(Slip Op. 03–30)

VWP OF AMERICA, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 93–12–00803

[On consideration of remand results from U.S. Customs Service valuing imported fabrics from Canada, judgment for the government.]

(Decided March 20, 2003)

Barnes, Richardson & Colburn (James S. O'Kelly and *Alan Goggins),* New York City, for the plaintiff.

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

OPINION

MUSGRAVE, *Judge:* This opinion concerns the proper valuation of certain melton and other fabrics imported from Canada and presumes familiarity with the Court's prior decision, 25 CIT ___, 163 F. Supp. 2d 645 (2001). Previously, in accordance with the decision of the Court of Appeals for the Federal Circuit in *VWP of America, Inc. v. United States*, 175 F.3d 1327 (Fed. Cir. 1999), this Court found that a certain navy/purple melton fabric imported by the plaintiff ("VWPA") from its Canadian parent Victor Woollen Products, Ltd. ("VWPC") was "similar" to a certain navy Cookshiretex melton fabric[1] and that a certain VWPC plaid fabric was "similar" to a Cookshiretex plaid fabric[2] for purposes of related-party transaction valuation under 19 U.S.C. § 1401a(b)(2)(B). *See* 19 U.S.C. § 1401a(h)(4)(B). The matter was remanded to the U.S. Customs Service ("Customs") for determination of whether each claimed value, adjusted for selling commission and any dutiable charge backs, "closely approximates" its respective test value. Customs was directed

[1] *Cf.* Plaintiff's Exhibit ("Pl.'s Ex.") 9 at 13 (code "0912", a 23/25 oz. melton, 75% wool, 20% nylon, 5% other, 152.75 yards @ US$4.70/yard) *with* Defendant's Exhibit ("Def.'s Ex.") E–7 (a 22 oz. melton of 80% wool, 15% nylon, 5% other, 2,000 yards @ US$4.27/yard).

[2] *Cf.* Pl.'s Ex. 9 at 25 (code "C9217", an 18/20 oz. plaid of 60% wool, 25% polyester, 10% acrylic, 57.25 yards, US$3.60 per yard) *with* Def.'s Ex. E–2 (a 17 oz. plaid of 65% wool, 30% acrylic, 5% nylon, 9.84 yards @ US$2.95/yard).

to consider valuing the remaining contested fabric on the basis of transaction value in light of such results or search its database for any additional liquidated entries that might serve as test values for transaction valuation. The remand results have been filed and the parties have commented thereon.

The plaintiff's proffered deductive and computed value statements did not prove the acceptability of transaction valuation,[3] but they were deemed possible valuation bases in their own right. On the other hand, the Court acceded to the government's desire to examine the sources of the figures underlying the statements proffered. The Court concluded that "[i]f the plaintiff produces sufficient information within a reasonable time, Customs shall[ ] * * * value the remaining fabrics on the basis of deductive or, at plaintiff's option, computed value. Otherwise, Customs shall value the entries in accordance with 19 U.S.C. § 1401a(f)." 163 F. Supp. 2d at 669.

RESULTS OF REMAND

The remand results state that the Cookshiretex entries cannot be used for comparisons with the remaining VWPA entries because the prices of the VWPC fabrics at issue varied depending upon style and color, such qualities cannot be considered commercially interchangeable, and differences in color are not "adjustments to test values" permitted by 19 U.S.C. § 1401a(b)(2)(C). *Customs Remand Report* at 2–3.[4] Consequently Customs concluded it was not possible to make "across the board" comparisons from the Cookshiretex exhibits and that test value comparison of the remaining VWPC fabrics with "similar" fabrics was necessary. *Id*. at 2.

In accordance with the order of remand, Customs identified one additional entry as a potential test value candidate out of 19 entries of Canadian fabric classified under HTSUS 511.30.9000. The entry involved a black melton 24 oz, 80% wool, 15% nylon and 5% other fibers (514.59 yards, US$4.75/yard, total price of US$2,444.30) imported from Canada and transacted between Cookshiretex and Delong Sportswear, Inc. Customs concluded that the fabric was "similar" to VWPC 24/25 black melton fabrics, however it also concluded that the entered Cookshiretex fabric was 40 inches in length, whereas the similar VWPC merchandise was 58 inches in length. *Update to Customs Remand Report* at 1–2.

On the issue of what charge-back costs borne by VWPC on behalf of VWPA are dutiable, 19 C.F.R. § 15.103(g) requires proceeds to be "directly related" to importation to be dutiable. The remand results noted Customs' general rule that payments made by the buyer to the seller in connection with the sale or marketing of a product in the U.S. after importation are not considered part of the price actually paid or payable. *Customs Remand Report* at 8, referencing Headquarters Ruling Letter

[3] *See* 19 U.S.C. §§ 1401a(b)(2)(B)(ii), 1401a(d) & 1401(e).

[4] Customs also notes that despite Mr. Duval's testimony that a difference of up to 5 percent of wool content was considered commercially interchangeable, the statute does not permit adjustments to be made for differences in wool content.

("HRL") 545998 (Nov. 13, 1996). *See* 163 F. Supp. 2d at 653, 656 n.22. Since Customs presumes that all payments from the buyer to the seller are part of the price actually paid or payable for the imported merchandise, Customs burdens the claimant with establishing both what the payments were for and that they did not in any way relate to the sale resulting in importation. *Customs Remand Report* at 9. After reviewing the trial transcript and documentary evidence submitted by plaintiff during trial, Customs concluded that the "special circumstances" of this case must be taken into account, including the "close relationship" between VWPC and VWPA, the fact that VWPA obtained all of its merchandise from VWPC, and the fact that all of the managerial, accounting and other services were provided to VWPA by VWPC's officers and employees in Canada, "in many instances by the same individuals who provided such services to VWPC." *Id*. at 10. Customs concluded that under these circumstances the "conclusory statements" and summary documentation submitted were insufficient to establish that the payments at issue were "completely unrelated" to the imported merchandise and considered them part of the price actually paid or payable. *Id*.[5]

The parties agreed that the charge-backs and commissions would be allocable based on sales rather than yardage sold. Adjusting the VWPC-VWPA prices of the "similar" C9217/1 plaid in Pl.'s Ex. 9 (page 13) and the 0912 melton in Pl.'s Ex. 9 (page 25) according to the methodology considered at trial, Customs determined that the adjusted VWPC-VWPA prices were US$4.51/yard and US$5.09/yard, respectively. Customs then determined that there was insufficient information on pricing differences in quantity and commercial level which would otherwise require adjustment in accordance with 19 U.S.C. § 1401a(b)(2)(C)(i).[6] Customs next determined that the adjusted US$4.51 price of the C9217/1 VWPC plaid did not "closely approximate" the entered US$2.95/yard price of the Cookshiretex plaid (Def.'s Ex. E–2), although it noted that the VWPC-VWPA price would "closely approximate" the commercial invoice US$4.70/yard price of the Cookshiretex plaid. Customs lastly determined that the adjusted

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[5] Customs distinguished the present situation from that of HRL 545998 on the ground that in HRL 545998 the co-promotion fees therein were considered not part of the price actually paid or payable because the matter showed a detailed written contract which clearly specified that the payments related to specific marketing services to be provided by the seller in the U.S. based on a complex formula that related those specific undertakings. Customs determined that the situation here differs, because it was provided with "no VWPC/VWPA contract regarding either the services VWPC was to provide to VWPA or how the fees for these services would be determined; nor were the fees paid for specific services provided in the U.S. * * * [N]one of the safeguards that were applicable in HRL 545998 apply in this case[, n]or were any source documents provided to enable Customs to evaluate the testimony or the summary documents in the record." *Remand Results* at 10.

[6] Customs additionally states that as a result of remand it has "new concerns * * * with regard to the two Cookshiretex fabric comparisons" considered in the prior opinion. *Customs Remand Report* at 3. Def.'s Ex. E–2 consists only of an entry summary, showing a declared value of US$29 for a plaid fabric. Based on the declared description (9.84 yards plaid—17 oz 65% wool, 30% acrylic 5% nylon), Mr. Duval testified that it must have been entered at US$2.75 per yard. In addition to its search for additional liquidated entries that might be used for test purposes, Customs states that on remand it obtained the complete entry package for Def.'s Ex. E–2, which package includes the commercial invoice from Cookshiretex. The invoice specifies a price per yard of US$4.70 and a total price of US$47.23. Customs states that this suggests that Customs did not review this entry, and it now argues that it would be improper to make comparisons based on it. *Id*. at 3–4. Second, Customs states that it "has new information which suggests that the prices Cookshiretex charges to Lou Levy and Sons may be the result of volume discounts." Although it does not further elaborate on that assertion, Customs contends that it lacks sufficient information at this time to make any adjustments on this basis. *Id*. at 4.

US$5.09/yard price of the 0912 VWPC melton does not "closely approximate" the entered price of US$3.90/yard (or US$4.27/meter) of the Cookshiretex melton described in Def.'s Ex. E–7.

Customs followed the same methodology with respect to the additional Cookshiretex test value entry that had been located and determined "similar" to some of the VWPC fabric, entry E04–0930480–0. The price of the VWPC similar fabric varied depending upon the quantity purchased. Customs therefore selected "one of VWPA's larger purchases of 302 yards," Pl.'s Ex. 15, page 57. The date of export was December 8, 1992, two days prior to the test value date of export, which Customs found to satisfy the "at or about the same time" requirement of 19 U.S.C. § 1401a(b)(2)(B). Customs next determined an adjusted (in accordance with the foregoing method) VWPA-VWPC transaction value of US$4.00. Customs then determined that this did not "closely approximate" the E04–0930480–0 test value of US$4.70/yard because the difference of 16% was "significant". *Update to Customs Remand Report* at 3. Customs also noted that according to its National Import Specialist (NIS) for woven fabrics, the unit price per yard of fabric would depend upon width, and that if the test value fabric was the same width as the VWP fabric—58 inches instead of 40 inches, a difference of approximately 50%—the test value would be approximately 50% higher and, therefore, the difference would be even greater (40%). Customs further states that it is "worth noting" that the test value's US$6.88 price, assuming a 50% increase based on a 58/inch width, "is close to the [US]$6.55 price paid by VWPA's customer, the price at which the fabric was appraised." *Id*. In the final analysis, Customs found that none of the compared VWPA-VWPC transaction values closely approximated any of the test values.

The remand order directed Customs to appraise the fabrics that could not be appraised on the basis of transaction value on the basis of either deductive or computed value, at VWPA's option, or under the fallback provision, 19 U.S.C. § 1401a(f). By letter dated Oct. 23, 2001 Customs requested the plaintiff to state its preference for either deductive or computed valuation in accordance with the order of remand, and Customs also requested the plaintiff to provide source documentation to support its claimed profit and general expenses. If deductive value was selected, Customs further requested the plaintiff to provide evidence that the profit and general expenses figures in the deductive value exhibit (Pl.'s Ex. 55) are consistent with those usually made or incurred in connection with sales of imported merchandise of the same class or kind. VWPA immediately responded that its preference was to use deductive value over computed value. In response to request for sources to support the general expenses and profits claimed, counsel explained that such deductions were based directly on the VWPA's audited financial statements, Pl.'s Ex. 58, which were certified as complying with generally accepted accounting principles by Coopers and Lybrand. Counsel pointed out that Customs' auditor at trial expressed no criticism of the deductive value schedules and admitted that they may be entirely accurate, that

there was no testimony or other evidence indicating VWP of America's general expenses and profits were inconsistent with those reflected in sales in the United States of imported merchandise of the same class or kind, and that there were therefore "no grounds for ignoring the statutory preference for use of the importer's profits and general expenses in this case." Pl.'s Comments at 9 (quoting letter to Customs of Oct. 25, 2001). *See* 19 U.S.C. § 1401a(d)(3)(B)(i).

Customs regarded this as non-responsive. "Without this information, Customs cannot determine the deductive value of the merchandise at issue." *Customs Remand Report* at 10. Customs further concluded that the record lacked pertinent information to determine the unit price at which the merchandise concerned is sold in the greatest aggregate quantity after the date of importation of the merchandise being appraised but before the close of the 90th day after the date of such importation. *See* 19 U.S.C. § 1401a(d)(2)(A)(ii). In the end, Customs relied on the appellate court's statement that "the government is correct that if sales between VWPC and VWPA cannot serve as the basis for Transaction Value, then Transaction Value must be based upon sales by VWPA to its U.S. customers. *See* 19 U.S.C. § 1401a(a)(1)(b)." 175 F.3d at 1334. Customs therefore concluded, based upon the hierarchy mandated by 19 U.S.C. § 1401a(a)(1), that the alternative methods of deductive and computed value appraisement are not applicable to this case. *Remand Results* at 14 n.9, 15. Since Customs found related-party transaction valuation unacceptable, it therefore found, again, that "the price paid by the U.S. purchasers[ ] is a proper value either under the transaction value method under 19 U.S.C. 1401a(b) or under the fallback method under 19 U.S.C. 1401a(f)." In the alternative, it stated that "the merchandise could be appraised under 19 U.S.C. 1401a(f) using the VWPA/VWPC prices adjusted to include the charge-backs and selling commissions." *Customs Remand Report* at 15.

DISCUSSION

"Closely approximates."

The plaintiff points out that the VWPC-VWPA related party prices for C9217/1 plaid, 0219 navy melton and 0912 purple melton fabrics are already higher than the transaction value for the Cookshiretex similar fabrics. It contends that the purpose of the "closely approximates" test for the acceptability of related party prices is to ensure that related-party importers do no evade duties by declaring prices that are too low, and therefore additions to the VWPC-VWPA prices are unnecessary since they would only increase the VWPA-VWPC prices. Pl.'s Comments on *Customs Remand Report* at 3, referencing S.Rep. No. 96–249 at 121 (1979), *reprinted in* 1979 USCCAN 381, 507. The plaintiff also urges a comparison of the ranges of prices for Cookshiretex and VWPC fabrics

from the record.[7] It argues that these comparisons can be made without any of the adjustments called for in 19 U.S.C. § 1401a(b)(2)(C)(i) and (ii) to account for any differences in the commercial level of trade (*i.e.*, VPWA as distributor, *see* Tr. at 19, and Lou Levy as end-user, *see* Tr. at 57–58), or for the higher volumes imported by VWPA (*see* Tr. at 172–73), since the adjustments would only make the comparisons more favorable to it. *Id*. at 4.

Customs takes issue with the argument for determining the acceptability of related-party transaction valuation by comparing the price range of the VWPC-VWPA transactions with the price range of the Cookshiretex transactions. It explains that 19 U.S.C. § 1401a(b)(2)(B) contemplates specific transaction valuation of specific imported merchandise based upon a specific test value. The Court agrees. Furthermore, the government argues, "closely approximates" means just that and not "higher than." It argues that a transfer price that is too high would not be any more acceptable than one that is too low. Customs further argues that overvaluation raises serious concerns because of potential problems such as money laundering, tax evasion, and other schemes. *Update to Customs Remand Report* at 5, referencing *United States v. Ismail,* 97 F.3 50 (4th Cir. 1996) (upholding defendant's convictions for violating 18 U.S.C. § 542 by overstating on U.S. Customs documents the value of imported merchandise. Customs therefore takes issue with the characterization of the charge-backs and commissions as "artificial" additions, since they are mandatory to arrive at a transaction value that can then be compared to a test value.

Responding, the plaintiff emphasizes that from the beginning of this matter Customs has consistently resisted transaction valuation of the VWPC-VWPA transfer prices on the ground they were allegedly too *low.* Now, it argues, Customs is erecting a "straw man" argument of concern for overvaluation on the ground that the law requires "accurate" valuation. The plaintiff replies that the problems of money laundering, tax evasion and other schemes, while legitimate concerns, are in no way present in this case. Furthermore, it points out, Customs' "concern" is disingenuous because it is seeking valuation on an even *higher* basis.[8]

The Statement of Administrative Action ("SAA") adopted by Congress with the passage of the Trade Agreements Act of 1979, Pub. L. 96–39, 93 Stat. 144 (1979), indicates that the same considerations apply whether the transaction value is higher or lower than the test value, *viz.*:

> A number of factors will be taken into consideration in determining whether the transaction value "closely approximates" a test value. These factors include the nature of the imported merchandise, the

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[7] The VWPA-VWPC prices during the fiscal quarter in Pl.'s Ex.s 6–40 before any additions to prices ranged from a low of US$3.00 to a high of US$4.80, with one fabric at US$6.15 per yard and the Cookshiretex entries ranged in appraised values from a low of US$2.95 per yard (Def.'s Ex. E–2) to a high of US$4.70 per yard (Def.'s Ex. E–1), with one fabric possibly outside that range at US$5.14 per unit (exhibit is Def.'s Ex. E–6 unclear as to whether the merchandise was entered in meters or yards, but the per-yard price would be US$4.74, or within the range of the other Cookshiretex entries). Pl.'s Comments at 3–4.

[8] "If the imported fabrics are overvalued at the related party transfer prices, *a fortiori* they are overvalued at the appraised values adopted by Customs." Pl.'s Reply at 9.

> nature of the industry itself, the season in which the goods are imported, and whether the difference in value is attributable to integral transport costs in the country of exportation. Since these factors may vary from case to case, it will be impossible to apply a uniform standard, such as a fixed percentage, in each case. For example, a small difference in value in a case involving one type of goods could be unacceptable while a larger difference in a case involving another type of goods might be acceptable in determining whether the transaction value closely approximates any of the "test" values. In this regard, the Customs Service will be consistent in determining whether one value "closely approximates" another value. Therefore, the same approach will be taken in those circumstances when Customs considers a transaction value that is higher than any of the enumerated tests as was taken when the transaction value was lower than any of the enumerated tests.

S.Rep. 96–249, 459–50, *reprinted in 1979 USCCAN* 371, 712. *See* H.Doc. 96–153 (Part II). The Senate Report also states that "the new related party criteria place a special responsibility on the Customs Service to carefully monitor such transactions, both for the purpose of protecting the revenue and for the accurate reporting of the actual value of import trade." *Id*. at 121. Customs' position on this matter, albeit belatedly expressed, is consistent with congressional intent.

Additional Cookshiretex test entry.

The plaintiff argues that Customs' assumption regarding the width of entry E04–0930480–0 is incorrect and that the suggested adjustment to price to account therefor is unnecessary. The plaintiff asserts that Cookshiretex sold melton fabrics only in 58/60 inch widths, an industry standard, and never produced or sold any 40-inch widths of melton. Pl.'s Sur-Reply at 2. For support, the plaintiff provides the affidavit of Bruno Beaudoin, the plant manager at Cookshiretex, to that effect. *Id*. at Ex. A. Additionally, the plaintiff argues that mathematical equivalence supports the foregoing.[9] The plaintiff also notes that the government's analysis of the VWPC-VWPA and the Cookshiretex transactions fails to take into account differences in quantity and commercial levels of trade as required by 19 U.S.C. § 1401a(b)(2)(C), and it further argues that Customs' analysis fails to adjust the Cookshiretex price to account for the difference in the weight of the fabrics. It argues that Mr. Beaudoin's affidavit establishes that Delong Sportswear is an apparel manufactur-

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[9] Specifically, the plaintiff argues that the actual quantity of the fabric must have been 478 linear yards, not the declared quantity of 478 square meters, and that the weight of the fabric was correctly declared as 350 kilograms. The invoice attached to the entry declares the quantity of fabric 514.59 yards weighing 771.89 pounds. Since the fabric was priced and sold by the yard, the plaintiff reasons, "it is safe to assume that the invoice accurately reflects the quantity sold." *Id*. at 3, n.1. Since one yard equals approximately 0.9144 meters, the 514.59 yards reported on the invoice translates into approximately 471.54 linear meter, "which is reasonably close to the 478 meters shown on the entry summary (514.59 x 0.9144)." *Id*. at 3.

Alternatively, the plaintiff points out that the invoice describes the fabric as weighing 24 oz./yard. One linear meter equals 1.0936 linear yards. The equivalent ounces per linear meter is 26.25 ounces (24 x 1.0936). There are 35.27 ounces per kilogram, so the equivalent kilograms/linear meter is 0.7442 kilograms. Multiplying 0.7442 kilograms times 471 linear meters yields a gross weight of 350.51 kilograms, "almost exactly the 350 kg reported on the entry summary." *Id*. Therefore, based on Mr. Beaudoin's affidavit and its own calculations, the plaintiff argues that Customs' proposed upward adjustment of entry E04–0930480–0 to account for a supposed different in the width of the fabrics was unnecessary. *Id*.

er, a "different level of commerce," *id*. at 4, and it contends there is sufficient information in the record upon which to base a level of trade adjustment. It asserts that the difference between a distributor price and end-user/manufacturer price is normally the distributor's mark-up and that the audited financial statements of VWPA establish a distributor mark-up of 24.6% (the selling and administrative expenses of 12.5% and profit of 12.2%). It asserts that the record further establishes that the VWPC-VWPA business arrangement was typical and not unusual. *Id*. at 4, n.2, referencing Tr. at 492 (Testimony of Customs Auditor Mr. Gosslin). Applying this adjustment to the Cookshiretex price of US$4.75 results in a downward adjustment of US$1.17 per yard (4.75 x 0.246). The plaintiff also contends that the test value should also be adjusted downwards by US$0.10 to account for the difference in the weight of the fabrics, along the lines of the adjustment Mr. Duval made at trial in order to arrive at a proper comparison. The plaintiff further asserts that an adjustment for differences in quantity would be proper. If the record contains insufficient information to make such an adjustment, the plaintiff notes that Delong is a manufacturer and VWPA is a distributor, and therefore it would be reasonable to infer that VWPA imported substantially more fabric than Delong. Nonetheless, the plaintiff asserts that even without an adjustment for quantity the VWPC-VWPA price of US$3.35 "closely approximates" the test value price, adjusted in accordance with its foregoing calculations, of US$3.48.

The government responds that: (1) if the plaintiff's affidavit is correct and the entered value and width are incorrect, none of the information in the entry can be considered a statutory transaction value that was "accepted" by Customs;[10] (2) the volume of this Cookshiretex transaction was 514 yards whereas the import volume of the allegedly similar VWPC fabric ranged from *one* yard to 302 yards, and it asserts that "there is absolutely no evidence of record [to indicate] that the sales price on a high volume sale would be the same on a low volume sale[,]" (3) regardless of any adjustment to account for differences in width, Customs determined that the test value and the chosen VWPCVWPA transaction were not "closely approximate;" (4) 19 U.S.C. § 1401a(b)(2)(C) does not permit adjustments to account for differences in weight and there is no indication of what the actual weight of the comparable VWP fabric was in any event; (5) there is insufficient information upon which to base an adjustment to the additional Cookshiretex entry to account for the different commercial levels involved;[11] and (6) the plaintiff's proposal to make adjustments based upon VWPC's own markup to VWPA for purposes of comparison is problematic and unacceptable because (a) there is no means of assuming what the Cook-

[10] The government also maintains that the "the appraised value accepted by Customs, based upon the CF 7501 filed by Cookshiretex, was an appraised value for fabric that was 482 meters/40 inches wide. It was not an appraised Transaction Value that was accepted by Customs for 58/60 fabric." Def.'s Sur-Reply at 9.

[11] Specifically, the government states that the "analysis producing for comparisons of entries by making adjustments for the different weights of the fabrics has no basis in the statute or in the record–there is no testimony that different weight fabrics are, in fact, similar merchandise, simply because the price per yard can be compared based upon the adjustment of the different weights of the fabrics." *Id*. at 10.

shiretex sale price would have been if an intermediary had been involved, (b) using that mark-up as the *bona fides* would be bootstrapping since that issue is precisely what this case is about, and (c) again, the adjustment would not result in a "closely approximates" comparison in any event, since the VWPA-VWPC transaction, once it is adjusted for selling commission and charge-back expenses, would still be approximately 15% higher. Def's Sur-Reply at 8–11.

The Court accepts the plaintiff's argument that entry E04–0930480–0 involved a 58-inch width, however the government's analysis of the other issues appears correct. Assuming *arguendo* that the dutiable charge-back expenses may be properly determined, the Court is persuaded that the evidence does not show that the additional Cookshiretex entry "closely approximates" the VWPAVWPC transfer price to which the entry could be compared.

"Charge-back" and commission expenses.

Regarding the commissions paid to Concept III by VWPA, the plaintiff urges the Court to consider allocating the commission payments between VWPC and VWPA in accordance with the Court's finding that Concept III was the agent of both. The plaintiff argues that only that portion of Concept III's activities on behalf of the seller should be included in transaction value and that the fair and equitable thing to do in this instance is split the amount of the commissions evenly between the companies. Customs objects to this suggestion and argues that amounts equal to "any selling commission incurred by the buyer with respect to imported merchandise" are properly added to or included in the price paid or payable, *see* 19 U.S.C. § 1401a(b)(1) & (4). Since VWPA paid the full commission to Concept III and the Court was unable to distinguish the commissions paid to Concept III as relating "solely" to VWPA's U.S. sales, Customs maintains that the full amount is dutiable. The government further argues that even if there is an *arguendo* basis for concluding that only portions of the commissions were dutiable, there is "insufficient information" in the record upon which to determine such apportionment. Consequently, it contends the plaintiff's claimed transaction values should be rejected pursuant to the last clause of 19 U.S.C. 1401a(b)(1) ("If sufficient information is not available, for any reason, with respect to any amount referred to in the preceding sentence, the transaction value of the imported merchandise concerned shall be treated, for purposes of this section, as one that cannot be determined.")

Regarding the "charge backs" remitted to VWPC by VWPA , the plaintiff argues that the evidence shows that they "were for services billed monthly and paid separately without regard to shipment of fabrics to the Unites States in a given month." *Id*. at 6, referencing Pl.'s Ex. 60, Tr. 173–174, 271–273. It therefore contends that the charge-back expenses are not "directly related" to the imported merchandise and should not be included in transaction value under 19 U.S.C. § 1401a(b)(1)(E). It argues that Customs' "completely unrelated" requirement regarding the chargeback expenses contradicts the "directly related" standard of 19

C.F.R. § 152.103(g) and should be disregarded. For support, the plaintiff references "twenty years worth" of Customs rulings finding the types of charges at issue to be non-dutiable, including HQ 542122 (Sep. 1, 1980) (payments for management, accounting, legal and other services), HQ 543512 (Apr. 9, 1985 (payments for management services, accounting, finance, planning and clerical activities); HQ 544353 (Oct. 24, 1989) (payments for general administrative services including but not limited to management, accounting and legal services); HRL 545420 (May 31, 1995) (payments for management service fees for financing, accounting, administration and clerical services), HQ 546801 (Nov. 5, 1998) (payments for accounting and legal expenses). Furthermore, it points out, the January 2001 edition of the *Customs Valuation Encyclopedia (1980–1999), An Informed Compliance Guide* continues to represent Customs' official public position on the dutiability of these types of expenses. In it, HQ 543512 appears in the section entitled "payments unrelated to the imported merchandise." This is in direct contrast, the plaintiff emphasizes, to the position the government has taken in this matter and its argument over the proper interpretation of *Generra Sportswear Co. v. United States*, 905 F.3d 377 (Fed. Cir. 1990). The plaintiff also calls particular attention to HRL 545420 which found, on the authority of *Generra*, that quota payments had to be added to the transaction value of the imported merchandise but *not* the management services considered therein. Pl.'s Comments at 7.

The government responds that Customs has no "long standing" rule regarding the dutiability of the charge back expenses at issue and that they are handled on a case by case basis. It states that in light of *Generra*, *supra*, Customs presumes such payments to be dutiable and shifts the burden to importers to disprove. It further states that Customs gives little weight to HRL 543512 because the ruling pre-dated *Generra*, and unlike the instant matter the fees considered therein reflected time spent by management personnel *in* the United States. *Update to Customs Remand Report* at 7.

The plaintiff responds that HQ 543512 is still valid and that the government's assertions regarding its applicability post-*Generra* are disingenuous. The plaintiff points out that HRL 545420 (May 31, 1995) was issued some *five years* after *Generra*. HRL 545420 considered certain management fees and relied on *inter alia* HQ 543512 to find that fees paid for arranging financing, accounting services, administration and clerical activities *were not* to be included in the transaction value. Finally, the plaintiff notes that Customs has avoided answering whether the charge-back expenses were "directly related" to the importations, as required by 19 C.F.R. § 152.103(g) and the Court's remand order. The plaintiff further argues that Customs' "completely unrelated" test, in addition to being contrary to Customs' own regulation, is impossible to prove, since a payment "completely unrelated" to the importation would depend upon a profitable United States resale.

The government argues that the rulings upon which the plaintiff relies are irrelevant here. Post-*Generra*, the government avers, Customs applies the *Generra* criteria and does not follow HQ 543512 in the context of the price paid or payable or in the context of section 1401a(b)(1)(E) proceeds. It argues that the plaintiff's reliance upon HRL 545420 (which relied on HQ 543512) is misplaced because Customs rulings before and after HRL 545420 applied the *Generra* interpretation of "price paid or payable," and furthermore because HRL 545420 was concerned with the issue of the dutiability of management payments as "assists" pursuant to 19 U.S.C. § 1401a(b)(1)(C) and (h), which the government contends are limited by statute to matters possessing a "relationship to the production process of the imported merchandise." Def's Sur-Reply at 5. The government argues that the management fees in issue in HQ 543512 and HRL 545420 "could not, by statute, be dutiable as assists." *Id*. The government also contends that the plaintiff's position is contrary to *Nissho Iwai American Corp. v. United States,* 16 CIT 86, 94, 786 F. Supp. 1002, 1010 (1992), wherein the court held that accounts receivable insurance paid by a parent to its U.S. subsidiary is dutiable. 16 CIT at 94, 786 F.Supp. at 1010, *rev'd on other grounds*, 982 F.2d 505 (Fed. Cir. 1992). The government maintains that Customs' position here is in accordance with *Moss Manuf. Co. v. United States*, 896 F.2d 535, 538 (Fed. Cir. 1990) and *Generra*, *supra*, wherein the Court of Appeals for the Federal Circuit held that costs or payments were part of statutory transaction value, even though they were not part of the sales price of the merchandise, if they were made to the seller or for the benefit of the seller. *Id* at 6. Finally, it contends that Customs rulings have followed *Generra*, both before and after HRL 545420, to hold administrative and supervisor costs paid to the seller as part of the "price paid or payable" or "proceeds" in the context of 19 U.S.C. § 1401a(b)(1)(E). *Id*. at 4, 7, referencing HRL 545848 (Sep. 1, 1995); HRL 545500 (Mar. 24, 1995); HRL 544764 (Jan. 6, 1994); HRL 544701 (Mar. 1, 1993).

Customs' presumption that all payments made by a buyer to a seller are part of the price paid or payable for imported merchandise is consistent with the holding of *Generra*, and the "directly related" standard of 19 C.F.R. § 152.103(g) is not inconsistent therewith. *Cf.* 175 F.3d at 1340. To the extent Customs' presumption appears inconsistent with 19 C.F.R. § 152.103(g), the regulation has not been amended post-*Generra*, and the order of remand instructed Customs "to include such proceeds as are appropriate for inclusion in the price actually paid or payable for the imported merchandise" consistent with that regulation. The government, however, also contends that if Customs cannot rely upon the presumption, and if the plaintiff is correct that some of the charge-backs are not dutiable, then the plaintiff still has the statutory burden of proving the precise amounts that are dutiable and which charge-backs must be added to the VWPC-VWPA price to arrive at the proper statutory transaction value. It contends that VWPA has not borne its burden of

proof on this issue, and that without proof as to the precise amount of dutiable charge-backs for each entry there can be no statutory transaction valuation. Def's Sur-Reply at 1–4. The Court is constrained to agree. Even assuming *arguendo* it is appropriate to split the commission paid to Concept III between VWPA and VWPC, there is insufficient information on the record for apportionment, and there is likewise insufficient information in the record for determining which charge-backs were dutiable and which were not. Transaction valuation on the basis of the VWPA-VWPC transfer prices therefore remains problematic.

Deductive valuation.

Regarding the deductive valuation alternative, the plaintiff maintains that in accordance with 19 U.S.C. § 1401a(g)(3), the amount of the general expenses and profits deduction that was derived from its certified audited financial statements cannot be rejected by Customs. It objects to the manner in which Customs has treated the issue, arguing that Customs did not, despite the plaintiff's repeated attempts to contact Customs after remand to determine what source documents would satisfy Customs' concerns over the proffered deductive value statement, work with the plaintiff, as mandated by the remand order, to resolve the issue. The plaintiff complains that Customs issued a vague request for "source documents" in its "eleventh hour" letter of October 23, 2001 before the remand report was due. The plaintiff argues this was tantamount to a request for all of its business records for the period concerned.

Regarding the government's concerns over source documentation to support the plaintiff's deductive valuation claim, the plaintiff asserts that the government had 55 days from the Court's order to comply, and despite the plaintiff's attempt to confer with Customs on the matter, Customs waited until *after* the Court's denial of the government's motion for an extension of time to issue any request therefor to plaintiff's counsel and provided only two days to respond. The plaintiff argues that this was dilatory and that it was unreasonable to expect instant production of "source documents"related to expenses and profits, as described in Customs' request, which was tantamount to a request for *all* records, including purchase and sale invoices. The plaintiff argues that under the circumstances, the Court should accept the audited financial statements of VWPA which are part of the record of this proceeding as "more than adequate" to support the claimed deductive values. In the alternative, the plaintiff requests a 30-day extension so that Customs may conduct its own verification, independent of VWPA's independent auditors. Regarding the acceptability of VWPA's claimed deductions, the plaintiff argues the burden is upon the government to prove that they are inconsistent with the class or kind, not on VWPA to prove that they are consistent with the class or kind. The plaintiff argues there is no basis in the record for ignoring the statutory preference for use of VWPA's general expenses and profits in calculating a deductive value for the imported merchandise, and it further criticizes Customs for raising the issue of

"greatest aggregate quantity" in its report without requesting this information from the plaintiff. It contends that such information has always been in the record in any event, since the entry documents in this case and in those on the suspension disposition calendar indicate all the relevant VWPA's resale prices over the period.

Regarding the plaintiff's response to request for source documents to support deductive valuation, Customs continues to believe that the summary documents provided at trial are insufficient to determine deductive value. Accordingly, Customs adheres to its conclusions as set forth in its remand report. The government contends that the plaintiff's inability to provide deductive value information was due to its own lack of cooperation, not the government's. The plaintiff *opposed* the government's motion for the extension of time that was ultimately denied by the Court. The government states that the two-day deadline that Customs gave to the plaintiff to provide the source documentation to support deductive valuation was the result of the Court's denial of the government's motion. The government explains as follows.

> Because Customs did not know whether deductive value information would be needed from VWPA to determine the appraised value until after Customs had received and analyzed the data regarding transaction value of identical or similar merchandise, customs did not request deductive value information from VWPA immediately after issuance of the Court's remand order. These delays were compounded by the following facts: counsel for defendant was out of town taking numerous depositions in a variety of cases during this period; shortly after counsel returned, the World Trade Center attack occurred on September 11; our offices were closed from September 11, 2001, until September 24, 2001; when we returned, we were seriously hampered by the lack of telephone lines and e-mail capability until well into October, and the need to catch up with many deadlines; the ability to communicate with Customs was seriously hampered, and it was not until well into October that we were able to complete the copying and transmission of the trial record and exhibits to Customs in Washington, DC[.]

Def.'s Sur-Reply at 13–14. In sum, the government maintains, without the source documentation it cannot agree to the proffered deductive values.

Customs' position on the acceptability of the plaintiffs' certified financial statements appears rather draconian, however the situation is apparently one in which the plaintiff bears some responsibility for opposing the government's motion for extension of time. In the final analysis, the Court concludes that the plaintiff has not borne its burden with respect to proving the reliability of its proposed deductive valuation method.

VWPA-U.S. purchaser transaction valuation; fall-back valuation.

The plaintiff argued that there is sufficient information on the record for appraisement on the basis of either transaction or deductive valuation and therefore the fallback method of appraisement is improper.

That does not appear to be the case, however the government argues that if transaction valuation on the basis of the VWPC-VWPA sales was not possible, the "next statutory value" is the transaction value between VWPA and the U.S. purchasers, according to the appellate court's remand decision. *See* 175 F.3d at 1334 ("The government is correct that if sales by VWPC to VWPA cannot serve as the basis for transaction value, then transaction value must be based upon sales by VWPA to its U.S. customers. *See* 19 U.S.C. § 1401a(a)(1)(B).").

The Court rejects the government's argument that the appellate decision mandated that the "next statutory value" is the transaction value between VWPA and the U.S. purchasers pursuant to 19 U.S.C. § 1401a(a)(1(B). The appellate court also decided that the VWPC-VWPA sale was a "sale for exportation" within the meaning of 19 U.S.C. § 1401a(b)(1) and therefore was a possible basis for transaction valuation. 175 F.3d at 1339. The government's argument here raises the question of whether the VWPA-U.S. purchase sale was *also* a "sale for exportation" within the meaning of 19 U.S.C. § 1401a(b)(1). That position that does not, at first blush, appear unreasonable, given that importation by VWPA was dependent upon and was caused by the acceptance of an order from a U.S. purchaser, however subsection (a)(1)(B) states that if valuation under subsection (A)[12] cannot be determined or used, then Customs must look to the "transaction value of identical merchandise provided for under subsection (c) of this section[.]" 19 U.S.C. § 1401a(a)(1)(B). Subsection (c) states, *inter alia*, that "with respect to the merchandise being appraised[,]" the transaction value of "identical" or "similar" merchandise that is "exported to the United States at or about the time that the merchandise being appraised is exported to the United States" may be acceptable. 19 U.S.C. § 1401a(c)(1). Subsection (c)(2), moreover, states that:

> Transaction values determined under this subsection shall be based on sales of identical merchandise or similar merchandise, as the case may be, at the same commercial level and in substantially the same quantity as the sales of the merchandise being appraised. If no such sale is found, sales of identical merchandise or similar merchandise at either a different commercial level or in different quantities, or both, shall be used, but adjusted to take account of any such difference. Any adjustment made under this paragraph shall be based on sufficient information. If in applying this paragraph with respect to any imported merchandise, two or more transaction values for identical merchandise, or for similar merchandise, are determined, such imported merchandise shall be appraised on the basis of the lower or lowest of such values.

19 U.S.C. § 1401a(c)(2).

Subsection (c) transaction valuation thus contemplates resort to a different sale than the sale of the merchandise being appraised. The government's interpretation is incorrect because it involves not com-

[12] *I.e.*, the transaction value of the imported merchandise determined under 19 U.S.C. § 1401a(b)(1).

parison but contemplation of the sale of the merchandise being appraised at the ultimate purchaser level.

Nonetheless, given that "[t]he government is correct that if sales by VWPC to VWPA cannot serve as the basis for transaction value, then transaction value must be based upon sales by VWPA to its U.S. customers", 175 F.3d at 1334, valuation on the basis of the VWPA-U.S. purchaser transaction under 19 U.S.C. § 1401a(f) appears to be the appropriate resolution of this matter.

CONCLUSION

Judgment for the government will enter accordingly.

(Slip Op. 03–31)

AMERICAN SPORTING GOODS, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 95–05–00627

[Judgment for plaintiff.]

(Dated March 20, 2003)

Grunfeld, Desidero, Lebowitz, Silverman & Klestadt LLP *(Robert B. Silverman* and *Erik D. Smithweiss),* 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, United States Department of Justice *(Bruce N. Stratvert),* for the defendant.

OPINION

GOLDBERG, *Senior Judge:* This matter is before the Court following trial *de novo.* At issue is the proper classification of six entries of certain footwear that the plaintiff calls "chula" sandals ("sandals"). The parties agree on the basic nature of the merchandise in dispute and that it is classifiable as "[o]ther footwear with outer soles and uppers of rubber or plastics: [o]ther footwear" under heading 6402 of the 1994 Harmonized Tariff Schedule of the United States ("HTSUS").

They part company with respect to a single issue: whether the external surface area of the upper ("ESAU") of the sandals is more than 90 percent rubber or plastic. If, as the plaintiff claims, such is the case, the parties agree that the sandals are classifiable under subheading 6402.99.15, HTSUS, and dutiable at a rate of 6 percent *ad valorem.* If, however, the ESAU is less than or equal to 90 percent rubber or plastic, then Customs's classification of the sandals under subheading 6402.99.30, HTSUS, and assessment of duty at a rate of 37.5 percent *ad valorem* must stand. Upon review of the merchandise, the exhibits, the testimony of record, and the applicable law, the Court finds in favor of the plaintiff.

I. BACKGROUND

Prior to the dispute that gave rise to this litigation, the plaintiff imported and distributed chula sandals manufactured according to its design and specifications by an independent factory in Shanghai, China.[1] In May and June, 1994, the plaintiff imported a total of six shipments comprising 65,736 pairs of such sandals in various sizes and styles for children, youth, boys, men, and women, and entered them under HTSUS 6402.99.15 as "[o]ther footwear with outer soles and uppers of rubber or plastics: [o]ther footwear: [o]ther: [h]aving uppers of which over 90 percent of the external surface area * * * is rubber or plastics * * *: [o]ther: [o]ther * * *."

In June 1994, Customs tested a single sample from the first shipment, a size 10 in one of the two men's styles, and determined that its ESAU was 89.7 percent rubber or plastic. Consequently, Customs liquidated all six shipments of sandals under subheading 6402.99.30, HTSUS, as "[o]ther footwear with outer soles and uppers of rubber or plastics: [o]ther footwear: [o]ther: [o]ther: [f]ootwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners * * *."

The plaintiff protested the classification and provided Customs with five additional sandals in other styles and sizes, as well as analyses of the other half of each pair conducted by an independent commercial laboratory that determined the ESAU of each sample to be above 90 percent rubber or plastic. Customs declined to conduct tests on these additional samples, denied the protest on November 9, 1994, and denied a request for reconsideration on February 13, 1995. The plaintiff then appealed the denial of protest to the Court of International Trade, and the matter proceeded to bench trial.

The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a).

II. DISCUSSION

A. Findings of Fact

Based on the evidence adduced at trial, together with the supporting exhibits, the Court hereby adopts the following findings of fact.

1. Production of the subject merchandise

Mr. John Thomas, vice-president of the plaintiff,[2] testified that eligibility for the lower tariff rate applicable under subheading 6402.99.15, HTSUS, was, together with aesthetic appeal, the primary consideration in the design of the sandals. Before mass production of the subject merchandise began, the plaintiff prepared a prototype pattern in a size 8, and confirmed that it exceeded the 90 percent threshold by several percentage points, as intended. Prototypes for the other models and sizes

[1] According to the plaintiff, Customs's adverse tariff ruling led it to modify subsequent production of chula sandals to increase the percentage of rubber or plastic in the ESAU. This alteration proved to be aesthetically unappealing and destroyed the commercial viability of the product, leading the plaintiff to cease production and importation of the sandals.

[2] Mr. Thomas is responsible for design, development, and quality control, and has more than 30 years experience in product design. His testimony was substantially unimpeached.

were unnecessary because the sandal design was scalable, so that the percentage of rubber and plastic in the ESAU would not change markedly from one type of sandal to the next. The importance of maintaining the "duty feature" was communicated to the Shanghai factory fulfilling the plaintiff's orders, a request familiar to the factory from its production for other U.S. importers.

However, the production of sandals is not a matter of scientific precision. Production variances occur because the upper is connected to the sole by hand. The sole is mounted on a last, and the straps of the sandal are pulled through the slots in the sole and fastened; how slackly or tautly this is done necessarily affects the total ESAU of the sandal. Because hand-lasting introduces greater risk of production variances, the plaintiff's employees visually inspect ten percent of all pairs in a shipment for unacceptable production variances, and examine the entire lot if five percent of the initial pairs sampled evince a defect.

2. Measurement of the ESAU of footwear

Customs Laboratory Method 64–01 ("Method 64–01") establishes the proper methodology for measuring the ESAU of footwear.[3] According to Method 64–01, either of two instruments is permissible to conduct such measurements: a polar compensating planimeter ("polar planimeter"), or an image analyzer. Because both of these instruments are capable of measuring only two-dimensional surfaces, the three-dimensional footwear uppers must be reduced to two dimensions in order to be measured.

To that end, Method 64–01 directs the tester to: (1) identify all external surfaces to be included in the determination of the size of the upper; (2) cut off all such external surfaces, and, if necessary, cut them again so that they lie flat; (3) trace around the border of surfaces to be measured in white if necessary to heighten the contrast with surrounding surfaces; (4) lay the detached external surfaces flat and photocopy the image[4]; (5) trace around the area of each material type (e.g., plastic or textile) on the photocopied image of the ESAU; (6) use a polar planimeter or image analyzer to measure at least twice the relative surface area of each material; and (7) calculate the average value for the area of each material and the average total area of all materials, and then calculate the relative percentage area for each material.

According to Customs's guidelines, the external surface to be included in the determination of the area of the upper "is, in general, the outside surface of what you see covering the foot * * * when the [footwear] is worn." Treas. Decision 93–88 (Oct. 25th, 1993). Thus, with re-

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[3] The parties agree that Method 64–01 sets forth the accepted methodology for testing the ESAU of footwear, but dispute whether their respective testers properly adhered to it. Because the reliability of the methodology is not in doubt, the standards for evaluating reliability enumerated by the Supreme Court in *Daubert v. Merrell Dow,* 509 U.S. 579 (1993), and by the Court of Appeals in *Libas, Ltd. v. United States,* 193 F.3d 1361 (Fed. Cir. 1999), are not relevant to the disposition of this case.

[4] Despite the instruction in Method 64–01, strictly speaking it is no longer necessary to produce a photocopy for use by an image analyzer, as an image analyzer is usually paired with a photoreceptive scanner that records a two-dimensional image of the sample. Nevertheless, the necessity of ensuring that the sample lies flat remains constant in either case.

spect to the sandals at issue here, a tester would not include the lower, inner portion of the strap binding the wearer's foot in place, to the extent that it were overlaid by (and attached by velcro to) the upper, outer portion of that same strap. Unspecified by Method 64–01 and Customs guidelines, however, is the extent to which the upper strap *should* overlie the lower one. This issue has ramifications in the instant case, because a portion of the lower strap is composed of textile (i.e., not rubber or plastic) that is exposed if the velcro on the upper strap is not matched precisely to the velcro on the lower strap.

3. Deficiencies in Customs's test for ESAU

In June 1994, the Customs Testing Laboratory analyzed the sample pulled at random from the plaintiff's inital shipment of subject merchandise. The first Customs analyst, Mr. Melvin Barber, tested the sandal twice using an image analyzer, and determined the ESAU to be composed of 89.3 and 90.1 percent rubber or plastic on the first and second occasions, respectively. Because his results were close to and above the 90 percent threshold, a different Customs tester, Mr. Brian Kennedy, performed a third test, and obtained a result of 89.7 percent rubber or plastic. The raw data for the three tests was aggregated, yielding a final, official determination that the ESAU was 89.74 percent rubber or plastic. On the basis of this determination, Customs liquidated the sandals under subheading 6402.99.30, HTSUS, and denied the plaintiff's subsequent protest. The sample and a single rather poorly-contrasted photocopy of the sample were retained, but the individual calculations with respect to each part of the sample were lost. Neither Mr. Barber nor Mr. Kennedy was deposed or testified at trial. In 1997, after the instant suit was initiated, Customs retested the original sample five times, and obtained measurements of the ESAU ranging from 88.2 to 89.9 percent rubber or plastic.

In preparation for the instant litigation, the plaintiff commissioned Consumer Testing Laboratories ("CTL"),[5] to examine the sample tested by Customs as well as Customs's analyses of that sample. Mr. Hemant Patel,[6] who at that time was CTL's laboratory technical manager, used a polar planimeter[7] to test both the image obtained by Customs in 1994 from the original sample, as well as photocopies of the sample that he made himself.[8] He found that the ESAU of Customs's own 1994 image was 90.47 percent rubber or plastic. His calculations for each of the three photocopies that he made of the original sample yielded an ESAU of 92.10, 91.29, and 91.08 percent rubber or plastic, respectively.

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[5] CTL is a commercial testing laboratory that regularly tests the ESAU of footwear for persons in the import community. The Court of International Trade accepted CTL's footwear ESAU analyses in a previous case. *See Hi-Tech Sports USA v. United States,* 21 CIT 212, 213, 958 F. Supp. 637, 638 (1997).

[6] Mr. Patel holds a master's degree in mechanical engineering from the Massachusetts Institute of Technology, and has tested footwear at CTL since the 1970's, conducting several thousands ESAU tests. He is now a vice-president at CTL.

[7] Mr. Patel used a Planex–5 planimeter, which had been tested and shown to be accurate within –0.062 percent, well within the +0.2 percent tolerance specified by Method 64–01.

[8] Mr. Patel did not test the first set of photocopies that he made of the sample, because he found that he had not followed the correct procedure for obtaining a proper photocopied image.

In addition, Mr. Patel found that approximately 0.25 square inches of the ESAU, composed of rubber or plastic, was improperly not severed from the outer sole of the original sample. He calculated that including this portion in the determination of the ESAU would increase the rubber or plastic proportion of that area by approximately 0.05 percentage points. Dr. Doemeny conceded Custom's error, but stated that the magnitude of the error would not materially alter Customs's classification decision.

Mr. Patel suggested that the discrepancies between Customs's results and his own could be inferred from deficiencies in Customs's 1997 tests. First, Mr. Patel emphasized that an accurate analysis requires that the samples be completely flat when photocopied or scanned. The presence of shadowing, and the oval shape of circles on the straps, indicated that the images that Customs obtained in 1997 were not made when the sample was lying completely flat. Second, he testified that the velcro visible on the lower strap in the 1997 images indicated that Customs's tester had failed to "normalize" the straps—i.e., to match velcro-to-velcro, which both he and Mr. Thomas testified was the normal position for the straps.[9]

Dr. Paul Doemeny and Ms. Marian Samarin of the Customs Service Laboratory[10] both took the stand in part to refute Mr. Patel's testimony. Ms. Samarin explained that the 1997 tests were conducted purely in consideration of the pending litigation, and that the Customs testers were deliberately tweaking the sample as an experiment.[11] However, neither Dr. Doemeny nor Ms. Samarin had direct knowledge of how the 1994 image was obtained, so neither was able to testify as to whether the sample in that image was lying completely flat.

In addition, both gave contradictory testimony with respect to whether the lower and upper straps should be normalized so that they match velcro-to-velcro. Dr. Doemeny testified that in the initial test, the straps were matched velcro-to-velcro, but subsequently stated that they should be laid according to their "natural crease." Ms. Samarin testified that it was not normal Customs practice to match velcro-on-velcro. However, in her deposition testimony, she claimed that it was normal practice to match velcro-to-velcro, but that to do so would not be appropriate in this case because the strap would bulge, and that instead the strap should be cut to eliminate such a bulge. There was no evidence that any Customs analyst consistently followed this or any other practice, however.

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[9] Mr. Patel testified—although his recollection of this event was hazy—that a Customs official lecturing at a footwear conference had stated that the normal procedure was to match velcro to velcro. One of the two Customs officials at the conference testified that he could not recall giving such an instruction. Mr. Thomas explained that, from a design and marketing standpoint, matching velcro-to-velcro produced the most attractive appearance for the sandal.

[10] Dr. Doemeny holds a Ph.D. in Chemistry and has worked as an assistant research chemist at the Customs Testing Laboratory since 1973. Ms. Samarin has worked at the Customs Testing Laboratory as a full-time footwear analyst since 1990.

[11] The Court gives credence to this testimony. At the same time, it bears notice that Ms. Samarin did maintain that the original sample was positioned completely flat for the 1997 tests. Ms. Samarin testified that the apparent oval shape of the circles could be shadows caused by the scanner for the image analyzer, and Dr. Doemeny testified that the apparent shadows in the 1997 images could actually be velcro.

4. Plaintiff's tests for ESAU

After learning of Customs's initial test result finding anESAU of 89.7 percent rubber or plastic, one Ms. Jane Y. Mo, an employee of the plaintiff who did not testify,[12] apparently contacted the Shanghai factory to confirm that the sandals were produced to the plaintiff's specifications including with respect to the percentage of rubber and plastic in the ESAU. Mr. Thomas also instructed Ms. Mo to select[13] additional samples from the entries for analysis by CTL.[14] At CTL, Mr. Jim Bibeault[15] tested the five samples, which included sizes 9 and 11 of men's sandals in the same style as the initial sample tested by Customs; ladies' sizes 5 and 7; and a youth's size 6. The aggregate percentage of rubber or plastic in the ESAU of each sample was 91.7; 91.8; 91.3; 92.9; and 91.7, respectively. Mr. Bibeault's work and results were supervised by Mr. Patel, and Mr. Bibeault testified that he paid particular care to the necessity of ensuring that the sample was flat before photocopying, and of normalizing the straps.

B. Conclusions of Law

Customs's tariff classification decisions enjoy a statutory presumption of correctness, and the burden of proving otherwise rests upon the party challenging such decisions. 28 U.S.C. § 2639(a). However, the presumption of correctness "does not add evidentiary weight; it simply places the burden of proof on the challenger." *Anhydrides & Chems., Inc. v. United States,* 130 F.3d 1481, 1486 (Fed. Cir. 1997).[16] Thus, although

> the methods of weighing, measuring, and testing merchandise used by [C]ustoms officers and the results obtained are presumed to be correct, * * * this presumption may be rebutted by showing that such methods or results are erroneous. Furthermore, the presumption does not have evidentiary value and may not be weighted against relevant and material proof offered by the plaintiffs. If a *prima facie* case is made out, the presumption is destroyed, and the Government has the burden of going forward with the evidence.

Aluminum Co. of America v. United States, 60 CCPA 148, 151, 477 F.2d 1396, 1398–99 (1973) (quoting with approval *Consolidated Cork Co. v. United States,* 54 Cust. Ct. 83, 85 (1965)) (citations omitted).

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[12] The substance of Ms. Mo's actions were recounted by Mr. Thomas. Although Customs did not object on this ground, much of the testimony concerning Ms. Mo's actions is hearsay. The Court recounts it here because it is useful background information and is not central to the disposition of the case.

[13] Mr. Thomas testified that he instructed Ms. Mo to pull, or have the warehouse manager pull, the samples at random, and that she would have done so, but there is no real evidence either to confirm or refute this detail.

[14] The plaintiff also sent a sample or samples for analysis to U.S. Testing, a different commercial testing laboratory, but there is no evidence that such an analysis was ever conducted.

[15] Since June 1993, Mr. Bibeault has worked as a testing engineer at CTL, where he peforms approximately 300 polar planimeter tests a year.

[16] Moreover, the presumption of correctness applies only to the factual basis of such decisions, and not to their legal component, with respect to which the Court of International Trade exercises *de novo* review. *See Universal Elecs., Inc. v. United States,* 112 F.3d 488, 492 (Fed. Cir. 1997); *Anhydrides,* 130 F.3d 1485–1486. However, because the Court agrees with the parties that the subject merchandise should be classified under either of their competing proposed classifications, the disposition of this case turns on a purely factual issue, *viz.,* whether the ESAU of the sandals is greater than 90 percent plastic. *Cf. Anhydrides,* 130 F.3d at 1482–83 ("The application of the correctly interpreted tariff classification to a particular article is a question of fact.").

In *Aluminum Co.,* the court considered the claim of a plaintiff who argued that Customs had erred by classifying the subject merchandise as fluorspar containing not over 97 percent by weight calcium fluoride. The court found that the plaintiff established its prima facie case by submitting evidence of multiple analyses of the merchandise, conducted according to Customs's own established testing method, each of which showed the calcium fluoride content to exceed 97 percent. 60 CCPA at 151, 477 F.2d at 1399. After weighing the evidence, the court found that the preponderance of the evidence supported the plaintiff's proposed classification, and ruled accordingly. *Id.* at 151–52; 477 F.2d at 1399–1400.

Thus, the plaintiff in a case such as this may make out a prima facie case either by showing that Customs's results or methods are erroneous, *Consolidated Cork,* 54 Cust. Ct. at 85, or by "submitting evidence of analysis [that the plaintiff] applied to the merchandise which gave a result different from that claimed by the Government." *Aluminum Co.,* 60 CCPA at 151, 477 F.2d at 1399. The plaintiff here has done both. The question becomes, therefore, whether this evidence, when weighed against that produced by Customs, is such that the plaintiff has carried its burden of proving by a preponderance of the evidence that the rubber or plastic content of the ESAU of the subject merchandise is greater than 90 percent.

The Court finds that the plaintiff has met its burden, for three related reasons. First, the plaintiff raised some doubts about the precision of Customs's 1994 test, by noting the minor but still important failure to sever the upper cleanly from the sole, and by highlighting Customs's inability to define a standard practice with respect to matching the upper and lower straps, suggesting a confused or inconsistent approach in that regard. While it may not be fair to impute the deficiencies in Customs's 1997 tests to the 1994 tests (about which Customs's records are scant), as Customs's witnesses and counsel expressly disclaimed reliance on the 1997 tests, that fact points to a second consideration. Stated plainly, the plaintiff adduced evidence of its own test on six different samples, each of which was determined to have an ESAU above 90 percent rubber and plastic, whereas Customs relied only on its original, underdocumented test on a single sample.[17] More extensive testing is particularly likely to be more reliable with respect to merchandise such as the plaintiff's that is subject to normal production variances. Nor was Customs able to point to any significant flaws in the plaintiff's own test results.

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[17] In this case, Customs has persisted in a mistaken belief that some special talismanic power or authority attaches to the results of the test on which it based its original classification decision. The Court must make its determination on the basis of the record before it, comprising the evidence introduced at trial, rather than that developed by Customs. *Automatic Plastic Molding, Inc. v. United States,* Slip Op. 02–120, at 3–4 (CIT October 5, 2002) (quoting *United States v. Mead Corp.,* 533 U.S. 218, 233 n.16 (2001)). In light of Customs's poor custody of the data for the initial test results and its failure to make available the persons who conducted the 1994 tests, any other rule would make it very difficult indeed for the plaintiff to prevail.

Still, the plaintiff's evidence can hardly be called overwhelming,[18] and it might not have been enough to triumph were it not for the fact that Customs went to trial already backed up against its own goal line. That is to say, the third and decisive factor in this case is that Customs's evidence that the ESAU was equal to or less than 90 percent rubber or plastic is inherently weakened by the fact that its own tests produced results so close to the borderline. To be sure, there are no ties in Customs classification decisions, and if the evidence clearly showed that the ESAU of the subject merchandise were 89.99 or even 90.00 percent rubber or plastic, Custom's classification would be upheld. At the same time, the Court believes it is incumbent upon the Customs Service to recognize that in especially close cases—where even one of Customs's own tests exceeds the 90 percent threshold—the agency has a special duty to ensure that its determinations are accurate and well-substantiated.

As the court explained in *Consolidated Cork*, "the final determination in situations where the merchandise approaches the borderline set by the tariff act depends upon the accuracy of the methods used and their application by the chemists who performed the tests." 54 Cust. Ct. at 87. The court in that case scorned the decision of Customs officials to test only 11 ounces from an entry of 22,050 pounds of granulated cork. "For such a result to be drawn from so small a sample, extreme niceness of weighing and measurement is required. The slightest error would be fantastically multiplied in the final result." 54 Cust. Ct. at 88. The court likewise observed that the plaintiff's experts conducted fifteen tests compared to Customs's single test. *See* 54 Cust. Ct. at 88 ("Since 15 tests were made, it is possible to check the accuracy of the tests against each other. * * * As the record stands, these tests are more likely to be accurate and representative of the density of the entire shipment than the single one made by the Government chemist.").

The Court does recognize the practical limitations on the resources of both the Customs Service and the import community, and does not suggest that it is either practicable or desirable that the testing process continue *ad nauseum,* particularly if it initial results do not suggest a close case. In this instance, however, Customs's results were close to the threshold, and the plaintiff adduced additional evidence showing both deficiencies in Customs's tests and the probable outcome of those tests had they been error-free. While the plaintiff's case is not overwhelming, it is enough to meet its burden to prove by a preponderance of the evidence that the ESAU of the subject merchandise was greater than 90 percent rubber or plastic.

III. CONCLUSION

The preponderance of the record evidence establishes that Customs erred in classifying the subject merchandise under subheading

[18] In particular, the Court notes that the plaintiff failed to substantiate testimony that the additional samples were pulled at random, and failed to have more than one commercial testing facility analyze the subject merchandise. *Cf. Aluminum Co.*, 60 CCPA at 151, 477 F.2d at 1400 (noting with approval that multiple analysts at multiple facilities had tested plaintiff's merchandise).

6402.99.30, HTSUS, and that the merchandise is properly classifiable under 6402.99.15, HTSUS. The Court will enter judgment accordingly.

(Slip Op. 03–32)

CORUS STAAL BV AND CORUS STEEL USA, INC., PLAINTIFFS *v.* U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANT *v.* BETHLEHEM STEEL CORP., NATIONAL STEEL CORP., AND U.S. STEEL CORP., DEFENDANT-INTERVENORS *v.* GALLATIN STEEL CO., IPSCO STEEL INC., NUCOR CORP., AND STEEL DYNAMICS, INC., DEFENDANT-INTERVENORS

Court No. 02–00002

[ITC's material injury determination sustained.]

(Dated March 21, 2003)

Steptoe & Johnson, LLP (Richard O. Cunningham, Joel D. Kaufman, Alice A. Kipel and *Gregory S. McCue)* for plaintiffs.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Mary Elizabeth Jones),* for defendant.

Dewey Ballantine LLP (Alan Wm. Wolff and *Kevin M. Dempsey)* and *Skadden, Arps, Slate Meagher & Flom LLP (Stephen Vaughn* at oral argument; *Robert E. Lighthizer, John J. Mangan* and *James C. Hecht* on the brief) for defendant-intervenors Bethlehem Steel Corporation, National Steel Corporation, and United States Steel Corporation.

Schagrin and Associates (Roger B. Schagrin) for defendant-intervenors Gallatin Steel Company, IPSCO Steel Inc., Nucor Corporation, and Steel Dynamics, Inc.

OPINION

RESTANI, *Judge:* Corus Staal BV and Corus Steel USA, Inc. (collectively "Corus"), respondents in an antidumping investigation before the United States International Trade Commission ("ITC" or "Commission"), move for judgment upon the agency record pursuant to USCIT Rule 56.2. Corus challenges several aspects of the ITC's final affirmative material injury determination in *Hot Rolled Steel Products from China, India, Indonesia, Kazakhstan, The Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine,* 66 Fed. Reg. 57,482, USITC Pub. 3468, Inv. Nos. 701–TA–405–408 and 731–TA–899–904 and 906–908 (Nov. 2001) (final determ.) (adopting the factual findings and analysis of its determination in *Hot Rolled Steel Products from Argentina and South Africa,* 66 Fed. Reg. 46,026, USITC Pub. 3446, Inv. Nos. 701–TA–404 and 731–TA–898 and 905 (Aug. 2001) (final determ.)) [hereinafter *"Final Determination"].*[1] Corus first claims that the *Final*

[1] Citations to the *Final Determination* and Staff Report are to the confidential versions of those documents unless otherwise indicated. The public versions of the Commission's opinion and Staff Report are contained in USITC Pub. 3446 (explaining the ITC's views in *Hot Rolled Steel Products from Argentina and South Africa)* and USITC Pub. 3468 (explaining background of the present investigations and adopting the views stated in Pub. 3446), and citations to the public documents contain the appropriate USITC publication number.

Determination in the ITC's hot-rolled steel investigation is unsupported by substantial evidence in the administrative record. Second, Corus challenges the Commission's decision to cumulate Dutch imports with other subject imports on the grounds that subject imports from the Netherlands were not involved in a reasonable overlap of competition with other subject imports and with the domestic like product. Third, Corus argues that even if the ITC's decision to cumulate Dutch imports with other subject imports is supported by substantial evidence, the Commission erred in failing to individually assess whether Dutch imports were the cause of any material injury to the domestic industry.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction is proper pursuant to 28 U.S.C. § 1581(c) (2000). The court upholds the ITC's findings and determinations in an antidumping investigation unless they are "unsupported by substantial evidence in the administrative record or [are] otherwise not in accordance with law." 19 U.S.C. § 1516(a)(2)(B)(i) (2000).

FACTUAL AND PROCEDURAL BACKGROUND

The Commission initiated antidumping and countervailing duty investigations pursuant to petitions filed on November 13, 2000, by domestic steel producers[2] who alleged that an industry in the United States was materially injured or threatened with material injury by reason of imports of hot-rolled steel products that were either sold at less than fair value ("LTFV") or subsidized from Argentina, China, India, Indonesia, Kazakhstan, the Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine. In its *Preliminary Determination,* the ITC found a reasonable indication that the domestic industry was materially injured by reason of subject imports. 66 Fed. Reg. at 805. A public hearing was held on July 17, 2001, during which the Commission heard testimony from the parties and industry representatives. *See* Tr. of Hr'g Before the ITC (July 17, 2001).

In August 2001, the Commission determined by a 6–0 vote that the domestic industry was materially injured by subsidized imports from Argentina and LTFV imports from Argentina and South Africa.[3] *See Final Determination,* USITC Pub. 3446, at 3. On August 30, 2001, the Commission issued the proprietary version of the Commission's views in the present case, adopting the findings and analysis from its deter-

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[2] The petitioners included Bethlehem Steel Corp., Gallatin Steel Co., IPSCO Steel, Inc., LTV Steel Co., National Steel Corp., Nucor Corp., Steel Dynamics, Inc., U.S. Steel Group of USX Corp., Weirton Steel Corp., and Weirton's Independent Steelworkers Union. *Final Determination,* USITC Pub. 3468, at 1. Weirton was not a petitioner in the investigation involving the Netherlands. *Hot-Rolled Steel Products from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine,* 66 Fed. Reg. 805, 806 n.2 (ITC Jan. 4, 2001) (preliminary determ.) [hereinafter *Preliminary Determination].* The remaining petitioners appear in the present action in support of the ITC's Final Determination.

[3] The investigation of the Netherlands and other subject countries here arose out of a group of simultaneous petitions alleging subsidized and LTFV imports of hot-rolled steel from various countries. The ITC was required to issue its determination in the investigations of subsidized imports from Argentina and LTFV imports from Argentina and South Africa in August of 2001 because the Department of Commerce had issued its final determinations in those investigations earlier than it did in the remaining investigations. *Final Determination,* USITC Pub. 3468, at 3.

mination with respect to imports from Argentina and South Africa.[4] *See supra* note 1 and accompanying text. Finding a reasonable overlap of competition among imports from each of the subject countries and between the subject imports and the domestic like product, the Commission cumulatively assessed the volume and price effects of subject imports in conducting its material injury analysis. *See* 19 U.S.C. § 1677(7)(G)(i) (2000). The Commission determined that the domestic hot-rolled steel industry was materially injured by reason of cumulated subject imports, including imports from the Netherlands, that were sold in the United States at LTFV during the period of investigation ("POI").[5] *Final Determination,* USITC Pub. 3468, at 3.

Approximately two months after the Commission's confidential views were released, the Department of Commerce issued a revised, final weighted-average dumping margin for Dutch imports at 2.59 percent.[6] *Notice of Amended Final Determination of Sales at Less Than Fair Value,* 66 Fed. Reg. 55,637, 55,639 (Dep't Commerce Nov. 2, 2001). Later that month the Commission issued the public version of its *Final Determination* and Staff Report, which indicated that the revised dumping margins for the Netherlands and other subject countries did not alter its conclusion that the domestic hot-rolled steel industry was materially injured by reason of cumulated subject imports.[7] *Final Determination,* USITC Pub. 3468, at 3. Corus Staal BV, the only manufacturer and exporter of hot-rolled steel in the Netherlands, and Corus Steel USA, Inc., an importer of hot-rolled steel from the Netherlands, appeal the Commission's affirmative material injury determination.

DISCUSSION

I. Material Injury Determination

In the final phase of countervailing and antidumping duty investigations, the Commission determines whether an industry in the United States is materially injured by reason of the imports under investigation. *See* 19 U.S.C. § 1673d(b) (2000). The statutory definition of "material injury" is "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (2000). In making its material injury determination, the ITC must consider the volume of imports, their effect on prices for the domestic like product, and their impact on producers of the domestic like product in the context of U.S. production operations. *Id.* § 1677(7)(B). The Commission may also consider other

[4] Federal law requires the ITC to make its determinations in the instant investigations on the same record as the determinations regarding Argentina and South Africa, except that the present record also includes Commerce's final determinations in these investigations and the parties' final comments concerning the significance thereof. *See* 19 U.S.C. § 1677(7)(G)(iii); *Final Determination,* USITC Pub. 3468, at 3.

[5] The following countries' LTFV imports were included in the material injury determination: China, India, Indonesia, Kazakhstan, the Netherlands, Romania, Taiwan, Thailand, and Ukraine. The ITC also determined that the domestic industry was materially injured by reason of subsidized imports from India, Indonesia, South Africa, and Thailand. *Final Determination,* USITC Pub. 3468, at 3.

[6] The original weighted-average dumping margin for the Netherlands was 3.06 percent. *Notice of Final Determination of Sales at Less Than Fair Value,* 66 Fed. Reg. 50,408, 50,409 (Dep't Commerce Oct. 3, 2001).

[7] Commissioner Bragg specifically noted that she rarely considers the magnitude of the dumping margins to be significant in evaluating the effects of subject imports on the domestic industry. *Final Determination,* USITC Pub. 3468, at 3 n.4.

relevant economic factors that bear on the state of the domestic industry. *Id.* This section first summarizes the *Final Determination* pursuant to the statutory standards and then addresses and analyzes Corus's arguments separately *infra* Part I.D.

A. Volume

In the first prong of the ITC's material injury analysis, the Commission must assess whether the volume of subject imports is "significant." 19 U.S.C. § 1677(7)(C)(i). In its *Final Determination,* the Commission found that subject import volume significantly increased throughout the POI despite declines in total apparent domestic consumption of hot-rolled steel.[8] Between 1998 and 1999, subject import volume increased by 122.7 percent; cumulated subject imports increased another 36.2 percent between 1999 and 2000. Although total shipments of the domestic like product rose by 4.8 percent between 1998 and 2000, domestic producers' shipments to the merchant market declined between 1999 and the first half of 2000[9] while subject import volume continued to increase, peaking in the second quarter of 2000. Based on the coincidence of peak subject import levels and peak purchaser inventory levels of hot-rolled steel during the first half of 2000, the Commission found that purchases of subject imports contributed to the significant inventory build-up that occurred in that time frame. *See infra* n.14. The Commission determined that the inventory build-up exerted downward pressure on orders for the domestic like product through at least the first quarter of 2001. Finally, though subject import volume subsequently declined, imports remained above pre-1999 levels until the first quarter of 2001, and the ITC found it likely that the filing of the antidumping petitions contributed to the decline of subject import volume. Thus, the Commission concluded that subject import volume was significant, both in absolute terms and relative to consumption in the United States. *Final Determination* at 27–30.

B. Price Effects

In evaluating the effects subject imports have on domestic prices, the ITC must consider whether (1) there has been significant underselling by the imported merchandise compared with prices for the domestic like product and (2) the imports have caused significant price depression or suppression. 19 U.S.C. § 1677(7)(C)(ii). In discussing price trends for hot-rolled steel, the Commission explained that domestic prices were at their highest levels for the POI in the first or second quarter of 1998, but then sharply dropped as unfairly traded imports from Brazil, Japan, and Russia entered the market. In late 1999 and early 2000, prices began to rise after import relief was granted against those imports, but domestic prices remained below 1998 peaks despite increased apparent domestic

[8] The ITC noted that consumption fell in 1999, recovered somewhat in 2000, but remained at lower levels in 2000 than in 1998. *Final Determination* at 27 (citing Staff Report at Tables C–1 and C–2).

[9] In 1999, shipments of the domestic like product to the merchant market increased by 1.4 million short tons, compared to a 1.7 million short ton increase in the volume of subject imports. In 2000, domestic shipments fell by 106,804 short tons, while subject imports increased by another 1.1 million short tons. *Id.* at 28 (citing Staff Report at Tables IV–5 and IV–8).

consumption. Prices then fell sharply during the second half of 2000 and the first part of 2001, generally to lower levels than the industry had experienced prior to the imposition of import relief with respect to imports from Brazil, Japan, and Russia. *Final Determination* at 30 (citing Staff Report at Tables V–3–V–12).

Turning to the effect subject imports had on domestic prices, the Commission found that subject imports consistently undersold the domestic like product throughout most of the POI.[10] Underselling was particularly probative to the ITC in these investigations because low prices, along with anticipated future demand, were an important factor in determining purchasing decisions and inventory levels. *Id*. at 31 (citing Staff Report at V–11); *see infra* n.14. The Commission found that underselling in late 1999 and the first half of 2000—at a time when domestic prices and shipments were making a limited recovery after import relief was imposed against nonsubject imports from Brazil, Japan, and Russia—significantly suppressed prices by permitting limited price increases and sparked the significant growth in import volume that occurred during that period.[11] *See id.* at 31–32.

The ITC recognized that some overselling began to occur in the last two quarters of 2000, but the Commission rejected the notion that those instances of overselling indicated that the subject imports did not have a significant adverse effect on domestic prices. To the contrary, the domestic industry had already lost volume and sales in the first half of 2000 due to the significant increase in subject import volume, and domestic producers resorted to price cutting in an attempt to maintain production volume and market share. *Id.* at 31 (citing Staff Report at Table III–5; Hr'g Tr. at 57 (testimony of Mr. DiMicco)). The Commission also noted that the filing of the petition in late 2000 coincided with the instances of overselling. Finally, despite some overselling, subject imports continued to depress or suppress prices throughout the latter part of the POI by virtue of the inventory overhang to which the surge in subject imports in the first half of 2000 contributed. *Id.* Therefore, the Commission found that subject imports had significant adverse effects on domestic prices during the POI. *Id.* at 33.

C. Impact

As noted above, the ITC considers all relevant economic factors that reflect the state of the domestic industry in examining the impact of subject LTFV imports. 19 U.S.C. § 1677(7)(C)(iii). These factors include, among other things, output, sales, inventories, capacity utilization,

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[10] *Id.* at 31. Subject imports undersold the domestic like product in 64.7 percent of the Commission's quarterly comparisons. *Id.* (citing Staff Report at Table V–13).

[11] The Commission considered, and rejected, the foreign producers' argument that one cause of the price declines in 2000 was aggressive price competition by minimills at the expense of the integrated mills, because product-specific pricing data showed that proposition to be incorrect. In one high-volume product price comparison, minimill product [ ] integrated mill product in the first half of 2000, and both integrated and minimill product were [ ] by combined subject imports during that period. *Id.* at 31–32 (citing INV–Y–148). Similar patterns emerged in other high-volume product-specific price comparisons. Thus, the Commission found no evidence that minimills initiated the price declines that emerged in 2000. To the contrary, the record indicated that the domestic hot-rolled steel industry reacted to the significantly increased volume of lower-priced imports by reducing prices. *Id.* at 32.

market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. *Id*. No single factor is outcome-determinative and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1677(7)(C)(iii).

In evaluating the impact of the subject imports, the Commission first noted that despite certain positive indicators of the condition of the domestic industry from 1998 to 2000—capacity, production, capacity utilization, and commercial shipments all rose during this period—the domestic industry's financial performance was poor throughout most of the POI. *Final Determination* at 34 (citing Staff Report at Table III–3). In both 1999 and 2000, the domestic industry experienced operating losses on its total production, commercial sales, internal transfers, and related-party transfers. *Id.* (citing Staff Report at Tables VI–2, VI–5, and VI–5A). Two domestic producers ceased operations altogether, and several others entered Chapter 11 bankruptcy proceedings. *Id.* (citing Staff Report at III–1 n.1). The adverse impact that subject imports had on the domestic industry was also evidenced by employment and wage statistics; the number of production-related workers, number of hours worked, and total wages paid all declined throughout the POI. *Id.* (citing Staff Report at Table III–10). Finally, while total capital expenditures increased between 1998 and 2000, expenditures on research and development dropped. *Id.* (citing Staff Report at Table VI–8).

The industry's performance in the early portion of the POI reflected the adverse effects of unfairly traded imports from Brazil, Japan, and Russia, but quarterly data indicated that domestic producers had gained some benefit from the import relief imposed on those imports by mid-1999. For a brief period, shipments and prices increased and the domestic industry's financial performance improved, though prices generally remained below pre-injury levels.[12] The improvement did not last. The order books at minimills peaked in the third quarter of 1999; integrated mill order books peaked in the fourth quarter. *Id.* at 36 (citing INV–Y–156). Domestic shipments to the merchant market and total domestic shipments peaked in the first quarter of 2000. *Id.* (citing Staff Report at Table III–5). Shipments to the merchant market, however, declined by 7.8 percent from the first quarter of 2000 to the second. In contrast, subject imports rose from 1.2 million short tons in the first quarter of 2000 to 1.5 million in the second quarter. *Id.* (citing Respondents' Joint Economic Prehearing Submission at Ex. 8). In addition, subject imports were generally underselling the domestic like product in

[12] For example, the value per ton of net domestic commercial sales fell to $292 in 1999, but reached $323 by the first quarter of 2000. *Id.* at 34 (citing Staff Report at Table VI–1). By the first quarter of 2000, operating income on commercial sales had changed from a $12 loss per ton for the year 1999 to a $16 per ton profit. *Id.* at 34–35. The value of total net production was $285 for 1999 but reached $314 per ton in the first quarter of 2000, and the net value of internal transfers and transfers to related parties for downstream processing was $282 in 1999 and $310 for the first quarter of 2000. *Id.* at 35 (citing Staff Report at Tables VI–5 and VI–5A). Finally, on total production, a loss of $11 per ton in 1999 shifted to a $5 profit in the first quarter of 2000, and operating losses on internal transfers and transfers to related parties for downstream processing were $22 per ton for the year 1999 and $1 per ton in the first quarter of 2000. *Id.* (citing Staff Report at Tables VI–5 and VI–5A).

second quarter 2000. *Id.* at 36–37 (citing INV–Y–148). The record reflected that subject imports gained sales from the domestic industry, largely through underselling, at a time when overall apparent domestic consumption was still strong. *Id.* at 37.

Although the industry's condition was also affected by a drop in apparent consumption at the end of 2000, the Commission found that subject imports, which peaked in second quarter 2000, were the primary cause of the domestic industry's sharp drop in commercial shipments through the third quarter of 2000. This sharp decline preceded the general drop in demand for hot-rolled steel late in 2000. *Id.* at 36. Turning to the domestic industry's condition towards the end of the POI, the Commission found that virtually every financial and production indicator was lower in interim 2001 than in interim 2000, including shipments to the merchant market, total shipments, operating income, the number of production related workers, and hours worked.[13] *Id.* at 35–36. Operating losses affected 17 of 21 reporting firms in 2000, compared to only 12 firms in 1998 and 13 firms in 1999, when imports from Brazil, Japan, and Russia were adversely affecting the domestic industry. *Id.* (citing Staff Report at Table VI–5).

The Commission thus found that the subject imports had a significant adverse impact on the domestic industry. *Id.* at 37. The record indicated that subject imports significantly increased in volume and market share, undersold the domestic like product, and had a significant suppressing and depressing effect on domestic prices throughout the POI. In addition, the Commission found that low-priced subject imports contributed to the high level of purchaser inventories that negatively affected the domestic industry for the remainder of the POI.[14] *Id.* Based on its findings on volume, price effects, and impact, the Commission determined that an industry in the United States is materially injured by reason of imports of hot-rolled steel products from India, Indonesia, South Africa, and Thailand that are subsidized and by imports of hot-rolled steel products from China, India, Indonesia, Kazakhstan, the Netherlands, Romania, Taiwan, Thailand, and Ukraine that are sold at LTFV. *Id.* at 38.

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[13] Shipments to the merchant market in interim 2001 were 11.4 percent lower than in interim 2000. *Id.* at 35 (citing Staff Report at Table C–2). Total shipments were 16.5 percent lower in interim 2001 than in interim 2000. *Id.* (citing Staff Report at Table C–1). Operating loss per ton of net sales was $50 in interim 2001, compared to a positive income per ton of $16 in interim 2000. *Id.* (citing Staff Report at Table VI–1). Operating loss per ton of total production was $63 in interim 2001, compared to a positive income per ton of $5 in interim 2000. *Id.* (citing Staff Report at Table VI–5). The number of production related workers fell from 31,639 in interim 2000 to 29,123 in interim 2001. *Id.* at 36 (citing Staff Report at Table III–10). Hours worked were 16.3 million in interim 2001, compared to 18.2 million in interim 2000. *Id.*

[14] The Commission noted that though fewer than half of the responding purchasers were able to classify inventories by country of origin, the data indicated that subject imports did contribute to inventory growth. In the second quarter of 2000, purchaser inventories reached peak levels at the same time as subject import volume peaked, compared to a decline in domestic shipments to unrelated purchasers. *Final Determination* at 37 n.187 (citing Staff Report at V–13). Subject import volume held in purchaser inventories rose by 149.8 percent between 1998 and 2000, while reported total purchaser inventories only rose by 20.5 percent. *Id.* (citing Staff Report at V–15). Finally, inventory data available indicated that subject imports accounted for only 4.9 percent of inventories in 1998 but made up 10.2 percent of significantly larger inventories by the end of 2000. *Id.*

D. Analysis

Corus claims that the Commission erred when it determined that subject imports were the cause of material injury to the domestic hot-rolled steel industry. Brief of Corus Staal BV and Corus Steel USA Inc. in Support of Rule 56.2 Motion for Judgment on the Agency Record at 7 (hereinafter "Corus Br."). Corus makes two alternative arguments. First, Corus claims that subject imports were not the cause of material injury to the domestic industry during the POI. *See id.* at 7–11. Second, Corus argues that even if domestic producers were injured by subject imports, the extremely limited duration of any alleged injury does not allow the ITC to make an affirmative finding of material injury. *See id.* at 11–12.

1. Injury from subject imports

Corus argues that contrary to the Commission's *Final Determination,* the record does not support its conclusion that the domestic industry suffered material injury by reason of subject imports. Instead, Corus claims that the record "clearly demonstrates" that the POI contained two commercially distinct time periods. Corus characterizes the period from 1998 through the second quarter of 2000 as period of economic expansion "marked by a robust economy with a resultant increase in shipments, prices, production, capacity utilization, and profitability." Corus Br. at 8. Corus cites increasing demand as the cause of the increase in subject import volume and market share during these years[15] and claims that the increase in domestic product shipments, prices, and profitability undermines the Commission's conclusions on the price effects and impact of subject imports on the domestic industry. *Id.* at 9.

Responding to particular factual findings in the Commission's impact analysis, Corus argues that it was the domestic producers' "series of aggressive price increases," not lower-priced subject imports, that prompted service centers and other inventory-holding purchasers to build their stocks before expected future price increases.[16] *See id.* at 8, 10 (citations omitted). Furthermore, Corus claims that the decrease in production-related employees, hours worked, and wages paid during this period "can only be interpreted as the result of increased efficiency on the part of the domestic industry and, therefore, further indicia of the health of the industry." *Id.* at 9 n.2. Therefore, Corus views the record as

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[15] *But see supra* nn.10–11 and accompanying text. Corus acknowledges that the Commission's pricing data indicated margins of underselling by subject imports during this period, but Corus contests the ITC's conclusions regarding underselling because the data only included coverage for 13.3 percent of Dutch imports. Corus Br. at 9 & n.3. Corus fails to point out, however, that the coverage data in the Staff Report was derived from data submitted by respondents, i.e., Corus Staal BV and other foreign producers, in response to the Commission's questionnaires. *See* Staff Report at V–16–V–17. Furthermore, based on this same data the Commission also recognized overselling by subject imports, including Dutch imports, beginning in the second half of 2000. *See* Corus Br. at 9 n.3 (citing *Final Determination* at 21 and 25). Corus does not contest those conclusions, however, but instead relies upon the Staff Report's data on overselling to support several of its arguments on appeal. See Corus Br. at 5.

The Commission must make its decisions based on the information available, and because the limited coverage for Dutch imports is directly attributable to Corus itself, Corus's challenge to the representativeness of the ITC's pricing data is without merit.

[16] Corus claims that imports were not the cause of the build-up of inventories from 1999 to mid–2000 because the record demonstrated that such purchasers bought "primarily * * * domestically produced inventory." Corus Br. at 11. The inventory data available to the Commission, however, indicated that subject imports did contribute to the surge in inventory levels. *See supra* n.14

clearly demonstrating that the domestic industry was not injured prior to the second half of 2000. *Id.* at 9.

Corus characterizes the second time frame, from the third quarter of 2000 to the end of the POI, as a period of "significant contraction in the U.S. economy" that was marked by a sharp decline in U.S. demand for hot-rolled steel products that resulted in corresponding declines in apparent consumption,[17] production, domestic and import shipments, prices, and increases in inventory. *Id.* at 8, 10. Corus claims that subject import volumes had fallen sharply and that subject imports oversold domestic products before the declines in prices and demand began in the second half of 2000, and that therefore imports "could not possibly account for any continuing adverse effects." *Id.* at 10 (citing *Final Determination,* USITC Pub. 3446, at C–5).

The court's role is limited to reviewing the *Final Determination* to determine whether the Commission's findings are supported by the evidence and the reasonable inferences therefrom. *See Daewoo Elecs. v. Int'l Union,* 6 F.3d 1511, 1520 (Fed. Cir. 1993). The "substantial evidence" standard of review only requires the court to find "such relevant evidence as a reasonable mind might accept as adequate to support [the Commission's] conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (internal citations and quotations omitted). Substantial evidence is "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent the administrative agency's findings from being supported by substantial evidence." *Timken Co. v. United States,* 166 F. Supp. 2d 608, 613 (Ct. Int'l Trade 2001) (quoting *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966) (citations omitted)). Furthermore, "it is not the province of the courts to * * * reweigh or judge the credibility of conflicting evidence." *Chung Ling Co. v. United States,* 16 CIT 636, 648, 805 F. Supp. 45, 55 (1992). The court cannot substitute its judgment for that of the Commission. *Goss Graphic Sys., Inc. v. United States,* 22 CIT 983, 1008–09, 33 F. Supp. 2d 1082, 1104 (1998), *aff'd,* 216 F.3d 1357 (Fed. Cir. 2000) (citations omitted).

With these principles in mind, there is substantial evidence in the record to support the ITC's finding of present material injury by reason of subject imports. The court finds that there is substantial evidence supporting the ITC's conclusions on the significance of subject import volume. Subject import volume increased by 203.4 percent from 1998 to 2000. Contrary to Corus's arguments, subject imports continued to enter the domestic market in large volumes well into the third quarter of 2000. Based on the record data, it was reasonable for the Commission to conclude that such an increase over the POI was significant both in absolute terms and relative to consumption in the United States. *See supra* Part I.A.

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[17] Apparent consumption declined 20.6 percent between the first quarter of 2000 and the first quarter of 2001. Corus Br. at 10 (citing *Final Determination,* USITC Pub. 3446, at IV–6).

The court also finds that the ITC reasonably concluded that subject imports had a significant suppressing or depressing effect on domestic prices. The existence of price increases in late 1999 and early 2000, which occurred after import relief was imposed against nonsubject imports, is not incompatible with a finding of price suppression or depression. *See Encon Indus., Inc. v. United States,* 16 CIT 840, 842–43 (1992). The significant increase in subject import volume, persistent and significant underselling by those subject imports, and the limited nature of the price recovery of domestic hot-rolled steel all occurred during the same time period. Later in the POI, prices fell sharply due to continued high volumes of low-priced subject imports. Therefore, the Commission's conclusion that subject imports suppressed and depressed domestic prices was reasonable and supported by substantial evidence. *See supra* Part I.B.

The Commission's impact findings are also reasonable and based upon substantial evidence in the record. Contrary to Corus's view of the evidence, the surge of subject imports had adverse effects on the domestic industry well before mid-2000. As noted previously, the record reflected a sharp increase in subject import volume and market share, underselling by subject imports of the domestic like product, and significant price effects throughout the POI. The poor financial performance of domestic firms during the POI is undisputed; more than half reported operating losses on hot-rolled operations in 1998, and over 60 percent experienced reported losses in 1999 and 2000. These losses were sustained at a time when apparent domestic consumption was strong, but subject import volume was increasing and subject imports were pervasively underselling the domestic like product. Thus, the record contradicts Corus's assertion that the domestic industry was strong prior to mid-2000. Furthermore, virtually every financial and production indicator was lower in interim 2001 than in interim 2000, with 17 of 21 firms reporting operating losses on total hot-rolled steel operations in the first quarter. Losses continued throughout the later portion of the POI despite increases in domestic production and shipments because prices remained weak. Finally, the record supports the ITC's finding that purchases of subject imports contributed to the significant inventory build-up in the first half of 2000 that exerted downward pressure on orders for the domestic like product later in the POI. *See supra* n.14. Accordingly, the Commission could reasonably have concluded that the subject imports had a negative impact on the domestic hot-rolled steel industry, despite some positive indicators of the industry's condition. *See supra* Part I.C.

In conclusion, the Commission's findings on the significance of subject import volume, price effects, and overall impact of subject imports in the U.S. market are reasonable and supported by substantial record evidence. Corus's challenge to the material injury determination essentially is asking the court to reweigh the record evidence and substitute its judgment for that of the Commission, which the court clearly cannot

do. The Commission, having found that changes in subject import volume, price effects, and impact were related to the pendency of the investigation, acted within its discretion in discounting post-petition data. *See* 19 U.S.C. § 1677(7)(I). The court therefore holds that the ITC's material injury determination is supported by substantial evidence and is otherwise in accordance with law.

2. Limited duration of injury

Alternatively, Corus urges the court to find that an affirmative injury determination is precluded by the limited duration of any alleged injury. Corus Br. at 11. Corus again asserts the health of the U.S. industry from 1998 to 2000, pointing to positive trends in key performance indicators such as capacity, actual production, and capacity utilization. *Id.* (citing Staff Report at Table III–3). Based on those positive trends in early 2000, and subsequent signs of recovery in indicators such as production and volume[18] in the fourth quarter of 2000, Corus asserts that any minimal adverse effect from subject imports could only be present for a limited duration in 2000. *Id.* at 11–12. Corus concludes, "Given the brevity of any arguable injury caused by imports—at most several months—there was insufficient basis for a finding of present material injury." *Id.* at 12 (citing *Bjelland Seafoods v. United States,* 16 CIT 945, 955–56 (1992) and *Saarstahl AG v. United States,* 18 CIT 595, 600, 858 F. Supp. 196, 200 (1994)). The court rejects this argument, however, for the same reasons it discussed *supra* in affirming the Commission's material injury determination. The injury suffered by the domestic industry was not as limited in nature as Corus suggests, and there is substantial evidence supporting the Commission's findings to the contrary.

II. Cumulation of Dutch Imports With Other Subject Imports

The Commission, in the course of making its material injury determination, is required to cumulatively assess the volume and effect of imports from two or more countries subject to investigation if such imports compete with each other and with domestic like products in the U.S. market. 19 U.S.C. § 1677(7)(G)(i). "This analysis recognizes that a domestic industry can be injured by a particular volume of imports and their effects regardless of whether those imports come from one source or many sources." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, at 847 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040; *see Bingham & Taylor Division v. United States,* 815 F.2d 1482, 1485 (Fed. Cir. 1987). The ITC must find only a

[18] Corus asserts that the domestic industry experienced "significant recovery" in volume in late 2000, and points out that shipments of domestic product rose 13% between the fourth quarter of 2000 and the first quarter of 2001. Corus Br. at 12 (citing Staff Report at Table III–5). Although the domestic industry did show a slight degree of recovery in volume levels between the fourth quarter of 2000 and the first quarter of 2001, quarterly data on the domestic industry's total shipments reveal an overall decline in the quantity and value of total shipments from the first quarter of 2000 to the first quarter of 2001. Staff Report at III–8–III–9. The industry shipped 18,154,595 short tons in first quarter 2000, 17,120,222 shorts tons in second quarter 2000, 16,338,517 short tons in third quarter 2000, 14,181,850 in fourth quarter 2000, and 15,097,920 in first quarter 2001. *Id.* at Table III–5. Based on these figures, it puzzles the court how Corus can claim that U.S. producers began to see "significant recovery" in volume in late 2000 when shipments actually decreased by a significant degree between the third and fourth quarters of that year. Furthermore, though volume did rise somewhat between fourth quarter 2000 and first quarter 2001, 2001 shipments were markedly below volume levels for the first quarter of 2000. *See id.*

"reasonable overlap of competition" between the subject imports from different countries before the mandatory cumulation provision applies. Goss, 22 CIT 983, 984, 33 F. Supp. 2d 1082, 108 (1998) (quoting Wieland Werke v. United States, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989)).

The Commission has an established framework for assessing whether there is a reasonable overlap of competition that involves the consideration of the following four factors: (1) the degree of fungibility (or substitutability) between the products, including consideration of specific customer requirements and other quality related questions; (2) the presence of sales or offers to sell in the same geographic markets; (3) the existence of common or similar channels of distribution; and (4) the simultaneous presence of subject imports in the market. *Final Determination* at 13; *see Wieland Werke,* 13 CIT at 563, 718 F. Supp. at 52. The Commission's framework for analysis has been approved by the court on numerous occasions. *See, e.g., Goss,* 22 CIT at 988, 33 F. Supp. 2d at 1089; *Fundicao Tupy S.A. v. United States,* 12 CIT 6, 10–11, 678 F. Supp. 898, 902, *aff'd,* 859 F.2d 915 (Fed. Cir. 1988). These factors are not exhaustive, no single factor is determinative, and completely overlapping markets are not required. *See Wieland Werke,* 13 CIT at 563, 718 F. Supp. at 52 (citations omitted).

In analyzing the four cumulation factors in the present case, the Commission found that there was a reasonable overlap of competition among the subject merchandise from all countries subject to investigation and between subject imports and the domestic like product. *Final Determination* at 19. In evaluating fungibility, the ITC found that the record evidence indicated a moderate level of substitutability between domestic and imported hot-rolled steel products and subject imports. *Id.* at 14. The Commission found geographic overlap among the subject imports and the domestic like product and determined that the subject imports and domestic products moved in similar channels of distribution. *See id.* at 16–18. Finally, domestic products and subject imports were simultaneously present in the market. *See id.* at 18–19. Therefore, the Commission cumulated subject imports from all subject countries for the purpose of determining whether the domestic industry was materially injured by reason of subject imports. *Id.* at 19.

Corus raises a number of challenges to the Commission's cumulation determination. Corus claims that the finding on fungibility of Dutch imports was incorrect and disputes the findings of simultaneous presence and geographic overlap. Corus further contends that the Commission should have given more weight to the channels of distribution factor in its cumulation analysis because, in Corus's view, it was the primary focus of petitioners' injury allegations. Finally, Corus forcefully contests the Commission's finding that Dutch imports move in similar channels of distribution with other subject imports and the domestic like product.

A. Channels of Distribution

Corus first claims that the Commission should have focused its cumulation analysis on one of the traditional four factors, channels of dis-

tribution,[19] because it was the "primary focus of the petitioners' injury allegations" and "[t]he concept of an inventory overhang was critical to the Commission's material injury determination." Corus Br. at 16. However, both the petitioners and the ITC recognized that imports for inventory were only one source of material injury suffered by the domestic industry. This is clear from the court's review of the ITC's material injury determination *supra* Part I. Furthermore, the Commission's cumulation methodology of considering each of the traditional four factors is settled practice and, as indicated, has been approved by the court on numerous occasions. Corus's argument that the Commission should have altered its methodology to comport with Corus's particular theory of causation, a theory that erroneously isolates one of many factors actually relied upon by the ITC in finding material injury in these investigations, is therefore without merit.

Corus next challenges the Commission's decision to cumulate subject imports from the Netherlands with other subject imports by claiming that its products did not move in similar channels of distribution as the domestic like product or other subject imports. The Commission found that slightly more than half of all commercial shipments of the domestic like product and approximately two-thirds of all commercial shipments of subject imports went to distributors, processors, or service centers in the year 2000. *Final Determination* at 17. Similarly, a substantial amount of subject imports from the Netherlands were sold to distributors, processors, and service centers.[20] *Id.* at 18. Corus tried to distinguish its service center and distributor sales on the ground that it knew who the final purchaser would be, but the record before the Commission showed that a significant portion of all subject imports were for a known final end user,[21] even when distributors or service centers were involved

[19] According to Corus, channels of distribution may, in certain circumstances, outweigh the other three factors. Corus Br. at 15. Each of the cases cited by Corus, however, is distinguishable from the instant case. In two of the investigations, the Commission actually determined to cumulate despite differences in channels of distribution. *See Honey from Argentina and China,* USITC Pub. 3470, Inv. Nos. 701–TA–402 and 731–TA–892–893 (Nov. 2001) (final determ.) and *Stainless Steel Angle from Japan, Korea, and Spain,* USITC Pub. 3421, Inv. No. 731–TA–888–890 (May 2001) (final determ.). In two other cases, the Commission did decline to cumulate imports, but in both cases the differences in channels of distribution also reflected differences in products. *See Ferrosilicon fom Egypt,* USITC Pub. 2688, Inv. No. 731–TA–642 (Oct. 1993) (final determ.) and *Certain Preserved Mushrooms from China, India, and Indonesia,* USITC Pub. 3159, Inv. No. 731–TA–777–779 (Feb. 1999) (final determ.).

[20] The record indicated that about [ ] of subject imports from the Netherlands were sold to distributors, processors, or service centers, as were 53.7 percent of all domestic commercial shipments and 67.3 percent of all subject imports. *Final Determination* at 18; Staff Report at Table I–1.

[21] The Commission found that [ ] percent of subject imports from the Netherlands were sold directly to end users. Similarly, about a third of all subject imports and over 45 percent of commercial shipments of hot-rolled steel from domestic producers were sold directly to end users. Manufacturers of pipes and tubes were the major purchasers of hot-rolled steel from all sources. Staff Report at Table I–1.

Corus challenges the sufficiency of the evidence on the ITC's finding that a significant portion of all subject imports were prepared for a known final customer because it claims that the other producers of subject imports did not submit "sufficiently detailed data" and because the record contained some evidence to contradict the Commission's finding. The mere existence of contradictory evidence, however, does not invalidate the Commission's determination or require remand. BIC Corp. v. United States, 21 CIT 448, 451, 964 F. Supp. 391, 396 (1997) (citations omitted). Furthermore, "the choice between two possible conclusions is properly the task of the Commission, and not the court." Id. The court therefore declines to substitute Corus's evaluation of the evidence for that of the Commission.

in the transaction.[22] *Id.* Thus, although the Commission considered Corus's claims regarding the uniqueness of its distribution channel, it nevertheless found that substantial evidence on the record that indicated that subject imports from the Netherlands, other subject imports, and the domestic like product did compete for sales in similar channels of distribution. The court agrees.

B. Other Factors

1. Fungibility

Corus claims that it is a niche supplier that does not provide highly fungible, commodity grade products. That fact, according to Corus, severely limits its competition with other suppliers. Corus Br. at 27. In rejecting this claim, the Commission found at least a moderate level of substitutability between domestic and imported hot-rolled steel products generally[23] and, in the specific case of the Netherlands, the Commission found that [ ] of Dutch imports were fungible with the domestic like product and with other subject imports. *Final Determination* at 15–16. The court finds that the Commission considered Corus's argument on this issue and gave a reasonable explanation for its finding that Dutch products were fungible with other subject imports and the domestic like product. Therefore, the ITC's fungibility finding is sustained.

2. Geographic overlap and simultaneous presence

Corus points to the limited nature of its customer base to refute any finding that it sells in the same geographic market as other subject imports and the domestic like product and that its products are simultaneously present in the market. Corus claims that, because it only has a few long-standing customers and does not actively solicit new customers, it is not "out in the market." Corus Br. at 27. In evaluating geographic overlap and simultaneous presence in the market, the ITC must make a determination that subject imports and the domestic like product are competing for sales at similar times and in similar places. *See Mukand Ltd. v. United States,* 20 CIT 903, 907–10, 937 F. Supp. 910, 915–17 (1996). The evidence in the record clearly shows that subject imports from the Netherlands, other subject imports, and the domestic like product were both widely available throughout the POI and were

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[22] Although Corus claims that there is not enough evidence for the Commission's conclusion, the record shows the contrary. Purchasers were asked if they placed orders prior to the manufacture of hot-rolled steel or bought from inventory. One purchaser reported buying from inventory, 19 reported placing orders prior to manufacture, and 6 reported using both methods. Furthermore, reports by respondents from China, Indonesia, South Africa, and Thailand, as well as the Netherlands, indicated that "virtually all of their exports are pre-sold prior to entry." Staff Report at II–18. Thus, Corus's distribution methods are not as different from those used by other producers, foreign and domestic, as Corus suggests.

[23] Domestic producers find subject imports to have a [ ] of interchangeability, and importers also find a [ ] of fungibility. *Final Determination* at 14 (citation omitted). Also, purchasers generally agreed that imported and domestically-produced steel are used in the same applications, and they specifically identified Dutch product as being used in the same applications as the domestic like product. *Id.* (citing Staff Report at II–17).

offered for sale in a variety of overlapping locations.[24] *See Final Determination* at 14–19. The ITC's findings on these factors are therefore reasonable and supported by substantial record evidence.

C. Conclusion

Like Corus's arguments regarding the ITC's material injury determination, Corus's challenge to the Commission's decision to cumulate imports from the Netherlands with other subject imports amounts to no more than a request for the court to reweigh the evidence in Corus's favor. As stated previously, the Court cannot substitute its judgment for that of the Commission. The ITC fully evaluated Corus's various claims and challenges to cumulation at the administrative level, and the record contains substantial evidence to support the Commission's finding that a reasonable overlap of competition existed between subject imports from the Netherlands, other subject imports, and the domestic like product. Therefore, the court sustains the Commission's decision to cumulate Dutch imports with other subject imports in conducting its material injury analysis.

III. Causation

Corus argues that even if Dutch subject imports were properly cumulated with other subject imports, Commission was required to make a separate causation determination with respect to Dutch imports. Corus Br. at 28 (citing *BIC Corp. v. United States,* 21 CIT 448, 964 F. Supp. 391 (1997) and *Comm. of Domestic Steel Wire Rope & Specialty Cable Mfrs. v. United States,* 201 F. Supp. 2d 1287 (Ct. Int'l Trade 2002)). Corus advances five arguments against a finding of material injury caused by Dutch products imported into the domestic market.[25] The court, however, finds this line of argument unpersuasive. The cases Corus cites to support its contention are inapposite. In both, the court merely recognized that notwithstanding an affirmative cumulation finding, the Commission is permitted to make a negative causation finding regarding the effect of cumulated imports on the volume and price of the domestic like product, in addition to their impact on the domestic industry. *Wire Rope,* 201 F. Supp. 2d at 1298–99; *BIC,* 21 CIT at 452–53, 964 F. Supp. at 397–98. Nothing in either case suggests that a separate causation finding for a subject country that has been cumulated would be permissible under the statute, let alone required.

In addition, although Corus would limit the import of the statutory language, a separate causation analysis would violate the plain lan-

[24] Regarding geographic overlap, the Commission specifically found that the domestic like product was marketed and sold throughout the entire U.S. market. Also, while some of the subject imports may have entered the United States through different regions, the Commission concluded that at some point during the POI some portion of subject imports from most countries entered every region. *Id.* at 16–17. Regarding simultaneous presence in the market, the Commission found that the domestic product was available troughout the POI and that subject imports from every country entered the U.S. market during every year of the POI. *Id.* at 18–19.

[25] First, Corus states that Dutch subject imports generally sold at or above domestic prices for sales to service centers, distributors, and end users during the POI. Second, Corus argues that nothing in the record demonstrates that U.S. producers lost sales or revenue to Dutch imports. Corus's third argument is that product differentiation creates attenuated competition between Dutch and domestic producers. Fourth, Corus maintains that Dutch import have had no adverse effect of the volume of sales in the domestic market. Finally, Corus argues that Commerce's determination on the margin of dumping does not establish material injury. Corus Br. at 29–39.

guage of the *cumulation* statute, which provides that, in conducting its material injury analysis, "the Commission shall cumulatively assess the volume and effects of imports of the subject merchandise *from all countries* * * * if such imports compete with each other and with the domestic like products in the United States market." 19 U.S.C. §1677(7)(G)(i) (emphasis added). This leaves no room for a separate causation analysis. Finally, this court has specifically rejected the argument that "imports from each country under investigation must be found to have a separate causal link to the material injury suffered by the pertinent U.S. industry before they can be assessed cumulatively" as "circular reasoning" that conflicts with both the statute and its legislative history. *Fundicao Tupy,* 12 CIT at 9, 678 F. Supp. at 901. In *Fundicao Tupy,* the court held that the operation of the cumulation provision does not involve a separate causation finding with respect to each country because it implicates the imports of each country in the general pattern of activity that is causing injury to the domestic industry. *Id.* at 10, 678 F. Supp. at 902. This interpretation of the interplay between cumulation and causation was affirmed by the U.S. Court of Appeals for the Federal Circuit. *Fundicao Tupy,* 859 F.2d at 917. In light of this longstanding and binding precedent contrary to Corus's position, the court declines to address Corus's arguments regarding whether Dutch imports individually caused material injury to the domestic industry.

CONCLUSION

For the foregoing reasons, the court denies Corus's Motion for Judgment Upon the Agency Record and sustains the ITC's material injury determination.

(Slip Op. 03–33)

YANTAI ORIENTAL JUICE CO., ET AL., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND COLOMA FROZEN FOODS, INC., ET AL., DEFENDANT-INTERVENORS

Court No. 00–00309

[Antidumping determination remanded to Commerce.]

(Decided March 21, 2003)

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt L.L.P. (Bruce M. Mitchell, Jeffrey S. Grimson and *Mark E. Pardo),* for Plaintiffs.

Robert D. McCallum Jr., Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen,* Director, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Lucius B. Lau,* Assistant Director, International Trade Section, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Scott D. McBride,* Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

The Law Firm of C. Michael Hathaway (C. Michael Hathaway), for Defendant-Intervenors.

MEMORANDUM OPINION AND ORDER

EATON, *Judge:* This matter is before the court on the motion of Yantai Oriental Juice Co. ("Yantai Oriental"), Qingdao Nannan Foods Co. ("Nannan"), Sanmenxia Lakeside Fruit Juice Co., Ltd. ("Lakeside"), Shaanxi Haisheng Fresh Fruit Juice Co. ("Haisheng"), Shandong ZhongluJuice Group Co. ("Zhonglu"), Xianyang Fuan Juice Co., Ltd. ("Fuan"), Xian Asia Qin Fruit Co., Ltd. ("Asia"), Changsha Industrial Products & Minerals Import & Export Corp. ("Changsha Industrial"), and Shandong Foodstuffs Import & Export Corp. ("Shandong Foodstuffs") (collectively "Plaintiffs") for judgment upon the agency record pursuant to USCIT R. 56.2. By their motion, Plaintiffs contest certain aspects of the determination of the United States Department of Commerce ("Commerce" or the "Department") resulting from its antidumping investigation of non-frozen apple juice concentrate ("AJC") from the People's Republic of China ("PRC"), *see Certain Non-Frozen Apple Juice Concentrate from the P.R.C.,* 65 Fed. Reg. 19,873 (Dep't Commerce Apr. 13, 2000) (final determination) *("Final Determination"), amended by Certain Non-Frozen Apple Juice Concentrate From the P.R.C.,* 65 Fed. Reg. 35,606 (Dep't Commerce June 5, 2000) (am. final determination) *("Am. Final Determination"),* covering the period of investigation ("POI") of October 1, 1998, through March 31, 1999. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(A)(i)(I). For the reasons set forth below, the court again remands this matter to Commerce with instructions to conduct further proceedings in conformity with this opinion.

BACKGROUND

On June 18, 2002, the court remanded this matter and directed Commerce to reexamine its surrogate country selection, and the various fac-

tors of production, used to calculate the antidumping duty margins for PRC AJC producers/exporters in the *Final Determination. See Yantai Oriental Juice Co. v. United States,* 26 CIT ____, Slip Op. 02–56 (June 18, 2002) *("Remand Order").* Familiarity with this opinion is presumed.

On November 15, 2002, Commerce released the results of its remand determination. *See Yantai Oriental Juice Co. v. United States,* 00–00309 (Dep't Commerce Nov. 15, 2002) (redetermination pursuant to court remand) *("Remand Determination").* Upon remand Commerce determined that: (1) Turkey, not India, was the proper surrogate country; (2) in light of its selection of Turkey as the surrogate country and the resultant reevaluation of the various factors of production, Yantai Oriental, Nannan, Lakeside, Haisheng, and Zhonglu (collectively the "Fully-Investigated Respondents") were "excluded" from the antidumping order and, thus, their antidumping duty margins were zero percent; and (3) because the Fully-Investigated Respondents' antidumping duty margins were lowered to zero percent, and because the antidumping duty margin for Fuan, Asia, Changsa Industrial, and Shandong Foodstuffs (i.e., companies that fully responded to Commerce's antidumping questionnaire but were not selected for investigation) (collectively the "Cooperative Respondents") was calculated from the Fully-Investigated Respondents' antidumping duty margins in the *Final Determination,* it was necessary to recalculate the Cooperative Respondents' antidumping duty margin for the *Remand Determination.* As a result of this recalculation the Cooperative Respondents' antidumping duty margin increased from 14.88 percent to 28.33 percent.

DISCUSSION

When reviewing the *Remand Determination* pursuant to 28 U.S.C. § 1581(c), the court will sustain Commerce's determinations unless they are "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 consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Daewoo Elecs. Co. v. United States,* 6 F.3d 1511, 1520 (Fed. Cir. 1993) (quoting *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 932 n.10 (Fed. Cir. 1984)). However, "Commerce must articulate a 'rational connection between the facts found and the choice made.'" *Rhodia, Inc. v. United States,* 25 CIT ____, ____, 185 F. Supp. 2d 1343, 1348 (2001) (quoting *Burlington Truck Lines, Inc. v. United States,* 371 U.S. 156, 168 (1962)).

A. Surrogate Country/Factors of Production

To determine whether subject merchandise is being, or is likely to be, sold in the United States at less than fair value, Commerce must make "a fair comparison * * * between the export price or constructed export price and normal value." 19 U.S.C. § 1677b(a); 19 C.F.R. § 351.401(a) (2002). Where, as here, the subject merchandise is exported from a nonmarket economy country ("NME"), Commerce is directed by statute to calculate normal value "on the basis of the value of the factors of produc-

tion utilized in producing the merchandise * * *." 19 U.S.C. § 1677b(c)(1); 19 C.F.R. § 351.408(a). When valuing factors of production in NME circumstances, subsection 1677b(c) directs Commerce to gather surrogate prices from "the best available information * * * in a market economy country * * * considered to be appropriate by the administering authority." 19 U.S.C. § 1677b(c)(1); *see Nation Ford Chem. Co. v. United States,* 166 F.3d 1373, 1377 (Fed. Cir. 1999) ("Whether such analogous information from the surrogate country is 'best' will necessarily depend on the circumstances, including the relationship between the market structure of the surrogate country and a hypothetical free-market structure of the NME producer under investigation."). This being the case, "the process of constructing foreign market value for a producer in [an NME] is difficult and necessarily imprecise * * *." *Sigma Corp. v. United States,* 117 F.3d 1401, 1408 (Fed. Cir. 1997). Commerce enjoys wide discretion in valuing factors of production. *See Lasko Metal Prods., Inc. v. United States,* 43 F.3d 1442, 1446 (Fed. Cir. 1994); *see also Sigma,* 117 F.3d at 1405 (citing *Torrington Co. v. United States,* 68 F.3d 1347, 1351 (Fed. Cir. 1995)) ("Commerce * * * has broad authority to interpret the antidumping statute * * *."). However, Commerce's discretion in calculating surrogate prices is not limitless. *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100–576, at 590 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623 ("Commerce shall avoid using any prices which it has reason to believe or suspect may be * * * subsidized prices."); *see also Shakeproof Assembly Components, Div. of Ill. Toolworks, Inc. v. United States,* 268 F.3d 1376, 1382 (Fed. Cir. 2001) ("In determining the valuation of the factors of production, the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible.").

Commerce, in accordance with the *Remand Order,* reexamined various aspects of the *Final Determination* including: (1) the selection of India as the surrogate country; (2) the valuation of Indian juice apples and, specifically, how a government market intervention scheme ("MIS") may have affected the price of such apples; (3) the valuation of domestic steam coal; (4) the use of certain financial data from an Indian grower of apples; and (5) the calculation of certain freight rates.

1. Surrogate Country

In the *Final Determination* Commerce selected India as the surrogate country for PRC AJC production. The court found Commerce's selection, based on the determination that India was a "significant producer of AJC," to be unsupported by substantial evidence and otherwise not in accordance with law. *See Remand Order* at 11. Commerce's determination was found to be not in accordance with law because it was based on uncorroborated secondary information—a market study commissioned

by the petitioners.[1] *Id.* Commerce's determination was found to be unsupported by substantial evidence because Commerce merely adopted the conclusions found in the petitioners' market study but did not "articulate a 'rational connection between the facts found and the choice made.'" *Remand Order* at 12 (citing *Rhodia,* 25 CIT at ____, 185 F. Supp. 2d at 1348). On remand, Commerce reexamined its selection of India as the proper surrogate country for PRC AJC production and stated that it had

> concluded that the record does not support our determination in the investigation that India was a significant producer of [AJC]. Instead, the Department has determined that Turkey is a more appropriate surrogate country for the [PRC] because it is the country most economically comparable to the PRC that is also a significant producer of AJC. Therefore, the Department has amended its calculations using Turkish data to value juice apples, [selling, general and administrative] expenses, overhead, and profit.

Remand Determination at 1 (citations omitted). In support of its selection of Turkey as the appropriate surrogate country, Commerce explained:

> Section 773 (c)(4) of the Act directs the Department to value the [NME] producers' factors of production in a market economy country that is both (1) economically comparable to the NME and (2) a significant producer of comparable merchandise, to the extent possible. Thus, it is the Department's policy to select a surrogate country that meets both of these requirements, when it is possible to do so.
>
> In the underlying investigation, the Department concluded that India was both economically comparable to the PRC and a significant producer of comparable merchandise. Hence, the Department selected India as its primary surrogate in this proceeding.
>
> In response to the concerns raised by the Court in its remand order, the Department reexamined closely the investigation record. Based on its reexamination, the Department reasoned that India could be a significant producer of comparable merchandise given its high level of apple production. However, the Department concluded that it lacked appropriate benchmarks for determining what constitutes significant production. Thus, the Department proposed two measures of significant production and attempted to apply them using the information in the investigation record. Unfortunately, the record did not contain sufficient information pertaining to alternative surrogate possibilities because once the Department had accepted India as an appropriate surrogate for AJC production in the investigation, there was no need or cause for parties to supply further comments on the record regarding other potential surrogate countries.

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[1] The Defendant-Intervenors in this action, Coloma Frozen Foods, Inc., Green Valley Packers, Knouse Foods Cooperative, Inc., Mason Country Fruit Packers, and Tree Top, Inc., were the petitioners at the administrative level. *See Certain Non-Frozen Apple Juice Concentrate From the PRC,* 64 Fed. Reg. 36,330, 36,330 (Dep't Commerce July 6, 1999) (initiation of investigation).

> Consequently, as a result of the Court's underlying determination and analysis, the Department developed two measures of significant production: Whether India (or any other country economically comparable to the PRC) was a significant netexporter of AJC and whether any was a major exporter of AJC to the United States. * * *
>
> The only source of information [among those examined by the Department] that consistently provided export and import information for India and the other comparable economies identified by the Department in the investigation (as well as all other worldwide exporters of AJC) was [the United Nations Food and Agriculture Organization ("FAOSTAT")]. * * *
>
> As the [data from FAOSTAT] shows, neither India nor any other country identified by the Department in the investigation as being economically comparable to the PRC is a significant net-exporter or a major exporter to the United States. In fact, during the relevant period, India was a net importer of AJC.

Remand Determination at 4–5. Thus, Commerce determined that Turkey was the appropriate surrogate country for valuing factors of production. *Id.* at 7.

2. Juice Apple Valuation

In the *Final Determination* Commerce determined that the price paid for Indian juice apples was a factor of production. The court found Commerce's determination to be unsupported by substantial evidence on the record as Commerce had not adequately explained why the MIS administered by the national and local Indian governments—which administration included subsidizing Indian apple growers and controlling an entity that further "administered the MIS to [the governments'] detriment"—did not affect the valuation of apples. *Remand Order* at 18. On remand, Commerce determined that any possible effects of the MIS on the price of Indian juice apples to be a "moot" issue as "the Department is using Turkish juice apple prices * * *." *Remand Determination* at 10.

3. Steam Coal Valuation

In the *Final Determination* "the Department calculated the value for steam coal using Indian import statistics because the Department concluded that the import statistics were the 'best available information.'" *Remand Determination* at 10. Commerce reasoned that the import statistics it relied on were the "best available information" because they were "more contemporaneous with the POI than the data submitted by plaintiffs * * *." *Id.* The court questioned Commerce's selection of import statistics for valuing domestic Indian coal because there was no indication that (1) the prices for domestic Indian steam coal were distorted or (2) that the "use of imported values 'best approximate[d] the cost incurred' for Indian AJC production." *Remand Order* at 24. After reviewing the record, Commerce determined that it would use the "domestic

price in India to value steam coal." *Remand Determination* at 10. In support of its use of domestic Indian steam coal prices Commerce stated:

> While we continue to believe that contemporaneity is an important consideration in selecting valuation data, we have reviewed the information in this case and have concluded that both the import statistics and the domestic prices preceded the POI, and hence, neither was contemporaneous with the POI. Moreover, there is no evidence suggesting that the domestic Indian prices were distorted.

Id. (citing *Creatine Monohydrate from the P.R.C.,* 67 Fed. Reg. 10,892 (Dep't Commerce Mar. 11, 2002) (final results); *Certain Preserved Mushrooms from the P.R.C.,* 67 Fed. Reg. 46,173 (Dep't Commerce July 12, 2002) (final results and partial rescission of antidumping rev.)).[2]

4. Valuation of Selling, General, and Administrative Expenses, and Overhead Ratios

In the *Final Determination* Commerce relied on financial data for selling, general, and administrative expenses ("SG&A"), and overhead ratios based on generalized Indian financial data from the *Reserve Bank of India Bulletin*. *Remand Order* at 24. The court questioned the use of such data as there was publically available audited financial information from an Indian producer of AJC, Himachal Pradesh Horticultural Produce Marketing and Processing Corporation. *Id.* at 26. On remand, Commerce determined that this issue was "moot" because "the Department is using information from a Turkish company to determine the factory overhead, SG&A and profit ratios * * *." *Remand Determination* at 11.

5. East Coast Surrogate Freight Rates Calculation

In the *Final Determination* Commerce "included freight to Detroit in calculating the East Coast average freight rate." *Remand Determination* at 11. The court found that neither Commerce nor the Government had addressed adequately the issue of how including the Detroit shipment in the East Coast freight rate was appropriate given that there was no "weighting" of this rate in Commerce's calculation of the East Coast rate. *See Remand Order* at 29–30. On remand, Commerce stated that it

> agrees with the Court that Detroit should not be included in the calculation of the East Coast average freight rate in this case, given that the record evidence does not show that Detroit shippers were transporting goods by way of the East Coast. Therefore, the Department has calculated an East Coast rate, a West Coast rate, and a separate Detroit rate. Because we have calculated different rates for the different destinations, the weighting issue raised by the Court does not arise.

Remand Determination at 11.

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[2] Although Commerce did not use Turkish prices for the valuation of domestic steam coal, no argument is made that the use of alternative Indian data for this factor was improper in the instant investigation.

6. Conclusion

The court finds that Commerce has complied with its remand order with respect to the selection of the proper surrogate country and the various factors of production. Moreover, as Plaintiffs do not take issue with Commerce's selection of Turkey as the proper surrogate country or otherwise challenge Commerce's selection of the proper factors of production used to calculate the Fully-Investigated Respondents' antidumping duty margins, the court, therefore, finds Commerce's determination in this regard to be supported by substantial evidence and otherwise in accordance with law, and sustains Commerce's determination that the Fully-Investigated Respondents should receive antidumping duty margins of zero percent.

B. Cooperative Respondents' Antidumping Duty Margin

In the original investigation the Cooperative Respondents' antidumping duty margin was calculated to be 14.88 percent. *See Am. Final Determination,* 65 Fed. Reg. at 35,607. This antidumping duty margin was based on the weighted average of the Fully-Investigated Respondents' antidumping duty margins.[3] *See Final Determination,* 65 Fed. Reg. at 19,874; *see also* 19 U.S.C. § 1673d(c)(5)[4]; *Coalition for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States,* 23 CIT 88, 109, 44 F. Supp. 2d 229, 249 (1999). In the *Remand Determination,* however, because the Fully-Investigated Respondents received antidumping duty margins of zero percent, Commerce decided that a new methodology was needed to calculate that margin. *See Remand Determination* at 14. Commerce determined that it would continue to calculate the Cooperative Respondents' margin following the "all-others" methodology found in 19 U.S.C. § 1673d(c)(5). *See id.* However, because all of the margins in the investigation were either (1) zero, i.e., the Fully-Investigated Respondents' margins, or (2) based on facts available, i.e., the PRC-wide margin, Commerce did not follow the methodology of 19 U.S.C. § 1673d(c)(5)(A) but, instead, looked to 19 U.S.C.

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[3] While Commerce does not specifically state that it used the "all-others" methodology of 19 U.S.C. § 1673d(c)(5)(A) to calculate the Cooperative Respondents' antidumping duty margin in the *Final Determination,* Commerce's methodology is consistent with that subsection. *See Final Determination,* 64 Fed. Reg. at 19,874 (citing *Bicycles from the P.R.C.,* 61 Fed. Reg. 19,026 (Dep't Commerce Apr. 30, 1996) (final determination)) ("For those PRC producers/exporters that responded to our separate rates questionnaire * * * but did not respond to the full antidumping questionnaire * * * we have calculated a weighted-average margin based on the rates calculated for the fully-examined responding companies, except that we did not include rates which were zero * * * [or] based entirely on facts available (i.e., the PRC-wide rate) * * *.").

[4] This subsection provides:

(A) *General rule*

For purposes of this subsection * * * the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and de minimis margins, and any margins determined entirely [on facts available].

(B) *Exception*

If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or de minimis margins, or are determined entirely [on facts available], the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

19 U.S.C. § 1673d(c)(5)(A)–(B).

§ 1673d(c)(5)(B). *See Remand Determination* at 14. In support of this determination Commerce explained that

> [a]s all the dumping rates in this redetermination on remand are now either * * * zero or based entirely on facts available, we have applied the methodology of section [1673d(c)(5)(B)] which is consistent with that used in determining the "all-others" rate *(i.e.,* the rate applied to companies not individually investigated) in a market economy case under the same circumstances. Section [1673d(c)(5)(B)] states that in situations where the estimated weighted-average dumping margins established for all exporters and producers individually investigated are zero or *de minimis,* or are determined entirely [on facts available] under section 776, "the administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averaging the weighted-average dumping margins determined for the exporters and producers individually investigated." The Statement of Administrative Action states that in using any reasonable method to calculate the all-others rate, "[t]he expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided that volume data is available." Thus, consistent with section [1673d(c)(5)(B)], we have determined the separate rates for these companies which were not individually investigated by weight-averaging the zero margins and margins determined pursuant to facts available.

Id. (citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–826(I), at 873 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4201 ("SAA")).[5] Using what it calls the "expected" method, Commerce calculated the Cooperative Respondents' "weighted average" margin based on the PRC-wide margin of 51.74 percent and the Fully-Investigated Respondents' margins of zero percent. *Id.* In its original investigation Commerce had determined the 51.74 percent PRC-wide margin by selecting "the higher of: (1) The highest margin stated in the notice of initiation; or (2) the highest margin calculated for any respondent in this investigation." *See Final Determination,* 65 Fed. Reg. at 19,874 (citing *Stainless Steel Wire Rod from Japan,* 63 Fed. Reg. 40,434 (Dep't Commerce July 29, 1998) (final determination)). Thus, using this methodology Commerce assigned a PRC-wide margin using data contained in the petition, which was "higher than the margin calculated for any respondent in this investigation." *Id.* It is worth noting that calculation of this PRC-wide margin of 51.74 percent was based, in part, on financial data from India that is no longer

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[5] The SAA states that 19 U.S.C. § 1673d(c)(5)(B)

> provides an exception to [19 U.S.C. § 1673d(c)(5)(A)] if the dumping margins for all of the exporters and producers that are individually investigated are determined entirely on the basis of the facts available or are zero or *de minimis.* In such situations, Commerce may use any reasonable method to calculate the all others rate. The expected method in such cases will be to weight-average the zero and *de minimis* margins and margins determined pursuant to the facts available, provided volume data is available. However, if this method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods.

1994 U.S.C.C.A.N. at 4201 (emphasis added).

relevant to the instant investigation. *See, e.g., Antidumping Investigation Initiation Checklist,* Conf. R. Doc. 6 at 10–11, 15 (citing *Pet. for the Imposition of Antidumping Duties: Certain Non-Frozen Apple Juice Concentrate from China,* Conf. R. Doc. 1 Ex. 12 Attach. M, at 29 (schedule 16)).

Plaintiffs object to Commerce's methodology for recalculating the Cooperative Respondents' antidumping duty margin arguing that

> [w]hile Commerce may have a certain amount of discretion in devising its methodologies in NME cases, the appellate court has stated that "the critical question is whether the methodology used by Commerce is based on the best available information and establishes antidumping margins as accurately as possible." It is immediately apparent that Commerce's new methodology does not calculate margins as accurately as possible for the [Cooperative Respondents].

Pls.' Comments Regarding Commerce's Final Remand Determination (Dec. 16, 2002) (citation omitted) *("Pls.' Comments")* at 2–3 (emphasis removed). Plaintiffs contend that Commerce's methodology was improper because

> [t]he [Cooperative Respondents'] rate is meant to represent a dumping margin that reasonably reflects the potential margin for the [Cooperative Respondents] had they been asked to submit complete sales and factors of production data. It is therefore beyond comprehension that Commerce would consider it reasonable or fair that the [Cooperative Respondents'] rate should double when the margin for every single cooperative respondent had been reduced to zero.

Id. at 3 (emphasis removed).

The United States ("Government"), on behalf of Commerce, counters that Commerce's methodology was proper because

> [t]he statute does not impose a requirement upon Commerce to examine all producers and exporters of merchandise that is subject to its investigation. Rather, the statute specifically provides for at least two methodologies to be applied to all other *(i.e.,* non-investigated) producers and exporters. The increase in the rate for the non-selected respondents occurred because Commerce originally followed the methodology contained in 19 U.S.C. § 1677d(c)(5)(A) and, because compliance with this Court's Order of Remand resulted in margins that were either zero or based entirely on facts available, subsequently followed the "expected method" pursuant to 19 U.S.C. § 1677d(c)(5)(B). [Plaintiffs have] not demonstrated that the 28.33 percent rate selected by Commerce is not "reasonably reflective" of the potential dumping margins of the non-selected respondents. Nor does the mere fact that the selected respondents all received margins of zero compel a finding that the potential dumping margin of the non-selected respondents must be zero.

Def.'s Resp. to Pls.' Comments Concerning the Remand Determination Filed by the United States Dep't of Commerce at 3–4 (Jan. 16, 2003) *("Def.'s Comments").*

The court does not agree that Commerce's calculation of the Cooperative Respondents' antidumping duty margin in the instant investigation was proper. First, the record shows that the Cooperative Respondents fully and completely complied with all of Commerce's requests for information. Indeed, the only apparent difference between the Fully-Investigated Respondents and the Cooperative Respondents is that Commerce did not select them for full investigations. Second, while it is not inconceivable that individual margins for each Cooperative Respondent could have increased had they been fully investigated, this outcome seems unlikely given that all of the Fully-Investigated Respondents' antidumping duty margins were reduced to zero percent—including that respondent originally assigned an antidumping duty margin of 27.57 percent. *See Am. Final Determination,* 65 Fed. Reg. at 35,607. Given these facts it appears that Commerce strained to reach its result. This is particularly puzzling given that in reaching its result Commerce abandoned the methodology used in the *Final Determination* (i.e., weight-averaging the estimated dumping margins of the Fully-Investigated Respondents) even though that method is specifically provided for in the statutory subsection it purported to follow. *See Remand Determination* at 14 (citing 19 U.S.C. § 1673d(c)(5)(B)). More importantly, in doing so, Commerce failed to justify the use of its new methodology other than by reference to the SAA. The SAA, however, takes into account the possibility that, under certain facts, the "expected" method should not be used. *See* SAA, 1994 U.S.C.C.A.N. at 4201 (However, if [the "expected"] method is not feasible, or if it results in an average that would not be reasonably reflective of potential dumping margins for non-investigated exporters or producers, Commerce may use other reasonable methods."). As the SAA indicates, when choosing a methodology for assigning antidumping duty margins Commerce cannot simply rely on a methodology found to be acceptable in other investigations. Rather, Commerce must insure that any methodology it employs in any particular investigation "is based on the best available information and establishes antidumping margins as accurately as possible." *Shakeproof,* 268 F.3d at 1382. In addition, when selecting a methodology Commerce must "articulate a 'rational connection between the facts found and the choice made.'" *Rhodia*, 25 CIT at ____, 185 F. Supp. 2d at 1348. The plain language of the statute allows Commerce the flexibility to formulate a methodology that permits it to best comply with these injunctions, and specifically allows for the averaging of the zero percent antidumping duty margins. *See* 19 U.S.C. § 1673d(c)(5)(B) ("[T]he administering authority may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, *including averaging the estimated weighted average dumping margins determined for the exporters and producers*

individually investigated." (emphasis added)). In the *Remand Determination,* however, Commerce nowhere explains how its choice of methodology established the Cooperative Respondents' antidumping duty margin "as accurately as possible" or makes a "rational connection between the facts found and the choice made." *Shakeproof,* 268 F.3d at 1382; *Rhodia,* 25 CIT at ____, 185 F. Supp. 2d at 1348. Thus, the court finds that, with respect to the recalculation of the Cooperative Respondents' antidumping duty margin, Commerce's determination on remand is neither based on substantial evidence nor otherwise in accordance with law.

CONCLUSION

For the reasons set forth above, the court remands this matter to Commerce. On remand, Commerce shall revisit the issue of the proper calculation of the Cooperative Respondents' antidumping duty margin and shall either: (1) use the methodology set forth in 19 U.S.C. § 1673d(c)(5)(B); or (2) set out another methodology. In either event, Commerce shall explain in clear and specific terms why its selected methodology "is based on the best available information and establishes antidumping margins as accurately as possible." *Shakeproof,* 268 F.3 at 1382.

Such remand determination is due within 45 days of the date of this opinion, comments are due thirty days thereafter, and replies to such comments 11 days from their filing.

(Slip Op. 03–34)

USEC INC. AND UNITED STATES ENRICHMENT CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 02–00112; and Court Nos. 02–00113, 02–00114 and Consolidated Court Nos. 02–00219; 02–00221, 02–00227, 02–00229, and 02–00233

[Department of Commerce's final determinations vacated as unsupported by substantial evidence on the record and not in accordance with law, and remanded to Commerce for reconsideration.]

(Decided March 25, 2003)

Fried, Frank, Harris, Shriver & Jacobson (David E. Birenbaum, Jay R. Kraemer, Mark Fajfar); Weil, Gotshal & Manges LLP (Stuart M. Rosen, Gregory Husisian, Jennifer J. Rhodes) for Plaintiffs and Defendant-Intervenors Eurodif S.A., COGEMA and COGEMA, Inc., Urenco Limited, Urenco Deutschland GmbH, Urenco Nederland B.V., Urenco (Capenhurst) Ltd., and Urenco, Inc.

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

Steptoe & Johnson, LLP (Sheldon E. Hochberg, Richard O. Cunningham, Eric C. Emerson) for Defendant-Intervenors and Plaintiffs USEC Inc. and United States Enrichment Corporation.

Shaw Pittman LLP (Stephen E. Becker, Nancy A. Fischer, Sanjay J. Mullick, Joshua D. Fitzhugh) for Plaintiff-Intervenors Ad Hoc Utilities Group.

OPINION

POGUE, *Judge:* Plaintiffs Eurodif, S.A., COGEMA, COGEMA Inc. (collectively, "Cogema"), Urenco Limited, Urenco Deutschland GmbH, Urenco Nederland B.V., Urenco (Capenhurst) Ltd. and Urenco, Inc. (collectively, "Urenco"),[1] challenge the final affirmative antidumping and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom.[2] Plaintiffs assert that the antidumping and countervailing duty laws do not apply to certain uranium enrichment transactions because the contractual arrangements involve purchases of enrichment services, rather than purchases of LEU as merchandise, and services fall outside the scope of the antidumping and countervailing duty laws. The Ad Hoc Utilities Group ("AHUG"), an association of twenty-two United States utilities that are consumers of low enriched uranium, seeks to intervene as of right in this action. *See* Mem. Supp. AHUG Mot. Intervene at 1 ("AHUG Intervention Mem."). This Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000). For the reasons discussed below, we find that Commerce's determinations are neither supported by substantial evidence in the record nor in accordance with law.

BACKGROUND

On December 7, 2000, USEC, Inc. and its wholly-owned subsidiary United States Enrichment Corporation (collectively, "USEC"), petitioned the Department of Commerce for initiation of antidumping and countervailing duty investigations into imports of low enriched uranium from France, Germany, the Netherlands, and the United Kingdom. On December 21, 2001, Commerce issued its final affirmative determinations in the antidumping and countervailing duty investigations of LEU from France and in the countervailing duty investigations of LEU from Germany, the Netherlands, and the United Kingdom. *See LEU from France,* 66 Fed. Reg. at 65,877; *Low Enriched Uranium from*

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[1] Plaintiffs appear alternatively as Defendant-Intervenors in actions brought by USEC Inc. and the United States Enrichment Corporation challenging these final determinations. These actions have been consolidated as Court Numbers 02–00221, 02–00227, 02–00229, and 02–00233, and the parties have submitted cross-motions for judgment on the agency record. The motions raise certain "general issues" which are addressed here. Pursuant to this Court's Scheduling Order of August 5, 2002, the parties have initially submitted opening briefs on these "general issues."

[2] The challenged determinations are *Low Enriched Uranium from France,* 67 Fed. Reg. 6680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); *Low Enriched Uranium from France,* 66 Fed. Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (final determination of sales at less than fair value) *("LEU from France"); Low Enriched Uranium from France,* 67 Fed. Reg. 6689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); *Low Enriched Uranium from France,* 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom,* 67 Fed. Reg. 6688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); *Low Enriched Uranium from Germany, the Netherlands and the United Kingdom,* 66 Fed. Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

France, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); *Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom,* 66 Fed. Reg. 65,903 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

The antidumping and countervailing duty investigations initiated upon the petition of USEC covered "all low enriched uranium (LEU). LEU is enriched uranium hexafluoride (UF_6) with a U^{235} product assay of less than 20 percent that has not been converted into another chemical form, such as UO_2, or fabricated into nuclear fuel assemblies, regardless of the means by which the LEU is produced." *LEU from France,* 66 Fed. Reg. at 65,877; *see also* Petition for the Imposition of Antidumping and Countervailing Duties on Low Enriched Uranium from France, Germany, the Netherlands and the United Kingdom, Jt. App. Tab 2–A at JA–1011–12 (stating the scope of the petition) ("Petition"). Low enriched uranium is a good, classifiable under headings 2844.20.0020, 2844.20.0030, 2844.20.0050, and 2844.40.00 of the Harmonized Tariff System of the United States ("HTSUS"). *See LEU from France,* 66 Fed. Reg. at 65,877; Petition, Jt. App. Tab 2–A at JA–1012–13. All parties to this action acknowledge that LEU itself is a good, and that trade in LEU may be subject to the application of the unfair trade laws. *See, e.g., LEU from France,* 66 Fed. Reg. at 65,878 ("{W}e found, and no party disputed, that LEU entering the United States constitutes a good, the tangible yield of a manufacturing operation."); Pls.' Opening Br. Supp. Mot. J. Agency R. at 14 ("Pls.' Opening Br.").[3]

Low enriched uranium is used to produce nuclear fuel rods, which are used in nuclear reactors to produce electricity. *See LEU from France,* 66 Fed. Reg. at 65,879; Def.'s Resp. Opp'n Pls.' Mot. J. Agency R. at 5 ("Def.'s Resp."). Enrichment is the process by which the percentage of the fissionable isotope U^{235} contained in uranium is increased. *See, e.g.,* Pls.' Opening Br. at 9–10; Def.'s Resp. at 4. Natural uranium contains approximately 0.711 percent of U^{235}; most nuclear utilities in operation require fuel with a U^{235} concentration or "assay" between three and five percent. Pls.' Opening Br. at 9; Def.'s Resp. at 4–5.

The production of nuclear fuel involves: (1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium (U_{308}); (3) converting the natural uranium into uranium hexafluoride (UF_6), or "feed uranium;" (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors. *See* Pls.' Opening Br. at 9; Def.'s Resp. at 3–5; *LEU from France,* 66 Fed.

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[3] Title 19 U.S.C. § 1673 authorizes Commerce to impose antidumping duties where it "determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. §1673 (2000). The language of the statute requires that there be a sale or likely sale at less than fair value in order for there to be a final determination. *See* 19 U.S.C. § 1673d(a)(1) ("{T}he administering authority shall make a final determination of whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value."). The Department interprets the statute to apply also to investigations of merchandise entered into the United States for "consumption." *LEU from France,* 66 Fed. Reg. at 65,878. We will assume, arguendo, that Commerce's interpretation is a reasonable one.

Reg. at 65,879. The process of enrichment results in the creation of LEU, with its higher concentration of U^{235}, and depleted uranium or uranium "tails." Pls.' Opening Br. at 10; *LEU from France,* 66 Fed. Reg. at 65,879.

Nuclear utilities employ two types of contracts for procuring LEU from uranium enrichers. One is a contract for enriched uranium product ("EUP contract"), in which the utility simply purchases LEU from the enricher. *See LEU from France,* 66 Fed. Reg. at 65,878, 65,885; Pls.' Opening Br. at 13; Def.'s Resp. at 5. In an EUP contract, the price paid for the LEU covers all elements of the LEU's value, including the feed uranium and the effort expended to enrich it. Transcript of Dep't of Commerce Hearing (Oct. 31, 2001), Jt. App. Tab 6–A at 46 ("Hrg. Trans."); Pls.' Opening Br. at 13. All parties to this action agree that sales of enriched uranium product are sales of merchandise subject to the antidumping and countervailing duty laws. *See, e.g.,* Pls.' Opening Br. at 14 ("Movants do not question the application of the antidumping and countervailing duty laws to the sale of LEU.").

The second type of contract provides for the purchase of "separative work units" ("SWU") and also provides for the delivery by the utility of a quantity of feed uranium to the enricher. *LEU from France,* 66 Fed. Reg. at 65,878, 65,884–85; Pls.' Opening Br. at 11–12; Def.'s Resp. at 5. A "separative work unit" is a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium, or uranium "tails," at specified assays. *See LEU from France,* 66 Fed. Reg. at 65,884; Pls.' Opening Br. at 10 & n. 15; Def.'s Resp. at 5. In an SWU contract, the precise quantity of LEU purchased is not initially specified. Rather, the contract specifies the general terms of the transaction. Notices given during the contract term specify the quantity of SWUs, the product assay, and the tails assay. These specifications determine the material characteristics of the resultant LEU. *LEU from France,* 66 Fed. Reg. at 65,884; Pls.' Opening Br. at 11–12; Resp. Br. of USEC, Inc. Opp'n Cogema/Urenco Mot. J. Agency R. at 18 ("USEC Resp."). Specification of the product and tails assays by means of the notices given during the contract term permits the utility to determine how many SWUs it will pay for and how much feed uranium it will provide to the enricher. *See* Pls.' Opening Br. at 12 & n.20; USEC Resp. at 18; Hrg. Trans., Jt. App. Tab 6–A at 45–46. This allows the utility to "optimize the relative amounts of money and uranium it must provide for the LEU it will receive." USEC Resp. at 18; *see also id.* at 7 ("{T}he utility customer, by specifying the product assay and transactional tails assay * * * can control the total price it will pay and the amount of natural uranium it will provide."); Hrg. Trans., Jt. App. Tab 6–A at 45–46.

Feed uranium is fungible. *See, e.g.,* USEC Resp. at 17. Therefore, the specific feed uranium provided by a utility customer need not be used to produce LEU for that customer. *See id.* at 16 & n.21. Rather, enrichers maintain inventories of feed uranium, which is not segregated according to source or ownership. Any uranium held by the enricher may be used to produce LEU for any customer. *Id.* at 17; Def.'s Resp. at 5–6.

Utilities purchase feed uranium from third parties,[4] and prior to delivering the feed uranium to the enricher, the utilities have title, risk of loss, power to alienate or sell, and use and possession of the feed uranium. Title to feed uranium supplied to the enricher remains with the utility customer until the LEU is delivered, at which time title to the LEU is transferred to the utility. One contract states, for example, that "{t}itle to the Feed Material shall remain with {the utility} until the {LEU} Delivery associated with such Feed Material * * * at which time the Feed Material shall be deemed to have been enriched; whereupon {the utility} sha{ll} have title to such {LEU} associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–F at JA–1364; *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–G at JA–1399. Pursuant to the SWU contracts, risk of loss or damage to the feed uranium, as well as use and possession, pass from the utility to the enricher upon delivery of the feed uranium to the enricher. Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–F at JA–1364; *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–G at JA–1399; Transcript of Oral Argument at 35 (Feb. 11, 2003) ("Oral Arg. Trans."). However, the enricher does not obtain title to the feedstock; rather, actual title is at all times with the utility. *See, e.g.,* Oral Arg. Trans. at 34. Nor does the enricher have the power to sell a utility's feedstock to a third party. *Id.* at 35. Moreover, it appears clear on this record that at the moment when the LEU is delivered to the utility by the enricher, the utility has title to and ownership of the LEU. *See* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–F at JA–1361 (indicating that title to the LEU and all risk of loss or damage to pass from the enricher to the utility customer upon delivery of the LEU by the enricher); *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–G at JA–1401. The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records.[5] *See, e.g.,* Oral Arg. Trans. at 38. The contractual arrangement described above, in which utilities supply feed uranium and pay for the separative work performed as measured in SWUs, long predates the initiation of the challenged investigations. *See, e.g.,* Hrg. Trans., Jt. App. Tab 6–A at 43–45. During the 1960s and 1970s, the U.S. Department of Energy had a monopoly on enrichment services, but offered no other services relating to the production of

[4] Nothing in the record suggests that the parties from whom utilities purchase the feed uranium are in any manner related to the enrichers.

[5] Commerce verified the foreign enrichers' records, which did not reflect payments for customer-provided uranium. Oral Arg. Trans. at 38. Furthermore, even though USEC has represented that, as an enricher, it receives feed uranium as consideration or "payment-in-kind" for the supply of LEU, USEC has required its utility customers to pay all property tax on what it views, correctly, as the "customer's feed." *See* Letter from Weil, Gotshal & Manges LLP to Hon. Norman Y. Mineta (Dec. 20, 2000) at Ex. 2, Letter from USEC to Enrichment Customers (Nov. 19, 1998), Jt. App. Tab 5–B at JA–1885 ("USEC Property Tax Letter") ("USEC will report all the property that it owns at the two {gaseous diffusion plants} and will pay property tax accordingly. USEC does not intend to report any UF_6 to which it does not hold legal title."). The record does not indicate that the enrichers depreciated the customer-owned feed uranium or otherwise treated it as an asset.

nuclear fuel. *See id.* at 43. Consequently, utilities purchased enrichment services from the Department of Energy, but purchased feedstock from third parties. *Id.* at 43–45. In summary, utilities contract for each step of the nuclear fuel production process, including for enrichment. *Id.*

Commerce found during its investigations that enrichers were producers of LEU for purposes of the less-than-fair-value determination. In reaching its affirmative antidumping and countervailing duty determinations, Commerce concluded that EUP and SWU contracts were "functionally equivalent," in that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." *LEU from France,* 66 Fed. Reg. at 65,884–85. The agency found that (1) the enrichment process is the "most significant manufacturing operation involved in the production of LEU" and that "it is the enricher who creates the essential character of LEU," *LEU from France,* 66 Fed. Reg. at 65,884; (2) the enrichers fully control the enrichment process, including the "level of usage of the natural uranium provided by the utility company," and therefore "cannot be considered tollers {or subcontractors} in the traditional sense under the regulation," *id.;* and (3) U.S. utility companies do not maintain production facilities for the enrichment of uranium. *Id.*

Plaintiffs argue that SWU contracts are transactions in services and therefore not subject to the antidumping and countervailing duty laws. *See, e.g.,* Pls.' Opening Br. at 7–9. Plaintiffs further assert that the petitions were not filed on behalf of the United States industry. *Id.* at 9. AHUG joins the plaintiffs in these assertions. *See* AHUG Intervention Mem. at 5–6; AHUG Opening Br. Supp. Mot. J. Agency R. at 7–8 ("AHUG Opening Br."). AHUG also claims that it is entitled to intervene as of right because its members are producers of LEU. AHUG Intervention Mem. at 5.

STANDARD OF REVIEW

This Court will sustain Commerce's determinations unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

"Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951) (internal citation omitted); *Micron Tech., Inc. v. United States,* 117 F.3d 1386, 1393 (Fed. Cir. 1997). "{T}he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n,* 383 U.S. 607, 620 (1966). A decision will be reviewed on the grounds invoked by the agency, *see SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947), and the Court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974). The Court's function is not to re-weigh the evidence, but to ascertain whether the agency's determination is supported by substantial evidence on the re-

cord. *Matushita Elec. Indus. Corp. v. United States,* 750 F.2d 927, 936 (1984).

DISCUSSION

I. The Tolling Regulation, 19 C.F.R. § 351.401(h), and Commerce's Prior Decisions Related Thereto[6]

Title 19 U.S.C. § 1673 provides that antidumping duties may be imposed on imported merchandise where "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value" and imports, sales, or likely sales of that merchandise result in injury or the threat of injury to the domestic industry, or in the material retardation of the establishment of the domestic industry. 19 U.S.C. § 1673.[7] In order to determine whether merchandise is being sold or is likely to be sold in the United States at less than fair value, Commerce compares the merchandise's normal value, or the price at which the merchandise is first sold for consumption in the exporting country, to the export price or constructed export price, which represent the price of the good when sold in or for export to the United States.[8] *See* 19 U.S.C. § 1673; 19 U.S.C. § 1677a; 19 U.S.C. § 1677b(a). In order to determine export price or constructed export price, Commerce must determine which company is the producer or exporter of the merchandise. *See Taiwan Semiconductor Mfg. Co. v. United States,* 25 CIT ____, ____, 143 F. Supp. 2d 958, 966 (2001) ("In order to make a less-than-fair-value determination, Commerce must first determine the exporter or producer of the subject merchandise who controls the export price (or constructed export price) that Commerce compares to normal values to determine dumping margins.").

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[6] Commerce argues that the issue of the applicability of the Department's tolling regulation is not a "general issue" and should therefore be postponed to a later stage in the proceeding. As we made clear in the Scheduling Order for this matter, issues which are not general include "challenges to the Department of Commerce's calculation results and methods." Scheduling Order at 5. While the initial applicability of the tolling regulation also has implications for the Department's calculation results and methods, it is more appropriately addressed as a general issue affecting the Department's threshold determinations. Accordingly, we address it here.

[7] The statute states that antidumping duties shall be imposed where

> (1) * * * a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than fair value, and
> (2) the Commission determines that—
> (A) an industry in the United States—
> (i) is materially injured, or
> (ii) is threatened with material injury, or
> (B) the establishment of an industry in the United States is materially retarded,
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation.

19 U.S.C. § 1673. "The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the foreign manufacturers charge for the same products in their home markets." *Torrington Co. v. United States,* 68 F.3d 1347, 1352 (Fed. Cir. 1995).

[8] "Export price" is defined as

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States.

19 U.S.C. § 1677a(a). "Constructed export price" is defined as

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter.

19 U.S.C. § 1677a(b).

In determining who is the producer or exporter of subject merchandise, one factor Commerce considers is whether the merchandise is manufactured under a tolling or subcontracting arrangement. Title 19 C.F.R. § 351.401(h) states that Commerce "will not consider a toller or subcontractor to be a manufacturer or producer where the toller or subcontractor does not acquire ownership, and does not control the relevant sale, of the subject merchandise or foreign like product."[9] 19 C.F.R. § 351.401(h). The regulation sets out "certain conditions under which {the agency} will not find that a toller or subcontractor is the producer of the subject merchandise." *Polyvinyl Alcohol from Taiwan,* 63 Fed. Reg. 32,810, 32,813 (Dep't Commerce June 16, 1998) (final results of antidumping duty administrative review). "{T}he purpose of the tolling regulation is to identify the seller of the subject merchandise for purposes of establishing export price, constructed export price, and normal value." *LEU from France,* 66 Fed. Reg. at 65,878. As observed by this Court, "Commerce's construction of 'producer,' as memorialized in {the regulation}, emphasizes three factors: (1) ownership of the subject merchandise; (2) control of the relevant sale * * *; and (3) control of production of the subject merchandise." *Taiwan Semiconductor Mfg. Co.,* 25 CIT at ____, 143 F. Supp. 2d at 966. Thus, under the regulation, Commerce will not find tollers or subcontractors to be producers where such toller or subcontractor does not acquire ownership and does not control the relevant sale of the subject merchandise or foreign like product. The regulation "does not provide a basis to exclude merchandise from the scope of an investigation," *LEU from France,* 66 Fed. Reg. at 65,878, and "does not purport to address all aspects of an analysis of tolling arrangements." *Polyvinyl Alcohol from Taiwan,* 63 Fed. Reg. at 32,813. In making its producer determination, Commerce is "not restricted to the four corners of the contract" and will "look at the totality of the circumstances presented." *Id.*

Commerce has noted that "{t}ypically, the subcontracting, or tolling, addressed by this practice involves a contractor who owns and provides to the subcontractor a material input and receives from the subcontractor a product that is identifiable as subject merchandise." *Response to Court Remand, Taiwan Semiconductor Mfg. Corp., Ltd. v. United States,* Jt. App. Tab 7–A at JA–2604 (Dep't Commerce June 30, 2000) *("SRAMS Remand Response").* The basis for treating the toller or subcontractor as a service provider and not the producer of the good is that the toller's price represents only the price for "some processing of the

[9] "Relevant sale" is "the first sale in the distribution chain by the company that is in a position to set the price of the product, and by doing so, to sell at less than fair value in or to the U.S. market." *Taiwan Semiconductor,* 143 F. Supp. 2d at 966 (quoting *Response to Court Remand, Taiwan Semiconductor Mfg. Corp., Ltd. v. United States* (Dep't Commerce June 30, 2000)).

subject merchandise," not the "full cost of manufacturing."[10] *Polyvinyl Alcohol Mem.,* Jt. App. Tab 7–F at JA–2730 (stating that Commerce prefers not to use tollers as respondents where a toller's price for the good does not "capture all the costs of production for producing the subject merchandise, as required by the statute"). Rather, the producer of the merchandise must be the company that "bears all essential costs from the inception of production through the time of the sale to the first customer. Because its pricing represents all elements of value, * * * this entity functions as the 'price setter' or potential price discriminator." *SRAMS Remand Response,* Jt. App. Tab 7–A at JA–2604.

In *Static Random Access Memory Semiconductors from Taiwan,* 63 Fed. Reg. 8,909 (Dep't Commerce Feb. 23, 1998) (notice of final determination of sales at less than fair value) *("SRAMS from Taiwan")*, a foundry manufactured SRAM wafers using a design and design mask supplied by a design house. The design house developed the design, which was the crucial element in the production of the SRAM wafer; retained ownership of the design as intellectual property; "arrange{d} and pa{id} for the production of" the design mask; and "{told} the foundry what and how much to make." *SRAMS from Taiwan,* 62 Fed. Reg. 51,442, 51,444 (notice of preliminary determination of sales at less than fair value). Commerce concluded that the foundry, TSMC, was a toller, or subcontractor, rather than the producer of the SRAMS. Pursuant to this Court's instruction to explain why it treated the foundry in *SRAMS from Taiwan* as a service provider and not the producer of the merchandise, Commerce stated that

> although a subcontractor may deliver to the contractor a product which, based on its characteristics, is subject merchandise, the price paid to the subcontractor may not represent the entire value of the subject merchandise, but merely represents a portion of that value. In fact, in most subcontracting arrangements, the contractor already owns an essential portion of the product, and thus the price paid is only for the work performed by the subcontractor; that is, the sale by the subcontractor is only a sale of the service it performed (and any inputs provided). Under these circumstances, we find that it is not appropriate to equate the price of a subcontractor's services (and material inputs) with the price of subject merchandise in a dumping analysis. Indeed, we do not consider the "sale" between the subcontractor and such a contractor to be a sale of subject merchandise at all. Rather, it is a sale of certain inputs and subcontracting services. It is the contractor's subsequent sale which is the relevant sale because that party owns the merchandise

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[10] Commerce stated that

> Continuing to base the margin methodology on a toller's prices and/or costs for tolling only raises the issue as to whether such comparisons are consistent with the statute in determining the appropriate bases for normal value and export price, the definition of subject merchandise, and how we calculate dumping margins. The statute requires that we base comparisons on the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise. Where cost of production and/or constructed value analysis is necessary, the statute requires that we calculate the full cost of manufacturing, not part of the cost of manufacture of the subject merchandise.

Dep't of Commerce Mem. from Team to Barbara R. Stafford, *Treatment of DuPont's Sales of Polyvinyl Alcohol Tolled by Chang Chun* Jt. App. Tab 7–F at JA–2730 (Aug. 8, 1995) *("Polyvinyl Alcohol Mem.").*

> in its entirety and thus its sales price represents the full value of the subject merchandise.

SRAMS Remand Response, Jt. App. Tab 7–A at JA–2604. The agency noted that "the price from TSMC did not include an essential component of the product. Consequently, TSMC did not sell subject merchandise, but rather only sold inputs and fabrication services." *Id.* at JA–2605. The "essential component" not present in TSMC's pricing was the cost of the wafer design and design mask, which were provided to TSMC by the contractor. *Id.* at JA–2604–05.

Commerce further stated in the *SRAMS Remand Response* that

> we believe that the entity controlling the wafer design in effect controls production in the SRAMS industry. The design house performs all of the research and development for the SRAM that is to be produced. It produces, or arranges and pays for the production of, the design mask. At all stages of production, it retains ownership of the design and design mask. The design house then subcontracts the production of processed wafers with a foundry and provides the foundry with the design mask. It tells the foundry what and how much to make. The foundry agrees to dedicate a certain amount of its production capacity to the production of the processed wafers for the design house. The foundry has no right to sell those wafers to any party other than the design house unless the design house fails to pay for the wafers. Once the design house takes possession of the processed wafers, it arranges for the subsequent steps in the production process. The design of the processed wafer is not only an important part of the finished product, it is a substantial element of production and imparts the essential features of the product. The design defines the ultimate characteristics and performance of the subject merchandise and delineates the purposes for which it can be used.

SRAMS Remand Response, Jt. App. Tab 7–A at JA–2603. Commerce stated that it considered the foundry to be a subcontractor because "it did not acquire ownership of the SRAM design or the design mask, nor did it control the subsequent sale of the wafers." *Id.*

In *Polyvinyl Alcohol from Taiwan,* Commerce determined that under one contractual arrangement, the manufacturer of the subject merchandise, Chang Chun, was engaged as a toller or subcontractor, and therefore was not the producer of the subject merchandise for purposes of calculating export or constructed export price. The contractor, DuPont, manufactured the primary input, shipped it to Taiwan for processing by Chang Chun according to specifications supplied by DuPont, and exported it from Taiwan back to the United States and to third countries. *See Polyvinyl Alcohol from Taiwan,* 63 Fed. Reg. 6,526, 6,527 (Dep't Commerce Feb. 9, 1998) (preliminary results of antidumping duty administrative review); *Polyvinyl Alcohol Mem.,* Jt. App. Tab 7–F at JA–2727. Commerce determined that under these circumstances, DuPont was the producer of the subject merchandise. *Polyvinyl Alcohol from Taiwan,* 63 Fed. Reg. at 6,527. Like the design house in *SRAMS*

from Taiwan, DuPont (1) coordinated all aspects of the production of the good and (2) supplied materials to the subcontractor to be used in the manufacturing process.[11] *See Polyvinyl Alcohol from Taiwan,* 63 Fed. Reg. at 6,527 (preliminary results of antidumping duty administrative review); *Polyvinyl Alcohol from Taiwan,* 63 Fed. Reg. at 32,817 (final results of antidumping duty administrative review); *Polyvinyl Alcohol Mem.,* Jt. App. Tab 7–F at JA–2727.

Finally, in *Certain Forged Stainless Steel Flanges from India,* 58 Fed. Reg. 68,853 (Dep't Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value), Commerce determined that Akai, a contractor that did not engage in manufacturing operations, was the producer of the subject merchandise. *Id.* at 68,855. Akai "purchase{d} and maintaine{d} title (during the entire course of production) to the raw materials used for the production of the vast majority of the flanges," and also "direct{ed} and control{led} the manufacturing process" by providing specifications for the finished merchandise. 58 Fed. Reg. at 68,856. Commerce noted that "for the vast majority of the flanges produced * * * Akai controls the costs for all elements incorporated in the production of the flanges." *Id.*

The circumstances of the instant case largely resemble the tolling or subcontracting arrangements seen in these earlier determinations. Like Akai in *Certain Forged Stainless Steel Flanges from India,* the utilities direct and control the process of producing the merchandise, i.e. nuclear fuel. *See, e.g.,* Hrg. Trans., Jt. App. Tab 6–A at 44–45. Using contractors at each step, they coordinate the production of uranium, LEU, and fuel rods. *Id.* As in *Polyvinyl Alcohol from Taiwan,* where the contracting company provided the material to be processed, the utilities provide the feed uranium to the enrichers and pay separately for the work performed, measured in SWUs. The utilities, by supplying the feed uranium, accept the risk of fluctuations in the price of UF6 and can make the decision as to how much UF_6 versus how many SWUs to purchase in a given transaction. *See* Pls.' Opening Br. at 13 n.22 & sources cited therein. The contracts require the utility customer to provide the quantity of feed necessary to produce the desired quantity and assays of LEU. *See, e.g.,* French CVD Verification Exhibit C–1 (Oct. 23, 2001), [ ], Jt. App. Tab 4–A at JA–1507. As noted above, the utility customer retains title to the feed uranium until it is enriched. *See, e.g.,* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–F at JA–1364; USEC Property Tax Letter, Jt. App. Tab 5–B at JA–1885–86

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[11] Notably, in a second contractual setting in *Polyvinyl Alcohol from Taiwan,* Commerce determined that the same manufacturer, Chang Chun, was the producer of the subject merchandise, while the other company, Perry, was determined to be an importer and reseller. *See Polyvinyl Alcohol from Taiwan,* 63 Fed. Reg. at 6,527. The contractual arrangement under which Perry purchased and supplied input materials to Chang Chun was altered only after a finding of sales at less-than-fair-value by Chang Chun. *Id.* Perry purchased the inputs from a Chang Chun affiliate and arranged for their delivery to Chang Chun. *Id.* Perry did not and had never manufactured any chemicals or chemical inputs; it was merely an importer and reseller. *Id.* The crucial finding in *Polyvinyl Alcohol from Taiwan* was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to circumvent the antidumping duties. This is distinguishable from the instant case because here the utility purchases the feedstock from a party unrelated to the enricher, and therefore the purchase of the feedstock confers no economic benefit on the enricher. The contract here is not simply a restructured purchase contract.

(noting that the utility customer is responsible for paying property taxes due on feed uranium stored by USEC on the utility's behalf). Upon enrichment and delivery of LEU, the title to the feed is considered extinguished and the customer gains title to the LEU. Significantly, the contracts for LEU state that once the separative work is performed and the LEU is delivered, "the Feed Material shall be deemed to have been enriched; whereupon {the utility customer} sha{ll} have title to such {LEU} associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–F at JA–1364; *see also* Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–G at JA–1399.[12] These contractual provisions acknowledge the fungible nature of feed uranium while establishing a legal fiction that the enrichment process will be performed on the uranium provided by the customer. The SWU contracts indicate that the provision of feed uranium is not treated by the parties as a payment in kind, but the provision of specific material, owned by the customer, to be enriched. Accordingly, the contractual provisions, without more, do not support Commerce's interpretation that the provision of feed uranium is substantively a payment in kind. *See LEU from France,* 66 Fed. Reg. at 65,884–85 (indicating that while Commerce recognized that the provision of feed uranium under SWU contracts "may not be a payment-in-kind in the formal sense," it is substantively a payment in kind and is part of an "arrangement between buyer and seller * * * dedicated to the delivery of LEU").

The designation by the utilities of particular assays for the LEU and for uranium tails is analogous to DuPont's provision of specifications to Chang Chun in *Polyvinyl Alcohol from Taiwan,* and to Akai's control of the specifications in C*ertain Forged Stainless Steel Flanges from India.* The designation of quantities and assays is based on (1) the design of the core reactor, which determines the level of U^{235} needed by that reactor,[13] and (2) the utility's needs at a particular time, depending on its operating cycle and the amount of fuel that has been spent. *See, e.g.,* AHUG Intervention Mem. at 11. The utilities provide these specifications to the enricher, which then produces LEU in the required quantities and assays.

Commerce has previously indicated that control over the specifications of the final product was sufficient control to be considered a producer. Companies that did not engage in actual manufacturing processes have previously been held to be producers of subject merchandise. In *SRAMS from Taiwan,* discussed *supra,* the design house sub-

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[12] Defendant United States cites *NSK Ltd. v. United States,* 115 F.3d 965, 975 (Fed. Cir. 1997), for the proposition that a sale exists when there is "a transfer of ownership to an unrelated party and consideration." *NSK Ltd.,* 115 F.3d at 975; Def.'s Resp. at 58–59. As there is no finding that the enrichers' rights rise to the level of ownership, *NSK* is inapplicable.

[13] AHUG states that "{t}he specific level of U^{235} needed is determined by each utility, based on the reactor core design it develops for its own reactors. In developing this design, the utility determines the number of fresh fuel assemblies and corresponding enrichment level necessary to produce the energy it needs until the next scheduled refueling date." AHUG Intervention Mem. at 11.

contracted the manufacturing of the wafer to a foundry. The design house created the design, retained ownership of the design throughout the production process, and provided manufacturing specifications to the foundry. *SRAMS from Taiwan,* 63 Fed. Reg. at 8,918 ("The design house * * * subcontracts the production of processed wafers with a foundry and provides the foundry with the design mask. It tells the foundry what and how much to make.") (quoting internal decision memorandum); *see also* text pp. 18–20, *supra.* Commerce found that the design house was the producer of the wafers. *Id.* at 8,918–19.

In *Certain Forged Stainless Steel Flanges from India,* the petitioners claimed that Akai, a company that did not engage in manufacturing operations, could not be the producer of the subject merchandise. 58 Fed. Reg. at 68,855. Commerce disagreed, stating that Akai was the producer of the subject merchandise because in addition to purchasing and retaining title to the raw materials used to produce the "vast majority" of the flanges, Akai also "direct{ed} and control{led} the manufacturing process insofar as it determines the quantity, size, and type of flanges to be produced." 58 Fed. Reg. at 68,856. Commerce noted that "for the vast majority of the flanges produced * * * Akai controls the costs for all elements incorporated in the production of the flanges." *Id.* Similarly, in *Certain Pasta from Italy,* 63 Fed. Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998) (preliminary results of new shipper antidumping duty administrative review), Commerce determined that the producer was a company that purchased all inputs, paid the subcontractor a processing fee, and maintained ownership of both the inputs and the final product at all times, as well as marketed the product and conducted product testing and marketing research.

Accordingly, if the text of 19 C.F.R. § 351.401(h) and Commerce's prior decisions were applied to the evidence on this record, the SWU contracts would be treated as contracts for the performance of services, and the enrichers would be treated as tollers and the utilities as the producers of LEU. Here, however, Commerce determined that the enrichers were the producers, offering three primary reasons for distinguishing this case from its prior decisions in cases involving tolling services. First, the agency asserted that "the enrichment process is such a significant operation that it establishes the fundamental character of LEU." *LEU from France,* 66 Fed. Reg. at 65,884. Yet in earlier cases involving tolling, it has also been the toller that created the "essential character" of the finished good by transforming the raw materials or inputs into the subject merchandise. In *Polyvinyl Alcohol from Taiwan,* the subcontractor Chang Chun transformed the material provided by DuPont into the final good, polyvinyl alcohol. *See* 63 Fed. Reg. at 6,527 ("DuPont * * * produces the main input, vinyl acetate monomer ('VAM'), which it then ships to Taiwan. Under contract with Chang Chun, the VAM is then converted into subject merchandise."). In *Certain Pasta from Italy,* the toller manufactured the subject pasta from the inputs supplied by the producer. *See* 63 Fed. Reg. at 53,642 ("Corex reports that it: (1) pur-

chases all of the inputs, (2) pays the subcontractor a processing fee, and (3) maintains ownership at all times of the inputs as well as the final product."). Here, the enricher transforms feed uranium into LEU. Yet, as in the earlier cases, while its operations do create the "essential character" of LEU, the enricher does not acquire ownership over either the feed or the final product, and neither its operations nor its pricing account for the full value of the finished LEU.

Second, Commerce distinguished the instant case from prior cases on the ground that "the enrichers control the production process to such an extent that they cannot be considered tollers in the traditional sense under the regulation."[14] *LEU from France,* 66 Fed. Reg. at 65,884. However, tollers normally, and in prior cases, control the operational process by which they perform the tolling services. Like the contractor Akai in *Certain Forged Stainless Steel Flanges from India,* the utility controls the specifications of the final product. *See* 58 Fed. Reg. at 68,856 ("{W}e have determined that Akai is the producer of this merchandise. * * * Akai purchases and maintains title * * * to the raw materials used for the production of the vast majority of the flanges, and * * * directs and controls the manufacturing process insofar as it determines the quantity, size, and type of flanges to be produced."). As in *Certain Forged Stainless Steel Flanges from India,* the actual processes of creating the product are left within the control of the toller. *See id.*

Third, Commerce stated that "utility companies do not maintain production facilities for the purpose of manufacturing subject merchandise." *LEU from France,* 66 Fed. Reg. at 65,884. Yet under the circumstances of this case, the fact that the utilities do not maintain enrichment facilities does not appear to be significant. Commerce itself acknowledged the expense and technological sophistication involved in building and maintaining enrichment facilities. *See id.* (noting that each of the two technologies for enriching uranium feedstock, gaseous diffusion and centrifuge, "requires a huge financial investment in facilities and a technically skilled workforce. In fact, the centrifuge technology has been years in the making and has required millions of dollars in research. So highly specialized is it, and so expensive to develop, that three major European governments combined their resources to develop the technology and create Urenco."). Moreover, we note that the producers in *SRAMS from Taiwan, Certain Pasta from Italy,* and *Certain Forged Stainless Steel Flanges from India* did not maintain manufacturing facilities, and this fact did not prohibit the application of the tolling regulation. *See SRAMS Remand Response,* Jt. App. Tab 7–A at JA–2603; *Certain Pasta from Italy,* 63 Fed. Reg. at 53,642; *Certain*

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[14] Commerce based this distinction in part on its conclusion that "{t}he most important factor in determining whether the contract is fulfilled is whether the utilities receive the precise amount of LEU that results from the application of the SWU equation that is explicitly spelled out and agreed upon in the SWU contract." *LEU from France,* 66 Fed. Reg. at 65,884. In fact, the substantive provisions of the contracts are fulfilled by the purchase of the designated quantities of SWU, the enrichment of the uranium to the specified assay, and delivery of the LEU. *See, e.g.,* Contract for Uranium Conversion and Enrichment Services between [ ] and Cogema, Inc., Jt. App. Tab 3–C at JA–1255–58; Contract for Uranium Enrichment Services between [ ] and Cogema, Inc., Jt. App. Tab 3–E at JA–1297, JA–1299, JA–1301, JA–1303–05; Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–F at JA–1356.

Forged Stainless Steel Flanges from India, 58 Fed. Reg. at 68,855. Finally, while the enricher invests in the research and development necessary to develop and maintain separation facilities, we note that the foundry in *SRAMS from Taiwan* "conduct{ed} research and development related to process technology," but that this fact was not "controlling to {Commerce's} analysis." *SRAMS Remand Response,* Jt. App. Tab 7–A at JA–2606 n.3.

Commerce asserted in its final determination that "the overall arrangement, even under the SWU contracts, is an arrangement for the purchase and sale of LEU." *LEU from France,* 66 Fed. Reg. at 65,884. However, under any tolling arrangement, the "overall arrangement" is one for acquisition of a good, usually manufactured by the toller. Yet Commerce has previously distinguished tollproduced goods on the grounds that the toller does not acquire ownership, and the toller's price for its work does not represent the full value of the good. *See, e.g., SRAMS Remand Response,* Jt. App. Tab 7–A at JA–2603–04.

We cannot reconcile Commerce's prior distinctions between tolling services and sale of goods with the agency's statements in this case that EUP and SWU contracts are "functionally equivalent," and that "{i}t does not matter whether the producer/exporter sold subject merchandise as subject merchandise, or whether the producer/exporter sold some input or manufacturing process that produced subject merchandise, as long as the result of the producer/exporter's activities is subject merchandise entering the commerce of the United States." *LEU from France,* 66 Fed. Reg. at 65,879, 65,885. Commerce's claim that the sole difference between enrichment transactions and sales of LEU under EUP contracts is the way such transactions are structured fails to take into account a critical difference between the two transactions: what is purchased.

Under EUP contracts, enrichers purchase their own uranium feed and enrich it for sale to the utilities as a complete product. Utilities pay the seller a price that reflects all elements of the value of the LEU: the value of the natural uranium and the amount of enrichment services, or SWU, performed.

Under SWU contracts, by contrast, the purchase price does not include the full value of the merchandise involved. Most significantly, such contracts do not include the cost or responsibility for providing the uranium feed, and no payment for the uranium is recognized on the enricher's financial statements, as would be the case if the enricher merely bought the uranium.[15]

These types of transactions thus do not contemplate the sale of a complete product. Instead, enrichment contracts specify that the only payment to be made by the utility is for the enrichment services to be

[15] The apparent reason for this structure is to allow a utility to control costs by determining how much feedstock it supplies, versus how many SWUs it pays for. *See, e.g.,* Pls.' Opening Br. at 10–12; AHUG Opening Br. at 11–12; Oral Arg. Trans. at 50, 57–58. No benefit flows to the enricher from the utility's supplying the feedstock.

provided, on a price-per-SWU basis.[16] While the SWU prices may include certain incidental costs, they do not include the significant cost of the natural uranium, which is approximately 35 percent of enriched uranium's total value. *See* Petition, Jt. App. Tab 2–A at JA–1016. Commerce has recognized that where the price paid for subject merchandise does not include the entire value of such merchandise, but instead only that portion of the value added by the services performed, there is no cognizable sale under the antidumping duty law.[17] Commerce's decision in the *SRAMS Remand Response* confirms this position. The statute requires a comparison of "the price of the subject merchandise sold in the U.S. to the price of the subject merchandise sold to the home or third country markets, not the price of some processing of the subject merchandise." *Polyvinyl Alcohol Mem.,* Jt. App. Tab 7–F at JA–2730.

While Commerce correctly states that 19 C.F.R. § 351.401(h) does not "exempt merchandise from {antidumping} proceedings," *LEU from France,* 66 Fed. Reg. at 65,880, the regulation is applicable in determining who is the producer in order to determine export price or constructed export price. Thus, a determination that the enricher provides a tolling service would mean that the price charged by the enricher to the utility for the enrichment cannot form the basis of the export price for the purpose of determining dumping margins.

It is well established that Commerce is authorized to depart from its prior practice as long as the agency articulates a "reasoned analysis" which demonstrates that the departure is supported by substantial evidence and in accordance with law. *Allegheny Ludlum Corp. v. United States,* 24 CIT ____, ____, 112 F. Supp. 2d 1141, 1147 (2000) (quoting *Motor Vehicles Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42 (1983)); *see also Asociacion Colombiana de Exportadores de Flores v. United States,* 22 CIT 173, 184–85, 6 F. Supp. 2d 865, 879–80 (1998) ("Commerce has the flexibility to change its position providing that it explain the basis for its change and providing that the explanation is in accordance with law and supported by substantial evidence."). Here, Commerce's decision not to apply the tolling regulation to a case that appears similar to earlier tolling cases, including *SRAMS from Taiwan* and *Polyvinyl Alcohol from Taiwan,* represents a departure from the practice authorized by a regulation "having the force and effect of law." *Allied Signal Aerospace Co. v. United States,* 28 F.3d 1188, 1191 (Fed. Cir. 1994). As such, Commerce's decision requires a more persuasive explanation than provided in the agency's determinations.

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[16] For example, the Uranium Enrichment Services Contract between [ ] and Urenco specifies as follows:

[ ]

Uranium Enrichment Services Contract between [ ] and Urenco, Jt. App. Tab 3–F at 1366. Further, the [ ] under a Cogema enrichment contract provides as follows:

12.3 [ ]

Uranium Enrichment Services Contract between [ ] and Cogema, Inc., Jt. App. Tab 3–E at JA–1308.

[17] The record does not indicate that Commerce analyzed the pricing provisions of the SWU contracts, or the structure of SWU transactions, in order to distinguish them from the pricing or transactional patterns found in the earlier cases involving subcontracting or tolling arrangements and in which 19 C.F.R. § 351.401(h) was found to apply.

In summary, Commerce's determination that enrichers are producers and not tollers is against the weight of the evidence on the record and inconsistent with both the agency's regulations and its prior decisions involving tolling services. Commerce's reasons for distinguishing the instant case, and consequently for declining to apply the tolling regulation, are not persuasive. Thus, Commerce's decision to treat these contracts as contracts for sales of a good is neither supported by substantial evidence nor in accordance with law.

II. Industry Support

In determining that the antidumping and countervailing duty petitions regarding low enriched uranium had the requisite industry support, Commerce determined that enrichers, but not utilities, were producers of the subject merchandise.[18] *See Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom,* 66 Fed. Reg. 1,080, 1,081 (Dep't Commerce Jan. 5, 2001) (notice of initiation of antidumping duty investigations) ("Antidumping Initiation Notice"). Consequently, Commerce determined that petitioner USEC, as the sole domestic producer of LEU, "established industry support representing over 50 percent of total production of the domestic like product," and therefore the industry support requirement was fulfilled. *Id.*

Commerce employed a six-factor test used by the International Trade Commission to determine whether a company may be considered a "member of the domestic industry." Dep't Commerce Mem. from Melissa G. Skinner to Holly A. Kuga, *Determination of Industry Support for the Antidumping and Countervailing Duty Petitions on Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom,* Jt. App. Tab 1–A at JA–0007–08 (Dec. 27, 2000) *("LEU Industry Support Mem.").* The test "focuses upon 'the overall nature' of production-related activities in the United States, to determine whether production operations are sufficient for a company to be considered a member of the domestic industry." *Id.* at JA–0008.

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[18] 19 U.S.C. § 1673a(b)(1) provides that

> {a}n antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C), (D), (E), (F), or (G) of section 1677(9) of this title files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title * * *.

19 U.S.C. § 1673a(b)(1).

19 U.S.C. § 1677(9) defines "interested party" as:

> (A) a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise or a trade or business association a majority of the members of which are producers, exporters, or importers of such merchandise,
>
> * * * * * * *
>
> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
>
> (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
>
> * * * * * * *
>
> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product * * *.

19 U.S.C. § 1677(9).

In order to determine that a petition has the requisite industry support, Commerce must find that

> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. § 1673a(c)(4)(A).

Commerce determined that the utilities were not producers of LEU because

> {t}hese companies do not engage in any type of manufacturing activities related to the production of LEU: they make no claim to have any LEU manufacturing operations; no capital investment in production facilities; they add no value to the product through the performance of any manufacturing operations; and have no employees dedicated to manufacturing.

Id. (citing *Brother Industries, Ltd. v. United States,* 16 CIT 1106 (1992) *aff'd,* 1 F.3d 1253 (Fed. Cir. 1993)). Rather, Commerce determined that the utility companies are "purchasers and industrial users of LEU." *Id.*

Commerce further asserted that the tolling regulation, 19 C.F.R. § 351.401(h), does not apply to determine who is a producer for the purposes of industry support. *See LEU Industry Support Mem.,* Jt. App. Tab 1–A at JA–0006. Commerce stated that

> we do not interpret section 351.401(h) * * * to be applicable to our determinations on industry support. Instead, * * * we find that section 351.401, including subsection (h) on tolling, was intended to "establish certain general rules that apply to the calculation of export price, constructed export price, and normal value," and not for purposes of determining industry support. * * * Our interpretation that the tolling regulation is intended for purposes of calculating antidumping margins is further supported by the absence of any parallel provision on tolling in the CVD regulations.

Id. (internal footnotes omitted).

Commerce further noted that

> In practice, moreover, the Department has never applied, nor relied upon, section 351.401(h) to determine industry support, with good reason. The purpose of the tolling regulation is to identify the party responsible for setting the price of subject merchandise sold to the United States. * * * By contrast, to determine industry support, the Department seeks to identify the entity or entities (or workers) that are engaged in the production or manufacture of the identical merchandise set forth in the petition. Thus, identifying the seller for purposes of respondent selection and identifying the domestic producers for purposes of industry support are separate questions that require different examinations for different purposes.

Id. at JA–0007.

Commerce's decision not to apply the tolling regulation to determine who is a producer in connection with its industry support determination is based on the agency's assessment of the purpose and context of the regulation. The Court acknowledges that the purpose of the tolling regulation is accurate calculation of export or constructed export price, and that the regulation does not arise in connection with the industry support determination. However, it is unclear from Commerce's explanation why the definition of "producer," a term that is not statutorily defined, should differ between one subsection of the statute and another. Furthermore, it appears incongruous that Commerce may determine

that the utility companies are not producers of LEU for the purpose of the industry support determination, but subsequently may determine, as a result of applying the tolling regulation, that the same companies are producers for the purpose of determining export price or constructed export price.[19] Where a term appears in multiple subsections within a statute, we "presume that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and we presume that Congress intended that Commerce, in defining the term, would define it consistently." *SKF USA Inc. v. United States,* 263 F.3d 1369, 1382 (Fed. Cir. 2001). Commerce is permitted to apply different definitions of such a statutory term only if it provides "an explanation sufficient to rebut this presumption." *Id.*

Consequently, as the Court is remanding the Department's determination for reconsideration of its decision not to apply the tolling regulation, Commerce also will have the opportunity to reconsider the effect of the tolling regulation on its industry support determination. If Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be "producers" under the tolling regulation are also "producers" for purposes of the industry support determination. Should Commerce determine that this is not the case, and that, in effect, a different definition of "producer" applies in the industry support context than in the context of the export price calculation, the agency is directed to articulate an appropriate basis for such a conclusion.

III. Applicability of the Countervailing Duty Statute

In deciding to apply the countervailing duty law to the subsidies it found to have benefitted Plaintiffs during the period of investigation, Commerce, relying on the same rationale it employed in applying the antidumping duty law, determined that because LEU was entering the United States for consumption, that merchandise was subject to countervailing duties:

> Similarly, in conducting countervailing duty investigations, {19 U.S.C. § 1671(a)(1)} requires the Department to impose duties if, *inter alia,* "the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, in the United States." We believe the statute is clear that,

[19] When making an industry support determination, Commerce identifies the producers that make up the domestic industry. 19 U.S.C. § 1673a(c)(4); 19 U.S.C. § 1677(4)(A) ("The term 'industry' means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."). When Commerce identifies the producer of subject merchandise for the purpose of determining export price or constructed export price and calculating the dumping margin, the agency is identifying a seller in the ordinary course of trade. *See* 19 U.S.C. § 1677b. Although we do not reach this issue, it would seem that if the word "producer" were to have a different definition in the context of the industry support determination than in the context of the export price determination, the industry support definition should be the more inclusive, not the more exclusive, because the purpose of the provision is to identify the industry as a whole.

> where merchandise from an investigated country enters the commerce of the United States, the law is applicable to such imports.

LEU from France, 66 Fed. Reg. at 65,879. Commerce went on to note that "under the countervailing duty law, {19 U.S.C. § 1677(5)(E)(iv)} defines as a benefit the purchase of goods for more than adequate remuneration. Because we have determined that SWU contracts involve the purchase of LEU, we determine that these transactions constitute the purchase of goods." *Id.* at 65,883 n.7; *see also* 19 U.S.C. § 1677(5)(E)(iv).

We have already determined that Commerce's determination regarding the "functional equivalency" of EUP and SWU contracts is not supported by the record. Accordingly, we cannot sustain the Department's determination that for the purposes of applying the countervailing duty statute, SWU contracts involve the purchase of LEU. Upon remand, the Department will have the opportunity to reconsider the application of its tolling regulations to the transactions at issue here. The Department therefore must reconsider its countervailing duty determinations in that context.

IV. Intervention of the Ad Hoc Utilities Group

Intervention in antidumping and countervailing duty actions "is governed by Rule 24 of the Rules of this Court subject to the limitations in 28 U.S.C. § 2631(j)."[20] *Rhone Poulenc, Inc. v. United States,* 14 CIT 364, 365, 738 F. Supp. 541, 542 (1990) (citing *Manuli Autoadesivi, S.p.A. v. United States,* 9 CIT 24, 25, 602 F. Supp. 96, 97–98 (1985)). Title 28 U.S.C. § 2631(j)(1) provides that "{a}ny person who would be adversely affected or aggrieved by a decision in a civil action pending in the Court of International Trade may, by leave of court, intervene in such action." However, subsequent subparagraphs limit this right. Title 28 U.S.C. § 2631(j)(1)(B) provides that, "in a civil action under section 516A of the Tariff Act of 1930, only an interested party who was a party to the proceeding in connection with which the matter arose may intervene, and such person may intervene as a matter of right." Additionally, under section 2631, "'interested party' has the meaning given such term in section 771(9) of the Tariff Act of 1930." 28 U.S.C. § 2631(k)(1). That section defines "interested party" as, inter alia, "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States." 19 U.S.C. § 1677(9)(E).

Intervention in an action before this Court implicates the Court's jurisdiction and authority. Consequently, it is the Court that determines who is an "interested party" for the purpose of intervention. As noted in *Zenith Radio Corp. v. United States,* "{t}here is no presumption of standing in an area where Congress has provided explicit instructions on the subject." 5 CIT 155, 156 (1983) (internal citation omitted). Fur-

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[20] USCIT Rule 24 provides, inter alia, that a party may intervene as of right in an action when it "claims an interest relating to the property or transaction which is the subject of the action and * * * the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." USCIT R. 24(a).

thermore, as the Court observed, Commerce's decision to permit a party to participate in its investigative process, "even if done in terms of recognizing them as 'interested parties,' cannot control the Court's understanding of a matter primarily related to the invocation of its powers of judicial review." *Id.* "The agenc{y's} receptiveness to participation by various parties does not generate standing for judicial review." *Id.* (internal citation omitted). This Court's decision as to whether AHUG's members are "interested parties" for purposes of intervention in the instant action does not depend upon the administrative determination as to the same question.[21]

AHUG participated in the administrative proceedings at issue here pursuant to 19 C.F.R. § 351.312, which permits "industrial users" of subject merchandise to submit "relevant factual information and written argument" to Commerce. 19 C.F.R. § 351.312(b).[22] However, no provision of the statutes or regulations indicates that participation in the administrative proceeding as an "industrial user" is sufficient to meet the requirement of "party" to the proceeding under 28 U.S.C. § 2631.

Furthermore, we note that even if AHUG is considered to have been a "party" to the administrative proceeding within the meaning of 28 U.S.C. § 2631(j)(1)(B), the association still must meet the definition of "interested party," as required by 28 U.S.C. §§ 2631(j)(1)(B), 2631(k)(1). As noted earlier, "interested party" in this context is defined as, inter alia, "a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States." 19 U.S.C. § 1677(9)(E); *see also* 28 U.S.C. § 2631(k)(1).

Although Commerce acknowledged that the utility companies were "purchasers and industrial users of LEU," the agency determined they were not producers of LEU for purposes of industry support. *LEU Industry Support Mem.,* Jt. App. Tab 1–A at JA–0008. Yet as we are remanding to Commerce the question of the applicability of the tolling

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[21] The government directs the Court's attention to *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 738 F. Supp. 541 (1990) in support of the proposition that this Court "is divided with respect to the question whether the agencies or the Court determines who is an 'interested party who was a party to the proceeding.'" Def.'s Resp. Opp'n AHUG Mot. Intervene at 11. In *Rhone Poulenc,* the Court determined whether a party was "an interested party who was a party to the proceeding," as required by 28 U.S.C. § 2631(j)(1)(B), by referring to Commerce's regulations governing who was a "party to the proceeding." *Rhone Poulenc,* 14 CIT at 365, 738 F. Supp. at 542. In *Zenith Radio Corp.,* the Court denied a motion for intervention after determining that the applicants did not meet the statutory and regulatory definitions of interested parties. 5 CIT at 157. The applicants claimed that because the administrative agency had accepted their participation in its proceeding, they had standing to intervene in the action before the Court. The Court's decision in *Zenith* clarifies that, while the Court will look to the relevant statutes and regulations in determining who is eligible to bring or intervene in an action, the actions of the agency cannot bind the Court in connection with its determination of standing and the exercise of its jurisdiction. Consequently, there is no conflict between the Court's decisions in *Rhone Poulenc* and in *Zenith Radio Corp.*

[22] Section 351.312 permits industrial users to "submit relevant factual information and written argument" under §§ 351.218(d)(3)(ii), (d)(3)(vi), and (d)(4), addressing sunset reviews; §§ 351.301(b), (c)(1), and (c)(3), addressing time limits; §§ 351.309(c) and (d), which permit "any *interested party* or U.S. Government agency" (emphasis supplied) to submit written argument in antidumping and countervailing duty proceedings; and § 351.309(e), which permits comments in connection with expedited sunset reviews. 19 C.F.R. § 351.312(b). The most pertinent section here is § 351.309, but it appears from the language of the regulation that AHUG would have to be an "interested party" within the meaning of the antidumping and countervailing duty statutes in order to make a submission. However, it is unclear why § 351.312 would grant the right to participate to "industrial users," who presumably are not "interested parties," and yet cross-reference another subsection requiring interested party status.

As USEC points out in its brief, USEC did not object to AHUG's participation in the administrative proceeding as an industrial user. *See* Resp. Br. of USEC Opp'n AHUG Mot. Intervene at 5. Additionally, the briefs submitted by both USEC and the Department of Justice in connection with AHUG's motion to intervene appear to assume that AHUG properly appeared in the administrative proceeding below. As the regulation is unclear, the Court will assume that AHUG properly participated in the administrative proceeding under 19 C.F.R. § 351.312.

regulation, the question whether AHUG's members are "producers" of LEU within the meaning of the statute remains unresolved. Moreover, as discussed earlier in this opinion, application of the tolling regulation would result in a finding that the utilities are producers of LEU. *See supra* text at 26–35; 19 C.F.R. § 351.401(h). Accordingly, AHUG's members may be "producers" within the meaning of 19 U.S.C. § 1677(9)and 28 U.S.C. § 2631(k)(1).

Significantly, AHUG members, as purchasers and users of LEU, could be adversely affected by a decision in the instant case. 28 U.S.C. § 2631(j). The association has actively participated, to the extent permitted, throughout the administrative investigation, and the views and concerns of AHUG's members may offer valuable insights in this litigation. Finally, AHUG's claims raise questions of law and fact common to those raised by the plaintiffs, who are mandatory parties here.

As noted above, a decision by Commerce regarding a party's status for purposes of participation in the agency's investigative process "cannot control the Court's understanding of a matter primarily related to the invocation of its powers of judicial review." *Zenith Radio Corp.,* 5 CIT at 156. Under the facts presented in this case, because AHUG's members may be "producers" of LEU within the meaning of 19 U.S.C. § 1677(9) and 28 U.S.C. § 2631(k)(1), and therefore entitled to intervene as of right, we will grant AHUG's motion to intervene as an "interested party who was a party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(j)(1)(B).

CONCLUSION

In summary, we find that Commerce's decision not to apply the tolling regulation to the SWU contracts between enrichers and utilities, as well as its industry support determination, were neither supported by substantial evidence nor in accordance with law. The Court remands these matters to Commerce for further proceedings consistent with this opinion. Remand results are due seventy-five days from the date of this decision. All parties may file responses thereto within twenty days after the filing thereof. All parties may reply to any responses within seven days after the filing thereof. Finally, AHUG's motion to intervene in the instant action is granted.

(Slip Op. 03–35)

FORMER EMPLOYEES OF HENDERSON SEWING MACHINES, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 01–00883

Plaintiffs, Former Employees of Henderson Sewing Machines ("plaintiffs")[1], move pursuant to USCIT R. 56.1 for judgment upon the agency record or, in the alternative, for a re-remand of this case for further investigation, challenging the United States Secretary of Labor's ("Labor") determinations entitled: (1) *Notice of Negative Determination on Remand of Henderson Sewing Machine Company, Inc. Andalusia, Georgia ("Negative Determination II"),* 67 Fed. Reg. 18,927 (April 17, 2002); and (2) *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance ("Negative Determination I"),* 66 Fed. Reg. 47,240 (Sept. 11, 2001).[2] Specifically, plaintiffs contend that Labor erred in denying plaintiffs' certification of eligibility for trade adjustment assistance on the basis that plaintiffs did not produce an article, plaintiffs did not qualify as support service workers and Henderson did not produce an article affected by increased imports that contributed importantly to plaintiffs' separation from Henderson.

Held: Plaintiffs' 56.1 motion is denied; case dismissed.

(Dated March 25, 2003)

Robins, Kaplan, Miller & Ciresi L.L.P., (Charles A. Hunnicutt) for Former Employees of Henderson Sewing Machines, plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius B. Lau,* Assistant Director, and *John N. Maher);* of counsel: *Louisa M. Reynolds,* Office of the Solicitor, United States Department of Labor, for the United States, defendant.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiffs, Former Employees of Henderson Sewing Machines ("plaintiffs"), move pursuant to USCIT R. 56.1 for judgment upon the agency record or, in the alternative, for a re-remand of this case for further investigation, challenging the United States Secretary of Labor's ("Labor") determinations entitled: (1) *Notice of Negative Determination on Remand of Henderson Sewing Machine Company, Inc. Andalusia, Georgia ("Negative Determination II"),* 67 Fed. Reg. 18,927 (April 17, 2002); and (2) *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance ("Negative Determination I"),* 66 Fed. Reg. 47,240 (Sept. 11, 2001). Specifically, plaintiffs contend that Labor erred in denying plaintiffs' certification of eligibility for trade adjustment assistance on the basis that plaintiffs did not produce

[1] In the brief and response brief of Former Employees of Henderson Sewing Machines, Sharon L. Cobb appears as the sole plaintiff in this action. *See* Pl. Sharon Cobb's Mot. J. Agency R. ("Pls.' Mot.") and Pl.'s Resp. Def.'s Opp'n Pl.'s Mot. J. Agency R. ("Pls.' Resp."). However, in Def.'s Resp. Opp'n Pls.' Mot. J. Agency R. ("Def.'s Resp. Opp'n), the United States Secretary of Labor ("Labor") makes reference to plaintiffs rather than Sharon L. Cobb ("Cobb") as the sole plaintiff. The Court notes that since Cobb is appearing on behalf of the Former Employees of Henderson Sewing Machines, the Court will consider Cobb's brief and response brief as filed on behalf of all plaintiffs (that is, Former Employees of Henderson Sewing Machines) and not solely on behalf of Cobb as plaintiff.

[2] Labor notes that "[i]n the Federal Register, Labor misidentified the location of the facility at which the instant plaintiffs worked. Although the facility is actually in Alabama, Labor misstated, due to clerical error, that the facility is in Georgia." Def.'s Resp. Opp'n at 2 n.1.

an article, plaintiffs did not qualify as support service workers and Henderson did not produce an article affected by increased imports that contributed importantly to plaintiffs' separation from Henderson.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. § 1581(d)(1) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Labor's determination of eligibility for trade adjustment assistance, the Court will uphold Labor's determination if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 2395(b) (2000); *Former Employees of Marathon Ashland Pipeline v. Chao*, 26 CIT ____, ____, 215 F. Supp. 2d 1345, 1350 (2002) (citing *Woodrum v. Donovan,* 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd, Woodrum v. United States,* 737 F.2d 1575 (Fed. Cir. 1984)); *Former Employees of Barry Callebaut v. Herman,* 25 CIT ____, ____, 177 F. Supp. 2d 1304, 1308–09 (2001). Pursuant to 19 U.S.C. § 2395(b), Labor's findings of fact are conclusive if they are supported by substantial evidence. *See* 19 U.S.C. § 2395(b). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 810 F.2d 1137 (Fed. Cir. 1987); *see also Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938). "Additionally, 'the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis.'" *Former Employees of Marathon Ashland,* 26 CIT at ____, 215 F. Supp. 2d at 1350 (quoting *Former Employees of General Electric Corp. v. U.S. Dep't of Labor,* 14 CIT 608, 610–11 (1990)(citation omitted)).

Moreover, although "'the nature and extent of the investigation are matters resting properly within the sound discretion of [Labor,]'" *Former Employees of Galey & Lord Indus. v. Chao,* 26 CIT ____, ____, 219 F. Supp. 2d 1283, 1286 (2002) (quoting *Former Employees of CSX Oil & Gas Corp. v. United States,* 13 CIT 645, 651, 720 F. Supp. 1002, 1008 (1989) (citation omitted)), "'[g]ood cause [to remand] exists if [Labor's] chosen methodology is so marred that [Labor's] finding is arbitrary or of such a nature that it could not be based on substantial evidence.'" *Former Employees of Galey & Lord Indus.,* 26 CIT at ____, 219 F. Supp. 2d at 1286 (quoting *Former Employees of Barry Callebaut,* 25 CIT at ____, 177 F. Supp. 2d at 1308 (citations omitted)). "However, in evaluating the evidence underlying [Labor's] conclusions, the court may consider only the administrative record before it." *Former Employees Marathon Ashland,* 26 CIT at ___, 215 F. Supp. 2d at 1350.

DISCUSSION

I. Labor's Decision to Deny Plaintiffs Trade Adjustment Assistance

A. Background

On June 29, 2001, Henderson's vice president signed a petition for trade adjustment assistance ("TAA") under Section 221(a) of the Trade Act of 1974, as amended (that is, 19 U.S.C. § 2271(a) (2000)), which was filed with Labor on behalf of plaintiffs who were separated from employment with Henderson on June 22, 2001.[3] *See* Admin. R. at 1.

In response to the petition, Labor initiated an investigation to determine whether plaintiffs were entitled to TAA. During the investigation, Labor: (1) reviewed the June 29, 2001, petition and accompanying attachments, *see* Def.'s Resp. Opp'n Pls.' Mot. J. Agency R. ("Def.'s Resp. Opp'n) at 2; (2) sent a "Business Confidential Data Request" form to Henderson, *see* Admin. R. at 11–13 (confidential version); and (3) "surveyed [Henderson's] major declining customers." Def.'s Resp. Opp'n at 3; *see also* Admin. R. at 14–17 (confidential version). The June 29, 2001, petition signed by Henderson's vice president described plaintiffs' jobs at Henderson as "accounting"[4] and indicated a response of "textile industry" to a question asking for "a description of the articles (products) produced by the firm * * * [to] include such information as the common and technical names of the articles, [as well as] the method of manufacture." Admin. R. at 1. On July 16, 2001, Henderson's vice president completed the "Business Confidential Data Request" form providing sales and employment data, but no production data. *See* Admin. R. at 11 (confidential version). Additionally, Henderson's vice president indicated that Henderson manufactures sewing machine parts. *See id.; see also* Admin. R. at 3.

Subsequent to the investigation, Labor in its "Findings of the Investigation" revealed in pertinent part that

> [w]orkers [that is, the plaintiffs in this action] at the Henderson Sewing Machine Company, Inc. in Andulusia, Alabama were engaged in accounting services for the company. The subject firm is involved in sales and distribution of industrial sewing machine parts.
>
> * * * * * * *
>
> A survey was conducted for the major declining customers of the subject firm [that is, Henderson].
>
> None of the customers increased import purchases of parts for sewing machines, while decreasing purchases of the subject firm [that is, Henderson].

Admin. R. at 18–19. Moreover, on August 29, 2001, Labor determined that the plaintiffs formerly employed at Henderson were not eligible to receive worker adjustment assistance under section 223 of the Trade

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[3] The plaintiffs in this action who were separated from employment with Henderson located in Andalusia, Alabama, were Cobb and Elaine Scott. *See* Admin. R. at 1.

[4] "In a June 25, 2001 letter attached to the [June 29, 2001] petition," Def.'s Resp. Opp'n at 3, Henderson's vice president stated that "Cobb has worked for [Henderson] for more than 10 years, as accounts payable clerk." Admin. R. at 2.

Act of 1974 (that is, 19 U.S.C. § 2273 (2000)). *See* Admin. R. at 20–21. Labor reasoned that:

> The investigation revealed that the workers of [Henderson] did not produce an article within the meaning of Section 223(3) [sic][5] of the Trade Act of 1974 [that is, 19 U.S.C. § 2272(a)(3) (2000)]. [Labor] has consistently determined that the performance of services does not constitute production of an article, as required by the Trade Act of 1974, and this determination has been upheld in the [United States] Court of Appeals.
>
> Workers of [Henderson] may be certified only if their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control. Additionally, the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification and the reduction must directly relate to the product impacted by imports. These conditions have not been met for workers performing services at [Henderson].

Admin. R. at 20–21. Labor sent notices of its decision to plaintiffs on September 10, 2001, *see* Admin. R. at 23–24, and published its notice of the negative determination on September 11, 2001. *See Negative Determination I,* 66 Fed. Reg. at 47,241.

On October 15, 2001, one of the plaintiffs in this action (that is, Cobb), filed a letter along with enclosures, deemed a summons and complaint, stating in pertinent part that "[Cobb] started part time in 1980 working as [an] account receivable clerk [at Henderson], and within two-three years was asked to go full time * * * [and] was then changed to [an] account payable clerk[.]" Cobb further stated that Henderson "does not produce products, [but] * * * res[ells] commercial sewing machines and parts to sewing factories." Subsequently, in Cobb's "Amended Affidavit in Support of Motion to Proceed *in Forma Pauperis,"* Cobb stated that "Henderson R&D Dept. does produce parts for use on commercial sewing machines."

On December 7, 2001, this Court granted Labor's consent motion for voluntary remand and ordered Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for worker adjustment assistance benefits. During the remand investigation, Labor: (1) contacted various customers of Henderson, *see* Admin. R. at 33, 34, 36, 37, 38 (confidential version); (2) sent a "Business Confidential Data Request" form to Henderson, *see id.* at 29–32; and (3) "contacted Mr. Henderson, the company vice-president, who responded in writing." Def.'s Resp. Opp'n at 6; *see also* Admin R. at 39 (confidential version). In response to the remand investigation, the following occurred: (1) the various customers of Henderson responded that Henderson was "involved in sales and distribution of sewing machines and parts[,]" Def.'s Resp. Opp'n at 5, *see* Admin. R. at 33, 34, 36

[5] The Court assumes that Labor intended to cite to Section 222(3) of the Trade Act of 1974.

(confidential version); (2) Henderson's vice president completed the "Business Confidential Data Request" form providing sales and employment data, but no production data, and further indicated that Henderson manufactures sewing machine parts and machines, *see* Admin. R. at 29 (confidential version); and (3) Henderson's vice president responded to Labor in a letter describing Henderson's business and explaining that the two plaintiffs in the case at bar were terminated from their employment at Henderson while another five employees left for reasons other than being terminated. *See id.* at 39.

Subsequently, on February 6, 2002, Labor issued its "Notice of Negative Redetermination on Remand" affirming Labor's initial notice of negative determination, *see Negative Determination I,* 66 Fed. Reg. at 47,241, and stating:

> The results of the investigation on remand revealed that during the relevant period, [Henderson] laid off a total of two administrative workers. Another five workers left on their own accord, due to various personal reasons. None of these workers were engaged in the manufacture of any product while employed at the subject facility.
>
> Further, the overwhelming portion of the activities performed at the subject facility relates to the sales of industrial sewing machines and related parts. The company also produces components that attach to the sewing machine (value added) before they are sold. The company indicated that this is a negligible portion of the total functions performed at the subject facility.

Admin. R. at 41. Labor published its notice of negative determination on remand on April 17, 2002. *See Negative Determination II,* 67 Fed. Reg. at 18,927–28.

On March 7, 2002, plaintiffs filed a notice expressing dissatisfaction with the negative remand results. Moreover, on May 30, 2002, this Court granted "Plaintiffs' Unopposed Motion to Amend the Administrative Record" and ordered that Labor file an amended record and index to include any and all records pertaining to Investigation Nos. TA–W–34,672 (Andalusia), TA–W–34,672A (Multrie), and TA–W–34,314B (Maryville) involving workers at Henderson (that is, records pertaining to Henderson's previous petition to Labor of May 26, 1998, for trade adjustment assistance). Labor submitted the Amended Administrative Record ("Am. Admin. R.") to this Court on June 13, 2002.

Plaintiffs' motion for judgment upon the agency record currently before the Court followed.

B. Contentions of the Parties

1. Plaintiffs' Contentions

Plaintiffs contend that Labor's initial negative determination *(Negative Determination I,* 66 Fed. Reg. 47,240) and Labor's subsequent negative determination on remand *(Negative Determination II,* 67 Fed. Reg. 18,927) denying plaintiffs' certification of eligibility for trade adjustment assistance are not supported by substantial evidence and are not

in accordance with law. *See* Pl. Sharon Cobb's Mot. J. Agency R. ("Pls.' Mot.") at 5–22; *see also* Pl.'s Resp. Def.'s Opp'n Pl.'s Mot. J. Agency R. ("Pls.' Resp.") at 1–15. In particular, plaintiffs argue that plaintiffs meet the eligibility requirements of 19 U.S.C. § 2272 for trade adjustment assistance because: (1) Henderson produces an article, *see* Pls.' Mot. at 7–11; (2) plaintiffs' positions at Henderson were directly related to the production of an article, *see id.* at 11–14; (3) a significant number of Henderson employees became separated, *see id.* at 14–16;[6] and (4) "Henderson's * * * sales declined and imports directly competitive with Henderson's * * * articles contributed importantly to such decline." *Id.* at 16.

First, with respect to plaintiffs' argument that Henderson produces an article within the meaning of 19 U.S.C. § 2272, plaintiffs argue that "the record does not support Labor's conclusion that Henderson does not produce an article." Pls.' Resp. at 2. Plaintiffs point out that: (1) Henderson's vice president indicated on a questionnaire that Henderson manufactures sewing machine parts, *see* Pls.' Mot. at 7 (citing Admin. R. at 3 and Admin. R. at 39 (confidential version)); (2) "Labor's own petition screening and verification form indicates that Henderson['s] * * * products are sewing machine parts[,]" Pls.' Mot. at 7 (citing Admin. R. at 6); (3) Labor's August 29, 2001, negative determination states that "'[t]he affected workers * * * provided * * * accounting services at a company where industrial sewing machines are produced[,]'" Pls.' Mot. at 7 (quoting Admin. R. at 20) (emphasis omitted); (4) "[t]he absence of a response on one part of Labor's form [that is, the "Business Confidential Data Request" form completed by Henderson's vice president] is not evidence that Henderson does not produce an article[,]" Pls.' Resp. at 2; (5) "Henderson * * * is the same company performing the same functions today as it did in 1998 when other former employees, including service workers, were certified for trade adjustment assistance under the Trade Act[,]" Pls.' Mot. at 9 (citing Am. Admin. R. at 1, 13–15 and Am. Admin. R. at 11 (confidential version)), *see also* Pls.' Mot. at 10; and (6) "Labor's reliance on Ms. Cobb's inaccurate statement [that is, Cobb's statement that Henderson does not produce products] in the complaint is misplaced" because in Cobb's "Amended Affidavit in Support of Motion to Proceed *in Forma Pauperis",* "Ms. Cobb stated that 'Henderson R&D Dept. produces parts for commercial sew[ing] machines.'" Pls.' Resp. at 8. Plaintiffs further argue that Labor's reliance on information provided by various customers of Henderson on

[6] The Court will not address plaintiffs' contention that a significant number of Henderson's employees became separated because it is not at issue. *See* Pls.' Mot. at 14 n.2.

whether Henderson produced an article is misplaced.[7] *See* Pls.' Mot. at 8–9 (citing Admin. R. at 33–36 (confidential version)); *see also* Pls.' Resp. at 3–6. Moreover, plaintiffs maintain that "the record does not support a finding that [Henderson] indicated its production of components is negligible." Pls.' Mot. at 7. In particular, plaintiffs argue that "there is no substantial evidence upon which Labor could base its conclusion that the 'company indicated' that its manufacturing activities were negligible."[8] *Id.* at 8 (quoting Admin. R. at 41).

Second, with respect to plaintiffs' argument that "[t]he separated workers' positions were directly related to the production of an article[,]" Pls.' Mot. at 11, plaintiffs contend that: (1) "Cobb's position had the same relation to production as the service workers that were certified in [Labor's] 1998 investigation[,]"[9] *id.* at 12; and (2) "Cobb was a service worker to Henderson['s] * * * production division."[10] *Id.* at 13.

Finally, with respect to plaintiffs' argument that "Henderson's * * * sales declined and imports directly competitive with Henderson's * * * articles contributed importantly to such decline[,]" Pls.' Mot. at 16, plaintiffs assert that Labor "misconstrues the record when claiming that responses to [Labor's] survey[s] 'uniformly revealed that none of Henderson's customers increased imports while decreasing purchases from Henderson,' and that Henderson's sales were not affected by imports." Pls.' Resp. at 9 (confidential version) (quoting Def.'s Resp.

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[7] In plaintiffs' response brief, plaintiffs argue that Labor mistakenly relied on information provided by various customers of Henderson "for support of * * * [Labor's] finding that Henderson does not produce an article." Pls.' Resp. at 3. In particular, plaintiffs contend that: (1) "Henderson itself, the best source for such information, has indicated that it does in fact produce articles[,]" *id.* at 3–4; (2) "[a] customer's incorrect understanding or belief is not a valid basis upon which Labor should be permitted to reach such an important conclusion[,]" *id.* at 4; (3) "there is evidence in the record that Labor may have incorrectly informed certain customers that Henderson did not produce an article * * * [because] Labor's statements may have tainted the customers' responses or caused them to return survey forms without completing them[,]" *id.* at 4–5 (citing Admin. R. at 34) (confidential version); and (4) the various customers "have no firsthand knowledge concerning Henderson's internal operations." Pl.'s Resp. at 5.

The Court finds that Labor's reliance on the information provided by various customers is not misplaced and that Labor acted properly within the scope of its discretion. *See Former Employees of CSX Oil and Gas Corp.,* 13 CIT at 651, 720 F. Supp. at 1008 (quoting *Cherlin v. Donovan,* 7 CIT 158, 162, 585 F. Supp. 644, 647 (1984)) ("It is well established that while Labor has a duty to investigate, 'the nature and extent of the investigation are matters resting properly within the sound discretion of the administrative officials'"); *Former Employees of Galey & Lord Indus.,* 26 CIT at ___, 219 F. Supp. 2d at 1286 (quoting *Former Employees of Barry Callebaut,* 25 CIT at ___, 177 F. Supp. 2d at 1308 (citations omitted)) ("'Good cause [to remand] exists if [Labor's] chosen methodology is so marred that [Labor's] finding is arbitrary or of such a nature that it could not be based on substantial evidence'").

[8] Plaintiffs point to a handwritten notation in the margin of a letter provided by Henderson's vice president and argue that "[t]here is no evidence on the record that Henderson actually provided such information to Labor." Pls.' Resp. at 6 (citing Admin. R. at 39 (confidential version)). Labor responds that "[Labor] share[s] plaintiffs' view that this handwritten note was made by a Labor employee * * * who likely contacted Mr. Henderson [that is, Henderson's vice president] for clarification and made the notation to memorialize Mr. Henderson's comment." Def.'s Resp. Opp'n at 24. Relying on *United States Steel Workers of Am., Local 1082 v. McLaughlin,* 15 CIT 121, 123 (1991) for the proposition that "reliance upon unverified statements of company officials constitutes substantial evidence in the absence of contradictory information[,]" Labor further asserts that "[i]n light of * * * consistent information from various relevant sources, plaintiffs have not demonstrated that Labor's understanding of Henderson's production situation resulted from anything but reasoned analysis of findings supported by substantial evidence." Def.'s Resp. Opp'n at 24–25.

[9] Plaintiffs assert that "the record is clear that one employee from the Andalusia, Alabama, facility at issue in the 1998 investigation, and ultimately deemed part of the certified group of separated workers, was a customer service representative." Pls.' Mot. at 12 (citing Am. Admin. R. at 1). "Moreover, [in the 1998 investigation], separated workers from the sales divisions located in Moultrie, Georgia, and Maryville, Tennessee, * * * were part of the group of certified workers." Pls.' Mot. at 12 (citing Am. Admin. R. at 10–12 (confidential version) and Am. Admin. R. at 13–15); *see also* Pls.' Mot. at 12 (citing *Abbott v. Donovan,* 6 CIT 92, 100–01, 570 F. Supp. 41, 49 (1983)).

[10] In their brief, plaintiffs provide a narration of Cobb's job activities. *See* Pls.' Mot. at 13. The Court agrees with Labor that "plaintiffs' moving brief contains information that is not part of the administrative record * * * [and] [t]he Court should not consider it." Def.'s Resp. Opp'n at 21; *see Former Employees of Marathon Ashland,* 26 CIT at ___, 215 F. Supp. 2d at 1350 (quoting *Former Employees of General Electric Corp.,* 14 CIT at 610–11 (citations omitted)) ("in evaluating the evidence underlying [Labor's] conclusions, the [C]ourt may consider only the administrative record before it").

Opp'n at 3 and citing Def.'s Resp. Opp'n at 8, 9, 17). In particular, plaintiffs point out that: (1) the same conditions that existed in the 1998 investigation of Henderson exist in the investigation at bar (that is, just as in the 1998 investigation of Henderson, the current investigation reveals that pursuant to 19 U.S.C. § 2272(a)(3), "[t]he increase in imports * * * contribute[d] importantly to the decline in sales or production and the separation of employees[,]" Pls.' Mot. at 16 (citing Am. Admin. R. at 7–8 (confidential version) and Admin. R. at 11 (confidential version)); (2) "[c]ommensurate with the decline in sales was the increase in imports of sewing machines, parts and accessories competing with Henderson[,]" Pls.' Mot. at 16 (citing Admin. R. at 12 (confidential version)); (3) "Henderson * * * explained in its Petitioner Questionnaire in the instant matter that it had already been importing sewing machines and parts" from various countries, Pls.' Mot. at 16 (citing Admin. R. at 3); (4) one of Henderson's customers "indicated that its purchases from Henderson * * * declined from 1999 through 2001, while sewing machines and parts purchased from other sources increasingly were manufactured in a foreign country[,]" Pls.' Mot. at 17 (citing Admin. R. at 14 (confidential version)); (5) "[a]nother customer * * * indicated that its purchases of sewing machines and parts from domestic sources declined[,]" Pls.' Mot. at 17 (citing Admin. R. at 38 (confidential version)); (6) another customer of Henderson "confirmed that purchases of domestic sewing machines and parts steadily declined[,]" Pls.' Mot. at 17 (citing Admin. R. at 16 (confidential version)); and (7) "[o]ther customers, whose purchases declined, either closed and filed bankruptcy, moved to foreign countries, or failed to respond to questionnaires due to the mistaken belief that Henderson * * * did not manufacture parts." Pls.' Mot. at 17 (citing Admin. R. at 12, 17, 34, 37 (confidential version)).

In the alternative, plaintiffs argue that if the Court does not certify the plaintiffs for trade adjustment assistance, then the Court should remand this case and "order [Labor] to undertake a more thorough investigation" pursuant to 19 U.S.C. § 2395(b). Pls.' Mot. at 20. Plaintiffs maintain that: (1) the administrative record at issue "lacks any meaningful discussion regarding the investigative measures undertaken by [Labor,]" *id.* at 21; and (2) "[t]he information and documentation submitted by [Henderson's vice president] on behalf of Henderson * * * is incomplete and many questions were answered inconclusively." *Id.* (citing Admin. R. at 1, 3–5).

As a further alternative, plaintiffs assert that "[i]f this Court disagrees that the existing record can establish that imports increased and contributed to the decline in Henderson's * * * sales, it should find * * * that the record is not sufficient to support [Labor's] denial of eligibility[]" because "many customers failed to respond to Labor's questionnaires and other customers, under the mistaken belief that Henderson * * * did not produce a product, were instructed by Labor not to complete the forms." Pls.' Mot. at 22.

2. Labor's Contentions

Labor responds that its initial negative determination *(Negative Determination I,* 66 Fed. Reg. 47,240) and Labor's subsequent negative determination on remand *(Negative Determination II,* 67 Fed. Reg. 18,927) denying plaintiffs' certification of eligibility for trade adjustment assistance are supported by substantial evidence and are in accordance with law. *See* Def.'s Resp. Opp'n at 8–27. In particular, Labor argues that "Labor reasonably denied certification because none of the former employees produced an article, qualified as a service support employee, and the subject firm did not produce an article, let alone one that was affected by increased imports." *Id.* at 9.

First, with respect to Labor's argument that plaintiffs did not produce an article, Labor points out that: (1) the June 29, 2001, petition signed by Henderson's vice president described plaintiffs' jobs at Henderson as "accounting," *see* Def.'s Resp. Opp'n at 14 (confidential version) (citing Admin. R. at 2); (2) "[i]n a June 25, 2001 letter to Labor attached to the petition for assistance," Henderson's vice president stated that "'Cobb has worked for [Henderson] for more than 10 years as accounts payable clerk[,]'" Def.'s Resp. Opp'n at 14 (confidential version) (quoting Admin. R. at 2); and (3) plaintiffs in their brief do not dispute that plaintiffs provided accounting services. *See* Def.'s Resp. Opp'n at 14 (citing Pls.' Mot. at 3). Labor maintains that "[i]t is well-established that the performance of services does not constitute production of an article, as required by [19 U.S.C. § 2272(a)(3)]." Def.'s Resp. Opp'n at 14; *see also* Def.'s Rep. Opp'n at 14–16 (citing *Former Employees of Permian Corp. v. United States,* 13 CIT 673, 675, 718 F. Supp. 1549, 1551 (1989); *Woodrum,* 5 CIT 191, 564 F. Supp. 826; *Nagy v. Donovan,* 6 CIT 141, 571 F. Supp. 1261 (1983); *Pemberton v. Marshall,* 639 F.2d 798 (D.C. Cir. 1981); and *Fortin v. Marshall,* 608 F.2d 525, 526 (1st Cir. 1979)). Labor, therefore, asserts that "Labor's initial negative determination *[Negative Determination I,* 66 Fed. Reg. 47,240] that workers who provided accounting services 'did not produce an article within the meaning of [19 U.S.C. § 2272(a)(3)]' is supported by undisputed evidence and Labor's negative eligibility ruling is the result of a reasoned application of the statute and relevant case law to the undisputed facts." Def.'s Resp. Opp'n at 16 (quoting *Negative Determination I,* 66 Fed. Reg. at 47,241).

Second, Labor argues that plaintiffs do not qualify as support service employees. *See* Def.'s Resp. Opp'n at 16–18. Relying on *Bennett v. Secretary of Labor,* 20 CIT 788 (1996), Labor maintains that: (1) "[b]ecause no production employee independently qualified for certification, certification of support service workers is precluded[,]"[11] Def.'s Resp. Opp'n at 17; (2) "the record indicates that the plaintiffs' did not lose their jobs because imports affected an article Henderson produced[,]" *id.;* (3) Hen-

[11] Contrary to Labor's argument that certification of support service workers is precluded because "no production employee independently qualified for certification," Def.'s Resp. Opp'n at 17, plaintiffs maintain that "neither [19 U.S.C. § 2272(a)] nor the case law *[Bennett,* 20 CIT 788; *Katunich v. Donovan,* 8 CIT 156, 166–67, 594 F. Supp. 744, 753 (1984); and *Abbott,* 6 CIT 92, 570 F. Supp. 41] support [Labor's] legal argument." Pls.' Resp. at 10; *see also* Pls.' Resp. at 10–15.

derson's vice president did not provide production data and "none of Henderson's customers increased imports while decreasing purchases from Henderson[,]" Def.'s Resp. Opp'n at 17 (confidential version) (citing Admin. R. at 14–17 (confidential version)); and (4) Labor's remand investigation revealed that

> during the relevant period, [Henderson] laid off a total of two administrative workers. Another five workers left on their own accord, due to various personal reasons. None of these workers were * * * engaged in the manufacture of any produc[t] while employed at [Henderson].

Def.'s Resp. Opp'n at 17–18 (confidential version) (citing Admin. R. at 41); *see also* Def.'s Resp. Opp'n at 18 (citing Admin. R. at 39 (confidential version) and Admin. R. at 1)).

Finally, Labor asserts that an additional basis that precludes the certification of the plaintiffs is Labor's finding that

> 'the overwhelming portion of the activities performed at [Henderson] relates to the sales of industrial sewing machines and related parts. The company also produces components that attach to the sewing machine (value added) before they are sold. The company indicated that this is a negligible portion of the total functions performed at the facility.'[12]

Def.'s Resp. Opp'n at 18 (confidential version) (quoting Admin. R. at 41). Labor maintains that: (1) Henderson's vice president submitted a petition that was resubmitted unchanged during remand indicating a response of "'textile industry'" to a question asking for "'a description of the articles (products) produced by [Henderson],'" and to "'include such information as the common and technical names of the articles [as well as] the method of manufacture[,]'" Def.'s Resp. at 19 (quoting Admin. R. at 1); (2) Henderson's vice president responded to Labor's "Business Confidential Data Request" form by providing sales and employment data, but no production data, *see* Def.'s Resp. at 19 (citing Admin. R. at 11 (confidential version), *see also* Admin. R. at 29 (confidential version); (3) during the remand investigation, various customers of Henderson responded that Henderson was involved in sales and distribution of sewing machines and parts, *see* Def.'s Resp. Opp'n at 19, *see* Admin. R. at 33, 34, 36 (confidential version); (4) "Henderson itself corroborated the evidence demonstrating [that it was involved in sales and distribution of sewing machines and parts] rather than production[,]" Def.'s Resp. Opp'n at 20 (citing Admin. R. at 39 (confidential version)); (5) Cobb's October 15, 2001, letter filed with enclosures, deemed a summons and complaint, states that "'Henderson * * * does not produce products, [but] * * * res[ells] commercial sewing machines and parts to sewing factories[,]'" *id.* at 20–21; and (6) the attachment to Cobb's October 15, 2001, letter states that "'Henderson * * * res[ells] * * * commercial sewing machines and parts.'" *Id.*

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[12] Plaintiffs argue that "the issue is not whether production is negligible, but whether production has become affected by imports." Pls.' Mot. at 10; *see also* Pls.' Mot at 10–11 and Pls.' Resp. at 7–8.

Alternatively, Labor argues that "plaintiffs have not demonstrated that Labor's determinations *[Negative Determination I,* 66 Fed. Reg. 47,240 and Labor's subsequent negative determination on remand, *Negative Determination II,* 67 Fed. Reg. at 18,927] are unsupported by substantial evidence contained in the administrative record, thus remand for further investigation is inappropriate, and Labor's decisions should not be disturbed." Def.'s Resp. Opp'n at 21; *see also* Def.'s Resp. Opp'n at 21–27 (confidential version). In particular, Labor points out that plaintiffs fail to cite to the record for support of their argument that "'Henderson * * * is the same company performing the same functions today as it did in 1998 when other former employees, including service workers, were certified for trade adjustment assistance.'" Def.'s Resp. Opp'n at 22 (quoting Pls.' Mot. at 9). Moreover, Labor argues that plaintiffs' assertion that Henderson is the same company as it was during the 1998 investigation is fundamentally flawed because: (1) in 1998, Henderson's vice president provided Labor with certain production numbers whereas in the investigation at issue, Henderson's vice president did not provide production numbers[,] *see* Def.'s Resp. Opp'n at 23 (comparing Am. Admin. R. at 7 with Admin. R. at 11 (confidential versions)); and (2) "[i]n 1998, Labor determined that Henderson in fact had employees engaged in production that independently met the statutory criteria for certification," Def.'s Resp. Opp'n at 23 (citing Am. Admin. R. at 11 (confidential version)) whereas in the investigation at bar, "Labor properly determined that none of the employees that left Henderson during the period investigated was involved in production." Def.'s Resp. Opp'n at 23 (citing Admin. R. at 39 (confidential version)). Additionally, contrary to plaintiffs' argument that "'a decline in sales and production contributed importantly to [plaintiffs'] separation[,]'" Def.'s Resp. Opp'n at 26 (confidential version) (quoting Pls.' Mot. at 11), Labor maintains that "[t]his representation is arguably accurate to the extent that sales may have led to plaintiffs' separation" but it is incorrect as to production leading to plaintiffs' separation. Def.'s Resp. Opp'n at 26 (citing Admin. R. at 39 (confidential version)). Labor, therefore, contends that the Court should deny plaintiffs' motion and sustain Labor's negative determinations.

C. Analysis

The Trade Adjustment Assistance program under Section 221(a) of the Trade Act of 1974, as amended, (that is, 19 U.S.C. § 2271(a)) was designed to provide temporary financial assistance for workers who have been partially or totally displaced as a result of increased imports. *See Former Employees of Rohm and Haas Co. v. Chao,* 2003 Ct. Intl. Trade LEXIS 7, *2, Slip. Op. 03–7 (Jan. 23, 2003) (citing *Former Employees of*

Hawkins Oil & Gas, Inc. v. U.S. Sec'y of Labor, 15 CIT 653, 654 (1991)). Pursuant to 19 U.S.C. § 2272(a):[13]

> [Labor] shall certify a group of workers * * * as eligible to apply for adjustment assistance under this subpart if [Labor] determines—
>
> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

"Thus, it follows that [19 U.S.C. § 2272(a)(3)'s] certification requirements are satisfied if it is established that a group of workers produce[] an "article" within the meaning of the statute, and an imported article like or directly competitive with the article produced by the workers' firm or subdivision contributes importantly to the loss of such workers' jobs." *Former Employees of Marathon Ashland,* 26 CIT at ____, 215 F. Supp. 2d at 1351. Section 2272(b)(1) of Title 19 defines "contributed importantly" to mean "a cause which is important but not necessarily more important than any other cause."[14] 19 U.S.C. § 2272(b)(1); *see also Former Employees of Rohm and Haas Co.,* 2003 Ct. Intl. Trade LEXIS 7, at *3 (quoting *Former Employees of Hewlett-Packard Co. v. United States,* 17 CIT 980, 985 (1993) ("[t]here must be an 'important causal nexus' between increased imports and the decline in sales or production").

The Court finds that Labor's *Negative Determination I,* 66 Fed. Reg. 47,240, and Labor's subsequent *Negative Determination II,* 67 Fed. Reg. 18,927, denying plaintiffs' certification of eligibility for trade adjustment assistance on the basis that the plaintiffs did not produce an article, plaintiffs did not qualify as support service workers and Henderson did not produce an article affected by increased imports that contributed importantly to plaintiffs' separation from Henderson are supported by substantial evidence and are in accordance with law.

1. Plaintiffs Did Not Produce an Article

First, with respect to Labor's determination that plaintiffs did not produce an article within the meaning of 19 U.S.C. § 2272(a)(3), the record evidence indicates that Henderson's vice president signed a peti-

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[13] Congress recently amended the Trade Act of 1974. *See* Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107–210, 116 Stat. 933 (Aug. 6, 2002). However, in the case at bar, plaintiffs' petition for trade adjustment assistance predates "November 4, 2002, the effective date of [the Trade Adjustment Assistance Reform Act of 2002]." *Former Employees of Rohm and Haas Co.,* 2003 Ct. Intl. Trade LEXIS at *2–3 n.1 (citing Pub. L. No. 107–210 § 151, 116 Stat. at 953–54).

[14] "According to the Senate Report to the Trade Reform Act of 1974, while a 'cause may have contributed importantly even though it contributed less than another single cause[, it still] must be significantly more than *de minimis* to have contributed importantly[.]'" *Former Employees of Kleinerts, Inc. v. Herman,* 23 CIT 647, 651, 74 F. Supp. 2d 1280, 1285 (1999) (quoting S. Rep. No. 93–1298, 93rd Cong., 2nd Sess. at 133 (1974)).

tion for TAA on behalf of plaintiffs on June 29, 2001, describing plaintiffs' jobs at Henderson as "accounting." *See* Admin. R. at 1. A June 25, 2001, letter from Henderson's vice president to Labor that was attached to the petition stated that "Cobb * * * worked for [Henderson] for more than 10 years, as accounts payable clerk." *Id.* at 2. Moreover, a letter submitted by Henderson's vice president to Labor during the remand investigation stated that plaintiffs' did not produce a product. *See* Admin. R. at 39 (confidential version). Additionally, Cobb's letter with enclosures deemed a summons and complaint by this Court states in pertinent part that "[Cobb] started part time in 1980 working as [an] account receivable clerk [at Henderson], and within two-three years was asked to go full time * * * [and] was then changed to [an] account payable clerk[.]" Since plaintiffs fail to point to any record evidence that contradicts Labor's finding that plaintiffs did not produce an article, the Court finds that Labor's determination that plaintiffs did not produce an article within the meaning of 19 U.S.C. § 2272(a)(3) is supported by substantial evidence.[15] *See Former Employees of Pittsburgh Logistics Systems, Inc. v. U.S. Sec'y of Labor,* 2003 Ct. Intl. Trade LEXIS 18, *18, Slip. Op. 03–21 (Feb. 28, 2003) (citing *Woodrum,* 5 CIT at 198, 564 F. Supp. at 831; *Nagy,* 6 CIT at 145, 571 F. Supp. at 1264; and *Pemberton,* 639 F.2d 798)) ("TAA was intended to benefit those who ha[ve] been engaged in the production of an import-impacted article, and courts have noted the common meaning of 'production,' *i.e.,* to 'give birth, create or bring into existence'").

2. Plaintiffs Did Not Qualify as Support Service Workers

Plaintiffs who do not produce an article (product) are eligible for TAA certification as "support service workers" if:

> (1) their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control;
>
> (2) the reduction in the demand for their services originated at a production facility whose workers independently met the statutory criteria for certification; and
>
> (3) the reduction directly related to the product impacted by imports.

Former Employees of Chevron Prods. Co. v. United States Sec'y of Labor, 2002 Ct. Intl. Trade LEXIS 129, *37, Slip. Op. 02–131 (Oct. 28, 2002)

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[15] The Court is not persuaded by plaintiffs' argument that "Henderson * * * is the same company engaged in the same activities as it was in 1998 [and, therefore,] Cobb's position in the accounting department ha[s] the same nexus to production activities as the sales employees' positions [and customer service representative's position] in the 1998 investigation." Pls.' Mot. at 12. First, plaintiffs fail to point to record evidence in support of this argument. Second, in the 1998 investigation, Henderson's vice president responded to Labor's "Business Confidential Data Request" form by stating that Henderson produced a certain article (product) and provided Labor with production numbers for that article whereas in the investigation at issue, Henderson's vice president responded to Labor's "Business Confidential Data Request" form on *two occasions* (during the initial investigation and during the voluntary remand investigation) stating in both instances that Henderson produced a certain article and *failing to provide any production numbers for that alleged article. Compare* Am. Admin. R. at 1, 6–8 (1998 investigation) (confidential version) *with* Admin. R. at 1, 11–13, 29–32 (investigation at bar) (confidential version) (emphasis supplied). Finally, in the 1998 investigation, Labor determined that "Henderson *in fact had employees engaged in production that independently met the statutory criteria for certification,"* Def.'s Resp. Opp'n at 23 (citing Am. Admin. R. at 11 (confidential version)) whereas in the investigation at bar, "Labor * * * determined that *none of the employees that left Henderson during the period investigated was involved in production[.]"* Def.'s Resp. Opp'n at 23 (citing Admin. R. at 39 (confidential version) (emphasis supplied)).

(citing *Bennett,* 20 CIT at 792; *Abbott,* 6 CIT at 100–01, 570 F. Supp. at 49).[16]

In the case at bar, Labor determined in its initial investigation that "[n]one of [Henderson's] customers increased import purchases of parts for sewing machines, while decreasing purchases [from] [Henderson]." Admin. R. at 19. Labor further reasoned that:

> Workers of [Henderson] may be certified only if their separation was caused importantly by a reduced demand for their services from a parent firm, a firm otherwise related to the subject firm by ownership, or a firm related by control. Additionally, the reduction in demand for services must originate at a production facility whose workers independently meet the statutory criteria for certification and the reduction must directly relate to the product impacted by imports. These conditions have not been met for workers performing services at [Henderson].

Id. at 21. Additionally, subsequent to the remand investigation, Labor issued its "Notice of Negative Redetermination on Remand" affirming Labor's initial notice of negative determination, *see Negative Determination I,* 66 Fed. Reg. at 47,241, and stated:

> The results of the investigation on remand revealed that during the relevant period, [Henderson] laid off a total of two administrative workers. Another five workers left on their own accord, due to various personal reasons. None of these workers were engaged in the manufacture of any product while employed at the subject facility.

Id. at 41.

The Court finds that Labor's determinations are supported by substantial record evidence and are in accordance with law. In particular, the record reveals that: (1) Henderson's vice president responded to Labor's "Business Confidential Data Request" form on two occasions (that is, during the initial investigation and the remand investigation) and in *both instances* stated that Henderson produced a certain article *but provided no production data,* Admin. R. at 11–13, 29–32 (confidential version) (emphasis supplied); (2) one of Henderson's customers that was surveyed by Labor during the initial investigation provided that for the period of January to June 2001, there was an *increase* in the value of purchases of sewing machines from Henderson and a *decrease* in value of sewing machines from other domestic sources (the sewing machines purchased from the other domestic sources were manufactured mostly in a foreign country), *see* Admin. R. at 14 (confidential version) (emphasis supplied); (3) another customer of Henderson surveyed by Labor

[16] The Court disagrees with plaintiffs' argument that "neither [19 U.S.C. § 2272(a)] nor case law supports [Labor's] legal argument," Pls.' Resp. at 10, that certification of plaintiffs as support service workers is precluded because "no production employee independently qualified for certification[.]" Def.'s Resp. Opp'n at 17; *see Abbott,* 6 CIT at 100–01, 570 F. Supp. at 49 (citing *Woodrum,* 5 CIT 191, 564 F. Supp. 826) ("the Court must accord substantial deference to the interpretation of the statute [19 U.S.C. § 2272(a)] by the agency [Labor] charged with its administration"); *Bennett,* 20 CIT at 792 (stating in pertinent part that "plaintiff[s] are eligible for certification [as support service workers] when * * * *their separation is caused by a reduced demand for their services from a production department whose workers independently meet the statutory criteria for certification"* and holding that "Labor permissibly and reasonably interpreted [19 U.S.C. § 2272(a)] in formulating the test for certifying support service workers").

during the initial investigation only supplied data depicting a decrease in the value of purchases of sewing machine parts from other domestic sources but did not supply any data with regards to Henderson nor foreign sources, *see id.* at 16 (confidential version); (4) another customer of Henderson surveyed by Labor during the initial investigation and later in the remand investigation did not supply any data and stated that the company had closed, *see id.* at 17, 37 (confidential version); (5) during the remand investigation Labor contacted the various customers of Henderson who responded that Henderson was involved in sales and distribution of sewing machines and parts, *see* Admin. R. at 33, 34, 36 (confidential version); (6) another customer of Henderson surveyed by Labor during the remand investigation only supplied data depicting a decrease in the quantity and value of purchases of sewing machines from other domestic sources (the sewing machines purchased from the other domestic sources during the period of 1999 through 2001 were increasingly being manufactured mostly in a foreign country) but did not supply any data with regards to Henderson nor foreign sources, *see* Admin. R. at 38 (confidential version); and (7) during the remand investigation, Henderson's vice president responded to Labor in a letter explaining in pertinent part that the two plaintiffs in the case at bar were terminated from their employment at Henderson while another five employees left for reasons other than being terminated. *See* Admin. R. at 39 (confidential version).

Based on the record evidence, the Court finds that Labor could reasonably conclude as it did in the instant case that plaintiffs did not qualify as support service workers because *inter alia:* (1) "no production employee independently qualified for certification[,]" Def.'s Resp. Opp'n at 17, and (2) "the record indicates that the plaintiffs' did not lose their jobs because imports affected an article Henderson produced."[17] *Id.*

3. Henderson Did Not Produce an Article Affected by Increased Imports That Contributed Importantly to Plaintiffs' Separation from Henderson

Finally, the Court also finds Labor's determination that Henderson did not produce an article affected by increased imports that contributed importantly to plaintiffs' separation from Henderson as supported by substantial evidence. The record evidence provides that: (1) Henderson's vice president signed a petition for TAA on behalf of the plaintiffs on June 29, 2001, indicating a response of "textile industry" to a question asking for "a description of the articles (products) produced by [Henderson]," and to "include such information as the common and technical names of the articles [as well as] the method of manufacture[,]" Admin. R. at 1; (2) Henderson's vice president responded to Labor's "Business Confidential Data Request" form on two occasions (that

[17] The Court notes that plaintiffs fail to point to record evidence to support a contrary result (that is, that plaintiffs qualify as support service workers).

is, during the initial investigation and the remand investigation) and in *both instances* stated that Henderson produced a certain article *but provided no production data,* Admin. R. at 11–13, 29–32 (confidential version) (emphasis supplied); (3) one of Henderson's customers that was surveyed by Labor during the initial investigation provided that for the period of January to June 2001, there was an *increase* in the value of purchases of sewing machines from Henderson and a *decrease* in value of sewing machines from other domestic sources (the sewing machines purchased from the other domestic sources were manufactured mostly in a foreign country), *see* Admin. R. at 14 (confidential version) (emphasis supplied); (4) another customer of Henderson surveyed by Labor during the initial investigation only supplied data depicting a decrease in the value of purchases of sewing machine parts from other domestic sources but did not supply any data with regards to Henderson nor foreign sources, *see* Admin. R. at 16 (confidential version); (5) another customer of Henderson surveyed by Labor during the initial investigation and later in the remand investigation did not supply any data and stated that the company had closed, *see* Admin. R. at 17, 37 (confidential version); (6) another customer of Henderson surveyed by Labor during the remand investigation only supplied data depicting a decrease in the quantity and value of purchases of sewing machines from other domestic sources (the sewing machines purchased from the other domestic sources during the period of 1999 through 2001 were increasingly being manufactured mostly in a foreign country) but did not supply any data with regards to Henderson nor foreign sources, *see* Admin. R. at 38 (confidential version); (7) during the remand investigation Labor contacted the various customers of Henderson who responded that Henderson was involved in sales and distribution of sewing machines and parts, *see* Admin. R. at 33, 34, 36 (confidential version); and (8) during the remand investigation Henderson's vice president responded in a letter describing Henderson's business as mostly involving sales and distribution of sewing machines and parts rather than production. *See* Admin. R. at 39 (confidential version). Additionally, Cobb's letter with enclosures deemed a summons and complaint by this Court states in pertinent part that Henderson "does not produce products, [but] * * * res[ells] commercial sewing machines and parts to sewing factories."[18]

[18] Plaintiffs raise a number of arguments and assert that the record does not support Labor's conclusions that Henderson does not produce an article, let alone one that was affected by increased imports. The Court disagrees with plaintiffs and addresses plaintiffs' arguments as follows.

First, plaintiffs raise two arguments with regards to a handwritten notation that appears in the margin of the letter provided by Henderson's vice president during the remand investigation. *See* Admin. R. at 39 (confidential version). In particular, plaintiffs contend that "[t]here is no evidence in the record that Henderson actually provided such information to Labor[,]" Pls.' Resp. at 6 (citing Admin. R. at 39 (confidential version)), and that "the issue is not whether production is negligible, but whether production has become affected by imports." Pls.' Mot. at 10; *see also* Pls.' Mot at 10–11 and Pls.' Resp. at 7–8.

Continued

Accordingly, the Court finds that Labor properly issued its "Notice of Negative Redetermination on Remand" affirming Labor's initial notice of negative determination and stating in pertinent part:

> [T]he overwhelming portion of the activities performed at [Henderson] relates to the sales of industrial sewing machines and related parts. The company also produces components that attach to the sewing machine (value added) before they are sold. The company indicated that this is a negligible portion of the total functions performed at the subject facility.

Admin. R. at 41; *see Negative Determination II,* 67 Fed. Reg. at 18,928.

CONCLUSION

Based on a careful examination of the record as a whole, this Court sustains Labor's initial negative determination *(Negative Determination I,* 66 Fed. Reg. 47,240) and Labor's subsequent negative determination on remand *(Negative Determination II,* 67 Fed. Reg. 18,927) denying plaintiffs' certification of eligibility for trade adjustment assistance as supported by substantial evidence and in accordance with law. This case is dismissed.

The Court disagrees with plaintiffs' arguments with regards to the handwritten notation that appears in the margin of the letter provided by Henderson's vice president because as Labor correctly points out, "reliance upon unverified statements of company officials constitutes substantial evidence in the absence of contradictory information[.]" Def.'s Resp. Opp'n at 24–25 (citing *United States Steel Workers of Am., Local 1082,* 15 CIT at 123; *see also supra* Discussion Part I, C (Analysis) n.14 (quoting *Former Employees of Kleinerts, Inc.,* 23 CIT at 651, 74 F. Supp. 2d at 1285 (quoting in turn S. Rep. No. 93–1298, 93rd Cong., 2nd Sess. at 133 ("[a]ccording to the Senate Report to the Trade Reform Act of 1974, while a 'cause may have contributed importantly even though it contributed less than another single cause[, it still] must be significantly more than *de minimis* to have contributed importantly'")). Reviewing *the record evidence as a whole,* the Court finds that the plaintiffs have not demonstrated that Labor's finding regarding Henderson's production situation resulted from anything other than a reasonable conclusion supported by substantial evidence. (Emphasis supplied).

Second, plaintiffs argue that Henderson's "sales declined and imports directly competitive with Henderson's * * * articles contributed importantly to such decline." Pls.' Mot. at 16. Plaintiffs argue *inter alia* that the same conditions that existed in the 1998 investigation of Henderson exist in the investigation at bar (that is, just as in the 1998 investigation of Henderson, the current investigation reveals that pursuant to 19 U.S.C. § 2272(a)(3), "[t]he increase in imports * * * contribute[d] importantly to the decline in sales or production and the separation of employees"). *Id.* at 16 (citing Am. Admin. R. at 7–8 (confidential version) and Admin. R. at 11 (confidential version).

As the Court previously pointed out, *see supra* Discussion Part I, C1 (Analysis) n.15, the Court is not persuaded by plaintiffs' argument that Henderson is the same company in the investigation at bar as it was in the 1998 investigation. Additionally, plaintiffs again fail to point to record evidence supporting their argument that imports contributed importantly to plaintiffs' separation from Henderson.