[PUBLIC VERSION]

(Slip Op. 03–42)

MAUI PINEAPPLE CO., LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND DOLE FOOD CO., INC., DOLE PACKAGED FOODS CO., AND DOLE THAILAND, LTD., DEFENDANT-INTERVENORS

Court No. 01–01017

[Plaintiff's Rule 56.2 motion for judgment upon the agency record is granted in part, denied in part. Plaintiff's motion for oral argument is denied.]

(Dated April 16, 2003)

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Hale and Dorr LLP (Michael D. Esch, Aimen Mir), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, *Chief Judge:* Plaintiff Maui Pineapple Company, Ltd. ("Maui") moves for judgment upon the agency record and challenges the United States Department of Commerce's ("Commerce") results in *Notice of Final Results of Antidumping Duty Administrative Review and Recission [sic] of Administrative Review in Part: Canned Pineapple Fruit From Thailand,* 66 Fed. Reg. 52,744 (Oct. 17, 2001) *("Final Results")* and the accompanying *Issues and Decision Memorandum for the Final Results of the Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand* (Oct. 9, 2001), Pub. Doc. 216, Def.'s Pub. App. Ex. 2 *("Decision Memo").* This Court has jurisdiction to hear the

case pursuant to 28 U.S.C. § 1581(c) (2000). The Court holds that Commerce properly accepted information on sales to the United States military by Defendant-Intervenors at verification and properly accepted corrections to Defendant-Intervenors' clerical errors. The Court remands the issues of imputed credit expenses and the alleged clerical error in Commerce's final margin program for further consideration by Commerce. For the reasons that follow, Plaintiff's motion is granted in part, and denied in part.

BACKGROUND

Commerce issued an antidumping duty order covering canned pineapple fruit from Thailand in 1995. *Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand,* 60 Fed. Reg. 29,553 (June 5, 1995) *("1995 Final Determination"), as amended Notice of Antidumping Duty Order and Amended Final Determination: Canned Pineapple Fruit From Thailand,* 60 Fed. Reg. 36,775 (July 18, 1995) *("1995 Amended Final Determination").* Imports by Dole Food Company, Inc., Dole Packaged Foods Company, Inc., and Dole Thailand, Ltd. (collectively "Dole") were covered by the initial order, and Dole was found to have a 1.73% dumping margin. *1995 Amended Final Determination*, 60 Fed. Reg. at 36,776.

On July 20, 2000, Commerce published notice of opportunity to request a review of the initial antidumping order for the period of review of July 1, 1999 to June 30, 2000. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 65 Fed. Reg. 45,035, 45,036 (July 20, 2000). The fifth administrative review, in which Dole participated, was initiated on September 6, 2000. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 65 Fed. Reg. 53,980, 53,982 (Sept. 6, 2000).

Commerce sent Dole its initial questionnaire on September 1, 2000. (Letter from U.S. Department of Commerce to Hale & Dorr LLP (on behalf of Dole) (Sept. 1, 2001), Pub. Doc. 19, Pl.'s Pub. App. Ex. 15, Def.'s Pub. App. Ex. 7, Dole's Pub. App. Ex. 4.) In the questionnaire, Dole was asked to describe the sales process for each of its sales methods or channels of distribution. (Dole's Section A Questionnaire Response (Oct. 10, 2000), at A–25 to A–27, Pub. Doc. 63, Def.'s Pub. App. Ex. 8 at 9–11.) With regard to sales to the United States military, Dole indicated that "sales are made to distributors that handle distribution to military commissaries (i.e., military base retail grocery outlets). Dole sells in large lots to the distributors. Subsequently, * * * Dole repurchases and then resells the merchandise in small lots pursuant to a price list applicable to military sales. As determined by [Commerce] in its original investigation [in 1995], Dole's sale to the distributor is the first sale to an unaffiliated purchaser. Accordingly, the sales to the distributor are reported in the U.S. sales listing while Dole's subsequent resales to the military

commissaries have been excluded from the U.S. sales listing." (*Id.* at A–26 to A–27, Def.'s Pub. App. Ex. 8 at 10–11.)[1]

Dole submitted its United States sales listings on November 6, 2000. (Dole's Section B, C, and D Questionnaire Response (Nov. 6, 2000), Prop. Doc. 21, Dole's Conf. App. Ex. 8; Dole's Section B, C, and D Questionnaire Response (Nov. 7, 2000), Pub. Doc. 92, Dole's Pub. App. Ex. 8.) The quantity of sales was reported according to the actual number of cases sold. (Dole's Section C Questionnaire Response, at C–15, Dole's Pub. App. Ex. 8 at 21.) A full case of 8 oz., 15 oz., or 20 oz. cans contains 24 cans. (*Id.*; Dole's Section A Questionnaire Response, at A–44, Def.'s Pub. App. Ex. 8 at 19.) Dole sold product code 38900–72475 in 4-packs of 15.25 oz. cans. (Dole's Section A Questionnaire Response, at Ex. A–12(d), Dole's Pub. App. Ex. 7 at 18, 21.) The gross unit price per actual case of product code 38900–72475 was [[ ]]. (Dole's Section A Questionnaire Response (Oct. 6, 2000), at Ex. A–12(d), Prop. Doc. 8, Dole's Prop. App. Ex. 7 at 18, 21.)

Dole was also asked to calculate imputed credit expenses. (Dole's Section B Questionnaire Response, at B–30, Dole's Pub. App. Ex. 8 at 6.)[2] Commerce instructed Dole to "[r]eport the unit cost of credit computed at the actual cost of short-term debt borrowed by [Dole] in the foreign market. If [Dole] did not borrow short-term during the period of review, [it should] use a published commercial short-term lending rate." (*Id.*) Commerce defined "foreign market" as "the home market or a thirdcountry market, whichever will be used to determine normal value." (*Id.* at B–1, Dole's Pub. App. Ex. 8 at 3.) Dole reported that its largest thirdcountry market is Canada but that it did not have short-term borrowing in Canada. (*Id.* at B–2, B–31, Dole's Pub. App. Ex. 8 at 4, 7.) Dole used the average bank prime lending rate in Canada for the four quarters of the period of review as published in *The Economist* to calculate the imputed credit expenses. (*Id.* at B–31 and Ex. B–8, Dole's Pub. App. Ex. 8 at 7–13.)

On December 11, 2000, Commerce sent a supplemental questionnaire to Dole in which Commerce noted "that for different products actual cases are not the same size" and asked Dole to "report [its] sales quantity and all adjustments on a consistent basis *(e.g.,* kilograms)." (Commerce's Supplemental Questionnaire (Dec. 11, 2000), at 8, Pub. Doc. 115, Pl.'s Pub. App. Ex. 9 at 10.) In its response, Dole "revised the sales

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[1] In the 1995 order, Commerce "excluded all sales made to military commissaries from our calculation of [United States price] because we determined that these sales do not represent the sale to the first unrelated purchaser. In this channel of trade, the first unrelated purchaser of [canned pineapple fruit] is a distributor for the U.S. military. This distributor takes title and physical possession of the merchandise before reselling it to the military commissaries. Dole's sales to the distributor were included in our calculation of [United States price]." *1995 Final Determination,* 60 Fed. Reg. at 29,554.

[2] When calculating normal value to determine if merchandise is being sold in the United States at less than fair value, Commerce may consider differences in the circumstances of sale and make adjustments to its calculations when the seller incurs costs in its home market that it does not incur when selling to the United States market. *See Torrington Co. v. United States*, 156 F.3d 1361, 1362–63 (Fed. Cir. 1998). Such adjustments include imputed credit expenses. *Id.* An adjustment "for differences in credit expenses is made to account for the producer's opportunity cost of extending credit to its customers. By allowing the purchaser to make payment after the shipment date, the producer forgoes the opportunity to earn interest on an immediate payment." *NTN Bearing Corp. of Am. v. United States*, 104 F. Supp. 2d 110, 122 (Ct. Int'l Trade 2000) (internal citations and quotations omitted).

database to convert the quantity and all adjustments to a common basis, a standard case equivalent (i.e., equivalent to 24 cans of 20 oz. product, approximately 30 lbs. net product weight)." (Dole's Supplemental Questionnaire Response (Jan. 16, 2001), at 38, Pub. Doc. 134, Dole's Pub. App. Ex. 11 at 5, Def.'s Pub. App. Ex. 10 at 6.)

Commerce sent Dole a letter on January 25, 2001, in which Commerce stated that it had "found that both [Dole's] U.S. and third-country databases have reported zero as the quantity of standard cases * * * for a significant number of observations" and asked Dole to submit corrected databases. (Letter from U.S. Department of Commerce to Hale & Dorr LLP (on behalf of Dole) (Jan. 25, 2001), at 1, Pub. Doc. 144, Pl.'s Pub. App. Ex. 12 at 1.) Dole filed a response addressing Commerce's concerns, but no military or other sales data was submitted. (Letter from Hale and Dorr LLP (on behalf of Dole) to U.S. Department of Commerce (Feb. 14, 2001), Pub. Doc. 152, Pl.'s Pub. App. Ex. 13 at 2–3.) When Dole submitted its sales reconciliation data, it again indicated that military sales were omitted from the reconciliation data. (Dole's Sales Reconciliation Data (Jan. 26, 2001), at Ex. R–18, Pub. Doc. 145, Dole's Pub. App. Ex. 12 at 8–9.)

Verification outlines were issued to Dole on January 23, 2001 and January 31, 2001. (Letter from U.S. Department of Commerce to Hale & Dorr LLP (on behalf of Dole) (Jan. 23, 2001), Pub. Doc. 141, Def.'s Pub. App. Ex. 11 ("Jan. 23 Verification Agenda"); Letter from U.S. Department of Commerce to Hale & Dorr LLP (on behalf of Dole) (Jan. 31, 2001), Pub. Doc. 146, Def.'s Pub. App. Ex. 13 ("Jan. 31 Verification Agenda").) The letters indicated that *"verification is not intended to be an opportunity for submitting new factual information.* We will accept new information at verification only when (1) the need for that information was not evident previously, (2) the information makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record." (Jan. 23 Verification Agenda, at 2, Def.'s Pub. App. Ex. 11 at 2; Jan. 31 Verification Agenda, at 2, Def.'s Pub. App. Ex. 13 at 2.)

At the beginning of verification, Dole presented Commerce with "minor corrections" to its sales database and submitted data regarding United States military sales. (Dole's Verification Corrections (Feb. 28, 2001), Pub. Doc. 154, Pl.'s Pub. App. Ex. 16; Dole's Verification Corrections (Feb. 27, 2001), Prop. Doc. 60, Pl.'s Prop. App. Ex. 16.) Dole explained that the military sales had been excluded from Dole's earlier submissions based on Commerce's determination in the 1995 order, but its distribution system changed prior to the period of review in the present case. (Dole's Verification Corrections, at Attach. 2, Pl.'s Pub. App. 16 at 8.) Whereas prior to the period of review "Dole repurchased products from distributors for resale into the military channel * * *, Dole now sells to a single military channel distributor who handles all sales to military customers. Accordingly, [Dole asserted that] it was error to exclude the military channel sales, and those sales should be added to the sales

database. The military channel sales accounted for just [[ ]] of all sales of subject merchandise during the [period of review]." (*Id.*; Dole's Verification Corrections, at Attach. 2, Pl.'s Prop. App. 16 at 9.) The military sales comprised [[ ]] standard case equivalents. ("Verification of the Sales and Cost Information in the Response of Dole Food Company, Inc., Dole Packaged Foods Company, and Dole Thailand Ltd. in the 1999–2000 Administrative Review of Canned Pineapple Fruit from Thailand" (Apr. 2, 2001), at Ex. U–18, Prop. Doc. 71, Def.'s Prop. App. Ex. A1 ("Verification Report"); Pl.'s Prop. Br. at 7; Def.'s Prop. Br. at 7.)[3] Commerce proceeded to verify the military sales and found no discrepancies. (Verification Report at 28–29, 31, 41, Pub. Doc. 172, Dole's Pub. App. Ex. 16 at 5–6, 8, 18.) Commerce included the military sales in its calculation of Dole's dumping margin. *Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Canned Pineapple Fruit From Thailand,* 66 Fed. Reg. 18,596, 18,599 (Apr. 10, 2001).

In its case brief to Commerce, Maui asserted that Commerce should apply adverse facts available in determining Dole's dumping margin because Dole's submission of the United States military sales data was untimely. ("Petitioners' Case Brief For Dole Food Company, Inc., Dole Package Foods Company, and Dole Thailand, Ltd." (July 9, 2001), at 1–7, Pub. Doc. 197, Def.'s Pub. App. Ex. 14 at 3–9.) Maui suggested that Commerce find a dumping margin of at least [[ ]]% as the highest non-aberrational transaction margin. (*Id.* at 7, Def.'s Pub. App. Ex. 14 at 9; "Petitioners' Case Brief For Dole Food Company, Inc., Dole Package Foods Company, and Dole Thailand, Ltd." (July 9, 2001), at 7, Prop. Doc. 88, Def.'s Prop. App. Ex. E at 9.) In its administrative rebuttal brief, Dole responded that the margin suggested by Maui was the result of a clerical error in the conversion factor for product code 38900–72475. ("Rebuttal Brief on Behalf of Dole Food Company, et al." (July 17, 2001), at 14, Pub. Doc. 206, Dole's Pub. App. Ex. 19 at 19 ("Dole's Rebuttal Br.").) Dole explained that when it was asked to resubmit the sales data in standard case format, the number of cans per case for product code 38900–72475 was mistakenly listed as eight rather than four. (*Id.* at 16, Dole's Pub. App. Ex. 19 at 21; "Rebuttal Brief on Behalf of Dole Food Company, et al." (July 16, 2001), at Annex 3, Prop. Doc. 93, Dole's Prop. App. Ex. 19 at 35–37.) Additionally, the conversion factor to convert the actual case configuration of a 24-can, full-case equivalent was incorrect-

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[3] Dole indicated in its questionnaire responses that the pineapple it sells is sourced from both Thailand and the Philippines at the same price and that it does not keep track of the country of origin of the specific products shipped from its United States inventory. (Dole's Section A Questionnaire Response, at A–2, Def.'s Pub. App. Ex. 8 at 5.) Dole therefore reported sales based on weighting factors derived by multiplying the total quantity and value of its United States sales during the period of review by the ratio of shipments from Thailand to the United States to total shipments from Thailand and the Philippines during the period of review. (*Id.*) At the start of verification, Dole reported [[ ]] standard cases of both Thai and Philippine origin product as its United States military sales data. (Verification Report, at Ex. U–18, Def.'s Prop. App. Ex. A1; Pl.'s Prop. Br. at 7; Def.'s Prop. Br. at 7.) According to Defendant and Dole, [[ ]] standard cases were of Thai origin product. (Def.'s Prop. Br. at 7; Dole's Prop. Br. at 8 n.8.) Commerce accepted and verified the weighting factors. *Decision Memo*, at 4, Def.'s Pub. App. Ex. 2 at 4. Dole asserts that the United States military sales of Thai origin product makes up at most [[ ]]% of total sales of Thai origin product in the United States. (Dole's Prop. Br. at 8 n.8.)

ly indicated as 0.33.[4] (*Id.*) These mistakes had caused the gross unit price for the product to be incorrectly stated, and Dole asked Commerce to accept corrections of these clerical errors. (Dole's Rebuttal Br., at 16–17, Dole's Pub. App Ex. 19 at 21–22.) After providing Maui with an opportunity to comment on the issue, Commerce relied upon *Certain Fresh Cut Flowers from Colombia; Final Results of Antidumping Duty Administrative Reviews,* 61 Fed. Reg. 42,833, 42,834 (Aug. 19, 1996) *("Colombian Flowers")* to accept the corrections. *Decision Memo*, at 12–13, Def.'s Pub. App. Ex. 2 at 12–13.

Maui also asserted in its case brief that the imputed credit expense on Canadian sales was overstated by Dole. (Pl.'s Case Br., at 14, Def.'s Pub. App. Ex. 14 at 11.) Maui argued that Commerce should apply a hypothetical Canadian interest rate imputed from Dole's U.S. borrowing rate. (*Id.*) Commerce noted that "[w]here a respondent has no short-term borrowings in the currency of the transaction, it is [Commerce's] policy to use publicly available information to establish a short-term interest rate applicable to the currency of the transaction." *Decision Memo,* at 7 cmt. 3 and n.12, Def.'s Pub. App. Ex. 2 at 7. Commerce therefore accepted the information that Dole submitted and rejected Maui's argument. *Id.*

Commerce calculated a 0.49% dumping margin for Dole. *Final Results*, 66 Fed. Reg. at 52,744. Maui filed its complaint with this Court on December 14, 2001.

PARTIES' CONTENTIONS

I. Plaintiff's Contentions

Plaintiff contends that Commerce wrongfully accepted the military sales data submitted by Dole. (Pl.'s Pub. Br. at 11.) First, Maui states that Commerce was statutorily prevented from accepting the information because it was submitted after the deadline established for submission. (*Id.* at 11–12 (citing 19 U.S.C. § 1677e(a) (1994)).) Maui argues that the information was submitted more than three months after the deadline had elapsed and therefore Commerce should have relied upon facts otherwise available rather than relying on the submitted information. (*Id.* at 12.) Maui notes that while under 19 U.S.C. § 1677m(d) Commerce must allow a respondent to remedy a deficiency in its submission, Commerce may reject a supplemental submission where the information is not submitted within the time limits established for completion of the review. (*Id.* at 12–13 (citing 19 U.S.C. § 1677m(d)(2)).) There are also certain circumstances under which Commerce may not refuse to consider submitted information that does not meet all applicable requirements for submission, but Maui points out that such information must be submitted within applicable deadlines. (*Id.* at 13 (citing 19 U.S.C. § 1677m(e)(1)).) Maui argues that Commerce's reliance on its "sometimes-relied-upon 'policy' of accepting new factual information after the established deadline * * * effectively reads [19 U.S.C. § 1677m(e)(1)] out

[4] Dole stated that the proper conversion factor was 0.17. (Dole's Rebuttal Br., at 17, Dole's Pub. App. Ex. 19 at 22.)

of the statute." (*Id.*) Maui challenges Defendant's insistence that the information was adequately verified, contending that in other cases where Commerce has accepted late-reported sales, Commerce appears to have verified every omitted sale. (Pl.'s Pub. Reply Br. at 11–12.) Maui points out that in the present case, only four of the omitted United States military sales were verified. (*Id.*)

Second, Maui relies on the Court's decision in *Florex v. United States*, 705 F. Supp. 582 (Ct. Int'l Trade 1988), for the principle that failure to report even one United States sale is a "serious error." (Pl.'s Pub. Br. at 13.) Maui also cites *Tatung Co. v. United States*, 18 Ct. Int'l Trade 1137 (1994), where unreported sales were discovered at verification but Commerce refused to accept them and instead used adverse facts available. (*Id.* at 13–14 (citing *Tatung*, 18 Ct. Int'l Trade at 1140–41).) Maui contends that Commerce's own administrative determinations are directly inconsistent with Commerce's determination in this case. (*Id.* at 14–21.) Plaintiff states that it "is unaware of any case in which the Court has permitted Commerce to accept such a significant number of sales several months after the deadline established for their submission." (*Id.* at 21.) Maui disputes Commerce's categorization of the sales data as a "minor correction" and contends that Commerce never stated how the submitted military sales correct information "already on the record." (Pl.'s Pub. Reply Br. at 5, 15.)

Third, Plaintiff argues that Commerce's "'policy' of accepting 'minor corrections' conflicts with the statute, and so must be voided." (Pl.'s Pub. Br. at 22.) Maui also contends that the "policy" is inconsistent with Commerce's other articulations as to its treatment of information submitted after an initial submission. (*Id.*) Maui's view is that Commerce's acceptance of the military sales data is contrary to Commerce's cautionary statements to Dole that information must be submitted by the established deadlines. (*Id.*) Maui quotes Commerce's admonition in the verification agendas that "verification is not intended to be an opportunity for submitting new factual information." (*Id.* at 23 (quoting Jan. 23 Verification Agenda, at 2, Pl.'s Pub. App. Ex. 18 and Jan. 31 Verification Agenda, at 2, Pl.'s Pub. App. Ex. 19) (emphasis omitted).) Maui contends that this language and similar admonitions by Commerce during this review contradict Defendant's argument that Commerce's verification agenda constituted a new request for information. (Pl.'s Pub. Reply Br. at 4.) Maui argues that if Commerce had followed its admonitions in the verification agendas, it would have found that the omitted information should have been submitted previously because Dole was required to report all United States sales. (Pl.'s Pub. Br. at 23.) Maui contends that Commerce would have also found that the military sales were not minor corrections but rather were new sales that did not corroborate, support, or clarify information already on the record. (*Id.*)

In response to Defendant's argument that Commerce has discretion in establishing deadlines and evaluating the adequacy of information, Plaintiff maintains that the letters sent to Dole by Commerce made

clear that no new information would be accepted. (Pl.'s Pub. Reply Br. at 13–14.) Maui relies upon *Reiner Brach GmbH & Co. v. United States*, 206 F. Supp. 2d 1323 (Ct. Int'l Trade 2002). Maui explains that in *Reiner Brach*, Commerce's decision not to accept the respondent's data reported at verification was upheld because the failure to report the data based on the respondent's misunderstanding of its reporting obligations did not excuse the omission. (*Id.* at 14 (citing *Reiner Brach*, 206 F. Supp. 2d at 1330–31).) Maui argues that in the present case, Commerce had no reason to believe that Dole's exclusion of the military sales data was improper or that Dole's distribution process had changed. Maui asserts that, just as in Reiner Brach, Commerce had no reason to believe that a deficiency existed in light of the respondent's vague responses to Commerce's deficiency letters. (*Id.* at 14–15.)

In addition, Maui challenges Commerce's acceptance of the corrections submitted by Dole as to product code 38900–72475. (Pl.'s Pub. Br. at 26.) Maui maintains that, in order to be timely, the corrections should have been submitted no later than in Dole's case brief. (*Id.* at 26–27.) Maui contends that because Dole submitted the corrections in its rebuttal brief, the corrections were untimely. (*Id.*) According to Maui, before Commerce accepts a respondent's corrections of clerical errors, the conditions set forth in *Colombian Flowers* must be satisfied. (*Id.* at 27–28.) Maui contends that Dole failed to meet two of the conditions required by *Colombian Flowers:* (1) the respondent must have availed itself of the earliest reasonable opportunity to correct the error, and (2) the clerical error allegation and corrections must be submitted no later than the due date for the respondent's administrative case brief. (*Id.* at 28–29.) In its *Decision Memo*, Commerce reasoned that "[b]ecause Dole did not realize that it had made an error until [Maui's] allegation called its attention to certain high-margin sales, its rebuttal brief was the earliest opportunity to correct the error." *Decision Memo*, at 13, Def.'s Pub. App. Ex. 2 at 13. Maui believes that Commerce incorrectly read the first condition noted above as permitting Dole to make corrections at its earliest opportunity, regardless of the second requirement. (Pl.'s Pub. Br. at 29.) Plaintiff cites another agency decision in which Commerce refused to accept corrections to a clerical error when they were first introduced in the respondent's rebuttal brief. (*Id.* at 30 (citing *Certain Cold-rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review,* 64 Fed. Reg. 11,825, 11,829 (Mar. 10, 1999)).) Maui states that regardless of whether it had an opportunity to comment on the issue, Commerce should not have considered the corrections in the first place because they were untimely. (Pl.'s Pub. Reply Br. at 19.) Maui further argues that acceptance of the corrections of the clerical errors, as well as the military sales data, was fundamentally unfair. (Pl.'s Pub. Br. at 30.) According to Maui, Commerce changed its policy as to the acceptance of corrections and deviated from its application of *Colombian Flowers* without a reasonable explanation. (Pl.'s Pub. Reply Br. at 19–21.) Maui remarks that "[t]o sanction Commerce's prac-

tice of changing the rules mid-game is inherently unfair to petitioners as it forces them to speculate about when last minute corrections will be admitted and creates an incentive for respondents to hold off announcing mistakes, or even look for them, until the last minute." (Pl.'s Pub. Br. at 30–31.) Maui emphasizes that acceptance of the corrections undermines the statutory requirement that information must be submitted by the established deadline. (*Id.* at 31.)

As to the imputed credit expenses accepted by Commerce, Maui maintains that the rate submitted by Dole does not represent Dole's creditworthiness. (*Id.* at 32.) Maui notes that *The Economist* lending rate listing indicated that the average prime lending rate in Canada was 6.50% while the average United States dollar prime rate was reported as 8.38%. (*Id.*) Maui points out that Dole had actual borrowings in the United States and that Dole's actual United States interest rate was lower than the average United States dollar prime rate. (Pl.'s Prop. Br. at 32.) Maui asserts that this difference in United States rates demonstrates that Dole is a "most favored" borrower that is qualified for lower interest rates. (*Id.*) Therefore, Maui posits that "[t]he *average* Canadian-dollar prime rate * * * that Dole selected is clearly higher than the rate Dole would actually have to pay" if Dole had actual borrowings in Canada. (*Id.*) Maui contends that Commerce did not address Maui's argument that the rate selected did not represent Dole's creditworthiness. (Pl.'s Pub. Br. at 33–34.) According to Maui, Commerce instead relied on Commerce's policy to use publicly available information (a policy that Maui states it did not challenge). (*Id.*) Maui disagrees with Defendant's interpretation of Commerce's role in the investigative process. (Pl.'s Pub. Reply Br. at 22–23.) Maui maintains that it is Commerce's obligation to take into account Dole's actual creditworthiness. (Pl.'s Pub. Br. at 33–34.) Maui asks this Court to "direct Commerce to revise its calculations to substitute a Canadian dollar interest rate that is consistent with Dole's actual creditworthiness." (*Id.* at 34.)

Finally, Plaintiff points out that Commerce's final margin program contained a clerical error "whereby Commerce failed to properly convert Thailand-incurred inventory carrying costs (DINVCARU) on U.S. sales from Thai baht to U.S. dollars, due to improper use of parentheses." (*Id.* at 34.) Maui acknowledges that it failed to notify Commerce of the error but nevertheless asks the Court to direct Commerce to correct the error. (*Id.*) Maui argues that the incorrect programming language is as follows: [[ ]]. (Pl.'s Prop. Br. at 35.) According to Maui, the correct language is: [[ ]]. (*Id.*) Maui states that the addition of the internal parentheses is needed to convert inventory carrying costs from Thai baht to U.S. dollars. (*Id.*) Maui asserts that if the error alleged is corrected, then Dole's final dumping margin would rise above the *de minimis* level. (*Id.* at 34.) In response to Defendant's reliance on the exhaustion doctrine, Maui counters that "[t]his Court has directed Commerce to remedy its own clerical errors, notwithstanding the exhaustion doctrine, where the Court otherwise issues a remand to Com-

merce." (Pl.'s Pub. Reply Br. at 23–24 (citing *Serampore Indus. Pvt., Ltd. v. United States Dep't of Commerce,* 696 F. Supp. 665, 673 (Ct. Int'l Trade 1988)).) Plaintiff also lists various "mitigating factors" that it believes support correction of the error: (1) the correction is "uncontroversial and extremely simple"; (2) "other errors in Commerce's preliminary results programming masked the significance of this particular error"; and (3) the mistake is material in that correction would result in a non-*de minimis* margin. (*Id.* at 24–25.)

Plaintiff asks the Court to find that Commerce's determination in this case is unsupported by substantial evidence and to remand the case to Commerce.

II. Defendant's Contentions

Defendant argues that Commerce's decision to accept the previously unreported military sales data was supported by substantial evidence and otherwise in accordance with law. (Def.'s Pub. Br. at 19.) According to Defendant, Dole "promptly" informed Commerce about the change in its military sales process and cooperated fully with Commerce's requests for information. (*Id.* at 19–20.) Defendant notes that pursuant to 19 C.F.R. § 351.301(b)(2) (2000), the deadline for submission of factual information to Commerce in this case was December 18, 2000. (*Id.* at 22.) Nevertheless, Defendant explains, an exception to the deadline established by § 351.301(b)(2) exists when information is requested by the verifying officials, in which case the information is due no later than seven days after the date when verification is completed. (*Id.*) Defendant cites its statement in the verification agendas that it "will accept new factual information" under certain circumstances and argues that this language "constituted a new, if limited, request for information." (*Id.* at 22–23.) As further support, Defendant points to 19 C.F.R. § 351.301(c)(2), which states that Commerce may request that a party submit factual information "at any time during a proceeding." (*Id.* (quoting 19 C.F.R. § 351.301(c)(2)).) Defendant therefore maintains that the military sales that Dole submitted at verification as "minor corrections" were not untimely. (*Id.* at 23.)

Defendant asserts that Commerce's policy of accepting minor corrections at verification is reasonable. (*Id.* at 26.) It remarks that Commerce has been given broad discretion in administering the antidumping laws, designating deadlines, and evaluating adequacy and accuracy of submitted information. (*Id.*) Defendant characterizes Commerce's policy of accepting minor corrections as "a typical administrative procedure entrusted to Commerce's discretion." (*Id.* at 26–27.) Defendant argues that Maui's interpretation of the term "deadline" in 19 U.S.C. §§ 1677e(a)(2) and 1677m(e) is "inflexible and extreme" and "fails to accord proper deference to Commerce's reasonable interpretation of the statute and its own administrative procedures." (*Id.* at 27.) Defendant maintains that this Court has upheld Commerce's policy of accepting minor corrections. (*Id.* (citing *Coalition for the Pres. of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States,* 44 F. Supp. 2d 229, 235–37

(Ct. Int'l Trade 1999) *("American Brake")).)* Defendant disputes Maui's assertion that Commerce has an established rule that the omission of a single U.S. sale is serious error. (*Id.* at 28.) Contrary to Maui's assertion, Defendant explains, the Court has sustained Commerce's case-by-case consideration of the facts in each review. (*Id.*) As to the *Florex* case relied upon by Maui, Defendant claims that in that case Commerce found that the respondent failed verification for various reasons and not solely because of the omission of a single sale. (*Id.* at 28–29 (citing *Florex*, 705 F. Supp. at 588).) Defendant maintains that the same holds true in the *Tatung* case and stresses that both of these cases predate the enactment of 19 U.S.C. § 1677m(e), which requires Commerce to consider data meeting the criteria in that provision. (*Id.* at 29 (citing *Tatung*, 18 Ct. Int'l Trade at 1140–42 & n.3).) Defendant responds to Maui's claim of inconsistent treatment of cases by Commerce by stating that Maui's claim "ignores the judgment that Commerce brings to bear in each case." (*Id.* at 30.) In response to the cases Maui cites in which the Court affirmed Commerce's rejection of a respondent's data, Defendant reasons that "Maui misunderstands the difference between what the prior judicial decisions permit and what they require. * * * A decision of this Court upholding Commerce's determination in the context of another case that the failure to report or disclose some number of U.S. sales supported the use of 'facts available' does not establish a 'court imposed requirement.'" (*Id.*)

Defendant further argues that Commerce was correct in rejecting Maui's request to apply facts otherwise available rather than using the submitted sales. (*Id.* at 31.) Under 19 U.S.C. § 1677e(a)(2), Commerce may apply facts otherwise available where an interested party (1) withholds information that Commerce requested, (2) fails to provide requested information by applicable deadlines or in the form and manner requested, (3) significantly impedes a proceeding, or (4) the information submitted is unverifiable. 19 U.S.C. § 1677e(a)(2). According to Defendant, none of these criteria was met and therefore Commerce properly refused to use facts otherwise available. (Def.'s Pub. Br. at 31–32.) In particular, as to the second circumstance allowing use of facts otherwise available, Defendant offers that "the additional sales information constituted minor corrections to the comprehensive response data and were, thus, submitted within Commerce's deadlines." (*Id.* at 32.) Defendant insists that although the military sales were originally excluded, they were fully reported before the start of verification and therefore should not be considered "unreported sales." (*Id.*) Defendant states that "Maui's strict construction of the statute, which would preclude Commerce from accepting even minor corrections to submitted information 'under any circumstances,' is particularly inappropriate in the context of this case," where Maui does not dispute the accuracy of the information Dole submitted. (*Id.* at 33 (quoting Pl.'s Pub. Br. at 11).) Defendant believes that Commerce had no need or legal basis to use facts otherwise available because it had Dole's submissions. (*Id.* at 34.)

Defendant also disagrees with Maui's contention that Commerce should not have accepted Dole's corrections of the clerical errors as to product code 38900–72475. (*Id.*) Defendant points out that Maui was given an opportunity to comment on the acceptance of the corrections and cannot show prejudice from Commerce's acceptance and consideration of the corrected data. (*Id.*) According to Defendant, the errors caused the price of product code 38900–72475 to be understated by half when the sales were converted from the actual case format to the standard case format. (*Id.* at 35.) Defendant contends that Dole acted "promptly" in informing Commerce of the errors in its administrative rebuttal brief. (*Id.*) Defendant stresses that the errors were "inadvertent" and "unintentional" and had a "significant impact upon the calculated dumping margin," thus making Commerce's acceptance of the corrections proper. (*Id.* at 36.) Defendant presents case law emphasizing that "the goal of the antidumping law is to arrive at the most accurate results possible." (*Id.* at 37 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Keonig & Bauer-Albert AG v. United States*, 15 F. Supp. 2d 834, 848 (Ct. Int'l Trade 1998)).) Defendant responds that Maui's argument on this issue is contrary to *NTN Bearing Corp. v. United States*, 74 F.3d 1204 (Fed. Cir. 1995). (*Id.*) According to Defendant, "[t]he court [in *NTN Bearing Corp.*] held that the important goal of finality could not justify Commerce's refusal to consider corrections brought to Commerce's attention well before the deadline for issuance of the final result of the review." (*Id.*) Defendant explains that the policy that Commerce set forth in *Colombian Flowers* was adopted in response to the decision in *NTN Bearing Corp.,* and that the objective of *Colombian Flowers* was to expand rather than restrict Commerce's ability to accept corrections of clerical errors. (*Id.* at 37–38.) Defendant concludes that "[t]he policy * * * does not restrict Commerce's discretion to consider * * * corrections that meet all of the substantive requirements of the *Colombian Flowers* test and can be considered by Commerce within the statutory deadlines for completion of the administrative review. * * * Commerce retains the authority to relax a deadline or remove a restriction when it determines it can do so within the constraints of available resources and statutory deadlines." (*Id.* at 38–39 (citations omitted).)

With regard to the imputed credit expenses, Defendant states that Maui fails to demonstrate that Commerce's policy of accepting published data regarding actual foreign currency borrowing rates is unreasonable and does not provide any reason to question the reliability of the information submitted. (*Id.* at 40–41.) Defendant posits that Commerce's policy is a reasonable and practical methodology for calculating the imputed credit expenses where the antidumping statute does not specify any particular methodology or interest rate that should be applied. (*Id.*) Defendant states that "Commerce's policy does not contemplate further adjustments for asserted 'creditworthiness' comparisons for borrowing in another currency." (*Id.* at 42.)

Finally, Defendant argues that Maui's request to correct the clerical error in the final margin program should be rejected for failure to exhaust administrative remedies on this issue. (*Id.* at 42–44.) Defendant calls attention to Maui's failure to point out the error during the administrative proceeding or subsequent to the disclosure of the *Final Results* calculations. (*Id.* at 44.) In Defendant's view, Maui suggests that the time period for the error to be addressed was insufficient but does not show how it was insufficient. (*Id.* at 44–45.)

Defendant asks the Court to affirm Commerce's determination in the *Final Results* and dismiss the case. (*Id.* at 45.)

III. Defendant-Intervenors' Contentions

Because this Court finds Dole's arguments in this matter substantially similar to those presented by Defendant, this Court will not recount them, although they have been duly considered.

STANDARD OF REVIEW

Commerce's determination will be upheld unless the Court finds that 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). Substantial evidence is defined as "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). To be in accordance with law, Commerce's actions must be "reasonable under the terms of the relevant statute." *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States,* 102 F. Supp. 2d 486, 489 (Ct. Int'l Trade 2000).

ANALYSIS

I. Commerce properly accepted Dole's submitted United States military sales data.

Under Commerce's regulations, for the final results of an administrative review, factual information must be submitted no later than "140 days after the last day of the anniversary month." 19 C.F.R. § 351.301(b)(2) (2001). The anniversary month is the calendar month in which the anniversary of the date of publication of the order occurs. § 351.102(b). When Commerce finds that a response does not comply with its request, it "shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of * * * reviews under this subtitle. If that person submits further information in response to such deficiency and * * * such response is not submitted within the applicable time limits, then [Commerce] may * * * disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d). Commerce may not refuse "to consider information that is submitted by an interested party and is necessary to the deter-

mination but does not meet all of the applicable requirements established by [Commerce] if—

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

§ 1677m(e). Subject to 19 U.S.C. § 1677m(d), Commerce shall use facts otherwise available in reaching its determination if:

> "(1) necessary information is not available on the record, or
> (2) an interested party * * *—
>
> > (A) withholds information that has been requested * * *,
> > (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to [19 U.S.C. §§ 1677m(c)(1) and (e)],
> > (C) significantly impedes a proceeding * * *, or
> > (D) provides such information but the information cannot be verified."

§ 1677e(a). As noted earlier, Commerce's verification agendas in this case contain its standard admonition to respondents that Commerce will accept new information only when "(1) the need for [the] information was not previously evident, (2) the information makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record." (Jan. 23 Verification Agenda, at 2, Def.'s Pub. App. Ex. 11 at 2; Jan. 31 Verification Agenda, at 2, Def.'s Pub. App. Ex. 13 at 2.)

Using the criteria of 19 U.S.C. § 1677m(e), Commerce determined that it would accept the military sales data because (1) its stated policy allows respondents to make minor corrections at verification and therefore the submission was not untimely; (2) the information was verified; (3) there was no evidence at verification that the military sales data was incomplete; (4) there was no evidence at verification of Dole's lack of cooperation to the best of its ability; and (5) the information could be used without difficulty. *Decision Memo*, at 4–5, Def.'s Pub. App. Ex. 2 at 4–5. Commerce noted that its decision to accept the data at verification "is made on a case-by-case basis and depends on the significance of the new information. The military sales constitute a very small percentage of Dole's total U.S. sales." *Id.* at 4, Def.'s Pub. App. Ex. 2 at 4.

Commerce properly found that the military sales were acceptable as minor corrections to information already on the record. Dole submitted the military sales data during the earlier part of verification. In fact, Commerce had sufficient time to verify the information and use it in the calculations of Dole's dumping margin. (Verification Report, at 28–29,

31, 41, Def.'s Prop. App. Ex. A at 28–29, 31, 41; "Analysis Memorandum for Dole Food Company, Dole Packaged Foods and Dole Thailand" (Apr. 2, 2001), at 4–5, Prop. Doc. 69, Def.'s Prop. App. Ex. G at 4–5.) This Court acknowledges that Commerce's ability to use facts otherwise available serves as an inducement for respondents to provide complete and accurate information in a timely manner. *See NTN Bearing Corp. of Am. v. United States,* No. 98–12–03232, 2003 Ct. Intl. Trade LEXIS 8, at *18 (Ct. Int'l Trade Jan. 24, 2003); *see also* Uruguay Round Agreements Act, Statement of Administrative Action, Pub. L. No. 103–465, 868–869, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198 ("SAA"). The Court also acknowledges that due to deadlines and limited resources, "it is vital that accurate information be provided promptly to allow the agency sufficient time for review." *Tatung*, 18 Ct. Int'l Trade at 1140–41 (quoting *Ceramica Regiomontana, S.A. v. United States,* 636 F. Supp. 961, 967 (Ct. Int'l Trade 1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987)). At the same time, "Commerce enjoys very broad, although not unlimited, discretion with regard to the propriety of its use of facts available." *NTN Bearing Corp.*, 2003 Ct. Intl. Trade LEXIS 8, at *18. Commerce also has broad discretion to "fashion its own rules of administrative procedure, including the authority to establish and enforce time limits concerning the submission of written information and data." *American Brake*, 44 F. Supp. 2d at 237. Further, Commerce's determination as to whether a respondent has complied with its request for information is discretionary. *Allegheny Ludlum Corp. v. United States*, 215 F. Supp. 2d 1322, 1338 (Ct. Int'l Trade 2000) (quoting *Daido Corp. v. United States*, 893 F. Supp. 43, 49–50 (Ct. Int'l Trade 1995)).

In *American Brake*, the plaintiff challenged Commerce's decision not to apply facts otherwise available and Commerce's acceptance of information before and during verification. *American Brake,* 44 F. Supp. 2d at 235. The Court found the plaintiff's argument to be misplaced in light of the statement in Commerce's verification agenda that it would accept new information when the information makes minor corrections to or corroborates, supports, or clarifies information that is already on the record. *Id.* at 235–36. The Court found that Commerce's actions conformed with 19 U.S.C. § 1677m(d) (1994). *Id.* at 236.[5] The Court also rejected the plaintiff's argument that the quantity of incomplete answers required use of facts otherwise available, reasoning that Commerce has discretion in determining if a respondent has complied with an information request and if the errors substantially effect the integrity of the response. *Id.* Commerce had verified the respondent's submis-

[5] The Court in *American Brake* cited the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex II, which is implemented in the United States by the Uruguay Round Agreements Act of 1994. *American Brake*, 44 F. Supp. 2d at 234 & n.7, 236 n.12; *see also* SAA, Pub. L. No. 103–465, at 869, 1994 U.S.C.C.A.N. at 4198. Of relevance to the case before the Court is the statement in Annex II that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Annex II, Point 5. In the present case, Dole does not appear to have purposefully omitted the military sales from its United States sales database. When the omission was discovered, Dole acted promptly to submit the information and Commerce was able to verify it. Commerce therefore acted within the principles articulated in Annex II.

sions and determined that the revisions were not unduly extensive, and thus all errors were corrected and Commerce was able to calculate an accurate margin. *Id.* at 236–37.

As in *American Brake*, Commerce was able to verify the military sales data. At the time that the military sales were submitted to Commerce, Dole's United States sales were "already on the record" in that Dole had already submitted its United States sales in its questionnaire responses. The military sales, which were a small percentage of all United States sales of the subject merchandise reported by Dole, corrected information that was already on the record in that the addition of the military sales made the United States sales more accurate. As this Court has previously found, "the issue is not the value of the errors as a percentage of total U.S. sales, or the number of instances of errors. Rather the issue is the nature of the errors and their effect on the validity of the submission." *Tatung*, 18 Ct. Int'l Trade at 1141.

Maui questions Commerce's verification of Dole's military sales data, asserting that it "disagrees * * * that the limited, four-sentence review of four military sales out of over [[ ]] previously unreported sales means that those sales were 'verified.'" (Pl.'s Prop. Reply Br. at 12.) The Court, however, finds that Commerce properly verified the military sales. First, the figure that Maui puts forth is the total number of military sales made of the subject merchandise of both Thai and Philippine origin. (Verification Report, at Ex. U–18, Def.'s Prop. App. Ex. A1, Dole's Prop. App. Ex. 16.) The country of origin in this administrative review is Thailand and it is only with the Thai origin goods that Commerce was concerned. Second, Commerce has broad discretion is establishing verification procedures. *See Torrington Co. v. United States*, 146 F. Supp. 2d 845, 897–98 (Ct. Int'l Trade 2001); *Acciai Speciali Terni S.p.A. v. United States*, 142 F. Supp. 2d 969, 1007 (Ct. Int'l Trade 2001). As this Court observed in *FAG Kugelfischer Georg Schafer AG v. United States,* "verification is a spot check and is not intended to be an exhaustive examination of the respondent's business. Commerce has considerable latitude in picking and choosing which items it will examine in detail. In fact, Commerce enjoys wide latitude in its verification procedures. The Court defers to the agency's sensibility as to the depth of the inquiry needed. In the absence of evidence in the record suggesting that the need to examine further the supporting evidence itself, the agency may accept the credibility of the document at face value. To conclude otherwise would leave every verification effort vulnerable to successive subsequent attacks, no matter how credible the evidence and no matter how burdensome on the agency further inquiry would be." *FAG Kugelfischer Georg Schafer AG v. United States*, 131 F. Supp. 2d 104, 133 (Ct. Int'l Trade 2001) (alterations in original omitted) (internal citations and quotations omitted); *see also U.S. Steel Group v. United States*, 22 Ct. Int'l Trade 104, 107 (1998) ("Verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness. Normally, an audit entails selective examination rather than

testing of an entire universe. Hence, evasion is a common possibility, but only when audits uncover facts indicating the actuality thereof are auditors compelled to search further.") (quoting *Bomont Indus. v. United States,* 733 F. Supp. 1507, 1508 (Ct. Int'l Trade 1990)). "Commerce is not required to verify every sale and invoice submitted." *Tatung,* 18 Ct. Int'l Trade at 1140 (holding that it is the respondent's burden to create an accurate record). In the present case, Commerce properly exercised its discretion in verifying four of Dole's submitted military sales. Third, though Maui seems to argue that more investigation of the military sales data was necessary for the data to be considered "verified," Maui does not challenge the completeness or accuracy of the information that Dole submitted.

Maui cites the *Florex* and *Tatung* cases for the proposition that the omission of even a single sale is considered a "serious error." These cases are distinguishable from the case before the Court and do not stand for the asserted proposition. In *Florex*, there were numerous errors and omissions, including the omission of "at least one U.S. sale." *Florex*, 705 F. Supp. at 587. In that case, nearly half of the reported home market sales were inaccurately reported. *Id.* In light of the numerous errors and omissions in the responses, the Court found that Commerce was justified in finding a failure of verification. *Id.* In *Tatung*, the respondent's submissions contained errors as to commissions, sales expenses, and unit price, as well omissions of United States sales. *Tatung*, 18 Ct. Int'l Trade at 1140. In affirming Commerce's refusal to rely upon the respondent's submissions, the Court remarked that it is the respondent's burden to create an adequate record and that Commerce is not required to verify every sale to guarantee accuracy. *Id.* Neither of these cases involved Commerce's decision to refuse to use the respondent's submissions because of a single omission; in both cases Commerce was faced with a number of errors and omissions which led Commerce to believe that the totality of the information submitted was unreliable. *See Florex*, 705 F. Supp. at 587*; Tatung*, 18 Ct. Int'l Trade at 1140. Further, in the present case, Dole's response was not replete with errors and the military sales omissions did not make up a significant percentage of the total United States sales. Commerce was able to verify the information submitted and did not find errors in the submissions. Commerce acted reasonably in relying upon the information in calculating Dole's dumping margin.

Maui's reliance on *Reiner Brach* is also misplaced. In *Reiner Brach*, Commerce had requested that the respondent submit all home market sales of the foreign like product, which was defined as "merchandise that is sold in the foreign market and that is identical or similar to the subject merchandise." *Reiner Brach*, 206 F. Supp. 2d at 1330. The respondent's initial response to Commerce's questionnaire contained information regarding sales of identical merchandise, but it omitted sales of similar merchandise and some of the sales of identical merchandise. *Id.* at 1330–31. Commerce sent a supplemental questionnaire in which

it asked the respondent to explain the discrepancy between the questionnaire response and the respondent's submitted sales data. *Id.* at 1332. The respondent answered in vague terms that the figures in the questionnaire response were based on aggregate sales data while the figures in the data spreadsheets were based on individual invoices. *Id.* In light of this vague response, Commerce's inability to know of any further deficiency until verification, Commerce's admonitions that new information would not be accepted at verification, and the discretion given to Commerce, the Court found that Commerce properly refused to accept the respondent's data on sales of similar merchandise submitted at verification. *Id.* at 1334.

Unlike the respondent in *Reiner Brach*, Dole indicated to Commerce before verification that it had not submitted the military sales data based upon the 1995 order. (Dole's Section A Questionnaire Response, at A–26 to A–27, Def.'s Pub. App. Ex. 8 at 10–11; Dole's Sales Reconciliation Data, at Ex. R–18, Dole's Pub. App. Ex. 12 at 8–9.) When Commerce questioned Dole as to why Dole's databases have reported zero sales for a "significant number of observations," Dole clearly explained that the sales were "converted first to a standard case basis and then weighted by the shipment ratio reflecting the relative proportion of this product sourced from Thailand. For some products, which were sourced 100% from the Philippines and 0% from Thailand, the weighting fact is zero, and therefore the weighted quantity will be zero. Such transactions may be disregarded in the dumping analysis, as they constitute sales of non-subject merchandise." (Letter from Hale and Dorr LLP (on behalf of Dole) to U.S. Department of Commerce (Feb. 14, 2001), at 2, Pl.'s Pub. App. Ex. 13 at 2.) This explanation, as well Dole's explanation that the military sales were being omitted in light of the 1995 order, were not vague; rather, they demonstrate that Dole acted to the best of its ability to submit the requested information. *See Decision Memo*, at 5, Def.'s Pub. App. Ex. 2 at 5. Additionally, the respondent in *Reiner Brach* failed to submit all of its sales data for similar merchandise; in the present case, however, Dole failed to submit military sales that made up only a small portion of all sales to be reported. Thus, *Reiner Brach* is also distinguishable.

For the reasons stated above, the Court finds that Commerce properly applied 19 U.S.C. § 1677m(e) in accepting the United States military sales data.

II. Commerce properly accepted Dole's corrections to the clerical error caused by conversion from actual cases sold to standard case equivalents.

Maui challenges Commerce's acceptance of Dole's corrections of clerical errors as to product code 38900–72475 that occurred when Commerce asked Dole to convert its data from actual cases sold to standard case equivalents. As noted earlier, when Dole resubmitted its sales in standard case format, the number of cans per case for product code 38900–72475 was mistakenly listed as eight rather than four and the

conversion factor to convert the actual case configuration of a 24-can, full-case equivalent was incorrectly indicated as 0.33. (Dole's Rebuttal Br., at 16, Dole's Pub. App. Ex. 19 at 21.) Maui claims that the acceptance of the corrections was contrary to the requirements in *Colombian Flowers* that the corrections be submitted at the earliest reasonable opportunity and that they be submitted no later than the respondent's administrative case brief. (Pl.'s Pub. Br. at 27–28.) Defendant maintains that Commerce acted in accordance with the objective of reaching the most accurate results possible. (Def.'s Pub. Br. at 37.) The Court holds that Commerce properly accepted the corrections of the clerical errors as to product code 38900–72475.

In *Colombian Flowers*, Commerce indicated that it will "accept corrections of clerical errors under the following conditions: (1) The error in question must be demonstrated to be a clerical error, not a methodological error, an error in judgment, or a substantive error; (2) [Commerce] must be satisfied that the corrective documentation provided in support of the clerical error allegation is reliable; (3) the respondent must have availed itself of the earliest reasonable opportunity to correct the error; (4) the clerical error allegation, and any corrective documentation, must be submitted to [Commerce] no later than the due date for the respondent's administrative case brief; (5) the clerical error must not entail a substantial revision of the response; and (6) the respondent's corrective documentation must not contradict information previously determined to be accurate at verification." *Colombian Flowers*, 61 Fed. Reg. at 42,834.

In applying the *Colombian Flowers* criteria to the present case, Commerce found that (1) there was a clerical error, as opposed to a substantive error, (2) the corrected database was reliable, (3) "[b]ecause Dole did not realize that it had made an error until [Maui's] allegation called [Dole's] attention to certain high-margin sales, its rebuttal brief was the earliest opportunity to correct the error," (4) the corrections were not a substantial revision in light of the small number of sales to be corrected, and (5) the corrected data did not contradict information presented at verification. *Decision Memo*, at 13, Def.'s Pub. App. Ex. 2 at 13.

By accepting the corrections, Commerce avoided the use of a high dumping margin and was able to obtain an accurate gross unit price for the merchandise sold. This Court, as well as the U.S. Court of Appeals for the Federal Circuit ("CAFC"), has repeatedly stated that Commerce must determine dumping margins as accurately as possible and that the antidumping laws are remedial, not punitive. *Viraj Group, Ltd. v. United States*, 193 F. Supp. 2d 1331, 1336 n.1 (Ct. Int'l Trade 2002) (discussing various decisions of the CAFC and this Court). The potential tension between finality and correct results has been acknowledged, but "preliminary determinations are 'preliminary' precisely because they are subject to change" and the tension between finality and correctness does not exist when corrections are submitted after preliminary determinations. *NTN Bearing Corp.*, 74 F.3d at 1208; *see also World Finer*

Foods, Inc. v. United States, No. 99–03–00138, 2000 Ct. Intl. Trade LEXIS 72, at *29 (Ct. Int'l Trade June 26, 2000). The criteria of *Colombian Flowers* were established in response to the CAFC's decision in *NTN Bearing Corp.,* where the CAFC stated that it did "not agree that draconian penalties are appropriate for the making of clerical errors in order to insure submission of proper data. Clerical errors are by their nature not errors in judgment but merely inadvertencies. While the parties must exercise care in their submissions, it is unreasonable to require perfection." *NTN Bearing Corp.,* 74 F. 3d at 1208; *Colombian Flowers,* 64 Fed. Reg. at 42,834.

The Court's decision in *World Finer Foods* also provides guidance on this issue. In that case, the respondent attempted to submit corrections to its database after the preliminary results were issued. *World Finer Foods, Inc.*, 2000 Ct. Intl. Trade 72, at *23. Commerce rejected the submission on the grounds that it was an untimely submission of new factual information which did not comply with the *Colombian Flowers* criteria that the corrective documentation be reliable and that it be submitted by the due date for the respondent's case brief. *Id.* at *23, *24 n.16. The Court found that the submission was a correction to a clerical error rather than new factual information and that Commerce did not demonstrate that the information was unreliable. *Id.* at *26–27. Relying upon *NTN Bearing Corp.*, the Court found that Commerce improperly treated the submission as untimely and violated the notion that dumping margins are to be determined as accurately as possible. *Id.* at *27–28. The Court observed that the respondent had been fully cooperative in the administrative review and that making the correction imposed little burden on Commerce. *Id.* at *28–29.

Similarly, Dole acted cooperatively in submitting information to Commerce, complying with Commerce's instructions to convert the sales data from actual cases sold to standard case equivalents. The errors were inadvertent and effected a single product code in the sales data submitted. Additionally, Commerce was able to make the corrections without difficulty and calculate an accurate dumping margin. "Use of the mistakenly submitted information would be punitive" to Dole, and the simple corrections were in accordance with the principle that the antidumping laws are remedial rather than punitive in nature. *Id.* at *29. As noted earlier, Commerce has discretion in establishing its administrative procedures and enforcing time limits for submitting information. *American Brake*, 44 F. Supp. 2d at 237. The Court holds that Commerce's acceptance of the corrections of the clerical errors was a reasonable exercise of its discretion.

III. The issues raised as to Commerce's calculation of Dole's imputed credit expenses are remanded for further consideration.

Commerce explains its use of imputed credit expenses in calculating normal value in Import Administration Policy Bulletin 98.2. *Import Administration Policy Bulletin 98.2: Imputed credit expenses and interest rates* (Feb. 23, 1998), Def.'s Pub. App. Ex. 17 *("Policy Bulletin 98.2")*. In

that policy bulletin, Commerce explains that it "makes a circumstances of sale adjustment to normal value (NV) to account for differences in credit terms. To make this adjustment, [Commerce] imputes a U.S. credit expense and a foreign market credit expense on each sale." *Policy Bulletin 98.2*, at 1, Def.'s Pub. App. Ex. 17 at 1; *see supra* note 2. According to the policy bulletin, "[i]n cases where a respondent has no short-term borrowings in the currency of the transaction, [Commerce] will use publicly available information to establish a short-term interest rate applicable to the currency of the transaction. For foreign currency transactions, [Commerce] will establish interest rates on a case-by-case basis using publicly available information, with a preference for published average short-term lending rates." *Id.* at 6, Def.'s Pub. App. Ex. 17 at 6. The imputed credit expense "must correspond to a dollar figure reasonably calculated to account for [the time value of money] during the gap period between delivery and payment. If the cost of credit is imputed in the first instance to conform with commercial reality, it must be imputed on the basis of usual and reasonable commercial behavior." *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455, 460–61 (Fed. Cir. 1990). As noted by Defendant, there is no statutory guidance as to how imputed credit expenses should be calculated or what interest rate should be applied. (Def.'s Pub. Br. at 41.) After the CAFC's decision in *LMI-La Metalli Industriale, S.p.A.*, Commerce sought to develop a policy such that the interest rate used would reflect the "commercial reality" in a given case. *See Policy Bulletin 98.2,* at 2–5, Def.'s Pub. App. Ex. 17 at 2–5. Commerce noted that "[i]n the case of foreign market sales, it is not possible to develop a single consistent policy for selecting a surrogate interest rate when a respondent has no short-term borrowings in the currency of the transaction. The nature of the available information will vary from market to market. However, any short-term interest rate used should * * * be reasonable, readily available, and representative of 'usual commercial behavior.'" *Id.* at 5.

Maui does not question the propriety of Commerce's policy of using publicly available information when there is no short-term borrowing rate. (Pl.'s Pub. Br. at 33; Pl.'s Pub. Reply Br. at 22.) Rather, Maui argues that Commerce should have investigated whether the interest rate submitted was reflective of Dole's creditworthiness. (*Id.*) In the *Final Results* and the *Decision Memo,* Commerce does not address the argument raised by Maui as to whether the interest rate chosen is reflective of Dole's creditworthiness. Commerce simply states that it is following its policy, as articulated in *Policy Bulletin 98.2*, of using publicly available information to establish the rate to be used. *Decision Memo*, at 7 & n.12, Def.'s Pub. App. Ex. 2 at 7. In light of the CAFC's mandate and Commerce's policy that the rate chosen must reflect "commercial reality" and "usual and reasonable commercial behavior," and Commerce's failure to address Maui's concerns that the rate chosen in this case does not reflect Dole's creditworthiness, the Court remands this issue so that Commerce may more adequately address Maui's arguments and explain

how the rate chosen is reflective of Dole's "usual and reasonable commercial behavior."

IV. The issues raised as to the existence of a clerical error in Commerce's final margin program language are remanded for further consideration.

Maui has identified a clerical error in Commerce's final margin program language the correction of which Maui maintains will cause Dole's final dumping margin to rise above the *de minimis* level. As discussed earlier, Maui argues that the incorrect programming language is as follows: [[ ]]. (Pl.'s Prop. Br. at 35.) According to Maui, the correct language is: [[ ]]. (*Id.*) Defendant and Dole counter that this alleged error, which was not raised during the administrative review, should not be considered by the Court because Maui failed to exhaust administrative remedies. The Court remands the issue to Commerce for further consideration.

Under 28 U.S.C. § 2637(d) (2000), in any civil action not specified in subsections (a) through (c), this Court "shall, *where appropriate*, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d) (emphasis added). "Nevertheless, the Court may exercise its discretion to prevent knowingly affirming a determination with errors." *Torrington Co. v. United States,* 21 Ct. Int'l Trade 1079, 1082 (1997). In *Serampore Industries,* the plaintiff raised computer input errors for the first time before this Court and requested a remand for correction of the errors. *Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce*, 696 F. Supp. 665, 673 (Ct. Int'l Trade 1988). In light of its decision to remand for consideration of another issue, the Court also agreed to remand for consideration of whether there was an error and for correction if necessary. *Id.* In the present case, the Court is remanding this case to Commerce for consideration of Maui's arguments regarding Dole's imputed credit expenses. Requiring Maui to exhaust its administrative remedies would not be appropriate in this case. Rather than "affirm a determination that might be based on a questionable record," the Court remands this issue to Commerce to determine whether there is an error in the final margin program language. *Id.* If Commerce finds that there is an error, Commerce is directed to make the appropriate corrections.

CONCLUSION

The Court finds that Commerce's decision to accept the United States military sales data and the corrections to a clerical error was supported by substantial evidence or otherwise in accordance with law. The Court remands to Commerce (1) to consider Maui's arguments as to the interest rate used for Dole's imputed credit expense and explain how the rate chosen is consistent with *LMI-La Metalli Industriale, S.p.A. v. United States*, 912 F.2d 455 (Fed. Cir. 1993) and *Policy Bulletin 98.2*, and (2) to determine whether there is a clerical error in Commerce's final margin program and make any necessary corrections. Plaintiff's motion for oral argument is denied.

[PUBLIC VERSION]

(Slip Op. 03–48)

PAM, S.P.A., PLAINTIFF *v.* U.S. DEPARTMENT OF OMMERCE, DEFENDANT, AND NEW WORLD PASTA CO., DEFENDANT-INTERVENOR

Court No. 02–00144

[Plaintiff's Motion for Judgment Upon an Agency Record is Denied.]

(Dated May 8, 2003)

Riggle and Craven, David A. Riggle and *(David J. Craven),* for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, *(Lucius B. Lau),* Assistant Director, *(David A. Harrington),* Trial Attorney; *Elizabeth Cooper Doyle,* Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant.

Collier Shannon Scott, PLLC, Paul C. Rosenthal, David C. Smith, and *(Adam H. Gordon),* for Defendant-Intervenor.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* Plaintiff PAM S.p.A. ("PAM")[1] filed a USCIT R. 56.2 Motion for Judgment Upon an Agency Record, challenging certain aspects of the Department of Commerce's ("Commerce" or "Department") determinations in the antidumping administrative review that it conducted concerning PAM. *See Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta From Italy,* 67 Fed. Reg. 300 (Jan. 3, 2002) *("Final Results").* This Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c).

II. BACKGROUND

On July 24, 1996, Commerce published in the Federal Register an antidumping duty order on certain pasta from Italy.[2] *See Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy,* 61 Fed. Reg. 38,547 (July 24, 1996). On July 20, 2000, Commerce published in the Federal Register notice of the "Opportunity to Request an Administrative Review" of this order for the period covering United States sales between July 1, 1999 and June 30, 2000. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review,* 65 Fed. Reg. 45,035 (July 20, 2000). Borden, Inc. and New World Pasta requested an administrative review on

[1] Formerly Prodotti Alimentari Meridionali, S.r.l.

[2] The subject merchandise is classifiable under item 1902.19.20 of the Harmonized Tariff Schedule of the United States.

September 6, 2000 and that same day, Commerce initiated the administrative review of the antidumping duty order on pasta from Italy. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part,* 65 Fed. Reg. 53,980 (Sept. 6, 2000).

On September 13, 2000, Commerce sent its questionnaire to PAM and the other respondents. PAM submitted its responses to sections A through C of the questionnaire by November 15, 2000. Commerce sent PAM a supplemental questionnaire requesting information about pasta cuts and their production on December 14, 2000. PAM submitted its section D responses pursuant to the Department's instructions by January 16, 2001. *See Def.-Int.'s App*. Ex. 3. On February 21, 2001, Commerce sent PAM another supplemental questionnaire seeking information concerning, among other things, a new production line at its D'Apuzzo facility.

In its section D response, PAM claimed a startup adjustment pursuant to 19 U.S.C. § 1677b(f)(1)(C) (1999), related to the installation of a "new production line" in its existing D'Apuzzo facility and stated that it had "remodeled an existing facility by addition of new machinery." *Id*. at 22. The Department's questionnaire also requested that PAM "explain how the production levels were limited by technical factors associated with the initial phase of commercial production." *Id.* at 23. PAM responded that the question "does not apply" because its new line did not begin to operate during the period of review ("POR"). *Id.*

On June 28, 2001, Commerce preliminarily determined that PAM sold the subject merchandise at less than normal value ("NV")[3] with a dumping margin of 4.48 percent and denied PAM's requested startup adjustment. *See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review and Intent To Revoke Antidumping Duty Order in Part: Certain Pasta From Italy,* 66 Fed. Reg. 34,414 (June 28, 2001) *("Preliminary Results").*

In its supplemental questionnaire to PAM, Commerce noted that PAM had "failed to provide all the information requested in the original questionnaire regarding these startup costs." *Def.-Int.'s App.* Ex. 4 at 1. PAM responded it had added "new machinery" in the form of a "new long cut production line," which required periodic closures of the plant. *Id.* at 2. PAM maintained that "production levels were limited because the new line was not yet ready to produce pasta and the existing lines could not produce pasta because the installation of the new line made it impossible for the old line to operate." *Id.* at 4. Commerce denied the request in the *Preliminary Results,* determining that PAM did not meet the criteria for a startup adjustment pursuant to 19 U.S.C. § 1677b(f)(1)(C)(ii). *Preliminary Results* at 34,419. Specifically, Commerce concluded that the new line did not constitute a "new production facility" or a "new product" that required substantial additional invest-

[3] Normal value is the weighted average price of the subject merchandise in the producer's home market. *See* § 1677b.

ment, and the new line did not constitute a "substantial retooling" of its existing facility. Commerce determined the addition of a new production line within an already existing facility was a "mere improvement," which, as the Uruguay Round Agreements Act, Statement of Administrative Action ("SAA")[4] states, does not qualify for a startup adjustment.

On August 7, 2001, Commerce received PAM's administrative case brief. In a December 5, 2001 letter, PAM supplemented its brief with a request that Commerce combine shape categories 5 (short cuts), 6 (specialty short cuts), and 7 (soupettes), asserting that Commerce acknowledged that it erred with respect to this issue in the judicial review of the third administrative review. *See Final Results* at 300 n.2. In the *Final Results*, Commerce declined to combine shape categories, explaining that Commerce's remand request in the prior judicial review, which PAM claimed to be a "clear and unequivocal" admission of error, was simply a request for an opportunity to "review the record with regard to shape categories." *Id*. at 300.

On January 3, 2002, Commerce published the final results of the administrative review, again denying the startup adjustment and determining PAM's dumping margin to be 4.10 percent. *Id*. at 302. Commerce rejected PAM's request that its margin be calculated by comparing the weighted average of normal values to entire invoices and, instead, followed the standard methodology of comparing the weighted average of normal values to individual transactions. *See Issues and Decision Memorandum for the Fourth Antidumping Duty Administrative Review; Final Results of Review* (Jan. 3, 2001) *("Issues and Decision Memo")* at 12 (citing 19 C.F.R. § 351.414(c)(2)). Commerce also declined to permit PAM's non-dumped sales to be used to offset the dumping margins on sales that had been dumped. *Id.*

On February 28, 2002, PAM filed a complaint with this court, alleging that the Department's determination was unsupported by substantial evidence on the record and was otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(B)(1)(B)(i). On October 7, 2002, PAM moved for Judgment upon an Agency Record pursuant to USCIT R. 56.2.

III. DISCUSSION

PAM challenges four separate issues in this case: first, whether Commerce's denial of a startup adjustment for PAM's new production line is supported by substantial evidence and is in accordance with law; second, whether the Department's calculation of PAM's dumping margin using the average-to-transaction method is in accordance with law; third, whether the Department erred by "zeroing"[5] negative margins on individual transactions when calculating PAM's dumping margin; and

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[4] The SAA "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements, both for purposes of U.S. international obligations and domestic law. * * * Moreover, since this Statement will be approved by Congress at the time it implements the Uruguay Round agreements, the interpretations of those agreements included in this Statement carry particular authority." SAA at 656, H.R. Doc. No. 103–316 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040.

[5] "Zeroing" is the methodology of assigning zero to margins with "negative" values. *See infra* Section C.

fourth, whether the Department erred in its classification of certain pasta shapes.

This court must evaluate whether the findings in question are supported by substantial evidence on the record and are otherwise in accordance with law. *See* § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984).

A. Commerce's Determination to Deny a Startup Adjustment for PAM's New Production Line is Supported by Substantial Evidence and is Otherwise in Accordance With Law.

PAM claimed a startup adjustment for its new pasta production line at its D'Apuzzo facility equal to the amount of the fixed overhead attributed to the period of time during which the D'Apuzzo facility was closed for the installation of the production line. In the *Final Results*, Commerce denied PAM's request for a startup adjustment, finding that the statutory criteria had not been satisfied.

To qualify for a startup adjustment, a producer must satisfy two requirements under the statute. In particular, Commerce will make an adjustment for startup costs when:

> I) a producer is using new production facilities or producing a new product that requires substantial additional investment, and
> II) production levels are limited by technical factors associated with the initial phase of commercial production.

19 U.S.C. § 1677b(f)(1)(C)(ii) (1999).

The statute does not define "new product" and "new production facility." *See Pohang Iron and Steel Co. v. United States,* 23 CIT 778, 782 (1999). However, the Department looks to the SAA for the interpretation of these terms. "'New production facilities' include[] the substantially complete retooling of an existing plant. Substantially complete retooling involves the replacement of nearly all production machinery or the equivalent rebuilding of existing machinery. A 'new product' is one requiring substantial additional investment." SAA at 836.

Consistent with the SAA's requirements, Commerce determined that the addition of a pasta production line to an already existing facility is a "mere improvement," and not a "new facility" or "substantially complete retooling." *See Preliminary Results* at 34,419. "Mere improvements to existing products or ongoing improvements to existing facilities will not qualify for a startup adjustment." SAA at 836.

On the other hand, PAM contends that the addition of a new production line does not constitute a "mere improvement," but rather constitutes a "substantial improvement tantamount to the opening of a new factory." *Pl.'s Br.* at 6. In support, PAM argues that because "mere" is not assigned a statutory definition, a dictionary must be consulted to ascertain its plain meaning. However, the Supreme Court has consistently held, and this Court has followed its lead as it must, that when the stat-

ute is ambiguous on an issue, the court will uphold Commerce's reasonable interpretations of the statute. *See Chevron*, 467 U.S. at 843. Commerce limits the definition of a new production facility to include only those involving substantially complete retooling whereas PAM contends that a substantial investment alone will qualify as a "new production facility." Commerce's interpretation, consistent with the SAA, is clearly reasonable. PAM's interpretation would make any substantial investment tantamount to a "new production facility" and essentially render that phrase in § 1677b(f)(1)(C)(ii)(I) superfluous. Such an interpretation is contrary to the intent of the statute.

To support its claim for a startup adjustment, PAM cites its financial data as evidence of a "substantial improvement." PAM reiterates that the increase in its production capabilities, [[ ]][6] times that of the old line, is "substantial and significant." *Pl.'s Reply* at 4. In addition, PAM allegedly increased total production capacity by nearly [[ ]]%, more than [[ ]] the value of the old plant. *Pl.'s Br.* at 7. Even if these assertions are assumed to be true, such statistics are not a basis for a startup adjustment pursuant to the statute. That PAM greatly expanded capacity or incurred significant costs in establishing the new line does not affect its eligibility for a startup adjustment "without a showing that the sizeable investment was geared toward the production of a new product or a new production facility." *Pohang*, 23 CIT at 783.[7]

PAM must show that the new pasta line constitutes a "new production facility" under § 1677b(f)(1)(C)(ii). A foreign producer may qualify for a startup adjustment if its investment was "geared toward" a new production facility. In the initial investigation, the Department sent PAM two questionnaires intended to clarify how PAM qualified for a startup adjustment. Because the first reply was not clear, the Department sent PAM a supplemental questionnaire. Based on these responses, the Department made a determination that PAM did not meet the statutory requirements for the adjustment. PAM argues that it has made a "substantial improvement to a production facility" and has created a "new production line," but it has not shown that the improvement was "geared toward" the establishment of a "new production facility" amounting to a complete retooling or a replacement of nearly all existing machinery. *Cf. Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Administrative Reviews,* 63 Fed. Reg. 13,170, 13,200 (Mar. 18, 1998) (disallowing a startup adjustment because the foreign producer failed to demonstrate that the production line in question constituted a "new fa-

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[6] Confidential information is set in double brackets and omitted from the public version.

[7] The producer's argument in *Pohang* depended solely on the fact that it expended substantial investment in creating a new line, and the record showed that the new line was only an expansion of the producer's existing type of production. The *Pohang* Court rejected the argument that the producer was entitled to a startup adjustment, explaining that incurring "'considerable costs' in establishing a new line is unremarkable without a showing that the sizeable investment was geared toward the production of a new product or a new production facility." *Pohang*, 23 CIT at 783. The *Pohang* Court further found that the "new [product] line was established as part of the existing factory and increased the [producer's] overall capacity * * * as it performed functions that were the same or similar to those of other lines at the plant." *Id*. Thus, because the producer failed to provide evidence that it had built a new production facility, or that its investment was intended for such a purpose, it was denied a startup adjustment.

cility" or manufactured a "new product"). Therefore, PAM failed to meet the statutory requirements.

Plaintiff failed to show that it established a new production facility or made a substantial investment geared towards a new production facility. It was reasonable for Commerce to conclude that PAM's addition of machinery to its existing facility did not qualify for a startup adjustment within the meaning of § 1677b(f)(1)(C)(ii)(I).[8] Therefore, the court affirms Commerce's denial of PAM's requested startup adjustment.

B. The Department Properly Calculated PAM's Margin of Dumping Using the Average-to-Transaction Method.

PAM challenges the Department's use of the average-to-transaction method in this case. The average-to-transaction method is described as "a comparison of the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise." 19 C.F.R. § 351.414(b)(3) (2000). PAM primarily argues that the Department ignored the plain language of the statute when it failed to calculate antidumping duties on an "entry by entry" basis pursuant to 19 U.S.C. § 1675(a)(2)(A). *Pl.'s Br.* at 9. In addition, PAM argues that Commerce should have offset positive and negative dumping margins on an invoice by invoice basis, resulting in a lower calculation of its dumping margin.[9]

Section 1675(a)(2)(A) is a general provision concerning the calculation of the antidumping duty margin in administrative reviews. PAM relies on the language which states that "[f]or the purpose of paragraph (1)(B), the administering authority shall determine—(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry." § 1675(a)(2)(A). Because the provision contains the word "entry," PAM argues that this provision dictates the method employed by Commerce.[10]

Commerce counters that the statute permits the employment of its methodology in this case and it is necessary to read 19 U.S.C. § 1675(a)(2) within the context of the other sections of the statute and in conjunction with 19 C.F.R. § 351.414 in order to comprehend the full meaning of the statute. *See Def.'s Br.* at 14; *see also Marcel Watch Co. v. United States*, 16 CIT 474, 477, 795 F. Supp. 1199, 1202 (1992) ("It is fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and in fulfilling [its] responsibility in

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[8] Because PAM failed to qualify for a startup adjustment according to the requirements of § 1677b(f)(1)(C)(ii)(I), the court need not determine whether Commerce properly concluded that production levels were not limited by technical factors, pursuant to § 1677b(f)(1)(C)(ii)(II).

[9] PAM's argument concerning the Department's method of calculating its dumping margin is intertwined with its zeroing argument. Zeroing is discussed below in Section C.

[10] The Department defines a "transaction" as consisting of a specific line item on an invoice, rather than an entire invoice. *See Issues and Decision Memo* at 12. PAM contends that because an import entry consists of one or multiple invoices, the best approximation of the entry is the invoice. *Pl.'s Br.* at 10–11. In support of its definition of "entry," PAM cites 19 U.S.C. § 1484. *Pl.'s Br.* at 19. Section 1484 is the Tariff Act provision concerning "entry of merchandise" for Customs purposes. PAM argues that the definition of "entry" contained in § 1484 requires Commerce to treat assorted merchandise contained on a single invoice "as a single unit" for dumping calculation purposes. In drawing on this provision for support, PAM ignores the distinction between "entry" for purposes of Customs duties, as opposed to "entry" for purposes of the Department's antidumping duty calculation methodology. *See Def.-Int.'s Br.* at 15–16.

interpreting legislation, [the court] must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy") (internal quotes and citation omitted).

The statute expressly states that in a review, "when comparing export prices (or constructed export prices) of individual *transactions*," the Department will use "the calendar month of the individual export sale" as a base. § 1677f–1(d)(2) (emphasis added). Moreover, this Court has repeatedly upheld the Department's use of the "average-to-transaction" method in administrative reviews. *See Ad Hoc Comm. of S. Calif. Producers of Gray Portland Cement v. United States,* 19 CIT 1398, 914 F. Supp. 535 (1995); *NSK Ltd. v. United States,* 17 CIT 590, 825 F. Supp. 315 (1993); *Am. Silicon Technologies v. United States*, 23 CIT 237, 240–41 (1999). PAM argues that in prior cases where the use of "sales" as opposed to "entries" was endorsed in dumping margin calculations, the calculation used the "constructed export price" ("CEP") as opposed to "export price" ("EP"). *See, e.g., NSK Ltd. v. United States*, 17 CIT 590 (1993). This argument, however, was properly rejected by this Court in *American Silicon*:

> The problem with plaintiffs' argument is that if the Court were to require an entries-based methodology based upon the "plain language" of § 1675(a)(2)(A), Commerce would subsequently be required to utilize an entries-based approach not only for EP transactions, but also CEP transactions. Under a plain language reading of § 1675(a)(2)(A), the term "entry" appears to apply equally and without distinction to both CEP and EP transactions. Any ruling by this Court as to the meaning of the term "entry," as set forth in § 1675(a)(2)(A), would, therefore, also apply equally and without distinction to both CEP and EP margin calculations.
>
> The parties agree that it is oftentimes impossible for Commerce to tie sales to entries for CEP transactions. If Commerce were required to limit its § 1675(a)(2)(A) margin analysis solely to entries made during the POR, Commerce would then be presented with two options, either attempt to perform the impossible or cease calculating dumping margins for CEP transactions. Either result would significantly impede Commerce's ability to effectively enforce the antidumping law and could not have been intended by Congress. Therefore, the Court finds that once § 1675(a)(2)(A) is read in the context of the antidumping law as a whole, it becomes apparent that Commerce is not limited to entries made during the period of review when calculating dumping margins.

American Silicon, 23 CIT at 240.

In addition, PAM's reliance on the term "entry" in the statue is ill-founded because there is a specific regulation which enumerates the methods Commerce may employ in determining the antidumping duty margin, namely § 351.414. "In a[n administrative] review, the [Department] normally will use the average-to-transaction method" in calculating the antidumping duty margin. § 351.414(c)(2). Further, the SAA describes the average-to-transaction method as "the preferred method-

ology in reviews." SAA at 843. Since it is an administrative review (as opposed to an initial investigation) that is under review here, Commerce was within its discretion to employ the average-to-transaction method in this case.

The use of the average-to-transaction method in administrative reviews is in conformity with the statute, the SAA, and the Department's regulations. Therefore, the court sustains the use of the method in PAM's case.

C. The Department Did Not Err in Using "Zeroing" When Calculating PAM's Dumping Margin.

PAM challenges Commerce's methodology for calculating its weighted average dumping margin, a practice referred to as "zeroing." In zeroing, Commerce calculates the dumping margin by assigning a zero value to all sales where the U.S. price exceeds NV, thus effectively excluding all non-dumped sales or sales with "negative" margins. At the same time, Commerce includes the value of dumped sales in the dumping margin, which are therefore referred to as sales with a "positive" margin. Commerce next determines the percentage of the weighted average dumping margin "by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B). Thus, while the sales with negative margins are excluded in the numerator of this formula, they are nevertheless taken into account in the denominator.[11]

Here, PAM's main argument is that if positive margins were "offset" with negative margins, the result would have been a lower overall dumping margin. *See Pl.'s Br.* at 11. PAM asserts that the Department should calculate a "net" dumping margin, rather than disregarding negative margins or non-dumped sales—a methodology that would produce a more accurate result.

Commerce's zeroing methodology in its calculation of dumping margins is grounded in long-standing practice. *See, e.g., Timken Co. v. United States,* 26 CIT ____, 240 F. Supp. 2d 1228 (2002); *Bowe Passat Reinigungs-Und Waschereitechnik GMBH v. United States*, 20 CIT 558, 570, 926 F. Supp. 1138, 1149–50 (1996); *Serampore Indus. Pvt. Ltd. v. United States*, 11 CIT 866, 873–74, 675 F. Supp. 1354, 1360 (1987).[12] Commerce justifies its position by arguing that if Congress intended that negative margins be offset by positive margins, "the statute would require Commerce to calculate a 'net' dumping margin, rather than 'aggregate' individual 'dumping margins.'" *Def.'s Br.* at 21. Commerce explains that the statutory basis for its zeroing methodology is found in § 1677(35)(A) and (B), and when taken together, direct Commerce to aggregate all individual dumping margins and to divide this amount by the value of all sales. The statute defines the dumping margin as "the

[11] PAM had sales with both negative and positive margins in the POR.

[12] The court notes that some of the cited cases upholding zeroing precede the World Trade Organization ("WTO") Anti-Dumping ("AD") Agreement, effective as of January 1, 1995.

amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." § 1677(35)(A) (emphasis added). On the other hand, a "'weighted average dumping margin' is the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." § 1677(35)(B). Commerce interprets these provisions to permit the inclusion of only positive margins in the calculation of the aggregate dumping margin. *Def.'s Br.* at 20. "Where normal value fails to exceed the export price or constructed export price," Commerce assigns no dumping margin because there is "no dumping." *Id.*; *see also* 19 U.S.C. § 1677(34) (defining "dumping" as "the sale or likely sale of goods at less than fair value").

In determining whether Commerce's interpretation and application of the antidumping statute are in accordance with law, the applicable standard of review is prescribed by *Chevron*. The first step is to investigate as a matter of law "whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 842–43). If the Court determines that the statute is silent or ambiguous with respect to the issue, the Court proceeds to the second step. *See Chevron,* 467 U.S. at 843. This is essentially an inquiry into the reasonableness of the Department's decisions, and, accordingly, the Court sustains Commerce's reasonable interpretations of the statute. *See Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). "In determining whether Commerce's interpretation is reasonable, the Court considers, among other factors, the express terms of the provisions at issue, the objectives of those provisions[,] and the objectives of the antidumping scheme as a whole." *Mitsubishi Heavy Indus., Inc. v. United States,* 22 CIT 541, 545, 15 F. Supp. 2d 807, 813 (1998).

"The statute is silent on the question of zeroing negative dumping margins." *Bowe Passat,* 20 CIT at 572, 926 F. Supp. at 1150. This gap or ambiguity in the statute requires the application of the *Chevron* step-two analysis and compels this court to inquire whether Commerce's methodology of zeroing in calculating dumping margins is a reasonable interpretation of the statute.

The underlying purpose for the practice of zeroing is articulated in *Serampore Industries*. The *Serampore* Court found that Commerce, in applying a zeroing methodology, had interpreted the statute "in such a way as to prevent a foreign producer from masking its dumping with more profitable sales." 11 CIT at 874, 675 F. Supp. at 1360–61. By offsetting positive and negative margins into a net margin, foreign producers could undermine U.S. law by strategically dumping merchandise in the United States. For instance, companies could purposefully dump but escape antidumping duties by setting the prices of their other sales to a level such that they offset the margin, thus averaging out the margins to a level of no dumping. *Def.'s Br.* at 21 n.8.

Section 1677(35)(A) of the statute states that dumping occurs when NV exceeds the export price and does not refer to a "net" margin. An "aggregate dumping margin" is therefore reasonably interpreted to refer to the sum of margins of only the dumped sales. In addition, section 1677(35)(B) specifies that the aggregate dumping margin is divided by "aggregate export prices," including the prices of all sales. Accordingly, Commerce's exercise of including only dumped sales in the aggregate while including all sales in the division does conform to the statute and cannot be pronounced an unreasonable interpretation of the statute.

PAM next argues that because the World Trade Organization ("WTO") Appellate Body has ruled against the EC's practice of zeroing, Commerce's zeroing methodology is inconsistent with the United States' international obligations.[13] *Pl.'s Br.* at 11. In *European Communities—Antidumping Duties on Imports of Cotton-Type Bed Linen from India,* WT/DS141/AB/R (Mar. 1, 2001) *("Bed Linen"),* the WTO Appellate Body ruled that the zeroing methodology employed by the EC was inconsistent with the Article 2.4.2 of the WTO Anti-Dumping ("AD") Agreement because it did not take into account the entirety of prices of those export transactions where negative margins were found, resulting in inflated calculations of dumping margins. Commerce counters that the WTO decision does not affect the Department's zeroing methodology because that case involved a dispute between India and the EC and did not comment on U.S. practice. *Def.'s Br.* at 22. Although the exact mathematical method of the EC zeroing is not available, the fundamental practice of zeroing, as summarized in the WTO decision, is similar to the U.S. practice.[14] The fact that the U.S. submitted third party briefs to the WTO litigation in support of the EC's zeroing methodology also lends credence to the argument that the two practices are comparable.[15] Despite these similarities, *Bed Linen* is not a basis for striking the Department's zeroing methodology. *See Corus Staal BV v. United States*, slip op. 03–25 at 18, 27 CIT ____, ____ (2003). WTO panel and appellate decisions are non-binding on third parties and do not serve as precedent before this Court. *See, e.g., Hyundai Elec. Co. v. United States*, 23 CIT 302, 311, 53 F. Supp. 2d 1334, 1343 (1999); SAA at 1032 ("Reports issued by panels or the Appellate Body under the [WTO Dispute Settlement Understanding] have no binding effect under the law of the United States."); *see also Corus*, slip op. 03–25 at 18 (observing that WTO decisions have no *stare decisis* effect in the zeroing issue also being litigated

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[13] Commerce and the Defendant-Intervenor argue that PAM does not have standing under 19 U.S.C. § 3512(c) to introduce WTO cases in support of its argument that the Department's methodology is inconsistent with its international obligations. *Def.'s Br.* at 22; *Def.-Int.'s Br.* at 19. Commerce's argument is identical to the one rejected by the *Timken* court. "[T]he Department's reliance on § 3512(c) is an erroneous technical bar." *Timken Co. v. United States*, 26 CIT ____, ____, 240 F. Supp. 2d 1228, 1238 (2002) (citations and quotation omitted). Commerce claims that the *Timken* court misapplied § 3512(c) by allowing the plaintiff Timken to cite the WTO AD Agreement in support of its private cause of action. The court also notes that PAM advances the WTO *Bed Linen* decision as a persuasive source, rather than as a binding precedent. Therefore, the court may properly consider it.

[14] The Court notes that the U.S. practice of zeroing is currently being challenged by Mexico pursuant to the WTO rules of dispute settlement, although a panel has not yet been established (as of the date of this opinion).

[15] The WTO Dispute Settlement Understanding ("DSU") defines a "third party" as "[a]ny Member having a substantial interest in a matter before a panel and having notified its interest to the [Dispute Settlement Body]." Article 10.2 of the WTO DSU.

here) (citation omitted). However, the reasoning of such decisions may help to inform the court's decision. *Hyundai*, 23 CIT at 311, 53 F. Supp. 2d at 1343.

Moreover, "[i]t has also been observed that an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains." *Murray v. Schooner Charming Betsy,* 6 U.S. 64, 118 (1804) (articulating the well-known Charming Betsy doctrine); *see also* Restatement (Third) of Foreign Relations Law of the United States § 114 (1987) (recommending enjoinment of violations of international law "[w]here fairly possible."). As stated in *Timken*, this court "must determine if the Department's interpretation is reasonable, as informed by *Chevron* step-two and *Charming Betsy.*" *Timken*, 240 F. Supp. 2d at 1240. In addition, the Supreme Court has held that *Chevron* is not absolute and may yield to other rules of interpretation. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg.,* 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago,* 440 U.S. 490, 499–501 (1979)).

The *Bed Linen* panel did in fact find that the EC should have included the negative margins or non-dumped sales in the aggregation of dumping margins (in the numerator of the formula). *Bed Linen* at 16. Therefore, *Bed Linen* may fairly be said to call into question Commerce's methodology which excludes such margins. However, the *Bed Linen* decision was only one interpretation of the WTO AD Agreement and its precedential application is restricted to the facts and parties involved in that case.

The WTO AD Agreement on its face does not preclude Commerce's interpretation of the U.S. law. In particular, the WTO AD Agreement does not explicitly prohibit zeroing, and, indeed, does not even use the term zeroing. Article 2.4.2 of the Agreement requires that the calculation of the dumping margins be based upon "a comparison of a weighted average normal value with a weighted average of prices of *all* comparable export transactions." Article 2.4.2 of the WTO AD Agreement (emphasis added). Consistent with this mandate, in calculating the weighted average, the Department in fact divides aggregate margins (of only dumped sales) by all sales (including both the dumped and non-dumped sales). *See* § 1677(35)(A) & (B). Since the zeroing methodology employed by Commerce is not in such direct contradiction with an international obligation of the United States, the application of the Charming Betsy Doctrine to the facts of this case is not warranted. *Cf.* Jane A. Restani & Ira Bloom, *Interpreting International Trade Statutes: Is the Charming Betsy Sinking?,* 24 Fordham Int'l L.J. 1533, 1545 (2001) (arguing that faced with an ambiguous statutory provision and contrary WTO decision, the agency's decision may nevertheless be entitled to *Chevron* deference when the agency considered the WTO decision and

the agency decision developed with attendant due process safeguards). The court's task is limited to evaluating Commerce's interpretations of the statute on the basis of reasonableness. Therefore, under the facts of this case the court continues to uphold the Department's zeroing methodology, finding it reasonable.

D. The Department Did Not Err in Merging Pasta Shapes in PAM's Case.

This issue has carried over from a previous administrative review of pasta from Italy. PAM challenged Commerce's classification of pasta shapes in *Prodotti Alimentari Meridionali, S.r.l. v. United States,* slip op. 02–68, 26 CIT ____, ____ (July 16, 2002) *("PAM I").* Subsequently, Commerce voluntarily remanded on the classification issue. PAM brought the present suit before the Court ruled on the remand. Recently, the Court upheld Commerce's remand determination that affirmed its earlier findings. *See Prodotti Alimentari Meridionali, S.r.l. v. United States,* slip op. 03–37, 27 CIT ____, ____ (April 1, 2003) *("PAM II").*

PAM's sole argument here is that "the [*PAM II*] decision * * * should control in this matter and that when [the Court] properly holds that shape categories 5 and 7 should have been merged in the third review, [] this court should also order the Department [to] do so in this matter." *Pl.'s Br.* at 13. However, the *PAM II* did not hold that shape categories 5 and 7 should have been merged, instead it found "no inherent error in Commerce's model match methodology, a methodology developed with the parties and used from the outset of the investigation." *PAM II* at 5. *PAM II* articulated that "a methodology seeking to compare pasta products based upon shape, ingredients used, and method of production is a reasonable one" despite the fact that they may be "produced on the same machines at similar speeds" and "used in a similar manner." *Id.* PAM makes no argument and points to no fact that would help this court to distinguish *PAM II*. On the contrary, PAM urges this court to follow *PAM II*. Since this court in its independent judgment finds no reason to depart from *PAM II*, Commerce's decision not to merge PAM's pasta shape categories 5 and 7 in this review is accordingly sustained.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff's Motion for Judgment upon an Agency Record is denied, and the United States Department of Commerce's determination in *Notice of Final Results of Antidumping Duty Administrative Review, Partial Rescission of Antidumping Duty Administrative Review and Revocation of Antidumping Duty Order in Part: Certain Pasta From Italy,* 67 Fed. Reg. 300 (Jan. 3, 2002) is upheld with respect to Plaintiff's challenges. A separate order will be entered accordingly.

(Slip Op. 03–51)

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

Court No. 01–00088

[Agency determination after remand sustained in part and reversed in part.]

(Decided May 14, 2003)

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

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Reginald T. Blades, Jr.,* Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Glenn R. Butterton,* Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Barnes & Thornburg (Randolph J. Stayin) for Defendant-Intervenor.

OPINION

POGUE, *Judge:* In *San Francisco Candle Co. v. United States,* 26 CIT ____, 206 F. Supp. 2d 1304 (2002), this Court remanded aspects of the determination by the United States Department of Commerce ("Commerce") in *Final Scope Ruling; Antidumping Duty Order on Petroleum Wax Candles from the People's Republic of China (A–570–504); SFCC,* Compl. App. III (Feb. 12, 2001)*("Final Scope Ruling").* Candles 1, 4, 9, 11, and 12 were remanded to Commerce pursuant to the agency's request. Candles 2, 3, 5, 8, and 10 were remanded with the instruction that the agency should reconsider and clarify its reasoning as to whether the subject candles fell within the scope of the Order.[1] The Court now reviews the results of the remand as presented in Commerce's *Final Results of Remand Redetermination, San Francisco Candle Co., Inc. v. United States* (Aug. 20, 2002) ("Remand Determ."). This Court has jurisdiction under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(vi) (2000).

BACKGROUND

The antidumping duty order on petroleum wax candles from the People's Republic of China, issued in August 1986, covers "certain scented or unscented petroleum wax candles made from petroleum wax and having fiber or paper-cored wicks * * * sold in the following shapes: tapers, spirals, and straight-sided dinner candles; rounds, columns, pil-

[1] The candles at issue in the Remand Determination are the following:

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

The opinion will refer to the candles by the assigned numbers noted above.

lars, votives; and various wax-filled containers." *Antidumping Duty Order: Petroleum Wax Candles from the People's Republic of China,* 51 Fed. Reg. 30,686, 30,686 (Dep't Commerce Aug. 28, 1986) ("Candles Order" or "Order"). Certain novelty candles, including Christmas holiday candles, are excluded from the scope of the Order. In clarifying the scope of the Candles Order, Commerce stated that

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

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

In November 2000, San Francisco Candle Company ("SFCC") requested that Commerce issue a scope ruling in connection with twelve candles. *See* Letter from Suda Tam, SFCC, to Sean Carey, Dep't of Commerce, Int'l Trade Admin., Antidumping and Countervailing Enforcement Group III, Compl. App. I at 2 (Nov. 17, 2000) ("Scope Ruling Request"). Commerce found eleven of the twelve candles to be within the scope of the Candles Order. *See Final Scope Ruling,* Compl. App. III at 4–7. SFCC challenged the results of the *Final Scope Ruling* in this Court pursuant to 28 U.S.C. § 1581(c), claiming that all of the candles submitted in the Scope Ruling Request were novelty candles that fell outside the scope of the Candles Order.

Commerce requested that candles 1, 4, 9, 11, and 12 be remanded for reconsideration by the agency, but asserted that candles 2, 3, 5, 6, 8, and 10 were correctly found to be within the scope of the Candles Order. *SFCC I,* 26 CIT at ____, 206 F. Supp. 2d at 1308; Def.'s Resp. Pl.'s Mot. J. Agency R. at 2–3. The Court affirmed Commerce's finding with respect to Candle 6 and remanded candles 1, 4, 9, 11, and 12 for reconsideration by the agency.[2] *SFCC I,* 26 CIT at ____, 206 F. Supp. 2d at 1311, 1317.

[2] The decorative patterns on candles 1, 4, 9, 11, and 12 include holly leaf and berry designs. Commerce originally determined the holly designs to be "generic to the winter season" and therefore ineligible for exclusion from the Candles Order as holiday novelty candles. *Final Scope Ruling,* Compl. App. III at 4–7 ¶¶ 1, 4, 9, 11, 12. However, this determination was contrary to *Springwater Cookie & Confections, Inc. v. United States,* 20 CIT 1192, 1195–96 (1996), in which this Court stated that holly sprigs "are indeed a symbol associated with Christmas," and inconsistent with other Candles Order rulings in which Commerce, following *Springwater,* concluded that the holly leaf and berry design is a symbol of Christmas that qualifies a candle for the holiday novelty exception. *See Final Scope Ruling, JCPenney Purchasing Corp.,* Pl.'s Ex. 8 at 5–8 (May 21, 2001); *Final Scope Ruling, Avon Products, Inc.,* Def.-Int.'s Ex. 6 at 4 (May 8, 2001); *Final Scope Ruling, Dollar Tree Stores, Inc.* at 3–4 (Apr. 9, 1997). The Court granted Defendant's request for remand, and further instructed Commerce to consider both the cube and pillar versions of candle 12, the Christmas Patchwork candle. *SFCC I,* 26 CIT at ____, 206 F. Supp. 2d at 1311.

The Court also remanded candles 2, 3, 5, 8, and 10, directing the agency to (1) assess whether the requirement that a design be visible from multiple angles is properly applied to holiday novelty candles, *SFCC I,* 26 CIT at ____, ____, 206 F. Supp. 2d at 1313–14, 1316–17; (2) refrain from considering whether a design will easily melt or burn away, *id.* at 1314, 1316; (3) explain whether its "minimally decorative" standard requires that a holiday design be both easily discernable and visible from multiple angles in order to qualify a candle as a holiday novelty candle, *id.* at 1315–17; and (4) consider the combined effects of colors and holiday designs in determining whether the decorations rendered the candles "specially designed for use only in connection with the Christmas holiday season." *Id.* at 1316–17 (quoting Scope Clarification, Pl.'s Ex. 4 at 1). Familiarity with the Court's earlier opinion is presumed.

STANDARD OF REVIEW

This Court will uphold an agency determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Scope Determinations

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

In determining whether a product falls within the scope of an order, Commerce looks to "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1) (2002). If the descriptions are dispositive, Commerce issues the scope ruling based on this information alone. *See id.* at § 351.225(k)(2); *Nitta Indus. Corp. v. United States,* 997 F.2d 1459, 1461 (Fed. Cir. 1993).[3]

II. The Candles Order

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

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

excluded from the Order as a novelty candle.[4] Among the excluded novelty candles are holiday candles, including Christmas candles. Holiday novelty candles fall outside the scope of the Order when they are "specially designed for use only in connection with the Christmas holiday season," and this use is "clearly indicated by Christmas scenes or symbols depicted in the candle design." Scope Clarification, Pl.'s Ex. 4 at 1.

The holiday novelty exclusion is narrowly defined, requiring specific and easily recognizable holiday images. *See SFCC I,* 26 CIT at ____, 206 F. Supp. 2d at 1310; *Russ Berrie & Co. v. United States,* 23 CIT 429, 440, 57 F. Supp. 2d 1184, 1194–95 (1999); *Springwater Cookie & Confections, Inc. v. United States,* 20 CIT at 1197 ("[C]olors *per se* will not exempt a candle from the scope of the antidumping duty order."). In determining whether a candle falls within the holiday novelty exception, Commerce considers all of the candle's characteristics in combination. *See, e.g.,* Remand Determ. at 7–8.

The Remand Determination contains a discussion of the standards Commerce applies in determining whether a candle qualifies as a holiday novelty candle that is excluded from the scope of the Order. Commerce states that a candle's "holiday- or event-specific design must be large enough or proportionately situated on the candle as to render it easily recognizable from most perspectives." Remand Determ. at 7. In response to the Court's inquiry in *SFCC I,* the agency states that its ruling in *Final Scope Ruling, Endar Corp.* (Jan. 11, 2000) *("Endar Ruling")* did not promulgate a two-element standard requiring that a design be both easily recognizable and visible from multiple angles in order to qualify a candle for the novelty candle exception. *SFCC I,* 26 CIT at ____, 206 F. Supp. 2d at 1315–16; Remand Determ. at 7–8 ("[T]he Department does not interpret the ruling on Endar's alleged bamboo candle to require *per se* that the candle meet both standards discussed in that ruling (whether the design is easily recognizable and visible from most angles) in order to qualify for the novelty candle exception."). Commerce emphasizes in its Remand Determination that the agency "takes into consideration the totality of the candle (the combination of the colors, patterns, and images)," and states that "[the *Endar]* guidelines were designed to simply help the Department interpret the exclusion narrowly." Remand Determ. at 8.

Neither Commerce's Remand Determination nor its earlier Candles Order rulings offer a clear definition of the "minimally decorative" standard. However, a review of the Remand Determination and other rulings indicates that in determining whether a design is "minimally decorative," the agency considers whether the design is easily seen or is

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[4] As noted earlier, the following are excluded from the scope of the Candles Order as novelty candles:

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

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

easily discernable, the size of the design relative to the size of the candle, the location of the design on the candle, and whether the design is located in only one place on the candle. *See Endar Ruling* at 5 (noting that the bamboo design on the subject candle was "not easily discernable"); Remand Determ. at 7 (indicating that a design is "minimally decorative" when it is not "large enough or proportionately situated on the candle" that it may be seen easily); *Final Scope Ruling, Interpro International* at 7 (Sept. 26, 2002) (holding that a design was "minimally decorative" because it was "small and/or singularly placed on the candle") *("Interpro Ruling").* Additionally, it appears that Commerce may inquire whether a design is "identifiable from most angles" as part of its "minimally decorative" standard. *See, e.g., Endar Ruling* at 5 (finding that the subject candle's design was "minimal[ly] decorative" because it was "not easily discernable" and "not visible from all sides"); *but see* Remand Determ. at 9 (suggesting that the "identifiable from most angles" standard is separate from, rather than a component of, the "minimally decorative" standard); *Interpro Ruling* at 7–8 (stating that "[i]f the * * * holiday-specific design is not identifiable from most angles, or if the design or characteristic is minimally decorative, the Department may determine that the candle does not qualify for exclusion from the Order under the novelty candle exception.").

In *SFCC I,* the Court also asked Commerce to clarify whether the requirement that a design be visible from multiple angles, which was previously applied only to candles allegedly formed in the shape of identifiable objects, is also properly applied to holiday novelty candles. *See* 26 CIT at ____, 206 F. Supp. 2d at 1313–14. In its Remand Determination, the agency states that "[s]tarting with the SFCC Ruling, the Department recognized that the 'identifiable from most angles' benchmark was appropriately applied * * * to candles allegedly associated with a recognized holiday as well as to candles allegedly in the shapes of identifiable objects." Remand Determ. at 9. Commerce explains that application of the standard to both categories of novelty candles is proper because "these characteristics both fall under one and the same exception to the scope of the Order: the novelty candle exception." *Id.* at 9–10. The agency also asserts that examining candles in light of the "identifiable from most angles" standard helps to "ensure[] that the candles for which the novelty candle exception is requested truly meet the requirements of this narrowly-construed exception to the scope of the Order." *Id.* at 9.

In summary, it appears that Commerce may find a candle design to be "minimally decorative" and therefore within the scope of the Order when the candle's holiday-specific design cannot easily be seen or discerned, when the design is very small in relation to the size of the candle, or when the design is "singularly located" on the candle. Commerce also may find that a holiday candle is within the scope of the Order when its design is not easily recognizable as a holiday-specific image, or when the design is not visible or identifiable from most angles. Commerce evalu-

ates candles on a case-by-case basis, and looks at the totality of the candle's design characteristics in order to assess the combined effects of colors and design patterns.

The Court now proceeds to evaluate Commerce's application of these standards to the candles at issue. Commerce's application of its legal standards will be upheld if the record can be reasonably interpreted to support the agency's decisions.

A. Candles 1, 2, and 3

Candles 1, 2, and 3 are pillar candles. Each has diagonal "candy cane" pattern stripes on the body of the candle and a holiday image imprinted into the top surface of the candle. Candle 1 has red and white stripes and a holly leaf and berry image printed on the top surface. Similarly, Candle 2 has red and white stripes and an image of Santa Claus printed on top. Candle 3 has red, white, and green stripes and an image of a Christmas tree with a star printed on top. Upon reconsideration, Commerce determined that candles 1 and 3 fall outside the scope of the Order, while candle 2 is covered by the Order.

In its reconsideration of candle 2, Commerce stated that the image imprinted on the top surface is only "'minimally decorative' and can only be viewed when looking down at the top surface of the candle." Remand Determ. at 14. Commerce opined that this "singular image[] [is] not substantial enough to transform" this candle into an exempt holiday novelty candle. *Id.* Additionally, although Commerce acknowledged the red and white "peppermint candy" color pattern on the candle, *id.* at 17, the agency concluded that "even when taking into consideration the combined effect of the colors, patterns, and images on these candles, the result is not sufficient to qualify these candles for the holiday novelty exception." *Id.*

In its analysis of candles 1 and 3, Commerce stated as follows:

> Although the small images of the holly leaves and berries and the Christmas tree with a star, [sic] are, when viewed in isolation, minimally decorative and not easily recognizable as holiday images from most angles, the combination of these images with other designs characteristic of Christmas, such as the red, green, and white color combination, indicate that these candles were "specially designed for use in connection with the Christmas holiday season." Unlike candles 2, 8, 9, and 10, candles 1 and 3 have more than a "peppermint candy" striped effect; candles 1 and 3 also have a green stripe, which taken in concert with the other colors and images, more closely identifies these candles as designed for the Christmas holiday season.

Remand Determ. at 19–20.

The Court agrees that in the case of candle 3, the red, white, and green stripes and the Christmas tree with star image closely identify the candle with the Christmas holiday. Therefore, the Court finds that Commerce's decision to exclude candle 3 from the scope of the Candles Order is supported by substantial evidence.

However, candle 1 does not have a green stripe. Rather, candle 1, like candle 2, has only red and white striping. In addition to the red and white diagonal stripes, candle 1 bears an image of holly leaves and berries and candle 2 bears an image of Santa Claus. Both holly leaves and berries and Santa Claus are images closely associated with the Christmas holiday. The images, although present only on the tops of the candles, are easily identifiable as holiday images and occupy significant portions of the top surfaces of the candles.[5] Moreover, as the candles stand only 2-7/8 inches to 3 inches tall, the images are distinctly visible from most angles and appear to be the central design element of the candle. Finally, the red and white colors and "candy cane" striping, in combination with the Santa Claus or holly leaves and berries designs, strengthen the identification of these candles with the Christmas holiday.

In summary, candles 1 and 2 have clearly identifiable, highly visible holiday-specific images, as well as color combinations and patterns that strengthen the identification with the Christmas holiday. As such, these candles meet the requirements set out in the Scope Clarification for holiday novelty candles that are excluded from the scope of the Order. While the Court "may not substitute its judgment for that of the [agency] when the choice is between two fairly conflicting views," *Timken Co. v. United States,* 26 CIT ____, ____, 201 F. Supp. 2d 1316, 1319–20 (2002) (internal citations and quotations omitted), the evidence here supports only the conclusion that these candles are within the holiday novelty exception. Consequently, the Court finds that Commerce's determination that candle 2 is within the scope of the Order is neither supported by substantial evidence nor in accordance with law. The Court therefore reverses Commerce's determination with respect to candle 2, and finds candles 1 and 2 to be holiday novelty candles that are excluded from the scope of the Order.

B. Candles 4 and 5

Candle 4, the Christmas Holly Leaf Pillar, is a dark green pillar candle with an image of holly leaves and berries sketched in white on one side of the candle. Candle 5, the Christmas Sock Pillar, is a white pillar candle with an image of a Christmas stocking sketched in red on one side of the candle. The sketched stocking image also contains an image of a Christmas tree with a star on the top.

Commerce concluded that both of these candles fall within the scope of the Candles Order. The agency stated that "the images are only sketches, are relatively small and are singularly imprinted on only one surface or side of each candle. Therefore, the respective images are

[5] Candles 1 and 2 measure approximately 2-7/8 inches in diameter. Approximately 1/8 to 3/16 of the diameter at the outer edge of the candle's top surface is occupied by the red and white striped outer layer, leaving a red center section that measures approximately 2-3/4 to 2-11/16 inches in diameter, into which the holiday specific images are set. The holly sprig on the top surface of candle 1 measures approximately 1-1/2 inches long at its longest point and 1-7/8 inches wide at its widest point. The Santa Claus image on the top surface of candle 2 measures approximately 1-7/8 inches long and 1-5/8 inches wide at its widest point.

'minimally decorative' and can only be viewed from one angle." Remand Determ. at 19.

Upon examination, the Court notes that if the candle is turned so that the image faces away, it appears to be simply a solid green or white pillar.[6] Thus, while the decorative images are holiday-specific, they are "singularly placed" on the candles, *see Interpro Ruling* at 7, and not easily seen from most angles. *Endar Ruling* at 5. As the images meet two of the characteristics of "minimally decorative" designs, the Court upholds Commerce's determination that these candles fall within the scope of the Order.

C. Candles 8, 9, and 10

Candles 8, 9, and 10 are column candles approximately twelve inches tall. Candle 8, the Santa Claus Candy Cane Column, has red and white "candy cane" striping and a small image of Santa Claus imprinted in a circle in one side of the candle. Candle 9, the Christmas Holly Leaf with Berries Candy Cane Column, has red, white, and green striping and a small image of a holly sprig imprinted into one side. Candle 10, the Christmas Tree with Star Candy Cane Column, has red, white, and green striping and a small image of a Christmas tree with a star on top imprinted into one side.

Commerce found candles 8, 9, and 10 to be within the scope of the Order, stating that "although these candles possess images related to the Christmas season * * * the designs are 'minimally decorative' and are not easily recognizable as holiday images from most angles." Remand Determ. at 13.

The holiday images set into the sides of these columns are very small and located in only one place on the candle, thus meeting two of the characteristics considered by Commerce to be "minimally decorative." *See, e.g.,* Remand Determ. at 7; *Interpro Ruling* at 7. The small holiday images also cannot be seen from most angles.

The columns are covered in red and white or red, white, and green striped "candy cane" color patterns. Color patterns may link candles more closely to the Christmas holiday season, and the Court notes that Commerce has found red, white, and green striping more closely associated with the Christmas holiday than red and white striping alone. In its analysis of candle 3, discussed earlier, Commerce concluded that the green color in addition to the red and white stripes and the otherwise "minimally decorative" holiday image was sufficient to qualify the candle as a holiday novelty candle. Remand Determ. at 19–20.

In this case, however, Commerce stated that

> the small images * * * on one small place on the side of candles 8, 9, and 10, [sic] are not easily seen when viewing the candles from most perspectives and, furthermore, the Department has ruled in the

[6] Commerce also stated that "we do not believe that these specific designs are easily recognizable as the holly leaves and berries and stocking, respectively, that they are alleged to be because they are only abstract outlines." Remand Determ. at 19. As the Court affirms Commerce's determination that the images are "minimally decorative" on other grounds, we do not reach the question whether the images are easily recognizable as holiday images.

> past that the "peppermint candy" striped design does not relate specifically to the Christmas holiday. Therefore, the combined effect of colors and designs does not reach a level that would qualify these candles for the holiday novelty exception.

Remand Determ. at 17–18. After examining the candles, the Court finds that due to the inconspicuousness of the holiday-specific images, it is reasonable to conclude that even those candles bearing the additional green stripes cannot qualify as holiday novelty candles. Therefore, the Court upholds Commerce's determination that candles 8, 9, and 10 are within the scope of the Order.

D. Candles 11 and 12

Candle 11 is a red pillar candle covered with a raised holly leaf and berry design. Commerce determined that candle 11 falls within the scope of the Order because the design does not "resemble a holly sprig in the traditional sense." Remand Determ. at 19. The agency stated that

> [t]he leaves and berries are scattered around the surface of the candle, rather than grouped together, as a holly sprig is normally pictured, and could represent another type of leaf or berry. In this respect, this candle does not relate specifically to the Christmas holiday season; rather, it could be used generically throughout the fall or winter season.

Id. (internal citation omitted).

The Court finds that the agency's reasoning in connection with candle 11 is supported by substantial evidence. The agency asserts that the holly image closely associated with the Christmas holiday is the holly sprig, showing the holly leaves and berries grouped together. Remand Determ. at 11 ("[T]he Department also considers that, in order for holly leaf and berry design [sic] to qualify a candle for exclusion from the Order, it must be both explicit and easily identifiable * * * [T]he holly leaf and berry image must be readily recognizable as the *traditional* holly leaf and berry, *i.e.,* with the holly leaves and berries grouped together."). This reasoning is supported by *Springwater,* which refers to "sprigs" of holly as a symbol closely associated with the Christmas holiday. 20 CIT at 1196. Here, the leaves and berries are separated, and it is not clear that the leaves represent holly leaves. As the candle does not bear a clearly identifiable specific holiday image, as required by the Scope Clarification, the agency's decision to include it within the scope of the Candles Order is supported by substantial evidence and in accordance with law.

Finally, Commerce determined that both the pillar and square versions of Candle 12 are holiday novelty candles and are excluded from the

scope of the Candles Order.[7] *See* Remand Determ. at 20. These candles are decorated with a variety of images, including holly leaves and berries, candy canes, evergreen trees, snow-covered houses, snowflakes, cardinals, stars, reindeer, and multicolored patterns, arranged in a patchwork design. Commerce concluded upon reconsideration that the designs and color combinations of the candles, and particularly the inclusion of a recognizable holly leaf and berry design and the use of red, white, and green coloring, provides "identification with the Christmas holiday." *Id.* After examining candle 12, the Court finds that the agency may reasonably conclude that the combination of designs and colors indicates that candle 12 is intended for use "only in connection with the Christmas holiday season." Scope Clarification, Pl.'s Ex. 4 at 1. Therefore, the Court affirms Commerce's determination that candle 12 is a holiday novelty candle excluded from the scope of the Order.

CONCLUSION

In accordance with the foregoing discussion, this Court reverses Commerce's determination as to candle 2, and determines instead that candle 2 is a holiday novelty candle excluded from the scope of the Candles Order. The Court upholds Commerce's determination as to candles 1, 3, 4, 5, 8, 9, 10, 11, and 12.

(Slip Op. 03–52)

CHINA STEEL CORP. AND YIEH LOONG, PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP., NATIONAL STEEL CORP., UNITED STATES STEEL CORP., GALLATIN STEEL CO., IPSCO STEEL INC., NUCOR CORP., STEEL DYNAMICS, INC., AND WEIRTON STEEL CORP., DEFENDANT-INTERVENORS

Court No. 01–01040

[Plaintiff's motion for judgment on the agency record is denied. The Court sustains the Department of Commerce's final antidumping determination in part, and remands in part.]

(Decided May 14, 2003)

Miller & Chevalier Chartered (Karl Abendschein, Peter Koenig) for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Depart-

[7] Plaintiff asserts that the Christmas Patchwork Square is excluded from the scope of the Order because it is not one of the enumerated shapes. Pl.'s Partial Opp'n to Def.'s Aug. 20, 2002 Remand Results at 21–23; *see also* Candles Order, 51 Fed. Reg. at 30,686 (stating that the Order covers candles in the shapes of "tapers, spirals, and straight-sided dinner candles; rounds, columns, pillars, votives; and various wax-filled containers"). Commerce has previously determined that candles in the shapes of cubes or squares fall within the scope of the Order. *See Final Scope Ruling, Request for Rulings on a Petroleum Wax Candle in the Shape of a Cube or Square (Mervyn's, Enesco Corp., and Midwest of Cannon Falls)* (Dec. 9, 1996); *see also Final Scope Ruling, Leader Light Ltd.* (Aug. 31, 1998) (finding cube and square shaped candles to be within the scope of the Order). Consequently, Plaintiff's argument is without merit.

ment of Justice, *Augusto Guerra,* Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

Dewey Ballantine LLP (Bradford Ward, Hui Yu) for Defendant-Intervenors Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

Schagrin Associates (Roger B. Schagrin) for Defendant-Intervenors Gallatin Steel Company, IPSCO Steel Inc., Nucor Corporation, Steel Dynamics, Inc., and Weirton Steel Corporation.

OPINION

POGUE, *Judge:* This action is before the Court on the motion of China Steel Corporation ("China Steel") and Yieh Loong (collectively "Plaintiff") for judgment upon the agency record pursuant to USCIT R. 56.2.[1] Plaintiff contests the final affirmative determination of sales at less than fair value ("LTFV") rendered by the International Trade Administration of the United States Department of Commerce ("Commerce" or "Department") in the investigation of certain hot-rolled carbon steel ("HRCS") flat products from Taiwan for the period October 1, 1999 through September 30, 2000 ("POI"). *Certain Hot-Rolled Carbon Steel Flat Products from Taiwan,* 66 Fed. Reg. 49,618, 49,618–19 (Dep't Commerce Sept. 28, 2001) (notice of final determination of sales at LTFV) ("Final Determ."). Specifically, Plaintiff contests four aspects of Commerce's final determination: (1) Commerce's affiliation determination regarding the Yieh Loong affiliates; (2) Commerce's decision to apply facts otherwise available; (3) Commerce's decision to apply adverse facts available; and (4) Commerce's conduct in investigating the antidumping petition. The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons set forth below, the Court sustains in part, and remands in part, the agency's determination.

I. BACKGROUND

On November 13, 2000, Gallatin Steel Company, IPSCO Steel Inc., Nucor Corporation, Steel Dynamics, Inc., Weirton Steel Corporation, Bethlehem Steel Corporation, U.S. Steel Group (a unit of USX Corporation), National Steel Corporation, United Steelworkers of America, LTV Steel Company, Inc., and Independent Steelworkers Union (collectively "Domestic Producers")[2] initiated an antidumping investigation with Commerce. *Certain HRCS Flat Products from Argentina, India, Indonesia, Kazakhstan, the Netherlands, the People's Republic of China, Ro-*

[1] For purposes of calculating a weighted-average margin, Commerce concluded prior to the preliminary determination that China Steel and Yieh Loong were affiliated under 19 U.S.C. § 1677(33)(E), and collapsed the two entities into a single producer pursuant to 19 C.F.R. § 351.401(f) (2001). Dep't of Commerce Mem. from Patricia Tran to Joseph A. Spetrini, *Antidumping Duty Investigation on Certain Hot-Rolled Carbon Steel Flat Products from Taiwan: Affiliation Issue regarding China Steel Corporation (China Steel) and Yieh Loong Enterprise Co., Ltd. (Yieh Loong),* C.R. Doc. 51, Def.'s Conf. Ex. 5 at 2, 4 (Apr. 19, 2001); *see also Certain Hot-Rolled Carbon Steel Flat Products from Taiwan,* 66 Fed. Reg. 22,204, 22,207 (Dep't Commerce May 3, 2001) (notice of preliminary determination of sales at less than fair value) ("Prelim. Determ."). As those two determinations are not challenged in the instant action, the Court will refer to the collapsed entity as "Plaintiff" or "CSC/YL;" all other references to the two corporations by their proper names shall refer only to the respective individual corporation.

[2] U.S. Steel Group (a unit of USX Corporation), United Steelworkers of America, LTV Steel Company, Inc., and Independent Steelworkers Union are not parties to this action.

Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation collectively will be referred to as "Defendant Intervenors I," while Gallatin Steel Company, IPSCO Steel Inc., Nucor Corporation, Steel Dynamics, Inc., and Weirton Steel Corporation collectively will be referred to as "Defendant Intervenors II."

Plaintiff's counsel changed affiliation from Ablondi, Foster, Sobin & Davidow, P.C., to Miller & Chevalier Chartered prior to seeking judicial review of Commerce's affirmative LTFV determination with the Court.

mania, South Africa, Taiwan, Thailand, and Ukraine, 65 Fed. Reg. 77,568, 77,568 (Dep't Commerce Dec. 12, 2000) (notice of initiation of antidumping duty investigations) ("Initiation Notice"). The Domestic Producers alleged that imports of HRCS flat products from Argentina, India, Indonesia, Kazakhstan, the Netherlands, the People's Republic of China, Romania, South Africa, Taiwan, Thailand, and Ukraine were being or likely to be sold at LTFV.[3] *Id.* at 77,569. On December 4, 2000, Commerce initiated an investigation to determine whether certain HRCS flat products were being sold at LTFV in the United States. Prelim. Determ., 66 Fed. Reg. at 22,204. In their petition for unfair trade relief, the Domestic Producers identified China Steel and Yieh Loong as principal Taiwanese producers of the subject merchandise. Initiation Notice, 65 Fed. Reg. at 77,576.

Commerce issued an antidumping duty questionnaire to China Steel and Yieh Loong requesting responses to sections A (General Information), B (Sales in the Home Market or to Third Countries), C (Sales to the United States), and D (Cost of Production) on January 4, 2001. Final Determ., 66 Fed. Reg. at 49,619; Letter from Robert James, Program Manager, Int'l Trade Admin., to Ablondi, Foster, Sobin & Davidow, P.C., P.R. Doc. 28, Pl.'s Ex. 2 at 2 (Jan. 4, 2001) ("Questionnaire I").[4] Commerce explicitly informed China Steel and Yieh Loong that "[i]f [either respondent were] unable to respond to this questionnaire within the specified time limits, [the respondent] must formally request an extension of time." Questionnaire I, P.R. Doc. 28, Pl.'s Ex. 2 at 2. Questionnaire I directed China Steel to provide affiliated parties' resale information if "sales to affiliates constituted more than five percent of total home market sales." Final Determ., 66 Fed. Reg. at 49,621. That questionnaire defined "affiliated persons" according to Section 771(33) of the Tariff Act of 1930, as amended, and §§ 351.102(b) and 351.401(f) of the Department's regulations. Questionnaire I, P.R. Doc. 28 at app. I.

China Steel requested to be excused from reporting home market resales by affiliates on January 19, 2001, as sales to its affiliates, China Steel Global Trading Corporation and China Steel Chemical Corporation, constituted less than five percent of its total home market sales. Final Determ., 66 Fed. Reg. at 49,621. Commerce responded on January 29, 2001, stating that the agency could not make a determination based on the information China Steel provided, and requested China Steel to

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[3] An antidumping duty is imposed upon imported merchandise if that merchandise is sold or is likely to be sold in the United States at LTFV, and an industry in the United States is materially injured or is threatened with material injury. *See* 19 U.S.C. § 1673. To determine whether merchandise is sold at LTFV, Commerce compares the price of the imported merchandise in the United States to the normal value for the same or similar merchandise in the home market. *See* 19 U.S.C. § 1677b(a).

Normal value is the comparable price for a product like the imported merchandise when first sold (generally, to unaffiliated parties) "for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price." 19 U.S.C. § 1677b(a)(1)(B)(i). Export price is the "price at which the subject merchandise is first sold * * * by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser," 19 U.S.C. § 1677a(a); constructed export price means the "price at which the subject merchandise is first sold * * * in the United States * * * [by a] producer or exporter * * * to a purchaser not affiliated with the producer or exporter." 19 U.S.C. § 1677a(b).

[4] Citations to the administrative record include references to both public documents ("P.R. Doc.") and proprietary documents ("C.R. Doc.").

"document the total quantity of subject merchandise sold to all affiliated parties." *Id.*

China Steel and Yieh Loong submitted responses to section A of Questionnaire I on February 2, 2001. *Id.* at 49,619. The following day, China Steel and Yieh Loong requested a three week extension of time to complete sections B, C, and D of Questionnaire I, stating that the information required was extensive and complex, and the employees answering the questions had also been finalizing the respective companies' accounts. Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, P.R. Doc. 38, Pl.'s Ex. 3 at 1 (Feb. 3, 2001). Commerce granted that request in part, extending the deadline to February 22, 2001, and warning the two companies that the statutory deadlines imposed on the agency were "mandatory, not optional in nature." *See* Letter from Robert James, Program Manager, Int'l Trade Admin., to China Steel Corporation and Yieh Loong Enterprise, Co., Ltd., c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., P.R. Doc. 115, Pl.'s Ex. 9 at 1–2 (Apr. 25, 2001) ("Denial Letter"). China Steel and Yieh Loong again requested an additional week of time on February 14, 2001 for the same reasons described above to complete sections B and D of Questionnaire I. Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, P.R. Doc. 43, Pl.'s Ex. 4 (Feb. 14, 2001).

On February 26, 2001, China Steel and Yieh Loong filed their responses to sections B, C, and D of Commerce's Questionnaire I. Final Determ., 66 Fed. Reg. at 49,619. The following day, Commerce issued supplemental section A questionnaires to China Steel and Yieh Loong seeking, among other things, clarification of each companies' relationship with other companies. *See* Letter from Robert James, Program Manager, Int'l Trade Admin., to Yieh Loong Enterprise, Co., Ltd., c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., C.R. Doc. 21, Def.'s Conf. Ex. 2 at 1, supp. questionnaire para. 5, 8, 9 (Feb. 27, 2001); Letter from Robert James, Program Manager, Int'l Trade Admin., to China Steel Corporation, c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., C.R. Doc. 22, Def.'s Conf. Ex. 3 at 1, supp. questionnaire para. 3–4 (Feb. 27, 2001).

On March 15, 2001, Commerce issued supplemental sections B and C questionnaires to China Steel and Yieh Loong (collectively "Questionnaire II"), seeking missing product characteristics information. Final Determ., 66 Fed. Reg. at 49,620; Letter from Robert James, Program Manager, Int'l Trade Admin., to Yieh Loong Enterprise, Co., Ltd., c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., P.R. Doc. 69, Def.'s Ex. 2 (Mar. 15, 2001) (instructing that a *"complete"* response be provided by March 28, 2001) (emphasis in original) ("YL's Questionnaire II"). Commerce again requested that China Steel provide data containing "all affiliated parties' resale information, [which includes sales by] (Yieh Loong, China Steel Chemical [Corporation], China Steel Global [Trading Corporation], Yieh Phui [Enterprise Co. Ltd.], [and] Yieh

Hsing [Enterprise Co. Ltd.]) to the first unaffiliated party." Final Determ., 66 Fed. Reg. at 49,621; *see also* Letter from Robert James, Program Manager, Int'l Trade Admin., to China Steel Corporation, c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., C.R. Doc. 27, Def.-Int. II's Conf. Ex. 3 at 1, supp. questionnaire para. 3 (Mar. 15, 2001) ("CSC's Questionnaire II"). Commerce further directed China Steel to "[f]ully report the [product] characteristics of 'leeway' and overrun merchandise following the criteria specified in [the agency's] [Q]uestionnaire [I]." CSC's Questionnaire II, C.R. Doc. 27, Def.-Int. II's Conf. Ex. 3 supp. questionnaire para. 5.

China Steel and Yieh Loong submitted their responses to the supplemental section A questionnaire on March 20, 2001 ("CSC's Mar. 20 Response"). Final Determ., 66 Fed. Reg. at 49,619. On March 21, 2001 and March 26, 2001, China Steel and Yieh Loong submitted additional responses to accompany their March 20, 2001 submission. *Id.* Also on March 21, 2001, Commerce issued supplemental section D questionnaires to China Steel and Yieh Loong. *Id.* at 49,620. Both entities requested an extension of time to file their sections B, C, and D supplemental responses on March 22, 2001, arguing that the Department's requests were extremely burdensome because of the short deadlines and complex nature of the issues and transactions. Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, P.R. Doc. 80, Pl.'s Ex. 6 (Mar. 22, 2001). Another extension of time was requested on March 30, 2001 for ten days in order for China Steel to prepare affiliate resale information pertaining to Commerce's Questionnaire II, because the affiliates' records were kept in a system from which China Steel could not easily extract the information. *See* Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, P.R. Doc. 85, Pl.'s Ex. 7 (Mar. 30, 2001). The two companies each filed responses to Questionnaire II on April 3, 2001. Final Determ., 66 Fed. Reg. at 49,620. China Steel and Yieh Loong then filed their responses to the supplemental section D questionnaires on April 9, 2001. *Id.*

Questionnaire III was issued to China Steel and Yieh Loong on April 17, 2001 and April 18, 2001 with respect to each company's sections B, C, and D responses, requesting that China Steel supply complete product characteristics and downstream sales information, and that Yieh Loong supply downstream sales' narratives and supporting documentation for all expenses and adjustments. *Id.* On April 23, 2001, China Steel and Yieh Loong filed a request seeking a four day extension to file their responses to Commerce's Questionnaire III. Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, P.R. Doc. 108, Pl.'s Ex. 8 at 2 (Apr. 23, 2001) ("Extension Request"). That same letter also requested an extension of the "preliminary and/or final" determinations to permit sufficient time for the two companies to defend their cases, given that the investigation was complex and the affiliated parties would not cooperate with Plaintiff's re-

quests for resale information. *Id.* at 1–2. Nonetheless, the two corporations submitted their responses to Questionnaire III on April 23, 2001. Final Determ., 66 Fed. Reg. at 49,620. Commerce denied the four-day and preliminary determination time extension requests on April 25, 2001. Denial Letter, P.R. Doc. 115, Pl.'s Ex. 9 at 2.

On May 3, 2001, Commerce published its preliminary determination of sales at LTFV. Prelim. Determ., 66 Fed. Reg. at 22,204. Among other things, Commerce concluded that China Steel was affiliated with Yieh Loong's affiliates, Yieh Hsing Enterprise Co. Ltd. ("YH"), and Yieh Phui Enterprise Co., Ltd ("YP"), as a result of collapsing China Steel and Yieh Loong, and that China Steel was required to report those two affiliates' downstream sales data. *See id.* at 22,207. Commerce also concluded that China Steel failed to cooperate to the best of its ability "[i]n light of China Steel's repeated failure to provide affiliated sales information and * * * all necessary product characteristics or to provide any meaningful explanation of why such data could not be provided." *Id.* at 22,208. Accordingly, Commerce applied an adverse facts available dumping margin to sales made by the collapsed entity. *Id.*

A week later, on May 10, 2001, Commerce cancelled the sales and cost verifications for the two companies. Final Determ., 66 Fed. Reg. at 49,620 (internal citation omitted). On May 30 and 31, 2001, China Steel and Yieh Loong submitted additional responses to Commerce's Questionnaire III. *Id.* Those responses subsequently were returned to the respective companies by Commerce because the Department found them untimely. *Id.* (internal citation omitted).

On July 17, 2001, Commerce published a postponement of the final determination for this investigation. *Certain HRCS Flat Products from Taiwan,* 66 Fed. Reg. 37,213, 37,214 (Dep't Commerce July 17, 2001) (postponement of final determination for antidumping duty investigation) ("Postponement Notice"). The agency also delayed its final determination by four days in light of the tragic events of September 11, 2001. Final Determ., 66 Fed. Reg. at 49,618–19. Commerce published its affirmative final determination on September 28, 2001. *Id.* at 49,618.[5]

In rendering its affirmative LTFV determination, Commerce made several findings. First, Commerce found that China Steel was affiliated with Yieh Loong's affiliates because "[c]ollapsed companies constitute a single entity and therefore affiliates of either company are affiliates of the collapsed entity." Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 6; *see also* Final Determ., 66 Fed. Reg. at 49,621. Accordingly, Commerce concluded that China Steel's home market sales to affiliated parties constituted more than five percent of its total sales, thereby requiring China Steel to report all resale information. *See* Final Determ., 66 Fed. Reg. at 49,621.

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[5] Commerce's final determination incorporates by reference the agency's Issues and Decision Memorandum, which responds to CSC/YL's and the Domestic Producers' comments filed during the antidumping investigation. Dep't of Commerce Mem. from Joseph A. Spetrini to Faryar Shirzad, *Issues and Decision Memo for the Antidumping Investigation of Certain HRCS Flat Products from Taiwan—October 1, 1999 through September 30, 2000,* P.R. Doc. 151, Def.'s Ex. 8 (Sept. 21, 2001) ("Issues and Decision Mem.").

Second, Commerce determined that the use of facts available was appropriate pursuant to 19 U.S.C. § 1677e(a)(2)(A)—1677e(a)(2)(C) because CSC/YL "withheld information requested by the Department, failed to supply such information by the applicable deadlines and has significantly impeded this proceeding," and also failed to request any modification of the reporting requirements. *See id.* at 49,620. In particular, Commerce found that CSC/YL's affiliated party resales responses were "incomplete, deficient, and inconsistent" because China Steel only reported downstream sales made after February 21, 2000 by Yieh Loong, YP, and YH. *See* Final Determ., 66 Fed. Reg. at 49,621. Moreover, Yieh Loong's downstream sales information failed to provide narratives and supporting documentation for all expenses and adjustments. *Id.* Commerce concluded that Plaintiff's product characteristics data contained deficiencies because the information failed to describe the "quality, carbon, yield strength, thickness, and width [characteristics for] a significant percentage of its home market sales," and that such merchandise was "prime quality," which could be matched to U.S. sales of prime quality merchandise. *See id.* at 49,621–22. Commerce stated that those deficiencies precluded the sales data from being used for cost tests, model matching, or price comparisons. *Id.* at 49,622. Without this information, the agency stated that it was unable to accurately calculate a dumping margin. *Id*. at 49,621. Finally, Commerce concluded that the sales information provided by Plaintiff overall "was too incomplete to form a reliable basis for making a determination and that [Plaintiff] has not acted to the best of its ability in providing information." *Id.* at 49,620.

Third, Commerce determined that China Steel failed to cooperate to the best of its ability because it repeatedly ignored instructions to submit complete product characteristics and accurate downstream sales data, and "never provided alternatives or reasonable explanations for why it could not report all downstream sales." *Id.* at 49,622. Without this information, Commerce stated that it was unable to calculate an accurate margin, use China Steel's home database to match sales of identical or most similar products, or properly perform a cost test for home market sales. *Id.* Commerce also noted that Plaintiff "repeatedly told the Department that the missing information would be forthcoming." *Id.* at 49,620. As Plaintiff's deficient responses affected a "significant" portion of its responses, Commerce found the submitted data unusable for purposes of calculating a dumping margin. *Id.* at 49,622. Commerce therefore determined that the application of adverse facts available was appropriate pursuant to 19 U.S.C. § 1677e(a)(2)(B), (b). *Id.* at 49,620. Accordingly, Commerce assigned Plaintiff an adverse facts available dumping margin of 29.14 percent. *Id.* at 49,622.

II. Standard of Review

In reviewing final determinations in antidumping duty investigations, the Court will hold unlawful those agency determinations which

are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(I) (2000).

III. DISCUSSION

There are four issues presented. The Court must determine whether: (1) Commerce's affiliation determination is supported by substantial evidence and in accordance with law, (2) Commerce's decision to apply facts available is in accordance with law, (3) Commerce's decision to use adverse facts available is supported by substantial evidence and in accordance with law, and (4) Commerce's conduct during the investigation was arbitrary and capricious, or an abuse of discretion.

A. Affiliation[6]

Commerce concluded that CSC/YL was affiliated with YH, YP, and Persistence Hi-Tech Materials Inc. ("Persistence") pursuant to 19 U.S.C. §§ 1677(33)(F), (G) on the basis of the following evidence: (1) Yieh Loong, aware of the statutory definition of "affiliated parties," conceded affiliation with YH, YP, and Persistence in its section A questionnaire responses; (2) Yieh Loong, YH, YP, and Persistence shared a common chairman of the board; (3) Taiwanese law grants "extensive power" to chairmen of the board; and (4) Yieh Loong, YH, and YP each own a minority stock interest in one another. Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 6–7; Dep't of Commerce Mem. from Patricia Tran to File, *Certain HRCS Flat Products from Taiwan—China Steel Corporation (China Steel), Yieh Loong Enterprise (Yieh Loong), and affiliated resellers,* C.R. Doc. 50, Def.'s Conf. Ex. 4 at 2 (Apr. 19, 2001) ("Affiliated Resellers Mem."). In reaching that conclusion, Commerce first found that Yieh Loong is affiliated with YH, YP, and Persistence. Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 7. Commerce then concluded that "China Steel is affiliated with Yieh Loong's affiliates," because "[c]ollapsed companies constitute a single entity and therefore affiliates of either company are affiliates of the collapsed entity." *See id.* at 6–7. In support of its determination, the Department cites *Stainless Steel Sheet and Strip in Coils from Germany,* 64 Fed. Reg. 30,710 (Dep't Commerce June 8, 1999) (final determination of sales at LTFV).[7] Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 7.

Plaintiff challenges Commerce's conclusion that it is affiliated with YH, YP, and Persistence, claiming that CSC/YL does not "control" the resellers' pricing. *See* Pl.'s Br. Supp. Mot. J. Agency R. at 15 ("Pl.'s Br."). Plaintiff argues that control is lacking for several reasons. First, as stated in its certified statement to Commerce, Plaintiff claims that the

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[6] With the passage of Uruguay Round Agreement Act ("URAA"), Congress modified U.S. trade law and replaced the concept of "exporter" with the definition of "affiliated persons" as of January 1, 1995. URAA, Pub. L. No. 103–465, 108 Stat. 4809, 4875–76 (1994); *compare* 19 U.S.C. § 1677(33) (2000) *with* 19 U.S.C. § 1677(13) (1988).

[7] Commerce's reliance on *Stainless Steel and Strip in Coils from Germany* is misplaced, as the agency in that case found affiliation based on Thyssen's common control over its affiliates and KTS pursuant to 19 U.S.C. § 1677(33)(E)–(F). *See* 64 Fed. Reg. at 30,723–24. While Commerce relied on subsection (F) in rendering its determination here, the Department's decision also was based on subsection (G). More importantly, Commerce does not rely on "common control" pursuant to subsection (F) or equity ownership pursuant to subsection (E) to support its affiliation determination in this case. Thus, Commerce's reliance on *Stainless Steel and Strip in Coils from Germany* does not support the Department's determination here.

common chairman between Yieh Loong, YH, YP, and Persistence is not responsible for pricing or daily operations, but rather meets with the board of directors several times a year to handle macroeconomic and investment issues. *Id.* at 15–16. Second, although Yieh Loong, YH, and YP retain a minority ownership interest of less than three percent in each other, the common chairman only has influence to the extent of that ownership percentage. *Id.* at 17. Third, Plaintiff asserts that "[a] party's statements on affiliation, including in financial statements" do not support Commerce's affiliation determination. *Id.* at 18. Plaintiff's final argument contends that it is not required, as a matter of law, to submit pre-affiliation downstream sales data where China Steel became affiliated with Yieh Loong, and purportedly in turn to YP, YH, and Persistence only on February 21, 2000, a point almost five months into the POI. Pl.'s Br. at 20.

Affiliation is defined statutorily at 19 U.S.C. § 1677(33), stating, in relevant part:

> [t]he following persons shall be considered to be "affiliated" or "affiliated persons:"
>
> * * * * * * *
>
> (F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.
>
> (G) Any person who controls any other person and such other person.

19 U.S.C. § 1677(33); *see also* 19 C.F.R. § 351.102(b) (2001) (defining "[a]ffiliated person; affiliated parties" according to 19 U.S.C. § 1677(33)). The statute further expounds that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33); *see also* Uruguay Round Agreements Act, Statement of Administration Action, H.R. Doc. No. 103–465 at 838 ("SAA").[8]

To determine whether "control" exists, Commerce's regulations direct the agency to consider the following factors, "among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close supplier relationships." 19 C.F.R. § 351.102(b). Commerce, however, is precluded from finding "control" on the basis of those factors "unless the relationship has the potential to impact decisions concerning the * * * pricing, * * * of the subject merchandise." *Id.* Commerce shall also "consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control." 19 C.F.R. § 351.102(b); *see also Hontex Enter., Inc. v. United States,* slip. op. 03–17 at 39 (CIT Feb. 13, 2003).

Neither the statute nor Commerce's regulations, however, prescribe how Commerce should determine when a party is affiliated with a col-

[8] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements * * *. [T]he Administration understands that it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this statement." SAA at 656.

lapsed entity. Thus, the Court must consider whether Commerce's affiliation determination is based on a permissible construction of the antidumping statute. *See AK Steel Corp. v. United States,* 22 CIT 1070, 1084–85, 34 F. Supp. 2d 756, 767–68 (1998).

Plaintiff claims that the existence of a common chairman cannot support a determination of "control" here because that individual is not responsible for pricing or daily operations, but rather meets with the board of directors several times a year to discuss macroeconomic and investment issues. Pl.'s Br. at 15; *see also* Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 54, Pl.'s Conf. Ex. 9 supp. questionnaire para. 1 (Apr. 23, 2001) ("YL's Apr. 23 Response") (certifying that "[t]he President [instead of the board] makes the final determinations as to the pricing and slab purchasing of Yieh Loong"). In support of that argument, Plaintiff contends that Commerce erroneously failed to discuss Taiwan Company Law Article 193,[9] which requires listed companies, such as China Steel and Yieh Loong, to sell to affiliates at the same market price as non-affiliates in order to avoid price controls and conflicts of interest. Pl.'s Br. at 15–17.[10] Taiwan Company Law Article 193 deems directors personally liable to the company for causing loss or damage for violations of the law or the company's articles of incorporation. *Investment Laws of the World: Taiwan, supra* note 9.

Plaintiff's claim misstates the antidumping statute. Rather than requiring actual exercise of control, the statute only requires that a person is "legally or operationally in a position to exercise restraint or direction over the other person." 19 U.S.C. § 1677(33); SAA at 838 (same); *see also Ta Chen Stainless Steel Pipe, Ltd. v. United States,* 23 CIT 804, 813 (1999) ("The statute focuses on the capacity to control, rather than on the actual exercise of control.") (citing *Ferro Union, Inc. v. United States,* 23 CIT 178, 192, 44 F. Supp. 2d 1310, 1324 (1999)). As stated by Commerce in its explanatory comments to its final rule, the agency "focus[es] on relationships that have the potential to impact decisions concerning production, pricing or cost. This does not mean however, that proof is required that a relationship in fact has had such an impact." *Antidumping Duties; Countervailing Duties,* 62 Fed. Reg. 27,296, 27,297–98 (Dep't Commerce May 19, 1997) (final rule).

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[9] Article 193 states, in relevant part:

> The board of directors, in conducting business, shall act in accordance with laws and ordinances, [and] the articles of incorporation * * *.
>
> Where any resolution adopted by the board of directors contravenes the aforesaid provisions, thereby causing loss or damage to the company, all directors taking part in the adoption of such resolution shall be liable to compensate the company for such loss or damage.

YL's Apr. 23 Response, C.R. Doc. 54 at Ex. 22 art. 193; *see also Investment Laws of the World: Taiwan* art. 193 (Int'l Ctr. for Settlement of Inv. Disputes, ed. 1982).

[10] Plaintiff also claims that "Commerce unreasonably and unlawfully, failed to investigate further, * * * if it had concerns as to [Yieh Loong's] certified statement." Pl.'s Br. at 17 (citing *Olympia Indus., Inc. v. United States,* 22 CIT 387, 392, 7 F. Supp. 2d 997, 1002 (1998)). Plaintiff's reliance on *Olympia Indus.* is misplaced. In that case, Commerce failed to further investigate or explain its rejection of data submitted by a party who believed that its submission was the best information available. 22 CIT at 390, 392, 7 F. Supp. 2d at 1001–02. Here, Commerce explicitly rejected Plaintiff's certified statement and supported that rejection by discussing the extensive power granted to chairmen under Taiwan Company Law Articles 202 and 208. Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 6–7.

In this case, Commerce did not base its finding of control on actual proof that the common chairman influences the pricing decisions of YH, YP, and Persistence. Instead, Commerce apparently concluded that the common chairman was operationally in a position to affect pricing decisions, because Taiwan law grants extensive power to the chairman of the board. *See* Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 6–7. The record reveals that Taiwanese law generally extends chairmen of the board "'the power to perform every act in connection with the business operations of the company,'" and in practice, "'may engage in significant transactions without seeking approval of the company's board of directors.'" Affiliated Resellers Mem., C.R. Doc. 50, Def.'s Conf. Ex. 4 at 2 (quoting Paul Cassingham and Nicholas Chen, *Taiwan-Joint Ventures in an Uncommon Law Jurisdiction,* Int'l Tax Rev. (1992)); *see also Investment Laws of the World: Taiwan, supra* note 9 at art. 202 (granting the board of directors the power to transact all of the company's business).[11] The record also reveals that Taiwanese law grants chairmen the power to call and direct board meetings. *See Investment Laws of the World: Taiwan, supra* note 9 at art. 208, 203 (stating that "[t]he chairman of the board of directors shall internally preside at the meetings of * * * the board of directors" and that "[m]eetings of the board of directors shall be convened by the chairman of the board"). Finally, the record indicates Yieh Loong admitted that its board of directors conform to these responsibilities. YL's Apr. 23 Response, C.R. Doc. 54 at 2 ("Since Yieh Loong is a company duly organized and existing under the law of [Taiwan], it follows [Taiwan] Company Law with respect to the responsibilities of the Board of Directors."). Thus, the Court finds that Commerce's determination that the common chairman was operationally in a position to exercise direction over pricing decisions is supported by substantial evidence.

The Department's final determination and supporting memoranda fail to explicitly address Article 193. It can be presumed, however, that the agency considered this article in light of the fact that the Department directly discusses other articles of Taiwan Company Law in rendering its final determination. *See* Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 6–7; *China Nat'l Mach. Imp. & Exp. Corp. v. United States,* slip. op. 03–16 at 19 (CIT Feb. 13, 2003) ("[T]he agency is pre-

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[11] Plaintiff asserts that the article "is not in the [Department's] record of this proceeding, rendering its use impermissible." Pl.'s Reply to Opp'n. Mot. J. Agency R. at 10 n.13 ("Pl.'s Reply"). As the article is cited in the agency's Affiliated Resellers Memorandum, C.R. Doc. 50, Def.'s Conf. Ex. 4 at 2, and as that memorandum was created by the agency during the course of this proceeding, the Court concludes that the article is part of the record. 19 U.S.C. § 1516a(b)(2)(A) (noting that the record consists of "all governmental memoranda pertaining to the case"); 19 C.F.R. § 351.104(a) (stating that the Department "will include in the official record all factual information * * * or other material developed by, presented to, or obtained by the [agency] during the course of a proceeding"). Moreover, the article was available in the public domain during the agency's investigation of this case. Cassingham and Chen, *supra* p. 22, *at* http://www.perkinscoie.com/resource/intldocs/uncommon.htm (Apr. 16, 2001).

Plaintiff further argues that the article is inapplicable because it was published prior to the POI. *See* Pl.'s Reply at 10 n.13. The Court disagrees. Because the article was obtained by the agency during the course of this proceeding, and because the article was expressly incorporated into the Affiliated Resellers Memorandum, the Court can properly review the affiliation decisions using such information. *Cf. Floral Trade Council v. United States,* 13 CIT 242, 243, 709 F. Supp. 229, 230–31 (1989) (finding that the record contains "those documents at the agency which become sufficiently intertwined with the relevant inquiry * * * no matter how or when they arrived at the agency," and that the agency's express reference in its determination to "the original investigations by the ITC and the Department" incorporated all relevant information from those prior investigations into the record) (internal citation omitted).

sumed to have considered all of the evidence in the record, and the burden is on the plaintiff to prove otherwise.") (internal citations omitted); *see also Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974) (holding that the Court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (internal citation omitted). Even though Article 193 seems to support Plaintiff's certified statement that the common chairman does not "control" pricing or daily operations, Commerce determined that the common chairman was operationally in a position of control under Taiwanese law. As Commerce ultimately bears the responsibility of weighing the evidence, the Court may not substitute its judgment for that of the agency. *See Corus Staal BV v. United States,* slip. op. 03–25 at 11 (CIT Mar. 7, 2003). Even if there is some evidence which detracts from the agency's conclusions, the Court need only determine whether the Department's conclusions are substantially supported by the record. *See id.; Olympia Indus., Inc.,* 22 CIT at 389, 7 F. Supp. 2d at 1000 (citing *Atl. Sugar, Ltd. v. United States,* 744 F.2d 1556, 1563 (Fed. Cir. 1984)).

Plaintiff's second argument contends that control is lacking because the common chairman only has the power to influence the board of director's decisions to the extent of the shares his company owns, which in this case is less than 3 percent. Pl.'s Br. at 17. Plaintiff's argument again incorrectly states the statutory requirements, as it focuses only on a finding of actual control, rather than the capacity for control. As such, the Court finds this argument lacks merit.

Plaintiff's third argument that a party's affiliation statements, including those made in financial statements, are not substantial evidence of affiliation is unfounded. In fact, only one of the four agency determinations cited in Plaintiff's Brief lends support for CSC/YL's claim, but even that determination only stands for the limited proposition that admissions of affiliation contained in an entity's financial statements alone insufficiently establish affiliation. *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Brazil,* 64 Fed. Reg. 38,756, 38,769 (Dep't Commerce July 19, 1999) (notice of final determination of sales at LTFV) *("Certain Steel Products from Brazil").* Thus, the Court finds Plaintiff's third argument also lacks merit.

Plaintiff's final contention is that it is not required, as a matter of law, to submit pre-affiliation downstream sales data where China Steel became affiliated with Yieh Loong, and purportedly in turn to YP, YH, and Persistence, only on February 21, 2000. Pl.'s Br. at 20. Commerce's own regulation requires that it consider the temporal aspect of a relationship in determining whether control exists. 19 C.F.R. § 351.102(b). In *Hontex Enter., Inc.,* slip. op. 03–17 at 39–40, the Court refused to sustain Commerce's determination where the agency failed to address the temporal aspect of the entities' relationships, and explain why that factor was not necessary to its determination. Here, too, Commerce has failed to address the temporal aspect of the relevant parties' relationships, or to ex-

plain why that factor is not necessary to its determination. Accordingly, the Court cannot sustain Commerce's determination. *Torrington Co. v. United States,* 82 F.3d 1039, 1049 (Fed. Cir. 1996) ("Commerce, like other agencies, must follow its own regulations.") (citing *Fort Stewart Sch. v. Fed. Labor Relations Auth.,* 495 U.S. 641, 654 (1990) (internal citation omitted)). On remand, Commerce will have the opportunity to reconsider the temporal aspect of the pertinent parties' relationships.

The Court therefore finds aspects of Commerce's determination that Yieh Loong is affiliated with YH, YP, and Persistence, and that China Steel is affiliated with Yieh Loong's affiliates, supported by substantial evidence. The Court, however, remands the decision because the agency failed to consider the temporal aspect of the parties' relationships, and as such, finds the agency's determination not in accordance with law.

B. Facts Otherwise Available

The second issue concerns Commerce's decision to apply facts otherwise available. Commerce determined that the application of facts available was appropriate in this case pursuant to 19 U.S.C. § 1677e(a)(2)(A)–(C), because CSC/YL "withheld information requested by the Department, failed to supply such information by the applicable deadlines and has significantly impeded this proceeding," and also failed to request any modification of the reporting requirements with respect to the deficient downstream sales and product characteristics information. *See* Final Determ., 66 Fed. Reg. at 49,620. In particular, Commerce found deficiencies in the downstream sales and product characteristics information submitted by Plaintiff in response to the agency's Questionnaires I, II, and III. *See id.* Commerce concluded that CSC/YL's affiliated party resales responses were "incomplete, deficient, and inconsistent" because China Steel only reported downstream sales made after February 21, 2000 by Yieh Loong, YP, and YH. *See id.* at 49,621. Moreover, Yieh Loong's downstream sales information failed to provide narratives and supporting documentation for all expenses and adjustments. *Id.* Commerce concluded that Plaintiff's product characteristics data contained deficiencies because the information failed to describe the "quality, carbon, yield strength, thickness, and width [characteristics for] a significant percentage of its home market sales," and that such merchandise was "prime quality," which should be matched to U.S. sales of prime quality merchandise. *See id.* at 49,621–22.

Plaintiff challenges Commerce's facts otherwise available determination as not in accordance with law. *See* Pl.'s Br. at 22. Plaintiff raises several arguments supporting that contention. First, Plaintiff contends that Commerce failed to provide Yieh Loong notice and an opportunity to remedy China Steel's deficient information prior to applying facts available, because Commerce did not notify Yieh Loong of China Steel's deficient downstream sales and missing product characteristics data until the agency decided to collapse the two entities in its preliminary determination, and because Commerce would not accept any additional information after such date. *Id.* (citing Case Brief of Yieh Loong and Chi-

na Steel Corporation before the U.S. Dep't of Commerce, P.R. Doc. 140, Pl.'s Ex. 14 at 8 ("Case Br.")).

Second, Plaintiff claims it notified Commerce in its first response to sections B, C, and D that it was unable to report certain home market "leeway" overrun product characteristics in accordance with 19 U.S.C. § 1677m(c)(1), because that information was not readily available. Pl.'s Br. at 30 (citing Letter from Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 17, Pl.'s Conf. Ex. 3 at 5–6 (Feb. 26, 2001) ("CSC's Feb. 26 Response")). Plaintiff also claims that it notified Commerce of the problems it encountered in collecting downstream sales information. Pl.'s Br. at 30 (citing Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 43, Pl.'s Conf. Ex. 8 at 2 (Apr. 10, 2001) ("CSC's Apr. 10 Letter")); Extension Request, P.R. Doc. 108, Pl.'s Ex. 8 at 2. Thus, Plaintiff argues that Commerce was required to simplify its requests for information and offer assistance. *See* Pl.'s Br. at 30. Commerce responds that Plaintiff failed to provide a full explanation of its difficulty meeting reporting requirements and to suggest alternative forms in which it was capable of providing the requested information. Def.'s Mem. Opp'n to Mot. J. Agency R. at 30 ("Def.'s Mem.").

Last, Plaintiff argues that Commerce should have considered its deficient data because CSC/YL acted in accordance with 19 U.S.C. § 1677m(e). Pl.'s Br. at 30–31.

Title 19 U.S.C. § 1677e(a) permits Commerce to use "facts otherwise available" in reaching determinations where "necessary information is not available on the record," or an interested party withholds requested information, fails to submit the requested information by the deadline or provide such information in the form and manner requested, significantly impedes an investigation, or provides the requested information in an unverifiable form. 19 U.S.C. § 1677e(a). Before resorting to facts available, however, the Department is required to comply with the notice and remedial requirements of § 1677m(d).[12] *Id.* Nonetheless, if the remedial response or explanation is found unsatisfactory or untimely, the Department may, subject to § 1677m(e),[13] "disregard all or part of

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[12] Section 1677m(d) requires the Department to "promptly inform the person submitting the response of the nature of the deficiency and * * * to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of [the] investigation[]." 19 U.S.C. § 1677m(d). *See infra* pp. 32–33.

[13] Section 1677m(e) provides:

> (e) Use of Certain Information
> In reaching a determination under * * * this title the administering authority * * * shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by the administering authority * * * if—
> (1) the information is submitted by the deadline established for its submission,
> (2) the information can be verified,
> (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
> (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority * * * with respect to the information, and
> (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

the original and subsequent responses" in favor of facts available. 19 U.S.C. § 1677m(d).[14]

If Commerce finds that an interested party failed to provide requested information by the deadline or in the form and manner requested, Commerce's use of facts available is subject to 19 U.S.C. § 1677m(c)(1) and (e). 19 U.S.C. § 1677e(a)(2)(B). Subsection (e) requires Commerce to consider deficient information if the respondent satisfies five enumerated criteria. *See supra* note 13. Subsection (c) requires a party to promptly notify Commerce as to why it cannot comply with the agency's questionnaire. 19 U.S.C. § 1677m(c)(1).[15] That subsection also requires parties to suggest alternative forms in which they are able to comply with the request. *Id.*

In the instant case, neither China Steel nor Yieh Loong individually contest Commerce's efforts to comply with § 1677m(d) prior to the preliminary determination in which the two entities were collapsed. Put differently, Plaintiff concedes that Commerce, in accordance with § 1677m(d), promptly informed each entity of their respective deficiencies by issuing supplemental questionnaires requesting the deficient information. *See* Pl.'s Br. at 22; *see also* Letter from Robert James, Program Manager, Int'l Trade Admin., to China Steel Corporation, c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., C.R. Doc. 22, Def.'s Conf. Ex. 3 (Feb. 27, 2001); YL's Questionnaire II, P.R. Doc. 69, Def.'s Ex. 2. At the point at which Commerce collapsed China Steel and Yieh Loong, the two companies were no longer treated as separate legal entities. Rather, China Steel and Yieh Loong collectively constituted a single "producer"[16] pursuant to 19 U.S.C. § 1677(28) for purposes of conducting the antidumping investigation and calculating a dumping margin. Final Determ., 66 Fed. Reg. at 49,620; *see also Antidumping Duties; Countervailing Duties,* 61 Fed. Reg. 7,308, 7,330 (Dep't Commerce Feb. 27, 1996) (proposed rule) (stating that upon collapsing multiple separate legal entities, Commerce treats the selected entities as a single enti-

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[14] Section 1677m prevents Commerce's unrestrained use of facts available as to a firm that makes its best efforts to cooperate with the Department. *Borden, Inc. v. United States,* 22 CIT 233, 262, 4 F. Supp. 2d 1221, 1245 (1998), *aff'd sub nom. F.LLI De Cecco Di Filippo Fara S. Martino S.p.A. v. United States,* 216 F.3d 1027 (Fed. Cir. 2000) ("Borden I"). This section was enacted as a part of the URAA, Pub. L. 103–465, § 231, to implement portions of Annex II to the Antidumping Agreement, which states, in relevant part, that information which "may not be ideal," should not be disregarded if the party "has acted to the best of its ability." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Annex II para. 5, *reprinted in* U.S. Trade Representative, *Final Texts of the GATT Uruguay Round Agreements* 168 (1994).

[15] Title 19 U.S.C. § 1677m(c) states as follows:

> (c) Difficulties in meeting requirements
>
> (1) Notification by interested party
>
> If an interested party, promptly * * * notifies the administering authority * * * that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority * * * shall consider the ability of the interested party to submit the information * * * and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.
>
> (2) Assistance to interested parties
>
> The administering authority * * * shall take into account any difficulties experienced by interested parties, particularly small companies, in supplying information requested by the administering authority * * * in connection with investigations and reviews under this subtitle, and shall provide to such interested parties any assistance that is practicable in supplying such information.

19 U.S.C § 1677m(c).

[16] Title 19 U.S.C. § 1677(28) defines the term "exporter" or "producer" as the "exporter of the subject merchandise, the producer of the subject merchandise or both where appropriate."

ty for calculation of a single weighted-average dumping margin). As a result, Yieh Loong is not entitled to separately receive notice or remedial opportunities after the two entities were collapsed, as Yieh Loong is not an individual or separate producer in the investigation. Thus, the Court finds Commerce's actions consistent with § 1677m(d).[17]

To support its second argument, its § 1677m(c)(1) contention, Plaintiff points to responses indicating that it coded the requested product characteristics data in new columns because such information lacks "specific record." CSC's Feb. 26 Response, C.R. Doc. 17, Pl.'s Conf. Ex. 3 at 5–6. With respect to the downstream sales information, Plaintiff points to responses indicating that it "had pushed hard to get [YH] to fully report its resale data," and that YH was unable to submit complete data because of financial cutbacks. CSC's Apr. 10 Letter, C.R. Doc. 43, Pl.'s Conf. Ex. 8 at 2.

Plaintiff's two responses do not meet the threshold requirements of 19 U.S.C. § 1677m(c)(1), as Plaintiff neither explains in detail the difficulties it experienced, nor suggests alternatives for supplying the deficient information. *Compare Kawasaki Steel Corp. v. United States,* 24 CIT 684, 691, 110 F. Supp. 2d 1029, 1036 (2000) (holding that respondent failed to provide a full explanation why requested information could not be submitted and failed to suggest alternatives for providing such information where the respondent simply asked to be excused from answering a section of the questionnaire) *with World Finer Foods, Inc. v. United States,* 24 CIT 541, 542–44 (2000) (holding that respondent Arrighi provided a detailed explanation in accordance with § 1677m(c) when the company explained to Commerce that it ceased exportation of pasta to the United States and was unable to submit full responses to the agency's questionnaire because the company was not financially in a position to spare personnel to compose such responses, and then offered to supply limited information the Department might find worthwhile or helpful).

In fact, the record suggests that Plaintiff was capable of complying with the Department's requests, because Plaintiff asked for numerous extensions of time in order to collect and submit the requested information. *E.g.,* Final Determ., 66 Fed. Reg. at 49,620 (stating that Plaintiff "repeatedly told the Department that the missing information would be forthcoming"); Supplemental Section B Response from China Steel Corporation before the Int'l Trade Admin., P.R. Doc. 92, Def.-Int. II's Ex. 6 para. A3,(seeking an extension of time to file the deficient downstream sales information with Plaintiff's supplemental section D responses), A4 (indicating that product characteristics such as "overrun, prime, carbon, yield strength etc. can be identified from the production

[17] Plaintiff also contends that Commerce failed to again provide it notice and an opportunity to remedy its deficiencies prior to applying adverse facts available. *See* Pl.'s Br. at 22. Plaintiff's argument is based on a misinterpretation of the statute. As described above, Commerce is only required to provide notice of deficient responses and an opportunity to remedy those deficiencies prior to applying facts available in accordance with 19 U.S.C. §§ 1677(e)(a), 1677m(d). Commerce may not apply adverse facts available until it has complied with the requirements for applying facts available. *Compare* 19 U.S.C. § 1677e(a) *with* 19 U.S.C. § 1677e(b). Thus, Commerce is not again required to extend notice and remedial opportunities after reaching its facts available determination.

record, inventory record as well as the product code system * * * while * * * paint, thickness, width, cut-to-length, pickled, edge trim and patterns in relief can be identified with customers' orders") (Apr. 3, 2001); Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 52, Pl.'s Conf. Ex. 10 at 5–6 (Apr. 23, 2001) ("CSC's Apr. 23 Response") (describing Plaintiff's efforts to collect the information and expressly requesting the opportunity "to refine the data submitted before making the final determination"). Moreover, Plaintiff also claims that it ultimately, albeit tardily, submitted all of the deficient data. *See* Pl.'s Br. at 30.

Because Plaintiff failed to provide a full, detailed explanation and suggest alternatives for providing the information, however, the Court finds Commerce's duty to "assist interested parties experiencing difficulties" was not triggered. *World Finer Foods,* 24 CIT at 544 (internal citation omitted).

Contrary to Plaintiff's third argument, Commerce ultimately rejected Plaintiff's submitted responses because it failed to provide complete product characteristics and accurate downstream sales information. *See* Final Determ., 66 Fed. Reg. at 49,620–21. Commerce concluded that Plaintiff's submitted data were "too incomplete to form a reliable basis for making a determination" pursuant to 19 U.S.C. § 1677m(e)(3). *Id.* at 49,620. Without the requested data, Commerce stated that it was unable to calculate an accurate margin, nor could it use China Steel's home market database to match sales of identical or most similar products, compare prices of the merchandise, or properly perform a cost test for home market sales. *Id.* at 49,622. Because Commerce is charged with calculating dumping margins "'as accurately as possible,'" *Lasko Metal Prods. Inc. v. United States,* 43 F.3d 1442, 1446 (Fed. Cir. 1994) (quoting *Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1191 (Fed. Cir. 1990)), and because the agency was inhibited from doing so without the requested information, the Court finds Commerce's decision to apply facts available in accordance with law.[18]

C. Adverse Facts Available

The third issue concerns Commerce's application of adverse facts available. The Department concluded that Plaintiff "has not cooperated by acting to the best of its ability." Final Determ., 66 Fed. Reg. at. 49,620–21. Commerce reached this conclusion because China Steel repeatedly ignored instructions to submit complete product characteristics and accurate downstream sales data, and "never provided alternatives or reasonable explanations for why it could not report all downstream sales." *Id.* at 49,622. This information was necessary to calculate an accurate margin, to match sales of identical or most similar products, and to perform a cost test for home market sales. *Id.* Com-

[18] Although Commerce also concluded that Plaintiff failed to act to the best of its ability, Final Determ., 66 Fed. Reg. at 49,620–21, the Court will address that issue in subsection C below, discussing adverse inferences. Regardless, as Plaintiff has not demonstrated that all five of the elements contained in § 1677m(e) are satisfied, the Department's decision to apply facts available is reasonable. *See* 19 U.S.C. § 1677m(e).

merce also noted that Plaintiff "repeatedly told the Department that the missing information would be forthcoming." *Id.* at 49,620. As CSC/YL's deficient responses affected a "significant" portion of its responses, Commerce found the submitted data unusable for purposes of calculating a margin. *Id.* at 49,622. Commerce therefore determined that the application of adverse facts available was appropriate under 19 U.S.C. § 1677e(a)(2)(B), 1677e(b). *Id.*

Plaintiff challenges Commerce's decision to apply adverse facts available as unsupported by substantial evidence and not in accordance with law, asserting that the agency merely repeated that Plaintiff had problems in timeliness and completeness without finding that its refusal to cooperate was willful. Pl.'s Br. at 12, 22, 29. Plaintiff further argues that the Department failed to consider the difficulties Plaintiff experienced in tracing the requested product characteristics data and extracting and collecting the requested affiliate reseller information. *See id.* at 13. Last, Plaintiff contends that Commerce failed to provide it with a meaningful opportunity to respond to the Department's requests for product characteristics and affiliate downstream sales data. Pl.'s Br. at 23.

Once Commerce determines that facts available is warranted, § 1677e(b) permits Commerce to apply an "adverse inference" if the Department makes an additional finding that a party has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b); *see also Fujian Mach. and Equip. Imp. & Exp. Corp. v. United States,* 25 CIT ____, ____, 178 F. Supp. 2d 1305, 1332 (2001) (internal citations omitted). This finding must be "reached by 'reasoned decisionmaking,' including * * * a reasoned explanation supported by a stated connection between the facts found and the choice made." *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n,* 747 F.2d 1511, 1513 (D.C. Cir. 1984) (citing *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)). Otherwise, "the Department's decision-making process will be arbitrary and capricious." *Steel Auth. of India, Ltd. v. United States,* 25 CIT ____, ____, 149 F. Supp. 2d 921, 929 (2001).[19]

In making its determination that an interested party did not act "'to the best of its ability,' [Commerce] cannot merely recite the relevant standard or repeat its facts available finding." *Steel Auth. of India, Ltd.,* 25 CIT at ____, 149 F. Supp. 2d at 930 (internal citation omitted); *see also Kawasaki Steel Corp.,* 24 CIT at 689, 110 F. Supp. 2d at 1034 ("It has been well established by the court that a 'mere recitation of the relevant [adverse facts available] standard is not enough for Commerce to satisfy its obligation under the statute.'") (internal citation omitted). Rather, to satisfy its statutory obligations, the Department must be explicit in

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[19] The Court considers not only the Department's interpretation of the statute, but its decision-making process as well. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42–43 (1983) (describing the role of rationality in reviewing an agency's decision-making process).

This review differs from *Chevron* review in that it focuses on whether the Department "articulate[d] with reasonable clarity its reasons for decision[,]" rather than on the reasonableness of the Department's statutory interpretation. *Steel Auth. of India, Ltd.,* 25 CIT at ____, 149 F. Supp. 2d at 929 n.10 (internal citation omitted) (alterations in original).

its reason for applying adverse inferences. *See Ferro Union, Inc.,* 23 CIT at 200, 44 F. Supp. 2d at 1331. For the Department's decision to be supported by substantial evidence, Commerce must clearly articulate "'why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of [the agency's] investigation.'" *Nippon Steel Corp. v. United States,* 24 CIT 1158, 1170, 118 F. Supp. 2d 1366, 1378 (2000) ("Nippon Steel Corp. I") (quoting *Mannesmannrohren-Werke AG v. United States,* 23 CIT 826, 839, 77 F. Supp. 2d 1302, 1313–14 (1999)). Commerce's explanation must include, "[a]t a minimum," a determination "that a respondent could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply." *Nippon Steel Corp. I,* 24 CIT at 1171, 118 F. Supp. 2d at 1378–79 (internal citation omitted). Furthermore, Commerce "must also find either a willful decision not to comply or behavior below the standard for a reasonable respondent." 24 CIT at 1171, 118 F. Supp. 2d at 1379.

Here, Commerce appears to conclude that Plaintiff could comply with the agency's requests. Final Determ., 66 Fed. Reg. at 49,620–21 (noting that Plaintiff "repeatedly told the Department that the missing information would be forthcoming" and that Plaintiff failed to provide any proof that it was unable to comply with the requests); *see also Bowman Transp., Inc.,* 419 U.S. at 286 (holding that the Court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned").

Commerce's decision, however, failed to make the required additional finding that Plaintiff failed to act to the best of its ability. Commerce neglected to explain or analyze whether Plaintiff willfully decided not to comply with its requests, or alternatively, whether Plaintiff's behavior fell below the standard for a reasonable respondent. *See Nippon Steel Corp. I,* 24 CIT at 1170–71, 118 F. Supp. 2d at 1378–79. Instead, Commerce supports its use of adverse facts available by repeating its facts available reasoning, although using slightly different words. *Compare* Final Determ., 66 Fed. Reg. at 49,622 (finding that China Steel failed to cooperate to the best of its ability because it repeatedly ignored the agency's instructions to submit downstream sales and product characteristics data, and never provided alternatives or explanations for why it could not report the information) *with id.* at 49,620–21 (holding that use of facts available was proper because Plaintiff withheld and failed to supply downstream sales and product characteristic information requested by the Department without seeking modification of the reporting requirements). In so doing, Commerce conflates the prerequisites for use of facts available with the additional findings required to use an adverse inference. *See Nippon Steel Corp. v. United States,* 25 CIT ____, ____, 146 F. Supp. 2d 835, 840 (2001) ("Commerce may not in this manner 'simply repeat[] its 19 U.S.C. § 1677e(a)(2)(B) finding, using slightly different words,' in lieu of making the requisite additional findings before drawing an adverse inference.") (citing *Borden I,* 4 F. Supp. 2d at

1246); *see also Steel Auth. of India, Ltd.,* 25 CIT at ____, 149 F. Supp. 2d at 930; *Kawasaki Steel Corp.,* 24 CIT at 689, 110 F. Supp. 2d at 1034 (internal citations omitted). The Court therefore finds the Department's "best of ability" determination not in accordance with law. *See Steel Auth. of India, Ltd.,* 25 CIT at ____, 149 F. Supp. 2d at 930–31.

The Department's "best of ability" determination fails for an additional reason. In its Case Brief before Commerce, Plaintiff described the difficulties it experienced in gathering and submitting the requested information. Case Brief, P.R. Doc. 140, Pl.'s Ex. 14 at 2–3 (stating that "the case is highly complex, involving over 100,000 transactions from nine separate sales data bases, about three million individual figures," and multiple tracings through up to 70 transactions for requested product characteristics). The Department, however, fails to address this claim in reaching its "best of ability" determination. As "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" Commerce failed to clearly identify its reasons for discounting Plaintiff's claims in making its best of ability determination. *Motor Vehicle Mfrs. Ass'n,* 463 U.S. at 43 (internal citation omitted).

CSC/YL's last argument contends that Commerce failed to afford Plaintiff a meaningful opportunity to respond to the agency's requests to submit the data in question. Generally, Commerce affords interested parties at least 30 days to respond to the full initial questionnaire from the date of receipt. 19 C.F.R. § 351.301(c)(2)(iii). Notwithstanding that regulation, our case law has established that "parties must be given a reasonable and meaningful opportunity to participate in the review and provide complete responses." *Mitsui & Co. v. United States,* 18 CIT 185, 202 (1994) (internal citation omitted).

In *Am. Silicon Tech. v. United States,* 24 CIT 612, 624–25, 110 F. Supp. 2d 992, 1003 (2000), the Court found that Commerce's use of adverse facts was inappropriate because it was "not clear" that the "numerous opportunities" afforded to respondent Eletrosilex were meaningful opportunities to respond. The Department in that case issued an initial questionnaire and a supplemental questionnaire, to which Eletrosilex responded promptly. 24 CIT at 620, 110 F. Supp. 2d at 998–99. Thereafter, Commerce sought additional information on "certain topics" by issuing a second and third questionnaire that required responses within one week of issuance, because of the statutory deadline for filing the preliminary decision. 24 CIT at 620, 110 F. Supp. 2d at 999. Eletrosilex failed to respond to either supplemental questionnaire. *Id.* Instead, the respondent informed the Department that it was being acquired, and that it was unable to file timely responses to the supplemental questionnaires because of management reviews and changes in staffing. *Id.* The Court found that it was unclear whether Plaintiff was afforded a meaningful opportunity to respond, because the questionnaires required responses within one week of issuance in light of the approaching preliminary determination deadline, and Eletrosilex notified the

agency upon receipt of the questionnaires that it was being acquired and that it was unable to submit timely responses because of management reviews and staffing changes. 24 CIT at 624–25, 110 F. Supp. 2d at 1002–03.

Similarly, in *Mitsui & Co.,* 18 CIT at 202, the Court held that Commerce failed to afford respondent a meaningful opportunity to respond to the Department's requests because the agency requested 5 years of information to be submitted in 83 days, and the Department failed to provide the respondent notice of the alleged deficiencies in its submission. The Court in *Melex USA, Inc. v. United States* further held that Commerce's resort to "best information available"[20] was not in accordance with law because the respondents were expected to submit data covering several years of sales which occurred over ten years before the initiation of the investigation, and the Department failed to give some indication whether the information submitted satisfied the agency's requests. *See* 19 CIT 1130, 1142, 899 F. Supp. 632, 642 (1995) (indicating the investigation was initiated in April 1991 for the period of July 1, 1976 through June 10, 1980).

The instant case, however, is factually dissimilar from our "meaningful opportunity" jurisprudence. Here, it is undisputed that Commerce notified Plaintiff of its deficient Questionnaire I responses. Thereafter, Commerce continued to seek the same product characteristics and downstream sales data, providing Plaintiff with notice of deficiencies and issuing repeated supplemental questionnaires. Even though Plaintiff was only given several days to complete Commerce's Questionnaires II and III, Plaintiff, in fact, received a total of more than four months to respond to Commerce's request for data describing sales which occurred within the same year of the Department's initiation of the antidumping investigation. The Court therefore finds that Commerce afforded Plaintiff a meaningful opportunity to respond to the Department's requests.

Accordingly, the Court remands Commerce's adverse facts available decision so that the Department may make specific findings as to whether CSC/YL willfully decided not to cooperate or behaved below the standard of a reasonable respondent, or otherwise reconsider its decision to apply an adverse inference in choosing the available data to calculate the dumping margin.[21]

D. Additional Arguments Contesting Commerce's Application of Adverse Facts Available

1. "Overrun" Product Characteristics

Plaintiff also argues that Commerce may not resort to adverse facts available because the missing product characteristics data are "insignif-

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[20] The "best information available" ("BIA") standard preceded the current "facts available" standard. *See Ferro Union, Inc.,* 23 CIT at 198 n.41, 44 F. Supp. 2d at 1329 n.41. Pursuant to the URAA, Pub. L. No. 103–465, 108 Stat. 4809 (1994), the terminology was changed, and the Department was instructed to make more discriminating judgments then previously mandated under the BIA standard. *Id.*

[21] Plaintiff also claims that Commerce failed to corroborate the selected adverse facts available margin. Pl.'s Br. at 31. Because the Court remands this matter for reconsideration of the inferences drawn adversely against Plaintiff, any ruling on the corroboration of the adverse facts available dumping margin would be premature.

icant or irrelevant." Pl.'s Br. at 6. Plaintiff asserts three arguments in support of its contention. First, Plaintiff challenges Commerce's conclusion that the "leeway overrun" merchandise in question is "prime quality merchandise," which should be matched to U.S. sales, as unsupported by substantial evidence. *Id.* at 9. Plaintiff's second argument is that its "leeway overrun" merchandise is sold outside the ordinary course of trade.[22] *Id.* at 8. Third, Plaintiff argues that the "leeway overrun" merchandise in question is sold only in the home market, and as such, the Department should have excluded that merchandise from use in calculating the dumping margin in accordance with agency practice. *Id.* at 6–7.

The Department's questionnaires do not request product characteristics data for "leeway overrun" products. Instead, the agency sought product characteristic data for all products Plaintiff classifies as "leeway" merchandise and specifically for Plaintiff's "overrun" merchandise. *See, e.g.,* CSC's Questionnaire II, C.R. Doc. 27, Def.-Int. II's Conf. Ex. 3 supp. questionnaire para. 5; YL's Questionnaire II, P.R. Doc. 69, Def.'s Ex. 2 supp. questionnaire para. 2. Commerce defines "overrun" merchandise as "excess production from [a] particular purchase order, regardless of the manner in which [the product] is ultimately sold." *Id.*

In the normal course of business, Plaintiff, however, does not appear to individually catalogue data for overrun merchandise. Rather, Plaintiff classifies overrun as a possible source of "leeway" merchandise, because that product lacks a purchase order. CSC's Feb. 26 Response, C.R. Doc. 17, Pl.'s Conf. Ex. 3 at 3. "Leeway" merchandise derives from four possible sources, according to Plaintiff, including: (1) overrun, (2) prime products that do not meet customers' original specifications, (3) prime products produced after cancelled orders, and (4) newly developed products. CSC'S Apr. 3 Response, C.R. Doc. 39, Pl.'s Conf. Ex. 6 para. 5. In one questionnaire response, Plaintiff describes "leeway" merchandise as both prime and non-prime quality merchandise, *id.* para. 6, while at various other places in the record, Plaintiff insists that "leeway" products are prime quality. CSC's Mar. 20 Response, C.R. Doc. 31, Pl.'s Conf. Ex. 4 at 24 (indicating that "[i]rregular miscellaneous leeway" product is "prime finished goods" and that such product "would be reported as overrun prime in the sales listings"); CSC's Apr. 3 Response, C.R. Doc. 39, Pl.'s Conf. Ex. 6 para. 5; CSC's Apr. 23 Response, C.R. Doc. 52, Pl.'s Conf. Ex. 10 at 5. With regards to overrun merchandise, CSC/YL defines overrun as excess production that is either non-prime or prime quality merchandise. *See* Pl.'s Br. at 5; Letter from Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, C.R. Doc. 39, Pl.'s Conf. Ex. 6 para. 5–6 (Apr. 3, 2001) ("CSC's Apr. 3 Response"). Plaintiff also stated in CSC's Apr. 3 Response that a substantial percentage of the overrun

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[22] "Ordinary course of trade," a variable considered in calculating normal value, is defined by 19 U.S.C. § 1677(15) as "the conditions and practices which, for a reasonable time prior to the exportation of the subject merchandise, have been normal in the trade under consideration with respect to merchandise of the same class or kind."

merchandise in question is prime quality. CSC's Apr. 3 Response, C.R. Doc. 39 para. 7.

Here, Commerce concluded that contrary to Plaintiff's characterization of the subject merchandise as "leeway" sales, "the merchandise in question is not 'secondary' quality merchandise which should not be matched to prime quality merchandise. The merchandise in question is prime quality; it has simply not been purchased by the customer to whose specifications it was originally produced." Final Determ., 66 Fed. Reg. at 49,621. In other words, as a result of excess production, the merchandise is sold to other customers from Plaintiff's inventory. *Id.*

Commerce's determination that the merchandise in question is prime quality is supported by substantial evidence. While the record indicates that overrun merchandise may be either prime or non-prime quality merchandise, it clearly indicates that a substantial percentage of the overrun merchandise in question is prime quality. Moreover, the record reveals Plaintiff only once stated that "leeway" merchandise, a category which contains the overrun merchandise in question, is either prime or non-prime quality merchandise; in all other instances, the record indicates that "leeway" merchandise is prime quality. For these reasons, the Court finds Commerce's determination is supported by substantial evidence.

With regards to Plaintiff's second argument contending that leeway overrun merchandise is outside the ordinary course of trade, Commerce responds that the Court should decline to review this argument because Plaintiff failed to exhaust its administrative remedies. Def.'s Mem. at 29. The Court will address the agency's argument first.

"The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court." *Timken Co. v. United States,* 26 CIT ____, ____, 201 F. Supp. 2d 1316, 1340 (2002) (internal citation omitted). There is, however, "no absolute requirement of exhaustion in the Court of International Trade in non-classification cases." *Consol. Bearings Co. v. United States,* 25 CIT ____, ____, 166 F. Supp. 2d 580, 586 (2001) (internal citation omitted). Rather, Congress vested the Court with discretion to determine the circumstances under which it is appropriate to require the exhaustion of administrative remedies pursuant to 28 U.S.C. § 2637(d).

> While a plaintiff cannot circumvent the requirements of the doctrine * * * by merely mentioning a broad issue without raising a particular argument, plaintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it.

Luoyang Bearing Factory v. United States, 25 CIT ____, ____, 240 F. Supp. 2d 1268, 1297 (2002) (internal citations omitted). The sole fact that the agency failed to address a plaintiff's argument does not invoke the exhaustion doctrine and shall not preclude a plaintiff from seeking judicial relief. *Id.* at 1298. "An administrative decision not to address the

issue cannot be dispositive of the question whether or not the issue was properly brought to the agency's attention." *Id.*

Here, Plaintiff properly exhausted its administrative remedies. In its Case Brief before the Department, Plaintiff raised its challenge contending that the "leeway overrun" merchandise was sold outside the ordinary course of trade. Specifically, Plaintiff argued that Commerce discards "similar overruns sold at a discount in the dumping margin calculation, as * * * not in the ordinary course of trade" and cited three agency determinations to support its position. Case Brief, P.R. Doc. 140, Pl.'s Ex. 14 at 7. Even though Plaintiff's statement of its position was brief, Plaintiff articulated its "ordinary course of trade" challenge with reasonable clarity, and provided the Department with an opportunity to address that argument in the final determination. Thus, the Court finds that Plaintiff has properly presented its claim here. *Cf. NSK Ltd. v. United States,* 25 CIT ____, ____, 170 F. Supp. 2d 1280, 1291 (2001) (finding that respondent NSK sufficiently exhausted its administrative remedies by bringing forth the issue in its case brief before Commerce). The Court now turns to the merits of Plaintiff's second contention.

In calculating the antidumping margin, Commerce generally excludes home market sales of overrun merchandise from U.S. sales comparisons where the agency determines that the overrun merchandise is sold outside the ordinary course of trade. *E.g., Certain Cut-to-Length Carbon-Quality Steel Plate Products from Italy,* 64 Fed. Reg. 73,234, 73,236–37 (Dep't Commerce Dec. 29, 1999) (notice of final determination of sales at LTFV); *Certain Steel Products from Brazil,* 64 Fed. Reg. at 38,771. In evaluating whether sales of overrun merchandise are outside the ordinary course of trade, the agency typically examines all of the circumstances particular to the sales in question. *See, e.g., Certain Steel Products from Brazil,* 64 Fed. Reg. at 38,770. For example, the agency has considered several factors, no one of which is dispositive, including: (1) an average price comparison between an overrun sale and a commercial sale; (2) a comparison between the ratio of overrun sales to total home market sales; (3) the volume of sales and number of buyers in the home market; (4) whether the merchandise is "off-quality" or produced according to unusual specifications; (5) whether the merchandise is sold at unusually high profits or according to unusual terms of sale; or (6) whether the merchandise is sold to affiliated parties at non-arm's length prices. *Id.; Mantex, Inc. v. United States,* 17 CIT 1385, 1403, 841 F. Supp. 1290, 1305–06 (1993); *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea,* 65 Fed. Reg. 76,218, 76,221 (Dep't Commerce Dec. 6, 2000) (preliminary results and rescission in part of antidumping administrative review). It follows that Commerce would be unable to determine whether a producer's overrun sales were sold outside the ordinary course of trade until the agency has actually evaluated the producer's complete overrun sales data. *See id.*

The Department here could not conduct such an examination of Plaintiff's overrun merchandise. Because Plaintiff failed to submit com-

plete product characteristics data, Commerce concluded that it was unable to use Plaintiff's submissions to conduct price comparisons and accurately compute a dumping margin. Final Determ., 66 Fed. Reg. at 49,621. In other words, without the products characteristics data, the agency was unable to consider all of the circumstances particular to Plaintiff's overrun sales to determine whether those sales were sold outside the ordinary course of trade. Moreover, the agency's inaction is consistent with its obligation to calculate accurate dumping margins. *Lasko Metal Prods. Inc.,* 43 F.3d at 1446 (quoting *Rhone Poulenc, Inc.,* 899 F.2d at 1191). The Court therefore finds that Commerce's failure to make an ordinary course of trade determination was reasonable.

The Court finds Plaintiff's third argument unpersuasive. As evidence of the Department's practice to exclude home market overrun sales from the dumping margin where a producer has no U.S. overrun sales, CSC/YL incorrectly cites to *Certain Steel Products from Brazil,* 64 Fed. Reg. at 38,770–71.[23] Pl.'s Br. at 7. In that determination, Commerce concluded that, although producer CSN's home market overruns were sold only in the home market, and represented "such an insignificant portion" of CSN's total home market sales during the period of investigation that the data's effect on the margin was negligible, the merchandise did not warrant exclusion from the home market database. 64 Fed. Reg. at 38,771. Because none of the factors the Department considers in determining whether overrun sales are outside the ordinary course of trade were germane to the producer's overrun sales, Commerce decided to include the overrun sales data. *Id.*

It can reasonably be inferred, however, that the agency's decision in *Certain Steel Products from Brazil* was based on its evaluation and verification of complete overrun sales information. *See id.* Accordingly, the instant case is factually distinguishable. The agency here neither found that the missing overrun sales were only sold in the home market, nor that those sales constituted "such an insignificant portion" of CSC/YL's home market sales that the merchandise's effect would be "negligible." *Certain Steel Products from Brazil,* 64 Fed. Reg. at 38,771; Final Determ., 66 Fed. Reg. at 49,621 (indicating that the missing product characteristics data affected a "significant" portion of China Steel's home market sales and that such merchandise could be matched to U.S. sales). More importantly, unlike *Certain Steel Products from Brazil,* CSC/YL failed to provide complete overrun sales information during the investigation, which resulted in Commerce's inability to consider whether those sales were made only in the home market, and consequently, outside the ordinary course of trade. *See supra* pp. 51–53. For these reasons,

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[23] Plaintiff also cites to *Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from Japan,* 64 Fed. Reg. 24,329, 24,341 (Dep't Commerce May 6, 1999) (notice of final determination of sales at LTFV) for support of its contention. Pl's Br. at 7. The Department in that determination found that the producer's home market overrun merchandise was outside the ordinary course of trade and should be excluded from the dumping margin for three reasons. *Id.* One of those reasons included the fact that the Department found sufficient matches of U.S. and home market non-overrun prime merchandise sold in the ordinary course of trade. *Id.* The agency, however, did not find, nor does the determination suggest, that the overrun sales were excluded from the margin because the producer had not sold any overrun merchandise in the U.S. *See id.* Therefore, the Court finds this determination unsupportive of Plaintiff's contention.

the Court finds that Commerce's decision to include the overrun sales in the dumping margin was in accordance with law.

2. Downstream Sales Data

Plaintiff raises two additional arguments supporting its contention that Commerce erroneously used adverse facts available with respect to the downstream sales data. Plaintiff first argues that Commerce erred because its total home market sales to affiliates do not meet the five percent threshold required in 19 C.F.R. § 351.403(d), and thus, the missing affiliate reseller data would not be used in calculating the dumping margin. *See* Pl.'s Br. at 19. Plaintiff's second argument contends that the agency failed to consider whether the sales to the affiliates were arm's length transactions pursuant to 19 C.F.R. § 351.403(c),(d) and agency practice. *See* Pl.'s Br. at 18–19. Plaintiff argues that Commerce should have made this decision prior to requesting the affiliate downstream sales information. *Id.* at 19.

With regards to CSC/YL's first argument, Commerce "normally will not calculate normal value based on the sale by an affiliated party if sales of the foreign like product by an exporter or producer to affiliated parties account for less than five percent of the total value (or quantity) of the exporter's or producer's sales." 19 C.F.R. § 351.403(d). Here, the agency concluded that "China Steel's sales to affiliates constituted approximately one-fifth of its total home market sales;" particularly, Commerce determined that sales to Yieh Loong, YH, and YP constituted more than five percent of China Steel's home market sales, or a "significant percentage." Final Determ., 66 Fed. Reg. at 49,621–22; *see also* Dep't of Commerce Mem. from Patricia Tran, Dep't Commerce to File, *The Use of Adverse Facts Available for China Steel Corporation (China Steel) and Yieh Loong Enterprise Co., Ltd. (Yieh Loong),* C.R. Doc. 55, Def.'s Conf. Ex. 7 at 5–6 (Apr. 23, 2001). Commerce, however, included Yieh Loong in its affiliate reseller calculation, even though that entity was collapsed with China Steel. As discussed above in subsection B, once the two entities are collapsed, Commerce must treat them as a single producer for purposes of calculating the dumping margin. *See supra* pp. 32–33. Because Yieh Loong's sales were included in the calculation, Commerce's determination may have been erroneous, and the Court is unable to review that determination. Accordingly, the Court remands this issue to Commerce for reconsideration.

The Court finds Plaintiff's second argument lacks merit. The plain language of the regulation indicates that Commerce *may* calculate normal value based on affiliate reseller data, although the Department *normally* will not do so if the exporter's or producer's sales to affiliates constitute less than 5 percent of its home market sales or were arm's length transactions. 19 C.F.R. § 351.403(d) (emphasis supplied). Further, the Department *may* calculate normal value based on sales to affiliates if the agency is satisfied that the transactions were made at arm's

length. *See* 19 C.F.R. § 351.403(c) (emphasis supplied).[24] Thus, Commerce has discretion to calculate normal value pursuant to subsections (c) and (d). Neither the regulations nor the Department's practice, however, support Plaintiff's contention that Commerce is required to conduct an arm's length test prior to requesting affiliate reseller data. Rather, it seems that the agency could not conduct an arm's length test without first receiving the requisite affiliate reseller data. Thus, Commerce's failure to conduct an arm's length test prior to requesting affiliate reseller data in the instant case was permissible.

3. World Trade Organization Obligations

a. 19 U.S.C. § 3512

As a preliminary matter, Commerce argues that 19 U.S.C. § 3512(c) prohibits Plaintiff, as a private party, from challenging any government action brought under any provision of law as inconsistent with any of the World Trade Organization ("WTO") Agreements. *See* Def's Mem. at 31–32. As the Court determined in *Timken Co. v. United States,* 26 CIT ____, ____, 240 F. Supp. 2d 1228, 1238 (2002) ("Timken I"), Plaintiff is not bringing this action under any WTO agreement; instead, Plaintiff argues that Commerce's application and interpretation of U.S. law violates its international obligations pursuant to a WTO agreement.

CSC/YL is certainly "'free to argue that Congress would never have intended to violate an agreement it generally intended to implement, without expressly saying so.'" *Timken I,* 26 CIT at ____, 240 F. Supp. 2d at 1238 (quoting *Gov't of Uzbekistan v. United States,* slip. op. 01–114 at 11 (CIT Aug. 30, 2001)). As in those two cases, Commerce's reliance here on § 3512(c) is an "'erroneous technical bar.'" *Id.* Therefore, Plaintiff's arguments are properly before the Court.

b. WTO Panel Reports

Plaintiff argues that Commerce's application of adverse facts available violates U.S. obligations to the WTO, rendering its decision not in accordance with law. Pl.'s Br. at 14, 23. With respect to the product characteristics data, Plaintiff argues that for Commerce to "demand all this [data], and to require that it all be perfect under penalty of hair-trigger application of '[facts available]' within significantly accelerated deadlines, is the epitome of unreasonable government action." *Id.* at 14 (citing WTO Dispute Settlement Report on *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* 29 Bernan's Annot. Rep. 163 (Feb. 28, 2001) *("Certain HR Products from Japan")).*[25]

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[24] 19 C.F.R. § 351.403(c) states that the "[i]f an exporter or producer sold the foreign like product to an affiliated party, the [Department] may calculate normal value based on that sale only if satisfied that the price is comparable to the price at which the exporter or producer sold the foreign like product to a person who is not affiliated with the seller." 19 C.F.R. § 351.403(c).

[25] Plaintiff further argues that a respondent cooperates to the best of its ability when the respondent asks a third-party to cooperate and that party fails to do so, even if the respondent could have done more to induce the third-party's cooperation. Pl.'s Br. at 23. Because the Court found Commerce's "best of ability" determination not in accordance with law in subsection C above, the Court declines to reach this argument.

Plaintiff's reliance on *Certain HR Products from Japan,* however, is misplaced, as the Panel in that case did not find that the Department "unduly accelerated the proceeding" in violation of U.S. international obligations. 29 Bernan's Annot. Rep. at 85–86. Rather, the Panel held that it "simply [could] not see any basis on which to find that [Commerce] failed to administer the anti-dumping law in a uniform, impartial, and reasonable manner simply because [the agency] chose to act faster than it normally did in issuing the questionnaires in this investigation." *Id.* at 86. Put differently, the Panel held the Department's 25-day acceleration of the investigation in accordance with law. *Id.*

Similarly, the Court does not find Commerce's requests for product characteristics data in the time frame at issue here to be "unreasonable government action." Unlike *Certain HR Products from Japan,* here, Commerce did not significantly accelerate the deadlines for initiating the investigation, issuing its initial questionnaire, and rendering a preliminary and final determination. In particular, the Department initiated the investigation here 21 days after receiving the petition, *see* Prelim. Determ., 66 Fed. Reg. at 22,204; Initiation Notice, 65 Fed. Reg. at 77,568, whereas in *Certain HR Products from Japan,* the agency initiated the investigation the day after the petition was filed, or five days earlier than normal. 29 Bernan's Annot. Rep. at 85. Although the Department sent questionnaires to the respondents in *Certain HR Products from Japan* only four days after initiating the investigation, 29 Bernan's Annot. Rep. at 85, the agency here waited the normal thirty days. *See* Prelim. Determ., 66 Fed. Reg. at 22,205. As discussed in more detail below in subsection E, Commerce's preliminary determination was made within the statutorily mandated time frame of 140 days, *infra* pp. 67–68, unlike the Department's actions in *Certain HR Products from Japan,* in which a preliminary decision was rendered 120 days after the initiation of the investigation. 29 Bernan's Annot. Rep. at 85. Rather than accelerating the deadline for the final determination, the Department here postponed its final determination an additional 60 days beyond the statute's prescribed 75 days. Postponement Notice, 66 Fed. Reg. at 37,213–14. Accordingly, the Court does not find that Commerce "unduly accelerated the proceeding" in violation of U.S. international obligations, but rather acted in conformity with the statutorily mandated norms for instituting, investigating, and rendering a LTFV determination. 19 U.S.C. §§ 1673b(b)(1)(A), 1673b(c), 1673d(a)(2).

E. Commerce's Conduct during the Investigation

The final issue concerns Commerce's actions in conducting the investigation. Plaintiff raises three arguments. First, Plaintiff contends that Commerce abused its discretion in rejecting its May 30–31, 2001 submission, which allegedly provided all deficient affiliate downstream sales and product characteristics information, in addition to its response to the agency's verbal, post-preliminary determination request for warranty costs on a transaction-specific basis for over 100,000 sales. *See* Pl.'s Br. at 24–25. This new information in particular, Plaintiff con-

tends, should not have been rejected, as the agency never provided a deadline for its submission. *Id.* at 25. Thus, Plaintiff contends that Commerce's actions were not in accordance with law. *Id.*

Next, Plaintiff argues that Commerce's conclusion that the agency had insufficient time to use CSC/YL's May 30–31, 2001 submission in calculating the dumping margin within the postponed time frame for rendering the final determination is inconsistent with its prior statement that the agency would analyze Plaintiff's April 23 Responses and make its final decision within 75 days of the publication of the preliminary decision. Therefore, Plaintiff argues that Commerce's claim is unsupported by substantial evidence and not in accordance with law. *See* Pl.'s Br. at 25–26. Plaintiff relies on *ALTX, Inc. v. United States,* 25 CIT ____, ____, 167 F. Supp. 2d 1353, 1363 (2001) for the proposition that Commerce "may not reach inconsistent conclusions as to different points in the investigation." Pl.'s Br. at 26.

Third, Plaintiff claims that Commerce unnecessarily limited the investigation time frame in this case. According to CSC/YL, Commerce should have postponed the preliminary determination an additional 50 days to allow sufficient time for the questionnaire process to lead to an accurate dumping margin in this "extraordinarily complicated" case. Pl.'s Br. at 26–27.

With respect to Plaintiff's first contention, the regulations clearly state that a submission of factual information is due no later than 7 days before verification is scheduled in final antidumping determinations. 19 C.F.R. § 351.301(b)(1). "[A]t any time prior to [that] deadline," however, any interested party "may submit factual information to rebut, clarify, or correct factual information submitted by any other interested party." 19 C.F.R. § 351.301(c)(1). The Department, moreover, may request any party to submit factual information at any time during the proceeding. 19 C.F.R. § 351.301(c)(2)(I). The regulations do not govern Commerce's issuance of verbal requests, but the case law establishes that "the administrative record is limited to the information that was presented to or obtained by the agency making the determination during the particular review proceeding for which section 1516 authorizes judicial review." *Neuweg Fertigung GmbH v. United States,* 16 CIT 724, 726, 797 F. Supp. 1020, 1022 (1992) (internal citations omitted).

Plaintiff's May 30–31, 2001 submission purportedly contains two sets of information: the deficient downstream sales and product characteristics data and warranty costs on a transaction-specific basis for over 100,000 sales. Commerce denied the entire response as untimely, because this submission constituted a new response and would require additional analysis and investigation to properly administer the case. Final Determ., 66 Fed. Reg. at 49,618; Letter from Robert James, Program Manager, Int'l Trade Admin., to China Steel Corporation and Yieh Loong Enterprise Co. Ltd., c/o Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., P.R. Doc. 131, Def.-Int. I's Ex. 15; Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 13.

With regards to the product characteristics and downstream sales information, the record reveals that Commerce scheduled verification for Yieh Loong and China Steel to commence on April 30, 2001 and May 7, 2001 respectively. Letter from Neal Halper, Director, Office of Accounting, Int'l Trade Admin., to Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., C.R. Doc. 49 at 1 (Apr. 19, 2001); Letter from Neal M. Halper, Director, Office of Accounting, Int'l Trade Admin., to Peter Koenig, Ablondi, Foster, Sobin & Davidow, P.C., C.R. Doc. 56 at 1 (Apr. 26, 2001). For Plaintiff's submission to be timely, Plaintiff should have filed its responses seven days before the commencement of each companies' respective verification. 19 C.F.R. § 351.301(b)(1). As the submission was filed on May 30–31, 2001, approximately one month after the regulatory deadline for timely submissions, Plaintiff's submission of this factual information was properly rendered untimely and rejected by the agency.

With regards to the warranty costs information, as Commerce may request factual information from any interested party at any time during the proceeding, Commerce properly issued this request. The agency, however, requested the information orally on May 3, 2001 without setting a deadline for its submission. *See* Letter from Peter Koenig and Kristen Smith, Ablondi, Foster, Sobin & Davidow, P.C., to U.S. Sec'y of Commerce, P.R. Doc. 138, Pl.'s Ex. 13 at 1–2 (June 21, 2001); Dep't of Commerce Mem. from Patricia Tran to File, *Telephone Conversation with Counsel for Yieh Loong Enterprise Co., Ltd. (Yieh Loong) and China Steel Corporation (China Steel),* P.R. Doc. 122, Def.-Int. I's Ex. 13 (May 9, 2000). Consequently, Plaintiff could not have made a timely submission of the warranty costs information, as the Department requested that information after the regulatory deadline for filing factual information. Moreover, Commerce rejected that data as untimely, even though the agency failed to provide a deadline for its submission, and Plaintiff submitted the request within a month of its verbal issuance. Accordingly, on these facts, the Court finds that Commerce abused its discretion in rejecting Plaintiff's warranty costs data. Therefore, the Court instructs the agency to reopen the record for further consideration of the warranty costs data.[26]

Plaintiff's reliance on *ALTX, Inc.* in support of its second argument is misplaced. In that case, the International Trade Commission ("ITC") supported its determination that subject import volumes were not significant with a finding that "nonsubject imports were so significant as to have displaced subject imports and the domestic like product," focusing

[26] Plaintiff further contends that Commerce's rejection of the May 30–31, 2001 submission violates Article 6.8 of the WTO Antidumping Code, and is therefore, not in accordance with law, because Plaintiff made that submission in time to allow for its verification and use in the final determination. Pl.'s Br. at 28–29 (citing *Certain HR Products from Japan,* 29 Bernan's Annot. Rep. at 28, 33–34). The instant case, however, is factually dissimilar from *Certain HR Products from Japan*. There, because the respondents submitted their questionnaire responses almost two weeks before verification, and because those responses did not present new information, the Panel found that the submissions, although untimely, were made within a reasonable time as required by Article 6.8. *Certain HR Products from Japan,* 29 Bernan's Annot. Rep. at 28 (indicating that respondent NSC submitted the information 14 days before verification, while respondent NKK submitted the information 9 days beforehand), 33 (citing Article 6.8) (stating that determinations may be made on the basis of facts available if parties do not supply requested information within a reasonable time). Here, however, Plaintiff filed its submission approximately one month after the scheduled verification. Accordingly, the Court finds Plaintiff's reliance on that panel decision misguided.

specifically on the latter half of the period of investigation. 25 CIT at ____, 167 F. Supp. 2d at 1363. The Court found that the ITC failed to rationally support its conclusion, because the application of the agency's rationale to the first half of the period of investigation produced a contrary conclusion. *Id.* at 1362–63. In particular, the Court stated:

> Having employed a rationale to interpret data from the later part of the [period of investigation] in such a manner as to support its conclusion, the Commission may not ignore the fact that the same rationale applied to data from the earlier part of the [period of investigation] weakens its conclusion with regard to nonsubject imports. Further explanation is required on remand for the agency to support its reasoning that nonsubject imports were so significant as to have displaced subject imports and the domestic like product.

25 CIT at ____, 167 F. Supp. 2d at 1363. Put differently, the Court held that the agency must provide further explanation to substantially support its rationale when that rationale would produce two inconsistent conclusions from the evidence. *See id.*

The instant case, however, is distinguishable from *ALTX, Inc.* Commerce's conclusion that it lacked sufficient time to use the data in calculating the dumping margin within the postponed time frame for rendering the final determination is inconsistent with its prior statement that the agency would analyze Plaintiff's responses to Questionnaire III and make its final decision within 75 days of the publication of the preliminary decision. The Department's conclusion, nevertheless, is reasonable. Unlike the agency in *ALTX, Inc.,* Commerce sufficiently supported its conclusion by providing a detailed explanation of its rationale. The record reveals that reasoning.

> The May 30 and 31, 2001 submissions * * * would constitute such a major revision of China Steel/Yieh Loong's questionnaire as to qualify as a completely new response. It would involve significant new subsets of home market sales, and accompanying narrative, submitted for the first time. The same holds true for the missing model match data. Even with the extended final determination, the Department would not be able to properly administer the investigation of this case. To [do so], the Department must: analyze the new submissions; allow an opportunity for comments from interested parties; issue additional supplemental questionnaires; conduct cost and sales verification of China Steel/Yieh Loong; issue verification reports; and allow interested parties to comment and request a hearing.

Issues and Decision Mem., P.R. Doc. 151, Def.'s Ex. 8 at 13. The Court therefore finds that Commerce's conclusion that it lacked sufficient time to use CSC/YL's May 30–31, 2001 submission is in accordance with law.

The Court finds that Plaintiff's third argument lacks merit. Commerce is not required to extend the preliminary determination's deadline beyond the normal 140 day limitation. *See* 19 U.S.C. § 1673b(b)(1)(A). Commerce may, however, extend that deadline "if"

the agency determines that the parties are cooperating, additional time is needed to make the preliminary decision, and the case is "extraordinarily complicated." 19 U.S.C. § 1673b(c)(1)(B).[27] The agency determines that a case is "extraordinarily complicated" by considering "(I) the number and complexity of the transactions to be investigated or adjustments to be considered, (II) the novelty of the issues presented, or (III) the number of firms whose activities must be investigated." *Id.* Thus, Commerce has discretion to extend the deadline where it finds that a case is extraordinarily complicated. *See id.*

Here, Commerce did not find this case extraordinarily complicated, even though Plaintiff repeatedly asserted that Commerce's data requests required review and submission of thousands of transactions. *See* Denial Letter, P.R. Doc. 115, Pl.'s Ex. 9 at 2; Pl.'s Br. at 26–27. Instead, the record reveals that Commerce determined that the instant matter was controlled by the statutorily defined time limitations. Denial Letter, P.R. Doc. 115, Pl.'s Ex. 9 at 1–2. As the statute clearly grants the agency discretion to determine whether the instant matter was extraordinarily complicated and there is no indication that Commerce's determination was unreasonable, the Court defers to the Department's decision not to postpone the preliminary determination deadline. Accordingly, the Court finds Plaintiff's argument unpersuasive.

IV. CONCLUSION

For the foregoing reasons, the court sustains the agency's determination in part and remands in part for reconsideration in accordance with this opinion. Specifically, on remand, Commerce shall reconsider their affiliation determination in light of the fact that China Steel only became affiliated with Yieh Loong and in turn with the Yieh Loong affiliates, on February 21, 2000. Commerce's affiliation determination must consider this temporal aspect of Plaintiff's relationship with the Yieh Loong affiliates or explain why that factor is not necessary to its determination in accordance with the agency's regulations. The agency shall also make specific findings as to whether CSC/YL willfully decided not to cooperate or behaved below the standard of a reasonable respondent, or otherwise reconsider its decision to apply an adverse inference in choosing the available data to calculate the dumping margin. Commerce shall also reconsider whether the missing affiliate reseller data should be used in calculating the dumping margin. In particular, the agency must reconsider whether Plaintiff's home market sales to affiliates satisfy the five percent threshold required in the agency's regulations. The agency may not, however, include home market sales from China Steel to Yieh Loong in that calculation. Finally, Commerce must reopen the record for further consideration of the warranty costs data requested orally by the agency on May 3, 2001.

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[27] The statute also permits the agency to extend the deadline for making the preliminary determination in "extraordinarily complicated cases" if the petitioner files a timely request for an extension. 19 U.S.C. § 1673b(c)(1)(A). As the Domestic Producers did not file such a request in the instant case, that subsection is irrelevant here.

Commerce shall have 60 days to submit its remand determination. The parties shall have 15 days to submit comments on the remand determination. Rebuttal comments shall be submitted within 7 days thereafter.

(Slip Op. 03–53)

DANIEL ATTEBERRY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 02–00647

[Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. §2636(a)(1) denied.]

(Dated May 14, 2003)

Vanessa von Struensee, for Plaintiff.

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 *(Jack S. Rockafellow); Yelena Slepak,* Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, United States Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* The United States ("Government") has moved to dismiss for lack of subject matter jurisdiction this action in which plaintiff Daniel Atteberry ("Importer") contests the decision of the United States Customs Service ("Customs")[1] re-classifying for tariff purposes certain merchandise which he describes as "bike[s]/kart[s]/scooter[s]." Specifically, the Government's motion contends that this action is untimely under 28 U.S.C. § 2636(a)(1) (2000), because it was assertedly filed more than 180 days after the mailing of Customs' notice of denial of the Importer's protest challenging the agency's re-classification decision.

For the reasons set forth below, the Government's motion to dismiss for lack of subject matter jurisdiction pursuant to § 2636(a)(1) must be denied.

I. BACKGROUND

In late May 2001, a shipment of "bike[s]/kart[s]/scooter[s]" was entered duty-free through the port of Seattle by plaintiff Importer, Daniel Atteberry (d/b/a Pedal Pedal GoKarts). Later, Customs re-classified the merchandise, resulting in the imposition of duties on certain items. Customs notified the Importer of the agency's determination in late Sep-

[1] Effective March 1, 2003, the Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security,* H.R. Doc. 108–32, at 4 (2003).

tember 2001; and, in mid-October, Customs liquidated the entry and billed the Importer for the unpaid duties.[2]

In response to Customs' determination, the Importer submitted an "Application for further review [re Entry] 603 10483064" dated December 20, 2001, seeking reconsideration of the agency's decision. Customs treated that submission as a protest, and denied it on April 3, 2002 (according to the date on the face of the notice of denial). The agency then mailed a copy of the notice to the Importer.

At issue here is the "date of mailing" of the notice. The Government's motion is premised on its assertion that Customs personnel mailed the notice of denial to the Importer the same day the protest was denied. *See* Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Action for Lack of Subject Matter Jurisdiction ("Def.'s Brief") at 6. In contrast, the Importer has consistently maintained that the notice was mailed six days later—on April 9, 2002. *See* Summons (with Importer's handwritten note "Mailed 4/9/02" in box captioned "Date Protest Denied"); Memorandum in Support of Plaintiff's Motion for Judgment and in Opposition to Defendant's Motion to Dismiss ("Pl.'s Brief") at 6.

This action was commenced with the Court's receipt of the Importer's Summons and Complaint[3] on Monday, October 7, 2002—187 days after April 3, 2002, and the first business day following Sunday, October 6, 2002 (which was the 180th day after April 9, 2002).

II. ANALYSIS

It is axiomatic that "'[t]he United States, as sovereign, is immune from suit save as it consents to be sued * * *, and [that] the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States v. Mitchell,* 445 U.S. 535, 538 (1980) (*quoting United States v. Sherwood,* 312 U.S. 584, 586 (1941)). Pointing to 28 U.S.C. § 2636(a)(1), the Government asserts in its opening brief that this action therefore must be dismissed because "Congress only gave this Court jurisdiction over civil actions filed within 180 days" of Customs' denial of a protest. Def.'s Brief at 5.

The referenced section of the statute reads:

> **§ 2636. Time for commencement of action.**
>
> (a) A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515] is barred unless commenced in accordance with the rules of the Court of International Trade—
>
> (1) within one hundred and eighty days after the *date of mailing* of notice of denial of a protest under section 515(a) of such Act; * * *

28 U.S.C. § 2636(a)(1) (2000) (emphasis added).

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[2] Although the Government asserts that the bill was mailed to the Importer's address of record, there is no indication in the record here whether he ever actually received it.

[3] The Importer's letter dated October 3, 2002, attached to the Summons, has been deemed the Complaint. At the time this action was filed, the Importer was acting *pro se*.

As noted above, the Government's claim of untimeliness is premised on its assertion that Customs mailed the notice of denial of protest on April 3, 2002 (the same day the protest was denied). In support of that assertion, the Government invokes the presumption of regularity, and cites a Customs regulation concerning notice. *See generally* Def.'s Brief at 6.

The presumption of regularity holds, in essence, that "public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations." *Alaska Airlines, Inc. v. Johnson,* 8 F.3d 791, 795 (Fed. Cir. 1993) (*quoting Parsons v. United States,* 670 F.2d 164, 166 (Ct. Cl. 1982)). *See also Takashima U.S.A., Inc. v. United States,* 19 CIT 673, 677–78, 886 F. Supp. 858, 861 (1995) (same). *See generally* Def.'s Brief at 6. The regulation on which the Government relies—19 C.F.R. §174.30—provides that, for purposes of calculating the 180-day period for filing of a civil action challenging the denial of a protest, "the date appearing on [the notice of denial of the protest] shall be deemed the date on which such notice was mailed." 19 C.F.R. § 174.30(a) (2000). In light of those authorities, the Government argues, it "must be presumed, in the absence of evidence to the contrary, that Customs mailed [the] notice of the denial of [the Importer's] protest on April 3, 2002, the date on which the protest was denied." Def.'s Brief at 6.

To buttress the presumption of regularity (and thus its claim of untimeliness), the Government has also submitted the sworn declaration of the Supervisory Customs Entry Officer for the Port of Seattle, who has attested in no uncertain terms to the clockwork precision with which Customs there handles the mailing of notices of denials of protests:

> *The procedure used by our office * * * has been to mail the denial on the same day* that is shown in the Customs Automated Commercial System ("ACS") record as the date of denial, and *which is stamped or handwritten on the notice of denial of the protest itself.* Specifically, once the denial is recorded in ACS, an entry specialist places the notice of the denial of a protest into an envelope, and brings it to the mail room. All the outgoing mail is delivered by the mailroom personnel to the U.S. Postal Service postal drop boxed located in the lower lobby of our building. Pick up from the postal drop boxes is daily.

Attachment F ("Customs Declaration") to Declaration of Jack S. Rockafellow With Attachments, ¶ 5 (emphases added).

Whatever the procedure of Customs personnel in Seattle, the notice of denial of the protest in this case was not postmarked until April 9, 2002—a full six days after the date on the face of the notice itself and the date on which the denial was entered into Customs' ACS system. *See* Pl.'s Brief, Exh. 1 (copy of envelope from Customs in Seattle addressed to Importer, postmarked "Seattle WA APR09'02). And, as discussed above, this action was commenced on Monday, October 7, 2002—the first business day following Sunday, October 6, 2002, which was the 180th day after April 9, 2002.

However improbable, it is at least conceivable that the delay in postmarking the notice at issue is attributable not to Customs, but to the United States Postal Service.[4] In other words, it is at least possible (albeit unlikely) that Customs did in fact deposit the notice in the drop box in the lobby of Customs' building in Seattle in a timely fashion on April 3, 2002, but that the Postal Service either failed to make its regular pickups for a matter of several days in a row or it picked up the mail as scheduled but failed to promptly process it.

In this respect, one aside by the Government merits special attention. In a footnote in its opening brief, the Government observes that—by the terms of the statute itself—the 180-day clock established in 28 U.S.C. § 2636(a)(1) begins running on the "date of mailing" of the notice. Implying that Congress deliberately chose the language "date of mailing" over the language "date of postmark," the Government posits that there is no reason "that the 'date of mailing' of the notice of denial for purposes of 28 U.S.C. § 2636(a)(1) must be deemed to be the date when the notice is postmarked by the Post Office." *See* Def.'s Brief at 7 n.4.

The Government's argument, in short, is that "an item quite reasonably might be placed in a box intended solely for U.S. Mail on a date *earlier* than the date of postmark, in which case the earlier date should be deemed the 'date of mailing.'" *Id*. In essence, then, under the Government's hypothetical construction of § 2636(a)(1), Customs personnel in Seattle could hold the day's worth of notices of denials of protests until moments after the Postal Service mail carrier's final pickup from Customs' lobby drop box on a Friday before a Monday holiday; then, as soon as the mail carrier departed, Customs could deposit the notices in the drop box; and, according to the Government's theory, the notices would be deemed "mailed" and the 180-day period triggered as of Friday, even

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[4] Whether the delay is attributable to the Customs Service or to the Postal Service, it is—in any event—attributable to an entity of the federal government. Significantly, however, neither party has intimated that fault here lies with the Postal Service, the overall efficiency and reliability of which have been recognized in case after case over the years.

"Founded in the early days of our national life [, the Postal Service] has had * * * two centuries of successful operation * * *. [and] has justly earned the confidence of the people of the United States." *Charlson Realty Co. v. United States,* 384 F.2d 434, 447–48 (Ct. Cl. 1967) (Jones, J., concurring). It is the historic efficiency and reliability of the Postal Ser ice that are the foundation of the "presumption of delivery (arrival) and receipt of mail in due course" which is often invoked, in tandem with the presumption of regularity, in notice cases such as this. *See*, *e.g.*, *Frontier Ins. Co. v. United States,* 25 CIT ___, 155 F. Supp. 2d 779, 788–89 (2001). In short, the presumption of regularity goes to proof of mailing; and proof of mailing, in turn, "raises a presumption of delivery." *See A.N. Deringer, Inc. v. United States,* 20 CIT 978, 986 (1996) (citation omitted); *Miller v. United States,* 364 F. Supp. 1390, 1394 (Cust. Ct. 1973).

Thus, more than a century ago, it was already a "well settled" rule that "if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed." *Rosenthal v. Walker,* 111 U.S. 185, 193 (1884), *quoted in Miller,* 364 F. Supp. at 1393. That presumption is, in a sense, a presumption of regularity as to the operations of the U.S. Postal Service. *See, e.g., Charlson Realty Co.,* 384 F.2d at 442 (explaining that justification for presumption of arrival of mail in due course is that "[p]ostal employees are presumed to discharge their duties in a proper manner" (citations omitted)); *United States v. Int'l Imps., Inc.,* 55 CCPA 43, 49 (1968) (*quoting Huntley v. Whittier,* 105 Mass. 391, 392 (1870), for proposition that presumption of arrival of mail in due course is "founded on the probability that the officers of the government will do their duty and [sic; in] the usual course of business").

though the notices would not be postmarked (and would not enter the Postal Service's delivery system) for at least four more days.[5]

To its credit, the Government is not pressing that argument here.[6] It is, in any event, an extraordinary proposition, and one not borne out by the statute's legislative history. Simply stated, there is nothing in the record of the lawmakers' deliberations to suggest that Congress intended to impose a stringent 180-day clock on the filing of civil actions challenging denials of protests, and—at the same time—to allow Customs to shave precious days off that clock by "gaming the system."

One final note about the presumption of regularity and the sworn statements proffered in this action concerning Customs' practices in the mailing of notices of denial of protests. To be sure, the sheer volume of protests to be processed is daunting. It therefore would be difficult to criticize the overburdened agency if it were to confess that, while it strives to mail notices on the day that they issue, mailing is sometimes delayed. But it would be unseemly for the Government to invoke a *presumption* of regularity if in fact there is no regularity; and, depending on the circumstances, it might well constitute perjury for a federal official to attest that an agency adheres strictly to certain standard procedures if in fact it does not.[7]

Although it is not possible here to entirely rule out fault on the part of the U.S. Postal Service, it seems much more likely that the notice at issue languished in the custody of Customs.[8] And there is nothing to sug-

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[5] If one is inclined to float strained arguments on the triggering of the 180-day clock, there is no reason to stop with the statute. As noted above, the Government here has invoked a Customs regulation which provides that, for purposes of calculating the 180-day period, "the date appearing on [the notice of denial of a protest] shall be deemed the date on which such notice was mailed." Def.'s Brief at 6 (*quoting* 19 C.F.R. § 174.30) (emphasis omitted). Reading that regulation in conjunction with 28 U.S.C. § 2636(a)(1) and extending to the regulation the same sort of reasoning that the Government applied to the statute, the Government might argue that, regardless of when—*or even whether*—the notice denying an importer's protest is deposited in a postal drop box or postmarked by the Postal Service, the importer's time for filing a civil action challenging the denial expires 180 days from the date which Customs places on the face of the notice.

In other words, by that reasoning, Customs could keep all notices of denials in a drawer and mail them to the respective importers on Day 181 (or not at all), and then move to dismiss as untimely any civil actions brought challenging those denials. To state such an absurd proposition is to reject it. *Cf. Knickerbocker Liquors Corp. v. United States,* 432 F. Supp. 1347, 1351 (Cust. Ct. 1977) (where court was "unwilling to presume that customs officials would intentionally be guilty of such bad faith and conduct as would be present where notification of a denial of a protest is withheld specifically to prevent judicial review").

Indeed, although it may be "*the date of mailing* of notice of denial of a protest" (emphasis added) which triggers the 180-day period of 28 U.S.C. § 2636, the notice required by the statute is perfected only upon receipt. *See F.W. Myers & Co. v. United States,* 6 CIT 215, 216, 574 F. Supp. 1064, 1065 (1983) (noting that "[i]mplicit in the term 'notice,' as contained in [28 U.S.C. § 2636(a)], is the requirement that the protestant shall *be made aware* of the denial of the protest") (emphasis added); *see also United States v. Int'l Imps.,* 55 CCPA at 53 (discussing general rule that notice is perfected upon receipt; in context of statutory requirement that "notice" of increased appraisement be "given" to importer, "proof of mailing is not *ipso facto* proof of notice given to the importer * * * where * * * the unrefuted testimony is that no notice was received"). In this sense, then, withholding notification of a denial of protest could not prevent judicial review.

[6] *See* Defendant's Memorandum in Response to "Plaintiff's Motion for Summary Judgment and for Denial of Defendant's Motion to Dismiss" ("Def.'s Reply Brief") at 1, n.2, 3.

The Government implicitly concedes that the postmark date controls for purposes of calculating the 180-day period for filing of a civil action challenging the denial of a protest; and it apparently does not challenge the authenticity of the postmark here. *Id.* at 1.

[7] Such action on the part of the Government would be particularly egregious where, as here, its effect would be to non-suit a plaintiff. Reflecting on the grave consequences of the Government's undertakings in this area, the court in *Orlex Dyes & Chemicals Corp. v. United States,* 168 F. Supp. 220, 223 (Cust. Ct. 1958), emphasized: "[I]t must be remembered that important rights are often made to depend in some manner upon notification by mail." There, as here, "the right of appeal * * * [was] influenced by the date of mailing, since the statutory time for appeal * * * [was] reckoned from that date." *Id. See also Plywood & Door S. Corp. v. United States,* 57 Cust. Ct. 309, 315 (1966) ("Bear in mind the fact that the giving of notice * * * sets into motion a statute of limitations which affects and controls important rights of the importing public.").

[8] *See* n.4, *supra*.

gest that the handling of this notice was anything out of the ordinary;[9] thus, there can be no assurance that other notices in other cases (perhaps even notices issued by other ports) have not suffered similar mailing delays.[10]

If the Importer here had not retained the envelope in which Customs mailed the notice of denial, his lawsuit would have met a swift end.[11] But, in some respects, the Government's stakes are even higher. Particularly for an inveterate litigant such as the Government, the credibility of its witnesses is the coin of the realm.[12] Moreover, the Government can expect to continue to enjoy the presumption of regularity in the future only if experience shows that it is warranted.[13] Cases like this one call that into doubt.

III. CONCLUSION

As the Government apparently now concedes, the notice of denial of protest here at issue was mailed on April 9, 2002. The 180-day period established in 28 U.S.C. § 2636(a)(1) for the filing of civil actions challenging such Customs actions thus expired on October 6, 2002. Since that day was a Sunday, and since this action was commenced on October 7, 2002 (the first business day thereafter), the action was timely filed.

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[9] Indeed, the Seattle Customs official has affirmatively represented that there was nothing whatsoever unusual about the mailing of the notice of denial in this case. Customs Declaration ¶ 10.

[10] While it might be tempting to dismiss this particular instance of delayed mailing as an isolated incident, there is nothing in the record to support such a conclusion. The Government's reply offers no explanation for the discrepancy between the fact of the postmark in this case and the sworn statements in the Customs Declaration filed in support of the Government's motion. *See generally* Def.'s Reply Brief.

Moreover, it would be wrong to assume that such mailing delays are rare simply because there are no similar reported cases. As the Government notes (*see* Defendant's Statement of Undisputed Material Facts ¶¶ 15–17; Def.'s Reply Brief at 1 n.2), it requested that the Importer in this case provide proof of the date of mailing, and filed its motion to dismiss only after the Importer failed to respond. Presumably, if the Importer had supplied the Government with a copy of the postmark promptly upon request, the instant motion would never have been filed. Thus, there may be other similar cases—perhaps even many other cases—where there was a similar discrepancy between the actual postmark date and the date on which Customs initially asserted that notice was mailed. But any such cases would not have made it into the annals of the law if (as it sought to do here) the Government successfully ferreted out and resolved the "date of mailing" discrepancies early in litigation, so that they never became the subject of unsuccessful motions to dismiss.

Further, this is a rare notice case, because the issue here is the *date* of mailing. In the typical notice case, the issue is not *when*, but *whether* notice was mailed. *See*, *e.g.*, *F.W. Myers & Co.,* 6 CIT 215, 574 F. Supp. 1064.

In the typical case, the importer is in the position of (quite literally) trying to prove a *negative* (i.e., his non-receipt of notice); and the result in such cases generally turns on how airtight a case the importer can make that his procedures for the handling of mail are so foolproof that the "missing" notice could not possibly have been duly delivered and thereafter misplaced. *Compare*, *e.g.*, *A.N. Deringer, Inc.,* 20 CIT 978 (where court found that procedures of plaintiff broker/importer of record for handling of incoming notices were not "as foolproof" as plaintiff's testimony depicted) *with United States v. Int'l Imps.,* 55 CCPA 43 (where, considering importer's testimony on its procedures for handling of incoming notices and government's testimony as to agency's "regular mailing procedures," court found in favor of importer based on "strong evidence of irregularities" in government's procedures).

This case is thus unusual, in that here—due to the nature of the case—there is direct, *affirmative* evidence controverting the Government's claim as to mailing. At a minimum, that evidence effectively rebuts any presumption of regularity in this case. But, arguably, it does much more. Arguably, it also tends to corroborate (at least to some degree) other importers' claims of *non-receipt*; for, if—notwithstanding Customs' sworn testimony of ironclad adherence to stringent procedures—at least some notices are mailed late, then perhaps some notices are never mailed at all. This case thus casts a shadow over Customs' claim to the presumption of regularity, at least in the context of the mailing of notice.

[11] This action may yet meet an early demise. Asserting that the Importer failed to pay the outstanding duties before commencing this suit, the Government has also moved to dismiss the case for lack of subject matter jurisdiction under 28 U.S.C. § 2637(a) (2000). That motion remains pending, as does the Importer's cross-motion for summary judgment.

[12] In *A.N. Deringer, Inc.,* 20 CIT at 985, the court counseled that an importer's "claim of nonreceipt * * * must be scrutinized carefully * * * , given the incentive that a plaintiff may have to claim that no notice was received." But, as this case suggests, there is another side to that coin: Customs' own incentive to claim that notice was timely mailed.

[13] Another notice case sagely cautions against treating as a "presumption" something which has no basis in actual fact—what is, in truth, a "legal fiction": "Presumptions or fictions serve well enough for a while, but we must avoid mistaking them for reality." *Charlson Realty Co.,* 384 F.2d at 449 (Nichols, J., concurring).

Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2636(a)(1) therefore must be, and hereby is, denied.

(Slip Op. 03–54)

ST. EVE INTERNATIONAL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 03–00068

[Upon trial as to Customs notices to redeliver imported camisoles, judgment for the plaintiff.]

(Decided May 15, 2003)

Coudert Brothers (Robert L. Eisen and *Christopher E. Pey)* for the plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Jack S. Rockafellow* and *Harry A. Valetk);* and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection *(Michael W. Heydrich),* of counsel, for the defendant.

OPINION AND ORDER

AQUILINO, *Judge:* Discerning a trend in certain female attire in America, the U.S. Customs Service, which has since become the Bureau of Customs and Border Protection per the Homeland Security Act of 2002, §1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003), issued to St. Eve International, Inc. three notices on Customs Form 4647 to redeliver specified imported women's wear, as well as notices of liquidated damages for failure to comply with those redelivery demands.

I

The importer protested those demands and thereafter commenced this case, praying for and obtaining expedited trial (and now this decision) of its pleaded causes of action as to the contested notices. Among other things, the complaint, which has been amended, requests revocation of each notice and "such further and additional relief as this Court may deem just, including attorney's fees and costs of suit".

The trial began on April 9, 2003. Two days later, Customs issued an apparent warning to the plaintiff that another of its entries would be rejected if it failed to execute and return a proffered Wearing Apparel Detail Sheet because

> THERE ARE CURRENTLY SEVERAL ISSUES PENDING WITH RESPECT [to] IMPORTATIONS OF WEARING APPAREL BY YOUR ACCOUNT ST. EVE. INTERNATIONAL, SUCH AS PEN-

> ALTY CASES, PROTESTS, AND SUMMONS TO COURT. AS THE ISSUES CENTER AROUND CLASSIFICATION/QUOTA/VISA/ADMISSABILITY ISSUES, A REVIEW OF THE PREVIOUS ENTRIES REVEALS THAT THE INVOICE DESCRIPTION USED IS NOT SUFFICIENT TO ENSURE PROPER CLASSIFICATION.

Plaintiff's Exhibit 126, first page (capitalization in original). Whereupon counsel pressed in open court for injunctive relief from such, claimed harassment by the Bureau. *See* trial transcript ("Tr."), pp. 750–51.

Whatever the precise intent of Customs or reaction of its object at that moment of exchange, suffice it to state that the record developed to date herein does not support the extraordinary, additional equitable relief that the plaintiff is now also requesting. Moreover, award of attorney's fees and expenses and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412, requires that the court find that the position of the United States was not substantially justified. *Compare* 28 U.S.C. §2412(d)(1)(A) *with Turtle Island Restoration Network v. Mallett,* 24 CIT 627, 642–43, 110 F.Supp.2d 1005, 1018–19 (2000), *aff'd in pertinent part, rev'd on another ground in part,* 284 F.3d 1282 (Fed.Cir.), *reh'g on that ground denied,* 299 F.3d 1373 (Fed.Cir. 2002), *cert. denied,* 155 L.Ed.2d 511 (2003). As recited in that case,

> a position can be justified even though it is not correct, and we believe it can be substantially *(i.e.,* for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact.

24 CIT at 643, 110 F.Supp.2d at 1019, quoting *Pierce v. Underwood,* 487 U.S. 552, 566 n. 2 (1988). *See also Gavette v. Office of Personnel Management,* 808 F.2d 1456, 1467 (Fed.Cir. 1986), and cases cited therein.

Clearly, the record at bar shows that the government satisfies at least this standard. That is, with regard to any award under EAJA, the court cannot find that defendant's position was not substantially justified.

A

In both its complaint and amended complaint, the plaintiff erroneously pleads subject-matter jurisdiction pursuant to 19 U.S.C. §1581(a). In its answer to the latter, the defendant admits jurisdiction over entry nos. 655–1151865–0 and 655–1152655–4 under 28 U.S.C. §1581(a)[1] while denying any jurisdiction over the third entry at issue, No. 655–1146249–5[2].

Concurring at the least with defendant's admission, the court, having granted plaintiff's application for expedition of this case[3], proceeded to trial.

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[1] Defendant's admission as to these entries is conditioned upon a "deni[al] that this Court has jurisdiction under 28 U.S.C. §1581(a) with respect to the requested revocation of the Notices of Liquidated Damages issued in connection [there]with". Pretrial Order, Schedule B–2. *See* Defendant's Answer, p. 1, para. 3; p. 6, paras. 4, 5, 6.

[2] *See id. See also* Defendant's Pretrial Summary Memorandum, p. 2, paras. 5–10; p. 4, para. 1.

[3] That application was heard in open court. The defendant continues its objection to expedition, asserting that this approach has been to its "undue and significant detriment." Pretrial Order, Schedule B–2, n. 1.
No evidence has been adduced, however, at either the hearing or the trial in support of this assertion, and the record developed does not somehow show otherwise.

B

Goods encompassed by the entries numbered 655–1146249–5 and 655–1152655–4 were landed by the plaintiff under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States ("HTSUS") (2002) at a rate of duty of 17.4 percent *ad valorem* and subject to quota category 352. According to the plaintiff, entry no. 655–1151865–0 merchandise, which arrived under HTSUS subheading 6108.91.0015 "[d]ue to an error by the broker"[4], is also "properly classified under subheading 6109.10.0037, HTSUS, subject to quota category 352." Amended Complaint, para. 26. That provision is set forth as follows:

> T-Shirts, singlets, tank tops and similar garments, knitted or crocheted:
>
> Of cotton
>
> * * * * * * *
>
> Women's or girls':
>
> Underwear (352)

The defendant counters that the goods of entry no. 655–1151865–0 at issue are properly classifiable under suffix 60 to this foregoing subheading as "Women's or girls': * * * Other: * * * Tank tops: Women's (339)" while those of the other two impleaded entries belong under HTSUS subheading 6114.20.0010 (2002), to wit:

> Other garments, knitted or crocheted:
>
> * * * * * * *
>
> Of cotton
>
> Tops:
>
> * * * * * * *
>
> Women's or girls' (339)

As indicated, both of the classifications posited by Customs require a visa for category 339, which the importer did not produce, ergo the Service's notices to redeliver.

The parties agree at bar that since the goods at issue are garments, their classification is controlled by the use for which they are donned. *See, e.g.,* Pretrial Order, Schedules D–1, D–2; Plaintiff's Pretrial Memorandum of Law, p. 10; Defendant's Pretrial Summary Memorandum, p. 7 and Post Trial Brief, p. 3. Each refers to HTSUS Additional U.S. Rule of Interpretation 1(a) that

> 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[.]

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[4] Amended Complaint, para. 22; Plaintiff's Pretrial Memorandum of Law, p. 5.

They disagree, however, with respect to the class or kind to which the imported goods belong[5], although each side refers the court to *United States v. Carborundum Co.,* 63 CCPA 98, C.A.D. 1172, 536 F.2d 373, *cert. denied,* 429 U.S. 979 (1976), among other cases, for guidance in this regard. The merchandise in that particular case was an iron-silicon alloy powder for use in the manufacture of ferrous metals, but the parties take the position that the factors applied in determining therein whether that merchandise fell within a particular class or kind apply equally now to the women's wear herein, to wit,

> the general physical characteristics of the merchandise, the expectation of the ultimate purchasers, the channels, class or kind of trade in which the merchandise moves, * * * the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed * * *), the use, if any, in the same manner as merchandise which defines the class, the economic practicality of so using the import, the recognition in the trade of this use.

63 CCPA at 102, 536 F.2d at 377 (citations omitted).

II

The parties stipulated in the pretrial order, and the evidence adduced thereafter at trial confirmed, that St. Eve International, Inc. is known in its industry as a women's underwear or intimate apparel company which does not advertise or market directly to the ultimate consumers. *See* Pretrial Order, Schedule C; Tr., pp. 404–05. Among other offers of proof pre-trial was that the defendant

> does not dispute that the imported merchandise which is the subject of this action, i.e., merchandise which has been referred to as shelf bra camisoles and shelf bra tank tops, is sold principally in the women's intimates or underwear departments of walk-in retail stores, and further, defendant will not introduce any evidence that the imported merchandise is sold otherwise in walk-in retail stores.

Pretrial Order, Schedule C–2, para. 3.

A

Given the record since developed, the court is able to enumerate the following findings of fact:

> 1. St. Eve International, Inc. is a New York corporation with its principal place of business in the "lingerie building", 180 Madison Avenue, New York, New York. *See* Tr., pp. 87, 523.
> 2. That building and location in Manhattan are known in the trade for underwear, intimate apparel, and sleepwear. *See id.* at 89, 140–41.
> 3. Design of St. Eve merchandise takes place at that location. *See id.* at 345.

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[5] *Compare, e.g.,* Plaintiff's Pretrial Supplementary Memorandum of Law *passim and* Plaintiff's Exhibit 124 *with* Defendant's Pretrial Summary Memorandum, pp. 10–17 *and* Post Trial Brief, p. 2 *and* Tr., pp. 29–31, introducing Defendant's Exhibits BJ–1 and BJ–2.

4. St. Eve International, Inc. sells nothing but underwear and sleepwear. *See id.* at 53, 60–61.

5. The trade in general and buyers in particular consider St. Eve International, Inc. only as a supplier of underwear and sleepwear. *See id.* at 58. *Cf.* Plaintiff's Exhibit 85.

6. St. Eve International, Inc. does not deal with buyers of sportswear. *See* Tr., pp. 63, 90.

7. St. Eve International, Inc. markets its camisoles as underwear. *See id.* at 57.

8. St. Eve International, Inc. sells underpants that match its camisoles. *See id.* at 60. *See generally* Plaintiff's Exhibits 97 and 105. *Compar*e Defendant's Exhibits BB *and* BC *with* Exhibit BD.

9. The stores that purchase St. Eve camisoles offer them for sale in their lingerie and intimate-apparel departments. *See* Tr., pp. 41, 46, 48–49, 160.

10. The lingerie and intimate-apparel departments of such stores are "destinations" for shoppers as opposed to arenas of casual visitation, inspection and sizing. *See id.* at 284–85.

11. The stores that purchase St. Eve camisoles do not offer them for sale as sportswear. *See id.* at 105.

12. Underwear and intimate apparel are marketed year-round. *See id.* at 216; Defendant's Exhibits BB, BC and BD.

13. St. Eve camisoles are sold year-round. *See* Tr., pp. 307–08, 345; Defendant's Exhibits BB and BC.

14. Camisoles manufactured for sportswear are marketed primarily in conjunction with spring and summer. *See* Tr., p. 775.

15. Retailers offer St. Eve camisoles in the lingerie sections of their catalogues. *See id.* at 74; Plaintiff's Exhibit 50, second page.

16. Retailers offer St. Eve camisoles in the lingerie sections of their *Internet* websites. *See* Plaintiff's Exhibit 64; Defendant's Exhibit E, p. 1.

17. The merchandise at issue herein was produced for and exported to St. Eve International, Inc. by Clifton Apparels Ltd., Chittagong, Bangladesh. *See* Tr., p. 69.

18. The Clifton Apparels Ltd. plant that manufactured St. Eve's entries herein only produces underwear and sleepwear. *See id.*

19. The manufacture of underwear and intimate apparel requires equipment specially designed and adapted therefor. *See id.* at 70, 73, 154.

20. The fabric in underwear and intimate apparel should be soft to the touch. *See id.* at 126–27, 198, 728–29.

21. The fabric in underwear and intimate apparel should be lightweight, preferably 180 grams per square meter or less. *See id*. at 61–62, 347–48. *Compare* Plaintiff's Exhibit 89 *with* Plaintiff's Exhibit 25.

22. Underwear and intimate apparel should be stitched or otherwise assembled in such a manner as to minimize discomfort and visibility of its elements, *e.g.,* straps, connections, seams, and hems. *See* Tr., pp. 133, 198.

23. Four-hundred-fifty-seven dozen women's and girls' cotton briefs and panties were entered by St. Eve International, Inc. per No. 655–1146249–5, classified under HTSUS subheading

6108.21.0010 and subject to quota category 352. *See* Plaintiff's Exhibit 87, p. 001.

24. St. Eve briefs and panties for women and girls are sometimes referred to as boyshorts, boylegs, thongs, strings, bikinis, bunpants, and hipsters, among other names. *See* Tr., pp. 75, 149–50, 461, 503–03, 523; Plaintiff's Exhibit 98; Defendant's Exhibit AQ; Complaint, Exhibit 5.

25. Such bottom pieces of underwear and intimate apparel comprise the majority of product imported by St. Eve International, Inc. in terms of volume and value. *See* Tr., pp. 53, 58.

26. To the extent such bottom pieces of underwear were part of plaintiff's entries at bar, Customs did not dispute their classification or order their redelivery for lack of a proper visa. *Cf. id.* at 26.

27. The 500 dozen camisole tops also entered by St. Eve International, Inc. per No. 655–1146249–5 were style no. 65132. *See, e.g.,* Plaintiff's Exhibit 7. *See also* Plaintiff's Exhibit 87.

28. That St. Eve style no. 65132 is comprised of 92 percent brushed cotton and eight percent spandex knit fabric with an approximate material weight of 160 grams per square meter. *See* Tr., pp. 347, 400.

29. That St. Eve style no. 65132 has a front scoop neckline, straight-cut back, and an inner shelf[6] bra. *See* Plaintiff's Exhibit 7; Defendant's Exhibits B, T and AT.

30. That shelf (or self) bra consists of an additional layer of fabric wrapped inside and around the top of the camisole, and attached only thereto, with an 11/16-inch scalloped elastic band hemmed to its bottom, hanging loose within the shell that is intended to be form-fitting, slightly narrower albeit flared at the bottom. *See, e.g.,* Plaintiff's Exhibit 7.

31. The top edge of that St. Eve style no. 65132 is trimmed with a thin band of elastic material, has narrow, elastic "spaghetti" straps with lingerie-style adjusters and unobtrusive stitching and hemming typical of women's and girls' underwear and intimate apparel. *See, e.g., id. See also* Tr., pp. 61, 88–89, 133, 161, 204, 296, 350.

32. That St. Eve style no. 65132 does not veil completely a developed human female breast. *Cf. id.* at 629–30.

33. That St. Eve style no. 65132 was imported in three basic colors, white, heather gray, and black, for sale to the May Company. *See id.* at 309.

34. That St. Eve style no. 65132 was sold to the May Company along with its matching bottoms, although not via entry no. 655–1146249–5. *See id.* at 76, 301–02.

35. The May Company has stores in 37 states. *See id*. at 278–79.

36. The May Company purchased St. Eve style no. 65132 only for display and sale in the women's and girls' underwear and intimate-apparel departments of its stores, namely, *Filene's Basement, Hecht's, Robinson,* and *Strawbridge's. See id.* at 76, 86–87, 279–81, 307, 308.

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[6] At trial, defendant's expert witness was of the view that shelf is a bit of a misspelling or a misconception; *self* is what she considers that element of a camisole to be. *See* Tr., p. 623. *Cf. id.* at 726.
For purposes of this case, the court accepts either spelling and concept based thereon.

37. The 344 dozen camisole tops entered by St. Eve International, Inc. per No. 655–1151865–0 were style no. 27–0180–3. *See* Plaintiff's Exhibit 88, p. 001. *Compare* Plaintiff's Exhibit 8 *with* Defendant's Exhibit D.

38. That St. Eve style no. 27–0180–3 is comprised of 95 percent brushed cotton and five percent spandex knit fabric with an approximate material weight of 160 grams per square meter. *Ibid.*

39. That St. Eve style no. 27–0180–3 was sold in three solid colors, white, ivory, and black, to *Chadwick's of Boston* along with its matching bottoms, although not via entry no. 655–1151865–0. *See* Tr., p. 64.

40. *Chadwick's of Boston* purchased St. Eve style no. 27–0180–3 only for display and sale in the women's and girls' underwear and intimate-apparel departments of its stores. *See id.* at 74–75. *See also* Complaint, Exhibit 8.

41. That St. Eve style no. 27–0180–3 has an open, u-shaped neckline decorated with one-inch see-through lace in the front, shoulder straps approximately one and a half inches wide that are not adjustable, and a shelf bra that consists of an additional layer of fabric wrapped inside and around the top of the camisole, and attached only thereto, with an elastic band hemmed to its bottom, hanging loose within the shell that is slightly narrower albeit flared at its bottom. *Compare* Plaintiff's Exhibit 8 with Defendant's Exhibit D.

42. That St. Eve style no. 27–0180–5 does not veil completely a developed human female breast. *Cf.* Tr., p. 658.

43. The 750 dozen camisole tops entered by St. Eve International, Inc. per No. 655–1152655–4 were style no. 65134. *See* Plaintiff's Exhibit 5 and Exhibit 90, p. 001.

44. That St. Eve style no. 65134 is comprised of 92 percent brushed cotton and eight percent spandex knit fabric with an approximate material weight of 160 grams per square meter. *See* Plaintiff's Exhibit 5.

45. That St. Eve style no. 65134 material has been dyed plum/heather in a striped pattern. *See id.*

46. That St. Eve style no. 65134 has a front scoop neckline, straight-cut back, and an inner shelf bra. *See id.*

47. That shelf bra consists of an additional layer of fabric wrapped inside and around the top of the camisole, and attached only thereto, with an elastic band hemmed to its bottom, hanging loose within the shell that is intended to be form-fitting, slightly narrower albeit flared at its bottom. *See, e.g., id.*

48. The top edge of that St. Eve style no. 65134 is trimmed with a thin band of elastic material, has narrow, elastic "spaghetti" straps with lingerie-style adjusters and unobtrusive stitching and hemming typical of women's and girls' underwear and intimate apparel. *See, e.g., id.*

49. That St. Eve style no. 65134 was sold to the May Company along with its matching bottoms, although not via entry no. 655–1152655–4. *See* Plaintiff's Exhibit 90, second page; Defendant's Exhibit BH, p. 2141.

50. St. Eve International, Inc. has marketed its style nos. 65132 and 65134 as part of its *Stretch Invisibles* and *Cami/Boyleg* promo-

tions. *See* Tr., pp. 360–61; Plaintiff's Exhibits 97 and 98; Complaint, Exhibit 5.

51. The St. Eve shelfbra camisoles at issue herein do not provide adequate support for sportswear by the average woman. *Cf.* Tr., p. 661.

52. The St. Eve shelfbra camisoles at issue herein can supplant a brassiere for the average woman. *Cf.* Plaintiff's Exhibit 13; Tr., p. 296.

B

That the government's position herein is not "substantially [un]justified" within the meaning of EAJA does not necessarily mean that it prevails on the merits. *See, e.g., United States v. Ziegler Bolt & Parts Co.,* 21 CIT 830, 971 F.Supp. 597 (1997), and cases cited therein. At a minimum, that position must satisfy *United States v. Mead Corp.,* 533 U.S. 218, 221 (2001), wherein eight justices

> agree[d] that a tariff classification has no claim to judicial deference under *Chevron [U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984)], there being no indication that Congress intended such a ruling to carry the force of law, but [] h[e]ld that under *Skidmore v. Swift & Co.,* 323 U.S. 134 (1994), the ruling is eligible to claim respect according to its persuasiveness.

(1)

Prior to the entries and Customs notices in response thereto that underlie this case, the Service had considered similar issues and promulgated ruling letters in New York numbered B86925 (July 11, 1997), B88682 (Sept. 4, 1997), and C81236 (Dec. 18, 1997)[Plaintiff's Exhibit 104]. The first ruling was that certain knit, tank-styled garments were classifiable as underwear per HTSUS 6109.10.0037, whereas the other two classified the garments under review as tank top outerwear under subheading 6109.10.0060. Pursuant to a request for reconsideration of those two decisions, B88682 and C82136, Customs Headquarters affirmed all three rulings, number B86925 because submissions established that the camisoles were designed, marketed and sold as underwear, whereas no such evidence had been submitted at the times of the other two rulings. S*ee Withdrawal of Notice of Proposed Modification*[7] *and Affirmation of Ruling Letters Relating to Tariff Classification of Certain Knit Tank-Styled Garments,* 35 Cust. B. & Dec., no. 41, p. 13 (Oct. 10, 2001)[Plaintiff's Exhibit 103, p. 1]. That affirmation was based upon reasoning which is appropriate to quote at length herein, to wit:

> The *Guidelines* [*for the Reporting of Imported Products in Various Textile and Apparel Categories,* CIE 13/88 (1988)] define "underwear" as * * *

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[7] *See* Plaintiff's Exhibit 100.

> garments which are ordinarily worn under other garments and are not exposed to view when the wearer is conventionally dressed for appearance in public, indoors or out-of-doors.

The instant garments meet the definition of tank tops. However, some tank tops are outerwear and some tank tops are underwear. Customs originally stated that the subject garments were fashionable camisole-styled tank tops currently popular among teens and young women as outerwear. However, based on the responses to the Proposed Notice of Modification, it is now Customs belief that the instant garments are not clearly outerwear.

In past rulings, Customs has pointed out that the merchandise itself may be strong evidence of use. Citing *Mast Industries v. United States,* 9 CIT 549, 552 (1985), aff'd 7[8]6 F.2d 1144 ([Fed.Cir.] 1986), citing *United States v. Bruce Duncan Co.,* 50 CCPA 43, 46, C.A.D. 817 (1963). The importer suggests that the appearance and construction features of the garments at issue, including the "underwear weight" fabric, elasticized trim, narrow "lingerie-type" straps and snug-fit construction are characteristic of underwear. Customs does not agree that such features are limited to use in underwear. The weight and opaqueness of the fabric is appropriate for both underwear and outerwear. The narrow adjustable straps have become a popular feature on outerwear camisole-styled tank tops. Current fashion has also embraced snug-fitting garments as outerwear. Based on physical examination of the garments, the tank tops are not readily identifiable as either underwear or outerwear. The garments are ambiguous.

When presented with a garment which is ambiguous and not clearly recognizable as underwear or outerwear, Customs will consider other factors such as environment of sale, advertising and marketing, recognition in the trade of virtually identical merchandise, and documentation incidental to the purchase and sale of the merchandise, such as purchase orders, invoices, and other internal documentation. See HQ 960866, July 15, 1999; HQ 960865, dated July 15, 1999; HQ 963442, July 7, 1999; HQ 960864, July 2, 1999; HQ 960862, dated July 2, 1999; HQ 961978, dated June 17, 1999; HQ 961185, dated June 11, 1999; HQ 960906, June 3, 1999; HQ 960926, February 25, 1999; HQ 960925, February 23, 1999; HQ 960928, February 15, 1999; HQ961116, November 20, 1998; HQ 960690, September 25, 1998; HQ 959843, May 6, 1998; HQ961036, April 27, 1998; HQ 960797, February 19, 1998; HQ 960442, August 4, 1997; HQ 960391, April 22, 1997; HQ 957762, April 28, 1995; HQ 957615, May 24, 1995; HQ 957004, November 23, 1994; HQ 956351, July 7, 1994[;] and HQ 956350, July 5, 1994.

Ariela-Alpha and its sister companies are engaged in the production and sale of fine lingerie. The importer submitted a copy of Alpha-Syrlay's catalogue which indicates that Alpha-Syrlay exclusively sells intimate apparel including similar camisole-styled tank tops with matching panties. The subject garments were designed by the Director of Designing at Ariela-Alpha, who has been designing lingerie for over thirteen years, as undershirt and panty sets. Performance standards showed that the instant garments were designed to meet the washing standards for underwear which

are more rigorous than the standards for outerwear. Although Ariela-Alpha failed to provide specifications establishing a difference between underwear tank tops and outerwear tank tops, in comparing the subject garments to the outerwear camisole-styled tank tops submitted by the importer, the subject garments do appear to be made of a lighter weight fabric and are cut smaller.

Each of the garments at issue is sold as a "cami and panty set" and thus have a matching panty. Statements from underwear buyers for Sears, K-mart, Boscov's and Value City Department stores indicate that the garments were purchased for sale in the intimate apparel department as "cami and panty sets." Copies of commitment sheets from these retailers substantiate that the garments were exclusively purchased as underwear. It is also clear that the garments are sold by the retailers as underwear. Photographs from showroom floors support the claim that the tank tops are merchandised and displayed as underwear and sold in the lingerie department along side other underwear garments as underwear. The importer has also established that the intimate apparel industry perceives the subject tank tops as underwear by submitting statements from buyers stating that the garments are known in the trade as underwear.

The importer has submitted several advertisements showing the garments advertised as underwear. The advertisements depict the "cami and panty sets" among other lingerie articles. Customs notes that the hang tags show the subject garments worn with the matching panties. The importer has also provided numerous printouts from various websites showing similar lightweight, slim-fitting camisole-styled tank tops advertised as intimate apparel.

Although the manner in which an article is designed, manufactured, and marketed is not dispositive of tariff classification, Customs finds it to be persuasive in this case when determining the classification of ambiguous tank tops. See *Mast Industries, Inc. v. United States, [supra] * * *; St. Eve International, Inc. v. United States,* 11 Ct. Int'l Trade 224 (1987); and *Inner Secrets/Secretly Yours, Inc. v. United States,* [19 CIT 496,] 885 F.Supp. 248 (1995).

Customs emphasizes that upon physical examination the instant tank tops were not readily identifiable as outerwear or underwear. Accordingly, this ruling does not affect the classification of the majority of tank tops which upon physical examination are clearly outerwear or underwear.

Several of the comments raised the concern that the proposed modification would have resulted in all knit cotton tank tops being classified as outerwear. There was fear of a massive quota migration from textile category 352 to textile category 339. However, this would not have been the result because the proposed revocation, like the current ruling, only covered a small number of garments. Similarly, now that the subject tank tops are classified as underwear, there should not be a concern of a quota migration from textile category 339 to textile category 352.

As with any ambiguous garment, Customs recommends that importers submitting ruling requests involving tank tops which are not readily recognizable as underwear or outerwear should submit

> a full and complete statement of the facts, including but not limited to design, marketing and sales information. Customs realizes that this may result in the same merchandise being classified differently when imported by different companies. Despite Customs belief that each article has only one appropriate classification under the HTSUSA, it appears that in the case of ambiguous underwear/outerwear tank tops, the courts direct consideration of the manner in which the garments are designed, marketed, sold and recognized in the trade. If an importer can establish that an ambiguous tank top is designed, marketed and sold as underwear, the garment will be classifiable as underwear.

Id., pp. 16–18 [and fourth to sixth pages]. Indeed, the courts do so direct such consideration. In the prior action brought by St. Eve International, Inc., for example and which is cited in the foregoing ruling, Customs rejected the company's classification of its cotton pajamas and other nightwear in favor of an outerwear category that required another entry visa which was not possessed or presented by St. Eve. Following the approach set forth in *United States v. Carborundum Co., supra,* the Court of International Trade overruled the Service's attempted exclusion of the company's merchandise. *See* 11 CIT 224 *passim.*

Called to testify in this case was the responsible Customs National Import Specialist[8], who seemingly paid little heed to such prior court directions and the foregoing Service headquarters ruling based thereon in concluding that the St. Eve goods had to be ordered redelivered. *See, e.g.,* Tr., pp. 457, 458, 472, 509, 511–12, 538. Rather, that determination to redeliver all of the camisoles covered by the three different entries was based upon his consideration of but one such garment[9], and notwithstanding testimony that "[e]ach garment stands on it own"[10]; [w]e classify the garment presented to us"[11]; "[w]ithout looking at the garment, I have no opinion"[12]; [i]t's the total garment that's presented"[13]; and he can classify an undergarment "[b]y looking at the garment as a wh[o]le * * * Nothing else but the garment"[14]. Nonetheless, the National Import Specialist testified that he considers the St. Eve

> garments at issue [] indistinguishable from garments which are used and sold as sportswear garments or activewear garments or yoga wear garments[15]

and that they present no ambiguity as to whether or not they are underwear[16] within the meaning of the Customs Service's headquarters ruling, *supra.*

[8] The defendant called to the witness stand a second Bureau officer assigned this select title, but she denied any responsibility for classification of women's underwear and thus for the decision challenged herein. *See* Tr., pp. 557–58, 560–61, 569–70. Hence, all references in this opinion to *the National Import Specialist* are to defendant's first such, responsible officer.

[9] *See* Tr., pp. 437, 459, 508, 536.

[10] *Id.* at 458.

[11] *Id.* at 458–59.

[12] *Id.* at 522.

[13] *Id.* at 534

[14] *Id.* at 537.

[15] *Id.* at 506.

[16] *See id.* at 438, 439. *See also id.* at 521.

(2)

Clearly, the record otherwise developed in this matter does not support this continuing view of the defense, and the court therefore cannot and does not concur. Of course, the fundamental ambiguity underlying this case is that one woman might wear that which another would not dare to bear without more cover. No doubt, some of this phenomenon has been on daily display during the National Import Specialist's walks to work in Manhattan[17], if not also in his own home among his wife and daughters[18]. And retailers have sought to support and advance these American propensities by placing camisoles for sale in settings not necessarily constricted by traditional concepts of intimacy and modesty. But those settings have not led the government (or anyone else connected with this case) to locate thereat or therein a single St. Eve camisole that has been ordered redelivered. On the contrary, the evidence adduced shows that the trade recognizes St. Eve's camisoles to be underwear[19], all the more so given the underpants that match[20] and are marketed with them[21]. As for the economic practicality of so using the imports, pricing did not develop at trial as a definitive issue. For example, the St. Eve style no. 27–0180–3 camisole which is at issue herein was apparently purchased by the government for $7.99 at *Marshalls*[22], whereas the St. Eve camisole that the defendant concedes to be underwear, albeit shelf-braless, is tagged with a manufacturer's suggested retail price of $12. *See* Plaintiff's Exhibit 16; Tr., p. 533. To the extent such pricing induces sales of the St. Eve goods to consumers, the evidence shows their environment to be that of underwear and intimate apparel. *See, e.g.,* Tr., pp. 291–93; Plaintiff's Exhibits 38, 39, 49, 50, 71, 109. And, given that exclusive environment of sale, the record developed at bar supports an expectation that the ultimate purchasers of the St. Eve goods will wear them beneath other pieces of clothing in a manner within the well-settled definition of such "layering"[23] *viz.:*

> **undergarment**
>
> Item of apparel worn under the outer garments. These garments serve many functions. They may protect the outer clothing from being soiled or provide a more comfortable layer between the skin of the wearer and the outer clothing. Those garments serving this purpose are usually made from soft, washable fabrics. Undergarments may serve to give shape to the outer garments either through constricting the body or providing support to the clothing. It is not unusual for several layers of undergarments to be worn at the same time. Although generally unseen, parts of undergarments may

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[17] *See id.* at 427–28.

[18] *See id*. at 427.

[19] *See, e.g., id.* at 167. *Cf. id.* at 58.

[20] *Compare, e.g.,* Defendant's Exhibit C *with* Plaintiff's Exhibit 11. *See also* Defendant's Exhibit P.

[21] *See, e.g.,* Plaintiff's Exhibits 97, 98, 105.

[22] *See* Defendant's Exhibit D.

[23] Tr., pp. 96, 103, 119, 177–78, 180–82, 244–46, 297, 316, 370–72, 402, 425, 472, 512, 522, 589, 672–74, 677, 692, 768–69. *Cf. id.* at 301–02, 726, 733–34.

> sometimes be a visible element of the costume. Also called *underwear.*

The Fairchild Dictionary of Fashion [Plaintiff's Exhibit 78], p. 462 (3rd ed. 2003)(emphasis in original).

To be sure, defendant's witnesses testified that that expectation of the ultimate purchasers is not ironclad. *See, e.g.,* Tr. at 472 (Burtnik); *id.* at 555, 567 (DeGaetano); *id.* at 699, 703 (Holmes). *See also* Monget, *Blurring the Lines; As Innerwear Increasingly Delves into Sportswear, An Industry Grapples With the Pros and Cons of Crossover Appeal,* Women's Wear Daily, Aug. 27, 2001, p. 325 [Defendant's Exhibit AW, pp. 4–7]. Nonetheless, this fact that unveils a notable trend has not been shown to broaden the channel of trade in which St. Eve camisoles are designed, knit, stitched together, imported, consigned, and ultimately passed on to the public. *See, e.g.,* Tr., pp. 70, 89, 91, 141, 300–01. That channel has not been shown to encompass sports- and active-wear. *See, e.g., id.* at 90, 310, 398. Rather, both sides have proven that shelfbra camisoles are to be found in an other channel for such, more-demanding dress. *See id.* at 153–54, 162–63, 226–27, 316, 439–40, 494, 633 and 639–41 and Defendant's Exhibit BK, 772–74. *Compare, e.g.,* Plaintiff's Exhibits 17 *and* 116 *with* Defendant's Exhibits N, U, Q, *and* AS.

Defendant's witnesses also testified that they consider shelfbra camisoles to be substantially similar in their physical characteristics. *See, e.g.,* Tr. at 457, 506–07 (Burtnik); *id.* at 574–75 (DeGaetano); *id.* at 625–27, 664, 689 (Holmes). The court can concur that those presented at trial do have similarities, but it cannot find that the St. Eve piece which has been received in evidence as defendant's exhibit M, for example, has characteristics substantially similar to those of plaintiff's exhibit 17. *Also compare, e.g.,* Plaintiff's Exhibit 7 *with* Defendant's Exhibit Q.

Be their physical differences as they obviously are, when distinctions, as here, are found to exist, Customs and the courts, as recited at length above, have resorted to consideration of the other, multiple factors articulated in *Carborundum* and HQ 962021, among other precedent. The Service's National Import Specialist did not really do so here. For him, the presence of a shelf bra in a particular piece was the ultimate dispositive element. *See* Tr., pp. 504–05, 541. His approach has left defendant's able counsel to attempt to impress upon this case and thus the law a class or kind of merchandise not spelled out to date in the prodigious HTSUS, to wit, shelfbra camisole. *See, e.g.,* Pretrial Order, Schedule F–2 ("Defendant's Statement of the Genuine Issues"):

> * * * Whether the class or kind to which the subject imports belong is necessarily a class or kind of shelf bra camisole (or tank top), as the Government contends, thereby permitting a finding—either way—that the principal use of the class or kind is as outerwear or as underwear.

And their proposed corollary is that the

> proper path for the Court is to follow U.S. Rule of Interpretation 1(a) and determine classification by the principal use of the class or

> kind of goods to which the subject imports belong **and not the principal use of the specific imports.** *Lenox Collections v. United States,* 19 C.I.T. 345, 346 * * * (1995). The Court must be given a choice of uses—outerwear or underwear—that applies to the class, **not** to the specific imports in this action.

Post Trial Brief of Defendant, p. 3 (emphasis in original). Neither the existing law, nor the evidence adduced herein, advances as far as they propose. The class-or-kind competition engendered by HTSUS heading 6109 is either "T-Shirts, singlets, tank tops and similar garments, knitted or crocheted: Of cotton * * * Women's or girls': Underwear (352)" on the one hand, as opposed to "Other: * * * Tank tops: Women's (339)" under that heading or to "Of cotton * * * Tops * * * Women's or girl's (339)" under heading 6114.

Both the law and the evidence now on the record preponderate in favor of plaintiff's position per subheading 6109.10.00.37, HTSUS, and this court so concludes.

III

In the final analysis, it cannot be overlooked that this case contests redelivery (essentially exclusion) of merchandise, which makes the matter particularly goods-specific. And, if this in turn makes the fundamental question really whether plaintiff's camisoles should have been excluded and thus ordered redelivered since they definitely are not classifiable as women's or girls' underwear, then this court certainly is not so persuaded.

The parties are hereby directed to confer and present a proposed form of final judgment in accordance with this opinion within 20 days of the date hereof.

So ordered.

(Slip Op. 03–55)

SANDRA CHRISTOPHER AND FORMER EMPLOYEES OF ANVIL KNITWEAR, PLAINTIFFS *v.* CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 02–00153

(Dated May 16, 2003)

ORDER OF DISMISSAL

WALLACH, *Judge:* The Court having reviewed the Department of Labor's ("Labor") determination on remand, Anvil Knitwear, Inc.; Kings Mountain, North Carolina; Notice of Revised Determination On Remand, 68 Fed. Reg. 5,655 (Feb. 4, 2003) ("Revised Determination"), which certifies all workers of Anvil Knitwear, Inc., Kings Mountain,

North Carolina who became totally or partially separated from employment on or after August 3, 2000 through two years from the issuance of the Revised Determination as eligible to apply for adjustment assistance; and the Court having reviewed all the pleadings and papers on file herein, and Plaintiffs having advised the Court, by letter dated March 6, 2003, that they are satisfied with Labor's determination on remand, and good cause appearing therefore, it is hereby

ORDERED that this action is dismissed pursuant to USCIT Rule 41(a)(2).

(Slip Op. 03–56)

COMMITTEE FOR FAIR COKE TRADE AND UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, PLAINTIFFS *v.* UNITED STATES OF AMERICA, AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND CITIC TRADING CO., LTD., MINMETALS TOWNLORD TECHNOLOGY, LTD., DUFERCO, SA, MITSUBISHI CHEMICAL CORP., AND MITSUI MINING CO., LTD., DEFENDANT-INTERVENORS

Court No. 01–00826

[United States International Trade Commission's negative preliminary injury determination remanded for further proceedings in conformity with this opinion.]

(Dated May 20, 2003)

Gardner, Carton & Douglas, LLC (W.N. Harrell Smith, IV; Wallace C. Solberg; Peter C. Koch), for Plaintiffs Committee for Fair Coke Trade and United Steelworkers of America, AFL-CIO/CLC.

Lyn M. Schlitt, General Counsel, United States International Trade Commission; *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Karen Veninga Driscoll),* for Defendant.

Manatt, Phelps & Phillips, LLP (Jeffrey S. Neeley), for Defendant-Intervenors CITIC Trading Company, Ltd. and Minmetals Townlord Technology, Ltd.

White & Case, LLP (Walter J. Spak; Adams C. Lee; Frank H. Morgan), for Defendant-Intervenor Duferco, SA.

Cleary, Gottlieb, Steen & Hamilton (Donald L. Morgan), for Defendant-Intervenor Mitsubishi Chemical Corporation.

Bingham McCutchen, LLP (Roger L. Selfe), for Defendant-Intervenor Mitsui Mining Company, Ltd.

OPINION AND ORDER

EATON, *Judge:* This matter is before the court on the motion for judgment upon the agency record, pursuant to USCIT R. 56.2, of the Com-

mittee for Fair Coke Trade[1] and United Steelworkers of America, AFL-CIO/CLC ("Plaintiffs") contesting the negative preliminary injury determination of the United States International Trade Commission ("ITC" or "Commission") contained in Blast Furnace Coke From China and Japan, Inv. Nos. 731–TA–951–952 (Prelim.), USITC Pub. 3444 (Aug. 2001), Pub. R. List 1, Doc. 59 ("Preliminary Determination").[2] The ITC opposes this motion and urges the court to sustain its Preliminary Determination. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(1)(C). For the reasons set forth below, the court remands this matter to the ITC for further proceedings in accordance with this opinion.

BACKGROUND

On June 29, 2001, Plaintiffs filed a petition alleging that an industry in the United States was materially injured or threatened with material injury by reason of less than fair value imports of blast furnace coke from the People's Republic of China and Japan ("Subject Imports").[3] *See* Certain Blast Furnace Coke Prods. From the P.R.C. and Japan, 66 Fed. Reg. at 39,009; Blast Furnace Coke From China and Japan, 66 Fed. Reg. 35,669 (ITC July 6, 2001) (institution of antidumping investigations). The ITC conducted preliminary antidumping duty investigations and issued the Preliminary Determination, finding that there was no reasonable indication that an industry in the United States was materially injured or threatened with material injury within the meaning of 19 U.S.C. § 1673b(a) by reason of the Subject Imports. *See* Blast Furnace Coke From China and Japan, 66 Fed. Reg. 45,692 (ITC Aug. 29, 2001) (prelim. determination). This negative preliminary determination terminated the investigations. *See* 19 U.S.C. § 1673b(a)(1) ("If the Commission finds that imports of the subject merchandise are negligible or otherwise makes a negative determination under this paragraph, the investigation shall be terminated.").

STANDARD OF REVIEW

When considering an ITC preliminary determination in the context of an antidumping review, "[t]he court shall hold unlawful any determination, finding, or conclusion found * * * to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law * * *." 19

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[1] The Committee for Fair Coke Trade is a trade association whose members are producers of blast furnace coke in the United States. Compl. ¶ 3. Members of the Committee for Fair Coke Trade are: Acme Steel Co.; DTE Energy Services, Inc.; Koppers Industries, Inc.; and Shenango, Inc. *Id.*

[2] Citations are to the public versions of the Preliminary Determination, the accompanying staff report, *see* Staff Report, Blast Furnace Coke From China and Japan, Inv. Nos. 731–TA–951–952 (Prelim.), USITC Pub. 3444 (Aug. 2001), Pub. R. List 1, Doc. 59 ("Staff Report"), and briefs submitted by Plaintiffs, *see* Pls.' Mem. Supp. Mot. J. Agency R. ("Pls.' Mem."), and the ITC, *see* Def.'s Mem. Opp'n Pls.' Mot. J. Agency R. ("Def.'s Resp."). Where the court discusses the postconference briefs submitted to the ITC on behalf of Duferco, SA, *see* Duferco, SA's Postconference Br., Pub. R. List 1, Doc. 35 ("Duferco Brief"), and on behalf of Mitsubishi Chemical Corporation and Mitsui Mining Company, Ltd., *see* Mitsubishi Chem. Corp.'s and Mitsui Mining Co., Ltd.'s Postconference Br., Pub. R. List 1, Doc. 38 ("Joint Japanese Brief"), the court limits its discussion to the nonconfidential portions of those briefs.

[3] The scope of the ITC investigations covered "[b]last furnace coke made from coal or mostly coal and other carbon materials, with a majority of individual pieces less than 100 MM (4 inches) of a kind capable of being used in blast furnace operations, whether or not mixed with coke breeze." Certain Blast Furnace Coke Prods. From the P.R.C. and Japan, 66 Fed. Reg. 39,009 (Dep't Commerce July 26, 2001) (notice of initiation of antidumping investigations). "[C]oke breeze is the fine screenings from crushed coke used predominantly as a fuel source in the process of agglomerating iron." Staff Report at I–5 n.10.

U.S.C. § 1516a(b)(1)(A). The court, in reviewing the ITC's decision, must "ascertain whether there was a rational basis for the determination." *Ranchers-Cattlemen Action Legal Found. v. United States,* 23 CIT 861, 878, 74 F. Supp. 2d 1353, 1369 (1999) (citing *Torrington Co. v. United States,* 16 CIT 220, 223, 790 F. Supp. 1161, 1167 (1992)); *see also id.* (quoting *Conn. Steel Corp. v. United States,* 18 CIT 313, 315, 852 F. Supp. 1061, 1064 (1994)) ("The Court may only reverse the ITC's determination if there is a 'clear error' of judgment and where there is 'no rational nexus between the facts found and the choices made.'"). Nonetheless, the ITC's conclusions must be based on evidence, not conjecture, and in no event may the court "supply a reasoned basis for the agency's action that the agency itself has not given * * *." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.,* 419 U.S. 281, 285–86 (1974) (citing *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947)); *see also Altx, Inc. v. United States,* 26 CIT ____, ____, Slip Op. 02–154 at 4 (Dec. 31, 2002) ("The court can only review the reasoning that the Commission expresses.").

In the course of its review, the court must examine "whether the [ITC] has articulated the requisite rational connection between the facts found and the choice[s] made" in light of the reasonable indication standard set forth in 19 U.S.C. § 1673b(a). *See Calabrian Corp. v. USITC*, 16 CIT 342, 344–45, 794 F. Supp. 377, 381 (1992) (applying 19 U.S.C. § 1673b(a) (1988)). In making its preliminary determination, "[t]he ITC * * * must decide whether there is a reasonable indication for finding '(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.'" *Ranchers-Cattlemen*, 23 CIT at 877, 74 F. Supp. 2d at 1368 (quoting *Am. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986)); *Am. Lamb*, 785 F.2d at 1001 ("[The] ITC has consistently viewed the statutory 'reasonable indication' standard as one requiring that it issue a negative determination * * * only when (1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.").

DISCUSSION

I. The ITC's Findings

In an antidumping duty investigation, the ITC must preliminarily determine, based on the information available to it at the time, whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury by reason of im-

ports of the subject merchandise. 19 U.S.C. § 1673b(a)(1)(A)(i)–(ii).[4] In determining whether there is a reasonable indication of material injury, the ITC shall consider the imports': (1) volume, (2) effect on prices for the domestic like product, and (3) impact on the domestic industry. 19 U.S.C. § 1677(7)(B)(i)(I)–(III). Further, the ITC "may consider such other economic factors as are relevant" to its material injury determination. 19 U.S.C. § 1677(7)(B)(ii). In addition, the ITC shall examine whether there is a reasonable indication of threat of material injury, taking into consideration the relevant factors set forth in 19 U.S.C. § 1677(7)(F)(i).[5] The presence or absence of any statutory factor "shall not necessarily give decisive guidance with respect to the determination"; however, the ITC's threat determination "may not be made on the basis of mere conjecture or supposition." 19 U.S.C. § 1677(7)(F)(ii).

By its Preliminary Determination the ITC concluded that there was no reasonable indication of material injury to the domestic blast furnace coke industry by reason of the importation of blast furnace coke. *See* Prelim. Determination at 3. In reaching this determination, the ITC found that competition between the Subject Imports and the domestic like product was "attenuated," and thus insufficient to serve as a basis for finding material injury. *Id*. at 9 (finding that "there [was] a reasonable overlap of competition sufficient for cumulation, while at the same time recognizing the attenuated competition between subject imports and domestically produced blast furnace coke."). In light of that finding, and other findings concerning conditions of competition, the ITC further concluded that the volume, effect on domestic prices, and impact of the Subject Imports were not significant. *Id*. at 18–19, 21. In addition, the ITC determined that there was no reasonable indication that the domestic coke industry was threatened with material injury due to the importation of blast furnace coke. *Id*. at 26.

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[4] Pursuant to subsection 1673b(a), the ITC shall make a preliminary determination

> based on the information available to it at the time of the determination, whether there is a reasonable indication that—
>
> (A) an industry in the United States—
>
> (i) is materially injured, or
>
> (ii) is threatened with material injury * * *
>
> by reason of imports of the subject merchandise and that imports of the subject merchandise are not negligible.

19 U.S.C. § 1673b(a)(1)(A)(i)–(ii).

[5] By statute the ITC considers the following factors, "among other relevant economic factors":

> (I) [factor pertaining to countervailable subsidies],
>
> (II) any existing unused production capacity or imminent, substantial increase in production capacity in the exporting country indicating the likelihood of substantially increased imports of the subject merchandise into the United States, taking into account the availability of other export markets to absorb any additional exports,
>
> (III) a significant rate of increase of the volume or market penetration of imports of the subject merchandise indicating the likelihood of substantially increased imports,
>
> (IV) whether imports of the subject merchandise are entering at prices that are likely to have a significant depressing or suppressing effect on domestic prices, and are likely to increase demand for further imports,
>
> (V) inventories of the subject merchandise,
>
> (VI) 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,
>
> (VII) [factor pertaining to agricultural products],
>
> (VIII) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the domestic like product, and
>
> (IX) any other demonstrable adverse trends that indicate the probability that there is likely to be material injury by reason of imports (or sale for importation) of the subject merchandise (whether or not it is actually being imported at the time).

19 U.S.C. § 1677(7)(F)(i)(I)–(IX). In the Preliminary Determination, the ITC considered factors I and VII inapplicable to this antidumping investigation. Prelim. Determination at 22 n.156.

Plaintiffs challenge the ITC's attenuated competition finding and the ITC's negative determinations with respect to volume, price effect, impact, and threat. Plaintiffs claim that "the majority's attenuated competition conclusion has no rational basis in fact," in particular taking issue with the ITC's findings concerning mode of transportation and product quality. Pls.' Mem. at 25. Plaintiffs further contend that the allegedly erroneous attenuated competition finding is central to the ITC's determinations with respect to material injury and threat, and that "[w]hen it fails, little is left of the rest of the Majority Opinion." *Id*. at 26. The ITC responds that its attenuated competition finding, "which it relied upon both in its material injury and threat of material injury determinations, is supported by clear and convincing evidence." Def.'s Resp. at 16.

A. Attenuated Competition

In the Preliminary Determination the ITC found that competition between the Subject Imports and the domestic like product was "attenuated" for two reasons. First, "a significant amount of subject imports [was] transported over water[6] and sold directly to steel makers at steel plants with port facilities," and, thus, the Subject Imports were restricted to delivery at limited locations and were more economical for the purchaser to receive; and second, "blast furnace coke transported over water result[ed] in less product deterioration than blast furnace coke transported over land." Prelim. Determination at 9–10. As a result, the ITC concluded that, for the most part, the Subject Imports did not compete directly with domestically produced blast furnace coke.

This finding of attenuated competition was an important factor in the ITC's determinations with respect to the Subject Imports' effect on domestic prices and threat of material injury. In support of its position with respect to price effect, the ITC stated that the "nature of the conditions of competition for this industry" confirmed "[t]he lack of significant adverse price effects by the subject imports * * *." Prelim. Determination at 19. Further, the ITC concluded that "[t]here is no evidence on this record that the prices of these imports, *that to a great extent do not compete with domestically produced blast furnace coke,* and which constitute the overwhelming percent of the subject imports, have had a significant effect on domestic prices." *Id*. (emphasis added). In support of its position with respect to threat of material injury, the ITC stated that

> the vast majority of subject imports during the period of investigation were destined for [certain domestic steel producers]. As stated earlier, these * * * steel producers do not generally purchase domestically produced blast furnace coke for use at their steel production

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[6] By "over water" the ITC appears to mean by oceangoing vessel and possibly by "Panamax" vessel. "'Panamax' refers to the maximum dimensions allowable to permit the vessel to go through the Panama Canal * * *." 2 Thomas J. Schoenbaum, Admiralty & Maritime Law § 10–4, at 29 n.4 (3d ed. 2001).

> facilities with port facilities, reportedly due to the economic advantages of water transport which reduces degradation * * *.

Id. at 23.

Case law provides some guidance as to how this court should view the ITC's attenuated competition methodology. In *Committee of Domestic Steel Wire Rope & Specialty Cable Manufacturers v. United States,* 26 CIT ____, 201 F. Supp. 2d 1287 (2002), the court reviewed the ITC's final determination that an industry in the United States was neither materially injured nor threatened with material injury by reason of imports of steel wire rope.[7] The ITC had found that although a reasonable overlap of competition existed for purposes of cumulation, competition was nevertheless "attenuated" for purposes of injury "due to quality and product mix issues." Steel Wire Rope From China and India, Inv. Nos. 731–TA–868–869 (Final), USITC Pub. 3406 (Mar. 2001) ("Steel Wire Rope Final Determination") at 10.[8] The court upheld this determination, noting that the ITC had "detailed the reasons why the competition between the subject imports and the domestic like product was 'attenuated,'" i.e., that differences in quality and product mix limited substitutability.[9] *Steel Wire Rope*, 26 CIT at ____, 201 F. Supp. 2d at 1299. In other words, the court found that although an examination of the four cumulation factors supported a cumulation finding, i.e., a reasonable overlap of competition, other factors justified a finding of attenuated competition. *See Steel Wire Rope*, 26 CIT at ____, 201 F. Supp. 2d at 1292–93; *see also id.* at 1292 n.4 (quoting Steel Wire Rope Final Determination at 15).

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[7] The court notes that it is applying a different standard of review in the present case from that in *Steel Wire Rope*. In *Steel Wire Rope*, the court reviewed the ITC's final determination to ascertain whether it was "unsupported by substantial evidence on the record, or otherwise not in accordance with law * * *." 19 U.S.C. § 1516a(b)(1)(B) (1994); *see Steel Wire Rope,* 26 CIT at ____, 201 F. Supp. 2d at 1291 (citing 19 U.S.C. § 1516a(b)(1)(B) (1994)). Here, the court applies the arbitrary and capricious standard, which requires that "the agency * * * examine the relevant data and *articulate a satisfactory explanation* for its action including a 'rational connection between the facts found and the choice made.'" *Mot. Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)) (emphasis added); *Candle Corp. of Am. v. USITC,* 27 CIT ____, Slip Op. 03–40 at 12–13 (Apr. 8, 2003) (quoting *Mot. Vehicle Mfrs. Ass'n,* 463 U.S. at 43); *but see Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT ____, ____, 178 F. Supp. 2d 1305, 1314 (2001) (quoting *Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996) (bracketing in original)) ("[S]ubstantial evidence and arbitrary and capricious 'connote[] the same substantive standard of review'" in their application to factual issues).

[8] The court in *Steel Wire Rope* recognized that the ITC may find a reasonable overlap of competition for cumulation while also finding attenuated competition between the imports and the domestic like product for its injury analysis, as these two inquiries serve different purposes. *See Steel Wire Rope*, 26 CIT at ____, 201 F. Supp. 2d at 1297 (citing *BIC Corp. v. United States,* 21 CIT 448, 964 F. Supp. 391 (1997)) ("[T]wo distinct 'competition' findings are logical and legally permissible."); *see also BIC,* 21 CIT at 455, 964 F. Supp. at 399 ("[L]ike product, cumulation, and causation are functionally different inquiries because they serve different statutory purposes." (citation omitted)). Generally, for purposes of cumulation the ITC considers four factors in assessing whether the imports compete with each other and with the domestic like product: "(1) the degree of fungibility between products; (2) the presence of sales or offers to sell in the same geographic; (3) the existence of common or similar channels of distribution; and (4) the simultaneous presence of imports in the market." *Wieland Werke, AG v. United States,* 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989); *see also Steel Wire Rope,* 26 CIT at ____, 201 F. Supp. 2d at 1292 n.4. Here, as in *Steel Wire Rope*, the ITC found a reasonable overlap of competition sufficient for cumulation while recognizing that competition was attenuated for purposes of causation. Prelim. Determination at 9. No party disputes the ITC's decision to cumulate the Subject Imports.

[9] In the Steel Wire Rope Final Determination the ITC cited differences in product quality and product mix which led to the conclusion that substitutability between imports of steel wire rope and the domestic like product was limited. *See* Steel Wire Rope Final Determination at 10–12. In reaching its decision, the ITC found that one of the reasons the products were not in direct competition was that they could not be used for the same purposes. The ITC stated:

> Many purchasers and distributors state that only domestic product is used for so-called "critical" applications: those in which failure of the rope could result in damage, injury, or death. Similarly, various steel wire rope distributors expressed concern over liability arising out of any failure by imported steel wire rope they might sell, particularly imports from China.

Id. at 13–14.

1. Mode of Transportation

The ITC found that, during the period of investigation, most sales of the Subject Imports were to U.S. steel producers with blast furnace facilities equipped to receive the imports by water. Prelim. Determination at 11, 12. In light of this finding, the ITC observed: "[I]t is far more economical for purchasers to receive blast furnace coke by vessel than by rail or truck * * *." *Id.* at 14 & nn.95–96 (citing Duferco Br. at 6–7, 18–19; Duferco Br., Ex. 3, Palmer Aff. ("Palmer Affidavit") at 1–2).[10] The ITC also stated that "imported coke was a viable option only to U.S. customers with ready access to port facilities due to the significance of freight costs. * * * [M]ost U.S. merchant producers of coke were located inland, and so were limited to sales to nearby steel mills." *Id.* & n.97 (citing Conference Transcript, Pub. R. List 1, Doc. 26 ("Tr.") at 85 (Test. of Mr. Bruce Malashevich)[11]). Thus, the ITC found that due to the greater cost of land transport used by the domestic producers and the scarcity of plants with adequate port facilities competition between the foreign and domestic products was limited.

Plaintiffs argue that the attenuated competition finding based on mode of transportation is "factually incorrect." Pls.' Mem. at 5. Plaintiffs maintain that "the preponderance of coke is delivered in modes of transportation identical to those used [to ship] U.S.-produced coke * * *." *Id.* According to Plaintiffs, "[o]nly one blast furnace * * * receives subject imports by ocean going vessel on the coast," and certain foreign producers' shipments of the Subject Imports involve transporting such imports by land as well as by water. *Id.* at 11. Plaintiffs argue that the percentage of Subject Imports delivered solely by waterborne vessel declined during the period of investigation and that this "necessarily indicates that subject imports delivered not by Panamax vessel, but by comparable modes of transport (barge/rail or both) to that used by the domestic industry sharply increased during the [period of investigation]." *Id.* Thus, Plaintiffs urge the court to find that the ITC's attenuated competition finding based on mode of transportation "has no rational basis in fact * * *." *Id.* at 25.

In support of its findings with respect to mode of transportation the ITC claimed three sources: (1) the testimony of Mr. Bruce Malashevich; (2) the Duferco Brief; and (3) the Palmer Affidavit. Prelim. Determina-

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[10] In the Preliminary Determination, the ITC combined its mode of transportation and product quality findings, often in the same sentence. For example, in full, this sentence states: "According to one of the Chinese respondents, it is far more economical for purchasers to receive blast furnace coke by vessel than by rail or truck because receiving the coke by water reduces the amount of handling of the coke, which in turn, reduces degradation." Prelim. Determination at 14. For purposes of clarity, the court will analyze these two factors separately.

[11] On July 20, 2001, the ITC held a public conference and heard testimony from Mr. Malashevich, an economist appearing for the Japanese respondents, among others. *See* Blast Furnace Coke From China and Japan, 66 Fed. Reg. at 35,669.

tion at 14 nn.95–97; *see also id.* at 12 n.74 (citing Joint Japanese Br. at 33 n.23).[12] Mr. Malashevich stated, in relevant part:

> [A]nother condition of competition very pertinent is that furnace coke has a low ratio of value to weight. Differences in freight costs thus weigh heavily in sourcing decisions.[13] As a practical matter, imported coke is a viable option only to U.S. customers with ready access to port facilities. Most U.S. merchant producers of coke, however, are located inland and so are limited to sales for consumption by nearby steel mills.
>
> Trade sources tell me that for the last ten years one of the largest purchasers of subject imports * * * also has been the largest seller of U.S. produced coke on the merchant market. Differences in freight costs presumably lie behind this pattern.

Tr. at 85:14–25 to 86:1. The reasons for relying so heavily on this testimony are unclear. While tending to support the conclusion that waterborne coke can be landed only at particular sites, Mr. Malashevich's testimony does not provide any detail with respect to the claimed differences in freight costs for the transportation of domestic coke in comparison with imported coke. Thus, this testimony fails to provide a basis for the ITC's conclusion that the differences in such costs were "significant." Moreover, Mr. Malashevich offered testimony based on what "[t]rade sources [told] [him]" and concluded that "presumably" freight costs were the reason that a certain domestic steel producer decided to purchase Subject Imports rather than rely on other domestic sources of blast furnace coke. Given the importance placed on the "significance of freight costs" in the ITC's finding of attenuated competition, this testimony simply provides insufficient support for this conclusion.

Next, the ITC cited the Duferco Brief for the proposition that it is "far more economical" to receive imports by water than by land. Prelim. Determination at 14 n.95. Indeed, the ITC seemingly borrowed the "far more economical" language, which appears in the Preliminary Determination, from the Duferco Brief:

> Imported Chinese or Japanese furnace coke [is] imported almost exclusively to U.S. integrateds that are located at sites that [are] accessible to waterway transport. For example, [one steel producer's] plant * * * is located on the water and is set up to receive materials by vessel [which] is *far more economical* than to receive materials by truck or rail. * * * Any site that cannot be easily accessed by waterway becomes economically prohibited for imports because of the

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[12] In the Preliminary Determination and in Defendant's Response, the ITC cited, as evidence, certain page ranges in the Duferco Brief and the Joint Japanese Brief without identifying the specific passages that it found persuasive. Thus, as the exact language on which the ITC relied is unspecified, where the court quotes these Briefs, it focuses on the language which seems to support the ITC's position. Furthermore, the ITC cited the confidential version of the Joint Japanese Brief as support for the proposition that waterborne transportation resulted in lower costs than land transportation. *See* Prelim. Determination at 12 & n.74; *see also* Joint Japanese Br., Confidential R. List 2, Doc. 13 at 33 n.23. The court has examined the specific footnote in the Brief and finds that the confidential sources cited therein make substantially the same point as is made in publicly available sources elsewhere.

[13] While the statements might appear to support the ITC's conclusions with respect to waterborne transport, they are so lacking in specificity as to any comparison of freight costs among the various modes of transportation that they fail to provide a "rational nexus between the facts found and the choices made." *See Ranchers-Cattlemen*, 23 CIT at 878, 74 F. Supp. 2d at 1369 (internal quotation omitted).

> additional overland transportation costs by truck or rail that are usually more expensive than waterway freight costs * * *.

Duferco Br. at 6 (emphasis added). An examination of the sources cited in the Duferco Brief for these statements, however, reveals that they fail to substantiate the conclusions reached in the Brief. For instance, Mr. Andrew Aloe's testimony, cited in the Duferco Brief as the basis for the proposition that "[t]he ability to receive materials by water is superior [to] overland transport," see id., does not, in fact, indicate any economic benefits accruing to purchasers of the Subject Imports resulting from waterborne transport, but rather addresses the degradation that results from handling blast furnace coke:

> [T]raditionally what happens is that when we produce our coke it goes directly from a screening station into a rail car directly to the customer; [there is a] minimum amount of breakage because * * * when * * * blast furnace coke and foundry coke [are] transported [they] will break. Every time you move it, every time it drops from one belt to another belt, there's going to be breakage.
>
> We don't want to move [the coke] at all, so when we have to put it on the ground and inventory it we normally would put it into a truck. There's one drop. Then the truck takes it out to where you're going to inventory it. He drops it again on the ground, and then because you have a pile of coke * * * you use up a vast amount of area if you just start laying coke down one truck at a time, so you need a high lift operator who then is going to jam his shovel * * * into that pile and start building it up * * *.
>
> Every time he does that he's running over it. He's putting that heavy piece of equipment into it and you're breaking it up, or you're putting it into a conveyor that then takes it up to a varying height and it drops, and then again, it's breaking. Just putting it down you have breakage.

Tr. at 74:1–23.[14] No other source cited in the Duferco Brief can be said to demonstrate that it is "far more economical" to receive coke by waterborne transport than by other means. Thus, because the evidence cited in the Brief does not address any cost advantages resulting from waterborne transport, the ITC's reliance on the Duferco Brief for its conclusions with respect to these matters is not justified.

Finally, the ITC cited the Palmer Affidavit as confirmation of its finding that freight costs played a major role in the U.S. steel producers' preference for the Subject Imports. This Affidavit states:

> Several key factors are considered by [the domestic steel producers] in selecting [their] outside suppliers of blast furnace coke. I believe that these factors are still considered by integrateds and serve to limit the volume of Chinese imports.
>
> First, transportation costs. [Some steel companies] considered the transportation costs for delivering furnace coke from the supplier

[14] The Duferco Brief also cites certain statements made by Mr. Palmer in his Affidavit and during his testimony at the public conference, which are similar in substance. The court addresses such statements below.

> of their furnaces. [One company's blast furnace steel facility] is located on the water * * * and thus has a bias towards global sourcing. [This facility] is configured to receive large quantities of raw materials more economically by water than by rail or truck. Waterway transport from [another] cokemaking facility to [a waterside facility] is not feasible because of the distance and complicated logistics required.
>
> The same logistics concerns also limit the locations to which imports can be delivered. Ocean vessels usually transport coke in 40,000–50,000 metric ton increments, whereas lake vessels can hold only 18,000 metric tons. It is my understanding that * * * [confidential information omitted].

Palmer Aff. at 1–2. As with Mr. Malashevich's testimony, the Palmer Affidavit contains qualifying language such as "I believe" and "It is my understanding" when discussing the motivation for the domestic steel producers to choose a source for blast furnace coke from outside of the United States. *See id*. While the Palmer Affidavit does suggest that delivery of coke at one specific steel facility could be achieved "more economically by water," this statement cannot support the general conclusion that waterborne transport is "far more economical" than delivery by land. The clear purpose and import of the Palmer Affidavit, and for that matter, Mr. Malashevich's testimony, is that foreign shipments can be off-loaded at limited sites. Their statements, however, do not demonstrate that the domestic producers' means of delivery are somehow limited, nor are they authoritative with respect to cost. No meaningful comparison between the freight costs associated with domestic deliveries and foreign deliveries is provided by the Palmer Affidavit. Thus, taken as a whole, the sources cited by the ITC as support for its conclusion that it is "far more economical" to receive waterborne Subject Imports than to receive domestic coke by land transport do not rise to the level of "clear and convincing" evidence required by case law. *See Ranchers-Cattlemen*, 23 CIT at 877, 74 F. Supp. 2d at 1368 (quoting *Am. Lamb,* 785 F.2d at 1001) ("The ITC * * * must decide whether there is a reasonable indication for finding '(1) the record as a whole contains clear and convincing evidence that there is no material injury or threat of such injury; and (2) no likelihood exists that contrary evidence will arise in a final investigation.'").

2. Product Quality

In the Preliminary Determination, the ITC found that the Subject Imports, which were transported and delivered by water to U.S. steel producers' port facilities, deteriorated less in transit than domestic

blast furnace coke.[15] Prelim. Determination at 9–10. The ITC noted that "purchasing the subject imports through a port facility results in *lower degradation* of the blast furnace coke" and that higher product quality is maintained "[by transporting the Subject Imports] over water rather than over land." *Id.* at 12 & n.74 (citing Duferco Br. at 6–7; Joint Japanese Br. at 33 n.23) (emphasis added); *see also* Def.'s Resp. at 12 ("[T]he record reflects [that] market participants consider water transport easier on blast furnace coke."). The ITC further observed that "receiving the coke by water reduces the amount of handling of the coke, which in turn, reduces degradation." Prelim. Determination at 14 & nn.95–96 (citing Duferco Br. at 6–7, 18–19; Palmer Aff. at 1–2). With these findings as its predicate, the ITC determined that the Subject Imports did not directly compete with the domestic like product on the basis of quality. *See generally id.* at 9–10.

Plaintiffs contend that the record fails to support the ITC's finding that the Subject Imports are less physically degraded when transported and delivered by water. First, Plaintiffs argue that "there is no evidence of record of greater or lesser degradation within transit by mode (Panamax vessel, barge, rail)." Pls.' Mem. at 12. Rather, Plaintiffs claim that frequency of handling is the determinative factor in coke degradation. Plaintiffs cite an exhibit attached to the Joint Japanese Brief, which purports to compare the price for coke that has been handled several times with a hypothetically constructed price of coke that has never been handled. *See* Joint Japanese Br. at 19a, Ex. 11A ("Japanese Exhibit"). Plaintiffs argue that the Japanese Exhibit "is based on the (correct) premise that it is valid to show the effect of handling on product degradation, but that mode of transport does not determine the degree of degradation." Pls.' Mem. at 13. Second, with respect to the impact of degradation on the price of blast furnace coke, Plaintiffs claim that "product difference[s] can account for price differences of up to but not more than $3 to $5 per metric ton." *Id*. at 13 (discussing testimony of Mr. Drew Bachman).[16] Finally, Plaintiffs argue the evidence shows that, in any event, "[p]roduct degradation is only one element of product quality" and that other factors, such as "chemistry, ash content, and physical

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[15] Moreover, the ITC found the following with respect to product quality:

> Blast furnace coke crumbles whenever it is being transported or handled, creating particles of coke called coke breeze. Operators do not want this breeze in their furnaces because it can plug up the blast furnaces. A higher percentage of breeze in a shipment, caused, for example, by the coke being on the ground, can result in a decreased price for the shipment, either because the purchaser discounts the shipment or because the breeze is screened out. Therefore, blast furnace coke producers seek to minimize crumbling or degradation of the blast furnace coke prior to use, by minimizing handling, moving or transporting the coke.

Prelim. Determination at 14 & nn.90–93 (citing Tr. at 46–47; 74–75; 48–49; 51–52, 76); *see also* Def.'s Resp. at 12 (citing Tr. at 75 (Test. of Mr. Richard Boltuck)) ("Coke breaks very easily if it is not handled properly * * *."); Pls.' Mem. at 4 ("[H]andling, and not mode of transportation, causes degradation.").

[16] Mr. Bachman testified:

> I think first and foremost it must be recognized that coke consumed in this country is fungible or considered the same, whether it's domestically produced or imported. These cokes can be blended or used alternatively * * * and once the coke is qualified at a user's facility these materials are considered interchangeable.
>
> Any differences between coke sources can [be] and are adjusted at the user levels through operational mechanisms that vary from user to user, whether they're outlined in specific contracts or not. Pricing adjustments can also be used. In our experience, these adjustments are minor, I would say in the range of three, four, five dollars a ton, and are therefore not sufficient to impact the widespread price differential between domestic and imported cokes.

Tr. at 27:23–25 to 28:1–11.

condition," also determine product quality. *Id*. (citing Staff Report at II–4 to –8); *id*. at 25. Therefore, Plaintiffs contend that an opportunity should be provided for the distribution of

> [p]urchaser questionnaires requesting purchaser specifications blast furnace operational requirements and coke quality tolerances, would permit a judgment on the degree to which product quality differentiates product usability, geographic coverage, and may or may not mitigate price underselling and to what degree * * *.

Id. at 25. Thus, it is Plaintiffs' contention that a likelihood exists that contrary evidence would arise in a final investigation. *Id*. at 7.

The ITC counters that "there is record evidence that water transport is easier on blast furnace coke than overland transportation." Def.'s Resp. at 10. With respect to the effect of degradation on the price of a shipment, the ITC argues that "a high percentage of breeze in a coke shipment can result in a discounted price." *Id*. at 14. In addition, the ITC argues that the Japanese Exhibit does not support Plaintiffs' claim because it "uses the number of times blast furnace coke is handled as a measure of degradation, but never states that all modes of transporting coke cause equivalent levels of degradation." *Id*. at 12. Thus, it is the ITC's contention that "clear and convincing evidence" supports its attenuated competition finding with respect to product quality. *Id*. at 15–16.

In the Preliminary Determination the ITC cited the following evidence to support its findings with respect to product quality: (1) the Duferco Brief; (2) the Palmer Affidavit; and (3) the Joint Japanese Brief. First, in the Duferco Brief, counsel asserted: "The ability to receive materials by water is superior than [sic] overland transport because it reduces the *amount of handling* of the furnace coke, which in turn, reduces the amount of degradation that results from each handling. * * * [O]verland transportation * * * require[s] more handling and result[s] in greater degradation." Duferco Br. at 6 & nn.9–10 (citing Tr. at 74; Tr. at 104) (emphasis added). It is worth noting that this statement supports Plaintiffs' position that handling, not mode of transportation, is the significant factor in coke degradation.[17] Further, the evidence cited in the Duferco Brief, e.g., the testimony of Mr. Aloe, also deals with the deteriorating effects of repeated handling on blast furnace coke and tends to undermine the ITC's finding that transporting blast furnace coke by water results in less degradation and less coke breeze than transporting it by land. Mr. Aloe's testimony indicates that in the moving, lifting, loading, and unloading of blast furnace coke breakage oc-

[17] Indeed, the Preliminary Determination itself states "blast furnace coke producers seek to minimize crumbling or degradation of the blast furnace coke prior to use, by minimizing *handling, moving or transporting* the coke." Prelim. Determination at 14 (emphasis added). This general statement would seem to apply equally to domestically produced coke and the Subject Imports.

curs, and that more, not less, breakage would result from oceangoing transport or delivery:

> [I]t's not an easy thing to offload those [oceangoing] vessels.
>
> It goes into a barge, and then that barge is taken up to some dock. It's taken off the dock, and then it's moved from that dock either by truck or rail * * * to the ultimate consumer. You'd think with all that moving around that [the respondents would] have a substantial disadvantage in the marketplace because their ultimate product that they're delivering is broken up.

Tr. 80:18–25 to 81:1. In fact, this evidence does not discuss the effect of waterborne transport on the Subject Imports, only delivery. The Duferco Brief also cites the testimony of Mr. Palmer given separate from his affidavit. This testimony merely supports the proposition that it is difficult to transport imports inland, and that "[t]he need for accessible location precludes any significant volume of imports from being delivered to any land-locked locations." Tr. at 104:11–13. Again, the effect of waterborne transport on the quality of the Subject Imports is not mentioned. As the ITC itself concedes that "[c]oke breaks very easily if it is not handled properly," Def.'s Resp. at 12, it is difficult to see how Mr. Palmer's testimony provides much support for the proposition that the Subject Imports are of a higher quality than domestic coke based on mode of transportation. Thus, this evidence does not support the ITC's finding.

Second, although it addresses the question of product quality, the court does not find that the Palmer Affidavit serves as adequate evidentiary support with respect to the ITC's product quality finding. Mr. Palmer stated that "[o]cean and river transport is more advantageous than overland transport because it requires less handling, which causes degradation of the coke." Palmer Aff. at 2. Mr. Palmer further stated:

> To deliver coke to [a domestic steel producer's blast furnace steel facility] by water, the coke can be transported directly from the ocean vessel and placed at the stockyard located right before the blast furnace. In contrast, to deliver coke to [that facility] by land, the coke is handled many more times and suffers a much higher degradation rate. It is my understanding that * * * [confidential information omitted].

Id. The utility of the Palmer Affidavit, however, is limited because: (1) there is no indication that his views are based on firsthand knowledge; (2) the statements that the ITC found convincing with respect to the reasons certain purchasers chose imported coke contain the qualifying language "It is my understanding"; and (3) his statements tend equally to support Plaintiffs' position that it is the frequency with which coke is handled, not necessarily mode of transportation, that leads to product degradation.

Finally, contrary to the argument made by the ITC in its Response, the evidence cited in the Joint Japanese Brief does not tend to prove the assertion that water transport is "gentler" on blast furnace coke than land transport. *See* Def.'s Resp. at 11. The Brief cites the testimony of

Mr. Ryu Hasegawa who stated that Mitsui and Mitsubishi have "specialized equipment to load blast furnace coke onto Panamax vessels with minimal breakage." Tr. at 99:14–15. However, Mr. Hasegawa's testimony deals with loading, not transport or delivery. Moreover, neither the Brief nor the evidence cited in the Brief makes any meaningful comparison between domestic and foreign methods of loading blast furnace coke "gently."

Notably absent from the record is any real evidence that directly supports the ITC's finding that the Subject Imports are superior in quality to the domestic like product. On the contrary, there is at least some evidence provided in the Staff Report that the domestic like product is superior in quality to the Subject Imports. According to the Staff Report:

> U.S. producers and importers were asked if there are any differences other than price between U.S.-produced blast furnace coke and blast furnace coke produced in China and Japan that are significant factors in their sales of blast furnace coke. According to U.S. producers, the domestic blast furnace coke is superior to imported blast furnace coke in terms of quality, but when foreign prices are far below domestic prices, blast furnace operators are reportedly willing to sacrifice some quality for the cheaper imports. Responding importers stated that domestic and imported coke characteristics are different; however the integrated steel makers reportedly need to import blast furnace coke because their demand for blast furnace coke has consistently been much greater than the available domestic supply.

Staff Report at II–4. Also, with respect to substitutability, the Staff Report indicates that "[t]he degree of substitution between U.S.-produced and imported blast furnace coke depends upon such factors as relative price, quality, and availability."[18] *Id*. Taking these factors into consideration, the Staff Report concluded that "there is a high degree of substitution between domestic and imported blast furnace coke." *Id.*; *cf. Steel Wire Rope*, 26 CIT at ____, 201 F. Supp. 2d at 1300 ("The Commission's 'attenuated' competition finding was critical to the material injury determination because the difference in product quality and mix, coupled with the *low substitutability* of the subject imports with the domestic like product showed that the domestic industry was not injured by the subject imports." (emphasis added)). In addition, as noted by the dissenting Commissioners, and as evidence on the record suggests, it would appear that the interchangeability between the Subject Imports and the domestic like product is a critical factor in the material injury

[18] There is record evidence that price is an important, though not necessarily determinative, consideration:

> Price is an important factor in the sale of blast furnace coke, however other factors such as quality, availability, and reliability of supply are significant factors in purchase decisions. Suppliers generally compete on price only if their product has been tested and deemed as consumable by the end user.

Staff Report at II–4.

and threat evaluations.[19] *See* Dissenting Views of Commissioners Bragg and Miller, Prelim. Determination at 27 n.1 ("Given that the record indicates that subject imports and the domestic like product are interchangeable and recognizing an important issue raised regarding the nature of competition between subject imports and the domestic like product, i.e., whether transportation costs limit U.S. merchant producers' sales to nearby purchasers, we believe that negative determinations at this preliminary stage would be premature. The record does not, at this time, present information sufficient to support dispositive distinctions regarding the industry's performance, as reflected in the lack of purchaser input regarding the nature of competition between the domestic product and imported product, particularly in the sizable merchant segment.").

Although the scope of judicial review of an ITC preliminary injury determination is a narrow one, the ITC must nonetheless explain the reasons behind its determination. *See Bowman Transp.,* 419 U.S. at 285–86; *Mot. Vehicle Mfrs. Ass'n,* 463 U.S. at 43 ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action * * *."). Here, unlike in *Steel Wire Rope*, the ITC has not "detailed the reasons why the competition between the subject imports and the domestic like product was 'attenuated.'" *Steel Wire Rope*, 26 CIT at ____, 201 F. Supp. 2d at 1299. Moreover, contrary to the ITC's claim, the "clear and convincing" standard, which the ITC has long applied as the measure of evidence required before it may issue a negative determination, *see Am. Lamb*, 785 F.2d at 1001, is not met based on the evidence cited in the Preliminary Determination. Thus, the ITC has failed to demonstrate that there is a reasonable indication that the record on the whole contains "clear and convincing evidence that there is no material injury or threat of such injury" to the domestic blast furnace coke industry, and that "no likelihood exists that contrary evidence will arise in a final investigation." *See id*.

Where an agency has not articulated a rational connection between the facts found and the choices made, remand is appropriate. *See Burlington Truck Lines*, 371 U.S. at 168; *Altx, Inc. v. United States,* 25 CIT ____, ____, 167 F. Supp. 2d 1353, 1367–68 (2001) (quoting *Bando Chem. Indus., Ltd. v. United States,* 16 CIT 133, 136, 787 F. Supp. 224, 227 (1992)). The ITC has not adequately articulated its reasons for finding that competition between the Subject Imports and the domestic like product is attenuated—indeed, it is not clear from the Preliminary Determination at what point competition becomes "attenuated"—nor does the evidence cited by the ITC, with respect to its mode of trans-

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[19] In its analysis of the fungibility of domestic and imported blast furnace coke, the ITC found "a sufficient level of physical interchangeability between domestically produced and imported blast furnace coke from China and Japan" for purposes of cumulation. Prelim. Determination at 10. This court has held that fungibility plays an important role in the ITC's causation analysis. *BIC*, 21 CIT at 456, 964 F. Supp. at 400 (citing *Gen. Mot. Corp. v. USITC*, 17 CIT 697, 711–12, 827 F. Supp. 774, 787–88 (1993)) ("[T]he more fungible two products are the more likely underselling by one will affect the price of the other."). While the factors which the ITC considered in deciding whether to cumulate the Subject Imports, i.e., fungibility, geographic overlap, simultaneous presence in the market, and channels of distribution, are not determinative of the attenuated competition finding, here they would appear to be relevant.

portation and delivery and product quality findings, demonstrate that, in fact, direct competition does not exist. *See Bowman Transp.*, 419 U.S. at 285–86 (court may not "supply a reasoned basis for the agency's action that the agency itself has not given."); *Altx*, 26 CIT at ____, Slip Op. 02–154 at 4 ("The court can only review the reasoning that the Commission expresses."). Thus, as there is no "rational connection between the facts found and the choice[s] made," the court must remand this matter to the ITC so that it may explain this finding. *Burlington Truck Lines*, 371 U.S. at 168.

Accordingly, on remand the ITC shall revisit its Preliminary Determination, and, should it conclude that a negative determination continues to be warranted, revisit its conclusions with respect to its attenuated competition finding and: (1) explain the methodology and standards employed in reaching the conclusion that "to a great extent [Subject Imports] do not compete with domestically produced blast furnace coke," Prelim. Determination at 19; (2) state with specificity the factors underlying its finding of attenuated competition; (3) state whether U.S. purchasers of Subject Imports comprise a separate market and cite the record evidence to support such conclusion, if any; (4) state with specificity any record evidence demonstrating that lower costs resulting from waterborne transport of the Subject Imports created a separate market for the Subject Imports; (5) state with specificity any record evidence demonstrating that it is "far more economical" for Subject Imports to be delivered by waterborne transport when compared with modes of transportation available to the domestic like product; (6) quantify the cost differences resulting from waterborne transport and delivery of the Subject Imports when compared with the cost of transport of the domestic like product; (7) state the percentage of Subject Imports unloaded directly from Panamax vessels and other oceangoing ships directly for use in the United States; (8) state with specificity any record evidence demonstrating that the superior quality resulting from waterborne transport or delivery of the Subject Imports created a separate market for the Subject Imports; (9) examine the significance of the manner and frequency of handling of the Subject Imports in its product quality analysis; (10) state with specificity any record evidence demonstrating that the Subject Imports are superior in quality to the domestic like product and specify in what way the Subject Imports are superior; (11) state with specificity any record evidence demonstrating a preference on behalf of U.S. blast furnace coke consumers for the Subject Imports based on product quality; and (12) state with specificity any record evidence that the Subject Imports and the domestic like product are not fungible.

CONCLUSION

For the reasons set forth above, the court remands this matter to the ITC for further proceedings in accordance with this opinion. Such remand results are due within ninety days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments eleven days from their filing.

(Slip Op. 03–57)

NSK LTD., NSK CORP., NTN BEARING CORP. OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORP., NTN BOWER CORP., NTN CORP., KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., PLAINTIFFS AND DEFENDANT-INTERVENORS *v.* UNITED STATES, DEFENDANT, AND TIMKEN CO., DEFENDANT-INTERVENOR AND PLAINTIFF

Consolidated Court No. 00–04–00141

(Dated May 21, 2003)

JUDGMENT

TSOUCALAS, *Senior Judge:* This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("Remand Results") in *NSK Ltd. and NSK Corporation; NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Bower Corporation and NTN Corporation; Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. v. United States and The Timken Company,* 27 CIT ____, 245 F. Supp. 2d 1335 (2003), and Commerce having complied with the Court's Remand Order of January 9, 2003, and no responses to the Remand Results having been submitted by plaintiffs, it is hereby

ORDERED that the Remand Results filed by Commerce on April 8, 2003, are affirmed in their entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.