U.S. Customs and Border Protection

Slip Op. 12–137

CAMAU FROZEN SEAFOOD PROCESSING IMPORT EXPORT CORPORATION, et al., Plaintiffs, v. UNITED STATES, Defendant, and AD HOC SHRIMP TRADE ACTION COMMITTEE AND AMERICAN SHRIMP PROCESSORS ASSOCIATION, Defendant-Intervenors.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00399[1]

[affirming, in part, and remanding, in part, final results of administrative review of antidumping duty order]

Dated: November 15, 2012

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Joshua E. Kurland, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, on behalf of Defendant. With him on the briefs were *Stuart F. Delery*, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Patricia M. McCarthy*, Assistant Director. Of counsel on the briefs was *Jonathan Zielinski*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

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OPINION

Pogue, Chief Judge:

This is a consolidated action seeking review of determinations made by the United States Department of Commerce ("Commerce") in the fifth administrative review of the antidumping duty order covering certain frozen warmwater shrimp from the Socialist Repub-

[1] This action is consolidated with Court No. 11–00383. Order, Dec. 20, 2011, ECF No. 30.

lic of Vietnam ("Vietnam").[2] Currently before the court are motions for judgment on the agency record submitted by Respondents Camau Frozen Seafood Processing Import Export Corp., *et al.*, (collectively "Respondents") and Petitioner Ad Hoc Shrimp Trade Action Committee ("AHSTAC"). Respondents challenge Commerce's decision to zero in this administrative review after it ceased zeroing in investigations; AHSTAC challenges Commerce's choice of Bangladesh as the primary surrogate country and Commerce's decision to value labor using only data from the Bangladesh Bureau of Statistics.

As explained below, the court (1) affirms Commerce's explanation for continuing to zero in reviews but not in investigations; (2) does not reach Commerce's choice of Bangladesh as the primary surrogate country; and (3) remands Commerce's decision to value labor using only data from the Bangladesh Bureau of Statistics.

The court has jurisdiction pursuant to § 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006)[3] and 28 U.S.C. § 1581(c) (2006).

BACKGROUND

Commerce has designated Vietnam as a non-market economy country ("NME"). When investigating potentially dumped merchandise from an NME, Commerce considers the NME data for measuring normal value[4] to be unreliable. Therefore, Commerce calculates normal value for merchandise from an NME using surrogate values for factors of production drawn from a market economy country. 19 U.S.C. § 1677b(c)(1). In general, Commerce prefers to draw all surrogate values from a single surrogate country (the "primary surrogate country"). Import Administration Policy Bulletin No. 04.1, Non-Market Economy Surrogate Country Selection Process (Mar. 1, 2004), *available at* http://ia.ita.doc.gov/policy/bull04–1.html (last visited Nov. 15, 2012) ("Policy Bulletin 04.1"). In this review, Commerce chose Bangladesh as the primary surrogate country and rejected AHSTAC's preferred choice, the Philippines. *I & D Mem.* cmt. 1 at 3–5.

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[2] *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 76 Fed. Reg. 56,158 (Dep't Commerce Sept. 12, 2011) (final results and final partial rescission of antidumping duty administrative review) ("*Final Results*"), and accompanying Issues & Decision Memorandum, A-552–802, ARP 09–10 (Aug. 31, 2011), Admin. R. Pt. 2 Pub. Doc. 9, *available at* http://ia.ita.doc.gov/frn/summary/VIETNAM/2011–23278–1.pdf (last visited Nov. 13, 2012) ("*I & D Mem.*") (adopted in *Final Results*, 76 Fed. Reg. at 56,159).

[3] All further citations to the Tariff Act of 1930, as amended, are to Title 19 of the U.S. Code, 2006 edition.

[4] An antidumping duty equal to "the amount by which the normal value exceeds the export price" may be assessed on merchandise sold at less than fair value in the United States. 19 U.S.C. § 1673.

In the past, Commerce has deviated from its general surrogate value policy when choosing surrogate values for labor. Rather than drawing surrogate labor values from the primary surrogate country, Commerce historically valued labor by averaging labor values from multiple countries. While this review was pending, Commerce changed its policy to value labor solely on the basis of data from the primary surrogate country. *Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor*, 76 Fed. Reg. 36,092 (Dep't Commerce June 21, 2011) ("*New Labor Methodology*"). In light of its new policy, Commerce sought additional comments from interested parties on how to value labor in the instant review. *I & D Mem.* at 2. After reviewing the comments, Commerce chose to value labor consistent with the *New Labor Methodology* by using data solely from the primary surrogate country, Bangladesh. Id. at cmt. 2.I at 21–24.

Furthermore, when calculating the weighted average dumping margin in this review, Commerce chose to zero dumping margins with negative values. *Id.* at cmt. 3 at 32.[5] At the time of this review, Commerce's practice of zeroing in administrative reviews differed from its practice of offsetting in antidumping investigations, where it allowed dumping margins with negative and positive values to offset each other when calculating the weighted average dumping margin. *Id.* at 30–32.[6] However, in February of this year, Commerce published a new policy regarding the use of zeroing in administrative reviews. *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings; Final Modification*, 77 Fed. Reg. 8101 (Feb. 14, 2012) ("*Final Modification*"). In the *Final Modification*, Commerce stated that

> the Department is adopting the proposed changes to its methodology for calculating weighted-average margins of dumping and antidumping duty assessment rates to provide offsets for non-dumped comparisons when using monthly [average-to-

[5] This issue has been the subject of much recent litigation, and further background on the issue and its development can be found in *Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT __, 853 F. Supp. 2d 1352 (2012) ("*Grobest II*") and *Union Steel v. United States*, 36 CIT __, 823 F. Supp. 2d 1346 (2012).

[6] *See also Grobest II*, 36 CIT at __, 853 F. Supp. 2d at 1360–61 ("Pursuant to both methodologies, Commerce calculates the § 1677(35)(A) dumping margin by subtracting the export price from normal value for each averaging group [of subject merchandise]. Once a dumping margin has been established, Commerce aggregates these dumping margins to determine a weighted average dumping margin. In an investigation, Commerce aggregates all of the dumping margins to determine 'overall pricing behavior.' In a review, Commerce zeros negative margins prior to aggregation to arrive at a more accurate margin and to uncover masked dumping." (citation omitted)).

> average] comparisons in reviews, in a manner that parallels the WTO-consistent methodology the Department currently applies in original antidumping duty investigations.

Id. at 8102. Therefore, as of April 16, 2012, Commerce ceased zeroing, in general, consistent with the policy announced in the *Final Modification*.

STANDARD OF REVIEW

When reviewing Commerce's decisions in administrative reviews of antidumping duty orders, the Court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Zeroing

Turning first to the issue of zeroing, Respondents challenge Commerce's decision to employ zeroing in administrative reviews but not in investigations. But the explanation Commerce provided in this review is the same as that previously held to be both reasonable and consistent with the Court of Appeals for the Federal Circuit's decisions in *Dongbu Steel Co. v. United States*, 635 F.3d 1363 (Fed. Cir. 2011) and *JTEKT Corp. v. United States*, 642 F.3d 1378 (Fed. Cir. 2011). *See Grobest II*, 36 CIT at __, 853 F. Supp. 2d at 1356–62; *see also Far E. New Century Corp. v. United States*, 36 CIT __, Slip Op. 12–110, *6–7 (Aug. 29, 2012). In *Grobest II*, the court found the relevant statute ambiguous and Commerce's rationale for employing differing methodologies in investigations and reviews to be a reasonable interpretation of the statute. *Grobest II*, 36 CIT at __, 853 F. Supp. 2d at 1358–62.

Respondents also raise an issue in this case that was not decided in *Grobest II*. Specifically, Respondents challenge Commerce's reliance on the goal of identifying masked dumping as a basis for Commerce's continued use of zeroing in administrative reviews. Respondents argue that it is inappropriate for Commerce to rely on this rationale in light of Commerce's new policy of not zeroing in administrative reviews.[7] Mem. of Law Supp. Pls.' Rule 56.2 Mot. J. Agency R. at 15, ECF No. 40 ("Resp'ts' Br.").

[7] In *Grobest II*, the defendant-intervenors raised this issue in their comments to the court on Commerce's remand results. Because the issue had not been raised in comments to Commerce on the Department's draft remand results, the court found that defendant-intervenors had failed to exhaust their administrative remedies and declined to consider

Respondents focus on language in the *Final Modification* where Commerce states that "the Department disagrees with those comments that suggest it is not capturing 100 percent of the dumping" and that "the Department does not agree that the potential for masked dumping means that [average-to-average] comparisons are unsuitable as the default basis for determining the weighted-average dumping margins . . . in reviews." *Final Modification*, 77 Fed. Reg. at 8106, 8104; Resp'ts' Br. at 15–16.[8] Taken together, Respondents argue, these statements show that Commerce concedes it can capture 100 percent of dumping without zeroing; therefore, masked dumping is not a reasonable concern that can support alternative methodologies in investigations and reviews.

Respondents, however, do not recognize the full extent of Commerce's reasoning in the *Final Modification*. First, Commerce does not argue that it can capture 100 percent of dumping with its new average-to-average offsetting methodology for reviews; rather, Commerce argues that it "will capture 100 percent of the dumping *that is determined to exist pursuant to this methodology*." *Final Modification*, 77 Fed. Reg. at 8106 (emphasis added). Furthermore, Commerce has not abandoned its concern about masked dumping. On the contrary, Commerce has changed its approach to masked dumping by deciding to pursue masked dumping on a case-by-case basis. *Id.* at 8104 ("Similar to the conduct of original investigations, when conducting reviews under the modified methodology, the Department will determine, on a case-by-case basis, whether it is appropriate to use an alternative comparison methodology . . . .").

When examined in full, Commerce's reasoning in the *Final Modification* does not indict the rationale behind its prior policy of zeroing in reviews but not in investigations. Commerce has made a change in policy and priority. The new policy announced in the *Final Modification* responds to a series of adverse World Trade Organization ("WTO") decisions finding that Commerce's zeroing methodology in reviews was inconsistent with the General Agreement on Tariffs and Trade ("GATT") and the Agreement on Implementation of Article VI of the GATT 1994. *Id.* at 8101–02. To adhere to these adverse findings, Commerce, pursuant to 19 U.S.C. § 3533(g), changed its policy. When

the argument. *Grobest II*, 36 CIT at __, 853 F. Supp. 2d at 1361 n.10. Here, while Respondents have not previously raised this argument before Commerce, they had no opportunity because the new policy was published on February 12, 2012, following the publication, on September 12, 2011, of the *Final Results*. Therefore, the exhaustion doctrine does not apply in this case.

[8] Respondents also argue that the methodology announced in the *Final Modification* is arbitrary and unreasonable because Commerce reserves the right to apply an alternative methodology when it believes such is appropriate. Resp'ts' Br. at 15–16. But Commerce's application in future cases is not at issue in this case.

Commerce stated that the new policy would "capture 100 percent of the dumping that is determined to exist pursuant to this methodology," *Final Modification*, 77 Fed. Reg. at 8106, it was acknowledging that some dumping could go uncaptured. While Commerce remains concerned about masked dumping, and will pursue it on a case-by-case basis, Commerce adopted a new methodology that may capture less masked dumping in order to conform with adverse WTO rulings.

This new policy does not undermine Commerce's rationale for the prior policy. Commerce remains concerned about masked dumping but has determined it cannot pursue its prior approach to masked dumping and conform to the adverse WTO rulings. Going forward, Commerce has chosen to pursue the latter objective over the former. This change in objective does not make the prior policy unreasonable, just as Commerce previously "adjust[ed] its methodology to seek overall pricing behavior in investigations and more accurate duties in reviews, by zeroing in reviews but not in investigations," without being unreasonable, *Grobest II*, 36 CIT at __, 853 F. Supp. 2d at 1361–62.

For the foregoing reasons, the court will follow its recent opinions in *Grobest II* and *Far E. New Century* on the issue of zeroing and affirm Commerce's explanation as reasonable.

II. Surrogate Country Choice

In its first of two challenges, AHSTAC contends that Commerce improperly selected Bangladesh as the primary surrogate country. Specifically, AHSTAC challenges Commerce's policy of considering all countries designated economically comparable to the NME under investigation to be *equally* economically comparable. AHSTAC, however, did not raise this issue before Commerce, even though the issue was clearly in play and AHSTAC had an opportunity to raise its challenge during the administrative review. Therefore, the court will not reach this issue because AHSTAC failed to exhaust its administrative remedies.

In actions challenging antidumping determinations, "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). Exhaustion is "generally appropriate in the antidumping context because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review — advancing the twin purposes of protecting administrative agency authority and promoting judicial efficiency." *Carpenter Tech. Corp. v. United States*, 30 CIT 1595, 1597, 464 F. Supp. 2d 1347, 1349 (2006) (quoting *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d

1344, 1346 (2006)). For these reasons, parties are "procedurally required to raise the[ir] issue before Commerce at the time Commerce [is] addressing the issue." *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1375 (Fed. Cir. 2010) (alteration in original) (citing *Mittal Steel Point Lisas Ltd. v. United States*, 548 F.3d 1375, 1383 (Fed. Cir. 2008)).

In its case brief to Commerce, AHSTAC argued that the Philippines should be the surrogate country solely because its surrogate value data was superior to the Bangladeshi data. AHSTAC Case Br., A-522–802, ARP 09–10 (Apr. 18, 2011), Admin. R. Pt. 1 Pub. Doc. 166 at 1–11. Commerce was not persuaded and selected Bangladesh as the primary surrogate. At no point did AHSTAC contend that the difference in GNI between Bangladesh and the Philippines (or the difference between either potential surrogate country and Vietnam) was relevant to the surrogate country selection. In other words, AHSTAC never argued that one country was more economically comparable to Vietnam than the other.

The issue of economic comparability became important for AHSTAC when Commerce decided to apply its *New Labor Methodology* in this administrative review because this meant Commerce would value labor using data from the primary surrogate country, Bangladesh, rather than using multi-country averaging or data from AHSTAC's preferred source, the Philippines. Nevertheless, when Commerce invited comments on the application of the *New Labor Methodology* in this review, Letter from Commerce to Interested Parties, A-552–802, ARP 09–10 (June 23, 2011), Admin. R. Pt. 1 Pub. Doc. 173 ("Labor Letter"), AHSTAC did not challenge Commerce's finding of equal economic comparability between Bangladesh and the Philippines in light of the *New Labor Methodology*, *see* Producers Comments on Labor Rates, A-552–802, ARP 09–10 (July 7, 2011), Admin. R. Pt. 1 Pub. Doc. 175 ("AHSTAC's Labor Methodology Comments"). AHSTAC chose to argue instead that Commerce should either 1) maintain its multi-country averaging approach because it was consistent with prior Court of International Trade case law, 2) choose the Philippines as the surrogate country because the ILO Chapter 6A data Commerce said it preferred in the *New Labor Methodology* was available from the Philippines but not Bangladesh, or 3) value labor alone based on data from the Philippines because ILO Chapter 6A data was available and the Bangladeshi Bureau of Statistics data on wage rates was unreliable. AHSTAC's Labor Methodology Comments at 2–9.

AHSTAC contends that exhaustion is not appropriate because Commerce notified the parties that it intended to apply the *New Labor Methodology* after the period for submission of administrative case briefs had ended and requested narrowly tailored comments within a short (two week) time frame. Pl. Ad Hoc Shrimp Trade Action Comm.'s Reply Mem. at 12–13, ECF No. 72 ("AHSTAC's Reply Br."). In AHSTAC's view these procedures were so exceptional and onerous that the court should exercise its discretion to consider AHSTAC's argument. *Cf. Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.").

The court recognizes that such cases may exist, but this is not one. Though the period for additional comment may have been short and the subject matter narrow, AHSTAC had ample notice of the *New Labor Methodology* and a fair opportunity to raise its concern about the presumption of equal economic comparability. But AHSTAC never raised its economic comparability argument before Commerce.[9] By not raising the argument, AHSTAC deprived Commerce of the opportunity to "apply its expertise, rectify administrative mistakes, [or] compile a record adequate for judicial review" on the issue. *Carpenter Tech.*, 30 CIT at 1597, 464 F. Supp. 2d at 1349.

By not raising the equal economic comparability argument before Commerce, AHSTAC failed to exhaust its administrative remedies with respect to this issue. *See QVD Food Co. v. United States*, 34 CIT __, 721 F. Supp. 2d 1311, 1320–21 (2010) (finding a failure to exhaust administrative remedies where a party introduced, in its brief to the court, new arguments not made before Commerce even though issues were "squarely in play"), *aff'd*, 658 F.3d 1318 (Fed. Cir. 2011). Accordingly, the court does not reach Commerce's choice of Bangladesh as the primary surrogate country.

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[9] In its comments on valuing labor in this review, AHSTAC did challenge the choice of Bangladesh as the primary surrogate country and argued that Commerce should reconsider that decision and choose the Philippines on the basis of the superior Philippine data. AHSTAC's Labor Methodology Comments at 4–5. This challenge to primary surrogate country choice is no more germane to the "narrow issue of the Department's final labor rate pursuant to [the *New Labor Methodology*]," AHSTAC's Reply Br. at 12–13 (quoting Labor Letter at 2) (emphasis omitted), than an argument challenging the economic comparability policy would have been. Having argued surrogate country choice in its comments, AHSTAC's argument that it did not have an opportunity to comment on economic comparability because the request for comment was so narrowly tailored is not persuasive.

III. Surrogate Labor Methodology

AHSTAC also challenges Commerce's decision to rely solely on data from Bangladesh to value labor. AHSTAC contends both that the Bangladeshi labor rate is unsupported by substantial evidence and that Commerce failed to adequately explain its decision to change from a policy of valuing labor using multi-country averaging to valuing labor based on data solely from the primary surrogate country.[10] As the latter is a facial challenge to Commerce's new policy, it will be addressed first.

When valuing factors of production, Commerce "shall utilize, to the extent possible, the prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country, and (B) significant producers of comparable merchandise." 19 U.S.C. § 1677b(c)(4). Prior to the Court of Appeals' decision in *Dorbest Ltd. v. United States*, 604 F.3d 1363 (Fed. Cir. 2010) ("*Dorbest IV*"), Commerce valued labor using a regression based methodology described in 19 C.F.R. § 351.408(c)(3). *Id.* at 1367–68. In *Dorbest IV*, the Court of Appeals invalidated the regression based methodology, holding that § 351.408(c)(3) "improperly requires using data from both economically comparable and economically dissimilar countries, and it improperly uses data from both countries that produce comparable merchandise and countries that do not." *Id.* at 1372.

In response to *Dorbest IV*, Commerce established an interim methodology that relied on a simple average of labor rates from economically comparable countries that were also significant producers of comparable merchandise. *Dorbest Ltd. v. United States*, 35 CIT __, 755 F. Supp. 2d 1291, 1294–96 (2011) ("*Dorbest VI*"); *see also Antidumping Methodologies in Proceedings Involving Non-Market Economies: Valuing the Factor of Production: Labor; Request for Comment*, 76 Fed. Reg. 9544, 9546–47 (Dep't Commerce Feb. 18, 2011) ("*Request for Comment*"). Commerce's interim methodology was subsequently upheld by this Court on several occasions. *See Grobest & I-Mei Indus. (Vietnam) Co. v. United States*, 36 CIT __, 815 F. Supp. 2d 1342, 1356–60 (2012) ("*Grobest I*"); *Home Products Int'l, Inc. v. United States*, 36 CIT __, 810 F. Supp. 2d 1373, 1377–78 (2012); *Shandong Rongxin Imp. & Exp. Co. v. United States*, 35 CIT __, 774 F. Supp. 2d 1307, 1314 (2011). While affirming multi-country averaging, *Shandong* also narrowed the universe of countries available for Commerce

[10] AHSTAC also challenges the Bangladeshi labor data as aberrationally low. As discussed below, Commerce's choice of the Bangladeshi data will be remanded because it is not supported by substantial evidence; therefore, the court need not reach the question of whether the Bangladeshi data is aberrational.

to average by holding that "Commerce's interpretation of 'significant' encompasses countries which almost certainly have no domestic production — at least not any meaningful production, capable of having influence or effect — and is therefore an impermissible construction of [the 'significant producer' test in] 19 U.S.C. § 1677b(c)(4)." *Shandong*, 35 CIT at __, 774 F. Supp. 2d at 1316.

Following the *Request for Comment*, Commerce published its *New Labor Methodology*, where it decided that in light of the diminished sample size for averaging occasioned by *Dorbest IV* and *Shandong*, it would value labor solely based on data from the primary surrogate country. *New Labor Methodology*, 76 Fed. Reg. at 36,093. Commerce applied the *New Labor Methodology* in this review based on the same analysis, *I & D Mem.* cmt. 2.I at 23–24, which AHSTAC now challenges.

But changes in administrative policy are not subject to heightened review. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009). In other words, the agency is not required to explain why a new policy is better than the old policy; it is enough that the policy would have been justified if adopted new. *Id.* at 514–15. Thus, it is sufficient for the new policy to reasonably fill a statutory gap left for agency decision making. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984).

Commerce premises its change in policy, in both the *I & D Mem.* and the *New Labor Methodology*, on the diminished efficacy of multi-country averaging after *Dorbest IV* and *Shandong*:

> [T]he Department concluded that to be compliant with the statute, and the two most recent court decisions, the base for an average wage calculation would be so limited (two countries in this case following the interim labor methodology) that there would be little, if any, benefit to relying on an average of wages from multiple countries for purposes of minimizing the variability that occurs in wages across countries.

I & D Mem. cmt. 2.I at 24; *see also* New *Labor Methodology*, 76 Fed. Reg. at 36,093. Acknowledging its past policy and addressing the problem that led it to reject multi-country averaging provides a reasonable basis for Commerce's policy change. *Cf. Fox Television*, 556 U.S. at 515. In light of *Dorbest IV* and *Shandong*, Commerce cannot find enough countries that are both economically comparable and significant producers of subject merchandise to effectively average wages from multiple countries. Thus, Commerce has provided a reasonable basis for abandoning its prior policy, and the new policy is reasonable on its face.

That Commerce's decision to change policy may be facially reasonable does not fully resolve the issue presented here. Commerce's decision in this review, to value labor based solely on Bangladeshi data, must also be supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). And the "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* at 488.

In considering whether to value labor solely on the basis of data from Bangladesh, Commerce did not reconsider its prior findings that wage rates strongly correlate to GNI and, therefore, require special consideration. As Commerce stated when it promulgated 19 C.F.R. § 351.408:

> [W]hile per capita GDP and wages are positively correlated, there is great variation in the wage rates of the market economy countries that the Department typically treats as being economically comparable. As a practical matter, this means that the result of an NME case can vary widely depending on which of the economically comparable countries is selected as the surrogate. . . . By avoiding the variability in results depending on which economically comparable country happens to be selected as the surrogate, the results are much fairer to all parties.

Antidumping Duties; Countervailing Duties, 61 Fed. Reg. 7308, 7345 (Dep't Commerce Feb. 27, 1996) (proposed rules).[11] In light of Commerce's prior findings, the facts on the record of this case seem to highlight the very concerns about valuing labor on the basis of a single surrogate country that Commerce has repeatedly raised. Specifically, taking into account the three factors Commerce considers in choosing surrogate countries — economic comparability, significant production of comparable merchandise, and quality of data —

[11] *See also Request for Comment*, 76 Fed. Reg. at 9545 ("[W]age data from a single surrogate country does not normally constitute the best available information for purposes of valuing the labor input due to the variability that exists across wages from countries with similar GNI."); *Certain Frozen Warmwater Shrimp from the People's Republic of Vietnam*, 75 Fed. Reg. 47,771 (Dep't Commerce Aug. 9, 2010) (final results and partial rescission of antidumping duty administrative review) and accompanying Issues and Decision Memorandum, A-552–802, ARP 08–09 (July 30, 2010) cmt. 9 at 27 ("[W]age data from a single surrogate country does not constitute the best available information for purposes of valuing the labor input due to the variability that exists between wages and GNI. . . . As a result, we find reliance on wage data from a single surrogate country to be unreliable and arbitrary.").

Commerce had the following points of comparison on the record of this case[12]:

	GNI (per capita USD)	Labor Rate (USD/hour)
Philippines	1890	1.91
Vietnam	890	- -
Bangladesh	520	0.21

[12] The following table includes the two countries that Commerce determined satisfied all three criteria on the record of this case. For the *Preliminary Results* of this review Commerce employed its interim labor methodology. *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 76 Fed. Reg. 12,054, 12,062–63 (Dep't Commerce Mar. 4, 2011) (preliminary results, partial rescission, and request for revocation, in part, of the fifth administrative review) ("*Preliminary Results*"). Based on GNI, measured in per capita U.S. Dollars, Commerce found thirty-five countries, falling between Bangladesh at the low end and Indonesia at the high end, to be economically comparable to Vietnam. Surrogate Values for the Preliminary Results, A-552–802, ARP 09–10 (Feb. 28, 2011), Admin. R. Pt. 1 Pub. Doc. 144 at 6 ("Surrogate Value Mem."). Of these thirty-five economically comparable countries, Commerce determined that eighteen were also significant producers of comparable merchandise, using its pre-*Shandong* criteria for significant producers. *Id.* Of these eighteen countries, three reported industry specific data under Chapter 5B of the ILO dataset: Egypt, the Philippines, and Indonesia. *Id.* at 7–8. If the Department's preference forindustry specific data, as reported in ILO Chapter 6A or acomparable form, *see New Labor Methodology*, 76 Fed. Reg. at 36,093–94, is taken into account, then Indonesia is removed from the list. Finally, Egypt exported $39,251 of subject merchandise in 2007 and had no reported exports in 2008 or 2009, Ex. 6 to the Surrogate Value Mem.; therefore, it arguably fails the *Shandong* significant producer test and should be removed.

AHSTAC also introduced ILO 6A data and argued that Guyana (GNI 1450/0.82 USD/hour), Nicaragua (GNI 1080/1.02USD/hour), and India (GNI 1070/0.70 USD/hour) met the economically comparable and significant producer tests. Producers' Rebuttal Factual Info., A-552–802, ARP 09–10 (July 15,2011), Admin. R. Pt. 1 Pub. Doc. 180, at 3. Because Commerce valued labor based on data from the primary surrogate country, Bangladesh, there is no record in the *Final Results* or *I & D Mem.* of whether Commerce considered the alternate AHSTAC values to have met all the necessary prongs for consideration; nor, therefore, is there a record decision for the court to review.

The data in this table is drawn from the following sources. GNI data is drawn from Request for Comments on Surrogate Country Selection, A-552–802, ARP 09–10 (Aug. 20, 2010), Admin. R. Pt. 1 Pub. Doc. 82A, attach. 1. Labor rate data for the Philippines is drawn from Ex. 6 to the Surrogate Value Mem. Labor rate data for Bangladesh is drawn from the Final Surrogate Value Mem., which states that the Bangladeshi laborrate for the relevant period was 14.55 Bangladeshi Takas per hour. Ex. 1 to the Final Surrogate Value Mem., A-552–802, ARP09–10 (Aug. 31, 2011), Admin. R. Pt. 2 Pub. Doc. 3A. The average exchange rate for Bangladeshi Takas to U.S. Dollars during the first half of 2009, the period for which the Bangladeshi labor rate was calculated, was 1.45%, as calculated by averaging the daily buy rate of U.S. Dollars in Bangladeshi Takas provided by Bangladesh Bank, the Central Bank of Bangladesh, from January 1,2009, to June 30, 2009. *See* Bangladesh Bank, Exchange Rates, http://www.bb.org.bd/econdata/exchangerate.php (use drop down menus under "search previous data from archive" to retrieve daily historical exchange rates with the U.S. Dollar) (last visited Nov. 14, 2012). Converting 14.55 Bangladeshi Takas at a rate of1.45% results in a labor rate of $0.210975 or $0.21 per hour.

The data in this table places the Department's prior arguments regarding disparate wage rates across countries presumed to be equally economically comparable into sharp relief. Insofar as Commerce considers both countries in this table to be economically comparable to Vietnam, the record suggests that choosing one country to value labor may introduce either overstated or understated labor rates. Commerce obliquely acknowledges this fact when it fails to address AHSTAC's contention that wage rate variability is correlated to GNI variability. Commerce notes in the *I & D Mem.* that

> [t]he Department has long recognized, and the Petitioners also agree, that the disparity in labor rates correspond with disparities in the GNIs of countries. The Petitioners' labor data does not demonstrate that the Bangladeshi labor data is aberrationally low, but speak to the Petitioners' argument that the Department's wage rate policy establishes a practice whereby labor wage rates will be understated when the surrogate country has a low GNI and overstated when the GNI is high.

I & D Mem. cmt. 2.I at 24.

Commerce has acknowledged both the correlation of wage rates to GNI and AHSTAC's concerns about the resulting possibility for outlying labor values in this review, yet Commerce did not address the disparity in the GNI of potential surrogate countries on the record of this case. The Philippines has a GNI roughly twice that of Vietnam, and Bangladesh has a GNI roughly half that of Vietnam. Furthermore, this disparity in GNI is reflected in a disparity between the wage rates of the two countries.

Commerce's conclusion that Bangladesh's wage rate is the best available information for valuing the wage rate in Vietnam must be based on a reasonable reading of the entire record.[13] By accounting for neither its prior finding of a correlation between wage rates and GNI nor the disparity in both wage rates and GNIs of the proposed surrogate countries on the record of this case, Commerce has not considered evidence that fairly detracts from the weight of its conclusion. *Universal Camera*, 340 U.S. at 488.

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[13] Commerce argues that the Bangladeshi data is the best available information for valuing labor because Commerce has a policy that favors valuing all factors of production using a single surrogate country. Commerce has previously found, however, that labor should be treated differently for the reasons discussed above. Without addressing these prior findings and the apparent discrepancy in labor values on the record of this case, Commerce's policy of preferring a single surrogate country doesnot satisfy the substantial evidence test.
At oral argument, counsel for the Government offered alternative bases for choosing Bangladesh, including its relative proximity in GNI to Vietnam; however, counsel's arguments were not made by Commerce on the record of this case.

Therefore, Commerce's use of Bangladeshi data to value labor is not supported by substantial evidence. Commerce may change its averaging methodology, but it must make data choices that a reasonable mind could find to be the best available on the record. In light of its prior findings regarding the exceptional nature of the labor factor of production, Commerce should reconsider what factors are important when valuing labor in this review. For the foregoing reasons, Commerce's decision to value labor only on the basis of data from Bangladesh will be remanded for reconsideration or further explanation.

CONCLUSION

Consistent with the foregoing opinion, the *Final Results* are affirmed, in part, and remanded, in part. Commerce's explanation for its continued use of zeroing in administrative reviews is affirmed. Commerce's decision to value labor solely on the basis of data from Bangladesh is remanded. On remand, Commerce must either reconsider whether, on the facts presented here, it is reasonable to value labor using only data from the primary surrogate country or provide further explanation for its decision. In either case, Commerce's decision must be supported by substantial evidence on the record.

Commerce shall have until January 14, 2013, to complete and file its remand redetermination. Plaintiffs and Defendant-Intervenors shall have until January 28, 2013, to file comments. Plaintiffs, Defendant, and Defendant-Intervenors shall have until February 11, 2013, to file any reply.

It is **SO ORDERED**.

Dated: November 15, 2012
New York, New York

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

Slip Op. 12–138

FINE FURNITURE (SHANGHAI) LIMITED, et al., Plaintiffs, and HUNCHUN FOREST WOLF INDUSTRY COMPANY LIMITED, et al., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and THE COALITION FOR AMERICAN HARDWOOD PARITY, Defendant-Intervenor.

Before: Donald C. Pogue,
Chief Judge
Consol. Court No. 11–00533[1]

[1] This action was consolidated with portions of the complaints from Court Nos. 12–00009, 12–00017, and 12–00022. Order, Apr. 5, 2012, ECF No. 50.

JUDGMENT

Whereas the United States Department of Commerce has filed its Final Results of Redetermination Pursuant to Court Remand, ECF No. 77, which was issued pursuant to the court's Aug. 31, 2012, opinion and order, Slip Op. 12–113, ECF No. 76; and Plaintiffs have filed their response thereto, ECF No. 80, in which Plaintiffs supported the Redetermination; and no other party having filed a response; and the court having reviewed all pleadings and papers on file herein; and good cause appearing therefor, it is hereby

ORDERED, ADJUDGED and DECREED that Multilayered Wood Flooring from the People's Republic of China, 76 Fed. Reg. 64,313 (Dep't Commerce Oct. 18, 2011) (final affirmative countervailing duty determination), as modified by the Final Results of Redetermination Pursuant to Court Remand, ECF No. 77, is AFFIRMED.

Dated: November 15, 2012
New York, New York

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

Slip Op. 12–139

AK STEEL CORP., ALLEGHENY LUDLUM CORP, AND NORTH AMERICAN STAINLESS, Plaintiffs, v UNITED STATES, Defendant, and THYSSENKRUPP MEXINOX S.A. DE C.V., AND MEXINOX USA, INC., Defendant-Intervenors.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 11–00366
PUBLIC VERSION

Held: Plaintiffs' Motion for Judgment on the Agency Record is denied because the International Trade Commission's second sunset review determinations regarding cumulation, likely volume effect, and likely price effect was based on substantial evidence.

Dated: November 15, 2012

Kelley Drye & Warren LLP, (*Daved A. Hartquist*, *Kathleen W. Cannon*, and *R. Alan Luberda*) for AK Steel Corp., Allegheny Ludlum Corp., and North American Stainless, Plaintiffs.

James M. Lyons, General Counsel; Neal J. Reynolds, Assistant General Counsel; Karl Von Schriltz, Office of the General Counsel, U. S. International Trade Commission, for Defendant, United States.

Hogan Lovells US LLP, (*Lewis E. Leibowitz*, *Craig A. Lewis*, *Brian S. Janovitz*, and *Wesley V. Carrington*) for Thyssenkrupp Mexinox S.A. de C.V. and Mexinox USA, Inc., Defendant-Intervenors.

OPINION AND ORDER

TSOUCALAS, Senior Judge:

Plaintiffs AK Steel Corp., Allegheny Ludlum Corp., and North American Stainless (collectively "domestic industry" or "plaintiffs") move pursuant to USCIT Rule 56.2 for judgment upon the agency record challenging the determination of the United States International Trade Commission ("Commission") in *Stainless Steel Sheet and Strip from Germany, Italy, Japan, Korea, Mexico and Taiwan*, USITC Pub. 4244, Inv. Nos. 701-TA-382 and 731TA-798–803, 76 Fed. Reg. 46,323 (2011) (second sunset review) ("*Views*"). The Commission and defendant-intervenors ThyssenKrupp Mexinox S.A. de C.V. ("Mexinox") and Mexinox USA, Inc. oppose the motion.

BACKGROUND

In 1999, the Commission determined that certain imports of stainless steel sheet and strip ("SSSS") from France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the United Kingdom had materially injured an industry in the U.S., *Certain SSSS from France, Germany, Italy, Japan, Korea, Mexico, and the United Kingdom*, USITC Pub. 3208, Inv. Nos. 701-TA-380–382 and 731-TA-797804 (1999), resulting in the imposition of antidumping and countervailing duty orders on August 6, 1999. *Views*, at 3–4. In 2005, the Commission completed its first five-year review of those orders. *Id.* at 4. Based on the Commission's findings, the Department of Commerce revoked the orders as to France and the United Kingdom. *Id.* at 4–5. As a result of changed circumstances, Commerce also revoked the orders as to Italy in 2006. *Id.* The Commission initiated its second five-year review of the remaining orders on September 1, 2010, *id.* at 5, the results of which domestic industry appeals to this court. *See* Pls.' Mem. Supp. Mot. J. Agency R. ("Pls.' Br.") at 1–4.

Mexinox is one of several affiliated steel producers subject to the antidumping and countervailing duty orders in question. Respondents below also included German producers ThyssenKrupp Nirosta GmbH and ThyssenKrupp VDM GmbH, Italian producer ThyssenKrupp Acciai Speciali Terni S.p.A., domestic producer ThyssenKrupp Stainless USA LLC ("SL-USA"), and several affiliated importers. *Views*, at 5. The multinational ThyssenKrupp group (collectively, including other unlisted corporate affiliates, "TK") is responsible for [[ ]] of SSSS production in Germany and Italy, and [[ ]] of SSSS production in Mexico. *Id.* at 6.

Since the last review, TK has contracted $1.2 billion and spent $950 million on a new production facility in Greenfield, Alabama. *Id.* at 26–27 & n.127. TK plans to spend $1.4 billion on the new Alabama facility in total, *id.*, with the goal of adding two additional cold rolling mills, a hot-annealing and pickling line, a hot-rolling mill, and a melt shop to increase production capacity substantially over the next several years. *Id.* at 48–49. The Commission found that the facility's SSSS production capacity "[[

]]"

and that its projected production is "[[

]]." Id. at 49. SL-USA has control over the Alabama facility. Id. at 27.

In its responses to the Commission's questionnaires, TK explained that it made its investment in SL-USA pursuant to its new "local supply strategy." Response of SL-USA to U.S. Producers' Questionnaire (Mar. 9, 2011) Conf. Rec. 85 App'x at 10, 14–18.[1] Under the local supply strategy, TK plans to serve the North American market with SSSS produced by Mexinox and SL-USA "almost exclusively[,] . . . while [TK's] German and Italian operations focus on serving the European market." *Views*, at 26–27; *see* CR 96 at 7–8. TK plans to limit imports from Germany and Italy to "small quantities of niche products not produced by SL-USA or Mexinox, such as certain embossed or pattern surfaced SSSS." *Views*, at 49. As SL-USA increases its 300-series SSSS production, Mexinox will shift its focus onto production of 400-series SSSS. *Id.* at 56; CR 96 at 7–8. In addition to contracting $1.2 billion in developing SL-USA's capacity, TK reconfigured its corporate hierarchy and consolidated its steel marketing divisions under the vice president for sales at SL-USA in furtherance of this strategy. *Views*, at 48; *see* Intervenor-Def.'s Mem. Opp'n Pls.' Br. at 15–16 (detailing uncontroverted administrative changes). Lastly, TK vested SL-USA's vice president for sales with the authority to "veto" any imports from TK's international production facilities with instructions "to wield such authority to safeguard [TK's] substantial investment in SL-USA." *Views*, at 50; *see* PR 102 at 161 ("SL-USA will not permit any action" by an affiliated foreign producer "that could potentially harm the economic viability of its operations and jeopardize the billions that we have invested in the Alabama mill.").

[1] Hereinafter all documents in the public record will be designated "PR" and all documents in the confidential record designated "CR" without further specification except where relevant.

TK also explained that it adopted its local supply strategy in response to a series of changes in the domestic and international SSSS market arising since the last review. PR 102 at 143–44. Customers in the U.S. began to demand shorter "lead times" for SSSS products, now expecting delivery in as little as four to six weeks where they had previously tolerated six to eight weeks. *Views* at 44–45. Domestic producers were able to meet this expectation by increasing inventories, *id.* at 45, but TK found it "impossible" to do the same with its German and Italian production. *Id.* at 44, 50. Furthermore, logistical costs for ocean transport and raw materials increased over the period of review, rendering importation from Europe generally less feasible. *Id.* at 50. Lastly, the relative weakness of the U.S. dollar over the period of review resulted in higher costs for all of TK's foreign goods sold in the U.S. *Id.*

The Commission recognized two additional changes in the SSSS market during the last period of review. First, domestic industry reorganized substantially and expanded its production capacity, leading the Commission to find that it stood at a much stronger competitive posture than in previous reviews. *Id.* at 38–41, 58–62. Second, although U.S. demand for SSSS dipped at the end of the review period due to a recession, world demand for SSSS was at its highest level of the period of review in 2010. *Id.* at 42–43. U.S. and world demand for SSSS is expected to increase significantly over the next several years, Mexico and Latin America included. *Id.*; CR 96 at 8.

After the period of review, TK announced its intention to sell its entire SSSS production unit. In a statement to the Commission regarding the planned sale, Clemens Iller, Chairman of TK's SSSS Marketing Board, wrote that the sale represents "a chance for [the] stainless [unit] to further develop its strength as a manufacturer of high-quality stainless steel and high performance alloys on an independent basis." PR 108 Ex. 3 at 2. TK offered evidence indicating that it would assemble a set of possible separation plans by January, 2012, including "an IPO[,] Spin-Off[,] . . . [and] possible strategic partnerships." *Id.* 2–3; *see* PR 102 at 206–07. Nevertheless, Chairman Iller affirmed that "there are no intentions to break the current stainless activities apart," as TK intended to sell "the stainless activities in total." PR 108 Ex. 3 at 3; *see* PR 102 at 206–07.

The Commission made three determinations relevant to the present appeal. First, based on the implications of TK's common ownership and the local supply strategy, the Commission cumulated subject imports from Mexico, Germany and Italy together on the one hand, and cumulated those from Japan, Korea, and Taiwan on the

other. *Views*, at 14, 26–32. Second, relying on TK's historical practices, the likely effect of the local supply strategy, and current SSSS market conditions, the Commission found that the cumulated volume of imports from Mexico, Germany, and Italy were not likely to increase substantially in the event of revocation. *Id.* at 46–54. Lastly, the Commission relied on TK's historical sales and the local supply strategy to conclude that the cumulated effect of Mexican, German, and Italian imports on prices would not be substantially depressive or suppressive in the event of revocation. *Id.* at 54–64.

JURISDICTION

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).[2]

STANDARD OF REVIEW

Under 19 U.S.C. § 1516a, "[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence, or otherwise not in accord with the law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence "can be translated roughly to mean[:] [I]s [the determination] unreasonable?" *Globe Metallurgical Inc. v. United States*, 32 CIT 274, 275, 547 F. Supp. 2d 1371, 1374 (2008) (quoting *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006)) (alteration in *Nippon*).

Challenging a Commission determination under the substantial evidence standard is "a course with a high barrier to reversal." *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001). The Commission's factual determinations "are presumed to be correct," and "[t]he burden of proving otherwise . . . rest[s] upon the party challenging such a decision." 28 U.S.C. § 2639(a)(1). The Commission's determination can be supported by substantial evidence despite the "possibility of drawing two inconsistent conclusions from the evidence." *Nevinnomyssikiy Azot v. United States*, 31 CIT 1373, 1379 (2007) (not published in the Federal Supplement) (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966)). "When 'the totality of the evidence does not illuminate a black-and-white answer,' it is the role of the [Commission] as the 'expert factfinder' to

[2] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

decide which side is most likely accurate." *Id.* (quoting *Nippon*, 458 F.3d at 1359). Consequently, the court "may not 'displace the [Commission's] choice between two fairly conflicting views,'" *U.S. Steel Corp. v. United States*, 36 CIT , , 856 F. Supp. 2d 1318, 1321 (2012) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)), and it may not "'reweigh the evidence or substitute its own judgment for that of the agency.'" *Id.* (quoting *Usinor v. United States*, 28 CIT 1107, 1111, 342 F. Supp. 2d 1267, 1272 (2004)).

DISCUSSION

Domestic industry objects to the Commission's cumulation, volume, and price effects determinations — as well as the Commission's decision to rely on TK's local supply strategy in making those determinations — on the basis that they are unsupported by substantial evidence.

"The [Commission] is required to conduct a sunset review every five years after publication of an antidumping duty order, a countervailing duty order, or a prior sunset review." *Nucor Corp. v. United States*, 32 CIT 1380, 1385, 594 F. Supp. 2d 1320, 1333 (2008), *aff'd*, 601 F.3d 1291 (Fed. Cir. 2010) (citing 19 U.S.C. § 1675(c)(1)). In such a review, the Commission is charged with determining "whether revocation of an order . . . would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). The likelihood of continuation or recurrence of material injury depends on "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked." *Id.* Furthermore, in analyzing the potential for injury, the ITC has the discretion to "cumulatively assess the volume and effect of imports of the subject merchandise" from a set of countries to better assess the effect of revocation, so long as certain requirements are met. *Nucor*, 32 CIT at 1385–86, 594 F. Supp. 2d at 1320 (quoting 19 U.S.C. § 1675a(a)(7)).

I. The Local Supply Strategy

As a preliminary matter, domestic industry argues that the Commission's reliance on TK's local supply strategy in support of its cumulation, volume, and price determinations renders each unsupported by substantial evidence because the local supply strategy has limited predictive value. Pls.' Br. at 9–13. "[T]he statutory term 'likely' . . . is the fulcrum upon which most of the determinations that the [Commission] is required to make in a sunset review turn." *Siderca, S.A.I.C. v. United States*, 29 CIT 572, 574, 374 F. Supp. 2d 1285, 1288 (2005). Courts understand "likely" to mean "'probable,' or,

to put it another way, 'more likely than not.'" *Id.* (citing *A.G. der Dillinger Huttenwerke v. United States*, 26 CIT 1091, 1101 n.14, 193 F. Supp. 2d 1339 n.14 (2002); *Usinor Industeel, S.A. v. United States*, 26 CIT 813, 813–14, 215 F. Supp. 2d 1356, 1357–58 (2002); *Usinor Industeel, S.A. v. United States*, 26 CIT 1402, 1403–04 (2002) (not published in Federal Supplement)). "'[U]nder the likelihood standard, the Commission will engage in a counter-factual analysis: it must decide the likely impact [of revocation] in the reasonably foreseeable future.'" *Consol. Fibers, Inc. v. United States*, 32 CIT 820, 829–30, 571 F. Supp. 2d 1355, 1365 (2008) (quoting Uruguay Round Amendments Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 884 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209).

The first prong of domestic industry's argument in opposition to the Commission's reliance on the local supply strategy is that the strategy "was only in the process of being implemented, there was no evidence of actual application of that policy, and the new policy was a departure from TK's historical sales policy." Pls.' Br. at 12. In support of its contentions, domestic industry cites uncontroverted evidence tending to show that the Alabama facility [[

]]. Pls.' Br. at 10–11 (citing CR 135 Ex. 6). Domestic industry also asserts that "there is no record evidence that [SL-USA] had ever exercised [its veto] authority as to Mexinox." Pls.' Br. at 12. In essence, domestic industry suggests that it was unreasonable for the Commission to rely on the local supply strategy in determining the likely effects of revocation because TK would not actually pursue it.

Contrary to domestic industry's assertion, the Commission cited substantial, uncontroverted evidence demonstrating TK's actual dedication to the local supply strategy. The Commission found that "[TK's] investment of $1.4 billion in SL-USA — $1.2 billion of which has been contracted and $950 million of which has been spent — is *compelling* evidence of the company's commitment to this strategy." *Views* at 50 (emphasis added). In addition to providing SL-USA with unequivocal "veto power" over imports from other TK producers, including Mexinox, TK consolidated its "North American administration and marketing in[to] SL-USA" and placed responsibility of U.S. and Canadian sales in the hands of the vice president for sales of SL-USA. *Id.* at 27. This organizational shift corroborates TK's numerous statements before the Commission affirming its commitment to the local supply strategy. *Id.* at 27; *e.g.*, PR 102 at 143–47 ("[TK] has recognized for a long time that the local supply strategy is a competitive necessity."); CR 96 at 8 ("[[

]].”); CR 135 Ex. 1 at 10–18 ([[

]]).

Furthermore, although domestic industry establishes that the local supply strategy is relatively new, it does not and cannot dispute the existence of new economic conditions that the Commission also relied upon to conclude that TK would likely follow through with its plan. Unlike domestic producers, TK found customer demands for shorter lead times “impossible to satisfy [when importing] from Germany and Italy,” *Views*, at 50, given the “financial risks associated with maintaining large inventories of subject imports” so far from the point of production. *Id.* at 45; *see* PR 102 at 143–44. “[I]ncreased logistical costs for ocean transport and raw materials” coupled with “the weakness of the dollar relative to the euro” further strained TK’s ability to import from abroad. *Views*, at 50. Domestic industry’s “neither surprising nor persuasive” alternative interpretation of evidence regarding SSSS market conditions does not undermine the Commission’s own reasonable interpretation. *See Nevinnomysskiy Azot*, 31 CIT at 1379 (quoting *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 936 (Fed. Cir. 1984)). The Commission reasonably concluded and explained TK’s new local supply strategy was a commercially “logical approach” to *new economic conditions, Views*, at 50, and corroborated its conclusion with uncontroverted evidence on the record showing that TK made substantial new investments and established new hierarchical structures in implementing that strategy. *Id.* at 27.

Second, domestic industry argues that because TK “intended to sell a majority stake in its stainless steel business,” Pls.’ Br. at 14–18 (quoting PR 107 Ex. 2), “there is no reason to anticipate that the TK strategies and plans would be followed by the new owner, who would then have operational control.” *Id.* at 15–17. Domestic industry objects to the Commission’s finding that the SSSS unit would remain intact after the sale, or at least that the new “single owner would continue to operate those facilities as a group.” *Id.* at 16. “[W]hether or not TK’s facility [would be] sold intact,” domestic industry continues, “the Commission’s presumption that the local supply strategy would be adopted by a new owner based on the ‘strong rationale’ for pursuing that strategy is without merit” because there are “other rational strategies for selling products.” *Id.* at 17.

Domestic industry’s arguments are again insufficient to undermine the Commission’s reasonable reliance on the local supply strategy. The Commission must predict the outcome of revocation for the “fore-

seeable future," *Consol. Fibers*, 32 CIT at 829–30, 571 F. Supp. 2d at 1365 (quoting 1994 U.S.C.C.A.N. at 4209), which domestic industry argues is "behavior projected over roughly two years." Pls.' Br. at 13 n.4 (citing *Magnesium from China and Russia*, USITC Pub. 4214 at 31 n.176, Inv. Nos. 731-TA10701–1072(2011) (second sunset review); *SSSS from France, Germany, Italy, Japan, Korea, Mexico, Taiwan, and the United Kingdom*, USITC Pub. No. 3788 at 48 & n.56, Inv. Nos. 701-TA-380–382 and 731-TA797–804 (2005) (first sunset review)). The Commission commenced the second sunset review in 2010 and published the results in 2011, well before the January 2012 target TK set as a deadline to develop *several different plans* for selling its SSSS unit. *Views*, at 29 (citing PR 102 at 207). As the record indicates little likelihood that TK would have selected a strategy, found a buyer, and completed the sale within the foreseeable future, domestic industry's doubts regarding the continued application of the local supply strategy for the foreseeable future are not persuasive.[3] Furthermore, the Commission reasonably relied on unambiguous evidence indicating TK would sell its SSSS unit as a whole,[4] *see* PR 102 at 207; PR 108 Ex. 3 at 2–3, and as above, reasonably concluded that "short lead times[,] . . . increased logistical costs, and exchange rate volatility" would provide any future owner of the SSSS unit with a "strong rationale" to pursue the same local supply strategy. *Views*, at 29–30.

This court owes "the expert factfinder — here the majority of the Presidentially-appointed, Senate-approved Commissioners" — a con-

[3] Domestic industry repeatedly characterizes TK's sale of the SSSS unit as imminent, even going so far as to say that the sale *would* occur in January, 2012. *See* Pls.' Br. at 15 (the local supply strategy "could not be presumed to continue in 2012 following the ownership change" and the sale "was planned to occur in less than a year"); Pls.' Reply Supp. Mot. J. Agency R. at 4 ("TK planned to sell its stainless operations in both the United States and Mexico by January 2012."). The record does not support this interpretation, as it is clear that TK only intended to prepare *plans* by January, 2012. *Views*, at 29; *see* Pls.' Br. at 14 (quoting PR 102 at 207) ("[TK] also said that it would decide in January 2012 how exactly it would go about spinning off its stainless steel operations, following a review by a group that had 'just recently started' to study the issue, that would present several 'options,' and 'then a decision will be taken which way to go.'").

[4] Domestic industry selectively quotes statements from Chairman Iller to imply that TK is considering selling its SSSS entities piecemeal. Pls.' Br. at 14; Pls.' Reply at 3. As the Commission correctly noted at oral argument, the quotations at issue actually refer to TK's openness to the variety of methods of sale, not whether the sale would include each of TK's SSSS producers. Immediately following the text domestic industry quotes, Chairman Iller states: "I would like to point out that there are *no intentions* to break the current stainless activities apart, but rather bring forward the stainless activities in total." PR 108 Ex. 3 at 3 (emphasis added). Chairman Iller was no less clear during a hearing before the Commission, stating that TK wants "to separate the *whole* [SSSS] business" such that "*all* of the [SSSS] units" would be part of the deal. PR 102 at 207–08 (emphasis added).

siderable amount of deference in using its expertise to make such predictions, and as such, domestic industry has a high burden to overcome. *Nippon*, 458 F.3d at 1352, 1359. The Commission cited record evidence in support of its determinations concerning new economic realities of the SSSS market, which domestic industry either fails to dispute or fails to explain using more than an alternative, equally viable interpretation. Consequently, the Commission's reliance on the local supply strategy to buttress its cumulation, volume, and price determinations was reasonable. *See Nucor Corp. v. United States*, 34 CIT , , 675 F. Supp. 2d 1340, 1350 (2010) ("While it is true . . . that there are circumstances under which [a foreign producer would increase imports] . . . even if doing so caused harm to [its domestic producer], the mere plausibility of a set of given circumstances is insufficient to overcome the high barrier to reversal of an agency determination.").

II. Cumulation

"In a sunset review," the Commission has discretion to "cumulate unfairly traded imports from multiple countries to adequately capture the goods' simultaneous injurious effects on the domestic industry that might otherwise be obscured in the agency's country-by-country review of the subject imports." *NSK Corp. v. United States*, 34 CIT , , 712 F. Supp. 2d 1356, 1360–61 (2010). Under 19 U.S.C. § 1675a(a)(7), the Commission "may cumulatively assess the volume and effects of imports of the subject merchandise from all countries" subject to a sunset review if (1) the reviews of each country began on the same day,[5] (2) imports from each country would be likely to compete with each other and domestic like products, and (3) such imports would likely have a discernible adverse impact on the domestic industry. 19 U.S.C. § 1675a(a)(7); *see NSK Corp.* , 34 CIT at , 712 F. Supp. 2d at 1361. "[T]he Commission has wide latitude in selecting the types of factors it considers relevant in undertaking its cumulation analysis." *Allegheny Ludlum Corp. v. United States*, 30 CIT 1995, 2005, 475 F. Supp. 2d 1370, 1380 (2006).

Domestic industry's primary argument is that TK's imports from Mexico would not compete under similar conditions with its imports from Italy and Germany because the record demonstrates that TK will limit imports from Italy and Germany while maintaining "substantial" imports from Mexico. Pls.' Br. at 21–23. As domestic industry puts it, "TK announced a coordinated program whereby Mexinox

[5] There is no dispute that this statutory requirement is satisfied because the Commission initiated sunset reviews with respect to all countries subject to the orders on June 1, 2010. Views, at 5.

— which already accounted for a substantial market share — would continue to export sizeable volumes of SSSS, while imports from Germany and Italy would be limited to 'small quantities of niche products.'"[6] *Id.* at 22 (quoting *Views*, at 49). Because "the projected volumes of imports from Mexico would be akin to those from Japan, Korea, and Taiwan, in arriving in the U.S. market in significant volumes," domestic industry concludes, the Commission should have cumulated Mexican SSSS imports with those from Japan, Korea, and Taiwan. *Id.* at 23.

Although domestic industry demonstrates that the volume of subject Mexican imports would differ from the volume of subject Italian and German imports, this fact alone is insufficient to overcome the Commission's wide latitude in using its discretion to cumulate imports from those countries based on the substantive implications of TK's common ownership. *See U.S. Steel Corp. v. United States*, 32 CIT 832, 834–35, 572 F. Supp. 2d 1334, 1340–41 (2008) (Commission determination not to cumulate imports under common ownership with unaffiliated imports from other countries affirmed as reasonable where those under common ownership would also compete with a domestic affiliate). Domestic industry does not and cannot argue that Japanese, Korean, and Taiwanese SSSS producers risked injuring their own corporate affiliates by importing into the U.S. Domestic industry also does not and cannot argue that in pursuing contracts and planning output, Korean, Japanese, and Taiwanese producers needed to consider a possible "veto" from a corporate affiliate. On the other hand, domestic industry acknowledges that TK would coordinate its Mexican, Italian, and German imports under a unified business plan, *see* Pls.' Br. at 22, and the record establishes that TK's Mexican, Italian, and German imports face competition and the threat of a veto from an affiliated U.S. production facility. *Views*, at 26–30. Simply put, the Commission's decision to cumulate Mexican imports with German and Italian imports was reasonable because

[6] The fundamental structure of TK's local supply strategy is to use Mexinox and SL-USA instead of its European producers to supply U.S. markets. PR 102 at 143–47; *Views*, at 26–27. Consequently, the "coordinated program" TK "announced" is none other than the local supply strategy domestic industry urges this court to ignore above. *See* Pls.' Br. at 18–24. Domestic industry also relies on the local supply strategy elsewhere in its briefs as convenience dictates. *See, e.g.*, Pls.' Br. at 26 (imploring the court to evaluate its position on the Commission's volume determination while "assuming for the sake of argument that it was proper for the Commission to rely on . . . [the] local supply policy"). Unsurprisingly, domestic industry does not explain how it would fashion a remand simultaneously instructing the Commission to disregard TK's local supply strategy and to use a critical component of that strategy in crafting revised cumulation, price, and volume determinations. Because the Commission grounded its determinations on substantial evidence, however, the court need not undertake this challenge itself.

the weight of the evidence shows similar conditions of competition between Mexican, German, and Italian SSSS producers.

III. Likelihood of Continuation or Recurrence of Material Injury

"After making the threshold determination whether to cumulate, the Commission must determine whether revocation of the order under review would be likely to lead to continuation or recurrence of material injury." *Wieland-Werke AG v. United States*, 31 CIT 1884, 1888–89, 525 F. Supp. 2d 1353, 1360 (2007), *aff'd*, 290 Fed. App'x 348 (Fed. Cir. 2008). The Commission evaluates the likelihood of continuation or recurrence of injury by predicting the volume, price effects, and impact of subject imports on domestic industry. 19 U.S.C. § 1675a(a)(2)–(4). In so doing, "[t]he Commission is required to consider any prior injury determinations, including volume, price effect, impact of imports before the order was in place, improvements in the state of the industry, industry vulnerability and Commerce's duty absorption findings." *Allegheny Ludlum*, 30 CIT at 2007, 475 F. Supp. 2d at 1382. The Act provides an outline of factors for the Commission to consider in making its volume, price, and impact determinations, *id.*, but "[t]he presence or absence of any factor . . . shall not necessarily give decisive guidance with respect to the Commission's determination." 19 U.S.C. § 1675a(a)(5).

A. Volume

Domestic industry argues that the Commission erred in finding that subject imports from Mexico would not likely increase above historical levels because "Mexinox is becoming even more central to TK's coordinated plans for the U.S. market than it has been at any time since the antidumping duty order was issued." Pls.' Br. at 26. Domestic industry supports this contention with record evidence that it characterizes as demonstrating that the U.S. was Mexinox's "primary market," Pls.' Br. at 25–27, that Mexinox intentionally increased its U.S. market share during the review period, *id.* at 27–29, that Mexinox has significant excess capacity, *id.* at 29–32, and that Mexinox would likely direct that excess capacity towards the U.S.[7] *Id.* at 32–33.

[7] Domestic industry also insists that TK intended to expand subject capacity at Mexinox, quoting announcements from TK to the effect that it sought to "grow with [its] customers in the months and years ahead," and "to support and grow with its U.S. Customers." Pls.' Br. at 28 (quoting PR 93 Ex. 4). As the Commission correctly points out in its response, TK's statements are actually responses to concerns about Mexinox's ability to *maintain its sales* given the antidumping duties in place, not any declaration of an intention to expand subject

Under 19 U.S.C. § 1675a(a)(2), the Commission determines the likely volume of imports after revocation by evaluating (1) "any likely increase in production capacity or existing unused production capacity in the exporting country," (2) "existing inventories of the subject merchandise, or likely increases in inventories," (3) "the existence of barriers to the importation of such merchandise into countries other than the United States," and (4) "the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products." *Id.* § 1675a(a)(2)(A)–(D).

First, domestic industry cites the local supply strategy and Mexinox's consistent market share during prior periods of review to argue that the U.S. was and will be its "primary market." Pls.' Br. at 25–27. This contention is unpersuasive without a corollary explanation of how such facts demonstrate a likely *increase* in import volume. *See* Pls.' Br. at 25–27. The local supply strategy explicitly requires Mexinox to supply the U.S. market without harming SL-USA. CR 96 at 8. The 400 series grade SSSS Mexinox sells in the U.S. affects the price of the 300 series grade SSSS SL-USA produces, meaning that any excessive increase in export volume from Mexinox would adversely impact SL-USA and thus would be subject to SL-USA's veto power. *Views*, at 50–51; PR 102 at 161. Indeed, domestic industry does not identify *any* evidence suggesting that TK's local supply strategy calls for Mexinox to increase import volume. *See also* PR 93 Ex. 3 at 23 (presentation slide stating TK's intention to "replace imports by new TK Stainless mill in Alabama").

Second, domestic industry cites data showing that Mexinox's "average market share" during the current review period was [[ ]] higher than its "average market share" during the investigation, Pls.' Br. at 28, and suggests that Mexinox would continue to increase its market share. *Id.* at 29. Domestic industry's figures are unpersuasive in light of the Commission's uncontroverted finding that TK's cumulated U.S. market share — principally comprised of Mexinox's products — remained in the [[ ]] range *since the imposition of the antidumping orders*, and that its cumulated market share is actually [[ ]] lower in 2010 than it was at the end of the investigation. Def.'s Br. at 28; *Views*, at 46–47. Domestic industry also fails to explain how a [[ ]] increase from an average [[ ]] market share during the last review is a "significant" increase, a telling omission given that ongoing restructuring and sensitivity of the domestic SSSS market could

capacity. Def.'s Mem. Opp'n Pls.' Br. ("Def.'s Br.") at 28; *see* PR 93 Ex. 4 (addressing "valued customers" regarding "concerns surrounding recent announcements in the press on the dumping margins impacting Mexinox").

lead to frequent changes in prices and market share. *See Views*, at 41–46, 50—51, 56–57.

Third, domestic industry argues that Mexinox had a significant amount of excess production capacity. Pls.' Br. at 29–32. Domestic industry does not contest the facts underlying the Commission's findings with respect to Mexinox's capacity, specifically that its [[ ]] capacity utilization rate left an "[[

]]." Views, at 47. Instead, domestic industry contends that Mexinox harbored the potential to shift its production from non-subject cut-to-length stainless steel strip ("CTLSSS") production to subject SSSS production. Pls.' Br. at 30–32. Domestic industry supports its contention with evidence showing that "subject producers can easily shift" from CTLSS production to coiled SSSS, that "coiled SSSS involves fewer processing steps than [CTLSS] and is easier to transport and more flexible for customers to use," and that "the growth in imports of CTLSS from Mexico strongly correlates to the filing of the antidumping case." Pls.' Br. at 30–31.

For product shifting to evidence a likely increase in import volume, "in addition to the physical ability to product-shift," the practice must "otherwise [be] a viable option." *Siderca, S.A.I.C. v. United States*, 28 CIT 1782, 1797–99, 350 F. Supp. 2d 1223, 1237–38 (2004). As the Commission recognized, CTLSS is a "value added product" that demands higher prices than subject SSSS, meaning that there is little incentive for Mexinox to abandon its CTLSS capacity. *Views*, at 54. "Moreover, U.S. demand for [CTLSS began to increase *prior to the imposition of the orders*," contrary to domestic industry's assertion that Mexinox increased CTLSS production "primarily as a means of circumventing the orders on SSSS." *Id.* More importantly, the local supply strategy limits Mexinox's ability to increase imports regardless of what type of subject goods they produced. CR 96 at 7–8. Although it can demonstrate the possibility of product shifting, domestic industry simply does not identify evidence indicating that such a strategy would be an economically viable option for Mexinox. *See Siderca*, 28 CIT at 1797–99, 350 F. Supp. 2d at 1237–38.

In further support of its excess capacity argument, domestic industry suggests that TK misled the Commission about its production capacity, citing a 2008 press report indicating that "TK planned to increase its Mexinox capacity from 295,000 short tons to 340,000 short tons," as "corroborated by Mexinox's own website as well as TK's presentation to its banks showing SL-USA supplying Mexinox with 340,000 short tons of hot-rolled SSSS feedstock by 2012/2013." Pls.' Br. at 30. The Commission reasonably chose to weigh the article,

which is dated 2008 and appears on a Chinese website of unclear repute, PR 93 Ex. 2 at 1–2, less heavily than TK's more recent and highly detailed questionnaire responses. *See generally*, CR 96 (TK's detailed questionnaire responses). Furthermore, the "corroborating" evidence does not cast doubt on TK's questionnaire responses regarding its SSSS production capacity because neither the website nor the presentation slides differentiate between subject and nonsubject production. *See* PR 93 Ex. 2 at 3 (TK webpage indicating that Mexinox has an "annual cold rolling capacity of 270,000 metric tons," without further specification); *id.* Ex. 3 at 21 (arrow indicating flow of 340,000 short tons of "hot rolled supply" without further specification). The marginal probative value of this evidence is insufficient to support domestic industry's dubious falsification claim.

Lastly, domestic industry asserts that Mexinox's alleged excess capacity would be directed towards the U.S. market. The Commission determined that Mexinox would not direct excess towards the U.S. because of higher average unit prices in Mexico, a projected significant increase in Mexican demand, and the prohibitive structure of the local supply strategy. *Views*, at 52. Domestic industry criticizes the average unit value figure as being based on a non-specific mix of expensive and inexpensive products, Pls.' Br. at 33, but it does not dispute the "*significant [projected] increase* in Mexican home market demand." *Views*, at 52 (emphasis added); *see* PR 93 Ex. 3 at 7 (slide from TK's presentation to its creditors showing a map of North America indicating Mexinox would sell products made from additional feedstock from SL-USA to consumers in Mexico rather than the U.S.). In light of an uncontroverted projected increase in demand and the probable effect of the local supply strategy, the Commission's finding was reasonable despite domestic industry's objection to average unit values.

Domestic industry's four arguments are insufficient to unsettle the Commission's reasonable likely volume determination, as they are merely an invitation for this court to reweigh record evidence in its favor. *See Nevinnomysskiy Azot*, 31 CIT at 1379 (quoting *Consolo*, 383 U.S. at 620). Consequently, domestic industry's challenge to the Commission's likely volume determination must fail.

B. Price

In reviewing whether the continuation or recurrence of material injury is likely if an antidumping duty order is revoked, "the Commission shall consider" the price effects of imports without the order in place. 19 U.S.C. § 1675a(a)(3). Specifically, the Commission must consider whether "(A) there is likely to be significant price undersell-

ing . . . as compared to domestic like products, and (B) [whether] imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products." *Id.*

Domestic industry's numerous arguments in opposition to the Commission's price determination follow two distinct paths, the first of which addresses the likelihood of significant underselling. Domestic industry asserts that the Commission ignored evidence showing that "Mexinox undersold the domestic industry . . . 54 percent of the time[] during the original investigation," "17.2 percent" after the imposition of the order, and then "34.3 percent" during the current period of review. Pls.' Br. at 34–35. Domestic industry further insists that "Mexinox . . . used [this] underselling to increase or maintain market share," given that "Mexinox's average annual U.S. market share increased" from the first period of review to the current period of review. *Id.* Domestic industry also cites a report prepared by North American Stainless, one of the plaintiffs in this action, showing that offers for subject SSSS from Mexinox were "[[ ]]" after SL-USA had begun production. *Id.* at 36.

The Commission did not improperly ignore evidence of past underselling in determining that future underselling was unlikely. The Commission found that "culminated subject imports . . . oversold the domestic like product during the period of review . . . in 50 of 75 quarterly comparisons, or two-thirds of the time." *Views*, at 55. As above, domestic industry's reliance on average market share over the investigation and each period of review obscures the Commission's reasonable finding that TK's cumulated market share remained consistently within the [[ ]] range from the investigation through the second sunset review. *Id.* at 46–47. Domestic industry relies on the same figures to color Mexinox's behavior in the most advantageous light, and therefore its argument here is nothing more than an alternative interpretation of evidence on the record. *See Nevinnomysskiy Azot*, 31 CIT at 1379 (quoting *Consolo*, 383 U.S. at 620); *U.S. Steel Corp.*, 32 CIT at 841–42, 572 F. Supp. 2d at 1345–46 (Commission's price determination affirmed as reasonable it was supported in part by evidence of "mixed" overselling and underselling).

Domestic industry's citation to Mexinox's alleged 2011 price offers are also insufficient for this court to upset the Commission's determination. As the Commission explained below, the price offers are "contradicted by the pricing data on the record of these reviews, showing that imports from Mexico oversold the domestic like product

in 46 of 70 quarterly comparisons." *Views*, at 55 n.279. Furthermore, the proffered evidence did "not indicate the product at issue or the source of the information" on some pages, and "did not indicate the time frame" on others. *Id.*; *see* CR 138 Ex. 3 (chart and emails regarding alleged price offers without verifiable source citations and dates). Even if the difference between offer prices and transaction prices is a "quibble" as domestic industry claims, the Commission acted reasonably in deciding to weigh verifiable transaction prices from the period of review more heavily than evidence of offer prices with limited source citations compiled by an interested party.

The second set of domestic industry's arguments challenges the Commission's finding that Mexinox's imports were not likely to have an otherwise significant depressing or suppressing effect on domestic prices. Domestic industry claims that "[m]aintaining high prices in the U.S. market . . . is not TK's announced objective" because "[a]ll of TK's published materials emphasize its push for volume and market share in North America." Pls.' Br. at 34. Further, "[e]ven assuming that SL-USA has an incentive to manage its imports in a manner that will not harm its own business, it has no incentive to manage its imports in a manner that does not harm the rest of the domestic SSSS industry." *Id.* at 38. In other words, "[t]o protect its $1.4 billion dollar investment and cover its massive fixed costs at SL-USA, TK must first maximize its sales volume," in turn causing Mexinox to lower its prices in response to an increasingly depressed U.S. SSSS market. *Id.* at 34.

Domestic industry's argument fails to acknowledge sufficiently one critical fact underlying the Commission's determination: SL-USA is a domestic producer. Indeed, while SL-USA's "surge in new capacity" may depress domestic prices, *id.* at 39, it bears little relevance to the likelihood of whether *Mexinox's* imports will have a "significant" depressing or suppressing effect, let alone the likely cumulated effect of all TK's imports. *See* 19 U.S.C. § 1675a(a)(3)(B). Under the local supply strategy, SL-USA must carefully manage subject imports from Mexinox and TK's European producers *regardless* of what impact its own production has on the domestic market. The Commission found that cumulated subject imports would not cause significant price depression or suppression, and domestic industry's argument here does not undermine that finding. *See* Views at 54–57.

In short, domestic industry has identified no evidence in either prong of its arguments demonstrating that TK's cumulated imports would cause price suppression or depression in the U.S. SSSS market, whereas the Commission grounded its likely price effect deter-

mination in substantial evidence. *See* U.S. Steel *Corp.*, 32 CIT at 841–42, 572 F. Supp. 2d at 1345–46 (Commission determination that revocation would not have significant depressing or suppressing price effects reasonable where foreign producer's product would affect the price of affiliated domestic producer's similar product).

CONCLUSION

Based on the foregoing, the court concludes that the Commission's determination with regard to cumulation, volume effects, and price effects are supported by substantial evidence and are otherwise consistent with the law. Therefore, the determination is hereby affirmed in its entirety and this matter is dismissed.

Dated: November 15, 2012
New York, New York

/*s*/ *NICHOLAS TSOUCALAS*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 12–140

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

Before: Gregory W. Carman, Judge
Court No. 07–00318

[*Following bench trial, and upon the Court's finding that Customs unlawfully rate-advanced Plaintiff's merchandise, judgment is entered in favor of Plaintiff.*]

Dated: November 20, 2012

Eckert Seamans Cherin & Mellott, LLC (*Gregory H. Teufel* and *Jeremy L. S. Samek*) for Plaintiff.

Stuart F. Delery, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Edward F. Kenny* and *Jason M. Kenner*); *Yelena Slepak*, Office of the Assistant Chief Counsel, Int'l Trade Litigation, U.S. Customs and Border Protection, of counsel, for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

Following a bench trial held from February 6, 2012 to February 10, 2012, this matter is now before the Court for findings of facts, conclusions of law, and entry of judgment. Upon considering and weighing the evidence on the trial record, the Court finds that Plaintiff,

International Custom Products, Inc. ("ICP"), has proven that the product it imported in the entry underlying this case, called "white sauce," conformed to a properly obtained binding ruling letter, D86228 (the "Ruling Letter"), issued by the New York office of the Bureau of Customs and Border Protection ("CBP" or "Customs") on January 20, 1999. Because the Ruling Letter, which had not been properly revoked, controlled the tariff classification of ICP's white sauce, the Court finds that CBP acted contrary to law in liquidating the entry under a different tariff classification associated with a much higher tariff rate. As a consequence, the Court will issue a partial final judgment pursuant to USCIT Rule 54(b),[1] requiring Customs to reliquidate the single entry of Plaintiff's merchandise underlying this suit at the rate established by the Ruling Letter and to refund to Plaintiff any overpayment with interest as provided by law.

I. PROCEDURAL BACKGROUND OF CASE

Litigation between Plaintiff and the government over the liquidation rate of entries of Plaintiff's white sauce has been ongoing since 2005. It was on April 18, 2005 that Customs issued a Notice of Action which had as its result that 100 entries (the "Affected Entries") of ICP's white sauce were reclassified under 0405.20.3000, HTSUS, for "[b]utter and . . . dairy spreads," rather than as "[s]auces and preparations therefor" under 2103.90.9091, HTSUS (the 2005 analog of 2103.90.9060, HTSUS, which was the subheading provided for in the 1999 Ruling Letter). The Notice of Action stated that "action has been taken" to rate-advance the Affected Entries, and that in the future, "all shipments of this product must be classified" under 0405.20.3000, HTSUS. The consequence of the reclassification was an increase of approximately 2400% in the duties owed by ICP. Since 2005, ICP has sought relief in various forms from the Notice of Action.

A. Overview of ICP Cases

Customs's reclassification of ICP's white sauce has spawned a number of lawsuits. A brief overview of that litigation is appropriate here to provide the context within which the current case arises.

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[1] USCIT Rule 54(b) permits the Court to "direct entry of a final judgment as to one or more, but fewer than all, claims" where the Court "expressly determines that there is no just reason for delay." The Court will avail itself of this procedure because certain of Plaintiff's claims have been stayed on agreement of the parties until such time as judgment has been issued on the claims decided in this opinion and all appeals have been exhausted. Further details are provided below.

1. *The 2005 Case*

Challenges to tariff classification are typically brought before this court under 28 U.S.C. § 1581(a). However, in its 2005 suit (Court No. 05–00341), ICP asserted jurisdiction under the Court's residual jurisdictional statute, 28 U.S.C. § 1581(i)(4). The Court may not exercise § 1581(i) jurisdiction when the plaintiff can access the court "by traditional means, such as under § 1581(a)," unless "the remedy provided under [subsection (a)] would be manifestly inadequate." *Thyssen Steel Co. v. United States*, 13 CIT 323, 328, 712 F. Supp. 202, 206 (1989). This Court determined that a suit brought pursuant to § 1581(a) would be manifestly inadequate because ICP was challenging not the "classification of its white sauce as enunciated in the Notice of Action," but rather "the Notice of Action itself and Customs's authority to issue it." *International Customs Products, Inc. v. United States*, 29 CIT 617, 622, 374 F. Supp. 2d 1311, 1320 (2005) ("*ICP I*"). This Court also found that ICP's remedy under § 1581(a) would be manifestly inadequate because the company would likely cease to exist due to the financial effects of the Notice of Action before any § 1581(a) remedy could be obtained. *Id.* at 1322.

Having determined that jurisdiction under § 1581(i) was proper, this Court proceeded to grant a motion by ICP for judgment on the agency record, declaring that the Notice of Action was null and void because it was a "decision" that revoked the Ruling Letter without following the notice-and-comment requirements for revocation of ruling letters set forth in 19 U.S.C. § 1625(c). *Id.* at 1325–30. This Court found that Customs must reliquidate the Affected Entries consistent with the Ruling Letter, which this Court declared was still in force at the time the entries had been rate-advanced. *Id.* at 1333.

The Court of Appeals for the Federal Circuit ("CAFC") reversed this Court regarding jurisdiction, holding that "the remedy provided by subsection 1581(a) is not manifestly inadequate, and that therefore the Court of International Trade lacked jurisdiction under subsection 1581(i)(4)." *International Custom Products, Inc. v. United States*, 467 F.3d 1324, 1327 (Fed. Cir. 2006) ("*ICP II*"). Due to the jurisdictional defect, the CAFC vacated this Court's decision regarding the merits of ICP's arguments and remanded the case for dismissal. *Id.* at 1328. Accordingly, this Court dismissed ICP's 2005 case. *International Custom Products, Inc. v. United States*, 31 CIT 266 (2007) (Judgment Order).

2. *The 2007 Case (the Current Case)*

In 2007, ICP timely filed this lawsuit, seeking, in essence, to raise the same challenges to the Notice of Action that were raised in Court

No. 05–00341, but on § 1581(a) jurisdictional grounds. A plaintiff must protest before Customs the duties imposed, have Customs deny that protest, then pay all imposed duties before bringing suit in the Court of International Trade ("CIT") under § 1581(a). Apparently because Plaintiff could not afford to pay the 2400% increase in duties on the scores of Affected Entries, Plaintiff protested and paid duties on a single entry, entry 180–0590029–7 ("the Entry"), upon which it bases this suit. The Entry was part of a group of 11 entries brought into the United States in 2005 after the Notice of Action was issued. Customs liquidated the Entry at the higher rate provided in the Notice of Action on June 29, 2007 and ICP protested the liquidation on July 26, 2007 with a request for expedited treatment. The protest was deemed denied. ICP paid the assessed duties by August 27, 2007 and filed this suit on August 28, 2007.

3. *The 2008 Cases*

Two other lawsuits filed by Plaintiff in 2008 are stayed pending the resolution of the current case. The first of these suits, assigned Court No. 08–00055, challenges as unlawful certain actions Customs took after importation of the Entry in the instant case. The precise content of that suit is immaterial here.[2] *See* Compl., Court No. 08–00055, ECF No. 4. The second 2008 suit, assigned Court No. 08–00189, also addresses events postdating the Customs actions challenged in the instant case and is immaterial here.[3] *See* Compl., Court No. 08–00189, ECF No. 2.

The Court stayed all proceedings in Court No. 08–00055 and Court No. 08–00189 on October 29, 2008 and August 5, 2009, respectively.[4]

B. Prior Proceedings in the Current Case

It will be useful to summarize here the prior opinions and proceedings of the Court with regard to the current case, leading up to the trial.

On November 30, 2007, the government responded to the complaint with a motion to dismiss for failure to state a claim upon which relief can be granted. *See* Motion to Dismiss, Court No. 07–00318, ECF No. 23. The Court granted the government's motion to dismiss as to two

[2] Court No. 08–00055 challenges Customs's formal revocation of the Ruling Letter pursuant to the notice-and-comment procedures of 19 U.S.C. § 1625(c), effective January 2, 2006. Those events postdate the events giving rise to the instant suit.

[3] Court No. 08–00189 challenges on various grounds Customs's reclassification of 13 entries of ICP's white sauce in 2007.

[4] In Court No. 08–00055, the parties must file a joint scheduling order thirty days following entry of final judgment, and the conclusion of any appeals, in the current case. Order, Court No. 08–00055, ECF No. 12. Court No. 08–00189 is stayed until ten days after entry of a final judgment in the current case. Order, Court No. 08–00189, ECF No. 47.

of ICP's claims.[5] *See International Custom Products, Inc. v. United States*, 32 CIT 302, 549 F. Supp. 2d 1384 (2008) ("*ICP III*"). However, the Court denied the motion to dismiss as to three of ICP's claims: (a) Count I, alleging that the 2005 Notice of Action was unlawful because it revoked the binding Ruling Letter without going through the notice-and-comment revocation procedures required by 19 U.S.C. § 1625(c)(1), and applied that revocation retroactively; (b) Count II, making a similar allegation that Customs revoked a prior treatment of ICP's white sauce in violation of notice-and-comment requirements provided by 19 U.S.C. § 1625(c)(2); and (c) Count V, alleging that Customs violated ICP's constitutional due process rights when it revoked the Ruling Letter, depriving ICP of a property interest in continued classification of its white sauce entries under the Ruling Letter absent notice and an opportunity to comment pursuant to 19 U.S.C. § 1625(c). *Id.* In the course of determining that Count I was not subject to dismissal for failure to state a claim upon which relief could be granted, the Court held that the Notice of Action was an "interpretive ruling or decision" within the meaning of 19 U.S.C. § 1625(c)(1) and "that, if the actions alleged of Customs are proven, Customs effectively revoked ICP's classification ruling by its conduct in connection with the white sauce importations." *ICP III*, 549 F. Supp. 2d at 1393–94. After the Court issued its decision on the motion to dismiss, the government filed an answer to the complaint on April 14, 2008. Answer, Court No. 07–00318, ECF No. 44.

Plaintiff filed a motion for summary judgment on January 4, 2008 (Court No. 0700318, ECF No. 27), and the government filed a cross-motion for summary judgment on September 26, 2008 (Court No. 07–00318, ECF No. 67). The Court denied those motions on January 29, 2009, finding that genuine issues of material fact precluded resolving the case without a trial. *International Custom Products, Inc. v. United States*, 33 CIT __, 2009 WL 205860 (2009). In its opinion on the cross-motions for summary judgment, the Court specifically found that jurisdiction in the current case was properly based upon § 1581(a) and extended only to the Entry (entry 180–0590029–7), but not to any of the other 99 Affected Entries. *Id.* at *3.

The Court also identified in detail the issues of material fact preventing entry of summary judgment. First, the Court found that "there is a genuine issue of material fact as to whether the actual goods Plaintiff imported conform to the description of 'white sauce'" in

[5] The dismissed claims alleged that Customs impermissibly modified the Ruling Letter without a compelling reason, and that Customs's revocation of the Ruling Letter constituted rulemaking conducted without notice and comment in violation of section 553 of the Administrative Procedure Act, codified at 5 U.S.C. §§ 553 *et seq.*

the Ruling Letter. *Id.* at *5. At issue was whether the white sauce in the Entry contained xanthan gum or carboxymethylcellulose ("CMC") at all, and whether it contained milkfat (interchangeably referred to as "butterfat") in concentrations conforming to the Ruling Letter. *Id.* Second, the Court found that "[w]hether or not Plaintiff made entries of 'white sauce' that . . . can serve as 'prior treatment' for the purposes of 19 U.S.C. § 1625(c)(2), represents a genuine issue of material fact." *Id.* at *7. Third, the Court found that judgment could not be entered summarily on Plaintiff's Due Process claim because that claim relied on the alleged violation of 19 U.S.C. § 1625(c)(1) as to which the Court had already indicated genuine material issues of fact existed. *Id.* at *8. The government's cross-motion sought summary judgment on the basis that ICP had made a material misstatement or omission, by mischaracterizing the contents of white sauce and by failing to disclose known typical uses and designations of white sauce, when applying for the Ruling Letter. *Id.* The Court found that, although the government had presented "pertinent" evidence on these issues, that evidence was insufficient to determine the issue as a matter of law. *Id.*

C. Bifurcation of the Current Case

On August 4, 2010, the parties jointly moved to bifurcate trial of Plaintiff's remaining claims in the current case into two phases, with Plaintiff's 19 U.S.C. § 1625(c)(1) claim and due process claim to be tried first and Plaintiff's 19 U.S.C. § 1625(c)(2) claim to be reserved and stayed for possible later trial, pending the outcome of the first phase. (Joint Motion to Sever (Bifurcate Trial), Court No. 07–00318, ECF No. 157.) The Court granted this motion. (Order of August 13, 2010, Court No. 07–00318, ECF No. 158.) For this reason, no evidence concerning Plaintiff's 19 U.S.C. § 1625(c)(2) claim was taken during the present trial; that portion of Plaintiff's complaint remains stayed at this time.

II. PRETRIAL

After some additional motion practice, and a limited extension of discovery, the parties submitted proposals for a pretrial order to govern trial of this case. In doing so, differences between the parties as to the admissibility of certain evidence arose.

A. Evidentiary Issues

Two evidentiary issues raised by the parties in the pretrial stage remain pending before the Court. First, Plaintiff sought an adverse inference that certain samples of white sauce, destroyed while in the government's possession, contained ingredients that conformed to the

description of white sauce set forth in Plaintiff's ruling request. (Pl.'s Mot. in Limine, Court No. 07–00318, ECF No. 172.) The Court denied this motion, but permitted Plaintiff to present evidence relevant to spoliation at trial and renew the motion at the close of trial if Plaintiff wished to do so. (Order of May 26, 2011, Court No. 07–00318, ECF No. 190.) Second, the Court deferred ruling on a motion by Defendant (Def.'s Second Mot. in Limine and for Disqual., Court No. 07–00318, ECF No. 163) to exclude Plaintiff's counsel, Mr. Teufel, until such time as Plaintiff might actually seek, at trial, to introduce testimony from Mr. Teufel. (Slip Op. 11–60, May 26, 2011, Court No. 07–00318, ECF No. 189.)

As for exhibits, those issues were resolved prior to trial, with the exception of Plaintiff's Ex. 18. After motion practice and discussions between the parties and the Court as to the admissibility of paper exhibits and deposition transcripts, the parties each moved in colloquy immediately prior to the beginning of trial to admit a particular set of exhibits to which the other party did not object. Upon consideration of the consent of the parties and upon the Court's own consideration of the admissibility of the exhibits, the Court admitted into evidence Plaintiff's Exhibits 1–7, 9, 12–13, 15–16, 19, 21, 23, 25–27, 30–34, 44, 50a–50ppppp, 51–59, 62–64, 66, 68–74, 77–78, 80–81, 85, 88–89, 93–94, 96, 98, 100, 105–107, 237, 242–243, 253, 255–258, 277, and 281–282; and Defendant's Exhibits A–HH, KK–OO, and RR–DDD. (Tr. 6–15; Pretrial Order, Court No. 07–00318, ECF No. 235, Attachs. 1–5.)[6] The Court took testimony regarding Plaintiff's Ex. 18 (production "make sheets" from the files of the New Zealand-based manufacturer of white sauce) and admitted that exhibit over Defendant's hearsay objection. (Tr. 195–197.)

B. Pretrial Order

A pretrial order in this case was entered on January 25, 2012. (Pretrial Order, Court No. 07–00318, ECF No. 235.) Plaintiff and Defendant outlined the issues for trial in their respective Pretrial Order Schedules. (Pretrial Order, Court No. 07–00318, ECF No. 235, Scheds. F1 and F2.) To ensure that the relevant legal and factual issues were properly framed prior to trial, the Court distributed an

[6] A color-coded chart of all proposed exhibits was incorporated into the Pretrial Order in lieu of Pretrial Order Scheds. H-1 and H-2. (Court No. 07–00318, ECF No. 235, Attachs. 1–5.) This chart marked each exhibit in either light or dark green (stipulated to by the parties), yellow (status to be determined at the opening of trial), or red (withdrawn by the parties). The Court had indicated to the parties on the chart the manner in which it intended to rule should a decision be required on the dark green or red entries, but the necessity for the Court to issue those rulings was avoided by the stipulations and withdrawals of the parties.

outline of relevant issues to the parties at a pretrial conference on November 17, 2011, and the parties confirmed their agreement.

1. *Issues for Trial*

The principal issues to be decided are (1) whether the white sauce in the Entry conformed with the Ruling Letter and (2) whether the Ruling Letter was invalid due to material false statements or omissions made by ICP in seeking it. (*Id.*)

As to whether the white sauce in the Entry conformed with the Ruling Letter, there are two relevant questions: (a) did the white sauce in the Entry contain CMC and xanthan gum, and (b) did the white sauce in the Entry contain between 72% and 77% milkfat. A subsidiary question is whether the Entry failed to materially conform to the Ruling Letter if its milkfat content was above 77%.

As to whether the Ruling Letter is invalid due to material false statements or omissions made by ICP, three questions are relevant: (a) did ICP fail to disclose its knowledge as to the typical use of white sauce; (b) did ICP fail to disclose all the commercial, common, and technical designations for white sauce; and (c) did ICP mislead Customs as to the purpose of the ingredients in white sauce. (Pretrial Order, Court No. 07–00318, ECF No. 235, Sched. D2 at ¶ 2.)

2. *Uncontested Facts*

Certain basic facts regarding this case were agreed upon between the parties in the pretrial order. (Pretrial Order, Court No. 07–00318, ECF No. 235, Sched. C.) Those facts are as follows. Dennis Raybuck is the President and founder of ICP, an importer and distributor of dairy products, including white sauce, to manufacturers of food products. (*Id.* at ¶¶ 1–3.) White sauce is a milkfat-based product that serves as the base and can be an ingredient for products including, but not limited to, gourmet sauces, salad dressings, processed cheeses, club cheese preparations, other sauces, and baked goods. (*Id.* at ¶¶ 4–5.)

In 1998, ICP sought a binding tariff classification ruling from Customs, stating in its request that white sauce "may be used as the base for a gourmet sauce or salad dressing" and "is the commercially recognized formulated sauce preparation which serves as the base for production of gourmet sauces and dressings." (*Id.* at ¶¶ 6–8.) A specification sheet for white sauce, attached to ICP's ruling request, stated that white sauce "has been properly acidified and contains all of the necessary thickeners and emulsifiers needed for the further production of gourmet sauces and dressings," which was given as white

sauce's "[t]ypical usage." (*Id.* at ¶¶ 9–10.) According to the specification sheet, the "producer of gourmet sauces and dressings need only add the proper flavoring compounds necessary for the production of their specific sauce or dressing." (*Id.* at ¶ 11.) The specification sheet also listed, under the heading "TYPICAL ANALYSIS," milkfat content of 72%–77% and ingredients as "Milkfat, Water, Vinegar (and/or lactic acid and/or citric acid), Zanthum [sic] gum, Carboxymethelcellulose [sic], Sodium Phosphate and/or Sodium Citrate."[7] (*Id.* at ¶¶ 12–13.) ICP also submitted a sample of white sauce with the ruling request. (*Id.* at ¶ 15.) Customs issued the Ruling Letter on January 20, 1999, classifying the product described in the ruling request in HTSUS 2103.90.90, providing for "[s]auces and preparations therefor; . . . : [o]ther: [o]ther: [o]ther: [o]ther," with a duty rate of 6.6% *ad valorem*. (*Id.* at ¶ 16–17.)[8]

Beginning in early 2000, ICP purchased property to build a manufacturing facility, but production did not begin until the first quarter of 2005 due to a lawsuit and sewer and zoning problems. (*Id.* at ¶¶ 26–32.)

Customs tested three samples of ICP's imported white sauce between 2000 and 2007. (*Id.* ¶ 34.) In 2001, Customs requested the breakdown of a sample, asking "DOES IT CONTAIN MILK OR CHEESE?" (*Id.* at ¶ 36.) The lab reported that the 2001 white sauce sample contained 72.97% milkfat and concluded that "Fat and Moisture analyses indicates [sic] that the sample contains 73% fat and 23% moisture which is consistent with the information provided by the importer. Information from the importer indicates the sample contains 77% [milk]fat, 21% moisture, and 2% (Lactic acid, zanthum [sic] gum, carboxymethelcellulose [sic], sodium phosphate and sodium citrate)." (*Id.* ¶ 37–38.)

A second white sauce sample was tested to verify the ingredient breakdown in late 2004; two reports concluded that the milkfat content of this sample was approximately 78%. (*Id.* ¶¶ 39–41.) Certificates of analysis for the entry from which the 2004 sample was taken indicate milkfat content of 77.3% and 78.1%, calculated using a technique called the "by difference" method. (*Id.* at ¶ 48.) The data attached to the 2004 and 2005 reports on the 2004 sample list slightly varying percentages of both milkfat and butyric acid (a measurement that allows for conversion of tested crude fat levels into milkfat levels). (*Id.* ¶¶ 42–47.) The butyric acid levels given with the lab reports lead to a calculation that more than 100% of the sample's

[7] "Zanthum gum" is an incorrect spelling of xanthan gum and "Carboxymethelcellulose" is an incorrect spelling of carboxymethylcellulose, *i.e.*, CMC. *Id.* at ¶ 14.

[8] That tariff rate was reduced to 6.4% *ad valorem* in the 2005 HTSUS. (*Id.* at ¶ 18.)

crude fat consists of milkfat. (*Id.* at ¶¶ 45–47.)

Customs sent a final white sauce sample for testing in 2007 in order to verify its ingredient breakdown, specifically requesting that the ingredients on the specification sheet be verified and that the lab determine whether the white sauce was an emulsion (and if so, of what type). (*Id.* at ¶¶ 51–52.) For the 2007 sample, the lab determined a milkfat content of approximately 76.58%, rounded up to 77% in the lab report, which was 1.52% less than the milkfat percentage stated in the certificate of analysis accompanying the entry. (*Id.* at ¶¶ 53–56.) The average lab findings of milkfat content in the 2001, 2004, and 2007 samples was 75.84%. (*Id.* at ¶ 58.)

On an unspecified date, ICP created for its main customer, Schreiber Foods ("Schreiber") (the company that purchased the Entry) a white sauce specification sheet which did not list xanthan gum or CMC as ingredients. (*Id.* ¶ 21–22.)

Customs liquidated the Entry under HTSUS 0405.20.30 on June 29, 2007; ICP timely protested liquidation, the protest was deemed denied, and ICP paid the assessed duties of $66,602.32 by August 27, 2007. (*Id.* at ¶¶ 23–25.)

III. TRIAL

The trial of this matter was held before the undersigned at the Court of International Trade on February 6–10, 2012.

A. Trial Exhibits

As mentioned above, in colloquy at the commencement of the trial the Court granted Plaintiff's unopposed motion to enter into evidence Plaintiff's Exhibits 1–7, 9, 12–13, 15–16, 19, 21, 23, 25–27, 30–34, 44, 50a–50ppppp, 51–59, 62–64, 66, 68–74, 77–78, 80–81, 85, 88–89, 93–94, 96, 98, 100, 105–107, 237, 242–243, 253, 255–258, 277, and 281–282; and Defendant's Exhibits A–HH, KK–OO, and RR–DDD. (Tr. 6–15; Pretrial Order, Court No. 07–00318, ECF No. 235.) The Court heard testimony from Dennis Raybuck, the CEO of ICP, that Plaintiff's Exhibit 18 contained production control sheets, also called make sheets, from a plant run by ICP's New Zealand based white sauce supplier. (Tr. 103.) Mr. Raybuck testified that he visited the plant at least once a year and looked at make sheets during his visits. (Tr. 105.) Mr. Raybuck stated that shift supervisors in charge of running the plant prepared the make sheets contemporaneously with production, recording information within their direct knowledge, and that the make sheets were kept in the regular course of business. (Tr. 104–05.) On voir dire, Mr. Raybuck stated that he examined the make sheets in batches for approximately one hour during his visits to ICP's supplier's plants, did not personally fill out the make sheets, never

worked for or held an ownership interest in the supplier company, and did not know what rules the supplier had regarding how the make sheets were to be filled out. (Tr. 105–09.) The government moved to exclude Plaintiff's Exhibit 18 on hearsay grounds, arguing that the make sheets were unreliably filled-out and that Mr. Raybuck could not establish a business records exception because he did not work for the white sauce supplier company. (Tr. 109.) The Court admitted Plaintiff's Exhibit 18 into evidence under Federal Rule of Evidence 803(6), the business record exception to the hearsay rule. (Tr. 195–96.) The Court found that Mr. Raybuck was a qualified witness as to the regularity of the records, and his testimony established that the make sheets were made at or near the time, by (or from information transmitted by) someone with white sauce production knowledge and were kept in the ordinary course of business as a regular practice. (Tr. 196–97.) The Court found that the government's objection that the records were not filled out in a reliable manner went to weight, not admissibility. (Tr. 197.)

B. Trial Testimony

Because the parties included many of the same witnesses on their witness sheets, the Court allowed the witnesses to be called only a single time and gave the parties latitude in their questioning.

Plaintiff called Dennis Raybuck, the president and CEO of ICP, as both a fact witness and an expert witness (Tr. 92–463, 597–709, 817–23, and 1088–1117); Donald B. Learmonth, an executive with Fonterra and associated companies that supplied ICP's white sauce, as a fact witness (Tr. 465–502); Stanley Hopard, a former Customs National Import Specialist who authored the Ruling Letter, as a fact witness (Tr. 503–75); Leslie Aita, a Customs Import Specialist involved in the investigation that led up to Customs issuing the Notice of Action, as a fact witness (Tr. 576–96); Alexander J. Costigan, former owner of Level Valley Creamery, as a fact witness (Tr. 710–30); and Gerd Stern, the former owner of companies that were early suppliers of ICP's white sauce, as a fact witness (Tr. 730–64).

Defendant called Diane Kutskel, Mr. Raybuck's former assistant at ICP, as a fact witness (Tr. 766–815); John G. McManus, director of purchasing for Schreiber Foods from 1998–2004, as a fact witness (Tr. 832–69); Julian B. Heron, an attorney who represented ICP in the past and who prepared the Ruling Request, as a fact witness (Tr. 870–85); Cheryl Glenzer, a former senior ingredients purchaser for Schreiber Foods from 1989–2006, as a fact witness (Tr. 886–903); and Dr. Robert L. Bradley, Jr., a dairy professor at the University of Wisconsin, as an expert witness (Tr. 904–1080).

IV. FINDINGS OF FACT

Upon the trial record, the Court's consideration of the testimony taken, the Proposed Findings of Fact submitted by the parties, and all other papers and proceedings had in this matter, the Court hereby makes the following findings of fact.

A. Ingredients in the Entry

The Court finds that the white sauce in the Entry contained CMC and xanthan gum in functional amounts, and an actual milkfat content under 77%.

1. *CMC and Xanthan Gum*

CMC and xanthan gum serve to thicken liquids. (Tr. 163.) Mr. Learmonth and Mr. MacBeth, employees of ICP's supplier, credibly confirmed that the supplier always added CMC and xanthan gum to the white sauce it manufactured for ICP. (Tr. 479; Pl. Ex. 9 at 50–1.) Mr. Raybuck provided ICP's supplier with the same specification sheet for white sauce that was supplied to Customs with the Ruling Request (Tr. 225–26; Pl. Ex. 2 at 3), and ICP instructed the supplier to include .2% CMC and .25% xanthan gum so that the white sauce would contain thickeners in the middle of the functional range (Tr. 203). When Mr. Raybuck used the white sauce in his test kitchen, it always thickened upon heating and otherwise acted in a manner consistent with containing CMC and xanthan gum in effective quantities. (Tr. 164–65.) Numerous certificates of analysis ("COAs"), make sheets, and other documents recording the regular procedures of ICP's white sauce supplier regarding batches of white sauce produced in the period leading up to manufacture of the Entry, as well as of the Entry itself, confirm the presence of CMC and xanthan gum in the white sauce generally and in the Entry specifically. (Pl. Exs. 18, 31.) The Court finds that Plaintiff established with this evidence that the Entry contained CMC and xanthan gum in functional quantities.

The Court also finds that ICP created a business, Giuseppe's Finer Foods, to create a line of gourmet sauces from white sauce, and credits Mr. Raybuck's testimony that ICP would have made three to four times as much money at this business than it made selling white sauce to Schreiber. (Tr. 285–86.) The record shows that ICP built a facility for the manufacture of these sauces. (Tr. 285–86, 298–307; Pl. Ex. 258.) The Court finds ICP's actions consistent with a genuine intent to use white sauce in the manner described in the Ruling Request, and further finds that removing CMC and xanthan gum from white sauce would have prevented this use. This provides a

further basis for the Court to credit Mr. Raybuck's testimony that CMC and xanthan gum were always in the white sauce.

Although CMC and xanthan gum were removed from certain specification sheets for ICP's white sauce (Pl. Ex. 21), Plaintiff established to the Court's satisfaction that this change in documentation was merely an accommodation made to a customer, and was not accompanied by a change in the actual ingredients of white sauce (Tr. 94100; Tr. 479; Pl. Ex. 9 at 50–1). The Court also credits Mr. Raybuck's testimony that CMC and xanthan gum were removed from the Schreiber specification sheets after ICP's then-attorney, Mr. Heron, told ICP that changing the specification was permissible. (Tr. 95, 100–01.) Although the government called Mr. Heron and he was unable to recall the consultation, the government never established that the consultation did not occur. (Tr. 876–84.) But regardless of the question of whether ICP made the specification sheet change upon legal consultation, the Court finds that the stripping of CMC and xanthan gum from the specification sheets was done at the request of ICP's principal customer, Schreiber, for sales purposes, and was not accompanied by a corresponding stripping of those ingredients from the white sauce in the Entry.

Dr. Bradley testified that CMC and xanthan gum were not present in effective concentrations in the Entry. (Tr. 944–45, 950–55.) The Court finds that testimony to be unreliable and unconvincing.

It is worth examining at this point the reasons that the Court finds Dr. Bradley to have been an unreliable witness. First, Dr. Bradley had financial motives to support the government's position, as a long-term and frequent expert witness for the government. (Tr. 963–69.) The mere fact that hired experts ordinarily have financial interest in providing useful testimony to their clients does not typically lead the Court to question the usefulness of an expert's conclusions. Dr. Bradley, however, attempted to downplay the financial significance of his service as a government expert and the extent of his ongoing involvement in such work. (*Id.* (testimony of Mr. Bradley, in which he stated that he only worked as an expert for the government "[t]hree or four days a year, maybe, at the most," later admitted that he was also paid to act as a consulting expert in many other cases, yet answered "[n]one" to the number of cases in which he had served as a consultant but not testified).) In addition, the Court finds that Dr. Bradley had a partisan sympathy to the government's case that undercut the reliability of his expert testimony. (*See generally* Tr. 1031–35.) Dr. Bradley declared, "I always maintain an objective attitude." (Tr. 969.) That declaration was belied by Dr. Bradley's later testimony to the Court that ". . . [w]hen [ICP] went to get the ruling,

they only had gourmet sauces and dressings on the recommended uses . . . . And then subsequently, after talking with Schreiber, [ICP] amended that and added more uses . . . . if they had gone for a ruling with all of those uses on, we might not be here today." (Tr. 1035.) Dr. Bradley articulated a legal argument as to the inappropriateness of ICP's Ruling Request during his testimony and, in doing so, a personal commitment to the government's victory in this case. Dr. Bradley's advocacy was highlighted by the urgent manner in which he spoke from the witness stand. Dr. Bradley was offered by the government, and accepted by the Court, as an expert on "dairy processing, dairy products, dairy testing" and "the use of pricing of butter and the pricing of white sauce." (Tr. 940–41.) Yet he exceeded the accepted scope of expertise to lecture the Court with his legal opinion as mentioned above. (Tr. 1035.) Dr. Bradley's expertise also did not include sauces or dressings, or the use or detection of CMC and xanthan gum in such products, yet he provided testimony about those questions despite admitting that he had no expertise in commercial sauce or dressing production. (Tr. 92931, 933–34, 940–41, 950–55, 974, 979–81, 1041–55, 1077–79.) That testimony was not only unhelpful, but also baseless. Dr. Bradley had neither a basis as an expert for opinions on such issues nor any factual basis for the opinions he expressed in those portions of his testimony. As a result, the Court finds Dr. Bradley's testimony about the amount and function of CMC and xanthan gum in ICP's white sauce to be unpersuasive.

2. *Milkfat Content*

The Court finds that the Entry contained milkfat in a concentration between 76% and 77%. Direct evidence on the milkfat content of the Entry exists in the COAs made at the time the Entry was manufactured and shipped from the supplier. (Pl. Ex. 27 at ICP001393–94.) The Entry consisted of 1120 cartons of white sauce, each weighing 25 kilograms. (*Id.*) The Entry contained 1099 cartons from a batch of white sauce with a COA showing a milkfat content of 77.3%, and 21 cartons from a batch of white sauce with a COA showing a milkfat content of 77.4%. (*Id.* at ICP001390.) This milkfat percentage was calculated using the "by difference" method, which estimates milkfat concentration by removing moisture from the sample and assuming that the remainder is comprised solely of milkfat. (Tr. 165–66 (Mr. Raybuck); Tr. 480–81 (Mr. Learmonth).) "By difference" calculations overstate the actual milkfat content slightly, because it lumps contents such as CMC, xanthan gum, and other additives in white sauce

into the milkfat percentage. (*Id.*) This is shown by Customs's own laboratory tests of ICP's white sauce during the course of importation. For example, the COA for one of ICP's importations of white sauce showed a milkfat concentration, calculated "by difference," of 78.1% (Pl. Ex. 58), but testing by a Customs laboratory of a sample from that shipment of white sauce showed an actual milkfat concentration of 76.6%, rounded up for purposes of the lab report to 77% (Pl. Ex. 7). A 2001 laboratory test by Customs had similar results, determining actual milkfat concentrations of an ICP white sauce sample to be more than 4% lower than the percentage "by difference" stated on the COA. (Pl. Ex. 4.) In sum, the Court credits the exhibits and testimony that the "by difference" method overstated milkfat concentrations in ICP's white sauce imports by at least .75%. Consequently, the Court finds that the actual milkfat concentration of the white sauce in the Entry was approximately 76.65%, and therefor fell within the range of "typical" milkfat concentration for white sauce provided in the Ruling Letter.

The Court also finds that, even if the Entry contained a milkfat concentration slightly above 77%, as claimed by the government, the overage would be immaterial. Evidence supporting this finding of fact is contained in the Customs laboratory reports at Plaintiff's Exhibits 5–6. These reports were issued in response to a request that the laboratory test a sample of ICP's white sauce for classification and conformance with the Ruling Letter. (*Id.*) While the Court agrees with Plaintiff that the test results contain internal inconsistencies that make the conclusion as to actual milkfat content unreliable, the reports nonetheless determined that white sauce samples containing 78% milkfat conformed to the Ruling Letter. (*Id.*) Additionally, Mr. Hopard, who drafted the Ruling Letter, testified that no specific milkfat concentration or range of concentration was necessary for conformance with the Ruling Letter. (Tr. 506–07.) Mr. Hopard also testified that, when the Customs laboratory determined that samples of ICP's white sauce contained between 77% and 78% milkfat, Customs believed that "[i]t was consistent" with the ingredients of white sauce as stated by ICP. (Tr. 525.) Thus the Court finds that Customs believed that the Ruling Letter properly applied to ICP white sauce even when that white sauce contained a milkfat concentration of 78%.

In sum, the Court concludes that the Entry physically conformed to the Ruling Letter because it contained CMC and xanthan gum in functional quantities and contained milkfat in an amount consistent with the typical range.

B. How the Ruling Letter Was Obtained

As an affirmative defense, the government claimed that the Ruling Letter was void *ab initio* because ICP made material misrepresentations and omissions when it applied for the Ruling Letter. Examining the record, the Court finds that ICP adequately informed Customs of the typical uses of white sauce; the common, commercial, and technical designations for white sauce; and the purpose of the ingredients in white sauce when it applied for the Ruling Letter. Therefore, the Ruling Letter was valid at the time of the Entry and was not void *ab initio*, as claimed by the government.

1. *Contents of the Ruling Request*

As an initial matter, it is important to describe exactly what the Ruling Request contained.

First, the packet contained a letter to Customs dated December 21, 1998, stating that ICP's white sauce "may be used as the base for a gourmet sauce or salad dressing" and "is the commercially recognized formulated sauce preparation which serves as the base for production of gourmet sauces and dressings." (Pl. Ex. 2 at ICP000001.)

Second, a specification sheet described white sauce by stating that it "has been properly acidified and contains all of the necessary thickeners and emulsifiers needed for the further production of gourmet sauces and dressings," which was given as white sauce's "[t]ypical usage." (*Id.* at ICP000003.) Under the heading "TYPICAL ANALYSIS," the specification sheet gave milkfat content of 72%–77% and ingredients of "Milkfat, Water, Vinegar (and/or lactic acid and/or citric acid), Zanthum [sic] gum, Carboxymethelcellulose [sic], Sodium Phosphate and/or Sodium Citrate." (*Id.*)

Next, two recipes incorporating white sauce were provided, one for "Gourmet Hollandaise Sauce" and one for "Gourmet Salad Dressing."

Then, an October 1998 article in a food industry magazine entitled "Secrets to Sauce Success" was included. The article "Secrets to Sauce Success" quotes a Kraft Food Ingredients employee, who describes the beginning stage of making a sauce this way:

> [Y]ou're going to make a white sauce, and the white sauce is just a thickening system. [. . .] And you're going to build into that thickening system any special functionality you need, including flavor. But if you're building a decent white sauce, it's going to have just about all the functionality you need.

(*Id.* at ICP000006.) The article goes on to describe the use of stabilizers, such as xanthan gum and CMC. (*Id.* at ICP000006–10.) Regarding the final stage, flavoring the sauce, the article discusses the

growing popularity of cheese-flavored and cheese sauces, and mentions that "sauces can run the gamut from high-fat cheese-based and cream-based sauces to nonfat gravies." (*Id.* at ICP000011.)

The final two items in the Ruling Request were a physical sample of white sauce and a price quote for white sauce from an Israeli supplier. (Pl. Ex. 2 D, E.)

2. *Known Typical Uses of White Sauce*

The Court finds that ICP provided adequate information regarding the principal use of white sauce in the Ruling Request.

In its Ruling Request, ICP informed Customs in numerous ways that white sauce was "the commercially recognized formulated sauce preparation *which serves as the base for production of gourmet sauces and dressings*" and that it "may be used as the base for gourmet sauce or salad dressing." (*Id.* at ICP000001) (emphasis added). The included specification sheet added the information that white sauce "has been properly acidified and contains all of the necessary thickeners and emulsifiers needed for the further production of gourmet sauces and dressings." (*Id.* at ICP000003.) Usage as a "base sauce preparation for gourmet sauces and dressings" is described as typical. (*Id.*) The attached recipes gave specific examples of these typical uses, and the article made clear that professionals in the sauce industry saw a "decent white sauce" as the basis upon which any of a variety of different sauces could be made. (Pl. Ex. 2 C.) Mr. Raybuck, who was qualified as an expert on sauce making, testified that manufacturers of sauces and dressings had been creating an industrial version of white sauce since the early 20th century and that he had seen this white sauce used in making hollandaise sauce and vodka sauce. (*See*, *e.g.*, Tr. 156–60.) The Court credits this testimony and the submissions in the Ruling Request, especially as the trade magazine article provides strong independent corroboration for Mr. Raybuck's statements. The Court therefore finds that ICP accurately described the use of white sauce when it submitted the Ruling Request to Customs.

The government pointed, however, to several ICP-produced specification sheets for white sauce listing possible uses different from the principal use as a base for sauces and dressings described in the Ruling Request. The stand-out among these is an early white sauce specification sheet ICP gave to Kraft Foods during business negotiations shortly before ICP submitted its Ruling Request—negotiations that were never consummated. (Def. Ex. S.) This specification sheet bears the date August 1, 1998 and a fax header showing it was faxed to Kraft on October 7, 1998, about two and a half months before ICP

submitted its Ruling Request to Customs. (*See id.*, Pl. Ex. 2.) It describes white sauce as "the food product made from fresh cream and other high quality ingredinets [sic] via a proprietary process . . . [and] used as a base sauce preparation for any sauce or dressing that is in need of this particular taste profile." (Def. Ex. S.) Recommended usage is given as "an ingredient in baked goods and butter based sauces." (*Id.*) This specification sheet, unlike all others in the record, contains a disclaimer that reads, "[t]his information is presented for consideration in the belief that it is accurate and reliable" but stating that "no warranty, either express or implied is made . . . ." (*Id.*) Within days before ICP faxed Kraft this specification sheet, the two companies entered into a "Confidential Disclosure Agreement" to share information regarding a process ICP had developed to import a product and convert it into anhydrous milkfat (AMF), and which Kraft wished to evaluate. (Def. Ex. RR.)

Plaintiff submitted a collection of eleven specification sheets into the record, each describing white sauce as "the commercially recognized formulated sauce preparation which serves as the base for the production of gourmet sauces and dressings" and indicating that "[t]ypical usage is as a base sauce preparation for gourmet sauces and dressings." (Pl. Ex. 21.) These specification sheets are, in these regards, identical to the specification sheet submitted by ICP with its Ruling Request. (*Compare* Pl. Ex. 2 (Ruling Request) *with* Pl. Ex. 21.) However, five of the specifications sheets in Pl. Ex. 21 include an additional sentence in the recommended usage section: "Other uses include processed cheese sauces, processed cheese and club cheese preparations." (Pl. Ex. 21, pages marked in lower right corner "LV1143," "080," "085," "275," and "0850.") The Court finds that the specification sheets with the "processed cheese" language were provided to customers on or after September 7, 1999.[9] (*Id.*) As such, these specifications sheets were employed after the Ruling Letter had already been issued.

Mr. Hopard credibly testified that, in issuing the Ruling Letter, he relied on the accuracy of ICP's representations in the Ruling Request as to the principal use of white sauce, as required by regulation. (Tr. 549–50.) Mr. Hopard examined the various specification sheets for white sauce and testified that his decision would have taken into consideration the alternative uses of white sauce given there, had those alternative uses been disclosed. (Tr. 555–65.) During the government's examination of Mr. Hopard, he was presented with a hy-

[9] Although many of the specification sheets are marked, incorrectly, with dates in 1998, those sheets contain fax headers showing when they were provided to Schreiber. None of the fax headers predates September 7, 1999. The only specification sheet without a fax header bears a date from 2003.

pothetical question as to whether he would have classified white sauce differently if he had seen all of the various uses referred to in the specification sheets post-dating the ruling letter, and he answered that he would have. (Tr. 565.) However, Mr. Hopard later clarified that "if the greatest use in the United States of this so-called white sauce was to make sauce preparations, then that would be a factor in calling that the principal use" despite the other potential uses. (Tr. 571.)

The "principal use" question was a central topic of Mr. Hopard's testimony, since, as he repeatedly emphasized, the principal use of the class or kind of goods to which a product belongs is "very critical" when classifying that product. (*See*, *e.g.*, Tr. 553.) But the Court will perhaps be forgiven this observation: deciding the critical question of the classification of a good in a principal use provision of the tariff appears to be an almost ineffable experience on a par with describing the sound of one hand clapping.[10] Mr. Hopard confirmed that the process contains two steps: first, to identify the class or kind of good to which the product in question belongs; and second, to determine what the principal use of that class or kind of goods is. (Tr. 519–20.)

Mr. Hopard struggled, however, to articulate how the first step would be conducted. For example, he stated, "Well, class or kind is broad in scope . . . [and] includes products that are . . . not necessarily identical, but have similar characteristics." (Tr. 515–16.) As to defining this in a particular case, "there are no definite steps," but it is a "question of the type of product presented to you" and how it "relates to others you have seen" or "other types of products you have done research on and so forth." (Tr. 516.) Class or kind is "broader and not just the product in front of you," which takes some burden off the importer to be responsible for the actual use of a particular importation. (Tr. 541.)

Furthermore, Mr. Hopard was unaware of the government ever having done any class or kind determination with regard to white sauce. (Tr. 516–17.) To his knowledge, no inquiries to any other sauce makers were made to determine whether or not white sauce was of the class or kind of goods used in the preparation of sauces. (Tr. 521.) In the absence of other evidence of a class or kind investigation, the Court finds that the government never determined what class or kind of good white sauce belonged to.

[10] This should not be taken as an indication that Mr. Hopard was not a credible witness. Overall, the Court found Mr. Hopard to be informative and helpful, with a refreshing dedication to providing honest testimony evidenced in the way he fully engaged the questions put to him and provided clear answers without shying away from nuance during examination by the attorneys for both parties.

As for the second step of a principal use determination, identifying the principal use of the class or kind of good to which a product has been determined to belong, principal use is "defined in the tariff" as "a use of a product that exceeds all other uses . . . in the United States of the class or kind of good" to which the product in question belongs. (Tr. 515.)

Mr. Hopard described implementing that process in a manner that leads the Court to find that it was more a matter of intuition that rigorous analysis. For example, Mr. Hopard stated that "[y]ou decide it based upon the identity of the product, how it's going to be used, where similar products have been used in industry and such. *That's kind of how you get the feel of that.*" (Tr. 559) (emphasis added). It is "a decision I make based upon the facts presented to me and my knowledge of other types of products that fall into that general category of good." (Tr. 559–60.) It is "based upon what other independent research and knowledge you gain being on the job, you discover certain similarities in types of products." (Tr. 564.) Mr. Hopard also testified that, contrary to an actual use tariff provision, a primary use provision gives an importer more leeway because the actual use of a particular entry is not determinative. (*See* Tr. 541.)

After carefully considering all of the testimony from Mr. Hopard, the former official who was responsible for conducting the analysis of principal use and drafting the Ruling Letter, the Court finds that Defendant has failed to show that the Ruling Letter was obtained by false information or material omissions from ICP regarding the principal use of the class or kind of goods to which white sauce belongs.

3. *Common, Commercial, and Technical Designations for White Sauce*

The Court finds that ICP provided Customs with adequate information about the common, commercial, and technical designations for white sauce at the time at which ICP applied for its ruling letter. This has already been shown by the evidence establishing that white sauce is used by manufacturers as a base for the creation of sauces and dressings as described in, for example, the article included with the Ruling Request.

Defendant's challenges on this issue point out that ICP failed to tell Customs in the Ruling Request about alternative names used by other companies to refer to ICP's white sauce. Plaintiff does not contest that Schreiber referred to ICP's white sauce by a Schreiber-chosen designation "CMF-403," incorporating the acronym for concentrated milkfat. (Tr. 622–23 (Mr. Raybuck).) However, the Court finds no evidence in the record that ICP provided paperwork to

Schreiber using the CMF designation for white sauce earlier than 2003 and therefore could not have informed Customs about that designation in the 1998 Ruling Request. (Pl. Ex. 2; Def. Ex. EE.) The Court also finds that ICP did not control the terminology employed by Schreiber, but merely complied with its customer's request to use a preferred designation on paperwork when the two companies did business. (Tr. 622–23.) It is also important to note that the name of a product in a ruling request is "really not very important" and "is not something that has great weight" in determining classification, according to Mr. Hopard. (Tr. 551–52.) Therefore, the Court finds that ICP did not omit material information from the Ruling Request by failing to tell Customs about other names used for white sauce.

4. *Purpose of the Ingredients in White Sauce*

The government contends that ICP designed white sauce as a vehicle to sneak large amounts of milkfat into the US without paying the properly-applicable duties or falling under the applicable quotas, and never intended to manufacture it into sauces or dressings. (Def.'s Post Trial Findings of Fact and Conclusions of Law at 19, Court No. 07–00318, ECF No. 251.) The government's theory is that ICP therefor tried to maximize the milkfat content of white sauce and minimize the other ingredients.

Contrary to the government's contentions, the Court finds that ICP genuinely intended to use its imports of white sauce as a base for the manufacture of gourmet sauces and dressings. This is established by credible evidence on the record that ICP created a subsidiary, Giuseppe's Finer Foods, intended to produce gourmet sauces and dressings from white sauce. (Tr. 132–35, 286.) ICP also struggled through logistical difficulties to build, at great expense, a large production facility at which it intended to produce gourmet sauces and dressings (Tr. 286, 298–307, Pl. Ex 258). ICP formulated an Awesome Aussie Grilling Sauce and an Awesome Aussie Seafood Sauce, and had discussions with both Outback Steakhouse and Red Lobster restaurants about supplying those products. (Tr. 285–86.) Mr. Raybuck testified that, "had we been able to accomplish that . . . we would have made about three or four times on [white sauce] than what we were doing just selling it to someone else. So that was always our interest in doing that." (Tr. 286.) The Court credits Mr. Raybuck's testimony, and finds that ICP genuinely intended to use its white sauce in the manner described in the Ruling Request and allowed by the Ruling Letter.

Testimony from Diane Kutskel, who was subpoenaed and testified involuntarily, implied otherwise. (Tr. 765–815.) Ms. Kutskel was Mr.

Raybuck's only employee at ICP for the first few years after its inception; she started as secretary and eventually handled many varied administrative responsibilities. (Tr. 768–69.) According to Ms. Kutskel, Mr. Raybuck "told me, because it always had to be kept very secretive, but he basically told me that [white sauce] was just another way to bring in butter." (Tr. 775.) She also claimed that Mr. Raybuck told her that ICP's $65 million production plant was built as a cover for continuing to import white sauce. (Tr. 798–99.)

Two reasons that the Court does not credit Ms. Kutskel's testimony bear discussing. Firstly, Ms. Kutskel is an unreliable witness given that she and Mr. Raybuck appear to have had an extremely bitter falling out over her abrupt termination from ICP in 2003. (Tr. 778–82.) Ms. Kutskel denied holding a grudge or continuing to be angry due to this falling out. (Tr. 785, 814–15.) But that denial was completely undercut by Ms. Kutskel's demeanor, which alternated between sharp and tearful while testifying, and made clear to the Court that the more than eight years between her severance from ICP and her testimony had not resolved her ongoing anger and sadness toward Mr. Raybuck. (Tr. 780–82, 800–05.) Secondly, and perhaps more importantly, the Court finds that Ms. Kutskel did not make precise distinctions between the terms butter, margarine, and white sauce in a manner according with the precise ways those terms are understood within Customs law. This sort of slipping from precise to casual terminology by Ms. Kutskel in regard to white sauce is exemplified by a portion of her testimony in which she admitted that she had freely intermixed the terms butter and margarine when interviewed by a investigator from the Department of Homeland Security Immigration and Customs Enforcement Bureau. (Tr. 794–97.) Due to this tendency toward imprecise use of language and paraphrasing, the Court finds Ms. Kutskel's testimony about butter and white sauce unreliable in resolving the legal issues at hand.

The Court has already found that the white sauce in the Entry conformed with the Ruling Letter by containing xanthan gum and CMC in functional amounts and milkfat within the typical range described in the Ruling Letter. Consistent with those findings, the Court finds no evidence in the record establishing that ICP removed any non-milkfat ingredients from its white sauce.

As to minimizing non-milkfat ingredients in white sauce, the government makes much of a specification sheet ICP provided to Schreiber on which the ingredients xanthan gum and CMC are not listed. The government suggested, but did not demonstrate, that ICP removed these ingredients from the white sauce entirely. However, the Court credits Mr. Raybuck's testimony that he consulted ICP's

then-attorney, Mr. Heron (*see supra*, p. 23) and as a result believed that the FDA did not object to removing CMC and xanthan gum from the Schreiber specification sheets on the ground that they were present in small enough quantities that they need not be mentioned for labeling purposes. (Tr. 94–98.)

There is no credible evidence on the record from which the Court could conclude that removing CMC and xanthan gum on a specification sheet for FDA labeling purposes had any material relevance to the classification decision. Although Dr. Bradley testified to the effect that CMC and xanthan gum were present in such small quantities as not to be functional, this testimony is unpersuasive and outside Dr. Bradley's expert competence as the Court has previously indicated. (Tr. 944, 950–55.)

In any case, the Court finds that Schreiber's request to remove references to CMC and xanthan gum from specification sheets was made shortly before October 5, 1999, and thus post-dated the Ruling Request and could not have been anticipated and disclosed at the time the request was submitted. (Tr. 94–95.)

The Court has already found that the milkfat content of white sauce remained between the 72% and 77% described in the specification sheet included with the Ruling Request—a finding that runs counter to the government's suggestion that ICP attempted to maximize the milkfat content of white sauce. The government's view is also inconsistent with the testimony of Mr. Hopard, who testified that the exact quantity of fat in the white sauce, whether derived from milk or another source, was not necessary for conformance with the Ruling Letter. (Tr. 507.) Additionally, Mr. Hopard testified that "[i]ngredients for sauces are very, very varied" and can range "all over the lot" and still be classified as a sauce preparation. (Tr. 564.) From this, the Court finds that ICP could have simply submitted a request for white sauce to include more milkfat in the first place, rather than obtaining a ruling for a lower amount and later surreptitiously increasing it by as little as 1%. To do so would simply make no sense.

V. POST-TRIAL SUBMISSIONS

Following the trial, the parties agreed to forego closing arguments and, in their stead, to provide the Court with Proposed Findings of Fact and Conclusions of Law. These were submitted on April 5, 2012 (Court No. 07–00318, ECF No. 250, by Plaintiff, and Court No. 07–00318, ECF No. 251, by Defendant).

Thereafter, on June 6, 2012, the Court sent a letter requesting that the parties provide briefs addressing the following issues: the manner of determining to which class and kind of good a particular piece of

merchandise belongs; classification of merchandise under a principal use provision where (a) the product is used commercially but has never previously been offered for sale, and (b) the product is a new type of merchandise; the effect of evolution in the principal use of a class or kind of merchandise on a binding ruling letter issued prior to that change; and the legal status of an interpretive ruling or decision which effectively results in retroactive and prospective refusal by Customs to abide by a binding ruling letter when that interpretive ruling or decision is issued without the notice and comment procedures required by 19 U.S.C. § 1625(c)(1). (Letter Concerning Post-Trial Briefs, Court No. 0700318, ECF No. 253.)

The parties submitted their briefs on June 27, 2012 (Court No. 07–00318, ECF No. 255, by Plaintiff ("Pl.'s Post-Trial Brief"), and ECF No. 254, by Defendant ("Def.'s Post-Trial Brief")). On July 2, 2012, Defendant moved to strike certain portions of Plaintiff's Post-Trial Brief. (Def.'s Mot. to Strike, Court No. 07–00318, ECF No. 256.) Plaintiff filed an opposition on July 23, 2012. (Court No. 07–00318, ECF No. 257.) Defendant's Motion to Strike remains pending before the Court at this time.

VI. CONCLUSIONS OF LAW

A. Jurisdiction and Standard of Review

The Court has jurisdiction over Plaintiff's challenge to the liquidation of the Entry underlying this case pursuant to 28 U.S.C. § 1581(a). In such a case, the Court makes its determination *de novo* upon "the basis of the record made before the court." 28 U.S.C. § 2640(a); *Park B. Smith, Ltd. v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003) (stating that the Court decides "civil actions that contest the denial of a protest" on "a de novo basis.")

B. Conclusions of Law

The Court now turns to legal conclusions that stem from the facts established in the Court's findings. There are four main legal issues before the Court. First, the Court must determine whether the Ruling Letter was void *ab initio* and therefore not binding on Customs. Second, the Court must determine whether the Ruling Letter, if valid, applied to the Entry. Third, the Court must determine whether the Notice of Action violated 19 U.S.C. § 1625(c)(1) by effectively revoking the Ruling Letter with regard to the Entry without first satisfying the notice and comment procedures specified in the statute. Fourth, the Court must determine whether Plaintiff is entitled to a remedy and, if so, the nature of that remedy.

1. *The Ruling Letter Was Not Void Ab Initio*

The Court concludes that the Ruling Letter was not void *ab initio* as the Court has found as a matter of fact that it was not obtained by material misstatement or omission.

This issue arises from the CBP regulations that set forth what to include in classification ruling requests and how Customs is to make its determinations in response. The regulations state that, "generally," "[e]ach request for a ruling must contain a complete statement of all relevant facts relating to the transaction" and the "transaction to which the ruling request relates must be described in sufficient detail to permit the proper application of relevant customs and related laws." 19 C.F.R. § 177.2(b)(1)–(2)(i). Specifically with regard to ruling requests seeking the proper HTSUS classification of an import,

> the request for a ruling should include a full and complete description of the article and whenever germane to the proper classification of the article, information as to the article's chief use in the United States, its commercial, common, or technical designation, and, where the article is composed of two or more materials, the relative quantity (by weight and by volume) and value of each.

Id. § 177.2(b)(2)(ii)(A). In addition, ruling requests

> must state whether, to the knowledge of the person submitting the request, the same transaction, or one identical to it, has ever been considered, or is currently being considered by any Customs Service office or whether, to the knowledge of the person submitting the request, the issues involved have ever been considered, or are currently being considered, by the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, or any court of appeal therefrom.

Id. § 177.2(b)(5). As for how Customs decides such requests, CBP regulations provide that Customs ruling letters are "[g]enerally"

> issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect . . . . [I]f the transaction described in the ruling letter and the actual transaction are the same, and any and all conditions set forth in the ruling letter have been satisfied, the ruling will be applied to the transaction.

Id. § 177.9(b)(1).

The Court has already found that ICP submitted the necessary material facts regarding white sauce—accompanied by an actual sample of the product—to Customs when seeking the Ruling Letter. ICP also informed Customs of its belief that a prior ruling letter had been issued for white sauce, as required by § 177.2(b)(5).

The Court therefore concludes that ICP correctly followed the ruling request procedures set out in section 177.2 of Title 19 of the Code of Federal Regulations, and that the Ruling Letter issued by CBP was not void *ab initio*.

2. *The Ruling Letter Applied to the Entry*

The Court concludes that the Ruling Letter applied to the Entry because the white sauce contained in the Entry materially conformed to the description in the Ruling Letter.

> Ruling letters, when issued, apply to a particular class of merchandise:
>
> [e]ach ruling letter setting forth the proper classification of an article . . . will be applied only with respect to transactions involving articles identical to the sample submitted with the ruling request or to articles whose description is identical to the description set forth in the ruling letter.

Id. § 177.9(b)(2).

The Court has found that the white sauce contained in the Entry conformed to the product described in the Ruling Letter and to the sample of white sauce provided to Customs with the Ruling Request, and was therefore within the particular class of merchandise to which the Ruling Letter applied. The Court therefore concludes that Customs violated its own regulation at 19 C.F.R. § 177.2(b)(2) when it decided not to apply the Ruling Letter to the Entry, despite the conformance of the Entry.

3. *The Notice of Action in Effect Revoked the Ruling Letter Contrary to Law*

The Court concludes that the Notice of Action was tantamount to an interpretive ruling issued contrary to law, as it had the effect of revoking the Ruling Letter without the notice and comment procedures required by 19 U.S.C. § 1625(c)(1) by liquidating the Entry under a different HTSUS subheading than specified in the Ruling Letter.

The Court has already held that the Notice of Action was an "interpretive ruling or decision" within the meaning of 19 U.S.C. § 1625(c)(1) and that, subject to proof at trial, Customs effectively revoked the Ruling Letter contrary to law by "its conduct in connection with the white sauce importations." *ICP III*, 549 F. Supp. 2d at 1393–94. The Court here reaffirms this earlier determination and fully incorporates it into the current opinion. Having found that Customs rate-advanced the Entry without following the procedures required by 19 U.S.C. § 1625(c)(1), the Court concludes that Customs acted unlawfully.

4. *Plaintiff Is Entitled to a Remedy*

As to the question of the appropriate remedy, the Court concludes that Plaintiff is entitled to: (1) a declaration that the liquidation of the Entry contrary to 19 U.S.C. § 1625(c)(1) is void; and (2) a judgment requiring Customs to reliquidate the Entry at the rate specified in the Ruling Letter and refund any excess duties to ICP with interest.

It is important be mindful that the Court is not called on here to determine the proper classification of ICP's white sauce *de novo*. The Court is instead faced with the question of whether Customs violated ICP's right to notice and comment procedures, contained in 19 U.S.C. § 1625(c)(1), when Customs refused to apply a lawfully-obtained, applicable Ruling Letter to the Entry. Because the Court has determined that Customs violated its legal obligation to classify the Entry according to the Ruling Letter, the appropriate remedy is one tailored to cure that breach of law. It is thus appropriate to declare Customs's rate-advance of the Entry to be void, and to require that Customs apply the Ruling Letter to the Entry as it should have done initially. This can be accomplished by requiring Commerce to reliquidate the Entry at the rate specified in the Ruling Letter and to refund any overpayments, along with interest covering the time of ICP's overpayment to the time the Court's judgment is satisfied.

VII. REMAINING ISSUES

Several minor issues remain: Plaintiff's motion seeking an adverse inference based on Defendant's alleged spoliation of a white sauce sample; Defendant's motion to disqualify Plaintiff's counsel; and Defendant's motion to strike certain portions of Plaintiff's Post-Trial Brief.

First, The Court need not reach the questions of whether Defendant spoliated evidence or whether Plaintiff would be entitled to an adverse inference on that basis, as the Court has concluded as a factual matter that the white sauce in the entry materially conformed to the

Ruling Letter on the basis of the trial record. An adverse inference is therefore unnecessary, and Plaintiff's motion is denied as moot.

Similarly, Defendant's motion to disqualify Plaintiff's counsel is denied as moot, as Mr. Teufel did not testify or ask to testify at trial.

Finally, Defendant's motion to strike certain portions of Plaintiff's Post-Trial Brief is granted. In its Post-Trial Brief, Plaintiff referenced certain purported evidence that Plaintiff attempted to introduce at trial and which the Court excluded by sustaining an evidentiary objection from Defendant. As such, these purported facts were not in evidence and cannot be considered by the Court. The Court therefore strikes the references to these matters from page 9 of Plaintiff's Post-Trial Brief, and has ignored this text in issuing this decision.

VIII. CONCLUSION

For the foregoing reasons, the Court determines that: (a) the Ruling Letter was not obtained by material misrepresentation; (b) the Ruling Letter was therefore valid and binding on Customs at the time of the Entry; (c) the white sauce in the Entry materially conformed to the Ruling Letter; (d) Customs improperly liquidated the white sauce contrary to the Ruling Letter by means of the Notice of Action; (e) the Notice of Action had the effect of unlawfully revoking the Ruling Letter contrary to the requirements imposed by 19 U.S.C. § 1625(c)(1), and (f) Plaintiff is therefore entitled to reliquidation of the Entry at the rate established by the Ruling Letter.

Pursuant to USCIT Rule 54(b), "[w]hen an action presents more than one claim for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, claims . . . only if the court expressly determines that there is no just reason for delay." The Court determines that Plaintiff is entitled to all of the relief it seeks based on the outcome of its 19 U.S.C. § 1625(c)(1) claim, and that there is thus no just reason to delay entry of judgment.

Because the Court finds that Plaintiff is entitled to full relief based on its 19 U.S.C. § 1625(c)(1) claim, the Court need not reach Plaintiff's due process claim or bifurcated 19 U.S.C. § 1625(c)(2) "prior treatment" claim at this time. Those claims remain dormant pending the outcome of any appeals. Should the Court's judgment on the 19 U.S.C. § 1625(c)(1) claim be disturbed, Plaintiff may seek further relief on its other claims as appropriate.

Final judgment on the 19 U.S.C. § 1625(c)(1) claim will issue accordingly. In accordance with the foregoing, it is hereby

ORDERED that Plaintiff's motion for an adverse inference based on spoliation of evidence is denied as moot;

ORDERED that Defendant's motion to disqualify Plaintiff's counsel is denied as moot; and it is further

ORDERED that Defendant's Motion to Strike portions of Plaintiff's Post-Trial Brief is granted.

Dated: November 20, 2012
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN