Slip Op. 03–164

AL TECH SPECIALTY STEEL CORP., CARPENTER TECHNOLOGY CORP., REPUBLIC ENGINEERED STEELS, TALLEY METALS TECHNOLOGY, INC. and UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, *Plaintiffs*, v. UNITED STATES OF AMERICA and THE UNITED STATES INTERNATIONAL TRADE COMMISSION, *Defendants*, and KRUPP EDELSTAHLPROFILE GMBH and KRUPP HOESCH STEEL PRODUCTS, INC., *Defendant-Intervenors*.

Court No. 98–10–03062
[PUBLIC VERSION]

[Plaintiffs' Motion for Judgment Upon the Agency Record is denied.]

December 16, 2003

Collier Shannon Scott, PLLC (*Laurence J. Lasoff, Robin H. Gilbert* and *R. Alan Luberda*), for Plaintiffs.

Lyn M. Schlitt, General Counsel; (*Charles A. St. Charles*), Office of the General Counsel, United States International Trade Commission, for Defendant.

Hogan & Hartson LLP (*Lewis E. Leibowitz, Craig A. Lewis*, and *Stephen F. Propst*), for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

Plaintiffs AL Tech Specialty Steel Corp., Carpenter Technology Corp., Republic Engineered Steels, Talley Metals Technology, Inc., and United Steel Workers of America, AFL-CIO/CLC (collectively, "Plaintiffs" or "Domestic Industry") challenge the determination by the United States International Trade Commission (the "Commission") that imports of stainless steel wire rod ("SSWR") from Germany were "negligible" within the meaning of 19 U.S.C. §§ 1673d(b)(1) and 1677(24)(A)(i).[1] *Stainless Steel Wire Rod From*

[*] This Public Version of the Court's opinion has been redacted to protect business proprietary information. Redactions are reflected by empty brackets, except that, for the sake of readability—wherever possible—a description or characterization of the redacted informa-

Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan, 63 Fed. Reg. 49,610 (Int'l Trade Comm'n Sept. 16, 1998) ("*ITC Final Determination*"). By operation of law, the Commission's finding of negligibility terminated its antidumping investigation of imports from Germany. 19 U.S.C. 1673d(b)(1).

For the reasons set forth below, Plaintiffs' motion for judgment on the agency record is denied.

I. Background

Plaintiffs filed an antidumping duty petition with the United States Department of Commerce ("Commerce") and the Commission against imports of SSWR from Germany and other countries on July 30, 1997.[2] Complaint ¶ 6. The petition alleged that these SSWR imports "are being, or are likely to be, sold in the United States at less than fair value within the meaning of [19 U.S.C. § 1677], and that such imports are materially injuring an industry in the United States." *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 62 Fed. Reg. 45,224 (Dep't Commerce Aug. 26, 1997). Both Commerce and the Commission instituted preliminary antidumping investigations. *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 62 Fed. Reg. 42,263 (Int'l Trade Comm'n Aug. 6, 1997); *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 62 Fed. Reg. 45,224 (Dep't Commerce Aug. 26, 1997).

During the preliminary injury investigation, Defendant-Intervenors Krupp Edelstahlprofile GmbH ("KEP") and Krupp Hoesch Steel Products, Inc. (collectively, "Krupp") argued that imports of SSWR from Germany were "negligible" within the meaning of 19 U.S.C. § 1673b(a)(1) and § 1677(24)(A)(i). Public Record ("P.R.") 102, Confidential Record ("C.R.") 27, Post-Conference Brief on Behalf of Krupp Edelstahlprofile GmbH and Krupp Hoesch Steel Products, Inc. at 25–33. Krupp noted a discrepancy between the "official" import data and its own records with respect to German imports of SSWR when it noted a concentration of German imports un-

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tion has been substituted for the proprietary information. Those descriptions or characterizations appear in italics within the brackets.

[1] Stainless steel wire rod is identified as "stainless steel products that are hot-rolled or hot-rolled annealed and/or descaled rounds, squares, octagons, hexagons, or other shapes, in coils, that may also be coated with a lubricant containing copper, lime or oxalate. . . . . Stainless steel wire rod is provided for in subheading 7221.00.00 of the Harmonized Tariff Schedule (HTS) with a 1998 column 1-general tariff rate of 2.8 percent *ad valorem*, applicable to products of each of the subject countries." *ITC Final Determination*, 63 Fed. Reg. at 49,610 n.1.

[2] The Commission reviewed investigations of imports of SSWR from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan. Only the Commission's negligibility determination with respect to imports of SSWR from Germany is at issue here. Complaint ¶ 1. *See ITC Final Determination*, 63 Fed. Reg. 49,610.

der the tariff subheadings 7221.00.0045 HTSUS (stainless steel wire rod with cross-sections exceeding 19mm) and 7221.00.0075 (coiled stainless steel wire rod and bars of non-circular cross-sectional profiles) when it actually only shipped [*a relatively low number of*] tons. C.R. 27 at 32, C.R. 76 at 2–4. Specifically, it argued that statistics showing 1,024 tons—or 44%—of German imports were classified under subheadings 7221.00.0045 and 7221.00.0075 could not be correct since Krupp [ ] and the Commission estimated Krupp accounted for [*a very high percentage*] of all SSWR imports from Germany as of September 1997. P.R. 102/C.R. 27 at 32; C.R. 76 at 3–4, C.R. 43, *Stainless Steel Wire Rod From Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, Staff Report to the Commission on Inv. No. 701–TA–373 and Nos. 731–TA–769 through 775 (Prelim.) ("*Preliminary Staff Report*") at VII–3 n.3 (Sept. 8, 1997).

The Commission Staff noted a "discrepancy between official statistics on imports from Germany and the numbers reported by [*one company*] in the foreign producer questionnaire and [*another company*] in the importer's questionnaire." C.R. 173. Specifically, official import statistics showed [*a major inconsistency compared to*] reported imports and exports in 1996. C.R. 173. Official statistics showed 1,655 short tons of SSWR imported from Germany, but questionnaire responses reported only [*a much smaller quantity*] exported to the United States. C.R. 43, *Preliminary Staff Report*, IV–4 (Table IV–2), VII–2 to –3 (Table VII–1). When asked about the discrepancy, counsel for Krupp guessed that the problem could be misclassification of goods or mislabeled country of origin. C.R. 173. Counsel for Krupp requested that the Commission, in the event of a final investigation, "do an extensive analysis" to trace "exactly where the shipments were originating." C.R. 173.

The Commission published notice of its preliminary affirmative determination that there was "a reasonable indication that an industry in the United States [was being] materially injured or threatened with material injury by reason of imports from Germany . . . of stainless steel wire rod that [were allegedly being] sold in the United States at less than fair value (LTFV)." *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 62 Fed. Reg. 49,994 (Int'l Trade Comm'n Sept. 24, 1997) ("*ITC Preliminary Determination*"); *see* P.R 144, *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, Inv. Nos. 701–TA–373 and Nos. 731–TA–769–775 (Prelim.), USITC Pub. 3060 ("*Preliminary Commission Views*") at IV–1 at 3 n.1 (Sept. 1997). In its preliminary determination, the Commission relied on the unadjusted, official U.S. import statistics for imports for consumption to find that imports of SSWR from Germany accounted for more than three percent of total imports for consumption during twelve months prior to the petition for which information was available, that is July

1996 through June 1997. P.R. 144, *Preliminary Commission Views* at 14. The Commission also noted Krupp's argument to the contrary. P.R. 144 at 14.

Commerce also published notice of a preliminary affirmative determination that imports of SSWR from Germany were being sold for less than fair value.[3] *Stainless Steel Wire Rod From Germany*, 63 Fed. Reg. 10,847 (Dep't Commerce Mar. 5, 1998) ("*DOC Preliminary Determination*"). Commerce later issued a final determination that imports of SSWR from Germany were being sold at less than fair value, stating it would impose final antidumping duties on the imports if the Commission found material injury, or threat of material injury.[4] *Stainless Steel Wire Rod From Germany*, 63 Fed. Reg. 40,433 (Dep't Commerce July 29, 1998) ("*DOC Final Determination*").

On February 26, 1998, Krupp again raised the issue of the apparent discrepancies in the official import statistics with the Commission. C.R. 270. Krupp noted the possibility that [ ] non-German material may have been included in the statistics. C.R. 270. Two weeks later, counsel for Krupp spoke with the Commission noting its concern that "there is a misclassification in the official statistics" because "[*of a significant discrepancy in official statistics on imports of stainless steel wire rod from Germany compared to*] the exports from Germany to the United States reported by the [ ] major producers/exporters in Germany." C.R. 270. The Commission then began the final phase of its injury investigation on March 23, 1998. *See Stainless Steel Wire Rod From Germany, Italy, Japan, Korea, Spain, Sweden and Taiwan*, 63 Fed. Reg. 13,872 (Int'l Trade Comm'n Mar. 23, 1998) (scheduling of final phase of countervailing duty and antidumping investigations).[5]

Ultimately, the Commission Staff reported two major discrepancies between official import statistics and questionnaire responses that resulted in the Commission Staff adjusting the official statistics. P.R. 481/C.R.81 *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden and Taiwan*, Report to the Commis-

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[3] In its investigation of stainless steel wire rod from Germany, Commerce sent a questionnaire on September 19, 1997 to two potential producers and/or exporters of the subject imports to the United States: Krupp and BGH Edelstahl Freital GmbH ("BGH Edelstahl"). *DOC Preliminary Determination*, 63 Fed. Reg. at 10,847. Krupp only responded to one section of the questionnaire, and BGH Edelstahl did not respond at all to the questionnaire. *Id.* Based on the companies' failure to fully respond to Commerce's questionnaires, Commerce determined that the use of adverse facts available was "warranted with respect to both companies." *DOC Preliminary Determination*, 63 Fed. Reg. at 10,848. Commerce then based the companies' dumping margins on information from the petition (as adjusted by Commerce at the time of initiation). *Id.*

[4] As it found in its preliminary determination, Commerce found that imports of SSWR from Germany had margins ranging from 19.45 to 21.28 percent *ad valorem*. *DOC Final Determination*, 63 Fed. Reg. at 40,434. *See also* Complaint ¶ 9.

[5] [*Another*] importer also raised questions as to the accuracy of German import statistics. *See* C.R. 398 [ ].

sion on Investigations Nos. 70–9A–373 (Final) and 731–9A–769 through 775 (Final) ("Final Staff Report"), F–18 to –19, (Table F–8) nn.1–4. The first significant discrepancy was a difference in import volumes of [*Company A*]; [*Company A*] imports were misclassified, so the Commission Staff excluded the misclassified imports. *See id.* [*Company A*] reported [ ] imports of SSWR during July 1996 through June 1997 on its certified questionnaire response. C.R. 102. But official import statistics showed [*Company A*] as having imported a significant tonnage of SSWR during that period. C.R. 81, *Final Staff Report* at F–18 to –19, Table F–8 & n.2.

Commission Staff contacted the U.S. Customs Service[6] to obtain import data, sorted by importer, C.R. 274, and contact information for manufacturers for which Commission Staff could only identify a manufacturer code. C.R. 275. Customs identified [*a particular German manufacturer*]. C.R. 276. Commission Staff reviewed the import data sent by Customs and noted that [*a substantial proportion of*] imports classified under one subheading under investigation were imported by [*Company A*]. C.R. 545. Further, Commission Staff noted that imports from [*the German manufacturer identified by Customs*] tracked "almost exactly with publically official statistics." C.R. 561.

Commission Staff called [*a representative of Company A*] to ask for an explanation of the large discrepancy between [*Company A's*] report of [ ] imports from Germany and the import volume recorded in official import statistics.[7] C.R. 426. The response was "that [*Company A's*] 'major product by far' in the past several years has been [*a particular type of steel product*]; [*Company A*] imports [*that type of product*], not [*steel of the type subject to the investigation*]." C.R. 426. Commission Staff probed, asking if [*the steel product imported by Company A*] may fall under the scope definition in these investigations, and [*the representative of Company A*] said no. Commission Staff called a second time to ask about the physical characteristics of the good imported by [*Company A*], but [*Company A's*] description did not conform with that of the merchandise subject to the investigation. C.R. 426. [*Company A*] did admit to importing SSWR in previous years; and, when told that at least some of its nonconforming imports were classified as SSWR, [*the representative of Company A*] stated "[*he would make inquiries to determine whether there had been a misclassification*]." C.R. 426.

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[6] The United States Customs Service was renamed effective March 1, 2003, and is now organized as the United States Bureau of Customs and Border Protection. See Homeland Security Act of 2002, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108–32 (2003).

[7] Commission Staff expressed concern about whether official import data was accurate in an email sent to [ ]: "Since official stats have been called into question, at least with respect to Germany, I would like to feel very comfortable that the foreign data and US import data are correct." C.R. 400.

The Commission Staff followed up with [*Company A*], asking for written confirmation of the statements made in telephone conversations that the imports classified in official statistics as SSWR attributable to [*Company A*] were actually misclassified and not subject to the investigation. C.R. 545. [*Company A*] complied with the request by sending written confirmation that "[*all its imports from Germany were of a steel product other than the subject merchandise*]." C.R. 550. Commission Staff then contacted [*the German manufacturer that Customs had identified*] by fax to inquire into [*the manufacturer's*] production facilities and production of SSWR. C.R. 558. Bollinghaus replied by fax, explaining [*the limitations of its facilities*] and certifying its [ ] answer to the questionnaire inquiry, "Has your firm produced stainless steel wire rod since January 1, 1995?" C.R. 568.

The second discrepancy was a difference in import volumes due to allegedly mislabeled countries of origin by importer, [*Company B*]. The resulting adjustment was the exclusion of [*a substantial percentage*] of the imports originally labeled as German. *See* C.R. 81, *Final Staff Report*, F–18 to –19 (Table F–8) n.4. The Commission Staff was first alerted to the possibility that the official statistics may be unreliable regarding [*Company B's*] imports when it contacted and received confirmation from [*Company B*] that [*a particular German supplier*], from which [*Company B*] imported all its SSWR, was the company listed as the manufacturer of the SSWR shipped to [*Company B*] but was not a producer of SSWR. C.R. 274; C.R. 81 *Final Staff Report* F–18 (Table F–8) n.1; C.R. 280, Letter from [ ]. [*The president of Company B*] explained to the Commission Staff that [*Company B's supplier*] purchased SSWR from European sources, tested the SSWR, then shipped it to [*Company B*]. C.R. 274. Accordingly, Commission Staff "asked [*the president of Company B*] to identify his imports by individual producers" on the Importer's Questionnaire he was to file with the Commission. C.R. 274. Official import statistics showed that all [*Company B's*] SSWR imported from [*its supplier*] was designated as originating in Germany. *Final Staff Report*, C.R. 81, F–19 (Table F–8) n.4. [*The president of Company B*] memorialized the conversation by way of letter to Commission Staff reiterating that [*Company B's supplier*] did not produce SSWR, purchasing SSWR from European sources instead, and shipping the purchased SSWR to [*Company B*]. C.R. 280.

[*Company B*] indicated [*that a certain percentage of its imports were of German origin, with the remainder from a second country*]—without any tonnage breakout—by handwritten marking next to country selections and in response to the share-of-imports question on its Importer's Questionnaire. C.R. 396. After receiving the questionnaire, Commission Staff called [*Company B's president*] and wrote a letter requesting "a better breakout of [*the two countries of origin*]," and suggesting, "(I believe you said that maybe the grades

or the 'heat' classification might help you?)" C.R. 492V. [*Company B's president*] responded to the further inquiry on behalf of [*Company B*] by sending a letter with a print out of [*Company B's*] vessel list containing SSWR import data from July 1996 through June 1997. C.R. 496.

The vessel list included handwritten notations in the country-of-origin column stating [*the origin of material—either Germany or the second country*]. C.R. 496. The word "Germany" appears [*a number of*] times; and each time lines extend from the word to material-weight figures in the weight column, indicating which material volumes are associated with the country label. C.R. 496. One group of material volumes in the weight column corresponding to [*the second country*] is similarly marked. C.R. 496. But most groups of volumes from the weight column have an arrow pointing from material volume subtotals appearing in the weight column to [*the name of the second country*] in the country-of-origin column. C.R. 496. Further, each material volume has a corresponding "heat code" in a column labeled "Heat #," to the right of the country-of-origin column. C.R. 496. Every material volume marked [*with the name of the second country*] has a corresponding [*heat number of a particular type*], and every material volume marked "Germany" has a corresponding [*heat number of a different type*]. C.R. 496.

Commission Staff noted that, while the certified questionnaire "estimated a [*particular*] split in imports between Germany and [*the second country*] . . . in subsequent information [that [*the president of Company B*]] submitted it appears that [*a substantial percentage*] of his imports were from [*the second country*]." C.R. 597. [*The president of Company B*] confirmed the approximate [*ratio of material of German origin to that of second country origin*]. C.R. 597.

Commission Staff then prepared a worksheet comparing the import and country-of-origin information provided by [*Company B*] with official import statistics. C.R. 603. Commission staff noted, "there are a number of instances where the date appearing in the Customs Net Import File (CNIF) differs from the date appearing in the vessel list supplied by [*Company B*]; however, even with this inconvenience, the correlation between the data is obvious." C.R. 603. In the worksheet, Commission Staff labeled [*a number of*] groups of import volumes as "unknown" country of origin. C.R. 603. The marked-up copies of the vessel lists—used by Commission Staff to prepare the comparison chart—show that the "unknown" volumes of material were volumes at the beginning of groups of volumes in the weight column before a subtotal of material volume by weight, but were volumes not included in the subtotal. C.R. 603. Further, in each case of an "unknown" volume, the "unknown" group was sandwiched between volumes [*identified as being of second country*] origin, and had no intervening subtotal which would create an obvious break in the numbers in the column of import volumes by weight." C.R. 603.

Moreover, each "unknown" volume has a corresponding [*heat code of the particular type associated with origin in the second country*]. C.R. 603. The Staff Report explains that "[ ]." C.R. 81 *Final Staff Report*, F–19, (Table F–8) n.4.

Approximately [ ] percent of [*Company B's*] imports on the vessel list were not marked with any country of origin. C.R. 81, *Final Staff Report*, F–19, (Table F–8) n.4. The percentage break down of [*Company B's*] imports with country-of-origin markings—according to [*the company president's*] handwritten notations—]was [ ] percent [*second country origin*] and [ ] percent German. *Id.* The Commission Staff extrapolated the same [*country of origin ratio derived*] from the [*material of known origin*] to the [ ] percent of imports the Commission Staff labeled as having "unknown" origin. C.R. 81, *Final Staff Report* F–19 (Table F–8) n.2; C.R. 603.

As a result of its investigation, the Commission Staff concluded that official imports from Germany were overstated, because: (1) "they include [*stainless steel wire rod of second country origin*] that was shipped to [*Company B*] by [*its sole supplier, which does not manufacture SSWR*]"; and (2) "imports of [*a steel product other than stainless steel wire rod*] by [*Company A*] into [*a specific U.S. port*] from Germany, [*and two other countries*] are misclassified as stainless steel wire rod." P.R. 481/C.R. 81, *Final Staff Report* at IV–3.

The Commission Staff then adjusted the "official" import statistics for the data covering the twelve-month period prior to the petition (the data used for the negligibility analysis) to account for these discrepancies by [*the two companies*]. *See* P.R. 481/C.R. 81, *Final Staff Report* at IV–4 (Table IV–1) (U.S. Imports, questionnaire data, period of investigation, by source), F–8 to 9 (Table F–3) (U.S. Official Imports for Consumption as adjusted by Commission staff, period of investigation, by source), F–10 to 11 (Table F–4) (U.S. Imports, questionnaire data, period of investigation, by firm); F–13 (Table F–5) (U.S. Imports, official data, imports for consumption adjusted for misclassification).

The Final Staff Report included negligibility calculations based on imports-for-consumption and general-imports data, both unadjusted and adjusted for errors. *See generally* P.R. 481/C.R. 81, *Final Staff Report* at F–13 (Table F–5), F–18 to –19 (Table F–8). Specifically, using official imports-for-consumption statistics, *adjusted for inaccuracies* imports from Germany accounted for 2.76 percent of all SSWR imports during the 12-month period preceding the filing of the petition (July 1996 through June 1997). P.R. 481/C.R. 81, *Final Staff Report* at F–13 (Table F–5).

Using general-imports statistics, the Commission Staff determined that "*adjusted* German imports . . . accounted for only 2.94 percent of total adjusted imports." P.R. 481/C.R. 81, *Final Staff Report* at F–18 to –19 (Table F–8). "[*U*]*nadjusted*, the official U.S. [general-imports] statistics show a 4.74 percent share for Germany."

Pls.' Brief at 8–9 (emphasis added) (*citing* P.R. 481/C.R. 81, *Final Staff Report*, F–18 to –19 (Table F–8 nn.1–4)).

Based on this data, the Commission determined that for the purposes of its present-material-injury analysis, imports of SSWR from Germany were negligible during the twelve months preceding the filing of the petition. *Id.*; *see ITC Final Determination*, 63 Fed. Reg. at 49, 610; *see also* Complaint ¶ 10. Specifically, four of the five participating Commissioners relied on the negligibility calculation based on the imports-for-consumption data series and determined that imports from Germany accounted for 2.76 percent of total adjusted imports. *See* P.R. 481/C.R. 81 at 12 & n. 43, *Final Staff Report*, Table F–5. All five of the participating Commissioners found that the imports would be negligible if the ratio for German imports were calculated using the adjusted "general" imports data series. P.R. 506, *Final Commission Views* at 12 n.43. None of the participating Commissioners relied on the unadjusted official data for either imports for consumption or general imports. Def.-Intervenors' Brief at 28. Further, although the Commission majority found "a potential that subject imports from Germany will imminently account for more than three percent of total SSWR imports in the relevant 12-month period," it concluded that "an industry in the United States is not threatened with material injury by reason of imports of SSWR from Germany that have been found by Commerce to be sold at LTFV."[8] P.R. 506, *Final Commission Views* at 4–5, 23; *see also ITC Final Determination*, 63 Fed. Reg. at 49,610 n.5.

This action ensued, challenging the Commission's final determination that there was no present material injury by reason of subject imports from Germany because such imports were "negligible" within the meaning of 19 U.S.C. § 1673d(b)(1) and § 1677(24)(A)(1). *See, e.g.*, Complaint ¶¶ 5, 12. Plaintiffs argue that by basing the determination on imports-for-consumption data instead of general-imports data, the Commission relied on the wrong set of official import statistics. *See* Pls.' Brief at 1, 9–10, 13, 23–25; Pls.' Reply Brief at 1–14. Plaintiffs also contend that the Commission should not have relied on adjustments made by the Commission staff to the official import statistics based on data provided by importers. *See* Pls.' Brief at 1, 3, 9, 14–26; Pls.' Reply Brief at 15–31.

Jurisdiction lies under 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 2636(c).

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[8] In contrast, because Commissioner Crawford found that imports of SSWR from Germany would *not* imminently exceed the three percent negligibility threshold, she did not go on to consider those imports for purposes of determining threat of material injury. *See* C.R. 644, *Stainless Steel Wire Rod from Germany, Italy, Japan, Korea, Spain, Sweden and Taiwan*, Inv. No. 701–TA–373 & 731–TA–769–775 (Final) (Sept. 16, 1998) ("*Confidential Commission Views*") at 48–51 (dissenting views of Commissioner Crawford). Commissioner Crawford's finding is not at issue in this action.

II. Standard of Review

In reviewing a challenge to the Commission's final determination in an antidumping case, the Commission's determination must be upheld 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).

The party challenging the Commission's finding "bears the burden of proving the evidence is inadequate." *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1397 (Fed. Cir. 1997). "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." *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (defining "substantial evidence" as "something less than the weight of the evidence"). " 'It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record.' " *Timken Co. v. United States*, 913 F. Supp. 580, 583 (CIT 1996) (quoting *Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (1988), aff'd, 894 F.2d 385 (Fed. Cir. 1990)). Moreover, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

III. Analysis

In antidumping investigations, the Commission determines whether

> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury, or
>
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise with respect to which the administering authority has made an affirmative determination under subsection (a)(1) of this section. *If the Commission determines that imports of the subject merchandise are negligible, the investigation shall be terminated.*

19 U.S.C. § 1673d(b)(1) (1994) (emphasis added). The Statement of Administration Action ("SAA") is to the same effect. SAA at 855.

The Commission's negligibility analysis is specifically guided by Section 771(24) of the Tariff Act of 1930, as amended by the URAA, which provides that imports are considered "negligible" if such imports "account for less than 3 percent of the volume of all such merchandise imported into the United States in the most recent 12-month period for which data are available that precedes" the filing of the petition. 19 U.S.C. § 1677(24)(A)(i) (1994). In this case, the Commission determined that imports of SSWR from Germany were negligible during the relevant twelve month period preceding the filing of the petition—July 1996 through June 1997. *ITC Final Determination*, 63 Fed. Reg. 49,610; *see also* P.R. 506, *Final Commission Views* at 20–22.

The plaintiff Domestic Industry here argues (a) that the Commission erred in relying on statistics concerning "imports for consumption" (rather than "general imports") in reaching its negligibility determination;[9] and (b) that certain adjustments made to the official statistics are not supported by substantial evidence. Although the Commission based its determination on "imports for consumption," it also analyzed the "general imports" data—the data that Plaintiffs urged. Like its analysis based on statistics concerning imports for consumption, the Commission's analysis of statistics on general imports concluded that German imports were negligible. Accordingly, because — as detailed below — the adjustments are supported by substantial evidence in the record and are otherwise in accordance with law, there is no need to reach Plaintiffs' other issue.

A. [*Company A*] Adjustments

As discussed in section I above, the Commission adjusted the official statistics to reflect information supplied by [*Company A*] in the course of the investigation indicating that imports from Germany, [*and two other countries*] — which had been declared to Customs to be SSWR — were, in fact, instead "[*another steel product*]." The Domestic Industry contends that — for two reasons — the Commission's adjustments to [*Company A's*] data are not supported by substantial evidence on the record, and are otherwise contrary to law. *See generally* Plaintiffs' Brief at 3, 9, 21–23; Plaintiffs' Reply Brief at 27–30.

First, the Domestic Industry seeks to depict [*Company A*] as untrustworthy, and to cast doubt on the "accuracy, reliability, and probative value"of the information it provided — emphasizing that, at the time it made its disclosure, the company knew that a negligibil-

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[9] Imports-for-consumption data "measure the total merchandise that has physically cleared through Customs, either entering consumption channels immediately or as withdrawals from bonded warehouses under Customs custody or from foreign trade zones." Def.'s Response Brief at 3 (*citing Guide to Foreign Trade Statistics* (Dep't Commerce Dec. 1992)).

ity determination would result in no liability for antidumping duties; suggesting that the company may have intentionally misclassified its merchandise to obtain the lower customs duty rate applicable to SSWR; and questioning whether the company ever reported the misclassification to Customs. Plaintiffs' Brief at 21–22; Plaintiffs' Reply Brief at 27–30. The Domestic Industry asserts that, at a minimum, [*Company A*] is guilty of misrepresentation to at least one of the two federal agencies and that, under the circumstances, the Commission erred in "simply tak[ing] the importer's word for what it said had occurred regarding its imports." Plaintiffs' Brief at 22.

As an initial matter, it is worth noting — in the context of the Domestic Industry's challenges to the reliability of information provided by [*Company A*] — that the credibility of sources is largely a matter within the province of the Commission, as the trier of fact. *See generally* Defendant-Intervenors' Brief at 58–59.

But, contrary to the Domestic Industry's claims, the Commission did not blindly accept [*Company A's*] statements at face value. As section I above explains, discrepancies in the official import data first came to the Commission's attention in the preliminary phase of the investigation, when counsel to the German producers noted in post-conference briefing that the official data showed an inexplicable concentration of German imports in one particular HTSUS subheading, covering material with circular cross-sections exceeding 19 mm. Those data could not be reconciled with the fact that KEP — which accounted for [*a very high percentage*] of total German imports — had shipped a [ ] quantity of the material in the relevant twelve-month period. C.R. 43, *Preliminary Staff Report* at VII–3; C.R. 27 at 32.

After analyzing the foreign producer and importers' questionnaire data, the Commission staff expressed similar concerns about the vast "discrepancy between official statistics on imports from Germany and the numbers reported by [*one company*] in the foreign producer questionnaire and [*another company*], in the importer's questionnaire." C.R. 173. The staff investigator further noted that "the numbers in the official statistics are [*significantly higher in calendar year 1996 than*] the reported import and export numbers." *Id*. Indeed, the Preliminary Staff Report showed that — according to the official statistics — 1996 imports of SSWR from Germany totaled 1,655 short tons, while foreign producer questionnaire data reflected total shipments to the United States of [*a significantly smaller*] quantity. *See* C.R. 43, *Preliminary Staff Report*, at IV–4 (Table IV–2) and VII–3 (Table VII–1). When asked about the discrepancy, counsel to the primary German producer suggested that the problem might lie with the large diameter material, and requested that — in the event of a final investigation — the Commission "do an extensive analysis" to trace "exactly where the shipments were originating." *Id*.

The concerns about these discrepancies in the official import data continued unabated into the final phase of the Commission's investigation. In late February 1998, counsel for KEP spoke with the Commission investigator, seeking a meeting to discuss "issues specific to the exports from Germany, for example some shipments classified as German are not German (they may be transhipments)." C.R. 270. Counsel spoke with the Commission staff again in mid-March 1998, emphasizing that "[*there was a significant discrepancy in official statistics on imports of stainless steel wire rod from Germany compared to*] the exports from Germany to the United States reported by the [ ] major producers/exporters in Germany." Counsel indicated his belief that misclassification was involved, and asked that the Commission staff "look into this matter." *Id.*

The source of counsel's concern was manifest in the official import statistics, which indicated that a substantial volume of the imported, allegedly "German" material consisted of stainless steel coiled bars with diameters of 19 mm or more, and coiled stainless steel wire rod and bars of non-circular cross-sectional profiles. However, as Krupp noted in post-hearing briefing, the official data could not be correct, and could not accurately reflect imports of German material, because the evidence compiled in the final investigations indicated that KEP — which was by far the largest German producer and exporter of subject merchandise — [ ] non-circular product (subheading 7221.00.0075, HTSUS) or coiled bar (subheading 7221.00.0045, HTSUS) to the United States during the relevant period. C.R. 76 at 3. Similarly, the only other German producer of SSWR — [ ] — advised in its prehearing brief that it, too, had sold only [ ] in the United States. C.R. 53 at 3. Thus, the volumes of non-circular product reported in the official statistics could not be attributed to [*that producer*].

Through its final investigation, the Commission staff sought to resolve the identified discrepancies. The information developed, confirmed, and corroborated by the Commission through correspondence with importers and foreign suppliers, as well as proprietary Customs sources, eventually enabled the Commission to reconcile the data, and resulted in the adjustments to the [*Company A*] data. The evidence supporting those adjustments includes: (1) the certified importers' questionnaire response which [*Company A*] submitted in the preliminary investigation, listing imports of SSWR from [*a country other than Germany*] only — [ ] (C.R. 102); (2) the certified foreign producers' questionnaire response, with cover letter, submitted by the German supplier/manufacturer [ ], confirming [*its product line*] (C.R. 568; *see also* C.R. 81, *Final Staff Report* at IV–3 n.4); (3) proprietary Customs entry data showing that all material entered by [*Company A*] in the relevant period and listed as "German" was classified as [*a particular type of steel product, under a particular subheading of the HTSUS*] — the product

category which was confirmed [ ] (C.R. 263); and (4) confirmation that the data provided by [*Company A*], the data listed in the CNIF import files, and the official import data, all matched and cross-checked. C.R. 81, *Final Staff Report* at IV–3.

In short, contrary to the claims of the Domestic Industry, there is ample evidence in the record to support the Commission's adjustment to the official data, excluding the [*Company A*] material.

The Domestic Industry's arguments concerning [*Company A's*] obligations *vis-a-vis* Customs are similarly unavailing. As Krupp notes, there is no evidence on the record to substantiate any claim that [*Company A*] lied, either to Customs or to the Commission. It is entirely possible that any misclassification was entirely inadvertent. *See* Defendant-Intervenors' Brief at 46.

Moreover, while it may be true that there is no record evidence that [*Company A*] reported its misclassification to Customs, it is equally true that there is no evidence that the company failed to make any necessary subsequent disclosures. Defendant's Brief at 30 n.38; Defendant-Intervenor's Brief at 47. And, indeed, what evidence there is on the record cuts against the Domestic Industry's position: [*Company A*] did, in fact, advise the Commission staff that it would be contacting its customs broker to ascertain whether merchandise had been misclassified. C.R. 426.

Further, there is no merit to the Domestic Industry's implication that any inconsistencies between the information that [*Company A*] reported to the Commission and that reported to Customs necessarily renders the information furnished to Customs the only information on which the Commission could reasonably rely. Customs' responsibility for classifying imports for the purpose of assessing duties does not detract from the Commission's independent obligation to compile the necessary information required for its analyses. Other agencies are not bound by Customs' classifications. *See, e.g., Royal Business Mach., Inc. v. United States*, 1 CIT 80, 507 F. Supp. 1007, 1014 n.18 (1980), *aff'd*, 669 F.2d 692 (CCPA 1982).

It is beyond cavil that the Commission is entitled to supplement information from official statistics with the information that it gathers during its own investigation, and — after weighing the evidence — to choose to rely upon one set of facts over the other. Indeed, the Commission routinely relies on information it gathers in the course of its investigations, even when that data conflicts with other official statistics on the record; and the Commission has been repeatedly upheld when it has done so. *See, e.g., Texas Crushed Stone Co. v. United States*, 17 CIT 428, 822 F. Supp. 773, 781 (1993), *aff'd*, 35 F.3d 1535 (Fed. Cir. 1994); *see generally* Defendant's Brief at 27–31.

Here, the Commission obtained specific, detailed information about the merchandise at issue that was not previously available to Customs. The record before the Commission thus included different — or additional — information from that which Customs used in its

classification. The Commission responsibly reviewed its own administrative record and, based on those facts and drawing on its expertise, reached an informed conclusion as to the appropriate adjustments to be made to the data used for its negligibility determination.

The Domestic Industry's second challenge to the Commission's reliance on information provided by [*Company A*] rests on its complaint that the information was not submitted in the form of a certified questionnaire response. *See* Plaintiffs' Brief at 7, 21–22. While it is true that [*Company A*] did not return the importers' questionnaire in the final phase of the investigation, the company was responsive to the Commission's requests for information. C.R. 550.

More to the point, the information that [*Company A*] submitted in the final phase of the investigation confirmed and was consistent with information that it had previously submitted. The Domestic Industry thus conveniently ignores [*Company A's*] importers' questionnaire response submitted in the course of the Commission's preliminary investigation — which *was* certified, and which indicated that the company had imported SSWR only from [*a country other than Germany*] and that [ ] throughout the relevant period. C.R. 102; *see also* C.R. 81, *Final Staff Report* at IV–3 n.4.[10]

B. [*Company B*] Adjustments

The Commission's adjustments to the official statistics were not confined to the data on [*Company A*]. The Commission also adjusted the official statistics to reflect information supplied in the investigation indicating that a portion of [*Company B's*] imports of SSWR that were declared to Customs as being of German origin were actually of [*another (i.e., second) country*] origin. Specifically, based on the handwritten notations on the [*Company B*] worksheet, the Commission determined the origin of [*a very high*]% of the [*Company B*] shipments at issue. The Commission further determined that — of that [*very high*]% — approximately [ ]% were actually of [*second country*] origin, while only approximately [ ]% were of German origin. The Commission allocated the remaining [ ]% of the material — the so-called "unknown" material — between [*the second country*] and Germany, based on the [*ratio derived from the material for which the countries of origin were known*]. *See generally* Defendant's Brief at 34.

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[10] The Domestic Industry similarly ignores the existence in the record of a certified response to the foreign producers' questionnaire that was submitted in the final phase of the investigation by the supplier [ ]. That certified questionnaire response further corroborated both the questionnaire response submitted by [*Company A*] in the preliminary investigation and the company's statements to the Commission in the final phase of the investigation, to the effect that it had imported [ ] SSWR from Germany during the period at issue. C.R. 568; *see also* C.R. 81, *Final Staff Report* at IV–3, n.4.

Just as it objected to the adjustments to the data on [*Company A*], so too the Domestic Industry contends that the Commission's adjustments to the [*Company B*] data are not supported by substantial evidence on the record, and are otherwise contrary to law. *See generally* Plaintiffs' Brief at 14–21; Plaintiffs' Reply Brief at 16–30.

The Domestic Industry first attacks the Commission's reliance on the worksheet. The Domestic Industry portrays the [*Company B*] data as a "moving target," emphasizing that Customs records indicated that all the [*Company B*] merchandise at issue was of German origin; that – in the course of the investigation — [*Company B*] initially advised the Commission that the merchandise was [ ]% German and [ ]% [*from the second country*]; and that only after [*Company B*] was pressed to provide a more specific breakdown did it provide the worksheet with handwritten notations on country of origin, from which the Commission staff derived the [*ratio which the staff then used to allocate the "unknown" material between Germany and the second country*]. Plaintiffs' Brief at 16–19; Plaintiffs' Reply Brief at 16–23. All in all, the Domestic Industry seeks to impugn the credibility of [*Company B*], and to challenge the "accuracy, reliability, and probative value" of the information provided by the company on which the Commission's adjustments were based. Plaintiffs' Brief at 14.[11]

The Domestic Industry charges that [*Company B's*] worksheet reflects nothing more than the company's "estimates," and that its figures lack any corroboration. Plaintiffs' Brief at 15; Plaintiffs' Reply Brief at 18. However, [*Company B's*] worksheet was no "estimate"; it was a shipment-by-shipment "reconstruc[tion]," annotated by the hand of the president of the company to indicate country of origin. C.R. 496. Nor is the record lacking in evidence to substantiate [*Company B's*] claims.

The Commission specifically confirmed that [*Company B's German supplier*] — listed as the manufacturer in the official statistics — simply does not manufacture SSWR. C.R. 81, *Final Staff Report*, at F–18 (table f–8) n.1; C.R. 280; C.R. 274; C.R. 396 at 5; C.R. 592. In addition, German SSWR producers had separately informed the Commission that the official statistics on SSWR imports appeared to be inaccurate (overstating imports from Germany), and had requested that the Commission investigate the matter further. C.R. 270. Moreover, the total imports which [*Company B*] reported to the Commission were virtually identical to the totals listed for the company in the official statistics. C.R. 81, *Final Staff Report*, at F–18–19

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[11] It is again worth reiterating that, as a general matter — as noted in section II. A. above — evaluation of the credibility of sources is largely reserved to the trier of fact, the Commission.

(Table F–8) n.4 (and revisions at C.R. 89).[12] Thus, there is substantial evidence in the record to support both [*Company B*'s] claims and the Commission's determination that adjustments to the official statistics were needed. Moreover, although the Domestic Industry characterizes as "arbitrary" the country-of-origin breakdown set forth in [*Company B*'s] worksheet (Plaintiff's Brief at 15), they point to no evidence and advance no arguments to support their skepticism, other than their general attacks on [*Company B*'s] credibility.[13]

As with [*Company A*], the Domestic Industry seeks to make much of the fact that there is no record evidence that [*Company B*] ever reported its misclassifications to Customs. *See* Plaintiffs' Brief at 17; Plaintiffs' Reply Brief at 17 n.17. However, as discussed in section II.A, there is also no evidence that [*Company B*] *failed* to make any necessary disclosures. *See also* Defendant's Brief at 36; Defendant-Intervenors' Brief at 54. With the record in equipoise on this point, it provides no grounds to second-guess the Commission's determination.

In a further effort to undermine [*Company B*'s] credibility, the Domestic Industry questions the motivation behind the company's statements, asserting that an interest in obtaining a lower [ ] dumping margin would have given [*Company B*] an incentive to lie. *See* Plaintiffs' Brief at 17–18. However, that concern is largely disposed of by Krupp's observation that, "[b]y definition, the imports at issue *all* were made before the antidumping petitions were even filed and, therefore were never subject to an antidumping-related suspension of liquidation, let alone an assessment of antidumping duties. Consequently, the origin of the entries could not possibly have any impact on the potential liability for antidumping duties. Furthermore, because the importer at issue [ ], the importer would have been free to source future imports elsewhere in the event that substantial dumping margins were imposed." Defendant-Intervenors' Brief at 54–55.

Similarly, the Domestic Industry's assertion that [*Company B*] had an incentive to lie because it was "keenly aware" that its responses could affect the outcome of the case for Germany is sheer speculation. *See* Plaintiff's Brief at 18. Indeed, as Krupp points out, the only authority cited by the Domestic Industry to support its claim is a letter that is addressed not to [*Company B*], but to another, unaffiliated importer. Defendant-Intervenors' Brief at 55.

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[12] The Domestic Industry minimizes the probative value of this correlation. *See* Plaintiff's Reply Brief at 20–21. Although — considered alone — it may not be compelling, it has at least some probative value. And, as discussed above, it is buttressed by other information corroborating [*Company B*'s] statements, and justifying the Commission's adjustments.

[13] As discussed in greater detail below, there is evidence in the record of a relationship between the country of origin of a given shipment, and the manufacturer's "heat codes."

_____ While the Domestic Industry objects generally to the [*specific ratio*] derived from [*Company B*'s] worksheet, it takes particular exception to the Commission's extrapolation of that ratio to the [ ]% of the material that the ITC Staff deemed to be of unknown origin. Plaintiffs' Brief at 18–21; Plaintiffs' Reply Brief at 23–25. The Domestic Industry complains that the Commission "not only rejected official statistics when the importer claimed to have conflicting information, it also rejected official statistics even when the importer had no information indicating a conflict." Plaintiff's Brief at 18. According to the Domestic Industry, where "[*Company B*] did not even provide a *guess* as to the origin of particular material, the staff gave the company the best treatment possible for the missing data." *Id.*

Indeed, the Domestic Industry claims that the only record evidence as to the country of origin of the [*so-called "unknown" material*] is the Customs declaration made at the time the materials were entered. According to the Domestic Industry, that "unrebutted" record evidence identifies the [ ] "unknown" material as German, and the Commission should have treated it as such. *See* Plaintiffs' Brief at 19; Plaintiffs' Reply Brief at 17 n.18, 23, 25.

But, contrary to the Domestic Industry's claims, the Customs declarations do not stand "unrebutted." In the course of the investigation, [*Company B*] — in effect — affirmatively superseded the Customs declaration with the submission of the [*Company B*] worksheet (and with the submission of its questionnaire responses before that). Based on the record before the Commission, it was entirely reasonable for the Commission to apply the [*ratio derived by the staff from the material of known origin*] to the [ ] "unknown" material. Applied to the same general data set from which the ratio was drawn, there was clearly "a rational relationship between the data chosen and the matter to which they are to apply." *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992).

In any event, the Domestic Industry's quarrel with the Commission's extrapolation of the [*ratio derived from the material of known origin*] to the "unknown" shipments is of no moment. Even if the Commission had treated [*all the "unknown"*] material as German in origin (as the Domestic Industry urged), it would have had no effect on the Commission's negligibility determination. Although the Domestic Industry repeatedly asserts that — with that assertedly "slight modification" — the German share of imports would have been 3% (and thus above the negligibility threshold), in fact the share would have been only [*less than 3*]%. *Compare* Plaintiff's Brief at 19–20 *with* Defendant's Brief at 35 *and* Defendant-Intervenor's Brief at 57–58. In short, even if all of the [*"unknown" material*] had

been assumed to be German, the negligibility determination would have been unchanged.[14]

Krupp takes it one step further, reasoning that application of the [*ratio derived from the material of known origin*] to the "unknown" [ ] material was not only reasonable, it was actually *conservative*, and ultimately prejudicial to [*Company B*]. *See* Defendant-Intervenors' Brief at 55–56. As Defendant-Intervenors note, the [*Company B*] worksheet provides, *inter alia*, the manufacturer's "heat code" for each material listed. Each volume of material specifically identified as German in origin has a [*particular type of*] heat code, while those identified as [*originating in the second country*] have [*a different type of*] heat code. Defendant-Intervenors' Brief at 56; C.R. 603. As Defendant-Intervenors note, the Commission's worksheet shows that, in each and every case, the "unknown" material has [*the second type of*] heat codes — which are consistent with [*second country*] — rather than German — origin. Defendant-Intervenors' Brief at 56–57; C.R. 496; C.R. 603. Obviously, if the "unknown" [ ]% of [*Company B's*] material had been treated as being entirely of [*second country origin*] (rather than allocated pursuant to the [*ratio derived by the Commission from the material of known origin*]), the German share would have been even further below the negligibility threshold.

Indeed, the Defendant-Intervenors further reason that, in fact, the [*Company B*] worksheet affirmatively identifies the country of origin of *all* the listed material, and that the Commission staff's identification of [ ]% of the material as being of "unknown" origin is the product of a simple misreading of the document. A review of the [*Company B*] worksheet indicates that, as Defendant-Intervenors note, each designation of origin supplied by [*Company B*] is handwritten next to a subtotal (of weight) that corresponds to the preceding series of [*heat codes of one of two different types*] (which, in turn, as discussed above, apparently correspond to country of origin). As Defendant-Intervenors note, it appears that [*Company B*] "was attempting to provide the origin of *all* of the listed material" by specifying the country of origin next to each subtotal. However, as the Commission staff later discovered, some of the subtotals did not include all of the material listed above. It was these few entries that the Commission staff treated as being of unknown origin. *See* Defendant-Intervenors' Brief at 56–57.

The Domestic Industry takes strong exception to the Defendant-Intervenors' interpretation of the [*Company B*] worksheet, dismiss-

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[14] The Domestic Industry characterizes the distinction between [*less than 3*]% and 3% as "nothing more than hair-splitting, and unreasonable." Plaintiffs' Reply Brief at 24 n.23. But the Domestic Industry cannot simply "round up" to reach the 3% threshold. Throughout its investigation, the Commission consistently calculated import share figures to two decimal places, not one. *See* Defendant's Brief at 35; Defendant-Intervenors' Brief at 57–58.

ing it as *post hoc* rationale unsupported by the record. *See* Plaintiffs' Reply Brief at 17–18. But, contrary to the Domestic Industry's claims, there is explicit support in the record for the asserted relationship between heat codes and country of origin. In a conversation with a Commission staffer, the president of [*Company B*] indicated that a review of heat codes would enable him to provide a more specific country of origin breakdown for [*Company B's*] material. *See* C.R. 492V.

It is, in any event, unnecessary under the circumstances to rely on the Defendant-Intervenors' interpretations of the [*Company B*] worksheet, because there is no need to consider whether the [ ] "unknown" material was actually of German origin. Both the Commission's adjustments to the official statistics on [*Company B*] and the Commission's negligibility determination as a whole are supported by substantial evidence in the record as it now stands.

C. The Path of the Commission's Decisionmaking

As a final challenge to the determination at issue, the Domestic Industry asserts that the Commission failed to articulate an explanation for its use of adjusted data. Specifically, the Domestic Industry contends that the negligibility determination lacks a rational basis, because it is assertedly "not clear from the Commission's determination that any commissioner was aware of the concerns raised by the domestic industry, and that the commissioners had an opportunity to consider these important issues in reaching their determination." Plaintiffs' Reply Brief at 30. *See generally* Plaintiffs' Brief at 23; Plaintiffs' Reply Brief at 30–31.

However, the Commission is presumed to have considered all evidence in the record in reaching its determinations "absent a showing to the contrary." *USEC Inc. v. United States*, 34 Fed. Appx. 725, 2002 U.S. App. LEXIS 7845, at **14 (Fed. Cir. 2002). Here, the Domestic Industry proffers no evidence that the Commission failed to consider its views regarding the adjusted imports data. Indeed, the Domestic Industry expressly concedes that "it is possible that [the Commissioners] did read some of the staff notes and footnotes to tables that mentioned [the concerns of the Domestic Industry]. . . ." Plaintiffs' Reply Brief at 31.

Moreover, the Domestic Industry's arguments in this action go to the *evidentiary basis* for the Commission's negligibility determination (*i.e.*, its adjustments to the official statistics). While the Commission is required to address the facts and conclusions of law upon which its determination is based, it "is not required to address every piece of evidence presented by the parties. . . ." *USEC Inc.*, 2002 U.S. App. LEXIS 7845, at **14; *cf. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 290 (1974) (affirming the Commission's action where the court was able to "discern in the

Commission's opinion a rational basis for its treatment of the evidence. . . . ").

Applying these standards, the Commission's determination here clearly passes muster.

IV. Conclusion

For the reasons set forth above, the Commission's negligibility determination in this matter is supported by substantial evidence on the record and is otherwise in accordance with law. Plaintiffs' motion for judgment on the agency record is therefore denied, and the Commission's negligibility determination in *Stainless Steel Wire Rod From Germany, Italy, Japan, Korea, Spain, Sweden, and Taiwan*, 63 Fed. Reg. 49,610 (Sept. 16, 1998) is sustained. This action is dismissed.

Judgment will enter accordingly.

SLIP-OP 04–84

THE PILLSBURY CO., Plaintiff, v. UNITED STATES, Defendant.

PUBLIC VERSION
Before: WALLACH, Judge
Court No.: 00–12–00570

[Judgment for Defendant.]

Decided: July 12, 2004

Neville Peterson, LLP, (*John M. Peterson, Curtis W. Knauss*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Department of Justice, Civil Division, Commercial Litigation Branch; *Saul Davis*, Department of Justice, Civil Division, Commercial Litigation Branch; *Michael Heydrich*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

WALLACH, Judge:

FINDINGS OF FACT & CONCLUSIONS OF LAW

I
INTRODUCTION

This matter is before the court for decision following a bench trial on November 13, 2003, and November 14, 2003. Plaintiff, the

Pillsbury Company, challenges the United States Customs Service's[1] ("Customs") decision to classify certain entries of frozen dessert bars as dairy products under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 2105.00.40 (1999). Plaintiff seeks an order directing reliquidation of these entries, classification of the subject merchandise under HTSUS Subheading 2105.00.50, or in the alternative under HTSUS Subheading 0403.10.90.00,[2] and a refund of all duties paid, plus interest. This Court has exclusive jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994), which provides for judicial review of denied protests filed in compliance with the provisions of 19 U.S.C. § 1514 (1999). Pursuant to the following findings of fact and conclusions of law, and in accordance with USCIT R. 52(a), the court enters a final judgment in favor of the Defendant and against Plaintiff.

II
BACKGROUND

Plaintiff entered certain Haagen-Dazs brand frozen dessert bars from Canada, through the Port of Detroit, Michigan, between March 30, 1999, and September 17, 1999. The subject merchandise is comprised of two flavors of Haagen-Dazs brand frozen dessert bars. One has chocolate sorbet on the outside and vanilla yogurt on the inside, one with raspberry sorbet on the outside and vanilla yogurt on the inside.[3] Between February 11, 2000, and July 28, 2000, Customs classified the imported frozen dessert bars under HTSUS Subheading 2105.00.40,[4] assessed duty thereon at the rate of 51.7¢ plus

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. 107–296, § 1502, 116 Stat. 2135, 2308–09 (2002); Reorganization Plan for the Department of Homeland Security, H.R. Doc. No. 108–32 (2003).

[2] HTSUS Subheading 0403.10.90.00 (1999), provides:

0403. Buttermilk, curdled milk, yogurt, kephir and other fermented or acidified milk and cream, whether or not concentrated or containing added sugar or other sweetening matter or flavored or containing added fruit, nuts or cocoa:
0403.10. Yogurt:
0403.10.90.00 Other.

[3] For convenience the core of both bars is herein referred to as yogurt, or the yogurt portion. Except where explicitly addressed, this term is used for ease of reference and is not to be construed as a finding of fact or law as to the proper classification of that portion of the subject merchandise.

[4] HTSUS Subheading 2105.00.30, through 2105.00.50 provide for:

2105.00 Ice cream and other edible ice, whether or not containing cocoa:
Ice cream:
* * *
Other:
Dairy products described in additional U.S. note 1 to chapter 4:

17.5% *ad valorem*, and liquidated accordingly. Plaintiff paid all liquidated duties, fees and charges prior to the commencement of this action. Between May 10, 2000, and July 31, 2000, Plaintiff filed four timely protests with the Port Director at Detroit, Michigan, challenging Customs' classification. It claimed that the frozen dessert bars were properly classified under HTSUS Subheading 2105.00.50, and entitled to duty-free entry under NAFTA. Customs denied Plaintiff's protests between July 7, 2000, and October 26, 2000. On December 18, 2000, Plaintiff commenced the instant action by filing a Summons with the Clerk of the Court.

In its Complaint, Plaintiff claims that the subject merchandise is properly classified under HTSUS subheading 2105.00.50, or, in the alternative, under HTSUS Subheading 0403.10.90.00, and seeks a refund of all duties paid, plus interest. The basis of Plaintiff's claim is that the dessert bars are neither primarily characterized by their frozen yogurt component, nor is that component properly classified as a "product of milk" as defined in HTSUS.

Defendant claims that the dessert bars were properly classified and thus requests judgment in its favor, affirming its classification and assessment of duties. Defendant contends that the frozen dessert bars are properly classifiable as 'articles of milk,' a term which they contend, under statutory interpretation and case law, is broader than 'milk.' Defendant states that, based on industry standards for ice cream and frozen yogurt, as well as the primary ingredients of the subject product, the frozen yogurt is the basis of the product, it's essential nature, whereas the sorbet portion is correctly viewed as a flavoring or coating. Furthermore, according to Defendant, the yogurt core is not, in fact yogurt, but, based on limited portion of fermented ingredients, milk.

The parties' contentions center on classifying the subject desert bars under one of three possible HTSUS subheadings, 2105.00.40

2105.00.30	Described in additional U.S. note 10 to chapter 4 and entered pursuant to its provisions
2105.00.40	Other.
2105.00.50	Other.

Additional U.S. Note 1 to Chapter 4 states that "for the purposes of this schedule, the term '*dairy products described in additional U.S. note 1 to chapter 4*' means any of the following goods: malted milk, and articles of milk or cream (except (a) white chocolate and (b) inedible dried milk powders certified to be used for calibrating infrared milk analyzers); articles containing over 5.5 percent by weight of butterfat which are suitable for use as ingredients in the commercial production of edible articles (except articles within the scope of other import quotas provided for in additional U.S. notes 2 and 3 to chapter 18); or, dried milk, whey or buttermilk (of the type provided for in subheading 0402.10, 0402.21, 0403.90 or 0404.10) which contains not over 5.5 percent by weight of butterfat and which is mixed with other ingredients, including but not limited to sugar, if such mixtures contain over 16 percent milk solids by weight, are capable of being further processed or mixed with similar or other ingredients and are not prepared for marketing to the ultimate consumer in the identical form and package in which imported."

(requiring a finding that the yogurt portion predominates and that said portion constitutes an article of milk or cream as defined in U.S. note 1 to chapter 4 of the HTSUS), 0403.10.90.00 (requiring a finding that the yogurt portion predominates and that said portion constitutes yogurt), or 2105.00.50 (requiring a finding that the sorbet portion predominates). Ultimately, which of the three categories these items fall into depends on whether essential character is the 'yogurt' portion. If the essential character is the sorbet portion, HTSUS subheading 2105.00.50 is eliminated as a possibility. If the essential character is the 'yogurt' portion, and this portion is properly characterized as an 'article of milk', Customs initial finding is confirmed. If the 'yogurt' portion is characterized as 'yogurt', its proper classification lies under 0403.10.90.00.[5]

III
STANDARD OF REVIEW

Plaintiff paid all liquidated duties and charges prior to the timely commencement of this action. Although Customs's decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1) (1994), the Court makes its determinations upon the basis of the record made before the Court, rather than that developed by Customs. *See United States v. Mead Corp.*, 533 U.S. 218, 233 n.16, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). Accordingly, the Court makes the following findings of fact and conclusions of law as a result of the de novo trial. *See* 28 U.S.C. § 2640(a) (1994).

IV
FINDINGS OF FACT

A
Facts Uncontested By The Parties And Agreed To In The Pretrial Order

1. The merchandise which is the subject of this case (the "subject merchandise") consists of frozen dessert bars. Two varieties of the subject merchandise are included in this case: (A) one bar consists of an outer shell of raspberry flavored sorbet and an inner filling of vanilla-flavored frozen yogurt, and (B) the second bar consists of an outer shell of chocolate-flavored sorbet and an inner filling of vanilla-flavored frozen yogurt.

2. In their condition as imported, the dessert bars are frozen, and are packaged for retail sale. Each of the frozen dessert bars features a wooden stick which is used to hold the bars while they are being eaten.

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[5] All parties agree that classification under HTSUS subheadings covering ice cream would be inappropriate. *See* Pretrial Order at 6.

3. Between March 30, 1999, and September 17, 1999, Plaintiff entered at the Port of Detroit, Michigan, under cover of consumption entries listed in the Summons, shipments containing the subject merchandise; frozen dessert bars.

4. Between February 11, 2000, and July 28, 2000, the Post Director of Customs at the Port of Detroit, Michigan liquidated the subject entries, classifying the imported frozen dessert bars in liquidation under HTSUS Subheading 2105.00.40, as "Ice cream and other edible ice, whether or not containing cocoa: Other: Dairy products described in additional U.S. note 1 to chapter 4: Other" and assessing duty thereon at the rate of 51.7¢ plus 17.5% *ad valorem*. Plaintiff paid all liquidated duties, fees and charges prior to the commencement of this action.

5. Between May 10, 2000, and July 31, 2000, Plaintiff caused to be filed with the Port Director of Customs at Detroit, Michigan, timely protests, challenging the classification in liquidation of the imported merchandise, and asserting that the frozen dessert bars are properly classified under HTSUS Subheading 2105.00.50, as "Ice cream and other edible ice, whether or not containing cocoa: Other: Other" and entitled to duty-free entry under NAFTA.

6. The Port Director of Customs denied Plaintiff's protests between July 7, 2000, and October 26, 2000.

7. On December 18, 2000, Plaintiff timely commenced the instant action by filing a Summons with the Clerk of the Court.

8. Neither the imported frozen dessert bars, nor any component thereof, constitute or consists of "ice cream," as that term is commonly or commercially known. The imported frozen dessert bars are not classifiable under HTSUS subheadings 2105.00.05 through 2105.00.20.

9. The merchandise which is the subject of this action was also the subject of New York Customs Ruling Letter No. D84417 (Dec. 3, 1998), in which the Bureau of Customs and Border Protection (then the United States Customs Service) classified the subject merchandise under HTSUS subheading 2105.00.40.

B
Facts Established At Trial

10. Plaintiff's current packaging, entered into evidence as Plaintiff's exhibit 2, differs from the subject merchandise as imported. However, although the box has been updated, the subject frozen dessert bars inside remain unchanged.

11. The current packaging states that the box contains "FAT FREE VANILLA FROZEN YOGURT COATED WITH RASPBERRY SORBET." The packaging also specifies that "[w]e take rich, creamy Haagen-Dazs yogurt and dip it in incredibly smooth Haagen-Dazs sorbet. . ."

12. Although the packaging specifies that the yogurt is dipped in sorbet, in manufacturing the subject merchandise, the sorbet is, in fact, poured into a mold and chilled. When it reaches a certain temperature a portion of the unfrozen center is "sucked back" and saved for future use. The frozen yogurt portion is then injected into the void to create the frozen yogurt center.

13. Haagen-Dazs' development and marketing documentation demonstrates that the yogurt portion of the dessert bars was tested with a variety of flavorings. The documentation indicates that the subject merchandise was consistently identified by the yogurt component. ("Pl. Ex.") 11–14.

14. The yogurt portion of the subject merchandise weighs 32 grams. The raspberry portion of that flavor of dessert bar weighs 36 grams. The chocolate portion of that flavor of dessert bar weighs 35.9 grams.[6] An entire dessert bar weighs approximately 71 grams.

15. The documentation entered as Pl. Ex. 3, p.48, describing the ingredients used to produce the subject merchandise, demonstrates that by weight and volume, milk is an essential ingredient.

16. By weight, milk products (LK skim/conditioned skim milk blend and condensed fresh US Grade A skim milk) comprise 21.43% of the total weight of subject merchandise. By volume, milk products comprise approximately the same percentage.

17. This percentage of milk products is approximately equal to the weight of the fruit ingredients in the raspberry flavored bar.

18. The weight of the milk ingredients in both types of bars are exceeded only by the weight of the water and sweeteners

19. The court finds highly probative and credible the expert testimony of Professor Robert L. Bradley, Jr. The court designated Professor Bradley as an expert in the production, processing and formulas relating to frozen yogurt and yogurt.

20. Professor Bradley is currently a Professor Emeritus at the University of Wisconsin, where he earned his Ph.D. in 1964. From 1964 until the present, he has taught food science at the University of Wisconsin and has published extensively. Professor Bradley holds memberships in several professional societies and has received numerous awards. He has taught courses in the manufacture of both yogurt and frozen yogurt.

21. Professor Bradley testified at trial that in his expert opinion the yogurt portion is what gives the bars their essential character. His opinion is based on the industry and Code of Federal Regulations standard of comparing solids content, a comparison of which portion is more nutritious, and his review of Plaintiff's development, production, processing and marketing documents.

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[6] The chocolate flavor of dessert bar has been discontinued.

22. Plaintiff offered certain product testing documents, entitled "Live and active culture test for Haagen-Dazs fat free frozen yogurt" and admitted as Pl. Ex. 8., which the court admitted not to establish the validity of the tests or results, but only to establish that from time to time, the Pillsbury Company tests frozen yogurt.

23. Professor Bradley reviewed these testing documents and Plaintiff's formula documents concerning the composition of the subject merchandise.

24. Professor Bradley testified credibly that yogurt, according to the National Yogurt Association and under the Code of Federal Regulations,[7] is a product in which all milk solids have been fermented.

25. The yogurt portion of the subject merchandise is not one in which all milk solids have been fermented.

26. National Import Specialist Thomas Brady, with the National Commodity Specialist Division of Customs, testified regarding the practices of Customs regarding classification of merchandise under the provisions of Heading 2105. This testimony was credible and probative.

27. The decision to classify the subject merchandise under 2105.00.40 was based on the agency's determination that the frozen desert bars constituted an "article of milk or cream" under HTSUS additional U.S. note 1 to chapter 4.

28. Brian Sweet, Product Quality Manager for Haagen-Dazs testified. Mr. Sweet identified the subject merchandise, and discussed how it is manufactured. He testified as to the formulation of the components. He also described the marketing plans and product development within Pillsbury during the time of the subject entries. His testimony was credible and probative.

29. The product does not contain full cream milk, or skimmed milk.

30. The yogurt portion of the subject merchandise is made from 88% by weight of a "vanilla flavored ice milk base" and 12% by weight of a "yogurt base."

31. The "vanilla flavored ice milk base" portion of the yogurt core is made from [a percentage] by weight of a reduced lactose skim milk blend, together with [a percentage of] liquid amber sugar, [a percentage of] corn syrup solids, [a percentage] of a blend of corn syrup and liquid sugar, [a percentage] of charcoal-filtered water, and [a percentage of] specialty corn syrup solids.

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[7] *See* 21 C.F.R. §§ 131.200, 131.203, 131.206 (1999) covering yogurt generally. Each states that yogurt is a "food produced by culturing one or more of the optional dairy ingredients specified in paragraph (c) of this section with a characterizing bacterial culture that contains the lactic acid-producing bacteria, Lactobacillus bulgaricus and Streptococcus thermophilus."

32. The "yogurt base" portion of the yogurt core is made from [a percentage] by weight of condensed fresh U.S. Grade A skim milk, [a percentage of] charcoal-filtered water, and [a percentage of certain types of] yogurt cultures.

33. Of the yogurt portion, only a very small percentage actually contained yogurt cultures. This percentage is diluted with the "vanilla flavored ice-milk base" to provide the flavor of yogurt.

34. Once the "yogurt base" and "vanilla flavored ice-milk base" are mixed, there is no further fermentation due to the concentration of sugars.

35. The vanilla flavored ice-milk base which made up a majority of the 'yogurt' portion was never fermented

36. Plaintiff offered into evidence the requirements of the National Yogurt Association for live and active culture yogurt. Pl. Ex. 7.

37. Based on these standards, as well as the testimony of Prof. Bradley and Mr. Sweet, in order to meet the criteria of the National Yogurt Association criteria for live and active culture yogurt, sampling and analytical procedures National Yogurt Association, a product must, *inter alia*, contain a certain level of active cultures, 10^7 CFU per gram, at the end of the stated shelf life, and have a certain titratable acidity, at least 0.15%, obtained from fermentation.

38. Plaintiff failed to establish through credible evidence that the yogurt portion of the subject merchandise contained the requisite level of active cultures at the end of the stated shelf life.

39. Plaintiff failed to establish through credible evidence that the yogurt portion of the subject merchandise had the requisite titratable acidity as a result of fermentation.

40. If any of these Findings of Fact shall more properly be Conclusions of Law, they shall be deemed to be so.

V
CONCLUSIONS OF LAW

1. Plaintiff did not meet its burden of proving that the imported desert bars are not within the scope of the tariff provision for "article[s] of milk or cream" of a kind described in additional U.S. Note 1 to HTSUS Chapter 4.

2. Based on the foregoing Findings of Fact, the court finds the essential character of the subject merchandise to be the yogurt portion of the dessert bar.[8] The subject bars are composite goods, consisting of two or more materials or components classified in different head-

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[8] General Rule of Interpretation 3(b) states that:

> Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

ings of the tariff, frozen yogurt portion under 2105.00.40, and sorbet portion classifiable under 2105.00.50. The essential character of an entry is "that attribute which strongly marks or serves to distinguish what it is. Its essential character is that which is indispensable to the structure, core or condition of the article, i.e., what it is. Webster's Third New International Dictionary, 1966 edition." *Oak Laminates D/O Oak Materials Group v. United States*, 8 CIT 175, 180 (1984) (citing *United China & Glass Co. v. United States*, 61 Cust. Ct. 386, C.D. 3637, 293 F. Supp. 734 (1968)). The marketing of the merchandise, the weight and volume of the ingredients, and the product itself, in addition to other facts revealed at trial support this conclusion. The court in *Mead Corp. v. United States*, 283 F.3d 1342, 1349 (Fed. Cir., 2002), explained that "[w]hile the importer's marketing of the goods will not dictate the classification, such evidence is relevant to the determination." Thus, in accordance with General Rule of Interpretation No. 3 (b), this court finds that the yogurt portion gives the merchandise its essential character.

3. HTSUS subheading 2105.00.40 covers "Ice cream and other edible ice, whether or not containing cocoa: Other: Dairy products described in additional U.S. note 1 to chapter 4: Other." The court finds that the yogurt portion of dessert bars constitutes a dairy product described in additional U.S. note 1 to Chapter 4 of the HTSUS, given that this portion is not entirely fermented and based upon the nature of the ingredients used.

4. Note 1 to Chapter 4 of the HTSUS states that "[t]he expression '*milk*' means full cream milk or partially or completely skimmed milk."

5. Additional U.S. note 1 to Chapter 4 of the HTSUS states that "[f]or the purposes of this schedule, the term '*dairy products described in additional U.S. note 1 to chapter 4*' means and of the following goods: malted milk, and articles of milk or cream. . ." Thus, the range of items covered by "*dairy products described in additional U.S. note 1 to chapter 4*", are broader than full cream milk or partially or completely skimmed milk.

6. As the court explained in *United States v. Andrew Fisher Cycle Inc.*, 57 CCPA 102, 426 F.2d 1308 (1970); *Washington Int'l Ins. Co. v. United States*, 24 F.3d 224 (1994), the name under which merchandise is marketed is not dispositive for classification purposes. Thus, the fact that Plaintiff routinely refers to the core as "yogurt" and

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Explanatory note to General Rule of Interpretation 3(b) states that "[t]he factor which determines essential character will vary by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."

markets the dessert bars that way is not sufficient to establish then, legal classification as yogurt.

7. As the fermented part comprises only about 12% of the yogurt portion, this court finds that it would be improper to classify the entire yogurt portion, and thus the entire entry, as yogurt.

8. Merchandise must be examined to determine whether, as imported, it contains the named ingredients. *Imprex, Inc. v. United States*, 17 CIT 650 (1993). Here the merchandise was not comprised chiefly of yogurt as imported. The dessert bars did contain articles of milk or cream as defined in HTSUS additional U.S. note 1 to Chapter 4.

9. By operation of the finding that the subject merchandise contains articles of milk or cream, the dessert bars cannot be classified under HTSUS heading 0403 covering YOGURT. The Explanatory Notes discuss the scope of Chapter 4, which includes the "yogurt" of HTSUS heading 0403, it states:

> The Chapter also **excludes**, *inter alia*, the following:
> (c) Ice cream and other edible ice (heading 21.05).

Harmonized Commodity duty Description and Coding system, Explanatory Notes (1st ed. 1986) at 30.

10. As a confection, dessert, or novelty, the subject merchandise is properly covered by HTSUS heading 2105.

11. Because the evidence shows that the subject merchandise is an article of milk as defined in U.S. note 1 to chapter 4 of the HTSUS, the court finds that the merchandise is properly classified under HTSUS subheading 2105.00.40.

12. Accordingly, Plaintiff has failed to overcome the presumption of correctness, pursuant to 28 U.S.C. § 2639(a) (1994), that attaches to Customs' classification decisions.

13. If any of these Conclusions of Law shall more properly be Findings of Fact, they shall be deemed to be so.

SLIP OP. 04–109

BEFORE: RICHARD K. EATON, JUDGE

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., ET AL., PLAINTIFFS, v. UNITED STATES, DEFENDANT.

COURT NO. 02–00057

[United States Department of Commerce's final results pursuant to remand sustained]

Dated: August 26, 2004

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Bruce M. Mitchell, Jeffrey S. Grimson, Mark E. Pardo, Paul Figueroa*), for plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA), Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Reginald T. Blades, Jr.*); *Robert LaFrankie*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

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

MEMORANDUM OPINION

EATON, Judge: This matter is before the court following remand to the United States Department of Commerce ("Commerce"). In *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 27 CIT ___ , slip op. 03–151 (Nov. 21, 2003) ("*Zhejiang I*"), the court remanded Commerce's determination contained in Honey From the P.R.C., 66 Fed. Reg. 50,608 (ITA Oct. 4, 2001) ("Final Determination"), *as amended by* 66 Fed. Reg. 63,670 (ITA Dec. 10, 2001) ("Am. Final Determination"); Issues and Decision Memorandum for the Antidumping Investigation of Honey from the P.R.C., Pub. R. Doc. 216 ("Decision Mem."). Plaintiffs Zhejiang, et al.,[1] challenged that determination with respect to Commerce's calculation of antidumping duty margins, its critical circumstances

[1] The other plaintiffs are Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA), Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc. (collectively "Plaintiffs").

finding, and the reliability of certain sources of valuation data. Jurisdiction lies pursuant to 28 U.S.C. § 1581(c) (2000); and 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (B)(i) (2000). For the reasons set forth below, Commerce's determination on remand is sustained.

BACKGROUND

The relevant facts and procedural history in this case are set forth in *Zhejiang I*. A brief summary of these is included here. Commerce conducted two separate investigations of honey from the People's Republic of China ("PRC"), the first in 1994 ("First Investigation") and the second in 2000 ("Second Investigation").[2] The First Investigation resulted in an affirmative preliminary determination of sales at less than fair value. *See* Honey From the P.R.C., 60 Fed. Reg. 14,725 (ITA Mar. 20, 1995) (notice of prelim. determination). Subsequently, Commerce entered into a suspension agreement with the government of the PRC. *See* Honey From the P.R.C., 60 Fed. Reg. 42,521 (ITA Aug. 16, 1995) (notice of suspension of investigation); Agreement Suspending the Antidumping Investigation on Honey From the P.R.C., Aug. 2, 1995, U.S.-P.R.C., *reprinted in* 60 Fed. Reg. at 42,522–27 ("Suspension Agreement").[3] Issues relating to the Suspension Agreement were the subject of the court's opinion in *Zhejiang I*.

The Suspension Agreement expired by its terms on August 16, 2000. Thereafter, the domestic honey industry filed a petition with Commerce and the United States International Trade Commission ("ITC"), alleging, among other things, that the honey industry was being injured as a result of less than fair value sales of honey from Argentina and the PRC. *See* Antidumping and Countervailing Duty Pet., Honey from Arg. and the P.R.C. (Sept. 29, 2000), Pub. R. Doc. 1.

The Second Investigation resulted in Commerce's determination that honey from the PRC "is being sold, or is likely to be sold, in the United States at less than fair value," Final Determination, 66 Fed.

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[2] The Second Investigation, which resulted in the Final Determination at issue here, covered

> natural honey, artificial honey containing more than 50 percent natural honey by weight, preparations of natural honey containing more than 50 percent natural honey by weight, and flavored honey. The subject merchandise includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

Final Determination, 66 Fed. Reg. at 50,610 ("Subject Merchandise").

[3] The scope of the Suspension Agreement covered products that were nearly identical to the Subject Merchandise:

> natural honey, artificial honey containing more than 50 percent natural honey by weight, and preparations of natural honey containing more than 50 percent natural honey by weight. The subject products includes all grades and colors of honey whether in liquid, creamed, comb, cut comb, or chunk form, and whether packaged for retail or in bulk form.

Suspension Agreement, 60 Fed. Reg. at 42,522.

Reg. at 50,608, and the assessment of antidumping duty margins ranging between 25.88% and 183.80%. See Am. Final Determination, 66 Fed. Reg. at 63,672. Subsequently Zhejiang filed a motion for judgment upon the agency record, and the court in *Zhejiang I* remanded the matter to Commerce with instructions to revisit its decision to rely on an article from the Indian newspaper, *The Tribune*[4] (the "Tribune Article" or "Tribune of India" article), in valuing raw honey at 35 rupees per kilogram.[5] Commerce's Final Results of Redetermination Pursuant to Remand ("Remand Results") are the subject of this opinion.

STANDARD OF REVIEW

When reviewing a final determination in an antidumping duty investigation, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . . " 19 U.S.C. § 1516a(b)(1)(B)(i); *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting 19 U.S.C. § 1516a(b)(1)(B)(i) (2000)) ("As required by statute, [the court] will sustain the agency's antidumping determinations unless they are 'unsupported by substantial evidence on the record, or otherwise not in accordance with law.' "). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). "[T]he possibility of drawing two inconsistent conclusions

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[4] Commerce relied upon an article that appeared in the May 1, 2000, edition of *The Tribune*, a Chandigarh, India newspaper. The article stated in relevant part: "The sale price of honey by beekeepers in India varies from Rs 25 to Rs 45 per kg whereas in countries like the USA, Argentina and Brazil, the price varies from Rs 55 to Rs 80 a kg." K. Sarangarajan, *Apiculture, a major foreign exchange earner*, THE TRIBUNE (Chandigarh, India), May 1, 2000.

[5] Specifically, the court instructed Commerce to

> (1) determine whether the use of the Tribune Article results in the "valuation of [raw honey] . . . based on the best available information regarding the value[ ] of such factor[ ]," (2) should it find that it is, explain in detail how the use of 35 rupees per kilogram in determining normal value "evidences a rational and reasonable relationship to the factor of production it represents," (3) no matter whether it continues to use the Tribune Article or other sources, fully and completely justify any sources of data as the "best available information" for the finding such data are used to support, and (4) should any resulting calculation of normal value of honey from the PRC exceed that of the weighted-average of the honey unit import values from all other countries during the POI, explain in detail how this furthers the goal of estimating antidumping duty margins as accurately as possible.

Zhejiang I, slip op. 03–151 at 45–46 (internal citations omitted).

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 (1966) (citations omitted).

DISCUSSION

Pursuant to the court's instructions to revisit its decision to value raw honey at 35 rupees per kilogram based on the Tribune Article, Commerce conducted remand proceedings and concluded that

> the Department's determination to use the publicly-available raw honey information from the *Tribune of India* article to calculate respondents' normal value is (1) based on the "best available information," (2) evidences a "rational and reasonable relationship to the factor of production it represents," and (3) furthers our goal of estimating antidumping duty margins as accurately as possible.[6]

Remand Results at 25. Plaintiffs argue here that Commerce has not demonstrated that the Tribune Article is the "best available information" to value raw honey, and that Commerce has failed to explain how its valuation of raw honey was reasonable. *See generally* Pls.' Comments Regarding Remand Determination ("Pls.' Comments"). The court will address each argument in turn.

I. *Commerce's use of the* Tribune of India *article to value raw honey is in accordance with law and supported by substantial evidence*

Among the factors of production valued by Commerce was raw honey. In valuing raw honey, Commerce "used an average of the highest and lowest price for raw honey given in [the Tribune Article]. . . . " Honey From the P.R.C., 66 Fed. Reg. 24,100, 24,106 (ITA May 11, 2001) (prelim. determination). Commerce stated:

> The raw honey price data from *The Tribune of India* is the best available surrogate value for the following reasons: 1) it is the most contemporaneous, dated May 1, 2000; 2) the broad-based data is specific to Indian raw honey prices (i.e., generally Indian honey, like PRC raw honey, has a high moisture content); and 3) it is quality agricultural data. We do not find that the prices offered by petitioners and respondents offer more accurate or representative alternatives.

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[6] Where the subject merchandise is exported from a nonmarket economy ("NME") country such as the PRC, normal value is constructed from values for the factors of production used in producing the merchandise in a comparable market economy country, or surrogate. *See* 19 U.S.C. § 1677b(c)(1). An NME country is defined as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A).

Decision Mem., Pub. R. Doc. 216 at 21. With respect to Commerce's decision, the court in *Zhejiang I* stated:

> In deciding to use the Tribune Article, Commerce rejected a study published by the Agriculture and Processed Food Products Export Development Authority ("APEDA Study"), finding that "the values in . . . the APEDA study submitted by respondents . . . suffer from inherent weaknesses not present in the prices reflected in *The Tribune of India*."

Zhejiang I, slip op. 03–151 at 40 (internal citation omitted). The court agreed that the *Tribune of India* article appeared to be more reliable than the APEDA Study offered by Plaintiffs, stating:

> As between the source of data relating to the price of honey Commerce selected, and that offered by Plaintiffs, Commerce appears to have used the more reliable source. The Tribune Article addresses the sale price of honey, whereas the table in the APEDA Study from which Plaintiffs identify the "average value of honey" appears in the context of a discussion concerning the development of a model for "doubl[ing] the number of bee colonies every 2 years," not determining the value of honey. The publication of the Tribune Article, dated May 1, 2000, coincides with the [period of investigation]. The APEDA Study, in contrast, bears the year 1999. . . . Moreover, the Tribune Article, published on *The India Tribune's* Web site, was publicly available, while Plaintiffs make no such argument with respect to the APEDA Study. *See* 19 C.F.R. § 351.408(c)(1) ("The Secretary normally will use publicly available information to value factors.").

Id. at 42–43 (internal citations and footnote omitted). The court nevertheless found that "the results reached by applying the data from the Tribune Article [we]re sufficiently incredible so as to call into question their reliability." *Id.* at 43.

On remand, Commerce was instructed to "determine whether the use of the Tribune Article results in the valuation of [raw honey] . . . based on the best available information regarding the value[ ] of such factor[ ] . . . . " *Zhejiang I*, slip op. 03–151 at 45 (internal citation omitted). In the Remand Results, Commerce continues to insist that the Tribune Article was the best source of information for valuing raw honey:

> We have revisited our decision and find that the *Tribune of India* article is the best available information to value raw honey. In selecting the pricing information from the *Tribune of India* article as the most appropriate surrogate value to represent raw honey prices in India, the Department reasons that the raw honey pricing data in this article is the best quality data because (1) it is published, publicly-available data; (2) it was

> "intended to serve the Indian agribusiness community;"[7] and (3) it is representative of the beekeeping honey industry in India. Therefore, the information in this article has "greater credibility" than would a similar article published only as a "general interest" article.

Remand Results at 10 (internal citation omitted). Commerce further explained that, in addition to the foregoing reasons, it chose the Tribune Article because

> a critical factor in determining which surrogate value is the most specific or comparable to the raw honey input consumed by PRC honey processors is moisture content. This is important to consider because more raw honey will be consumed during the production process to reduce the moisture content to an acceptable level. As the record indicates, Indian raw honey generally has a high moisture content. Therefore, the Department finds that the country-wide raw honey prices from the *Tribune of India* article are the most specific to the raw honey consumed by honey processors in the PRC (*i.e.*, generally, both have high moisture contents).

Id.[8]

Commerce also considered, but rejected, the source provided by defendant-intervenors American Honey Producers Association and Sioux Honey Association, i.e., the 1999–2000 financial statement of an Indian Honey Cooperative, Mahabaleshwar Honey Producers Cooperative Society, Ltd. ("MHPC"). With regard to the MHPC data, Commerce stated:

> The Department determines that the average raw honey price from the MHPC is not representative of raw honey prices in India pursuant to 19 U.S.C. § 1677b(c)(1)(B). As the Department stated in the *Final Determination*, "although, the MHPC is a cooperative, and hence likely buys raw honey from various sources, the value for raw honey reported on its financial statement represents the value as experienced by a single processor of honey in a particular region of India." And, as already noted above, the Department prefers to use industry-wide values, rather than the values of a single producer, wherever possible, because industry-wide values are more representative of prices/

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[7] Apparently, Commerce makes this claim based on the Tribune Article having been republished in the Agricultural Edition of the *Tribune*. *See* Remand Results at 15.

[8] In other words, Commerce chose the Tribune Article, in part, because, in terms of moisture content, Indian honey is generally similar to Chinese honey. In order to ensure that the moisture content would be reflected in prices, however, Commerce concluded that a country-wide rather than a regional surrogate price was needed.

> costs of all producers in the surrogate country. Since the average raw honey price from the MHPC's financial statement was based on information obtained from a single processor, it is not representative of all producers in India. Therefore, the MHPC average raw honey price is neither more accurate nor more reliable than the data from the *Tribune of India* article.

Remand Results at 13 (internal citation omitted).

Finally, Commerce pursued its own search for potential sources for valuing raw honey. Commerce stated:

> As indicated by the record, we only located the republished *Tribune of India* article (in its Agricultural Edition) dated May 1, 2000. Our search for a suitable surrogate revealed no additional reliable or credible information on valuing raw honey in India other than the *Tribune of India* article; thus, we continued to rely on the published raw honey values appearing in the *Tribune of India* article as the basis for calculating the final surrogate raw honey price. . . .

Remand Results at 14–15 (internal citation omitted). Thus, having rejected the sources proposed by the parties, and unable to find any additional reliable or credible sources of its own, Commerce concluded that

> the surrogate value information from the *Tribune of India* article offers the most accurate and reliable calculation of plaintiffs' normal value pursuant to 19 U.S.C. § 1677b(c). The *Tribune of India* article constitutes the most reliable source on the record, and is a publicly-available article printed in a widely-distributed and established Indian newspaper. . . . [B]ecause the data itself is the most representative of raw honey prices in India, and is quality data that is contemporaneous with the POI, as well as specific to the raw honey industry in India, the Department determines that it has relied upon the "best available information" on the record of these proceedings in valuing the raw honey input.

Id. at 15 (footnote omitted).

For their part, Plaintiffs continue to assert that the APEDA study should serve as the basis for raw honey valuation, arguing that "[t]he only difference between the two documents is that the APEDA study is far more detailed and demonstrates a much greater and more comprehensive knowledge of the Indian honey industry." Pls.' Comments at 4.

As previously noted, the court's views with respect to the APEDA study were stated in *Zhejiang I* and will not be repeated here beyond restating that, "[a]s between the [Tribune Article] and th[e] [APEDA study], Commerce appears to have used the more reliable source."

Zhejiang I, slip op. 03–151 at 42. Plaintiffs offer nothing in their Comments to cause the court to reconsider this conclusion.

Pursuant to 19 U.S.C. § 1677b(c), Commerce is required to base the valuation of the factors of production in NME cases "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.* Although the statute does not define "best available information," it provides that Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are[:] (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). "[T]he statute grants Commerce broad discretion to determine the 'best available information' in a reasonable manner on a case-by-case basis." *Peer Bearing Co. v. United States*, 25 CIT 1199, 1208, 182 F. Supp. 2d 1285, 1298 (2001) (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)); *see also Shakeproof Assembly Components, Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("[T]he critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible.").

With respect to the source offered by defendant-intervenors, the court finds proper Commerce's decision to reject the average raw honey price calculated from MHPC's 1999–2000 financial statement, on the grounds that the value for raw honey reported on the financial statement represents the value for raw honey "as experienced by a single processor of honey in a particular region of India." Remand Results at 13 (internal citation omitted). Commerce "prefers to use industry-wide values, rather than the values of a single producer, wherever possible. . . . " *id.*; *see also Peer Bearing Co.*, 25 CIT at 1217, 182 F. Supp. 2d at 1307 ("Commerce asserts that it does not focus upon a particular surrogate producer of subject merchandise if more objective, industry-wide values . . . are available because . . . Commerce's goal is to use surrogate values that represent the industry norm of the surrogate country, not company-specific surrogate values. . . . "). Furthermore, the MHPC financial statement represents the average price paid to its members for raw honey during a nine-month period that predates the POI in this case. Commerce rightly favors data contemporaneous with the POI over that which is not. *See id.* ("Commerce prefers to value factors using public information that is most closely concurrent to the specific period of review. . . . "). Thus, because the data contained in MHPC's 1999–2000 financial statement neither represents an industry-wide value nor comports with the POI, the court finds that Commerce properly rejected it. *See, e.g., Writing Instrument Mfrs. Ass'n, Pencil Sec. v. United States*, 21 CIT 1185, 1202, 984 F. Supp. 629, 644 (1997) (ap-

proving Commerce's chosen source for surrogate value information where the only source submitted by plaintiffs lacked the "inherent reliability" of Commerce's source).

Finally, as already noted, Commerce "pursued its own search for potential surrogate values to value the raw honey input." Remand Results at 14. With respect to that search, Commerce stated that it "revealed no additional reliable or credible information on valuing raw honey in India other than the *Tribune of India* article. . . . " *Id.*

For the foregoing reasons, the court finds that Commerce has complied with the court's remand instruction to "determine whether the use of the Tribune Article results in the 'valuation of [raw honey] . . . based on the best available information regarding the value[ ] of such factor[ ]. . . . ' " *Id.* at 45 (internal citation omitted). In addition, the court finds that Commerce's decision to use the data from the Tribune Article is in accordance with law and supported by substantial evidence.

II. *Commerce's decision to value raw honey at 35 rupees per kilogram is reasonable*

Also on remand, Commerce was instructed to revisit its decision to value raw honey at 35 rupees per kilogram based on the data found in the Tribune Article. Commerce reached that figure "based on a simple average of all raw honey pricing information from that article. In other words, the Department took the highest and lowest values in the *Tribune of India* article, and then averaged them together (*i.e.*, (25 Rs./kg. + 45 Rs./kg.)/2 = 35 Rs./kg.)." Remand Results at 16. In *Zhejiang I*, the court found that, although the Tribune Article was the better of the two proffered sources, the results reached by applying the data from it were "sufficiently incredible so as to call into question their reliability." *Zhejiang I*, slip op. 03–151 at 43. The court stated:

> In accordance with the Suspension Agreement, the minimum price at which honey could be sold during the POI was equal to 92% of the weighted-average of the honey unit import values from all other countries. Thus, taking Zhejiang's data as an example, the weighted-average of honey unit import values from all other countries during the POI would have been approximately $932.25 per metric ton. Using a price of 35 rupees per kilogram, however, Commerce calculated normal value for Zhejiang to be $1,001.99 per metric ton. . . . Thus, the weighted-average of the honey unit import values from all other countries was approximately $69.74 less than Commerce's calculation of the normal value of honey sold by Zhejiang. Because raw honey is by far the most important factor of production, its valuation appears to be the most anoma-

> lous. As MOFTEC[9] put it in a letter to Commerce, "This conclusion implies that the whole world was dumping honey during [the POI], which is irrational." While it is possible that the PRC is the worldwide high cost producer of honey, the very magnitude of the difference between Commerce's calculation of normal value and the weighted-average of honey unit import values from all other countries during the POI, calls into question Commerce's methodology and the evidence on which it relied.

Id. at 44–45 (footnotes and internal citations omitted). In other words, the data appeared to indicate that Zhejiang's constructed cost of *producing* honey was higher than the price for which the other countries were able to *sell* honey.

As to the court's concerns regarding this apparently anomalous result, Commerce argues that the prices resulting from the Suspension Agreement were distorted by the large volume of dumped imports from Argentina during the POI. Commerce explained:

> [T]his large volume of lower priced honey imports from Argentina distorted the suspension agreement prices. This is evident from the fact that, under the suspension agreement reference price calculations (i.e., weighted average price of U.S. imports from all countries, excluding the PRC), Argentina's imports accounted for approximately 76 percent (by volume) of the reference price calculations. Given the predominant impact of Argentine imports on the reference price calculations, the drop in Argentine prices "drove down the suspension agreement prices" lower than they should have been.

Remand Results at 23–24.

Commerce has provided various tables demonstrating the changes resulting from removing the data from Argentina. Once this exercise has been performed, the unit import value for all countries excluding Argentina and the PRC during the POI equals $1,264.56 per metric ton or $163.67 more than the calculated normal value for Zhejiang. Thus, while "the whole world" may not have been dumping honey, Argentina's sales were such a large portion of imports that they distorted the results. This being the case, the anomaly identified by the court is removed. In light of Commerce's further explanation and the explanatory calculations, the court finds that Commerce's decision to use a simple average of 35 rupees, as derived from the Tribune of India article, is supported by substantial evidence and in accordance with law. *See, e.g., Rhodia, Inc. v. United States*, 25 CIT 1278, 1285, 185 F. Supp. 2d 1343, 1350 (2001) ("The general practice of Com-

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[9] The Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") is a Chinese governmental agency responsible for foreign trade, economic cooperation, and foreign investment.

merce [in calculating surrogate values] is to apply a simple average. In order to depart from this practice, Commerce needs to 'explain the reasons for its departure.'") (internal citation omitted). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd* 810 F.2d 1137 (Fed. Cir. 1987).

CONCLUSION

Based on the foregoing, Commerce's final results pursuant to remand are sustained in their entirety, and this case is dismissed. Judgment shall be entered accordingly.

Slip Op. 04–110

DAIMLERCHRYSLER CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Court No. 99–03–00178

[Judgment for plaintiff following appeal.]

Dated: August 26, 2004

Barnes, Richardson & Colburn (*Lawrence M. Friedman* and *Harvey Karlovac*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis* and *Aimee Lee*), *Karen P. Binder*, Office of Assistant Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant.

JUDGMENT

RESTANI, Chief Judge:

In accordance with the mandate of the Court of Appeals for the Federal Circuit issued on August 2, 2004 and as requested by the parties, judgment following appeal shall now enter for plaintiff as follows:

IT IS HEREBY ORDERED that

1. The United States Bureau of Customs and Border Protection shall reliquidate the entries of DaimlerChrysler Model Year

1993 and 1994 trucks at issue here to afford duty-free treatment under HTSUS subheading 9802.00.80 to the United States product sheet metal components of the trucks sent to Mexico for assembly into the trucks as entered.

2. Interest and costs are awarded as provided by law.

Slip Op. 04–111

RAOPING XINGYU FOODS CO., LTD., Plaintiff, v. UNITED STATES, Defendant, -and- COALITION FOR FAIR PRESERVED MUSHROOM TRADE, Intervenor-Defendant.

Court No. 02–00550

[Plaintiff's motion for judgment on the agency record denied; action dismissed.]

Decided: August 31, 2004

DeKieffer & Horgan (*John J. Kenkel* and *J. Kevin Horgan*) and *Lee & Xiao* (*Yingchao Xiao*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Peter J.S. Kaldes*), of counsel, for the defendant.

Collier Shannon Scott, PLLC (*Michael J. Coursey* and *Adam H. Gordon*) for the intervenor-defendant.

Memorandum

AQUILINO, Judge: According to the Trade Agreements Act of 1979, as amended, in determining whether foreign merchandise is being, or is likely to be, sold in the United States at less than fair value, a comparison shall be made between the export (or constructed export) price and "normal value." 19 U.S.C. § 1677b(a). And when such merchandise is produced in a nonmarket-economy country, the act authorizes the International Trade Administration, U.S. Department of Commerce ("ITA") to

> determine the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise. . . . [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 [it].

19 U.S.C. § 1677b(c)(1). The list of those factors in the statute includes "amounts of energy and other utilities consumed". 19 U.S.C. § 1677b(c)(3)(C). And the act further provides:

> (4) Valuation of factors of production
>
> The [ITA], in valuing factors of production under paragraph (1), shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are—
>
> (A) at a level of economic development comparable to that of the nonmarket economy country, and
>
> (B) significant producers of comparable merchandise.

19 U.S.C. § 1677b(c)(4).

I

The complaint filed in this action alleges that the above-named plaintiff is a privately-held company organized under the laws of the People's Republic of China ("PRC"), which country is still considered to have a nonmarket economy. *See, e.g., Coalition for the Preservation of American Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 28 CIT ___ , 318 F.Supp.2d 1305 (2004). Certain mushrooms produced and preserved there and exported to the United States have become subject to an ITA antidumping-duty order published at 64 Fed.Reg. 8,308 (Feb. 19, 1999). The petitioner for that relief, the above-encaptioned intervenor-defendant herein, requested an agency administrative review of exports of such merchandise subject to that order emanating from some 28 named PRC enterprises, including the plaintiff company now at bar.

That process resulted in a weighted-average dumping margin for it of 161.57 percent for the period of review ("POR") per the ITA's *Certain Preserved Mushrooms From the P[RC]: Final Results of Third New Shipper Review and Final Results and Partial Rescission of Second Antidumping Duty Administrative Review*, 67 Fed.Reg. 46,173, 46,175 (July 12, 2002). The plaintiff seeks relief from this determination via a motion for judgment upon the record compiled by the agency in connection therewith.

The court's jurisdiction to hear and decide this motion that has been proffered pursuant to USCIT Rule 56.2 is based upon 28 U.S.C. §§ 1581(c), 2631(c).

A

The sum and substance of plaintiff's complaint is that the ITA

> used a surrogate value for the wrong type of fuel in calculating the dumping margin for Raoping. Raoping argued and submit-

> ted supporting data for Commerce to use a value for the actual type of fuel it uses, namely "heavy" fuel oil. Rather, Commerce decided to use a value for "furnace oil," a different product. Such an apples-to-oranges comparison is unsupported by substantial evidence on the record and otherwise not in accordance with law.

Count I, para. 13. Its motion takes the position that the otherwise-not-in-accordance-with-law element of the court's standard of review per 19 U.S.C. § 1516a(b)(1)(B)(i) governs relief in this matter in that the "use of a value for a factor of production not utilized by Raoping Xingyu is unlawful", to borrow the words (but not the printed emphasis) of its statement of the sole issue, plaintiff's memorandum, page 1.

Of course, counsel must recognize that the resolution of an issue of law often depends on the underlying facts. Here, they include ITA issuance to Raoping Xingyu of a dumping questionnaire on or about March 30, 2001, section D of which, pursuant to 19 U.S.C. § 1677b(c)(1), *supra*, was concerned with the company's factors of production. Part IIA thereof, for example, requested a "description of . . . [it]s productional process for the merchandise under consideration" to include:

> . . . 5. . . . **all** inputs used to produce the merchandise . . ., including specific types of raw materials, labor, energy, subcontractor services, research and development, *etc.*

Boldface in original. The court has reviewed *in camera* Raoping Xingyu's initial response[1] to that part of the agency's questionnaire and found reference to many such inputs, including, for example, electricity[2], water[3], and coal[4], but no reference to the input, liquid fuel, still at issue. A subsequent response on behalf of the company and "its supplier Raoping Yucan Canned Foods Factory . . . submit-[ted] minor corrections to Raoping Yucan's factors of production data."[5] Among other things, that submission refers to "industrial heavy oil"[6].

That submission was followed by an ITA letter to company counsel, apprising them of the agency's "first resort to the use of publicly available published information from surrogate countries" and offering an "opportunity to submit any such information which they be-

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[1] Defendant-Intervenor's [Confidential] Response Brief, Appendix 3.

[2] *See id.*, pp. D–17 to D–18.

[3] *See id.*, p. D–18.

[4] *See id.*, pp. D–18 to D–19.

[5] *Ibid.*, Appendix 4, first page.

[6] *See, e.g., id.*, fifth page.

lieve the Department should consider when valuing the factors of production". Defendant's Memorandum, Appendix 3, p. 1. Counsel were thereafter admonished by the ITA for "deficiencies, omissions and areas where further clarification is needed"[7] purportedly found in the Raoping Xingyu response(s) to its questionnaire. Whatever the precise nature thereof, the court has reviewed the company's response[8] to that agency letter dated October 3, 2001 and its responses[9] to supplemental ITA questionnaires[10]. The responses dated January 11, 2002 and May 10, 2002 each have line items labelled "Heavy Oil". The January 11 submission explains that, once washed and then sliced, Raoping's mushrooms are blanched in a stainless steel tank heated by steam produced by a boiler, which burns "heavy oil". Plaintiff's [Confidential] Memorandum, Appendix 4, eighth page, para. 3.

The ITA's *Preliminary Results* of its administrative review, which were published at 67 Fed.Reg. 10,128 *et seq.* (March 6, 2002), stated, in pertinent part, that, to

> value furnace oil, we used price data contained in Hindustan Lever Limited's . . . 1999–2000 financial report because no other data was available from the other financial reports on the record.

67 Fed.Reg. at 10,132, col. 2. The reference to that firm in India was the result of the agency's reaffirmance of its position that the PRC continue to be treated as a nonmarket-economy country[11] and its determination that

> India is among the countries comparable to the PRC in terms of overall economic development. . . . In addition, based on publicly available information placed on the record, India is a significant producer of the subject merchandise. Accordingly, we considered India the primary surrogate country for purposes of valuing the factors of production because it meets the Department's criteria for surrogate country selection.

Id. at 10,131, col. 3.

This selection precipitated the filing of a case brief with the ITA on behalf of Raoping, to wit:

> The furnace oil that Hindustan Lever used is of different quality from the heavy fuel (which was translated literally into

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[7] Defendant's Memorandum, Appendix 5.

[8] Defendant-Internevor's [Confidential] Response Brief, Appendix 5.

[9] *Id.*, Appendix 14; Plaintiff's [Confidential] Memorandum, Appendixes 4, 5.

[10] Defendant's Memorandum, Appendixes 7, 10.

[11] *See* 67 Fed.Reg. at 10,131, col. 3.

> "heavy oil" in Raoping's questionnaire response) that Raoping used for its canned mushroom production during the POR. First, the huge difference between the prices of Hindustan Lever's and Raoping's fuel indicates that the qualities of the two fuels are different. We understand that as in a non-market economy, Raoping's fuel price cannot be used for such a comparison. However, the heavy fuel price that the Department used for China in a different proceeding is just a fraction of that of Hindustan Lever's furnace oil. . . . [T]he only heavy fuel price . . . used was in the Persulfates case (A–570–847), which is $0.12337 per kilogram. In the current review the furnace oil that the Department used is USD 0.45 per kilogram, 3.6 times of that in the Persulfates case, and it is even more expensive than the diesel oil which is a purer and better quality fuel than heavy fuel. . . . The dramatic difference of the prices indicates that the two fuels are of different quality. The heavy fuel that Raoping used is the last residual of oil refining process and it was so cheap that Raoping actually reduced its production cost by using it. . . . Raoping's boiler is also specially designed to use cheap fuel. While we have no information in the record regarding how and for what products . . . Hindustan Lever used the furnace oil, we know that canned mushroom is a small portion of Hindustan Lever's production, and it is very likely that Hindustan used the fuel in the production of the products that require a higher quality oil. Even [if] Hindustan Lever uses the furnace oil for its canned mushroom production, it may be of a higher quality and more efficient oil than that of Raoping's. Before we know that the two fuels are of similar quality, using . . . Hindustan Lever's oil price to calculate Raoping's cheap heavy fuel cost is not proper. For these reasons, we urge the Department to find a surrogate price of a fuel that is close to what Raoping used during the POR, or continue its past practice to use the heavy fuel price in the Persulfates case with adjustments.

Plaintiff's Memorandum, Appendix 6, third-fourth pages (citations omitted). This plea was rejected by the ITA in its Issues and Decision Memorandum as follows:

> . . . First, we find that the price of Hindustan's financial report is more contemporaneous to the POR than the price from *Energy, Prices and Taxes*. In addition, after examining information contained in Hindustan's financial report, we find no basis which supports Raoping Xingyu's contention that the furnace oil Hindustan uses is not comparable to the furnace oil Raoping Xingyu uses in its production process. The mere fact that there is a difference in the price of furnace oil contained in Hindustan's financial report and in *Energy, Prices and Taxes*

> does not necessarily indicate that there is an issue with regard to the quality of the furnace oil contained in either resource, especially when one recognizes that the price from *Energy, Prices and Taxes* is at least four years older than the price from Hindustan's financial report. Absent any supporting documentation or resources, we find that we cannot agree with Raoping Xingyu's claim that it uses furnace oil which is vastly different from that used by Hindustan. Thus, we are continuing to value this input using data from Hindustan's financial report.

Id., Appendix 3, pp. 6–7. The agency's subsequently-published *Final Results* that are now before the court adopted this reasoning. *See* 67 Fed.Reg. at 46,175, col. 1.

B

That adoption, and that of defendant's counsel in their memorandum, pages 9–10, seem somewhat incongruous. If the court's understanding is correct that *Energy Prices & Taxes* is a continuing, quarterly publication of statistics by the Organisation for Economic Cooperation and Development's International Energy Agency ("IEA"), then Hindustan Lever's past fuel prices are not "more contemporaneous to the POR than the price from *Energy, Prices and Taxes*." *Ibid*. Indeed, independent of the IEA, the U.S. government is or should be awash in oil data gathered and published by its own Energy Information Administration.

Be that as it may, the ongoing, world-wide phenomenon that is the flighty pricing of petroleum in all of its combinations and permutations has made contemporaneity a most-fleeting element of any related equation. Spot price is what counts. In this matter, however, as the court reads the record, the plaintiff failed to proffer any price paid for, or understood-grade of, its fuel oil.[12] Belatedly, it pleaded for reference, as quoted above, to an oil factor listed in the ITA's Index of Factor Values for Use in Antidumping Duty Investigations Involving Products from the P[RC]: Memorandum from Richard Moreland to All Reviewers (April 1997). *Cf.* Plaintiff's Memorandum, Appendix 6, Exhibit 1, p. 2. While that factor may well have been of moment during the period indicated, October 1994 to March 1995, to require the ITA now to resort thereto would reduce the requirement of 19 U.S.C. § 1677b(c)(1) of "the best available information regarding the values of such factors" to a degree certainly not contemplated

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[12] Its counsel concede the timely "opportunity to submit any such information which they believe the [ITA] should consider when valuing the factors of production". Plaintiff's Memorandum, p. 10, quoting Appendix 8 thereto, p. 1. *Cf. Tianjin Machinery Import & Export Corp. v. United States*, 16 CIT 931, 936, 806 F.Supp. 1008, 1015 (1992)("the burden of creating an adequate record lies with respondents and not with Commerce"), citing *Chinsung Indus. Co. v. United States*, 13 CIT 103, 705 F.Supp. 598 (1989).

by Congress or countenanced by the courts. Given the record, such as it is herein, this court cannot find that the Hindustan Lever data are not the best available, nor can this court conclude that the agency's reliance thereon was not in accordance with the law recited hereinabove.

II

In view of the foregoing, plaintiff's motion for judgment upon the agency record must be denied and this action dismissed. Judgment will enter accordingly.