Decisions of the United States
Court of International Trade

Slip Op. 05–157

POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, *et al.*, Plaintiffs and Defendant-Intervenors, GLOPACK, INC., *et al.*, Plaintiffs and Defendant-Intervenors GUANGDONG ESQUEL TEXTILES CO., Plaintiff-Intervenor, v. UNITED STATES, Defendant, HANG LUNG PLASTIC MANUFACTORY, LTD., Defendant-Intervenor, NANTONG HUASHENG PLASTIC PRODUCTS CO., Defendant-Intervenor.

Before: Judge Judith M. Barzilay
Consol. Ct. No. 04–00319
Public Version

OPINION

[Upon Plaintiffs' USCIT R. 56.2 Motion for Judgment upon an Agency Record, Commerce's determinations are affirmed except for one issue, and the case is remanded to the United States Department of Commerce.]

Decided: December 13, 2005

King & Spalding, (*Stephen A. Jones*), *Joseph W. Dorn, Jeffrey B. Denning*, for the plaintiffs and defendant-intervenors *Polyethylene Retail Carrier Bag Committee, et al.*

Garvey Schubert Barer, William E. Perry, (*Ronald M. Wisla*), for the plaintiffs and defendant-intervenors *Glopack, Inc., et al.* and *Hang Lung Plastic Manufactory Ltd.*

DeKieffer & Horgan, Gregory Stephen Menegaz, for the plaintiff-intervenor *Guangdong Esquel Textiles Co.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director; Civil Division, Commercial Litigation Branch, U.S. Department of Justice *Stefan Shaibani*, (*Sameer Yerawadekar*), *Marisa Beth Goldstein, Peter J. Kaldes*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

White & Case, LLP, Adams Chi-Peng Lee, Frank H. Morgan, Kelly Alice Slater, Walter J. Spak, for the defendant-intervenor *Nantong Hausheng Plastic Products Co.*

BARZILAY, JUDGE: In this consolidated action, the plaintiffs and defendant-intervenors filed USCIT R. 56.2 Motion for Judgment upon an Agency Record, challenging certain aspects of the final determination of the U.S. Department of Commerce ("Commerce") in the antidumping investigation *Final Determination of Sales at Less*

Than Fair Value: Polyethylene Retail Carrier Bags from the People's Republic of China, 69 Fed. Reg. 34,125 (June 18, 2004) (P.R. 505) ("*Final Determination*"), *amended*, 69 Fed. Reg. 42,419 (July 15, 2004) (P.R. 530) ("*Amended Final Determination*"). Plaintiffs Polyethylene Carrier Bag Committee, and its individual members, Vanguard Plastics, Inc., Hilex Poly Co., LLC, and Superbag Corp. (collectively "PRCB Committee Plaintiffs") are domestic manufacturers. Plaintiffs Glopack, Inc. ("Glopack"), Elkay Plastics Co., CPI Packaging, Inc., and PDI Saneck International are importers of polyethylene retail carrier bags from China to the United States; Plaintiffs Sea Lake Polyethylene Enterprise, Ltd. ("Sea Lake") and Rally Plastics Co. ("Rally") are Chinese producers and exporters to the United States of polyethylene retail carrier bags, (collectively "Glopack Plaintiffs"). Before the court are four issues raised by the PRCB Committee Plaintiffs and two issues raised by the Glopack Plaintiffs. For the reasons outlined below, the court AFFIRMS Commerce's determination regarding five challenges and remands the case on Commerce's calculations of Hang Lung's electricity usage as a factor of production.

I. BACKGROUND

This action challenges Commerce's determination of sales at less than fair value in the underlying investigation on polyethylene retail carrier bags ("PRCBs") from the People's Republic of China ("PRC"), covering the period of review from October 1, 2002 to March 31, 2003 ("POR"). Specifically, the subject merchandise included t-shirt sacks, merchandise bags, grocery bags, and checkout bags. *See Final Determination*, 69 Fed. Reg. at 34,125. In the Final Determination, Commerce determined that PRCBs from PRC were or likely were sold in the United States at less than fair value as provided in section 735 of the Tariff Act of 1930. *See Final Determination*, 69 Fed. Reg. at 34,125. *See Issues and Decision Mem. for the Administrative Review of Certain Stainless Steel Bar from India* (July 5, 2002) ("*Issues and Decision Mem.*") (containing explanations for Commerce's determinations).

The PRCB Committee Plaintiffs contest the following aspects of Commerce's antidumping duty determination: 1) Commerce's selection of facts otherwise available with respect to Hang Lung Plastic Manufactury Ltd. ("Hang Lung"), a Chinese manufacturer and exporter to the United States of the PRCBs and a mandatory respondent in the underlying investigation and defendant-intervenor in this case; 2) Commerce's acceptance of certain prices for polyethylene resin reported by Nantong Huasheng Plastic Products Co. ("Nantong"), a PRCBs exporter and mandatory respondent in the underlying investigation and defendant-intervenor in this case; 3) Commerce's decision to accept Nantong's reported factors of produc-

tion data; and 4) Commerce's selection of a surrogate value for cardboard inserts consumed in the production of PRCBs.

In the amended preliminary determination, the Department calculated a dumping margin of 0.12 percent for Hang Lung. *See Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Polyethylene Retail Carrier Bags from the PRC*, 69 Fed. Reg. 7908, 7909 (Feb. 20, 2004) ("*Amended Preliminary Determination*"). The final margin assigned to Hang Lung was 0.24 percent. *See Final Determination*, 69 Fed. Reg. at 42420. Since Hang Lung's margin was less than the 2.0 percent *de minimis* threshold, Hang Lung's customs entries of the subject merchandise were excluded from antidumping duties.

Commerce's preliminary determination for Nantong was based on neutral "facts otherwise available" pursuant to 19 U.S.C. § 1677e(a) because the respondent did not report its factors of production information on a product-specific basis. *See Preliminary Determination*, 69 Fed. Reg. at 3549. Nantong's preliminarily determined margin was 18.43 %. *Preliminary Determination*, 69 Fed. Reg. at 3549. Commerce ultimately verified Nantong's questionnaire responses and did not apply facts otherwise available in calculating the final margin. *Issues and Decision Mem.*, at 77–80. Nantong's final margin was 0.01 %. *See Final Determination*, 69 Fed. Reg. at 42420.

The Glopack Plaintiffs challenge the following aspects of the final determination: 1) Commerce's use of average unit values calculated from Indian basket category import statistics for certain black and color printing ink types to value Sea Lake and Rally's reported color-specific flexographic and gravure printing inks used in the manufacture of the subject merchandise and 2) Commerce's use of surrogate values rather than the prices reported paid for certain raw material inputs purchased from a Hong Kong trading company. *Glopack Pls Br.* at 2–3.

Plaintiffs Glopack, Inc., Sea Lake, and Rally participated in the investigation and submitted detailed responses to the Department's information requests. Plaintiff Sea Lake submitted responses covering two production plants: Shanghai Glopack Packing Ltd. ("Shanghai Glopack")[1] and Sea Lake. Commerce calculated a margin of 19.79 % for Shanghai Glopack and Sea Lake. *Final Determination*, 69 Fed. Reg. at 42420; *Antidumping Duty Order*: *Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 Fed. Reg. 48,201. Rally's final margin was determined to be 23.85 %. *Amended Final Determination*, 69 Fed. Reg. at 42420. In the preliminary de-

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[1] Shanghai Glopack, an exporter with no PRC ownership, was found to be affiliated with Sea Lake, a Hong Kong-based company with no PRC ownership. *See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: PRCBs from PRC*, 69 Fed. Reg. 3533, 3547. Because of these circumstances, Commerce did not engage in a separate-rate analysis for Glopack. *See id.*

termination, the Department calculated a dumping margin of 18.56 % for Rally. *Amended Preliminary Determination*, 69 Fed. Reg. at 7909.

The six issues contested in this action concern different sets of facts Commerce relied on in the administrative record. The relevant facts will be set forth separately in the discussion section for each separate challenge.

II. JURISDICTION AND STANDARD OF REVIEW

The court exercises its jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2004). The court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). "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." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)). When the court applies this standard, it affirms the agency's factual determinations "so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)); *see Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989) (The court may not reweigh the evidence or substitute its own judgment for that of the agency.).

The court reviews Commerce's surrogate value determinations for reasonableness. *Coalition for the Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 44 F. Supp. 2d 229, 258 (1999) ("Commerce need not prove that its methodology was the only way or even the best way to calculate surrogate values for factors of production as long as it was a reasonable way.").

III. DISCUSSION

1. *Commerce's Application of Adverse Facts Available by Allocating Hang Lung's Total Electricity Usage Rate*

The factors of production methodology used in nonmarket economy ("NME") cases requires Commerce 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 . . .

based on the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate." 19 U.S.C. § 1677b(c). Factors of production include "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost." 19 U.S.C. § 1677b(c). Respondents in such cases have to report on a model-specific basis the precise quantity of each factor required for production of one unit of merchandise. When Commerce "determines that it is unable to verify the respondent's submission, it may substitute for the information submitted by the respondents, facts otherwise available." *Chia Far Industrial Factory Co. v. United States*, 28 CIT ___ , 343 F. Supp. 2d 1344, 1363 (2004) ("*Chia Far*") (citing 19 U.S.C. § 1677e(a)(2)(A), (D)). If Commerce finds that "the failure to fully respond is the result of the respondent's lack of cooperation in . . . failing to put forth its maximum efforts to investigate and obtain the requested information from its records[,]" the agency is authorized to adopt an adverse inference when selecting facts otherwise available, pursuant to 19 U.S.C. § 1677e(b)[2]. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1383–84 (Fed. Cir. 2003) ("*Nippon Steel*"); *F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

In its Final Determination, Commerce applied an adverse inference to determine the value of the electricity usage related to the production of PRCBs. Commerce explained that it "was able to verify the usage amounts that were listed on model-specific usage worksheets for the individual models that [it] examined, but the per-unit amounts [it] verified did not appear in Hang Lung's FOP database for most of the models examined." *Issues and Decision Mem.* at 64. Finding that Hang Lung did not act to the best of its ability in reporting usage rates, Commerce decided to use adverse inferences in restating these usage rates. *Issues and Decision Mem.* at 64. However, Commerce concluded that because it was "able to verify the total electricity used by Hang Lung during the POI for subject merchandise[,]" it "allocated Hang Lung's total electricity usage that [it]

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[2] Section 1677e(b) provides:

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from--

(1) the petition,

(2) a final determination in the investigation under this subtitle, (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or (4) any other information placed on the record.

19 U.S.C. § 1677e(b).

verified to its reported U.S. sales." *Issues and Decision Mem.* at 64. Commerce further explained that it "allocated electricity based on the total amount of extruded resin and concentrate reported by Hang Lung in its United Stats factors-of-production database. In addition, [it] only allocated printing electricity to printed bags and [it] only allocated handwork electricity to handworked bags." *Analysis for the Final Determination of PRCBs from PRC: Hang Lung Manufactory Ltd.*, June 9, 2004, at 2.

During the oral argument and in its motion for leave to clarify its calculation, Commerce, however, evidenced an inconsistent position, claiming that "Commerce actually allocated the total electricity used in Hang Lung's production of *all* plastic bags, regardless of destination, to its United States sales." *Def. Mot. Leave Clarify Commerce's Electricity Calculations for Hang Lung*, at 2. In support, Commerce references Hang Lung Verification Exhibit 11 that showed: 1) the amounts of electricity used by Hang Lung for each month of the period of investigation for each department involved in its bag-producing activities (extrusion, printing, gusseting, cutting, and handwork), calculating the total electricity used for each department during the period of investigation by adding these monthly amounts, and 2) Hang Lung's reported electricity usage for each bag-producing and non-bag producing activity in December 2002. *Verification Hang Lung's U.S. Sales and Factors-of-Production Data*, Mar. 11, 2004, Ex. 11. Commerce explained that Exhibit 11 demonstrates that Hang Lung calculated total electricity used to produce all merchandise by subtracting "overhead electricity" from the expenses it incurred in the monthly electricity bills. *Def. Mot. Leave to Clarify Commerce's Electricity Calculations for Hang Lung*, at 2. These numbers, Commerce now argues, are not broken down by country of destination.

While this reading of Exhibit 11supports Commerce's explanation of its final calculations of the electricity usage in *Issues and Decision Memorandum*, at 64, it is inconsistent with Commerce's explanation in *Analysis of the Final Determination* for Hang Lung, where Commerce stated that it allocated the total electricity "based on the total amount of extruded resin and concentrate reported by Hang Lung in its United States factors-of-production database." *See Analysis Final Determination PRCBs from PRC: Hang Lung Manufactory Ltd.*, June 9, 2004, at 2.

On appeal, the PRCB Committee Plaintiffs do not contest the application of adverse facts available, but challenge Commerce's calculations as based on neutral, non-adverse facts. Plaintiffs maintain that Commerce recalculated Hang Lung's electricity consumption based on "a precise, multi-step allocation methodology and then restricted the amount to be allocated to the total verified electricity usage associated with production of subject merchandise during the POI." *PRCB Committee Br.* at 15. Plaintiffs suggest that Commerce did not adhere to its decision to use adverse facts, instead calculat-

ing the electricity usage in a neutral way. *PRCB Committee Br.* at 16. Thus, Plaintiffs claim that the methodology adopted by the Department in the final results is contrary to law and must be reversed. *See* 19 U.S.C. 1516a(b)(1)(B)(i). They demand that the court remand this issue, instructing the Department to select as adverse facts available, the highest reported and verified electricity usage rate on the record. *PRCB Committee Br.* at 20. In response and opposition to Commerce's motion for leave to clarify its calculation, the PRCB Committee Plaintiffs argued that the government attempted to "completely change its position" by claiming that Commerce allocated the electricity used by Hang Lung to produce plastic bags, regardless of the type of bag or destination of shipment. *PRCB Committee Resp. in Opp'n Def. Mot. Leave Clarify*, at 3.

The court must evaluate whether Commerce's selection of partial adverse facts available was supported by substantial evidence in the administrative record. *See Fujitsu*, 88 F.3d at 1038. In this case, Commerce claims that it decided to take the total electricity usage calculated for each department involved in the productions of subject merchandise, less the overhead electricity usage, and to allocate it to the United States sales. Commerce's final determination specifically cited to 19 U.S.C. § 1677m(e), which provides:

> [Commerce] shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority or the Commission, if–
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
> (5) the information can be used without undue difficulties.

Commerce explained that it verified Hang Lung's reported total electricity usage rate, and nothing in the record indicates that this information was unusable or incomplete. In applying facts adverse to a party's interest, Commerce's goal is to "encourage compliance while determining current margins as accurately as possible." *Nat'l Steel Corp. v. United States*, 20 CIT 100, 103, 913 F. Supp. 593, 596 (1996). Simultaneously, Commerce must select non-aberrant facts rationally related to what they are used to calculate. *See id.* In this case, the court finds that using the total electricity consumed during the period of review in producing all bags, regardless of destination, was

neither unreasonable nor aberrant. However, Commerce took inconsistent positions in explaining how it allocated that verified value. In the *Hang Lung Analysis for the Final Determination*, Commerce stated that it "allocated that value based on the total amount of extruded resin and concentrate reported by Hang Lung in its factors of production database." *Analysis for the Final Determination of PRCBs from PRC: Hang Lung Manufactory Ltd.*, June 9, 2004, at 2. In its motion to clarify, the government insisted that it allocated the total electricity usage to Hang Lung's reported United States sales, not conditioned on any other factor. The record does not furnish any more information for the court to ascertain how Commerce allocated the value. Lacking this information, the court cannot determine whether Commerce's methodology in this instance was contrary to law or unsupported by substantial evidence in the record. Therefore, the court remands this issue, instructing the government to explain its calculation. Commerce must address the seeming inconsistency between the *Hang Lung Analysis for the Final Determination* and the information in Commerce's motion to clarify and to reconcile this information.

2. *Use of the Price Nantong Paid to Market Economy Suppliers for Certain Raw Material Inputs*

During the investigation, Nantong reported that it bought certain raw material inputs from market economy suppliers. *Nantong Questionnaire Response*, Oct. 1, 2003. Upon verification of the reported information, Commerce examined the invoices for each raw material input, including invoices for inputs from market economy suppliers. *See Nantong Verification Report*, April 15, 2004, at 8. The record shows that Nantong reported low prices for polyethylene resin purchased from a supplier located in Hong Kong. Plaintiffs point out that Nantong's reported prices for resin were [a certain range][3] percent below contemporaneous price indices published by commodities exchanges and the verified prices reported by all other respondents participating in the investigation. In this case, Nantong was required to report any relationship with its supplier of polyethylene resin, [ ]. Nantong disclosed its relationship with [the supplier] during verification, claiming that it was able to negotiate the low resin prices because of a "long-established relationship" with [that supplier], and because its arrangements with [the supplier] were subject to certain minimum purchase requirements. *Nantong Verification Report*, Apr. 15, 2004, at 8. In addition, Nantong reported the following facts regarding its relationship with [the supplier]:

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[3] Confidential business information has been redacted in this public version of the opinion.

1) In the nine months preceding the POI, Nantong sold PRCBs to [the supplier] as a downstream product valued at more than $ [ ].

2) Nantong and [the supplier] had a joint customer - [ ].

3) The [ ] dollars in sales to [the supplier] in the months immediately preceding the POI involved merchandise identical to the merchandise sold to [the joint customer], and all the merchandise sold to [the supplier] was resold to [the joint customer].

4) Nantong granted preferential prices to [the supplier]. Specifically, the prices charged to [the supplier] were up to [ ] percent less than the prices charged to [the joint customer] for identical merchandise.

Commerce was satisfied with Nantong's reported prices and found no discrepancies between the information reported by Nantong in its questionnaire and the results of the administrative verification. *See Nantong Verification Report*, Apr. 15, 2004, at 8. Commerce concluded that it could use the prices paid by Nantong to its Hong Kong supplier instead of surrogate values, because Nantong purchased the inputs in arm's length transactions from a market economy supplier.

Plaintiffs challenge Commerce's use of these reported prices in the final margin calculations, which resulted in a *de minimus* margin for Nantong. The PRCB Committee argued on the administrative level that prices reported by Nantong for key material inputs such as polyethylene resin[4] ("PE resin") were unacceptable because they were significantly lower than prices reflected in published price indices or prices reported by all other respondents. Plaintiffs further argued that the Department was obligated by law to investigate whether the relationship between Nantong and its supplier distorted prices paid by Nantong to its supplier.

Plaintiffs presented evidence that the reported prices were [a certain range] percent lower than contemporaneous prices published by the London Metals Exchange or Independent Commodity Information Service - London Oil Report ("ICIS-LOR") and that prices reported by other respondents were tightly clustered (within 5 and 6 percent of the mean, respectively, for both HDPE and LLDPE), as would be expected form a commodity like PE Resin.

Plaintiffs argue that because PE Resin is a commodity, and Commerce has recognized that commodity purchasers base their purchasing decisions primarily on price and availability, there exists little price variability in a given market at a given time. For example, in one case Commerce stated that products traded as commodities are "price sensitive and sales are thus often made or lost based on relatively small differences in price." *Notice of Final Determination of Sales at Less Than Fair Value*: *Stainless Steel Plate in*

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[4] Three types of PE Resin were involved in this investigation: high density polyethylene ("HDPE"), low density polyethylene ("LDPE"), and linear low density polyethylene ("LLDPE").

Coils from Taiwan, 64 Fed. Reg. 15,493, 15,504 (Dep't Commerce, Mar. 31, 1999), *app'd on other grounds*, *Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 215 F. Supp. 2d 1322 (2000). In contrast, significant differences appear between the prices reported by Nantong and other respondents, who reported PE Resin purchases from market economy suppliers. Plaintiffs also claim that Nantong failed to disclose facts surrounding its relationship with its market economy supplier of polyethylene bags. Finally, Plaintiffs maintain that Commerce's failure to thoroughly investigate Nantong's reported prices was contrary to law and its acceptance of those prices unsupported by substantial evidence.

Commerce claims that it adequately investigated how Nantong negotiated the price for resin. Commerce accepted Nantong's explanation that it relied on a website for market prices, which it used to negotiate the price, per metric ton, that it would pay its market economy supplier. *Nantong Verification Report*, Apr. 15, 2004, CR 176. Commerce also concluded that the prices that Nantong paid arose through market-driven, arm's length negotiations. Commerce maintains that there is nothing unusual in the discounted prices that Nantong's market economy supplier provided to Nantong, a long-standing customer. The government argues that a long-standing relationship between Nantong and its supplier and Nantong's sales of its products back to the supplier do not indicate the type of an affiliation between Nantong and its supplier that would make transactions between the two distorted. Importantly, there is evidence in the record that Nantong and [the supplier] competed against each other for customers in the United States. *See Nantong Verification Report*, Apr. 15, 2004, at 9.

During an investigation, Commerce aims to determine whether a relationship exists between respondents and their suppliers that would distort the reported prices. Commerce has the authority to value raw material inputs used to determine normal value in NME cases using the actual market prices paid by respondents ("ME inputs") instead of surrogate values. Commerce's relevant regulation states that "where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier." 19 C.F.R. § 351.408(c)(1). Before Commerce can use reported ME input prices, the record must show that such prices are "market determined." *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). The Preamble to the Department's regulation notes that although the Federal Circuit upheld Commerce's practice of using prices paid to market economy suppliers, it "do[es] not view this decision as permitting us to use distorted (*i.e.*, non-arm's length) prices." *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce, May 19, 1997). In non-market economy cases, the statute authorizes Com-

merce to disregard prices paid to affiliated suppliers if the price "does not fairly reflect" market prices, 19 U.S.C. § 1677b(f)(2), or if the suppliers sell major raw material inputs at "less than the cost of production." 19 U.S.C. § 1677b(f)(3).

In this case, the record evidence supports Commerce's position because, even though Nantong reported prices that were lower than the prices reported by other respondents in the investigation, Nantong provided sufficient explanation on how it negotiated lower prices in the normal course of its business. Commerce verified that the transactions between Nantong and its supplier were at arm's length. Plaintiffs' comparison of Nantong's prices to other respondents' reported prices and to contemporaneous prices published by the London Metals Exchange or ICIS-LOR does not evidence market price distortion. Commerce did investigate the validity of the market prices that Nantong reported and determined that they were the "best available information" for valuing market economy inputs. *See Lasko Metal Prods. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (finding that the best available information on what the supplies used by the Chinese manufacturers would cost in a market economy country was the price charged for those supplies on the international market). Commerce is not required to scrutinize the reported prices other than satisfactorily verify them. The record supports Commerce's conclusion that the prices accurately reflected market prices in accordance with 19 U.S.C. § 1677b(c)(1) and 19 C.F.R. § 351.408(c)(1). *See Luoyang Bearing Factory v. United States*, 26 CIT 1156, 1187, 240 F. Supp. 2d 1268, 1298 (2002) (refusing to apply plaintiff's mode of examination that required determining "whether the price paid by a PRC bearing manufacturer to a market-economy supplier was market-driven or representative of market-prices.").

3. *Commerce's Decision to Accept Nantong's Reported Factors of Production*

A. Commerce's Acceptance of Nantong's Allocation Methodology for HDPE and LLDPE Resin

In its *Preliminary Determination*, Commerce applied "facts otherwise available" under 19 U.S.C. § 1677e(a) to value all of Nantong's reported sales. *Preliminary Determination*, 69 Fed. Reg. at 3548–49. Nantong explained that because of its usual business practices, it could not allocate its use of different inputs to the production of its different products. *Id.* (citing *Nantong Letter to Commerce*, Jan. 12, 2004, at 2). Commerce preliminarily determined that Nantong's data, as provided, distorted the amount of raw material inputs consumed in production and that Commerce would have to use facts otherwise available to value the inputs. *Preliminary Determination*, 69 Fed. Reg. at 3529.

Specifically, Nantong reported the same factor usage rate for all five inputs reported for each of the 94 individual products exported to the United States during the POI. Then Nantong submitted a revised factors database, which included four sets of material input factors and usage rates for 95 individual products. Nantong reported four different costs of production and normal values for 95 unique bag types. In the preliminary determination, Commerce declined to use any of Nantong's factors data and based its entire margin on neutral facts available, because it found the factor information distorting. *Preliminary Determination*, 69 Fed. Reg. at 3549.

In its final determination, the Department reversed itself and used Nantong's data to calculate Nantong's *de minimis* final dumping margin. *Issues and Decision Mem.*, Comment 23; *Amended Final Determination*, 69 Fed. Reg. at 42420. Commerce explained that it verified Nantong's assertion that its business practices prevented it from reporting an allocation of its factors of production on a product-specific basis. *See Nantong Verification Report*, at 12 (Def. Tab 16). Commerce verified Nantong's reported factors of production of resin, ink, and scrap. Nantong advised the Department that the bag production involved mixing resin with scrap and pigment in accordance with a specified recipe stated on "production order slips." *Nantong Verification Report*, at 3. The verifiers examined the production order slips, which included production codes for each model ordered, the number of cartons and pieces per carton for each model ordered, resin percentage instructions for each model, and total raw material inputs required to produce the order (whether new or recycled). *Nantong Verification Report*, at 6. Nantong used only two types of resin: HDPE and LLDPE. Commerce found that Nantong's allocation methodology for these raw material inputs per kilogram of finished product, based on the total consumption of raw materials in the POI and the total production of finished goods in that period was satisfactory. Nantong explained to the verifiers that the company did not "follow the production order consumption ratios exactly because it need[ed] to take into account recycle scrap in its mixture of resin . . . which can vary between 10 to 20 percent and can go as high as 50 percent." *Nantong Verification Report*, at 6–7. "Nantong officials explained that they are unable to provide the Department with more specific information because they do not keep track of that type of information in the accounting system." *Nantong Verification Report*, at 12. Nantong also explained that it could provide the actual amount of scrap in inventory by using its end-of-month scrap inventory ledger, but it could not tell how much scrap was consumed for each production run. *Nantong Verification Report*, at 12. Commerce found no discrepancies resulting from this generalized methodology. It supported its decision by concluding that there was "no evidence that Nantong did not act to the best of its ability in providing the necessary information to calculate a dumping margin." *Issues*

and Decision Mem., at 78. As a consequence of using Nantong's reported data, Nantong received a *de minimus* margin, and was, pursuant to 19 C.F.R. § 351.204(e), excluded from the order. *See Amended Final*, 69 Fed. Reg. at 42,420 (Tab 3).

Plaintiffs claim that Nantong's reported factors were not accurate, alleging that Nantong falsely stated that it did not keep business records that would allow a more detailed allocation of product-specific costs. *Nantong's Resp.* at 13. Plaintiffs claim that Commerce's reversal of its approach in the final determination was not warranted by any enhanced data accuracy. They maintain that the varied amount of scrap reported on the order slips does not make the slips unreliable because it is ordinary for PRCB producers to recycle scrap. Plaintiffs argue that Commerce should have used the data based on the "specific recipes" stated in the order slips. Instead, Nantong based its reported factors of production on average resin consumption ratios reported to Chinese customs officials for purposes of claiming import tax exemptions on imported PE Resins consumed in production of exported products: 75 % HDPE and 25 % LLDPE; 5 % HDPE and 95 % LLDPE. *Nantong Verification Report*, at 7, 12. These ratios are supported by a letter dated August 5, 2001, more than a full year before the October 1, 2002, beginning of the POI. *Nantong Verification Report*, Ex. 16. Plaintiffs argue that Commerce failed to discuss or acknowledge the basis of Nantong's reporting in the published notice of final determination. *Issues and Decision Mem.*, Comment 23.

Plaintiffs' central argument is that Nantong maintained records in the normal course of business that would have allowed preparation of considerably more accurate factors of production data. Because Commerce accepted less accurate factors of production, its final determination was not supported by substantial evidence and was contrary to law. 19 U.S.C. § 1516a(b)(1)(B).

To show that Nantong produced imprecise factors of production, Plaintiffs cite the data reported by other respondents in the investigation. While Nantong reported only five raw material input factors for its production of t-shirt bags, other respondents reported no fewer than 15 and as many as 29 raw material inputs for exactly the same type product. Additionally, other respondents reported a broad range of normal values among the various sizes, colors, and printings of t-shirt bags sold in the United States. Nantong reported 4 normal values for the 95 products it exported. *PRCB Committee Br.* at 38–39. Plaintiffs argue that because Nantong had more accurate data, such as production order slips, Nantong's reporting of factors of production data presents a concrete example of a respondent "failing to put forth its maximum efforts to investigate and obtain the requested information from its records." *Nippon Steel*, 337 F.3d at 1384. Plaintiffs claim that Commerce's decision to disregard the ex-

istence of more accurate data resulted in a calculation unsupported by substantial evidence in the record.

Nantong claimed that its resin allocation methodology "in actuality increases its factors-of-production cost." *Nantong Verification Report*, Apr. 15, 2004, at 7. It explained that HDPE resin costs more than LLDPE, so that by over-reporting its HDPE consumption, Nantong used a conservative methodology for reporting resin consumption. *Nantong Verification Report April 15, 2004*, at 7. In addition, Nantong argues that the HDPE/LLDPE percentages listed in the production order slips exist only in narrow bands, differing no more than five percentage points. *Nantong's Br.* at 12. Thus, Nantong calculates that using Nantong's market-economy purchase prices, the difference in constructed value using the 75 % HDPE / 25 % LLDPE ratio versus a 70 % HDPE / 30 % LLDPE ratio would yield only a minimal per unit change of [ ]. *Nantong's Br.* at 12. Nantong's calculation of [ ] reflects the most extreme range of difference in the production order slip ratios. Nantong presents other calculations to illustrate that because it always reported the highest percentage for the more expensive HDPE resin in its factors, Plaintiffs' proposed allocation methodology based on the order slips could only reduce Nantong's constructed value.

Nantong also claims that Plaintiffs have not offered evidence demonstrating that its production order slips would yield a more accurate calculation of the constructed value. At verification, Nantong's officials said that they could not provide "the amount of actual resin, pigment, or ink consumption by day, production order or model because the mixing workshop does not record amounts inputted during the mixing process." *Nantong Verification Report*, at 12. In addition, Nantong did not follow its recipes reflected on the production order slips: "[B]ecause the recipes . . . do not vary substantially, the employee who mixes the resin will regularly mix multiple production orders at the same time." *Nantong Verification Report*, at 3. The production order slips provide only a guide to the mixing of HDPE and LLDPE resins, supporting Commerce's finding that the company did not maintain records of the actual amount of resin consumed in the production process by model, production run, or other basis. *See Nantong Verification Report*, at 6.

> Regarding the use of scrap resin, Nantong explains that
>
> > although the production order slips have specific percentages, in reality, Nantong does not follow the production order consumption ratios exactly because it needs to take into account recycle scrap in its mixture of resin. . . . [T]he production order slip . . . does not take scrap into account and therefore the percentages reported on the slip do not reflect the actual percentages produced.

Nantong Verification Report, at 6. Nantong explains that even if the production order slips were followed with respect to virgin resin consumption, the high scrap percentage would reduce the accuracy of the production order slips. Plaintiffs concede that the presence of scrap renders any allocation methodology less accurate. *See PRCB Committee* Br., at 40.

Commerce maintains that it had discretion to accept Nantong's factors of production responses. Section 1677e of the antidumping statute provides that Commerce apply "facts otherwise available" on the record if, among other things, necessary information is not available on the record. 19 U.S.C. § 1677e(a). Furthermore, section 1677m(e) provides that Commerce

> shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administrative authority . . . if—
>
> **(1)** the information is submitted by the deadline established for its submission,
>
> **(2)** the information can be verified,
>
> **(3)** the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
>
> **(4)** the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
>
> **(5)** the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

Commerce is charged with "determining current margins as accurately as possible." *Rhone-Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Shakeproof*, 268 F.3d at 1382. When factors of production are identified, the statute directs the Department to use the "best available information" to value each one. 19 U.S.C § 1677b(c)(4). "In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible." *Shakeproof*, 268 F.3d at 1382.

Plaintiffs cite to other cases where the Department requested product-specific cost data, requiring reasonable cost allocations among various products under investigation if the respondent's normal accounting records did not contain product-specific cost information. *See, e.g., Certain Cold-Rolled Flat-Rolled Carbon Quality Steel Products from Turkey*, 65 Fed. Reg. 15123 (Dep't Commerce, Mar. 21, 2000) (noting that frequently respondents' normal cost accounting

systems do not differentiate among products or provide product-specific costs and that Commerce's "consistent practice" is to require reasonable allocation methodologies to achieve product-specific costs.").

In reviewing whether Commerce's decision is supported by substantial evidence on the record, the court "tak[es] into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). The court "will find a determination unlawful where Commerce . . . relied on inadequate facts or reasoning, or failed to provide an adequate basis for its conclusions." *Rhone-Poulenc, Inc.*, 20 CIT 573, 575, 927 F. Supp. 451, 454 (1996) (citations omitted).

In this case, Commerce accepted the average non-model-specific ratios provided by Nantong. Commerce specifically verified Nantong's reported factors of production of resin, ink, and scrap and found Nantong's methodology of allocating raw material inputs per kilogram of finished product, based upon the total consumption of raw materials in the POI and the total production of finished goods in that period, reliable. It also found "no evidence that Nantong did not act to the best of its ability in providing the necessary information to calculate a dumping margin." *Issues and Decision Mem.*, at 78. Commerce did not find the production order slips more accurate or reliable because verification revealed that the slips were not strictly followed in production. Commerce found that Nantong did not keep any production or accounting records that tracked costs on a model-specific basis. *See Nantong Verification Report*, at 12; *Issues and Decision Mem.*, at 77–80. As a general rule, Commerce has the discretion and "authority to determine the extent of investigation and information it needs." *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992). In this case, Commerce's conclusion was supported by substantial evidence in the record, and the court will not re-weigh the evidence.

B. Nantong's Allocation of Ink Consumption

Plaintiffs argue that Commerce also improperly accepted Nantong's ink consumption data. The record shows that Nantong produced [ ] styles of bags that contained printing, that the print images varied in total print area, and that Nantong reported using red, blue, green, yellow, and black ink. Commerce accepted Nantong's two consumption ratios for ink; one of the values was zero. The Department examined the size of bags and the number of colors used in printing and found that these factors "are not necessarily an accurate indicator of ink consumption." *Issues and Decision Mem.*, at 80. Commerce also found no "correlation between bag size, the number of printed sizes, and ink consumption." *Id.* It concluded

"that the size of the bag and the number of colors are not necessarily an accurate indicator of ink consumption." *Final Determination Mem.*, Comment 23.

Plaintiffs argue that Commerce had model-specific image design and color information for each product and that Nantong could have developed a model-specific allocation methodology for black and color inks. For instance, Nantong could have reported more precise factors of production based on information maintained in the normal course of business, such as the production order slips. Plaintiffs argue that Nantong failed "to put forth its maximum efforts to investigate and obtain the requested information from its records," and Commerce is thus authorized to adopt adverse inferences when selecting facts available, pursuant to 19 U.S.C. § 1677e(b).

The Department's task is to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mrfs. Ass'n of United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). In this case, the Department found no correlation among size, the number of printed sides, and the number of colors, and concluded that there was no basis to allocate ink consumption to various bag types. Lacking a basis for allocation, Nantong could only assign a single ink consumption amount to printed bags. Although there were variations among Nantong's printed bags, Commerce found Nantong's allocation methodology reasonable given the information that the company kept in its normal course of business. Plaintiffs have not demonstrated a more discernable pattern for a different allocation. Commerce's conclusion cannot be disturbed unless unsupported by substantial evidence or contrary to law. *Fujitsu*, 88 F.3d at 1038.

4. *Commerce's Application of Adverse Facts Available to Hang Lung*

In the final determination, Commerce applied a surrogate value for cardboard inserts using the weighted-average unit value of cardboard inserts imported into India during the POI. *Issues and Decision Mem.*, at 97, 100–01. When providing Commerce with information regarding the cardboard inserts, Glopack explained that "certain companies use untreated cardboard" inserts while others "use treated cardboard" ones. *See Surrogate Value Submission*, Nov. 20, 2003, at 6. The investigation respondents did not specify which type they used in their production. Commerce therefore relied on a combination of HTS subheading 4810.29.00 (treated cardboard) and 4805.80.09 and 4805.70.09 (untreated cardboard) to value all inserts. The PRCB Committee argues that Commerce failed to analyze and explain its conclusion that HTS 4810.29.00 is the correct tariff classification for valuing coated cardboard inserts and maintains

that HTS 4810.39.09, which includes lower-quality treated inserts, might be more appropriate. *PRCB Committee Br.* at 47. Specifically, Plaintiffs argue that the Department failed to make a reasonable connection between the facts on the record and its conclusion, and, therefore, its selection of the surrogate value for cardboard inserts was contrary to law and unsupported by substantial evidence. *PRCB Committee Br.* at 47.

During the investigation, Commerce instructed participating respondents to "describe each type and grade of material used in the production process." Rally replied that the cardboard inserts were "low grade, recycled cardboard inserts." *See, e.g., Rally's Section D Response*, Oct. 2, 2003, at 6. Later, Glopack, Rally, and Hang Lung provided different information, stating that "the treated cardboard inserts . . . [are] higher quality cardboard that can be used for graphic purpose, but [they are] used by the respondents for inserts." *Surrogate Value Submission*, Nov. 20, 2003, at 6. The respondents further provided certain Indian import data showing that "[t]he treated cardboard inserts used by respondents are classified under US HTS [sic] item 4810.29.10.00." *Surrogate Value Submission*, Nov. 20, 2003, at 6.

The PRCB Committee Plaintiffs requested that Commerce use the value for HTS subheading 4810.39.09, rather than HTS subheading 4810.29.00, as the proper surrogate value for treated cardboard inserts, claiming that HTS subheading 4810.29.00 included higher quality inserts than those included under HTS subheading 4810.39.09, and that inconsistent statements made Glopack's assertion that it used higher quality inserts incredible. In its final determination, Commerce did not address this inconsistency in the respondents' responses. However, Commerce explained that "[b]ecause none of the respondents specified what type of cardboard insert (treated or untreated) it used in the production of subject merchandise, [it] applied our methodology . . . valu[ing] cardboard inserts using the weighted-average of the surrogate values for treated and untreated cardboard inserts." *Issues and Decision Mem.*, at 100. As a result, for most respondents, Commerce used "the weighted average of the values . . . for HTS subheadings 4810.29.00, 4805.70.09, and 4805.80.09." *Issues and Decision Mem.*, at 100. Commerce did not explain, however, why the selection of subheading 4810.29.00 over subheading 4810.39.09 was more appropriate, stating that petitioners "have not demonstrated that the use of HTS subheading 4810.29.00 is inappropriate or that the use of HTS subheading 4810.39.09 is more appropriate." *Issues and Decision Mem.*, at 100.

The PRCB Committee argues that the Department failed to address the official descriptions of the competing tariff headings. Heading 4810 is defined as: "Paper and paperboard, coated on one or both sides with kaolin (China clay) or other inorganic substances." The heading is further divided into the following relevant divisions: 1)

subheadings 4810.21 and 4810.29 encompasses "Paper and paperboard of a kind used for writing, printing or other graphic purposes, of which more than 10 percent by weight of the total fiber content consists of fibers obtained by a mechanical process" and 2) subheadings 4810.31, 4810.32 and 4810.39 cover "Kraft paper and paperboard, other than that of a kind used for writing, printing, or other graphic purposes." *See Surrogate Value Submission*, Mar. 22, 2004 (citing to Chapter 48 of the Harmonized Tariff Schedule of the United States, which is harmonized to the six-digit level with the Indian HTS.).

In rebuttal, the government argues that the PRCB Committee Plaintiffs did not demonstrate how subheading 4810.39.09 is more appropriate for valuing treated cardboard inserts. The Department explains that the respondents did not provide specific detail regarding whether the cardboard inserts they used were "treated" or "unreated," let alone specific types of inserts they used. Commerce therefore selected a weighted average of the HTS categories for both treated and untreated cardboard inserts as the "best available information" for cardboard inserts. *See* 19 U.S.C. § 1677b(c)(1). However, as accurately pointed out by the PRCB Committee Plaintiffs, the record shows that the description of the treated cardboard supplied by the respondents during the investigation changed, and Commerce did not specifically address that change in its final analysis. While Commerce has the authority to use "best information available" when it finds petitioners' submissions incomplete or inconsistent, *see* 19 U.S.C. § 1677e, it also must, "to the extent practicable, provide [petitioners] with an opportunity to remedy and explain the deficiency." 19 U.S.C. § 1677m(d). Plaintiffs do not claim that they lacked an opportunity to show Commerce that the use of subheading 4810.39.09 was more appropriate. In addition, although the detailed submission by Glopack, Rally, and Hang Lung, which stated that the treated cardboard inserts respondents used were classified under subheading 4810.29.10.00 differed from Rally's earlier response, it was not unreasonable for Commerce to rely on a more detailed explanation, especially since Commerce had to use "the best information available." *See Surrogate Value Submission*, Nov. 20, 2003, at 6. Commerce chose one among several HTS categories to value treated cardboard inserts, and the respondents' submission supported that choice. Thus, the PRCB Committee Plaintiffs did not show that record evidence did not support Commerce's methodology.

5. *Selection of the Surrogate Value for Black and Color Inks*

In response to Commerce's request that the respondents provide publicly available information for valuing their factors of production, Glopack offered a list of average prices for flexographic and gravure inks, in black and other colors, from Hindustan Inks and Resins, Ltd. ("Hindustan"), an individual Indian manufacturer. *Glopack*

Surrogate Value Submission 1 (Nov. 20, 2003). Glopack argued that these prices should be used as surrogate values for ink because they included only those inks used in printing on polyethylene retail carrier bags, namely flexographic and gravure inks, and because they were color-specific. *Id.* at 3–5. Commerce noted that the proposed prices were not accompanied by source documentation.

In the preliminary determination, Commerce concluded that India represented the appropriate surrogate for the PRC and relied on publicly available Indian import statistics for valuing black and color inks. *See Preliminary Determination*, 69 Fed. Reg. at 3549. In the *Factor Valuation Memorandum*, Commerce explained that it used cumulative Indian import statistics as surrogate values for each material input. Commerce also explained why it did not use the surrogate value data submitted by Glopack to value the ink. Commerce explained that the Indian import statistics were "reliable" because they were "based on the sum of all imports into India during the POI." Commerce did not accept the Hindustan data, finding that it was derived from only one producer and varied greatly from the import statistics. *Factor Valuation Mem.*, at 3.

Following the preliminary determination, Glopack submitted U.S. import statistics of gravure and flexographic printing inks, price lists for United States sales from one of Glopack's own importers for gravure and flexographic printing inks used to print plastic bags, and a price list from a Malaysian company for sales to Vietnam of gravure printing inks used to print plastic bags. *Glopack Submission*, Mar. 22, 2004, at 3–5. Another respondent in the investigation provided worldwide average data from the United Nations. Using these various data, Glopack contended that the Indian import statistics that Commerce used were less accurate than the Hindustan data.

In the Final Determination, Commerce continued to value ink inputs using the publicly available import statistics that it used in the preliminary determination. It determined that the Indian import statistics presented the best available surrogate value because they were 1) sufficiently product-specific, 2) country-wide, 3) tax and export exclusive, and 4) contemporaneous with the period of investigation. Commerce did not find the Hindustan data more accurate or representative than the Indian import statistics. *Id.*

The basket category tariff provisions Commerce used were based on the Indian HTS items 3215.11.90 ("Other black printing ink") and 3215.19.90 ("Other printing ink & printing colors"). These broad basket provisions include a large number of products Plaintiffs did not use to produce the subject merchandise. In addition to the flexographic and gravure printing inks, they include: 1) all types of printing inks other than newspaper inks, rotary inks, and screen and lithographic printing inks; and 2) gravure and flexographic printing inks used in applications other than printing on polyethyl-

ene bags, including more costly applications of printing on paper, coated paper, and cardboard; 3) printing inks of higher quality than necessary for printing on polyethylene bags; 4) printing inks of different concentrations, such as printing ink jellies and paste, necessarily more expensive on a per-unit basis; and 5) for color inks a single combined value for all distinct colors, regardless of the relative value of each individual color.

1. Glopack's Arguments

Glopack argues that the Department's selection of surrogate values for the color-specific factors of production for flexographic and gravure printing inks used by Plaintiffs Sea Lake and Rally to manufacture the subject merchandise did not meet the statutory test for two reasons: (1) the surrogate prices selected by the Department were derived from basket category tariff provisions not specific to the ink type used to produce the subject merchandise and 2) the Department rejected alternative surrogate values Plaintiffs submitted that consisted of the average unit values based on actual Indian sales of color-specific flexographic and gravure printing inks used to manufacture polyethylene bags.

Regarding the specificity of the data Commerce used, Glopack argues that the basket tariff provisions were overly broad in several respects. First, as a residual basket category, the data for printing types included all types of specialty and computer printing inks (in addition to the gravure and flexographic) valued substantially higher than gravure and flexographic printing inks used to print polyethylene bags. Plaintiff argues that the import statistics also used both liquid printing inks of normal concentrations used by Plaintiffs to print plastic bags and more highly concentrated inks in jelly and paste forms used in other applications. The record shows that ink's per unit value necessarily increases as the ink concentration of the product increases, thus making the data used inaccurate. Finally, the basket import statistics for color ink fail to account for the different colors of the printing inks. The cost of red, violet, and pink tone printing inks substantially exceeds those of blue, yellow and green tone.

Glopack pinpoints a significant discrepancy between the alternative surrogate values: the Hindustan data showed black ink valued at $1.96/kg and the most expensive color ink at $ 4.27 per kg, whereas the basket categories had values of $7.63/kg for black ink and $12.47/kg for all color ink. In addition, Glopack asked Commerce to compare the Hindustan data with U.S. import statistics for calendar years 2000, 2001, 2002, and 2003 (HTSUS 3215.11.00.20, black flexographic; 3215.11.00.20, black gravure; 3215.19.00.20, color flexographic; and 3215.19.00.30, color gravure). Pub. Doc. # 424 (Tab 7). Plaintiffs argue that, unlike the Indian tariff provisions, these U.S. tariff provisions are not basket categories, but are limited to

gravure and flexographic printing inks, the types of ink specifically used in production of the subject merchandise. Specifically, Glopack argues that the U.S. import statistics for calendar years 2002 and 2003 that it provided in its surrogate value submission, showed U.S. import prices substantially closer to the Hindustan prices than to the basket category import prices. For example, Plaintiffs calculated that the calendar year 2003 combined average unit value of U.S. import statistics for black flexographic and black gravure inks came to $3.74/kg. The Hindustan data provided $1.96/kg for black flexographic and gravure inks and the Department's surrogate value for black gravure and flexographic ink was $7.63/kg.

Glopack also submitted a signed price list from a Malaysian exporter of gravure inks to Vietnamese producers of polyethylene bags. The price list included the sale of white, red, and blue gravure inks ranging from $2.00/kg to $2.25/kg. Glopack calculated that the average Hindustan price reported for red ink was $2.47/kg, for blue ink $2.88/kg and for white ink $2.10/kg. In comparison, the average unit value for color inks for the basket category Indian tariff provision was $ 10.22 higher than the highest priced color ink offered by the Malaysian producer. Consequently, Glopack maintains that the Malaysian price list corroborates the color-specific average sales prices reported by Hindustan and confirms aberration of the basket category import statistics and does not reflect commercial prices of flexographic and gravure printing inks. Such data also shows that Commerce used distorted data that includes all other types, qualities, and concentrations of printing inks in addition to flexographic and gravure printing inks.

Glopack argues that Commerce erroneously cited to the U.N. data to support the reliability of the basket category import statistics because Commerce's analysis focused on the U.N. data for India derived from official Indian statistics and was "comparable [to the official Indian import statistics] . . . with regard to both black and color ink." *Issues and Decision Mem.*, at 48. While engaging in this circular reasoning, Commerce completely ignored the reason why the respondent submitted the data – to highlight the great disparity between the average unit Indian values and the weighted-average global unit average import price of black and color flexographic inks.

In this case, the color-specific average Indian prices for flexographic and gravure printing inks reported by Hindustan constituted the most specific surrogate value information for flexographic and gravure printing inks because the data provided surrogate values on a color-specific basis and included the types of ink used in production of the subject merchandise. *Issues and Decision Mem.*, Comment 9, at 46. Glopack argues that the administrative record indicated that a significant price differential existed between different colored inks. In fact, the record shows color inks more expensive than black ink, and certain color inks are signifi-

cantly more expensive than others. Average ink prices ranged from 94.35 rupees per kg for black ink to 205.12 rupees per kg for purple ink. Likewise, a significant price differential among color inks was evident in the two U.S. ink price lists and the Malaysian price list the respondents submitted.

In the final determination, Commerce concluded that while "Hindustan's pricing data is more specific to black and color inks, the data is less preferable in terms of the other factors we considered because the data is not contemporaneous, the pricing data is based on an experience by a single Indian producer of ink, and, therefore, not completely representative of the cost of this input, and the pricing data has little or no supporting documentation." *Issues and Decision Mem.*, at 46–47. The import data Commerce used is more contemporaneous than the Hindustan data. The POI in this case spans from October 1, 2002 to March 31, 2003. The Hindustan data covers the six-month period immediately after the POI, April 1, 2003 to September 30, 2003. *Id*. In response, Plaintiffs maintain that the specificity of the Hindustan data takes precedence over other factors, such as contemporaneity. In addition, Glopack argues that the Hindustan data is reasonably contemporaneous and covers the six-month period immediately after the POI.

Plaintiffs make one appealing argument. They claim that indexing the reported prices to the period of review – an adjustment routinely made in surrogate value calculations – can remedy any concerns about the contemporaneity of the data. Glopack argues that even so, to calculate certain surrogate value factors, Commerce applied inflation adjustments by using the Indian wholesale price index ("WPI") data reported in the International Financial Statistics published by the International Monetary Fund. *Glopack Br.* at 24. In addition, the Hindustan data post-dates the period of review, and therefore, any WPI adjustment necessary to account for inflation would reduce, not increase, the prices Hindustan reported. *Glopack Br.* at 24. The unadjusted Hindustan data possibly overstates the relevant ink prices. Glopack argues that when weighing the contemporaneity factor against the specificity of import statistics, the balance should tip toward the specificity factor because Commerce's ability to index the data can mend the modest shortcomings in the Hindustan data's contemporaneity. The Department therefore should have chosen the Hindustan data as superior in product-specificity. Based on this reasoning, Glopack claims that the Department's choice of data is not supported by substantial evidence on the record.

Glopack also argues that Commerce incorrectly characterized the color-specific Hindustan data as a series of prices quotes. Commerce explained that it considered the Hindustan data deficient because it did not reflect "numerous transactions between many buyers and sellers because the experience of a single producer is less representative of the cost of an input in a surrogate country." *Issues and Deci-*

sion Mem., at 46. Glopack points out that the Hindustan data concerned average unit prices of sales based on actual sales transactions of flexographic and gravure printing inks for the printing on plastic bags in India from April 2003 to September 2004.

The record shows that the Hindustan data was derived from actual sales transactions widely applicable throughout India. According to a Hindustan official, Hindustan sold those products throughout India, and its sales accounted for approximately 30% of the Indian market. The Hindustan data was derived as follows: the company reviewed all sales of flexographic and gravure printing inks made to home market customers who purchased ink for the purpose of printing on polyethylene bags during the April 2003 - September 2003 period; then on a color-by-color basis, the company aggregated the total sales quantity of each ink color (in kilograms) and the total sales value of each ink color (in rupees); then the total sales value of each color ink was divided by the total sales quantity of that color ink. The total average sales price formed a weighted average rupee per kilogram rate derived from the total sales value of all color inks (including black) divided by the sales quantity of all color inks (including black).

Glopack also notes that nothing in the record addresses the size of the Indian market for printing inks. There was no basis for Commerce to conclude that the small quantity of ink imports constituted a reliable domestic price for printing inks in India. Plaintiffs request that the court take judicial notice of new information relating to the size of the Indian market for printing inks, obtained from the website of the All India Printing Ink Manufacturers Association, Ltd., reporting that the annual domestic Indian market for flexographic and gravure printing inks is approximately 32,100 metric tons. Based on this new information, Glopack argues that even if all imports in the basket category Commerce used were flexographic and gravure printing inks, these imports constitute only 3.64 % of the Indian market for gravure and printing inks. Meanwhile, Glopack states that Hindustan's sales accounted for 30% of the Indian market. Consequently, the Department's determination that the basket category import statistics better represented the Indian prices than the color-specific average unit prices derived from actual sales transactions of flexographic and gravure printing inks in India, as reported by the largest Indian printing inks seller, is not supported by substantial evidence in the administrative record.

In addition, Glopack argues that the import statistics used by Commerce are unreliable because they are inconsistent over time. Specifically, "when viewed over time, the basket category import statistics, being of relatively small volume and covering numerous types of printing inks of varying concentrations and quality, are highly volatile and are not representative of domestic Indian ink pricing." *Glopack Br.*, at 29.

In support, Glopack presents new information, not considered on the administrative level, of quarterly import statistics for basket tariff provisions for each quarter from January 1999 to June 2004 obtained from the official Indian import statistics and reported by Global Trade Atlas. Having calculated quarterly average unit values for each provision, Glopack argues that its analysis exposes the unrepresentative nature of the basket category import statistics of the Indian pricing for gravure and flexographic printing inks and demonstrates that the import statistics for any particular period are unrepresentative of import pricing over time. As a general matter, Glopack maintains that due to the volatility of import statistics over time, they are too inaccurate to provide a reliable basis for the calculation of surrogate values in this case.

Finally, Glopack points out that the petitioners on the administrative level declined to furnish the prices that they paid for the flexographic and gravure printing inks that they used in printing on the polyethylene bags in their U.S. or foreign facilities. The absence of such readily available information further confirms that the average unit values of the basket category import statistics greatly overstated the actual commercial prices of flexographic and gravure printing inks used to produce the subject merchandise.

2. Government's Arguments

Commerce explained in its final determination that it chose the Indian import statistics because they were more "reliable," as they were "based on the sum of all imports into India during the POI". *Factor Valuation Mem.*, at 3. Commerce found the Hindustan data unreliable because it was "not completely representative of the cost of this input" and "the experience of a single producer is less representative of the cost of an input in a surrogate country." *Issues and Decision Mem.*, at 46–47.

Commerce argues that while more product-specific, the Hindustan data was not contemporaneous with the PIO and represented the experience of only a single Indian producer, and had little or no supporting documentation. *Issues and Decision Mem.*, at 46–47. Therefore, Commerce's determination that the Indian import statistics presented the best available information for use as a surrogate value for black and color ink is based on substantial evidence, consistent with the anti-dumping statute and Commerce's practice, and is in accordance with law.

In cases involving nonmarket economies such as the PRC, Commerce looks to surrogate value sources from market economy countries at the same level of economic development for the value of the factors of production. *See* 19 U.S.C. § 1677b(c)(1). Commerce needed to find surrogate sources for the values of black and color ink. Commerce solicited comments from all interested parties on possible sources for surrogate values. In response to Commerce's solicitation,

Glopack contended that Commerce should use data that it provided from a single Indian producer, Hindustan.

Commerce considered the submissions by Glopack and other respondents and found that they did not support use of the Hindustan data over the Indian import statistics. *Issues and Decision Mem.*, at 39–40, 46–49. Commerce found that while Indian prices were higher than the worldwide average, the statutory mandate required it to determine surrogate values based on data from a country at the same level of economic development as the PRC, despite an inconsistency with worldwide average import prices. *Issues and Decision Mem.*, at 48. Commerce found it could not use the other data Glopack submitted because the data came from individual producers, was derived from importing countries not economically comparable to the PRC, and was not publicly available. *Issues and Decision Mem.*, at 47. Commerce concluded that the United States import statistics confirmed that the Indian import statistics were not distorted for combining several colors within a single import category because the United States import prices for ink specific categories did not substantially differ from the import prices for basket categories that included several ink types. *Issues and Decision Mem.*, at 47–48. Commerce criticized the Malaysian data for not being contemporaneous with the POI and for not following Commerce's preference for publicly available data since it was based on a single producer's experience.

3. Analysis

The court decides whether Commerce's choice of the surrogate value was supported by substantial evidence and is in accordance with law. "In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible." *Shakeproof*, 268 F.3d at 1382. The statute requires that the Department's "valuation of the factors of production shall be based on the best available information regarding the values of such factors." 19 U.S.C. § 1677b(c)(1). "While § 1677b(c) provides guidelines to assist Commerce in this process, this section also accords Commerce wide discretion in the valuation of factors of production in the application of those guidelines." *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999); *see also Anshan Iron & Steel Co. v. United States*, 2003 WL 22018898, at *3 (CIT, July 16, 2003); *Timken Co. v. United States*, 25 CIT 939, 166 F. Supp. 2d 608, 616 (2001).

When assessing which particular surrogate represents the "best available information" for the factors of production reported to Commerce, the Department relies on surrogate values which are: 1) non-export average values, 2) most contemporaneous with the period of investigation, 3) product-specific, and 4) tax exclusive. *Issues and*

Decision Mem., at 46. Commerce uses product-specific surrogate values, seeking surrogates most comparable in terms of design or materials to the actual input consumed by the Chinese respondents in production of the subject merchandise. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value*: *Bicycles from China*, 61 Fed. Reg. 19026, 19030 (Dep't of Commerce, Apr. 30, 1996); *Certain Helical Spring Lock Washers from China; Final Results of Antidumping Admin. Review*, 61 Fed. Reg. 41994, 41996–7 (Dep't of Commerce, Aug. 13, 1996) (it is Commerce's practice to seek surrogate prices that most closely reflect the specific grade and physical characteristics of the input used).

Plaintiffs cite to certain cases, involving activated carbon as a raw material input, where Commerce rejected the use of average unit values obtained from Indian import statistics as the appropriate surrogate because Indian import statistics broadly covered all grades and types of activated carbon. Commerce instead relied on an alternative surrogate value which more closely corresponded to the activated carbon incorporated into the subject merchandise. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances*: *Certain Television Receivers from China*, 69 Fed. Reg. 20594 (Dep't of Commerce, Apr. 16, 2004); *Notice of Final Determination of Sales at Less Than Fair Value*: *Polyvinyl Alcohol from China*, 68 Fed. Reg. 47538 (Dep't of Commerce, Aug. 11, 2003).

This Court has affirmed the Department's selection of a surrogate value more specific than the average price in the Indian index numbers. *See Kerr-McGee Chem. Corp. v. United States*, 985 F. Supp. 1166, 1176 (1997) (affirming Commerce's decision to use a surrogate value of the type of manganese with the ore content " 'more comparable to the ore used by the Chinese producers than the [surrogate price for] ore with the higher manganese content' " (internal citation omitted)). In previous cases, Commerce recognized that import statistics based on a basket tariff category are inappropriate if a more representative alternate surrogate is available. *See, e.g., Notice of Preliminary Determination of Sales at Less Than Fair Value*: *Tetrahydrofurfuryl Alcohol from China*, 69 Fed. Reg. 3887, 3892 (Dep't of Commerce, Jan. 27, 2004); *Freshwater Crawfish Tailmeat from China*; *Final Results of New Shipper Review*, 64 Fed. Reg. 27961, 27962 (Dep't of Commerce, May 24, 1999) ("[I]mport data from basket categories can be too broad to be reliable."). This Court has ruled that Commerce can rely on Indian import statistics as the basis for a surrogate value only "after concluding that they [the import statistics] are based on commercially and statistically significant quantities." *Shanghai Foreign Trade Enter. Co. v. United States*, 28 CIT ___ , 318 F. Supp. 2d 1339, 1352–53 (2004) (rejecting Commerce's reliance on Indian import statistics for pig iron as surrogate

value because import volume constituted only 1,132 metric tons of product, a quantity determined to be too small to reliably represent India market value).

In this case, Commerce chose to use the Indian import statistics in accordance with its preference to use "countrywide data" when available. *Issues and Decision Mem.*, Comment 2. Commerce considered the experience of one company, Hindustan, less representative of the cost of an input in an entire surrogate country. *Issues and Decision Mem.*, at 46. The record shows that while the Hindustan data is more product-specific as it provides values for those input products valued in this case, it represents only 30% of the Indian sales of those products. Glopack moved to submit new information in support of its argument that the Indian import statistics account for even a smaller percentage of the sales of the relevant inks. However, the new information presented by Glopack relating to the size of the Indian printing inks market from the All India Printing Ink Manufacturers Association, Ltd.'s website was not supplied during the administrative review, and the court will not consider this evidence. *See Atcor, Inc. v. United States*, 11 CIT 148, 154, 658 F. Supp. 295, 300 (1987) ("In reviewing agency action, the Court must base its decision upon the administrative record. New evidence may not be received."); *see also PPG Indus., Inc. v. United States*, 5 CIT 282, 284 (1983) ("Thus, any data or memoranda not presented to, obtained by, considered or relied upon by [the agency] . . . [is] not part of the record.").

Commerce also found that the Hindustan data was not supported by sufficient documentation. *Issues and Decision Mem.*, at 46–47. While Glopack presented several factors that detract from Commerce's finding that the Indian import statistics were more accurate, those factors pertain only to the data's product specificity. This court cannot substitute its own evidentiary evaluation for Commerce's. Finally, Glopack has not shown that based on prior cases that Commerce acted contrary to the law when using the Indian imports statistics.

6. Use of Surrogate Values for Sea Lake's and Glopack's Purchases of Inputs from a Hong Kong Trading Company.

Sea Lake provided Commerce detailed listings of its market economy purchases of raw material inputs used to produce the subject merchandise. The listings included purchases of raw material inputs from Hong Kong suppliers, including color concentrate, color ink, and cardboard inserts, bought with Hong Kong or U.S. dollars. In the preliminary determination, Commerce valued Sea Lake's factors of production for these inputs using Sea Lake's reported Hong Kong prices.

During its verification of Sea Lake's responses, Commerce found that a substantial volume of Sea Lake's total market economy purchases of ink and color concentrate from Hong Kong suppliers was of Chinese origin. In the final determination, Commerce reversed its position and valued Sea Lake's factors of production for inks, colorants, and cardboard inserts using surrogate values. *Issues and Decision Mem.*, Comment 4. Commerce determined that its regulation requiring the valuation of reported factors of production with the market economy purchase prices of those inputs did not apply to inputs produced in China.

Plaintiffs argue that the administrative record shows that Sea Lake purchased the Chinese-origin inputs in Hong Kong and had them shipped from Hong Kong to their factory in Shenzhen. Glopack argues that Sea Lake's market economy purchases were not intra-China transfers transacted in Hong Kong dollars, but were transactions that left the NME stream of commerce, and were physically moved from China to Hong Kong and then re-exported back to China. Sea Lake owns a "processing" factory in Shenzhen, Sea Lake Shenzhen, which has a permit to import materials for processing and re-export. *Issues and Decision Mem.*, at 4–5. Sea Lake Shenzhen

> is just a factory and is allowed to process imported materials only. The raw materials are purchased by the [sic] Sea Lake Hong Kong and the processed goods are sent to Sea Lake Hong Kong. The factory does not have any sales revenue and makes only processing fees to cover the labor wages and rent and utility expenses.

Sea Lake Dec. 22, 2003 Supp. Response, at SA–3.

Sea Lake provided Commerce with the information that its purchase of domestic Chinese raw material inputs for use in its production was limited. By operation of law, the factory is required to import most of its raw material inputs, in this case from Hong Kong, and then export the finished products back to Sea Lake in Hong Kong. Sea Lake Hong Kong, and not its Chinese factory, was responsible for the purchase of raw materials, including inks and color concentrate. *Sea Lake Verification Report*, at 4, Pub. Doc. # 447.

In the pending appeal, Glopack argues that Commerce's determination is contrary to law because the agency's own regulation and longstanding administrative practice require the Department to use actual import prices to value reported factors of production if the inputs were purchased in a market economy country with market economy currency, without regard to the country of origin of the imported merchandise.

Commerce's regulation provides "where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier." 19 C.F.R. § 351.408(c)(1). The preamble to the

regulation provides that "where the NME producer purchases inputs from a market economy producer and these inputs are paid for in a market economy currency, we would use the price paid by the NME producer to value that input." *Antidumping Duties; Countervailing Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,366 (Dep't Commerce, May 19, 1997).

In its final decision, Commerce cited the preamble of 19 C.F.R. § 351.408(c)(1) and interpreted it as applying the regulation "to those inputs which were produced in a market economy country." *Issues and Decision Mem.*, at 26. Commerce concluded that, given the language in the preamble, the regulation did not require the use of the actual prices paid for inputs that were produced in a nonmarket economy. *Issues and Decision Mem.*, at 25–26 ("[P]rices of products that originate in a NME country should not be used because of the inherent distortions involved in an economy that is not controlled by market forces.").

" '[A]n agency's interpretation of its own regulation[s] is entitled to deference' when the language of the regulation is ambiguous or the regulation is silent about the issue at hand." *Timken Co.*, 25 CIT at 943 n.2, 166 F. Supp. 2d at 615 n.2 (citing *Christensen v. Harris County*, 529 U.S. 576, 588 (2000)). In this case, the regulation's plain language provides that where the input is "purchased" in a market economy country with market economy currency from a market economy "supplier," the purchase price is used to value the reported factor of production. *See* 19 C.F.R. § 351.408(c)(1). The term "supplier," however, is open to interpretation because it arguably could either mean "vendor" or "producer." *See Def. Br.* at 29.

In past cases, Commerce has interpreted 19 C.F.R. § 351.408(c)(1) as not disqualifying transactions based on the goods' country of origin. *See Issues and Decision Mem. for the Antidumping Duty Investigation of Certain Color Television Receivers from the People's Republic of China*, Comment 8, at 39 (Dep't Commerce, Apr. 16, 2004) ("We agree with the respondents that we should not reject prices of goods purchased in Hong Kong based on the country of origin of the goods."); *Issues and Decision Mem. for the Antidumping Duty Administrative and New Shipper Reviews on Certain Preserved Mushrooms from China*, 88 ITADOC 31204, Comment 7 (Dep't of Commerce, June 11, 2001) (stating that 19 C.F.R. § 351.408(c)(1) "does not require that the nonmarket economy respondent establish in which particular country the factor of production was produced, only that it was obtained from a market economy supplier."). As a rule of thumb, agencies are required to interpret and apply regulations consistently from case to case. *See Fort Stewart Sch. v. Fed. Labor Relations Auth.*, 495 U.S. 641, 654 (1990); *Torrington Co. v. United States*, 82 F.3d 1039, 1049 (Fed. Cir. 1996); *China Steel Corp. v. United States* 27 CIT ____ , 264 F. Supp. 2d 1339, 1354 (2003). Commerce may reach different determinations in separate administra-

tive reviews, but it must either employ the same methodology or give reasons for changing its practice. *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997) (involving challenge to Commerce's method of calculation for cost of production and constructed value); *Hussey Cooper, Ltd. v. United States*, 17 CIT 993, 997, 834 F. Supp. 413, 418 (1993) (citations omitted) ("It is 'a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure. . . . .' ").When Commerce departs from its prior decision, it must provide a reasoned explanation for its departure in order for the court to judge the consistency of the administrative action. *Hussey Cooper, Ltd.*, 17 CIT at 998, 834 F. Supp. at 419; *see RHP Bearings Ltd. v. United States*, 24 CIT 1218, 120 F. Supp. 2d 1116, 1124 (2000), *aff'd in part and vacated in part*, 288 F. 3d 1334, 1337 (Fed. Cir. 2002) (vacating the CIT decision sustaining Commerce's calculation of profit component of constructed value and remanding case for further proceedings).

> In this case, Commerce explained why it reinterpreted its regulation:
>
> Unlike in [*Color Television Receivers*], in this case we have been presented with arguments as to why we should not use market-economy prices for inputs produced in a NME country. Based on our review of those comments, we have determined that prices of products that originate in a NME country should not be used because of the inherent distortions involved in an economy that is not controlled by market forces.
>
> . . . .
>
> [W]e have strong concerns that, were we to use the prices of inputs that were produced in a NME country, our methodology for valuing the factors of production would become easily open to manipulation. This is particularly worrisome where, as here, the inputs may never have left the stream of the NME commerce. It would not be difficult for a firm to open a paper company in Hong Kong (or other market-economy countries) and route "sales" through this company in order to take advantage of our market-economy-input methodology. For these reasons, our practice is not to use the prices of inputs that originated in a NME country even if the input is sourced from a market-economy supplier.

Issues and Decision Mem., Comment 4, at 25–26. Commerce further distinguished this case from *Certain Color Television Receivers from China*, 69 Fed. Reg. 20594 and *Certain Preserved Mushrooms from China*, 66 Fed. Reg. 31204. In *Color Televisions Receivers*, the determination did not indicate whether the inputs purchased from the Hong Kong suppliers ever left China, and in *Certain Preserved Mushroom from China*, Commerce did not find evidence that the in-

puts were not produced in a market economy.

Glopack argues that Commerce's conclusion that the inputs never left the stream of NME commerce is not supported by the record, citing to Sea Lake's response that Sea Lake, a Hong Kong company, purchased the Chinese-origin inputs in Hong Kong and shipped them from Hong Kong to its factory in Shenzhen. *See Sea Lake Dec. 22, 2003 Supp. Response*, at SA–3. Glopack argues that Sea Lake's market economy purchases were not intra-China transfers transacted in Hong Kong dollars, but were transactions that left the NME stream of commerce and were physically moved from China to Hong Kong and re-exported back to China.

Commerce argues that it used surrogate values rather than the actual prices paid by Sea Lake and Glopack for raw material inputs manufactured in the PRC but purchased from a Hong Kong trading company to avoid using distorted prices for factors of production. Commerce found that to avoid using prices influenced by the distortions inherent in the PRC's nonmarket economy, it must disregard prices of inputs produced there, regardless of where the purchase took place. Commerce argues that this interpretation is consistent with its practice not to use prices distorted by nonmarket forces in its calculation.

Where Commerce has reason to believe or suspect that actual prices are subsidized, the court will "look at the facts of [the] record to determine whether Commerce has sufficient reasons to suspect that actual prices are distorted such that the substitution of actual prices with surrogate values is warranted." *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT ___ , 293 F. Supp. 2d 1334, 1336 (2003), *aff'd*, 104 Fed. Appx. 183 (Fed. Cir. 2004). The court finds that Commerce provided sufficient explanation of why it applied its regulation differently in this case from some prior cases. Furthermore, Commerce's decision was based on record evidence showing that Sea Lake purchased products produced in the PRC from its Hong Kong trading company, and that those goods may not have left the country on the way to Sea Lake. As a result, Commerce's valuation of this factor is supported by substantial evidence and in accordance with the law.

CONCLUSION

In conclusion, Commerce's determinations in this case are AFFIRMED with the exception of its calculation of Hang Lung's electricity usage. This issue is remanded to the Department of Commerce for further proceedings consistent with this opinion.

Slip Op. 05–166

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CRAWFISH PROCESSORS ALLIANCE; LOUISIANA DEPARTMENT OF AGRICULTURE AND FORESTRY; BOB ODOM, COMMISSIONER, Plaintiffs, v. UNITED STATES, Defendant, and HONTEX ENTERPRISES, INC., d/b/a LOUISIANA PACKING COMPANY; QINGDAO RIRONG FOODSTUFF CO., LTD. and YANCHENG HAITENG AQUATIC PRODUCTS & FOODS CO., LTD; BO ASIA, INC., GRAND NOVA INTERNATIONAL, INC., PACIFIC COAST FISHERIES CORP., FUJIAN PELAGIC FISHERY GROUP CO., QINGDAO ZHENGRI SEAFOOD CO., LTD. and YANGCHENG YAOU SEAFOOD CO., Defendant-Intervenors and Plaintiffs.

Consol. Court No. 02–00376

JUDGMENT

In *Crawfish Processors Alliance v. United States*, 29 CIT ___ , 395 F. Supp. 2d 1330 (2005), the Court remanded this matter to the United States Department of Commerce ("Commerce") with instructions to either: (1)(a) explain with specificity how the interactions between Jiangsu Hilong International Trade Co., Ltd. ("Jiangsu") and Ningbo Nanlian Frozen Foods Company, Ltd. ("Nanlian") indicate that one company has control over the other or both, especially how the invoices from Jiangsu to Hontex Enterprises, Inc., d/b/a Louisiana Packing Company created a business relationship with Nanlian during the September 1, 1999, to August 31, 2000, period of review, and (b) explain with specificity how Mr. Wei's contacts with Jiangsu and Nanlian demonstrate control of either company on behalf of the other or control over both; and (2) if Commerce is unable to provide substantial evidence supporting its collapsing decision, then it is to treat Jiangsu and Nanlian as unaffiliated entities and assign separate company specific antidumping duty margins using verified information on the record. *See Crawfish Processors Alliance*, 29 CIT at ___ , 395 F. Supp. 2d at 1337.

On December 9, 2005, Commerce filed its *Final Results of Determination Pursuant to Court Remand* ("*Final Results*"). For its *Final Results*, Commerce determined that without the presumption of affiliation between Jiangsu and Nanlian, the invoices and Mr. Wei's contacts between the two companies is insufficient to sustain its earlier determination to collapse the two companies. *See Final Results* at 5. Therefore, Commerce is treating Jiangsu and Nanlian as unaffiliated entities. *See id.* Accordingly, Nanlian's antidumping duty margin for the period September 1, 1999, to August 31, 2000, is 62.51 percent. *See id.* at 6. Commerce did not initiate a review of Jiangsu during the period of review, only reviewing Jiangsu's information as part of the collapsed Jiangsu/Nanlian entity, thus Jiangsu

does not have a separate entity margin for the period of review. *See id.*

This Court, having received and reviewed Commerce's *Final Results*, and having received no comments from the parties, holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that Commerce's *Final Results* are reasonable, supported by substantial evidence, and is otherwise in accordance with law; and it is further

ORDERED that the *Final Results* filed by Commerce on December 9, 2005, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

SLIP OP. 05–167

KOYO CORPORATION OF U.S.A., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 02–00800

[Motion to intervene as plaintiff for purposes of appeal denied.]

Dated: December 30, 2005

Sidley, Austin, Brown & Wood LLP (*Richard M. Belanger* and *Leigh Fraiser*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*James A. Curley*), for defendant.

Charles H. Bayar for plaintiff-intervenor.

MEMORANDUM OPINION AND ORDER

Restani, Chief Judge: Before the court is the motion of Shinyei Corporation of America ("Shinyei") to intervene in this action, post-judgment. In this action the court ruled for plaintiff, finding that 19 U.S.C. § 1504(d) did cause its entries to be deemed liquidated at the entered rate, as opposed to the lower rate established following final decision on antidumping duty proceedings. The purpose of the proposed intervention is to support the judgment on appeal with alternative argument, because in another action Shinyei is pursuing similar issues with respect to the finality of its own "deemed" or "no charge" liquidations. Assuming the court would find the basic standards of permissive intervention under USCIT R. 24(b) to be met,

the court is limited by any statutory restrictions on intervention. Such a statutory prohibition exists in this case.

Jurisdiction in this case lies under 28 U.S.C. § 1581(a) (2000), which reads as follows:

> **(a)** The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

Further, 28 U.S.C. § 2631(j)(1)(A) (2000) reads:

> **(j)(1)** Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, except that —
>
> > **(A)** no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930;

As stated in *House of Lloyd, Inc. v. United States*:

> Intervention in this court is governed by statute as well CIT Rule 24. Congress has provided for the intervention as of right and by leave of the court in various actions. 28 U.S.C. § 2631(j) (1982). In classification cases such as this, however, Congress has specifically stated that "no person may intervene in a civil action under section 515 or 516 of the Tariff Act of 1930 [19 U.S.C. §§ 1515, 1516 (1982)]." 28 U.S.C. § 2631(j)(1)(A)). *See Stewart-Warner Corp. v. United States*, 4 CIT 141, 142 (1982) (intervention in a 516 action is expressly forbidden by 28 U.S.C. § 2631(j)(1)(A)). *Cf. Matsushita Electric Industrial Co. v. United States*, 2 CIT 254, 255 & n.2, 529 F. Supp. 664, 666 & n.2 (1981) ("[t]he existence of a specific provision governing intervention also precludes the applicability of any other provisions or statutes").

11 CIT 278, 279–80, 659 F. Supp. 248, 249–50 (1987) (footnotes omitted).

It makes no difference that this action challenges liquidation on other than classification issues. It is still an action contesting the denial of a protest under section 515 of the Tariff Act of 1930. Thus, intervention is forbidden by statute.

Accordingly, the motion to intervene is denied.

Slip Op. 05–168

NUCOR CORPORATION, GERDAU AMERISTEEL CORPORATION, and COMMERCIAL METALS COMPANY, *Plaintiffs*, v. UNITED STATES, *Defendant*, and IÇDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., Defendant-Intervenor.

Court No. 05–00616

[Plaintiffs' application for preliminary injunction restraining liquidation of future entries of merchandise outside the period of review is denied.]

Dated: December 30, 2005

Wiley Rein & Fielding LLP (*Alan H. Price*, *John R. Shane*, and *Maureen E. Thorson*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); *Ada Loo*, Office of the Chief Counsel, U.S. Department of Commerce, Of Counsel; for Defendant.

Arnold & Porter LLP (Lawrence A. Schneider), for Defendant-Intervenor.

OPINION

RIDGWAY, Judge:

At issue in this action are the final results of the U.S. Department of Commerce's 2003–2004 administrative review of the antidumping order covering certain steel concrete reinforcing bars ("rebar") from Turkey, which resulted in the revocation of the order as to one Turkish rebar producer/exporter – Defendant-Intervenor ICDAS Celik Enerji Tersane ve Ulasim Sanayi, A.S. ("ICDAS"). *See* Certain Steel Concrete Reinforcing Bars From Turkey; Final Results, Rescission of Antidumping Duty Administrative Review in Part, and Determination To Revoke in Part, 70 Fed. Reg. 67,665 (Nov. 8, 2005) ("Final Results of Turkish Rebar Administrative Review"). Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[1]

Plaintiffs Nucor Corporation, Gerdau AmeriSteel Corporation, and Commercial Metals Company are domestic producers of rebar ("Domestic Producers"). The Domestic Producers dispute two specific aspects of the final results of the 2003–2004 administrative review. First, they challenge the Commerce Department's "unilateral decision to alter the date of sale for sales made by ICDAS" from the commercial invoice date (used by the agency in its preliminary results) to the contract date (used in the final results). *See* Motion of Plaintiffs Nucor Corporation, Gerdau AmeriSteel Corporation, and Commercial Metals Company for Preliminary Injunction Against Liquidation ("Domestic Producers Brief") at 3, 8; Complaint ¶¶ 6–8. And,

[1] All statutory references herein are to the 2000 edition of the United States Code.

second, the Domestic Producers contest the Commerce Department's refusal to treat certain of ICDAS's sales as Constructed Export Price ("CEP") sales, which "would have required Commerce to make additional, statutorily mandated adjustments to the U.S. transaction prices." *See* Domestic Producers Brief at 3–4; Complaint ¶¶ 10–12 (misnumbered as 10). According to the Domestic Producers, the Commerce Department's correction of the two alleged errors would result in the agency's reinstatement of the antidumping order as to ICDAS. *See* Domestic Producers Brief at 4.

Now pending before the Court is the Domestic Producers' Motion For Preliminary Injunction Against Liquidation, which has already been granted in part.[2] With the consent of all parties, a preliminary injunction has previously issued restraining liquidation (pending a final decision in this matter) of rebar produced and/or exported by ICDAS and entered or withdrawn from warehouse for consumption during the relevant period of review ("POR") – *i.e.*, April 1, 2003 through March 31, 2004. *See* Preliminary Injunction Order (Nov. 15, 2005). What remains at issue is the Domestic Producers' request for a prospective injunction restraining liquidation of *future* entries (*i.e.*, "post-POR entries" – entries outside the period of review).

As detailed more fully below, the Domestic Producers have failed to make the showing required to satisfy the classic "four factors" test for injunctive relief. Their application for a prospective preliminary injunction restraining liquidation of future, post-POR entries – relief which would be truly extraordinary – must therefore be denied.

I. *Background*

In 1997, the Commerce Department issued an antidumping order on rebar from Turkey. *See* Antidumping Duty Order: Certain Steel Concrete Reinforcing Bars From Turkey, 62 Fed. Reg. 18,748 (April 17, 1997). Since that time, the agency has completed a number of administrative reviews (also known as "section 751 reviews" or "annual reviews") of the order, the most recent of which is at issue in this action.[3]

Pursuant to section 751 of the Trade Agreements Act of 1979 (codified at 19 U.S.C. § 1675), the Commerce Department conducts administrative reviews of antidumping orders, upon request, in recog-

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[2] "Liquidation" is "the final computation or ascertainment [by the Bureau of Customs and Border Protection] of the duties . . . accruing on an entry." 19 C.F.R. § 159.1 (2005); *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995).

[3] The 2004–2005 administrative review is ongoing, with preliminary results now due on May 1, 2006. *See* Certain Steel Concrete Reinforcing Bars From Turkey; Notice of Extension of Time Limits for Preliminary Results in Antidumping Duty Administrative Review, 70 Fed. Reg. 70,785 (Nov. 23, 2005).

The final results of the 2002–2003 administrative review are currently being litigated in *Colakoglu Metalurji A.S. v. United States*, Court No. 04–00621 (filed Dec. 8, 2004).

nition of the fact that prices and costs change over time and that such changes may necessitate adjustments to antidumping duty rates established in antidumping orders.

The purpose of an administrative review is to determine the duty rates for the specific period of review ("POR"). The final results of the administrative review thus serve as "the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." 19 U.S.C. § 1675(a)(2)(C). The duty rates and deposit requirements established in the final results of the administrative review remain in effect until they are eclipsed by the publication of the final results of the next administrative review.[4] *See generally Dofasco Inc. v. United States*, 390 F.3d 1370, 1371–72 (Fed. Cir. 2004); *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1000–01 (Fed. Cir. 2003); *Fuyao Glass Indus. Group Co. v. United States*, 27 CIT ___ , ___ , 2003 WL 21780970 ** 2–3 (2003).

If a party seeks judicial review of the results of an administrative review, the Court of International Trade "may enjoin the liquidation of some or all entries of merchandise covered by [the administrative review]." 19 U.S.C. § 1561a(c)(2). Preliminary injunctions restraining liquidation of entries made during the period of review (*i.e.*, "POR entries") are routinely granted with the consent of all parties in cases – like this one – where the results of an administrative review are challenged in court. *See* Domestic Producers Brief at 4 ("this court routinely issues injunctions suspending liquidation in challenges to final determinations under Section 751") (citation omitted); Response of Defendant-Intervenor ICDAS to Defendant's Motion for Voluntary Remand ("ICDAS Brief") at 4–5 (referring to "the usual scenario where a preliminary injunction is almost routinely entered" suspending liquidation of POR entries "pending appeal of a Section 751 determination") (citation omitted).[5] Indeed,

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[4] As the Commerce Department's regulations explain:

> Unlike the systems of some other countries, the United States uses a "retrospective" assessment system under which final liability for antidumping . . . duties is determined after merchandise is imported. *Generally, the amount of duties to be assessed is determined in a review of the order covering a discrete period of time. If a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or,* if no review has been completed, the cash deposit rate applicable at the time merchandise was entered.

19 C.F.R. § 351.212 (2005) (emphasis added).

[5] *See also Algoma Steel Corp. v. United States*, 12 CIT 802, 806 n.6, 696 F. Supp. 656, 660 n.6 (1988) ("Injunctions are virtually automatic . . . in the context of a challenge to an annual review determination."); *SKF USA Inc. v. United States*, 28 CIT ____ , ____ , 316 F. Supp. 2d 1322, 1337 (2004) ("For nearly two decades, since *Zenith*, parties have sought, Commerce has consented to, and . . . court[s] [have] issued" preliminary injunctions in cases challenging the results of administrative reviews). *Cf. PAM, S.p.A. v. United States*, 28 CIT ____ , ____ , 347 F. Supp. 2d 1362, 1365 (2004) ("In most countervailing and antidumping duty cases, it is the general practice before this Court that motions for preliminary in-

such an injunction already has been entered in this action. *See* Preliminary Injunction Order (Nov. 15, 2005). As explained in greater detail below (*see* section II.B.1), the purpose of such an injunction is to preserve the court's jurisdiction, so that cases are not mooted by the liquidation of all POR entries during the pendency of litigation. *See Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983).

However, the Domestic Producers are not content with the scope of the existing preliminary injunction, because it enjoins the liquidation of POR entries only. The Domestic Producers emphasize that, because the 2003–2004 administrative review was the third review in which ICDAS's dumping margin was zero or *de minimis*, the antidumping order was revoked as to ICDAS as a result of the review.[6] The Domestic Producers assert that the Commerce Department's correction of the errors alleged in the Domestic Producers' Complaint would raise ICDAS's dumping margin above the *de minimis* level and, thus, result in the reinstatement of the antidumping order. The Domestic Producers therefore seek to extend the preliminary injunction, to prospectively restrain the liquidation of future, post-POR entries, pending a final decision in this litigation. *See* Domestic Producers Brief at 1–5, 9–11; Response of Plaintiffs Nucor Corporation, Gerdau AmeriSteel Corporation, and Commercial Metals Company Regarding Defendant's Motion for Voluntary Remand and to Reinstate Suspension of Liquidation ("Domestic Producers Reply Brief") at 2.

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junctions come before the court on consent of the parties.").

[6] In its Final Results at issue here, the Commerce Department summarized its policy on revocation of antidumping orders:

> The Department may revoke, in whole or in part, an antidumping duty order upon completion of . . . [an administrative review]. While Congress has not specified the procedures that the Department must follow in revoking an order, the Department has developed a procedure for revocation that is described in 19 CFR 351.222. This regulation requires, inter alia, that a company requesting revocation must submit the following: (1) A certification that the company has sold the subject merchandise at not less than normal value (NV) in the current review period and that the company will not sell subject merchandise at less than NV in the future; (2) a certification that the company sold commercial quantities of the subject merchandise to the United States in each of the three years forming the basis of the request; and (3) an agreement to immediate reinstatement of the order if the Department concludes that the company, subsequent to the revocation, sold subject merchandise at less than NV.

Final Results of Turkish Rebar Administrative Review, 70 Fed. Reg. at 67,666. As the Commerce Department explained, it concluded that revocation of the antidumping order as to ICDAS was warranted because:

> (1) the company had zero or *de minimis* margins for a period of at least three consecutive years; (2) the company has agreed to immediate reinstatement of the order if the Department finds that it has resumed making sales at less than NV; and (3) the continued application of the order is not otherwise necessary to offset dumping.

Id. *See generally FMC Corp. v. United States*, 3 F.3d 424, 426 (1993) (summarizing process of revocation of antidumping order there at issue).

In a teleconference hearing on the Domestic Producers' Motions for Temporary Restraining Order and Preliminary Injunction Against Liquidation convened on November 15, 2005, both the Government and ICDAS vigorously opposed the grant of a temporary restraining order or preliminary injunction restraining the liquidation of future, post-POR entries. The Government and ICDAS maintained that – as a threshold matter – the Court lacks jurisdiction to grant such relief, and, further, that the Domestic Producers have failed to satisfy the classic "four factors" test for injunctive relief.[7] The Domestic Producers' motion for a temporary restraining order was denied as to future, post-POR entries, and a schedule for further briefing and a tentative hearing on the application for a preliminary injunction as to those entries was established. *See* Order (Nov. 15, 2005).

A mere three days later, the Government filed a Motion for a Voluntary Remand on the "date of sale" issue – the first of the two issues raised in the Domestic Producers' Complaint. *See* Defendant's Motion for a Voluntary Remand ("Government Brief"); Complaint ¶¶ 6–8. In its motion, the Government advised that the Commerce Department now "consents to the entry of an injunction ordering the suspension of liquidation upon the entries of the subject merchandise produced and exported by ICDAS entered on or after April 1, 2004" – *i.e.*, a prospective injunction restraining liquidation of future, post-POR entries. *See* Government Brief at 3.

In light of the Government's abrupt change of position on the entry of a prospective injunction, the tentatively-scheduled hearing was canceled, and the parties were relieved of their briefing obligations under the Court's November 15, 2005 Order "except to the extent . . . appropriate, in the context of Defendant's Motion For a Voluntary Remand, to address Plaintiffs' Motions for a Temporary Restraining Order/Preliminary Injunction." *See* Order (Nov. 28, 2005).

The Domestic Producers' subsequent submission – like the Government's Brief – did not even mention the jurisdictional issue and, indeed, added relatively little to the substance of the Domestic Producers' opening brief. ICDAS's brief, on the other hand, reiterated its strong opposition to the Domestic Producers' application for prospective relief, both as a matter of jurisdiction and on the merits. *See* Domestic Producers Reply Brief; ICDAS Brief.

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[7] *See* ICDAS Brief at 2–3 (noting that, during the November 15 hearing, "both counsel for ICDAS and counsel for the U.S. Government took the position that, among other things, the Court does not have jurisdiction . . . to issue a preliminary injunction against liquidation of entries entered after the review period" at issue).

The Domestic Producers' request for a preliminary injunction restraining liquidation of future, post-POR entries is now ripe for decision.[8]

II. *Analysis*

The Domestic Producers contend that they have satisfied the classic "four factors" test for issuance of an injunction. *See* Domestic Producers Brief at 4, 9; Domestic Producers Reply Brief at 2.[9] ICDAS strenuously disputes that claim and asserts, moreover, that the Court lacks jurisdiction to grant the requested relief. *See* ICDAS Brief, *passim*. As discussed above, the Government has been straddling the fence (first opposing the Domestic Producers' motion, and now consenting to it). *See* Government Brief at 3. Much of its reasoning remains a mystery.

The parties' arguments on both jurisdiction and the merits of the Domestic Producers' application are addressed in turn below.

A. *Jurisdiction to Grant the Requested Prospective Relief*

No party disputes that the Court has jurisdiction over this action. Nor does any party dispute the Court's jurisdiction to enter a preliminary injunction prohibiting liquidation of entries made during the POR at issue. Indeed, as discussed above, such an injunction already has been entered, with the consent of all parties. *See* Preliminary Injunction Order (dated Nov. 15, 2005).

The narrow – and apparently novel – question that ICDAS raises as a threshold matter is whether the Court has jurisdiction to enjoin the liquidation of future, post-POR entries. *See generally* ICDAS Brief at 2–5. In other words, ICDAS contends that – even if the Domestic Producers were able to satisfy the "four factors" test for preliminary injunctive relief (spelled out in section II.B, below) – the Court nevertheless could not grant the prospective injunctive relief that the Domestic Producers are now seeking.

ICDAS reasons that the statute invoked by the Domestic Producers refers only to entries "covered by" the agency determination at issue. *See* 19 U.S.C. § 1516a(c)(2) (authorizing court to "enjoin the liquidation of some or all entries of merchandise *covered by* [the

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[8] The Government's Motion for a Voluntary Remand was granted on December 15, 2005, with the consent of all parties. *See* Order (Dec. 15, 2005); Government Brief at 3 (noting the Domestic Producers' consent to the motion for remand); ICDAS Brief at 1 ("ICDAS does not oppose a voluntary remand . . . for further consideration of the date of sale issue").

[9] The Domestic Producers' opening brief conflates their arguments for an injunction as to liquidation of POR entries with their arguments for an injunction as to liquidation of future, post-POR entries. As discussed below, however, the merits of their request for an injunction as to POR entries are quite different from the merits of the pending application. It is therefore necessary to parse the Domestic Producers' papers, to identify those statements which relate to the matter at hand.

agency] determination" at issue in court proceeding). And, according to ICDAS, future entries made outside the POR plainly are not "covered by" the Commerce Department determination contested in this action. *See* ICDAS Brief at 4 (emphasizing that "[c]onspicuously absent from the movants' pleadings is any explanation of how ICDAS' future entries are 'covered' by Commerce's most recent administrative review determination. . . . [E]ntries made on or after April 1, 2004 are not 'covered,' and an injunction ordering suspension of liquidation cannot be issued under Section 1516a(c)(2).").

ICDAS first advanced its jurisdictional argument in the course of the November 15, 2005 hearing on the Domestic Producers' motions for a temporary restraining order/preliminary injunction. At that time, the Government expressly endorsed – and joined in – ICDAS's jurisdictional challenge. *See* ICDAS Brief at 2–3 (noting that, during the November 15 hearing, "both counsel for ICDAS and counsel for the U.S. Government took the position that, among other things, the Court does not have jurisdiction . . . to issue a preliminary injunction against liquidation of entries entered after the review period" at issue in this action).

Just three days later, however, the Government did an about-face. In the context of seeking a voluntary remand on the so-called "date of sale" issue, the Government advised that the Commerce Department now "consents to the entry of an injunction ordering the suspension of liquidation upon the entries of the subject merchandise produced and exported by ICDAS entered on or after April 1, 2004" – *i.e.*, a *prospective* injunction restraining liquidation of future, post-POR entries. *See* Government Brief at 3. As grounds for its new position on the entry of such an injunction, the Government stated simply that "a change in the date of sale determination would likely result in the reinstatement of the antidumping duty order." *Id*. The Government failed to explain how that fact affects the relevant jurisdiction of the Court. The Government's reasoning on the jurisdictional issue is thus entirely unclear. Indeed, although the Government's newly-granted consent to a prospective injunction implicitly suggests that it now believes that there is no jurisdictional bar to the Court's entry of such an injunction, there is room for at least some doubt as to that matter as well.

The Domestic Producers have been no more forthcoming on the issue of jurisdiction. Their opening brief did not anticipate ICDAS's jurisdictional argument. *See* Domestic Producers Brief. Surprisingly, their reply brief – filed almost a month after the November 15 hearing – is equally silent. *See* Domestic Producers Reply Brief.[10]

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[10] The Domestic Producers' failure to address the jurisdictional issue is particularly difficult to understand, since they bear the burden of establishing both jurisdiction generally and their entitlement to the relief that they seek. *See, e.g., Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997) ("Once jurisdiction is challenged, the plaintiff bears the

ICDAS is thus the only party to have addressed the jurisdictional issue in writing. And even ICDAS's papers raise more questions than they answer. It is noteworthy, for example, that none of the cases cited by ICDAS speaks in terms of jurisdiction. *See, e.g., Torrington Co. v. United States*, 20 CIT 1293 (1996) (denying preliminary injunction restraining liquidation of future entries, based on applicant's failure to establish irreparable harm and likelihood of success on the merits); *FMC Corp. v. United States*, 16 CIT 378, 792 F. Supp. 1285 (1992) (same), *aff'd on alternative grounds*, 3 F.3d 424 (Fed. Cir. 1993). Moreover, as ICDAS itself candidly acknowledges, the issue that it raises might arguably be deemed a matter of the extent of the Court's equitable powers, rather than a question of its jurisdiction. *See* ICDAS Brief at 8–9.[11]

In any event, as detailed below, the Domestic Producers have failed to establish that they are otherwise entitled to the prospective preliminary injunction that they seek. There is, therefore, no need to reach ICDAS's jurisdictional argument at this time.

B. *The Merits of the Domestic Producers' Application*

As explained in section I above, preliminary injunctions restraining the liquidation of POR entries are sought and granted almost reflexively in cases (like this one) challenging the outcome of administrative reviews. Preliminary injunctions are nevertheless "extraordinary relief." *FMC Corp.*, 3 F.3d at 427 (citations omitted). To obtain such relief, a movant bears the burden of establishing its right thereto in light of the classic "four factors" test. *Id.* Thus, as the Court of Appeals explained in *Zenith*, a movant must show:

> (1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits; (3) that the public interest would be better served by the relief requested; and (4)

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burden of proving that the court's jurisdiction is invoked properly.") (citation omitted); *FMC Corp.*, 3 F.3d at 427 ("[t]o obtain the extraordinary relief of an injunction prior to trial, the movant carries the burden to establish a right thereto").

[11] To the extent that the phrase "covered by" might be argued to be ambiguous, full briefing on the jurisdictional issue presumably would discuss any legislative history that may be relevant. Similarly, if the issue is indeed jurisdictional (as ICDAS claims), briefing presumably would address the implications, if any, of sovereign immunity for the interpretation of the phrase. *See, e.g., Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature."); *Lane v. Pena*, 518 U.S. 187, 192 (1996) (waiver of sovereign immunity "must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign") (citations omitted). *See also American Spring Wire Corp. v. United States*, 7 CIT 2, 5 n.2, 578 F. Supp. 1405, 1407 n.2 (1984) (stating that "injunctions issued in the section 751 review context are of the All Writs Act type, designed to preserve the reviewing court's jurisdiction, rather than of the rule 65 variety") (citations omitted); *Zenith*, 710 F.2d at 809 (discussing All Writs Act).

> that the balance of hardship on all the parties favors the [movant].

Zenith, 710 F.2d at 809 (citations omitted).[12]

1. *Irreparable Harm*

The threat of immediate, irreparable harm is the *sine qua non* of preliminary injunctive relief. *See Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506–07 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies") (footnote omitted). In the instant case, the Domestic Producers have proffered no affidavits or other specific, particularized evidence to establish that they will suffer irreparable harm absent an injunction prohibiting liquidation of future, post-POR entries. Instead, they rely solely on *Zenith*.[13] *See* Domestic Producers Brief at 5–7 (*citing Zenith*, 710 F.2d 806); Domestic Producers Reply Brief at 2. That reliance is misplaced.

Zenith establishes the existence of irreparable harm only as to entries *during* the POR; and the POR entries at issue in this action are already the subject of a preliminary injunction. Contrary to the Domestic Producers' implication, courts have consistently refused to

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[12] The law on the relative importance of the four factors is somewhat unsettled. In *FMC Corp.*, for example, the Court of Appeals wrote:

> *No one factor, taken individually, is necessarily dispositive.* If a preliminary injunction is granted by the trial court, the weakness of the showing regarding one factor may be overborne by the strength of the others. If the injunction is denied, *the absence of an adequate showing with regard to any one factor may be sufficient*, given the weight or lack of it assigned the other factors, to *justify the denial*.

FMC Corp., 3 F.3d at 427 (emphases added) (citations omitted). Elsewhere, the Court of Appeals has emphasized that, "irrespective of relative or public harms, a movant must establish both a likelihood of success on the merits *and* irreparable harm." *Reebok Int'l Ltd. v. J. Baker, Inc.*, 32 F.3d 1552, 1556 (Fed. Cir. 1994). A trial court therefore "may deny a preliminary injunction based on the movant's failure to establish either of these two crucial factors without making additional findings respecting the other factors." *Id.*

As discussed below, the Domestic Producers here have failed to prove irreparable harm. Accordingly, at least under *Reebok*, there is no need to reach the remaining three factors. The analysis nevertheless proceeds to conclusion, since "it is always preferable . . . [to] make findings regading each of the four factors which weigh in the balance concerning whether to deny a preliminary injunction." *Reebok*, 32 F.3d at 1555.

[13] *See FMC Corp.*, 3 F.3d at 430 (applicant for preliminary injunction "failed to proffer any evidence to establish irreparable harm or the extent thereof, choosing instead to rely exclusively on *Zenith*."); *American Spring Wire Corp.*, 7 CIT at 4, 578 F. Supp. at 1406 (applicants for preliminary injunction "submitted no affidavits and . . . offered no testimony to substantiate their claim of irreparable injury. . . . Instead they rel[ied] exclusively upon . . . *Zenith* . . . "). *See also Zenith*, 710 F.2d at 809 (noting that "evidence of specific competitive injury to Zenith would establish a more compelling showing of irreparable injury warranting injunctive relief"). *Compare, e.g., Timken Co. v. United States*, 11 CIT 504, 666 F. Supp. 1558 (1987) (preliminary injunction denied based on failure to establish irreparable harm, notwithstanding applicant's submission of detailed affidavits, field reports, and live testimony on subject of harm).

read *Zenith* to extend to the sort of additional *prospective* injunctive relief that the Domestic Producers here seek.

As the Court of Appeals recognized in *Zenith*, the threat of irreparable harm in administrative review cases stems from the fact that the consequence of the liquidation of the merchandise entered during the POR would be to effectively moot the case, entirely depriving a plaintiff of judicial review:

> Once liquidation occurs, a subsequent decision by the trial court on the merits of Zenith's challenge can have no effect on the dumping duties assessed on entries . . . during the '79–'80 review period. Any change in deposit amounts that might be required [as a result of the trial court's decision] . . . could not affect the amount of dumping duty actually assessed on the '79–'80 entries or any subsequent entries.

Zenith, 710 F.2d at 810.

The Court of Appeals in *Zenith* emphasized that – absent an injunction prohibiting the liquidation of POR entries – the trial court "would be powerless to grant the only effective remedy in response to Zenith's request for review: assessment of correct dumping duties on entries occurring during the '79–'80 review period, " and that "[j]udicial review of the challenged [agency] determination [would] therefore provide no tangible benefit for Zenith, making that [judicial] review unavailing." *Id.* (emphasis added). *See also Altx, Inc. v. United States*, 26 CIT 735, 211 F. Supp. 2d 1378 (2002).

A party challenging the outcome of an administrative review thus must obtain an injunction suspending liquidation of the POR entries in order to preserve its "right to have the administrative determination reviewed, *with respect to that specific period*." *FMC Corp.*, 3 F.3d at 431 (emphasis added). Otherwise, the liquidation of the POR entries during the pendency of litigation would eliminate the Court of International Trade's power to review the Commerce Department's determination. *See generally Zenith*, 710 F.2d at 810 (explaining that statutory scheme precludes CIT from reliquidating entries); *Coal. for the Preserv. of Am. Brake Drum and Rotor Aftermkt. Mfrs. v. United States*, 29 CIT ___, ___ , 2005 WL 1459830 at ** 1–2 (2005) (dismissing case for lack of jurisdiction where plaintiff failed to seek injunction suspending liquidation).

In short, *Zenith* stands for the proposition that a party's deprivation of a judicial remedy constitutes "irreparable harm" for purposes of a four factors analysis, in the context of the potential liquidation of POR entries during the pendency of a case challenging the results of an administrative review. *Zenith* does not speak to a prospective injunction of liquidation of future entries outside the POR, such as that sought by the Domestic Producers in this case. *See generally Torrington*, 20 CIT at 1295 ("*Zenith* provides support for a contention of irreparable injury regarding POR entries only").

Here, the liquidation of post-POR entries will not moot the Domestic Producers' challenge to the results of the 2003–2004 administrative review, and thus will not deprive the Domestic Producers of a judicial remedy. There is thus no truth to their claim that "because Commerce has deemed ICDAS eligible to have the antidumping duty order against the company revoked, any opportunity to ensure that subsequent entries of merchandise are assessed antidumping duties would be forever lost" in the absence of a prospective injunction. *See* Domestic Producers Brief at 5. Although it is true that some post-POR entries may be liquidated during the pendency of this action, the courts nevertheless will be able to grant effective relief as to both POR entries *and* future entries, should the Domestic Producers ultimately prevail on the merits.[14] *See generally Sandoz Chems. Corp. v. United States*, 17 CIT 1061, 1063 (1993) ("liquidation does not substantially curtail available judicial remedies" when entries at issue are not limited to discrete time period); *Timken Co.*, 11 CIT at 507, 666 F. Supp. at 1560 ("Even though some entries will be liquidated without additional duties, appropriate relief may be fashioned prospectively" if plaintiff ultimately prevails on the merits).

Based on the rationale outlined above, courts in other cases like this one have uniformly declined to enjoin the liquidation of future, post-POR entries. *See, e.g., FMC Corp.*, 16 CIT at 381, 792 F. Supp. at 1287 (where case involves not only a challenge to the results of an administrative review, but also the resulting revocation of an antidumping order, the antidumping order is reinstated as to future entries of merchandise if plaintiff ultimately prevails on the merits; thus, "[p]laintiff's remedy will not disappear if entries are liquidated during the course of [the judicial] proceeding"), *aff'd on other grounds*, 3 F.3d 424 (Fed. Cir. 1993); *Torrington*, 20 CIT at 1295 (same).

As ICDAS observes, *Torrington* is squarely on point. *See* ICDAS Brief at 5. There, as here, the Commerce Department found *de minimis* margins for the foreign exporter's entries during the POR at issue. *Torrington*, 20 CIT at 1294. And there, as here, the POR at issue was the third consecutive review period in which the foreign exporter was found not to have made sales at less than fair value. Therefore, there – as here – the Commerce Department also revoked the antidumping duty order as to the exporter in question. *See* Antifriction Bearings (Other Than Tapered Roller Bearings) and

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[14] The Court thus will be able to grant *a* remedy, even if it is not *the* remedy that the Domestic Producers would prefer. *Cf. American Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1551 & n.4 (Fed. Cir. 1983) (explaining, "That importers here could fashion a more desirable remedy does not make the remedy fashioned by Congress constitutionally inadequate," and that while "[i]t is true that injunctive and declaratory relief is a more desirable remedy in plaintiffs' view, . . . 'the mere fact that more desirable remedies are unavailable does not mean that existing remedies are inadequate.' ") (*quoting J.C. Penney Co. v. U.S. Treasury Department*, 439 F.2d 63, 68 (2d Cir. 1971)).

Parts Thereof from Thailand; Final Results of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order, 61 Fed. Reg. 33,711, 33,714 (June 28, 1996); Final Results of Turkish Rebar Administrative Review, 70 Fed. Reg. at 67,666.

In *Torrington*, the Court of International Trade initially granted the plaintiff domestic producer's motion for a preliminary injunction, which covered not only entries during the POR, but also future entries as well. But the court later reversed itself, and vacated the injunction as to post-POR entries. *Torrington*, 20 CIT at 1294–95.

Indeed, the courts have denied requests to enjoin the liquidation of future entries in a growing line of cases, in a wide range of contexts. *See, e.g., Neenah Foundry Co. v. United States*, 24 CIT 33, 39–40, 86 F. Supp. 2d 1308, 1313–15 (2000) (appeal of Commerce Department sunset review determination); *Sandoz Chems. Corp.*, 17 CIT at 1063 (appeal of ITC final negative injury determination); *Timken*, 11 CIT at 506–07, 666 F. Supp. at 1559–60 (appeal of Commerce Department decision to exclude exporter from scope of dumping determination).[15]

In *American Spring Wire*, for example, the plaintiffs sought to enjoin liquidation of all entries of the subject merchandise pending their appeal of final negative injury determinations by the International Trade Commission ("ITC"). *American Spring Wire Corp.*, 7 CIT at 3, 578 F. Supp. at 1405–06. The court rejected the plaintiffs' application, reasoning that their right to a judicial remedy was not in jeopardy – even though some entries might well be liquidated in the meantime:

> [The ITC's determination] will, as a practical matter, extend *in futuro*, unless upset by an intervening judicial decision. And should this court ultimately reverse the Commission's negative injury determinations, antidumping and countervailing duties can still be assessed at that time on all unliquidated as well as future entries pursuant to an affirmative injury determination. Thus, unlike the [administrative review] context [where liquidation of POR entries must be suspended to preserve a judicial

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[15] *See also Dupont Teijin Films USA, LP v. United States*, 27 CIT ____ , ____ , 2003 WL 22881546 *2 (2003) (appeal of Commerce Department less than fair value determination); *Fuyao Glass Indus. Group Co. v. United States*, 27 CIT ____ , ____ , 2003 WL 22058668 * 3 (2003) (appeal of antidumping duty order); *Shandong Huarong Gen. Group Corp. v. United States*, 24 CIT 1279, 1285, 122 F. Supp. 2d 1367, 1372 (2000) (appeal of Commerce Department administrative review determination); *Budd Co. Wheel & Brake Div. v. United States*, 12 CIT 1020, 1023, 700 F. Supp. 35, 37 (1988) (appeal of Commerce Department antidumping duty determination); *Bomont Indus. v. United States*, 10 CIT 431, 436, 638 F. Supp. 1334, 1339 (1986) (appeal of Commerce Department decision to exclude foreign producers from antidumping determination). *Cf. NMB Singapore Ltd. v. United States*, 14 CIT 1239, 120 F. Supp. 2d 1135 (2000); *Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 121 F. Supp. 2d 684 (2000).

> remedy], plaintiffs will unquestionably have meaningful judicial review regardless of whether an injunction now issues.

American Spring Wire, 7 CIT at 5, 578 F. Supp. at 1407 (footnote omitted).

The Domestic Producers here have failed even to address – much less distinguish – *Torrington* and the numerous other cases that ICDAS and the Government relied on in the course of the November 15, 2005 hearing, and which are cited in ICDAS's brief. Nor does it appear that they can they do so. Simply stated, liquidation itself does not constitute legally cognizable "irreparable harm," except when it operates to effectively deprive a party of its judicial remedy. The instant case is not such a case.

In sum, the Domestic Producers have failed to demonstrate that – absent an injunction restraining liquidation of future, post-POR entries – they will suffer *any* legally cognizable irreparable harm.[16] Certainly they have not shown that any such harm is "immediate," as the law requires to justify the extraordinary relief they seek. *See Zenith*, 710 F.2d at 809 (to prevail on application for preliminary injunction, litigant must show, *inter alia*, "that it will be *immediately* and irreparably injured") (emphasis added).

The failure to prove the existence of at least *some* irreparable harm virtually dooms the Domestic Producers' application for a preliminary injunction restraining liquidation of future, post-POR entries. In other words, the complete absence of irreparable harm would essentially defeat the Domestic Producers' motion even if they made a strong case on other factors of "four factors" test. *See S.J. Stile Associates Ltd. v. Snyder*, 646 F.2d 522, 525 (CCPA 1981) ("The trial court must be upheld if it . . . properly concluded that *any one* of [the four] requisites for a preliminary injunction had not been established" by the movant) (emphasis added); *Zenith*, 710 F.2d at 809 ("To prevail on its motion for a preliminary injunction, Zenith *must show* [the four factors].") (emphasis added) (citations omitted). *Cf.*

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[16] As noted above, the Domestic Producers have relied exclusively on *Zenith*, and have failed to proffer any evidence of irreparable harm beyond the potential for liquidation. Such evidence is required, however, where – as here – liquidation alone does not constitute legally cognizable irreparable harm. *See, e.g., Trent Tube Div., Crucible Materials Corp. v. United States*, 14 CIT 587, 588, 744 F. Supp. 1177, 1179 (1990) (denying injunction where movants failed to adduce sufficient evidence of harm other than potential for liquidation); *Altx*, 26 CIT at 737–38, 211 F. Supp. 2d at 1381–82 ("[T]o support a finding of irreparable harm, Altx must present additional evidence establishing irreparable injury" other than mere prospect of liquidation); *Timken*, 11 CIT at 507, 666 F. Supp. at 1560 (where plaintiff challenged agency decision to exclude foreign exporter from scope of an antidumping finding, potential for liquidation was held to be insufficient to establish irreparable harm; "[s]ome further affirmative showing on plaintiff's part as to irreparable injury is required."). *See also* ICDAS Brief at 8 n.1 (*citing FMC Corp.*, 3 F.3d at 431, and asserting that Domestic Producers here would find it "exceedingly difficult" to show irreparable harm, since "the Department of Commerce has consistently found that the dumping margins for ICDAS' sales to the United States since 1999 have been zero or *de minimis*.").

n.12, *supra*. In any event, as discussed below, the Domestic Producers' showing on the remaining three factors is similarly underwhelming.

2. *The Likelihood of Success on The Merits*

The Domestic Producers' argument on the second of the four factors proceeds from the premise that they have "firmly established" irreparable harm. *See* Domestic Producers Brief at 7. Based on that premise, the Domestic Producers assert that – to prevail on the second factor, the likelihood of success on the merits – they need only "raise[ ] questions which are serious, substantial difficult, and doubtful." *Id*. (*citing Timken Co. v. United States*, 6 CIT 76, 80, 569 F. Supp. 65, 70 (1983)).

The premise of the Domestic Producers' argument is flawed. As set forth above, the Domestic Producers have made *no* showing of legally cognizable irreparable harm. Moreover, even if they had in fact "firmly established" such harm, it is not clear that the standard they cite for "likelihood of success on the merits" would be the proper one. *See U.S. Association of Importers of Textiles and Apparel v. U.S. Dep't of Commerce*, 413 F.3d 1344, 1347 (Fed. Cir. 2005) (withholding judgment on application of "serious, substantial, difficult, and doubtful question" standard).

In any event, as discussed below, the Domestic Producers have failed to demonstrate even a "fair chance of success on the merits" – "the less demanding . . . standard for proving the likelihood of success prong." *Id*.

In arguing that they are likely to succeed on the merits of their case, the Domestic Producers put all their eggs in one basket, focusing solely on their "date of sale" claim, and making no representations as to the merits of their second claim (*i.e.*, their claim that certain of ICDAS's sales should have been treated as CEP sales). *See* Domestic Producers Brief at 7–8; Domestic Producers Reply Brief at 1–2.

Even as to their "date of sale" claim, the Domestic Producers emphasize the procedural errors in the Commerce Department's handling of the issue. *See, e.g.*, Domestic Producers Brief at 7–8; Domestic Producers Reply Brief at 1–2.[17] Procedural safeguards are important, to be sure. Indeed, this matter is already on remand to

[17] The Domestic Producers assert, for example, that "Commerce, *sua sponte*, reversed its own findings concerning the proper date of sale as it pertains to ICDAS. Commerce initially determined that the correct date of sale is the date of ICDAS' commercial invoice; the information was confirmed at verification. Subsequently, neither ICDAS nor Petitioners raised this issue in their pleadings or in their briefs. Despite all this, Commerce, without any factual support or record evidence, reversed its findings and altered its determination with respect to date of sale. Further, Commerce cited to non-existent evidence to support its finding." Domestic Producers Brief at 8.

the agency, so that the procedural defects that the Domestic Producers have identified may be cured. *See* Order (Nov. 28, 2005). However, the fact that the Commerce Department committed procedural errors in reaching its final "date of sale" determination does not *ipso facto* mean that its determination is substantively wrong, and thus does not necessarily indicate that the Domestic Producers are ultimately likely to prevail on the substantive merits of their claim that the correct date of sale is the date of ICDAS's commercial invoice.

In their reply brief, the Domestic Producers go beyond cataloguing the procedural problems with the Commerce Department's "date of sale" determination, and affirmatively state that "the date of sale, and therefore, the Department's treatment of material contract terms will likely change on remand." *See* Domestic Producers Reply Brief at 2. Yet the Domestic Producers cite no evidence and offer no rationale to substantiate that bald assertion. Whatever the basis for their confidence as to the results of the remand proceeding, the Domestic Producers have failed to put it on the record for purposes of their pending motion.[18]

The Government has stated that "a change in the date of sale determination would likely result in the reinstatement of the antidumping duty order" as to ICDAS. *See* Government Brief at 3. But that statement is, at most, a prediction of the probable consequences *if* the "date of sale" were to be changed. The statement says nothing about the likelihood of such a change, and thus does not speak to the likelihood that the Domestic Producers will ultimately succeed on the merits of their "date of sale" claim.

One of the two alternative draft proposed orders proffered by the Government in seeking a voluntary remand on the "date of sale" issue did include language to the effect that "defendant's request for a remand will likely result in a change in the date of sale determination." *See* Government Brief at second attachment. It is unclear, however, whether that language in the draft order accurately reflects the Government's position, since the language is at least somewhat at odds with the position articulated in the Government's brief itself (and since briefs are typically written and reviewed more carefully than the draft proposed orders that accompany them). In any event, like the Domestic Producers' statement concerning the "likely" results of the remand, the language in the draft proposed order is bald speculation. Like the Domestic Producers' papers, the Government's papers too are devoid of evidence, argument, or rationale to

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[18] Even if the Commerce Department were to change the date of sale on remand (as the Domestic Producers predict), it would remain to be seen whether that change would be sustained in this action. *See Trent Tube*, 14 CIT at 589, 744 F. Supp. at 1179 (although applicants for preliminary injunction "contended that they had a significant likelihood of success on the merits since the remand determination resulted in their favor," court noted that it "ha[d] not affirmed the remand result and believe[d] plaintiffs' assumption of the Court's affirmation to be premature").

support a finding that, on remand, the Commerce Department "will likely . . . change . . . the date of sale determination."

Only ICDAS articulates the rationale underlying its position on the probable outcome of the remand on the "date of sale" issue. And, not surprisingly, ICDAS's position contrasts sharply with that of the Domestic Producers. According to ICDAS, "if Commerce reviews all facts relevant to the date of sale determination, . . . Commerce should reaffirm its conclusion that the more appropriate date of sale for U.S. sales by ICDAS is the date of contract, that ICDAS' dumping margin is *de minimis*, and that Commerce's revocation of the Order as to ICDAS was correct." *See generally* ICDAS Brief at 1–2.

ICDAS points out that the "date of sale" issue is now the subject of three cases before the Court of International Trade involving the antidumping order on rebar from Turkey.[19] ICDAS notes that in one of the other two cases – *Colakoglu* – the Government previously sought, and the court granted, a voluntary remand on the "date of sale" issue. ICDAS Brief at 2 (*citing Colakoglu Metalurji A.S. v. United States*, 29 CIT ___ , ___ , 394 F. Supp. 2d 1379, 1381 (2005)).

In *Colakoglu*, for the 2002–2003 review, the Commerce Department had used the earlier of invoice or shipment date as the date of sale for Colakoglu's U.S. sales. After reconsidering the issue on remand, the agency reversed its position. Thus, with the final results in that remand due to be filed with the court in January, the Commerce Department is currently considering comments on its November 18, 2005 "Draft Results of Redetermination Pursuant to Court Remand," in which the agency indicates that the date of sale for U.S. sales by Colakoglu should be the "order" (or contract) date. *See* ICDAS Brief at 2. As ICDAS emphasizes, that is the same date of sale that the Commerce Department used for ICDAS's sales in the 2003–2004 review, which is at issue here. And, according to ICDAS, "a full review of all relevant facts will confirm on remand" that "that is the date that better reflects the date on which the material terms of sale were established for U.S. sales by ICDAS." *See* ICDAS Brief at 2.[20]

Apart from their bald, unsupported prediction as to the results of the remand on the "date of sale" issue, the Domestic Producers have pointed to nothing to substantiate their assertion that they are ulti-

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[19] The other two cases are *Colakoglu*, Court No. 04–00621, which involves the 2002–2003 administrative review of the order, and *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, Court No. 05–00613 (filed Nov. 10, 2005), which – like this case – concerns the 2003–2004 review. *See* ICDAS Brief at 2.

[20] The timeline of events at the administrative level suggests that it is at least possible that the Commerce Department's *sua sponte* reversal of its position on the "date of sale" issue between the preliminary results and the final results in this case may have been influenced by the agency's analyses and deliberations in the course of the *Colakoglu* remand, which apparently was also pending before the agency at the time.

mately likely to prevail on their claims. The Domestic Producers have thus failed to demonstrate even a "fair chance of success on the merits."

Even if it is not *per se* fatal (*see* note 12 above), "[t]he failure to prove a likelihood of success on the merits presents a formidable obstacle to the granting of an injunction, particularly where the injury factor is weak." *FMC Corp.*, 3 F.3d at 431; *see also id.* at 427 ("Absent a showing that a movant is likely to succeed on the merits, we question whether the movant can ever be entitled to a preliminary injunction unless some extraordinary injury or strong public interest is also shown.").

In the instant case, the irreparable harm is not merely "weak" – it is non-existent. And, as discussed below, the public interest does not compensate.

3. *The Public Interest and the Balance of Hardships*

The Domestic Producers contend that the public interest and the balance of hardships also militate in favor of the requested injunction. *See generally* Domestic Producers Brief at 7–9; Domestic Producers Reply Brief at 2. But their recitations on both counts are largely *pro forma*. [21]

The Domestic Producers assert broadly that "[t]he public interest is best served by effective enforcement of the trade laws, by ensuring that accurate amounts of antidumping duties are assessed on entries covered by antidumping duty orders, and by ensuring that entities, to the extent that they continue to sell merchandise at less than fair value, remain subject to antidumping duty orders." Domestic Producers Brief at 8 (*citing Smith-Corona Group v. United States*, 1 CIT 89, 98, 507 F. Supp. 1015, 1023 (1980), *aff'd*, 713 F.2d 1568 (Fed. Cir. 1983) ("the public interest is best served by preventing entries subject to antidumping duties from escaping the correct amount of such duties")).

The Domestic Producers' argument on public interest is a virtual truism – entirely unobjectionable, and the international trade law equivalent of invoking flag, motherhood, and apple pie.[22] However, the argument is, on its face, predicated on the assumption that ICDAS is "continu[ing] to sell merchandise at less than fair value"

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[21] The other parties are relatively mum on the last two of the four factors. Indeed, the Government says nothing at all in its brief; and ICDAS addresses the balance of hardships in a footnote. *See* ICDAS Brief at 8 n.l.

[22] Similar language – invoking basically the same principles and values – is recited in virtually every application for a preliminary injunction in cases such as this. *See, e.g., NSK Ltd. v. United States*, 28 CIT ____ , ____ , 350 F. Supp. 2d 1128, 1133 (2004); *PAM*, 28 CIT at ____ , 347 F. Supp. 2d at 1366; *Elkem Metals Co. v. United States*, 25 CIT 186, 196, 135 F. Supp. 2d 1324, 1335 (2001); *Neenah Foundry*, 24 CIT at 43, 86 F. Supp. 2d at 1317; *Trent Tube*, 14 CIT at 589, 744 F. Supp. at 1179.

and therefore should "remain subject to [the] antidumping duty order[ ]" – a proposition that is both vigorously disputed by ICDAS and contrary to the Commerce Department's final determination in this matter. Even more importantly, the Domestic Producers have failed to explain how the public interest in this case can be distinguished from the public interest in the many other similar cases where prospective injunctions were found to be unwarranted.[23]

The Domestic Producers' case on the fourth factor – relative hardships — is no stronger. The Domestic Producers contend that any hardship to other parties resulting from a delay in liquidation would be "outweighed by the irreparable harm" that the Domestic Producers assertedly will suffer if the injunction that they seek does not issue. *See* Domestic Producers Brief at 7. But the sole claim of hardship that they assert is that their "right to obtain meaningful judicial review as to the duties on POR entries is at stake." *Id*. And their rights vis-a-vis POR entries are protected by the preliminary injunction already in place. The Domestic Producers' papers identify no other legally cognizable harm with which they are threatened. *See* section II.B.1, *supra*.

Just as the Domestic Producers overstate the hardship that they face in the absence of the requested injunction, they also understate the hardship that such an injunction would impose on other parties. Specifically, the Domestic Producers assert that enjoining future liquidation would "at most 'inconvenience[ ]' " the Government and interested private parties, and that "[i]f any refunds of duties are ultimately owed to private parties, they will receive the amounts with interest, thereby compensating for any delay." Domestic Producers Brief at 7 (*quoting Timken*, 6 CIT at 81, 569 F. Supp. at 70).

As ICDAS notes, however, there are other potential hardships that the Domestic Producers' calculus does not take into account. For example, in analyzing relative hardships, the Court of International Trade in the past has weighed the fact that suspending liquidation would "cause uncertainty" for producers, exporters, importers and others in the marketplace. *See* ICDAS Brief at 8 n.1 (*citing Timken*, 11 CIT at 509, 666 F. Supp. at 1561). *See also, e.g.*, *Elkem Metals*, 25 CIT at 196–97, 135 F. Supp. 2d at 1335–36 (noting "the potential consumer harm associated with the suspension of liquidation," and weighing "price uncertainty" that would be caused by stay of liquidation) (*citing Algoma Steel Corp.*, 12 CIT at 806, 696 F. Supp. at 660 (discussing congressional "concern regarding the 'commercial uncertainty related to the suspension of liquidation,' as expressed in legislative history of Trade Agreements Act of 1979)); *Trent Tube*, 14 CIT at 589, 744 F. Supp. at 1180 (weighing "uncertainty to the importers

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[23] *See also Elkem Metals*, 25 CIT at 196, 135 F. Supp. 2d at 1335 (noting that "it is impossible to determine whether the relief requested would effect [the undisputed] public policy" interest in effectuating the purpose of the international trade laws).

and independent businesses as to the ultimate price of the goods" that would result from stay of suspension of liquidation) (*quoting Timken*, 11 CIT at 509, 666 F. Supp. at 1561).

In short, just as the Domestic Producers have failed to demonstrate that they will suffer any legally cognizable irreparable harm absent the requested injunction or that they have even a "fair chance" of success on the merits of their case, so too they have not established either that the prospective injunction they seek would serve the public interest or that the balance of hardships tips in their favor.

III. *Conclusion*

As set forth above, the Domestic Producers here have failed to make the requisite showing to satisfy the "four factors" test for the truly extraordinary relief that they seek. The Domestic Producers have identified no other similar case in which the liquidation of future entries has been enjoined. And they have failed to distinguish this case from the many others in which such relief has been denied. Accordingly, the Domestic Producers' application for a prospective preliminary injunction restraining liquidation of future, post-POR entries must be, and hereby is, denied.

So ordered.

Slip Op. 06–1

ESSEX MANUFACTURING, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge
Court No. 02–00101

OPINION

[Defendant's motion for summary judgment granted; Plaintiff's cross-motion for summary judgment denied; case dismissed]

Dated: January 3, 2006

Neville Peterson, LLP (*John M. Peterson* and *Maria E. Celis*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office (*Jack S. Rockafellow*); *Chi S. Choy*, Office of Assistant Chief Counsel for United States Bureau of Customs and Border Protection, of counsel, for defendant.

Eaton, Judge: This matter is before the court on cross-motions for summary judgment pursuant to USCIT Rule 56. Plaintiff Essex Manufacturing, Inc. ("Essex" or "plaintiff"), challenges the classifica-

tion of its imitation leather jackets by the United States Customs Service ("Customs")[1] under the Harmonized Tariff Schedule of the United States (2000) ("HTSUS").[2] Customs classified the jackets under HTSUS subheading 3926.20.90 as "Other articles of plastics and articles of other materials of headings 3901 to 3914: . . . . Articles of apparel or clothing accessories (including gloves, mittens and mitts): . . . Other: . . . " subject to a 5% *ad valorem* tariff rate.[3] Essex argues that its jackets are properly classifiable under HTSUS subheading 3926.20.60 as "Plastic rainwear, including jackets, coats, ponchos, parkas and slickers, featuring an outer shell of polyvinyl chloride plastic with or without attached hoods, valued not over $10 per unit," and, thus, not subject to any tariff. By its cross-motion, defendant United States (the "Government" or "defendant"), on behalf of Customs, maintains that Customs properly classified the subject merchandise under HTSUS subheading 3926.20.90, and asks the court to deny Essex's motion and dismiss this case. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000). For the reasons set forth below, the court denies plaintiff's motion for summary judgment, grants the Government's cross-motion for summary judgment, and dismisses this case.

BACKGROUND

Plaintiff is an importer of the subject merchandise, which it identifies as polyvinyl chloride ("PVC") or "pleather" jackets. *See* Pl.'s Mem. of Points and Auth. in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem.") at 1. In June, July, and August of 1999, plaintiff imported these jackets at ports of entry in Atlanta, Georgia and Los Angeles, California. *See* Summons of 1/17/01. Customs subsequently liqui-

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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* Reorganization Plan Modification for the Dep't of Homeland Security, H.R. Doc. 108–32 at 4 (2003).

[2] With respect to the subsections at issue in this action, the terms of the Harmonized Tariff Schedule of the United States in 1999 are identical to those of 2000.

[3] It is undisputed that Customs properly found in Headquarters Ruling Letter 963800 of April 17, 2001, that in order to classify the jackets under plaintiff's proposed subheading, HTSUS 3926.20.60, plaintiff had to establish that:

1. The article in issue is plastic;

2. The article is "rainwear," which includes jackets, coats, ponchos, parkas and slickers;

3. The article features an outer shell of polyvinyl chloride plastic;

4. The article may, but need not feature an attached hood; and

5. The article is not valued over ten ($10) dollars per unit.

See also Pl.'s Mem. of Points and Auth. in Supp. of Pl.'s Mot. for Summ. J. at 7. It is also undisputed that defendant concedes that plaintiff's jackets meet each of these criteria except so much of number 2 as requires that the jackets be "rainwear." *See* Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J., and in Supp. of a Trial or Def.'s Cross-Mot. for Summ. J. ("Def.'s Mem.") at 7.

dated plaintiff's five Atlanta entries in November 1999, and the single Los Angeles entry in June 2000, classifying the merchandise under HTSUS subheading 3926.20.90. *Id*. Thereafter, plaintiff timely filed protests challenging Customs' classification.[4] Customs, finding that plaintiff's jackets were not "rainwear," denied the protests and plaintiff timely commenced the present action. *Id*. Both parties then moved for summary judgment pursuant to USCIT Rule 56. After briefing was complete, the court ordered each party to submit a letter brief addressing the issue of whether there was a "common or commercial" meaning of the term "rainwear." *See* Pl.'s Letter of 6/24/05; Def.'s Letter of 6/24/05. Further, on August 4, 2005, an evidentiary hearing was held. At the hearing, in addition to presenting testimony as to the "common or commercial" meaning of the term "rainwear," the parties, through their expert witnesses and various exhibits, also presented evidence as to the construction, design, and marketing of plaintiff's jackets and other garments. All of the testimony presented by the expert witnesses was subject to cross-examination by opposing counsel as well as questioning by the court.

STANDARD OF REVIEW

This court may resolve a classification issue by means of summary judgment. *See Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . ." USCIT R. 56(c). Summary judgment of a classification issue "is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb*, 148 F.3d at 1365; *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997). Where jurisdiction is predicated on 28 U.S.C. § 1581(a), Customs' interpretation of an HTSUS tariff term, a question of law, is subject to *de novo* review. *See* 28 U.S.C. § 2640(a)(1); *see also E.T. Horn Co. v. United States*, 27 CIT ___, ___, slip op. 03–20 at 4 (Feb. 27, 2003) (not published in the Federal Supplement) (quoting *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1466–67 (Fed. Cir. 1998)).

DISCUSSION

The court employs a two-step process when analyzing a classification issue: "[F]irst, construe the relevant classification headings; and second, determine under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb*, 148 F.3d at 1365 (citing *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 491 (Fed.

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[4] Plaintiff filed its protest concerning the Atlanta entries on December 22, 1999, and the Los Angeles entry on June 12, 2001. *See* Summons of 1/17/01.

Cir. 1997)). Here, the court finds, and the parties agree, that the subject merchandise should be classified within HTSUS chapter 39, which provides for classification of "plastics and articles thereof." Furthermore, there is no disagreement that the subject merchandise should be classified within heading 3926, which provides for "Other articles of plastics and articles of other materials of headings 3901 to 3914." The parties differ, however, as to the appropriate classification subheading. Plaintiff argues that the subject merchandise should be classified under subheading 3926.20.60 as "Plastic *rainwear*, including jackets . . . featuring an outer shell of polyvinyl chloride plastic . . . valued not over $10 per unit." *See* Pl.'s Mem. of Points and Auth. in Opp'n to Def.'s Mot. for Summ. J. ("Pl.'s Opp'n") at 1–2 (emphasis added). Defendant, on the other hand, claims that, because it is not rainwear, the subject merchandise is properly classified under subheading 3926.20's "basket" provision, i.e., "Other articles of plastics . . . Articles of apparel . . . , Other . . . " under subheading 3926.20.90. *See* Def.'s Mem. in Opp'n to Pl.'s Mot. for Summ. J., and in Supp. of a Trial or Def.'s Cross-Mot. for Summ. J. ("Def.'s Mem.") at 7. Where goods are capable of being classified under two or more headings, the General Rules of Interpretation[5] ("GRI") direct that the "most specific description shall be preferred to headings providing a more general description." GRI 3(a). Under the GRIs, then, if this court finds that the jackets constitute "rainwear," plaintiff's more specific proposed subheading would trump defendant's general provision. Therefore, because "[t]he meaning of [a] tariff[] term is a question of law," the classification of plaintiff's jackets is, in accordance with the two-step process, initially dependent upon this court's construction of the word "rainwear." *See E.M. Chem. v. United States*, 20 CIT 382, 386, 923 F. Supp. 202, 206 (1996) (citing *E.M. Chem. v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990)).

I. HTSUS 3926.20.60 is a Principal Use Provision

For plaintiff to prevail in its proposed classification, its jackets must be shown to be rainwear. Both parties contend that "rainwear," as contained in subheading 3926.20.60, is a use provision. *See* Pl.'s Opp'n at 16–17; Def.'s Mem. at 1. As such, the term is properly read in the subheading as "plastic apparel used as rainwear." *See United States v. Hillier's Son Co.*, 14 Ct. Cust. App. 216, 222 (1929) ("Obviously, the test of use must be applied to a preparation in order to determine whether it is to be classified as a medicinal preparation, al-

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[5] Classification of goods under the HTSUS is governed by the General Rules of Interpretation ("GRI"). *See Carl Zeiss v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999) (citing *Baxter Healthcare Corp. of P.R. v. United States*, 182 F.3d 1333, 1337 (Fed. Cir. 1999)). If the proper classification cannot be determined by reference to GRI 1, it is then necessary to refer to the succeeding GRIs in numerical order. *See N. Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001) (citation omitted).

though the word 'use' does not appear in paragraph 5."); *see also Stewart-Warner Corp. v. United States*, 748 F.2d 663, 667 (Fed. Cir. 1984) (stating that "[d]og food is a tariff item which, like smokers' articles, household utensils, tableware, and other classifications too numerous to detail, is a use classification. It means food that is used to feed dogs."). Moreover, in completing the first step of the two-step process, the court is required to reach a conclusion as to the principal use of the subject merchandise. Under the Additional U.S. Rules of Interpretation ("AUSRI"),

> 1. In the absence of special language or context whichotherwise requires–
>
> (a) a tariff classification controlled by use(other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and *the controlling use is the principal use*. . . .

AUSRI 1(a) (emphasis added). Principal use is "the use 'which exceeds any other *single* use.' " *Lenox Collections v. United States*, 20 CIT 194, 196 (1996) (not reported in the Federal Supplement) (emphasis in original). Thus, the court must decide if plaintiff's jackets belong to the class or kind of goods principally used as rainwear.

A. Proper Meaning of Rainwear under the HTSUS

"Where a tariff term is not defined in either the HTSUS or its legislative history, the term is given its common meaning, which is presumed to be the same as its commercial meaning." *Intercontinental Marble Corp. v. United States*, 381 F.3d 1169, 1173 (Fed. Cir. 2004) (citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001); *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999)). "To ascertain the common meaning of a term, a court may consult dictionaries, scientific authorities, and other reliable information sources and lexicographic and other materials." *Id*. (internal quotation marks omitted).

Here, both parties cite various reference sources in support of their positions. Plaintiff presents the following definitions of the term "rainwear": "Clothing and accessories that are waterproofed or water-repellant," *Fairchild's Dictionary of Fashion* 301 (2d ed. 1998); and "waterproof or water-resistant clothing," *Merriam-Webster Online Dictionary.*[6] Likewise, defendant presents the following definitions of the term "rainwear": "garments suited for wearing in rain," XIII *The Oxford English Dictionary* 133 (quot. 1953) (2d ed. 1989); and "waterproof or water-resistant clothing (as a raincoat) for bad weather wear," *Webster's Third New International Dictionary of*

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[6] *See* wwww.m-w.com/dictionary/rainwear.

the English Language, 1877 (1993). In like manner, at the evidentiary hearing held in this matter, the parties' experts testified as to the definition of rainwear.[7] Plaintiff's witness defined the term as "an article of clothing that is worn to protect you against the elements — of warmth[8] and keeping you dry and . . . water-resistant." Tr. of Civ. Cause For Evid. Hearing ("Tr.") at 19:12-14. Defendant's witness defined the term as having the "primary function of protecting the wearer from the rain." Tr. at 95:4–5. In other words, the parties are in substantial agreement that "rainwear" means a garment that keeps the wearer dry in the rain. The question then arises as to whether all garments that are waterproof or water-resistant and, therefore, provide some protection from the rain, are rainwear in their principal use.

B. Principal Use of the Subject Merchandise

As previously noted, the principal use of an article is that "use . . . which exceeds all others." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1394 (Fed. Cir. 1994); *see also Lenox Collections*, 20 CIT at 196; *Automatic Plastic Molding, Inc. v. United States*, 26 CIT 1201, 1205 (2002) (not published in the Federal Supplement); *Int'l Custom Prods., Inc. v. United States*, 29 CIT ___ , ___ , 374 F. Supp. 2d 1311, 1332 (2005). This court customarily employs the several factors first referenced in *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976) ("*Carborundum* Factors"), to decide whether an article is included in a particular class or kind of merchandise. Specifically,

> Factors which have been considered by courts to be pertinent in determining whether imported merchandise falls within a particular class or kind include [1] the general characteristics of the merchandise, [2] the expectation of the ultimate purchasers, [3] the channels, class or kind of trade in which the merchandise moves, [4] the environment of the sale, [5] the use, if any, in the same manner as merchandise which defines the class, [6] the economic practicality of so using the import, and [7] the recognition in the trade of this use.

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[7] On June 13, 2005, prior to the evidentiary hearing, this court ordered the parties to submit letter briefs addressing, among other things, whether the term "rainwear" had a common or commercial meaning within the trade. *See* Order of 6/13/05. Neither party claimed that "rainwear" had any special meaning within the garment trade. *See* Pl.'s Letter of 6/24/05 at 2 (arguing that "the common meaning of rainwear does not include any of the limitations posited by Customs. . . ."); *see also* Def.'s Letter of 6/24/05 at 1 (contending that, despite not having a special meaning, the common meaning of the term should be limited).

[8] It is worth noting that, at various times, plaintiff seeks to introduce the notion that rainwear is worn not only to ward off the rain, but also to keep the wearer warm. *See, e.g.*, Pl.'s Opp'n at 17 ("purchasers use [the] merchandise to stay dry and *warm* in inclement weather.") (emphasis added).

Carborundum, 536 F.2d at 377 (internal citations omitted); *see also Bousa, Inc. v. United States*, 25 CIT 386, 389 (2001) (not reported in the Federal Supplement); *Simon Mktg., Inc. v. United States*, 29 CIT ___ , ___ , 395 F. Supp. 2d 1280, 1289 (2005).

1. General Characteristics of the Merchandise

Plaintiff argues that its jackets have the characteristics of a garment that would keep the wearer warm and dry in inclement weather. To that end, plaintiff describes the merchandise as

> below-waist-length "stadium" rainwear jackets, which feature the logos and colors of National Football League (NFL), National Basketball Association (NBA), Collegiate Licensing and Major League Baseball (MLB) teams. The outer shell of each jacket is constructed of a thick layer of polyvinyl chloride (PVC) plastic bonded to a tricot knit "scrim" fabric, which is composed 65% by weight of polyester and 35% of cotton. The jacket features a full front heavy zipper with long sleeves and elasticized cuffs. The collar is folded down and the bottom of the jacket features an elasticized waist. . . . The jackets are designed to be worn out of doors, in rainy or inclement weather. For example, they might be worn to football games or other sporting events (hence the name "stadium" jackets).

Pl.'s Opp'n at 2–3. For plaintiff, these physical characteristics place its jackets in the rainwear class or kind of garment. "[T]he subject merchandise is used in the same manner which defines the rainwear class. Like rubber slickers, the subject pleather jackets are intended to be used in the rain or snow to prevent rain from reaching the wearer." Pl.'s Opp'n at 17–18.

Customs disputes plaintiff's assessment of the subject merchandise's physical characteristics. Specifically, Customs argues that

> common experience has taught us that many outerwear garments which are primarily used or intended to be used for warmth and/or fashion may also have some water-repellant qualities. But those qualities alone do not qualify an article of clothing as belonging to the class or kind of merchandise known as rainwear. Rather, the principal purpose of rainwear is to keep the wearer dry in the rain. The primary function of [plaintiff's] PVC jacket is as [a] substitute leather . . . varsity jacket, rather than functioning primarily as rainwear.

Def.'s Mem. at 1 (emphasis omitted). Customs bases this assertion on its observation that the jackets at issue "do not have any underarm vents, back vents, or chest vents . . . are 'waist' length. . . . The outside pockets . . . do not have flaps, buttons, zippers or velcro

fasteners . . . [and] there is no fabric flap covering the zipper. . . ."[9] Def.'s Mem. at 2–3. Customs maintains that although the jackets may be waterproof or water-resistant, the absence of these features prevents the merchandise from effectively keeping the wearer dry in the manner that would allow their principal use to be as rainwear. That is, without these features, the jackets cannot have as their "use that exceeds all others" the protection of the wearer from the rain.

Based on the undisputed facts and the court's own examination of plaintiff's jackets, it is apparent that they lack the characteristics of garments whose principal use is as rainwear. First, the jackets fail to protect the lower half of the body from getting wet in the rain.[10] Indeed, the jackets are designed with an elasticized waistband over which the jacket blouses, which, as this court observed when a jacket was worn in open court, tends to make the jacket ride up to the waist. As a result, the wearer's buttocks and legs would be subject to the soaking effects of rain. *See* Tr. at 103:22–24. Further, the scrim tricot fiber material that lines the jackets is intended to provide warmth, *see* Tr. at 28:11–13; Tr. at 109:19, an unnecessary feature of a garment principally designed to keep the wearer dry in the rain irrespective of the outside temperature. Rather, this feature is typical of a jacket whose purpose is to provide warmth whether it is raining or not. *See* Def.'s Resp. to Pl.'s Facts at 2; Tr. at 108:10–13. Here, the subject merchandise is constructed of non-breathable PVC material with no means of ventilation. *See* Tr. at 49:17–19. The absence of any ventilation, such as grommets or breathable fabric,[11] along with the scrim tricot lining, will cause the wearer to perspire if the jacket is worn in the rain for any length of time. *See* Tr. at 108:15–16, 20–21 (explaining, through testimony of defendant's expert, that some type of ventilation is needed for "comfort and wearability"); *see also id.* at 55:1–9, 10–13 (admitting, through the testimony of plaintiff's expert, that vents might help to carry away perspiration). Thus, the general characteristics of the jackets indicate that they are not of the class or kind of merchandise whose principal use is as rainwear.

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[9] Plaintiff agrees that the subject merchandise lacks the above mentioned features; however, plaintiff disagrees that the presence or absence of those features is determinative of whether the subject merchandise can be properly classified as rainwear. *See generally* Pl.'s Opp'n at 14–18.

[10] As the Federal Circuit has noted, "the merchandise itself is often a potent witness in classification cases." *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1578 (Fed. Cir. 1989).

[11] The experts for both parties testified that the PVC material that constitutes the subject merchandise is not breathable, while at the same time acknowledged that breathable fabrics, such as Gortex or Microfiber, are often used to construct garments that are intended to be worn in the rain. *See* Tr. at 48–49, 107:15–17.

2. Expectations of the Ultimate Consumer

The second of the *Carborundum* Factors, the expectations of the ultimate consumer, does little to support plaintiff's position. According to defendant, it is difficult to see how a consumer can expect plaintiff's jackets to be used as rainwear when the "primary function . . . is as a substitute leather ("pleather") varsity jacket. . . ." Def.'s Mem. at 1. Indeed, plaintiff's own expert repeatedly referred to the subject merchandise as a "stadium jacket," not as rainwear. *See* Tr. at 44:5–7. Specifically, plaintiff's expert stated that the subject merchandise was "an all-purpose garment that could be used for [both] rainwear and activewear." *Id.* Plaintiff's expert further asserted that the type of individual who would purchase the subject merchandise is "someone that wants to be noticed . . . to be with their peers and . . . wants to feel part of the whole sports thing." *Id.* at 37:11–13. Such evidence leads the court to conclude that a purchaser would not primarily buy the subject merchandise for protection from the rain, but instead would purchase the jacket for wear in any cool weather conditions. Thus, the expectations of the ultimate purchaser provide support for Customs' classification.

3. Channels of Trade

Third among the *Carborundum* Factors is the channels of trade in which the merchandise moves. In arguing that their jackets move in the same channels of trade as merchandise included in the class or kind of rainwear, plaintiff claims that "the licensing agreements and sales sheets [for the production and sale of the merchandise] show that the merchandise moves in particular sales environments and channels of trade belonging to rainwear and is recognized in the trade as rainwear." Pl.'s Opp'n at 18. An examination of these documents, however, reveals that they provide, at best, equivocal evidence for plaintiff. While the sales sheets (some of which appear to be with a related manufacturer) refer to the merchandise as rainwear, the licensing agreements do not. For instance, the licensing agreement with NBA Properties, Inc. refers to "Adult sized synthetic leather jackets for mass retail distribution only," *see* Letter from NBA to William Baum of 9/3/1998 at 2, and that of The Collegiate Licensing Company to "Water Repellant PVC Jacket (Pleather)," *see* The Collegiate Licensing Company Specification Sheet at 1. Thus, the documents plaintiff cite as support for its proposed classification are of little use for that purpose.

4. Environment of Sale

The fourth *Carborundum* Factor is the environment in which the merchandise is sold. Despite plaintiff's contention in its brief that "the merchandise moves in particular sales environments . . . as rainwear," Pl.'s Opp'n at 18, nothing indicates that the subject merchandise was ever specifically promoted, advertised, or sold as

rainwear. To the contrary, as plaintiff's expert testified and Customs' expert agreed, given the "mass-market" character of the subject merchandise, the stores that would ultimately purchase the jackets for retail and in which the jackets would be sold, i.e., Sears, Wal-Mart, or Target, "don't . . . have specific departments that say rainwear . . . ," Tr. at 33:16–19 (testimony of plaintiff's expert), and "[the purchaser] almost ha[s] to do the shopping [herself] in those kind of stores." *Id.* at 47:4–5; *see also* Tr. at 113:9–12, 20–25 (concurring testimony of defendant's expert). Thus, it appears that the environment of sale does not aid plaintiff.

5. Use, Economic Practicality, Recognition in the Trade

The remaining *Carborundum* Factors, (a) use of the subject merchandise in the same manner as merchandise which defines the class; (b) the economic practicality of so using the import; and (c) the recognition in the trade of this use, merit briefexamination. First, while there was no direct evidence of the jackets being actually used to prevent the wearer from getting wet, there is no dispute that the jackets are waterproof or water-resistant. Thus, nothing would preclude the jackets from having some utility as protection if worn in the rain. That is, while they may not afford the more complete protection of other garments, the court finds that one of the uses of the jackets could be to provide the wearer some protection from the rain. Next, while there was no direct evidence of the economic practicality of using the jackets as rainwear, at an imported price of under $10 per jacket, there would appear to be little economic impediment to the jackets being purchased by many consumers. Finally, there is no evidence on the record indicating that the jackets would be recognized in the trade as rainwear. Both experts consistently referred to the jackets as something other, i.e., "stadium jackets," Tr. at 118:5–15, "varsity jackets," *id.*, and "outerwear jackets," *id.* at 45:12–13, 115:13–14. Indeed, plaintiff's expert stated that the jackets would not be found in a "rainwear" section because the stores simply "[do not] really have specific departments that say rainwear anymore." Tr. at 33:23–24. Thus, to the extent that evidence is on the record, it does not support a finding that the jackets are recognized in the trade as rainwear.

Having applied the *Carborundum* Factors to the subject merchandise, it is apparent they do not indicate that the jackets' "use which exceeds any other *single* use" is to keep the wearer dry. Thus, the jackets are not principally rainwear. Chief among the reasons for this conclusion is that the general physical characteristics of the jackets are not in accord with their principal use being rainwear. In addition, the remainder of the *Carborundum* Factors would not compel a different conclusion. As a result, the court rejects plaintiff's proposed classification. This being the case, the court finds that the

defendant has demonstrated that the proper classification[12] of the merchandise is the basket provision under HTSUS subheading 3926.20.90, "Other articles of plastics and articles of other materials of headings 3901 to 3914: . . . Articles of apparel and clothing accessories (including gloves, mittens and mitts): . . . Other. . . ."

CONCLUSION

Therefore, the court denies plaintiff's motion for summary judgment, grants the Government's cross-motion for summary judgment, and dismisses this case. Judgment shall be entered accordingly.

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[12] In a classification case, this court is "required to decide the correctness not only of the importer's proposed classification but of the government's classification as well." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 874 (Fed. Cir. 1984). Indeed, this court "must consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." *Id.* at 878.