(Slip Op. 03–67)

VANETTA U.S.A. INCORPORATED, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 97–01–00117

[Cross-motions for summary judgment as to classification of animal-feed additives denied.]

Dated: June 25, 2003

Barnes, Richardson & Colburn (James S. O'Kelly) for the plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Bruce N. Stratvert*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Joseph M. Spraragen*), of counsel, for the defendant.

MEMORANDUM & ORDER

AQUILINO, *Judge*: The parties have interposed cross-motions for summary judgment in this consolidated action, which contests U.S. Customs Service classification of certain additives imported from Italy for animal feeds. While this court's careful, albeit belated, review of these motions does not lead it to conclude that such judgment can be entered, they do substantiate, yet again, the accumulated wisdom encompassed by USCIT Rule 56(d) that such motions aid in

> ascertain[ing] what material facts exist without substantial controversy and what material facts are actually and in good faith controverted[,]

thereby streamlining preparation for and conduct of the trial on the remaining material issue(s) of fact.

I

Subsequent to the filing of plaintiff's motion for summary judgment, the defendant chose to respond with such a motion of its own. This form of response has precipitated a formal motion to strike by the plaintiff, which takes the position that defendant's cross-motion "was not timely filed in accordance with the scheduling order in this case."

That order of the court issued pursuant to USCIT Rules 1 and 16 set a date certain for submission of any dispositive motions. The plaintiff met the deadline, whereas the defendant twice moved for, and obtained, formal extensions of time "to respond to plaintiff's motion for summary judgment". Whereupon the plaintiff presses that "[i]n neither instance did defendant seek a modification of the scheduling order or request more time to file its own motion for summary judgment." Plaintiff's Motion to Strike Defendant's Motion for Summary Judgment, p. 2.

The precision of this motion to strike is unimpeachable, but, when faced with a similar challenge by the plaintiff in *Rollerblade, Inc. v. United States*, 24 CIT 812, 116 F.Supp.2d 1247 (2000), *aff'd*, 282 F.3d 1349 (Fed.Cir. 2002), the court determined to accept "as such" the defendant's cross-motion for summary judgment on the ground that the

> practice of combining the cross-motion for summary judgment with the party's response to the original motion for summary judgment is an efficient use of court resources.

24 CIT at 813 and 116 F.Supp.2d at 1250, n. 1. Since the motion to strike at bar does not show any prejudice to the plaintiff as a result of the nature of defendant's chosen response, this court discerns no basis for deviation from the determination in *Rollerblade*. Indeed, all parties are at liberty to posit motions for summary judgment whenever, in the exercise of sound analysis, they come to conclude "that there is no genuine issue as to any material fact and that the[y are] entitled to a judgment as a matter of law." USCIT Rule 56(c). Moreover, it has long been the mandate in an action like this that the court reach "the correct result[ ] by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878, *reh'g denied*, 739 F.2d 628 (Fed.Cir. 1984) (emphasis in original). Here, that procedure may well include cross-motions for summary judgment.

II

The court's jurisdiction to hear and decide this matter is pursuant to 28 U.S.C. §§ 1581(a), 2631(a). *Cf.* Defendant's Reply Brief in Support of Motion for Summary Judgment and in Opposition to Plain-

tiff's Response, p. 2, n. 3 ("the Government withdraws its jurisdictional objections previously advanced").

As required by Rule 56, plaintiff's motion for summary judgment is accompanied by a statement of the material facts as to which it contends there is no genuine issue to be tried. Included therein are the following averments:

4. The imported merchandise consists of Menadione Sodium Bisulfite (hereinafter "MSB"), Menodione Sodium Bisulfite Complex (hereinafter "MSBC"), Menadione Dimethylpyrimidinol Bisulfite (herein after "MPB") and Menadione Nicotinamide Bilsulfite (hereinafter "MNB")* * * *

5. The chemical structure of naturally occurring Vitamin K_1 phylloquinone is 2-methyl-3-phytyl-1, 4-naphthoquinone* * * *

6. The chemical structure of naturally occurring Vitamin K_2 menaquinone is 2-methyl-3-all-trans-polyprenyl-1, 4-naphthoquinone* * * *

7. Vitamin K_1 and vitamin K_2 are vitamins for purposes of the HTSUS and are classified under heading 2936, HTSUS* * * *

* * * * * * *

11. When MSB, MSBC, MPB or MNB is ingested, the menadione in these products is converted into a form of vitamin K_2, specifically vitamin $K_{2(20)}$* * * *

12. The principal use of the imported products is as a component in animal feeds* * * *

13. Customs excluded the imported products from classification under heading 2936 because, as interpreted by Customs, this heading does not include "synthetic substitutes for vitamins" * * * *

14. The phrase "synthetic substitute for a vitamin" does not appear anywhere in the HTSUS statute enacted by Congress* * * *

15. Defendant defines "synthetic substitute for a vitamin" as "a synthesized chemical compound that is not found in nature but has vitamin activity. This differs from a synthetically reproduced vitamin whose structure is found in nature but has been synthesized from other chemicals." * * * *

* * * * * * *

17. The imported MSB was classified by Customs as "Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated or nitrosated

derivatives: * * * Halogenated, sulfonated, nitrated or nitrosated derivatives: Aromatic: * * * Other", under subheading 2914.70.20, HTSUS, dutiable at 11% *ad valorem* * * * *

18. The imported MSB has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone* * * *

19. The SB or sodium bisulfite portion of MSB is excreted by the body after ingestion* * * *

20. From a nutritional perspective, the menadione (2-methyl-1, 4-naphthoquinone) moiety is the most important component of MSB* * * *

* * * * * * *

21. The imported MSBC was [also] classified by Customs * * * under subheading 2914.70.20, HTSUS, [*supra*, para. 17,] dutiable at 11% *ad valorem* * * * *

22. The imported MSBC has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone* * * *

23. MSBC is essentially MSB with additional sodium bisulfite added for increased stability* * * *

24. The SBC or sodium bisulfite complex portion of MSBC is excreted by the body after ingestion* * * *

25. From a nutritional perspective, the menadione (2-methyl-1, 4-naphthoquinone) moiety is the most important component of MSBC* * * *

* * * * * * *

27. The chemical structure of MPB is 2-methyl-1, 4-naphthoquinone 2-hydroxy-4, 6-dimethylpyrimidine bisulfite* * * *

28. The imported MPB has the same menadione moiety (2-methyl-1, 4-naphthoquinone) as naturally occurring Vitamin K_1 phylloquinone and naturally occurring Vitamin K_2 menaquinone* * * *

29. The PB portion of MPB is excreted by the body after ingestion and has no nutritional value* * * *

30. From a nutritional perspective, the menadione (2-methyl-1,

4-naphthoquinone) moiety is the most important component of MPB* * * *

* * * * * * *

32. Nicotinamide is also known as niacinamide* * * *

33. Niacinamide is a vitamin described in heading 2936, HTSUS* * * *

34. The bisulfite portion of MNB is excreted by the body after ingestion* * * *

35. The nicotinamide portion is not excreted by the body after ingestion and provides niacin or niacinamide activity * * * *

36. The nicotinamide portion of MNB is a vitamin, as described in subheading 2936.29.1530, HTSUS* * * *

* * * * * * *

38. Defendant is unaware of any uses of MNB as a component of animal feeds other than as a source of vitamin K activity and niacin* * * * [1]

The defendant admits without any reservation all but one of these averments. *See* Defendant's Response to Plaintiff's Statement of Material Facts as to Which There is No Genuine Dispute, pp. 1–4. As for that single, enumerated paragraph, 4, *supra*, the defendant admits it with regard to MSB and MSBC but

> [a]vers that none of the imported merchandise is described on the commercial invoices as MNB, or MPB, or their equivalents.

Id. at 1, para. 4. As for defendant's own statement of material facts in support of its cross-motion, the plaintiff admits the following averments contained therein:

2. MSB, MNB and MSBC are aromatic derivatives of quinones.

3. MPB is an aromatic heterocyclic compound containing a pyrimidine ring.

* * * * * * *

5. Menadione is not the natural precursor of vitamins K_1[ ] in plants and K_2 in bacteria.

6. The Menadione found in nature is not a provitamin of Phylloquinone.[2]

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[1] Plaintiff's Rule 56(i) Statement of Material Facts as to Which No Genuine Dispute Exists (citations in support of each averment omitted).

In sum, there is agreement between the parties with regard to many of the salient facts. Hence, the plaintiff also agrees that HTSUS chapter 29 (1994)

> contemplates that some organic chemical products may be described in more than one of its headings. MSB, MSBC, MPB and MNB are examples of four such products.

Plaintiff's Memorandum, p. 12. This means that MSB, MNB and MSBC are at least arguably covered by HTSUS subheading 2914.70.20 and MPB by subheading 2933.59.70, as now posited by the defendant.

Be such concurrence as it may, a court

> first construes the language of the heading, and any section or chapter notes in question, to determine whether the product at issue is classifiable under the heading. Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise. *See* GRI 1, 6. Furthermore, when determining which heading is the more specific, and hence the more appropriate for classification, a court should compare only the language of the headings and not the language of the subheadings. *See* GRI 1, 3.

Orlando Food Corp. v. United States, 140 F.3d 1437, 1440 (Fed.Cir. 1998); *Schulstad USA Inc. v. United States*, 26 CIT ___ , ___ , 240 F.Supp.2d 1335, 1338 (2002)("GRI" referring to the HTSUS General Rules of Interpretation). As indicated above, the headings favored by the defendant are as follows:

2914	Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated, or nitrosated derivatives[.]
2933	Heterocyclic compounds with nitrogen heteroatom(s) only; nucleic acids and their salts[.]

Headnote 3 to HTSUS chapter 29 provides, however, that

> [g]oods which could be included in two or more of the headings of this chapter are to be classified in that one of those headings which occurs last in numerical order.

The plaintiff relies on this note in pressing for classification of its merchandise under heading 2936, to wit:

> Provitamins and vitamins, natural or reproduced by synthesis (including natural concentrates), derivatives thereof used primarily as vitamins, and intermixtures of the foregoing, whether or not in any solvent[.]

With regard to this rubric, the defendant complains that the plaintiff

> ignores, completely, the Government's key point that while the MSB, MSBC, MPB, and MNB undoubtedly are provitamins (albeit *artificial* provitamins), they assuredly do not reproduce natural provitamins[2], and hence, cannot be described, and are not described, by the language of Heading 2936, HTSUS, which, by its terms, only covers natural vitamins, natural provitamins, reproductions of natural vitamins or provitamins, and derivatives of natural vitamins or provitamins.

Defendant's Reply Brief, pp. 1–2 (emphasis in original, footnote 3 omitted). Footnote 2 to this reply states in part:

> *Reproduce* means to produce a copy of something. Inasmuch as the HTSUS heading, in issue, Heading 2936, provides for "[p]rovitamins and vitamins, natural or reproduced by synthesis," clearly, the only provitamins described by this language are natural provitamins or reproductions of natural provitamins, which MSB, MSBC, MPB, and MNB plainly are not* * * *

Id. at 2, n. 2 (emphasis in original).

III

This reply by the defendant is the crux of the controversy at bar. Having studied the affidavits of Dr. John W. Suttie, Dr. T.M. Frye, and Dr. Mark W. LaVorgna, as well as Binder, Benson & Flath, *Eight 1,4-Naphthoquinones From Juglans*, 28 Phytochemistry, pp. 2799-2801 (1989), and Shils & Young, *Vitamin K*, Modern Nutrition in Health and Disease, ch. 14 (7th ed. 1988), proffered by the plaintiff in support of its instant motion, and having compared their rather esoteric contents with those of the two affidavits of Dr. Robert E. Olson filed on behalf of the defendant, the court is unable to conclude that the parties cross-motions completely satisfy the requirement that "there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) (emphasis in original). The foregoing material matter articulated by the defendant must be addressed at trial and subjected to cross-examination, "which has been said to be the surest test of truth and a better security than the oath." *The Hanover Ins. Co. v. United States*, 25 CIT ____ , ____ , Slip Op. 01–57, p. 21 (2001).

Thus, the parties' cross-motions for summary judgment must be, and they hereby are, denied. Counsel are directed to confer and propose to the court on or before August 1, 2003 a schedule for the necessary preparation for, and conduct of, the trial of those issue(s) of fact which are not already agreed to herein and which cannot be stipulated to in the pretrial order.

So ordered.

(Slip Op. 03–68)

DREXEL CHEMICAL COMPANY, PLAINTIFF *v.*
THE UNITED STATES, DEFENDANT

Court No. 98–02–00295–S

Dated: June 27, 2003

AMENDED JUDGMENT

MUSGRAVE, *Judge*: Upon consideration of the Consent Motion to Amend the Judgment Pursuant to Rule 59(e) and good cause having been shown, it is hereby;

ORDERED that, for the reasons set forth in the Consent Motion to Amend the Judgment Pursuant to Rule 59(e), the Consent Motion is granted; and it is further

ORDERED that the United States pay interest to Drexel as provided by 28 U.S.C. § 2644 and 19 U.S.C. § 1505.

(Slip Op. 03–69)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS COMPANY AND GLOBE METALLURGICAL INC. PLAINTIFFS *v.* UNITED STATES, DEFENDANT AND LIGAS DE ALUMINIO S.A. DEFENDANT-INTERVENOR. ELETROSILEX S.A., PLAINTIFF *v.* UNITED STATES DEFENDANT AND AMERICAN SILICON TECHNOLOGIES, ELKEM METALS COMPANY AND GLOBE METALLURGICAL INC. DEFENDANT-INTERVENORS.

Consolidated Court No. 99–03–00149

[Plaintiff Eletrosilex, S.A. contests the Department of Commerce's second remand determination applying a 67.93 percent surrogate dumping margin to Eletrosilex as adverse facts available. Eletrosilex contends that: (1) the margin selected by Commerce is not reliable since it was calculated on remand in another administrative review and is now on appeal before the Court of Appeals for the Federal Circuit; and (2) the margin fails to meet the requirement that it be "a reasonably accurate estimate of [its] actual rate, albeit with some built-in increase intended as a deterrent to noncompliance," *see F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). **Held:** Since the surrogate margin selected by Commerce has not been invalidated, Commerce may use it as adverse facts available. The Court also finds that this margin is consistent with the requirement enunciated by the Federal Circuit in *De Cecco*. Therefore, Commerce's second remand determination is sustained.]

Decided: June 27, 2003

Baker Botts, LLP (Samuel J. Waldon, and Matthew T. West) for plaintiffs and defendantintervenors American Silicon Technologies, Elkem Metals Company, and Globe Metallurgical Inc.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Reginald T. Blades, Jr.*), and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Barbara J. Tsai*), of counsel, for defendant.

Dorsey & Whitney, LLP (Philippe M. Bruno and Rosa S. Jeong) for plaintiff and defendantintervenor Eletrosilex, S.A.

OPINION

MUSGRAVE, *Judge*: In this action plaintiff Eletrosilex S.A., a Brazilian producer of silicon metal, challenges the decision by the International Trade Administration of the United States Department of Commerce ("Commerce" or "the agency") to use total adverse facts available to determine its dumping margin in the sixth administrative review of the antidumping duty order on silicon metal from Brazil, *Silicon Metal From Brazil: Final Results of Antidumping Duty Administrative Review*, 64 Fed. Reg. 6305 (Feb. 9, 1999). The Court has remanded this determination twice in prior Opinions. *See American Silicon Technologies v. United States*, 26 CIT ___ , 240 F. Supp. 2d 1306 (2002); *American Silicon Technologies v. United States*, 24 CIT 612, 110 F. Supp. 2d 992 (2000). Most recently, the Court held that the 93.2 percent dumping margin selected by Commerce as adverse facts available for Eletrosilex was disproportionately high relative to commercial practices at and around the relevant time period. 26 CIT at ___ , 240 F. Supp. 2d at 1313. Thus the Court remanded this matter for Commerce to select a different dumping margin. *Id.* Commerce issued its *Final Results of Redetermination Pursuant to Court Remand* ("*Second Remand Results*") on January 22, 2003, and selected a 67.93 percent margin calculated for another respondent in the fourth administrative review as the adverse facts available rate for Eletrosilex. *See Second Remand Results* at 3. In selecting this rate, Commerce reasoned:

> Pursuant to the Court's directive, the Department selected an alternate rate to apply as adverse [facts available] to Eletrosilex. The highest rate calculated for Eletrosilex in any segment of this proceeding was 53.63 percent. The highest rates calculated for other respondents in other segments of this proceeding were 91.06 ("all others rate" from less-than-fair-value (LTFV) investigation), 93.20 (highest rate calculated for any respondent during the LTFV investigation), 61.58 (highest rate calculated for any respondent during the third review of this proceeding) and 81.61 and 67.93 percent (the two highest rates calculated for respondents during the fourth review of this proceeding).
>
> Eletrosilex's previously calculated rate of 53.63 percent is not an appropriate rate for use as adverse [facts available] because the rate was calculated for a review period during which Eletrosilex was cooperative. Hence, the use of this rate would

> not carry an adverse inference. The Court dismissed the 81.61 rate issued in the fourth review period and indicated that margins above 90 percent in this proceeding "lack a rational relationship to Eletrosilex." The Department therefore chose as adverse [facts available] the 67.93 percent calculated rate issued in the fourth administrative review of this case. Because this rate is from a review period that began two years before the instant review period, it should reasonably reflect commercial practices at or around the time in question. Moreover, as the 67.93 percent rate is above Eletrosilex's previously calculated rate of 53.63 percent, the Department finds that this rate serves the Court's directive of selecting a rate that is a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance." Therefore, in order to comply with the Court's order, we have selected 67.93 percent as the adverse [facts available] rate to apply to Eletrosilex for the sixth review of this proceeding. Consequently, Eletrosilex's dumping margin for the sixth review of this proceeding will change from 93.20 percent to 67.93 percent.

Second Remand Results at 2–3 (footnote omitted).

Eletrosilex subsequently submitted comments to the Court objecting to the *Remand Results* and Commerce and defendant-intervenors American Silicon Technologies, Elkem Metals Co., and Globe Metallurgical Inc. (collectively "American Silicon") submitted rebuttal comments. For the reasons which follow, the Court sustains Commerce's *Second Remand Results.*

Jurisdiction and Standard of Review

The Court has jurisdiction of this action pursuant to 19 U.S.C. § § 1516a(a) and 28 U.S.C. § 1581(c). The Court shall uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However, substantial evidence supporting an agency determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's

conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F. Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488 (1951)).

Discussion

Eletrosilex argues that the 67.93 percent margin is not reliable because it was "calculated for another respondent, Companhia Brasileira Carbureto de Calcio ("CBCC"), in the court-ordered remand proceeding" and "is not a final calculated margin." Eletrosilex's Comments on the Final Results of Redetermination Pursuant to Court Remand ("Eletrosilex's Comments") at 3–4. Eletrosilex notes that Commerce originally calculated and published a 0.37 percent rate for CBCC in the fourth administrative review. *Id.* at 4. This Court reversed Commerce's determination, and on remand Commerce calculated the 67.93 percent rate. The Court entered judgment sustaining the remand results, but subsequently stayed the judgment as it pertained to CBCC pending the outcome of CBCC's appeal, which has yet to be decided. Thus, Eletrosilex concludes that, "the remand decision has not become final and is without any legal effect at this time." *Id.* at 4. Eletrosilex also argues that it is inappropriate to use this rate as adverse facts available because it will have no recourse if the Federal Circuit subsequently finds in CBCC's favor. *Id.* at 6.

Eletrosilex also argues that the 67.93 percent rate is not a reasonably accurate estimate of its actual rate. *Id.* It notes that for three reviews prior to the one at issue its dumping margins were 39.00 percent, 38.39 percent, and 13.18 percent. *Id.* at 7. Moreover, it avers that CBCC was "the *only* respondent, since the original investigation, that received a calculated dumping rate that is significantly over 50 percent." *Id.* (emphasis in the original).

Eletrosilex contends that Commerce chose the 67.93 percent margin because it was slightly higher than Eletrosilex's highest calculated rate and was therefore " 'a reasonably accurate estimate' of Eletrosilex'[s] 'actual rate' of dumping and that the additional 14.3 percent (the difference between the two rates) serves as the 'built-in increase intended as a deterrent to non-compliance.'" *Id.* at 8. Eletrosilex argues that this reasoning is misleading since the 53.63 percent rate was "not calculated for the period of review at issue, but was calculated in the first administrative review" and is therefore "old and irrelevant." *Id.* at 9. Eletrosilex further alleges that the economic conditions in Brazil at the time the 53.63 percent rate was calculated were different from the conditions during the period of review at issue in this action. *Id.* Finally, Eletrosilex challenges the logic behind Commerce's statement that "[t]he fact that Eletrosilex was willing to cooperate in a review to obtain the 53.63 percent rate suggests that, in this review, in which Eletrosilex was not willing to

cooperate, Eletrosilex may have been dumping at a rate significantly higher than 53.63 percent." *Id.* at 10 (quoting *Second Remand Results* at 7–8). Eletrosilex contends that it does not follow that the 53.63 percent margin calculated in an administrative review five years earlier is representative of Eletrosilex's actual dumping margin during the period of review at issue in this case just because Eletrosilex was cooperative in the earlier review. *Id.*

Eletrosilex argues that Commerce should arrive at a reasonable estimate of its dumping rate for this review by looking at its calculated rates in the reviews leading up to this one and its preliminary rate in this review. *Id.* at 10–11. Based on this analysis, Eletrosilex believes that a rate between 33 and 39 percent would be a relatively accurate estimate of its actual dumping margin for this period. *Id.* at 11. Eletrosilex also contends that the extra percentage added to this estimated actual rate as a "deterrent for non-compliance" "should not exceed 14.3 percent." *Id.* As a result, Eletrosilex posits 53.63 percent, its highest ever calculated rate, as an appropriate adverse facts available rate for Commerce to apply in this review. *Id.*

While Eletrosilex argues its case well, the Court does not agree with its conclusions. First, regarding the reliability of the 67.93 percent margin, the Court holds that Commerce may use margins calculated during remand proceedings as adverse facts available, even if they are under appeal. The Court concludes that there is no meaningful difference between the question of whether Commerce may use a margin that is on appeal before the Federal Circuit and the question of whether Commerce may use a margin that is in litigation before this Court. In *D & L Supply Co. v. United States*, 113 F.3d 1220 (Fed. Cir. 1997), the Federal Circuit held that Commerce could not use a margin that had been invalidated as the best information available ("BIA")[1] margin for an uncooperative respondent. The court qualified this holding by stating:

> This is not to say that Commerce must wait until a particular antidumping duty rate has been judicially blessed or has otherwise become final before that rate can be used as the basis for calculating a BIA rate. A margin that has not yet been overturned is presumed to be accurate and can properly be used in the BIA determination.

Id. at 1224. Based on this presumption of accuracy and the fact that the margin in question has been sustained by this Court, Commerce is permitted to use the 67.93 margin as adverse facts available.

The Court also finds that the rate selected by Commerce on remand bears a rational relationship to Eletrosilex's commercial practices and meets the requirement that it be "a reasonably accurate es-

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[1] The statute formerly referred to "facts available" and "best information available." *Compare* 19 U.S.C. § 1677e(c) (1988) *with* 19 U.S.C. § 1677e(a) (1994).

timate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). Unlike the rate previously assigned to Eletrosilex, which was calculated in the original Less-Than-Fair-Value Investigation that began six years earlier, see *American Silicon Technologies*, 26 CIT at ___ , 240 F. Supp. 2d at 1312, the 67.93 percent margin was calculated in an administrative review only two years prior to the period of review at issue in this action. Although Eletrosilex's highest prior rate, 53.63 percent, was calculated five years prior to the period in question, that does not make it irrelevant to this determination. Since Eletrosilex had previously dumped at that level, it is not unreasonable for Commerce to conclude that its actual rate could have once again fallen in this range.[2] In light of this, the 67.93 percent margin is not an unreasonably high surrogate margin for Commerce to apply to Eletrosilex in this review.

Conclusion

For the foregoing reasons, the *Second Remand Results* are sustained, and judgment shall enter in this action.

(Slip Op. 03–70)

FIRTH RIXSON SPECIAL STEELS LIMITED PLAINTIFF *v.* UNITED STATES, DEFENDANT AND CARPENTER TECHNOLOGY CORP.; CRUCIBLE SPECIALTIES METALS DIV. CRUCIBLE METALS CORP.; ELECTROALLOY CORP.; SLATER STEELS CORP., FORT WAYNE SPECIALTY ALLOYS DIVISION; AND THE UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, DEFENDANT-INTERVENORS

Court No. 02–00273

[The plaintiff challenged antidumping investigation finding that questionnaire responses warranted adverse inference in selection of facts otherwise available; CIT Rule 56.2 motion denied, judgment for the defendant.]

Decided: June 27, 2003

Pillsbury Winthrop LLP, Washington DC (*Christopher R. Wall*), for the plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice

[2] While Eletrosilex states that the 53.63 percent dumping margin resulted from economic conditions in Brazil that were not present at the time of the review at issue in this action, it has provided no evidence to support this assertion. In the *Second Remand Results* Commerce rejected this argument noting that another respondent received only a 0.42 percent margin for that same period. *Second Remand Results* at 7. Thus it is not readily apparent that economic conditions were a direct cause of Eletrosilex's prior margin.

(*A. David Lafer*), Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*James K. Lockett*), of counsel, for the defendant.

Collier Shannon Scott, PLLC, (*Robin H. Gilbert*), Washington, D.C., for the defendantintervenors.

OPINION

MUSGRAVE, *Judge*: Plaintiff Firth Rixson Special Steels Limited ("FRSS") appeals the margin determined in an antidumping investigation conducted by the International Trade Administration of the United States Department of Commerce ("Commerce"or the "Department") and published *sub nom. Notice of Final Determination of Sale at Less Than Fair Value: Stainless Steel Bar From the United Kingdom*, 67 Fed. Reg. 3146 (Jan. 23, 2002). *See* PDoc[1] 157 (unpublished version). *See also Antidumping Duty Order: Stainless Steel Bar from the United Kingdom*, 67 Fed. Reg. 10381 (Mar. 7, 2002), PDoc 165. Commerce determined that FRSS had failed to act to the best of its ability by not submitting costs and expenses for subject merchandise produced and sold by Spencer Clark, an affiliate that was dismantled three months before the petition was filed. As a result, Commerce employed an adverse inference in the selection of facts otherwise available and determined a duty margin of 125.77% for FRSS. FRSS moves for remand pursuant to CIT Rule 56.2, arguing that Commerce's decision is unsupported by substantial evidence on the record or not in accordance with law. Specifically, FRSS argues that the record shows it acted to the best of its ability in providing all the data it had or could obtain with respect to Spencer Clark, that it was unlawful for Commerce to refuse to verify its responses, and that the margin from the petition selected as facts otherwise available was uncorroborated and therefore unlawful. The government and the defendant-intervenors (petitioners) argue that the final determination should be sustained. On the reasoning below, the Court denies the plaintiff's motion and grants judgment to the defendant.

Background

The petitioners' allegation of dumping of stainless steel bar ("SSB") from countries including the United Kingdom was filed on December 28, 2000. CDoc 1. The investigation into the petition was initiated January 2, 2001. *Notice of Initiation of Antidumping Duty Investigations: Stainless Steel Bar from France, Germany, Italy, Korea, Taiwan, and the United Kingdom*, 66 Fed. Reg. 7620 (Jan. 24, 2001), PDoc 17. Commerce selected the three largest producers/exporters of SSB from the United Kingdom as mandatory respondents. *See* PDoc 31. On February 20, 2001, Commerce sent anti-

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[1] The public and confidential documents of the administrative record are herein referenced "PDoc" and CDoc," respectively.

dumping duty questionnaires to each concerning their respective SSB sales in the U.S. and the U.K. over the period October 1, 1999 to September 30, 2000 (the "POI"). PDoc 38.

FRSS submitted answers to section A on March 23, 2001 and to sections B–D on April 12, 2001, and it sent cost reconciliation data for section D on May 16, 2001. PDoc 54, CDoc 8; PDoc 62, CDoc 13; PDoc 72, CDoc 18, respectively. Among other responses, in its section A responses to questions about affiliates, FRSS did not indicate that it had any which had produced and sold subject merchandise during the POI. In answer to question "6b," which requested financial documents for "all affiliates involved in the production or sale of subject merchandise in the foreign market and the U.S. market," FRSS asserted that it had "no affiliates" involved in such "during the period of investigation."

The petitioners commented that FRSS's section A–C responses were insufficient and contained, among other items, incorrectly formatted product control numbers ("CONNUMs"), incorrect or no grade codes for many sales, incorrect customer codes, incorrect shipment dates, no inventory carry costs, incorrect invoice dates and invoice numbers and incorrect destination codes. *See* PDoc 60, CDoc 11; PDoc 65, CDoc 14. Accordingly, Commerce deemed FRSS's response(s) "deficient and/or unresponsive" and on May 21, 2001 sent a supplemental questionnaire requesting, among other things, data on costs and price adjustments for FRSS's SSB sales in the U.S. and the United Kingdom. PDoc 73, CDoc 19. FRSS responded on June 11, 2001, in part:

> A short history detailing the creation of FRSS as it existed during the POI may help to explain FRSS's reporting problems. FRSS is the principle operating subsidiary of Firth Rixson plc ("Firth Rixson") engaged in the production and sale of [SSB]. FRSS was created on September 25, 1998 with the renaming of Barworth Flockton Ltd., a company acquired by Firth Rixson on December 22, 1997. Barworth Flockton did not produce [SSB]. In December 1998, Firth Rixson acquired Spartan (Sheffield) Ltd. and transferred Spartan's production capacity and sales to FRSS's site in Ecclesfield, Sheffield. On August 27, 1999, Firth Rixson acquired the Aurora Group. One company in the Aurora Group, Spencer Clark, was renamed Firth Rixson Metals Ltd. ("FRM"). On October 1, 2000, the production capacity and sales of FRM were transferred to FRSS.
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> FRSS has thoroughly reviewed all available data for the period before and after the Aurora Group acquisition and has determined that information and data concerning many adjustments to price for sales by Spencer Clark during the POI and information and data that could be used to produce cost calculations for the Department's CONNUM-specific model simply do not exist.

> FRSS requests that the Department use a non-adverse facts available methodology to "fill in the blanks" for Spencer Clark information and data that were destroyed, lost, or never available prior to the filing of the petition.
>
> FRSS has made and will continue to make its best cooperative efforts to locate any information and data necessary to respond to the Department's questionnaire. But FRSS cannot provide information and data that do not exist. Sales of Spencer Clark can be identified by invoice numbers starting with "C" or "M" in the home market and "E" on sales to the U.S.

PDoc 81, CDoc 24, at 2.

At Commerce's request, on June 14, 2001, Commerce met with counsel for FRSS to discuss FRSS's various responses. A Department memorandum of June 18, 2001 purports to summarize the meeting. PDoc 85. Regarding FRSS's section A–C supplemental response, the memorandum notes that FRSS provided "minimal information" on SSB produced and sold by Spencer Clark during the POI. Commerce requested FRSS: (1) to "clarify what additional information might be available for reporting purposes[;]" (2) to "provide Spencer Clark's trial balances and financial statements covering the POI[;]" (3) to "report the total quantity and value of sales of SSB made by Spencer Clark in the U.S. and home markets during the POI, and what percentage of FRSS's total home market and U.S. sales they represent[;]" and (4) to clarify "the role of Firth Rixson Metals Inc. in the U.S. sales made by Spencer Clark during the POI." *Id.* at 1–2. Regarding FRSS's original section D response, the memorandum described it as "largely inadequate" and "lack[ing] the elementary detail and narrative explanations necessary for cost calculation purposes" although the "[s]pecific areas of concern were communicated through the Department's section D supplemental questionnaire that was issued on June 15, 2001." *Id.* at 2. Regarding FRSS's non-Spencer Clark responses, the memorandum noted that FRSS had to date failed to provide: (1) quantity and value reconciliations; (2) a complete explanation of its product/grade coding system; (3) chemical content information for all grades sold in the U.S. and home markets during the POI and the three most similar home-market matches for each U.S. grade sold; (4) a control number concordance; and (5) calculation worksheets demonstrating the methodology used to derive the per-unit expense amounts reported in the home market and U.S. sales listings. *See id.* at 3. Commerce provided a copy of the memorandum to FRSS on June 18, 2001 and allowed until June 22, 2001 to file a response thereto.

The supplemental section D questionnaire sent the day following the meeting with Commerce allowed FRSS until June 29, 2001 to respond. PDoc 82, CDoc 25. This supplemental questionnaire requested, *inter alia*, control numbers for Spencer Clark's products, its

production quantities, and product-specific and average-cost figures for Spencer Clark SSB products produced and sold during the POI. Commerce stated that it intended to use Spencer Clark's average cost as a starting point for product-specific costs. FRSS submitted responses on June 22, 2001 and June 29, 2001. PDoc 87, CDoc 27; PDoc 90, CDoc 29. FRSS responded to each of Commerce's questions, but regarding Commerce's request for average cost of production for Spencer Clark SSB FRSS responded "[t]here is no way to calculate this figure from the data available to FRSS." PDoc 90, CDoc 29, at 14.

In its July 26, 2001 *Facts Available Memorandum* written prior to publication of the preliminary determination ("*FA Memo*"), Commerce noted that Spencer Clark accounted for a certain significant percentage of FRSS's U.S. sales as well as a certain significant percentage of FRSS's home market sales of subject merchandise during the POI. PDoc 105, CDoc 36, at 4 (footnote 4). See PDoc 87, CDoc 27, at 2–3. After reviewing Spencer Clark's trial balances and audited financial statements, Commerce determined it could not accept the claim that the data sought (*i.e.*, complete costs of production for Spencer Clark SSB products) did not exist because Spencer Clark's financial information had been reviewed and consolidated with that of FRSS and its parent by an independent auditing firm. *Id.* at 3, referencing PDoc 54, CDoc 8, at Attachment 8. The *FA Memo* noted that "FRSS has made no attempt to present an alternate methodology to enable the Department to calculate cost and selling expenses for [Spencer Clark's] SSB products." *Id.* at 4.

In the preliminary determination on the investigation, Commerce considered that FRSS's latest submissions were "partially responsive" but still "lack[ing] the basic product, sales expense, and cost of production information necessary to perform the antidumping margin analysis" in reference to the missing Spencer Clark data. *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Stainless Steel Bar From the United Kingdom*, 66 Fed. Reg. 40192, 40194 (Aug. 2, 2001). Commerce concluded that an adverse inference was warranted because "FRSS failed to identify an affiliated producer of SSB which produced and sold SSB during the POI until late in the investigation, and then failed to provide basic sales and cost data for its affiliate." *Id.* As a result, Commerce selected as adverse facts available the highest margin alleged in the antidumping petition. *Id.* See 19 U.S.C. § 1677e(b).

On August 2, 2001, at the request of FRSS, Commerce met with counsel to discuss the preliminary determination. *See* PDoc 112. FRSS states that at the meeting, it addressed Commerce's outstanding concerns by pointing to specific responses in its prior submis-

sions.[2] Thereafter, on August 13, 2001 Commerce issued another supplemental questionnaire to FRSS. This questionnaire asked only about matters pertaining to Spencer Clark. PDoc 114. In it, Commerce called attention to the fact that FRSS's independent auditors had opined that FRSS's financial statements had been prepared in accordance with the United Kingdom's Companies Act 1985 and that the auditors had noted that the Act requires private and public companies incorporated thereunder to retain their accounting records for three and six years, respectively, and that in forming their opinion, auditors must consider, among other things, that proper accounting records have been kept. Commerce requested FRSS to: (a) reconcile this requirement with its claim that Spencer Clark's records for the POI did not exist, (b) explain in detail why the requested Spencer Clark records do not exist, (c) explain what efforts were made to locate the company's records for purposes of responding to the Department's questionnaire, (d) provide a list of the records that are available, (e) provide a detailed list of the records that are not available, (f) provide source documentation to support a claim on the record-keeping requirements of Spencer Clark to do business in the United Kingdom and reconcile its response to this question to the claim that Spencer Clark records for the POI do not exist, and finally (g) provide a detailed list of the sales, cost and financial records that Firth Rixson plc had available to it for each company in the Aurora Group during and after the acquisition in August 1999. *Id*.

On August 20, 2001, FRSS responded by providing what it claims was "all available information" on Spencer Clark. FRSS further explained the circumstances of the Spencer Clark acquisition as part of the Aurora Group: that Spencer Clark's SSB-related turnover was an immaterial part of total Aurora Group sales and had not been considered integral to the acquisition since it was unrelated to Firth Rixson's primary forgings business; that Spencer Clark's operations continued on a limited basis (specifically, for shipment of product under pre-existing orders but not to accept new orders) as a separate, stand-alone business with the same (previous) employees and with only limited interaction with FRSS management; and that it was dismantled on or about September 30, 2000. FRSS clarified Commerce's point with respect to the unqualified opinion of the independent auditors by noting, among other things, that

> companies in the United Kingdom are required by the Companies Act 1985 to retain for a period of three to six years the general ledger, cash book, debtor and creditor ledgers, balance sheets and accounting period inventory records. It is presumed

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[2] Specifically, FRSS states that it pointed to pages B–25 and C–27 and Attachment 6 of PDoc 62, CDoc 13; page 22 of PDoc 81, CDoc 24; pages 1–3, 5 and Attachment 6 of PDoc 87, CDoc 27; and pages 1–14 and Attachment 6 of PDoc 90, CDoc 29.

> that these records existed at the time [the independent auditors] audited Firth Rixson's accounts as of September 30, 2000, prior to the filing of the petition. However, that can only be presumed from the fact that [the independent auditors] gave an unqualified opinion.

CDoc 38. The response further stated that except for Spencer Clark's trial balances, balance sheet, profit and loss account, statement of tangible fixed assets, notes on the accounts, group cash flow statement, taxation account, total cost of sales, and administrative expenses (see Attachment 4 to CDoc 27 and Attachment 7 to CDoc 29), it was nonetheless a "fact" that FRSS could not locate the specific cost and expense information for SSB sales that Commerce desired. *Id.*

Counsel for FRSS met again with Commerce on August 22, 2001 prior to the final determination. *See* CDoc 39. A memorandum summarizes that "treatment of * * * FRSS in the U.K. SSBar investigation" was discussed but Commerce "basically informed" counsel that it was declining to conduct verification because of the significant percentages of home market and U.S. sales for which FRSS had failed to provide complete data, *i.e.*, due to the absence of Spencer Clark SSB cost and expense data. On August 31, 2001, Commerce formally informed FRSS that in light of such missing data, there was no basis upon which to conduct verification. PDoc 122.

Subsequently, Commerce explained its full position at Comment 1 of the *Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Stainless Steel Bar from the United Kingdom* (Jan. 15, 2002) ("*Decision Memo*"), PDoc 156 at 7–11. Basically, Commerce found that FRSS had not acted to the best of its ability and determined to draw an adverse inference in selecting from facts otherwise available. Specifically, Commerce concluded that FRSS had "provided virtually no responses to the Department's cost questions and failed to provide" a cost of production and constructed value database, *id.* at 7, and it found the "claim that [FRSS] no longer has the necessary information is contradicted by information on the record" in the form of FRSS's "access" to a "detailed sales journal" and a "product line trial balance" which FRSS could have used as a starting point to a cost response. *Id.* Commerce also believed FRSS must at some point have had the records it requested because in order to obtain "a clean audit opinion, the auditors would have had to test the allocation of production costs between cost of sales and ending inventory to ensure the proper matching of cost of sales with sales revenue[.]" Commerce concluded that at a minimum FRSS could have obtained the auditors' work papers which might have provided usable Cost of production data, and/or FRSS could have proposed an alternate method for determining Spencer Clark cost of production. *Id.*

Commerce concluded that FRSS's responses were incomplete due to their "depth and kind of information" which was of "low quality" and "unresponsive" because it was within FRSS's capacity to provide "the right kind of information" given that FRSS had "access to" the specific information aforementioned. Commerce "questioned how important business and accounting information of this nature can be 'lost' entirely, even in a company takeover scenario" because, according to Commere, "[t]his is the type of information that a company should and would keep in the ordinary course of reasonable business operations." *Id.* at 8. Commerce thus believed this to be "a situation where existing information of a material nature was made unavailable by the actions of the company itself" without offering any "credible and rational explanation of how and why" the information came to be "lost," and that even if it was "lost" FRSS had "not shown that it was unable to respond in any way to the Department's requests for the missing information." *Id.* at 8–9. Thus, Commerce concluded that FRSS "did not want the Department to see this data relating to Spencer Clark" and that an adverse inference was justified. *Id.* at 9. In addition, Commerce disagreed with FRSS's assertion that the non-Spencer Clark deficiencies had been rectified. *Id.*, referencing PDoc 105, CDoc 36 (*FA Memo*).

Commerce examined as adverse facts otherwise available the highest margin in the petition, and "corroborated" that alleged margin by comparing the price and cost data in the petition with data provided by Corus, the "other participating respondent in this investigation." *Id.* at 10. Commerce found the petition data to be "in the range" of data provided by such participating respondent and that the margin in the petition therefore has "probative value." *Id.* at 10–11, referencing Statement of Administrative Action to the Uruguay Round Agreements Act, H.R. Rep. No. 103–316, vol. 1, at 870 (1994) (adverse inferences are appropriate to "ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully").

On January 23, 2002, Commerce issued its final determination. This action followed.

Discussion

Jurisdiction here is pursuant to 28 U.S.C. § 1581(c). To prevail in an action such as this, a plaintiff must demonstrate that the challenged agency determination is "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). This standard requires "something less than

the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966). However, substantial evidence supporting the agency's determination must be based on the whole record, and a reviewing court must take into account not only that which supports the agency's conclusion, but also "whatever in the record fairly detracts from its weight." *Melex USA, Inc. v. United States*, 19 CIT 1130, 1132, 899 F.Supp. 632, 635 (1995) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 478, 488 (1951)).

I.

FRSS argues that substantial evidence does not support Commerce's determination that it did not act to the best of its ability. It argues that it responded to all of Commerce's requests for information during the investigation and asserts that by the time of the preliminary determination it was led to believe that all of the outstanding matters had been resolved except for Commerce's desire for SSB-specific cost and expense data pertaining to Spencer Clark. With respect to the specific SSB data Commerce sought, FRSS states that it provided all available financial information for Spencer Clark in June 2001 and respectfully requested Commerce to "fill in the blanks" because the information was no longer available, if it ever had been. FRSS argues that an adverse inference is unwarranted in view of its responsiveness to the requests specified by Commerce and its diligence during the investigation to comply with those requests. Pl.'s Br. at 7, referencing *Olympic Adhesives, Inc. v. United States*, 799 F.2d 1565, 1572 (Fed. Cir. 1990) (respondent did not "refuse" or "was unable" to supply information within the meaning of 19 U.S.C. § 1677e(b) (1982) by responding that there was no data to provide.); *Bowe Passat Reinigungs-Und Waschereitechnik GmbH v. United States*, 20 CIT 1426, 1435–36, 951 F.Supp. 231, 239 (1996) (unreasonable to penalize failure to submit data that do not exist).

Further, FRSS argues that Commerce's decision not to conduct verification was unlawful because Commerce had ample time to analyze and confirm the nonexistence of the data it sought before making a final determination. FRSS points out that its responses were not "late" but were provided one and a half months before the preliminary determination and three months before verification of exporters' responses. Lastly, FRSS challenges the antidumping duty margin that was selected from the petition as uncorroborated.

The government and the petitioners argue that there is ample evidence on the administrative record to support Commerce's decision that FRSS did not act to the best of its ability. They contend FRSS impeded the investigation with numerous erroneous responses requiring time and effort to correct or clarify. They point out that

Spencer Clark should have been disclosed at the outset of the investigation in response to section A question 2 of the original questionnaire, but instead FRSS affirmatively asserted in question 6B of its March 23, 2001 response that "[t]here were no affiliates involved in the production or sale of the merchandise under investigation in the U.K." The government and the petitioners thus portray FRSS has having purposefully avoided full disclosure, and the *Decision Memo* concludes that FRSS's "inability" to comply was a situation of its own making.

Upon receipt of a request for information from Commerce, an interested party experiencing difficulty meeting the "form and manner" of such request may notify Commerce of such difficulty, "together with a full explanation and suggested alternative forms in which such party is able to submit the information[.]" 19 U.S.C. § 1677m(c)(1). Upon receipt of such notification, Commerce is required to "consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party." *Id*. Commerce is required to "take into account any difficulties experienced by interested parties, particularly small companies, in supplying [the requested] information" and also to "provide to such interested parties any assistance that is practicable in supplying such information." 19 U.S.C. § 1677m(c)(2). If Commerce "determines that a response to a request for information "does not comply with the request," Commerce must "promptly inform the person submitting the response of the nature of the deficiency" and it must also, "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of [the] investigation[.]" 19 U.S.C. § 1677m(d). If the interested party submits further information in response to a notice of deficiency, and Commerce "finds that such response is not satisfactory," then Commerce "may, subject to subsection (e) of this section, disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d). The referenced subsection (e) provides that in an investigation such as this, Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by" Commerce if the information "is submitted by the deadline established for its submission," "can be verified," "is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination," "can be used without undue difficulties[,]" and "the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] * * * with respect to the information[.]" 19 U.S.C. § 1677m(e)(1)—(5).

A determination on the margin must be made regardless of the information available at the administrative proceeding. 19 U.S.C. § 1677e(a). Commerce must use "facts otherwise available" where (1) necessary information is not available on the record, or (2) where an interested party (A) withholds requested information, (B) fails to provide it timely or in the form and manner requested (subject to 19 U.S.C. §§ 1677m(c)(1) and (e)), (C) significantly impedes the proceeding, or (D) provides the requested information but it cannot be verified as provided in 19 U.S.C. § 1677m(i). *Id.* The use of facts otherwise available under all of these situations is expressly subject to the limitations of section 1677m(d), *id.*, however, if "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information[,]" Commerce is also permitted to draw an adverse inference. 19 U.S.C. § 1677e(b).

If Commerce draws an adverse inference, Commerce must clearly articulate the finding that a party failed to act to the best of its ability and clearly articulate why the missing information is significant to the progress of the proceeding. *See, e.g., Nippon Steel Corp. v. United States*, 24 CIT 1158, 1169–70, 118 F.Supp.2d 1366, 1378 (2000); *Ferro Union, Inc. v. United States*, 23 CIT 178, 200, 44 F.Supp.2d 1310, 1331 (1999). Commerce's explanation must include a determination that an interested party "could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply[,]" and that the failure to comply was either willful or below the standard expected of a reasonable respondent. 24 CIT at 1171, 118 F.Supp.2d at 1379. *See, e.g., Borden, Inc. v. United States*, 22 CIT 233, 264, 4 F.Supp.2d 1221, 1246 (1998), *opinion after remand*, 22 CIT 1153 (1998), *aff'd sub nom. F.lli De Cecco di Filippo Fara S. Martino S.p.A v. United States*, 216 F.3d 1027 (Fed. Cir. 2000).

As described in the *Decision Memo*, Commerce's decision to employ an adverse inference was cumulative. In articulating that FRSS had not acted to the best of its ability, Commerce stated that FRSS submitted evasive and incomplete responses, and in particular failed to provide cost and expense data for Spencer Clark, did not explain why it could not do so, and failed to provide an average cost figure for use as a "starting point" for Spencer Clark SSB costs and expenses.

The government and the petitioners raise the point that Commerce provided "numerous" opportunities to FRSS to respond via supplemental questionnaires and meetings with counsel over the course of the investigation. FRSS emphasizes that this was its first U.S. international trade law proceeding, that a respondent's unfamiliarity with such proceedings is to be considered, that clarification and correction of responses is a normal part of the administrative procedure, and that the alleged "other-than-Spencer-Clark" deficiencies are "red herrings" because they were each addressed at the Au-

gust 2, 2001 meeting with Department officials. Pl.'s Reply, referencing Pl.'s Br. at 3–4 & App. Tabs 4–7.

Accuracy in the margin determination is an ideal of U.S. international trade law. *See, e.g., Rubberflex SDN. BHD v. United States*, 23 CIT 461, 469, 59 F.Supp. 1338, 1346 (1999). Towards that end, "it is essential that a respondent provide Commerce with accurate, credible, and verifiable information" via its questionnaire responses. *Gourmet Equipment (Taiwan) Corp. v. United States*, 24 CIT 572, 574 (2000). *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1560 (Fed. Cir. 1994) (cooperation of interested parties is essential to determination of accurate dumping margins within "extremely short statutory deadlines"); *Carpenter Technology Corp. v. United States*, Slip Op. 02–77 (CIT 2002) at 10 ("If a request from Commerce is unclear, it is incumbent upon parties to assist the administrative process and clarify the precise information sought."). It is also essential that Commerce fulfill its statutory duties to provide assistance to interested parties to the administrative proceeding as circumstances require. *See* 19 U.S.C. § 1677m(c) & (d). Whether a party has complied with a request for necessary information is a matter within Commerce's discretion,[3] but since the nature of investigation is to proceed from the general to the specific, as information is uncovered,[4] the appropriate exercise of that discretion must involve consideration not only of the directness of the response but of the clarity of the question(s) posed. Commerce must provide "meaningful opportunity" to respond to an allegedly deficient response. *E.g., China Steel Corp v. United States*, Slip Op. 03–52 (CIT 2003); *Am. Silicon Tech. v. United States*, 24 CIT 612, 624–25, 110 F.Supp.2d 992, 1003 (2000); *Mitsui & Co. v. United States*, 18 CIT 185, 202 (1994).

The August 9, 2001 memorandum of the August 2 meeting between FRSS and Commerce to discuss the *FA Memo* indicates that counsel pointed to specific responses that the *FA Memo* claimed were deficient with respect to sales made by FRSS,[5] and counsel asked Commerce to "explain the additional information required." PDoc 112. "Counsel for FRSS also requested that the company be given the opportunity to place additional information on the record in response to the Department's questionnaire." *Id.*[6] Subsequently, in the *Decision Memo*, Commerce disagreed that all of the non-Spencer

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[3] *E.g., Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1441, 215 F.Supp.2d 1322, 1338 (2000); *Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 931, 24 F.Supp.2d 304, 308 (1998); *Daido Corp. v. United States*, 19 CIT 853, 861, 893 F.Supp. 43, 49–50 (1995).

[4] *See, e.g., Antidumping Manual*, Ch. 4, part III ("Supplemental Questionnaires") (DOC/IA) (Jan. 22, 1998) at 15:

> The antidumping duty questionnaire presented to respondents in the early stages of the investigation or administrative review is generally not our sole request for information. A review of just about any case file will normally uncover a number of requests for further information. These requests are generally sent out to obtain information previously requested and not received, to clarify information submitted * * *, or to obtain new information based on data submitted or changed circumstances of the investigation or review.

[5] *See supra*, footnote 2. *See also* PDoc 147 (FRSS's *Case Brief*), CDoc 56, at 3–4.

[6] The memorandum next summarizes that counsel for FRSS and Department officials also discussed the matter of the outstanding necessary Spencer Clark information. PDoc 112.

Clark issues had been resolved completely and noted that FRSS reported incomplete chemical content information for each grade sold in the U.S. and home markets during the POI, incomplete most-similar grade match information, insufficient narrative for cost calculations, and no cost information for certain products (CONNUMs) in its U.S. sales listing. PDoc 156 at 10, referencing PDoc 105, CDoc 36 (*FA Memo*). Commerce insisted on a clear explanation of what happened to the Spencer Clark data it sought and why it could not be located, yet in light of FRSS's request for explanation of what additional information would be required and the August 13 supplemental questionnaire from Commerce, which addressed only matters pertaining to Spencer Clark and made no mention of the outstanding non-Spencer Clark matters, *see* PDoc 114, Commerce failed to provide a clear explanation of why FRSS's response(s) to date on non-Spencer Clark matters continued to be deficient. *See* 19 U.S.C. § 1677m(d) (Commerce "shall promptly inform the person submitting the response of the nature of the deficiency* * * * ").

Whether these "other" issues were material to the finding that FRSS had not acted to the best of its ability, the capstone of that finding concerned FRSS's responsiveness over matters concerning Spencer Clark. FRSS emphasizes that it did not have the ability to provide the requested SSBspecific cost and expense data. Both Commerce and FRSS presume that FRSS's audit would have included or covered sales of the Spencer Clark SSB product line, and the government references *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002),[7] to argue that FRSS had an obligation to maintain Spencer Clark's records. *See also Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1983) (citation omitted) ("The burden of production should belong to the party in possession of the necessary information."). However, the circumstances of this matter pertain to the initial investigation, which was begun approximately three months after Spencer Clark was permanently dismantled. During that interval, FRSS did not have "legal" notice indicating the need to retain and preserve any data of Spencer Clark which might specifically pertain to SSB production costs, and FRSS explained in response to Commerce's August 2 supplemental questionnaire that the Companies Act 1985 did not require retention

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[7] In *Ta Chen*, the outstanding antidumping duty order subjected Ta Chen to periodic review of exports of stainless steel pipe to the United States since 1992. *Amended Final Determination and Antidumping Duty Order; Certain Welded Stainless Steel Pipe From Taiwan*, 57 Fed. Reg. 62300 (Dec. 30, 1992). The issue challenged by Ta Chen in court involved amendment of the definition of "affiliate" for purposes of the antidumping statute by the Uruguay Round Agreements Act, Pub.L. No. 103–465, 108 Stat 4809 (1994) effective January 1, 1995. *Compare* 19 U.S.C. § 1677 (33) (2000) *with* 19 U.S.C. § 1677 (13) (1988). The change in definition effected Ta Chen's statutory relationship with Sun Stainless, Inc., which was sold to third parties during the latter part of the third administrative review period. Administrative review of that period was initiated in 1996, and resulted in a finding of noncompliance against Ta Chen for failure to supply sales data for Sun. Ta Chen was successful in challenging that ruling in court, but when the matter was remanded to Commerce and Ta Chen sought to obtain the sales data from Sun, Sun's new owners refused to comply with the request. Ultimately, on appeal, the majority of the appellate panel sustained partial adverse facts available against a respondent for not inducing its former affiliate under new ownership to provide information sought by Commerce concerning the affiliate's prior business. Judge Gajarsa's noteworthy dissent criticizes the decision for "conclud[ing] that Commerce may penalize importers for failure to engage in divination." *Ta Chen*, 298 F.3d at 1340 (Gajarsa, J., dissenting).

of such particular data, if it ever existed. This is not an "unsubstantiated assertion," and there is nothing of record to support Commerce's rejection of FRSS's characterization of U.K. law. *Ta Chen* is inapplicable.

The petitioners also called Commerce's attention to their announced intention to file a dumping petition in the September 25, 2000 issue of *Metal Bulletin*,[8] and they imply that FRSS thereby received implied or actual notice before the petition was filed and sought to avoid disclosure of the sought-after Spencer Clark data as a consequence of publication. FRSS had asserted that Spencer Clark had been operated as a stand alone business and amounted to an insignificant aspect of FRSS's global consolidated operations, and that when Spencer Clark was finally transferred to FRSS it was dismantled, its site vacated, personnel discharged, computers turned off, file cabinets emptied, and production capacity sent to a subsidiary of FRSS. *See* PDoc 147 (FRSS *Case Brief*), CDoc 56, at 6–7 (citation omitted). The petitioners emphasized to Commerce that FRSS never explained *why* the data were lost or where they went. Commerce agreed that FRSS's explanation was unsatisfactory and inferred that the data it sought ought to constitute the type of business information that is fundamental to company operations and should therefore have been retained as a matter of sound business practice.

FRSS contends that the reasoning does not apply to an operation that is being wound down and will no longer be a going concern. The record shows that Spencer Clark was dismantled by September 30, 2000 and that rationalization of Spencer Clark had been ongoing since FRSS acquired the Aurora Group, as evidenced by the fact that Spencer Clark had taken on no new orders during the POI but only serviced existing contracts. *Cf.* CDoc 27 ("Notes of the accounts") n.26 ("Exceptional items * * * Rationalisation—specific"). If FRSS's business focus is forgings and not SSB products, as a matter of document retention FRSS's explanation would not be unreasonable and would be consistent with its description of Spencer Clark as having been continued as a separate, stand-alone business with its same (previous) employees and with only limited interaction with FRSS management. And yet, as an affiliate consolidated in FRSS's financial statements, Spencer Clark is presumed to have been under FRSS's operational control.[9] There is nothing of record from which to infer that FRSS is uninterested in SSB business and/or to negate the presumption of operational control to the extent that a reviewing court could agree with FRSS that it might otherwise justifiably plead ignorance of Spencer Clark's product line operating costs. As

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[8] *See* PDoc 153, CDoc 60, Attachment A.

[9] The definition of "affiliate" under U.S. international trade law implicates operational control. *See* 19 U.S.C. § 1677(33) ("affiliated" and "affiliated persons" are "[t]wo or more persons directly or indirectly controlling, controlled by, or under common control with, any person" or "[a]ny person who controls any other person and such other person" and "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."). *See also* 19 C.F.R. § 351.102(b) (2001).

the finder of fact, Commerce is entitled to consider what information a reasonable business manager would be expected to retain, maintain, or know in, or as the result of, the ordinary or extraordinary course of business, and the Court is not free to disagree. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) ("the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence."). But, as a matter of law and based on the administrative record at hand, the failure to provide the *specific* data Commerce sought did not amount to "willful" noncompliance or equate to an ability to comply with the request. The *Decision Memorandum*'s reasoning behind such failure amounts to gratuitous speculation.

The *Decision Memo* faults FRSS for failing to estimate SSB cost of production based upon available information. In turn, the *Decision Memo* may be faulted for assuming the existence of such a journal, which FRSS claims was never maintained. It may also be faulted for stating that the Spencer Clark financial information reveals total cost of sales "by product line," which implies breakout figures for separate product lines (SSB and others), whereas the record information reveals only total cost of goods sold. *Cf.* CDoc 24 at Attachment 4 (profit/loss account). Furthermore, as FRSS points out, Commerce's proposed solution would yield neither a product-specific nor an average cost. "Dividing a single, aggregated, inseparable cost figure containing subject and nonsubject products by a quantity of subject and non-subject products would yield a single, simple average cost for subject and non-subject products. This information would be useless." Pl.'s Br. at 12.

An administrative decision may be sustained despite "less than ideal clarity if the agency's path may be reasonably discerned[.]" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974). Because FRSS submitted sales data for subject merchandise, Commerce concluded that FRSS could quantify non-subject merchandise just as well, and therefore Commerce may have believed it was possible to derive an average SSB cost using the total cost of goods sold figure on some *pro rata* basis. But if that was the point, Commerce ought to have renewed such a request at the meeting of August 2, 2001 and/or in the supplemental questionnaire to FRSS on August 13, 2001 or otherwise have afforded FRSS the chance to remedy a potential deficiency based on misunderstanding. The record shows that Commerce was provided the relevant financial information for Spencer Clark in June 2001, it made the request for average Spencer Clark SSB cost in the June 15, 2001 supplemental questionnaire, and it was further aware that FRSS experienced difficulty in complying with that request in light of FRSS's response (based on its apparent belief) that "[t]here is no way to calculate this figure from the data available to FRSS." PDoc 90, CDoc 29, at 14.

FRSS responded substantively to Commerce's August 13 questions on August 20, 2001 and provided what it asserted was "all available information" on Spencer Clark, but the August 13 questions focused on the disposition of the missing Spencer Clark data, *e.g.* requesting FRSS to "reconcile" its claims in light of Commerce's belief that FRSS was able to provide the missing Spencer Clark data. Again, clarity in the request for information is prerequisite to determining insufficiency in the response,[10] and Commerce ought to have indicated in that final request the method it had in mind for calculating average SSB production costs and expenses or otherwise provided assistance on determining the "starting point," in order to afford FRSS the opportunity to remedy a prior deficiency.[11] Even still, asks FRSS,

> The question is: a "starting point" for what? FRSS informed Commerce that the Spencer Clark [submitted] financial data * * * contained aggregated, inseparable data that include subject and non-subject merchandise including "tool and high speed steel, carbon and manganese steels, alloy and superalloys, nimonics, titanium, stainless steels, plus * * * hirework on a variety of customer's [*sic*] own materials."
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> * * * * * * *
>
> * * * FRSS has repeatedly informed Commerce, there are no Spencer Clark accounting records of raw materials usage, scrap quantity or values, labor hours per unit of product produced, energy usuage per unit of product produced, machine hours per unit of product produced, yield factors, or any of the other records that a respondent needs in order to produce a product-specific cost or even an average cost for [the] broade[st] group-[ing] of subject merchandise.

Pl.'s Br. at 12, referencing CDoc 29.

The foregoing adequately addresses FRSS's *inability* to comply with requests to provide the *specific* data sought, but Commerce's decision that FRSS did not act to the best of its ability is also underpinned by certain other noncompliance issues, including failure to attempt contact with its auditors (whose audit work papers might have yielded usable cost of production data) and failure to do more

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[10] *I.e.*, Commerce is under statutory obligation to "consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party[,]"19 U.S.C. § 1677m(c)(1), to "take into account any difficulties experienced by interested parties * * * in supplying [requested] information[,]" 19 U.S.C. § 1677m(c)(2), and to "provide to such interested parties any assistance that is practicable in supplying such information." *Id.*

[11] As mentioned, in the final supplemental questionnaire to FRSS Commerce focused mainly upon "reconciliation" of FRSS's claim that it could not provide requested data with their presumed existence at the time of independent audit. Commerce requested FRSS to explain why the requested Spencer Clark records do not exist and what efforts were made to locate the company's records and provide lists of the records that are available and those that are not available, substantiate business record-keeping requirements in the United Kingdom, and provide a detailed list of the sales, cost and financial records that Firth Rixson plc had available to it for each company in the Aurora Group during and after the acquisition in August 1999.

than merely assert that FRSS interviewed ex-Spencer Clark employees in search of the information Commerce requested. FRSS's brief states that Commerce does not accept average costs for subject merchandise and that it would still have been impossible, based upon "imagination" or available financial information, to determine realistic product-specific or average SSB costs, and therefore its apparent response is that such exercise would have been futile. *See* Pl.'s Br. at 13 (referencing *Light Walled Welded Rectangular Carbon Steel Tubing From Taiwan: Final Results of Antidumping Duty Administrative Review*, 57 Fed. Reg. 24464, 24465 (June 9, 1992)).

On the one hand, Commerce did not make such specific requests of FRSS. On the other hand, Commerce indicated to FRSS that it intended to use average cost as a "starting point" on June 15, 2001. PDoc 82, CDoc 25. If FRSS considered that its short response on the subject to Commerce would end the matter, it underestimated the purpose of the proceeding and the significance of Spencer Clark's SSB sales to accurate determination of its margin. Whether or not ex-Spencer Clark employees would have been in a position to "fill the gaps" on Spencer Clark's SSB production costs and expenses and/or useful cost-of-production data could have been obtained from the auditors' work papers, Commerce concluded that FRSS should have been motivated to support its position by providing more documentation for the administrative record. FRSS's argument that it acted to the best of its ability would have been strengthened had it produced even a list of the ex- Spencer Clark employees it had interviewed or a statement from its auditors regarding examination of Spencer Clark's costs of SSB sales.[12] *See* PDoc 116, CDoc 38, at 5.

In addition, Commerce was clearly troubled by the fact that FRSS first disclosed Spencer Clark "late in the investigation," as characterized by the government. Def.'s Memo at 13. FRSS argues that the information was submitted "early in the investigation" because it was submitted two months prior to the preliminary determination, three months prior to U.K. verification, and nearly seven months prior to the final determination. Pl.'s Reply at 3. The flip-side of that point is the fact that FRSS's disclosure occurred nearly five months after initiation of the investigation, but, be that as it may, FRSS does not adequately address the reasons for its original misstatement and its subsequent *volte face*. Commerce's interpretation of contradictory responses is a matter within its discretion.

Obviously, the absence of complete cost and expense data posed a serious problem for the accurate determination of the margin. FRSS may not have had the ability to provide the *specific* data Commerce

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[12] FRSS also notes that adverse facts available are intended to serve as a deterrent against non-cooperative parties for withholding data in future proceedings and argues the use of adverse facts available cannot serve as a deterrent in this situation because FRSS is not "withholding" data and in subsequent proceedings any data relating to Spencer Clark will not be an issue. Pl.'s Br. at 19–20 (referencing *inter alia Krupp Thyssen Nirosta GmbH v. United States*, Slip Op. 01–84 at 7 (CIT 2001)). That is likely true, but the argument does not address Commerce's broader consideration of FRSS's general cooperation.

sought,[13] but based upon the overall administrative record of the issue, the Court is constrained to conclude that substantial evidence supports Commerce's determination that FRSS did not, in accordance with 19 U.S.C. § 1677e(b), demonstrate that it acted to the best of its ability to work with Commerce on a solution to overcome the problem. *Cf.* 19 U.S.C. § 1677m(e)(4).

II.

FRSS also argues that Commerce's decision not to conduct verification of FRSS's responses was unlawful. The Court rejects the argument. 19 U.S.C. § 1677m(i)(1) requires Commerce to verify "all information" relied upon in making a final determination in an investigation. Positive proof of the nonexistence of the requested Spencer Clark data may be a logical impossibility, but it was nonetheless incumbent upon FRSS to make out a *prima facie* case for verification. *Cf. Industrial Fasteners Group, Am. Importers Ass'n v. United States*, 710 F.2d 1576, 1582 n.10 (Fed. Cir. 1983) ("In the absence of such information making at least a *prima facie* case as to India's proper establishment of the CCS payments, ITA did not have to verify the information supplied by India."). In view of the significance of Spencer Clark's SBB sales to the investigation and the lawfulness of the decision to draw an adverse inference, substantial evidence on the record supports Commerce's determination that verification was unnecessary.

III.

Lastly, FRSS argues that even if an adverse inference is permissible, Commerce failed to determine a reasonably accurate and appropriate margin because Commerce merely assigned to it the highest margin from the petition instead of properly analyzing the data FRSS submitted. FRSS argues the petition margin was uncorroborated and bears "no resemblance to the realities of the marketplace." Pl.'s Br. at 18. It contends that Commerce had "extensive" information provided by other respondents in this and concurrent investigations and that a margin 28 times higher than the margin imposed on the other respondent in this investigation is unreasonable. *Id.* at 20.

An adverse inference permits Commerce to rely on information derived from the petition, the final determination, a previous review or any other information placed on the record. 19 U.S.C. § 1677e(b). When Commerce relies on information other than information obtained during the course of the investigation or review, Commerce must, "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C.

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[13] FRSS also asserted that it spent tens of thousands of dollars in search of the requested data. If so, that is regrettable, because an interested party should never have to expend unreasonable time or sums on a Sisyphian exercise.

§ 1677e(c). *See Borden, Inc. v. United States*, *supra*, 22 CIT at 264–65, 4 F.Supp.2d at 1247. The adverse facts selected must be "rationally related to sales, indicative of customary selling practices, and not unduly harsh or punitive." Krupp Thyssen Nirosta GmbH v. United States, Slip Op. 01–84 at 7 (CIT 2001).[14]

In *Borden*, *supra*, this Court was skeptical that certain margins from that petition were useable because Commerce had found them "high" for all parties whose data had been verified and because the "possibility" that the respondent's "true" margin may be in the high end of the range was merely an unsupported inference. 22 CIT at 265, 4 F.Supp.2d at 1247. Commerce did not make such a finding here. After comparing the petition's price and cost data with data provided by Corus (the "other participating respondent in this investigation"), Commere found the petition data to be "in the range" of the unverified data provided by Corus and therefore of "probative value." PDoc 156 at 10–11. That is, Commerce corroborated by choosing a particular SSB product's sales alleged in the petition and comparing the ranges for constructed value ("CV") and other home market pricing and constructed export price ("CEP") or export price ("EP") pricing for the U.S. market against the respective ranges of such values from the unverified data provided by Corus for such product. CDoc 36 at 7–8. For the final determination, Commerce reexamined the price and cost information in light of information developed during the investigation and "continued to find that the rates contained in the petition have probative value." 67 Fed. Reg. at 3148.

In other words, Commerce corroborated the highest petition rate via inductive reasoning. Since Crownridge did not participate in the proceeding, it appears that Commerce has done what it could to "corroborate that information from independent sources that are reasonably at [its] disposal" to the extent practicable. *See* 19 U.S.C. § 1677e(c). FRSS has not suggested what other method might have been employed to prove or disprove.

Conclusion

Taking into consideration the final less-than-fair-value determination with respect to FRSS as a whole, the Court must conclude that

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[14] Commerce has "discretion to choose which sources and facts it will rely on to support an adverse inference" but its "discretion in these matters * * * is not unbounded." *F.Illi De Cecco di Filippo Fara S. Martino S.p.A*, *supra*, 216 F.3d at 1023. The Court of Appeals for the Federal Circuit stated in that case,

> the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins* * * * It is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a stronger deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.

Id. (citation omitted). *See Am. Silicon Technologies v. United States*, 240 F.Supp.2d 1306 (2002).

FRSS has not met its burden of proving that there is not substantial evidence to support the determination or that it is otherwise not in accordance with law. In the absence of such proof, the determination must be sustained.

(Slip Op. 03–71)

FORMER EMPLOYEES OF MURRAY ENGINEERING, PLAINTIFFS *v.* THE UNITED STATES, DEFENDANT

Court No. 03–00219

(Dated: June 25, 2003)

ORDER

RIDGWAY, *Judge*: Upon consideration of the defendant's consent motion for voluntary remand, it is hereby

ORDERED that the consent motion is granted; and it is further

ORDERED that this action in remanded to the United States Department of Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for worker adjustment assistance benefits; and it is further

ORDERED that remand results shall be filed no later than 60 days after the date of this order; and it is further

ORDERED that the plaintiffs shall file papers with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than 30 days after the remand results are filed with the Court; and it is further

ORDERED that the deadline for the filing of (1) the answer pursuant to Rule 12(a)(1)(A); and (2) the administrative record pursuant to 28 U.S.C. § 2635(d)(1) and Rule 72(a) shall be extended to 30 days after the plaintiffs indicate whether they are satisfied or dissatisfied with the remand results.

(Slip Op. 03–72)

FORMER EMPLOYEES OF AMERIPHONE, INC., PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Court No. 03–00243

(Dated: June 25, 2003)

ORDER

Upon consideration of defendant's consent motion for voluntary remand, it is hereby

ORDERED that the motion is granted; and it is further

ORDERED that this action is remanded to the Department of Labor to conduct a further investigation and to make a redetermination as to whether petitioners are eligible for certification for transitional adjustment assistance benefits, and it is further

ORDERED that the remand results shall be filed no later than 60 days after the date of this order, and it is further

ORDERED that plaintiffs shall file papers with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than 30 days after the remand results are filed with the Court, and it is further

ORDERED that the deadline for the filing of (1) the answer pursuant to Rule 12(a)(1)(A), and (2) the administrative record pursuant to 28 U.S.C. § 2635(d)(1) and Rule 72(a), shall be extended to 30 days after plaintiffs indicate whether they are satisfied or dissatisfied with the remand results.

(Slip Op. 03–74)

FAG KUGELFISCHER GEORG SCHÄFER AG, FAG ITALIA S.p.A., BARDEN CORPORATION (U.K.) LTD., FAG BEARINGS CORPORATION AND THE BARDEN CORPORATION, PLAINTIFFS AND INA WÄLZLAGER SCHAEFFLER oHG AND INA USA CORPORATION, PLAINTIFF-INTERVENORS *v.* UNITED STATES, DEFENDANT AND TIMKEN U.S. CORPORATION, DEFENDANT-INTERVENOR

Court No. 00–09–00441

(Dated: June 30, 2003)

JUDGMENT

TSOUCALAS, *Judge*: This Court, having received and reviewed the United States Department of Commerce, International Trade Ad-

ministration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"), *FAG Kugelfischer Georg Schäfer AG v. United States*, 2002 Ct. Intl. Trade LEXIS 118, Slip Op. 02-119 (Oct. 4, 2002), comments and reply comments of FAG Kugelfischer Georg Schäfer AG, FAG Italia S.p.A., Barden Corporation (U.K.) Ltd., FAG Bearings Corporation and The Barden Corporation, and INA Wälzlager Schaeffler oHG and INA USA Corporation, rebuttal comments of Timken U.S. Corporation[1] and Commerce's response, holds that Commerce duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Results* filed by Commerce on January 2, 2003, are affirmed in their entirety; and it is further

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

(Slip Op. 03–75)

SKF USA INC., SKF GmbH, SKF FRANCE S.A., SARMA, SKF INDUSTRIE S.p.A. AND SKF SVERIGE AB, PLAINTIFFS, AND INA WĀZLAGER SCHAEFFLER oHG AND INA USA CORPORATION, PLAINTIFF-INTERVENORS, *v.* UNITED STATES, DEFENDANT, AND TIMKEN U.S. CORPORATION, DEFENDANT-INTERVENOR

Court No. 00–09–00448

(Dated: June 30, 2003)

JUDGMENT

TSOUCALAS, *Judge*: This Court, having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"), *SKF USA Inc. v. United States*, 2002 Ct. Intl. Trade LEXIS 127, Slip Op. 02–129 (Oct. 25, 2002), comments of SKF USA Inc., SKF GmbH, SKF France S.A., Sarma, SKF Industrie S.p.A. and SKF Sverige AB, comments and reply comments of INA Wälzlager Schaeffler oHG and INA USA Corporation, rebuttal comments of Timken U.S. Corporation[1] and Commerce's response, holds that Commerce duly complied with the Court's remand order, and it is hereby

[1] On February 28, 2003, Stewart and Stewart notified the Court that The Torrington Company was acquired by The Timken Company, and is now known as Timken U.S. Corporation.

[1] On February 28, 2003, Stewart and Stewart notified the Court that The Torrington Company was acquired by The Timken Company, and is now known as Timken U.S. Corporation.

ORDERED that the *Remand Results* filed by Commerce January 23, 2003, are affirmed in their entirety; and it is further

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

(Slip Op. 03–76)

NSK LTD. AND NSK CORPORATION; NTN CORPORATION, NTN BEARING CORPORATION OF AMERICA, AMERICAN NTN BEARING MANUFACTURING CORPORATION, NTN DRIVESHAFT, INC. AND NTN-BOWER CORPORATION; AND TIMKEN U.S. CORPORATION, PLAINTIFFS AND DEFENDANT-INTERVENORS, *v.* UNITED STATES, DEFENDANT, KOYO SEIKO CO., LTD. AND KOYO CORPORATION OF U.S.A.; AND NACHI-FUJIKOSHI CORP., NACHI AMERICA, INC. AND NACHI TECHNOLOGY, INC., DEFENDANT-INTERVENORS

Consol. Court No. 98–07–02527

[Commerce's *Remand Results* are affirmed in part and remanded in part. Case remanded.]

(Dated: June 30, 2003)

Crowell & Moring LLP (*Robert A. Lipstein, Matthew P. Jaffe* and *Grace W. Lawson*) for NSK Ltd. and NSK Corporation, plaintiffs and defendant-intervenors.

Barnes, Richardson & Colburn (*Donald J. Unger, Kazumune V. Kano, Carolyn D. Amadon* and *William J. Murphy*) for NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation, plaintiffs and defendant-intervenors.

Stewart and Stewart (*Terence P. Stewart* and *Geert De Prest*) for Timken U.S. Corporation, plaintiff and defendant-intervenor.

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); of counsel: *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

Sidley Austin Brown & Wood LLP (*Neil R. Ellis*) for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., defendant-intervenors.

O'Melveny & Myers LLP, (*Greyson L. Bryan* and *Michael A. Meyer*) for Nachi-Fujikoshi Corp., Nachi America, Inc. and Nachi Technology, Inc., defendant-intervenors.

OPINION

I. Standard of Review

TSOUCALAS, *Judge*: The Court will uphold Commerce's redetermination pursuant to the Court's remand unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994). Substantial evidence

is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). 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 an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966)

II. Background

On July 8, 2002, this Court issued an order directing the United States Department of Commerce, International Trade Administration ("Commerce")

> (1) to determine whether NSK's cylindrical roller bearings at issue are (a) complex merchandise that encompasses characteristics so numerous that the process of valuation shall be entrusted to Commerce's discretion, or (b) merchandise that can be matched in accordance with the statutorily provided hierarchy; * * * and (2) with regard to NTN's minor inputs, to (a) * * * provide the Court with a sufficient and reasonable explanation of Commerce's methodology; or (b) if Commerce is unable to do so, amend *Final Results*, 63 Fed. Reg 33,320, accordingly.

NSK Ltd. v. United States, 26 CIT ___ , ___ , 217 F. Supp. 2d 1291, 1341 (2002). On December 9, 2002, Commerce submitted its *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"). On January 7, 2003, NSK Ltd. and NSK Corporation (collectively "NSK") filed comments with this Court regarding the *Remand Results*. On January 22, 2003, NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc. and NTN-Bower Corporation (collectively "NTN") filed comments with this Court, as well. Subsequently, Commerce filed a response and The Torrington Company, hereinafter referred to as Timken U.S. Corporation ("Timken")[1], submitted rebuttal comments.

III. Commerce's Use of Different Definitions of the Term "Foreign Like Product"

A. Contentions of the Parties

1. NSK's Contentions

NSK contends that the Remand Results failed to provide a reason-

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[1] On February 28, 2003, Stewart and Stewart notified the Court that The Torrington Company was acquired by The Timken Company, and is now known as Timken U.S. Corporation.

able explanation regarding Commerce's use of differing definitions of the term "foreign like product" in its constructed value ("CV") and normal value ("NV") price-based calculations. *See* Comments of NSK on Remand Determination ("NSK's Comments") at 1–7. NSK begins by urging the Court to dismiss any arguments relating to the legislative history of the term "foreign like product."[2] *See id.* at 3. NSK later frames two issues that it claims must be decided by the Court: (1) whether the contemporaneity rule, under 19 U.S.C. § 1677b(a)(1)(A) (1994), is applicable to CV profit calculations, and (2) whether a legally acceptable application of the contemporaneity rule prevents Commerce's use of the preferred CV profit methodology under 19 U.S.C. § 1677b(e)(2)(A) (1994).[3] *See* NSK's Comments at 4, 8.

Addressing the first issue, NSK points to Commerce's statement in the *Remand Results* that "the contemporaneity provision of [19 U.S.C. § 1677b(a)(1)(A)] does not apply to CV[,]" *Remand Results* at 41, and argues that no section of Title 19 links the contemporaneity requirement to CV profit calculations. *See* NSK's Comments at 4–7. NSK further argues that Commerce's use of noncontemporaneous data, in other words data based on the full period of review ("POR") as opposed to only several months, in Commerce's CV profit computation serves as evidence that Commerce believes that the contemporaneity rule does not apply to cost-based calculations. *See id.* at 5–6. NSK uses this conclusion to argue that the *Remand Results* ultimately reveal an inconsistency in Commerce's logic because Commerce rejected data reported by NSK as non-contemporaneous while simultaneously including other noncontemporaneous sales in the CV profit calculation.[4]

While attacking Commerce's second statement, *see supra* note 3, NSK further contends that substantial record evidence supports the conclusion that the preferred methodology for calculating CV profit under 19 U.S.C. § 1677b(e)(2)(A) is "fully operational" if Commerce defines foreign like product in the same manner when calculating CV profit and NV. *See* NSK's Comments at 8–10. NSK suggests that

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[2] The Court disagrees with NSK's argument because disregarding the legislative history of the antidumping statute would cripple the Court's ability to determine the reasonableness of Commerce's interpretation of the same statute. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citations omitted).

[3] To prove that Commerce violated the antidumping statute and that Commerce did not adhere to the order of *NSK Ltd.*, 26 CIT at ____, 217 F. Supp. 2d at 1341, NSK attacks the following two arguments made by Commerce in the *Remand Results*: (1) "***Congress did not intend to have the application of the preferred methodology defeat the contemporaneity requirement of [19 U.S.C. § 1677b(a)(1)(A),]" *Remand Results* at 25; and

> [(2) I]f [Commerce] were required to interpret and apply the term 'foreign like product' in precisely the same manner in the CV-profit context as in the price context, there would be no sales of the foreign like product upon which to base the CV-profit calculation. Accordingly, the preferred method of calculating CV profit established by Congress would become an inoperative provision of the statute.

Id. at 11.

[4] The first argument raised by NSK is not at issue since Commerce, at no time, claims that the contemporaneity rule applies specifically to the sales it considers when calculating CV profit. Instead, Commerce asserts that 19 U.S.C. § 1677b(a)(1)(A) is relevant to Commerce's "overall determination" of NV. Although the Court agrees that it would be anomalous to reject data as noncontemporaneous and then use other data that is itself noncontemporaneous in the same proceeding, Commerce adequately explains the relationship between its NV and CV profit calculating methodologies.

Commerce should use all the data provided to it by NSK, instead of applying the contemporaneity rule, and utilizing sales which only extend from three months prior to the month of the United States sale to two months after the month of sale. *See id.* at 9. If Commerce cannot find the necessary data to calculate CV under the preferred methodology by extending the range of the data used, NSK proposes that Commerce calculate CV using one of the alternative methodologies listed under 19 U.S.C. § 1677b(e)(2)(B) (1994). *See* NSK's Comments at 9–10. Accordingly, NSK argues that Commerce's explanation of its use of differing definitions for the term "foreign like product" should be rejected.

2. Commerce's Contentions

Commerce states that the *Remand Results* contain the same explanation provided in *SKF USA Inc. v. United States*, 2002 Ct. Intl. Trade LEXIS 65, at *1, Slip-Op. 02–63 (July 12, 2002), with regards to the use of differing definitions of the term "foreign like product." *See* Def.'s Resp. NSK's Comments Concerning Remand Determination ("Def.'s Resp.") at 3–4. According to Commerce, the explanation provided in the Remand Results "rebutt[s] the presumption that the term 'foreign like product' should have the same meaning in each of the pertinent parts of the statute in which it appears." *Id.* at 5. Commerce contends that the use of different definitions of foreign like product is "necessary in order to give meaning to all parts of the statute," since mandating Commerce to use the same definition would

> preclude the use of the preferred methodology for profit because (1) the preferred methodology refers to profit in connection with the production and sale of a "foreign like product" made in the "ordinary course of trade"; and (2) the statement of administrative action indicates that Commerce will resort to constructed value only if there are no above-cost sales in the ordinary course of trade.

Id. at 6. Commerce adds that restricting Commerce's use of different definitions of the term "foreign like product" would be unfeasible in instances where non-contemporaneous sales are rejected in price-to-price comparisons. *See id.* According to Commerce, such a practice would result in profit calculations that are based solely on non-contemporaneous sales, which would be contrary to the contemporaneity requirement of 19 U.S.C. § 1677(b)(a)(1)(A). *See id.* at 6–7. Commerce also argues that use of different definitions of "foreign like product" is warranted when applying the viability provision of 19 U.S.C. § 1677b(a)(1)(C)(ii) (1994). *See id.* at 7.

3. Timken's Contentions

Timken suggests that the Court follow *RHP Bearings Ltd. v. United States*, 2003 Ct. Intl. Trade LEXIS 11, *9–*15, Slip-Op. 03–10

(Jan. 28, 2003), and affirm Commerce's *Remand Results* since NSK's arguments have been addressed and rejected. *See* Rebuttal Comments of The Torrington Co. ("Timken's Comments") at 2. Timken offers no additional substantive arguments with regards to Commerce's use of different definitions of the term "foreign like product."

B. Analysis

In *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382 (Fed. Cir. 2001), the Court of Appeals for the Federal Circuit ("CAFC") stated that since Congress used the term "foreign like product" in various sections of the antidumping statute and specifically defines the term in 19 U.S.C. § 1677(16) (1994), it is

> presume[d] that Congress intended that the term have the same meaning in each of the pertinent sections or subsections of the statute, and * * * that Congress intended that Commerce, in defining the term, would define it consistently. Without an explanation sufficient to rebut this presumption, Commerce cannot give the term "foreign like product" a different definition (at least in the same proceeding) when making the [NV] price determination and in making the constructed value determination. This is particularly so because the two provisions are directed to the same calculation, namely, the computation of normal value (or its proxy, constructed value) of the subject merchandise.

The CAFC concluded that Commerce failed to explain its justification for the inconsistent use of the term "foreign like product" and outlined the explanation that Commerce must provide to properly rebut the presumption that Commerce cannot use differing definitions for an identical term in the same proceeding. *See SKF USA*, 263 F.3d at 1382–83. In accordance with the CAFC's decision on this issue in *SKF USA*, this Court ordered Commerce "(1) to determine whether NSK's cylindrical roller bearings at issue are (a) complex merchandise that encompasses characteristics so numerous that the process of valuation shall be entrusted to Commerce's discretion, or (b) merchandise that can be matched in accordance with the statutorily provided hierarchy* * * * " *NSK Ltd.*, 26 CIT at ___, 217 F. Supp. 2d at 1341.

In the *Remand Results*, Commerce explains that "although [antifriction bearings ("AFBs")] are considered complex merchandise, [Commerce] is capable of performing model matching for cylindrical roller bearings and, in fact, does so, in the first instance, to make price-to-price comparisons under [19 U.S.C. § 1677b(a)]." *Remand Results* at 3. Commerce states further that

> no relevant factual differences [exist] between NSK's cylindrical roller bearings in this case and any other respondent's merchandise in AFBs. As a factual matter, this case is exactly the

> same as the case of *SKF USA Inc. v. United States*[, 2002 Ct. Intl. Trade LEXIS 65, at * 1,] that was decided [on July 12, 2002] by the Court* * * * The complex aspect in both cases involves not only the interpretation of the term "foreign like product" but also the application of that term in the different statutory contexts, together with the deference afforded to [Commerce] under the statute* * * *

Id. Commerce further set out its unique model-matching methodology and reporting requirements of sales transactions used in Commerce's calculation of NV. Commerce explained that if it was "unable to find a sale of a comparison-market model made in the ordinary course of trade that is identical to or shares the family designation of the [United States] sale at a time reasonably corresponding to the time of the [United States] sale, [Commerce then] resort[s] to CV." *Remand Results* at 7. Commerce detailed its calculation of CV, which Commerce derived by adhering to 19 U.S.C. § 1677b(e), and later explained why Commerce "interpreted and applied the statutory term 'foreign like product' more narrowly in its" calculation of NV than in its calculation of CV under 19 U.S.C. § 1677b(e)(2)(A). *Id*. at 10.

According to Commerce, the preferred method for calculating CV, found in 19 U.S.C. § 1677b(e)(2)(A), is to be used unless "there are no home market sales of the foreign like product or because all such sales are at below-cost prices." Id. at 11 (citation omitted). Commerce can use the preferred methodology only if sales of the foreign like product exist that are within the ordinary course of trade. *See* 19 U.S.C. § 1677b(e)(2)(A). Title 19 of the United States Code and the Statement of Administrative Action ("SAA")[5] establish that only when "no abovecost sales [exist] in the ordinary course of trade in the foreign market under consideration will Commerce [then] resort to [CV]." SAA at 833 (emphasis in original). Accordingly, Commerce argues that if it were to use the same definition of the term "foreign like product" for the NV and CV profit calculations, it would eliminate all sales of the foreign like product upon which to base the CV profit calculation and would mandate that Commerce use one of the alternative methods listed under 19 U.S.C. § 1677b(e)(2)(B)(i) through (iii) to calculate CV. *See Remand Results* at 11–13; *see also SKF USA*, 263 F.3d at 1376–77. Commerce explained that this outcome is common in every situation where foreign like product is interpreted in the same manner for both price and CV profit determinations.

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[5] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "[I]t is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id*.; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

Commerce further explains that differing categories of merchandise can satisfy the meaning of the term "foreign like product," depending on the specific facts of each antidumping proceeding, and illustrates this point by explaining its usual practice of deriving different values, including NV. *See id.* at 12–17. In determining the viability of a comparison market for NV under 19 U.S.C. § 1677b(a)(1)(C) (1994), Commerce adds that it normally employs the definition of the term "foreign like product" provided under § 1677(16)(C). *See Remand Results* at 18; *Proposed Rule of Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7307, 7333 (Feb. 27, 1996). To find foreign like products that would fit into the definition provided under § 1677(16)(A) (identical products versus products of the "same general class or kind"), and to use such products in its viability determination would require Commerce to perform a product-specific matching analysis, and other analyses, requiring data not yet available to Commerce. *See Remand Results* at 16. The SAA makes clear that "Commerce must determine whether the home market is viable at an early stage in the [antidumping] proceeding to inform exporters which sales to report." SAA at 821. Commerce poses a similar argument when explaining its normal practice of calculating whether reasonable grounds to believe or suspect below cost sales exist under 19 U.S.C. § 1677b(b)(2)(A)(i) (1994), and adds that it defines the term "foreign like product" consistently in determining CV profits. *See Remand Results* at 20–25.

Contrary to the contentions espoused by NSK, the Court finds that the *Remand Results* provide sufficient explanation to rebut the presumption that Commerce cannot use differing definitions for an identical term in the same proceeding. *See FAG Kugelfischer Georg Schafer AG v. United States*, Nos. 02–1500, –1538, 2003 U.S. App. LEXIS 11607, *2 (CIT June 11, 2003). Commerce adequately explained why the differing use of the same term is necessary to establish NV and CV profit in the same antidumping proceeding. Commerce set out the factual background of its calculations and provided the Court with an adequate and reasonable explanation of why the methodology at issue enables it to comply with the statute. Accordingly, Commerce followed the mandate of *NSK Ltd.*

IV. Commerce's Treatment of All NTN Affiliated-Party Inputs as Minor Inputs

A. Contentions of the Parties

1. NTN's Contentions

NTN contends that the record information supplied to Commerce adequately distinguished between major and minor inputs purchased by NTN from affiliated and unaffiliated suppliers. *See* Com

ments of NTN on Remand Determination ("NTN's Comments") at 1–2. According to NTN, specifications, such as the names of parts, part numbers and average prices, were provided to Commerce in NTN's original Questionnaire Response, and the record was later supplemented with information regarding standard cost comparisons of materials and processing. *See id.* at 2 & app. A, Attach. D–6. NTN adds that its Supplemental Questionnaire Response includes "a table of codes * * * describing the codes that indicate assemblies, inner ring, outer ring, rolling elements, retainers and shields[,]" which are all characteristics used by Commerce to distinguish between major and minor inputs. *See* NTN's Comments at 2 & app. A, Attach. D–6. NTN argues, therefore, that since Commerce was provided with information necessary to distinguish between major and minor inputs, Commerce should follow the mandate of the major input rule, *see* 19 U.S.C. § 1677b(f)(3) (1994), and exclude minor inputs from the methodology reserved for major inputs. *See* NTN's Comments at 3–5.

2. Commerce's Contentions

Commerce responds that it incorrectly stated that "NTN did not include market prices" in the information supplied to Commerce. *See Remand Results* at 47. Commerce states that it properly used the information provided by NTN, but was unable to distinguish between major and minor inputs due to limitations in NTN's data. *See id.* Given this limitation, Commerce admits that it assumed that all NTN inputs were minor inputs. *See id.*

3. Timken's Contentions

Timken asserts that NTN has already received the relief it is seeking since Commerce did not apply the major input rule prescribed in 19 U.S.C. § 1677b(f)(3) to any of NTN's minor inputs. *See* Timken's Comments at 3–4. Timken further argues that NTN's persistence that the data provided to Commerce sufficiently distinguished between major and minor inputs actually works against NTN's interest. *See id.* at 4. Therefore, Timken contends that "NTN's true argument appears to be that Commerce cannot lawfully resort to [cost of production] when valuing minor inputs," id. at 5, and that NTN provides no support for such an assertion. *See id.* Accordingly, Timken argues that Commerce's methodology should be affirmed.

B. Analysis

According to the Court in *NSK Ltd.*, "[i]f NTN provided Commerce with sufficient record evidence to discriminate between 'major' and 'minor' inputs, it was Commerce's obligation to either: (1) exclude

'minor' inputs from the reach of Commerce's methodology reserved for 'major' inputs; or (2) articulate why Commerce's 'major input' methodology is equally applicable to 'minor' or any inputs." *NSK Ltd.*, 26 CIT at ___ , 217 F. Supp. 2d at 1322. In the *Remand Results*, Commerce states that "the database NTN provided with information concerning affiliated-party inputs did not distinguish between major and 'minor' inputs NTN had purchased from affiliated suppliers." Remand Results at 46. Commerce admits that since NTN was not asked "to identify which inputs were major and which were minor, [Commerce] treated all of NTN's affiliated-party inputs as minor inputs." *Id.* at 47. However, NTN's comments and exhibits have persuaded the Court to find otherwise. *See* NTN's Comments at 1–5 & app. A, Attach. D–6. According to NTN, Commerce was supplied with the information necessary to distinguish between NTN's major and minor inputs. Attachment D–6 of NTN's Supplemental Questionnaire Response supplied Commerce with a comparison of standard costs associated with processing NTN's AFBs. NTN also provided Commerce with a table of codes, that when compared to the standard cost comparison, would allow Commerce to distinguish between NTN's major and minor inputs. Since Commerce failed to provide a reasonable explanation articulating why the major input rule is applicable to minor inputs, the Court finds that Commerce failed to follow the mandate of *NSK Ltd.*, 26 CIT at ___, 217 F. Supp. 2d at 1341. Moreover, the Court rejects Timken's arguments that following the order of NSK Ltd. would actually work against NTN's interest and remands this issue to Commerce.

V. Conclusion

The Court finds that Commerce sufficiently met its burden to explain why a differing definition of the term "foreign like product" is used in calculating NV and CV profit for NSK and, accordingly, affirms Commerce's explanation. With respect to Commerce's treatment of NTN's major and minor inputs, the Court remands to Commerce to exclude "minor" inputs from the reach of Commerce's methodology reserved for "major" inputs in all instances where NTN's data sufficiently distinguished between such inputs.

(Slip Op. 03–77)

UNITED STATES, PLAINTIFF *v.* NEW-FORM MANUFACTURING COMPANY, LTD., DEFENDANT

Court No. 01–00034

[Judgment by default entered for Plaintiff in customs civil penalty action, imposing maximum penalty for gross negligence, and awarding interest and costs.]

Decided: June 30, 2003

Robert D. McCallum, Jr., Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*A. David Lafer* and *Timothy P. McIlmail*); *Kevin B. Marsh*, Office of the Associate Chief Counsel, Bureau of Customs and Border Protection, United States Department of Homeland Security, Of Counsel; for Plaintiff.

OPINION

RIDGWAY, *Judge*: In this customs penalty action, plaintiff, the United States, seeks a civil penalty against defendant, New-Form Manufacturing Company, Limited, Canada ("New-Form"), for conduct in connection with its importation of steel jack parts from Canada into the United States. Jurisdiction lies under 28 U.S.C. § 1582 (1994).[1]

Pending before the Court is Plaintiff's Application for Default Judgment ("Plaintiff's Application"). For the reasons set forth below, that application is granted. New-Form "has failed to plead or otherwise defend" this action, and default has been entered against it. The record further establishes that, although New-Form knew that its jack parts were subject to antidumping duties, the company failed to accurately classify and describe its merchandise on its invoices, and—when questioned by its broker—denied that the merchandise was jack parts. New-Form's conduct thus violated 19 U.S.C. § 1592, and warrants imposition of the maximum penalty for gross negligence, plus interest and costs.

I. *Background*

A. The Facts of The Case

New-Form, a Canadian corporation located in Canada, manufactured and exported steel jacks and jack parts to the United States.

[1] While all statutory citations in this opinion are to the 1994 version of the U.S. Code, the pertinent text of the cited provisions was the same at all times relevant herein.

A81 ¶ 3, A101 ¶ 3, A113 ¶ 5(d)—(e).[2] Initially, the company exported completed jacks. But, eventually, it turned to exporting jack parts — including steel beams, handles, large and small runners, lifting pins, reversing levers, pitmans, reversing switches, bases, lever guards, and dowel lift pins—which were then assembled into completed jacks in this country. A66 ¶ 54, A191–92 ¶ 4.

Under cover of more than 30 entries, between February 5, 1996 and October 22, 1997, New- Form caused more than 111,000 jack parts to be entered or introduced into the United States. A84 ¶ 13, A86–87, A102 ¶ 13, A191–92 ¶ 4. Throughout that period, steel jack parts from Canada were subject to antidumping duties. *See* 61 Fed. Reg. 6,627, 6,627–28 (Feb. 21, 1996).

New-Form was aware of the antidumping duty order. Indeed, in 1993, the company sought to have the antidumping duty finding revoked. A1; 60 Fed. Reg. 53,584 (Oct. 16, 1995). However, in its notice of the final results of the 1993–94 administrative review of the finding, the U.S. Department of Commerce explained that New-Form was covered, and described the merchandise covered as "multi-purpose hand-operated heavy-duty steel jacks, * * * measuring from 36 inches to 64 inches high, assembled, semi-assembled and unassembled, *including jack parts*, from Canada." 61 Fed. Reg. 6,627, 6,627–28 (Feb. 21, 1996) (emphasis added).

Moreover, in a September 1997 affidavit (presented in the course of litigation in Canada that is unrelated to this case), New-Form's President—David M. Boulanger—explained that New-Form decided to export jack parts to U.S. to minimize applicable duties. In his words:

> [S]elling the *components* of a given product attracts less duty than would a product in a finished or assembled state; the duty payable is directly proportional to the value of the goods being shipped into the United States.

A65–66 ¶ 54 (emphasis added). *See also* A67 ¶ 59, A72, A171. Included with the affidavit was a chart, submitted by Mr. Boulanger, which indicated that New-Form's "Canadian supplied *components*" were "*subject to U.S. Antidumping duty*." A67 ¶ 58, A69 (emphasis added).

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[2] Citations prefaced with the letter "A" are to documents included in the Appendix to Plaintiff's Application for Default Judgment ("Pl.'s Appl."). Citations prefaced with "SA" are to documents included in the Supplemental Appendix submitted with Plaintiff's Second Response to Court's May 22, 2003 Order ("Pl.'s Supp. Appl.").

Included in the Appendices are: correspondence from New-Form to the U.S. Department of Commerce concerning the antidumping finding on Steel Jacks from Canada; New-Form invoices for the merchandise at issue in this action; a telephone call sheet maintained by New-Form's broker; excerpts from an affidavit prepared by New-Form President David M. Boulanger in an unrelated case; excerpts from the transcript of testimony given at trial by Mr. Boulanger in an unrelated case; excerpts from the Complaint and Answer, as well as discovery requests and responses, in this action; the letter from New-Form's broker to Customs, transmitting payment for unpaid antidumping duties; excerpts from the transcript of Mr. Boulanger's deposition in this action; excerpts from the Harmonized Tariff Schedule of the United States; declarations prepared for this action, by a Customs special agent; Dun & Bradstreet reports on two business concerns related to New-Form; information from the website of Supplierpipeline (one of the two concerns); and several computer-generated reports prepared by Customs concerning the export activities of New-Form and Supplierpipeline.

Although New-Form knew that the components at issue were jack parts and were to be used for jacks, it failed to reflect that fact on its invoices, which were among the documents used to introduce its merchandise into the U.S. A2–63, A108 ¶ 18(b), A115 ¶ 18(b), A123–26 ¶¶ 56–59, A127 ¶ 64, A132 ¶ 64, A133 ¶¶ 56–59. New-Form's invoices also classified the jack parts by Harmonized Tariff Schedule ("HTS") numbers that do not apply to jack parts. Some parts were identified by reference to HTS 8431.10, rather than the more accurate 8431.10.0090. But other parts were identified by reference to 8201.90.60 and 7326.90. A2–63, A182–85.

Moreover, in mid-June 1996, New-Form was asked point-blank by its broker, Tower Group International ("Tower"), whether the merchandise at issue was—tracking the language of the antidumping duty finding—"heavy duty jack parts with a height of 36″–64.″" New-Form responded with an unequivocal "No." A64.

Although New-Form knew that its merchandise was jack parts to be used for jacks, and although New-Form knew that jack parts were subject to antidumping duties, neither New-Form nor Tower paid those duties until years later—when Tower finally paid them, long after the merchandise had been entered, and after this action had been filed.[3] A170. The jack parts at issue were valued at $81,537.31; and the revenue lost to the United States (*i.e.*, the unpaid duties) was, until Tower's payment, $18,466.84. A192 ¶ 5.

As recently as March 2002, New-Form intended to continue doing business in the U.S., and had transferred certain of its functions and personnel to a related company called "Supplierpipeline." A172, A176–77. Mr. Boulanger is not only the President of New-Form and, through Northman Holdings, Inc., its sole shareholder (A65, A171); he is also the President and Chief Executive Officer of Supplierpipeline, which is a subsidiary of Northman Holdings. A171, A187; SA5–6. And Dan Evans, a former Vice President of New-Form, is now a Vice President of Supplierpipeline. A114 ¶ 12; SA5–6, SA10, SA12.

Although New-Form itself has not exported merchandise into this country since December 2002 (SA15–16), it appears that the company's business is being continued through Supplierpipeline. Supplierpipeline represents that it began with "[its] Milverton, Ontario operation of New-Form Manufacturing," and that it manufactures and distributes jacks. A186; SA9. New-Form's internet address—www.new-form.com—leads directly to the website of Supplierpipeline. SA2 ¶ 6. And, although Dun & Bradstreet reports that Supplierpipeline commenced business in 2000 (SA6), Supplierpipeline claims to have been doing business for 11 years. SA11.

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[3] New-Form has never asserted that it believed that the antidumping duties were being paid by Tower; nor could it reasonably do so. The invoices that New-Form received from Tower during the period the merchandise was entered reflected the fact that Tower was not charging New-Form for payment of antidumping duties. *See* A133 ¶ 61.

See also A186 (Supplierpipeline boasts of growth rate "for the past 12 years"). Supplierpipeline even advertises, as one of its products, the "Jackall" jack—the same jack whose parts are the subject of this litigation. A172, A186; SA12, SA14. In fact, in March 2002, Mr. Boulanger, referring to a U.S. auto manufacturer, testified that "we're selling them Jackall jack product from Supplier Pipe Line." A172.

In its Spring 2002 newsletter, "In The Pipeline," Supplierpipeline reported that it was

> combining two of its three manufacturing facilities to offer a better freight solution to its customers. Currently, there are two manufacturing facilities in Mississauga and one in Milverton, Ontario. *The Milverton facility manufactures* Erie Wheelbarrows, *Jackall Jacks* and many * * * other seasonal lawn and garden products.

SA9 (emphasis added). The newsletter continued, "effective March 23rd, 2002 Supplierpipeline Inc. will combine its Mississauga MIC Metabuilt facility *and its Milverton Newform Manufacturing facility.*" Id. (emphasis added). Further, on January 28, 2003, in an apparent reference to its "Milverton Newform Manufacturing facility," Supplierpipeline reported:

> The most recent "Pipeline Partner" welcomed to the group is Sinclair-Erie Ltd, a Canadian manufacturer of Erie wheelbarrows and contractor tools located in Milverton, Ontario. Sinclair-Erie has acquired a strong manufacturing operation in Milverton, streamlined its product offering, and is committed to delivering improved service levels within the next 60 days.

SA11.

Supplierpipeline identifies Sinclair-Erie as one of "two manufacturing partners" that it "currently operates." SA13. And, although Supplierpipeline does not list the Jackall jack as one of the products that Sinclair-Erie manufactures, Sinclair-Erie is located at the same address (37 Pacific Avenue, Milverton, Ontario) and has the same telephone and fax numbers that New-Form used. A2–63; SA3, SA13.

Through May 2003, Supplierpipeline had exported more than $2.7 million worth of merchandise into the United States—including, since November 9, 2002, $482,323 worth of merchandise of which $10,000 consisted of jack parts classified under HTS number 8431.10.0090, and $12,158 consisted of jacks. SA2 ¶ 4, SA28–46.

B. The Procedural Posture of The Case

The early stages of this action were largely uneventful—discovery was completed, a pretrial conference was held, and counsel for both parties participated in a settlement conference before another judge of this Court. Following the settlement conference, the parties were

to file reports on the prospects for settling the case, together with their recommendations as to further proceedings.

The Government's post-settlement conference report advised that settlement was unlikely, and proposed a schedule for the filing of dispositive motions. In contrast, the report filed by counsel for New-Form—barely one month after the pretrial conference—stated that the company had just declared bankruptcy, that a bankruptcy trustee had been appointed by the Canadian authorities, and that the trustee had indicated that no counsel would be engaged to represent New-Form (apparently in this or any other action). The report concluded that it was therefore impossible "to propose any further recommendations as to further proceedings in this action." Attached to the report was a copy of a document on the letterhead of the "Office of the Superintendent of Bankruptcy Canada." The document, which is captioned "Certificate of Appointment" and was filed in an action styled "In the Matter of the Bankruptcy of New-Form Manufacturing Co. Ltd.," indicates that New-Form declared bankruptcy on November 7, 2002.[4] *See also* SA 6 (indicating date of filing for bankruptcy).

Through correspondence with the Court, counsel for both parties argued the merits of various ways of proceeding in light of the bankruptcy—dispositive motions (urged by the Government), a stay of this action pending the outcome of the bankruptcy (proposed by counsel to New-Form), and application for default.[5] In the meantime, the Court and the Government began to serve all papers on the bankruptcy trustee, as well as counsel to New-Form.[6]

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[4] The notice states as the "Date and Time of Bankruptcy: November 7, 2002, 08:30."

[5] By letter dated December 5, 2002, then-counsel for New-Form advised that his law firm "[could not] continue to represent the bankrupt," but argued that it would nevertheless "be inequitable to allow a default [against New-Form], even if that default were ultimately meaningless." Thus, at least as early as December 2002, New-Form recognized that its failure to retain substitute counsel to represent its interests in this action could result in the entry of a default judgment against it.

[6] The Court and the Government have gone to great lengths to keep New-Form and its representatives apprised of the status of this action. By letter dated November 21, 2002, counsel for both parties were asked to advise how New-Form should be served in the future, in light of the company's bankruptcy and the prospective withdrawal of its counsel. That same day, the clerk of the court contacted Mr. Keith Purves, Official Receiver in the Office of the Superintendent of Bankruptcy Canada, who issued the Certificate of Appointment appended to the post-settlement conference report submitted by then-counsel to New-Form. Mr. Purves confirmed that New-Form had filed for bankruptcy and that KPMG had been appointed trustee, and advised that, as necessary, the Court should serve the Defendant through the trustee, KPMG, at a Waterloo, Ontario address which he provided.

In response to the Court's November 21 letter, then-counsel for New-Form noted that "[t]he trustee is willing to accept service of any further process in this action." Counsel's letter was "cc'd" to "Richard Sutter, Trustee." The court then began serving copies of all orders and correspondence from the court on Mr. Sutter of KPMG, as well as on then-counsel for New-Form. After then-counsel for New-Form sought leave to withdraw as counsel, the Government began serving copies of all of its submissions and correspondence on counsel to KPMG as trustee. Since that time, the court and the Government have served all papers in this action on Mr. Sutter of KPMG and/or on counsel to KPMG. In addition, most of the more recent filings—including Plaintiff's Request for Entry of Default, Plaintiff's Application for Default Judgment, the Court's May 22, 2003 Order, and Plaintiff's Second Response to Court's May 22, 2003 Order—have also been served by mail (and, in some cases, by fax as well) on Willson International Inc. (which became New-Form's broker in December 1997) and on New-Form itself (at 37 Pacific Avenue in Milverton, Ontario).

The only document returned to the Court was the copy of its Order of May 22, 2003 that was mailed to New-Form. The envelope containing that document was returned on June 12, 2003, stamped "Moved/Unknown" and "Return to Sender" by Canadian postal authorities. That same order was also faxed to New-Form's fax number on May 22, 2003. On May 26, 2003, the Court received a fax from Mr. Ted Sinclair, on the stationery of Sinclair Erie Ltd. at 37 Pacific Avenue in Milverton, Ontario (New-Form's address of record), stating: "You have sent a fax to New Form Manufacturing Ltd. New Form Manufacturing went into receivership in November 2002. The Official Receiver for New Form is Richard Sutter of KPMG, [phone and fax numbers]. Please forward all future correspon-

By letter dated January 10, 2003, a Canadian law firm representing the bankruptcy trustee sought to "confirm to [the Court] that New-Form has filed an Assignment in Bankruptcy and is bankrupt." The letter emphasized that New-Form's status "is not a *proposal* in bankruptcy, and therefore is not analogous to the U.S. Chapter 11 situation. Rather, New-Form *is* bankrupt and its assets are being disposed of for distribution" in accordance with Canadian bankruptcy law. (Emphasis added.) The letter highlighted five separately-numbered points:

> 1. New-Form is bankrupt and will not be coming out of bankruptcy.
> 2. The assets of New-Form are being liquidated by secured creditors rather than by the Trustee in Bankruptcy.
> 3. It is expected that this will be a "no asset" bankruptcy in that the claims of secured creditors will exceed the realizable value of assets, and thus there will be no distribution to unsecured creditors.
> 4. Under Canadian Bankruptcy Law all proceedings against New-Form are stayed unless leave of the Bankruptcy Court is granted, and no such leave has been sought or granted.
> 5. The Trustee has not been funded to defend the U.S. litigation, or for that matter to fund [then-counsel to New-Form in this action].[7]

Letter to Court from Aird & Berlis LLP (Jan. 10, 2003).

A second letter from counsel to the trustee painted an even bleaker picture of New-Form's status:

> There may be some confusion arising from different practises within the United States and Canada. In the United States * * * it may be relatively common for companies to seek the protection of Bankruptcy Courts * * *, while continuing business operations and to later emerge from bankruptcy. Although there are provisions for corporate re-organization [under Canadian law], this is not a circumstance where there is in reality any pending proceeding. The result is known. New Form has been adjudged bankrupt. It is not in the process of re-organization and is not and will not be carrying on any business. Its assets have been given to the Trustee for disposition and in fact have been disposed of * * *. In reality, this means

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dence to Mr. Sutter as we will no longer be forwarding."

Finally, at all times, all papers and other materials filed in this matter have been on deposit with, and available to New-Form and its representatives through, the clerk of the court, as contemplated by Rule 5(b) for service where "no address is known." USCIT Rule 5(b).

[7] The letter from trustee's counsel took pains to note that the firm was not appearing as counsel in this action.

> that all of the net proceeds of realization will be going to the former bank of New Form as its secured creditor.

Letter to Court from Aird & Berlis LLP (Jan. 29, 2003).

The letter reiterated that "New Form is not now nor will it in the future be carrying on any business," and analogized "the imposition of a civil penalty to prevent future wrong in this case" as "somewhat akin to seeking leave to impose a death penalty upon a person who is already dead." The letter concluded, "Certainly, if a hearing [in the instant action] is to proceed it will proceed on an undefended basis," expressing "doubt that there is any serious precedent value in such a proceeding (if that were the aim)." *Id*.

A teleconference was scheduled in this action for early February 2003, to allow the Court and the parties to discuss the status of the case and future proceedings, in light of the two letters from counsel to the trustee as well as other developments. In the interim, then-counsel to New-Form sought leave to withdraw its appearance in this matter, which was granted.

New-Form failed to appear for the scheduled teleconference on February 7, 2003. In the course of that teleconference, the Court and counsel for the Government weighed various procedural options. The Government argued that New-Form was already in default because of its failure to be represented on the teleconference, and advised that the Government was tentatively planning to seek a default judgment. Audiotape of February 7, 2003 Teleconference. An order issued several days later instructed New-Form to engage substitute counsel no later than March 3, 2003, warning that the company's failure to retain new counsel could result in the entry of judgment by default against it. *See* Order of February 13, 2003. There was no response of any kind to that order.

The Government filed a Request for Entry of Default on March 7, 2003. As grounds for its request, the Government pointed to New-Form's failure to retain substitute counsel as required by the Order of February 13, 2003, and invoked Rule 55(a) of the Rules of this Court, which provides for the clerk's entry of default against a party that "has failed to plead or otherwise defend." USCIT Rule 55(a). Default was duly entered on March 11, 2003.

Approximately one month later, the Government filed the Application for Default Judgment at issue here. After reviewing the Government's submission, an order was entered requiring the parties to file by specified dates certain additional information, including (1) statements as to the need for, or advisability of, a hearing or trial on damages, under the circumstances of this case; (2) statements as to whether the parties and their representatives/counsel and witnesses (if any) would appear at and participate in a hearing or trial, if one were held; (3) memoranda of law discussing the factors to be considered in determining the amount of a civil penalty, and summarizing the relevant evidence as to those factors; (4) any further evidence

which should be considered in determining the amount of a civil penalty, including "any evidence bearing on (a) the finances of Defendant and any related or successor entities, and (b) any potentially exculpatory or mitigatory evidence relating either to the issue of negligence vs. gross negligence, or to the size of any penalty"; (5) any evidence concerning New-Form's bankrupt status and the disposition of its assets; and (6) any evidence concerning "the nature and extent of the alleged involvement of Defendant's President in ongoing ventures presently doing business in the United States." Order of May 22, 2003.

In addition, the order "once again cautioned [New-Form] that its failure to take immediate action to protect is interests [might] result in the Court's entry of judgment by default against it, with no further notice." The Government responded to the order in a timely fashion. *See* Plaintiff's First Response to Court's May 22, 2003 Order; Plaintiff's Second Response to Court's May 22, 2003 Order ("Pl.'s Supp. Appl."). However, the silence from north of the border has been deafening.

In sum, notwithstanding repeated warnings of the potential consequences (including entry of default and entry of judgment by default), nothing has been heard from New-Form or from any representative of its interests since February 5, 2003, when its then-counsel withdrew from the case. New-Form was not represented on the February 7, 2003 teleconference; it failed to respond in any fashion to the Court's Order of February 13, 2003; it failed to retain substitute counsel by March 3, 2003 (as the Order of February 13, 2003 required); it failed to respond to Plaintiff's Request for Entry of Default; it never sought to set aside the default entered against it on March 11, 2003; it failed to respond to Plaintiff's Application for Default Judgment; it failed to request a hearing on damages (*i.e.*, the size of the penalty to be imposed), although the Court's May 22, 2003 Order invited it to do so; and, indeed, it flouted that Order in its entirety.

To be sure, judgment by default is an "extreme sanction"—"a weapon of last, rather than first, resort." *Meehan v. Snow*, 652 F.2d 274, 277 (2d Cir. 1981) (citations omitted). But, here, it has become abundantly clear that—as counsel to the bankruptcy trustee prophesied some months ago—if this litigation proceeds, "it will proceed on an undefended basis." Letter to Court from Aird & Berlis LLP (Jan. 29, 2003). "Extreme" action is therefore appropriate.

II. *The Legal Standard for Judgment by Default*

Judgment by default may be entered in a civil penalty action. Indeed, the procedure has been invoked in at least two prior civil penalty cases before this court. *See United States v. Quintin*, 5 CIT 260, 261 (1983); *United States v. Almany*, 24 CIT 579, 579, 110 F. Supp.

2d 977, 977 (2000).[8] Moreover, there are no special or different standards that apply in such cases. Entry of default and entry of judgment by default in civil penalty actions, as in other actions, are governed by Rule 55 of the rules of this court. *See* USCIT Rule 55.

The entry of default is a condition precedent to the entry of judgment by default. *Meehan v. Snow*, 652 F.2d 274, 276 (2d Cir. 1981). As noted above, Rule 55(a) provides for entry of default by the clerk of the court "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend."[9] USCIT Rule 55(a).[10]

Rule 55(b), in turn, governs the entry of judgment by default, requiring that "[i]n all cases the party entitled to a judgment by de-

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[8] In *United States v. Quintin*, the court denied the plaintiff's motion for default judgment in a § 1592 action and set the case for trial, for two reasons. The court first noted that, although the *pro se* defendant failed to answer the amended complaint, the amended complaint "merely contain[ed] alternative claims for damages," and the defendant had filed an answer to the original complaint. The court thus apparently concluded that the defendant was not truly in default. Second, the court further noted that, based on the existing record, it simply was "not in a position to determine the basis of damage, i.e. fraud, gross negligence or negligence." 5 CIT at 261.

In *United States v. Almany*, the court entered partial summary judgment by default finding violations of § 1592, and ordered the parties to propose a schedule for further proceedings to determine culpability. 74 F. Supp. 2d 1345, 1349 (1999). When the defendants failed to comply with the court's order, the court entered judgment on the issue of culpability, and directed the parties to propose a schedule for proceedings to determine the amount of the penalty. 74 F. Supp. 2d at 1349. Eventually, the court entered judgment against the defendants for the maximum penalty, plus interest, after the defendants failed to respond to the court's order to show cause why judgment in favor of the United States should not be granted. *United States v. Almany*, 24 CIT 579, 579, 110 F. Supp. 2d 977, 977 (2000).

There was no suggestion in either *Quintin* or *Almany* that judgment by default is, as a matter of law or policy, improper in a civil penalty case. Nor has New-Form advanced any such argument.

[9] Judgment by default may be entered not only under Rule 55, but also under Rule 16 (for example, for failure to obey a scheduling order or to participate in a pretrial conference) or under Rule 37 (for discovery misconduct), as well as under a court's inherent powers. *See generally* Judgments in Federal Court § 13.01 (1997).

[10] There is some authority to the effect that Rule 55(a) "is designed to operate at the initial stages of a lawsuit," and would thus be inappropriate here. 10 James Wm. Moore *et al.*, Moore's Federal Practice and Procedure § 55.10[2][b] (and cases cited there). Parsing Rule 55(a)'s reference to a "fail[ure] to plead or otherwise defend," those authorities reason:

> The rule is written in the disjunctive. By its express language it authorizes a default only if a party fails to plead *or* otherwise defend. Therefore, once a party has pleaded, or has otherwise defended, may that party's subsequent conduct, such as a failure to appear at trial or a failure to comply with discovery requests, be considered a subsequent failure to "otherwise defend" so as to justify the entry of a default under Rule 55(a)? The proper answer is no.

Id. Indeed, this Court endorsed that rationale in *United States v. T.J. Manalo, Inc.*, 26 CIT _____ , _____ n.7, 240 F. Supp. 2d 1255, 1258 n.7 (2002).

But, however logical that position may appear at first blush, it is against the great weight of the authority. Courts across the country routinely enter default and judgment by default in circumstances similar to those presented here. *See, e.g., Alameda v. Sec'y of Health, Education and Welfare*, 622 F.2d 1044, 1048 (1st Cir. 1980) (defendant's failure to file memoranda requested by court, or to offer explanation after months of delay, constituted failure to "otherwise defend" suit); *Eagle Associates v. Bank of Montreal*, 926 F.2d 1305, 1310 (2d Cir. 1991) (partnership's failure to comply with court order to retain counsel constituted failure to "otherwise defend"); *Hoxworth v. Blinder, Robinson & Co.*, 980 F.2d 912, 917–18 (3d Cir. 1992) (filing of answer to complaint did not preclude default judgment against defendant that failed to appear at trial); *Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir. 1992) (failure to appear at show cause hearing and failure to respond to court notices constituted failure to "otherwise defend"); *McGrady v. D'Andrea Electric, Inc.*, 434 F.2d 1000, 1001 (5th Cir. 1970) (failure to appear at pretrial conference and failure to comply with court orders or rules warrants default judgment under Rule 55); *United States v. Di Mucci*, 879 F.2d 1488, 1494 (7th Cir. 1989) (where defendants failed to comply with court orders to produce documents and failed to appear at deposition, entry of default judgment under Rules 37 and 55 not an abuse of discretion); *Ackra Direct Mktg. Corp. v. Fingerhut Corp.*, 86 F.3d 852, 856–57 (8th Cir. 1996) (corporate defendant's failure to comply with court order to appoint counsel and failure to participate in litigation after counsel withdrew warranted default judgment for failure to "otherwise defend"); *Ringgold Corp.v. Worrall*, 880 F.2d 1138, 1141 (9th Cir. 1989) (failure to appear at pretrial conference and at trial warranted default judgment under Rule 55).

The dicta in *T.J. Manalo* was thus ill-considered. The result was nevertheless correct. *Cf. In re First T.D. & Inv., Inc.*, 253 F.3d 520, 532 (9th Cir. 2001) (vacating default judgment against defaulting defendants when court later granted summary judgment in favor of other defendants, because it would be incongruous and unfair to permit plaintiff to recover against some defendants on claim that was definitively determined to be invalid); *Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.*, 740 F.2d 1499, 1512 (11th Cir. 1984) (default judgment against one defendant creates inconsistent verdict when other defendant prevails on merits); *see also Frow v. De La Vega*, 82 U.S. 552 (1872) (reversing default judgment as to property ownership when plaintiff lost as to answering defendants).

fault shall apply to the court therefor."[11] USCIT Rule 55(b). If the action is one in which the defendant has never appeared, and the plaintiff's claim "is for a sum certain or for a sum which can by computation be made certain," Rule 55(b) provides that, "upon request of the plaintiff and upon affidavit of the amount due," judgment by default in the specified amount shall be entered. No advance notice to the defendant is required.

In contrast, where—as here—the defendant has already appeared in an action, Rule 55(b) entitles the defendant (or its representative) to 10 days' written notice of the application for default. Moreover, if the plaintiff's claim cannot "by computation be made certain" and it is therefore "necessary to * * * determine the amount of damages," the rule provides that the court "may conduct such hearings or order such references as it deems necessary and proper." USCIT Rule 55(b) (emphasis added).

Thus, because a defaulting defendant is deemed to admit all facts "well-pleaded" in the complaint against it, an entry of default generally establishes the defendant's liability. *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975). However, in considering whether to enter judgment by default, the court is not confined to the face of the complaint and may require the moving party to present proof of facts necessary to establish liability. USCIT Rule 55(b).[12] Moreover, before entering judgment by default, the court must make an independent determination on damages, unless the sum to be awarded is certain. *Credit Lyonnais Sec., Inc. v. Alcantara*, 183 F.3d 151, 154–55 (2d Cir. 1999).

The plaintiff bears the burden of proving its entitlement to the requested damages, *Oberstar v. FDIC*, 987 F.2d 494, 505 n.9 (8th Cir. 1993), but is entitled to all reasonable inferences that may be drawn from the evidence. *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981). In appropriate cases, detailed affidavits or other documentary evidence may suffice to fix the amount of damages for purposes of entering judgment by default. *Fustok v. Conticommodity Services, Inc.*, 873 F.2d 38, 40 (2d Cir. 1989). There is no iron-clad rule requiring a hearing or trial on damages in every case. *Id.*[13]

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[11] This is just one of several ways in which this court's Rule 55 differs from the parallel Federal Rule of Civil Procedure. Under the Federal Rules, the *clerk of the court* may enter *judgment by default* "[w]hen the plaintiff's claim * * * is for a sum certain or for a sum which can by computation be made certain" (provided that certain other conditions are met). Fed. R. Civ. P. 55(b)(1).

[12] Rule 55 (b) provides that "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary * * * *to establish the truth of any averment by evidence* * * *, the court may conduct such hearings or order such references as it deems necessary and proper." (Emphasis added.) *See also Televideo Sys., Inc. v. Heidenthal*, 826 F.2d 915, 917–18 (9th Cir. 1987) (district court "heard substantial testimony and admitted documentary evidence on all of the plaintiffs' claims"); *Au Bon Pain Corp. v. Artect, Inc.*, 653 F.2d 61, 65 (2d Cir. 1981) ("district court has discretion under Rule 55(b)(2) once a default is determined to require proof of necessary facts").

[13] Rule 55(b) is, on its face, permissive: "[T]he court *may* conduct such hearings or order such references as it deems necessary and proper* * * * " Some cases nevertheless say—or at least appear to say—that an inquest, an evidentiary hearing, or a trial on damages is necessary before entering default judgment whenever a plaintiff's claim is not for a sum certain. *See, e.g., Eisler v. Stritzler*, 535 F.2d 148, 153–54 (1st Cir. 1976) (where plaintiffs' claims not liquidated, evidentiary hearing is required to assess damages before entry of default judgment); *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980) ("a court must hold a hearing on damages before entering a [default] judgment on an unliquidated claim even against a defendant who has been totally unresponsive"). But, even

III. *Analysis*

A. Mootness

In light of New-Form's bankrupt status, there arises—as a threshold matter — a question of mootness. The Government maintains that "there is no indisputable evidence in the record" to establish that New-Form has been adjudged bankrupt. Pl.'s Supp. Appl. at 1–2. The Government concedes that "Dun & Bradstreet reports that New-Form entered bankruptcy on November 7, 2002, and that New-Form, currently, has no assets or liabilities." Pl.'s Supp. Appl. at 2 (*citing* SA6). But, quoting Rule 201 of the Federal Rules of Evidence, the Government argues that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *Id.* Asserting that "the source of the information reported by Dun & Bradstreet may reasonably be questioned," the Government concludes that New-Form's bankrupt status is not subject to judicial notice. *Id.*[14]

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in jurisdictions where a hearing may have been required in the past, it seems that the rule may be eroding. *Compare Eisler, supra, with Home Restaurants, Inc. v. Family Restaurants, Inc.*, 285 F.3d 111, 114 (1st Cir. 2002) (hearing on damages not required where complaint and cross-claim sought "specific dollar figures," where court received affidavits on damages, and where defendant had opportunity to respond prior to entry of default judgment); *compare Jackson, supra, with Int'l Painters and Allied Trades Industry Pension Fund v. R.W. Amrine Drywall Co.*, 239 F. Supp. 2d 26, 30 (D.D.C. 2002) ("court may rely on detailed affidavits or documentary evidence to determine the appropriate sum for the default judgment").

The great weight of the authority thus holds that there is no "hard and fast" requirement for a hearing on damages before entering judgment by default on an unliquidated claim. *See, e.g., Fustok v. Conticommodity Services, Inc.*, 873 F.2d 38, 39 (2d Cir. 1989) (court properly relied on detailed affidavits and documentary evidence, as well as its own knowledge of case, in determining damages, where damages "were neither liquidated nor capable of mathematical calculation"); *Curtis T. Bedwell and Sons, Inc. v. Int'l Fidelity Ins. Co.*, 843 F.2d 683, 689, 697 n.25 (3rd Cir. 1988) (damages hearing not required before entering default judgment under Rule 37 where damages established through "over 200 pages of affidavits and documentation," and where preclusive order "would [have] render[ed] any hearing on damages meaningless"); *Mut. Fed. Sav. and Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88, 94 (4th Cir. 1989) (no abuse of discretion to enter almost $9 million default judgment under Rule 37 without hearing on damages); *James v. Frame*, 6 F.3d 307, 309–11 (5th Cir. 1993) (where $10.2 million default judgment is entered late in litigation, so that court has "long and close familiarity" with case, and "where the evidence before the court allows it to make findings based upon that evidence, the court need not jump through the hoop of an evidentiary hearing"); *United States v. DeFrantz*, 708 F.2d 310, 312–13 (7th Cir. 1983) (no damages hearing required under Rule 55 where motion for default judgment under Rule 37 specified amount of damages sought, yet defendant never questioned the sum); *Taylor v. City of Ballwin, Mo.*, 859 F.2d 1330, 1332–33 (8th Cir. 1988) (where facts on the record indicated reasonable fair market value of merchandise, court "need not hold an evidentiary hearing on the issue of damages").

In light of the affidavits and documentary evidence proffered by the Government, there is no need here for an evidentiary hearing on damages. This is all the more true since New-Form has not requested such a hearing. Indeed, New-Form never even responded to the Court's request for the company's views on the need for or advisability of a hearing. *See* Order of May 22, 2003. Nor did New-Form advise whether its representatives and/or witnesses would appear at a hearing or trial on damages if one were held, although the company was ordered to do. *Id.* New-Form's intransigence indicates that a hearing on damages would have been little more than an empty exercise. *Cf. Curtis T. Bedwell and Sons*, 843 F.2d at 697 (damages hearing not required where, *inter alia*, preclusion order "would [have] render[ed] any hearing on damages meaningless); *Davis v. Fendler*, 650 F.2d 1154, 1161–62 (9th Cir. 1981) (defendant cannot be heard to complain that default judgment was entered without hearing on damages where not only did documentary evidence substantiate damages awarded, but court scheduled hearing to address, *inter alia*, damages, and defendant waived right to appear and testify).

[14] Quite apart from the Dun & Bradstreet report, judicial notice is appropriate here. The Court may take judicial notice of the Canadian court's bankruptcy records to establish the fact that New- Form has been adjudged bankrupt in Canada. As the Court of Appeals has recognized, "[T]he most frequent use of judicial notice of ascertainable facts is in noticing the content of court records." *Genentech, Inc. v. U.S. Int'l Trade Comm'n*, 122 F.3d 1409, 1417 n.7 (Fed. Cir. 1997) (*citing Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989), *quoting* 21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure § 5106, at 505 (1977)). *See also United States v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir. 1992) (noting that court "may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.") (citations omitted).

However, the Dun & Bradstreet report is admissible as evidence of New-Form's bankrupt status—"for the truth of the matter asserted"—without regard to the doctrine of judicial notice. Rule 803(17) of the Federal Rules of Evidence establishes an exception to the hearsay rule for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Fed. R. Evid. 803(17). The report at issue—compiled largely from public records by one of the world's leading providers of global business information, and offered through a subscriber service aimed at the business and financial communities—is clearly the sort of record contemplated by Rule 803(17).[15]

Because the Constitution generally restricts the exercise of judicial power to live "Cases" and "Controversies" (U.S. Const. art. III, § 2, cl. 1), the bankruptcy of a defendant conceivably could leave a plaintiff with no hope of recovery; and the impossibility of recovery could arguably render the case moot. However, that is not the situation here. A case is not moot as long as there is at least a metaphysical possibility of recovery. *See, e.g., Ratner v. Sioux Natural Gas Corp.*, 770 F.2d 512, 516–17 (5th Cir. 1985). As the Government notes, and as discussed in greater detail here (both above and below), the integral involvement of New-Form's President and sole shareholder — Mr. Boulanger—in Supplierpipeline, an ongoing venture presently doing business in this country, opens at least a potential avenue for recovery beyond New-Form, and thus precludes the dismissal of this action as moot. Pl.'s Supp. Appl. at 7–8.

B. Liability Under 19 U.S.C. § 1592

Although the entry of default precludes New-Form from controverting the factual allegations of the Complaint, a default neither establishes legal arguments made in the pleadings, nor requires the entry of judgment on a legally unsound claim. *See, e.g., Premier Bank v. Tierney*, 114 F. Supp. 2d 877, 880 (W.D. Mo. 2000); *In re Indus. Diamonds Antitrust Litig.*, 119 F. Supp. 2d 418 (S.D.N.Y. 2000). Thus, even after default, it must be determined "whether the unchallenged facts constitute a legitimate cause of action." 10A

However, judicial notice of a sister court's records is taken for the limited purpose of recognizing that court's judicial act. It does not recognize the sister court's findings of fact as true. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

[15] The information contained in the Dun & Bradstreet report is consistent with a record produced by an "Insolvency Name Search" conducted through the official website of the Office of the Superintendent of Bankruptcy Canada using the identification number of New-Form's case—35– 103918. The website is maintained by Industry Canada, a department of the Canadian Government. The record was thus produced by an agency of the Canadian Government, and reflects factual findings made by the Canadian Office of the Superintendent of Bankruptcy, pursuant to Canada's Bankruptcy and Insolvency Act.

The record indicates as the date of bankruptcy "2002/11/07" and lists New-Form's "Total Liabilities" and "Total Assets" at $7,166,045 and $2,831,349, respectively. Those statements are admissible "for the truth of the matter asserted," because the record falls squarely within Rule 803(8) of the Federal Rules of Evidence, which excepts from the hearsay rule "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth * * * (C) in civil actions and proceedings * * * factual findings resulting from an investigation made pursuant to authority granted by law unless the sources of information or other circumstances indicate lack of trustworthiness." Fed. R. Evid. 803(8).

Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure, Civil 3d § 2688, at 63 (1998).

In this case, the unchallenged facts establish gross negligence under 19 U.S.C. § 1592. That statute prohibits parties from entering, introducing, or attempting to enter or introduce any merchandise into the commerce of the United States by means of "any document or electronically transmitted data or information, written or oral statement, or act which is material and false," or "any omission which is material." 19 U.S.C. § 1592(a)(1)(A)(i)—(ii). A violation is grossly negligent if it results from an act or acts—whether of omission or commission—"done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. Pt. 171, App. B § (B)(2) (1996).[16]

Here, New-Form introduced merchandise into the commerce of this country by means of false written and oral statements, and by omissions. Customs regulations require that invoices for machine parts classifiable under the HTS specify the type of machine for which the parts are intended. 19 C.F.R. § 141.89(a). New-Form's invoices nevertheless failed to accurately describe its merchandise, in violation of the regulation. A2–63. Further, the invoices identified jack parts by HTS numbers other than HTS 8431.10.0090, the correct classification. A2–63, A182–85. On one occasion, New-Form even flatly denied to its broker that it was exporting heavy-duty jack parts. A64.

Moreover, New-Form's statements, acts and omissions were material. The measurement of materiality is the potential impact on Customs' determination of the applicable duties. *See United States v. Menard, Inc.*, 16 CIT 410, 417, 795 F. Supp. 1182, 1188 (1992). Here, New-Form exported jack parts from Canada, when jack parts from Canada were subject to antidumping duties. 61 Fed. Reg. at 6,627–28. New-Form's statements, acts and omissions related to whether its merchandise was jack parts and, thus, whether the merchandise was subject to antidumping duties.

Finally, New-Form acted with gross negligence. New-Form knew that its merchandise was jack parts to be used for jacks. A123–26 ¶¶ 56–59, A127 ¶ 64, A132 ¶ 64, A133 ¶¶ 56–59. New-Form knew that jack parts were subject to antidumping duties. A69. And New-Form knew that its broker was not paying those duties. See A133 ¶ 61. Nevertheless, on its invoices, New-Form identified its merchandise using HTS numbers that did not apply to jack parts, and failed to accurately describe the merchandise. A2–63, A182–85. Again, New-Form even denied to its broker that it was exporting jack parts. A64. New-Form's conduct thus evidenced not only its

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[16] While all citations to the Code of Federal Regulations in this opinion are to the 1996 version, the pertinent text of the referenced provisions was the same at all times relevant herein.

knowledge of and wanton disregard for relevant facts, but also its manifest indifference to and disregard for its obligations under the customs laws of this country.

C. The Size of The Penalty

The Government seeks the maximum penalty for New-Form's gross negligence—under 19 U.S.C. § 1592(c)(2)(A)(i)—(ii), the lesser of "the domestic value of the merchandise" at issue, or "four times the lawful duties, taxes, and fees of which the United States is or may be deprived." Pl.'s Appl. at 12, 14; Pl.'s Supp. Appl. at 3.

The factors to be considered in determining the size of a penalty are enumerated in *United States v. Complex Machine Works Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315 (1999): (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the applicable law; (5) the nature and circumstances of the violation; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty vis-a-vis the defendant's business, and its effect on the defendant's ability to continue doing business; (9) whether the penalty shocks the conscience of the court; (10) the economic benefit to the defendant as a result of the violation; (11) the degree of harm to the public; (12) the value of vindicating agency authority; and (13) whether the party sought to be protected by the statute has been adequately compensated for the harm; as well as (14) such other matters as justice may require. *Id.* The first 10 factors are largely remedial and relate essentially to deterring future violations, the primary focus of Congress in enacting § 1592. Accordingly, those factors are to be accorded greater weight in determining the size of a penalty. 23 CIT at 950, 950, 83 F. Supp. 2d at 1315–16, 1319.

As discussed below, application of the *Complex Machine Works* factors to the facts of this case supports the imposition of the maximum penalty for gross negligence—$73,867.36, or four times the revenue lost by the Government (and less than the $81,537.31 domestic value of the subject jack parts). New-Form elected to present no evidence or argument in mitigation. And independent analysis reveals that all—or virtually all—of the relevant factors weigh heavily in favor of a substantial penalty; certainly, none of the factors weighs against it.

Defendant's Character: Extent of Good Faith Effort to Comply, Degree of Culpability, and History of Prior Violations

The first three factors set forth in *Complex Machine Works*—the defendant's good faith effort to comply with the statute, the defen-

dant's degree of culpability, and the defendant's history of prior violations—are indicia of a defendant's character. 23 CIT at 950, 83 F. Supp. 2d at 1316.

As *Complex Machine Works* points out, "[a] strong indicator of [a defendant's] character is whether there was a good faith effort to comply with the statute." 23 CIT at 951, 83 F. Supp. 2d at 1316. The record in this action belies any suggestion that New-Form made a significant good faith effort to comply with the law. Although New-Form retained a licensed customhouse broker, the company affirmatively denied to that broker that the merchandise at issue was jack parts. A64, A82 ¶ 7, A102 ¶ 7, A114 ¶ 10, A133 ¶¶ 56–59. Application of the "good faith effort to comply" factor thus weighs in favor of the imposition of a heavy penalty. *Cf. Complex Mach. Works*, 23 CIT at 951, 83 F. Supp. 2d at 1316 ("good faith effort to comply" factor supported heavy penalty where defendants gave inconsistent, false and uncooperative responses and explanations to Customs).

A heavy penalty is also warranted by New-Form's "degree of culpability." Specifically, New-Form knew that its merchandise was jack parts (A133 ¶¶ 56–59), that jack parts were subject to antidumping duties (A69), and that its broker was not paying those duties. *See* A133 ¶ 61. Nevertheless, on its invoices, New-Form classified its merchandise according to HTS numbers that did not apply to jack parts, and failed to describe the merchandise as parts of jacks which were to be used with jacks. A2–63, A182–85. New-Form even denied, to its broker, that it was exporting jack parts. A64. Moreover, the sheer number and frequency of New-Form's violations are telling. A84 ¶ 13, A85–87, A102 ¶ 13, A191–92 ¶ 4. This was no isolated incident. Thus, as in *Complex Machine Works*, the record here reflects a high degree of culpability and merits a penalty at the high end of the range. 23 CIT at 951–52, 83 F. Supp. 2d at 1316–17.

The "history of previous violations" factor counsels a heavy penalty as well. The duration of a defendant's current violations can weigh in favor of a heavy penalty even where there is no history of previous violations. *Complex Mach. Works*, 23 CIT at 952, 83 F. Supp. 2d at 1317. Although New-Form had no history of customs violations before it began exporting jack parts to the United States, the violations at issue here involved more than 111,000 jack parts entered on more than 30 separate occasions spanning more than a year and a half. A84 ¶ 13, A85–87, A102 ¶ 13, A191–92 ¶ 4. As in *Complex Machine Works*, the relatively longstanding course of violations in this case is significant. 23 CIT at 952, 83 F. Supp. 2d at 1317.

Seriousness of Offense:
Public Interest in Compliance, Nature and Circumstances of Violation, and Gravity of Violation

As *Complex Machine Works* observed, "[a] significant public interest in the enforcement of the regulations at issue militates in favor

of a heavier penalty." 23 CIT at 952, 83 F. Supp. 2d at 1317. There, as here, "[t]he public interest at issue * * * is the truthful and accurate submission of documentation to Customs and the full and timely payment of duties required on imported merchandise." *Id*. In this action, the Government asserts that, even though New-Form has not exported merchandise to the United States since December 2002 (SA15–16), there is "no evidence of record that [New-Form] is bankrupt, has dissolved, or that it will not resume business and exports to the United States in the future, such that a penalty would have no deterrent effect upon New-Form itself." Pl.'s Supp. Appl. at 5.

As discussed above, however, New-Form's bankrupt status is established by the Dun & Bradstreet report which was proffered by the Government and is admissible "for the truth of the matter asserted." *See* section III.A, *supra*. It is nevertheless true that, even if New-Form is permanently defunct, the imposition of a substantial penalty in this case may well have a salutory effect upon the future conduct of others exporting to this country (including, in particular, Supplierpipeline and Mr. Boulanger, both of which are closely tied to New-Form), deterring them from conduct of the type in which New-Form engaged.

The "nature and circumstances of the violations" committed by New-Form also compel a heavy penalty. New-Form knew that it was exporting jack parts that were subject to antidumping duties that its broker was not paying. Yet the invoices New-Form prepared failed to accurately describe and classify those jack parts. Indeed, New-Form even denied to its broker that it was exporting jack parts. A2–64, A133 ¶¶ 56–59, A61, A69, A182–85. As the Government so succinctly puts it, New-Form's "knowledge, failure, and denial weigh in favor of a heavy penalty." Pl.'s Supp. Appl. at 8.

For purposes of determining the size of a penalty, the "gravity of the violations" can be assessed "in terms of the frequency of the violations, the amount of the duties at issue, and the domestic value of the imported goods." *Complex Mach. Works*, 23 CIT at 953, 83 F. Supp. 2d at 1317. As in *Complex Machine Works*, the conduct at issue here "[was] not an isolated occurrence, but [rather] presents a pattern of gross disregard for and evasion of the Customs laws of the United States." 23 CIT at 953, 83 F. Supp. 2d at 1317–18. Specifically, New-Form's violations spanned more than 30 entries over a period of one and a half years—a rate of nearly one entry every two weeks. A2–63, A84 ¶ 13, A85–87, A102 ¶ 13, A191–92 ¶ 4. The amount of the duties at issue totals nearly $19,000; and the domestic value of the imported goods exceeds $81,000. A192 ¶ 5. Had interest accrued on the antidumping duties from the date of the last violation in October 1997 through October 2001 (when New-Form's broker paid the duties) (A170), the total amount would be even greater. In

short, like the other factors discussed above, the gravity of the violations here weighs decisively against New-Form and in favor of the maximum allowable penalty.

Practical Effect of Penalty:
Defendant's Ability to Pay, Relationship of Size of Penalty to Defendant's Business and Effect on Ability to Continue Doing Business, and Whether Penalty Shocks Conscience

The "defendant's ability to pay" must also be considered in determining the size of a penalty. New-Form's financial status is thus once again implicated. Again, the Government argues that there is no affirmative evidence in the record to indicate that New-Form would be unable to pay the maximum allowable penalty. Pl.'s Appl. at 15; Pl.'s Supp. Appl. at 9. The Government notes that there are, for example, no audited financial statements, or expert testimony (by, for example, a witness qualified to explain Canadian bankruptcy law). *Cf. Complex Mach. Works*, 23 CIT at 954, 83 F. Supp. 2d at 1318 (evidence such as unaudited financial statements and foreign tax returns are accorded little weight).

But, to the contrary, as discussed above, New-Form's bankrupt status is properly a matter of record in this action. Ordinarily, the bankruptcy of a defendant might contraindicate a substantial penalty (and, indeed, could conceivably moot a case). Here, however, the record evidence establishes the close relationship between New-Form and Supplierpipeline—a company which has, in recent months, exported nearly half a million dollars worth of merchandise into this country. SA2 ¶ 4. That level of business activity in the United States suggests that both Supplierpipeline and Mr. Boulanger—the President and sole shareholder of both companies (A65; SA5–6)—are potential sources for payment of any penalty imposed upon New-Form. *See* Restatement (Second) of Judgments § 59 comment g (1982) ("a judgment nominally against the corporation creates a binding obligation upon those who have acted in corporate dress"). As recently as January of this year, Supplierpipeline boasted that it was progressing "toward its goal of $100 million annual sales," and that it "has enjoyed compounded annual growth of over 50% for the last 11 years straight." SA11. Under these circumstances, consideration of the "ability to pay" factor does not preclude the imposition of a substantial penalty.

Nor does the "ability to continue doing business" factor give pause. Even if New-Form is not now doing business, and even though it has not exported merchandise to the United States since December 2002 (SA15–16), Supplierpipeline is an ongoing, closely-related business concern which appears to have sufficient resources to pay the maximum penalty without jeopardizing its continued operation. SA2, SA6, SA11.

Moreover, even the maximum penalty in this case should not "shock the conscience" of a court. The importance of the United States to a defendant's business and the degree to which the defendant disregards the customs laws of this country are relevant to this factor. *Complex Mach. Works*, 23 CIT at 954, 83 F. Supp. 2d at 1318. New-Form viewed the United States as such an important market for its jacks that it requested that Commerce review the antidumping finding that applied to those jacks (A1); and the company established an assembly operation here to reduce the applicable antidumping duties. A66 ¶ 54, A69. Even if New-Form is now bankrupt, Supplierpipeline continues to export merchandise to the United States. SA2, SA6, SA11. And, in October 2002, Supplierpipeline announced plans to "open[ ] a second Western US based warehouse * * * to further enhance coverage for the North American market." SA10. As in *Complex Machine Works*, "[s]ince [the defendants'] business relied substantially upon United States markets, a greater proportion of their assets may fairly be called upon as [a] penalty for violations of United States law." 23 CIT at 954, 83 F. Supp. 2d at 1318. This factor thus supports a heavy penalty.

Economic Benefit to Defendant Resulting from Violation

Consideration of the "economic benefit to the defendant" is damning as well. New-Form's violations resulted in lost revenue to the United States in the sum of $18,466.84 in unpaid antidumping duties (A192 ¶ 5)—savings that flowed directly to New-Form. New-Form never paid a penny of those duties; its broker paid them. A170.

Public Policy Concerns:
Degree of Harm to Public, Value of Vindicating Agency Authority, and Whether Damaged Party Has Been Compensated for Harm

While the factors discussed above relate primarily to deterring future violations, the three remaining specific factors—the degree of harm to the public, the value of vindicating agency authority, and the extent to which the damaged party has been compensated for its harm—are concerned with compensating society. Accordingly, they are to be accorded less weight. *Complex Mach. Works*, 23 CIT at 950, 955, 83 F. Supp. 2d at 1315–16, 1319. They do not, in any event, favor New-Form.

The "harm to the public" here is clear. New-Form's violations resulted in the dumping of its jack parts into the United States—which, by definition, damaged the domestic jack industry. Moreover, "the amount of harm suffered by the Government is not limited to the dollar value of duties lost." *Complex Mach. Works*, 23 CIT at 955, 83 F. Supp. 2d at 1319. New-Form's conduct necessitated a Customs investigation and eventually led the Department of Justice to bring this action. The cost of investigating and prosecuting a customs pen-

alty action is an independent harm to the Government, and is to be considered in determining the size of a penalty. *Id*.

Although its broker has (albeit belatedly) paid the duties lost as a result of New-Form's actions (A170), the Government has yet to be compensated for the expense of the administrative and judicial proceedings that New-Form's conduct spawned. Both the "harm to the public" and "adequacy of compensation" factors thus support the imposition of a substantial penalty.

So too the public interest in "vindicating agency authority" weighs against New-Form, and in favor of the Government. "[I]t is vital that the penalties imposed deter future [potential] lawbreakers from considering [conduct such as that at issue here] to ensure the submission of true and accurate statements to Customs so that the agency may carry out its functions." *Complex Mach. Works*, 23 CIT at 955, 83 F. Supp. 2d at 1319.

As discussed above, even if a heavy penalty in this case has no deterrent effect on New-Form, it may deter others who export into the United States—including Supplierpipeline and Mr. Boulanger, in particular—from engaging in the type of conduct in which New-Form engaged. *See Complex Mach. Works*, 23 CIT at 955, 83 F. Supp. 2d at 1319 (penalty may deter future exporters from engaging in similar conduct).

Such Other Matters As Justice May Require

The final "catch-all" factor to be considered is "such other matters as justice may require." On this point, the Government emphasizes that—even if New-Form is bankrupt — it entered bankruptcy less than two weeks before this action had been scheduled to go to trial. SA6; Order Governing Preparation for Trial ¶ 8 (Aug. 14, 2002) (trial to commence November 20, 2002). The Government argues that, as a matter of policy, bankruptcy should not be a haven for wrongdoers. Pl.'s Supp. Appl. at 12 (*citing Commodity Futures Trading Comm'n v. Co Petro Mktg. Group, Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983)). The Government therefore concludes that justice requires that New-Form's current status not shield the company from liability for its actions. Pl.'s Supp. Appl. at 12. While the case for the maximum penalty is already compelling, this final factor may also militate in favor of a heavy penalty. At a minimum, it does not weigh against it.

IV. *Conclusion*

For all the reasons set forth above, Plaintiff's Application for Default Judgment is granted. New-Form's conduct violated 19 U.S.C. § 1592, and warrants imposition of the maximum civil penalty for gross negligence—in this case, $73,867.36, plus interest and costs.

Plaintiff shall submit within 30 days hereof a proposed final judgment in conformity with this opinion, with any response by Defendant due within 10 days thereafter.

So ordered.

ERRATA

(Slip Op. 03–61)

THOMAS J. AQUILINO, JR., JUDGE, ST. EVE INTERNATIONAL, INC., PLAINTIFF *v* UNITED STATES, DEFENDANT.

Court No. 03-00068

JUDGMENT

The plaintiff having commenced this case to contest notices on Customs Form 4647 to redeliver specified women's wear imported via Entry Nos. 655–1146249–5, 655–1151865–0 and 655–115–2655–4, as well as notices of liquidated damages for failure to comply with those redelivery demands; and the plaintiff having prayed for and obtained expedited trial and decision of its complaint; and the court having issued an opinion and order, slip op. 03–54, 27 CIT ____ , ____ F.Supp.2d ____ (May 15, 2003), denying certain requested relief but finding that plaintiff's goods bearing style numbers 65132, 65134, and 27–0180–3 are correctly classifiable under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002), textile category 352, based upon a fair preponderance of the evidence developed on the record, which thereby overcame the presumption of correctness on behalf of the U.S. Customs Service; and the court having ordered the parties to confer and present a proposed form of final judgment in accordance with slip op. 03–54; and counsel having complied with that direction; Now therefore, in accordance with slip op. 03–54, and after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the Customs notices of redelivery (and for liquidated damages in connection therewith) in Entry Nos. 655–1146249–5, 655–1151865–0, and 655–1152655–4 each be, and they hereby are, vacated; and it is further hereby

ORDERED that the U.S. Bureau of Customs and Border Protection reliquidate the merchandise of Entry No. 655–1146249–5 under subheading 6109.10.0037 of the Harmonized Tariff Schedule of the United States (2002) at a rate of duty of 17.4 percent *ad valorem* and

recover from the plaintiff any additional duties owed plus interest as provided by law.

NOTICE OF PROPOSED AMENDMENTS TO THE RULES

Pursuant to 28 U.S.C. § 2071(b), notice is given of certain proposed amendments were recommended by the Court's Advisory Committee, which was appointed pursuant to 28 U.S.C. § 2077(b). The proposals pertain to: **USCIT Rules (amended)** *3*, *5*, *7*, *16*, *22*, *26*, *27*, *40*, *54*, *58*, *63*, *67.1*, *68*, *70*, *71*, *72*, *73*, *74*, *78*, *79*, *81*, *82* and *82.1*; **USCIT Forms (amended)** *1*, *2*, *3*, *4*, and *9*; **USCIT Specific Instructions (amended)** for *Form 16*; **USCIT Rules (new)** *16.1*, *26.1*, *54.1*, *73.1*, *73.2*, *73.3*, *86.1*, and *86.2*; **USCIT Forms (new)** *16-1*, *16-2*, *16-3*, *16-4*, *16-5*, *20*, *M-1*, and *M-2*; **USCIT Specific Instructions (new)** for *Form 19*; and **USCIT *Guidelines for Court-Annexed Mediation* (new).** These new Guidelines were promulgated pursuant to new Rule *16.1* and make reference to new forms *M-1* and *M-2*.

This notice is given to provide the public, the bar and others interested in the work of the United States Court of International Trade with an opportunity to comment on the proposed amendments. All comments received will be forwarded to the Court for consideration.

Each proposal is accompanied by commentary describing the recommended change. Recommendations for language to be deleted from each rule appears in brackets with strikeovers. When viewed on the USCIT Website, the proposed new language will appear in red. If the proposed amendments are downloaded to a non-color printer, the proposed new language will appear in bold and/or may have a gray shaded background.

A copy of the amendments is available for review in the Court's Library, in the Records Management/Appeals Unit of the Case Management Section, and at the Court's web site: **www.cit.uscourts.gov.**

Comments are to be submitted in writing by the close of business on Thursday, **August 14, 2003** to:

Sarah A. Thornton, Chief Deputy Clerk
United States Court of International Trade
One Federal Plaza
New York, NY 10278-0001

Thank you for your interest in the work of the Court.

July 1, 2003

LEO M. GORDON,
Clerk of the Court.