U.S. Customs and Border Protection

Slip Op. 12–4

HOME PRODUCTS INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 11–00104

[Administrative review results remanded.]

Dated: January 6, 2012

Frederick L. Ikenson, *Peggy A. Clarke*, *Larry Hampel*, Blank Rome LLP, of Washington, DC for Plaintiff Home Products International, Inc.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. for defendant. With her on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director and *Patricia M. McCarthy*, Assistant Director. Of Counsel on brief was *Thomas M. Beline*, Office of the Chief Counsel for Import Administration, International Department of Commerce of Washington, D.C. for Defendant United States.

William E. Perry, *Emily Lawson*, Dorsey & Whitney LLP, of Seattle WA, for Defendant-Intervenor Since Hardware (Guangzhou) Co., Ltd.

OPINION AND ORDER

Gordon, Judge:

I. Introduction

This consolidated action involves an administrative review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering Floor-Standing, Metal-Top Ironing Tables from China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 76 Fed. Reg. 15,295 (Dep't of Commerce Mar. 21, 2011) (final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum for Ironing Tables from China, A-570–888 (Mar. 20, 2011), available at http://ia.ita.doc.gov/frn/summary/PRC/2011–6560–1.pdf (last visited Jan. 6, 2012) ("*Decision Memorandum*"). Before the court are motions for judgment on the agency record filed by Home Products International, Inc. ("HPI") and Since Hardware (Guangzhou) Co., Ltd. ("Since Hardware"). The court has jurisdiction pursuant to Sec-

tion 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

HPI challenges Commerce's determination to use the market economy purchase price for Since Hardware's cartons. Since Hardware challenges Commerce's (1) selection of a financial statement for use in the surrogate financial ratio, and (2) surrogate value determination for labor.[2] For the reasons set forth below, the court remands the *Final Results* to Commerce to address certain aspects of its surrogate value determination for labor.

II. Standard of Review

For administrative reviews of antidumping duty orders, the court sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2011). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, *8 West's Fed. Forms, National Courts* § 13342 (2d ed. 2011).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the anti-

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

[2] Since Hardware also challenged Commerce's surrogate value determination for brokerage and handling, which the court decided on procedural grounds in a prior order.

dumping statute. *Dupont*, 407 F.3d 1211, 1215; *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statutory interpretation is entitled to deference pursuant to *Chevron*.").

III. Discussion

A. Cartons

Although Commerce generally uses data from a surrogate market economy country to value inputs for a respondent operating in a non-market economy, if the respondent purchases an input in sufficient quantity from a market economy, Commerce values those inputs based on the purchase price paid. 19 C.F.R. § 351.408(c)(1). Commerce has adopted a rebuttable presumption that market economy purchase prices are the best available information if the total purchased volume exceeds 33 percent of the total volume of that input's purchases. *See Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments*, 71 Fed. Reg. 61,716, 61,717–719 (Dep't of Commerce Oct. 19, 2006) ("market economy input methodology").

Applying the market economy input methodology, Commerce determined that Since Hardware purchased more than 33 percent of its cartons from a market economy source, and that the market economy price was the best available information to value cartons. In its administrative case brief HPI contended that Since Hardware's carton input consisted of two inputs, cartons and corrugated paper, and that if separated, the 33 percent threshold would not be met. HPI Case Brief at 11–13, PR 82.[3] In the *Final Results* Commerce did not share HPI's "inferences and assumptions," *Clearon Corp. v. United States*, 35 CIT ___, ___, 800 F. Supp. 2d 1355, 1361 (2011), and continued to treat cartons as one input.

In its brief before the court, HPI again contends that Since Hardware's carton input should be divided into two separate factors of production—a cartons factor and a corrugated paper factor. Home Products Br. at 3–4, ECF No. 29. The available record evidence, however, demonstrates that Since Hardware reported the carton input as *one* factor, Since Hardware treats the input as *one* factor, and

[3] "PR __" refers to a document contained in the public administrative record.

Commerce verified Since Hardware's input as *one* factor. *See* Since Hardware Section D Response PR 17; Verification Memorandum, PR 51. The court cannot identify any record evidence that demonstrates that Since Hardware purchased cartons as two inputs (cartons and corrugated paper). For example, Home Products might have included on the administrative record affidavits or invoices from its own experience with cartons, or obtained information from Since Hardware's supplier (as it did for brokerage and handling) demonstrating that the supplier sells cartons as two items, not one. *See QVD Food Co. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011) ("[T]he burden of creating an adequate record lies with [interested parties] and not with Commerce.") (internal quotation marks and citation omitted). In short, Commerce's finding that Since Hardware's cartons are one factor and not two is reasonable. Commerce's treatment of Since Hardware's cartons input must therefore be sustained.

B. Surrogate Financial Statements

Since Hardware only filed a rebuttal brief during the administrative proceeding and did not challenge Commerce's selection of surrogate financial statements. *See* November 17, 2010 Letter from Since Hardware to Commerce, PR 83. In its brief before the court, Since Hardware raises for the first time issues relating to the selection of surrogate financial statements, issues that it could have raised before the agency in its case briefs. Since Hardware has therefore failed to exhaust its administrative remedies. *See* 28 U.S.C. § 2637(d); *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006) (citing *Woodford v. Ngo*, 548 U.S. 81, 88–90 (2006)); *see also* 19 C.F.R. § 351.309(c)(2). Accordingly, Commerce's selection of financial statements is sustained.

C. Labor Wage Rage

When determining surrogate labor rates, Commerce is required "to utilize, to the extent possible," data from one or more market economy countries that are both economically comparable to the non-market economy at issue, and "significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4); *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1372–73 (Fed. Cir. 2010) (invalidating portion of Commerce's labor regulation, 19 C.F.R. § 351.408(c)(3)). In the *Final Results* Commerce valued labor using an average, industry-specific wage rate calculated from earning or wage data under Chapter 5B of the International Labor Organization ("ILO") Yearbook on Labor Statistics. *See* Industry Specific Wage Rate Selection Memorandum, PR 71. Commerce relied on industry-specific labor data from multiple countries that Commerce determined were economically comparable to

China and significant producers of comparable merchandise. *Id.* Commerce, however, did not utilize wage data from the primary surrogate country, India. *Id.*

Since Hardware challenges Commerce's valuation of the labor wage rate, arguing that wage data from India is the best available information to value labor. Since Hardware contends that this result is mandated by 19 U.S.C. § 1677b(c)(4), *Dorbest*, and *Shandong Rongxin Import & Export Co. v. United States*, 35 CIT ___, 774 F. Supp. 2d 1307 (2011), as well as Commerce's subsequently announced policy changes for the calculation of labor wage rates in NME proceedings, *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (June 21, 2011) ("New Labor Wage Rate Policy").

These authorities, however, do not mandate the result that Since Hardware desires. As the court in *Shandong* explained: "The Court finds groundless [the] argument that Commerce was obligated to utilize data from a single country to value labor. This argument is untenable in the face of a statute, agency regulation, and CAFC case law, which all explicitly permit the agency to utilize data from multiple countries." *Shandong*, 35 CIT at ___, 774 F. Supp. 2d at 1314. Commerce may, as a matter of gap-filling discretion, decide to use only one country when valuing labor (an approach it has since adopted in its New Labor Wage Rate Policy), but nothing in the authorities relied upon by Since Hardware mandates that result.

For Since Hardware to obtain the relief it desires, (an order from the court directing Commerce to use only Indian wage data to value labor), the administrative record must support the conclusion that India, and India alone, is both economically comparable to China and a significant producer of comparable merchandise. Since Hardware, though, never makes that specific argument. Instead, Since Hardware argues that Commerce's use of HTS categories at the six-digit, instead of the 10-digit, level was "overly broad," inflating the measure of exports from countries that Commerce identified as "significant producers." Since Hardware Br. at 7, ECF No. 30. Missing from this argument, however, is any explanation why the measure is "overly broad." One might surmise that Since Hardware is arguing that the six-digit level includes merchandise that is not "comparable" to the subject merchandise, as required by 19 U.S.C. § 1677b(c)(4). That argument, in turn, would implicate an analysis of the meaning of the word "comparable", together with an analysis of the information on the administrative record on the scope of the six and ten-digit HTS categories. For whatever reason though, Since Hardware chose not to fully develop its argument that Commerce's approach was "overly

broad," leaving the court to deem the issue waived, and sustain Commerce's use of multiple countries to calculate the surrogate value for the labor wage rate. *See MTZ Polyfilms, Ltd v. United States*, 33 CIT ___, ___, 659 F. Supp. 2d 1303, 1308–09 (2009); *Fujian Lianfu Forestry Co. v. United States*, 33 CIT ___, ___, 638 F. Supp. 2d 1325, 1350 (2009); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (internal citations omitted).

Moving on, Since Hardware does raise one issue from Commerce's labor wage rate determination that merits a remand: Commerce's selection of the industry-specific data from the International Standard Classification of all Economic Activities ("ISIC"). Commerce selected ISIC Revision 3 instead of Revision 2 because it was more contemporaneous, but it does not include data from India (the primary surrogate), which did not report data in Revision 3. *See Decision Memorandum* at 5. The court in *Shandong* reviewed an identical issue, providing a detailed explanation of the potential unreasonableness of excluding Indian data from the labor calculus:

> The Court is less sanguine, however, about the reasons Commerce cites for excluding Indian labor data, which was reported under ISIC– Rev.2, from the group of countries ultimately providing the labor rate, all of which reported data under ISIC–Rev.3. While the agency has made clear that it prefers "to use data from a single ISIC revision to ensure consistency of the industry category," the Court finds Commerce's justification for this preference lacking and inconsistent. The Indian wages and earnings data reported to the ILO appears to meet all other criteria identified by the agency, including quality, specificity, and contemporaneity. Indian ILO labor data was reported for a year close to the period of review—2006—and was reported at a more specific 3–digit level of the ISIC than the 2–digit–level data relied on by Commerce. Also, India reported a combined earnings figure for men and women, in accordance with Commerce's preference, and the agency does not dispute that the ISIC–Rev.2 Indian labor data includes the pencil industry. To dismiss such apparently valuable data without further explanation is unjustified. Moreover, refusing to use ISIC–Rev.2 data contradicts what the agency has repeatedly identified as a para-

> mount interest: generating the broadest basket of countries possible to value labor. Commerce has cited the need for a broad basket of countries to justify using less contemporaneous data, *Remand Results* at 28, and to attempt to justify the inclusion of labor data from countries with minuscule amounts of exports, (Def.'s Resp. at 14.). The inconsistency with which Commerce has asserted the need for a broad basket of countries warrants a remand.
>
> Commerce has broad discretion to determine which criteria it will use to sort and prioritize the data it uses in making its determination. The Court's role is to ensure that Commerce's sorting and prioritizing decisions are reasonable and consistently applied. In this case, the Court finds that most of Commerce's sorting and prioritizing decisions are well justified, such as the decision to use earnings data if available, and wages data if not, and the choice only to utilize data reported for both sexes. The decision to insist that data be reported under a common ISIC revision, however, is not supported by substantial evidence on the record. On remand, if Commerce still wishes to omit all labor data that a qualifying country reported under ISIC–Rev.2, it must explain why the need for consistency across ISIC revisions predominates over the need for a broad basket of countries to value labor. Alternatively, if Commerce determines that the chief value is to have the broadest feasible basket of countries, Commerce is instructed to review which qualifying countries have reported data under a prior ISIC revision which satisfy the agency's other requirements.

Shandong, 35 CIT at ___, 774 F. Supp. 2d at 1315. This is persuasive. Accordingly, the court will remand this issue to Commerce to address these specific issues, and if necessary, include Indian data in its calculation.

Finally, Since Hardware challenges Commerce's choice of ISIC Classification 28 (metal fabricated products), as opposed to ISIC Classification 36 (manufacture of metal furniture) as one of the proper surrogate value data sources for ironing tables. Commerce carefully explained its choice of ISIC Classification 28 on page 3 of its Industry Specific Wage Rate Selection Memorandum and again in the *Decision Memorandum* at 5–6. Commerce's choice and its accompanying explanations appear more than reasonable on this administrative record.

Since Hardware favors ISIC Classification 36 (manufacture of metal furniture) on the ground that ISIC Classification 28 (metal

fabricated products) may cover items other than ironing tables, but Since Hardware fails to establish that ISIC Classification 36 (manufacture of metal furniture) only covers ironing tables. Since Hardware also fails to explain why or how this issue adversely affects the surrogate labor value for the subject merchandise. (For example, do labor rates vary widely among the products covered by ISIC Classification 28? And conversely, are labor rates consistently uniform for the items covered by ISIC Classification 36?). Also missing from Since Hardware's argument is any consideration of how ISIC Classification 36, when compared to ISIC Classification 28, yields a much more accurate surrogate labor value for ironing tables.

Whatever the merits of ISIC Classification 36 may be (and Since Hardware has not adequately explained what they are), substantial evidence review contemplates that for a given data selection issue, two or more reasonable though inconsistent choices are possible on the same administrative record. *See Catfish Farmers of Am. v. United States*, 33 CIT ___, ___, 641 F. Supp. 2d 1362, 1366 (2009) ("The administrative record for an antidumping duty administrative review may support two or more reasonable, though inconsistent, determinations on a given issue."). *See also CITIC Trading Co. v. United States*, 27 CIT 356, 366 (2003) ("while the standard of review precludes the court from determining whether [Commerce's] choice of surrogate values was the best available on an absolute scale, the court may determine the reasonableness of Commerce's selection of surrogate prices."). With this framework in mind, and given an administrative record containing a thorough and reasonable explanation justifying the selection of ISIC Classification 28, the court must conclude that Since Hardware's arguments for an alternative ISIC Classification are without merit. Commerce's choice of ISIC Classification 28 is therefore sustained.

IV. CONCLUSION

For the foregoing reasons the court will remand this action to Commerce to reconcile its exclusion of Indian wage data with *Shandong*. Accordingly, it is hereby

> **ORDERED** that this action is remanded to Commerce to reconcile its exclusion of Indian labor data with the concerns raised by the court in *Shandong* ; and it is further
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> **ORDERED** that Commerce shall file its remand results on or before February 15, 2012; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: January 6, 2012
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON

Slip Op. 12–5

PAPIERFABRIK AUGUST KOEHLER AG and KOEHLER AMERICA, INC., Plaintiffs, and MITSUBISHI INT'L CORP., MITSUBISHI HI-TEC PAPER FLENSBURG GMBH, and MITSUBISHI HI-TEC PAPER BIELEFELD GMBH, Plaintiff-Intervenors, v. THE UNITED STATES and the UNITED STATES INTERNATIONAL TRADE COMMISSION, Defendants, and APPLETON PAPERS INC., Defendant-Intervenor.

Before: Donald C.Pogue, Chief Judge
Court No. 08–00430

[Commission's remand determination affirmed.]

Dated: January 10, 2012

William Silverman and *Richard P. Ferrin*, Drinker Biddle & Reath LLP, of Washington, DC, for the Plaintiffs,

Eric C. Emerson and *Jamie B. Beaber*, Steptoe & Johnson LLP, of Washington, DC, for the Plaintiff-Intervenors,

David F. D'Alessandris, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for Defendants. With him on the briefs were *Tony West*, Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Patricia M. McCarthy*, Assistant Director.

Marc A. Bernstein, Office of General Counsel, United States International Trade Commission, of Washington, DC, for Defendant United States International Trade Commission. With him on the briefs were *James M. Lyons*, General Counsel, and *Neal J. Reynolds*, Assistant General Counsel for Litigation.

Joseph W. Dorn, *Gilbert B. Kaplan*, *Brian E. McGill*, and *Daniel L. Schneiderman*, King & Spalding LLP, of Washington, DC, for the Defendant-Intervenors.

OPINION

Pogue, Chief Judge:

INTRODUCTION

This case returns to court following remand ordered by the Court of Appeals for the Federal Circuit in *Papierfabrik August Koehler AG v.*

United States, 413 F. App'x. 227 (Fed. Cir. 2011) ("*Koehler II* ").[1] On remand, the International Trade Commission (the "ITC" or "Commission") found – after obtaining and taking into consideration intermediate calculation worksheets from the Department of Commerce showing that a specific subset of lightweight thermal paper ("LWTP") was not dumped on the United States market – that the domestic LWTP industry is still threatened with material injury by way of subject imports from Germany.

Plaintiffs ("Koehler") challenge the Commission's remand determination. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

After a brief discussion of the background and applicable standard of review, the court will explain why it concludes that the Commission's remand determination is free of legal error and based on a reasonable reading of the record.

BACKGROUND

In October, 2008, the Department of Commerce ("the Department" or "Commerce") issued a finding that imports of LWTP from Germany were being or were likely to be sold in the United States at less than fair value. *Lightweight Thermal Paper from Germany*, 73 Fed. Reg. 57,326 (Dep't Commerce Oct. 2, 2008) (notice of final determination of sales at less than fair value) ("*Commerce Final Determination*").[2] Shortly thereafter, pursuant to 19 U.S.C. § 1673d(b), the Commission conducted a separate injury investigation and determined that the domestic LWTP industry was threatened with material injury by way of imports from Germany, including imports from Plaintiffs. *Certain Lightweight Thermal Paper from China and Germany*, 73 Fed. Reg. 70,367 (ITC Nov. 20, 2008) (final determinations).[3]

LWTP is sold in a variety of weights, including 48 grams per square meter ("48g LWTP") and 55 grams per square meter ("55g LWTP"), which, together, comprise the bulk of LWTP sold in the United States.

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[1] *Koehler II* vacated and remanded this court's previous judgment. *See Papierfabrik August Koehler AG v. United States*,__ CIT __, 675 F. Supp. 2d 1172 (2009) ("*Koehler I*").

[2] Commerce defined the LWTP subject merchandise as "thermal paper with a basis weight of 70 grams per square meter . . . or less." *Commerce Final Determination*, 73 Fed. Reg. at 57,327.

Koehler was a mandatory respondent in Commerce's investigation, *Id.* at 57,327 n.4. In its investigation, Commerce found that imports of the subject merchandise from Koehler were being dumped at a margin of 6.50 percent. Id. at 57,328.

[3] The views of the Commission are contained in *Certain Lightweight Thermal Paper from China and Germany*, USITC Pub. 4043, Inv. Nos. 701-TA-451 & 731-TA-1126–1127 (Final) (Nov. 2008), Admin. R. Pub. Doc. 285 ("ITC Original Determination").

ITC Original Determination, USITC Pub. 4043 at 16. During the Commission's period of investigation, domestic production of LWTP was "overwhelmingly concentrated" in 55g LWTP. Remand Results 23, Sept. 30, 2011, ECF No. 123 (citing *ITC Original Determination*, USITC Pub. 4043 at 16). Similarly, the majority of imported LWTP during the same time period was 55g.[4] *ITC Original Determination*, USITC Pub. 4043 at 16. However, the Commission also found that domestic production of 48g LWTP was highly likely to increase in the future. *Id.* at 38, 42. Likewise, German producers, including Plaintiffs, reported increased imports of 48g LWTP as a "significant change in product range" during the pertinent time period. *Id.* at 17.

During the original ITC proceedings, Plaintiffs argued that a series of worksheets from Commerce's investigation showed that 48g LWTP was not dumped in the United States market during Commerce's period of investigation and therefore the Commission should completely disregard the increase in imports of 48g LWTP in its separate injury investigation and final determination. The Commission declined to do so based in part on the Federal Circuit's decision in *Algoma Steel Corp. v. United States*, 865 F.2d 240 (Fed. Cir. 1989), which, under the Commission's interpretation, did not "compel or even authorize the Commission to examine individual sales or model transactions considered by Commerce." *ITC Original Determination*, USITC Pub. 4043 at 31 n.201.[5] Because Commerce also had not issued a separate dumping margin for 48g LWTP, the Commission concluded it was not permitted to consider individual sales of 48g and 55g LWTP in its injury determination.

Plaintiffs appealed to this court which affirmed the Commission's determination. *Koehler I*, __ CIT at __, 675 F. Supp. 2d at 1191–92. The Court of Appeals, however, vacated *Koehler I*, holding that the Commission's refusal to consider intermediate 48g dumping margins "was premised on a divergent reading of *Algoma*, and a misunderstanding of Koehler's request." *Koehler II*, 413 F. App'x. at 231. The Court stated that "*Algoma* specifically allows for consideration of raw data in computer print outs 'by reasons specific to the particular case . . . .'" *Id.* (quoting *Algoma*, 865 F.2d at 242). It reasoned that the statute requires that Commerce make available to the Commission

[4] The Commerce period of investigation was from July 1, 2006 through June 30, 2007. The ITC's threat analysis, however, focused on the imminent future after October 2008. *See* Remand Results 22.

[5] The Commission also declined to disregard the increased 48g LWTP shipments based on 19 U.S.C. § 1677(35)(C)(ii), which states that the dumping margin used by the Commission "shall be . . . the dumping margin or margins most recently published by [Commerce] prior to the closing of the Commission's administrative record." *ITC Original Determination*, USITC Pub. 4043 at 31 n.201; 19 U.S.C. § 1677(35)(C)(ii).

all of the information upon which its determination was based, *see* 19 U.S.C. § 1673d(c)(1)(A), including the sales prices of a "subset of dumped goods," here the 48g LWTP. *Koehler II*, 413 F. App'x. at 231–32. With regard to the Plaintiffs' request, the Court of Appeals interpreted it as a request for the Commission to make decisions "based on the price, measured as a dumping margin, of a subset of dumped goods" and to analyze data that is available to the Commission. *Id.*[6]

The Court of Appeals further held that while the ITC may not change Commerce's determination that all of Plaintiffs' products were being dumped at a rate of 6.50 percent, it was permitted to examine and consider Commerce's intermediate calculations and subsets of the subject merchandise when making an injury determination. *Id.* at 231 (citing *Cleo Inc. v. United States*, 501 F.3d 1291, 1295 (Fed. Cir. 2007)).[7]

Following the Appeals Court order and mandate, this court remanded the matter to the Commission with instructions to reconsider and revise its decision in accordance with the decision of the Court of Appeals, indicating how any decision is in accordance with *Algoma Steel*.

Following the remand order, the Commission re-opened its record to obtain additional material from the record of Commerce's investigation. Noting that neither the Appeals Court opinion nor this court's remand order called into question the Commission's findings or conclusions regarding domestic like product, industry, or conditions of competition, the Commission focused on "whether the information from the Commerce dumping investigation warrants modification of the prior analysis that there is a threat of material injury by reason of the subject imports." Remand Results 5.

In affirming its finding of threat of material injury, the Commission concluded that different weights of LWTP are or will be dumped on the United States market in direct response to market competition. *See Id.* at 23. Specifically, importers respond to increased domestic production of and/or demand for a particular weight of LWTP by dumping the same weight of LWTP on the United States market.

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[6] "Commerce analyzed seven of Koehler's LWTP products, distinguished by weight . . . [and] found that six of the seven Koehler products had positive dumping margins—meaning they are being sold at [less than fair value]. As calculated by Commerce, and reflected in Commerce's intermediate calculations, the only Koehler product without a positive dumping margin was Koehler's 48 gsm LWTP product. The 48 gsm product constituted 38.15 percent of Kohler's quantity of sales in the United States and made up 40.28 percent of the value of sales in the United States." *Koehler II*, 413 F. App'x. at 229–30

[7] The court emphasized that the Commission, not Commerce, "determines whether all articles in the subject merchandise are 'like products,' which in turn make up an 'industry' for the purposes of a dumping determination." *Id.* at 231.

STANDARD OF REVIEW

The Department, in its remand redetermination, must comply with the terms of the court's remand order. *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009). In addition, the court "shall hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Koyo Seiko Co. v. United States*, 20 F.3d 1160, 1164 (Fed. Cir. 1994).

The substantial evidence standard of review "can be translated roughly to mean 'is [the determination] unreasonable?'" *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006) (alteration in original) (quoting *SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 381 (Fed. Cir. 1983)); *Daewoo Elecs. Co. v. Int'l Union*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) ("The specific determination we make is 'whether the evidence and reasonable inferences from the record support' [the agency's] findings."). Moreover, the possibility of drawing two inconsistent conclusions from the evidence does not render the agency's determination unreasonable, *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966), and where "[s]ubstantial evidence exists on both sides of the issue[,] . . . the statutory substantial evidence standard compels deference to the [agency]." *Nippon Steel*, 458 F.3d at 1354.

DISCUSSION

While Commerce is charged with investigating whether merchandise is being dumped on the domestic market and if so, determining the dumping margin for such imports, the ITC is responsible for determining whether an industry in the United States is or will be threatened with material injury by reason of these imports. *See* 19 U.S.C. § 1673d(b). The Commission's analysis is, by its nature, of a different character and also covers a different time period than the Commerce investigation. *See* 19 U.S.C. § 1677(7)(F) (charging the ITC with the forward-looking task of determining actual and potential effects of imports of subject merchandise on the domestic industry). The governing statute requires that the Commission consider all "relevant economic factors which have a bearing on the state of the industry in the United States, including, but not limited to actual and potential decline in output, sales, [and] market share . . . . " when making its threat analysis. 19 U.S.C. § 1677(7)(C)(iii).[8]

[8] In relevant part, the statute states that "the Commission shall consider, among other relevant economic factors . . . any . . . substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject

In order to find a causal nexus between the subject imports and the domestic industry's condition, the Commission must find that the subject imports will have more than a tangential, trivial, or incidental effect on the industry,[9] and that further dumped imports are imminent. 19 U.S.C. § 1677(7)(F)(ii). It is the Commission's charge to make findings of fact and, if it finds that there is injury to the domestic market, "explain, in a meaningful way," the causation of such injury. *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1376 (Fed. Cir. 2006); *Mittal Steel*, 542 F.3d at 874–75. The Commission "must examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Here, pursuant to the directive from the Court of Appeals, and the remand order of this court, the Commission considered Commerce's intermediate dumping margin calculations and provided a reasonable explanation for continuing to find a positive threat of injury to the domestic industry. First, the Commission reopened the record to request further information from Commerce regarding the interpretation of the Commerce data. Remand Results 9–10 (citing "Final Analysis Memorandum for Sales – Koehler" Sept. 25, 2008, and "Cost of Production and Constructed Value Calculation Adjustments for the Final Determination" Sept. 25, 2008, EDIS Doc. 454291). The Commission noted that it was required to weigh this information while conducting its overall statutory directives. *Id.* at 18. In this context, and responding to the court's remand order that it articulate how its decision is consistent with *Algoma Steel*, the Commission found that Commerce's intermediate calculations were "of limited utility in an analysis of threat of material injury by reason of subject imports"

merchandise into the United States . . . and any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports . . . ." 19 U.S.C. § 1677(7)(F)(i)(II) & (IX).

[9] Under the "by reason of" standard of causation, subject imports must have more than an "incidental, tangential or trivial" effect on the industry. *See Nippon Steel Corp. v. Int'l Trade Comm'n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003); *see also Gerald Metals, Inc. v. United States*, 132 F.3d 716, 721–22 (Fed. Cir. 1997); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 873 (Fed. Cir. 2008).

Nonetheless, in making its determination, the Commission "need not isolate the injury caused by other factors from injury cased by unfair imports . . . [r]ather, the Commission must examine other factors to ensure that it is not attributing injury from other sources to the subject imports." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, 156 (1994) reprinted in 1994 U.S.C.C.A.N. 4040, 4185 ("SAA"). The SAA accompanied the Uruguay Round Agreements Act ("URAA") and was approved by Congress as an "authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the URAA] in any judicial proceeding . . . concerning" the interpretation or application of the URAA. 19 U.S.C. § 3511(a)(2) and § 3512(d).

because they were not probative with respect to the focal point of the Commission's threat analysis. *Id.* at 19.[10]

The Commission recognized "undisputed changes in conditions of competition between the time covered by Commerce's dumping investigation and the time period we have considered in analyzing threat of material injury." *Id.* at 22. It further noted that market participants anticipated growing demand for 48g LWTP, indicated in part by Defendant-Intervenor's construction of a facility in August 2008 with the intent to increase production of 48g LWTP. Plaintiffs, the predominant German exporters of LWTP, ceased bringing 55g LWTP into the United States in March 2008 and indications are that future imports will be "heavily concentrated" in 48g LWTP. *ITC Original Determination*, USITC Pub. 4043 at 37.

In addition, the Commission recognized that "where competition was most concentrated during the periods both Commerce and the Commission investigated, Commerce calculated much higher rates of dumping than the 6.50 percent weighted average dumping margin it published in its final determination." Remand Results 23 (citing EDIS Doc. 454291). In this context, the Commission gave weight to data indicating that "Koehler was inclined to sell types of LWTP that competed directly with the domestic like product in dumped transactions, while non-dumped transactions tended to focus on a product type that was not at the time produced domestically in significant quantities." *Id.* at 24.[11]

The Commission emphasized that "the focus of competition between LWTP from Germany and the domestic like product [is] not static, but in fact changed after Commerce's period of investigation," and concluded that the imminent future would be "characterized by more intense competition between domestically produced and German 48 gram LWTP . . . ." *Id.* Therefore, in light of the evidence that dumping transactions occurred for products in direct competition, the Commission continued to find that there is a threat of material injury to the domestic market by way of imports of 48g LWTP. *Id.* at 23 ("In the circumstances of this investigation, viewing Commerce's calculations for 48 gram LWTP as conclusive of likely conduct during the imminent future is particularly inappropriate."). This conclusion is

[10] The Commission acknowledges that there is data from Commerce's first administrative review showing that 48g LWTP from Germany was sold at less than fair value after Commerce's initial period of review. However, because the data pertaining to Commerce's review was not available during the Commission's original investigation, the Commission has not considered it. Remand Results 26 n.85.

[11] Plaintiffs do not challenge this aspect of Commerce's reading of the record. *See* Plaintiff's Comments, ECF No. 127.

one that has reasonably taken into consideration and explained the "relevant economic factors" which have a bearing on the LWTP industry in the United States. *See* 19 U.S.C. § 1677(7)(C)(iii).

Plaintiffs concede that "the Commission is not required to tie each bit of injury to a dumped sale." Plaintiff Comments 27. Nonetheless, the Commission's analysis does not ignore the role of dumping in causing injury to the domestic industry. As noted above, the Commission concluded that imports entering in the imminent future would be heavily concentrated in 48g LWTP. Faced with evidence that Koehler's pricing practices indicated much higher rates of dumping "where competition was most concentrated during the periods both Commerce and the Commission investigated," Remand Results at 23, the Commission concluded that it was unlikely that sales of the 48g LWTP will be at normal value. *Id.* at 26.

The Plaintiffs raise two challenges to the remand determination. First, Plaintiffs contend that the remand determination violates the mandate of the Federal Circuit. The Plaintiffs correctly argue that "the Federal Circuit has already decided, either expressly or by necessary implication, that the computer printout showing a negative dumping margin for Koehler's sales of 48-gram [LWTP] is factually relevant and legally germane . . . ." Plaintiff Comments 3. Relevance, however, does not determine weight, and the Appeals Court did not supplant the Commission's role to weigh the evidence and, on remand, determine its effect. Had the Appeals Court intended otherwise, no remand would have been necessary.

Plaintiffs also argue that the following language in *Koehler II* precludes the Commission from making an affirmative finding of material injury:

> Instead, [the worksheet data] allows the Commission to take those calculations and apply its expertise to make a fair and equitable injury determination. When the threat determination is based almost exclusively on one product within the subject merchandise, and that one product is not being sold at [less than fair value], the Commission should be able to use all materials at its disposal to make an equitable determination. The Commission incorrectly denied Koehler's request, and incorrectly interpreted this court's holding in *Algoma*, when refusing to consider potentially dispositive intermediate data.

Id. at 7 (quoting *Koehler II*, 413 F. App'x. at 231–32). However, Plaintiffs' reliance is misplaced. The Court of Appeals ordered that the Commission examine the data that is required by statute to be available to it and conduct a "thoughtful consideration" of this data.

Koehler II, 413 F. App'x. at 231. While recognizing that the data was "potentially dispositive," the Court of Appeals does not, either expressly or impliedly, hold that such data is dispositive. This is in keeping with the Court's prior holdings that the Commission, not the courts, is the finder of facts in injury proceedings. *Mittal Steel*, 542 F.3d at 875; *Nippon Steel*, 458 F.3d at 1352. Thus it was for the Commission to evaluate all "relevant economic factors." Its affirmative threat finding is based on a reasonable reading of the record.

CONCLUSION

Because the Commission took into consideration the data submitted by Commerce and adequately explained its rationale for not giving them weight in its positive threat assessment and because the Commission's finding that the domestic market for 48g LWTP is threatened by way of imports from Germany is not unreasonable, its determination is affirmed.

Judgment will be entered accordingly.

Dated: January 10, 2012
New York, New York

/s/ Donald C. Pogue
DONALD C. POGUE, CHIEF JUDGE