In Calculating Normal Value

To calculate normal value for merchandise in an NME country, Commerce is to value each factor of production and "add[ ] an amount for . . . profit." 19 U.S.C. § 1677b(c)(1). COFCO claims that Commerce erroneously "added profit to the glass jars and caps that COFCO's customers provided for free, despite the lack of any evidence that COFCO charged its U.S. customers a mark-up for the glass jars and caps."[8] Plaintiff's Motion at 1−2. Prior to the *Final Results*, Commerce explained that it was treating these glass jars and caps as it had free inputs in previous reviews. *Final Decision Memo* cmt. 7, at 17 (citing *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 71,509 (December 11, 2006), and accompanying Issues and Decision Memorandum cmt. 6, and *Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review*, 70 Fed. Reg. 54,361 (September 14, 2005), and accompanying Issues and Decision Memorandum cmt. 13).

In its normal value calculation, Commerce properly included profit for the glass jars and caps that were provided free of charge to Yu Xing by COFCO's U.S. customers. This approach comports with the plain language of the statute that allows the addition of profit for in-

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[8] At the administrative level, COFCO requested that "the Department increase U.S. prices for sales transactions (for which the U.S. customers provided the glass jars and caps) by the surrogate values of the glass jars and caps plus an additional amount that corresponds to the increase in normal value due to surrogate profit ratios." COFCO Administrative Case Brief at 26 (emphasis omitted). Although COFCO references this U.S. price argument from the "underlying proceeding," it clarifies that "the issue on appeal is . . . whether Commerce should have included in normal value any profit amount attributable to the glass jars and caps that were provided for free to COFCO by its [U.S.] customers." Plaintiff's Motion at 21−22. Because COFCO is no longer challenging Commerce's calculation of the U.S. sales prices for the subject merchandise, that aspect of the *Final Results* need not be addressed.

puts.[9] *See* 19 U.S.C. § 1677b(c)(1). COFCO presents no basis to deviate from Commerce's previous treatment of free inputs. There is no support for COFCO's assertion that Commerce relied upon the "unsubstantiated assumption" that COFCO earned any profit attributable to the free glass jars and caps. *See* Plaintiff's Motion at 21. Defendant is correct that the existence of any such actual profit is "immaterial . . . . for purposes of calculating normal value." Defendant's Opposition at 17. Therefore, the absence of record evidence pertaining to profit earned attributable to the free inputs does not detract from the appropriateness of Commerce's normal value calculation that added profit for the free glass jars and caps. Consistent with both its practice and the statute, Commerce reasonably calculated normal value by including profit for the free inputs used in producing the subject merchandise.

V
CONCLUSION

For the above stated reasons, Commerce's determination in *Certain Preserved Mushrooms From the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 44,827 (August 9, 2007) is AFFIRMED.

Slip Op. 09−35

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, LOCAL 2911, Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Richard K. Eaton, Judge
Court No. 04−00492

[United States Department of Labor's final negative determination on remand denying plaintiff's application for trade adjustment assistance sustained.]

Dated: April 30, 2009

Stewart and Stewart (*Terence P. Stewart, Elizabeth J. Drake,* and *Philip A. Butler*), for plaintiff.

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[9] COFCO accurately states that " '[a]n amount' for profit does not mean an amount for profit on all inputs." Plaintiff's Reply at 11 (emphasis omitted) (citing 19 U.S.C. § 1677b(c)(1)). The statute clearly permits Commerce to include amounts for profit on each input, as Defendant explains that Commerce "normally" does. Defendant's Opposition at 16. COFCO emphasizes this "acknowledgement that there are circumstances where it is not appropriate to add an amount for profit to all factors of production." Plaintiff's Reply at 11. However, COFCO does not provide record support for its position that Commerce here inappropriately added profit for the free glass jars and caps.

Michael F. Hertz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Russell A. Shultis*), for defendant.

OPINION

Eaton, Judge: In *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2911 v. United States Secretary of Labor,* 32 CIT ___ , Slip Op. 08−45 (Apr. 30, 2008) (not reported in the Federal Supplement) ("*Steelworkers II*"), the court remanded this matter to the United States Department of Labor ("Labor" or the "Department") for further explanation of its determination to deny plaintiff ISU's[1] request for an extension of Weirton Steel Corporation's ("Weirton") Trade Adjustment Assistance ("TAA") eligibility certification from April 23, 2004 to May 18, 2004. On remand, the Department has again reached a negative determination. *See* Negative Determination on Remand, TA–W–54,455, Weirton Steel Corp., Weirton, WV (Dep't of Labor Aug. 28, 2008) (the "Remand Results").

As in *Steelworkers II*, jurisdiction lies under 28 U.S.C. § 1581(i)(4). *See* 32 CIT at ___ , Slip Op. 08−45 at 3−4; *Indep. Steelworkers Union v. U.S. Sec'y of Labor,* 30 CIT 1793, 1803−08, Slip Op. 06−171 at 21−30 (Nov. 17, 2006) (not reported in the Federal Supplement) ("*Steelworkers I*") ("It is clear that plaintiff's action seeking review of the Department's denial of its amendment request is a challenge to the Department's administration and enforcement of 19 U.S.C. §§ 2272 and 2273."). For the following reasons, Labor's negative determination embodied in its Remand Results is sustained.

BACKGROUND

Weirton was a steel producer. Because the company was faced with "serious difficulties due to import surges" and financial hardship, ISU petitioned Labor in mid-2001 to establish the eligibility of the Weirton workers to apply for TAA benefits.[2] Pl.'s Rule 56.1 Mot.

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[1] For purposes of continuity, the court again refers to plaintiff United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 2911 as "ISU," in reference to its former name, Independent Steelworkers Union.

[2] The group eligibility requirements for TAA benefits are as follows:

> (a) In general
>
> A group of workers (including workers in any agricultural firm or subdivision of an agricultural firm) shall be certified by the Secretary as eligible to apply for adjustment assistance under this part pursuant to a petition filed under section 2271 of this title if [Labor] determines that—
>
> (1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated, or are threatened to become totally or partially separated; and

for J. Agency R. ("Pl.'s Br.") 3−4 (citations omitted). Labor's determination was affirmative and the resulting certification found all Weirton workers, who became totally or partially separated from employment on or after July 3, 2000, eligible to apply for TAA cash benefits. *See* Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Traditional Adjustment Assistance, 67 Fed. Reg. 22,112 (Dep't of Labor May 2, 2002) (the "2002 Certification"). Under the statute, the 2002 Certification was to remain in effect for two years from the date of certification, and thus expire on April 23, 2004. *See* 19 U.S.C. § 2291(a)(1)(B).

In May 2003, however, approximately one year prior to the 2002 Certification's expiration, Weirton filed for Chapter 11 bankruptcy. *See* Pl.'s Br. 7; see also Weirton Steel Corp. Voluntary Pet. Chapter 11 Bankr., Admin. R. ("AR") at 188−89. Thereafter, Weirton officials agreed to sell the company's assets to its competitor International Steel Group ("ISG"). *See* Pl.'s Br. 8. To complete the sale, Weirton retained some of its workers to maintain the plant and to ensure a smooth transition of its facility to the new owners. *See* Letter Dated Sept. 14, 2004 from Mr. Terence P. Stewart to Labor, Suppl. Admin. R. ("SR") at 12−15 (the "Stewart Letter").

On March 9, 2004, ISU filed a new petition with Labor seeking TAA re-certification for Weirton's workers based on facts present during an investigatory period covering the year prior to the petition's filing (March 9, 2003, through March 9, 2004). See Weirton Steel Corp. Petition for TAA Dated Mar. 9, 2004 (the "2004 Petition"), AR at 2−40. Labor issued a negative determination with respect to this petition on May 14, 2004, finding that Weirton's workers failed to meet the statutory requirements for certification. That

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(2)(A)(i) the sales or production, or both, of such firm or subdivision have decreased absolutely;

(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and

(iii) the increase in imports described in clause (ii) contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or

(B)(i) there has been a shift in production by such workers' firm or subdivision to a foreign country of articles like or directly competitive with articles which are produced by such firm or subdivision; and

(ii)(I) the country to which the workers' firm has shifted production of the articles is a party to a free trade agreement with the United States;

(II) the country to which the workers' firm has shifted production of the articles is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act; or

(III) there has been or is likely to be an increase in imports of articles that are like or directly competitive with articles which are or were produced by such firm or subdivision.

19 U.S.C. § 2272. *See also* 19 U.S.C. §§ 2271, 2273.

is, Labor found that, during the investigatory period, increased steel imports did not contribute importantly to the worker separations. *See* Weirton Steel Corp., Weirton, WV: Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative Trade Adjustment Assistance (Dep't of Labor May 14, 2004), AR at 101−03 (the "Negative Determination"); Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 31,134, 31,135 (Dep't of Labor June 2, 2004) (notice).

Thereafter, on July 23, 2004, Labor denied plaintiff's request for administrative reconsideration of the Negative Determination. *See* Weirton Steel Corp., Weirton, WV: Notice of Negative Determination Regarding Application for Reconsideration (Dep't of Labor July 23, 2004), AR at 195−97 (the "Reconsideration Denial"); Weirton Steel Corp., Weirton, WV: Notice of Negative Determination Regarding Application for Reconsideration, 69 Fed. Reg. 47,184 (Dep't of Labor Aug. 4, 2004) (notice).

On September 14, 2004, having failed to secure benefits by way of a re-certification, ISU wrote Labor to "formally request that [Labor] amend the [2002] TAA certification to change its expiration date from April 23, 2004, to May 18, 2004, so as to include all workers of Weirton Steel who were adversely affected by increased imports." *See* Stewart Letter, SR at 12−15. The Stewart Letter details the circumstances that ISU believed justified an amendment to extend the 2002 Certification. Specifically, it recounts that the 2002 Certification's expiration date of April 23, 2004 "came just a few weeks before substantially all of the production assets of Weirton Steel Corporation were acquired out of bankruptcy" by ISG, and that on May 18, 2004 the company ceased to produce steel. *See* Stewart Letter, SR at 13. It is those workers who remained with the company for the three to four weeks after the 2002 Certification expired, but before the Weirton sale was completed, that were the subject of Weirton's request to extend the 2002 Certification. Stewart Letter, SR at 13−14.

According to plaintiff, the remaining workers "were engaged in preserving Weirton's assets and facilities and preparing them for the sale to ISG."[3] Stewart Letter, SR at 14. Plaintiff maintained that only an amendment of the 2002 Certification "would ensure that all the workers of Weirton Steel who were adversely affected by increased imports are included under [the 2002] Certification and eligible for needed assistance." Stewart Letter, SR at 14.

In addition, the Stewart Letter stated that it was plaintiff's "understanding that the Department has previously amended TAA certi-

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[3] The Stewart Letter recounts ISU's filing of the 2004 Petition and Labor's subsequent Negative Determination and Reconsideration Denial, since sustained by this court in *Steelworkers I*. *See* Stewart Letter, SR at 14; *Steelworkers I*, 30 CIT at 1803, Slip Op. 06−171 at 31.

fications to extend the period of eligibility where workers have been retained beyond the original expiration date of a certification." Stewart Letter, SR at 14 n.5 (citing O/Z-Gedney Co., Div. of EGS Elec. Group, Terryville, CT: Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 69 Fed. Reg. 43,454 (Dep't of Labor July 20, 2004) ("*O/Z-Gedney*"); Wiegand Appliance Div., Emerson Elec. Co., Vernon, AL: Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance, 58 Fed. Reg. 50,198 (Dep't of Labor Aug. 20, 2003) ("*Wiegand*")).

By letter dated September 24, 2004, Labor denied ISU's amendment request for two reasons. *See* Letter Dated Sept. 24, 2004 from Labor to Mr. Terence P. Stewart, SR at 16−17 (the "Denial Letter"). The first was that the facts presented in this case were distinguishable from the facts of the two certifications cited in plaintiff's amendment request (*O/Z-Gedney* and *Wiegand*) because, in the case of the Weirton facility, production at the plant continued, whereas in the other cases "workers were retained to assist with the plant closure after production had ceased." *See* Denial Letter, SR at 16 (emphasis added). The second reason was that, after a "full and careful investigation for the relevant period," Labor determined that workers' separation from the company was not due to an increase in imports. This second reason was apparently a reference to the 2004 Petition for re-certification. *See* Denial Letter, SR at 16.

In *Steelworkers I*, the court sustained the denial of benefits pursuant to the 2004 Negative Determination and Reconsideration Denial. *See* 30 CIT at 1803, Slip Op. 06−171 at 21 (sustaining the Department's determination "because the evidence supports Labor's conclusion that plaintiff did not satisfy the statutory requirements for certification"). The court, however, refrained from reaching the merits of ISU's amendment request pending the submission of a supplemental administrative record. *See id.* at 1808, Slip Op. 06−171 at 31.

Following submission of the supplemental administrative record, further briefing, and review, the court in *Steelworkers II* held that Labor did not explain adequately its decision to deny ISU's request to amend Weirton's 2002 Certification until May 18, 2004. *See Steelworkers II*, 32 CIT at ___ , Slip Op. 08−45 at 25−27. Accordingly, *Steelworkers II* remanded this matter to Labor with instructions that the Department further explain its determination. *See* 32 CIT at ___ , Slip Op. 08−45 at 26−27.

STANDARD OF REVIEW

In cases brought under 28 U.S.C. § 1581(i), this Court applies the default standard of review set forth in the Administrative Procedure Act ("APA") and therefore will "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." *See* 5 U.S.C. § 706(2)(A); *see also Former Employees of*

Alcatel Telecomms. Cable v. Herman, 24 CIT 655, 658−59, Slip Op. 00−88 at 6−7 (2000) (not reported in the Federal Supplement). Under this standard, "the court (1) must consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment, and (2) analyze whether a rational connection exists between the agency's factfindings and its ultimate action." *See Consol. Fibers, Inc. v. United States*, 32 CIT ___ , ___ , 535 F. Supp. 2d 1345, 1354 (2008). Further, the APA provides that, "[t]o 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 an agency action." 5 U.S.C. § 706.

DISCUSSION

I. Remand Results

In the Remand Results, Labor states that its current policy regarding amendment requests (which it insists has been in effect throughout all proceedings in this case), is to ensure that "the certification [will] cover all workers . . . who were adversely affected by increased imports of the article produced by the firm or a shift in production of the article, based on the investigation of the petition." Remand Results at 13. Despite the absence of a statutory or regulatory provision on point, the Department explains that it "has and continues to amend the expiration date of certifications when the facts of the case show that the later worker separations are attributable to the basis for [the original] certification (the increased imports or shift of production to a foreign country)." Remand Results at 13. According to the Department, using the same standard to grant a certification in the first instance or extend a certification comports with the remedial nature of the TAA statute. *See* Remand Results at 13−14.

In addition, Labor notes that amendment requests are rare. Remand Results at 17. When it receives such requests, however, the Department states that it reviews them on a case-by-case basis to determine if those worker separations occurring after the certification's expiration date are also "attributable" to the basis of the original certification. *See* Remand Results at 17. Labor explains that

> the earlier and later separated workers must have identical characteristics (same location, same article, and same basis for certification) aside from dates of separation. It must also be shown that the predominant important cause of the later worker separation is identical to the conditions that were the basis for the certification of the earlier separated workers.[4]

Remand Results at 17.

The Department further insists that there has been no change in its policy over time.[5] *See* Remand Results at 15 (citing Thomson, Inc., Circleville Glass Operations, Circlesville, OH: Amended Certification Regarding Eligibility To Apply for Worker Adjustment Assistance and Alternative TAA, 72 Fed. Reg. 5,750 (Dep't of Labor Feb. 7, 2007) (notice) ("*Thomson*")). Finally, Labor states:

> The Department has not, to the best of our knowledge, amended a certification to extend the expiration date except in limited circumstances when there has been a plant closing and a small number of workers are retained past the 2-year expiration date to complete shutdown activities. The intent of the Department in these cases, as in all cases, is for the amended certification to cover all adversely affected workers at the subject firm or appropriate subdivision (based on the investigation of the petition).

Remand Results at 15.

As to the significance of Weirton's plant remaining open, the Remand Results state that Labor's focus in assessing amendment requests is not on production facility closure, but rather on determining if the later separated workers were terminated for the same reasons that formed the basis of the original certification.[6] *See* Remand Results at 18−19. The Department thus maintains that "if there was a change in circumstance that prevents a causal nexus between the workers' separation and the basis for certification, then the Department cannot find that the workers' separation is attributable to the basis" for the 2002 Certification. Remand Results at 18. In Labor's view, a production facility's closure (accompanied with worker separations) tends to demonstrate the causal nexus required to tie the later separated workers to those separated earlier, and

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[4] Labor elaborated:

> If the certification was based on increased imports, the petitioning worker group must show that the increased imports (same article, same time periods, etc.) contributed importantly to their separations; if the certification was based on a shift of production, the petitioning worker group must show that the same shift of production (same article, same country, etc.) was the basis for their separations.

Remand Results at 17.

[5] Given this assertion, it is not unexpected that the Remand Results also state that Labor has taken no steps to notify the public of any policy change. *See* Remand Results at 16.

[6] Labor's original Denial Letter to the Weirton workers referenced both continued production and plant closure as being significant. In distinguishing Weirton's situation from past cases, the Department wrote:

> In each of these cases [referring to *O-Z/Gedney and Wiegand*], workers were retained to assist with the plant closure after production had ceased. This is not the case for workers at Weirton Steel. Production of steel products at the Weirton, West Virginia plant continued during the period relevant to the investigation.

Denial Letter, SR at 16−17.

thus to grant an amendment. *See* Remand Results at 19. Furthermore, the Department notes that its investigation following the 2004 revealed, not only that the Weirton plant had not closed, but that during the period of investigation "sales of the subject firm increased" and "there were declining imports or little or no increase in imports during the relevant period." Remand Results at 19 (citation omitted).

In response to the court's order directing further explanation as to why Labor treated those workers separated from the company after April 23, 2004 differently from those losing their jobs before that date, the Remand Results stress that the Department distinguished between these workers "because the workers separated before April 23, 2004 belong to a separately identifiable worker group." Remand Results at 20. That is, Labor found that they were not separated due to the impact of foreign trade because its investigation of the period preceding the 2004 Petition revealed that increased steel imports did not contribute importantly to their eventual separation. *See Steelworkers I*, 30 CIT at 1803, Slip Op. 06−171 at 21. Thus, Labor asserts, "[w]hile the certification of workers separated on or before April 23, 2004 was based on increased imports, worker separations after April 23, 2004 resulted from ISG's decision not to continue to employ the Weirton production workers when it purchased the operating Weirton plant as part of the May 18, 2004 sale." Remand Results at 20−21 (internal citations omitted).

In order to address the court's instruction to explain how the Remand Results comport with previous investigations that resulted in Labor granting amendment requests, the Department examines three prior cases: (1) *O/Z-Gedney*, 69 Fed. Reg. at 43,454; (2) *Wiegand*, 68 Fed. Reg. at 50,198; and (3) *Thomson*, 72 Fed. Reg. at 5,751. Labor states that *O/Z-Gedney* is distinguishable because there the Department amended the certification to include a single worker retained at the firm assisting with the closedown process. It adds: "The Department amended the certification because there was a causal nexus between the workers' [sic] separation and the plant closure that was the result of increased imports." Remand Results at 21.

As for *Wiegand*, the Department notes that workers in that case were also engaged in activities related to a production facility closure. Remand Results at 22 (stating that the "workers completed the tracking of outstanding customer orders until their termination"). It again states: "The Department amended the certification because there was a causal nexus between the worker's [sic] separation and the plant closure that was the result of increased imports." Remand Results at 22. Likewise, with respect to *Thomson*, the Remand Results state that the subject workers were retained for decommissioning activities pursuant to state regulation, and the amendment re-

quest was granted because Labor determined that there was no break in causation. Remand Results at 22−23.

Accordingly, Labor states that these past "amendments were based on findings that increased imports adversely affected the workers separated after the expiration of the certification." Remand Results at 23. In contrast, "[t]he Weirton workers separated after the plant's acquisition by ISG were not engaged in the closedown of that facility, but were actually involved in production and maintenance of the plant." Remand Results at 23.

Finally, with respect to the court's instruction to the Department for it to explain why its determination is consistent with the remedial nature of the TAA statute, Labor states that, although remedial, "the statute does not authorize the granting of certification, unlimited by time, in every situation involving a sympathetic fact pattern." Remand Results at 23−24.

II. Prior to the Issuance of the Remand Results, the Department Had No Articulated Policy for Extending Certifications

Despite its claims to the contrary, it is apparent that the Department had no articulated policy with respect to extensions of certifications prior to the issuance of the Remand Results in this case. While it may be that in its internal discussions Labor took into account the factors set forth in the TAA statute at 19 U.S.C. § 2272, its previous determinations extending certification did not enunciate reliance on those factors. Indeed, the Department's prior determinations do no more than briefly recite the facts surrounding the decisions to extend the subject certifications and state that Labor's intent is to include workers adversely affected by increased imports under certifications.

In *O/Z-Gedney*, for example, Labor's Federal Register notice reads in its entirety:

> In accordance with section 223 of the Trade Act of 1974 (19 U.S.C. 2273) the Department of Labor issued a Certification of Eligibility to Apply for Worker Adjustment Assistance on March 27, 2001, applicable to workers of O/Z-Gedney Company, Div. of EGS Electrical Group, Terryville, Connecticut. The notice was published in the Federal Register on April 16, 2001 (66 FR 19521). At the request of a company official, the Department reviewed the certification for workers of the subject firm. The workers were engaged in the production of electrical fittings for the non-residential construction industry. New information shows that a worker, Ms. Jacqueline Lancioni, was retained at the subject firm beyond the March 27, 2003, expiration date of the certification. This employee was engaged in activities related to the close-down process until her termination on March 26, 2004. Based on these findings, the Department is amending the certification to extend the March 27, 2003, expiration date

> for TA–W–38,569 to read March 26, 2004. The intent of the Department's certification is to include all workers of O/Z-Gedney Company, Div. of EGS Electrical Group, who were adversely affected by increased imports. The amended notice applicable to TA–W–38,569 is hereby issued as follows:
>
> > A worker of O/Z-Gedney Company, Div. of EGS Electrical Group, Terryville, Connecticut, who became totally or partially separated from employment on or after January 5, 2000, through March 26, 2004, is eligible to apply for adjustment assistance under section 223 of the Trade Act of 1974.

69 Fed. Reg. at 43,454. Likewise, the Department's notice in *Wiegand* reads much the same way. *See* 68 Fed. Reg. at 50,198.

Neither *O/Z-Gedney* nor *Wiegand* sets forth the policy claimed by Labor here, i.e., that Labor will amend expiration dates "when the facts of the case show that the later worker separations are attributable to the basis for [the original] certification (the increased imports or shift of production to a foreign country)." Remand Results at 13. Nor does either determination state any facts demonstrating that Labor was acting in a way consistent with its claimed policy.

Labor's determination in *Thomson* begins to suggest a policy because the Department engaged in a "nexus" analysis consistent with the policy it claims here. *See* 72 Fed. Reg. at 5,751 (stating that "the Department determined that there was a causal nexus between the subject firm's shutdown of operations and the shutdown workers' separations and that, therefore, the separations of the workers . . . [after the certification's expiration] are attributable to the conditions specified in section 222 of the Trade Act"). *Thomson* goes on to state, however, that "[t]he Department's decision in this case is limited to the precise circumstances of this specific case and should not be considered as any indication of how the Department would proceed in other cases or in any subsequent rulemaking on this subject." *Id*.

As a result, while it appears the Department has previously acted in a manner consistent with the policy it has now set forth, the court finds that it had no articulated policy at the time the determination not to extend the 2002 Certification was made.

III. The Department Did Not Act in an Arbitrary or Capricious Manner

While Labor had no declared policy with respect to the granting of extensions when it declined to extend Weirton's certification, this does not end the court's inquiry. The court must decide whether the Department's action in this case violated the APA's arbitrary and capricious standard. *See* 5 U.S.C. § 706(2)(A). Indeed, in addition to citing to its past practice, Labor also claims that it evaluates exten-

sion requests on a case-by-case basis. *See* Remand Results at 17. Having examined the manner by which Labor reached its result in this case, the court concludes that the Department did not abuse its discretion or act contrary to law in reaching its determination.

The court bases this conclusion primarily on Labor's denial of ISU's 2004 Petition. As previously noted, ISU petitioned Labor seeking re-certification for Weirton's workers on March 9, 2004, i.e., before the 2002 Certification expired and before ISU asked to extend that certification. *See* 2004 Petition, AR at 2−40. In its Negative Determination on the 2004 Petition, Labor found that during the one-year period prior to the 2004 Petition's filing (March 9, 2003, through March 9, 2004), Weirton's steel sales increased, and the company "did not import the products it produces. . . . " Negative Determination, AR at 102. Therefore, Weirton's workers were denied eligibility to apply for TAA benefits. Negative Determination, AR at 103.

The court sustained these findings in *Steelworkers I*. *See* 30 CIT at 1803, Slip Op. 06−171 at 21. Thus, the important distinction between this case and those relied upon by plaintiff is that, here, there is an intervening determination finding that Weirton's workers were not injured by imports during the period March 9, 2003, through March 9, 2004. *See* Pl.'s Comments 3 (citing Am. Standard, Inc., Trenton, NJ: Amended Eligibility to Apply for Worker Adjustment Assistance, TA–W–38,582, 68 Fed. Reg. 43,757 (Dep't of Labor July 24, 2004)). This determination found that the evidence did not support a finding that Weirton was still faced with increased steel imports that contributed importantly to worker separations. Thus, unlike the cases on which plaintiff relies, here there was substantial evidence establishing that Weirton's workers were not separated from their employment due to the impact of foreign trade, as 19 U.S.C. § 2272 requires. In other words, substantial record evidence demonstrated that the conditions that led to the 2002 Certification no longer existed at the time the workers were separated.

This situation is thus distinguishable from the Department's determination in *Thomson*. In *Thomson*, the remaining workers would have been separated during the certification period had they not been required by state regulation to stay on the job in order to submit a plan concerning the removal of hazardous materials from the facility. *Thomson*, 72 Fed. Reg. at 5,750. Put another way, but for the state regulatory requirements, the remaining workers would have been terminated prior to the expiration of the certification. Therefore, the reason for their ultimate termination was the impact of foreign trade. This contrasts with Weirton's situation where Labor's intervening investigation revealed just the opposite—that the company's remaining workers were not, in fact, terminated due to the impact of foreign trade.

As a result, the court cannot conclude that Labor's reliance on the results of its intervening investigation, which this court sustained in *Steelworkers I*, "represents an unreasonable judgment in weighing relevant factors" so as to render its determination arbitrary and capricious. *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005) (citation omitted). In the Remand Results, the Department explained that the workers who lost their jobs after April 23, 2004 "belong in a worker group that is separately identifiable" from those who lost their jobs prior to April 23, 2004 because of both the operation of the law and by reason of intervening facts. Remand Results at 20. That is, the Department reasoned that the 2002 Certification expired on April 23, 2004 by operation of 19 U.S.C. § 2291(a)(1)(B), and after that point, it became Labor's duty to assess whether "the events that caused the separations after April 23, 2004 are identical to those that were the basis for the certification." Remand Results at 20. In turn, the Department concluded that these workers were not, in fact, similarly situated because Weirton's post-April 23, 2004 workforce was separated from the company because of ISG's decision not to keep these workers on, rather than from increased imports. *See* Remand Results at 20−21. Notwithstanding the court's finding that Labor has had no clear policy for certification extensions prior to the issuance of the Remand Results, the court cannot conclude that this distinction was unreasonable.

CONCLUSION

The court finds that the Department's Remand Results are sufficiently in accordance with the instructions set forth in its prior opinion. Accordingly, the court further finds that Labor acted within its discretion, and did not act in an arbitrary and capricious manner, in concluding that an amendment to the 2002 Certification was not warranted here. Therefore, for the reasons stated, the Remand Results are sustained. Judgment shall be entered accordingly.

Slip Op. 09–36

MAY FOOD MANUFACTURING dba MRS. MAY'S NATURALS, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 06–00329

[Defendant's motion for summary judgment granted. Plaintiff's cross-motion for summary judgment denied.]

Dated: May 1, 2009

Peter S. Herrick, P.A. (Peter S. Herrick) for the plaintiff.

Michael F. Hertz, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jason M. Kenner*, *Gardner B. Miller*, and *Mikki Cottet*); *Beth Brotman*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge: This matter is before the court on cross-motions for summary judgment by plaintiff May Food Manufacturing doing business as Mrs. May's Naturals ("Mrs. May's") and defendant United States ("the Government") pursuant to USCIT Rule 56. The Government asserts that the United States Bureau of Customs and Border Protection ("Customs") properly classified the subject merchandise as prepared almonds under subheading 2008.19.40 of the Harmonized Tariff Schedule of the United States ("HTSUS").[1] Mrs. May's asserts that the subject merchandise is an article returned to the United States after being exported for alterations and therefore should be classified under subheading 9802.00.50.[2]

BACKGROUND

Mrs. May's manufactures the subject merchandise, "Almond Crunch" and "All Natural Almond Crunch" (collectively, "Almond Crunch"), a type of sweet snack food called almond brittle. (Def.'s Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Def.'s Statement of Facts") ¶¶ 1–3; Pl.'s Statement of Material Facts for Which There Is a Genuine Issue to Be Tried ("Pl.'s Resp. Statement of Facts") ¶¶ 1–3.) Mrs. May's purchases shelled, raw almonds from growers in California and exports the almonds to China (Def.'s Statement of Facts ¶¶ 5–6; Pl.'s Resp. Statement of Facts ¶¶ 5–7), where they are "manufactured into Almond

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[1] The relevant portion of Chapter 20 of the HTSUS reads:

2008	Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included:
	Nuts, peanuts (ground-nuts) and other seeds, whether or not mixed together:
	. . . .
2008.19	Other, including mixtures:
	. . . .
2008.19.40	Almonds . . . .

[2] The relevant portion of Chapter 98 of the HTSUS reads:

	Articles returned to the United States after having been exported to be advanced in value or improved in condition by any process of manufacture or other means:
	Articles exported for repairs or alterations:
	. . . .
9802.00.50	Other . . . .

Crunch" (Pl.'s Resp. Statement of Facts ¶ 7; *see also* Def.'s Statement of Facts ¶ 6). In China, the almonds are hand-sorted, roasted for flavor, and mixed with rice malt, sugar, and salt. (Def.'s Statement of Facts ¶¶ 8–9; Pl.'s Resp. Statement of Facts ¶¶ 8–9; Wong Dep. 28:7–8, Apr. 24, 2008, Def.'s Mot. for Summ. J. Ex. B.) The mixture is then rolled flat, cut into cubes, and bagged. (Def.'s Statement of Facts ¶ 10; Pl.'s Resp. Statement of Facts ¶ 10.) It is then imported back into the United States as Almond Crunch. (Def.'s Statement of Facts ¶ 11; Pl.'s Resp. Statement of Facts ¶ 11.)

Mrs. May's requested that Customs classify Almond Crunch as an article returned to the United States after being exported for alterations, which is subject to a duty only upon the value of the alterations, under subheading 9802.00.50, HTSUS. In ruling letters NY L82122 (Feb. 9, 2005) and NY L88301 (Nov. 3, 2005), Customs denied the requests and classified Almond Crunch under subheading 2008.19.40, HTSUS, as prepared almonds, which are subject to a duty rate of 32.6 cents per kilogram. Customs liquidated the entries at issue at that duty rate, and Mrs. May's filed protests, which Customs denied. (Summons 2–3.) Mrs. May's then commenced the present action. Both parties now move for summary judgment pursuant to USCIT Rule 56.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a). Summary judgment is appropriate if "there is no genuine issue as to any material fact," and "the movant is entitled to judgment as a matter of law." USCIT R. 56(c). The proper construction of a tariff provision is a question of law, and whether the subject merchandise falls within a particular tariff provision is a question of fact. *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002). Where, as here, "the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law," and the court reviews Customs' classification decision *de novo*. *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006).

DISCUSSION

The General Rules of Interpretation ("GRIs") of the HTSUS direct the proper classification of merchandise entering the United States. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). Under GRI 1, HTSUS, "classification shall be determined according to the terms of the headings and any relevant section or chapter notes[.]"

Heading 2008, HTSUS, applies to "nuts, . . . otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included: Nuts, . . . whether or not mixed together," subheading 2008.19 ap-

plies to nuts "[o]ther [than peanuts], including mixtures," and subheading 2008.19.40 applies to "[a]lmonds." Heading 2008, HTSUS, is the only tariff provision that describes the nature of Almond Crunch, which is a mixture of prepared almonds containing added sugar and other sweetening matter. Mrs. May's concedes that Almond Crunch is classifiable under subheading 2008.19.40, HTSUS, if it cannot be classified under subheading 9802.00.50, HTSUS, as an altered article. (*See* Pl.'s Mem. of Law in Supp. of Its Mot. for Summ. J. & in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Br.") 5.)

Heading 9802, HTSUS, provides for a reduced duty on articles returned to the United States after having been exported for alterations. U.S. note 1 to Chapter 98 of the HTSUS states: "The provisions of this chapter are not subject to the rule of relative specificity in [GRI] 3(a). Any article which is described in any provision in this chapter is classifiable in said provision if the conditions and requirements thereof and of any applicable regulations are met." Therefore, if Almond Crunch is an article returned to the United States after being exported for alterations, it would be classified under heading 9802, HTSUS, specifically under subheading 9802.00.50, not under heading 2008.

Under subheading 9802.00.50, HTSUS, "[c]hanges and additions to an article constitute alterations so long as the article has not lost its identity or has not been converted into something else." *Chevron Chem. Co. v. United States*, 59 F. Supp. 2d 1361, 1369 (CIT 1999). Alterations, however, "can only be made to finished articles." *Id.* An article is "finished" if it is "suitable for its ultimate intended use." *Id.* at 1370. Alterations "do not include intermediate processing operations which are performed as a matter of course in the preparation or the manufacture of finished articles." *Dolliff & Co. v. United States*, 599 F.2d 1015, 1019 (C.C.P.A. 1979).

Mrs. May's claims that Almond Crunch is classifiable under subheading 9802.00.50, HTSUS, because the processing of the almonds in China was a mere alteration. (Pl.'s Br. 5–18.) Mrs. May's claims that the raw almonds, after they were shelled, were "finished" because their ultimate intended use was for eating, and that they were suitable for that use when they were exported from the United States. (*Id.* at 6–10.) Mrs. May's also claims that the raw almonds did not lose their identity after the processing in China because the processing was not a substantial transformation under the country-of-origin marking statute and did not change the tariff classification of the almonds. (*Id.* at 11–12, 14–17.)

Here, the raw California almonds were converted into Almond Crunch, a sweet almond brittle snack. Although both raw almonds and Almond Crunch may be eaten, raw almonds are not commercially interchangeable with, or suitable to be sold as, Almond Crunch. (Def.'s Statement of Facts ¶ 16; Pl.'s Resp. Statement of Facts ¶ 16; Wong Dep. 28:25–29:5.) Because the raw almonds were

not suitable for their ultimate intended use as Almond Crunch, or any product similar thereto, when they were exported to China, they were not finished articles. The processing in China, especially the mixing of the almonds with rice malt, sugar, and salt, was necessary to convert the almonds into almond brittle, and therefore was intermediate processing performed as a matter of course in the preparation or the manufacture of the finished Almond Crunch, not an alteration.[3] *See Chevron*, 59 F. Supp. 2d at 1370 (holding that alpha olefin fraction exported from the United States was "unfinished" and that manufacturing in France was intermediate processing, not an alteration, because the product did not contain the benzene rings that the final product, alkylbenzene sulfonic acids, contained); *see also Dolliff*, 599 F.2d at 1017, 1019 (holding that fabrics exported from the United States as greige goods were "unfinished" and that dyeing and chemical treatments in Canada rendering the fabric suitable for manufacture into curtains were intermediate processing, not alterations); *Guardian Indus. Corp. v. United States*, 3 CIT 9, 12 (1982) (holding that raw annealed glass articles exported from the United States were unfinished because they were unsuitable for their intended use as sliding glass patio doors and that tempering in Canada was not an alteration).

Mrs. May's mistakenly relies on prior Customs ruling letters in arguing that the almonds became finished articles after they were shelled in the United States. (*See* Pl.'s Br. 8–10.) Although Customs has found that shelling is an operation that exceeds an alteration, HQ 555246 (Apr. 12, 1989); HQ 554834 (May 25, 1988), Customs has also found that roasting, salting, sugar-coating, or otherwise flavoring peanuts also exceeds an alteration, HQ 558797 (Jan. 20, 1995); HQ 554934 (Apr. 3, 1989). Such rulings are consistent with the conclusion that the manufacturing of Almond Crunch in China also exceeds an alteration.

Mrs. May's also mistakenly relies on Customs' ruling letters NY L88301 and NY L82122 determining that the subject merchandise "retains its identity as U.S. almonds" and did not undergo a substantial transformation under the country-of-origin marking statute. (*See* Pl.'s Br. 14–17.) Such determinations do not require a finding that Almond Crunch is classifiable under subheading 9802.00.50, HTSUS, because the country-of-origin marking statute is distinct

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[3] Mrs. May's asserts that the processing in China adds negligible value, as "[t]he sugar and rice malt . . . is approximately 7% by volume," and "[t]he cost breakdown to manufacture a 28 ounce package of Almond Crunch is $6.10 with the almonds costing $5.08." (Pl.'s Br. 17.) Although the volume of those ingredients and the cost of processing were relatively low compared to the cost and volume of the almonds, the ingredients and processing converted the almonds into almond brittle and increased the value of the almonds from $5.08 to approximately $11.00 per 28-ounce package of Almond Crunch, which is sold at a total profit of 30–50%. (*See* Kim Dep. 47:17–48:9, Feb. 22, 2008, Def.'s Mot. for Summ. J. Ex. A.) The value added in China therefore was not negligible.

from the HTSUS and serves different purposes. *See Tropicana Prods., Inc. v. United States*, 789 F. Supp. 1154, 1158 (CIT 1992) ("[T]he criterion of whether goods have been 'manufactured' serves different purposes under different statutes . . . ; substantial transformation criteria cannot be applied indiscriminat[e]ly in the identical manner across the entire spectrum of statutes for which it is necessary to determine whether merchandise has been 'manufactured.' ").

Finally, Mrs. May's unpersuasively asserts that the manufacturing in China was not an alteration because it did not result in a change in tariff classification. (*See* Pl.'s Br. 11–12.) Initially, the raw, shelled almonds exported from California might have fallen within heading 0802, HTSUS, which applies to "[o]ther nuts, [including almonds], whether or not shelled or peeled,"[4] rather than heading 2008, which applies to prepared or preserved nuts. The court, however, need not determine whether the almonds exported to China were subject to the same tariff classification as Almond Crunch because such a determination would not even support the argument that Almond Crunch falls within subheading 9802.00.50, HTSUS. Although cases applying the predecessor provisions to 9802.00.50 have held that processing that results in a tariff classification change exceeds an alteration, *see United States v. J.D. Richardson Co.*, 36 C.C.P.A. 15, 18–19 (1948); *Guardian*, 3 CIT at 15–16, no case has held that processing that does not result in a tariff classification change is merely an alteration. To the contrary, Doliff held that processing may exceed the scope of an alteration even if the merchandise as exported and as returned falls under the same tariff classification. *See* 599 F.2d at 1020.

CONCLUSION

Because the manufacturing of the California almonds into Almond Crunch in China was more than a mere alteration, the subject merchandise is not classifiable under subheading 9802.00.50, HTSUS.[5] Mrs. May's concedes that if subheading 9802.00.50, HTSUS, does not apply, subheading 2008.19.40, HTSUS, applies. Accordingly,

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[4] The relevant portion of Chapter 8 of the HTSUS reads:

0802	Other nuts, fresh or dried, whether or not shelled or peeled:	
	Almonds:	
	. . . .	
0802.12.00		Shelled . . . .

[5] Because the court concludes that Almond Crunch does not fall within subheading 9802.00.50, HTSUS, the court need not examine the issue of whether Mrs. May's is barred from receiving the duty benefit under that subheading for failure to report the value of the processing in China or submit documentation required under 19 C.F.R. § 10.8. *See LeGran Mfg. Co. v. United States*, 59 Cust. Ct. 58, 60 (1967) ("While defendant's brief raises a subsidiary issue concerning the importer's failure to comply with [19 C.F.R. § 10.8], we need reach that question only if we find that the imported articles were in fact no more than repaired or altered after being exported from the United States.").

Customs' classification of the subject merchandise under subheading 2008.19.40, HTSUS, is sustained. The defendant's motion for summary judgment is granted, and the plaintiff's cross-motion for summary judgment is denied.

SLIP OP. 09–37

GLOBE METALLURGICAL, INC., Plaintiff, v. UNITED STATES, Defendant, and DATONG JINNENG INDUSTRIAL SILICON CO., INC., JIANGXI GANGYUAN SILICON INDUSTRY COMPANY, LTD., and SHANGHAI JINNENG INTERNATIONAL TRADE CO., LTD., Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge

Consol. Court No. 07–00386

Public Version

[Commerce's remand determination sustained.]

Dated: May 5, 2009

DLA Piper US LLP (*William D. Kramer, Clifford E. Stevens, Jr., Jack A. Levy, Martin Schaefermeier,* and *Arlette Grabczynska*) for the plaintiff.

Michael F. Hertz, Deputy Assistant Attorney General; *Jeanne E. Davidson,* Director, *Reginald T. Blades, Jr.,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Loren M. Preheim*); *Aaron P. Kleiner, Brian R. Soiset, Jonathan M. Zielinski,* and *William J. Kovatch, Jr.,* Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Mayer Brown LLP (*Duane W. Layton, Kristy L. Balsanek,* and *Sydney H. Mintzer*) for the defendant-intervenors.

OPINION

Restani, Chief Judge: Plaintiff Globe Metallurgical, Inc. ("Globe") and defendant-intervenors Datong Jinneng Industrial Silicon Co., Inc., Jiangxi Gangyuan Silicon Industry Company, Ltd., and Shanghai Jinneng International Trade Co., Ltd. ("Defendant-Intervenors") challenged the results of new shipper reviews of an antidumping duty order on silicon metal from the People's Republic of China ("PRC"). Following initial briefing and oral argument, the court granted, in part, Globe's motion for judgment on the agency record, denied defendant-intervenors' motion for judgment on the agency record, and remanded for the Department of Commerce ("Commerce") to calculate the normal value of silica fume based on information that relates more specifically to the by-product silica fume. *Globe Metallurgical, Inc. v. United States*, Slip Op. 08–105, 2008 WL

4417187, at *7 (CIT Oct. 1, 2008). On remand, Commerce valued silica fume using an average unit value ("AUV") based on World Trade Atlas ("WTA") Indian import data for the basket tariff subheading for silicon dioxide, excluding from its calculation countries that were not producers of silicon metal or ferrosilicon and countries identified as nonmarket economies. Following remand, Globe asserts that Commerce's valuation is unsupported by substantial evidence and contrary to law because the silicon dioxide import AUV is not product-specific and includes large volumes of imports that are not silica fume, which significantly distorts the AUV calculation for silica fume and understates the dumping margins calculated. The court finds that Commerce's selection of a narrower subset of the WTA Indian import data for silicon dioxide to calculate the normal value of silica fume is supported by substantial evidence and in accordance with law.

BACKGROUND

Commerce initiated new shipper reviews of Defendant-Intervenors for the June 1, 2005, through May 31, 2006, period of review ("POR") of the *Antidumping Duty Order: Silicon Metal From the People's Republic of China*, 56 Fed. Reg. 26,649 (June 10, 1991). *See Silicon Metal From the People's Republic of China: Initiation of Antidumping Duty New Shipper Reviews*, 71 Fed. Reg. 42,084, 42,085 (July 25, 2006). In October 2007, Commerce published the final results of the new shipper reviews. *See Silicon Metal from the People's Republic of China: Notice of Final Results of 2005/2006 New Shipper Reviews*, 72 Fed. Reg. 58,641 (Oct. 16, 2007) ("*Final Results*"). Commerce considered the PRC a nonmarket economy country for the purpose of these reviews and selected India as its surrogate country for valuing the factors of production for Chinese silicon metal. *See Issues and Decision Memorandum for the Final Results of 2004/2006 Antidumping Duty New Shipper Reviews of Silicon Metal from the People's Republic of China*, A–570–806, POR 6/01/05–5/31/06, at 5, 8–9 (Oct. 9, 2007), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E7-20344-1.pdf ("*Issues and Decision Memorandum*").

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). The court will uphold Commerce's final determination in an antidumping investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

Commerce is required to use the "best available information" when valuing the factors of production, based on publicly available infor-

mation from a market economy of comparable economic development. 19 U.S.C. § 1677b(c)(1); 19 C.F.R. § 351.408. Commerce has "broad discretion" in this valuation process, *Timken Co. v. United States*, 166 F. Supp. 2d 608, 616 (CIT 2001), and the court will uphold Commerce's determination "if it is reasonable and supported by the record," *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal quotation marks and citation omitted).

Silica fume is a by-product created during the production of silicon metal and ferrosilicon, and the value of silica fume is subtracted from the production cost of silicon metal when calculating silicon metal's normal value. *See Issues and Decision Memorandum* at 20. Because silica fume does not have a specific subheading under the Indian Harmonized Tariff Schedule, Commerce calculated an AUV for silica fume imports into India using WTA Indian import data covered by the basket tariff subheading for all forms of silicon dioxide. *See id.* at 20–21, 25. The resulting AUV was approximately $1700 per metric ton ("MT"). *Id.* at 21. Commerce relied on the WTA data, asserting that it could not determine whether the Infodrive India data submitted by Globe included "a significant percentage of the WTA data," but acknowledged that the WTA data "may [have] include[d] higher-valued products." *Id.* at 25.

The court held that valuing silica fume using the basket category AUV "captures too many products that are not the by-product silica fume," and that "the best available information is data that better relates to the specific by-product silica fume." *Globe*, 2008 WL 4417187, at *7. Thus, the matter was remanded to Commerce "in order for it to obtain better information for valuing silica fume or to use information on the record that relates specifically to the by-product silica fume." *Id.*

On remand, Commerce allowed interested parties the opportunity to submit new information and initiated "its own extensive search" of surrogate value information to use in valuing silica fume. *See Final Results of Redetermination Pursuant to Court Remand for Globe Metallurgical, Inc. v. United States* at 2–3 (Feb. 2, 2009) (Docket No. 110) ("*Remand Results*"). Commerce was "unable to find alternative, reliable sources," and instead, adjusted the WTA Indian import data for silicon dioxide to include only data from countries identified as producers of silicon metal or ferrosilicon by the U.S. Geological Survey ("USGS") 2005 Mineral Yearbook for Ferroalloys. *Id.* at 3. Commerce also excluded countries that it had determined to be nonmarket economies. *Id.* Thus, based on these adjustments, Commerce's revised AUV of approximately $778 per MT[1] for silica fume

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[1] Commerce lists an AUV of $778 per MT for Datong Jinneng Industrial Silicon Co., Inc. and Shanghai Jinneng International Trade Co., Ltd. and an AUV of $774 for Jiangxi Gangyuan Silicon Industry Company, Ltd. (*See* Remand App. to Defendant-Intervenors' Comments on Final Results of Redetermination Pursuant to Court Remand Tabs B, C.) The

was based on WTA Indian import data from thirteen countries identified by the USGS as producers of silicon metal or ferrosilicon, compared to the original AUV of approximately $1700 per MT in the *Final Results* based on WTA Indian import data from twenty-five countries.[2] *Id.*

Globe contends that a surrogate value for silica fume based on even the adjusted AUV fails to comply with the court's requirement of "product-specific data" because it captures too many high-end products that distort the AUV calculation. (Pl.'s Comments on Redetermination on Remand Issued by Dept. of Commerce ("Pl.'s Remand Comments") 2.) Globe contends that in choosing the relevant import data to include in the AUV, Commerce failed to consider additional information in the record, most significantly Infodrive India data, which Globe contends demonstrated that seven of the thirteen countries included in the adjusted AUV supplied significant amounts of products other than silica fume to India during the POR. (*Id.* at 4–5.) Globe maintains that only the silicon dioxide imports from the remaining six countries should be used to calculate an adjusted AUV of either $530 per MT using the further adjusted WTA import data or $470 per MT using the Infodrive import data, because the Infodrive data demonstrates that the imports underlying these values consisted almost entirely of silica fume. (*Id.* at 9–10.) Globe also contends that the average sales prices of refractory-grade silica fume in India during the POR by Norchem Inc., a U.S. producer and exporter of silica fume into India, indicate that the adjusted AUV calculated by Commerce is significantly distorted.[3] (*Id.* at 10–11.)

In selecting surrogate values for use in nonmarket economy proceedings, Commerce understandably prefers to use prices that are publicly available, broad market averages, contemporaneous with the POR, specific to the input in question, and exclusive of taxes. *Import Administration Policy Bulletin 04.1: Non-Market Economy Surrogate Country Selection Process* at *4 (March 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04-1.html. Commerce acknowledged

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parties have not explained the reasoning for this slight discrepancy and obviously view this difference as immaterial.

[2] The thirteen countries relied on in the *Remand Results* are Brazil, Spain, Iran, Egypt, South Africa, Australia, Norway, France, Sweden, United States, Italy, Canada, and North Korea. *Id.*

[3] Norchem's average price for silica fume sold to India during the POR was $[[ ]] per MT for bagged, densified refractory-grade silica fume and $[[ ]] per MT for bagged, undensified refractory-grade silica fume. (*Id.* at 11.) This partially corroborates either of the two adjusted WTA figures now proposed by Commerce and Globe.

Globe also argues that Commerce erred in not including Germany as a country that produced silicon metal during the POR, but maintains that if Germany had been included, this would have further distorted the AUV for silica fume because only a small portion of the silicon dioxide imports into India during the POR from Germany were silica fume. (*Id.* at 15–18.) The court finds this argument to be contradictory, and it is also based on problematic Infodrive India import data.

that in this case it "continue[d] to be left with imperfect options" but concluded that its use of the adjusted WTA data it chose for valuing silica fume "relates more specifically to silica fume than the unadjusted WTA data." *Remand Results* at 5–6. That is no doubt true, but the essential issue raised by Globe is whether Infodrive India data should be used either to further adjust the WTA data or as a substitute for the WTA data.

Commerce has repeatedly expressed concerns over Infodrive's reliability, given the "significant and . . . unresolved discrepancies between the [WTA data and Infodrive data] that render the Infodrive data unusable."[4] *Id.* at 7. Information has not been provided detailing the specific relationship of Infodrive India data to the WTA Indian import data or what amount of the Infodrive data were subject to customs duties.[5] Infodrive data is based upon a variety of types of information and admittedly is not derived from data from all of India's ports. Commerce has stated that it will nonetheless "consider[ ] Infodrive data when further evaluating import data, provided the following conditions are met: 1) there is direct and substantial evidence from Infodrive reflecting the imports from a particular country; 2) a significant portion of the overall imports under the relevant HTS category is represented by the Infodrive India data; and 3) distortions of the AUV in question can be demonstrated by the Infodrive data." *Antidumping Duty Investigation of Lightweight Thermal Paper from the People's Republic of China: Issues and Decision Memorandum*, A–570–920, POR 1/01/07–6/30/07, at 34 (Oct. 2, 2008), *available at* http://ia.ita.doc.gov/frn/summary/PRC/E8-23284-1.pdf. Here, Commerce has been "unable to determine what percentage of the total import data is captured by the Infodrive data." *Remand Results* at 8. Under these facts the court cannot say Commerce must use the Infodrive data for any purpose.

The new value selected by Commerce is well within the range of silica fume prices in India. It is impossible to say if the better value is $530 per MT or $778 per MT or some other value. Given that "there is no single surrogate value option offered by any interested party that guarantees a perfect match with the silica fume sold by [Defendant-Intervenors]," *id.* at 9, the WTA data selected by Commerce, which comes from official Indian import statistics supplied by

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[4] Commerce noted that

> while the WTA Indian import data for silicon dioxide during the POR contains a total of 8,287 MT of silicon dioxide, the Infodrive India data contains 17,864 MT, . . . [and] 80% of the Infodrive India entries by volume are identified as not subject to customs duties. If we accept that such entries should be excluded, the total Infodrive India volume drops to just 3,409 MT, which is less than half the official WTA Indian import volume.

Issues and Decision Memorandum at 25.

[5] Imports subject to duties are likely for consumption in India, the surrogate country.

the Indian government, constituted suitable information for Commerce to use here. Unlike the prior value of $1700 per MT, the $778 per MT value is adequately supported on this record by the adjusted WTA data and other corroborating information. Accordingly, Commerce's new choice of a value for silica fume was based on data that better relates to the specific by-product silica fume as required by the court's remand and was supported by substantial evidence.

CONCLUSIONS

The results of the remand determination are sustained in their entirety.