Decisions of the United States Court of International Trade

(Slip Op. 02–79)

UGINE-SAVOIE IMPHY, UGINE STAINLESS AND ALLOYS, INC., AND TECHALLOY, INC., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CARPENTER TECHNOLOGY, EMPIRE SPECIALTY STEEL, AND UNITED STEEL WORKERS OF AMERICA (AFL-CIO/CLC), DEFENDANT-INTERVENORS

Court No. 00–08–00423

[ITC sunset review determination to continue antidumping duty orders is sustained.]

(Dated July 31, 2002)

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OPINION

GOLDBERG, *Senior Judge:* Plaintiffs appeal the United States International Trade Commission's (the "Commission") five-year sunset review determination that revocation of the antidumping duty order on stainless steel wire rod ("wire rod") from France would likely lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time. *See Notice: Stainless Steel Wire Rod From Brazil, France, India, and Spain,* 65 Fed. Reg. 45,409 (July 21, 2000); *Stainless Steel Wire Rod From Brazil, France, India, and Spain,* USITC Pub. 3321, Inv. Nos. 701–TA–178 (Review) and 731–TA–636–638 (Review) (July 26, 2000) *("Sunset Review").* Plaintiffs are Ugine-Savoie Imphy ("U-SI"), a French manufacturer of wire rod, and Ugine Stainless and Alloys, Inc. ("US&A") and Techalloy, Inc. ("Techalloy"), U.S. affiliates of U-SI and importers of wire rod. Carpenter Technology, Empire Specialty Steel, and United Steel Workers of America (AFL-CIO/CLC) participated as defendant-intervenors in this action.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000).

I. STANDARD OF REVIEW

The Court will uphold the Commission's determination in a sunset review 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); *see also Goss Graphics Systems, Inc. v. United States,* 216 F.3d 1357 (Fed. Cir. 2000).

II. BACKGROUND

A. Overview of the Sunset Review Statutory Provisions

The Commission and the International Trade Administration ("ITA") are required to conduct sunset reviews five years after publication of a duty order or a prior sunset review. *See* 19 U.S.C. § 1675(c)(1)(2000). In a sunset review of an antidumping duty order, the Commission determines "whether revocation of an order * * * would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1) (2000). To determine the likelihood of material injury, the Commission shall consider the likely (1) volume, (2) price effect, and (3) impact of the subject imports on the domestic industry if the order were revoked. *Id.*

Before the Commission analyzes the likely volume, price effect, and impact, the Commission determines whether to cumulatively assess the volume and effect of subject imports from all countries for which sunset reviews were initiated on the same day. 19 U.S.C. § 1675a(a)(7). The statute authorizes cumulation if the Commission determines that the countries' subject imports would likely compete with each other and with the domestic like product. *See id.* There is an express exception prohibiting cumulation if the Commission determines that the subject imports are "likely to have no discernible adverse impact on the domestic industry." *Id.* While the above limitations prevent cumulation in certain circumstances, in all other instances cumulation is discretionary, not mandatory. *See* 19 U.S.C. § 1675(a)(7) ("the Commission *may* cumulatively assess the volume and effect * * *") (emphasis added).

After determining whether to cumulate, the Commission analyzes the volume, price effect, and impact of subject imports on the domestic industry. With respect to the first factor, volume, the Commission shall consider whether the likely volume of subject imports "would be significant if the order is revoked * * * either in absolute terms or relative to production or consumption in the United States." 19 U.S.C. § 1675a(a)(2). For purposes of determining whether the likely volume would be significant, the Commission "shall consider all relevant economic factors," including likely increases in production capacity or current unused capacity in the exporting country, barriers to importation of

subject merchandise in other countries, and product-shifting potential in the exporting country.[1] 19 U.S.C. §§ 1675a(a)(2)(A)–(D).

In determining the second factor, the likely price effects if the order is revoked, the Commission shall consider whether "there is likely to be significant price underselling by imports of the subject merchandise as compared to domestic like products," and whether "imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products." 19 U.S.C. §§ 1675a(a)(3)(A)–(B).

Analyzing the third factor, the likely impact of subject imports on the domestic industry if the order is revoked, the Commission "shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States," including:

> (A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
> (C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.

19 U.S.C. §§ 1675a(a)(4)(A)–(C). The relevant economic factors are to be evaluated "within the context of the business cycle and the conditions of competition" of the domestic industry. 19 U.S.C. § 1675a(a)(4).

Throughout the Commission's analysis of these factors, the Commission shall consider its prior injury determination,[2] any improvement in the domestic industry related to issuance of the order, the potential vulnerability of the domestic industry if the order were revoked, and the ITA's findings of duty absorption. 19 U.S.C. §§ 1675a(a)(1)(A)–(D). In considering any and all of the factors required by § 1675a, no one factor is dispositive. 19 U.S.C. § 1675a(a)(5).

B. Summary of the Instant Sunset Review

The original investigation by the Commission in 1994 found that the U.S. industry was being materially injured by reason of less than fair value imports of wire rod from France. *See Stainless Steel Wire Rod From Brazil and France,* USITC Pub. 2721, Inv. Nos. 731–TA–636 and 637 (Final) (Jan. 1994). This determination caused the issuance of an antidumping duty order on imports of wire rod from France. *See Certain Stainless Steel Wire Rod From France,* 59 Fed. Reg. 4022 (Jan. 28, 1994).

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[1] The statute specifies that in assessing the likely volume of subject imports, the Commission shall consider, in addition to any other relevant economic factors, the following economic factors:

> (A) any likely increase in production capacity or existing unused production capacity in the exporting country,
> (B) existing inventories of the subject merchandise, or likely increases in the inventories,
> (C) the existence of barriers to the importation of such merchandise into countries other than the United States, and
> (D) the potential for product-shifting if production facilities in the foreign country, which can be used to produce the subject merchandise, are currently being used to produce other products.

19 U.S.C. §§ 1675a(a)(2)(A)–(D).

[2] "The Commission shall take into account * * * its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued * * *." 19 U.S.C. § 1675a(a)(1)(A).

Five years after the original investigation, pursuant to 19 U.S.C. § 1675(c), the Commission instituted sunset reviews of countervailing duty orders on imports of wire rod from Brazil, France, India, and Spain. *See Stainless Steel Wire Rod From Brazil, France, India, and Spain,* 64 Fed. Reg. 35,697 (July 1, 1999) *("Notice of Sunset Review").* The Commission later decided to do a full review rather than an expedited review because of the "adequate" responses to its *Notice of Sunset Review* from the domestic interested party group and France, and for other reasons in the reviews of Brazil, India, and Spain, which had not submitted adequate responses. *See Stainless Steel Wire Rod From Brazil, France, India, and Spain,* 64 Fed. Reg. 55,962 (Oct. 15, 1999) *("Full Review Notice").* The Commission later stated that the reason for the full reviews of Brazil, India, and Spain, despite their inadequate responses, was "to promote administrative efficiency." *See Sunset Review* at 3.

1. Cumulation

In the *Sunset Review,* the Commission first undertook to explain its decision not to cumulatively assess the volume, price effect, and impact of imports of wire rod from France, India, Brazil, and Spain. The sunset reviews for each country were initiated on the same day. *See Notice of Sunset Review.* The Commission determined that imports of wire rod from France, Brazil, and India would compete with each other and the domestic like product in the U.S. market. *Id.* at 15. Although the Commission found that imports of wire rod from Spain would likely have no discernible adverse impact on the U.S. industry if the countervailing duty order were revoked, preventing cumulation of Spanish imports, it did not conclude the same with respect to subject imports from France, Brazil, and India. *Sunset Review* at 13. Therefore, the Commission could have permissibly exercised its discretion to cumulate subject imports from France, Brazil, and India. *See* 19 U.S.C. § 1675a(a)(6).

Despite the findings regarding competition and discernible adverse impact, the Commission declined to cumulate imports of wire rod from France with imports from India and Brazil, citing different "conditions of competition for French wire rod relative to imports from Brazil and India." *Id.* at 16. Commissioner Bragg did not join in that portion of the *Sunset Review,* and instead cumulated French, Brazilian, and Indian imports for purposes of the sunset review.[3] *Id.* at 16 n.73.

2. Conditions of Competition

Regarding the conditions of competition, the Commission found that U.S. domestic demand for wire rod is inelastic, i.e., that it does not respond significantly to price changes. *Sunset Review* at 17. The Commission found that manufacturers are able to use the same equipment to produce wire rod and other long steel products, which allows for product

[3] The Commission's analysis in the *Sunset Review* is the view of Commissioners Miller, Hillman, and Bragg. Commissioner Bragg, while agreeing with the Commission's conclusion to not revoke the order, cumulated French imports with those of Brazil and India. *Sunset Review* at 13 n.54. The Commission's vote not to revoke the antidumping duty order was three votes in favor of revocation, and three votes opposed. Under the statute, a tie vote results in retention of the antidumping duty order. 19 U.S.C. § 1677(11) (2000).

shifting. *Id.* The U.S. wire rod industry has undergone substantial consolidation since the original investigation, and [ ] capacity in the domestic industry, coupled with declining production, has resulted in significant declines in capacity utilization. *See id.* at 18. The Commission cited the percentage of nonsubject imports in the U.S. market, listed various countries that had duty orders on their imports of wire rod, and referred to the captive consumption percentage of wire rod. *See id.* at 18. Finding that these conditions of competition were "likely to prevail for the reasonably foreseeable future," the Commission then undertook to analyze the volume, price effect, and impact of imports from France against this background. *Id.* at 19.

3. Volume

To analyze whether the likely volume of wire rod imports would be significant if the order is revoked, the statute requires the Commission to assess the volume either in absolute terms, or relative to U.S. production or consumption. *See* 19 U.S.C. § 1675a(a)(2); *Sunset Review* at 11. In the analysis of likely import volume, the Commission acknowledged that it "must consider 'all relevant economic factors,'" including the four specific factors listed in 19 U.S.C. §§ 1675a(a)(2)(A)–(D). *See id.* (quoting 19 U.S.C. § 1675a(a)(2)).

The Commission determined that the import volume of wire rod from France would likely be significant if the countervailing duty order were revoked. *See Sunset Review* at 27. Factors cited by the Commission included U-SI's "significant excess capacity," despite its high level of capacity utilization; U-SI's [ ]; the existence of antidumping duty orders covering a number of other countries importing wire rod into the United States; the fact that French producers doubled exports to the United States during the original investigation's period of review, and could likely do so again if the antidumping duty order were removed; high prices for wire rod in the United States, which make it an attractive market; and the presence of U-SI's affiliated companies in the United States, which are ready customers for U-SI. *See id.* at 27–28.

4. Price Effect

To evaluate the likely price effect, the Commission must "consider whether there is likely to be significant underselling by the subject imports as compared with domestic like products and whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of domestic like products." *Sunset Review* at 11 (citing 19 U.S.C. § 1675a(a)(3)).

The Commission determined that the wire rod imports from France would "likely be priced aggressively and have significant depressing and suppressing effects on the prices of the domestic like product." *Sunset Review* at 29–30. In support of its conclusion, the Commission cited record evidence of the following: underselling by French importers during the original investigation; inelastic demand and elastic supply in the domestic market for wire rod; reports that purchasing decisions were usually based on price; similarity between the proportion of domestic

production that entered the market and competed with subject imports in the sunset review and in the original investigation; and instances of underselling by importers of French wire rod during the sunset review period.[4] *See id.*

5. Impact

The Commission stated it would evaluate the factors enumerated in 19 U.S.C. § 1675a(a)(4), *see supra,* Part II.A, to determine the likely impact of imports of wire rod if the countervailing duty orders were revoked, considered "within the context of the business cycle and the conditions of competition that are distinctive to the industry." *Id.* at 12 (citing 19 U.S.C. § 1675a(a)(4)).

The Commission concluded that revocation of the antidumping duty order on wire rod imports from France would have a significant adverse impact on several aspects of the domestic industry. *See Sunset Review* at 31. Based on its investigation into volume, price effects, and impact, the Commission found "that revocation of the antidumping duty order on [wire rod] imports from France is likely to lead to continuation or recurrence of material injury to the U.S. [wire rod] industry within a reasonably foreseeable time." *Id.*

III. DISCUSSION

A. The Commission's finding that subject imports would likely increase to a significant level is supported by substantial evidence and is in accordance with law.

Plaintiffs maintain that the Commission's determination that French wire rod imports would likely be significant is unsupported by substantial evidence and is not in accordance with law. Plaintiffs argue several points to support their position: the common theme among them is that the Commission incorrectly interpreted the evidence before it. The Commission responds that there is substantial evidence to support its interpretation, and that under the applicable standard of review the Court may not reverse the Commission's determination merely because the plaintiffs' view of the same evidence leads to a contrary conclusion. For the following reasons, the Court finds that there is substantial evidence supporting the Commission's conclusion that French wire rod imports would likely increase to a significant level.

Plaintiffs assert that the Commission erred because (1) the evidence shows that U-SI currently has no excess capacity and will not in the reasonably foreseeable future; (2) U-SI's export history indicates it is not likely to increase exports to the United States; (3) duty orders on other importers of wire rod do not indicate U-SI would increase exports to the United States; (4) the Commission cannot rely on the doubling of imports during the original investigation since that was a product of removal of a voluntary restraint agreement ("VRA"); and (5) U-SI's production efforts are focused on higher-value stainless steel bar and

[4] The Commission considered instances of overselling not to be probative in this investigation since an antidumping duty order was in place. *See Sunset Review* at 30.

wire so that U-SI will not shift to producing wire rod.[5] The Court will consider each argument in turn.

First, plaintiffs claim that U-SI's average capacity utilization rate of [ ] percent is "virtually" full capacity for a wire rod manufacturer. Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Judgment Upon the Agency Record ("Plaintiffs' Memorandum") at 28. Moreover, they note that U-SI's capacity utilization was [ ] percent for the first quarter of 2000, and U-SI has been turning away orders, and argue that U-SI therefore could not increase exports to the United States. *Id.* at 29. Plaintiffs cite several Commission investigations where capacity utilization rates were high, and the Commission concluded that exports would not significantly increase to the United States.[6] *See, e.g., Synthetic Methionine From Japan,* USITC Pub. 3205, Inv. No. AA1921–115 (Review) (July 1999) (significant import volume unlikely because available capacity would not be a significant volume in the U.S. merchant market); *Stainless Steel Plate From Sweden,* USITC Pub. 3204, Inv. No. AA–1921–114 (Review) (July 1999) (high capacity utilization rates mean that Sweden cannot significantly increase export volume to the United States); *Certain Steel Wire Rope From Japan, Korea, and Mexico,* USITC Pub. 3259, Inv. No. 731–TA–547 (Review) (Dec. 1999) (same); *Sugar From the European Union; Sugar From Belgium, France, and Germany; and Sugar and Syrups From Canada,* USITC Pub. 3238, Inv. Nos. 104–TAA–7 (Review), AA1921–198–200 (Review), and 731–TA–3 (Review) (Sept. 1999) (significant import volume unlikely because available capacity would not be significant in the U.S. merchant market).

What these investigations do not represent is a Commission stance that high capacity utilization necessarily means that imports will not increase significantly. Instead, these investigations highlight that the Commission's concern is whether the exporting country's unused capacity represents a significant percent of domestic demand for the products. *See generally* 19 U.S.C. § 1675a(a)(2) (the Commission is to consider unused production capacity to assess import volume in absolute terms or *relative to U.S. production or consumption).* In the instant case, the Commission reasonably concluded that U-SI's excess capacity, when viewed as a percentage of U.S. consumption, was significant.[7] *Sunset Review* at 27. Moreover, the Commission also noted that U-SI plans to [ ] capacity [ ]. *Id.* And plaintiffs' argument that the Commission overlooked evidence that first-quarter of 2000 capacity utilization was [ ] percent merely bolsters the Commission's determination that U-SI is able to operate at capacity levels above "virtually" full capacity of [ ]

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[5] Plaintiffs do not dispute that it is physically possible to shift production from stainless steel bar and wire to wire rod. *See Sunset Review* at 17 n.85.

[6] Plaintiffs' claim that the Commission's determination is not in accordance with law because other sunset reviews with similar circumstances have led to revocation of the duty order; however, other sunset reviews are of limited precedential value, and the real question is whether the unique circumstances of this case constitute substantial evidence supporting the Commission's determination. *See Goss Graphics Systems, Inc. v. United States,* 216 F.3d 1357 (Fed. Cir. 2000)

[7] U-SI's excess capacity was [ ] percent of U.S. consumption in 1999. *Sunset Review* at 27.

percent. For these reasons, the Court concludes that there is substantial evidence to support the Commission's decision that high capacity utilization is not dispositive of the import volume issue. *See Goss Graphics Systems, Inc. v. United States,* 22 CIT 983, 990–91, 33 F. Supp. 2d 1082, 1090–91 (1998), *aff'd Goss Graphics Systems, Inc. v. United States,* 216 F.3d 1357 (Fed. Cir. 2000).

Plaintiffs next challenge the Commission's conclusion that the [ ] in capacity could be utilized to increase export volume to the United States. The statute directs the Commission to consider "any likely increase in production capacity or existing unused production capacity" in the exporting country. 19 U.S.C. § 1675a(a)(2). Plaintiffs insist that the evidence indicates the [ ] capacity would be used to further longstanding relationships with European customers and for further downstream production of higher-valued products by U-SI. As support, plaintiffs point to growing demand in Europe for wire rod, and to the fact that high transportation costs to the United States compared to Europe offset the higher wire rod prices in the United States. The Commission points out, however, that testimony from plaintiffs' witness indicates that prices in the U.S. market are very attractive. *See* Memorandum of Defendant U.S. International Trade Commission in Opposition to Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record ("Defendant's Memorandum") at 26–27; *see generally Sunset Review* at 28. The Commission also found that the European demand for wire rod varied considerably so that growth in European demand did not necessarily lead to the conclusion that [ ] would be shipped to European customers. *See Sunset Review* at 28 n.163. Finally, the Commission observed that [ ] in the downstream bar and wire merchant market meant that U-SI would likely shift production to wire rod, and that [ ] could be used for exporting wire rod. *See* 19 U.S.C. § 1675a(a)(2)(D).

Plaintiffs also claim that the Commission's reliance on U-SI's high percentage of exports as evidence of likely significant export volume to the United States is misplaced. Since [ ] percent of U-SI's exports are to European customers, and only [ ] percent of U-SI's total production is exported to the U.S. market, any excess capacity would be exported to Europe.[8] The Commission reasonably concluded that U-SI's emphasis on exports, [ ] of its production, could be shifted to the U.S. market, and that higher U.S. prices for wire rod would make such a shift likely. *See Sunset Review* at 27 n.159.[9]

An additional factor relied on by the Commission is that existing duty orders cover wire rod producers in Italy, Spain, and Sweden, which compete with U-SI in both the European and domestic markets. Plaintiffs contend that the presence of these orders stabilizes U.S. domestic price, as in *Stainless Steel Plate From Sweden,* and provides protection to the

[8] Plaintiffs do not mention what percentage of U-SI's total exports are to the U.S. market, but it is necessarily less than [ ] percent.

[9] According to the testimony of a U-SI sales manager before the Commission, despite additional costs to sell in the U.S., "[t]oday, the situation is such that there clearly should be an incentive in selling in the U.S." Transcript of Commission's Public Hearing of May 23, 2000, at 180 (Bernard Heritier of U-SI).

domestic wire rod industry. However, as the Commission found, if U-SI's duty order is revoked, it will gain a relative advantage over these exporters in the domestic market, which it lacks in the European market. Therefore, the Commission reasonably found that U-SI exports would likely increase to the United States, in part, on evidence of existing duty orders on countries that compete with U-SI. *See Sunset Review* at 28 n.160.

Plaintiffs next attack the Commission's reliance on the rapid expansion of French wire rod imports during the original investigation as an indicator of likely behavior if the antidumping duty order were removed. The plaintiffs argue that this conclusion is erroneous because U-SI lacks the excess capacity which makes a rapid expansion of exports practically impossible. Plaintiffs point out that the rapid increase in exports of wire rod to the United States during the original investigation, from 1991 to 1992, was the result of several factors, including the expiration of a voluntary restraint agreement; U-SI's recent acquisition of a U.S. subsidiary which initially needed to import a high volume of U-SI wire rod; and U-SI's lower capacity utilization during the original investigation. U-SI also notes that its exports to the U.S. market have remained steady in recent years, as evidenced by a comparison of the first quarter of 1999 to the first quarter of 2000.

The Court concludes that the Commission did not unreasonably give weight to evidence of increased imports from France during the original investigation. To the contrary, the statute directs the Commission to consider the original investigation in its sunset review, particularly because "this period is the most recent time during which imports of subject merchandise competed in the U.S. market free of the discipline of an order agreement." Statement of Administrative Action, H.R. Rep. No. 103–316, Vol. I, at 884 (1994). The Commission may have reasonably concluded that the removal of the antidumping duty order would increase imports in the United States, in the same manner that removal of the VRA during the period of review in the original investigation resulted in increased imports. In addition, both of U-SI's U.S. affiliates reported [ ] of wire rod from U-SI in 1999 over 1997, which fact supports the Commission's reasonable determination of a likely increase in imports.

Plaintiffs' final disagreement with the Commission's determination is that the Commission discounted evidence that U-SI's wire rod production was directed towards captive consumption to produce higher valued products, namely stainless steel bar and wire. Plaintiffs charge that this analysis is erroneous because the absolute proportion of captive consumption to production is irrelevant, and that the Commission should focus instead on the [ ] ratio of captive consumption to production. Plaintiffs also claim that [ ] is irrelevant because the sale of downstream products is still more profitable to U-SI than selling wire rod on the open market. The Commission discounted this evidence because U-SI internally consumes [ ] its production of wire rod, and there was [ ]

of down stream production of stainless steel bar and wire from 1998 to 1999. The Court finds that the Commission reasonably interpreted evidence of U-SI's captive consumption. Therefore, the Commission's determination that French wire rod imports would likely be significant is supported by substantial evidence and is in accordance with law.

B. The Commission's finding that subject imports would likely have significant depressing and significant price suppressing effects on prices of the domestic like product, is supported by substantial evidence and is in accordance with law.

Plaintiffs' argue that the Commission's price effect determination is not supported by substantial evidence and is contrary to law. The Statute directs the Commission to evaluate the "price effect," determined by considering whether "there is likely to be significant price underselling by imports * * * as compared to domestic like products," and whether "imports of the subject merchandise are likely to enter the United States at prices that otherwise would have a significant depressing or suppressing effect on the price of domestic like products." 19 U.S.C. § 1675a(a)(3). The Commission answered in the affirmative and based its conclusion on several factors: "the likely significant volume of imports, the high level of substitutability of the subject imports, the commodity-type nature of the product, the limited change in demand in response to price, the current underselling with an order in place, and the underselling by the imports in the original investigation * * *." *Sunset Review* at 30.

With respect to the first factor, plaintiffs refer to their previous argument regarding volume, and conclude that without substantial evidence of likely significant import volume, the Commission could not find that there would be significant price underselling by French imports of wire rod. For the reasons discussed above, *supra,* Part III.A, there is substantial evidence to support the Commission's finding of likely significant import volume. Therefore, the Commission acted reasonably in basing its conclusion of price effect, in part, on likely significant import volume.

The second factor plaintiffs challenge is the Commission's reliance on current underselling of French wire rod under the existing antidumping duty order. *See Sunset Review* at 29. The Commission found evidence of underselling in 8 of 21 price comparisons during the period of review for the sunset review, and dismissed evidence of overselling under the existing antidumping duty order as not probative of likely pricing behavior if the antidumping duty order were removed. Plaintiffs find this conclusion "incredibl[e]" since the evidence showed more instances of overselling than underselling, and the average unit values ("AUV") of French imports are $375 greater than the AUV of U.S. products in the first quarter of 2000. Plaintiffs' Memorandum at 44.

The Commission describes its consideration of underselling and overselling from a different perspective. Despite equal instances of price underselling and overselling in the original investigation, and increasing demand in the U.S. wire rod market, the price of the most common

grade of wire rod declined by nearly 15 percent and the domestic price of French imports decreased by an even greater percentage. During the period of review for the sunset review, the Commission considered additional evidence, including the likely significant volume of imports from France, the high substitutability between French imports and the domestic like product, and a likely limited increase in demand to offset a decrease in price of wire rod.[10] *Sunset Review* at 29.

Regarding AUV's, the Commission found that wire rod is produced in a variety of sizes and grades, which arguably supports its decision to disregard the AUV's. *See Sunset Review* at 3–4. The Court cannot ascertain from the *Sunset Review* if that was why the Commission did not consider the AUV's, but the Commission did act reasonably not to consider AUV's since the product mix of wire rod varied among the comparisons.[11] *See Sunset Review* at 3–4 & n.20, *Allegheny Ludlum Corp. v. United States,* 25 CIT ____, ____, 116 F. Supp.2d 1276, 1287 (2000) *vacated on other grounds by* 287 F.3d 1365 (Fed. Cir. 2002). For the foregoing reasons, the Court finds that the Commission's determination that significant price suppressing and depressing effects are likely is supported by substantial evidence and is in accordance with law.

C. The Commission's finding of significant adverse impact on the domestic industry is supported by substantial evidence and is in accordance with law.

Section 1675a(a)(4) of the statute requires the Commission to consider all relevant economic factors to determine whether revoking the antidumping duty order will likely result in a significant adverse impact on the domestic industry, and specifically lists several factors the Commission "shall" consider, including market share, utilization of capacity, and wages.[12] No one factor is dispositive. 19 U.S.C. § 1675a(a)(1). These factors are to be evaluated "within the context of the business cycle and the conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1675a(a)(4). U-SI claims that the Commission contravened this subsection in two respects, first by not finding certain record evidence together with prior sunset reviews to be dispositive, and second by failing to consider all of the enumerated specific factors under § 1675a(a)(4).

1. Prior Sunset Reviews Do Not Provide Dispositive Evidence of Consistent Agency Practice

According to plaintiffs, the Commission erred because certain record evidence present in the instant case was present in other sunset reviews wherein the Commission had found revocation of the duty orders ap-

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[10] The Commission had evidence before it of high price elasticity of supply, relatively inelastic demand, and that a majority of domestic purchasers of wire rod based their purchasing decisions primarily on price. *See Sunset Review* at 29. This evidence reasonably led the Commission to conclude that any increase in supply to the market will not cause the quantity demanded to increase but will cause prices to fall.

[11] The Commission notes in its cumulation discussion that "average unit values of [wire rod] from France have been much higher than those for [wire rod] from India, reflecting differences in pricing practices and product mix." *Sunset Review* at 16. This further suggests that the Commission was aware that AUV's were of little probative value in price effect analysis since the AUV's also reflected different product mixes.

[12] See Part II.A, *supra,* for the relevant statutory language.

propriate. Specifically, the plaintiffs refer to evidence of: consolidation of the domestic wire rod industry; substantial investment by the domestic wire rod industry; a high level of captive consumption by the domestic wire rod industry; growing domestic and worldwide demand for wire rod; lack of capacity on the part of the domestic wire rod industry to fully supply the U.S. market; and pre-existing orders that cover most of the non-French imports of wire rod. Plaintiffs then cite to sunset reviews where the record evidence contained one or more of the aforementioned pieces of evidence, and the Commission revoked the orders. *See, e.g., Certain Steel Wire Rope From Japan, Korea, and Mexico,* USITC Pub. 3259, Inv. Nos. AA1921–124 and 731–TA–546–547 (Reviews) (Dec. 1999) (Commission cited to market consolidation and capital expenditures in revoking the order); *Color Picture Tubes From Canada, Japan, Korea, and Singapore,* USITC Pub. 3291, Inv. No. 731–TA–367–370 (Review) (Apr. 2000) (evidence of high level of captive consumption was a factor in the Commission's determination that there was no likely volume impact); *Stainless Steel Plate From Sweden,* USITC Pub. 3204, Inv. No. AA1921–114 (Review) (July 1999) (increasing U.S. demand would absorb any increase in imports from Sweden, so that the U.S. industry was not adversely affected); *Carbon Steel Wire Rod From Argentina,* USITC Pub. 3270, Inv. Nos. 701–TA-A (Review) and 731–TA–157 (Review) (Jan. 2000) (evidence that U.S. industry couldn't fully supply the domestic market factored into the Commission's determination to revoke the order). *But see, e.g., Carbon Steel Butt-Weld Pipe Fittings From Brazil, China, Japan, Taiwan, and Thailand,* USITC Pub. 3263, Inv. Nos. 731–TA–308–310 and 520–521 (Review) (Dec. 1999) (market consolidation was partly relied on by Commission in deciding not to revoke duty order); *Cased Pencils From China,* USITC Pub. 3328, Inv. No. 731–TA–669 (Review) (July 2000) (reduced prices would not stimulate additional demand and thus domestic industry would be materially injured); *Sulfuric Acid From China and India,* USITC Pub. 3301, Inv. Nos. 701–TA–318 (Review) and 731–TA–538 and 561 (Review) (May 2000) (despite capital expenditure by domestic producers, revocation of order would result in a substantial adverse impact on the domestic industry); *Internal Combustion Industrial Forklift Trucks from Japan,* USITC Pub. 3287, Inv. No. 731–TA–377 (Review) (April 2000) (increasing U.S. demand for product has not led to increased U.S. production); *see also Polyethylene Terephthalate (Pet) Film from Korea,* USITC Pub. 3278, Inv. No. 731–TA–459 (Review) (Feb. 2000). Still, plaintiffs assert that in light of "the record evidence and prior [sunset review] determinations," the only reasonable conclusion is that injury to the domestic industry cannot continue or recur. Plaintiffs' Memorandum at 19.

Plaintiffs' argument fails for several related reasons. First, there is limited precedential value in sunset reviews since each case presents unique interactions of the economic variables the Commission considers. *See USEC, Inc. v. United States,* 25 CIT ____, ____, 132 F. Supp. 2d 1, 14 (2001); *Ranchers-Cattlemen Action Legal Foundation v. United*

States, 23 CIT 861, 891, 74 F. Supp. 2d 1353, 1379 (1999). What U-SI does not explicitly request, but is essentially asking, is for the Court to find that the Commission is departing from consistent agency practice. "An action by the ITC becomes an 'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure." *Ranchers-Cattlemen,* 23 CIT 884–85, 74 F. Supp. 2d at 1374. It is difficult to establish agency practice in sunset reviews since the presence of a specific factor in a prior sunset review is not dispositive of how a factor is interpreted in the current sunset review, or of the ultimate decision on whether to revoke the order. Therefore, the Court's inquiry here is whether there is a rational basis in fact for the Commission's determination. *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 58–59, 785 F.2d 994, 1004 (1986).

To the extent that exporters challenging sunset reviews are able to demonstrate the existence of a consistent agency practice notwithstanding the intrinsic variability of each such review, plaintiffs in the instant case have clearly failed to do so here. For each case that plaintiffs cite where the Commission found one of the aforementioned factors persuasive in revoking an order, there are other cases where the Commission did not find that same factor sufficiently persuasive to revoke an order. For these reasons, the Commission's determinations in other sunset reviews did not mandate revocation of the antidumping duty order in the present case.

2. The Commission Adequately Considered the Economic Factors

U-SI asserts that the Commission erred as a matter of law by not considering the factors found in 19 U.S.C. § 1675a(a)(4)(A)–(C).[13] The plaintiffs maintain that the Commission addressed the impact of revoking the antidumping duty order in one brief paragraph that does not satisfy the Statute. In that paragraph, the Commission stated:

> We have concluded that revocation of the antidumping duty order on [wire rod] from France would likely lead to a significant increase in the volume of subject imports that would undersell the domestic like product and significantly suppress or depress U.S. prices. We also find that the volume and price effects of the subject imports would likely have a significant adverse impact on the production, shipments, sales, market share, and revenues of the domestic industry. This reduction in the industry's production, shipment,

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[13] The subsection states:

> In evaluating the likely impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated, the Commission shall consider all relevant economic factors which are likely to have a bearing on the state of the industry in the United States, including, but not limited to—
>
> (A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
>
> (B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
>
> (C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.
>
> The Commission shall evaluate all relevant economic factors described in this paragraph within the context of the business cycle and the conditions of competition that are distinctive to the affected industry.

19 U.S.C. §§ 1675a(a)(4).

> sales, market share, and revenues would adversely impact the industry's profitability and ability to raise capital and maintain necessary capital investments. We therefore find that revocation of the antidumping duty order on [wire rod] imports from France is likely to lead to continuation or recurrence of material injury to the U.S. [wire rod] industry within a reasonably foreseeable time.

Sunset Review at 31. While this paragraph is certainly a cursory statement of conclusions regarding several of the factors set forth in § 1675a(a)(4), it does not represent the full extent of the Commission's discussion of those factors. The Commission also incorporated its analysis of the domestic industry on pages 23–25 of the *Sunset Review* by reference. *Sunset Review* at 30 ("As discussed above * * *" and "[a]s we noted * * *" both refer to the conclusions reached in the analysis of the domestic industry on pages 23–25 of the *Sunset Review.).* In that discussion the Commission analyzed the domestic industry, taking into account its original investigation, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the antidumping duty order was issued. *Sunset Review* at 23–25. In particular, the Commission stated that during the original investigation it had "concluded that the lower prices of the subject imports enabled them to increase market share in an expanding market at the expense of the domestic producers, leading to declines in domestic prices, domestic market share, production, shipments, and profitability." *Sunset Review* at 23.

The Commission also found that the domestic industry is in the same situation it was prior to the original investigation, when dumped imports led to a lower market share for the domestic industry, and consequently declines in domestic prices, production, shipments and profitability.[14] In discussing the likely impact of subject imports on the domestic industry if the duty order were revoked, the Commission stated that it discounted the significance of evidence that demand for wire rod is expanding by noting that "similar circumstances during the original investigation did not prevent dumped imports from France from capturing market share at the expense of the domestic industry." *Sunset Review* at 30–31. In light of these declines, the Commission concluded that the industry's ability to raise capital and maintain necessary capital investments would also decline.

Against the backdrop of the Commission's disjunctive analysis of the factors from 19 U.S.C. §§ 1675a(a)(4), the plaintiffs' object that the Commission did not discuss all of the factors, including the negative effects on cash flow, inventories, employment, wages, return on investments, and existing development and production efforts of the industry. However, the Statute directs the Commission to consider only the likely declines of these factors in the domestic industry, and the presence or

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[14] The statute requires the Commission to consider the original investigation in determining whether the material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked. 19 U.S.C. § 1675a(a)(1)(A).

absence of any factor is not decisive. *See* 19 U.S.C. § 1675a(a)(5). The Court assumes that since the Commission did not mention the other factors that the Commission did not view declines in these factors as likely. Because no single factor is dispositive, the Commission is not required to discuss every factor it considered when it cites to substantial evidence to support its determination. *Cf. Goss Graphics Systems, Inc. v. United States,* 216 F.3d 1357, 1362–63 (Fed. Cir. 2000) (within the context of the Commission "addressing" several of the factors required in its analysis, the Court found there was substantial evidence supporting the Commission's determination). Therefore, the Commission did not err as a matter of law by not mentioning all of the factors listed in 19 U.S.C. § 1675a(a)(4).

Additionally, the plaintiffs maintain that the Commission was required to forecast the quantity of imports and the degree of underselling and price suppression/depression in order to determine the impact of French imports of wire rod on the domestic industry. That level of precision is not required in sunset reviews, as the statute requires the Commission to determine "the likely impact of imports" on the domestic industry. *See* 19 U.S.C. § 1675a(a)(4). Furthermore, § 1675a(a)(6) gives discretion to the Commission to consider the degree of underselling. 19 U.S.C. § 1675a(a)(6) ("the Commission *may* consider the magnitude of the margin of dumping") (emphasis added). As the Federal Circuit explained:

> In no case will the Commission ever be able to rely on concrete evidence establishing that, in the future, certain events will occur upon revocation of an antidumping order. Rather, the Commission must assess, based on currently available evidence and on logical assumptions and extrapolations flowing from that evidence, the likely effect of revocation of the antidumping order on the behavior of importers.

Matsushita Elec. Indus. Co., Ltd. v. United States, 3 Fed. Cir. (T) 44, 750 F.2d at 927, 933 (1984). Therefore, the Commission's impact determination is supported by substantial evidence and in accordance with law.

D. Commissioner Bragg's determination to cumulate subject imports from France with subject imports from Brazil and India is supported by substantial evidence and is in accordance with law.

Under the statute the Commission may cumulate imports from subject countries if the sunset reviews were initiated on the same day, the Commission determines that there is a reasonable overlap in competition between imports from the subject countries and between the subject imports and the domestic like product, and the Commission does not find that the subject imports are likely to have no discernible adverse impact on the domestic industry. 19 U.S.C. § 1675a(a)(7). In the present sunset review, five Commissioners, including Commissioner Bragg, found that the three above requirements were met so that the Commission could exercise its discretion and cumulate imports. *See Sunset Review* at 1, n.1, and 29, n.59. While the Commission declined to cumulate

on other grounds, see Part II.B.1, *supra,* Commissioner Bragg decided to cumulate imports of wire rod from India, Brazil, and France in her sunset review analysis.

Plaintiffs challenge the Commission's finding that the adverse impact provision was satisfied, i.e. the determination that the Commission could not conclude that there would likely be no discernible adverse impact. The plaintiffs' hope is that if the Court rejects the Commission's conclusion on that adverse impact provision, then Commissioner Bragg cannot cumulate imports for purposes of the sunset review analysis, and thus Commissioner Bragg would have to reconsider her vote not to withdraw the duty order.

In discussing the adverse impact provision, the Commission referenced its discussion in the volume, price effect, and impact provisions of the *Sunset Review* as its reasoning.[15] Since the Court found that the Commission's determinations of volume, price effect, and impact were in accordance with law and supported by substantial evidence, the Court holds that the Commission's determination that it could not conclude there would likely be no discernible adverse impact on the domestic industry was likewise supported by substantial evidence and in accordance with law.

The plaintiffs also argue that Commissioner Bragg's determination to cumulate imports from France, India, and Brazil was an abuse of discretion, and unfairly penalized France for Brazil and India's failures to participate in the sunset review.

First, Commissioner Bragg did not abuse her discretion by cumulating imports. As discussed above, it was within the Commission's discretion to cumulate imports because the requirements of § 1675a(a)(7) were met. There is no exception for cumulation in the statute based on non-participation in the sunset reviews. There is an express exception to cumulation under the adverse impact provision, and the Court declines to create an implied exception for non-participation when Congress clearly delineated the exceptions it intended under the Statute.[16]

There is also no evidence that France was unfairly penalized for the lack of participation by other parties. There is no evidence that Commissioner Bragg took any adverse inferences. The Commission stated that because a number of parties did not participate in the sunset review, the Commission "relied on the facts available * * * which consist primarily of the evidence in the record from the Commission's original investigations, the information collected by the Commission since the institution of these review, and information submitted by the domestic producers

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[15] The cumulation analysis in the Commission's opinion is disjointed. The decision to cumulate analytically comes before the analysis of volume, price effect, and impact. The Commission references the later discussions of volume, price effect, and impact to support its decision to cumulate. However, since the Commission's opinion analyzed the volume, price effect, and impact of imports from France separately from Brazil and India, that analysis can form the support for its determination that the adverse impact provision does not apply to prevent cumulation. *See Angus Chemical Co. v. United States,* 140 F.3d 1478, 1486 (Fed. Cir. 1998) (the Commission's findings do not need to be discussed in a particular place in the opinion).

[16] Cumulation is expressly forbidden if the Commission cannot find that there would likely be no discernible adverse impact to the domestic industry. 19 U.S.C. § 1675a(a)(6).

and other parties in these reviews." *Sunset Review* at 10–11. Therefore, Commissioner Bragg's determination to cumulate imports from France, India, and Brazil was not an abuse of discretion and did not unfairly penalize France for the non-participation of India and Brazil.

IV. CONCLUSION

For all of the foregoing reasons, the Court sustains the Commission's *Sunset Review.* A separate order will be entered accordingly.

(Slip Op. 02–80)

BROTHER INTERNATIONAL CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 00–01–00007

[Summary judgment ordered for plaintiff.]

(Dated July 31, 2002)

Barnes, Richardson & Colburn *(Sandra Liss Friedman),* for plaintiff Brother International Corp.

Robert D. McCallum, Jr., Assistant Attorney General, *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Barbara M. Epstein),* for defendant United States.

OPINION

GOLDBERG, *Senior Judge:* This case is before the Court upon cross-motions for summary judgment. At issue is the proper tariff classification of a part, styled model number "PC 101," used in certain multifunction center ("MFC") machines and facsimile machines. The plaintiff importer, Brother International Corp. ("Brother"), which manufactures the MFC and facsimile machines that use the PC 101, claims that the subject merchandise should be classified under subheading 8473.30.50 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1998), and may be entered duty free. The United States Customs Service ("Customs") argues that the subject merchandise should be classified under subheading 3702.44.00, HTSUS, dutiable at a rate of 3.7% *ad valorem*. For the reasons that follow, the Court finds that there are no material facts in dispute and that the subject merchandise must be classified under subheading 8473.30.50, HTSUS, and accordingly grants summary judgment for Brother.

I. BACKGROUND

The PC 101 is a part, commonly labled a "printing cartridge,"[1] that consists of a plastic housing with two gears on each side. Inside the plastic housing is a roll of chemically treated polyethylene terephthalate ("PET") film, mounted on a feed spool and attached to an uptake spool. The PC 101 is specifically designed and constructed to be used in four models of MFC machines[2] and five models of facsimile machines manufactured and sold by Brother. When the PC 101 has been inserted into an appropriate MFC machine, and the machine receives a command to print, the gears of the PC 101 interact with those of the MFC machine to advance and position the roll of PET film. The MFC machine's thermal print head then heats the PET film, thereby transferring the film's chemicals to plain paper in a pattern that creates the characters and images desired by the user. Without the PC 101 installed, none of the aforementioned MFC or facsimile machines could function in their intended manner, as they would be unable to print.

Between January and March of 1998, Brother entered four shipments of the subject merchandise at the port of Los Angeles. In January 1999, Customs liquidated the entries, classifying the merchandise as "* * * [p]arts of facsimile machines: [o]ther," under subheading 8517.90.08, HTSUS, dutiable at 2.4% *ad valorem*. Brother filed timely protests, claiming that the subject merchandise should be classified as "[p]arts and accessories * * * suitable for use solely or principally with * * * machines of heading 8471: [n]ot incorporating a cathode ray tube: [o]ther," under subheading 8473.30.50, HTSUS. Brother argued that the PC 101 was principally used in MFC machines rather than facsimile machines, and that the MFC machines that used the PC 101 were similar in all respects to another Brother MFC machine that Customs Headquarters had previously ruled classifiable under heading 8471. *See* U.S. Customs Service Headquarters Ruling 961153 (March 30, 1998). Customs denied the protests.

Brother paid all liquidated duties before timely commencing this action. In its response to Brother's Complaint, Customs filed a counterclaim in which it alleged that the subject merchandise is properly classified under subheading 3702.44.00, HTSUS, as "[p]hotographic film in rolls, sensitized, unexposed, of any material other than paper, paperboard or textiles * * * without perforations * * * [o]f a width exceeding 105mm but not exceeding 610mm," dutiable at a rate of 3.7% *ad valorem*. Both parties moved for summary judgment.

The Court has jurisdiction under 28 U.S.C. §§ 1581(a) and 1583.

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[1] Customs emphatically denies that the PC 101 is accurately characterized as a "printing cartridge," and instead refers to the PC 101 as a "'PET' film roll in a plastic housing." Def.'s Response to Pl.'s Statement of Material Facts Not in Dispute ("Def.'s Undisputed Facts"), ¶¶ 4, 6. The Court observes from Customs's own exhibits, however, that the PC 101 is consistently described as a "printing cartridge" in its packaging and promotional literature. *See, e.g.,* Def.'s Ex. A–4 (cardboard box); Def.'s Ex. C (catalog). Of course, such labeling is not dispositive of the issue of the proper tariff classification of the merchandise.

[2] MFC machines typically combine the functions of a printer, digital copier, digital scanner, and facsimile machine.

II. DISCUSSION

A. Standard of Review

Summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." U.S.C.I.T. R. 56(c). "The proper scope and meaning of a tariff classification term is a question of law to be reviewed *de novo,* while determining whether the goods at issue fall within a particular tariff term as properly construed is a question of fact." *Franklin v. United States,* 289 F.3d 753, 757 (Fed. Cir. 2002) (citations omitted). That the latter determination is a question of fact does not preclude an award of summary judgment "when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb, Inc. v. United States,* 148 F.3d 1363, 1365 (Fed. Cir. 1998). Thus, the Court must grant summary judgment where the "nature and use" of the subject merchandise is not in dispute, *id.* (quoting *Nissho Iwai Am. Corp. v. United States,* 143 F.3d 1470, 1472–73 (Fed. Cir. 1998)), or where "none of the pertinent characteristics of the merchandise is in dispute, and thus the sole issue is a matter of properly interpreting the classification term at issue * * * to determine whether the scope of that term is broad enough to encompass the items with the particular characteristics." *Bausch & Lomb,* 148 F.3d at 1365 (ellipsis in original) (quoting *IKO Indus., Ltd. v. United States,* 105 F.3d 624, 626–27 (Fed. Cir. 1997)).

Customs's classification decisions enjoy a statutory presumption of correctness. 28 U.S.C. § 2639(a)(1) (2000). Citing *Tomoegawa USA, Inc. v. United States,* 12 CIT 112, 681 F. Supp. 867 (1988), *aff'd in part* 7 Fed. Cir. (T) 29, 861 F.2d 1275 (1988), and *Universal Elecs., Inc. v. United States,* 20 CIT 337 (1996), *aff'd* 112 F.3d 488 (Fed. Cir. 1997), Brother argues that Customs's classification is not entitled to this presumption in the instant case, because Customs has admitted that its initial classification of the subject merchandise was erroneous.

If the Court were to find that material facts were sufficiently in dispute as to preclude an award of summary judgment, Brother would be correct. Instead, Brother's argument is moot, for "when the Court is presented with a question of law in a proper motion for summary judgment, th[e statutory] presumption [of correctness] is not relevant." *Marathon Oil Co. v. United States,* 24 CIT ____, ____, 93 F. Supp. 2d 1277, 1279 (2000). The statutory presumption of correctness is simply "a procedural device that is designed to allocate, between the two litigants in a lawsuit, the burden of producing *evidence* in sufficient quantity." *Universal Elecs. Inc. v. United States,* 112 F.3d 488, 492 (Fed. Cir. 1997). "[W]ith respect to pure questions of law, such as the proper interpretation of a particular tariff provision or term[,] * * * the importer has no duty to produce *evidence* as to what the law means because evidence is irrelevant to that legal inquiry." *Id.* Thus, in a case such as this one, where the Court determines that there are no material facts in dispute,

Customs's proposed classification is not entitled to the statutory presumption of correctness.[3]

However, there exists an important distinction between a presumption of correctness, which is a procedural device that allocates evidentiary burdens between two parties to a litigation, and the notion of deference, which is governed by standards of review. *See Universal Elecs.,* 112 F.3d at 493. The Court does owe deference to Customs's classification rulings "in accordance with the principles set forth in *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)." *Franklin,* 289 F.3d at 757 (citing *United States v. Mead Corp.,* 533 U.S. 218, 234–35 (2001); *Mead Corp. v. United States,* 238 F.3d 1342, 1346 (Fed. Cir. 2002)). The Court of International Trade gives deference to Customs's classification rulings proportional to their "power to persuade," *Mead,* 533 U.S. at 235 (quoting *Skidmore,* 323 U.S. at 140), in accordance with their "thoroughness, logic and expertness, [ ] fit with prior interpretations, and any other sources of weight." *Mead,* 533 U.S. at 235. That Customs has abandoned its original classification of the subject merchandise, and now advances another in its litigation briefs, is certainly one factor the Court is entitled to consider in assessing the persuasive power of Customs's proposed classification.

B. The Parties' Arguments

Brother claims that the PC 101 is *prima facie* classifiable under heading 8473 of the HTSUS as a "[p]art[] * * * suitable for use solely or principally with machines of headings 8469 to 8472." Brother argues that the PC 101 is a "part" because it is integral to the successful functioning of the machines in which it is used, and that unrebutted evidence proves it is used "principally" with MFC machines, which are classifiable under heading 8471.[4]

Citing *Bauerhin Techs. Ltd. P'ship v. United States,* 110 F.3d 774 (Fed. Cir. 1997), Brother observes that an imported item is classifiable as a part if it passes *either* of two tests: (1) it is an "integral, constituent, or component part, without which the article to which it is to be joined, could not function as such article," *id.* at 779 (quoting *United States v. Willoughby Camera Stores, Inc.,* 21 CCPA 322 (1933)), or (2) it is "dedicated solely for use with another article." *Bauerhin,* 100 F.3d at 779 (citing *United States v. Pompeo,* 43 CCPA 9 (1955)). Brother claims that the

[3] The Court recognizes that this determination contravenes certain language in a recent Court of International Trade decision suggesting otherwise. *See Rubie's Costume Co. v. United States,* 26 CIT ___, ___, 196 F. Supp. 2d 1320, 1325 (2002) ("Where [ ] there are no material facts in dispute and only questions of law remain, Plaintiff must show legal error to overcome the statutory presumption of correctness."). In so holding, *Rubie's Costume* relied on *Commercial Aluminum Cookware Co. v. United States,* 20 CIT 1007, 1013, 938 F. Supp. 875, 881 (1996). However, the holding of *Commercial Aluminum* on this point is disfavored. *See Rollerblade, Inc. v. United States,* 112 F.3d 481, 484 (Fed. Cir. 1997) ("Customs' and the Court of International Trade's (in *Commercial Aluminum)* interpretation of § 2639 is inconsistent with our precedent * * *."); *Verosol USA, Inc. v. United States,* 20 CIT 1251, 1252 n.5, 941 F. Supp. 139, 141 n.5 (1996) ("Were the *Commercial Aluminum* rule followed, the responsibility of the Court of International Trade to interpret tariff terms would be greatly curtailed; no longer determined *de novo* by the court, the meaning of tariff terms would instead depend on the quality of the advocacy of the litigant challenging Customs' interpretation.").

[4] Customs has approved protests for each of the MFC models that use the PC 101, classifying them under subheading 8471.60.6500, HTSUS. Pl.'s Statement of Material Facts Not in Dispute Pursuant to R. 56(h) ("Pl.'s Material Facts"), ¶ 15; Def.'s Material Facts, ¶ 15. Although Customs argues that Brother has failed to establish that the PC 101 is principally used in MFC machines, rather than in facsimile machines (which are *not* classifiable under headings 8469 to 8472), Customs does not argue that MFC machines are not properly classifiable under heading 8471.

PC 101 passes both tests. It is an integral part of MFC machines because without the PC 101, such machines could not function in their intended roles as they would lack the means to create a printed image, and would instead display an error message instructing the user to insert a PC 101 cartridge. Brother claims that the PC 101 also passes the second *Bauerhin* test because it is dedicated solely for use with MFC and facsimile machines, and has no other legitimate or fugitive uses.[5]

In response to Customs's argument that the PC 101 is classifiable as photographic film because it contains a roll of PET film, Brother directs the Court's attention to the decision of the Court of Appeals for the Federal Circuit in *Mita Copystar America v. United States,* 160 F.3d 710 (Fed. Cir. 1998). In that case, the Federal Circuit reversed this Court's classification of toner cartridges for photocopier machines as "chemical preparations for photographic uses," under subheading 3707.90.30. Instead, the *Mita* court held that such cartridges were properly classified as "parts and accessories of electrostatic photocopying apparatus," under subheading 9009.90.00, *id.* at 714, notwithstanding the fact that the toner contained within the cartridges was itself classifiable as "chemical preparations for photographic uses" when imported separately. *Id.* at 712. The court reasoned that the cartridges were parts of photocopier machines because they "are sold with toner inside; they remain with the toner throughout its use by the photocopier; they are the standard device for providing toner to the photocopier; and they are not designed for reuse." *Id.* at 712–13. Observing that Note 2(b) to Chapter 90 of the HTSUS required that parts of particular machines "are to be classified * * * with the machines of that kind," and that neither the chapter nor heading notes governing heading 3707 required goods classifiable under that heading to be classified thus, the court held that the cartridges should be classified as photocopier parts. *Id.* at 713–14. Brother argues that *Mita* governs the resolution of the instant case because: (1) the toner in the cartridges in *Mita* is analogous to the PET film roll in the PC 101; and (2) Note 2(b) of Section XVI (which subsumes heading 8473) of the HTSUS requires parts classifiable under heading 8473 to be classified within that heading, just as did the Chapter Note in *Mita.*

Customs claims that the PC 101 is *prima facie* classifiable under heading 3702 of the HTSUS as "[p]hotographic film in rolls, sensitized, unexposed, of any material other than paper, paperboard, or textiles." Citing *QMS, Inc. v. United States,* 19 CIT 551 (1995), in which the Court of International Trade held that rolls of PET film were classifiable as "photographic film" under heading 3702, Customs argues that the PC 101 is likewise classifiable under heading 3702 because it is simply a roll of PET film in plastic housing. Customs argues that whatever the merits of

[5] While contesting their legal relevance, Customs admits the essential accuracy of these characterizations of the PC 101's functions. *See* Def.'s Material Facts, ¶ 8 (admitting PC 101 is involved in the printing process), ¶ 10 (admitting without the PC 101 installed, none of the MFC machines could function in their intended manner as they would be unable to print), ¶ 11 (admitting that the PC 101 is "designed and constructed to be used" in Brother's MFC and facsimile machines).

Brother's proposed classification of the PC 101 as a part, because the *QMS* court found that "photographic film" under heading 3702 was a more specific description than "parts and accessories" under heading 8473, *see id.* at 561, 563, this court is obliged by principles of *stare decisis* to classify the PC 101 under subheading 3702.44.00.

C. The PC 101 Is Classifiable Under Subheading 8473.30.50

In determining the proper classification of imported merchandise, the Court is guided by the General Rules of Interpretation ("GRI") of the HTSUS and the Additional United States Rules of Interpretation. *See Franklin v. United States,* 289 F.3d 753, 757 (Fed. Cir. 2002). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes * * *." The GRI must be applied in numerical order, *see North Am. Processing Co. v. United States,* 236 F.3d 695, 698 (Fed. Cir. 2001); thus, if the application of GRI 1 provides the proper classification, the Court may not consider any of the subsequent GRI. *See Mita,* 160 F.3d at 712.

1. The PC 101 is a "part"

For the PC 101 to be classifiable under heading 8473, Brother must first establish that it is a "part." The PC 101 has the indicia of a part, notwithstanding the fact that it contains a roll of PET film that would otherwise be classifiable as "photographic film[]" if imported separately. The PC 101 is sold with the PET film inside; the PC 101 remains with the PET film throughout its use by the MFC and facsimile machines; and the PC 101 is the standard device for providing the MFC or facsimile machines with the PET film that is required for them to be able to print images on paper. *Cf. Mita,* 160 F.3d at 712–13.[6] Moreover, as Brother argues, the PC 101 comports with the definitions of parts set forth in *Bauerhin Techs. Ltd. P'ship v. United States,* 110 F.3d 774 (Fed. Cir. 1997). First, the PC 101 is an integral part of the MFC and facsimile machines that use it, for these machines cannot function in their intended capacity unless the PC 101 is properly inserted, as they would lack the means to create a printed image. *Cf. id.* at 779 (citing *United States v. Willoughby Camera Stores, Inc.,* 21 CCPA 322 (1933)). And second, the cartridge is exclusively designed and constructed for use in Brother's MFC and facsimile machines. *Cf. Bauerhin,* 110 F.3d at 779 (citing *United States v. Pompeo,* 43 CCPA 9 (1955)); *see also infra* Part II.D.2. In light of *Mita* and *Bauerhin,* the Court concludes that the PC 101 is a "part" within the meaning of the tariff statutes.

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[6] The PC 101, unlike the toner cartridges at issue in *Mita,* is apparently capable of reuse. *See* Def.'s Ex. C (advertising refill rolls of PET film for the PC 101). In light of the other indicia that the PC 101 is a part, the Court does not understand the PC 101's suitability for reuse to preclude a determination that it is a part. The reuse provision in *Mita* was derived from *Bruce Duncan Co., Inc. v. United States,* 63 Cust. Ct. 412 (1969), but in that case the court focused on the imported butane cartridges' incapacity for reuse in order to distinguish them from ordinary shipping containers holding butane. In light of the especial design, including gears, of the PC 101's plastic housing, Customs cannot and does not contend that it is merely a shipping container.

Neither does the possibility that the refill rolls, imported individually, might be properly classified as "photographic films" require a contrary result. It is axiomatic that the classification of imported articles is determined by their condition at the time of importation. *See, e.g., Donalds Ltd. v. United States,* 32 Cust. Ct. 310, 314 (1954).

2. Brother's uncontroverted evidence establishes that the PC 101 is principally used in MFC machines

Customs argues that even if the PC 101 may be considered a "part," the Court cannot find that it falls within the ambit of heading 8473 because the determination of whether the PC 101 is "principally used" with machines of heading 8471, *i.e.,* MFC machines rather than facsimile machines, is a factual determination not amenable to disposition on summary judgment. The Court finds this contention to be without merit.

Customs is certainly correct that the determination of whether the PC 101 is principally used with MFC machines is primarily a factual determination. However, there exists no genuine issue as to this material fact, as Customs has proffered nothing to rebut the substantial evidence Brother has adduced showing that the PC 101 is principally used with MFC machines. Customs concedes that the PC 101 is designed and constructed for use in Brother's MFC and facsimile machines, *see supra* n.5, and has not alleged that it has any other legitimate or fugitive uses. Brother has submitted an affidavit from Matthew Hahn, Director of Marketing, Product Accessories, at Brother, stating that the PC 101 can only be used with certain of Brother's MFC and facsimile machines and that it has no other known uses. Thus, there is no real dispute that the PC 101 is used exclusively in Brother's MFC and facsimile the machines; the only remaining issue is in which one of the two types of machines it is principally used.[7]

Mr. Hahn's affidavit states that in 1998, the year in which the subject merchandise was entered, Brother sold 19,801 MFC machines that use the PC 101, and 6,397 facsimile machines that use the PC 101. Ex-

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[7] As Customs concedes that the PC 101 has no other uses, the Court can reject out of hand Customs's argument that summary judgment is inappropriate because Brother has not established the "class or kind" of goods to which the PC 101 belongs. Customs's argument rests on its misconstruction of Add'l U.S. R. Interpretation 1(a), which provides:

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

Customs maintains that because heading 8473 is a use provision, Brother is obliged to demonstrate the "class or kind" to which the subject merchandise belongs—*"not* merely for the specific merchandise at issue *(i.e.,* the PC 101), but for the 'class or kind' of merchandise to which that importation belongs *(e.g.,* 'photographic film')." Def.'s Reply Mem., at 12–13. Customs's argument betrays a fundamental misapprehension of the nature and purpose of the "class or kind" inquiry.

"The purpose of 'principal use' provisions in the HTSUS is to classify particular merchandise according to the ordinary use of such merchandise, even though particular imported goods may be put to some atypical use." *Primal Lite, Inc. v. United States,* 182 F.3d 1362, 1364 (Fed. Cir. 1999) (noting by way of example that a race car imported for use in advertising would still be classified as a vehicle used principally for automobile racing). The scope of the "class or kind" inquiry should be narrowly tailored to "the particular species of which the merchandise is a member." *Id.* The inquiry takes into account whether the pertinent characteristics of the imported merchandise are akin to those of the typical merchandise falling within the proposed use classification. *See Minnetonka Brands, Inc. v. United States,* 24 CIT ___, ___, 110 F. Supp. 2d 1020, 1027 (2000) (factors for consideration include purchasers' expectations, the environment of the sale, and recognition within the trade).

Thus, the relevant inquiry here is not, as Customs suggests, how the class of "photographic film" is principally used, because heading 3702 is not the heading being construed (and is not, in any event, a use heading). Instead, the only "class or kind" issue in this case is whether Brother can demonstrate that the PC 101 falls within the class or kind of "parts for MFC machines," rather than the class or kind of "parts for facsimile machines." *Cf. Pistorino & Co., Inc.,* 67 CCPA 1, 3–4, 607 F.2d 989, 991–92 (1979) (holding that entries of beam cutters principally destined for use in the shoe industry were not classifiable as "shoe machinery" because they were not shown to be of a different class or kind than other beam cutters). That determination turns on principal use.

Brother's undisputed evidence shows that the subject merchandise was not entered for some atypical or fugitive use, that the PC 101's essential characteristics are not unlike those of parts for multifunction centers, that the PC 101 is treated as a part of an MFC machine within the marketplace, and, as discussed *infra,* that the PC 101 is principally used as a part for MFC machines. Consequently, there is no live factual dispute concerning the "class or kind" of goods to which the PC 101 belongs.

pressed in relative terms, 75.6% of the machines were MFC machines and 24.4% were facsimile machines—a ratio of more than three to one. The uncontroverted and unimpeached testimony of a single witness may be sufficient to establish the use of an imported good. *United States v. Gardel Indus.,* 33 CCPA 118, 122 (1946); *Arden Mfg. Co. v. United States,* 65 Cust. Ct. 594, 599 (1970); *accord Innotech Aviation Ltd. v. United States,* 21 CIT 1392, 1395, 992 F. Supp. 411, 414 (1997). While Customs posits that the subject merchandise could be principally used as replacement parts in facsimile machines sold prior to 1998, it offers not a scintilla of evidence to support this idle speculation. More importantly, as explained *infra* n.7, the use inquiry focuses on the principal use, at the time of importation, of the class or kind of good to which the subject merchandise belongs. Brother's sales figures for 1998 clearly establish that the principal use for the PC 101 at the time of importation was as a part for MFC machines.

In opposing Brother's motion for summary judgment, Customs is not entitled "simply [to] rest on its pleadings. Rather, it must produce evidence * * * which set[s] forth specific facts showing that there is a genuine issue for trial." *Black & White Vegetable Co. v. United States,* 24 CIT ____, ____, 125 F. Supp. 2d 531, 536–37 (2000) (internal quotation marks omitted). *See also Crown Operations Int'l, Ltd. v. Solutia, Inc.,* 289 F.3d 1367, 1375 (Fed. Cir. 2002) ("Once the moving party has satisfied its initial burden, the opposing party must establish a genuine issue of material fact and cannot rest on mere allegations, but must present actual evidence."). As Customs has not met this burden, there is no material dispute that the PC 101 is principally used with machines of heading 8437. Because the Court has already determined that the PC 101 is a part, the subject merchandise is *prima facie* classifiable under subheading 8473.30.50, HTSUS.

D. The PC 101 must be classified under heading 8473 regardless of whether it is also prima facie classifiable as "photographic film[]"

Having established that the subject merchandise is *prima facie* classifiable as parts of MFC machines, the Court turns to Customs's competing proposed classification. Customs argues that because the court in *QMS, Inc. v. United States,* 19 CIT 551 (1995), classified a roll of PET film as "photographic film" under heading 3702, the PC 101 is likewise classifiable under heading 3702 because it contains a roll of PET film. Customs contends that even if the PC 101 is also *prima facie* classifiable as a part of a MFC machine, by operation of GRI 3(a)[8] it must be classified under heading 3702, as the *QMC* court found the heading for "photographic films" to be more specific than the alternative "parts and accessories" classification at issue in that case. Customs further argues that the Court must classify the PC 101 as photographic film out of respect for congressional intent, and for the principles of *stare decisis.*

[8] GRI 3(a) directs that when goods are *prima facie* classifiable under two or more headings, they should be classified under the heading providing the most specific description.

1. The Court is not bound by stare decisis to follow QMS

Taking these arguments in reverse order, the Court begins by rejecting Customs's argument that the Court's obligation to follow *QMS* controls this case. "The applicability of the doctrine of *stare decisis* is within the discretion of the [C]ourt." *De Laval Separator Co. v. United States,* 1 CIT 144, 148, 511 F. Supp. 810, 814 (1981). Certainly, the Court recognizes the general principle that "*stare decisis* is bottomed on the sound public policy that there must be an end to litigation and that, therefore, questions formerly determined should not be readjudicated except on a showing of clear and convincing error in the former holding." *Schott Optical Glass, Inc. v. United States,* 7 CIT 36, 38, 587 F. Supp. 69, 70–71 (1984), *rev'd* 3 Fed. Cir. (T) 35, 750 F.2d 62 (1984). However, the doctrine presents special problems in the context of classification cases. It is a well-established principle that "in customs classification cases a determination of fact or law with respect to one importation is not *res judicata* as to another importation of the same merchandise to the same parties." *Schott Optical Glass, Inc. v. United States,* 3 Fed. Cir. (T) 35, 36, 750 F.2d 62, 64 (1984) (citing *United States v. Stone & Downer Co.,* 274 U.S. 225, 236 (1927)). At a minimum, the party opposing the application of *stare decisis* must be afforded an opportunity to show that the prior decision was clearly erroneous. *Schott Optical,* 3 Fed. Cir. (T) at 37–38, 750 F.2d at 64–65. Application of *stare decisis* is particularly inappropriate here, where the imported merchandise is different, the parties are different, and the intervening decision by the Federal Circuit in *Mita* may well have circumscribed the relevance of *QMS* to the instant case.

2. Evidence of Congress's intent with respect to photographic films undercuts Customs's argument that the PC 101 must be classified under heading 3702

In *QMS,* the court rejected Customs's classification of the PET film rolls at issue as "typewriter or similar ribbons," and then determined that the rolls were classifiable as "photographic film" because it understood the statutory and scientific definitions of "photographic" to be "sufficiently broad so as to indicate a legislative intent to include within the tariff provisions of Chapter 37 more processes than what may be considered conventional photography." 19 CIT at 562. Applying GRI 3(a), the court then classified the merchandise as photographic film, in preference to the importer's proposed classification of the rolls as "parts and accessories," on the grounds that the latter classification was less specific.

In classifying rolls of PET film as photographic film, the *QMS* court did not have occasion to consider the legislative history that Customs now cites as evidence that Congress intended for photographic film to be classified only as such. In *United States v. American Express Co.,* 29 CCPA 87 (1941), which Customs cites extensively, the United States Court of Customs and Patent Appeals held that film separators that were parts of film packs were not classifiable as "parts of cameras." The court reasoned that the film packs of which the film separators were a

part could not themselves be classified as parts of cameras, because Congress intended that rolls of film not be dutiable as parts of cameras. *Id.* at 92–95. Customs seizes on this holding as evidence that Congress intended that the PET film in the PC 101 be classified as photographic film.

Customs's argument, however, overlooks the rationale underlying Congress's intent. As the *American Express* court recognized, Congress provided for separate treatment of film rolls in the Tariff Schedule of the United States ("TSUS") because it recognized that film was a discrete product; like the paper used in a typewriter, it was simply "the material upon which the camera operates." *Id.* at 95. Through interaction with the camera, the film becomes exposed, and is removed, retaining its essential characteristic as an item with intrinsic value, suitable for use in other purposes, such as archiving images or making prints therefrom. *See id.; see also* Charles Hagen, "Just How Sacred Should Photo Negatives Be?", N.Y. Times, C–13 (March 3, 1992) (discussing almost priceless value of Edward Weston's film negatives).

By contrast, the PET film roll within the PC 101 is *not* the material on which an MFC machine that uses it operates. It is not the output of the MFC machine, but merely plays a role in the production of that output, the paper on which an image is created through interaction of the PC 101 and the MFC machine's thermal print head. Once the PET film roll within the PC 101 is used up, it is discarded; it has no intrinsic value or separate purpose. Thus, the evidence of Congress's intent actually militates against the classification of the PET film roll within the PC 101 as photographic film. The court need not decide this issue, however, for assuming *arguendo* that the PET film roll within the PC 101 is *prima facie* classifiable as photographic film, the rationale underlying Congress's intent that it be classified as such rather than as a part clearly does not apply.

3. By operation of GRI 1 and Section XVI Note 2(b), HTSUS

Customs claims that even if the PC 101 is *prima facie* classifiable both as a part of MFC machines and as photographic film, in accordance with *QMS* and GRI 3(a) it must be classified as the latter because that heading provides the more specific description. *See QMS,* 19 CIT at 561, 563.

As discussed *infra,* the GRI must be applied in numerical order. *See North Am. Processing Co. v. United States,* 236 F.3d 695, 698 (Fed. Cir. 2001). Thus, if the application of GRI 1 provides the proper classification, the Court need not apply the relative specificity provision of GRI 3(a). GRI 1 provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." Note 2(b) to Chapter XVI provides that "[o]ther parts, if suitable for use solely or principally with a particular kind of machine, * * * are to be classified with the machines of that kind or in heading * * * 8473 * * * as appropriate." Because the relative section note provides that goods clas-

sifiable as parts of MFC machines shall be classified as such, the Court need not perform a relative specificity analysis under GRI 3(a).[9]

III. CONCLUSION

For the foregoing reasons, the Court finds that the subject merchandise must be classified under subheading 8473.30.50, HTSUS, as a "[p]art[] * * * suitable for use * * * principally with * * * machines of heading [8471]: [n]ot incorporating a cathode ray tube: [o]ther."

(Slip Op. 02–82)

ACCIAI 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 consideration of *Results of Redetermination on Remand Pursuant to Acciai Speciali Terni S.p.A. et al., v. United States,* Slip. Op. 02–51 (Ct. Int'l Trade June 4, 2002) *(Remand Redetermination),* Plaintiffs' Comments on Department of Commerce Remand Redetermination, Defendant-Intervenors' Response to Plaintiffs' Comments on Department of Commerce Remand Redetermination, Plaintiffs' Motion for Reconsideration of the Court's Opinion and Remand Order of June 4, 2002, Defendant's Response in Opposition to Plaintiffs' Motion for Reconsideration, and Defendant-Intervenors' Response in Opposition to Plaintiffs' Motion for Reconsideration, the *Remand Redetermination* is sustained in its entirety. Plaintiffs' motion for reconsideration of the Court's opinion and remand order of June 4, 2002 is denied.]

(Dated August 6, 2002)

Hogan & Hartson L.L.P. (Lewis E. Leibowitz, Lynn G. Kamarck, H. Deen Kaplan) for Plaintiff.

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; *Brent M. McBurney,* Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Michele D. Lynch*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

Collier Shannon Scott, PLLC (Eric R. McClafferty, Michael J. Coursey, Kathleen W. Cannon, David A. Hartquist) for Defendant-Intervenors.

Dewey Ballantine L.L.P. (John A. Ragosta, John R. Magnus, Hui Yu) for *Amici Curiae.*

OPINION

CARMAN, *Chief Judge:* In *Acciai Speciali Terni, S.p.A. v. United States*, No. 01–00051, 2002 WL 1225536 (Ct. Int'l Trade June 4, 2002), this

[9] Were the Court to undertake such an analysis, it is far from certain that it would reach the same result as did the *QMS* court. Under the rule of relative specificity, a good should be classified under "the provision with requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food Corp. v. United States,* 140 F.3d 1437, 1441 (Fed. Cir. 1998). "[A] product described by both a use provision and an *eo nomine* provision is *generally* more specifically provided for under the use provision." *Id.*

Court remanded *Grain-Oriented Electrical Steel From Italy; Final Results of Countervailing Duty Administrative Review,* 66 Fed. Reg. 2,885 (Jan. 12, 2001) (*Final Results*) to the Department of Commerce ("Commerce" or "the Department") to explain whether the Department had determined that the private holding company KAI, in a capacity as a separate purchaser, became legally responsible for all Acciai Speciali Terni, S.p.A.'s ("AST") assets and liabilities upon purchasing AST. Alternatively, Commerce was to explain whether AST, after its sale to KAI ("Post-Sale AST"), continued to have responsibility for the assets and liabilities attributed to AST before the sale ("Pre-Sale AST").

On June 24, 2002, Commerce filed with this Court *Results of Redetermination on Remand Pursuant to Acciai Speciali Terni S.p.A., et al., v. United States,* Slip. Op. 02–51 (Ct. Int'l Trade, June 4, 2002) (*Remand Redetermination*). In the *Remand Redetermination*, Commerce states that upon review of the administrative record, Commerce determined that Post-Sale AST "continued to have responsibility for all of pre-sale AST's assets and liabilities." *Remand Redetermination* at 1. In support of this determination, Commerce first notes "there is nothing in the record to suggest that, as a result of the privatization, AST relinquished its direct, legal ownership and control over any of its assets. Likewise, there is nothing in the record to suggest that, as a result of privatization, AST relinquished responsibility for any of the debt obligations of pre-sale AST." *Id*. at 3.

Commerce next points to two pieces of affirmative record evidence that support its "conclusion that there was complete continuity of financial position between pre- and post-sale AST": first, a comparison of AST's financial statements as of December 31, 1993 with AST's financial statements as of December 31, 1994; and second, the text of the Purchase Agreement, signed by KAI, making clear that AST sold shares to KAI but nowhere suggesting AST transferred assets or liabilities to KAI. *Id*. at 3–4.

Finally, Commerce remarks its finding is consistent with the primary reason many companies incorporate—to shield owners of company shares (here KAI) from liability for the company (AST). *Id*. at 4–5. In response to AST's assertion that, according to the Italian Civil Code, a 100 percent sole shareholder is fully and solely responsible for a company's assets and liabilities, Commerce states it has found no record evidence to support this assertion and that even if KAI assumed some residual or contingent responsibility for AST's debts, privatized AST could continue to be found to have full and direct responsibility for its debts. *Id*. at 5.

This Court will sustain the *Remand 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). This Court finds substantial evidence supports Commerce's determination that continuity of assets and liabilities remained between Pre- and Post-Sale AST. Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support

a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (internal quotations omitted). Here, the record provides two pieces of relevant evidence that a reasonable mind might accept as adequate to support the conclusion that Post-Sale AST remained fully responsible for its pre-sale assets and liabilities: (1) the comparison between AST's 1993 and 1994 financial statements; and (2) the Purchase Agreement's clear wording that KAI was purchasing shares and its lack of any reference to a transfer of assets or liabilities.

Plaintiffs point to the Government of Italy's statement that "KAI assumed the whole of AST indebtedness" to contradict Commerce's claim that nothing in the record suggests that the privatization resulted in AST relinquishing responsibility for any of the debt obligations of pre-sale AST. (Pls.' Cmts. at 4–5 (*citing Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States,* Court No. 99–06–00364 (August 14, 2000); *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)* adopted into *Final Results*, 66 Fed. Reg. 2,885 (Jan. 12, 2001)). "[T]he possibility of drawing two inconsistent conclusions from the evidence," however, "does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted). Plaintiffs had every opportunity during the underlying proceedings to object to the same language that led this Court to remand the issue of continuity of assets and liabilities to Commerce.

This Court is satisfied that substantial evidence on the record supports Commerce's determination that Post-Sale AST continued to have responsibility for all of Pre-Sale AST's assets and liabilities. Therefore, this Court finds substantial evidence on the record supports the Department's determination that Pre- and Post-Sale AST are the same entity and sustains the *Remand Redetermination* in its entirety. Plaintiffs' motion for reconsideration of the Court's opinion and remand order of June 4, 2002 is denied.

(Slip Op. 02–83)

PACIFIC GIANT, INC., ET AL., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, ET AL., DEFENDANT-INTERVENORS

Court No. 01–00340

[Upon consideration of Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record, Defendant's response, and Plaintiffs' reply, Plaintiffs' motion is denied. The Department of Commerce's determination in *Freshwater Crawfish Tail Meat From the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review,* 66 Fed. Reg. 20,634 (Apr. 24, 2001), *amended by Freshwater Crawfish Tail Meat From the People's Republic of China: Amended Final Results of Administrative Review and New Shipper Reviews,* 66 Fed. Reg. 30,409 (June 6, 2001), is affirmed in part and remanded in part. Plaintiffs' motion for a hearing is denied.]

(Dated August 6, 2002)

Garvey, Schubert & Barer (John C. Kalitka, William E. Perry), Washington, D.C., for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Mark L. Josephs*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Arthur D. Sidney*, Attorney, Office of the Chief Counsel for Import Administration, of Counsel, for Defendant.

Adduci, Mastriani & Schaumberg, L.L.P. (Will E. Leonard, Mark Leventhal, John C. Steinberger), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* This matter comes before the Court on a motion for judgment on the administrative record filed by Pacific Giant, Inc., Worldwide Link, Inc., and Ocean Duke Corp. ("Plaintiffs"). Plaintiffs challenge the Department of Commerce's ("Department" or "Commerce") determination in *Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review,* 66 Fed. Reg. 20,634 (Apr. 24, 2001), *amended by* 66 Fed. Reg. 30,409 (June 6, 2001) *(Final Results).* Specifically, Plaintiffs contest: (1) Commerce's application of adverse inferences in choosing from facts available for factors of production of respondent Huaiyin Foreign Trade Corporation No. 30 ("HFTC30"); (2) Commerce's application of surrogate values to well water consumed in the production of crawfish tail meat; and (3) the effects of the Continued Dumping and Subsidy Act of 2000, 19 U.S.C. § 1675c (2000) ("Byrd Amendment"), upon Plaintiffs' due process rights. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2000).

BACKGROUND

I. Procedure

On August 1, 1997, the Department published an antidumping duty order on freshwater crawfish tail meat from the People's Republic of

China ("PRC"). *See Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China,* 62 Fed. Reg. 41,347 (Aug. 1, 1997), *amended by Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat From the People's Republic of China,* 62 Fed. Reg. 48,218 (Sept. 15, 1997) *("Antidumping Duty Order").* On September 30, 1999, the Department received requests for an administrative review from, among others, respondent HFTC30. The Department then conducted an administrative review of the antidumping duty order for the period September 1, 1998 through August 31, 1999 and published the preliminary results of review on October 11, 2000. *See Notice of Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews, Partial Rescission of the Antidumping Duty Administrative Review, and Rescission of a New Shipper Review: Freshwater Crawfish Tail Meat From the People's Republic of China,* 65 Fed. Reg. 60,399 (Oct. 11, 2000) *(Preliminary Results).* Interested parties submitted comments and rebuttal comments and participated in a public hearing on December 11, 2000. Commerce published the *Final Results* on April 24, 2001, and Plaintiffs thereafter timely filed a summons and complaint challenging the final results.

II. Facts

For respondent HFTC30, Commerce determined a weighted-average dumping margin of 139.68 percent. *See Final Results*, 66 Fed. Reg. at 20,635. To determine the dumping margin, Commerce compared HFTC30's export prices to the normal value of the subject merchandise. *See Preliminary Results,* 65 Fed. Reg. at 60,404.

a. Factors of Production Methodology

For companies located in the PRC, a nonmarket-economy country, Commerce determines normal value by using a factors of production methodology pursuant to 19 U.S.C. § 1677b(c)(2000). *See id.* Under that methodology, Commerce determines "the normal value of the subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise." 19 U.S.C. § 1677b(c)(1). To value the factors of production, Commerce uses information regarding their values in a comparable market-economy country. *Id*. The statutory factors of production include, but are not limited to, "(A) hours of labor required, (B) quantities of raw materials employed, (C) amounts of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3). Commerce treated respondents' water usage as a factor of production. *See Memorandum from Joseph A. Spetrini to Bernard T. Carreau, Issues and Decision Memo for the Final Results of the Antidumping Duty Administrative Review and the Antidumping New Shipper Reviews of Freshwater Crawfish Tail Meat from the People's Republic of China,* Apr. 9, 2001, Pub.

Doc. 297, Pl. Pub. App. Tab 4, at 22 ("*Decision Memo*").[1] To value all factors of production except for the crawfish input, Commerce used publicly available information from India. *See Preliminary Results,* 65 Fed. Reg. at 60,404. For crawfish input, Commerce used Spanish import statistics for crawfish imported from Portugal. *Id*.

b. HFTC30's Two Channels of Sales

Based upon information obtained at verification, the Department determined that respondent HFTC30 had two channels of sales. *Decision Memo* at 30. In the first channel (also referred to as the direct sales channel), HFTC30 acted as a principal, purchasing tail meat and selling it to its U.S. customer. *See Memorandum From Thomas Gilgunn through Barbara E. Tillman for Joseph A. Spetrini: Determination of Partial Facts Available for Huaiyin Foreign Trade Corporation (30) in the Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China* (Sept. 29, 2000), Pub. Doc. 215, Pls.' Pub. App. Tab 3, at 1. In the second channel, HFTC30 assisted certain U.S. importers in purchasing crawfish tail meat from PRC processors. *Decision Memo* at 30.

The Department chose to verify one supplier from each sales channel. *Id*. From the first sales channel, Commerce verified supplier Huaiyin County Freezing Factory ("Huaiyin Freezing"). *See id.* at 36; *see also Memorandum to The File, AD Review of Freshwater Crawfish Tail meat from the People's Republic of China (PRC) (A–570–848): Factors Verification Report for Huaiyin County Freezing Factory (Huaiyin Freezing)* (Sept. 29, 2000), Prop. Doc. 65, Pl. Conf. App. Tab 8, at 1 *("Huaiyin Freezing Verification Memo").* From the second sales channel, Commerce verified supplier Baoying Freezing Factory ("Baoying Freezing"). *See Memorandum From Thomas Gilgunn through Barbara E. Tillman for Joseph A. Spetrini: Determination of Partial Facts Available for Huaiyin Foreign Trade Corporation (30) in the Administrative Review of Freshwater Crawfish Tail Meat from the People's Republic of China* (Sept. 29, 2000), Prop. Doc. 67, Pls.' Conf. App. Tab 3, at 2 *("Partial Facts Available Memo").*

(i) HFTC30 First Sales Channel

In conducting verification of the first sales channel, Commerce considered HFTC30's questionnaire responses regarding the supplier Huaiyin Freezing. *Huaiyin Freezing Verification Memo,* Pls.' Conf. App. Tab 8, at 1. Huaiyin Freezing could not demonstrate how it calculated its labor factors of production. *Id*. at 7. Because the labor factors of production were not verifiable, Commerce found the use of facts otherwise available to be warranted pursuant to 19 U.S.C. § 1677e(a). *Decision Memo* at 36. The Department assumed the labor factors for HFTC30's

[1] The *Issues and Decision Memo for the Final Results of the Antidumping Duty Administrative Review and the Antidumping New Shipper Reviews of Freshwater Crawfish Tail Meat from the People's Republic of China ("Decision Memo")* is included as part of *Freshwater Crawfish Tail Meat From the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review and New Shipper Reviews, and Final Partial Rescission of Antidumping Duty Administrative Review,* 66 Fed. Reg. 20,634 (Apr. 24, 2001), *amended by* 66 Fed. Reg. 30,409 (June 6, 2001). All page numbers for the *Decision Memo* are cited as paginated in Plaintiffs' Public Appendix Tab 4.

other processors also contained inaccuracies and therefore applied the adverse inference provision of 19 U.S.C. § 1677e(b), which states:

> If the administering authority * * * finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority * * *, the administering authority * * *, in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.

Decision Memo at 36. Commerce made an adverse inference and used partial facts available for the labor factors of all HFTC30's direct sales processors. *Id*.

(ii) HFTC30 Second Sales Channel

In conducting verification of the second sales channel, Commerce considered HFTC30's questionnaire responses regarding Baoying Freezing, a supplier of crawfish tailmeat for HFTC30's second channel sales. *See Partial Facts Available Memo*, Pls.' Conf. App. Tab 3, at 2.

At verification, the Department could not verify any of the factors of production information that HFTC30 reported for Baoying Freezing. *Decision Memo* at 32. In addition, Commerce discovered that HFTC30 had not reported another supplier of crawfish tailmeat named Huishan County Lake Products Processing Factory ("Huishan Lake"). *See Memorandum to The File from Thomas Gilgunn and Lesley Stagliano, Antidumping Duty Administrative Review of Freshwater Crawfish Tail meat from the People's Republic of China (PRC) (A–570–848): Sales Verification Report for Huaiyin Foreign Trade Corporation (30) (Huaiyin30)* (Sept. 29, 2000), Prop. Doc. 57, Pl. Pub. App. Tab 1, at 11. Commerce therefore determined HFTC30 had failed to cooperate to the best of its ability and that, pursuant to 19 U.S.C. § 1677e(b), the Department could draw inferences adverse to the interests of HFTC30 in selecting from among the facts otherwise available. *Decision Memo* at 33. Commerce accordingly applied a 201.63 percent rate to HFTC30's second channel sales. *Id*. at 35.

STANDARD OF REVIEW

This Court will uphold the Department's determination in an administrative review of an antidumping order 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).

DISCUSSION

I. The Department's application of facts otherwise available and adverse inferences to HFTC30's second channel sales is supported by substantial evidence on the record or otherwise in accordance with law.

a. Parties' Contentions

Plaintiffs first contend Commerce's application of facts otherwise available and adverse inferences to HFTC30's second channel sales to

the U.S. importer Worldwide Link is not supported by substantial evidence on the record or otherwise in accordance with law. (Pls.' R56.2 Mot. at 13.) Plaintiffs argue that HFTC30, Baoying Freezing, and Worldwide Link acted to the best of their ability in supplying factors of production information to the Department. They assert that mere mistakes in Baoying Freezing's calculations should not result in an adverse inference because verified data from Baoying Freezing exists on the record of the investigation, and the other unverified processors fully cooperated with the Department. Plaintiffs claim the Department has not provided a reasoned analysis for determining respondents did not act to the best of their ability, thereby failing to meet the high standards for applying adverse inferences as set forth in the Uruguay Round Agreements Act, the WTO Antidumping Agreement, and court precedent.

Defendant counters that HFTC30 cannot avoid the application of adverse inferences by pointing to the questionnaire responses of processors other than Baoying Freezing. According to Defendant, Baoying Freezing chose to report inaccurately its factors of production; the errors were numerous, each benefitted the respondent, and neither HFTC30 nor Baoying Freezing could explain the calculations. Therefore, Defendant argues Baoying Freezing's errors were not "simple mistakes," and Commerce properly found HFTC30 had failed to cooperate to the best of its ability.

Plaintiffs argue Commerce should not have applied facts otherwise available and adverse inferences to HFTC30's second channel sales to the U.S. importer Pacific Giant, despite HFTC30's failure to provide the factors of production for Huishan Lake, one of two suppliers for HFTC30's sales to Pacific Giant. (Pls.' R56.2 Mot. at 22–24.) Plaintiffs assert the Department could have used the factors of production on the record for another of HFTC30's second channel sales suppliers, Laoshan Brother Freezing Plant, or it could have used the average factors of production for the crawfish processors that supplied HFTC30 for its direct sales. Plaintiffs state that these alternatives would better reflect the actual dumping margin on HFTC30's sales of crawfish tail meat to Pacific Giant than the "punitive" 201.63 percent dumping margin the Department chose to apply. (*Id*. at 25.)

Defendant counters that Plaintiffs' arguments have no merit because HFTC30 simply failed to provide any information for one of two suppliers to Pacific Giant or to provide a reasonable excuse for its failure to provide the information. Defendant also asserts that information from the Laoshan Brother Freezing Plant is irrelevant because (1) respondents cannot pick and choose which supplier information they will provide; and (2) the information from Laoshan Brother Freezing Plant is not necessarily representative of Huishan Lake.

Finally, Plaintiffs argue the Department should have considered HFTC30's small size-only four employees-in determining whether HFTC30 acted to the best of its ability. Plaintiffs state that pursuant to *Krupp Thyssen Nirosta Gmbh v. United States*, No. 99–08–00550, 2000

WL 1118114 (Ct. Int'l Trade July 31, 2000) ("*Krupp Thyssen*"), Commerce must determine whether HFTC30 had the necessary resources to perform checks on the financial data of the fourteen processors that provided factors to HFTC30.

Defendant, on the other hand, asserts Commerce need not have taken into account the small size of HFTC30 because its numerous errors indicated a pattern of consistent behavior. In addition, Defendant argues HFTC30 failed to inform Commerce of any difficulties that its limited resources would cause it in responding.

b. Analysis

For ease of discussion, this Court addresses Commerce's rationale employed as to HFTC30's second channel sales preliminary to addressing Commerce's treatment of HFTC30's first channel sales.

Commerce's decision to apply an adverse inference in selecting from among facts otherwise available for HFTC30's second channel sales is supported by substantial evidence on the record or otherwise in accordance with law. In order to apply adverse inferences, Commerce must find that a respondent "failed to cooperate by not acting to the best of its ability." 19 U.S.C. § 1677e(b). Such a finding is supported by substantial evidence if Commerce (1) articulates its reasons for concluding a party failed to act to the best of its ability; and (2) explains why the missing information is significant to the review. *Nippon Steel Corp. v. United States*, 118 F. Supp. 2d 1366, 1378 (Ct. Int'l Trade 2000) *("Nippon").*

Commerce's reasons for concluding a party failed to act to the best of its ability should include (1) a finding that a party could comply with the request for information; and (2) a finding of either a willful decision not to comply or insufficient attention to statutory duties under the unfair trade laws. *Id*. at 1378–79. Commerce found that HFTC30 could have complied with Commerce's requests for information when it stated: "Considering that [HFTC30's] main business is selling crawfish tail meat and the limited number of suppliers from which it purchased crawfish tail meat, providing the names and quantity purchased from all its suppliers should have been accomplished with relative ease." *Decision Memo* at 33. Plaintiffs have failed to persuade this Court that HFTC30's small size disabled it from complying with Commerce's requests for information. Commerce stated that

> at no time during the questionnaire response period did [HFTC30] or its suppliers inform the Department that they were unable to accurately answer particular portions of the questionnaire due to their limited resources. The Department granted [HFTC30] additional time to provide their supplier information after the questionnaire due date. In addition, we allowed [HFTC30] to significantly revise its supplier information prior to verification.

Decision Memo at 34. Plaintiffs argue that *Krupp Thyssen* requires Commerce to determine whether HFTC30 had the necessary resources to perform checks on the financial data of the fourteen processors that provided factors to HFTC30. This Court, however, finds *Krupp Thyssen*

inapposite, for the record indicates HFTC30's errors and omissions were more than simple mistakes attributable to a lack of resources. *See Decision Memo* at 33.

In addition to finding that HFTC30 could comply with Commerce's requests for information, Commerce found that HFTC30 had given insufficient attention to its statutory duties. First, HFTC30 failed to provide the names of all suppliers. *Decision Memo* at 32. Second, neither HFTC30 nor Baoying could "demonstrate how they calculated *any* of the ten factors of production which they reported to the Department." *Id*. (emphasis added). Such findings demonstrate a reckless disregard of compliance standards that warrants adverse treatment.

Commerce also explained why the missing information is significant to the review, thus satisfying the second prong of the *Nippon* test, when it stated that "[s]uch basic information" as a supplier's name and quantity supplied "is fundamental to the antidumping duty margin calculation process and is readily available only to respondents." *Decision Memo* at 33. The Department also explained that "each error in [Baoying Freezing and HFTC30's] response favored the respondents and the net effect of these errors would have significantly reduced [HFTC30's] margin on the relevant sales." *Id*. Upon consideration of Commerce's reasoned analysis, this Court finds Commerce's decision to apply an adverse inference in selecting from among facts otherwise available for HFTC30's second channel sales be supported by substantial evidence on the record or otherwise in accordance with law.

Furthermore, Commerce properly exercised its discretion in verifying only HFTC30's questionnaire responses for Baoyang Freezing. Although other processors may have cooperated fully with the Department, Commerce has discretion to determine the method by which it will conduct a verification. *See NTN Bearing Corp. of Am. v. United States*, 186 F. Supp. 2d 1257, 1296 (Ct. Int'l Trade 2002) (quoting *Pohang Iron and Steel Co. v. United States*, No. 98–04–00906, 1999 WL 970743, at *16 (Ct. Int'l Trade Oct. 20, 1999)) ("Commerce enjoys 'wide latitude' in its verification procedures."); *see also Carlisle Tire and Rubber Co. v. United States*, 622 F. Supp. 1071, 1082 (Ct. Int'l Trade 1985). An exhaustive examination of the respondent's business is not required. *See PMC Specialties Group, Inc. v. United States*, 20 CIT 1130, 1134 (1996) (quoting *Monsanto Co. v. United States*, 698 F. Supp. 275, 281 (Ct. Int'l Trade 1988)). Commerce conducted a spot check of HFTC30 by examining HFTC30's questionnaire responses for Baoying Freezing. Commerce is not required to examine or use HFTC30's responses for the other suppliers simply because HFTC30 failed to respond accurately for Baoying Freezing or to report any information for Huishan Lake.

II. The Department's application of a partial adverse inference in selecting from among facts otherwise available for the labor factors of production for HFTC30's first channel sales suppliers is not supported by substantial evidence or otherwise in accordance with law.

a. Parties' Contentions

Plaintiffs contend Commerce should not have applied a partial adverse inference in selecting from among facts otherwise available for the labor factor of production for HFTC30's direct sales suppliers. Plaintiffs claim Commerce should not assume that all suppliers for HFTC30's direct sales were uncooperative in their labor reporting simply because the labor factors for one supplier could not be verified. Plaintiffs cite a 1992 investigation in which Commerce refused to apply the verified information from two producers to two different, unverified producers. *Id*. at 28 (citing *Final Determination of Sales at Less Than Fair Value: Sulfanilic Acid from the People's Republic of China,* 57 Fed. Reg. 29,705, 29,708–709 (July 6, 1992) *(Sulfanilic Acid)).* Plaintiffs also cite the Uruguay Round Agreements Act to reiterate that before Commerce may apply adverse inferences, it must find a willful act by respondents not to comply. Plaintiffs stress there is no evidence on the record that the processors did not fully cooperate and use their best ability to supply information requested by Commerce.

Defendant asserts Commerce properly applied partial adverse inferences for the labor factors of production for all HFTC30 direct sales suppliers based upon the labor factors from Huaiyin Freezing. Defendant argues it was reasonable for Commerce to assume the other suppliers' labor factors were as unverifiable as those of Huaiyin Freezing. For support, Defendant points to Baoying Freezing's unverifiable labor factors. Defendant states that HFTC30's pattern of providing consistently unverifiable information led to Commerce's proper exercise of discretion in applying adverse inferences to HFTC30's other direct sale suppliers. Defendant distinguishes *Sulfanilic Acid*, where each factory had unique factors of production, from the case at hand, where the factors of production for each factory are not unique.

b. Analysis

It is undisputed that an interested party provided information to the agency that could not be verified. Therefore, Commerce may resort to the use of facts otherwise available. *See* 19 U.S.C. § 1677e(a). However, the Department has not demonstrated to this Court that substantial evidence on the record supports the application of an adverse inference in selecting from among facts otherwise available for the labor factor of production for HFTC30's first sales channel.

In considering whether substantial evidence supports Commerce's application of a partial adverse inference to HFTC30's first channel sales, this Court applies the same analysis set forth in its discussion of the second channel sales. First, this Court finds Commerce has failed to articulate its reasons for concluding that HFTC30 failed to act to the

best of its ability to comply with Commerce's requests for information for first channel sales. Although no party disputes HFTC30's ability to comply with Commerce's requests for information, Commerce has failed to show that HFTC30 made a willful decision not to comply or that it gave insufficient attention to its statutory duties. The Department merely states:

> Bearing in mind that Baoying's reported labor factors were also unverifiable, it is reasonable for the Department to assume that the labor factors for [HFTC30's] other processors contained similar problems with accuracy. Moreover, since [HFTC30] submitted factors of production data for its suppliers to the Department, it is reasonable to assume that [HFTC30] exercised the same level of care in ensuring the accuracy of its other suppliers' factor information as it did with the two processors we selected for verification.

Decision Memo at 37.

Such assumptions, without more, are unreasonable within the context of HFTC30's first channel sales. Commerce does not point to substantial evidence on the record to indicate that HFTC30's error regarding Huaiyin Freezing's labor factors was anything more than inadvertent. HFTC30 submitted only one unverifiable factor of production for Huaiyin Freezing in contrast to submitting ten unverifiable factors for Baoying Freezing. Given the consistent errors in Baoying Freezing's numbers, Commerce reasonably concluded that HFTC30 had failed to cooperate to the best of its ability regarding Baoying Freezing. However, the same reasoning is faulty when applied to HFTC30's treatment of Huaiyin Freezing. Huaiying Freezing's unverifiable labor factor, unlike Baoying Freezing's, is not clearly one of a pattern of errors.

Second, Commerce has failed to explain the unverifiable labor factor's significance to the review. This Court will not speculate upon its significance.

Commerce's application of an adverse inference to all first sales channel suppliers is unsupported by substantial evidence on the record or otherwise not in accordance with law. This Court remands to Commerce to reconsider and further explain whether an adverse inference should apply to HFTC30's first sales channel labor factors and to determine, if needed, the appropriate labor factor to apply.

III. Commerce's application of a 201.63 percent rate for HFTC30's second channel sales is supported by substantial evidence on the record or otherwise in accordance with law.

a. Parties' Contentions

Plaintiffs argue that in applying an adverse inference Commerce chose an unreasonably high rate with no relationship to the actual dumping margin. Defendant counters that, as 19 U.S.C. § 1677e(b) allows inferences based upon information derived from a previous review or from "any other information placed on the record," Commerce properly relied upon the highest calculated margin from any segment of the

proceeding. Defendant points out that the 201.63 percent rate used for adverse inferences in this case was corroborated in the underlying investigation and in the immediately preceding first administrative review.

b. Analysis

Commerce's choice of a 201.63 percent dumping margin for its application of an adverse inference to HFTC30's second channel sales is supported by substantial evidence on the record or otherwise in accordance with law. It is "within Commerce's discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative." *F.lii De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). An "adverse facts available rate," however, should be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *Id*.

In this case, the 201.63 percent margin clearly acts as a deterrent to non-cooperation. In addition, it is reasonably related to HFTC30's dumping margin because, as the highest rate found in any segment of the proceeding, it was corroborated in the underlying investigation. *See Antidumping Duty Order,* 62 Fed. Reg. at 41,349–50 (discussing Commerce's arrival at 201.63 percent margin for all firms not fully responsive to its requests for information). Plaintiffs repeatedly assert the 201.63 percent margin is "punitive." However, Plaintiffs have not demonstrated why a corroborated 201.63 percent margin applied to other uncooperative firms should become "punitive" when applied to HFTC30. Neither do Plaintiffs' proposed alternatives persuade this Court that the 201.63 percent margin is unrelated to HFTC30's actual dumping margin for second channel sales. Commerce's use of a corroborated dumping margin, rather than unverified factors of production data from other HFTC30 suppliers, has allowed it to reach a reasonably accurate estimate of HFTC30's actual dumping margin.

IV. Commerce's assignment of a surrogate value to the well water consumed in the production of certain subject merchandise is supported by substantial evidence on the record or otherwise in accordance with law.

a. Parties' Contentions

Plaintiffs contend the Department improperly assigned a surrogate value to the well water consumed in the production of certain subject merchandise. Plaintiffs claim that because some producers do not incur a cost for the water pumped from their wells, the Department should not have valued it. Plaintiffs assert that to value the water would be inconsistent with the statute which requires Commerce to determine normal value "on the basis of the value of the factors of production * * *." 19 U.S.C. § 1677b(c)(1). Instead, Plaintiffs state Commerce should have

added to its margin calculations only the electricity used to pump the water from the wells.

Defendant argues Commerce's determination to value separately water consumed in the crawfish tail meat production is supported by substantial evidence and is otherwise in accordance with law. Defendant states Commerce followed longstanding practice by finding the suppliers used water for more than "incidental purposes" to determine water was a direct factor of production. Defendant adds there is no record evidence that electricity costs for pumping water were reported to Commerce as overhead costs and points to previous segments of the proceeding where Commerce valued water as a direct material cost. Finally, Defendant states it is irrelevant that crawfish processors did not incur a cost for the water because in constructing normal value in a nonmarket economy, the statute requires Commerce to base its factors of production upon quantities of inputs rather than the costs associated with them.

b. Analysis

Commerce's decision to assign surrogate values to water used in crawfish tailmeat production is supported by substantial evidence on the record or otherwise in accordance with law. First, the statute plainly focuses upon the quantity of inputs for factors of production rather than the costs associated with them. It states that "the factors of production utilized in producing merchandise include, but are not limited to—(A) hours of labor required, (B) *quantities* of raw materials employed, (C) *amounts* of energy and other utilities consumed, and (D) representative capital cost, including depreciation." 19 U.S.C. § 1677b(c)(3) (emphasis added). Second, water constitutes a factor of production in this case because of its use for more than incidental purposes. *See Decision Memo* at 22. Finally, because Commerce could not know whether the respondents included water cost in their factory overhead, Commerce reasonably determined to value water separately. *Id*. This is consistent with Commerce's past treatment of water in this proceeding, and Plaintiffs point to no record evidence provided to Commerce to cause it to deviate from this practice.

V. The Byrd Amendment did not cause Plaintiffs' due process rights to be violated.

a. The Continued Dumping and Subsidy Act of 2000 ("Byrd Amendment")

Through the imposition of duties, the Antidumping Act of 1921 (the Act) equalizes competitive conditions between foreign exporters and domestic industries affected by dumping. *See Huaiyin Foreign Trade Corp. (30) v. United States Dept. of Commerce,* 201 F. Supp. 2d 1351, 1363 (Ct. Int'l Trade 2002) *("Huaiyin 30")* (quoting *C.J. Tower & Sons v. United States*, 71 F.2d 438, 445–46 (C.C.P.A. 1934)). Previously, the duties collected pursuant to the Act were deposited with the Treasury for general purposes, such as to provide revenue to regulate commerce. *See*

Huaiyin 30, 210 F. Supp. 2d at 1363. In 2000, however, Congress modified the statute by passing the Byrd Amendment, which states:

> Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the "continued dumping and subsidy offset."

19 U.S.C. § 1675c(a). Pursuant to the Amendment, the duties are distributed to the domestic firms that petition for relief and to those that supported the petition. *See* 19 U.S.C. § 1675c(b)(1)(A), (B). The Amendment applies retroactively to assessments made on or after October 1, 2000, as well as to ongoing antidumping review investigations of subject entries prior to October 1, 2000. *See* 19. U.S.C. § 1675c(a).

b. Parties' Contentions

Plaintiffs claim that under the Byrd Amendment, property is taken away from importers and given to the petitioners without full due process of law under the Fifth Amendment to the Constitution. Plaintiffs also argue the Byrd Amendment effectively transforms U.S. antidumping law into a civil damage action. Instead of equalizing competitive conditions, Plaintiffs assert the dumping duty now penalizes the foreign exporter. Therefore, Plaintiffs contend the Byrd Amendment alters the antidumping law into a punitive statute and that as U.S. entities, they are entitled to full due process rights under the U.S. Constitution, including a hearing before a neutral judge. Plaintiffs request a remand to Commerce for a hearing before a neutral judge.

Defendant contends the doctrine of exhaustion of administrative remedies precludes Plaintiffs from presenting the due process argument in this Court because Plaintiffs never raised the issue at the administrative level. Defendant also asserts Plaintiffs were afforded full due process rights in the underlying administrative action through "multiple opportunities to submit relevant information, the opportunity to comment upon Commerce's verification results and submit case and rebuttal briefs, and an administrative hearing." (Def.'s Opp'n Pls.' Mot. J. Agency R. at 33.)

Were the Court to consider Plaintiffs' due process argument, however, Defendant argues the claim has no merit; the Byrd Amendment neither altered the responsibilities of Commerce or importers, nor did it change the existing administrative procedures. Defendant claims the Byrd Amendment does not change the antidumping law's remedial purpose into a punitive one.

b. Analysis

(i) Doctrine of Exhaustion

The doctrine of exhaustion dictates that a party must present a claim for the relevant administrative agency's consideration prior to raising it before the Court. *See Sandvik Steel Co. v. United States,* 164 F.3d 596,

599 (Fed. Cir. 1998). There is no absolute statutory requirement of exhaustion in non-classification cases, however, because 28 U.S.C. § 2637(d) states that the Court of International Trade "shall *where* appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (emphasis added). The phrase *"where appropriate"* authorizes this Court to determine the proper exceptions to the doctrine of exhaustion as well the circumstances under which it will be required. *See Koyo Seiko Co., Ltd. v. United States*, 186 F. Supp. 2d 1332, 1338 (Ct. Int'l Trade 2002) *("Koyo Seiko")*.

Such exceptions have included situations in which it would have been futile to raise the issue below. *See id*. This Court finds it would have been futile for Plaintiffs to raise the due process issue in the administrative proceeding because Commerce lacked authority to make any decision regarding the constitutionality of the Byrd Amendment. *See Thomson Consumer Elecs., Inc. v. United States,* 247 F.3d 1210, 1215 (Fed. Cir. 2001); *see also Moore v. East Cleveland*, 431 U.S. 494, 497, n.5 (1977) (plurality opinion); *Mathews v. Diaz*, 426 U.S. 67, 76 (1976). Congress, which passed the Byrd Amendment to further the antidumping law's remedial purposes, did not grant Commerce the authority to label the Amendment punitive. *See Huaiyin 30*, 201 F. Supp. 2d at 1364–1365. Furthermore, because the due process issue is one of law that requires no further factual development by the Department, the Court may consider the question without interfering with the Department's province. *See Koyo Seiko*, 186 F. Supp. 2d at 1338*; see also Timken Co. v. United States,* 630 F. Supp. 1327, 1334 (Ct. Int'l Trade 1986).

(ii) Due Process Rights and the Byrd Amendment

Central to Plaintiffs' contention is the argument that payment of duties to petitioners makes the antidumping laws punitive in nature. This Court, however, addressed this argument in *Huaiyin 30* when it described two characteristics of a penalty that do not characterize antidumping duties despite passage of the Byrd Amendment. *See Huaiyin 30*, 201 F. Supp. 2d at 1363–64. First, a penalty amount usually has no relation to the cost of remedying the harm caused by a prohibited act. *Id*. (citing *United States v. DelBellas,* 23 CIT 600, 601 (1999). After passage of the Byrd Amendment, however, the amount of antidumping duty assessed continues to be "directly related to the remedial goal of equalizing competitive conditions." *Huaiyin 30*, 201 F. Supp. 2d at 1364 (internal quotations omitted). Importers continue to be liable for duties equal to the amount by which the normal value exceeds the export or constructed export price for the merchandise. *See* 19 U.S.C. §§ 1673 and 1673e(a). Second, "a duty may constitute a penalty where it is 'enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature * * *.'" *Huaiyin 30,* 201 F. Supp. 2d at 1364 (quoting *Helwig v. United States*, 188 U.S. 605, 611–13 (1902)). Because the antidumping duty assessed here is identical to that assessed prior to implementation of the Byrd Amendment, the amount cannot be

considered so large as to constitute a penalty. *See Huaiyin 30,* 201 F. Supp. 2d at 1364.

In addition, this Court found that Congress "sought to change the antidumping law in order to strengthen its remedial purpose." *Id*. at 1365 (citing Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2000, Pub. L. No. 106–387, Title X § 1002(3), (5), 114 Stat. 1549 (2000)). The imposition of duties does not constitute the exclusive means of remediation, and Congress has exercised its constitutional powers in choosing to further the goal of remediation through the distribution of collected duties to parties affected by dumping. *Id*. at 1365–66.

The Court is not persuaded that the Byrd Amendment transforms the antidumping regime into one that imposes a penalty and therefore finds Plaintiffs' Fifth Amendment due process claim to be without merit.

CONCLUSION

Upon consideration of Plaintiffs' Rule 56.2 motion for judgment upon the agency record, Defendant's response, and Plaintiffs' reply, Plaintiffs' motion is denied. The Department of Commerce's *Final Results*, as amended, is affirmed in part and remanded in part. The Court remands to Commerce to reconsider and further explain whether an adverse inference should apply to HFTC30's first sales channel labor factors and to determine, if needed, the appropriate labor factor to apply. Plaintiffs' motion for a hearing is denied.

(Slip Op. 02–84)

GEUM POONG CORP. AND SAM YOUNG SYNTHETICS CO., LTD., PLAINTIFFS *v.* UNITED STATES OF AMERICA, DEFENDANT *v.* E.I. DUPONT DE NEMOURS, INC. AND ARTEVA SPECIALITIES S.A.R.L., D/B/A KOSA, AND WELLMAN INC., DEFENDANT INTERVENORS

Consolidated Court No. 00–06–00298

[Preliminary Injunction Denied; TRO Dissolved]

(Dated August 6, 2002)

Sandler, Travis & Rosenberg, P.A. (Philip S. Gallas, Gregory S. Menegaz and *Mark. R. Ludwikowski)* for plaintiffs.

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Collier Shannon Scott, PLLC (Paul C. Rosenthal, David C. Smith, Jr. and *Grace W. Kim)* for defendant-intervenors.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (Andrew B. Schroth, Adam M. Dambrov and *Eric Smithweiss)* for plaintiff-intervenor William Barnet & Son, Inc.

Sandler, Travis & Rosenberg, P.A. (Arthur Purcell, Gregory S. Menegaz and *Kenneth N. Wolf)* for plaintiff-intervenor Consolidated Textiles, Inc.

OPINION

RESTANI, *Judge:* This matter is before the court on the motions of two plaintiff-intervenors, William Barnet & Son, Inc. and Consolidated Textiles, Inc. (collectively, "Plaintiff-Intervenors") for a preliminary injunction in this antidumping duty matter. Defendant United States consents to the enjoining of liquidation in accordance with 19 U.S.C. § 1516a(c)(2) (2000) (injunctive relief) to permit eventual liquidation in conformity with final court action. Defendant-Intervenors oppose.

Movants are importers of merchandise subject to the antidumping order who seek the benefit of the Department of Commerce's decision following court ordered remand in this action, *see Geum Poong Corporation v. United States,* 193 F. Supp. 2d 1363 (Ct. Int'l Trade 2002), which resulted in a lower antidumping margin for Plaintiff Geum Poong Corporation, which in turn lowers the "all others" rate. The lower all others rate will be applicable to movants should they obtain the injunction they seek. *See* 19 U.S.C. § 1516a(e)(2) (providing for liquidation in accordance with final court decision of "entries, the liquidation of which was enjoined under subsection (c)(2) of [§1516a]"). The court would have little reason to deny the injunction but for the fact that Plaintiff-Intervenors' status as intervenors, granted in conjunction with the granting of temporary restraining orders herein, is challenged, and party status is a necessary requisite to any relief. Thus, once again the court is called upon to apply Court of International Trade Rule 24 on intervention in a trade matter. USCIT Rule 24.

Defendant takes no position on the proper interpretation of the court rule at issue but alleges no prejudice to the governmental agency and

therefore does not oppose intervention or injunctive relief. Defendant-Intervenor alleges prejudice because the funds available to them as domestic parties qualifying under 19 U.S.C. § 1675c (2000)[1] to receive assessed duties will be reduced pending the injunction.[2] If the court were balancing hardships, it would be inclined to give movants' request to have its entries liquidated in accordance with the final court decision greater weight than Defendant-Intervenor's claim of a delay in access to funds, but that is not the only issue here.

The primary issue before the court is whether a party with an absolute right to intervene,[3] if it fails to do so within 30 days of the service of the complaint, may do so two years later because the litigation is now leaning its way, without satisfying the good cause test found in the rules. In *Siam Food Prods. Pub. Co. v. United States,* 22 CIT 826, 24 F. Supp. 2d 276 (1998), the court decided the issue of intervention as of right under USCIT Rule 24(a), and the import of the 30-day limit contained therein for actions filed under 28 U.S.C. § 1581(c)(1994), such as this case. There the court noted that the 30–day limit may be waived only for good cause, which is defined as mistake, inadvertence, surprise, excusable neglect, or inability to file within 30 days, despite due diligence. *Siam Food,* 22 CIT at 827, 24 F. Supp. 2d at 278. Finding none of the requisite causes shown, the court declined to allow intervention.[4] *Id.,* 22 CIT at 830, 24 F. Supp. 2d at 281. Movants can cite no published opinion which explicitly dispenses with the requirements of the current rule, although in some cases late intervention has been permitted. What circumstances will permit such late intervention has not been made clear.

Movants argue that the time limit applies only to parties who contemplate "active litigation" and not to parties who merely seek liquidation in accordance with judicial review. First, the rule has no such limiting language. Second, if movants imply there can be no legally cognizable prejudice to any party as a result of such "limited intervention," here Defendant-Intervenors make out a case of at least potential prejudice flowing directly from such intervention because of the delay in assessment of duties to be placed in the fund established by 19 U.S.C. § 1675c. Thus, if the Rule 24(a) time limit has such an implicitly conscribed application, the implication does not arise in this case.

Movants also argue that the court will be flooded with pro forma motions to intervene and for injunctive relief if the time limit of Rule 24(a) is enforced. The court believes that questions of balancing court efficiency and the parties' burdens are addressed by the rule. The court concludes that, if necessary, the terms of rule may be revisited in the future,

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[1] This provision allows members of the corresponding domestic industry, such as Defendant-Intervenor to be reimbursed for certain qualifying expenses from duties assessed on the subject merchandise.

[2] The court recently addressed this statutory provision in *Altx, Inc. v. United States,* Slip. Op. 02–66 (Ct. Int'l Trade July 12, 2002). In that case no antidumping order yet existed and the domestic industry movant was the party claiming prejudice from potentially diminished duty collection. Thus, the burdens were different.

[3] Both William Barret & Son, Inc., and Consolidated Textiles, Inc. appeared and participated as interested parties in the antidumping duty investigation underlying this action.

[4] The parties discuss many cases which pre-date the 30-day limit which was added to the current rule by amendment in 1993. They do not inform the court.

but the rule as it exists now must be applied even-handedly to all concerned.

Movants also seek intervention under Rule 24(b) (permissive intervention), but such intervention must be "timely" sought. Under 28 U.S.C. § 2631(j) (2000), however, permissive intervention is apparently unavailable in unfair trade actions brought under 19 U.S.C. § 1516a.[5] Even if permissive intervention were allowed in such cases, the court should be guided by the time limits applicable to intervention as of right in trade cases in deciding what is "timely" under Rule 24(b). A wholly different view of "timely" would nullify the specific 30-day limit of Rule 24(a).

The court concludes that movants have not even attempted to show good cause for failing to timely intervene. Movants could have intervened as of right from the outset and likely would have been granted injunctive relief, but under existing court rules they may not intervene now. Accordingly, the court's orders permitting such intervention are vacated.

The temporary restraining orders issued in this matter are dissolved.

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[5] The statute provides in relevant part as follows:

> Any person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action, *except that* * * * in a civil action under section 516A of the Tariff Act of 1930 [19 USC § 1516a], only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and *such person may intervene as a matter of right*;

28 U.S.C. § 2631(j)(1)(B) (emphasis added).