Slip Op. 08–64

NEVINNOMYSSKIY AZOT, *et al*., Plaintiffs, v. UNITED STATES, Defendant, and AGRIUM US, INC. & AD HOC COMMITTEE OF DOMESTIC NITROGEN PRODUCERS, Defendant-Intervenors.

Before: Judith M. Barzilay,
Judge Court No. 06–00013

**Public Version**

[The Commission's Remand Determination is affirmed.]

Dated: June 9, 2008

*White & Case, LLP*, (*Jay C. Campbell*), (*Scott S. Lincicome*), *Frank H. Morgan*, and *Walter J. Spak* for Plaintiffs.

(*Michael K. Haldenstein*), *Andrea C. Casson*, *James M. Lyons*, and *Neal J. Reynolds*, United States International Trade Commission, Office of the General Counsel, for Defendant United States.

*Joel R. Junker & Associates*, (*Joel R. Junker*); *Akin*, *Gump*, *Strauss*, *Hauer & Feld*, *LLP*, (*Valerie A. Slater*), *Lisa W. Ross*, and *Margaret C. Marsh* for Defendant-Intervenors.

*OPINION*

**BARZILAY, JUDGE:** This case concerns the court's remand to the U.S. International Trade Commission (the "Commission") of its second sunset review determination regarding solid urea from Russia and Ukraine. The court affirmed several of the Commission's specific findings, but remanded to allow the Commission to provide a more reasoned analysis of (1) the impact of third-country barriers on urea exports, (2) the impact of non-subject imports on domestic pricing, and (3) certain conditions of competition in the industry. The Commission issued its remand determination on November 26, 2007. *See* Remand Determination of the Commission in *Nevinnomysskiy Azot v. United States*, Court No. 06–00013 (ITC Nov. 26, 2007) ("*Remand Determination*"). Plaintiffs Nevinnomysskiy Azot, Novomskovsk Azot JSC, JSC MCC Eurochem, Kuybyshevazot JSC,

JSC "Azot" Berezniki, and JSC "Azot" Kemerovo (collectively "Plaintiffs") challenge the Commission's remand determination, arguing that it is unsupported by substantial evidence and not in accordance with law. Agrium US, Inc., and the Ad Hoc Committee of Domestic Nitrogen Producers appear before the court as Defendant-Intervenors. The court finds that substantial evidence supports the Commission's remand determination and thus affirms.

## I. Procedural History

In July 1987, after investigating imports of solid urea from the German Democratic Republic ("GDR"), Romania, and the Union of Soviet Socialist Republics ("USSR"), the Commission determined that the domestic industry suffered material injury as a result of sales at less than fair value.[1] *See Urea From the German Democratic Republic, Romania, and the Union of Soviet Socialist Republics*, USITC Pub. 1992, Inv. Nos. 731–TA–338–340 (Final) (July 1987) ("Original Determination"). Commerce subsequently issued an antidumping duty ("AD") order on imports of solid urea from the GDR, Romania, and the USSR. *See Antidumping Duty Order; Urea From the Union of Soviet Socialist Republics*, 52 Fed. Reg. 26,367 (Dep't Commerce July 14, 1987); *Antidumping Duty Order; Urea From the Socialist Republic of Romania*, 52 Fed. Reg. 26,367 (Dep't Commerce July 14, 1987); *Antidumping Duty Order; Urea From the German Democratic Republic*, 52 Fed. Reg. 26,366 (Dep't Commerce July 14, 1987). Following the collapse of the USSR in December 1991, Commerce divided the original AD order into separate orders for each of the fifteen newly independent states. *See Solid Urea From the Union of Soviet Socialist Republics; Transfer of the Antidumping Duty Order on Solid Urea From the Union of Soviet Socialist Republics to the Commonwealth of Independent States and the Baltic States and Opportunity to Comment*, 57 Fed. Reg. 28,828 (Dep't Commerce June 29, 1992).[2]

In March 1999, the Commission instituted its first sunset reviews of the remaining orders on solid urea pursuant to section 751(c) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675(c). *See Solid Urea From Romania, Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia,*

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[1] According to the Commission, solid urea is "a high-nitrogen-content fertilizer that is produced by reacting ammonia with carbon dioxide" and is sold in both prilled and granular form. *Solid Urea From Russia and Ukraine*, Inv. Nos. 731–TA–340 E & H (Second Review), Pub. 3821 (Dec. 2005), Confidential R. ("CR") 139 at 5.

[2] Commerce ultimately revoked the AD order on solid urea from the former GDR in April 1998 because the petitioners in the original investigation expressed no further interest in the order. *See Solid Urea From the Former German Democratic Republic: Final Results (Revocation of Order) of Changed Circumstances Antidumping Duty Review*, 63 Fed. Reg. 16,471 (Dep't Commerce Apr. 3, 1998).

*Tajikistan, Turkmenistan, Ukraine, and Uzbekistan*, 64 Fed. Reg. 10,020 (ITC Mar. 1, 1999). Ultimately, the Commission determined that revocation of any AD order on solid urea imports, except the one pertaining to Armenia, would likely lead to a continuation or recurrence of material injury to the domestic industry within a reasonably foreseeable time. *See Solid Urea From Armenia, Belarus, Estonia, Lithuania, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan*, 64 Fed. Reg. 60,225 (ITC Nov. 4, 1999). Accordingly, Commerce revoked the AD order on Armenia but left the others in effect for an additional five years. *See Revocation of Antidumping Duty Order: Solid Urea from Armenia*, 64 Fed. Reg. 62,654 (Dep't Commerce Nov. 17, 1999); *Continuation of Antidumping Duty Orders: Solid Urea From Belarus, Estonia, Lithuania, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan*, 64 Fed. Reg. 62,653 (Dep't Commerce Nov. 17, 1999).

Five years later, the Commission instituted its second sunset reviews of the AD orders. *See* § 1675(c); *Solid Urea From Belarus, Estonia, Lithuania, Romania, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan*, 69 Fed. Reg. 58,957 (ITC Oct. 1, 2004). Because the domestic interested parties chose not to participate in the reviews, Commerce revoked all of the AD orders except those covering Russia and Ukraine. § 1675(c)(3)(A); *Solid Urea from Belarus, Estonia, Lithuania, Romania, Tajikistan, Turkmenistan, and Uzbekistan: Final Results and Revocation of Orders*, 69 Fed. Reg. 77,993 (Dep't Commerce Dec. 29, 2004).

The Commission issued the final determinations in its second sunset reviews of the Russian and Ukranian AD orders on December 16, 2005. *See Solid Urea From Russia and Ukraine*, 70 Fed. Reg. 74,846 (ITC Dec. 16, 2005). By a three-to-three vote, the Commission determined that revocation of the AD orders on solid urea from Russia and Ukraine would likely lead to material injury of the domestic industry within a reasonably foreseeable time.[3] *Id*. Therefore, Commerce left the AD orders on Russian and Ukranian urea in effect. *See Notice of Continuation of Antidumping Duty Orders: Solid Urea from the Russian Federation and Ukraine*, 71 Fed. Reg. 581 (Dep't Commerce Jan. 5, 2006).

Plaintiffs subsequently appealed the Commission's affirmative determination. *See Nevinnomysskiy Azot v. United States*, Slip Op. 07–130, 2007 WL 2563571 (Aug. 28, 2007) (not reported in F. Supp.) ("*Azot I*"). In *Azot I*, the court affirmed the Commission's findings that: (1) there was a reasonable amount of competition between granular and prilled urea; (2) the United States is an attractive market for subject producers because its urea prices are relatively higher than those in other markets; (3) the subject industries have

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[3] A tie vote of the Commission is statutorily defined as an affirmative determination by the Commission. *See* 19 U.S.C. § 1677(11).

the ability and incentive to divert their exports to the United States; and, (4) the global supply of solid urea will expand into a surplus in the reasonably foreseeable future. *See id*. at *7, 10–12. Finding that the Commission's determination was "devoid of the legally required explanation to support its finding," the court remanded the case so that the Commission would: (1) address "whether the likely volume of subject imports would prove significant if the [AD] orders in question are revoked"; (2) address the "likely price effects of subject imports in light of the already substantial presence of low-cost nonsubject imports in the domestic market"; and (3) "reassess the likely impact of subject imports on the domestic industry to account for the difference between the first sunset reviews' findings and the findings of the current reviews within the context of the domestic industry's recent improved performance." *Id*. at *16.

The Commission issued its remand determination in November 2007, concluding that "the domestic industry is vulnerable to the likely adverse impact of the subject imports upon revocation." *Remand Determination* at 26. In addition, because the Commission also found that "subject imports are likely to enter the market in significant volumes and at prices that will have a significant adverse impact on the industry's prices," it determined that "revocation of the orders would result in the entry of significant quantities of low-priced subject imports into the U.S. market and that these imports would likely lead to material injury in the industry." *Id*. Plaintiffs now appeal.

## II. Statutory Background

Every five years following the initial publication of an AD order, Commerce and the Commission must conduct a sunset review. *See* § 1675(c). Following review, Commerce must revoke the order unless the Commission determines that material injury to the domestic industry would likely continue or recur. *See* § 1675(d)(2). To make a proper determination, the Commission must "consider the likely volume, price effect, and impact of imports of the subject merchandise on the [domestic] industry if the order is revoked." 19 U.S.C. § 1675a(a)(1). In addition, the Commission must take into account its prior injury determinations, any improvements in the state of the industry, vulnerability of the industry to material injury, and Commerce's duty absorption findings. *See id*.

The Commission must weigh numerous additional considerations to properly make its determination. *See* § 1675a(a)(1)–(4). To evaluate whether the likely volume of subject imports would be significant, the Commission must consider all relevant economic factors, such as production capacity, inventories, third-country trade barriers, and manufacturing facilities' potential for product-shifting. *See* § 1675a(a)(2). In determining the likely price effects of subject imports, the Commission considers whether significant price undersell-

ing is likely and whether import prices would significantly depress or suppress domestic prices. *See* § 1675a(a)(3). Finally, to evaluate the impact of subject imports, the Commission considers "all relevant economic factors which are likely to have a bearing on the state of the [domestic] industry." § 1675a(a)(4).

Although the Commission must weigh all of the aforementioned considerations during the course of its determination, "no one factor is necessarily dispositive." *Azot I*, 2007 WL 2563571, at *4. Moreover, the presence or absence of any factor "shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time . . . ." § 1675a(a)(5).

## III. Jurisdiction & Standard of Review

This Court has "exclusive jurisdiction" over actions contesting a Commission sunset review determination, 28 U.S.C. § 1581(c); *see* 19 U.S.C. § 1516a. The Commission assesses the "likely effect of revocation of the antidumping order on the behavior of the importers" based on "currently available evidence and on logical assumptions and extrapolations flowing from that evidence." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). The court will uphold the Commission's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law." § 1516a(b)(1)(B)(i). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938). Crucially, "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). Because the Commission acts as the expert factfinder, the court will not "displace [an agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1359 (Fed. Cir. 2006)).

## IV. Discussion

### A. Effect of Third-Country Barriers on the Likely Volume of Subject Imports

In challenging the *Remand Determination*, Plaintiffs argue that the Commission's likely volume finding is not supported by substantial evidence because the Commission erred in its cumulation of the subject imports from Russia and Ukraine and in its analysis of the Chinese urea embargo. Pls.' Resp. Br. 3, 6.

Pursuant to court remand, the Commission re-examined the record to determine whether existing third-country barriers were likely to encourage shifting of subject imports to the U.S. market. *See Remand Determination* at 7. The Commission found that the European Union ("EU") order on Russian urea and the Mexican order on Ukranian urea, are "unlikely to cause a significant shift of subject imports away from those markets to the United States." *Id.* at 7. Specifically, in evaluating the EU's 1995 AD order on Russian urea, the Commission noted that despite an initial diversion of subject merchandise to other markets, exports of Russian urea to the EU have increased rapidly in recent years due to strengthening European prices. *See id*. at 7–8; *Staff Report to the Commission on Investigation Nos. 731–TA–340–E and H (Second Review): Solid Urea from Russia and Ukraine*, CR 134 at IV–10. Although the order would once again restrict Russian exports if prices fell below the set minimum, the Commission noted that prices "would have to fall *considerably* in the EU for Russian urea again to be hindered by the minimum pricing provision of the measure." *Remand Determination* at 8 (emphasis added). The Commission therefore found that the order "has not caused the subject Russian producers to shift significant volumes of urea away from the EU market and that it is unlikely to do so in the reasonably foreseeable future." *Id*. at 8. Similarly, based on a [[ ]] metric ton increase in imports of subject merchandise to Mexico between 2003 and 2004, the Commission concluded that the "Mexican order has not caused the Ukranian producers to shift significant volumes of urea away from the Mexican market [since the imposition of the AD order in 2003]" and is not likely do so in the reasonably foreseeable future. *Id*. at 8; *see Ad Hoc Committee Pre-Hearing Brief to the* [*Commission*], CR 113 Ex. 2 at 22.

In contrast, the Commission found that the Chinese restriction on urea and the EU order on Ukranian urea "are likely to continue diverting shipments of subject urea to other markets, such as the United States, in the reasonably foreseeable future." *Remand Determination* at 7. The Commission cited record evidence that China was the largest export market for both Russian and Ukranian urea before it imposed a "virtual embargo" on urea imports in 1998. *Id*. at 8; *see* CR 134 at IV–10, IV–12. As a result, exporters "shift[ed] significant volumes of urea away from the Chinese market to other export markets," causing Russian and Ukranian urea imports to drop from over 4 million metric tons in 1996 to 5,000 metric tons in 1999.[4] *Remand Determination* at 9; CR 113 Ex. 2 at 9, 22. Given the export pattern data, the Commission inferred that the loss of China as an export market "was a significant factor in the substantial and rapid

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[4] Although Ukraine exported [[ ]] metric tons of urea into China in 2001 and 2002, export levels once again fell to [[ ]] in 2003 and 2004. CR 113 Ex. 2 at 22. Russia fared similarly, with a peak of [[ ]] metric tons in 2002. *Id*. at 9.

growth of exports of Russian and Ukranian urea to such markets as the EU and Latin America . . . ." *Remand Determination* at 9. Accordingly, the Commission concluded that the Chinese embargo would likely continue shifting urea exports towards other markets within the reasonably foreseeable future. *Id*. Likewise, the Commission also found that the EU order on Ukranian urea caused producers to shift significant volumes of urea to other markets. *Id*. After the EU imposed its AD order on Ukranian urea in 2002, imports dropped [[ ]] percent between 2001 and 2004 to [[ ]] metric tons. *Confidential Remand Determination* at 10. During that same period, Ukranian exports to Latin America grew from [[ ]] metric tons in 2001 to [[ ]] metric tons in 2004 – approximately [[ ]] percent.[5] CR 113 Ex. 2 at 22. As a result of these trends, the Commission found that the EU order on Ukranian urea "caused the Ukranian producers to shift their urea shipments away from the EU and to other markets, such as Latin America" and that it would likely continue to do so within the reasonably foreseeable future. *Remand Determination* at 10.

Based on its analysis of third-country barriers, its affirmative findings on the foreign industry's excess capacity levels, the large size and export-oriented nature of the subject producers, the attractiveness of the U.S. market, and the likelihood of global oversupply, the Commission ultimately determined that the likely volume of subject imports would be significant if the AD orders were revoked. *Remand Determination* at 10–12; *Azot I*, 2007 WL 2563571, at *10–12.

### *1. Cumulation of Subject Imports*

Plaintiffs seek a remand of the Commission's cumulation decision, arguing that the Commission failed to consider whether cumulation of the subject imports remained appropriate in light of its more rigorous analysis of third-country barriers. Pls.' Resp. Br. 3–6. Pursuant to § 1675a(a)(7), the Commission "may cumulatively assess the volume and effect of imports of the subject merchandise from all countries [whose sunset reviews] were initiated on the same day, if such imports would be likely to compete with each other and with domestic like products in the Unites States market."[6] § 1675a(a)(7).

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[5] Record evidence shows even greater increases in exports of Ukranian urea to [[ ]] between 2001 and 2004. CR 113 Ex. 2 at 21–22.

[6] To determine whether imports compete with each other and with the domestic like product, the Commission considers four factors: (1) degree of fungibility, (2) presence of sales or offers to sell in the same geographic markets, (3) existence of common or similar channels of distribution, and (4) whether there is a simultaneous presence in the market. *See* CR 139 at 8 n.45. The Commission need not find completely overlapping markets for imports to compete with each other and the domestic product as only a "reasonable overlap" of competition is required to cumulate imports. *Id*. at 8 & n.46 (citing *Mukand Ltd. v. United States*, 20 CIT 903, 909, 937 F. Supp. 910, 916 (1996).

However, the Commission will not cumulatively assess the volume and effects of the subject imports where it "determines that such imports are likely to have no discernible adverse impact on the domestic industry." *Id*. To determine whether imports are likely to have a discernible adverse impact if the AD orders were revoked, the Commission considers the likely volume of the subject imports, as well as their impact on the domestic industry, within a reasonably foreseeable time. *See* CR 139 at 8.

On remand, noting that Plaintiffs did not challenge its decision to cumulate the subject imports for the sunset analysis, the Commission explicitly adopted its prior views on cumulation. *See Remand Determination* at 5. In its second sunset determination, the Commission exercised its discretion and cumulated the likely volume and price effects of subject imports from Russia and Ukraine because it found: (a) that the subject imports would have a discernible adverse impact on the domestic industry if the orders were revoked; (b) a likely reasonable overlap of the competition between the subject imports and the domestic like product if the orders were revoked; and (c) no significant differences in the conditions of competition for subject imports from Russia and Ukraine.[7] CR 139 at 9.

Plaintiffs contend that decumulation is warranted because the Commission changed its finding on the likely effects of the EU order on Russian urea. Pls.' Resp. Br. 4–5. The record evidence, however, indicates otherwise. *See* CR 139 at 20–21; *Remand Determination* at 7–8. In its original determination, the Commission evaluated the EU orders on Russian and Ukranian urea and found that "*only the measures on imports from Ukraine have a restraining effect*, leading to a decline of exports from Ukraine to the [EU] of almost 90 percent from 2003–2004 while Russian exports to the European Union increased rapidly." CR 139 at 20–21 (emphasis added). On remand, the Commission similarly found that "imports of urea from Russia into the EU have grown rapidly since 2000," and that the EU order on Russian urea "has not caused subject Russian producers to shift volumes of urea away from the EU market . . . ." *Remand Determination* at 7–8. As the Commission's original conclusions are consistent with its later determination on the likely effects of the EU order on Russian urea, the court holds that decumulation is not warranted.

Plaintiffs also claim that the Commission should have decumulated the subject imports because the effects of the EU orders on Russian and Ukranian urea result in competition differences within the U.S. market. Pls.' Resp. Br. 4; *see* § 1675a(a)(7). To support their argument, Plaintiffs cite a determination in which the existence of different third-country measures was one factor which led the Commission to find that subject imports are likely to compete

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[7] The reviews met the same-day requirement, as they were all initiated on October 1, 2004. CR 139 at 8.

differently in the U.S. market. Pls.' Resp. Br. 4 (citing *Stainless Steel Wire Rod from Brazil, France, India, and Spain*, Inv. Nos. 701–TA–178 and 731–TA–636–638 (Review), Pub. No. 3321 (July 2000) at 14 ("*SSWR*"). In *SSWR*, the Commission found "significantly different conditions of competition for French [stainless steel wire rod] relative to imports from Brazil and India," and accordingly, elected not to cumulate Brazilian and Indian imports with those from France. *SSWR* at 14. Although the Commission considered third-country measures during its competition analysis, it also evaluated numerous other factors that contributed to the Commission's decision, such as length of time and consistency of presence in the U.S. market, ability to maintain a presence in the U.S. market in spite of an antidumping order, ability to sell through U.S. subsidiaries, and average unit values. *Id*. The number of elements considered by the Commission in *SSWR* stands in sharp contrast to the present case, where Plaintiffs base their remand request on a single factor, *i.e.*, different third-country measures. That the record in this case contains evidence of one factor among many does not necessitate a remand of the cumulation decision.

Moreover, that the Commission found a likelihood of a reasonable overlap of competition in spite of the differing effects of the EU orders indicates there is little support for Plaintiffs' claim of competition differences. *See* CR 139 at 11–13, 20–21. Following agency practice, the Commission duly addressed each of the four factors used in its competition analysis. *See id*. at 8 n.45. First, the Commission found that subject imports and domestic like product are "sufficiently fungible for there be a reasonable overlap of competition" because some of the subject imports would be used as fertilizer and because one-quarter of domestic production is prilled urea. *Id*. at 12. The remaining three factors, *i.e.*, geographic overlap, channels of distribution, and simultaneous presence, were difficult to evaluate because the subject merchandise has been absent from the U.S. market since 1987. *Id*. Nevertheless, the Commission found a reasonable overlap of competition based on record evidence that: (a) international trading companies would likely sell solid urea from the subject countries to U.S. importers if the orders were revoked, (b) domestic and imported urea were "directed to the same customers and were frequently commingled in wholesalers' warehouses," and (c) "urea from both subject countries is marketed by the same international trading companies." *Id*. at 12–13. The Commission also took other factors into consideration, including the subject industries' export oriented nature, similar export markets, and high rates of capacity utilization. *Id*. In light of the evidence cited by the Commission, the court finds that substantial evidence supports the decision to cumulate the subject imports.

### *2. Likely Volume of Subject Imports*

Plaintiffs also challenge the affirmative volume determination by arguing that the Commission erred in its analysis of the Chinese urea embargo. Pls.' Resp. Br. 6–7. Specifically, Plaintiffs contend that record evidence of operation at almost [[ ]] capacity shows that the Russian and Ukranian industries had adjusted to the effects of the Chinese urea embargo and would be unlikely to shift exports into the United States.[8] Pls.' Resp. Br. 7. In its *Remand Determination*, the Commission found that "China's decision to restrict urea imports is likely to continue causing the subject producers to ship their production to *other markets* within the reasonably foreseeable future." *Remand Determination* at 9 (emphasis added). The plain meaning of the language demonstrates the Commission did not conclude that the Chinese measure would encourage subject producers to shift exports to the United States. Rather, the Commission found that subject producers will ship to other markets because they are unlikely to gain access to the Chinese market in the foreseeable future. *See Remand Determination* at 9. That the data implies subject producers have been able to adapt to the closing of China as an export market does not preclude the Commission from concluding that subject producers must search for export markets other than China. Indeed, the Commission's conclusion is supported by evidence that the Chinese embargo was a "significant factor in the substantial and rapid growth" of exports to the EU and Latin America, and that the "subject industries have the ability to divert rapidly a significant volume of their exports from foreign markets to the domestic market if Commerce revokes the orders." *Id*. at 9; *see* CR 113 Ex. 2, at 8–10, 21–22; *Azot I*, 2007 WL 2563571, at *10 n.15. Thus, because the Commission's conclusion is consistent with the data and is supported by the record, the court finds that the Commission properly cumulated the subject imports and properly evaluated the effects of the Chinese urea embargo.

## B. Likely Price Effects

Finding that the Commission failed to explain why subject imports would likely depress U.S. urea prices when non-subject imports have not affected domestic prices, the court ordered the Commission to explain "why the elimination of the subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers." *Azot I*, 2007 WL 2563571, at

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[8] The record indicates that between 1999 and 2004, the Russian industry's capacity utilization increased from [[ ]] and shipments to all markets increased by [[ ]]. Pls.' Resp. Br. 6–7; CR 134 at IV–9. The record also indicates that capacity utilization in Ukraine increased from [[ ]], and total shipments increased by [[ ]] during the same period. CR 134 at IV–14.

*14–15. On remand, the Commission considered the record evidence and ultimately concluded that the "subject imports are likely to enter the United States and have significant adverse effects on domestic prices if the orders are revoked." *Remand Determination* at 14. The Commission offered the following reasons for its finding: (1) "fundamental economics" predicts that significant volumes of low-priced Russian and Ukranian urea would likely place additional pricing pressure on all domestic and non-subject suppliers currently in the market; (2) the subject imports are likely to significantly undersell both the domestic like product and non-subject imports; (3) the record does not establish that the non-subject imports were significantly lower-priced than the domestic like product during the period of review; and (4) the lack of observable price effects from the non-subject imports is due, in part, to domestic producers importing a significant share of non-subject imports into the United States. *See id*. at 14–16.

***1. Fundamental Economic Principles***

Plaintiffs challenge the Commission's reliance on "fundamental economic principles," arguing that non-subject imports are likely to exit the U.S. market swiftly in the face of additional competition, rather than continuing to enter at a constant rate. Pls.' Resp. Br. 8–9. This argument, however, mischaracterizes the record evidence. Although the record indicates that non-subject imports have the *ability* to leave the United States and seek alternative markets, it does not show that they are *likely* to leave. Furthermore, even if non-subject imports were likely to leave the United States market, their exit does not preclude the subject merchandise from exerting downward pressure on domestic prices.[9] Because the Commission "has the discretion to make reasonable interpretations of the evidence and to determine the overall significance of any particular factor in its analysis," the court finds that the Commission's finding is consistent with the record evidence. *Goss Graphic Sys., Inc. v. United States*, 22 CIT 983, 1004, 33 F. Supp. 2d 1082, 1100 (1998) (citing *Me. Potato Council v. United States*, 9 CIT 293, 300, 613 F. Supp. 1237, 1244 (1985)).

***2. Freight Costs***

Plaintiffs also argue that in finding a likelihood of aggressive underselling, the Commission unreasonably relied on price compari-

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[9] In its second sunset determination the Commission noted that "only a relatively small portion of domestic shipments are insulated from import competition." CR 139 at 21 n.172. That subject imports may undersell and displace non-subject imports does not preclude displacement of domestic urea, given the likelihood that importers like [[ ]], which already market non-subject imports in the United States, will import and sell subject imports. *See id*.

sons that did not account for variations in freight costs. Pls.' Resp. Br. 9–11. The Commission found that "the record evidence, viewed as a whole, indicates that the subject imports are likely to significantly undersell both the domestic like product and non-subject imports." *Remand Determination* at 14 (footnote omitted); *see Azot I*, 2007 WL 2563571, at *13. According to the [[ ]] September 2005 study, there was a $28 to $45 per ton price differential between bulk prilled urea sold on a free on board ("f.o.b.") basis at Black Sea and Middle Eastern ports. *See Remand Determination* at 15; *see also Ad Hoc Committee Oct. 26, 2005 Submission of Additional Information to the* [*Commission*], CR 132 Attach. 1 at 9; CR 113 Ex. 22. The same study also showed that in 2004, prices for Russian and Ukranian urea were lower than urea from non-subject countries when entering third-country markets like Brazil, Canada, and Columbia. *Remand Determination* at 15 & n.52; *see* CR 113 Ex. 27.

According to Plaintiffs, the f.o.b. prices "had no probative value for assessing the delivered transaction price" because "when the difference in the freight rates [to Asia] is accounted for, there is [[ ]] between the [Black Sea] price and the Middle East price for prilled urea." Pls.' Confidential Resp. Br. 10 (second bracket in original). The court finds this argument unavailing for several reasons. First, as the Commission noted, Plaintiffs do not cite any evidence "supporting their assertion that freight costs from the Black Sea to Asian markets are *consistently and significantly* higher than the costs for shipment from Middle Eastern ports . . . . " *Remand Determination* at 15 n.52 (emphasis added). Second, Plaintiffs' claim ignores record evidence that [[

]]. *See* CR 113 Ex. 2 at 23. Third, Plaintiffs fail to acknowledge that pricing merchandise to compensate for expenses incurred in a [[ ]] percentage of their exports grants them an advantage vis-a-vis other producers when shipping to markets where there is little or no freight disadvantage. *See* CR 113 Ex. 7 at 2. Although Russia and Ukraine have a [[

]], these two markets constitute less than [[ ]] percent of total Russian and Ukranian exports in 2004.[10] *See* CR 113 Ex. 2 at 9–10, 22. In contrast, there is no evidence that subject producers experience the same sort of freight cost disadvantages in Latin America, a market that purchases [[ ]] percent of Russian urea exports and [[ ]] percent of Ukranian urea exports.[11] *See* CR 113 Ex. 2 at 9–10, 22. Rather, the record shows "consistent pricing differ-

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[10] In 2004, subject producers in Russia and Ukraine exported [[ ]] metric tons of urea, but shipped only [[ ]] metric tons to Asia and [[ ]] metric tons to Oceania, *i.e.*, less than [[ ]] percent of their total exports. CR 113 Ex. 2 at 9–10, 22.

[11] Although a " [[ ]]," f.o.b. prices at Baltic Sea ports were even lower than those at Yuzhnyy in 2005. CR 113 Ex. 2 at 10 & Ex. 7.

entials between the subject merchandise and other countries' exports" to Canada, Colombia and Brazil, markets which "reflect freight and transport charges at comparable levels."[12] *Remand Determination* at 15 n.52; CR 113 Ex. 27. Fourth, the court agrees with the Commission that "if the subject producers are pricing their products at lower prices to offset transportation costs to Asian markets, this indicates that they are willing to compete aggressively on price to com pete with other suppliers in export markets." *Remand Determination* at 15 n.52.

Given that freight differentials to [[ ]] export markets do not explain a low f.o.b. price for urea that subject producers ship predominantly to markets other than Asia and Oceania, and given that "the Commission, as the trier of fact, has considerable discretion in weighing the probative value and relevance of evidence," the court finds that the Commission reasonably relied on Black Sea f.o.b. prices as an indication that subject imports were likely to undersell both domestic and non-subject urea. *Mukand Ltd.*, 20 CIT at 906, 937 F. Supp. at 914.

### *3. The Commission's Reliance on Average Unit Values*

Plaintiffs contend that the Commission unreasonably relied on average unit value information that was flawed and of limited probative value.[13] Pls.' Resp. Br. 11–13. The court does not agree. The Commission is well aware of the potential pitfalls posed by average unit values and determines whether it may reasonably use the average unit value data for its likely price determination on a case by case basis.[14] Indeed, the Commission has stated that it "views [average unit values] with caution when comparing prices of the domestic like product and subject imports" because "the product mix in the two groups may differ" and "[average unit values] may not reflect an accurate price comparison for a particular product." *Greenhouse Tomatoes from Canada*, USITC Pub. 3424, Inv. No. 731–TA–925 (Preliminary), at 9 n.57 (May 2001) ("*Greenhouse Tomatoes*"). Accordingly, where there are differences in product mix or average unit

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[12] Russian and Ukranian urea compete against [[ ]]. *See* CR 132 Attach. 1 at 77–88. During 2004, the last year in the period of review, non-subject and subject urea imports differed by [[ ]] per metric ton in Brazil (f.o.b.), [[ ]] per metric ton in Colombia (c.i.f.), and [[ ]] per metric ton in Canada (f.o.b). CR 113 Ex. 27; *see Remand Determination* at 15.

[13] "[Average unit values] are computed by multiplying, for each product, the price of the product times the quantity sold, summing these results, and then dividing the total by the total number of products sold." *U.S. Steel Group v. United States*, 96 F.3d 1352, 1364 (Fed. Cir. 1996).

[14] Recognizing that "the Commission must assimilate and interpret large quantities of data" in making its determinations, the Federal Circuit has declined to "hold, as a general rule, that the Commission may not rely on [average unit value] trends as indicative of corresponding changes in price." *U.S. Steel Group*, 96 F.3d at 1364.

values represent a wide variety of transactions for many locations by several importers, the Commission does not utilize average unit values as an indicator of price comparisons. *See Urea Ammonium Nitrate Solutions From Belarus, Russia, and Ukraine*, USITC Pub. 3591, Inv. Nos. 731–TA–1006, 1008, and 1009 (Final), at 18 n.106 (Apr. 2003); *Oleoresin Paprika From India*, USITC Pub. 3415, Inv. No. 731–TA–923 (Preliminary), at 11 n.63 (Apr. 2001). Where product mix is *not an issue*, the Commission finds that average unit values reflect differences in average price. *See Hot-Rolled Steel Products From Argentina, China, India, Indonesia, Kazakhstan, Romania, South Africa, Taiwan, Thailand, and Ukraine*, USITC Pub. 3956, Inv. Nos. 701–TA–404–408 & 731–TA–898–902 & 904–908 (Review), at 37 & n.209 (Oct. 2007); *Silicon Metal From Russia*, USITC Pub. 3910, Inv. No. 731–TA–991 (Final) (Second Remand), at 13 n.69 (Mar. 2007); *Certain Polyester Staple Fiber From China*, USITC Pub. 3922, Inv. Nos. 731–TA–1104 (Final), at 17, 32–33 & n.210 (June 2007); *Greenhouse Tomatoes* at 9 n.57.

In this case, Plaintiffs provided no record evidence to support their claim that "in this context, average unit values can mask differences in product mix, making it impossible to conduct an apples-to-apples comparison." Pls.' Resp. Br. 11. Furthermore, the Commission found that prices for both forms of urea, *i.e.*, prilled and granular, are similar and that the two forms are moderately substitutable. *See* CR 139 at 16, 22.

The court is not persuaded by Plaintiffs's claim that the Commission misunderstood the data comparing f.o.b. prices for shipments of non-subject and subject urea to Canada and Brazil. Pls.' Resp. Br. 12. The Commission explicitly noted that imports into Brazil and Canada were priced on an f.o.b. basis, while Colombian prices were on a c.i.f. (*i.e.*, cost, insurance, and freight) basis. *Remand Determination* at 15 n.52. Moreover, that the Commission stated the prices "reflect freight and transportation charges at comparable levels" does not suggest that the data included the same types of freight, but rather, that the pricing data for each particular country is reported on the same basis. *Id*.

Although Plaintiffs also seek to discredit the Brazilian, Canadian, and Colombian price comparisons because the differences in all but five of the twenty-one comparisons is below $20 per ton, Pls.' Resp. Br. 13, the record is replete with evidence that price differences of this magnitude are significant. *See* CR 139 at 22–23 (stating that "price is an important consideration in purchasing decisions and the record indicates that consumers will consider switching to prilled

urea for use as a fertilizer given a sufficient discount."); [[ ]] *Questionnaire Response to the* [*Commission*], CR 28 at 11 [[ ]]; [[ ]] *Questionnaire Response to the* [*Commission*], CR 68 at 11 [[ ]]; [[ ]] *Questionnaire Response to the* [*Commission*], CR 46 at 11 [[ ]].

Because it is within the Commission's discretion "to assess the probative nature of the evidence obtained in its investigation and to determine whether to discount the evidence or to rely on it," the court holds that the Commission reasonably relied on the average unit value data to analyze the likely price effects of the subject imports. *See Goss Graphic Sys., Inc.*, 22 CIT at 1002, 33 F. Supp. 2d at 1099.

***4. Effect of Non-subject Imports on Domestic Urea Prices***

On remand the Commission found the record did not reflect that "non-subject imports were significantly lower-priced than the domestic like product during the period of review . . . ." *Remand Determination* at 16. Using its own pricing data as well as prices reported in the industry publication *Green Markets*, the Commission compared the prices of both types of urea at the Gulf Coast during the period of review. *Id*. While non-subject prices were "somewhat lower" than domestic prices at the Gulf Coast, "the pricing differential was small." *Id*. The Commission then attributed this small and insignificant price differential to the fact that domestic producers import a "large and significant" share of non-subject imports into the United States market. *Id*. Therefore,

> [g]iven that domestic producers imported a large share of the non-subject imports into the U.S. market at the end of the period of review, it is hardly surprising that the non-subject imports were priced at levels that did not adversely affect domestic pricing during the period of review.

*Id*.

Referring to data showing that domestic producers imported [[ ]], or [[ ]] percent, of the [[ ]] short tons of urea shipped into the United States in 2004, Plaintiffs claim that the Commission's finding cannot be sustained because it relied on inaccurate data regarding the percentage of imports attributable to domestic producers. Pls.' Confidential Resp. Br. 14 (citing CR 134 at I–40, Table I–6 & App. C Table C-2). The court, however, will not be persuaded by Plaintiffs' attempts to discredit information contained in its own submission, which stated that "[i]n 2004 domestic producers accounted for over [[ ]] of *reported* urea imports." *Pls.' Remand Proceeding Comments*, CR 145R at 10 (emphasis added); *Remand*

*Determination* at 16; CR 134 at I–42, Table I–7.[15] Because "[t]his Court lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation," and because the Commission reasonably interpreted the data reported by U.S. importers, the court finds that substantial evidence supports the Commission's finding.[16] *Acciai Speciali Terni S.p.A. v. United States*, 28 CIT 2013, 2030, 350 F. Supp. 2d 1254, 1269 (2004).

### *5. Average Unit Values of FSU Imports*

As a corollary to the adverse effect finding, the Commission noted that imports from former Soviet Union ("FSU") countries were priced lower than domestic urea after revocation of the AD orders. *Remand Determination* at 16 n.56. Accordingly, the Commission concluded that "[t]he behavior of the trading companies in selling this prilled urea from Black Sea ports is indicative of the manner in which the subject urea would be sold if the orders were revoked because it is most comparable to solid urea from Russia and Ukraine." *Id*. at 16–17 n.56. Plaintiffs contend that because "average unit values suffer from many shortcomings that render them unreliable indicators of price," the Commission unreasonably found that average unit values of FSU imports are indicative of likely subject import prices. Pls.' Resp. Br. 15. As discussed earlier, so long as there are no issues of product mix, the Commission is well within its discretion to reasonably rely on average unit values when making its determination. *See Goss Graphic Sys., Inc.*, 22 CIT at 1002, 33 F. Supp. 2d at 1099. Therefore, this argument fails.

According to Plaintiffs, the record contained information showing that the "actual U.S. market transaction price of FSU urea . . . [was] the same as U.S. producer's price" in September 2005. Pls.' Resp. Br. 15. However, Plaintiffs misconstrue the data. In its entirety, the record states that the "[i]mported product has sold at $305 [per short] ton Tampa, while PCS is at $305 [per short] ton Augusta." Pls.' Confidential Resp. Br. Attach. 13. The plain meaning of the language shows that the price quote does not specify the origin of the imported urea.[17] Moreover, it is unclear whether this particular data

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[15] The Commission solicited information from [[ ]] firms, and used data from the [[ ]] questionnaire responses it received to compile Table I–7. *See* CR 134 at I–41. The [[ ]] firms that responded account for [[ ]] percent of total United States imports and include five domestic producers – [[ ]]. *Id.*; *see CR* 134 at I–40, Table I–6.

[16] Even if the Commission were to find instead that domestic producers' imports accounted for only [[ ]] percent of total imports in 2004, it would nonetheless be reasonable for the Commission to find that "a large and significant share" of non-subject imports were imported into the United States given that said imports would constitute over [[ ]] of total imports. *See* CR 134 at I–40, Table I–6 & App. C Table C–2.

[17] The same report specifically refers to FSU urea by using phrases such as "FSU prices,"

represents an apples-to-apples comparison, as the evidence provides neither an f.o.b. price nor any indication of freight costs needed to ship the imports to Tampa or Augusta.[18] Pls.' Resp. Br. Attach. 13. Even if the import and PCS prices were appropriate for comparison, other evidence in the record contradicts Plaintiffs' claim. For example, the [[ ]] study shows that the price of FSU urea during 2005 was [[ ]] than urea from the Middle East, the United States, and the Carribean. CR 132 Attach. 1 at 104. Indeed, FSU urea undersold the domestic product by an average of [[ ]] percent. *See* CR 113 at 47 & Ex. 23. Given the unclear nature of the prices cited by Plaintiffs, the Commission reasonably relied on the other record evidence in concluding that FSU urea was priced lower than domestic urea.

### C. Likely Impact on the Domestic Industry

Upon review of the Commission's second sunset determination, the court held that the Commission failed to explain how it could find that high natural gas prices have weakened the domestic industry despite record evidence of increased profits and rising domestic urea prices. *See Azot I*, 2007 WL 2563571, at *15. In addition, because the court found that the data on sales, production, market share, production capacity, and capacity utilization revealed no particular trend, the Commission could not reasonably conclude that the industry would be vulnerable to material injury. *See id*. at *16. On remand, the court instructed the Commission to "reassess the likely impact of subject imports on the domestic industry to account for the difference between the first sunset reviews' findings and the findings of the current review within the context of the domestic industry's recent improved performance." *Id*. at *16.

Following its reexamination of the record, the Commission found that the "industry is vulnerable to the likely adverse impact of the subject imports upon revocation of the orders." *Remand Determination* at 18. Although various indicators of the industry's condition showed fluctuation and improvement during the period of review,[19] the Commission also found that "the industry experienced serious declines in other indicia of its condition over the period of review." *Remand Determination* at 19. Specifically, the industry lost 15.6 percent of its market share over the period of review, "falling from a majority position of 51.5 percent in 1999 to a minority position of 36.0

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"[[ ]]," and "FSU material." Pls.' Confidential Resp. Br. Attach. 13.

[18] Crucially, other evidence in the record indicates that the *f.o.b.* price of FSU urea during the third quarter of 2005 was between [[ ]] per ton. CR 132 Attach. 1 at 104.

[19] The record showed that the industry's operating income margins improved to profits of [[ ]] percent and [[ ]] percent in 2003 and 2004, productivity rates increased from [[ ]] short tons in 1999 to [[ ]] short tons in 2004, and average unit prices and net sales revenues improved considerably over the period of review. *Remand Determination* at 18–19; *see* CR 134 at I–6-I–7, Table I–1.

percent in 2004." *Id*. Between 2001 and 2004, industry capacity also declined significantly, falling 12 percent to 4.8 million tons. *Id.* Between 1999 and 2004, capacity utilization declined from 92.2 percent to 78.8 percent. *Id*. Other industry indicators show similar declines: shipment quantities fell by 19.8 percent during the period of review, workforce employment fell by 29.2 percent, hours worked fell by 30.5 percent and total wages fell by 13.3 percent. *Id*. (citing CR 134 at I–7, Table I–1 & App. C. Table C–1). The Commission noted that the domestic industry "was suffering further cutbacks in its production and capacity levels" as a result of natural gas supply shortages, spikes in natural gas pricing, plant closures, and inadequate demand. *Id*. at 20; *see* CR 134 at III–4–III–5. The Commission also acknowledged that "although the industry's average unit prices and sales revenues increased considerably over the period of review, these increases were offset to some degree by considerable, but smaller, increases in the industry's cost of goods sold, and selling, general and administrative expenses." *Remand Determination* at 20; *see* CR 134 at I–7, Table I–1. Based on the record evidence, the Commission determined that "the industry's position in the market has weakened to such an extent that it is vulnerable to the likely impact of the subject imports upon revocation." *Remand Determination* at 20.

Plaintiffs argue that the Commission should make its impact determination based solely on the conditions of currently operating domestic producers rather than on data that includes inefficient producers which have exited the business. Pls.' Resp. Br. 16–17. According to Plaintiffs, the inclusion of data from Mississippi Chemical Corp. and Terra Industries (which had exited the industry by 2005), to evaluate the "vulnerability or likely impact to the remaining producers distorts the actual performance of the industry, making it look [[ ]] than it actually was." Pls.' Confidential Resp. Br. 18. The court does not agree.

To determine the likelihood of continuation or recurrence of material injury, the Commission must evaluate "whether the *industry* is vulnerable to material injury if the order is revoked or the suspension agreement is terminated." 19 U.S.C. § 1675a(a)(1)(C) (emphasis added). That the term "industry" means "*producers as a whole* of a domestic like product" indicates that the Commission must evaluate the entire industry and include all of the participating producers. § 1677(4)(A) (emphasis added). This Court has also previously found that the Commission must "assess whether the industry 'as a whole' has been injured by the subject imports." *Cleo Inc. v. United States*, Slip Op. 06–131, 2006 WL 2685080, at *16 (Aug. 31, 2006).

With regard to the likely impact of subject imports, the Commission must consider all relevant economic factors that will affect the condition of the domestic industry. § 1675a(a)(4). This analysis does not occur in a vacuum, but rather, "within the context of the busi-

ness cycle and the conditions of competition that are distinctive to the affected industry." Id. A clear picture of market conditions and trends is possible only if the Commission considers all of the relevant economic data from the period of review. The fact that domestic producers were forced to exit the market is itself a condition of competition and an indicator of overall market conditions. As a result, "[a]ny vulnerability (or injury) analysis that excludes producers that exited the industry during the period will necessarily be inaccurate because it ignores those producers that have been most quickly affected by competitive conditions."[20] Def.-Int. Comments 17. Furthermore, exclusion of this data would mask the industry's shrinkage and obscure declining market share, capacity utilization, and United States shipments. *See Remand Determination* at 19.[21] The Commission must therefore evaluate the industry as a whole and include such data from the participating producers that it finds relevant to its analysis and will act as substantial evidence for its conclusions.

Plaintiffs also claim that because the Commission unreasonably relied on witness testimony, substantial evidence does not support a finding that "the domestic industry was no longer profitable by the second half of 2005." Pls.' Resp. Br. 19 (quotations omitted); *see Remand Determination* at 25. However, because "assessments of the credibility of witnesses are within the province of the trier of fact," this Court "lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation." *Negev Phosphates, Ltd. v. Dep't of Commerce*, 12 CIT 1074, 1092, 699 F. Supp. 938, 953 (1988); *see Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1358–59 (Fed. Cir. 2006); *NMB Sing. Ltd. v. United States*, 27 CIT 1325, 1348–49, 288 F. Supp. 2d 1306, 1326 (2003). In this case, the Commission cited the duly sworn and unimpeached testimony of three witnesses who testified to low profit margins in the second half of 2005. *See* Pls.' Confidential Resp. Br. Attach. 16 at 128–129. The Commission, therefore, reasonably relied on the record evidence to support its finding. Thus, in light of the significant declines in market indicia, the court finds that substantial evidence supports the Commission's finding that the domestic industry is vulnerable to the likely adverse impact of subject imports.

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[20] The record evidence shows that the domestic industry has become smaller over the course of the past two decades. *See Remand Determination* at 23. During the original investigations, twenty four firms operated in the domestic urea industry, with the number falling to twelve at the end of the first reviews, and seven in 2005. *See id*.; CR 139 at 17.

[21] Even if the Commission were to exclude the two inefficient firms from the data set, there would be no significant effect on the ratio of operating income/loss to net sales. *Compare* Pls.' Resp. Br. Attach. 17 (showing [[ ]] percent in 2003 and [[ ]] percent in 2004) *with* CR 134 at I–7, Table I–1 (showing [[ ]] percent in 2003 and [[ ]] percent in 2004).

## V. Conclusion

For the foregoing reasons, the court finds that the Commission reasonably relied on the record evidence and that its analysis is supported by substantial evidence. Accordingly, the *Remand Determination* is **AFFIRMED**.

## Slip Op. 08–78

A.D. SUTTON & SONS, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge

Court No. 03–00510

[Motion and cross-motion for summary judgment denied.]

Dated: July 16, 2008

*Serko Simon Gluck & Kane LLP* (*Joel K. Simon* and *Robert D. DeCamp*) for the plaintiff.

*Gregory G. Katsas*, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Gardner B. Miller* and *Marcella Powell*); *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, of counsel, for the defendant.

### *OPINION*

Restani, Chief Judge: This matter is before the court on cross-motions for summary judgment by plaintiff A.D. Sutton & Sons ("A.D. Sutton") and defendant United States ("the Government").[1] A.D. Sutton challenges the classification for tariff purposes of its imported merchandise, bags that it claims are used to store baby food and beverages. The United States Bureau of Customs and Border Protection ("Customs") classified the bags under the Harmonized Tariff Schedule of the United States (1998) ("HTSUS") subheading 4202.92.45 as other "[t]ravel, sports and similar bags" at 20% *ad valorem*.[2] A.D. Sutton contends that the bags should be classified un-

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[1] This case is designated a test case. (Order Granting Mot. for Test Case Designation (Nov. 4, 2004).)

[2] Subheading 4202.92.45 reads as follows:

4202 Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and

der subheading 3924.10.50 as other plastic "[t]ableware and kitchenware" at 3.4% *ad valorem*.[3] Because a genuine issue of material fact exists as to the principal use of the bags, the motions for summary judgment will be denied.

## *BACKGROUND*

The bags at issue entered through the Port of Newark in 1997 and 1998 and were liquidated in 1998 and 1999. (Gov't's Resp. to A.D. Sutton's Statement of Material Facts Not in Issue ¶¶ 7–8.) The parties agree that the bags are approximately 11″ high x 9″ wide x 5″ deep, that they are constructed of an outer and inner layer of plastic, and that some of the bags contain a middle layer of foam approximately three millimeters thick. (*Id.* at ¶ 13.) The parties also agree that the bags consist of a 495-cubic-inch compartment secured by a zipper or velcro mechanism, and have carrying straps and two internal elastic loops. (*Id.* at ¶ 14; Mem. in Opp'n to Pl.'s Mot. for Summ. J. & in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s Opp'n & Cross-Mot. for Summ. J.") 15.) A.D. Sutton refers to the bags as "insulated soft-sided coolers" or "bottle bags" and claims that they are "used to store and transport infants' food and beverages over short periods of time." (Gov't's Resp. to A.D. Sutton's Statement of Material Facts Not in Issue ¶ 10; Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts ¶ 1.) It contends that the "specific design of the two layers of [plastic] sheeting enclosing cell foam plastic insulation allows for storage and transportation of food at or near desired temperatures for a reasonable amount of time." (Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. (May 11, 2007) ("Pl.'s Mot. for Summ. J.") 5.)

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backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper:

. . .

Other:

. . .

4202.92 With outer surface of sheeting of plastic or of textile materials:
Travel, sports and similar bags:

. . .

4202.92.45 Other.

[3] Subheading 3924.10.50 reads as follows:

3924 Tableware, kitchenware, other household articles and toilet articles, of plastics:

3924.10 Tableware and kitchenware:

. . .

3924.10.50 Other.

Customs initially classified the bags as part of a set under HTSUS subheading 4202.92.45, as they were imported as part of "3-in-1" and "5-in-1" diaper bag sets. (Pl.'s Resp. to Def.'s Statement of Undisputed Material Facts ¶ 1; Answer to Compl. ¶ 6.) A.D. Sutton commenced this action to challenge the set determination, arguing that the bags should be classified individually and under subheading 3924.10.50. (Compl. ¶¶ 41–44.) After A.D. Sutton filed a motion for summary judgment, the Government conceded the set issue and moved to stay the action to conduct additional discovery to determine whether the bags were properly classifiable under heading 4202 or heading 3924. (Order Granting Mot. to Stay (Dec. 15, 2006); Consent Mot. to Stay; Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. (Sept. 29, 2006) ("First Summ. J. Mot."), Ex. A to Def's Opp'n & Cross-Mot. for Summ. J.) While the action was stayed, Customs tested samples of the bags to determine their insulative properties. (Joint Status Report.) Based on the test results, Customs concluded that the bags' foam layer possesses no insulative properties and therefore could not effectively maintain food and beverage temperature, and classified the bags under subheading 4202.92.45. (*Id.*; Def.'s Statement of Undisputed Material Facts ¶¶ 6–7.)

A.D. Sutton withdrew its prior summary judgment motion and filed the present motion, adhering to its claim that the bags should be classified under subheading 3924.10.50. (Withdrawal of Mot. for Summ. J.; *see generally* Pl.'s Mot. for Summ. J.) The Government cross-moved for summary judgment, urging the court to sustain its classification. (*See generally* Def.'s Opp'n & Cross-Mot. for Summ. J.)

## *JURISDICTION & STANDARD OF REVIEW*

The court has jurisdiction under 28 U.S.C. § 1581(a) in this action to contest the denial of timely protests filed under Section 515 of the Tariff Act of 1930.

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 and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c).

Determining the proper classification of imported merchandise involves a two step analysis: "(1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed." *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed. Cir. 1999) (citing *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998)). The first step is a question of law, and the second is a question of fact. *Id.* Both are decided *de novo* here. 28 U.S.C. § 2640(a)(1); *Cargill, Inc. v. United States*, 318 F. Supp. 2d 1279, 1287 (CIT 2004). Customs' classification of imported merchandise is presumed to be correct under 28 U.S.C.

§ 2639(a)(1). This presumption of correctness attaches only to factual determinations. *Universal Elecs. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997). An importer challenging the decision has the burden of overcoming the presumption. 28 U.S.C. § 2639(a)(1).

## *DISCUSSION*

### I

Preliminarily, A.D. Sutton contends that the Government's prior stipulations that similar bags were classifiable under subheading 3924.10.50 preclude the Government from now arguing otherwise. (Pl.'s Resp. to Def.'s Cross-Mot. for Summ. J. & Pl.'s Reply ("Pl.'s Resp. & Reply") 8–9.) This argument lacks merit. In classification cases, "[e]ach new entry is a new classification," and res judicata does not apply to bar successive litigation over the classification of subsequent similar imported merchandise, even if it involves the same issues of fact and questions of law. *Aves. in Leather, Inc. v. United States*, 317 F.3d 1399, 1403 (Fed. Cir. 2003) (citing *United States v. Stone & Downer Co.*, 274 U.S. 225 (1927)).

### II

To determine the proper classification of imported merchandise, the court looks to the General Rules of Interpretation ("GRIs") of the HTSUS. *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs set forth the order in which the elements of classification are considered. *Pillowtex Corp.*, 171 F.3d at 1374. Under GRI 1, the Court must first construe the language of the heading as well as relative section or chapter notes to determine whether the product at issue is classifiable under that heading. *Orlando Food Corp*, 140 F.3d at 1440. The court may refer to subsequent GRI provisions only where the headings and notes do not require a particular classification. GRI 1; *Pillowtex Corp.*, 171 F.3d at 1374. Only after the court determines that the merchandise is classifiable under a particular heading should it then look to the subheadings to find the correct classification. *Orlando Food Corp.*, 140 F.3d at 1440.

Note 2(ij) to Chapter 39 provides that the chapter "does not cover . . . trunks, suitcases, handbags or other containers of heading 4202." Note 2(ij) to Chapter 39, HTSUS. Thus, the court must first determine whether the bags are *prima facie* classifiable under heading 4202. *See Midwest of Cannon Falls, Inc. v. United States*, 122 F.3d 1423, 1429 (Fed. Cir. 1997). If the court so concludes, the bags are precluded from classification under heading 3924.

Heading 4202 is organized as a list of exemplars followed by the general term "similar containers." The Government argues that the bags are classifiable under heading 4202 because they are encompassed by the listed exemplars "traveling bags" and "bottle cases" or,

alternatively, by the general term "similar containers." (Def.'s Opp'n & Cross-Mot. for Summ. J. 10–13.) Heading 4202 is an *eo nomine* provision, as it describes the merchandise by name. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). An *eo nomine* designation ordinarily includes all forms of the named item. *Id.* The Government claims that, given its common meaning, "traveling bags" encompasses "all forms of flexible containers accompanying a traveler that may be closed for holding, storing, or carrying something." (Def.'s Opp'n & Cross-Mot. for Summ. J. 12.) Applying the same analysis to "bottle cases," the Government also claims, the term encompasses "all forms of decorative or protective containers for bottles." (*Id.* at 13.)

In classification cases, "[w]hen a list of items is followed by a general word or phrase, the rule of *ejusdem generis* is used to determine the scope of the general word or phrase." *Aves. in Leather, Inc. v. United States*, 178 F.3d 1241, 1244 (Fed. Cir. 1999). Under the rule, "the general word or phrase is held to refer to things of the same kind as those specified." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994). Thus, to fall within the scope of the general term, the imported good "must possess the same essential characteristics or purposes that unite the listed examples preceding the general term or phrase." *Aves. in Leather*, 178 F.3d at 1244. It is established that the exemplars in heading 4202 possess "the essential characteristics of organizing, storing, protecting, and carrying various items." *Totes, Inc. v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995). Applying the general rules of classification, because the bags here are used to organize, store, protect, and carry items, they would appear to be similar to "traveling bags" and "bottle cases," exemplars in heading 4204, and thus *prima facie* classifiable under heading 4202, and simultaneously excluded from classification under heading 3924. Ordinarily, this would end the matter, however, as will be explained, it does not.

The court is not writing on a clean slate here. The Federal Circuit, in *SGI, Inc. v. United States*, 122 F.3d 1468 (Fed. Cir. 1997), held that imported merchandise possessing the primary purpose of storing food and beverages are properly classifiable under heading 3924 and are not classifiable under heading 4202. Bound by the holding in *SGI*, the court must classify the bags under heading 3924 if their primary use is to store food or beverages, even if the bags appear to be similar to the exemplars listed in heading 4202.[4] Thus, applying

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[4] Since *SGI* was decided, by Presidential Proclamation, the term "insulated food or beverage bags" was added to the list of exemplars in heading 4202, in response to amendments to the International Convention on the Harmonized Commodity and Description and Coding System. Proclamation 7515, 66 Fed. Reg. 66,549, 66,619 (Dec. 18, 2001), *as corrected by* Technical Corrections to the Harmonized Tariff Schedule of the United States, 67 Fed. Reg. 2008 (Jan. 15, 2002); U.S. International Trade Commission, Publication 3430, Proposed Modifications to the Harmonized Tariff Schedule of the United States, Investigation No.

this precedent, the court must now determine the principal use of the bags.

## III

A.D. Sutton claims the bags are insulated "soft-sided coolers" used to store and transport baby food and beverages. (Pl.'s Mot. for Summ. J. 5–6.) In support, it submitted an affidavit and deposition of its president, David Sutton, and a sample of the bag.

Sutton's affidavit focuses on the factors, outlined in *United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976), that the court considers in determining the principal use of an imported merchandise.[5] Sutton stated that the bags are "principally sold wherever infant and toddler products are sold"; "marketed, designed and primarily used by the ultimate consumer (usually a parent) to carry baby bottles, jars of baby food, 'sipee' cups for toddlers, and other feeding items for toddlers and infants"; expected by "the ultimate purchaser . . . to store and transport an infant's food and beverage at a desired temperature while going on short trips"; and recognized by

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1205–5 (Final) 4 (June 2001). The modified provision reads:

| | |
|---|---|
| 4202 | Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, *insulated food or beverage bags*, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper. |
| . . . | |
| | Other: |
| . . . | |
| 4202.92 | With outer surface of sheeting of plastic or of textile materials: Insulated food or beverage bags: |
| . . . | |
| 4202.92.05 | With outer surface of textile materials |
| . . . | |
| 4202.92.10 | Other. |

HTSUS (2002) (emphasis added). The amendment, however, applies to imported merchandise entered on or after January 1, 2002. 66 Fed. Reg. at 66,553. Because the bags were entered prior to that date, the modification is inapplicable in this case, and the court must apply the applicable duty rate at the time of entry. *See* 19 C.F.R. § 141.69. Of course, for the future, the issue is resolved in the manner asserted by the Government here.

[5] The factors are "[1] the general physical 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 (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed), [5] the use, if any, in the same manner as the merchandise which defines the class, [6] the economic practicality of so using the import, and [7] the recognition in the trade of this use." *Carborundum*, 536 F.2d at 377 (internal citations omitted).

the "infant accessories trade" that their predominant use "is for storage and containment of food and beverages." (Aff. of David Sutton (May 11, 2007) ("Sutton Aff.") ¶¶ 5–7, 14, Ex. 2 to Pl.'s Mot. for Summ. J.) Sutton also stated that "[t]he zippered or velcroed closure helps enclose food or beverage"; "[t]he interior elastic loops are conducive to keeping bottles and jars of various sizes in an upright position"; "[t]he interior plastic lining allows for easy clean-up of spilled food and beverage"; and the "plastic cell foam insulation . . . allow[s] for thermal regulation." (*Id.* at ¶¶ 8–10.) Attached to the affidavit are purchase orders from 1997 through 2000 containing descriptions and drawings of the bags, identified as "bottle bags," and other imported bags. (*See* Purchase Orders, Attach. to Sutton Aff.)

The Government contends that the affidavit is conclusory in nature and defective because Sutton provided "no foundation, documentation, or explanation as to how he is qualified to make any of the statements made in the affidavit." (Def.'s Opp'n & Cross-Mot. for Summ. J. 16.) These objections are unavailing.

Under USCIT R. 56, affidavits are sufficient to support a summary judgment motion if they are "made on personal knowledge, . . . set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein." USCIT R. 56(e). The court recognizes that importers "have every incentive for knowing the uses to which their goods are or may be put" and that "executives concerned with designing, framing specifications, ordering, importing, selling, distributing, and promoting an article have to know its chief uses and are competent to testify about them." *Dolly*, 293 F. Supp. 2d at 1350 (quoting *Novelty Import Co., v. United States*, 285 F. Supp. 160, 165–66 (Cust. Ct. 1968)). Sutton worked for the company for thirty-one years and has been its president for eighteen years. (Sutton Aff. ¶ 1; Sutton Dep. 51:6–15 (May 17, 2006), Ex. D to Def.'s Opp'n & Cross-Mot. for Summ. J.) Thus, he is presumed to have personal knowledge of, and would be competent to testify about, the bags' chief use. In any event, his deposition and other record evidence are sufficient to support A.D. Sutton's motion. *See* USCIT R. 56(c) (summary judgment may be granted on the "pleadings, depositions, answers to interrogatories, and admissions on file").

During his deposition, Sutton testified that the bags are insulated and are primarily used "[t]o carry a bottle" and "to keep food at a certain temperature." (Sutton Dep. 25:11–19, 41:17–42:1, 42:21–23, 54:4–7, Ex. 3 to Pl.'s Mot. for Summ. J.) Further, in its interrogatory responses, A.D. Sutton stated that "[t]he insulated Bottle Bag is designed for, and dedicated to be used to keep an infant's or toddler's food and drink at an optimal temperature over an extended period of time while keeping the food and drink protected from undesirable external environmental factors." (Pl.'s Resp. to Def.'s First Interrogs. & First Reqs. for Prod. of Docs. & Things ("Interrogatories") 12, Ex.

F to Def.'s Opp'n & Cross-Mot. for Summ. J.) A.D. Sutton also distinguished the bags from the diaper bags that were sold with the bags by stating that the diaper bags were not intended to be used to carry food or beverages because of "the availability of specialized insulated Bottle Bags . . . specifically designed and marketed for carrying baby's bottles, food, and beverages." (*Id.* at 16.) This evidence, if unrebutted, is sufficient to support summary judgment for plaintiff under the principles of *SGI*.

## IV

The Government argues that the bags are not capable of insulating and therefore could not be used to contain food or beverages at a certain temperature.[6] (Def.'s Opp'n & Cross-Mot. for Summ. J. 15.) In support, it submitted the laboratory reports of the tests that Customs performed on the bags, which concluded that the foam middle layer provide no insulative properties. (Laboratory Report 1 (Jan. 18, 2007) ("First Lab Report") & Laboratory Report 3 (Feb. 5, 2007) ("Second Lab Report") (collectively "Lab Reports"), Ex. C to Def.'s Opp'n & Cross-Mot. for Summ. J.) The First Lab Report contains the results of a first set of tests, and the Second Lab Report contains results from a second set of tests. (*See generally* Lab Reports.) Accompanying the Reports is a declaration of the Assistant Laboratory Director who supervised the second set of tests, concluding that "the foam middle layer does not provide insulating properties to the [ ]bags, and the [ ]bags are not suited for maintaining the desired temperature of food or drinks for an extended period of time." (Decl. of Harold Katcher ("Katcher Decl.") ¶ 14, Ex. C to Def.'s Opp'n & Cross-Mot. for Summ. J.) The declaration discusses only the results detailed in the Second Lab Report.

A.D. Sutton claims the second set of tests is technically flawed because the tests deviated from the "cold milk bottle test" performed in *Dolly, Inc. v. United States*, 293 F. Supp. 2d 1340 (CIT 2003).[7] (Pl.'s

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[6] A.D. Sutton argues that capability or adequacy is not controlling of use. This argument is somewhat inconsistent with its position that the insulative capability of the bags distinguishes them from other bags and renders them appropriate for carrying food and beverages. (*See* First Summ. J. Mot. 28; Interrogatories at 16.)

Insulation generally is not determinative of whether a merchandise is used to store food or beverages, but is merely evidence of such use. *See Sports Graphics, Inc. v. United States*, 806 F. Supp. 268, 273 (CIT 1992) ("Although insulation is not a requirement . . . [it] is indicative of an ability to store food and beverages"), *aff'd* 24 F.3d at 1390. But here, determination of the bags' use depends on their ability, or, at least, perceived ability to maintain the temperature of food or beverages. Thus, whether the bags provide useful insulation is a material fact.

[7] The *Dolly* test entailed placing a bottle of milk in the subject bag there, leaving another bottle in open air, and measuring the temperature of the milk after fifty minutes. *Dolly*, 293 F. Supp. 2d at 1347 n.4. The *Dolly* court found that the bag possessed some insulative properties because there was an 8.4 degree difference between the milk in the bag and the milk exposed to open air. *Id.* The tests here entailed placing a bottle of milk inside a sample of

Resp. & Reply 13–18.) Although the tests performed in this case were different from the one in *Dolly*, there is no authority establishing that the *Dolly* test is the legally-accepted test to measure the insulative properties of imported merchandise for classification purposes. The test performed in *Dolly* was merely an ad hoc test conducted in the courtroom during trial proceedings. *Dolly*, 293 F. Supp. 2d at 1347 n.4. Furthermore, despite its complaints about Customs' tests, rather than conduct its own *Dolly* test, A.D. Sutton claims that Customs' test results actually support its position that the bags possess insulative capabilities. A.D. Sutton submitted a report from its own expert which states that the test results show that the bags actually decrease the rate of temperature change. (Technical Review of Laboratory Procedure for Testing Food & Beverage Tote Bags for Their Insulating Properties: The Dolly Test & the Cold Milk Bottle Test ("Crain Report") 14–15, Ex. 12 to Pl.'s Resp. & Reply.) The data relied upon in that report, however, is inconsistent with that in the Lab Reports, and A.D. Sutton does not explain where the data was obtained. (*Compare* Crain Report 14–15 *with* Second Lab Report.)

A.D. Sutton also claims that the Government skewed the evidence by giving little weight to the first set of tests.[8] (Pl.'s Resp. & Reply 11.) A.D. Sutton points out that the Government submitted the First Lab Report without also submitting the accompanying Laboratory Analytical Summary Sheet ("Summary Sheet"), which set forth the details of the tests and the test results.[9] (*Id.*) A.D. Sutton claims that those results support its position because the tests described in the Summary Sheet are more analogous to the *Dolly* test, and that the one conforming most strongly with the *Dolly* test shows a 7.3 degree difference between the milk in the bag and the milk left in open air. (*Id.* at 11–13.) Although this test conforms to the *Dolly* test and demonstrates insulative capabilities, the bag used was not one of the bags at issue, but was a sample of a similar bag with a five-millimeter foam layer that A.D. Sutton submitted in connection with a previously stipulated case. (Katcher Decl. ¶ 10.) Furthermore, the other five tests described in the Summary Sheet fail to rebut the Government's evidence. Two of them were tainted with testing defi-

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the bags, a similar bag without the foam layer, and a brown paper bag, and recording the temperatures at certain intervals over the course of four hours. (Katcher Decl. ¶ 6; Second Lab Report.) Customs also compared the insulative capabilities of the bags at issue with and without the foam layer. (Katcher Decl. ¶ 6.) In *Dolly*, each bottle had a thermometer attached to it, but it is unclear here whether thermometers were attached to the bottles or whether the bags were opened to obtain the temperature readings. (Pl.'s Resp. & Reply 12 n.6.) While both bottles in *Dolly* had the same initial temperature readings, the initial temperature reading for each bottle here was slightly different. (Second Lab Report.)

[8] A.D. Sutton also contends that Customs' reference to the First Lab Report as "Preliminary Results" and reference to the Second Lab Report as "Final Results," and the proximity of the dates noted on both reports, are "highly suggestive" of "a blatant attempt to manufacture data." (Pl.'s Resp. & Reply 18–19.) These contentions are speculative.

[9] A.D. Sutton provided the court with a copy of the Summary Sheet.

ciencies and could not provide any "conclusive evidence to be used for further consideration" (Summary Sheet 3, Ex. 6 to Pl.'s Resp. & Reply.) The other three show no difference in insulative properties between the subject bags and a different bag regardless of the thickness or existence of a foam layer in the other bag. (*Id.* at 4–6.)

Nonetheless, based on an independent review of the data in the Summary Sheet, the court finds that the bags, even without the foam layer, still offer some degree of insulation. Indeed, A.D. Sutton's expert witness stated that "any sealed container[ ] actually would provide some 'insulation.' " (Crain Report 11). And the Government admitted that the bags insulate as well as a brown paper bag. (Def.'s Statement of Undisputed Material Facts ¶ 8.)

## *CONCLUSION*

In sum, under *Carborundum*, the determination of the principal use of the bags involves determinations as to a subsidiary set of questions. The Government attempted to answer some questions and Sutton others. Although the Government's evidence tends to show that the foam layer is not capable of insulating to a great degree and thus the product may not be for food storage, its evidence also suggests that the bags may still offer some degree of insulation. For its part, A.D. Sutton fails to show that the foam layer retards temperature change to a significant degree, but its evidence, while somewhat conclusory, indicates that the bags are actually sold for the purpose of storing food and beverages. The evidence raises a genuine issue of material fact as to the principal use of the bags for classification purposes.[10] The parties' motions for summary judgment are DENIED.

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[10] Because the Government's evidence fails to show conclusively that the bags are not suitable for food storage, and A.D. Sutton provides evidence of the intended use of the bag, the presumption of correctness applicable to Customs' factual determinations does not resolve the issue.

## SLIP OP. 08–79

TOYS "R" US, INC., Plaintiff, v. UNITED STATES, Defendant, and AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR LEGAL TRADE, and VAUGHAN-BASSETT FURNITURE COMPANY, INC. Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court No. 07–00115

[Commerce scope inquiry determination remanded.]

Dated: July 16, 2008

*Grunfeld Desiderio Lebowitz Silverman & Klestadt, LLP* (*Mark E. Pardo* and *Paul G. Figueroa*) for the plaintiff.

*Gregory G. Katsas*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Brian A. Mizoguchi*); *Nithya Nagarajan*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

*King & Spalding, LLP* (*J. Michael Taylor*, *Stephen A. Jones*, *Joseph W. Dorn*, and *Tina M. Shaughnessy*) for the defendant-intervenors.

### *OPINION*

Restani, Chief Judge: This matter is before the court on plaintiff Toys "R" Us' ("TRU") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. Plaintiff, an importer of certain toy boxes from the People's Republic of China ("PRC"), challenges the United States Department of Commerce's ("Commerce") final scope ruling regarding an antidumping duty order covering certain wooden bedroom furniture from the PRC. (*See* Compl. ¶¶ 1–2); *see also Wooden Bedroom Furniture from the People's Republic of China: Scope Ruling on Toy Boxes*, *available at* App. to Pl.'s Br. in Supp. of Rule 56.2 Mot. for J. Upon the Agency R. ("Pl.'s App."), Tab 4 (Mar. 9, 2007) ("*Final Scope Ruling*"). For the reasons stated below, the court remands to Commerce to determine a functional test and to conduct a scope inquiry in accordance with 19 C.F.R. § 351.225(k)(2).

### BACKGROUND

On October 31, 2003, the American Furniture Manufacturers Committee for Legal Trade filed a petition for the imposition of antidumping duties against wooden bedroom furniture from the PRC. *See Petition for the Imposition of Antidumping Duties Against Wooden Bedroom Furniture from China*, *available at* Pl.'s App., Tab 1, at Ex. 5 (Oct. 31, 2003) ("*Petition*"). An antidumping duty order was placed on certain wooden bedroom furniture from the PRC in January 2005. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Wooden Bed-*

*room Furniture From the People's Republic of China*, 70 Fed. Reg. 329, 329–30 (Jan. 4, 2005) ("*WBF Order*"). The scope of this order was stated as follows:

> The product covered by the order is wooden bedroom furniture. Wooden bedroom furniture is generally, but not exclusively, designed, manufactured, and offered for sale in coordinated groups, or bedrooms, in which all of the individual pieces are of approximately the same style and approximately the same material and/or finish.

*Id.* at 332. Additionally, the subject merchandise included the following items:

> (1) Wooden beds such as loft beds, bunk beds, and other beds; (2) wooden headboards for beds (whether stand-alone or attached to side rails), wooden footboards for beds, wooden side rails for beds, and wooden canopies for beds; (3) night tables, night stands, dressers, commodes, bureaus, mule chests, gentlemen's chests, bachelor's chests, lingerie chests, wardrobes, vanities, chessers, chifforobes, and wardrobe-type cabinets; (4) dressers with framed glass mirrors that are attached to, incorporated in, sit on, or hang over the dresser; (5) chests-on-chests, highboys, lowboys, chests of drawers, chests, door chests, chiffoniers, hutches, and armoires; (6) desks, computer stands, filing cabinets, book cases, or writing tables that are attached to or incorporated in the subject merchandise; and (7) other bedroom furniture consistent with the above list.

*Id.* at 332 (footnotes omitted). A "chest" was defined as being "typically a case piece taller than it is wide featuring a series of drawers and with or without one or more doors for storing clothing. The piece can either include drawers or be designed as a large box incorporating a lid."
*Id.* at 332 n.5. The *WBF Order* also contained a list of particular items that were excluded from the scope of the order.[1]

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[1] The following items were excluded:

(1) Seats, chairs, benches, couches, sofas, sofa beds, stools, and other seating furniture; (2) mattresses, mattress supports (including box springs), infant cribs, water beds, and futon frames; (3) office furniture, such as desks, stand-up desks, computer cabinets, filing cabinets, credenzas, and bookcases; (4) dining room or kitchen furniture such as dining tables, chairs, servers, sideboards, buffets, corner cabinets, china cabinets, and china hutches; (5) other non-bedroom furniture, such as television cabinets, cocktail tables, end tables, occasional tables, wall systems, book cases, and entertainment systems; (6) bedroom furniture made primarily of wicker, cane, osier, bamboo or rattan; (7) side rails for beds made of metal if sold separately from the headboard and footboard; (8) bedroom furniture in which bentwood parts predominate; (9) jewelry armories; (10) cheval mirrors[;] (11) certain metal parts[;] (12) mirrors that do not attach to, incorporate in, sit on, or hang over a dresser if they are not designed and marketed to be sold in conjunction with a dresser as part of a dresser-mirror set. *Id.* at 332–33 (footnotes omitted).

On September 26, 2006, TRU filed a scope ruling request, asking that Commerce find five toy boxes imported by TRU to be outside the scope of the *WBF Order*. *Toys "R" Us Scope Inquiry on Certain Toy Boxes—Wooden Bedroom Furniture from the People's Republic of China*, *available at* Pl.'s App., Tab 1 (Sept. 26, 2006). TRU argued that the clear language of the *WBF Order*, as well as the descriptions included in the petition and the International Trade Commission's ("ITC") final report, indicated that the toy boxes at issue are not wooden bedroom furniture. *Id.* at 8. Specifically, TRU maintained that "toy boxes are not included in the scope based on the language covering bedroom chests because toy boxes are very distinct products used solely for the specific purposes of storing toys as well as entertaining and educating children." *Id.*

On March 9, 2007, Commerce released its final scope ruling, finding that four of the five boxes at issue were within the scope of the antidumping duty order. *Final Scope Ruling* at 9. Pursuant to 19 C.F.R. § 351.225(k)(1), Commerce found the description of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary of Commerce (including prior scope determinations)[2] and the ITC to be dispositive of the matter. *Id.* at 8–9. Commerce reiterated that "the WBF Order 'makes no reference requiring that boxes or chests be used for any particular or defined purpose. Nor does {it} provide exclusionary language for toy boxes or chests or any other wooden bedroom furniture that may be fitted with slow-closing safety hinges, special locking mechanisms, or air vents.' " *Id.* at 8 (citing *Dorel Scope Ruling* at 12). Finding that four of the five toy boxes "are large boxes, incorporating a lid, and are made substantially of wood," Commerce determined that "these toy boxes clearly meet the description of the merchandise covered by the WBF Order." *Id.* at 8–9. Commerce therefore found it unnecessary to consider the additional factors contained in 19 C.F.R. § 351.225 (k)(2). *Id.* at 9.

## JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2). Commerce's final scope determination is upheld unless it is 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). "The court

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[2] In an unrelated scope determination made on November 14, 2005, Commerce found that certain infant furniture, including infant armoires and toy boxes or chests, were within the scope of the *WBF Order* pursuant to 19 C.F.R. § 351.225(k)(1). *Final Scope Ruling and Formal Scope Inquiry Initiation: Dorel Asia*, *available at* Pl.'s App., Tab 1, at Ex. 1 (Nov. 14, 2005) ("*Dorel Scope Ruling*"). Commerce determined that the scope language "clearly states that wooden bedroom 'chests' or 'box[es] incorporating a lid' are within the scope of the Order, regardless of the proposed contents and design of the chests or boxes," and found that the Order made "no reference requiring that boxes or chests be used for any particular or defined purpose." *Id.* at 11–12.

gives significant deference to Commerce's interpretation of its own orders, but a scope determination is not in accordance with the law if it changes the scope of an order or interprets an order in a manner contrary to the order's terms." *Allegheny Bradford Corp. v. United States*, 342 F. Supp. 2d 1172, 1183 (CIT 2004); *see also Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2002).

## DISCUSSION

Pursuant to 19 C.F.R. § 351.225, "in considering whether a particular product is included within the scope of an order or a suspended investigation, [Commerce] will take into account . . . [t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] (including prior scope determinations) and the [ITC]." 19 C.F.R. § 351.225(k)(1). Only "[w]hen the above criteria are not dispositive . . . will [Commerce] further consider: (i) The physical characteristics of the product; (ii) The expectations of the ultimate purchasers; (iii) The ultimate use of the product; (iv) The channels of trade in which the product is sold; and (v) The manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2). In conducting a scope inquiry, " 'the scope of a final order may be clarified, [but] it can not be changed in a way contrary to its terms.' " *Duferco Steel, Inc.*, 296 F.3d at 1097 (quoting *Smith Corona Corp. v. United States*, 915 F.2d 683, 686 (Fed. Cir. 1990)).

TRU argues that the *WBF Order* "establishes two separate and distinct requirements for subject merchandise: (1) all subject merchandise must be made substantially of wood and (2) all subject merchandise must be 'bedroom furniture.' " (Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. Upon the Agency R. 13.) TRU contends that Commerce's reasoning unlawfully expands the scope of the *WBF Order* to cover all wooden boxes with lids, even if they are not "bedroom" furniture. (*Id.* at 19.) TRU maintains that instead, "[a] box or a chest can only be scope merchandise if it is an item of *bedroom furniture*, which can only be determined by its design and intended purpose." (*Id.* at 14.) TRU argues that the *WBF Order* describes a chest as "for storing clothing," and therefore, because the toy boxes in question are for other purposes, they plainly fall outside the scope of the order as constituting "non-bedroom furniture." (*Id.* at 14–15.)

TRU identifies the underlying petition and ITC investigation as further indications that the scope of wooden bedroom furniture is defined by its use or purpose. The petition states that "[a]ll types of wooden bedroom furniture are made of wood products, have physical characteristics that are dictated by their intended use in a bedroom, and are typically used in a bedroom." *Petition* at 20. The petition further notes that:

> Because a bedroom is the room in which people sleep, it is also the room in which people dress and undress, and is, therefore, the room in which people store their clothes. In terms of daily life, these functions are the essence of a bedroom – and have been, since time immemorial – and they are so linked as to be inseparable.

*Id.* at 18.

The ITC investigation also concluded that "wooden furniture [is] designed and manufactured for use in the bedroom. It includes such items of wooden furniture as beds, nightstands, chests, armoires, and dressers with mirrors." *Wooden Bedroom Furniture From China*, USITC Pub. No. 3743, Investigation No. 731–TA–1058 (Final), at 6 (Dec. 2004). The ITC determined that "all of the individual items of WBF share the same broad physical characteristics and end uses in that they are items of wooden furniture designed and manufactured for use in a bedroom." *Id.* at 7.

Commerce conversely argues that the plain language of the *WBF Order* clearly defines "chests" as bedroom furniture, contending that "bedroom" is defined by the listed subject and non-subject merchandise. (Tr. of Oral Argument 21:8–13 (May 1, 2008).) Commerce contends that the scope definition list of bedroom furniture is not an exhaustive list because it expressly includes the catch-all item of "other bedroom furniture consistent with the above list." (Def.'s Mem. in Opp'n to Pl.'s Mot. for J. Upon the Agency R. 14.) Commerce therefore maintains that because this catch-all follows the listing of "chests," the *WBF Order* clearly states that " 'chests' – "like all other items included in the 'above list' of subject merchandise – are defined by the WBF Order's plain language to be 'bedroom furniture.' " (*Id.* at 14–15.) Stated differently, Commerce argues that the subject merchandise meet the definition of "chests" because they are boxes with lids and do not fall within any of the specifically excluded items listed in the *WBF Order*.[3] Commerce also notes that the description of "chests" uses the word "typically" instead of "always." (*Id.* at 16.) Commerce contends that "to the extent that a chest is 'typically' a piece 'for storing clothing,' it is also plain from the text of the WBF Order's definition of a chest that such a piece can be 'a large box incorporating a lid.' " (*Id.* at 17.)

"[B]ecause the descriptions of subject merchandise contained in [Commerce's] determinations must be written in general terms," it is often difficult to determine "whether a particular product is included within the scope of an antidumping or countervailing duty order." 19 C.F.R. § 351.225(a); *see also Duferco Steel, Inc.*, 296 F.3d at 1096. Here, the plain language of the *WBF Order* does not define "bedroom

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[3] Notably, Commerce conceded at oral argument that it was not aware of any other scope order that has been read in this manner. (Tr. of Oral Argument 21:14–23.)

furniture." While both parties have presented arguments as to what the proper functional test for "bedroom furniture" is under the *WBF Order*, neither test is sufficient for a scope inquiry determination under 19 C.F.R. § 351.225(k)(1). Contrary to TRU's argument, the *WBF Order* does not require that chests must always be for "storing clothing" but rather states that they are only "typically" designed for doing so. Although the petition and ITC investigation "may provide valuable guidance as to the interpretation of the final order," and indicate that purpose or use help define the scope of wooden bedroom furniture, "they cannot substitute for language in the order itself." *Duferco Steel, Inc.*, 296 F.3d at 1097. Further, purpose or use cannot be the test when conducting a § 351.225(k)(1) determination, as for this product, they are factors relevant only to a § 351.225(k)(2) inquiry, which Commerce did not do here.

The *WBF Order* also cannot be read to encompass wooden chests as subject merchandise unless explicitly excluded. There are items that are not bedroom furniture that are neither included nor excluded under the order, and it is not possible to consider every item that could potentially be subject to the order. Instead, when the criteria under § 351.225(k)(1) are not dispositive for a scope inquiry, as is the case here, a determination pursuant to § 351.225(k)(2) is warranted. *See Novosteel SA v. United States*, 128 F. Supp. 2d 720, 723–24 n.5 (CIT 2001); *see also Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005) ("If the determination can be made based on section (k)(1), a scope ruling will issue without a full evaluation of the criteria in (k)(2).").

Consequently, the court concludes the *WBF Order* is ambiguous with respect to the chests at issue. A proper functional test has not been articulated that would make it possible to determine whether the toy boxes at issue are within the scope of the *WBF Order*. In addition to articulating a test, it is necessary for Commerce to further address whether the subject merchandise falls within the scope of the order using the factors enumerated in § 351.225(k)(2).

## CONCLUSION

The court hereby remands the matter to Commerce for further evaluation pursuant to the procedures set forth in 19 C.F.R. § 351.225(k)(2).