Decisions of the United States Court of International Trade

(Slip Op. 02–47)

SAN FRANCISCO CANDLE CO., INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NATIONAL CANDLE ASSOCIATION, DEFENDANT-INTERVENOR

Court No. 01–00088

[Plaintiff's motion for judgment on the agency record denied. Remanded to the Department of Commerce for further proceedings consistent with this opinion.]

(Decided May 30, 2002)

Sandler, Travis, & Rosenberg, P.A. (Philip S. Gallas, Gregory S. Menegaz) for Plaintiff.
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Barnes & Thornburg (Randolph J. Stayin, Karen A. McGee) for Defendant-Intervenor.

OPINION

POGUE, *Judge:* Plaintiff San Francisco Candle Company ("SFCC") moves for judgment upon the agency record pursuant to USCIT Rule 56.2, challenging a determination by the U.S. Department of Commerce ("Commerce") that certain candles are within the scope of an antidumping duty order. This Court has jurisdiction under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2000).

BACKGROUND

In August 1986, Commerce issued an antidumping duty order covering "[c]ertain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks * * * sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers." *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China,* 51 Fed. Reg. 30,686, 30,686 (Dep't Commerce 1986) ("Candles Order" or "Order"). A subsequent notice indicated that certain novelty candles would be excluded from the Order's scope:

> The Department of Commerce has determined that certain novelty candles, such as Christmas novelty candles, are not within the

> scope of the antidumping order on petroleum wax candles from the People's Republic of China (PRC). Christmas novelty candles are specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes or symbols depicted in the candle design. Other novelty candles not within the scope of the order include candles having scenes or symbols of other occasions (e.g., religious holidays or special events) depicted in their designs, figurine candles, and candles shaped in the form of identifiable objects (e.g., animals or numerals).

Dep't of Commerce, Scope Clarification Notice, *Petroleum-Wax Candles from the People's Republic of China—Case Number A–570–504,* Pl.'s Ex. 4 at 1 ("Scope Clarification"); Customs Info. Exch. Notification, *Petroleum Wax Candles from the People's Republic of China—Antidumping—A–570–504,* CIE N–212/85 (Sept. 21, 1987).

In November 2000, SFCC requested that Commerce issue a scope ruling as to twelve candles.[1] *See* Letter from San Francisco Candle Company to Sean Carey, Dep't of Commerce, Int'l Trade Admin., Antidumping and Countervailing Enforcement Group III (Nov. 17, 2000), Compl. App. I ("Scope Ruling Request"). Commerce found eleven of the twelve candles to be within the scope of the Candles Order.[2] *See Final Scope Ruling; Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China, (A–570–504); SFCC* at 4–7 (Feb. 12, 2001) ("Final Scope Ruling"), Compl. App. III.

SFCC appeals the results of the Final Scope Ruling pursuant to 28 U.S.C. § 1581(c), claiming that all of the candles submitted in the Scope Ruling Request are novelty candles that fall outside the scope of the Candles Order. SFCC also submits for review the Christmas Patchwork Square, which Commerce did not address in its Final Scope Ruling,[3] and two candles that were not presented to Commerce in the Scope Ruling Request.[4] *See* Pl.'s Mem. Supp. Mot. J. Agency R. at 32 ("Pl.'s Mem."); Scope Ruling Request, Compl. App. I. Defendant asserts that candles 2, 3, 5, 6, 8, and 10 were correctly found to be within the scope of the

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[1] SFCC submitted the following twelve candles for review in its Scope Ruling Request:

1. Christmas Holly Leaf with Berries Candy Cane Pillar (Item No. 03433)
2. Santa Claus Motif Candy Cane Pillar (Item. No. 13403)
3. Christmas Tree with Star Candy Cane Pillar (Item. No. 73633)
4. Christmas Holly Leaf Pillar (Item No. 83136)
5. Christmas Sock Pillar (Item No. 83036)
6. Santa Claus Pillar (Item No. 82936)
7. Carved Christmas Tree with Star Pillar (Item No. 64904)
8. Santa Claus Candy Cane Column (Item No. 00016)
9. Christmas Holly Leaf with Berries Candy Cane Column (Item No. 00016)
10. Christmas Tree with Star Candy Cane Column (Item No. 00016)
11. Christmas Holly Leaf with Berries Pillar (Item No. 166406)
12. Christmas Patchwork Pillar and Christmas Patchwork Square (Item No. 15736)

The opinion will refer to the candles by the assigned numbers 1–12.

[2] Commerce found Candle 7, the Carved Christmas Tree with Star Pillar (Item No. 64904), to be outside the scope of the Order. This is a white candle decorated with gold images of Christmas trees. Commerce held that the image is clearly identifiable as a Christmas tree, which is specific to the Christmas holiday; that the design is viewable from most angles; and that its removal would cause significant damage to the candle. This candle is not at issue here.

[3] The twelfth candle listed in the Scope Ruling Request is a Christmas Patchwork design available as a 3 in. x 6 in. pillar and a 3 in. x 3 in. cube. In its Final Scope Ruling, Commerce addressed the Christmas Patchwork Pillar but made no determination as to the Christmas Patchwork Square. *See* Scope Ruling Request, Compl. App. I ¶ 12; Final Scope Ruling at 7, Compl. App. III.

[4] These are the Moonlite Candy Cane candles (Item No. 213649), available in two color combinations: red, white, and green, or red and white.

Candles Order, and requests that candles 1, 4, 9, 11, and 12 be remanded for reconsideration by Commerce. *See* Def.'s Resp. Pl.'s Mot. J. Agency R. at 2–3 ("Def.'s Resp.").

STANDARD OF REVIEW

This Court will uphold an agency determination unless it is "unsupported by substantial evidence on the record or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000). Substantial evidence is "something less than the weight of the evidence," *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966), but is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). The possibility of drawing two inconsistent conclusions from the same evidence does not mean that the agency's finding is unsupported by substantial evidence, *see Consolo,* 383 U.S. at 620, and this court "may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo.'*" *Timken Co. v. United States,* slip op. 02–38 at 5–6 (CIT Apr. 22, 2002) (internal citations omitted).

DISCUSSION

I. Scope Determinations

Commerce has inherent authority to define and clarify the scope of an antidumping duty investigation. *See Koyo Seiko Co., Ltd. v. United States,* 17 CIT 1076, 1078, 834 F. Supp. 1401, 1403 (1993), *aff'd,* 31 F.3d 1177 (Fed. Cir. 1994). However, "while [Commerce] may interpret those orders, it may not change them." *Ericsson GE Mobile Communication, Inc. v. United States,* 60 F.3d 778, 782 (Fed. Cir. 1995) (citing *Smith Corona Corp. v. United States,* 915 F.2d 683, 686 (Fed. Cir. 1990)).

In determining whether a product falls within the scope of an order, Commerce looks to "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1) (2000). If the descriptions are dispositive, Commerce must issue the scope ruling based on this information alone. *See id.* at § 351.225(k)(2); *Nitta Indus. Corp. v. United States,* 997 F.2d 1459, 1461 (Fed. Cir. 1993).[5]

II. The Candles Order

In making a scope determination under the Candles Order, Commerce first determines whether the candle is in a shape covered by the Order. If so, Commerce then considers whether the candle may be ex-

[5] If a determination cannot be made using only the descriptions, Commerce initiates a scope inquiry and considers the following five factors: "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." 19 C.F.R. § 351.225(k)(2); *see also Diversified Prods. Corp. v. United States,* 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). In the instant case, the criteria of 19 C.F.R. § 351.225(k)(1) are dispositive. As Commerce concluded, no consideration of the criteria 19 C.F.R. § 351.225(k)(2) was required.

cluded from the Order as a novelty candle.[6] Among the excluded novelty candles are holiday candles, including Christmas candles.

In analyzing holiday novelty candles, including Christmas candles, Commerce asks whether the candle is specially designed for use only in connection with a specific holiday or event. Under the Scope Clarification, Christmas candles must be "specially designed for use only in connection with the Christmas holiday season," and this use must be "clearly indicated by Christmas scenes or symbols depicted in the candle design." Scope Clarification, Pl.'s Ex. 4 at 1. Prior scope rulings indicate that in order to qualify a candle for exclusion, a holiday design must be easily recognizable as a specific holiday image.

If a candle is found to be specially designed for use only in connection with a specific holiday or event, Commerce then determines whether the decorations can be removed without damaging the candle. *See Final Scope Ruling, Endar Corp.* at 4 (July 7, 2000) (explaining Commerce's three-step analysis of holiday novelty candles); *see also Final Scope Ruling, Am. Greetings Corp.* at 6 (May 4, 2000) (stating that Commerce will analyze whether a decoration may be easily removed only after first determining that the candle qualifies as a holiday novelty candle); *Final Scope Ruling, Hallmark Cards, Inc.* at 2 (Sept. 30, 1993) (finding a candle outside the scope of the Order because an engraved poem entitled "Our Wedding" limited its use to weddings and could not be removed without damaging the candle). If a candle's design is specific to a particular holiday or event but is not easily recognizable or is easily removed without damaging the candle, Commerce may still find the candle to be within the scope of the Order.

The holiday novelty exclusion is defined narrowly. *See Russ Berrie & Co., Inc. v. United States,* 23 CIT 429, 440, 57 F. Supp. 2d 1184, 1194 (1999); *Final Scope Ruling, Endar Corp.* at 5 (July 7, 2000). Decorative images must be specific to the holiday; generic and seasonal designs are not grounds for exclusion. *See, e.g., Final Scope Ruling, Endar Corp.* at 4 (July 7, 2000) ("Candles bearing designs or symbols of a general seasonal nature, for example, have not warranted exclusion as holiday novelty candles."); *Final Scope Ruling, Am. Greetings Corp.* at 8 (May 4, 2000) (candles decorated with snowflakes are seasonal and therefore do not qualify as holiday novelty candles); *Final Scope Ruling, Kohl's Dep't Stores, Inc.,* Def.-Int.'s Ex. 14 at 4 (Aug. 24, 1998) (candle decorated with cherubs, rope, flowers, and vines was within the scope of the Order because these decorations did not symbolize any particular holiday). Nor will colors alone qualify a candle for exclusion. *See, e.g., Springwater Cookie & Confections, Inc. v. United States,* 20 CIT 1192, 1197 (1996)

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[6] As noted earlier, the Candles Order excludes the following as novelty candles:

a) "Christmas novelty candles * * * specially designed for use only in connection with the Christmas holiday season. This use is clearly indicated by Christmas scenes or symbols depicted in the candle design;"
b) "Candles having scenes or symbols of other occasions (e.g., religious holidays or special events) depicted in their designs;"
c) "Figurine candles;" and
d) "Candles shaped in the form of identifiable objects, (e.g. animals or numerals)."

Scope Clarification, Pl.'s Ex. 4 at 1.

("[C]olors *per se* will not exempt a candle from the scope of the antidumping order."); *Final Scope Ruling, Institutional Financing Services and Hallmark Cards, Inc.,* Def.-Int.'s Ex. 12 at 3–4 (Apr. 9, 1997) (red and white rounds resembling a peppermint candy were within the scope of the Order). However, Commerce considers all of the characteristics of the candle in combination, and colors and designs that may be insufficient bases for exclusion when considered individually may qualify a candle for exclusion when considered together. *See, e.g., Springwater,* 20 CIT at 1195–96; *Final Scope Ruling, Endar Corp.,* Def.-Int.'s Ex. 9 at 4 (Apr. 7, 1999) ("[B]ecause the design and color combination of this candle (pine cones bunched in the center of green pine branches against a red background) is associated with Christmas, we find that [this candle] qualifies for the holiday novelty candle exclusion."); *see also Final Scope Ruling, Success Sales, Inc.,* Pl.'s Ex. 6 at 3–5 (July 27, 1994) (A packaged set of three candles was found to be a holiday novelty item where two of the three candles were holiday novelty candles, the packaging was labeled "Holiday Pillar Candles," and the set was marketed during the Christmas season); *Final Scope Ruling, Cherrydale Farms Confections* at 2–4 (Sept. 9, 1993) (A packaged set of two candles was found to be an excluded holiday novelty item where the candles used bayberry scent and red coloring, one candle was a holiday novelty candle, the non-novelty candle depicted a winter scene, and the packaging was labeled "Holiday Candles.").

III. The Scope Ruling

A. Defendant's Remand Request

As a preliminary matter, the Court notes Defendant's request for the remand of candles 1, 4, 9, 11, and 12 to the Department of Commerce for reconsideration.[7] *See* Def.'s Resp. at 3. The decorative patterns on these candles include holly leaf and berry designs that Commerce determined to be "generic to the winter season" and therefore ineligible for exclu-

[7] The following candles are included in Defendant's remand request:

1. *Christmas Holly Leaf Candle with Berries Candy Cane Pillar* (Item No. 03433)

   This candle has red and white diagonal stripes on its sides and a holly leaf and berry design imprinted into its flat top surface. Commerce found this candle to be within the scope of the Order, maintaining that (a) the holly leaf and berry pattern is "generic to the winter season" and is not specific to Christmas; (b) the design on the top surface would quickly melt; and (c) red and white striped "candy cane" candles are not eligible for the holiday novelty exception (citing *Final Scope Ruling, Institutional Financing Services and Hallmark Cards,* Def.-Int.'s Ex. 12 at 4 (Apr. 9, 1997)). Final Scope Ruling at 4 ¶ 1, Compl. App. III.

4. *Christmas Holly Leaf Pillar* (Item No. 83136)

   This dark green candle has a holly leaf and berry design drawn in white on one side. Commerce found this candle to be within the scope of the Candles Order, ruling that the holly leaf and berry design is "generic to the winter season" and "does not meet the specificity requirements to render a particular candle exempt under of the holiday novelty exemption." *Id.* at 5 ¶ 4.

9. *Christmas Holly Leaf with Berries Candy Cane Column* (Item No. 00016)

   This candle is decorated with red, white and green diagonal stripes along its length and a small holly leaf and berry image on one side. Commerce ruled that this candle was within the scope of the Candles Order on the sole ground that the holly leaf and berry motif is not specific to Christmas. *Id.* at 6 ¶ 9.

11. *Christmas Holly Leaf with Berries Pillar* (Item No. 166406)

   The body of this red candle is covered with a raised holly leaf and berry design. Commerce found this candle to be within the scope of the Order on the ground that the holly leaf and berry design is "generic to the winter season" and not specific to the Christmas holiday. *Id.* at 6 ¶ 11.

12. *Christmas Patchwork Pillar* (Item No. 15736)

   This candle is decorated with a variety of small images, including holly leaves and berries, candy canes, evergreen trees, snow-covered houses, cardinals, stars, reindeer, and multicolored patchwork designs. Commerce ruled that none of the images were "solely specific to the Christmas holiday" and found the candle to be within the scope of the Order. *Id.* at 7 ¶ 12.

sion from the Candles Order as holiday novelty candles. *See* Final Scope Ruling at 4–7 ¶¶ 1, 4, 9, 11, 12, Compl. App. III. This determination is contrary to *Springwater,* 20 CIT at 1195–96, which stated that holly sprigs are "symbols associated with Christmas," and to Candles Order rulings in which Commerce, following *Springwater,* concluded that the holly leaf and berry design is a symbol of Christmas that qualifies a candle for the holiday novelty exception. *See Final Scope Ruling, Avon Products, Inc.,* Def.-Int.'s Ex. 6 at 4 (May 8, 2001); *Final Scope Ruling, Dollar Tree Stores, Inc.* at 2–3 (Apr. 9, 1997).

Although Commerce is authorized to alter its prior practice, it must demonstrate that a decision to do so is supported by substantial evidence and in accordance with law. *See Asociacion Colombiana de Exportadores de Flores v. United States,* 22 CIT 173, 184–85, 6 F. Supp. 2d 865, 879–80 (1998) ("Commerce has the flexibility to change its position providing that it explain the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence."). Therefore, the Court will grant the defendant's request and remand candles 1, 4, 9, 11, and 12 to Commerce for reconsideration. The Court further directs Commerce to consider both the cube and pillar versions of candle 12, the Christmas Patchwork candle, in its remand determination.

B. SFCC's Moonlite Candles

Plaintiff includes in its motion two Moonlite Candles (Itemb No. 213649) that were not submitted to Commerce in the Scope Ruling Request. *See* Compl. at 8 ¶ 31; Scope Ruling Request, Compl. App. I; Pl.'s Mem. at 32. Absent an agency determination, there is no basis for this Court to exercise jurisdiction in this matter. *See* 19 U.S.C. § 1516a(a)(2)(B)(vi); *Ericsson GE Mobile Comm., Inc.,* 60 F.3d at 783 ("As the agency charged with administering the antidumping duty program, the Commerce Department is responsible for interpreting the antidumping duty order and determining whether certain products fall within the scope of the order as interpreted."). As Commerce has not had the opportunity to determine whether these candles fall within the scope of the Order, review in this Court is unavailable.

C. Commerce's Determinations in the SFCC Final Scope Ruling

Candles 2, 3, 5, 6, 8, and 10 remain to be considered by the Court. All are formed in shapes covered by the Order. Plaintiff claims that they should be excluded from the scope of the Order as Christmas novelty candles.

As the agency acknowledged, these candles are decorated with Christmas-specific images, including Santa Claus, Christmas trees, and Christmas stockings. Commerce nevertheless found the candles to be within the scope of the Order, reasoning that: (1) designs were not visible from most or all angles; (2) designs would quickly burn away when the candle was lit; (3) designs were "minimally decorative;" and (4) designs were not easily recognizable as holiday images. *See* Final Scope

Ruling at 5–6 ¶¶ 2, 3, 5, 6, 8, 10, Compl. App. III. The Court will address Commerce's analysis of each of these candles.

1. Candles 2 and 3

Candle 2, the Santa Claus Motif Candy Cane Pillar (Item No. 13403), is decorated with red and white diagonal stripes on its sides and an image of Santa Claus imprinted into the top surface. Similarly, candle 3, the Christmas Tree with Star Candy Cane Pillar (Item No. 73633), has red, white, and green diagonal stripes on its sides and an image of a Christmas tree with a star imprinted into the top surface. Commerce ruled that although the Santa Claus and Christmas tree images are specific to Christmas, the designs are "only discernable when viewed from above," rather than visible from multiple angles, and "would soon melt away once the candle is lit." *Id.* at 5 ¶¶ 2, 3. In both instances, Commerce further asserted that "a minimally decorative design that does not make the product easily identifiable as a novelty candle is not grounds for excluding an item from the Order." *Id.* (citing *Final Scope Ruling, Endar Corp.* at 6 (Jan. 10, 2000)). The Court will consider each of these reasons in turn.

a. The Design Is Not Visible from Multiple Angles

Whether a design may be seen from multiple angles has been a regular feature of rulings involving candles formed in the shape of identifiable objects. Commerce has determined that candles are within the scope of the Order where a shape is not clearly identifiable as that of a particular object, or is not identifiable when viewed from multiple angles. *See, e.g., Final Scope Ruling, Meijer, Inc.,* Def.-Int.'s Ex. 8 at 6–7 (Sept. 30, 1999) ("Star Candle" was within the scope of the Order because it was not clearly identifiable as a star or other object when viewed from all sides); *Final Scope Ruling, Endar Corp.,* Def.-Int.'s Ex. 9 at 3–4, 6 (Apr. 7, 1999) ("Gold 5" High Holiday Candle" found within the scope of the Order because it was not clearly identifiable as a star or other object; however, the "Christmas Star Candle" was outside the scope of the Order because it was clearly identifiable as a star when viewed from all sides).

Rulings addressing holiday novelty candles, however, have not previously required that a design be visible from multiple angles. *See Final Scope Ruling, Meijer Inc.* at 4 (Dec. 15, 1997) (finding a candle embossed with the word "Noel" to be a Christmas novelty candle without addressing the issue of visibility from multiple angles); *Final Scope Ruling, Enesco Corp.* at 3 (Oct. 30. 1996) (finding four candles decorated with raised Christmas scenes to be outside the scope of the Order without addressing visibility of the design); *Final Scope Ruling, Watkins, Inc.* at 2 (Feb. 14, 1995) (ruling that a raised relief Christmas design "clearly limit[s] this candle for use in connection with the Christmas holiday season," without addressing visibility from multiple angles); *Final Scope Ruling, Hallmark Cards, Inc.* at 2 (Sept. 30, 1993) (finding a candle engraved with a poem entitled "Our Wedding" outside the scope of the Order because the poem limited its use to weddings and could not be removed without damaging the candle. The design's visibility from mul-

tiple angles was not addressed.). Commerce's holiday novelty analysis, explained in *Final Scope Ruling, Endar Corp.* at 4 (July 7, 2000), does not address the issue of the design's visibility from multiple angles.

Furthermore, a requirement of visibility from multiple angles conflicts with several earlier Candles Order rulings in which Commerce concluded that holiday designs on the lids of wax-filled containers qualified candles for the holiday novelty exception. *See Final Scope Ruling, Kohl's Dep't Stores, Inc.,* Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998) (ruling that a wax-filled container with a Christmas print on the lid was a Christmas novelty candle and was outside the scope of the Order); *Final Scope Ruling, Cherrydale Farms Confections* at 3 (Sept. 3, 1993) (ruling that a wax filled container with a print titled "Bringing Home the Christmas Tree" on its lid was "limit[ed] * * * to use for Christmas" and was therefore a novelty candle excluded from the scope of the Order); *Final Scope Ruling, Primark Int'l* § 3 (June 9, 1993) (ruling that a wax-filled container with an image of Santa Claus and reindeer on the lid was a Christmas novelty candle and was excluded from the scope of the Order). A container lid is on top of the candle and must be removed entirely prior to use. A design on the lid is not visible either from multiple angles or when the candle is used. Thus, a requirement that a design be visible from multiple angles appears inconsistent with the determination that a design on top of a container lid may exclude a candle from the scope of the Order.

In another context, Commerce has found that designs molded on top of candles and designs that are recognizable only from the top are not grounds for exclusion from the scope of the Order. *See, e.g., Final Scope Ruling, Cherrydale Farms* at 4 (Oct. 5, 2000) (finding that an insect shape molded on top of a candle was insufficient to exclude it from the scope of the Order); *Final Scope Ruling, Endar Corp.,* Def.-Int.'s Ex. 11 at 5 (Jan. 10, 2000) (suggesting that impression of a dragonfly, visible only from the top, would not be sufficient to grant exclusion as a novelty candle. The candle was nevertheless excluded because it was formed in a shape not covered by the Order.). These rulings involved candles formed in the shapes of identifiable objects, however, and Commerce has not previously applied this reasoning to holiday novelty candles. Moreover, like the requirement of visibility from multiple angles, a determination that a holiday design on top of a candle is an insufficient basis for exclusion also appears to conflict with the earlier determinations that holiday designs on the lids of wax-filled containers are sufficient grounds for exclusion. *See Final Scope Ruling, Kohl's Dep't Stores, Inc.,* Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998); *Final Scope Ruling, Cherrydale Farms Confections* at 3 (Sept. 3, 1993); *Final Scope Ruling, Primark Int'l* § 3 (June 9, 1993).

An interpretation of the Scope Clarification to require a Christmas design to be visible from multiple angles represents a change from Commerce's prior practice. Yet here, Commerce offered no explanation as to

why the interpretation is correct or why Commerce altered its practice. Accordingly, the determination is not in accordance with law.

b. The Design Would Quickly Burn or Melt Away

As noted above, Commerce based its determination partly on the conclusion that the Santa Claus and Christmas tree designs imprinted into the top surfaces of candles 2 and 3 would quickly melt away when the candles were lit. *See* Final Scope Ruling at 5 ¶¶ 2,3, Compl. App. III. Commerce has consistently ruled that a novelty candle may still fall within the scope of the Order if the figurine or other decoration that qualifies the candle for novelty status may be easily removed without damaging the candle. *See, e.g., Final Scope Ruling, Meijer, Inc.* at 5 (June 11, 1998) (candle found outside the scope of the Order where an attached chick figurine could not be removed without damaging the candle); *Final Scope Ruling, Two's Company, Inc.,* Def.-Int.'s Ex. 5 at 4 (Jan. 13, 1995) (candle with attached gold angel figurine was outside the scope of the Order because the figurine could not be removed without damaging the candle).

However, Commerce has not previously determined that a candle is within the scope of the Order because a design would quickly burn or melt away. Moreover, the burning or melting of a design is not equivalent to the easy removal of a figurine or decoration. First, burning or melting a design cannot be achieved without damage to the candle. Second, the question of burning or melting the design requires consideration of the candle's characteristics after consumption, while the question of easy removal of a decoration considers the candle's characteristics prior to consumption. Prior rulings indicate that in determining whether merchandise falls within the scope of an antidumping order, Commerce looks to the condition of merchandise at the time of importation or purchase by the consumer, not at the time of consumption. *See, e.g., Final Scope Ruling, Russ Berrie, Inc.* at 4 (Sept. 25, 1997) ("The issue before the Department * * * is not the disposition of the container after the candle is consumed but, rather, the wax-filled container en toto as it is imported into the United States."); *Final Scope Ruling, Candles by Finesse* at 3 (Mar. 18, 1992) (Spiral candle which left behind a wax sculpture as it burned was within the scope of the Order because "at the time of purchase, [the candle] is not distinguishable in appearance from other spiral candles subject to the Order."). Accordingly, this basis for Commerce's decision is not in accordance with law.

c. The "Minimally Decorative" Standard

Commerce characterized the designs on candles 2 and 3, and others discussed *infra,* as "minimally decorative." *See* Final Scope Ruling at 5 ¶¶ 2, 3, Compl. App. III. The term "minimally decorative" is taken from Commerce's *Final Scope Ruling, Endar Corp.,* Def.-Int.'s Ex. 11 (Jan. 10, 2000), in which Commerce ruled that a candle with a bamboo design that incorporated only one characteristic knot and ribbed joint was not formed in the shape of an identifiable object, and was therefore within the scope of the Order. Commerce stated that "the center joint is only

slightly raised and not easily discernable, and the single knot is not visible from all sides. Therefore, * * * the minimal decorative design does not make this candle easily identifiable as bamboo." *Final Scope Ruling, Endar Corp.,* Def.-Int.'s Ex. 11 at 6 (Jan. 10, 2000).

Endar may be interpreted to promulgate a two-prong standard which asks, first, whether the design is easily discernable, and second, whether it is visible from all sides. The first element of this "minimally decorative" standard appears to correspond to an inquiry used in the holiday novelty analysis: whether the design is easily recognizable as a holiday image. *See Final Scope Ruling, Endar Corp.* at 4–5 (July 7, 2000); *Final Scope Ruling, Midwest of Cannon Falls, Inc.* at 3 (Oct. 30, 1996); *Final Scope Ruling, Enesco Corp.* at 3 (Oct. 30, 1996); *Final Scope Ruling, Kohl's Dep't Stores, Inc.,* Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998). The second element, however, asks whether the decoration is visible from multiple angles. As discussed above, this inquiry has not previously been applied to holiday novelty candles. *See supra* text at pp. 14–18. Absent further explanation, this Court is unable to determine that its use is supported by substantial evidence and in accordance with law. Commerce is therefore directed to evaluate the applicability of this standard to holiday novelty candles.

Assuming, *arguendo,* that the *Endar* ruling promulgates a two-part standard that may be applied to holiday novelty candles, Commerce's application of that standard in the instant case is flawed. In *Endar*, Commerce drew its conclusion that the candle was minimally decorated after a two-step inquiry. In the instant ruling, in contrast, the statement that the design is minimally decorative is simply an assertion, rather than a conclusion derived from examination of the candle's characteristics.[8] In addressing candle 2, the Santa Claus Motif Candy Cane Pillar, Commerce stated,

> While the Santa Claus image is specific to the Christmas holiday, it is only discernable when viewed from above and would soon melt away once the candle is lit. In a previous scope ruling, the Department found that a minimally decorative design that does not make the product easily identifiable as a novelty candle is not grounds for excluding an item from the Order.

Final Scope Ruling at 5 ¶ 2, Compl. App. III. This statement does not demonstrate a clear analysis under the two criteria of *Endar.* Although the mention of the Santa Claus image implies that the design is recognizable, and the statement notes that the design is visible only from above, rather than from multiple angles, the decision that the design is minimally decorative, if it is based on any analysis at all, is based partly on a third criterion not found in *Endar:* whether the design will quickly melt.

Similarly, in its analysis of another candle, Commerce said that "[w]hile the image of Santa Claus is specific to the Christmas holiday,

[8] The standard was similarly applied with respect to candles 2, 3, 5, 6, 8, and 10. The analysis discussed here is applicable to all of these candles.

this particular ornamentation is only minimally decorative and not viewable from most angles, and therefore is not grounds for excluding this item from the scope of the Order." *Id.* at 6 ¶ 8. Here, the visibility of the design is mentioned only after describing the candle's design as "minimally decorative." The description of the candle as "minimally decorative" is itself merely an assertion.

In summary, Commerce must determine whether the term "minimally decorative" refers to a two-element standard that is applicable to holiday novelty candles. If so, Commerce must apply the standard in an appropriate manner, "articulat[ing a] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962).

d. The Combined Effect of Colors and Holiday Design

The Court notes that Commerce omitted any discussion of whether the combination of color patterns and holiday images might bring these candles within the holiday novelty exception. As previously discussed, *see supra* text at pp. 9–10, decorations that provide insufficient grounds for exclusion when considered individually may be sufficient to exclude a candle from the scope of the Order when considered in combination. *See Springwater,* 20 CIT at 1195–96; *Final Scope Ruling, Endar Corp.,* Def.-Int.'s Ex. 9 at 4 (Apr. 7, 1999). Here, Commerce should evaluate whether the combination of red, white, and green colors, the pattern of diagonal stripes, and the holiday-specific designs may be sufficient to find that these candles are "specially designed for use only in connection with the Christmas holiday season." Scope Clarification, Pl.'s Ex. 4 at 1.

e. Conclusion

In accordance with the comments above, Commerce should evaluate whether the requirement of visibility from multiple angles and the related "minimally decorative" standard are properly applicable to candles 2 and 3. Absent some further explanation, Commerce should omit consideration of whether a design would easily burn or melt away, as this is not in accordance with law. Finally, if Commerce determines that the individual decorative characteristics of these candles do not qualify for the holiday novelty exclusion, the agency should assess whether the combined effect of the decorations removes these candles from the scope of the Candles Order.

2. Candles 5, 8, and 10

Candle 5, the Christmas Sock Pillar (Item No. 83036) is a white candle with an image of a stocking drawn in red on one side. Candle 8, the Santa Claus Candy Cane Column (Item No. 00016), has red and white diagonal stripes along the body of the candle and a small image of Santa Claus visible on one side. Similarly, candle 10, the Christmas Tree with Star Candy Cane Column (Item No. 00016), has red, white and green diagonal stripes along the body of the candle and a small image of a Christmas tree with a star on one side.

Although Commerce ruled that the Christmas stocking, Santa Claus, and Christmas tree images are specific to the Christmas holiday, all three of these candles were found within the scope of the Order on the grounds that the designs were not visible from most angles and were minimally decorative. *See* Final Scope Ruling at 5–6 ¶¶ 5, 8, 10, Compl. App. III.

As with candles 2 and 3, Commerce must evaluate whether the requirement of visibility from multiple angles and the "minimally decorative" standard are properly applied to holiday novelty candles. Additionally, Commerce should assess whether the combinations of colors, patterns, and Christmas images render these candles "specially designed for use only in connection with the Christmas holiday season." Scope Clarification, Pl.'s Ex. 4 at 1.

3. Candle 6

Candle 6, the Santa Claus Pillar (Item No. 82936), is a red candle with a silhouette drawn in white on one side. As with the previous three candles, Commerce held that the design was "minimally decorative" and was not easily viewable from most perspectives. Here, however, Commerce's determination that the candle falls within the scope of the Order rested primarily on the finding that the Santa Claus image is not easily recognizable.

Commerce has previously withheld novelty candle status on the grounds that the decorative design is not identifiable or easily recognizable as a holiday image. *See, e.g., Final Scope Ruling, Endar Corp.* at 6 (July 7, 2000) (ruling that candle decorations that were not recognizable as Christmas trees or holly bushes did not qualify for holiday novelty exception); *Final Scope Ruling, Midwest of Cannon Falls, Inc.* at 3 (Oct. 30, 1996) (ruling that Easter taper candle decorated with Easter eggs was within the scope of the Order because the decoration was not readily identifiable as eggs); *cf. Final Scope Ruling, Kohl's Dep't Stores, Inc.,* Def.-Int.'s Ex. 14 at 6 (Aug. 24, 1998) (finding a wax-filled container to be outside the scope of the Order because the print on the container's lid was "clearly intended to represent Christmas carolers"); *Final Scope Ruling, Enesco Corp.* at 3 (Oct. 30, 1996) (ruling that four candles were outside the scope of the Order because they "are designed for use only in connection with the Christmas holiday season" and "each candle's design contains identifiable features commonly associated with the Christmas season"). Such a requirement is in accordance with the terms of the Scope Clarification, which requires a Christmas novelty candle's holiday use to be *"clearly indicated* by Christmas scenes or symbols depicted in the candle design." Scope Clarification, Pl.'s Ex. 4 at 1 [emphasis supplied].

The design on candle 6 is an undetailed sketch composed of curving lines. Commerce found the design to be "a stylized outline of what appears to be a head and shoulders." Final Scope Ruling at 5 ¶ 6, Compl. App. III. After viewing the candle, we conclude that Commerce's finding is a reasonable construction of the evidence. Accordingly, Commerce's

determination that the design is not easily recognizable as Santa Claus is supported by substantial evidence. As the lack of clarity in the design is sufficient to deny holiday novelty status, the Court does not reach the application of the "viewable from multiple angles" and "minimally decorative" standards in this instance.

CONCLUSION

Commerce should reconsider and clarify its reasoning with regard to the subject candles. Pursuant to Defendant's request, candles 1, 4, 9, 11, and 12 are remanded to Commerce for reconsideration. Candles 2, 3, 5, 8, and 10 are remanded to Commerce for further proceedings consistent with this opinion. The determination of the Department of Commerce as to candle 6, the Santa Claus Pillar (Item. No. 82936), is affirmed. Plaintiff's claim regarding the Moonlite Candles (Item No. 213649) is dismissed for lack of jurisdiction.

(Slip Op. 02–48)

KAO HSING CHANG IRON & STEEL CORP., PLAINTIFF, AND ACI CHEMICALS, INC., AND YU DIN STEEL CO., LTD., PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND WHEATLAND TUBE CO., DEFENDANT-INTERVENOR

Consolidated Court No. 00–01–00026

Plaintiff foreign exporter brought action contesting final results of administrative review of antidumping order covering carbon steel pipe from Taiwan. United States Court of International Trade, Eaton, J. Held: United States Department of Commerce's ("Commerce") determination that use of facts available was warranted as to Plaintiff was not supported by substantial evidence on the record because, contrary to Commerce's findings, Plaintiff sought clarification of questionnaire instructions, notified Commerce of difficulties in submitting requested information, and timely submitted responses.

[Antidumping determination remanded to Commerce.]

(Dated May 30, 2002)

Ablondi, Foster, Sobin & Davidow, P.C.[1] *(F. David Foster* and *Kristen S. Smith),* for Plaintiff.

Holland & Knight, LLP (Frederick P. Waite and *Kimberly R. Young),* for Plaintiff-Intervenors.

Robert D. McCallum, Jr., Deputy Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melnbrencis,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Stephen M. DeLuca,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

Schagrin Associates (Roger B. Schagrin, Nicholas A. Kessler, Andrew B. Knapp, Brian E. McGill, and *Roger Banks),* for Defendant-Intervenor.

[1] Ablondi, Foster, Sobin & Davidow, P.C., merged with Miller & Chevalier, Chartered, in July of 2001.

OPINION

EATON, *Judge:* This matter is before the court on the motion of Plaintiff Kao Hsing Chang Iron & Steel Corporation ("KHC") for judgment upon the agency record pursuant to USCIT R. 56.2. KHC contests the results of the United States Department of Commerce's ("Commerce") sixth administrative review of the antidumping order[2] covering carbon steel pipe from Taiwan contained in *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 69,488 (Dec. 13, 1999) *("Final Results"), amended by Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan; Amended Final Results of Antidumping Duty Administrative Review,* 65 Fed. Reg. 5,310 (Feb. 3, 2000) *("Am. Final Results").* The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1994) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (1994). Where a party challenges the findings of an antidumping review the court will 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). For the reasons set forth below, the court remands this matter to Commerce with instructions to conduct further proceedings in conformity with this opinion.

BACKGROUND

On May 29, 1998, at the request of Allied Tube & Conduit Corp., Wheatland Tube Company, Sawhill Tubular Division of Armco, Inc., and Laclede Steel Co. (jointly "Petitioners"), Commerce initiated an administrative review of the order covering the subject imports for the period of May 1, 1997, through April 30, 1998. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,* 63 Fed. Reg. 35,188 (June 29, 1998). As part of its investigation, Commerce issued its standard questionnaire to KHC.[3] *(See* questionnaire of 7/10/98 ("Questionnaire"), Pub. R. Doc. 5, Attach.) Although initially not required to respond to questions concerning costs of production as set out in section D of the Questionnaire, Commerce notified KHC that it might be instructed to do so in the future. (Letter from Commerce to law firm of Dickstein Shapiro & Morin of 7/10/98, Pub. R. Doc. 5 at 2.) KHC responded to section A of the Questionnaire on August 7, 1998, and sections B and C on September 4, 1998.

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[2] *See Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Antidumping Duty Order,* 49 Fed. Reg. 19,369 (May 7, 1984). By this order KHC's weighted average antidumping duty margin was calculated as 9.7 percent for the subject merchandise. *Id.* at 5,311. Administrative reviews of this order were conducted for the periods of: 1983–84, *see* 51 Fed. Reg. 43,946 (Dec. 5, 1986) (final results), *amended by* 53 Fed. Reg. 51,128 (Dec. 20, 1988); 1985–86, *see* 53 Fed. Reg. 41,218 (Oct. 20, 1988) (final results), *amended by* 54 Fed. Reg. 1,752 (Jan. 17, 1989); 1986–87, *see* 54 Fed. Reg. 46,432 (Nov. 3, 1989) (final results); 1987–88, *see* 56 Fed. Reg. 8,741 (Mar. 1, 1991) (final results); and 1995–96, *see* 62 Fed. Reg. 52,971 (Oct. 10, 1997) (final results). KHC's margin was reviewed for the periods of 1985–86 (finding zero percent margin) and 1986–87 (adopting 1985–86 margin due to no shipments during POR). In addition, Commerce conducted an expedited sunset review of the subject merchandise, in which it noted KHC's margin, as calculated in the antidumping order, was 9.7 percent. *See Final Results of Expedited Sunset Review: Small Diameter Carbon Steel Pipes and Tubes from Taiwan,* 64 Fed. Reg. 67,873, 67,875–76 (December 3, 1999).

[3] The relevant questionnaire sections are: A (general information); B (comparison market sales-sales in the home market or to third countries); C (sales to the United States); and D (cost of production/constructed value).

(Letters from law firm of Ablondi, Foster, Sobin & Davidow ("AFS&D") to Commerce of 9/4/98, Pub. R. Docs. 20, 32.[4])

Thereafter, in response to Petitioners' further allegations that "KHC made home market sales below the cost of production * * * during the POR," *Certain Circular Welded Carbon Steel Pipes and Tubes From Taiwan: Prelim. Results of Antidumping Duty Admin. Review and Partial Rescission of Review,* 64 Fed. Reg. 30,306, 30,307 (June 7, 1999) *("Prelim. Results"),* Commerce "initiated an investigation of sales below cost," *id.,* and instructed KHC to respond to section D of the Questionnaire. (Letter from Commerce to AFS&D of 10/20/98, Pub. R. Doc. 46.) In connection with this request, Commerce provided KHC with general instructions for answering the questions found in section D relating to cost of production ("COP")[5] and constructed value ("CV").[6] These instructions provided guidance as to how various computer data fields were to be labeled and completed so that COP and CV could be calculated. (Questionnaire section D, Pub. R. Doc. 5, Attach. at D–10–19.) For COP and CV data, Commerce directed KHC to report "the *quantity produced during the cost calculation period"* in a data field labeled "PRODQTY" for each model identified by an individual model control number ("CONNUM"). *(See id.* at D–13, 19 (emphasis added).) KHC filed its section D response on December 4, 1998, after asking for and receiving an extension of time to do so. *(See* letters from Commerce to AFS&D of 11/17/98, Pub. R. Doc. 53A (granting extension of time to Dec. 4, 1998), and 12/7/98, Pub. R. Doc. 56 (referencing filing of preliminary business proprietary version on December 4, 1998).)

Commerce, after reviewing KHC's section D submission and receiving comments from interested parties thereon, sent a supplemental questionnaire to KHC. *(See* letter from Commerce to AFS&D of 1/21/99, Pub. R. Doc. 66.) Among other things, Commerce instructed KHC to, "As previously requested, report the *quantity produced during the cost calculation period* in the field labeled 'PRODQTY' within your COP and CV databases." (Supplemental questionnaire of 1/21/99 ("First Supplemental Questionnaire"), Pub. R. Doc. 66, Attach. at ¶ 47 (emphasis added).) Commerce did not, however, more specifically detail the nature of the deficiency. *(See generally* First Supplemental Questionnaire, Pub. R. Doc. 66, Attach.) KHC timely filed its response to the First Supplemental Questionnaire *(see* letter from AFS&D to Commerce of 2/16/99, Conf. R. Doc. 16) after asking for and receiving an extension of time *(see* letter from Commerce to AFS&D of 2/3/99, Pub. R. Doc. 70 (granting extension of time to February 16, 1999)). In this response, KHC stated: "As requested, KHC is reporting the *quantity produced during the cost cal-*

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[4] The law firm of Dickstein Shapiro & Morin withdrew as attorney of record for KHC on July 24, 1998 (Pub. R. Doc. 13), after which the law firm of Ablondi, Foster, Sobin & Davidow entered its appearance on July 28, 1998 (Pub. R. Doc. 14).

[5] "Cost of production" was defined as "the total model-specific cost of the foreign like product sold by your company in the foreign market." (Questionnaire section D, Pub. R. Doc. 5, Attach. at D–1.)

[6] "Constructed value" was defined as "the total model-specific cost of the subject merchandise sold by your company to the U.S. market, plus an amount for profit." (Questionnaire section D, Pub. R. Doc. 5, Attach. at D–1.)

culation period in the field labeled 'PRODQTY' within its revised COP and CV databases * * *." (First Supplemental Questionnaire Resp., Pub. R. Doc. 77, Attach. at 43 (emphasis added).)

After receiving and reviewing the First Supplemental Questionnaire Response, Commerce notified KHC that the information provided therein was deficient, and directed it to complete another supplemental questionnaire. (Letter from Commerce to AFS&D of 3/16/99, Pub. R. Doc. 86.) In this communication, for the first time, Commerce clearly stated that KHC had not provided requested information:

> For a large number of CONNUMs, including CONNUMs for which sales are reported in the sales response, data for the field "PRODQTY" is not provided. As requested in our original and supplemental questionnaire, report the *quantity produced during the cost calculation period* in the field labeled "PRODQTY" within your COP and CV databases.

(Supplemental questionnaire of 3/16/99 ("Second Supplemental Questionnaire"), Pub. R. Doc. 86, Attach. at ¶ 10(e) (emphasis added).)

Before submitting its response, KHC sought to address the issues raised by the Second Supplemental Questionnaire. To this end KHC contacted Commerce and, on March 23, 1999, a meeting was held between counsel for KHC and Commerce officials.[7] *(See* affidavit of F. David Foster, Pl.'s Mem. Supp. Mot. J. Agency R., Attach. 5 ("Foster Aff."); affidavit of Johnny Chiu, Pl.'s Mem. Supp. Mot. J. Agency R., Attach. 6.) At this meeting counsel for KHC stated that KHC's sales during the period of review included merchandise produced both prior to the period of review—*i.e.* from inventory—and during the period of review. (Foster Aff. at ¶ 4.) KHC's counsel explained that, since Commerce requested information only for quantities produced during the cost calculation period, no production quantity data had been provided for merchandise sold from inventory. *(Id.)* KHC's counsel suggested that, with respect to data for merchandise sold from inventory, "costs reported for the product most similar to a product not produced during the review period could be used as surrogate costs for the product not produced" as this "was normal ITA practice in situations such as KHC's." *(Id.* at ¶ 5.) Commerce did not consent to KHC's proposed method but, instead, indicated that the use of surrogate cost data would depend on a number of factors, including the relative similarity of the surrogate merchandise and estimated value of U.S. sales involved. *(Id.* at ¶ 6.) At no point did Commerce state, however, that KHC's use of such methodology was unacceptable or, alternatively, suggest any other approach. *(Id.* at ¶ 7.)

After this meeting, KHC requested and was granted an extension of time to respond to the Second Supplemental Questionnaire. *(See* letter from Commerce to AFS&D of 4/8/99, Pub. R. Doc. 102 (granting exten-

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[7] A memorialization of this meeting was not initially included as part the administrative record. The court granted Plaintiff's motion to include two affidavits in the record describing the events that transpired during that meeting. *See Kao Hsing Chang Iron & Steel Corp. v. United States,* 25 CIT ___, Slip Op. 01–51 (Apr. 19, 2001) (granting Plaintiff's motion to amend administrative record). There is no dispute that these affidavits, now part of the administrative record, accurately reflect the substance of that meeting. *Id.,* 25 CIT at ___, Slip. Op. 01–51 at 2.

sion of time to April 12, 1999).) KHC then timely filed its response to the Second Supplemental Questionnaire (Second Supplemental Questionnaire Resp. of 4/12/99, Pub. R. Doc. 105, Attach) explaining that it had:

> reported the quantity produced during the cost calculation period in the field labeled "PRODQTY" in the COP and CV databases. For some U.S. and home market sales (about 5% of the sales records in both the U.S. and home market data sets), there was no production during the POR; sales were from inventory. Exhibit 6 hereto sets forth those product numbers/CONNUMS where this is the case, and indicates for each such case the control number/CONNUM which is closest in characteristics for which production did occur, and whose costs KHC believes closely represents the costs of such product if it had been produced.

(Id., Pub. R. Doc. 105, Attach. at 11.) Exhibit 6[8] was a printed chart with handwritten notations of CONNUMs with "U.S. sales with no POR production, and closest product with production," and CONNUMs with "Home market sales with no POR production, and closest product with production." *(See* Second Supplemental Questionnaire Resp., Conf. R. Doc. 24, Attach. at Ex. 6.)[9] After filing the Second Supplemental Questionnaire Response KHC received no further inquiries or requests for information from Commerce. (Pl.'s Mem. Supp. Mot. J. Agency R. at 6.)

Commerce then published the *Preliminary Results*. Therein, it explained that the use of facts available as to certain merchandise was warranted because KHC "failed to provide any costs for certain models," *Preliminary Results,* 64 Fed. Reg. at 30,308, and "failed to provide any constructed value data for certain models * * *." *Id.* Therefore, for both cost of production and constructed value Commerce used the "highest average cost for the same category of product." *Id.*

On December 13, 1999, Commerce published the *Final Results*. Therein, it explained that "[w]here KHC failed to provide cost data, [Commerce] used the highest average costs of models for which KHC did provide data. The facts * * * used constitute partial adverse facts available, and are also the least adverse facts available on the record." *Final Results,* 64 Fed. Reg. at 69,489. Commerce explained that the use of facts available was warranted because:

> KHC withheld information requested by the Department, then belatedly offered different information, which did not fulfill the request, in an unacceptable format. * * * *KHC did not consult the Department on this matter, and did not explain its omission of quantity or cost data until its April 13, 1999 addendum to its April 12, 1999 supplemental response, where it mentioned in passing that the models were not produced during the POR.*

Id. (emphasis added). In addition, Commerce found that:

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[8] Exhibit 6 as filed on April 12, 1999, contained information deemed incorrect by KHC and was subsequently replaced. *(See* letter from AFS&D to Commerce of 4/13/99, Pub. R. Doc. 104 at 2.)

[9] The chart, which cross-referenced CONNUMs of merchandise sold from inventory with CONNUMs of merchandise produced during the period of review, did not provide specific production quantity data for CONNUMs sold from inventory.

> KHC chose to ignore both the instructions in the questionnaire * * * and basic statutory guidelines: [19 U.S.C. § 1677m(c)(1)] requires that an interested party promptly notify the Department if it is unable to submit information in the form and manner requested, and that it provide a "full explanation and suggested alternate forms" in which it is able to provide the information. KHC provided no such notification or explanation.

Id. at 69,490. Commerce explained that it used adverse inferences because:

> the facts we used are only partial adverse facts available and are the least adverse verified facts available on the record which would not reward non-compliance. Rather than applying the highest calculated margin for the sales with unreported cost data, we simply inserted the highest costs in order to complete the costs test and leave the price-to-price analysis intact. We have relied upon KHC's own verified data as our source of facts available. Use of costs other than those we have used, such as KHC's overall, non-product specific average costs, could reward KHC for failure to fully cooperate in this review because use of such data could potentially result in a lower margin than would have resulted from use of KHC's actual costs. Our application of partial adverse facts available in this manner is consistent with established practice because it is based on verified data and is sufficiently adverse to induce KHC's cooperation in future reviews.

Id. After correcting certain ministerial errors, Commerce set KHC's antidumping duty margin at 24.80 percent. *Am. Final Results,* 65 Fed. Reg. at 5,311.

DISCUSSION

KHC raises several issues in support of its motion. First, it argues that Commerce improperly resorted to the use of facts available because Commerce did not provide KHC with an adequate opportunity to correct deficiencies in its filings. Next, KHC contends that, even if the use of facts available were warranted, Commerce improperly resorted to the use of adverse inferences because KHC acted to the best of its ability to comply with Commerce's requests. Finally, KHC argues that the adverse inferences selected by Commerce from facts available were not in accordance with law because they were punitive in nature.[10]

The United States ("Government"), on behalf of Commerce, claims that the *Final Results* are supported by substantial evidence on the record and otherwise in accordance with law. The Government argues that the use of partial facts available was warranted because KHC failed

[10] Plaintiff-Intervenors contend that since Yu Din's antidumping margin was "linked" to KHC's, if KHC's margin is adjusted then Yu Din's must be as well. *(See* Pl.-Intervenors' Mem. Supp. Mot. J. Agency R. at 2.) Yu Din's margin was "linked" to KHC's because it "did not respond to [Commerce's] requests for information and [was] assigned, as facts available, the highest rate in any segment of this proceeding * * *," *see Am. Final Results,* 65 Fed. Reg. at 5,310, and KHC's margin was the highest calculated rate. *Id.* at 5,311. The Government agrees with Plaintiff-Intervenors, stating that "in the event this Court remand[s] KHC's action to Commerce to redetermine KHC's margin and KHC's current margin was ultimately discredited, that Yu Din's margin should be reconsidered as well because it has challenged the facts available margin in the current review. However, Commerce need * * * revise Yu Din's margin only if KHC's margin is disqualified in a final court determination following a remand in KHC's action." (Def.'s Mem. Opp'n to Pl.-Intervenor's Mem. Supp. Mot. J. Agency R. at 3.)

to submit COP and CV data for several models and, in addition, that the data KHC did submit was properly rejected by Commerce because it was not usable. The Government further argues that Commerce's selection of adverse inferences was proper since Commerce is allowed great discretion in selecting such inferences from facts otherwise available, and here those inferences selected were not punitive in nature but, rather, furthered the interests of the antidumping laws.

In order to be found proper, Commerce's findings must be supported by substantial evidence. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison v. Nat'l Labor Relations Bd.,* 305 U.S. 197, 229 (1938); *Daewoo Elecs. Ltd. v. United States,* 6 F.3d 1511, 1520 (Fed. Cir. 1993). In reviewing an agency's findings the court must determine "whether the evidence and reasonable inferences from the record support the [agency's] finding." *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984). Finally, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966); *Daewoo,* 6 F.3d at 1520 ("The questions is whether the record adequately supports the decision of the [agency], not whether some other inference could reasonably be drawn."). Here, Commerce's conclusions supporting its use of facts available was warranted are not supported by substantial evidence.[11]

First, the conclusion that KHC "withheld information requested by the Department, then belatedly offered different information, which did not fulfill the request, in an unacceptable format," *Final Results,* 64 Fed. Reg. at 69,489, is not supported by the record. The information KHC allegedly "withheld" is the PRODQTY data for CONNUMs sold from inventory. The clear wording of the questionnaire instructions, however, directed KHC to supply PRODQTY data for CONNUMs *produced* during the cost calculation period. While it may have been Commerce's intention to request PRODQTY data for all CONNUMs *sold* during the cost calculation period, this was not made clear to KHC until it received the Second Supplemental Questionnaire, thus prompting KHC to request the meeting that was held on March 23, 1999. In addition, KHC did not "belatedly" offer this information to Commerce. KHC informed Commerce of the difficulties it was having reconstructing the PRODQTY data for CONNUMs sold from inventory nearly three weeks prior to the April 12 deadline for the submission of the Second Supplemental Questionnaire response.

Next, the conclusion that KHC failed to provide requested information, in that it "did not consult the Department on [the submission of surrogate data], and did not explain its omission of quantity or cost data

[11] It is unclear whether Commerce based its use of facts available on KHC's alleged withholding of information pursuant to 19 U.S.C. § 1677e(a)(2)(A), or failure to provide information pursuant to 19 U.S.C. § 1677e(a)(2)(B). Whatever the basis, however, the court finds Commerce's conclusions are not supported by the record.

until its April 13, 1999 addendum * * * where it mentioned in passing that the models were not produced during the POR," *Final Results,* 64 Fed. Reg. at 69,489, is not in accord with the evidence now on the record. Following receipt of the Second Supplemental Questionnaire, KHC's counsel sought a meeting with Commerce officials and, on March 23, 1999, such meeting took place. (Foster Aff. at ¶ 2.) At that time KHC's counsel consulted with Commerce officials about the missing data, explained to them why the data had not been provided, and sought guidance from them as to how to comply with the data request. *(See id.* at ¶¶ 4–5.) Moreover, Commerce's further contention that KHC failed to comply with statutory and regulatory guidelines is also not in accordance with the record. In support of this conclusion Commerce stated:

> KHC chose to ignore both the instructions in the questionnaire * * * and basic statutory guidelines: [19 U.S.C. § 1677m(c)(1)] requires that an interested party promptly notify the Department if it is unable to submit information in the form and manner requested, and that it provide a "full explanation and suggested alternate forms" in which it is able to provide the information. KHC provided no such notification or explanation.

Final Results, 64 Fed. Reg. at 69,490. The record, however, shows that KHC, after receiving the Second Supplemental Questionnaire—which for the first time alerted it to the nature its response's deficiencies—promptly notified Commerce that it needed clarification of the instructions and was having difficulty providing the requested information. (Foster Aff. at ¶ 4.) KHC also explained why it had not previously supplied such data, and suggested an arguably reasonable means for completing the COP and CV databases with surrogate data. *(Id.* at ¶ 5.)

Therefore, because Commerce's findings in the *Final Results* are not based on the evidence on the record, its determination that the use of facts available was warranted as to KHC in the *Final Results* is not supported by substantial evidence.

CONCLUSION

The court remands this action so that Commerce may conduct further proceedings in conformity with this opinion, including consulting with KHC to develop an acceptable method for providing missing production quantity data for KHC's COP and CV databases. Such remand results are due within ninety days from the date of this opinion. KHC shall have thirty days thereafter within which to file comments and Commerce may reply to any such comments within eleven days of their filing.

(Slip Op. 02–49)

ORLEANS INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 01–00576

[Defendant's motion to dismiss for lack of subject matter jurisdiction is granted.]

(Dated June 3, 2002)

Barnes, Richardson & Colburn (Alan Goggins), New York, N.Y., for Plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General of the United States; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Aimee Lee*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, of Counsel; *Frank Martin,* Office of the General Counsel, U.S. Department of Agriculture, of Counsel, for Defendant.

OPINION

CARMAN, *Chief Judge:* Defendant, United States, moves to dismiss this consolidated action[1] for lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1). Plaintiff, Orleans International Inc. ("Orleans") opposes Defendant's motion, asserting this Court has subject matter jurisdiction under 28 U.S.C. § 1581(i)(1), (2) and (4) (2000). For the reasons that follow, this Court dismisses this action for lack of subject matter jurisdiction.

I. BACKGROUND

Orleans commenced the underlying action to challenge the constitutionality of assessments applied to imports of beef and related beef products pursuant to the Beef Promotion and Research Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901–11 (2000).[2] The Beef Act was enacted by Congress because it was determined to be:

> in the public interest to authorize the establishment, through the exercise of the powers provided herein, of an orderly procedure for financing (through assessments on all cattle sold in the United States and on cattle, beef, and beef products imported into the United States) and carrying out a coordinated program of promotion and research designed to strengthen the beef industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for beef and beef products.

7 U.S.C. § 2901(b).

The Beef Act directs the Secretary of Agriculture to promulgate a Beef Promotion and Research Order (the "Order"). *See* 7 U.S.C. § 2903. The

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[1] *Pierce Trading International v. United States*, Court No. 01–00696 and *A.S.C.-Meyner Company v. United States,* Court No. 01–00611, two cases raising identical issues, were consolidated under *Orleans International, Inc. v. United States*, Consolidated Court No. 01–00576, pursuant to court order dated December 13, 2001.

[2] Orleans claims the beef assessments are unconstitutional for two reasons: (1) the assessments violate the Plaintiff's First Amendment rights to free speech and assembly, in a manner similar to the mushroom fee held unconstitutional in *United States v. United Foods, Inc.*, 121 S. Ct. 2334 (2001); and (2) the assessments constitute an unjust taking of its property under the Takings Clause of the Fifth Amendment to the Constitution.

Order established the Cattlemen's Beef Promotion and Research Board (the "Board") and the Beef Promotion Operating Committee (the "Operating Committee"). *See* 7 U.S.C. § 2904; 7 C.F.R. §§ 1260.141, 1260.161 (2001). The Operating Committee develops "plans or projects of promotion and advertising, research, consumer information, and industry information, which [are] paid for with assessments collected by the Board." 7 U.S.C. § 2904(4)(B).

The assessments used to pay for these projects are collected on both domestic sales and imports. Domestic purchasers "making payment to a producer for cattle purchased from the producer [are required to] * * * collect an assessment and remit the assessment to the Board." 7 U.S.C. § 2904(8)(A). Importers "of cattle, beef, and beef products into the United States [are required to] pay an assessment to the Board through the U.S. Customs Service." 7 C.F.R. § 1260.172(b)(1). The rate of assessment is "one dollar ($1) per head of cattle" or "the equivalent thereof" for beef and beef products. 7 C.F.R. § 1260.172(a)(1), (2) & (b)(2).

Orleans has imported beef products into the United States from time to time since 1986 and has paid the assessments prescribed by the Beef Act upon its imports of beef products. Orleans timely instituted this action to contest the constitutionality of the beef assessments, pleading jurisdiction under 28 U.S.C. § 1581(i)(1), (2) & (4). Defendant subsequently moved to dismiss this action for lack of jurisdiction.

II. DISCUSSION

A. Contentions of the Parties

1. Defendant

Defendant makes three principal arguments in support of its motion to dismiss for lack of jurisdiction. First, Defendant argues 28 U.S.C. § 1581(i)(1) is not applicable because this action does not "arise out of any law of the United States providing for—(1) revenue from imports or tonnage." Defendant contends the purpose of the Beef Act is to regulate and strengthen the beef industry, not to raise revenue for the United States Treasury. The monies collected from the assessments are designed to pay for projects of promotion, advertising, research, consumer and industry information for the beef industry.

Second, Defendant contends the Court has no jurisdiction over this action pursuant to 28 U.S.C. § 1581(i)(4) because the Plaintiff is not complaining about Customs' "administration and enforcement with respect to the matters referred to in" the other subsections conferring jurisdiction on the Court. Here, Orleans is not contesting the collection of the assessment by Customs, but rather the constitutionality of the assessment itself. Therefore, Defendant asserts jurisdiction is not proper under this section.

Finally, Defendant contends jurisdiction is improper under 28 U.S.C. § 1581(i)(2). The United States argues that subsection (i)(2) creates two requirements that Plaintiff does not meet. First, the action must arise directly out of an import transaction or involve a matter of international trade law. Defendant argues this action does not arise directly out of im-

port transactions because the Beef Act assessment is imposed equally on imports and domestic sales of beef. Thus, according to Defendant, the assessment is payable because of a transaction involving a sale of beef or beef products, not as a result of the importation of the merchandise. The United States argues further that the Beef Act is not an international trade law or a statute governing import transactions but rather an agricultural statute enacted to promote the beef industry. Defendant posits the statute's only connection to imports is that the assessment applies both to domestic sales and imports.

Second, the Court of International Trade ("CIT") must have exclusive jurisdiction over the action. Defendant argues the Beef Act does "not involve questions of classification, valuation or rate of duty," matters over which the CIT does have exclusive jurisdiction. Therefore the Beef Act "should be treated the same whether a court is dealing with domestic or imported goods and more appropriately should come within the jurisdiction of the district courts." H.R. REP. NO. 96–1235, at 47–8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759. Additionally, Defendant points out that the Beef Act already vests the district courts with jurisdiction to enforce violations of the Beef Act, and the constitutionality of the Act has been addressed by the district court in earlier cases and is presently under consideration in two other district courts. Thus, if the CIT assumes jurisdiction because the assessments at issue here involve imports, the CIT must also assume jurisdiction over domestic sales for the jurisdiction to be exclusive. Finally, the United States argues that Congress' failure explicitly to grant jurisdiction to the CIT over this type of action (as it did in connection with the Harbor Maintenance Tax ("HMT")) means the CIT does not have exclusive jurisdiction over these cases.

2. Plaintiff

Plaintiff, Orleans, makes three principal arguments in support of its contention that the CIT possesses jurisdiction under 28 U.S.C. § 1581(i) to entertain this action. First, Plaintiff argues this action arises directly from an import transaction. Plaintiff posits that the assessment fees are identical to the duties, merchandise processing fees and harbor maintenance fees paid on the same import transaction. Further, Congress intended the CIT to have jurisdiction under § 1581(i) with regard to any civil action concerning any duty, tax, fee, interest or charge payable to Customs upon import. Thus, because the beef assessment fee is similar to fees considered Customs duties, Orleans contends the beef assessment fee should be treated as a Customs duty and subject to judicial review by the CIT. Plaintiff argues it is challenging the constitutionality of the beef assessment only as applied to Plaintiff's imports, not as applied to domestic sales. Therefore the question presented is directly related to the importation of merchandise and jurisdiction under § 1581(i) is proper.

Second, Plaintiff contends the CIT may claim exclusive jurisdiction over the constitutional challenge to the Beef Act in relation to imports.

Orleans argues Defendant ignores that this action only concerns the Beef Act as applied to imports of beef and beef products, not as applied to domestic sales of beef and beef products—an issue currently pending in the district courts.

Plaintiff contends the plain language of 7 U.S.C. § 2908(b) grants jurisdiction to the district courts only for the enforcement and prevention of violations of the Act, not to review the constitutionality of the Act. Since there is no violation or enforcement issue here, Plaintiff argues the CIT may address the constitutionality of the Act as applied to imports.

Plaintiff, citing the Supreme Court decision in *K Mart Corporation v. Cartier*, 485 U.S. 176 (1988), argues that the district courts are divested of jurisdiction if an action falls within one of the specific grants of exclusive jurisdiction to the CIT. Here, Plaintiff claims because this action falls within the scope of § 1581(i) the CIT, not a district court, should have jurisdiction. To place jurisdiction over this matter in the district court would create the type of confusion that Congress sought to remedy when it enacted the Customs Court Act of 1980.

Plaintiff also refutes Defendant's argument that Congress could have explicitly granted the CIT jurisdiction as it did with respect to the HMT. Plaintiff argues that the language in the HMT Act was necessary to provide jurisdiction in the CIT with regard to several non-import aspects of the HMT.

Third, Plaintiff argues that if the Court decides jurisdiction properly resides in the district court, the appropriate remedy is to transfer the case to the district court rather than to dismiss the action.

B. Analysis

1. Jurisdiction

When a defendant challenges the Court's jurisdiction, the plaintiff has the burden of establishing that jurisdiction exists. *See Lowa, Ltd. v. United States*, 561 F. Supp. 441, 443 (Ct. Int'l Trade 1983). The primary jurisdictional authority for the CIT resides in 28 U.S.C. § 1581(a)–(i). Plaintiff pleads jurisdiction under § 1581(i)(1), (2) and (4).[3]

Because a fee payable upon importation is at issue, it might appear this Court would have jurisdiction over Plaintiff's claims. Nevertheless, Congress explicitly vested jurisdiction under the Beef Act with the district courts. *See* 7 U.S.C. § 2908(b). Furthermore this Court finds that it

[3] The residual jurisdictional provision of the Court, 28 U.S.C. § 1581(i), states in pertinent part:

> In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> * * * * * * *
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.
>
> This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930.

may not assume jurisdiction pursuant to § 1581(i) because such jurisdiction would not be exclusive.[4]

The Court finds its jurisdiction over this action would not be exclusive for two reasons. First, 7 U.S.C. § 2908(b) specifically vests the district courts with jurisdiction "to enforce, and to prevent and restrain a person from violating, an order or regulation made or issued" under the Beef Act. Plaintiff argues that 7 U.S.C. § 2908(b) provides the district court with jurisdiction only to enforce the Beef Act, not to review the constitutionality of the Beef Act. This argument is illogical. In order for the courts to enforce a law, that law must be constitutional. Therefore, jurisdiction to enforce a law necessarily presumes the court's power to determine the law's constitutionality. The "jurisdictional conflict" that Plaintiff claims would arise if 7 U.S.C. § 2908(b) were read to create jurisdiction for this action in the district court would actually arise if two different courts were to have jurisdiction to review the constitutionality of the same act. There is no reason to presume Congress wanted to split jurisdiction, placing enforcement and collection actions in one court and importers' suits over the viability of the Beef Act in another.

Furthermore, the constitutionality of the Beef Act has already been considered by two district courts, *see Goetz v. Glickman*, 920 F. Supp. 1173 (D. Kan. 1996), *aff'd*, 149 F.3d 1131 (10th Cir. 1998), *cert. denied*, 525 U.S. 1102 (1999); *United States v. Frame*, 658 F. Supp. 1476 (E.D. Pa. 1987), *aff'd*, 885 F.2d 1119 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990), and is currently under review by two additional district courts. *See Livestock Mktg. Ass'n, et al. v. USDA, et al.,* Court No. 00–1032 (D. S.D.); *Charter v. USDA,* Court No. 00–198–BLG-RFC (D. Mont.). Two separate Courts of Appeals' affirmances and the Supreme Court's denial of certiorari belie the notion that the district courts are an improper forum for these actions. This Court holds that it has no jurisdiction over this action under 28 U.S.C. § 1581(i).

2. Orleans' Request for Transfer to the District Court

Finally, the Court will address Orleans' request to transfer the case to the appropriate district court. Transfer for lack of jurisdiction is governed by 28 U.S.C. § 1631, which provides in pertinent part:

> Whenever a civil action is filed in a court * * * and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action * * * to any other such court in which the action * * * could have been brought at the time it was filed * * *.

28 U.S.C. § 1631 (2000). The Supreme Court has stated that "[t]he statute confers on the [federal courts] authority to make a single decision upon concluding that it lacks jurisdiction—whether to dismiss the case

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[4] In its discussion of the Customs Court Act of 1980, Congress made it clear that once granted, jurisdiction over a specific action would be exclusive to the CIT:

> Subsection (i) is intended only to confer subject matter jurisdiction upon the court, and not to create any new causes of action not founded on other provisions of law. * * * This provision makes it clear that all suits of the type specified are properly commenced *only* in the [CIT].

H.R. REP. NO. 96–1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759 (emphasis added).

or, 'in the interest of justice,' to transfer it to a court * * * that has jurisdiction." *Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 818 (1988). There are two common reasons for transfer that meet the requirements of 28 U.S.C. § 1631: (1) a statute of limitations problem, and (2) deprivation of a forum. *See, e.g., AT, Inc. v. United States*, 24 F. Supp. 2d 399, 400 (M.D. Pa. 1998) (statute of limitations); *O'Neal v. Hatfield*, 921 F. Supp. 574, 576 (S.D. Ind. 1996) (same); *Old Republic Ins. Co. v. United States*, 741 F. Supp. 1570, 1576 (Ct. Int'l Trade 1990) (forum). Since there has been no allegation of a statute of limitations problem and the denial of the request to transfer will not deprive Plaintiff of a forum, the Court finds it is not "in the interest of justice" to transfer this case to the district court.

III. CONCLUSION

For the reasons stated above, the Court grants Defendant's motion to dismiss this action for lack of subject matter jurisdiction.

(Slip Op. 02–50)

REINER BRACH GMBH & CO. KG AND NOVOSTEEL SA, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP. AND UNITED STATES STEEL CORP., DEFENDANT-INTERVENORS

Court No. 01–00055

[Plaintiff's Rule 56.2 motion for judgment upon the agency record is denied.]

(Dated June 4, 2002)

Edmund Maciorowski, P.C. (Edmund Maciorowski, Pamela L. St. Peter), Bloomfield Hills, Michigan, for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Glenn R. Butterton*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

Dewey Ballantine LLP (Michael H. Stein, Bradford L. Ward, Navin Joneja), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* Plaintiffs Reiner Brach GmbH & Co. KG ("Reiner Brach") and Novosteel SA ("Novosteel") move for judgment upon the agency record, challenging the final results of two administrative reviews of cut-to-length carbon steel plates from Germany by the United States Department of Commerce ("Commerce"). *See Certain Cut-to-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Reviews,* 66 Fed. Reg. 3545 (Jan. 16,

2001) *(Final Results); see also Issues and Decision Memorandum for the Administrative Reviews of Certain Cut-to-Length Carbon Steel Plate from Germany: August 1, 1997 through July 31, 1998, and August 1, 1998 through July 31, 1999* (Jan. 16, 2001), Def. Pub. App. Ex. 2 *(Decision Memo).* In the *Final Results*, Commerce calculated a 36 percent dumping margin based on total adverse facts available. *See Final Results*, 66 Fed. Reg. at 3546; *see also Preliminary Results,* 65 Fed. Reg. at 54,207. Plaintiffs assert Commerce's decision to apply total facts otherwise available with adverse inferences and its application of a 36 percent dumping margin are not supported by substantial evidence and are not otherwise in accordance with law. Defendant United States and Defendant-Intervenors Bethlehem Steel Corporation and United States Steel Corporation ("Defendant-Intervenors") contend the application of total facts otherwise available with adverse inferences is reasonable. Plaintiffs' challenge to Commerce's determination is denied. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. 1581(c) (2000).

BACKGROUND

Reiner Brach is a German producer of cut-to-length steel plate. The merchandise at issue was purchased from Reiner Brach by the Swiss company Novosteel. *See Final Results*, 66 Fed. Reg. at 3545–46. On August 11, 1998, Commerce published a notice of opportunity to request administrative review of *Antidumping Duty Orders and Amendments to Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Germany,* 58 Fed. Reg. 44170 (Aug. 19, 1993) for the period August 1, 1997 through July 31, 1998. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 63 Fed. Reg. 42,821 (Aug. 11, 1998). A similar notice was published on August 11, 1999 as to that order for the period of August 1, 1998 through July 31, 1999. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 64 Fed. Reg. 43,649 (Aug. 11, 1999). Novosteel requested administrative reviews and a scope inquiry for both periods of review. *See Final Results*, 66 Fed. Reg. at 3545. After Commerce received Novosteel's responses to its questionnaires, Defendant-Intervenors requested termination of the administrative reviews, arguing Reiner Brach, rather than Novosteel, was the appropriate respondent. *See id.* In opposition to termination of the reviews, on February 2, 2000 Reiner Brach submitted a letter to Commerce agreeing to become a respondent for the reviews. *See id*. Commerce found that "Reiner Brach not only was the producer of the subject merchandise, but also had knowledge that the products were destined for the United States, and that, thus, the sale between Reiner Brach and Novosteel was the appropriate link in the sales chain" upon which to focus. *Id.* at 3545–46.

Commerce issued a questionnaire to Reiner Brach on February 15, 2000 directing it to:

> Report all sales of the foreign like product, whether or not you consider particular merchandise to be that which is most appropriately compared to your sales of the subject merchandise. The Department will then select the appropriate comparison sales from your sales listing.

U.S. Department of Commerce, Import Administration, Administrative Review Questionnaire (Feb. 15, 2000), at B–1, Pub. Docs. 33 and 34, Def. Pub. App. Ex. 1 at B–1 (Feb. 15 Administrative Questionnaire). Additionally, Section D of the questionnaire asked for cost of production (COP) and constructed value (CV) information. It stated, "The COP and CV figures that you report in response to this section of the questionnaire should be calculated based on the actual costs incurred by your company during the period of review ("POR"), as recorded under its normal accounting system." *Id.* at D–1.

After Reiner Brach submitted its responses, Commerce sent supplemental questionnaires requesting 1) clarification of discrepancies between the total quantity of home market sales reported in Reiner Brach's responses and the quantity indicated by the sales data in its spreadsheets, and 2) clarification as to why various reported costs were the same for both periods of review. *See* U.S. Department of Commerce Supplemental Questionnaire (May 25, 2000), at 1, Pub. Doc 51, Def. Pub. App. Ex. 3 at 3; U.S. Department of Commerce Supplemental Questionnaire (July 11, 2000), at 5–8, Pub. Doc. 68, Def. Pub. App. Ex. 5 at 7–10. As to the first question, Reiner Brach responded that while the total quantity of home market sales were "based on a review of their aggregate sales data," the figures derived from the data spreadsheets were "based on individual invoices for the period of review." Reiner Brach Supplemental Questionnaire Response (June 15, 2000), at 2, Pub. Doc. 60, Def. Pub. App. Ex. 4 at 4. With regard to the second question, Reiner Brach explained the costs "do not markedly change from year to year. The costs given are averages which reflect any slight increase or decrease in costs over the periods of review." Reiner Brach Supplemental Questionnaire Response (July 24, 2000), at 22–29, Pub. Doc. 73, Def. Pub. App. Ex. 6 at 5–12.

Commerce conducted verification of Reiner Brach's responses from August 2 through August 5, 2000. During verification Reiner Brach sought to submit previously unreported home market sales data of identical merchandise, but Commerce refused to accept the information because it constituted substantial new information and therefore was untimely. *See* Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (Aug. 9, 2000), at 1, Pub. Doc. 92, Def. Pub. App. Ex. 7 at 1. Commerce also discovered during verification that although the cost of production figures submitted for both periods of review were based on the same cost data, Reiner Brach could distinguish costs on a month-by-month basis yet had failed to do so de-

spite the request for "actual" costs. (Def. Br. at 9, citing Verification Report (Aug. 21, 2000) at 11, Conf. Doc. 26.)

Commerce issued its preliminary determination on September 7, 2000. *See Certain Cut-to-Length Carbon Steel Plate From Germany: Preliminary Results of Antidumping Duty Administrative Reviews,* 65 Fed. Reg. 54,205 (Sept. 7, 2000) *(Preliminary Results).* Significantly, Commerce used the total facts otherwise available pursuant to section 776(a)(2)(A) of the Tariff Act of 1930 ("the Act"). *See Preliminary Results*, 65 Fed. Reg. at 54,207. It noted Reiner Brach's provision of information only on a minimal portion of its home market sales of the foreign like product because Reiner Brach had "interpreted [Commerce's] questionnaire to mean that Reiner Brach only had to report identical sales in the home market that matched its U.S. sales." *Id.* Additionally, Commerce indicated that Reiner Brach had failed to provide accurate cost of production information. *See id.* Furthermore, because Reiner Brach had in its records the data that Commerce sought and was capable of providing it but failed to do so, Commerce used adverse inferences when choosing from among the facts otherwise available pursuant to section 776(b) of the Act. *See id.* Commerce decided the "all others rate" of 36 percent was appropriate because it was the highest rate applied to any company in any segment of the proceeding and was calculated during the less-than-fair-value investigation. *See id.* After receiving comments from the parties regarding the preliminary results, Commerce issued its final results on January 16, 2001, which contained no changes in its margin calculations. *Final Results,* 66 Fed. Reg. at 3545.

PARTIES' CONTENTIONS

I. Plaintiffs' Contentions

Plaintiffs contend that Commerce's decision to apply total facts otherwise available with adverse inferences is not supported by substantial evidence on the record and is not otherwise in accordance with law. Plaintiffs present seven arguments to support their contention. First, Plaintiffs argue that in submitting information to Commerce, they complied with the definition of the term "foreign like product" contained in 19 U.S.C. § 1677(16) and their "fair reading" of Commerce's questionnaires. (Pl. Br. at 18.) Based on Plaintiffs' understanding of the statute and questionnaire definitions, Plaintiffs believed they were required to submit home market sales of identical merchandise only. *See id.* at 10, 18.

Second, Plaintiffs posit Commerce did not properly review Reiner Brach's questionnaire responses and any such review would have revealed the alleged omissions. *See id.* at 19–22.

Third, Plaintiffs submit that statutory authority and case law require Commerce to give the respondent involved in the administrative review a reasonable opportunity to provide the information requested and to issue a deficiency letter when a response is not satisfactory. *See id.* at 23. Plaintiffs contend Commerce did not issue deficiency letters to allow for correction of Plaintiffs' responses or submission of omitted informa-

tion. *See id.* Plaintiffs therefore allege Commerce's failure to issue deficiency letters was in error.

Fourth, Plaintiffs challenge Commerce's refusal to accept the information that Reiner Brach submitted during verification regarding home market sales of identical merchandise. *See* id. at 24. Plaintiffs observe that Commerce "routinely" allows parties to submit information during verification and its failure to do so in this case was contrary to law. *See id.* at 25.

Fifth, Plaintiffs contend Commerce improperly refused to extend the date for its final determination and to issue supplemental questionnaires to allow submission of information during verification. *See id.* at 25. Commerce noted in its *Decision Memo* that it did not issue supplemental questionnaires during verification because "such use of the Department's discretion must be reserved for truly unique circumstances, not for cases in which a party's lack of cooperation resulted in a severely deficient record." *Id.* at 27, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 5. Plaintiffs point to their various submissions of requested information to Commerce to demonstrate their cooperation, and they note that Commerce referred to this case as being "extraordinarily complicated" to show the case is unique. (Pl. Br. at 27–28.)

Sixth, Plaintiffs argue Commerce incorrectly chose to apply total facts otherwise available with adverse inferences. They assert adverse inferences are used only when there is a refusal to provide requested information. Furthermore, Commerce had sufficient information with which to calculate normal value, and therefore total facts otherwise available should not have been used. *See id.* at 29–33.

Finally, the Plaintiffs challenge Commerce's application of the 36 percent dumping margin. They assert that the rate is unreasonable, unreliable, and irrelevant to the totality of the circumstances. *See id.* at 40. It is their claim that the 36 percent margin "bears no rational relationship to the current level of dumping in the industry." *Id.* at 42.

II. Defendant's Contentions

Defendant and Defendant-Intervenors (collectively "Defendants") assert Commerce was justified in relying upon total facts otherwise available with adverse inferences because Reiner Brach failed to provide home sales data for similar merchandise and improperly reported its cost of production data. Defendants maintain Reiner Brach possessed the requisite information and could have provided it to Commerce. Reiner Brach's failure to do so demonstrates its unwillingness to cooperate to the best of its ability. (Def. Br. at 17–19.)

Second, in response to Plaintiffs' claim that Reiner Brach properly interpreted the questionnaires to require only information regarding identical merchandise, Defendants point out that the questionnaires specifically asked for *all* sales of the foreign like product. *See id.* at 19.

Third, Defendants call attention to the fact that Commerce forwarded supplemental questionnaires to Reiner Brach inquiring about the discrepancies between its questionnaire responses and its sales data for

home market sales as well as the cost of production figures. *See id.* at 21–22. Defendants argue Commerce was not able to determine that the information submitted by Reiner Brach was inaccurate until verification. *See id.* Once Commerce determined during verification that Reiner Brach's submissions were not accurate, Defendants claim Commerce properly used its discretion in deciding not to issue further supplemental questionnaires because there would not be sufficient time to verify the information. *See id.* at 22–23, 26–28. Defendants maintain it is the obligation of the plaintiffs, not Commerce, to ensure the accuracy of the record. *See id.* at 31, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 4–5.

Fourth, Defendants rebut Plaintiffs' assertion that Commerce has developed a routine practice of accepting information during verification. Defendants distinguish the cases cited by Plaintiffs and call attention to Commerce's warning to Reiner Brach that verification is not an opportunity to submit new factual information. *See id.* at 23–25.

In response to Plaintiffs' complaint regarding Commerce's failure to extend the date for the final determination, Defendants assert Commerce would not have had time to issue a supplemental questionnaire and verify the submitted information. *See id.* at 27, quoting *Decision Memo,* Def. Pub. App. Ex. 2 at 5. Additionally, Defendants point out that extension of the time to issue a final determination is reserved for unique circumstances rather than for cases where there is a lack of cooperation. *See id.*

Sixth, Defendants state Plaintiffs' submission of "voluminous" data is irrelevant because Commerce could not use the sales or cost data to calculate dumping margins. *See id.* at 28. Defendants note that Reiner Brach only submitted a "minimal portion of its home market sales of the foreign like product,"(*id.* at 29, quoting *Decision Memo*, Def. Pub. App. Ex. 2 at 6–7), and maintain that "it is the quality of the information submitted, not the quantity that matters." (Def. Br. at 30.)

Finally, Defendants reason that Commerce properly applied the 36 percent dumping margin because the rate "ensures that the respondent does not obtain a more favorable result because it failed to cooperate in these administrative reviews." *Id.* at 33, quoting *Decision Memo,* Def. Pub. App. Ex.2 at 8. The rate applied in this case was the "all others" rate that Commerce asserts was appropriate to use rather than the lower rates calculated for another German producer of the subject merchandise in recent years because the other German producer had cooperated with Commerce's requests for information. (Def. Br. at 35–36.) Thus Commerce argues the 36 percent rate is reliable, reasonable, and relevant as required by case law. *See id.* at 34–36.

STANDARD OF REVIEW

This Court will sustain a final determination of Commerce unless it is found to be "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). 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) (internal quotations omitted). Commerce's decision will be upheld "if it is reasonable and supported by the record as a whole, including whatever fairly detracts from the substantiality of the evidence." *Novosteel SA v. United States*, 128 F. Supp. 2d 720, 725 (Ct. Int'l Trade 2001) (internal quote omitted). Commerce's decision is in accordance with law when "the agency's actions were reasonable under the terms of the relevant statute." *Shakesproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States,* 102 F. Supp. 2d 486, 489 (Ct. Int'l Trade 2000). In addition, "[s]ubstantial deference is granted to the agency in both its interpretation of its statutory mandate and the methods it employs in administering the antidumping law." *North Star Steel Ohio, a Div. of N. Star Steel Co. v. United States*, 824 F. Supp. 1074, 1077 (Ct. Int'l Trade 1993) (internal quotations omitted).

ANALYSIS

I. The Department of Commerce's application of total facts otherwise available is supported by substantial evidence on the record and is otherwise in accordance with law.

Congress has given Commerce statutory authority to use facts otherwise available in reaching administrative decisions if:

> (1) necessary information is not available on the record, or
> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, * * *
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified. * * *

19 U.S.C. § 1677e(a) (2000).

Commerce's ability to use facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(B) is subject to its compliance with § 1677m(c)(1), (d) and (e). Commerce is required to corroborate any secondary information it will rely upon rather than relying upon information obtained during the review. *See* § 1677e(c). As summarized in *Mannesmannrohren-Werke AG v. United States,* 77 F. Supp. 2d 1302, 1313 (Ct. Int'l Trade 1999), "before Commerce may use facts available, 19 U.S.C. § 1677m(d) * * * requires that Commerce give a party an opportunity to remedy or explain deficiencies in its submission. If the remedy or explanation provided by the party is found to be'not satisfactory' or untimely, the information may be disregarded in favor of facts available, subject to the five part test in Subsection (e)." In the present case, Commerce applied facts otherwise available based on its determination that Reiner Brach withheld sales information requested and failed to provide cost information in the requested form. *See Decision Memo*, Def. Pub. App. Ex. 2 at 6.

Based on the reasons that follow, the Court sustains Commerce's decision.

A. Submission of home market sales data

The Court finds Commerce sufficiently notified Reiner Brach that it was to submit home market sales data for both identical and similar merchandise. Commerce's use of facts otherwise available is justified because Reiner Brach failed to provide information regarding sales of similar merchandise and omitted certain sales of identical merchandise.

Commerce indicated to Reiner Brach in its initial questionnaire dated February 15, 2000 that *all* sales of the foreign like product were to be reported. *See* Feb. 15 Administrative Questionnaire, at B–1, Pub. Docs. 33 and 34, Def. Pub. App. Ex. 1 at B–1. In Appendix I of the February 15, 2000 questionnaire, Commerce defined "foreign like product" as "merchandise that is sold in the foreign market and that is identical or similar to the subject merchandise." *Id.* at I–7, Def. Pub. App. Ex.1 at I–7. In light of Commerce's request for "all" home market sales data for "identical or similar merchandise," it is apparent Commerce had requested data for sales of all merchandise that fell under either the "identical" category or the "similar" category, not just one category. With regard to the term "identical merchandise," Commerce provided, "Identical merchandise is the *preferred* category of foreign like product for purposes of the comparison with subject merchandise. The identical merchandise is merchandise that is produced by the same manufacturer in the same country as the subject merchandise, and *which the Department determines* is identical or virtually identical in all physical characteristics with the subject merchandise, as imported into the United States." *Id.* at I–8, Def. Pub. App. Ex. 1 at I–8 (emphasis added). In addition, Commerce made clear it would decide, based upon the information submitted, whether there were any sales of identical foreign like product and what constituted "similar merchandise." As to "similar merchandise," Commerce explained: "In deciding which sales of the foreign like product to compare to sales of the subject merchandise, the Department first seeks to compare sales of identical merchandise. If there are no sales of the identical foreign like product, the Department will compare sales of the foreign like product similar to the subject merchandise." *Id.* at I–11, Def. Pub. App. Ex. 1 at I–11.

In its initial response, Reiner Brach provided only information regarding what *it* considered to be identical merchandise sold in the home market. Reiner Brach relies upon its interpretation of the questionnaire language and the statute defining "foreign like product" to maintain that it reasonably believed it was obligated to report only information

regarding sales of identical merchandise.[1] Despite Plaintiffs' argument, it is clear that Reiner Brach was obligated to provide information regarding both identical merchandise and similar merchandise from Commerce's 1) request for "all" sales of the foreign like product, 2) definition of foreign like product as "identical or similar merchandise," and 3) indication that Commerce will determine itself which sales are appropriate for comparison purposes from those reported, as seen in the definition of identical merchandise as that merchandise *which Commerce determines* is identical. Commerce did not give Reiner Brach discretion to determine which were the proper sales for comparison purposes. Thus Reiner Brach had the obligation to submit information regarding home market sales of both identical merchandise *and* similar merchandise. *See Allegheny Ludlum Corp. v. United States,* Consol. Ct. No. 99–06–00369, 2000 Ct. Int'l Trade LEXIS 176, at *49 (Ct. Int'l Trade Dec. 28, 2000) ("In response to this inquiry into home market sales, a defined term that is one of the central issues in any dumping investigation, [the respondent] had a statutory obligation to prepare an accurate and complete record in response to questions plainly asked by Commerce.").

Reiner Brach further argues that Commerce failed to inform it that its response to the initial questionnaire was deficient as required by statute. The facts available statute states Commerce's use of facts otherwise available is subject to 19 U.S.C. § 1677m(d), which reads, "[i]f the administering authority * * * determines that a response to a request for information under this subtitle does not comply with the request, the administering authority * * * shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle."

The Court finds Commerce complied with the requirements of § 1677m(d). First, in the present case, the initial questionnaire was clear as to the information requested. Commerce asked for "all" home market sales of the foreign like product and made clear that "foreign like product" consisted of "identical or similar merchandise." Second, Commerce raised the discrepancies it noticed in the supplemental questionnaire and gave Reiner Brach an opportunity to explain the

[1] "Foreign like product" is defined in 19 U.S.C. § 1677(16) as:

> merchandise in the first of the following categories in respect of which a determination for purposes of part II of this subtitle can be satisfactorily made:
>
> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
>
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administrative authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16).

discrepancies. In its May 25, 2000 supplemental questionnaire, Commerce stated, "According to your Section A response, total quantity for Home Market sales sold is [* * *] kilograms and the total value is $ [* * *]. However, your sales data indicates that total quantity for Home Market sales is [* * *] MT or ([* * *] kg) and total sales value is $ [* * *]. Please explain these discrepancies." (Def. Pub. App. Ex. 3 at 3). Third, the response given by Reiner Brach to the supplemental questionnaire was so vague that Commerce did not have notice or reason to believe a deficiency existed. Commerce could not have known that there was a deficiency remaining in that Reiner Brach had not submitted all of its home market sales data as requested by Commerce. *See Tung Mung Dev. Co., Ltd.*, 2001 Ct. Intl. Trade LEXIS 94, at *97. Reiner Brach provided the following answer to the supplemental questionnaire on June 15, 2000, "The quantity and value figures given in Reiner Brach's Section A response were based on a review of their aggregate sales data. The quantity and value figures derived from the data spreadsheets are based on individual invoices for the period of review." (Def. App. Ex. 4 at 4).

Commerce maintains, based on the responses provided by Reiner Brach in the questionnaire and supplemental questionnaire, it could not have determined that the information provided was erroneous until verification. (Def. Br. at 21, citing *Decision Memo*, Def. Pub. App. Ex. 2 at 4). Reiner Brach, on the other hand, asserts the missing information was evident and if Commerce sought both identical and similar merchandise data, it had the obligation to inform Reiner Brach of any deficiency. Reiner Brach cites *Bowe-Passat v. United States*, 17 CIT 335 (1993) and *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 23 CIT 804 (1999) to support its argument, yet both cases are distinguishable. In *Ta Chen*, the information allegedly missing was never specifically requested in the original questionnaire or in the supplemental questionnaires. *See Ta Chen,* 23 CIT at 818–19. The reasoning of the court in *Ta Chen* is grounded in the fact that Commerce did not ask for the specific information in the initial questionnaire and then failed to ask for it in the supplemental questionnaires, thereby clearly violating 19 U.S.C. § 1677m. *See id.* at 818–20. In the present case, however, Commerce requested the specific information it sought in the initial and supplemental questionnaires. *See Tung Mung Dev. Co., Ltd. v. United States,* Consol. Ct. No. 99–07–00457, 2001 Ct. Intl. Trade LEXIS 94, at *95–96 (Ct. Int'l Trade July 3, 2001) (distinguishing *Ta Chen* based on the fact that in *Ta Chen* Commerce had not specifically asked for the information it later claimed was missing).

In *Bowe-Passat*, the court stated, "In the case at bar, the ITA would have this Court endorse an investigation where the ITA sent out a general questionnaire and a brief deficiency letter, then effectively retreated into its bureaucratic shell, poised to penalize Bowe for deficiencies not specified in the letter that the ITA would only disclose after it was too late, *i.e.,* after the preliminary determination. This predatory 'gotcha' policy does not promote cooperation or accuracy or rea-

sonable disclosure by cooperating parties intended to result in realistic dumping determinations." *Id.* at 343. First, *Bowe-Passat* was decided prior to the enactment of the Uruguay Round Agreements Act in 1994 which governs the present case. Second, it is apparent in *Bowe-Passat* that Commerce was aware of the deficiency at the time it issued the deficiency letter but failed to adequately address the deficiency and to inform Bowe that further information was required. In the present case, however, Commerce states that it was unaware of the deficiency and, based on Reiner Brach's supplemental questionnaire response, could not have known of it until verification. As discussed, the initial questionnaire was clear as to the information requested. In the supplemental questionnaire, Commerce asked about the discrepancies it did notice and gave Reiner Brach an opportunity to explain the discrepancies. Third, in *Bowe-Passat*, the court found that Bowe submitted information in response to the deficiency letter in a timely manner and was prepared to submit the information Commerce later claimed was missing if Commerce had informed Bowe of the deficiency. In the present case, the response given by Reiner Brach to the supplemental questionnaire was so vague that Commerce did not have notice or reason to believe a deficiency existed. It is the interested party's obligation to create an accurate record and provide Commerce with the information requested to ensure an accurate dumping margin. *See Sanyo Elec. Co., Ltd. v. United States*, 9 F. Supp. 2d 688, 697 (Ct. Int'l Trade 1998); *RHP Bearings v. United States*, 875 F. Supp. 854, 857 (Ct. Int'l Trade 1995).

The Court finds Reiner Brach's failure to provide all information regarding home market sales of identical merchandise justifies Commerce's decision to apply facts otherwise available. *See* 19 U.S.C. § 1677e(a)(2)(A) and (B); *see also Fabrique de Fer de Charleroi S.A. v. United States,* 155 F. Supp. 2d 801, 807–08 (Ct. Int'l Trade 2001). During verification, in letters dated August 2, 7, and 8, 2000, Reiner Brach sought to submit information regarding home market sales of identical merchandise which it had previously "inadvertently omitted." *See* Letter from Edmund Maciorowski, PC (on behalf of Reiner Brach) to the U.S. Department of Commerce (Aug. 2, 2000), at 1, Pl. Pub. App. 6 Ex. 19 at 1; Letter from Edmund Maciorowski, PC (on behalf of Reiner Brach) to the U.S. Department of Commerce (Aug. 8, 2000), Pl. Pub. App. 6 Ex. 21; Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (Aug. 9, 2000), at 1, Pub. Doc. 92, Def. Pub. App. Ex. 7 at 1. Commerce rejected the submission as "new factual information" and therefore "untimely" submitted. Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (Aug. 9, 2000), at 1, Pub. Doc. 92, Def. Pub. App. Ex. 7 at 1. Plaintiffs claim Commerce has routinely allowed for submission of information during verification and its refusal to do so in these circumstances was contrary to law. (Pl. Br. at 25.) The Court holds Commerce's decision to reject the information in question is supported by substantial evidence and is otherwise in accordance with law.

According to Commerce's regulations, for the final results of an administrative review, a submission of factual information is due no later than 140 days after the last day of the anniversary month. *See* 19 C.F.R. § 351.301(b)(2)(1999). The anniversary month is "the calendar month in which the anniversary of the date of publication of an order * * * occurs." § 351.102 (b). This court has previously held that Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits, and it has found Commerce's policy of setting time limits to be reasonable because Commerce "clearly cannot complete its work unless it is able at some point to 'freeze' the record and make calculations and findings based on that fixed and certain body of information." *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States,* 44 F. Supp. 2d 229, 237, 239 (Ct. Int'l Trade 1999) (citations omitted). Commerce had informed Reiner Brach it would not accept "substantial revisions" during verification; it would accept new information only when "(1) the need for that information was not evident previously; (2) the information makes minor corrections to information already on the record; or (3) the information corroborates, supports, or clarifies information already on the record." Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (July 18, 2000), at 2, Pub. Doc. 82, Def. Intervenor Pub.App. Ex. 25 at 2; Letter from the U.S. Department of Commerce to Edmund Maciorowski, PC (on behalf of Reiner Brach) (July 18, 2000), at 2, Pub. Doc. 83, Def. Intervenor Pub. App. Ex. 26 at 2. This instruction is consistent with Commerce's practice of accepting information during verification where the information relates to minor adjustments to or corroboration or clarification of information already on the record. *See, e.g., Acciai Speciali Terni S.P.A. v. United States,* 142 F. Supp. 2d 969, 1007 (Ct. Int'l Trade 2001); *Coalition for Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs.*, 44 F. Supp. 2d at 235–36. This Court has also upheld Commerce's discretion to reject substantial new factual information submitted after the deadline for submission of such information. *See, e.g., Bergerac, N.C. v. United States,* 102 F. Supp. 2d 497, 503–04 (Ct. Int'l Trade 2000). Commerce determined that even if it were to grant Reiner Brach's request to extend the deadline for the final determination by 60 days and issue supplemental questionnaires to allow submission of the omitted information, "[t]he additional sixty days would not provide sufficient time to review and analyze the data." *Decision Memo*, Def. Pub. App. Ex. 2 at 5.

This Court finds Commerce's rejection of the information submitted during verification to be reasonable in view of: 1) Commerce's discretion in administering and enforcing the applicable statutes and regulations, 2) the clarity of its questionnaires, 3) its inability to discern the omission of information until verification, and 4) its warning that new information would generally not be accepted during verification. Additionally, Commerce's decision to apply fact otherwise available due to Reiner

Brach's failure to provide the requested information was appropriate under the circumstances.

C. Submission of cost of production information

This Court finds Commerce acted reasonably in applying facts otherwise available due to Reiner Brach's failure to provide the cost of production information in the manner and form requested. As noted earlier, Reiner Brach was asked to submit cost of production information calculated based on the actual costs it incurred during each period of review. Commerce issued a supplemental questionnaire dated July 11, 2000 in which it asked Reiner Brach why various costs were the same for both periods of review. *See* U.S. Department of Commerce Supplemental Questionnaire (July 11, 2000), at 5–8, Pub. Doc. 68, Def. Pub. App. Ex. 5 at 7–10. The answer given to each of Commerce's questions was that the various costs figures "do not markedly change from year to year. The costs given are averages which reflect any slight increase or decrease in costs over the periods of review." Reiner Brach Supplemental Questionnaire Response (July 24, 2000), at 22–29, Pub. Doc. 73, Def. Pub. App. Ex. 6 at 5–12. Commerce found Reiner Brach had not submitted the cost of production information in the form and manner requested, making it appropriate for Commerce to apply facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(B).[2] In the *Decision Memo*, Commerce noted Reiner Brach company officials' statements that the company had the ability to provide its costs for each period of review. Additionally, at verification a company official stated that Reiner Brach's reported input materials costs changed between the periods of review and "Reiner Brach could distinguish costs on a month-by-month basis." *Decision Memo*, Def. Pub. App. Ex. 2 at 4, quoting Verification Report (Aug. 21, 2000) at 11, Conf. Doc. 26.

As noted earlier, Commerce's ability to use facts otherwise available pursuant to 19 U.S.C. § 1677e(a)(2)(B) is subject to its compliance with § 1677m(c)(1), (d) and (e). Plaintiffs argue Commerce failed to provide a deficiency letter to Reiner Brach in accordance with § 1677m(d) to notify Reiner Brach of deficiencies in its cost of production information. Commerce issued a supplemental questionnaire specifically requesting information as to why the cost of production figures were reported as averages. Defendants assert Commerce could not determine the information submitted was inaccurate and incomplete until verification. According to Defendants, Commerce believed it did have the proper information in light of Reiner Brach's response to the supplemental questionnaire that there were not marked changes in costs during the periods of review; it was not until verification, when company officials indicated varying costs and Reiner Brach's ability to report them, that

[2] In the *Decision Memo*, Commerce noted the following explanation given by Reiner Brach during verification as to why it did not provide the cost data for each period of review: "(1) cost data for 1999 were available, but the company did not have the personnel available to gather the data and allocate the costs to each cost center; (2) cost data for 1997 were available, but Reiner Brach did not review its records because the data was not of interest to Reiner Brach; and (3) Reiner Brach did not use July 1999 costs because many of its employees were on vacation and July's costs would not have been representative of a normal production month." *Decision Memo,* Def. Pub. App. Ex. 2 at 4.

Commerce was aware of the deficiency. Thus this Court finds Commerce complied with § 1677m(d).

Commerce's use of facts otherwise available is also subject to § 1677m(e), which provides that Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by" Commerce if:

> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce], and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e). In the present case, the condition set forth in § 1677m(e)(4) has not been met. Reiner Brach had actual cost information that could have been reported on a month-by-month basis but failed to provide such information despite Commerce's clear indication in its initial questionnaire that it sought actual costs and its supplemental questionnaire asking why actual costs were not reported. Such failure demonstrates that Reiner Brach did not act to the best of its ability in providing the requested information. Commerce is required to calculate antidumping duty margins as accurately as possible, making it "essential that a respondent provide Commerce with accurate, credible and verifiable information." *Gourmet Equip. (Taiwan) Corp. v. United States,* No. 99–05–00262, 2000 Ct. Intl. Trade LEXIS 82, at *6–7 (Ct. Int'l Trade July 6, 2000). In striving to obtain accurate and complete information, Commerce has discretion to determine if it is imposing an unreasonable burden by requiring that the information be submitted in a particular form. *See Fabrique de Fer de Charleroi S.A.*, 155 F. Supp. 2d at 808. This Court finds Commerce was not required to use the cost of production information submitted by Reiner Brach pursuant to § 1677m(e) .

II. The Department of Commerce's decision to use adverse inferences is supported by substantial evidence and was otherwise in accordance with law.

Once Commerce has determined that it will apply facts otherwise available under 19 U.S.C. § 1677e(a), it may decide to draw adverse inferences in selecting from among the facts otherwise available pursuant to § 1677e(b). *See Branco Peres Citrus, S.A. v. United States*, 173 F. Supp. 2d 1363, 1371 (Ct. Int'l Trade 2001). In order to apply adverse inference though, Commerce must first find "that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. §1677e(b). In the present case, Commerce determined in the *Final Results* that Reiner Brach did

not cooperate to the best of its ability in reporting home market sales data and cost of production figures. *See Decision Memo,* Def. Pub. App. Ex. 2 at 8.

According to the Statement of Administrative Action ("SAA"), H.R. REP. NO. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4199, "[w]here a party has not cooperated, Commerce and the Commission may employ adverse inferences about the missing information to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully. In employing adverse inferences, one factor the agencies will consider is the extent to which the party may benefit from its own lack of cooperation." Commerce's finding that the respondent failed to cooperate "must be reached by 'reasoned decision-making,' including * * * a reasoned explanation supported by a stated connection between the facts found and the choice made." *Steel Auth. of India, Ltd. v. United States*, 149 F. Supp. 2d 921, 929 (Ct. Int'l Trade 2001) (citations omitted); *see also Mannesmannrohren-Werke AG*, 77 F. Supp. 2d at 1313–14 (noting that "Commerce needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation."). The Court in *Steel Authority of India* made clear that "[Commerce] cannot merely recite the relevant standard or repeat its facts available finding. Rather, in order to satisfy its statutory obligations, [Commerce] must be explicit in its reason for applying adverse inferences." *Steel Auth. of India, Ltd.*, 149 F. Supp. 2d at 930 (internal citations omitted). Further, where the interested party has not submitted accurate and complete information but does have the ability to comply with Commerce's request, Commerce must demonstrate "a willfulness on the part of the respondent or behavior below the standard of a reasonable respondent in order to apply adverse inferences." *Id.* at 930 n.11 (citing *Nippon Steel Corp. v. United States,* 118 F. Supp. 2d 1366, 1378–79 (2000)); *see also Nippon Steel Corp. v. United States,* 146 F. Supp. 2d 835, 840 (Ct. Int'l Trade 2001) (stating that in cases where the omission is due to inadvertence, "the simple fact of a respondent's failure to report information within its control does not warrant an adverse inference.").[3]

In the present case, Commerce properly made the additional finding required to apply adverse inferences. In the *Preliminary Results*, from which the *Final Results* did not differ and to which no changes were made, Commerce outlined Reiner Brach's failure to provide the requested home market sales data and cost of production figures as its basis for using total facts available. *See Preliminary Results*, 65 Fed. Reg. at 54,207; *see also Final Results*, 66 Fed. Reg. at 3546. It then indicated that "Reiner Brach acknowledged that it had the requested data in its records and was capable of providing it to [Commerce], but nevertheless failed to provide a complete response to the Department's question-

[3] In cases where the interested party claims an inability to comply with Commerce's request, Commerce must minimally find that the party had the ability to comply but did not do so. *See Steel Auth. of India, Ltd.* 149 F. Supp. 2d at 930.

naire. Thus, we find that Reiner Brach failed to cooperate by not acting to the best of its ability with respect to its home market sales and cost data." *Preliminary Results*, 65 Fed. Reg. at 54,207. As to the cost of production figures, in the Decision Memo, Commerce explained that a Reiner Brach official stated in verification that the cost of production changed between the two periods of review, and the company could distinguish costs on a month-by-month basis. *See Decision Memo*, Def. Pub. App. Ex. 2 at 4. Commerce determined it did not have the required information "to conduct an accurate salesbelo w-cost test for each review which would allow [Commerce] to choose the correct above the cost of production home market sales for comparison with Reiner Brach's U.S. sales." *Id.*

To determine whether a respondent has cooperated to the best of its ability, Commerce may make justifiable inferences based on the record before it. *See Asociacion Colombiana de Exportadores de Flores v. United States,* 40 F. Supp. 2d 466, 472 (Ct. Int'l Trade 1999). This Court has acknowledged that "Commerce must necessarily draw some inferences from a pattern of behavior." *Borden, Inc. v. United States*, No. 96–08–01970, 1998 WL 895890, at *1 (Ct. Int'l Trade Dec. 16, 1998); *see also Nippon Steel Corp.*, 146 F. Supp. 2d at 840; *Mannesmannrohren-Werke AG,* 120 F. Supp. 2d at 1082–1087; *see, e.g., Mannesmannrohren-Werke AG,* 77 F. Supp. 2d at 1317. The facts of the case at hand demonstrate a pattern of behavior which makes Commerce's decision to use adverse inferences reasonable. Reiner Brach failed to provide information regarding home market sales of similar merchandise despite the clear language of the questionnaire asking for information on "all sales" of the foreign like product in the home market. It based its decision not to submit such information on the assumption that it only had to submit information regarding home market sales of identical merchandise, but it never asked Commerce to clarify whether its assumption was correct even in light of Commerce's supplemental questionnaire raising concerns regarding the submitted information. It then failed to provide all of its information regarding home market sales of the identical merchandise and did not seek to submit the information until verification, at which time Commerce would not have sufficient opportunity to review and verify the information. Further, it failed to provide Commerce with the actual costs of production for each period of review as requested in plain terms by Commerce, despite the fact that the information was available to Reiner Brach and Commerce gave it the opportunity to submit the information in a supplemental questionnaire. In each of the supplemental questionnaires, Reiner Brach supplied vague answers from which Commerce was not able to ascertain the nature or extent of the deficiencies until verification. This cumulative evidence justifies Commerce's finding that Reiner Brach failed to cooperate to the best of its ability, and therefore Commerce's decision to apply adverse inferences is supported by substantial evidence and is otherwise in accordance with law.

III. The Department of Commerce's decision to apply the 36 percent dumping margin is supported by substantial evidence and is otherwise in accordance with law.

Plaintiffs argue that even if Commerce properly chose to apply total facts otherwise available with adverse inferences, its choice of a 36 percent dumping margin is not supported by substantial evidence and is not otherwise in accordance with law. Plaintiffs state, "There is nothing in [Commerce's] determination that will support a 36% dumping margin as a reasonably accurate estimate of Respondent's actual rate, even with a built-in increase intended as a deterrent for non-compliance." (Pl. Br. at 41.) Plaintiffs posit the rate is outdated since it was calculated in a less than fair value investigation eight years ago. Additionally, Plaintiffs state the margin is not rationally related to Reiner Brach's activities because the margin had been based on sales by another German corporation, AG der Dillinger Hutterwerke ("Dillinger"), with greater manufacturing capabilities as well as a different product line and different annual sales revenue. Plaintiffs submit that the margin is not relevant because it is not rationally related to the current level of dumping in the industry. (Pl. Br. at 40–43.)

Defendants support Commerce's use of the 36 percent dumping margin by noting that the rate is not outdated, is the current all others rate, and is the rate presently applicable to exports by Plaintiffs as well as being the all others rate. Its use serves as a means of providing an incentive for a respondent to cooperate in administrative reviews, and the Court of Appeals for the Federal Circuit has acknowledged Commerce's discretion, albeit not unbounded, in choosing sources and facts upon which to rely where a respondent has been uncooperative. *See F.lii De Cecco di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027, 1032 (Fed. Cir. 2000). The rate has not been discredited since the less than fair value investigation. Defendants also assert that it was more appropriate to use the 36 percent margin rather than lower rates calculated in subsequent reviews of Dillinger because Dillinger had cooperated with Commerce's requests for information while Reiner Brach had not. Defendants assert Commerce complied with the requirement of 19 U.S.C. § 1677e(c) that "[w]hen [Commerce] * * * relies on secondary information rather than on information obtained in the course of an investigation or review, [Commerce] * * * shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." The rate came from a less than fair value investigation of Dillinger and "there was no evidence on the record indicating that the business practices of Reiner Brach differ significantly from those of other members of the German steel industry." (Def. Br. at 36.)

As noted, Commerce must corroborate secondary information used in an administrative review. *See* 19 U.S.C. § 1677e(c). The SAA states "[c]orroborate means that the agencies will satisfy themselves that the secondary information to be used has probative value." SAA, 1994

U.S.C.C.A.N. at 4199. This Court has posited that "[i]n order to comply with the statute and the SAA's statement that corroborated information is probative information, Commerce must assure itself that the margin it applies is relevant, and not outdated, or lacking a rational relationship to [Respondent]." *Ferro Union, Inc. v. United States*, 44 F. Supp. 2d 1310, 1335 (Ct. Int'l Trade 1999). Commerce has broad, but not unrestricted, discretion in determining what would be an accurate and reasonable dumping margin where a respondent has been found to be uncooperative. *See F. lii De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032 ("Particularly in the case of an uncooperative respondent, Commerce is in the best position, based on its expert knowledge of the market and the individual respondent, to select adverse facts that will create the proper deterrent to non-cooperation with its investigations and assure a reasonable margin. Commerce's discretion in these matters, however, is not unbounded."). It cannot impose "punitive, aberrational, or uncorroborated margins." *Id.*

Generally margins have been invalidated where the margin also did not bear a rational relationship to the interested party, had been discredited, or other margins were available. *See Kompass Food Trading Int'l, etal. v. United States,* No. 98–09–02848, 2000 Ct. Intl. Trade LEXIS 92, at *16 n.6 (Ct. Int'l Trade July 31, 2000); *see also F.lii De Cecco di Filippo Fara S. Martino S.p.A.,* 216 F.3d at 1032–34; *Am. Silicon Techs. v. United States,* 110 F. Supp. 2d 992, 1003–04 (Ct. Int'l Trade 2000). In *Kompass Food Trading International*, this Court stated that the fact that a margin was three years old, where it was otherwise rational and relevant, was an insufficient basis to invalidate the margin. *See Kompass Food Trading Int'l*, 2000 Ct. Intl. Trade LEXIS 92, at *16 n.6. Even in a case where an eight year old margin was invalidated, the reason for the invalidation was because the margin bore no rational relationship to the respondent and not because it was outdated. *See id.* The rate applied by Commerce in this case is the "all others" rate that currently applies to Plaintiffs and has not been discredited to date. Commerce was not required to select the rate determined for Dillinger in recent years because Dillinger, unlike Reiner Brach, has cooperated by properly responding to Commerce's requests for information. "Here, it is clear, moreover, that the statute has no requirement that Commerce is limited to the highest rate imposed on a cooperating company when selecting a rate for a noncooperating respondent." *F.lii De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032. The margin selected serves to induce cooperation by respondents in administrative reviews without being "punitive, aberrational or uncorroborated." Therefore this Court holds that the use of the 36 percent dumping margin is supported by substantial evidence and is otherwise in accordance with law.

CONCLUSION

This Court finds that Commerce's use of total facts otherwise available with adverse inferences and its use of the 36 percent dumping margin are supported by substantial evidence and is otherwise in accordance with law. Therefore the *Final Results* is affirmed in its entirety.

(Slip Op. 02–51)

ACCIALI SPECIALI TERNI S.P.A., ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND ALLEGHENY LUDLUM CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 01–00051

[In response to Plaintiffs' motion for judgment upon the agency record under Rule 56.2, and in consideration of Defendant's and Defendant-Intervenors' memoranda in opposition thereof, Plaintiffs' motion is denied. The Department of Commerce's determination in *Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review,* 66 Fed. Reg. 2,885 (Dep't Comm.) (January 12, 2001) is remanded.]

(Dated June 4, 2002)

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OPINION

CARMAN, *Chief Judge:* Plaintiffs contest certain aspects of the United States Department of Commerce's (the Department, or Commerce) determination in *Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review,* 66 Fed. Reg. 2,885 (Jan. 12, 2001) *(Final Results)*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

The principal dispute revolves around whether the manufacturer/exporter of the subject merchandise continued to receive countervailable subsidies after it was privatized by the Government of Italy.

BACKGROUND

I. Corporate History of AST

The complex corporate history of AST begins with Instituto per la Ricostruzione Industriale (IRI), a holding company of the Government of

Italy. IRI wholly owned Finsider S.p.A. (Finsider), another holding company that controlled all state-owned steel companies in Italy. Finsider's main operating subsidiary was Terni Societa' per l'Industria e l'Elettricita' S.p.A. (Terni). In 1987, as part of a restructuring, Terni transferred its assets, including those for electrical steel production, to a new company called Terni Acciai Speciali S.p.A. (TAS). *Issues and Decision Memorandum: Final Results of Countervailing Duty Administrative Review: Grain-Oriented Electrical Steel from Italy* from Holly A. Kuga to Troy H. Cribb *(Decision Memorandum)* at 2, Pl. Pub. App. Ex. 2 at 2.[1] In 1988, as part of another restructuring, Finsider and its main operating companies, including TAS, entered into liquidation and ILVA, S.p.A. (ILVA) was formed. On January 1, 1989, the day ILVA became operational, part of TAS's liabilities and most of its assets were transferred to ILVA. *See Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy,* 59 Fed. Reg. 18,357, 18,358 (Apr. 18, 1994) *(Electrical Steel)*. These included all assets associated with the production of electrical steel. On April 1, 1990, TAS's remaining assets and liabilities were transferred to ILVA. Only certain non-operating assets remained with TAS. *Id*.

From 1989 through 1993, ILVA consisted of several operating divisions, including the Specialty Steels Division located in Terni. ILVA was also majority owner of many separately incorporated subsidiaries, together with which it constituted the ILVA Group. IRI continued to own the ILVA Group. *Id*. In September 1993, IRI endorsed a plan to reorganize and privatize the ILVA Group by forming two new companies. Accordingly, on December 31, 1993, the Specialty Steels Division in Terni was separately incorporated by a demerger into Acciai Speciali Terni S.r.l (AST S.r.l.) (producer of specialty steel) and ILVA Laminati Piani S.r.l. (ILP) (producer of carbon steel flat products). The remainder of ILVA Group's assets, its existing liabilities, and much of the redundant workforce were transferred to ILVA Residua. *Decision Memorandum* at 2.

Initially, IRI owned all shares of AST S.r.l. Around the same time that IRI established AST S.r.l. as a separate corporation, IRI made a public offering for its sale. To prepare for this sale, IRI converted AST S.r.l. from a limited liability company (S.r.l.) to a stock company (S.p.A.) on February 11, 1994. *Id*.

KAI, a privately-held holding company jointly owned by German steelmaker Krupp AG Hoesch-Krupp and a consortium of private Italian companies called FAR Acciai S.r.l., agreed to purchase AST S.p.A. It signed a purchase agreement with IRI on July 14, 1994. *Id.* The European Commission approved the purchase agreement on December 21,

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[1] The *Issues and Decision Memorandum: Final Results of Countervailing Duty Administrative Review: Grain-Oriented Electrical Steel from Italy* from Holly A. Kuga to Troy H. Cribb *(Decision Memorandum)* is included as part of *Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review,* 66 Fed. Reg. 2,885 (Jan. 12, 2001) (*Final Results*). All page numbers for the *Decision Memorandum* are cited as paginated in Plaintiff's Public Appendix Exhibit 2.

1994, and the shares formally changed hands effective December 23, 1994. *Id*.

Between 1995 and 1998, AST S.p.A. and its parent companies underwent several restructurings and changes in ownership. At the end of the period of review, Krupp Thyssen Stainless GmbH (part of the Krupp AG Hoesch-Krupp group) owned 90 percent of AST, and Fintad Securities S.A., a private Italian company, owned 10 percent of AST S.p.A. *Id*.

Throughout much of this opinion, the Court will refer to AST in all its forms as AST. For convenience, however, this Court will occasionally refer to AST either as Pre-Sale AST, referring to AST in its pre-privatized forms, or as Post-Sale AST, referring to AST in its privatized state.

II. Procedural History

On July 7, 2000, the Department published the preliminary results of its administrative review of the countervailing duty order on grain-oriented electrical steel for the period of review January 1, 1998 through December 31, 1998, covering the manufacturer/exporter AST. *See Grain-Oriented Electrical Steel From Italy; Preliminary Results of Countervailing Duty Administrative Review and Extension of Time Limit for Final Results of Countervailing Duty Administrative Review,* 65 Fed. Reg. 41,950 (July 7, 2000) *(Preliminary Results).* In the *Preliminary Results,* the Department invited interested parties to comment upon the impact that *Delverde, SRL v. United States,* 202 F.3d 1360 (Fed. Cir. 2000) *(Delverde III),* issued by the United States Court of Appeals for the Federal Circuit on February 2, 2000, could have upon the Department's privatization methodology. *Preliminary Results*, 65 Fed. Reg. at 41,951. The Department received comments from petitioners and AST in their case and rebuttal briefs. The Department also sent questionnaires soliciting further information from AST, the Government of Italy, and the European Commission on September 28, 2000 and October 27, 2000. *Final Results,* 66 Fed. Reg. at 2,885.

Concurrent to the above proceedings, AST challenged in this Court a separate final determination by Commerce, *Final Affirmative Countervailing Duty Determination*; *Stainless Steel Plate in Coils From Italy,* 64 Fed. Reg. 15,508 (Mar. 31, 1999) *(Stainless Steel Plate in Coils). See Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States and Allegheny Ludlum Corp.,* et al., No. 99–06–00364, 2002 WL 342659 (CIT Feb. 1, 2002). On August 14, 2000, the Honorable Evan J. Wallach remanded *Stainless Steel Plate in Coils* to the Department to issue a determination consistent with *Delverde III.* On November 21, 2000, the Department issued its interpretation of *Delverde III* and its revised change in ownership methodology in *Draft Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States (Draft Redetermination).*

The next day, the Department placed the public version of the *Draft Redetermination* on the record of the administrative review being challenged in this action and gave the parties an opportunity to comment upon the change in ownership approach. In addition to submitting com-

ments on December 6, 2000, petitioners and AST participated in a public hearing held by the Department on December 15, 2000. *Final Results*, 66 Fed. Reg. at 2,885.

On December 19, 2000, the Department issued the *Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States (Final Redetermination). See Acciai Speciali Terni S.p.A. v. United States and Allegheny Ludlum Corp., et al.,* 2002 WL 342659 at *3. Afterwards, it placed the *Final Redetermination* on the record of the administrative review being challenged in this action.

On January 12, 2001, the Department issued the *Final Results* that Plaintiffs are challenging in this action, calculating a net subsidy rate of 14.25 percent for the period of review. 66 Fed. Reg. at 2,886.

III. Delverde III

As stated above, the United States Court of Appeals for the Federal Circuit issued *Delverde III* on February 2, 2000. Its central role in both the Department's proceedings below and the parties' contentions before this Court necessitates a brief summary of the decision.

In *Delverde III*, Commerce conducted a countervailing duty investigation of the company Delverde for the period of review 1994. In the course of the investigation, Commerce learned that Delverde had paid fair market value (FMV) for corporate assets from a private company that had received nonrecurring countervailable subsidies from the Government of Italy from 1983–1991. *See Delverde III*, 202 F.3d at 1362. Commerce determined the concerned assets had a 12-year average useful life. It divided the subsidy by the average useful life to reach an allocation of the subsidy for each of the twelve years. Because Commerce assumed a portion of the subsidies passed through to Delverde when Delverde purchased the concerned assets, Commerce, after making adjustments based on the purchase price, allocated a subsidy amount to Delverde for its 1994 period of review. Delverde argued before this Court that Commerce's assumption that a pro rata portion of the former owner's nonrecurring subsidies "passed through" to Delverde was erroneous and not in accordance with the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act. *Id*. at 1362–1363. After remanding to Commerce to consider the terms of the sale to determine whether Delverde had indirectly received the former owner's subsidies, this Court affirmed Commerce's determination. *Delverde, SrL v. United States*, 24 F. Supp. 2d 314, 317 (Ct. Int'l Trade 1998). Delverde timely appealed to the Federal Circuit.

The Federal Circuit found that in order to conclude a person received a subsidy, 19 U.S.C. § 1677(5)(B) clearly requires Commerce to "determine that a government provided that person with both a *financial contribution* * * * and a *benefit*." *Delverde III*, 202 F.3d at 1365 (emphasis in original). The Court next turned to the statute's change of ownership provision, which states:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a

> determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

19 U.S.C. § 1677(5)(F). The Court therefore found that although the statute prohibits the automatic conclusion that a subsidy has "been extinguished solely by an arm's length change of ownership," it also prohibits a *per se* rule that "a change in ownership *always* requires a determination that a past countervailable subsidy continues to be countervailable." *Delverde III*, 202 F.3d. at 1366 (emphasis in original). The Court concluded: "[T]he statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person * * * before charging it with receipt of a subsidy * * *." *Id*. The Federal Circuit held that Commerce's methodology was inconsistent with 19 U.S.C. § 1677(5) and therefore invalid because Commerce did not determine whether Delverde received a financial contribution and benefit.

IV. Final Determination By the Department of Commerce

In its *Final Results*, Commerce stated the Federal Circuit in *Delverde III* had "rejected the same change in ownership methodology that [was] applied in the Preliminary Results in the instant review." *Decision Memorandum* at 3. Specifically, Commerce noted *Delverde III*'s holding that "the Tariff Act, as amended, does not allow Commerce to presume conclusively that the subsidies granted to the former owner of Delverde's corporate assets automatically 'passed through' to Delverde following the sale. Rather, the Tariff Act requires that Commerce make such a determination by examining the particular facts and circumstances of the sale and determining whether Delverde directly or indirectly received both a financial contribution and benefit from the government." *Id.*, quoting *Delverde III*, 202 F.3d at 1364. Accordingly, Commerce applied a new two-step change in ownership approach to determine whether AST directly or indirectly received both a financial contribution and benefit from the Government of Italy. *Decision Memorandum* at 3. In its first step, Commerce examined whether AST "[was] the same person as the one that received the subsidies." *Id*. To make this determination, Commerce analyzed four factors: (1) continuity of general business operations; (2) continuity of production facilities; (3) continuity of assets and liabilities; and (4) retention of personnel. *Id*. The Department stated it would "generally consider the post-sale entity to be the same person as the pre-sale entity if, based on the totality of the factors considered, [it] determine[d] that the entity sold in the change-in-ownership transaction [could] be considered a continuous business entity because it was operated in substantially the same manner before and after the change in ownership." *Id*. If the pre- and post-sale entities were considered to be the same person, "nothing material [would have] changed since the original bestowal of the subsidy, so that the statutory requirements for finding a subsidy [would be] satisfied with regard to

that person." *Final Redetermination* at 7, Pl. Pub. App. Ex. 3 at 7. This Court will refer to this step in Commerce's analysis as the "Personhood Test."

If the pre- and post-sale entities were two distinct persons, however, Commerce would proceed to the second step of its analysis and consider "whether any subsidy had been bestowed upon that producer/exporter as a result of the change-in-ownership transaction." *Id*.

After analyzing the above four factors, Commerce determined that Post-Sale AST "is for all intents and purposes the same person as that which existed prior to the privatization. Hence, * * * [Post-Sale AST] received the financial contributions and benefits at issue in this review." *Decision Memorandum* at 4.

Commerce applied its Personhood Test to eight subsidy programs under review: (1) equity infusions provided by the Government of Italy, through IRI, to TAS or ILVA between 1987 and 1992 *(Decision Memorandum* at 8); (2) debt forgiveness resulting from the 1988–1990 restructuring plan (*Id.* at 8–9); (3) debt forgiveness resulting from the 1993–1994 restructuring plan (*Id*. at 9–11); (4) government interest contributions on AST's outstanding loans financed by IRI bond issues (*Id*. at 11); (5) pre-privatization retirement benefits to qualified steel workers under Italian Law 451/94 (*Id*. at 11–12); (6) exchange rate guarantees from the Italian Ministry of Treasury for AST's outstanding European Coal and Steel Community loans (*Id*. at 13–14); (7) European Coal and Steel Community loan to AST under Article 54 of the 1951 European Coal and Steel Community Treaty (*Id*. at 14–15); and (8) European Social Fund Objective 4 funding of training for employees in companies undergoing restructuring (*Id*. at 15–16).

ANALYSIS

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in a countervailing duty administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000).

Commerce's factual determinations are supported by substantial evidence on the record if "such relevant evidence as a reasonable mind might accept as adequate" supports its conclusion. *Matsushita Elec. Indus. Co., Ltd. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)).

Commerce's interpretation of the countervailing duty statute is "in accordance with law" if it comports with Congress's intention on the precise question at issue. *See Timex V.I., Inc. v. United States,* 157 F.3d 879, 881–882 (Fed. Cir. 1998). If Congress's intention is not judicially ascertainable, this Court must consider whether Commerce's interpretation of the statute is reasonable in light of the overall statutory scheme. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843 (1984).

THE STATUTE

To ascertain whether Commerce's determination is in accordance with law, this Court first examines the law as set forth in the statute. For Commerce to assess countervailing duties, Commerce must determine that a "government * * * or any public entity * * * is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States * * *." 19 U.S.C. §1671(a)(1).

A "countervailable subsidy" is described in 19 U.S.C. § 1677(5)(B) as one in which an authority "provides a financial contribution * * * to a person and a benefit is thereby conferred." The statute defines "financial contribution" as

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,
> (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,
> (iii) providing goods or services, other than general infrastructure, or
> (iv) purchasing goods.

19 U.S.C. § 1677(5)(D). The statute also details the meaning of "benefit conferred:"

> A benefit shall normally be treated as conferred where there is a benefit to the recipient, including—
> (i) in the case of an equity infusion, if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made,
> (ii) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market,
> (iii) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority, and
> (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

19 U.S.C. § 1677(5)(E).

Finally, a countervailable domestic subsidy must be specific to an enterprise or industry. *See* 19 U.S.C. § 1677(5)(A), and (5A)(D).

ISSUES

I. Commerce's two-step methodology for determining whether Post-Sale AST continues to receive indirect or direct subsidies granted Pre-Sale AST is supported by substantial evidence on the record or otherwise in accordance with law.

This Court finds Commerce's two-step methodology to be supported by substantial evidence on the record or otherwise in accordance with law for three reasons: First, Commerce's methodology conforms with the statutory requirements for finding a subsidy countervailable; second, Commerce's methodology is consistent with *Delverde III*; third, Commerce's methodology is reasonable and therefore within the discretion entrusted it by Congress to determine whether the privatization of a government-owned firm has eliminated any previously conferred countervailable subsidies.

First, Commerce's two-step methodology is in keeping with the statute's clear requirement that certain elements be satisfied in order for Commerce to impose countervailing duties. As the Federal Circuit found in *Delverde III*, "[T]he statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly * * *, before charging it with receipt of a subsidy * * *." *Delverde III*, 202 F.3d at 1366. Commerce complied with these statutory requirements and found each of the subsidy programs described above to be countervailable.

The issue before this Court is whether Commerce properly determined that the subsidy programs found countervailable with respect to Pre-Sale AST remained countervailable with respect to Post-Sale AST in 1998. The statute provides minimal guidance in this situation, stating only that

> [a] change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by the administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change in ownership is accomplished through an arm's length transaction.

19 U.S.C. § 1677(5)(F). The statute does not require that Commerce make a second financial contribution and benefit determination if the entity that originally received the subsidy is the same one being reviewed after privatization. Such a determination would only be redundant. Therefore, Commerce's two-step methodology is in accordance with the statute.

Second, Commerce's two-step methodology is consistent with *Delverde III.* In *Delverde III,* the Federal Circuit held that the statute prohibits a *per se* rule for determining whether a subsidy continues to be countervailable to a new owner following a change in ownership. *Delverde III,* 202 F.3d at 1366, 1368. Instead, the Court stated that the Tariff Act of 1930 requires Commerce to examine the particular facts and

circumstances of the sale in order to determine whether the subsidies granted to the former owner of an entity's corporate assets pass through to the new owner following the sale. *Delverde III*, 202 F.3d at 1364. *Delverde III* stresses the need to determine whether subsidies continue to be countervailable to the *new owner.*

In response to *Delverde III*, Commerce first determined whether Post-Sale AST was the same person as Pre-Sale AST, the original subsidy recipient. Finding them to be the same, Commerce considered the statutory requirements for finding a subsidy to have been met and therefore continued to impose countervailing duties against AST. Commerce's analysis does not result in an automatic assessment of countervailing duties against a new owner of the shares of AST. In this case, Commerce is assessing duties against AST, not against KAI or any of the subsequent owners of AST's stock. A subsidy recipient is usually distinguishable from an owner of shares of the subsidy recipient's stock.[2]

A sale of 100 percent of a corporation's shares demonstrates this distinction. Commerce has stated that "a simple sale of shares * * * is the type of case that would most readily reveal no change in the legal person." *Final Redetermination* at 9–10, Pl. Pub. App. Ex. 3, at 9–10. This is because a stock purchase changes the identity of the shareholders who own the original subsidy recipient, but it does not affect the identity of the corporate entity itself. Therefore, absent evidence that the subsidy has been extinguished, the subsidy merely continues to reside in the corporation that is now owned by new shareholders. *See e.g., British Steel v. United States*, 879 F. Supp. 1254, 1273 (Ct. Int'l Trade 1995), *aff'd in part, rev'd in part on other grounds by LTV Steel, Inc. v. United States,* 174 F.3d 1359 (Fed. Cir. 1999) (discussing hypothetical in which a subsidy does not travel after a change in shareholders of a corporation but remains with the corporation that continues to exist).

A sale of only several corporate assets presents a different scenario. There it could be argued that the new owner has stepped into the shoes of the subsidy recipient, requiring a new determination of financial contribution and benefit. However, Commerce's four-factor analysis allows it to identify substance over form of the transaction. If the commercial reality is a shared identity between pre- and post-privatization entity, Commerce may presume the subsidy remains with the post-privatization entity absent evidence to the contrary.

Plaintiffs have the responsibility to demonstrate that the benefits from prior subsidies have been extinguished, either through the change of ownership or otherwise. The change of ownership provision at 19 U.S.C. § 1677(5)(F) does not require Commerce to conduct a second benefit determination. Rather, it addresses the sufficiency of the subsi-

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[2] The Court distinguishes its analysis from the analyses found in *Allegheny Ludlum Corp. v. United States,* 182 F. Supp. 2d 1357 (Ct. Int'l Trade 2002), *GTS Industries S.A. v. United States,* 182 F. Supp. 2d 1369 (Ct. Int'l Trade 2002), *Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States and Allegheny Ludlum Corp., et al.,* No. 99–06–00364, 2002 WL 342659 (Ct. Int'l Trade Feb. 1, 2002), and ILVA *Lamiere E Tubi S.R.L., et. al.*, No. 00–03–00127, 2002 WL 484675 (Ct. Int'l Trade Mar. 29, 2002). In those cases, a key consideration was whether the new owner received the benefit of the financial contribution. In this case, the Court focuses upon whether the original subsidy recipient, being the same person before and after the change of ownership, continues to receive the subsidy benefit.

dy recipient's evidence that a subsidy is no longer countervailable. It states that "[a] change in ownership * * * does not *by itself* require a determination by the administering authority that a past countervailable subsidy * * * no longer continues to be countervailable, *even if* the change in ownership is accomplished through an arm's length transaction." 19 U.S.C. § 1677(5)(F) (emphasis added). Commerce is not required to conduct a second benefit investigation once it determines that the original subsidy recipient remains the same following a change of ownership.

Plaintiffs point to no record evidence that the benefits from the subsidy programs have been extinguished. Plaintiffs argue that *Delverde III* requires Commerce to make a benefit determination whenever there has been a fundamental change in ownership and that the benefit determination must turn upon whether Fair Market Value (FMV) was paid for the company. Plaintiffs contend that such a determination would reveal that neither AST nor its current owner received benefits because the buyers paid FMV arrived at through arm's length negotiations after an open and competitive bidding process. They assert that the bidding process resulted in a higher purchase price than the seller's independent consultants had originally projected. Nowhere in Plaintiffs' briefs do they point to evidence on the record that the FMV, although higher than originally projected, was in any way affected by AST's countervailing duty liability. The mere payment of more or less for the purchase of shares of stock would seem to have no impact by itself upon the amount of countervailable duty liability any more than such payment would have on the amount of a mortgage liability that was the responsibility of AST. It would simply mean the purchaser of stock paid more or less for its shares. Such payment by itself would not extinguish liabilities to third parties.

Finally, Commerce's two-step methodology is reasonable and therefore within the discretion entrusted it by Congress to determine whether the privatization of a government-owned firm has eliminated any previously conferred countervailable subsidies. The statute, its legislative history, and *Delverde III* do not indicate the method by which Commerce is to make this determination. However, the Statement of Administrative Action states:

> The issue of the privatization of a state-owned firm can be extremely complex and multifaceted. While it is the Administration's intent that Commerce retain the discretion to determine whether, and to what extent, the privatization of a government-owned firm eliminates any previously conferred countervailable subsidies, Commerce must exercise this discretion carefully through its consideration of the facts of each case and its determination of the appropriate methodology to be applied.

Uruguay Round Agreements Act, Statement of Administrative Action, H.R. REP. NO. 103–826, at 928 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4241. The Court in *Delverde III* also noted that the statute's change of ownership provision "does not direct Commerce to use any

particular methodology for determining the existence of a subsidy in a change of ownership situation." Therefore, this Court accords deference to Commerce's decision to make as its first step a determination of whether the pre- and post-privatization entities share the same identity.

In this case, Commerce acted within its discretion when it looked to principles of corporate successorship for guidance. It is reasonable to consider criteria developed in the corporate context for determining whether a company that has undergone a change in ownership carries on substantially the same business after the change in ownership and therefore remains responsible for previously incurred liabilities. *Final Redetermination* at 9–11, Pl. Pub. App. Ex. 3, at 9–11.

II. Commerce's decision to compare Pre-Sale AST to KAI-owned Post-Sale AST for purposes of its Personhood Test is supported by substantial evidence or otherwise in accordance with law.

Plaintiffs argue that in applying the Personhood Test, Commerce should have compared Post-Sale AST to ILVA as a whole rather than to Pre-Sale AST. This Court finds Commerce properly chose to compare Pre- and Post-Sale AST because "[a]ll of the subsidies that were bestowed on the predecessor operations of AST continued to benefit the business that was separately incorporated as AST as part of the 1993 ILVA demerger." *Final Redetermination* at 17, Pl. Pub. App. Ex. 3, at 17. Pre-Sale AST existed as a separate corporate entity prior to its 1994 privatization, and a reasonable mind could accept this as relevant evidence that Pre-Sale AST is the appropriate entity with which to compare Post-Sale AST.

Although Commerce described the demerger as a non-event in the *Decision Memorandum,* it did so to emphasize there had been no ultimate change in ownership of AST after the demerger. The Government of Italy, through its holding company IRI, continued to own AST before the demerger and until AST's privatization. *Id*.

III. Commerce's determination that Pre- and Post-Sale AST are the same entity is not supported by substantial evidence on the record or otherwise in accordance with law.

Commerce cites evidence on the record, developed through the application of the four factors, to support its conclusion that Pre- and Post-Sale AST are the same entity:

> (1) *Continuity of General Business Operations:* Commerce found record evidence to indicate that AST production base and products remained the same after privatization. In addition, IRI expected to obtain a higher sale price by selling AST as an operating entity rather than auctioning its individual assets. *Decision Memorandum* at 3, citing AST October 20, 2000 Questionnaire Response at 6. Finally, AST held itself out as a continuation of the previous enterprise by operating under the same name, AST, and by maintaining its access to the markets and customers that KAI had found desirable before purchasing AST. *Decision Memorandum* at 3–4, citing AST October 20, 2000 Questionnaire Response at 41.

(2) *Continuity of Production Facilities:* AST's principal specialty steel production facilities remained located in Terni. *Decision Memorandum* at 4.

(3) *Continuity of Assets and Liabilities:* Commerce found that all of AST's corporate assets were taken over by KAI and that Pre-Sale AST's liabilities were transferred through the privatization intact. *Id*. citing Government of Italy November 14, 2000 Questionnaire Response at 3.

(4) *Retention of Personnel:* Commerce found that KAI intended to maintain the AST workforce in place after privatization. The IMI Report, commissioned by the Government of Italy to value AST, highlighted continuity in AST's personnel. *Decision Memorandum* at 4, citing AST October 20, 2000 Questionnaire Response at 15. Ultimately, Commerce found nothing in the record indicating a substantial change in AST's workforce as a result of the privatization. *Final Redetermination* at 22, Pl. Pub. App. Ex. 3, at 22.

Commerce determined, based upon the totality of the factors considered, that Post-Sale AST was operated in substantially the same manner after the change in ownership as it was prior to its sale. The Court finds that substantial evidence on the record supports Commerce's determinations that there were continuity of general business operations and production facilities and retention of personnel between Pre- and Post-Sale AST. The Court notes, however, that Commerce's analysis of the third factor could lead to the conclusion that *no* continuity of assets and liabilities remained between Pre- and Post-Sale AST; rather, KAI, in a possible capacity as a separate purchaser, could have become legally responsible for all of AST's assets and liabilities. Defense counsel at oral argument appeared to disavow such a conclusion. Because Commerce's wording is unclear, the Court remands to Commerce to clarify whether KAI, in a capacity as a separate purchaser, became legally responsible for all of AST's assets and liabilities or explain if Post-Sale AST continued to have responsibility for all of Pre-Sale AST's assets and liabilities. If Commerce determines that KAI became legally responsible for all of AST's assets and liabilities, this Court orders Commerce to discuss whether substantial evidence supports its conclusion that Pre- and Post-Sale AST are the same entity.

IV. Commerce's two-step methodology for determining whether Post-Sale AST continues to receive indirect or direct subsidies granted Pre-Sale AST is not inconsistent with the World Trade Organization Appellate Body's ruling in UK Leaded Bar.

Plaintiffs claim this Court should construe the countervailing duty statute in accordance with *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,* WT/DS138/AB/R, Report of the Appellate Body (May 10, 2000) *(UK Leaded Bar).* In *UK Leaded Bar*, the World Trade Organization Appellate Body upheld the Dispute Settlement Panel's finding that, under the specific circumstances of the case, financial contributions bestowed upon a state-owned company between

1977 and 1986 could not be deemed to confer a benefit upon subsequent corporations that paid FMV to the state-owned company for its "productive assets, goodwill, etc." *UK Leaded Bar* at Paragraph 68. The WTO Appellate Body, however, specifically limited its finding to the particular circumstances of *UK Leaded Bar*. *UK Leaded Bar* at Paragraphs 74, 75(b) and (c). This Court does not therefore find it necessary to consider whether it must construe U.S. countervailing duty law in accordance with *UK Leaded Bar*. This case is limited by its facts, although this Court finds the methodology employed by Commerce to be supported by substantial evidence on the record or otherwise in accordance with law. The Court's holding in this case is not at variance with *UK Leaded Bar*. The cases are clearly distinguishable. In both instances the tribunals have examined unique facts presented and have based their decisions upon those unique facts. Commerce will be obliged in the future to examine facts presented on a case-by-case basis as it applies its methodology to its determinations.

V. Commerce properly applied the use of facts otherwise available and adverse inferences regarding pre-privatization asset spin-offs from ILVA and post-privatization sales of shares.

Plaintiffs argue that even if Commerce lawfully applied its Personhood Test, it unlawfully imposed an incorrect subsidy by failing to attribute a portion of the subsidies to pre-privatization spin-offs from ILVA and post-privatization sales of shares. Defendant asserts Commerce properly resorted to use of facts otherwise available and adverse inferences in determining that the pre-privatization asset spin-offs and post-privatization sales of shares had no effect upon AST's subsidy benefits.

Commerce may make a determination on the basis of facts available if an interested party "withholds information that has been requested by the administering authority" or "significantly impedes" a countervailing duty review. 19 U.S.C. § 1677e(a)(2)(A), (C). In addition, Commerce may resort to adverse inferences if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority." 19 U.S.C. § 1677e(b). Because AST failed to provide requested information regarding pre-privatization spin-offs and post-privatization sales of shares, Commerce found the information on the record to be too incomplete to serve as a reliable basis for determining whether the entities sold in the transactions were the same entities that benefitted from subsidies prior to their sale. *See Decision Memorandum* at 7.

In Commerce's October 16, 2000 remand supplemental questionnaire to the Government of Italy, Commerce stated: "The purpose of this remand is to re-examine our change-inownership methodology in light of, *inter alia*, *Delverde*. We therefore reiterate our request for complete remand questionnaire responses with regard to all of the changes in ownership. If we determine that this information is necessary to our remand determination and it is [sic] not been provided, we may resort to

facts otherwise available, including assumptions that are adverse to the respondent's interests." *Final Redetermination* at 36, citing Government of Italy October 16, 2000 Remand Supplemental Questionnaire at 3.

AST and the Government of Italy failed to provide the requested information. Instead, AST argued it was irrelevant to Commerce's treatment of AST's privatization and, together with the Government of Italy and the European Commission, "respectfully request[ed] that the Department explain how such information [was] pertinent to the proper scope" of the determination. *Decision Memorandum* at 7, quoting AST October 19, 2000 Supplemental Questionnaire Response at 29. In Commerce's October 27, 2000 supplemental questionnaire, Commerce noted the parties' deficient responses and reiterated its request, but AST and the Government of Italy failed to correct the deficiencies. *Decision Memorandum* at 7. Based upon the parties' affirmative refusals to provide the requested information, Commerce determined that AST and the Government of Italy had failed to cooperate. This Court finds, therefore, that Commerce properly resorted to the use of facts otherwise available and adverse inferences. Because the information on the record was too incomplete to serve as a reliable basis for determining whether the entities sold in the transactions were the same entities that benefitted from subsidies prior to the sale, Commerce properly applied the adverse inference that, once sold, the pre-1993 asset spin-offs did not constitute the same entity as ILVA and that the subsidy benefits therefore remained within ILVA's divisions. Commerce also properly applied the adverse inference that the post-privatization sales of shares did not affect the subsidy benefits to AST.

VI. Commerce's decision not to attribute a portion of the privatization purchase price to the repayment of prior subsidies is supported by substantial evidence on the record or otherwise in accordance with law.

Plaintiffs contend Commerce should have applied its pre-D*elverde III* approach of attributing a portion of the privatization purchase price to the repayment of prior subsidies. This argument was rejected by *Delverde III*. *See Delverde III*, 202 F.3d at 1367. Therefore, this Court finds Commerce's decision not to apply its pre-D*elverde III* approach of attributing a portion of the privatization purchase price to the repayment of prior subsidies to be supported by substantial evidence or otherwise in accordance with law.

VII. Commerce's treatment of the 1993 spinoff of AST is supported by substantial evidence on the record or otherwise in accordance with law.

Commerce found that as of December 31, 1993, ILVA Residua was "essentially a shell company with liabilities far exceeding assets." *Decision Memorandum* at 9. The majority of ILVA's debt had been placed in ILVA Residua rather than proportionately allocated to the spun-off entities AST and ILP. *Id*. at 10. In such a situation, it is Commerce's "practice to

allocate otherwise untied liabilities remaining in a shell corporation to the new, viable operations that had been removed from the predecessor company." *Decision Memorandum* at 30. Commerce's determination that AST received a benefit through debt forgiveness at the time of the spinoff is therefore supported by substantial evidence.

In valuing the benefit that AST received, Commerce analyzed the creditworthiness of ILVA as a whole. *See Decision Memorandum* at 33. Commerce found that ILVA, of which AST was a part, benefitted from the Government of Italy's ultimate assumption of the losses of the units originally comprising ILVA. *Id*. AST's debt forgiveness occurred at the moment of its incorporation; Commerce reasoned that it would be illogical to base its creditworthiness on AST's future prospects after the debt forgiveness had been granted because the debt forgiveness itself would have an impact upon private, commercial lenders' decisions of whether to lend funds to AST. *Id*., citing *Stainless Steel Plate in Coils*, 64 Fed. Reg. at 15,524. Therefore substantial evidence supports Commerce's decision to focus upon ILVA's creditworthiness and not to focus upon AST's creditworthiness.

Plaintiffs argue the figure arrived at for the amount of debt forgiven did not account for cash received in sales of viable assets. However, the countervailing duty statute requires Commerce to calculate subsidies upon the basis of the benefit to the recipient rather than upon the cost to the government. *See* 19 U.S.C. § 1677(5)(E). At the time of the spinoff, AST benefitted to the extent it did not assume a proportional share of ILVA's liabilities. *Decision Memorandum* at 31. Therefore, Commerce properly considered the benefit to AST rather than the ultimate cost to the Government of Italy in conducting its countervailing duty calculations. This Court finds Commerce's calculation of the amount of debt forgiven by the Government of Italy to be supported by substantial evidence on the record or otherwise in accordance with law.

VIII. Commerce's determinations regarding program-specific issues are supported by substantial evidence on the record or otherwise in accordance with law.

In addition to disputing Commerce's privatization analysis, Plaintiffs contend Commerce erred in determining that certain subsidies were countervailable. This Court finds that Commerce's determinations regarding these program-specific issues, set forth below in subsections A–D, are supported by substantial evidence on the record or otherwise in accordance with law.

A. Commerce's finding that the European Social Fund Objective 4 funding is a countervailable subsidy is supported by substantial evidence on the record and otherwise in accordance with law.[3]

The European Social Fund, operated by the European Commission, provided assistance to AST during the period of review through Objec-

[3] The Court notes that the parties have characterized the European Social Fund Objective 4 funding program as a post-privatization program. *See* Letter from Hogan & Hartson L.L.P. (on behalf of all parties) to United States Court of International Trade (May 23, 2001), at 3.

tive 4, which funds training for employees in companies undergoing restructuring. Commerce determined that the training programs provided a countervailable benefit to AST because the programs relieved it of a training obligation it would otherwise have incurred. Commerce stated that no new information or evidence of changed circumstances had been submitted to reconsideration of its previous finding that this program is countervailable. *Decision Memorandum* at 15.

Plaintiffs contend there is no basis for Commerce's determination that the European Social Fund Objective 4 funding is specific and therefore countervailable. However, Commerce found that despite its requests for information on the use of Objective 4 funds by the European Community and the Government of Italy, the Government of Italy, the European Union, and AST provided no new information or evidence of changed circumstances in this review to warrant reconsideration of Commerce's finding in this case. *Decision Memorandum* at 34. They did not demonstrate any efforts to obtain the information or offer any alternatives. *Id*. Therefore, Commerce's use of an adverse inference to find *de facto* specificity with respect to this program is supported by substantial evidence on the record or otherwise in accordance with law.

B. Commerce's determination that the European Coal and Steel Community is an authority that has provided a financial contribution pursuant to 19 U.S.C. § 1677(5)(B) is supported by substantial evidence on the record or otherwise in accordance with law.[4]

Under Article 54 of the 1951 European Coal and Steel Community Treaty, eligible companies can receive loans for up to 50 percent of the cost of an industrial investment project. The companies apply directly to the European Commission, which administers the European Coal and Steel Community. Once loan approval has been granted, the European Coal and Steel Community borrows funds at commercial rates which it then lends to steel companies at a slightly higher rate to cover administrative costs. Commerce has previously found Article 54 loans to be specific countervailable subsidies, and it stated that no new information or evidence of changed circumstances had been submitted in this proceeding to warrant reconsideration of its finding. *Decision Memorandum* at 14.

During the period of review, AST had one such outstanding loan, contracted in 1978. In 1987, the interest rate on this loan was reduced even though ILVA was not creditworthy. Therefore, Commerce treated the loan as if it were contracted in 1987 and calculated the benefit AST received by comparing the interest amount it should have paid at the benchmark interest rate for uncreditworthy companies to the amount AST actually paid during the period of review. *Id.* at 15.

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[4] The Court notes that the parties have characterized the European Coal and Steel Community Article 54 loan program as a post-privatization program. *See* Letter from Hogan & Hartson L.L.P. (on behalf of all parties) to United States Court of International Trade (May 23, 2001), at 3.

Plaintiffs argue that because the European Coal and Steel Community does not convey government funds to borrowers, the loans do not constitute a financial contribution provided by a public entity as required by 19 U.S.C. § 1677(5)(B). In response, Commerce has stated that "we see no requirement in the [Subsidies and Countervailing Measures] Agreement nor the Act that the financial contribution must be funded in a particular manner." *Id.* at 35. Plaintiffs have not directed this Court's attention to any statutory requirement that a financial contribution involve the expenditure of public funds.

Commerce has stated that the European Coal and Steel Community "is part of the European Union, which undeniably is a particular form of governmental body." *Stainless Steel Plate in Coils,* 64 Fed. Reg. at 15,529. Commerce, citing 19 U.S.C. § 1677(5)(D)(i), has also stated that "a financial contribution includes the direct transfer of funds, such as the provision of loans." *Decision Memorandum* at 35. This Court therefore finds Commerce's determination that the European Coal and Steel Community is an authority that has provided a financial contribution pursuant to 19 U.S.C. § 1677(5)(B) is supported by substantial evidence on the record or otherwise in accordance with law.

C. Commerce's determination that Law 451/94 retirement benefits to retirees are countervailable is supported by substantial evidence on the record or otherwise in accordance with law.[5]

When AST and ILP were spun off in preparation for their privatization, much of ILVA's redundant workforce was placed in ILVA Residua. *Decision Memorandum* at 2. Under Law 451/94, qualified steel workers applying for benefits in 1994, 1995, and 1996 could receive early retirement packages.

Commerce had previously found this program to be specific and stated that at the time of negotiating the terms of the lay-offs, ILVA, the labor ministry, and the unions knew the government would ultimately make contributions to worker benefits. *See Decision Memorandum* at 12. In keeping with past practice, therefore, Commerce treated half of the amount paid by the government as a financial contribution benefitting ILVA. *Id.* Plaintiffs claim Law 451/94 retirement benefits to retirees are not countervailable because AST had no *de jure* or *de facto* obligation to retain the workers who chose to retire early. In its Decision Memorandum, Commerce cites to its past finding of countervailability of Law 451/94 retirement benefits. *See Decision Memorandum* at 12, citing *Stainless Steel Plate in Coils,* 64 Fed. Reg. at 15,514. There, Commerce recognized that the entities spun-off from ILVA would be required to enter into negotiations with the unions before laying off workers. *See Stainless Steel Plate in Coils*, 64 Fed. Reg. at 15,514–15. It also pointed to statements by Government of Italy officials at verification indicating labor unrest, strikes, and lawsuits would result from failure to negotiate

[5] The Court notes that the parties have characterized the Law 451/94 retirement benefits program as a post-privatization program. *See* Letter from Hogan & Hartson L.L.P. (on behalf of all parties) to United States Court of International Trade (May 23, 2001), at 3.

a separation package. *Id*. Plaintiffs provided no new information or evidence of changed circumstances to Commerce to warrant a reconsideration of its finding that AST was relieved of having to assume a respective portion of the redundant workers placed in ILVA. *Decision Memorandum* at 12. Therefore, Commerce's determination that Law 451/94 retirement benefits to retirees are countervailable is supported by substantial evidence on the record or otherwise in accordance with law.

D. Commerce's determination that the 1988 Finsider payment to ILVA is countervailable is supported by substantial evidence on the record or otherwise in accordance with law.

Plaintiffs argue that Finsider's payment to ILVA in September of 1988 was not countervailable because it was not tied to subject merchandise. Commerce, however, considers equity infusions as untied subsidies benefitting the recipient company's total consolidated sales. *See Countervailing Duties, Final Rule,* 63 Fed. Reg. 65,348, 65,400 (Nov. 25, 1998). Plaintiffs have not demonstrated that the benefits of the equity infusion were tied to non-steel activities. *See Decision Memorandum* at 37, citing *Stainless Steel Plate in Coils,* 64 Fed. Reg. at 15,527. This Court therefore finds Commerce's determination that the 1988 Finsider payment to ILVA is countervailable is supported by substantial evidence on the record or otherwise in accordance with law.

CONCLUSION

Upon consideration of Plaintiffs' motion for judgment upon the agency record under Rule 56.2, Defendant's and Defendant-Intervenors' memoranda in opposition thereto, and other pertinent papers, Plaintiffs' motion is denied. The Department of Commerce's determination in *Final Results* is remanded to Commerce to explain whether it has determined that KAI, in a capacity as a separate purchaser, became legally responsible for all of AST's assets and liabilities or explain if Post-Sale AST continued to have responsibility for all of Pre-Sale AST's assets and liabilities.

If Commerce has determined that KAI became legally responsible for all of AST's assets and liabilities, Commerce is directed to explain whether substantial evidence on the record supports its conclusion that continuity of assets and liabilities remained between Pre- and Post-Sale AST. If Commerce determines that substantial evidence does not support the conclusion that continuity of assets and liabilities remained between Pre- and Post-Sale AST, Commerce is directed to explain whether substantial evidence on the record supports its determination that Pre- and Post-Sale AST are the same entity.

If Commerce determines that substantial evidence on the record does not support its determination that Pre- and Post-Sale AST are the same entity, Commerce is directed to explain whether Post-Sale AST received benefits from the countervailable subsidies made to Pre-Sale AST. If Commerce determines that Post-Sale AST did not receive benefits from the countervailable subsidies made to Pre-Sale AST, Commerce is directed to explain which of the eight subsidy programs listed in this opin-

ion are not countervailable against Post-Sale AST and why they are not countervailable against Post-Sale AST.

Commerce is directed to file its redetermination with the Clerk of this Court no later than the close of business on Monday, June 24, 2002; any responses by Plaintiffs must be filed with the Clerk of this Court no later than the close of business on Monday, July 1, 2002; any rebuttal comments by Defendant and Defendant-Intervenors must be filed with the Clerk of this Court no later than the close of business on Monday, July 8, 2002.

(Slip Op. 02–52)

VIRAJ GROUP, LTD., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CARPENTER TECHNOLOGY, CORP., ET AL., DEFENDANT-INTERVENORS

Court No. 00–06–00291

[Department of Commerce's Remand Redetermination, *Viraj Group, Ltd. v. United States*, Court No. 00–06–00291, Slip Op. 02–24 (February 26, 2002) is remanded to the Department of Commerce for reconsideration.]

(Dated June 4, 2002)

Ablondi, Foster, Sobin & Davidow (Peter Koenig), Washington, D.C., for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *David W. Richardson,* Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Collier Shannon Scott, PLLC (Robin H. Gilbert, Laurence J. Lasoff), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* Pursuant to 28 U.S.C. § 1581(c) (2000), this Court has jurisdiction to review the Department of Commerce's approach to the Indian rupee's devaluation in Final Results of Redetermination Pursuant to Court Remand, *Viraj Group, Ltd. v. United States of America and Carpenter Technology, Corp., et al.,* Slip Op. 02–24 (CIT February 26, 2002) *(Remand Redetermination II).* This Court will sustain *Remand Redetermination II* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

On February 26, 2002, this Court remanded to the Department of Commerce (Commerce) the Final Results of Redetermination Pursuant to Court Remand, *Viraj Group, Ltd. v. United States of America and Carpenter Technology, Corp., et al.,* Slip Op. 01–104 (CIT August 15,

2001). The Court ordered Commerce: (1) to consider how to apply a currency conversion methodology that best reaches an accurate dumping margin in this case; (2) if necessary, to recalculate the Plaintiff's dumping margin using a methodology that furthers the congressional goal of accuracy in dumping determinations; (3) to explain if different currency exchange rates were used in the dumping margin calculations, if the use of different rates was appropriate, and if not appropriate, to make any necessary corrective calculations; and (4) to explain the significance of the Plaintiff's pricing decisions to Commerce's determinations of whether the change in rupee valuation in this case constituted a fluctuation to be ignored. On April 12, 2002, Commerce filed *Remand Redetermination II* with this Court.

ANALYSIS

This Court first ordered Commerce to consider how to apply a currency conversion methodology that best reaches an accurate dumping margin in this case. In response, Commerce explained that the currency conversion methodology originally applied is "the best for calculating a fair and accurate dumping margin." *Remand Redetermination II* at 3.

Commerce's explanation is based upon the principle that potential price discrimination occurs on the date of sale (DOS) to the United States because on that date the producer decides and fixes the quantity and price of the merchandise. *Id*. The date of sale is the "date at which [the producer] assesses its costs and makes its competitive, economic decision to complete the sale." *Id*. at 5. Because dumping occurs on the date of sale, "Viraj's subsequent currency gains and losses on the sale following this date * * * are simply immaterial to the Department's calculation of dumping margins." *Id*. at 5–6. Subsequent currency gains and losses would only be relevant if Viraj had factored them into its date of sale pricing decisions. *Id*. at 4. Absent evidence of "forward-thinking" pricing, Commerce simply uses the exchange rate contemplated by the seller on the date of sale in order to compare pricing practices between markets. *Id*. at 3–4.

Although Commerce's currency conversion methodology is likely the best for calculating a fair and accurate dumping margin in many cases, Commerce has not persuaded the Court that its methodology best reaches an accurate dumping margin in *this* case. Despite labeling subsequent currency gains and losses as "immaterial" to its dumping margin determination, Commerce has in the past recognized their potential to distort dumping margin calculations. In *Policy Bulletin 96–1*, Commerce stated, "We are continuing to examine the application of the [exchange rate] model in situations where the foreign currency depreciates substantially against the dollar over the period of investigation or the period of review. In those situations, it may be appropriate to rely on daily rates." *Notice: Change in Policy Regarding Currency Conversions,* 61 Fed. Reg. 9,434, 9,435 n.2 (Mar. 8, 1996) *(Policy Bulletin 96–1).* Commerce also stated that "in both investigations and reviews, whenever the decline in the value of a foreign currency is so precipitous and large

as to reasonably preclude the possibility that it is only fluctuating, the lower actual daily rates will be employed from the time of the large decline." *Id*. at 9,436.

Commerce later developed the definition of "precipitous and large" in cases such as *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils From the Republic of Korea,* 64 Fed. Reg. 30,664 (June 8, 1999) *(Stainless Steel from Korea),* where the won declined 40 percent over two months, and *Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review, 64* Fed. Reg. 56,759, 56,763 (Oct. 21, 1999) *(Pipes and Tubes from Thailand),* in which the baht dropped 18 percent in one day. In those cases, Commerce resorted to the use of daily exchange rates for currency conversion purposes for home market sales matched to U.S. sales. However, even where Commerce has not considered a currency devaluation to be "precipitous and large," Commerce has addressed a devaluation's distorting effect upon dumping margin calculations. For example, in *Notice of Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Indonesia,* 64 Fed. Reg. 14,690, 14,693 (Mar. 26, 1999) *(Rubber Thread from Indonesia),* the rupiah decreased in value by more than 50 percent over five months. Commerce considered the decline "steady" and "significant." *Id*. Consequently, Commerce used two price averaging periods to determine whether sales at less than fair value existed because "using a single averaging period would result in a distortion of the dumping calculation." *Id*.

Commerce states that "the facts and circumstances on the record in the instant review do not motivate any general consideration of the issue of depreciating currencies, as the Court invites Commerce to do." *Remand Redetermination II* at 5. Had the rupee's devaluation been as rapid and large as the currency devaluations in *Stainless Steel from Korea* and *Pipes and Tubes from Thailand,* Commerce posits that Viraj would have been one among many market participants revising their expectations based upon the most current exchange rate data available. *Remand Redetermination I* at 3–4. In such a case, Commerce's dumping margin calculations would reflect the changed pricing decisions. *Id*. at 4. However, because Viraj as an individual market participant provided no evidence of changed pricing as a result of the rupee's gradual devaluation, Commerce asserts it need not consider whether the devaluation distorted its calculations. *Id*. at 4–5; *see also Remand Redetermination II* at 4–5.

Despite Commerce's assertion to the contrary, this Court finds the facts and circumstances on the record in the instant review do indicate a need to consider the issue of depreciating currencies in order to reach a fair and accurate dumping margin determination. Commerce stated there were "no extraordinary aspects to the observed movement in the rupee between November 3, 1997 and November 30, 1998," but it also recognized that the 14.6 percent depreciation of the rupee was not

small. *Remand Redetermination I* at 4–5. Furthermore, Commerce has acknowledged that, were it to account for the depreciation in its calculations, the dumping margin would be lower. *Id*. at 5. The depreciation therefore appears to be substantial if not precipitous. This Court would find helpful an examination by Commerce of whether a "substantial" devaluation merits the same treatment given "precipitous and large" devaluations. *Policy Bulletin 96–1* appears to consider two separate scenarios rather than merely the one presented by Commerce in this case.

The steep and precipitous currency declines in *Stainless Steel from Korea* and *Pipes and Tubes from Thailand* may have had a clear effect upon pricing decisions in those cases, but "the rupee's downward movement, while small and gradual, appears cumulatively to have had more than a *de minimis* effect upon Commerce's dumping margin calculations." *Viraj Group, Ltd. v. United States,* 193 F. Supp. 2d 1331, 1338 (Ct. Int'l Trade 2002). Viraj's apparent decision not to hedge against currency valuation changes does not necessarily reflect a decision to sell below value. The application of Commerce's standard currency conversion methodology in this case is unreasonable where "a more accurate methodology is available and has been used in similar cases." *Thai Pineapple Canning Ind. Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001). The case before this Court is no different in principle from *Stainless Steel from Korea, Pipes and Tubes from Thailand, and Rubber Thread from Indonesia.* This Court therefore remands once more to Commerce to apply a more accurate currency conversion methodology to its dumping margin calculations in this case.

This Court also ordered Commerce to explain if different currency exchange rates were used in the dumping margin calculations, if the use of different rates was appropriate, and if not appropriate, to make any necessary corrective calculations. Commerce stated that "no currency conversion is done by the Department" because the Department compares cost data reported in the home market currency with home market sales in the home market currency. *Remand Redetermination II* at 5. However, in the absence of a suitable comparison sale in the comparison market, Commerce uses cost data to reach a constructed value. In such a situation, "[t]he appropriate exchange rate is employed to convert the constructed value and compare it to the U.S. sale just as we would convert a comparison market price." *Id*. Currency conversion does appear, therefore, to be "done by the Department." However, although Commerce consistently uses the DOS exchange rate throughout the review, such an exchange rate does not appear to facilitate an accurate comparison in this case.

Finally, this Court ordered Commerce to explain the significance of the Plaintiff's pricing decisions to its determinations of whether the change in rupee valuation in this case constituted a fluctuation to be ignored. The Court is satisfied with Commerce's explanation of the importance of Plaintiff's pricing decisions upon dumping margin determinations. However, it is not satisfied that Commerce has explained the

importance of a producer's pricing decisions upon whether the change in currency valuation constitutes a fluctuation to be ignored. The significance of a producer's pricing decisions is particularly unclear in this case where a steady, gradual, but significant devaluation may have affected the normal value of the subject merchandise after the producer set the export price.

CONCLUSION

The Court does not find *Remand Redetermination II* to be supported by substantial evidence on the record, or otherwise in accordance with law. This Court therefore remands once again to Commerce to (1) apply a currency conversion methodology that reaches a more accurate dumping margin in this case by accounting for the rupee's depreciation in Commerce's dumping margin calculations; (2) explain to this Court why such a methodology does or does not further the congressional goal of accuracy in dumping determinations; and (3) explain to this Court which method it chooses to apply in this case, apply that method, and give an explanation of its reasons for doing so.

Commerce is directed to file its redetermination with the Clerk of this Court no later than the close of business on Wednesday, June 19, 2002; any responses by Plaintiffs must be filed with the Clerk of this Court no later than the close of business on Wednesday, June 26, 2002; any rebuttal comments by Defendant and Defendant-Intervenors must be filed with the Clerk of this Court no later than the close of business on Wednesday, July 3, 2002.