Slip Op. 04–94

CHIA FAR INDUSTRIAL FACTORY CO., LTD., Plaintiff, v. UNITED STATES, Defendant, AND ALLEGHENY LUDLUM CORP., *ET AL.*, Defendant-Intervenors.

Before: Wallach, Judge
Consol. Court No.: 02–00243
PUBLIC VERSION

[Plaintiff Chia Far's Motion for Judgment upon the Agency Record is denied; Plaintiffs' Allegheny Ludlum Corp., *et al*. Rule 56.2 Motion for Judgment upon the Agency Record is denied; and United States Department of Commerce's Final Results and Partial Rescission of Antidumping Administrative Review are affirmed.]

Dated: August 2, 2004

DeKieffer & Horgan, (*A. David Lafer*, *J. Kevin Horgan*, and *John J. Kenkel*) for Plaintiff Chia Far Industrial Factory Co., Ltd..

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Michael S. Dufault*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Jonathan J. Engler*, Attorney, Office of Chief Counsel, U.S. Department of Commerce, of Counsel, for Defendant United States.

Collier, Shannon & Scott, PLLC, (*David A. Hartquist*, *Jeffrey S. Beckington*, and *Adam H. Gordon*) for Plaintiffs and Defendant-Intervenors Allegheny Ludlum Corp., *et al*.

White & Case, LLP (*William J. Clinton* and *Adams C. Lee*) for Defendant-Intervenors Yieh United Steel Corp.

OPINION

WALLACH, Judge:

I
Introduction

In this action, Plaintiff Chia Far industrial Factory Co., Ltd. ("Chia Far") and Plaintiffs and Defendant-Intervenors Allegheny Ludlum Corp., AK Steel Corp., Butler Armco Independent Union, J&L Specialty Steel, Inc., United Steel Workers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization (collec-

tively "Allegheny") challenge the final results of an administrative review issued by the United States Department of Commerce ("Commerce") with respect to *Stainless Steel Sheet and Strip From Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 6,682 (Feb. 13, 2002) ("Final Results"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (1999). For the following reasons, this court finds Commerce's determination is in accordance with the law.

II
Background

On July 20, 2000, Commerce published a notice in the Federal Register of opportunity to request an administrative review of merchandise subject to the antidumping order on stainless steel sheet and strip coils from Taiwan. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 65 Fed. Reg. 45,035 (July 20, 2000). Chia Far and Yieh United Steel Co. ("YUSCO"), Taiwanese producers and exporters of the subject merchandise during the period of review ("POR")[1], June 8, 1999, through June 30, 2000, requested an admin-

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[1] In *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 65 Fed. Reg. 53,980 (Sept. 6, 2000), the Federal Register lists in a table that the POR for Taiwan: Stainless Steel Sheet and Strip in Coils was January 4, 1999, through June 30, 2000. In *Initiation of Antidumping and Countervailing Duty Administrative Reviews* ("Notice of Initiation"), 65 Fed. Reg. 71,299 (Nov. 30, 2000), the Federal Register lists in a table "Taiwan: Stainless Steel Sheet and Strip in Coils, A–583–831, Chia Far Industrial Factory Co., Ltd." and the POR for this antidumping duty proceeding as June 8, 1999, through June 30, 2000. In FN 2, referencing "Taiwan: Stainless Steel Sheet and Strip in Coils," it further states that "[i]n the initiation notice published on September 6, 2000, (65 FR 53980), the review period for this case was incorrect and [Chia Far] was inadvertently omitted. The period listed above is the correct period of review for this case and, we are adding the above-listed firm to the other firms' initiation for that review."

In the Final Results, 67 Fed. Reg. 6,682 (Feb. 13, 2002), the Federal Register states: "[t]his review covers imports of subject merchandise from [YUSCO], . . . [Chia Far] and Ta Chen Stainless Pipe, ltd. ('Ta Chen'). The [POR] is January 4, 1999 through June 30, 3000." The same notice then states: "[t]he review covers imports of subject merchandise from YUSCO, . . . Chia Far and Ta Chen. The POR is June 8, 1999, through June 30, 2000."

Chia Far states in its Motion for Judgment Upon the Agency Record at 2 that Commerce had defined the POR as between January 4, 1999, to June 30, 2000. The other three parties state in their briefs that the POR is June 8, 1999, through June 30, 2000. The court ordered the parties to file briefs to clarify these apparent discrepancies in the POR. *Chia Far Indus. Factory Co. v. United States*, Court No. 02–00243 (Order dated June 8, 2004).

In response to the order, Defendant stated that the correct POR was June 8, 1999, through June 30, 2000. Defendant's Brief Regarding Discrepancy in Period of Review ("Defendant's Brief on POR") at 1. Defendant explained that, in the Notice of Initiation, Commerce erroneously identified the POR as January 4, 1999, through June 30, 2000, because it

> had not suspended the liquidation of entries on the date of the preliminary determinations in this case, as amended on January 27, 1999, because it preliminarily determined that the respondents' dumping margins were *de minimis*. *See Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip*

istrative review for their merchandise entering the United States during the period. *See* Defendant's Public Version Appendix at 3 ("DPVA"). Allegheny also requested a review of YUSCO, Tung Mung and Ta Chen Stainless Pipe Co., Ltd. ("Ta Chen") and their affiliates,[2] pursuant to 19 U.S.C. § 1677 (33) (2000). DPVA at 4. Accordingly, on September 6, 2000, Commerce initiated an administrative review as to Chia Far, Tung Mung and YUSCO. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 65 Fed. Reg. 53,980 (Sept. 6, 2000).

On September 7, 2000, Commerce issued its initial antidumping questionnaires for its administrative review. *See* DPVA at 8. On October 12 and November 6, 2000, Chia Far responded to Commerce's Section A and C questionnaires. Defendant's Response to the Motions for Judgment Upon the Administrative record filed Chia Far Industrial Factory Co., Ltd. and Allegheny *et. al.* ("Defendant's Response") at 5. YUSCO responded to the questionnaires on September 28, 2000, and October 30, 2000, and November 6, 2000. *Id.* On November 30, 2000, the administrative review was amended to include

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in Coils from Taiwan, 64 Fed. Reg. 4,070, 4,072 (Jan. 27, 1999). Commerce ordered the suspension of liquidation on the date of publication of the final determination, June 8, 1999, when positive margins were found. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Taiwan*, 64 Fed. Reg. 30,592 (Jun. 8 1999).

Because Commerce can review dumping margins only for suspended entries, Commerce amended its *Notice of Initiation*, noting that the correct period of review was from June 8, 1999 through June 30, 2000. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 65 FR 71,299, 71,300 (Nov. 30, 2000).

Defendant's Brief on POR at 2. All the other parties to the case concur that the correct POR was June 8, 1999, through June 30, 2000. *See* Plaintiff's Brief Regarding Discrepancy in Period of Review; Defendant-Intervenors' Brief Regarding Discrepancy in Period of Review, on behalf of Allegheny; Response in Support of Defendant's Brief Regarding Discrepancy in Period of Review, on behalf of YUSCO.

[2] The following persons under 19 U.S.C. § 1677(33) are considered "affiliated" or "affiliated persons":

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(B) Any officer or director of an organization and such organization.

(C) Partners.

(D) Employer and employee.

(E) Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(G) Any person who controls any other person and such other person.

For purposes of this paragraph, 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.

the name of Chia Far. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 65 Fed. Reg. 71,299 (Nov. 30, 2000).

On April 20, 2001, the domestic industry's representatives met with Commerce to express concerns that Chia Far's previously reported U.S. sales through Lucky Medsup ("LM") had been improperly classified as export price[3] transactions. Response by Allegheny Ludlum Corp., *et al.*, in Opposition to Motion for Judgment on the Agency Record by Chia Far Industrial Factory Co., Ltd. at 2 ("Allegheny's Response"). In a letter dated May 4, 2001, Commerce memorialized this meeting and reopened the record for two days under 19 C.F.R. § 351.301(c)(2)(I) to receive factual information pertaining to those transaction. *See* Letter from Edward Tang, Office Director, AD/CVD Enforcement, Office 9, to Jeffery [sic] Beckington, Esq., Collier Shannon Scott (May 4, 2001) ("May 4th letter"); DPVA at 10. In its May 4th letter, Commerce also noted that the regulations at 19 C.F.R. § 351.301(c)(1) permit any interested party ten days to submit factual information to rebut, clarify, or correct factual information submitted by any other interested party.

Consistent with the Department's May 4th letter, Allegheny placed on the record factual information concerning Chia Far's affiliation with LM. Included in this submission was certain material for which Allegheny requested double-bracketed treatment under 19 C.F.R. §§ 351.304(a)(2)(ii) and 351.304(b)(2). By letter dated May 17, 2001, Chia Far responded stating as to LM *inter alia*, "Chia Far and this customer do not have, did not have in the POR, and did not have prior to the POR a principal/agent relationship, either in fact (via an agency contract) or in theory." Letter from John J. Kenkel, DeKieffer & Horgan, to the Hon. Don Evans, Secretary, U.S. Department of Commerce (May 17, 2001) ("Chia Far's May 17 Letter to Commerce"); DPVA at 7.

On May 21 and 22, 2001, the Department apprised Allegheny that Allegheny's May 4th letter was being returned and not accepted for the record due to the Department's conclusion that no clear and compelling need for double-bracketed treatment had been shown by Allegheny. Letter from Rick Johnson, Program Manager, Enforcement Group III, Office 9, to Jeff Beckington, Esq., Collier Shannon Scott (May 21, 2001); Letter from Rick Johnson, Program Manager, Enforcement Group III, Office IX, to Jeff Beckington, Esq., Collier Shannon Scott (May 21, 2001); Allegheny's Response at 3. On May 24, 2001 Allegheny filed an amended version of their May 4th letter, having deleted all of the double bracketed information. They ex-

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[3] "Export price" is defined as the "price at which the subject merchandise is first sold . . . before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States. . . ." 19 U.S.C. § 1677a(a) (2000).

plained in their cover letter that the information was removed in light of its sensitivity and Allegheny's fear that irreparable financial injury might occur if the double bracketed information was compromised. Letter from Jeffrey S. Beckington, Collier Shannon Scott, to Secretary of Commerce, U.S. Department of Commerce (May 24, 2001); Allegheny's Response at 3. On May 25, 2001, Commerce issued a Supplemental Questionnaire to Chia Far, to which the company responded on June 4, 2001. DPVA at 6.

On June 11, 2001, Allegheny responded to Chia Far's June 4, 2001, supplemental questionnaire response. As with the May 4th letter, Commerce concluded there was no clear and compelling need for the double-bracketed treatment for certain information. Thus, Allegheny submitted the redacted version of the June 11th letter to Commerce on June 18, 2001, following a meeting between Allegheny's' counsel and Commerce officials on June 14, 2001. The June 18 letter contained, among other documents, a "Certificate of Sole Agency," dated January 18, 1994, between Chia Far and LM, which was signed by the presidents of each company, certifying that "Lucky Medsup Inc. is working as a sole agent for Chia Far Industrial Factory Co., Ltd. in the West Coast District of The United States of America". Letter from Jeffrey S. Beckington, Collier Shannon Scott, to Secretary of Commerce, U.S. Department of Commerce (June 18, 2001) at Enclosure 1. Chia Far did not respond in writing to Allegheny's June 18 letter.

Commerce issued its Verification Report as to Chia Far on July 11, 2001, and Chia Far submitted preliminary comments on the Verification Report to Commerce on July 26, 2001. On August 8, 2001, Commerce issued its preliminary determination *Stainless Steel Sheet and Strip in Coils from Taiwan: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review*, 66 Fed. Reg. 41,509 (Aug. 8, 2001) ("Preliminary Results"). In that notice, Commerce preliminarily rescinded the administrative review with respect to Ta Chen based upon the party's claim that it made no shipments of the subject merchandise during the period of review. Commerce received comments from the parties in September 2001.

After considering comments by the parties, Commerce issued its final determination on February 13, 2002. *See* Final Results, 67 Fed. Reg. at 6,682. In the Final Results, Commerce rescinded the review with respect to Ta Chen, found zero antidumping margins with respect to YUSCO and Tung Mung, and found a 21.10% margin with respect to Chia Far. *Id.*

III
Arguments

Plaintiff Chia Far claims that the administrative record shows that (1) Chia Far and its customer, LM, were not affiliated; (2) Commerce did not allow Chia Far to meaningfully participate in the ad-

ministrative review; and (3) Commerce's decision to impute an affiliation was not based on substantial evidence on the record. Chia Far further argues that the application of adverse facts available was unwarranted because it was truthful in all of its responses to Commerce's requests for information and cooperated to the best of its ability. Lastly, Chia Far claims that the 21.10% adverse facts available rate that Commerce applied to it is punitive and erroneous. Thus, it says, Commerce's decision was arbitrary and capricious, not in accordance with the law, and not supported by substantial evidence on the administrative record.

Defendant, the U.S. Government, argues that Chia Far and its largest U.S. customer, LM, are affiliated. Defendant asserts that its application of adverse facts available, its decision to apply adverse inference to all of Chia Far's U.S. sales during the period of review, and the 21.10% adverse facts available rate it imposed on Chia Far are supported by substantial evidence and are otherwise in accordance with law. Defendant argues that it correctly accepted and relied upon information submitted by Allegheny after the initiation of the administrative proceedings. Defendant argues that it properly protected the name of Chia Far's customer, LM. Defendant claims that it correctly refrained from imposing an adverse facts available rate on YUSCO and from collapsing YUSCO, Yieh Mau, and Yeoh Yih to formulate the adverse facts available rate. Lastly, Defendant argues that its decision to rescind its review with respect to Ta Chen is supported by substantial evidence and is otherwise in accordance with law.

Allegheny, the Plaintiff and Defendant-Intervenor, argues conversely that Chia Far had an adequate opportunity to participate in the administrative review and that Commerce correctly found affiliation between Chia Far and its customer/agent, LM. Allegheny posits that LM's name should no longer receive business proprietary treatment, given its relationship with Chia Far. Allegheny argues that Commerce correctly imposed adverse facts available on Chia Far, but that the rate Commerce chose was insufficient to serve as a deterrent. With respect to YUSCO, Allegheny claims that Commerce should have imposed an adverse facts available rate on YUSCO and that it should have collapsed YUSCO, Yieh Mau, and Yeoh Yih to arrive at the correct adverse facts available rate. Finally, Allegheny argues that Commerce should not have rescinded its review of Ta Chen.

YUSCO, the Defendant-Intervenor, argues that Commerce was correct in not imposing on it the adverse facts available rate. YUSCO also claims that Commerce's determination to not employ collapsing methodology when examining its relationship with Yieh Mau and Yeoh Yih is supported by substantial evidence and is otherwise in accordance with law.

IV
Standard of Review

The Court of International trade will sustain "any determination, finding or conclusion" made by Commerce 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) (1999); *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938). The possibility of drawing two inconsistent conclusions from the evidence contained in the record, does not render Commerce's findings unsupported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). Additionally, the court does not weigh the wisdom of Commerce's legitimate policy choices. *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992).

V
Discussion

A
Chia Far

1
Commerce's Holding that Chia Far and its U.S. Customer are Affiliated Through a Principal/Agent Arrangement Is Supported By Substantial Evidence

a
Commerce Lawfully Compiled the Administrative Record

(1)
Commerce Used its Discretion in Accordance with Law in Not Accepting Chia Far's Proffered Evidence

Plaintiff Chia Far argues that the record provides no evidence of affiliation between itself and its largest U.S. Customer, LM. It contends that Allegheny's June 18, 2001, letter which showed affiliation, did not apply to this POR and that Commerce's determination ignores substantial record evidence because the relationship alleged by Allegheny ended prior to the POR. Furthermore, Chia Far says that it submitted commission ledgers at verification, which Commerce would not look at or accept, which it claims showed an absence of commissions to LM during the POR by contrasting earlier ledgers showing commission payments in early 1994 through mid-1995; Chia Far, however, claims not to have found "[any document

memorializing such an agency]." Chia Far's Motion for Judgement [sic] Upon the Agency Record ("Chia Far's 56.2 Motion") at 9.

Chia Far accuses Commerce of preventing Plaintiff from adequately defending itself by not allowing Plaintiff to submit evidence to controvert its conclusion. *Id.* at 11. While claiming that the verification team's comments dissuaded Chia Far from submitting pre-POR data, Chia Far did tell the team that it would provide a document showing the absence of agency during the POR by producing a document showing the rescission of agency in 1995. But, Chia Far claims that "it could not find the hoped-for document." *Id.* at 12. Chia Far argues that Commerce and Allegheny have failed to place on the record any information that is contemporaneous with the POR that refutes Verification Exhibition 12. *Id.* at 12–13 (referring to Verification of Chia Far Industrial Factory Co., Ltd. in the 1st Antidumping Administrative Review for Stainless Steel Sheet and Strip in Coils ("SSSS") from Taiwan, A–583–831, from Laurel LaCivita, Senior Import Compliance Specialist, to The File, through Rick Johnson, Program Manager (July 11, 2001) ('Verification Report")).

Allegheny, on the other hand, argues that the administrative record has been assembled properly. Allegheny claims that Commerce acted correctly in rejecting Chia Far's commission ledger submissions under 19 C.F.R § 351.307(d) because Commerce is only under an obligation to consider submitted information and Commerce "chose not to review the two aforementioned documents because the company's acknowledgment represented significant new information of the type that could not be considered at verification." Allegheny's Response at 17 (quoting the Verification Report at 7). Also, Allegheny asserts, Chia Far had ten days to rebut, clarify, or correct Allegheny's June 18, 2001, letter under 19 C.F.R. § 351.301(c)(1) and failed to do so.

Commerce disagrees with Chia Far's claim that Commerce's refusal to accept information in commission ledgers from 1994 through 1999, submitted during Verification, to rebut the content of Allegheny's June 18 submission is evidence of unfairness and bias. Issues and Decision Memorandum for the Final Results of Antidumping Administrative Review of Stainless Steel Sheet and Strip in Coils ("SSSS") from Taiwan, A–583–831, from Joseph A. Spetrini, Deputy Assistant Secretary, AD/CVD Enforcement Group III, to Faryar Shirzad, Assistant Secretary for Import Administration (February 4, 2002) ("Issues and Decision Memorandum") at 33–34. Commerce considered this submission to be new information of the type that could not be considered at verification.

The administrative record was lawfully compiled by Commerce. The applicable statute, 19 U.S.C. § 1677m(I) (2001), directs Commerce to

> verify all information relied upon in making –
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> (1) a final determination in an investigation,
>
> (2) a revocation under section 1675(d), and
>
> (3) a final determination in a review under section 1675(a) of this title, if–
>
> (A) verification is timely requested by an interested party as defined in section 1677(9)(C), (D), (E), (F), or (G) of this title, and
>
> (B) no verification was made under this subparagraph during the 2 immediately preceding reviews and determinations under section 1675(a) of this title of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.

Under the regulation, 19 C.F.R. § 351.307 (2001)[4], Commerce has to "verify the accuracy and completeness of submitted factual information." 19 C.F.R. § 351.307(d). Commerce enjoys considerable latitude in its verification procedures. *See Hercules, Inc. v. United States*, 11 CIT 710, 726 (1987). The statute and regulation require Commerce to verify information but generally leave the scope of verification and the procedures for conducting it to Commerce's discretion. *U.S. Steel Group v. United States*, 177 F. Supp. 2d. 1325, 1331 (CIT 2001).

In its correspondence with Chia Far, Commerce made clear that "*verification is not intended to be an opportunity for submitting new factual information*." Letter from Rick Johnson, Program Manager, AD/CVD Enforcement Group III, to Chia Far Industrial Factory, c/o Jay Kenkel, DeKieffer & Horgan (June 7, 2001) at 2 (emphasis in original).[5] This instruction is customary and consistent with Commerce's usual practice, *see Final Affirmative Countervailing Duty Determination; Stainless Steel Sheet and Strip in Coils from France*, 64 Fed. Reg. 30,774, 30,788 (June 8, 1999), and with case law, *see Am. Alloys, Inc. v. United States*, 30 F.3d 1469, 1475 (Fed. Cir. 1994); *Hercules*, 11 CIT at 725–27; *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 344, 362 (1990). *See Acciai Speciali Terni S.p.A. v. United States*, 142 F. Supp. 2d 969, 1007 (CIT 2001). Thus, this case is not one in which Commerce was under obligation to accept the commission ledgers outside the POR which Chia Far submitted on

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[4] 19 C.F.R. § 351.307 states, along with a detailed verification timeline, that "[p]rior to making a final determination in an investigation or issuing final results of review, the Secretary may verify relevant factual information."

[5] Commerce's stated, in this same letter, that it could accept new information at verification only when "(1) the need for that information was not evident previously, (2) the information makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record."

July 26, 2001. Chia Far had denied consistently the existence of any sole agency contract with LM until after Petitioners June 18, 2001, letter. In fact, as Commerce points out, "despite previous statements on the record to the contrary, the company now acknowledged the existence of [the contract]. . . ." Verification Report at 7. When Chia Far submitted this additional factual evidence to controvert the continued existence of the sole agency contract by providing commission ledgers from 1994 through 1999, Commerce fairly considered the information as "significant new information of the type that could not be considered at verification." *Id*.

Even if the submission was a rebuttal to Allegheny's June 18, 2001, letter, that response would have been governed by 19 CFR § 351.301(c)(1)(2001):

> If factual information is submitted less than 10 days before, on, or after (normally only with the Department's permission) the applicable deadline for submission of such factual information, an interested party may submit factual information to rebut, clarify, or correct the factual information no later than 10 days after the date such factual information is served on the interested party or, if appropriate, made available under APO to the authorized applicant.

This would have required the response to have been submitted to Commerce by June 28, 2001, which was not the case. As a result, Commerce correctly chose not to review the documents during the verification process. Because its conclusion is based on a reasonable inference drawn from evidence in the record, Commerce acted in accordance with the law.

(2)
Commerce Properly Accepted Allegheny's June 18, 2001, Submission as Timely

Plaintiff Chia Far alleges that Commerce did not follow its own rules, under 19 C.F.R. § 351.301(c), which states that new information may be submitted to Commerce to rebut information filed by another party only if it is submitted within ten days. Here, Plaintiff posits that Commerce should not have accepted Allegheny's June 18, 2001, submission because it was filed out of time, during the verification process. Chia Far argues that Commerce should not have accepted the submission under its rules, which in turn would have ended the inquiry on affiliation. Chia Far's 56.2 Motion at 19. Plaintiff asks that all the new information submitted by Allegheny on or after May 25, 2001, including double-bracketed items which Plaintiff did not have the opportunity to inspect, be stricken from the record.

Allegheny states that under 19 C.F.R. § 351.304(d), Commerce must determine within thirty days after submission the status of information provided and then the submitting person has two business

days to take any number of actions should the submission not conform to 19 U.S.C. § 1677f(b) and 19 C.F.R. § 351.304(d)(1). Allegheny states that it filed its June 18, 2001, submission in a timely fashion.

Commerce urges the court to reject Chia Far's argument that Commerce improperly accepted new information from Allegheny, "i.e. the evidence withheld by Chia Far that included a material contractual document." Defendant's Response at 14. Citing 19 C.F.R. § 351.301(c)(1), Commerce argues that it acted lawfully in accepting the information and granting Chia Far the courtesy of the "10 day rule" to rebut Petitioners contentions. Commerce says that Chia Far was not unlawfully prejudiced by the inclusion of Petitioner's submission and that the inclusion in the record was proper. Defendant's Response at 43.

Commerce properly accepted Allegheny's letter, dated June 18, 2001, as a timely submission. As per 19 C.F.R. § 351.301(c)(1)(2001), and, pursuant to 19 C.F.R. § 351.304(d) (2001),

> (d) Nonconforming submissions.
>
> (1) In general. The Secretary will return a submission that does not meet the requirements of section 777(b) of the Act and this section with a written explanation. The submitting person may take any of the following actions within two business days after receiving the Secretary's explanation:
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> . . . .
>
> (ii) If the Secretary denied a request for business proprietary treatment, agree to have the information in question treated as public information;
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> . . . .
>
> (2) Timing. The Secretary normally will determine the status of information within 30 days after the date on which the information was submitted. If the business proprietary status of information is in dispute, the Secretary will treat the relevant portion of the submission as business proprietary information until the Secretary decides the matter.

Allegheny submitted its letter in a timely fashion on June 18, 2001. Commerce issued a supplemental questionnaire on May 25, 2001. Chia Far responded to Commerce's questionnaire on June 4, 2001. On June 11, 2001, Allegheny responded to Chia Far's June 4 letter. Within the 30-day time period under 19 C.F.R. § 351.304(d)(2), in meetings Allegheny's counsel had with Commerce on June 14, 2001, Commerce notified Allegheny of its objections to the double-bracketing of certain information and rejected the letter. Allegheny was given two business days under the regulation to rem-

edy the submission – June 18, 2001, was a timely filing.[6] Commerce thus correctly accepted Allegheny's June 18, 2001, submission lawfully in accordance with its regulations. As a result, the relevant data filed by Allegheny on or after May 25, 2001, including the Certificate of Sole Agency between Chia Far and LM dated January 1994 remains on the record.

b

Commerce's Determination that Chia Far and Lucky Medsup Were Affiliated Is in Accordance with Law

Chia Far denies that its relationship with LM was anything other than seller/customer during the POR. Chia Far had stated that it "and this customer [LM] do not have , did not have in the POR, and did not have prior to the POR a principal agent relationship, either in fact (via an agency contract) or in theory. Chia Far's May 17 Letter to Commerce at 2.[7] It was only following Allegheny's June 18, 2001, submission that Chia Far even acknowledged the existence of an agency agreement with LM at any point. Yet, Chia Far summarily dismisses the sole agency contract document proffered by the Petitioners in their June 8, 2001, submission to Commerce. It claims that it had "forgotten" about the document, that a review of its archives did not produce such a document and that this was especially the case since the contract had not been in effect for six years prior to verification. Reply Brief in Support of Motion for Judgment on the Agency Record by Chia Far Industrial Co., Ltd. ("Chia Far's Reply") at 2; *see* Chia Far's 56.2 Motion at 26. In fact, Plaintiff says that there was no record evidence to prove that the agency was still operative during the POR. Chia Far's Reply at 4–5. Plaintiff Chia Far claims that Commerce ignores the facts on record which show a normal reseller business relationship between Chia Far and LM.

Chia Far challenges Commerce's reliance on *Notice of Final Determination of Sales at Less than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan* ("Gas Turbo Determination"), 62 Fed. Reg. 24394, 24402–03 (May 5, 1997), which set out five factors for determining the existence of a principal/agent relationship. Chia Far argues that in that case there was a much

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[6] Since June 14 was a Thursday, the two business days allowed under 19 C.F.R. § 351.304(d)(1) allowed Allegheny until Monday, June 18, to refile its June 11, 2001, letter with Commerce: Allegheny thus submitted the redacted letter in a timely fashion on June 18, 2001.

[7] Chia Far references this statement in its 56.2 Motion at 25 n. 20: "Chia Far firmly believes the reason why Commerce used AFA against it is because of its May 17 response in which it said it 'never' had an agency relationship with this customer. That statement no doubt caused Commerce (and was certainly used by the petitioners to bolster their arguments), to question everything Chia Far said – even to the point of ignoring verified information!"

higher degree of control asserted by the producer on the end-customer, bypassing the reseller. Chia Far disputes Commerce's use of five Gas Turbo Determination criteria as well as the two additional criteria[8] seemingly added in the Memorandum for the Final Results. Chia Far argues that its "responses were based on its own data in the POR, not on a subjective interpretation imputing facts to Chia Far." Chia Far's 56.2 Motion at 20. Plaintiff claims that its briefs only responded to the five initial criteria and thus did not have the chance to represent itself adequately before Commerce. *Id.* at 21.

Allegheny contests Chia Far's assertion that it had no U.S. affiliates, and argues that Chia Far was affiliated with LM. Allegheny in its submissions points to a number of facts as well as the existence of the sole agency agreement that it submitted to Commerce on June 18, 2001, to substantiate its claim.

Pursuant to 19 U.S.C. § 1677(33)(G) (2001), an affiliate or an affiliated person is "[a]ny person who controls any other person and such other person." This statute further provides that "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."[9] 19 U.S.C. § 1677(33)(G). The control element is central as per 19 C.F.R. § 351.102(b) (2001),

> "affiliated persons" and "affiliated parties" have the same meaning as in section 771(33) of the Act. In determining whether control over another person exists, within the meaning of section 771(33) of the Act, the Secretary will consider the following factors, among others: corporate or family groupings; franchise or joint venture agreements; debt financing; and close

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[8] The seven criteria are: 1) the foreign producer's role in negotiating price and other terms of sale; 2) the extent of the foreign producer's interaction with the U.S. customer; 3) whether the agent/reseller maintains inventory; 4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; 5) whether the agent/reseller further process or otherwise adds value to the merchandise; 6) the means of marketing a product by the producer to the U.S. customer in the pre-sale period; 7) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transaction. Chia Far's 56.2 Motion at 20.

[9] The Statement of Administrative Action uses the same language: "if one person is legally or operationally in a position to exercise restraint or direction over another person." Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–465, at 838, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4174–45 ("SAA"). The SAA explains that this definition of control is a shift from the prior definition:

> The traditional focus on control through stock ownership fails to address adequately modern business arrangements, which often find one firm "operationally in a position to exercise restraint or direction" over another even in the absence of an equity relationship. A company may be in a position to exercise restraint or direction, for example, through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other.

Id.

> supplier relationships. The Secretary will not find that control exists on the basis of these factors unless the relationship has the potential to impact decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. The Secretary will consider the temporal aspect of a relationship in determining whether control exists; normally, temporary circumstances will not suffice as evidence of control.

See China Steel Corp. v. United States, 264 F. Supp. 2d 1339, 1350–51 (CIT 2003). When Commerce issued this regulation, which became effective July 1, 1997, it did not explain specifically the standards for finding "control" or "affiliated persons." *Antidumping Duties; Countervailing Duties* 62 Fed. Reg. 27,296, 27,297 (May 19, 1997). Commerce stated that it was "more appropriate" for Commerce to develop its practice regarding affiliation "through the adjudication of actual cases" on a case-by-case basis. *Id.*; *see also Ta Chen Stainless Steel Pipe, Inc. v. United States*, 23 CIT 804, 820 (1999).

In practice, in previous investigations, Commerce has stated that a principal/agent relationship may be determined from an agency agreement, but evidence of the parties' conduct may also be used by Commerce to determine whether the relationship exists. *See* Gas Turbo Determination, 62 Fed. Reg. at 24,403. Commerce also has said that in the absence of an explicit agreement, but when there exists a principal who has the potential to control pricing and/or the terms of sale through the end-customer, Commerce will find agency and thus affiliation. *See Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol from the Republic of South Africa*, 62 Fed. Reg. 61,084, 61,088 (Nov. 14, 1997) ("Furfuryl Alcohol"). But, as Commerce admitted when it promulgated the regulations, its determination of agency is purely on a case-by-case basis; thus, the court must consider whether the factors which Commerce uses are based on a permissible construction of the antidumping statute and regulation. *See China Steel Corp.*, 264 F. Supp. 2d at 1351.

In this case, Commerce has used a four part test to determine affiliation which is a reasonable interpretation of the statute and regulations.[10] Commerce states that the agency's "established practice is

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[10] There was some confusion in this case as to the exact set of factors Commerce used to arrive at its affiliation decision. In the Issues and Decision Memorandum, Commerce cited seven criteria that it said it "may" use to determine if an agency relationship exists and then says "for example" before citing the list:

1) the foreign producer's role in negotiating price and other terms of sale;

2) the extent of the foreign producer's interaction with the U.S. customer;

3) whether the agent/reseller maintains inventory;

4) whether the agent/reseller takes title to the merchandise and bears the risk of loss;

to collectively examine the following *four* principal factors" drawn from 19 C.F.R. 351.102 and from a previous investigation, Furfuryl Alcohol, 62 Fed. Reg. at 61,088:

> (1) the extent to which the foreign producer participates in negotiating price and other terms of sale with the end-customer;
>
> (2) whether the foreign producer participates directly in marketing the subject merchandise to the end-customer, and the end-customer has knowledge at the time of sale of the producer's identity;
>
> (3) the extent of the foreign producer's interaction with the U.S. customer on product testing and other technical matters;
>
> (4) the extent to which the foreign producer has direct contact with the end customer.

Defendant's Response at 21–28 (emphasis added).

In this case, applying the four part test, Commerce found adequate factual evidence that Chia Far was affiliated with LM under the terms of the statute and the regulations. Commerce found Chia Far and LM to be affiliated parties because of the "explicit principal/agent agreement" that Allegheny submitted on June 18, 2001, showing a principal/agent relationship starting at one point in time without a specific termination date.[11] Commerce notes that the sole agency contract was not controverted by Chia Far or any other party and when asked about the document, a Chia Far company official claimed to have " 'forgotten about the [sole agency contract']." *Id*. at 18 (citing the Verification Report at 7). In discussing the contract, Commerce states that Chia Far, other than through "naked assurances," did not give a convincing explanation of why it argued that the agreement was not in effect during the period of review and did not provide rebuttal information after verification that it had prom-

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> 5) whether the agent/reseller further processes of otherwise adds value to the merchandise;
>
> 6) the means of marketing a product by the producer to the U.S. customer in the pre-sale period;
>
> 7) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transaction.

Issues and Decision Memorandum at 26 (citing Gas Turbo Determination, 62 Fed. Reg. at 24,402–03). During oral argument held on April 23, 2004, the court asked Commerce to elucidate what criteria or factors it used to come to its conclusion regarding affiliation. Commerce stated that it used a four part test while using the "seven factors as exemplary." Since the seven criteria as well as the four factors are in accordance with 19 C.F.R. § 351.102 and Commerce provided a satisfactory explanation for its procedures during oral argument, the court upholds its determination.

[11] Chia Far admitted during the June 23, 2004, oral argument that there was no explicit document that evidenced the termination of the explicit principal/agency agreement.

ised. *Id*. at 20–21. While Chia Far argued to Commerce that the absence of commission payments in the ledgers showed that the sole agency ended and that no such payments were made after the middle of 1995 both in its brief and during the April 23, 2004, oral argument, Commerce responded that the ledgers were not dispositive because the customer could have been "compensated in other ways." *Id*. at 21.

In addition to the explicit principal/agency agreement, Commerce identified correspondence concerning material terms of sale between LM and Chia Far which identified the end-customer, unlike Chia Far's transactions with other U.S. customers. According to Commerce, the end-customer knew of Chia Far's identity and Chia Far played an active role in negotiations with the end-customer. For example, Commerce states in the verification report that in some correspondences in 2001 from Chia Far address Mr. Kung, President of LM, as "[Uncle Steve]" and another employee of the company, Jill Tale of Franklin, as "[Sister Jill]," both of which Chia Far exemplifies as terms of "familiarity and affection and in this context, not terms of a [familial bond]." Verification Report at 5. Commerce found Chia Far to be affiliated with LM because of the degree of its involvement with the subject merchandise sales process of LM and with LM's marketing of the subject merchandise, and its high degree of involvement with LM's customers during the period of review. Defendant's Response at 12; *see Ta Chen Stainless Steel Pipe*, 23 CIT at 805–18.

c

Commerce Acted in Accordance with Law in Affording Lucky Medsup's Name Business Proprietary Treatment

Allegheny argues that LM's name should have been disclosed because LM was identified as Chia Far's affiliate and agent, not customer. Allegheny's 56.2 Motion at 14–15.

Despite its finding of a principal/agent relationship between LM and Chia Far, Commerce denied Allegheny's request to make LM's name public. Commerce argued that, under 19 C.F.R. § 351.304(a)(2)(I), there is no limitation on a respondent's rights to protect the names of customers who also have other commercial roles, such as agent. In this case, Commerce argued there was no reason to believe that LM was no longer acting as a customer even if it was affiliated with Chia Far. LM's participation in other commercial roles as selling agent in Chia Far's importation of the subject merchandise did not eclipse Commerce's obligation to keep confidential the identity of Chia Far's largest customer. Defendant's Response at 15. Chia Far said during the April 23, 2004, oral argument that it agreed with Commerce that LM's name should be afforded proprietary treatment.

Commerce's decision, finding that LM's name should remain confidential, is in accordance with the law. Pursuant to 19 U.S.C. § 1677f(b)(2) (2002),

> [if the administering authority or the Commission determines, on the basis of the nature and extent of the information or its availability from public sources, that designation of any information as proprietary is unwarranted, then it shall notify the person who submitted it and ask for an explanation of the reasons for the designation. Unless that person persuades the administering authority or the Commission that the designation is warranted, or withdraws the designation, the administering authority or the Commission, as the case may be, shall return it to the party submitting it.
>
> In a case in which the administering authority or the Commission returns the information to the person submitting it, the person may thereafter submit other material concerning the subject matter of the returned information if the submission is made within the time otherwise provided for submitting such material.

There are two applicable regulations for the treatment of business proprietary material in this context. First, 19 C.F.R. § 351.105(c)(6) (2002) establishes that Commerce normally will consider factual information to be business proprietary information, if so designated by the submitter: "[n]ames of particular customers, distributors, or suppliers." Second, 19 C.F.R. § 351.304(a)(2)(I) (2002), provides that Commerce "will require that all business proprietary information presented to, or obtained or generated by, [it] during a segment of a proceeding be disclosed to authorized applications," except for "[c]ustomer names submitted in an investigation." Here, LM's name has been fully protected pursuant to an administrative protective order because LM is Chia Far's largest U.S. customer. Even though Commerce has found that LM is an affiliate of Chia Far, that does not mean that it cannot keep its confidential treatment designated as an "affiliated customer."[12] LM's potential role as selling agent does not prejudice its classification as customer, and thus, warrants it protection as business proprietary information. Commerce acted in accordance with the law in affording LM confidential treatment.

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[12] In *Timken Co. v. United States*, 240 F. Supp. 2d 1228 (CIT 2002) and *Tung Mung Dev. Co. v. United States*, Slip Op. 01–83, 2001 Ct. Intl. Trade LEXIS 94 (July 3, 2001), customers who are affiliates are referred to as "affiliated customers" and have been give business proprietary treatment in the public, published Slip Opinions.

2

Commerce Accurately Applied Total Adverse Facts Available to Sales Made to Other U.S. Customers and its Decision Is Supported by the Evidence on the Record.

Chia Far claims that it was truthful in its responses to all of Commerce's requests for information and cooperated to the best of its ability, thus not warranting the use of adverse facts available ("AFA") by Commerce. Chia Far claims that its responses were neither misleading nor did it prevent Commerce from exploring affiliation through examining the principal/agent relationship in a timely fashion. Plaintiff argues that "simple inadvertence is insufficient for application of an adverse inference," thus arguing that Commerce was not justified in using adverse facts available. Chia Far's 56.2 Motion at 26 (citing *Nippon Steel Corp. v. United States*, 24 CIT 1158, 1171 (2000)). Conceding that one statement in its response was misleading, Chia Far claims that this statement and others like it at verification were not intended to mislead Commerce. Chia Far claims, instead, that its President did not recall the existence of the document signed in 1994 that established the principal/agent relationship between it and LM. In fact, Chia Far states: "[w]ho among us remembers every document we signed seven years ago? Particularly when such a document ceased to be effective five years ago!" Chia Far's 56.2 Motion at 25. Chia Far says that it "*simply could not give what it did not possess*." Chia Far's Reply at 12 (emphasis in original). Chia Far further argues that Commerce never notified it that its submissions were deficient or that its deficiencies would lead to the use of AFA.

Furthermore, Chia Far argues that it failed to respond to Allegheny's June 18, 2001, letter which proffered the sole agency contract because Commerce refused to accept the pre-POR 1994–1998 commission ledgers, because they were pre-POR; so, "in Chia Far's mind there was no point to submitting the data." Chia Far's 56.2 Motion at 11. Chia Far further claims that "it could not 'have complied' with Commerce's demand that it report its principal/agent relationship in the POR – there was simply nothing to report!" Chia Far's Reply at 4. Chia Far recorded all of its commission payment, which it paid to agents but not customers, in its commission ledgers; if Commerce had paid more attention to this, argues Plaintiff, Chia Far's position would have been vindicated. *Id.* at 13.

Allegheny claims that Commerce correctly applied AFA, because Chia Far failed to meet its burden of production and in turn to aid in creating an adequate record. Allegheny argues that the record shows sufficient evidence that Chia Far and LM had a principal/agent relationship and did not provide to Commerce information concerning sales to the first unaffiliated U.S. customer. Allegheny claims that by Chia Far failing to submit its constructed export price ("CEP") sales even in its June 4, 2001, supplemental response, it did not cooperate

to the best of its ability, and thus greatly impeded Commerce's investigation. Furthermore, Allegheny asserts that, under 19 U.S.C. § 1677m(d), Commerce gave Chia Far adequate opportunities to revise its response and thus imposed AFA in accordance with the law.

Commerce argues that it correctly fulfilled the preconditions for imposing AFA because it found that Chia Far failed to cooperate by not acting to the best of its ability, pursuant to 19 U.S.C. § 1677e(b). When Commerce determines that a response to a request for information does not comply with the request, 19 U.S.C. § 1677m(d) provides for Commerce to inform the party of the deficiency and give the party the chance to remedy or explain the deficiency. Commerce, here, claims that it had no reason to believe or suspect affiliation between Chia Far and the U.S. Customer, LM. Even though Commerce had no knowledge of Chia Far's affiliation with LM, Commerce had repeatedly asked Chia Far for such information throughout the review, but Chia Far had stated in its initial, supplemental, and follow-up supplemental responses that it was not affiliated with any U.S. customers.

After Allegheny submitted the sole agency contract to Commerce in its letter, dated June 18, 2001, Commerce points out that "[t]he record clearly demonstrates that Chia Far failed to provide Commerce with a copy of its sole [agency agreement with LM] that evidenced Chia Far's actual or potential control over its U.S. customer, [LM]." Defendant's Response at 13. Commerce found that Chia Far could have easily provided the document because it was in the best position to know its own business and respond to the request. *Id.* at 31 (citing Issues and Decision Memorandum at 32). In addition, Chia Far did not rebut Allegheny's June 18, 2001, submission though it had told the verification team that it was going to do so. Chia Far made unsubstantiated comments that the verification team's comments dissuaded it from producing the documents, but Commerce argues it was really because, as Chia Far stated in its 56.2 Motion, "it could not find the hoped-for document." Defendant's Response at 35. Commerce concluded that the use of AFA was strongly justified when Chia Far asserted that it had "forgotten" about the sole agency agreement, ignored specific requests for producing any contracts with LM initially and in subsequent letters[13], and failed effectively to rebut the continued legal effect of the document, even with notice that the contract was material to the margin's analysis. *Id.* at 13, 29.

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[13] Commerce describes in a footnote that Chia Far states in its brief that because LM's name was double-bracketed it "did not know exactly what Commerce was attempting to verify from Petitioner's June 18 submission." Defendant's Response at 32. Commerce claims, however, that this claim is contradicted by Chia Far's May 17, 2002, letter and its 56.2 Motion as it claims that its President could not remember signing the contract. *Id.*

Chia Far's consistent denials of a principal/agent relationship coupled with its failure to rebut, clarify, or correct Allegheny's June 18, 2001, submission, Commerce argues, establishes the existence of a principal/agent relationship between Chia Far and LM. Thus, because Chia Far did not provide Commerce with accurate and complete information and instead reported inaccurate and misleading information, Commerce determined that there was noncompliance and employed the use of adverse facts available.

Commerce is obligated to calculate antidumping margins in the most accurate way possible. *Rubberflex SDN. BHD. v. United States*, 23 CIT 461, 469 (1999). To this end, the respondent must provide Commerce with the most accurate, credible, verifiable information. *See Gourmet Equip. Corp. v. United States*, 24 CIT 572, 574 (2000). Ultimately, the burden of creating an adequate record lies with the respondents, not Commerce. *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 16 CIT 931, 936 (1992). If Commerce determines that it is unable to verify the respondent's submission, it may substitute for the information submitted by the respondents, facts otherwise available. 19 U.S.C. § 1677e(a)(2)(A) & (D) (2001)[14]. The imposition of facts available in trade remedy proceedings is the "only incentive to foreign exporters and producers to respond to Commerce questionnaires." SAA at 868. The requirements of 19 U.S.C. § 1677e(a), however, are subject to 19 U.S.C. § 1677m(d) (2001)[15]:

> If the administering authority or the Commission determines that a response to a request for information under this subtitle does not comply with the request, the administering authority or the Commission (as the case may be) shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either–
>
> (1) the administering authority or the Commission (as the case may be) finds that such response is not satisfactory, or

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[14] 19 U.S.C. § 1677e(a)(2)(A) & (D) provide that if an interested party or any other person "withholds information that has been requested by the administering authority or the Commission under this subtitle" or "provides such information but the information cannot be verified as provided in section 1677m(I) of this title, the administering authority and the Commission shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle."

[15] Also pursuant to 19 U.S.C. § 1677e(a), "the administering authority and the Commission shall, subject to section 1677m(d), use the facts otherwise available in reaching the applicable determination under this subtitle."

> (2) such response is not submitted within the applicable time limits,
>
> then the administering authority or the Commission (as the case may be) may, subject to subsection (e), disregard all or part of the original and subsequent responses.

See Ta Chen Stainless Steel Pipe, 23 CIT at 819. If Commerce acts in accordance with its statutory requirements for the imposition of total facts available, but finds that

> an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from –
>
> (1) the petition;
>
> (2) a final determination in the investigation under this subtitle,
>
> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
>
> (4) any other information placed on the record.

19 U.S.C. § 1677e(b); *See Gourmet Equip.*, 24 CIT at 577. Commerce is under the obligation to articulate its reasons for finding that a party did not act to the best of its ability and explain why the information missing is significant to the review. *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 839 (1999); *see Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). This court will uphold Commerce's affirmative finding that the party could have complied with the information request if it is based on substantial evidence. *See Pac. Giant, Inc. v. United States*, 223 F. Supp. 2d 1336, 1342 (CIT 2002).

When a respondent fails to respond to Commerce's requests and the information it requested is material to the investigation, this court previously has found such behavior to be unreasonable and the use of AFA appropriate. *See Branco Peres Citrus, S.A. v. United States*, 173 F. Supp. 2d 1363, 1371–74 (CIT 2001); *Am. Silicon Tech. v. United States*, 240 F. Supp. 2d 1306, 1308–1311 (CIT 2002). Furthermore, it is within Commerce's discretion to choose the sources and facts on which it will rely to support its use of AFA. *F.Lii de*

Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F. 3d 1027, 1032 (Fed. Cir. 2000). At issue in this case is whether Commerce's levying of AFA is in accordance with the law as the use of total facts available is not in dispute.

Here, Commerce acted in accordance with the law. From the inception of this investigation, Chia Far consistently denied any agency relationship with LM. It was only during verification, subsequent to Allegheny's submission of the sole agency contract between Chia Far and LM in its June 18, 2001, letter to Commerce, that Chia Far "acknowledged the existence of [the contract] and stated the company's denial of the [contract's existence] was inadvertent." Verification Report at 7. The court agrees with Commerce that it appears that Chia Far possessed "actual notice" of this exclusive agency contract that was material to Commerce's margin analysis and failed to submit the information, even though it was in the best position to know its own business operations. Defendant's Response at 29. In a questionnaire, Commerce even specifically asked Chia Far to produce information concerning any contracts or special arrangement with LM and in its response (in which it seems to have acknowledged the request), Chia Far stated that it and "this customer [LM] do not have, did not have in the POR, and did not have prior to the POR a principal/agent relationship, either in fact (via an agency contract) or in theory." Chia Far's May 17 Letter to Commerce.

Commerce presented Chia Far an additional opportunity, its May 25, 2001, supplemental questionnaire, to respond to Allegheny's allegations of affiliation and present this information to Commerce; Commerce even asked specific questions to Chia Far concerning this matter. Nevertheless, in its June 4, 2001, response to the supplemental questionnaire, Chia Far, stated once again that it "had no contracts with [Lucky Medsup] which established any relationship other than that of customer, i.e., an order confirmations [sic] establishing contract for sales." Supplemental Questionnaire Response of Chia Far Industrial Factory Co., Ltd. (June 4, 2001) at 7. Chia Far's justifications for not providing the information are insufficient. Whether or not it had "forgotten" about the contract or its President did not recall signing such a document in 1994, the failure to tell Commerce the truth is inexcusable even if it was "inadvertent."

Commerce gave Chia Far adequate opportunities to present this information and rebut Allegheny's June 18, 2001, as discussed *supra*; it was within Commerce's discretion as to whether it would consider the commission ledgers that Chia Far attempted to present as rebuttal during verification. Thus, this court finds that Commerce acted in accordance with law in its imposition of AFA.

3
Commerce Accurately Applied Total Adverse Facts Available to Sales Made to Other U.S. Customers and its Decision Is Supported by the Evidence on the Record.

Chia Far also challenges the 21.10% AFA rate applied by Commerce, claiming that the rate is incorrect and punitive.

Allegheny, however, while arguing that Commerce correctly imposed total AFA, claims that Commerce did not impose the correct total AFA *rate* on Chia Far, alleging the 21.10% was insufficient as a deterrent. Allegheny deems insufficient Commerce's explanation for imposing the 21.10% *ad valorem* rate that "[t]hough nothing on the record . . . indicates that the rate of 34.95% is unreliable per se, we agree with Chia Far that, absent an allegation of middleman dumping, another dumping margin may be more appropriate." Issues and Decision Memorandum at 37. Allegheny argues that 19 U.S.C. § 1677e(b) charges Commerce "to employ facts adverse enough to create a proper deterrent to non-cooperation with its antidumping investigations and reviews, while still achieving a reasonable margin," but claims that the 21.10% rate imposed by Commerce does not meet the goals of the statute. Allegheny's 56.2 Motion at 16 (citing *F.lli De Cecco*, 216 F.3d at 1032. Petitioners bolster their assertions by highlighting Chia Far's "outright nonresponsiveness" and "deception" in providing information during the administrative process – they claim that Plaintiff's general reticence warrants the use of AFA and the higher dumping rate. Lastly, concerning the imposition of total AFA on all of Chia Far's U.S. sales and U.S. customers, Petitioners argue that Commerce correctly levied total AFA on all U.S. sales to all Chia Far's U.S. customers as LM made up such a large percentage of its U.S. sales; the fact that Chia Far was reticent about 92% of its U.S. sales, argue Petitioners, warrants such a blanket rate.

Commerce defends the application of the 21.10% margin on Chia Far that it had placed on YUSCO in the original investigation, *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Sheet and Strip in Coils from Taiwan*, 64 Fed. Reg. 30,592, 30,599 (June 8, 1999) ("Final Determination 1999").[16] Commerce

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[16] Defendant stated in its Response at 40 that

> [i]n this case, Commerce's choice of a 21.10 percent dumping for its application of an adverse inference to Chia Far's sales represents the "all others" margin from the original antidumping investigation from Taiwan. *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Ste Sheet and Strip from Taiwan*, 64 Fed. Reg. 30592 (June 8, 1999).

Defendant further said that:

> Commerce properly exercised its discretion when it decided that a rate of 21.10% was the "most appropriate basis for facts available" with respect to Chia Far. *Issues and Decision Memo* at 37. PD at 212; fiche 84; frame 31; Tab 18. That rate was derived

claims that the rate it chose is correct because it has "broad discretion to choose which sources and facts" on which it will rely and here it found the rate was "rationally related to sales of the subject merchandise and would further encourage Chia Far's cooperation in the future." Defendant's Response at 14. The rate assigned to Chia Far is based on "secondary information"[17] because Chia Far had submitted inaccurate and unuseable sales information. Under the SAA, Commerce is supposed to corroborate the information to ensure the probative value of the evidence and in this case the information was, Commerce argues, corroborated in the less than fair value investigation in which it examined the accuracy and adequacy of the price-to-price information in the petition and corroborated the price-to-price petition comparison.

In applying the discretionary rate, Commerce explains that the 34.95% rate is a weight-averaged combination rate of 21.10% assigned to YUSCO in the original investigation plus a middleman dumping rate of 15.34% which had been assigned to YUSCO's sales through Ta Chen. Commerce applied the 21.10% rate because it verified that Chia Far had no sales through a middleman during the POR. Defendant's Response at 41. Commerce disagrees with Chia Far, however, concerning the applicability of *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Partial Rescission of Administrative Reviews, and Notice of Intent To Revoke Orders in Part*, 66 Fed. Reg. 8,931,

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from the original investigation, where Commerce applied a combination rate of 34.95% to respondent YUSCO. The rate was a weight-averaged combination of the 21.10% rate that applied to YUSCO, and a separate dumping rate of 36.44% assigned to sales by YUSCO through a middleman, Ta Chen. *Id.* Commerce obtained the 36.44% rate applied to YUSCO by adding YUSCO's rate of 21.10% to the middleman dumping rate of 15.34% for YUSCO sales through Ta Chen. In this case, Commerce properly decided not to apply the 15.34% middleman dumping rate to Chia Far as adverse facts available because Commerce verified that Chia Far made no sales to the U.S. through a middleman during the POR.

Id. at 41.

In the Issues and Decision Memorandum at 37, Commerce stated that

> [t]he rate of 34.95% is a weight-averaged combination rate of 21.10% assigned to YUSCO in the original investigation and a middleman dumping rate of 15.34% assigned to YUSCO's sales through Ta Chen. . . . [W]e are assigning Chia Far as AFA 21.10%, the rate assigned to YUSCO in the original investigation.

Upon questioning regarding this discrepancy by the court at oral argument, Commerce stated that the court had "pointed out an error in our brief." Defendant stated the 21.10% erroneously referenced in its brief was the dumping rate specifically for YUSCO minus the effective middleman dumping. Defendant then orally corrected the error.

[17] "Secondary information" is described in the SAA at 870 as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."

8,933–34 (Feb. 5, 2001) as the appropriate basis for facts available and assigned the AFA 21.10% rate granted to YUSCO during the original investigation.

The Federal Circuit has stated that it is within Commerce's discretion to choose the sources and facts on which it draws an adverse inference. *F.Lii De Cecco*, 216 F.3d at 1032. The AFA rate, additionally, is supposed to be an accurate estimate of the actual rate combined with a deterrent for non-compliance, particularly with a view to future proceedings. *Id.*; *see Nat'l Steel Corp. v. United States*, 20 CIT 100, 103–04 (1996). Commerce's discretion when dealing with uncooperative respondents is broad. *Ferro Union, Inc. v. United States*, 23 CIT 178, 204–05 (1999). In selecting a reasonable AFA rate, however, Commerce must balance the statutory objectives of finding an accurate dumping margin and inducing compliance, rather than creating an overly punitive result. *Timken Co. v. United States*, 354 F.3d 1334, 1345 (Fed. Cir. 2004); *see F.Lii De Cecco*, 216 F.3d at 1032. Thus, Commerce's discretion is not unbounded. *F.Lii de Cecco*, 216 F.3d at 1032.

Pursuant to 19 U.S.C. § 1677e(b), Commerce may rely on information derived from the petition, a final determination in an investigation, previous reviews, and any other information placed on the record to draw its adverse inference. Echoing the statute, the applicable regulation, 19 C.F.R. § 351.308(c) (2001), states that an adverse inference may include reliance on:

> (1) Secondary information[18], such as information derived from:
>
> (I) The petition;
>
> (ii) A final determination in a countervailing duty investigation or an antidumping investigation;
>
> (iii) Any previous administrative review, new shipper review, expedited antidumping review, section 753 review, or section 762 review; or
>
> (2) Any other information placed on the record.

Commerce is also bound by a corroboration[19] requirement pursuant to 19 U.S.C. § 1677e(c):

> [w]hen the administering authority or the Commission relies on secondary information rather than on information obtained

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[18] As stated above, "secondary information" is described in the SAA at 870 as "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under section 751 concerning the subject merchandise."

[19] "Corroboration" requires Commerce to assess that the information it is using "has probative value." SAA at 870.

> in the course of an investigation or review, the administering authority or the Commission, as the case may be, shall, to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal.

The applicable regulation is 19 C.F.R. § 351.308(d):

> Under section 776(c) of the Act, when the Secretary relies on secondary information, the Secretary will, to the extent practicable, corroborate that information from independent sources that are reasonably at the Secretary's disposal. Independent sources may include, but are not limited to, published price lists, official import statistics and customs data, and information obtained from interested parties during the instant investigation or review. Corroborate means that the Secretary will examine whether the secondary information to be used has probative value. The fact that corroboration may not be practicable in a given circumstance will not prevent the Secretary from applying an adverse inference as appropriate and using the secondary information in question.

This corroboration requirement intends for the AFA rate to be a reasonably accurate estimate of the respondent's actual rate with a built-in increase intended as a deterrent, but a tempered deterrent. *F.Lii de Cecci*, 216 F. 3d at 1032.

In this case, the 21.10% rate imposed by Commerce is in accordance with the law. Commerce derived this 21.10% rate by taking the 34.95% weight-averaged combination rate assigned to YUSCO in the original investigation minus the middleman dumping rate YUSCO had been assigned, since Commerce found no middleman dumping for Chia Far. *See* Final Determination 1999, 64 Fed. Reg. at 30592. Taking YUSCO's rate was consistent with 19 U.S.C. § 1677e(b)(2) and 19 C.F.R. § 351.308(c)(1)(ii), which allow Commerce to rely on a "final determination" in the "investigation" at issue. Because Commerce used YUSCO's margin from the original investigation, 19 U.S.C. § 1677e(c) and 19 C.F.R. § 351.308(c) regard this information as secondary information which must meet the corroboration requirement. The information Commerce used to arrive at Chia Far's AFA rate was already corroborated in the original investigation. Issues and Decision Memorandum at 37; Defendant's Response at 41. Commerce may act within its discretion so long as the rate chosen has a relationship to the actual sales information available. *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed. Cir. 2002). Furthermore, the court agrees with Commerce that the AFA rate imposed on Chia Far is reasonable given the circumstances of the AFA imposition.

B
YUSCO

1
Commerce's Determination Not to Apply AFA to YUSCO Is in Accordance with Law

Allegheny argues that YUSCO's classification of sales by market is severely inadequate and thus Commerce was unable to make a fair dumping analysis based on that information. Allegheny claims that Commerce should apply AFA in this review as it did previously in the original investigation because YUSCO kept the same internal sales order classification system which was deemed insufficient by this court in *Tung Mung Dev. Co. v. United States*, 25 CIT 752 (2001) and *Allegheny Ludlum Corp. v. United States*, 24 CIT 452 (2000). Specifically, Allegheny states that YUSCO knew or had reason to know that some of its so-called UZ sales through Ta Chen, its middleman, and its U* sales through its affiliated parties, Yieh Hsing and Lien Kang, exported to third countries were misclassified as home market sales. Allegheny thus suggests that YUSCO should manually reclassify all UZ and U* sales as home market sales or exported subject merchandise. Allegheny contends that Commerce discovered at verification that YUSCO records information required to classify sales according to their destination and end use, but withheld that information. By continuing to use the same sales order system, Allegheny posits, YUSCO misrepresents sales.

YUSCO, on the other hand, argues that the use of AFA must be rejected because it accurately reported its home market sales in light of Commerce's and this court's holding concerning the original investigation in *Tung Mung* and *Allegheny Ludlum*. With regard to the accuracy of its reporting, YUSCO did not rely solely on its internal order system to identify the appropriate classification of its sales, but instead used it "only to make the first cut of identifying the potential universe of sales that need[ed] to be reported." Defendant-Intervenor Yieh United Steel Corp.'s Response Brief in Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("YUSCO's Response to Allegheny's 56.2 Motion") at 15. In the previous investigation, Commerce had deemed YUSCO uncooperative because of its sole reliance on its internal order system and its withholding of the U* and UZ sales from its home market sales database. *Id.* at 16. Here, YUSCO's sales classification and reporting withstood the scrutiny of Commerce's verification process.

Commerce agreed with YUSCO citing that YUSCO accurately reported the necessary home market sales required for the calculation of the dumping margin. Commerce explained that its verification methodology of random sampling, which it has used for "decades," consists of selecting individual sales from the database and requiring the respondent to produce supporting documentation; the

amount of resources required to test every entry would not be feasible. Defendant's Response at 44–45. Through sampling, Commerce claims that it thoroughly tested the accuracy of YUSCO's home market reporting by looking at the home market database. *Id.* at 46. Commerce found that YUSCO rectified the reporting deficiencies that were in the original investigation in accordance with the April 24, 2001, supplemental questionnaire, *Antidumping Administrative Review on Stainless Steel Sheet and Strip in Coils from Taiwan: Questionnaire regarding Designation of Home Market Sales*, and *Allegheny Ludlum*. Issues and Decision Memorandum at 7. Commerce argues, contrary to Allegheny's assertions, that it verified that YUSCO did not misreport third country sales as home market sales. Furthermore, Commerce appeared to find no discrepancies with the facts provided by YUSCO during verification, so Commerce agreed with YUSCO that the use of AFA was unwarranted.

Commerce has broad discretion to develop and select its methodology for verification as long as there is substantial evidence on the record to support the choice. See *Hercules*, 11 CIT at 726; *see also Floral Trade Council v. United States*, 17 CIT 392, 399 (1993); *Am. Alloys*, 30 F.3d at 1475. "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620. This court may not reweigh the evidence or substitute its own judgment for that of the agency. *Fuyao Glass Indus. Group Co. v. United States*, Slip. Op. 03–169 at 28, 2003 Ct. Int'l Trade LEXIS 171 (Dec. 18, 2003) (citing *China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 264 F. Supp. 2d 1229, 1240 (2003)). In applying the "substantial evidence" standard, "the court affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus. v. United States*, 22 CIT 387, 389 (1998) (citing *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology. *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

In this case, Commerce used its established sampling verification methodology, selecting at random individual sales from the database and requiring the respondent to support the data with original, contemporaneous documents. Defendant's Response at 44; *See, e.g., Mannesmannrohren-Werke*, 23 CIT at 826. Pursuant to 19 U.S.C.

§ 1677f–1 (2001)[20], Commerce has the authority to select the appropriate samples as long as the samples are "representative of the transactions under investigation." *See Federal-Mogul Corp. v. United States*, 20 CIT 234, 253 (1996). In addition, the Court has consistently recognized that Commerce has been given broad discretion in its sample selection methodology. *Id.*; *Nachi-Fujikoshi Corp. v. United States*, 19 CIT 914, 918 (1995). Commerce here used sampling to verify YUSCO's sales listing and thus confirmed that YUSCO's reporting methodology did not yield errors or misclassified sales. Commerce determined that YUSCO rectified its reporting deficiencies with respect to U* and UZ sales in compliance with Commerce's April 24, 2001, supplemental questionnaire. Contrary to Allegheny's assertions, at verification, Commerce "conducted extensive tests of YUSCO's reported home market databases in order to ascertain the accuracy and completeness of YUSCO's reporting" and found no discrepancies. Issues and Decision Memorandum at 7. Thus, Commerce's conclusion that YUSCO's reporting methodology stood muster and its decision to not support the use of AFA against YUSCO is in accordance with law.

2
Commerce's Determination Not to Collapse YUSCO and its Affiliates in the Home Market Is in Accordance with Law

Allegheny argues that Commerce should collapse YUSCO and certain affiliated parties, Yieh Mau Corporation ("Yieh Mau") and Yeoh Yih Steel Company Limited ("Yeoh Yih"), in the home market under 19 C.F.R. 351.401(f). Allegheny states that Commerce properly found that YUSCO, Yeoh Yih, and Yieh Mau are affiliated parties. Allegheny's 56.2 Motion at 47. In addition to being affiliates, however, Allegheny argues that YUSCO's and its affiliates' relationship fulfilled the criteria for collapsing.

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[20] 19 U.S.C. § 1677f–1 states that

> (a) In general. For purposes of determining the export price (or constructed export price) under section 1677a of this title or the normal value under section 1677b of this title, and in carrying out reviews under section 1675 of this title, the administering authority may–
>
> (1) use averaging and statistically valid samples, if there is a significant volume of sales of the subject merchandise or a significant number or types of products, and
>
> (2) decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise.
>
> (b) Selection of averages and samples. The authority to select averages and statistically valid samples shall rest exclusively with the administering authority. The administering authority shall, to the greatest extent possible, consult with the exporters and producers regarding the method to be used to select exporters, producers, or types of products under this section.

YUSCO argues that Commerce was correct to refrain from collapsing it with its affiliates. YUSCO stresses that the evidence shows that there was no *significant* potential of manipulation of production or price between itself and Yieh Mau and Yeoh Yih, respectively. *See* YUSCO's Response to Allegheny's 56.2 Motion at 23 (emphasis added).

Commerce determined that the record evidence did not warrant collapsing YUSCO and its affiliated parties. Commerce prepared a document entitled *Decision Memorandum: Whether to Collapse Yieh United Steel Corporation ("YUSCO") and Yieh Mau Corporation ("Yieh Mau") and Yeoh Yih Steel Company Limited Into a Single Entity*, from Edward C. Yang, Director Office 9, for Joseph A. Spetrini, Deputy Assistant Secretary for Import Administration, Group III (Feb. 4, 2002), Defendant's Confidential Version Appendix at 19 ("Collapsing Memorandum"), to examine these issues.[21] Commerce considered the familial and equity relationships as well as the production facilities and capabilities of each company in its collapsing analysis. Furthermore, its verification did not reveal any inconsistencies in the information submitted concerning YUSCO's corporate structure nor any further evidence warranting collapsing of the entities. Issues and Decision Memorandum at 19. Commerce found that the record evidence showed that no manipulation of price or production would be possible without substantial retooling. Thus, Commerce determined that it would not collapse YUSCO and its affiliated parties.

Commerce's decision to not collapse YUSCO and its affiliates is supported by substantial evidence. Pursuant to 19 U.S.C. § 1677(33) and 19 C.F.R. § 351.401(f) (2001), Commerce may assign multiple affiliated entities a single antidumping margin in antidumping investigations; it "collapses" the companies into one and then calculates a single weighted-average margin for those affiliated companies. *Koenig & Bauer-Albert AG v. United States*, 24 CIT 157, 158 (2000); *see Queen's Flowers de Colom. v. United States*, 21 CIT 968, 971 (1997); *see also Import Administration Antidumping Manual*, U.S. Department of Commerce, Chapter 7 at 24–25 (1997). "Commerce's collapsing practice has been approved by the court as a reasonable interpretation of the antidumping statute." *Koenig & Bauer-Albert AG*, 24 CIT at 160.

When Commerce examines companies, it first determines whether parties are affiliated under 19 U.S.C. § 1677(33). *See Ta Chen Stain-*

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[21] Commerce states in order to collapse companies it must find: first, that the companies are affiliated under 19 U.S.C. § 1677(33) and second, under 19 C.F.R. § 351.401(f), that the affiliated entries have production facilities for similar or identical products so that substantial retooling would be unnecessary to restructure manufacturing priorities and that there exists the significant potential for manipulation of price or production through the affiliates. Collapsing Memorandum at 1.

less Steel Pipe, 23 CIT at 808. After finding affiliation, Commerce then applies the collapsing regulation, 19 C.F.R. § 351.401(f), which provides:

> (1) In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.
>
> (2) In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:
>
> (I) The level of common ownership;
>
> (ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and
>
> (iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

Koenig & Bauer-Albert AG, 24 CIT at 159 n. 4; *Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1362 n. 4 (2000). Commerce thus looks to see whether producers share "production facilities for similar or identical products." 19 C.F.R. § 351.401(f)(1); *Allied Tube*, 24 CIT at 1374. Finally, Commerce determines whether one affiliated party has the "significant potential for the manipulation of price or production" of the other. 19 C.F.R. § 351.401(f)(1); *see Allied Tube*, 24 CIT at 1374. For determining "significant potential for manipulation," the regulation states that Commerce "may consider" factors such as level of common ownership, presence of common board members, and the extent to which the companies are intertwined by examining sales information, production and pricing decisions, shared facilities or employees, or significant transaction between the companies. *Allied Tube*, 24 CIT at 1374; *see* 19 C.F.R. § 351.401(f)(2). While the list is not exhaustive, Commerce must determine that there is more than "mere affiliation" between the companies. *AK Steel Corp. v. United States*, 22 CIT 1070, 1080 n. 22 (1998), *aff'd in part, rev'd on other grounds*, 226 F.3d 1361 (Fed. Cir. 2000).

First, in the Final Determination 1999, 64 Fed Reg. at 30,592, Defendant found affiliation existed between YUSCO and Yieh Mau within the meaning of 19 U.S.C. § 1677(33). In its Section A Questionnaire Response of September 28, 2000, YUSCO reported Yieh

Mau and Yeoh Yih as affiliated parties. Collapsing Memorandum at 2. Commerce, thus, established the first part of the collapsing analysis.

Second, concerning the elements of 19 C.F.R. § 351.401(f), Allegheny argues that YUSCO and its affiliates (1) shared a common level of ownership; (2) shared common board members whose family connection constituted "evidence of control"; (3) had overlapping production capabilities as both processes convert stainless steel black coils into the subject merchandise; (4) had intertwined operations given the family control and sale of coiled sheet and strip and stainless steel black products between them, respectively. Allegheny's 56.2 Motion at 47. Allegheny claims that Commerce's reasoning, in not determining that the "totality of the circumstances" warranted collapsing of the two entities, is not supported by substantial evidence. *Id.* at 47–48.

YUSCO claims that Allegheny's analysis focuses disproportionately on certain factors. It argues that Allegheny ignores that Commerce and this court have determined that collapsing should occur based on the "totality of circumstances." YUSCO's Response to Allegheny's 56.2 Motion at 24.

Commerce examined YUSCO's two affiliates, Yieh Mau and Yeoh Yih, separately. Commerce found that Yieh Mau is a "finishing operation which performs slitting, edge trimming, grinding, and polishing of cold-rolled coils" and "does not have the production capability to produce stainless steel sheet and strip billets or hot-rolled coil; therefore, it is not regarded as producer of the subject merchandise." Collapsing Memorandum at 4. Because of the nature of Yieh Mau's production facilities and the type of product it manufactures, Commerce found that substantial tooling would be required for Yieh Mau to produce the stainless steel sheet and strip in coils that YUSCO produces. Commerce thus terminated the analysis with respect to Yieh Mau.

With regards to Yeoh Yih, Commerce determined that while YUSCO and Yieh Yih both perform "annealing & pickling, plate shearing, shearing, and solution hot-treatment, shot blasting and leveling" on their production lines, YUSCO also "performs slab casting, hot rolling, cold rolling, skin passes and tension leveling." *Id.* at 5. Because of their differences in capacity, however, Commerce determined that Yieh Yih would require a cold-rolling mill to fulfill the stipulations of the regulation and this would be constitute substantial retooling. Defendant's Response at 48–50. Therefore, Commerce found that Yeoh Yih did not meet the production facility/substantial retooling element of the collapsing analysis.[22] In order to arrive at

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[22] In the Collapsing Memorandum, Commerce did not explicitly undertake a 19 C.F.R. § 351.401(f)(1) "substantial retooling" analysis. It instead included the "substantial retooling" analysis within its 19 C.F.R. § 351.401(f)(1)–(2) "price manipulation" analysis. When

this conclusion, Commerce considered the remaining factor and subfactors in the collapsing analysis.

Commerce examined the potential for manipulation of price or production by looking at level of ownership, overlapping board members, production facilities, and the whether YUSCO's and Yeoh Yih's operations are interconnected. Commerce found that, though an individual, Mr. I.S. Lin, holds positions on the boards of both companies, his ownership amounts to only 14.1% of Yeoh Yih's stock. Collapsing Memorandum at 4–6. As noted above, Commerce found that while YUSCO and Yeoh Yih produce some of the same products, their capacity, particularly for certain products, does not warrant collapsing. Commerce also found, based on their submissions, that YUSCO and Yeoh Yih had no legal, business, or contractual arrangements; no shared facilities or employees; and had only one sale between them. *Id*. at 6. Thus, Commerce concluded that there was no significant potential for manipulation of price or production between YUSCO and Yeoh Yih.

Commerce abided by the statute and regulation, and properly determined not to collapse YUSCO, Yieh Mau, and Yeoh Yih. This court may not reweigh the evidence or substitute its own judgment for that of the agency. *China Nat'l Mach.*, 264 F. Supp. 2d at 1240. "[T]he court affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus.*, 22 CIT at 389. Commerce's decision is thus supported by substantial evidence and is in accordance with the law.

C
Ta Chen

In the original investigation, Ta Chen was investigated as a possible middleman to YUSCO and Tung Mung in the U.S. market. Due to Ta Chen's lack of cooperation, Commerce placed on it a 15.34% *ad valorem* dumping margin on total AFA grounds. Allegheny thereafter requested that Commerce investigate Ta Chen's alleged middlemen dumping by asking it to trace any and all of its sales of subject mer-

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asked about its methodology by the court during oral argument, Commerce said that the elements of the 19 C.F.R. § 351.401(f)(1)–(2) "price manipulation" analysis were "dispositive." Commerce acknowledged that the "argument would go the other way if Commerce had decided to collapse and there were a challenge to that, then perhaps that would be the basis for the challenge." Here, however, the question was whether Commerce's decision not to collapse was supported by substantial evidence and in addressing the fact that substantial retooling would have been required was in Commerce's view dispositive.

Commerce's explanation here satisfactorily addressed the elements of 19 C.F.R. § 351.401(f)(1)–(2) and provided evidence for its assertions. While authority exists which says that Commerce should undertake separate 19 C.F.R. § 351.401(f)(1) "substantial retooling" and "price manipulation" analyses, *see Slater Steels Corp. v. United States*, 316 F. Supp. 2d 1368, 1371–74 (CIT 2004), Commerce's failure to do so in this case is, if error, harmless.

chandise made during the POR from any Taiwanese producer to Ta Chen and Ta Chen's subsequent sale to the first unaffiliated U.S. customer.[23] In this review, Ta Chen cooperated with Commerce. Based on the information provided by Ta Chen as well as a Customs Query, Commerce requested of Customs, Commerce rescinded the first administrative review of Ta Chen because there were no entries of the subject merchandise during the POR.

Commerce Determination to Rescind Ta Chen's Review Is in Accordance with Law

Commerce argues that it rescinded the review because the record evidence shows that Ta Chen had no entries of the merchandise in this review during the POR. Commerce, citing 19 C.F.R. § 351.213(d)(3), states that in order for it to conduct an administrative review, if there is an absence of entries, exports, or sales during the POR, it "may rescind" the administrative review. Commerce claims that it based its decision on two things. First, Ta Chen provided a certified statement stating that it had no entries of the merchandise at issue during the POR. Issues and Decision Memorandum at 41; Defendant's Response at 50–51. Second, on October 26, 2000, Commerce asked Customs to report if it had any information on coiled stainless steel sheet and strip from Taiwan manufactured/exported by Ta Chen which had been exported/entered during the POR. *See U.S. Customs Data Query for Entries During the 1999–2000 Antidumping Duty Administrative Review on Stainless Steel Sheet and Strip in Coils from Taiwan*, from Michael Panfeld, Senior Case Analyst, Office of AD/CVD Enforcement, to Rick Johnson, Program Manager, Office of AD/CVD Enforcement (July 31, 2001), DPVA at 15. Because shipment queries do not require negative reports, and Customs did not respond, Commerce's inquiry confirmed that Ta Chen did not enter merchandise after the suspension of liquidation in the original investigation. *Id.*

Allegheny argues that Commerce improperly treated U.S. sales during the POR as pre-suspension entries and in turn erroneously rescinded the review with respect to Ta Chen. Allegheny alleges that Commerce impeded its ability to determine the most accurate dumping margin and cash deposit rates by not updating the dumping margin as Allegheny had sought. Allegheny's 56.2 Motion at 63–64. Additionally, Allegheny faults Commerce for relying on the Customs Query, claiming that Ta Chen and not Commerce was required to provide adequate facts to compile the record.

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[23] Commerce requested this data because it was unable to verify this information in the original investigation's final determination. It was the failed verification and Ta Chen's lack of cooperation that led to the imposition of the total AFA rate of 15.34%.

Commerce correctly decided to rescind Ta Chen's review based on the fact that there were no entries of the merchandise at issue during the POR, regardless of whether there were sales. Pursuant to 19 C.F.R. § 351.213(d)(3) (2001), Commerce

> may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if [Commerce] concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise, as the case may be.

See Yancheng Baolong Biochem. Prods. Co. v. United States, 337 F. 3d 1332, 1333 (2003). The Federal Circuit in *Allegheny Ludlum Corp. v. United States*, 346 F.3d 1368, 1371 (Fed. Cir. 2003) upheld Commerce's policy relating to its method of conducting annual reviews of antidumping orders: "where sales can be linked to customs entries, it is only entries within the period of review that are examined and used to calculate the cash deposit rates." *See also Antidumping Duties*, 62 Fed. Reg. at 27,314. In *Allegheny*, the court expressed that Commerce's policy to hinge its review on the basis of entries rather than sales "merely implements its lawful regulations." 346 F.3d at 1372. Merchandise that entered the U.S. prior to the period of review is not "subject merchandise" within the meaning of 19 U.S.C. § 1677(25) (2001).[24] In this case, Commerce had a certified statement from Ta Chen as well as a Customs query, both of which provided evidence that there were no entries during the POR. Therefore, Commerce's decision to rescind the review with respect to Ta Chen is supported by substantial evidence.

VI
Conclusion

Commerce's antidumping review determination in *Stainless Steel Sheet and Strip in Coils from Taiwan: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 6,682 (Feb. 13, 2002) is supported by substantial evidence and is otherwise in accordance with law.

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[24] Pursuant to 19 U.S.C. § 1677(25), "[t]he term 'subject merchandise' means the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921."

Slip Op. 04–104

MATTEL, INC. AND FISHER PRICE, INC. *Plaintiffs*, v. UNITED STATES, *Defendant.*

Court No. 98–12–03231

[Plaintiffs' motion for summary judgment granted; Defendant's cross-motion for summary judgment denied, and action dismissed.]

Decided: August 19, 2004

Stein Shostak Shostak & O'Hara, P.C. (*Marjorie M. Shostak* and *Heather C. Litman*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mikki Graves Walser*); *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs Service, Of Counsel; for Defendant United States.

OPINION

RIDGWAY, Judge:

In this action, plaintiffs Mattel, Inc. and its wholly-owned division, Fisher-Price, Inc., (collectively "Mattel") challenge the decision of the U.S. Customs Service ("Customs")[1] denying Mattel's protests concerning the tariff classification of certain children's merchandise imported by Mattel and marketed in this country as "Pop-Up Wackaroos."[2]

The Government maintains that Customs properly classified the "Pop-Up Wackaroos" as toys – specifically, "[o]ther toys . . . [i]ncorporating an electric motor," under subheading 9503.80.20 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1994),[3] assessing duties at the rate of 6.8% *ad valorem*. *See generally* Memorandum in Support of Defendant's Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment ("Def.'s Brief"); Defendant's Reply to 'Plaintiff's Combined Opposition to Defendant's Cross-Motion for

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

[2] Two Customs rulings on Pop-Up Wackaroos are included in the record. Customs Headquarters Decision on Further Review of Protest (March 7, 1996) ("Customs Headquarters Decision Memo") appears in the record as Plaintiffs' Exhibit 11 and as Defendant's Attachment A. The agency's ruling on Mattel's protest – HQ 958869 (May 13, 1998) ("Customs' Ruling Letter") – appears in the record as Plaintiffs' Exhibit 2 and as Defendant's Exhibit A.

[3] All references are to the 1994 version of the HTSUS.

Summary Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment' ("Def.'s Reply Brief").

Mattel contends that Pop-Up Wackaroos are instead properly classifiable as "[g]ame machine[s]," under subheading 9504.90.40, and thus are dutiable at the significantly lower rate of 3.9%. *See generally* Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment ("Pls.' Brief"); Plaintiffs' Combined Opposition to Defendant's Cross-Motion for Summary Judgment and Reply to Defendant's Opposition to Plaintiffs' Motion for Summary Judgment ("Pls.' Reply Brief").[4]

Cross-motions for summary judgment are pending. Jurisdiction lies under 28 U.S.C. § 1581(a) (1994). Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994). For the reasons discussed below, "Pop-Up Wackaroos" are properly classified as "[g]ame machines" under subheading 9504.90.40 of the HTSUS.

Mattel's motion for summary judgment is therefore granted, and the Government's cross-motion is denied.

I. *Background*

The box in which it is sold describes the merchandise here at issue – "Pop-Up Wackaroos" – as "[a] fast-paced preschool game" designed for children "[a]ges 3–7." *See* Def.'s. Exh. C (sample of merchandise at issue).[5] In essence, it is a scaled-down, children's version of "Whac-A-Mole," a venerable and beloved game common in arcades and casinos throughout the country.

Pop-Up Wackaroos consists of two pieces – a small, somewhat irregularly-shaped base unit made of hard plastic, and a two-headed, accordion-style mallet made of soft plastic. When the base unit is turned on, a timing device is activated, whooping, "wacky arcade sounds" begin to play, and six small comical "critter heads" randomly pop up – one at a time – out of six holes (or cavities) in the base unit, before quickly disappearing back into their respective holes.[6]

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[4] Heading 9503 covers, in relevant part, "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; parts and accessories thereof." Subheading 9503.80.20 covers "[o]ther toys and models incorporating a motor and parts and accessories thereof; Toys (except models): Incorporating an electronic motor."

Heading 9504 covers, in relevant part, "articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment." Subheading 9504.90.40 covers "[o]ther: Game machines, other than coin–or token-operated; parts and accessories thereof."

[5] Except as otherwise expressly indicated, the facts in this section are drawn largely from an examination of the sample merchandise. *See* Def.'s Exh. C (sample merchandise).

[6] To start "Pop-Up Wackaroos," a child pushes the large red button in the lower left hand corner of the base unit. A battery-powered motor then causes the six "critter heads" – one at a time – to randomly pop out of, and quickly disappear back into, their respective holes.

As parents are warned in the sheet of "Instructions" included with the merchandise,

For young children playing Pop-Up Wackaroos, the object is to "beat the clock" by using the mallet to quickly strike each critter as it pokes its head up (before it disappears back into its hole) – and to successfully hit all six critters before time runs out and the unit automatically shuts off (after roughly one minute or so).[7]

If a child succeeds in hitting a critter head while it is poking out of its hole, that critter makes a warbling, chirp-y sound, then does not pop up again. Any remaining critter heads (*i.e.*, critter heads that have not been successfully struck while out of their holes) continue to randomly pop up – one at a time – and then disappear again, until "time is up" (or until all six heads have been successfully struck, whichever happens first).[8] According to the back of the product box:

> Kids love keeping these cute critters from popping up. Turn it on, watch as they come out of their holes, then try to bop them back into place. Players win when all the critters stay down.

See Def.'s Exh. C (sample merchandise).

If a child hits all six critter heads within the allotted time (*i.e.*, before the unit automatically shuts off), the child "wins," and a distinctive, melodic "cavalry-charge"-type fanfare plays, heralding the child's success. On the other hand, if time expires before the child succeeds in striking all six "critter heads" while they are poking out of their holes, the unit silently shuts off. *See* Def.'s Exh. C (sample merchandise).

II. *Standard of Review*

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to . . . judgment as a matter of law." USCIT R. 56(c).

Customs classification decisions are reviewed through a two-step analysis – first, construing the relevant tariff headings, a question of law; and second, determining under which of those headings the merchandise at issue is properly classified, a question of fact.

"There is no 'OFF' switch on this product." *See* Def.'s Exh. C (sample merchandise). *Compare* Customs' Ruling Letter (stating, incorrectly, that the red button on the merchandise is both an "on" and an "off" switch).

[7] As explained in the Instructions packaged with the merchandise, "[t]he Pop/Up Wackaroos game will automatically shut off after approximately one minute. 'Winning' the game will also automatically shut off the game." *See* Def.'s Exh. C (sample merchandise). The sample merchandise provided as Defendant's Exhibit C runs for approximately one minute and forty-five seconds before automatically shutting off (unless a player successfully hits all six critter heads, in which case it shuts off sooner).

[8] A hit is successful only if the critter is struck while it is poking out of its hole; and the critters randomly pop out of their holes. However, there is otherwise no particular "order" in which the critters must be struck. *Compare* Customs' Ruling Letter (stating – in error – that "[i]f a child hits all the 'heads' with the mallet *in the correct order* . . . the unit makes bells and buzzer sounds" (emphasis added)).

Bausch & Lomb, Inc. v. United States, 148 F.3d 1363, 1365 (Fed. Cir. 1998) (*citing Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)).

Summary judgment is thus appropriate where, as here "there is no genuine dispute as to the underlying factual issue of what exactly the merchandise is." *Id.* at 1365. A factual dispute is genuine only "if the evidence is such that the [the trier of fact] could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "[T]here is no issue for trial unless there is *sufficient evidence* favoring the nonmoving party. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50 (emphasis added) (citations omitted). Thus, at the summary judgment stage, the question to be answered is "whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

On review, Customs' classification rulings are accorded a measure of deference proportional to their power to persuade, in accordance with the principles set forth in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002).

III. *Analysis*

The classification of all merchandise is governed by the General Rules of Interpretation ("GRIs"), which provide a framework for classification under the HTSUS, and are to be applied in sequential order. *See, e.g., North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998).

The GRIs relevant to this action are GRIs 1 and 3. Most goods are classified pursuant to GRI 1, which provides that "classification shall be determined according to the terms of the headings and any relevant section or chapter notes and, provided such section or notes do not otherwise require, according to [GRIs 2 through 6]." GRI 2(a) and 2(b) – which have no bearing here – generally deal, respectively, with the classification of articles that are "incomplete," "unfinished," "unassembled," or "disassembled," and with the classification of "mixtures or combinations" of materials or substances). GRI 3, in turn, governs the tariff treatment of goods that "are, *prima facie*, classifiable under two or more headings."

Both Mattel and the Government contend that Pop-Up Wackaroos is classifiable pursuant to GRI 1 – albeit with very different results. Mattel asserts that GRI 1 leads to classification as a "game machine" under heading 9504, while the Government maintains that it leads to classification as a "toy" under heading 9503. *See, e.g.*, Pls.' Brief at

6; Def.'s Brief at 22. Mattel argues, in the alternative, that – even if Pop-Up Wackaroos is *prima facie* classifiable under both headings 9503 and 9504 – GRI 3 compels classification as a "game machine." *See, e.g.*, Pls.' Brief at 4, 11–13; Pls.' Reply Brief at 10–11.

The parties' arguments are considered in turn below.

A. *GRI 1: The Terms of The Headings*

Classification under GRI 1 begins with "the terms of the headings and any relevant section or chapter notes." GRI 1.

1. *Heading 9504: The Definition of "Game"*

The Government explains that, because the term as used in heading 9504 is not defined in the HTSUS, Customs has established criteria for determining whether an article is classifiable as a "game," "[b]ased upon the dictionary definition of the term . . . and the prior judicial construction of that term." Def.'s Brief at 13. According to the Government, to secure tariff treatment as a "game," an article must involve:

> (1) a competition or contest with the objective of winning;
>
> (2) play activity between two or more people or between one person and the game itself;
>
> (3) skill, chance, or endurance, or a combination of these elements; and
>
> (4) a method or system of scoring.

Def.'s Brief at 13; Def.'s Reply Brief at 5, 10. *See also* Customs Headquarters Decision Memo at 2.

The Government maintains that Customs correctly found that Pop-Up Wackaroos "does not satisfy criteria (1), (3), and (4)" – that is, that the merchandise does not involve "a competition or contest with the objective of winning"; that it does not involve "skill, chance, or endurance, or a combination of these elements"; and that it does not involve "a method or system of scoring."[9] Def.'s Brief at 14. Thus, according to the Government, Customs properly concluded that Pop-Up Wackaroos cannot be classified as a "game" under heading 9504.

To the contrary, as discussed more fully below, nothing in the relevant case law requires a "game" to have "a method or system of scoring" (at least not in the sense that Customs and the Government

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[9] Interestingly, the Government at one point appears to retreat from its claims as to two of the three criteria. In its Reply Brief, the Government asserts that Pop-Up Wackaroos is not classifiable as a "game" because it "does not involve a physical or mental competition" (criterion (1)). But it makes no reference whatsoever to "skill, chance, or endurance" or "a method or system of scoring" (criteria (3) and (4)). *See* Def.'s Reply Brief at 1.

here use that concept). Nor do dictionary definitions reflect any such requirement. Moreover, such a requirement is belied by everyday logic and common sense, as well as Customs' past practice. In short, there is no basis for criterion (4) above – at least not in the sense in which Customs applied it in this instance.

In addition, contrary to the Government's assertions, Pop-Up Wackaroos both involves "a competition or contest with the objective of winning" (criterion (1)), and requires "skill, chance, or endurance, or a combination of these elements" on the part of players (criterion (3)). The Government's objections to classification under heading 9504 thus have no merit.

a. "*A Method or System of Scoring*"

The Government represents that controlling judicial precedent on the definition of a "game" requires a system of scoring.[10] *See* Def.'s Brief at 6 (asserting that *Mego* defined "games" as including "a method or system of scoring"), 13 (stating that, "according to the CCPA, an activity is a 'game' if it results in a 'score'"), 15–16 (suggesting that *Montgomery Ward* requires a scoring system). In fact, the Government simply misreads both *Mego* and *Montgomery Ward* (which *Mego* cites). *See generally Mego Corp. v. United States*, 62 CCPA 14, 505 F.2d 1288 (1971) (*Mego*); *Montgomery Ward & Co. v. United States*, 66 Cust. Ct. 233, 238 (1971) (*Montgomery Ward*).

While both *Mego* and *Montgomery Ward* stand for the proposition that an element of "contest" must be present, neither case expressly or implicitly requires a "system of scoring" as an essential element of a "game." Rather, in both cases, the existence of a system of scoring was treated as *evidence* that the play activity at issue constituted a "contest."

Mego involved the classification of a miniature pinball machine under the Tariff Schedule of the United States ("TSUS"), the predecessor to the HTSUS. There, as here, the key question was whether the merchandise at issue was a "game." The *Mego* court endorsed the parties' reliance on the common meaning of "game," as reflected in dictionary definitions of the term. Thus, *Mego* held that a game "must be competitive or involve a contest, and must possess an element of skill, chance, or endurance." *Mego*, 62 CCPA at 18. Conspicuously absent from that definition is any reference to a "system of scoring." Indeed, the *Mego* court referred to "the objective . . . [of] get[ting] the balls into the highest numbered slots *to make the highest score*" – its sole reference to a "system of scoring" – only to establish the presence of "the element of contest," which *is* required of a "game." *Mego*, 62 CCPA at 18 (emphasis added).

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[10] Both Mattel and the Government agree that *Mego* is the controlling authority on the definition of "game." *See* Pls.' Brief at 6; Def.'s Brief at 11–12.

As support for its holding that the objective of reaching a higher score satisfies the element of "contest" required for classification as a "game," the *Mego* court quoted *Montgomery Ward*. Like *Mego* and the case here at bar, *Montgomery Ward* concerned whether certain merchandise – there, the "Mechanical Mother Hen Target Game" – was a "game" (or a "game machine") for tariff purposes.

Significantly, the legal issue presented in *Montgomery Ward* (and, in particular, the subject of the excerpt quoted in *Mego*) was *not* whether "scoring" is a required element of a "game," but – rather – whether the mandatory element of a "contest" necessarily required competition *between at least two people*. 66 Cust. Ct. at 239. *Montgomery Ward* held that the "contest" required for classification as a game "may be between two or more persons, or between one person and the game itself," citing pinball machines, slot machines, and darts as "games" that may be played by one person alone. *Id*. The court reasoned:

> The point is that these activities [*i.e.*, pinball, slot machines, and darts] are games since they result in a '*score*' measuring one's skill or luck or combination thereof against a given set of rules.

Id. (emphasis added).

The court's point in *Mongtomery Ward* was that – because they result in a "score" – pinball, slot machines, and darts satisfy the required element of a "contest," even when they do not involve two or more competitors. The court notably did not hold that, in addition to involving a "contest," a game must *also* involve "scoring."

In sum, read carefully and in context, it is clear that – in both *Montgomery Ward* and *Mego* – the court viewed "scoring" *not* as an independent element required for classification as a "game," but, rather, as an indicator (or as evidence) of the existence of the required element of a "contest." The controlling case law simply does not require that a game, for tariff classification purposes, involve "scoring."

Nor do dictionaries define "game" to require "a method or system of scoring." Certainly the dictionary definitions of the term in *Mego* and *Montgomery Ward* did not mention scoring. *See Mego*, 62 CCPA at 18 (noting that the parties there "cite various dictionary definitions which indicate that a 'game' must be competitive or involve a contest, and must possess an element of skill, chance, or endurance"); *Montgomery Ward*, 66 Cust. Ct. at 236 (quoting at least seven definitions of "game" from three different dictionaries).

Moreover, none of the dictionary definitions cited by the Government in the case at bar identify "scoring" as an essential element of a "game." Indeed, of the three different dictionaries and the *nine or more definitions* of the term quoted in the Government's briefs, *only*

one of those definitions even mentions a variant of the word "score." *See* Def.'s Brief at 11 (quoting *Webster's Third New International Dictionary* (Unabridged 1961), *Webster's New World Dictionary* (Third College Edition 1988), and *Merriam Webster's Collegiate Dictionary* (Tenth Edition 1996); Def.'s Reply Brief at 3 (reiterating the same quotes). And that reference actually does not use "scoring" in the sense in which the Government is using the term here; rather, it comes from a definition of the word "game" meaning – literally – "[t]hat which is gained as the result a game."[11]

The definitions of "game" in *Mego* and *Montgomery Ward*, as well as various dictionaries – none of which require a "system of scoring" – are also consistent with everyday logic and common sense. Examples of "games" lacking "scoring" (*i.e.*, a graduated system of measuring performance) abound.[12] The company picnic favorite, "tug-of-war," in which two groups of people on either end of a rope try to pull each other across a dividing line, involves only a binary construct – "winning and losing" – without any graduated method of measuring the performance of the winners and losers.[13] The perennial barroom classic, "arm wrestling," similarly lacks any inherent method of distinguishing one winner or loser from another.

Further, this observation is not limited to games involving physical contests. The electronic game "Simon," emblematic of the late

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[11] The Government's use of ellipses is misleading. As quoted in the Government's briefs, it appears that the phrase "The number of points necessary to be scored in order to win . . ." is part and parcel of the definition numbered "3 a (1)": "a physical or mental competition conducted according to rules in which the participants play in direct opposition to each other, each side striving to win and to keep the other side from doing so." But, in truth, the reference to "scored" is actually part of another distinct, separately numbered definition, concerning a different, and arguably irrelevant, meaning of "game."

[12] It is worth noting that the concept of "scoring" does not necessarily inherently connote a graduated, multi-level or numerical measuring system (as Customs and the Government apparently contend). Thus, it is not apparent why a binary "win/lose" system cannot constitute a system of scoring. Indeed, *Montgomery Ward* defined "score" simply as the "measuring [of] one's skill or luck or combination thereof against a given set of rules." *Montgomery Ward*, 66 Cust. Ct. at 238. A "measuring" system based on 0 and 1 is not qualitatively different from a measuring system based on 0, 1, 2, and 3; it is merely more crude.

It is, in any event, unclear precisely what Customs means by a "system of scoring." While the agency sometimes appears to require a scoring method capable of measuring gradations of performance (*i.e.*, beyond simply determining winning or losing) (*see, e.g.*, Aff. of Customs National Import Specialist ¶ 36 (asserting that Pop-Up-Wackaroos lacks a "timing or scoring mechanism [that would permit players to] know if they were improving")), Customs has – in a number of instances – classified as "games" articles that did not provide for a system of scoring beyond a method of determining a winner and loser. *See, e.g.*, HQ 801795 (Dec. 21, 1991), HQ 037583 (Feb. 13, 1975) (electric racing car sets without lap timers or lap counters classified as games); HQ 038561 (Mar. 3, 1975) (mechanical karate action figures providing only for win/lose competition classified as games); HQ 959558 (Sept. 14, 1998) (box of chewing gum with plastic maze dispenser, and win/lose objective, classified as a game).

[13] Obviously, a graduated method of scoring may be imposed in any "win/lose" game by, for example, playing for "two-out-of-three." The point, however, is that graduated scoring is not intrinsic to the game itself.

1970s, consisted of a round plastic disc with four, large different colored buttons. Players tried to memorize and then repeat increasingly long sequences of musical tones after they were emitted from the disc and displayed by the illumination of the different colored buttons. Notably, Simon did not include any method of measuring a player's performance or "score." Nevertheless, Customs clearly considered it to be a "game" for tariff purposes. In a ruling made under the TSUS, Customs classified a part used in the manufacture of "Pocket Simon" (a miniaturized version of Simon) under the tariff provision for "game machines and parts thereof." *See* HQ 800291 (Apr. 7, 1981). Thus, even Customs' own prior practice demonstrates that tariff classification as a game does not turn on the presence of a "system of scoring" (at least not in the sense in which the Government uses that term here).[14]

In sum, Customs has identified no basis in law or logic for requiring "a method or system of scoring" as an integral element for tariff classification as a "game." Accordingly, its determination that Pop-Up Wackaroos lacks such a system gives no pause.

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[14] There are other similar examples of prior Customs practice that cannot be reconciled with the agency's position on "scoring" here. In fact, on other occasions, Customs has classified items lacking graduated systems of scoring as "games" under heading 9504 – the very HTSUS provision here at issue.

For example, "Wolverine Maze Candy" was a small box filled with pieces of chewing gum, with a plastic maze/dispensing portal on the top. In order to extract a piece of gum, one had to navigate the gum through the maze to the opening. Classifying the item as a game, Customs described it as a "contest or competition against oneself with a win/loose [sic] objective." HQ 959558 (Sept. 14, 1998). The chewing gum dispenser clearly did not have any system of measuring a player's performance (indeed, query whether one could even lose the "game"); yet Customs found that the chewing gum dispenser satisfied the same four specific criteria that the Government and Customs relied on here. *See also* n.12, *supra* (listing other such examples).

Customs' handling of "scoring" vis-a-vis classification as a "game" has been inconsistent in other ways as well. For example, some Customs rulings concerning potential classification as a "game" list scoring as an essential criterion, while others do not. *Compare* HQ 076287 (July 31, 1985), HQ 05279 (Feb. 13, 1978), *with* HQ 0375853 (Feb. 13, 1975), HQ 038561 (Mar. 3, 1975), HQ 033067 (Aug. 18, 1976), HQ 800741(June 26, 1981), HQ 061105 (Aug. 10, 1979), HQ 057781(Apr. 1, 1978), HQ 049067 (Apr. 21, 1977), HQ 087976 (Dec. 13, 1990).

And even where Customs' analysis points to scoring, sometimes it is treated not as an independent criterion for classification as a "game," but rather as evidence of the existence (or lack thereof) of a "contest" or "competition." *See*, e.g., HQ 033067 (Aug. 18, 1976) (method of computing scores cited among "factors . . . sufficient . . . to conclude [that the article] was designed and constructed to be used in competition"); HQ 061015 (Aug. 10, 1979) (finding that the object of the game in question is to score the highest number of points and therefore "is designed for use as a competition"); HQ 052868 (Aug. 19, 1977) (system of scoring listed among factors supporting conclusion that "competitiveness . . . is clearly lacking").

In fact, Customs has explicitly stated that, for some merchandise, a system of scoring is among a list of elements or features *not all of which need be present* in order to satisfy the criteria for classification as a "game." *See, e.g.*, HQ 087976 (Dec. 13, 1990) (listing lap counters, lap timers, and finish lines among elements providing evidence of competition in race car sets, but emphasizing that not all elements are required).

b. "*A Competition or Contest with the Objective of Winning*"

The Government further contends that Customs properly determined that Pop-Up Wackaroos does not involve "a competition or contest with the objective of winning" – criterion (1) of Customs' standard formulation for a "game." *See generally* Def.'s Brief at 16–17; Def.'s Reply Brief at 11–12. However, an examination of the sample merchandise refutes Customs' determination. *See* Def.'s Exh. C (sample merchandise).

Pop-Up Wackaroos plainly constitutes "a competition or contest" between the child playing with the merchandise and the item itself. The objective of play is for the child to "beat" the merchandise by successfully striking all six critter heads *at the appropriate time* (*i.e.*, as each individual head randomly pops up, but before it quickly disappears back into its hole) and *within the allotted time* (*i.e.*, before the timing device automatically shuts off the merchandise, silencing the background arcade sounds that always accompany play, and forcing the child to cease play without enjoying the distinctive, melodic fanfare that heralds a "win"). In short, Pop-Up Wackaroos effectively pits the child who is playing with the merchandise in a "race against time."[15] *See generally* Pls.' Brief at 9; Pls.' Reply Brief at 8–9.

The Government attempts to dismiss the timing device in Pop-Up Wackaroos as a mere "battery-saving feature." Def.'s Brief at 17. But that argument is unavailing. As an initial matter, the Government proffers no evidence (affidavit testimony or otherwise) in support of its claim, which appears only in its legal briefs.[16] In contrast, the uncontested testimony of a Fisher-Price game designer confirms that the "timing element" of Pop-Up Wackaroos creates "a *challenge* by the machine against the player." Pls.' Exh. 5 ("Aff. of Fisher-Price Designer") ¶ 12 (emphasis added).

More fundamentally, it completely strains credulity to claim that a timing device that shuts off a product *after only one minute* is simply an energy-saving feature – particularly where, as here, the timing device shuts off the product after just a minute or so *without regard to whether or not the product is still in active use.* The timing ele-

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[15] The Government asserts that "a child between the ages 3–7 is not capable of measuring time to 'play against' the machine." *See* Defendant's Response to Plaintiffs' Statement of Material Facts ¶ 8. However, the Government fails to back up that statement with any affidavit testimony or other evidence to substantiate its claim. Such bald allegations do not suffice to create a genuine issue of material fact on a motion for summary judgment. *See, e.g., Sweats Fashions Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987) (in opposing a motion for summary judgment, a non-movant may not rest upon mere denials, "but must proffer countering evidence sufficient to create a genuine factual dispute.")

[16] Again, as noted above, unsupported allegations generally do not suffice to create a genuine issue of material fact on a motion for summary judgment. *See, e.g., Sweats Fashions Inc.*, 833 F.2d at 1562 (in opposing summary judgment, a non-movant may not rest upon mere denials, "but must proffer countering evidence sufficient to create a genuine factual dispute.")

ment here thus is no mere "battery-saving device." Rather, it serves to inject the element of "competition or contest" into Pop-Up Wackaroos.[17] Indeed, even the Government's expert – a National Import Specialist – implicitly recognizes that the time pressure inherent in Pop-Up Wackaroos effectively "challenges" players, attesting that a player conceivably might "get good at [playing], and always beat the one-minute." Def.'s Exh. B ("Aff. of Customs National Import Specialist") ¶ 22.)

Just as an examination of the sample merchandise at issue establishes that Pop-Up Wackaroos involves the requisite element of "competition or contest," so too such an examination establishes the presence of "the objective of winning" that is mandatory for tariff classification as a "game." As explained above, the objective of playing with Pop-Up Wackaroos is to "beat" the product by striking all six critter heads *at the appropriate time* (*i.e.*, as each individual head randomly pops up, but before it quickly disappears back into its hole) and *within the allotted time* (*i.e.*, before the timing device automatically shuts off the merchandise, silencing the background "wacky arcade sounds" that always accompany play, and forcing the child to cease play without enjoying the distinctive, melodic fanfare that plays to trumpet success). Thus, a player "wins" at Pop-Up Wackaroos by successfully striking (1) all six critter heads, (2) at the appropriate time, and (3) within the allotted time.

The Government inexplicably asserts that "[t]here is no indication of winning or losing in playing with Pop-Up Wackaroos; there is no indication that the Pop-Up Wackaroos has won and the child has lost or vice versa." Def.'s Brief at 16–17. *See also* Def.'s Reply Brief at 8 ("Pop-Up Wackaroos has no method of determining whether the child has won or, conversely, that the machine has won"). The Government further states that "[a] child merely continues playing until bells and buzzers sound." Def.'s Reply Brief at 8. The facts are quite to the contrary.

If a player "wins" by successfully striking all six critter heads at the appropriate time and within the allotted time, that "win" is announced by a distinctive, melodic fanfare. Similarly, if Pop-Up Wackaroos "wins" (*i.e.*, if a player "loses" by failing to strike all six critter heads at the appropriate time and before the allotted time expires), the distinctive fanfare *does not* play. Instead, the automatic timing device simply shuts off the merchandise, silencing the back-

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[17] It is also telling that the timing element is emphasized in the retail packaging of Pop-Up Wackaroos. Specifically, five of the six sides of the box in which the merchandise is sold tout it as "A *fast-paced* preschool game!" *See* Def. Exh. C (sample merchandise) (emphasis added). While it is true that the manner in which an article is merchandised is not solely determinative of its classification, it is also true that the importer's consistent description of the merchandise as a "game" is a relevant factor. *See, e.g., R. Dakin & Co. v. United States*, 14 CIT 797, 800–01 (1990) (citing cases).

ground arcade sounds that always accompany play, and forcing the child to cease play without enjoying the melodic fanfare associated with victory.

In short, contrary to the Government's claims, after a maximum of approximately one minute of play with Pop-Up Wackaroos, a "winner" is declared – and either the distinctive, triumphant fanfare plays, or it does not. If the fanfare of victory is heard, the player has won; if it is not heard, the player has lost. In any event, it is difficult to imagine – in the Government's phraseology – a simpler or clearer "indication that the Pop-Up Wackaroos has won and the child has lost or vice versa."[18] Moreover, there is no truth whatsoever to the Government's claim that "[a] child merely continues playing until bells and buzzers sound." Def.'s Reply Brief at 8. The "bells and buzzers" to which the Government refers are actually instead the distinctive, melodic fanfare of victory; and it sounds *only* if the child "wins" as described above. Otherwise, Pop-Up Wackaroos automatically shuts itself off after approximately one minute. Contrary to the Government's assertions, it simply is not possible for a child to continue playing indefinitely "until bells and buzzers sound." The very design of the product precludes it.

Also wide of the mark is the Government's claim that the distinctive fanfare of victory indicates nothing more than the fact "that no more heads will pop-up to be hit, *i.e.*, the task (pounding down all heads) is complete, and the play activity has ended." *See* Def.'s Brief at 16. Critter heads stop popping up and the play activity ends after a maximum of approximately one minute in any event, whether a player "wins" or not. But the victorious fanfare is heard only if the critter heads stop popping up because a player has "won." The fanfare thus signifies more than simply the *fact* that no more heads will pop up; they also signify the *reason* that no more heads will pop up – *i.e.*, it signifies that the player has "won" by successfully striking all six critter heads at the appropriate time, and before the allotted time expired.[19]

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[18] The objective of "winning" is reinforced by the retail packaging of Pop-Up Wackaroos, as well as the Instructions included with the merchandise. For example, the back of the box in which the merchandise is sold states: "Players *win* when all the critters stay down." *See* Def.'s Exh. C (sample merchandise) (emphasis added). Similarly, the Instructions state: "Players *win* when all the critters have been pounded to stay down" and " '*Winning*' *the game* will . . . automatically shut off the game." *See* Def.'s Exh. C (sample merchandise) (emphasis added). Although an importer's own representations as to its merchandise are not determinative, they are a factor to be considered for classification purposes. *See, e.g.*, *R. Dakin & Co. v. United States*, 14 CIT 797, 800–01 (1990) (citing cases).

[19] The Government further asserts that the sounds of the distinctive, melodic fanfare of victory "at most, represent a reward" for pounding down all of the heads within the allotted time. Def.'s Brief at 16. Particularly in this context, however, it is difficult to discern how a "reward" is inconsistent with the notion of "winning" a game. Indeed, in classifying the "Wolverine Maze Candy" game, it was precisely a reward (there, chewing gum) for successfully completing a task (there, navigating a maze) that Customs considered sufficient to sat-

In short, the Government's arguments on this point fail to carry the day. Pop-Up Wackaroos plainly involves "a competition or contest with the objective of winning," and thus satisfies criterion (1) for tariff classification as a "game."

c. "*Skill, Chance, or Endurance*"

As with criteria (1) and (4), discussed above, the Government also seeks to defend Customs' determination that Pop-Up Wackaroos does not satisfy criterion (3) – *i.e.*, that it does not involve "skill, chance, or endurance, or a combination of these elements." But, apart from a handful of bald assertions that it is not met, the Government's papers have little to say about the criterion. *See* Def.'s Brief at 13 (asserting that "Pop-Up Wackaroos . . . does not . . . measur[e] one's skill or luck or combination thereof"), 14 (alleging that "Pop-Up Wackaroos does not . . . measur[e] one's skill or luck, or skill and luck").

It is, in any event, beyond cavil that skill (and/or luck) is involved in Pop-Up Wackaroos. Although the Government contends that there is no requirement "that the player must hit all of the [pop-up critter] heads within any specific time frame" and that "there is no real method of measuring one's skill or luck" in playing with Pop-Up Wackaroos (*see* Def.'s Reply Brief at 7), those statements simply cannot be squared with the facts.

As discussed elsewhere, an examination of the sample merchandise reveals that, to "win" at Pop-Up Wackaroos (and thus to trigger the playing of the distinctive, melodic fanfare of victory), a child must strike all six critter heads *at the appropriate time* (*i.e.*, as each individual head randomly pops up, but before it quickly disappears back into its hole) and *before the allotted time expires* (*i.e.*, before the timing device automatically shuts off the merchandise, after roughly one minute of play). *See* Def.'s Exh. C (sample merchandise). Thus, contrary to the Government's claims, "winning" at Pop-Up Wackaroos is expressly defined in terms of successfully striking all six heads within a "specific time frame." Similarly, a player's "skill or luck" is measured in terms of time – whether the player successfully strikes all six critter heads *at the appropriate time* and *within the allotted time expires*.

Indeed, in speculating that a child conceivably "might get good at [Pop-Up Wackaroos], and always *beat* the one-minute," the Government's own expert – the National Import Specialist – implicitly admits that the timing element of Pop-Up Wackaroos increases the challenge inherent in trying to strike critter heads in motion, necessarily requiring a certain degree of skill on the part of a player. *See*

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isfy "game" criterion (2) – "a competition or contest with the objective of winning." *See* n.14, *supra*.

Aff. of Customs National Import Specialist ¶ 22 (emphasis added).[20] The point here is that the time pressure element represents a challenge, compounding the challenge of striking objects in motion – both of which must, in tandem, be overcome by a player's *skill* at quickly and accurately hitting the critter heads with the mallet.

Here, again, Customs simply got it wrong. Pop-Up Wackaroos plainly involves skill (and/or luck), and thus satisfies criterion (3) for tariff classification as a "game."

d. "*Rules Either Expressed or Self-Evident*"

Over and above the standard four-criteria formula articulated by Customs and the Government and discussed above – *i.e.*, an article involving (1) a competition or contest with the objective of winning, (2) play activity between two or more people or between one person and the game itself, (3) skill, chance, or endurance, or a combination of these elements, and (4) a method or system of scoring – the Government here hints at various points in its papers that a "game" also must be "played according to rules either expressed or self-evident." *See, e.g.*, Def.'s Brief at 6; Def.'s Reply Brief at 1. *See also* Customs Headquarters Decision Memo at 2. However, the Government tends to discuss "rules" only in the context of one or another of its four specific criteria. *See, e.g.*, Def.'s Brief at 13 (referring to "a given set of rules" as a means of determining a "score" (*i.e.*, criterion 4) that measures a player's "skill or luck or combination thereof" (*i.e.*, criterion 3)), 14 (referring to "a given set of rules" against which "one's skill or luck" is measured using a "scoring system").

It is thus entirely unclear what role, if any, Customs and the Government believe "rules" play in determining whether an article is a "game" for tariff purposes. But, in any event, the matter is of little moment in this case. Although the Government asserts at one point that there is "no implied or expressed rule that [someone playing Pop-Up Wackaroos] must hit all of the heads within any specific time frame," and that "there is no real method of measuring one's skill or

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[20] The Government's papers include other similar concessions as well. For instance, the Government seeks (albeit in a slightly different context) to analogize Pop-Up Wackaroos to another Fisher-Price product, the "Tap 'n Turn Bench" – which the Government characterizes as a "classic work bench pegs and hammer toy." *See* Def.'s Brief at 27. But the Government's attempted analogy fails for a variety of reasons, some of which are relevant here.

Thus – for purposes of this discussion of "*Skill*, Chance, or Endurance" – it is sufficiently telling that the Government concedes that the element of *motion* inherent in Pop-Up Wackaroos (with the critter heads popping quickly up and down) means that Wackaroos involves "a more difficult challenge or *skill*" than the classic work bench (where the pegs to be struck are stationary). *See* Def.'s Brief at 27 (emphasis added). But, obviously, that "challenge or skill" is even greater when (as in Pop-Up Wackaroos) it is combined with the element of *time pressure* – an element that the Government consistently minimizes or ignores. *See* Def.'s Brief at 27 (discussing the "challenge or skill" inherent in the element of motion, with no reference to the element of time pressure).

luck against any given set of rules when playing" (*see* Def.'s Reply Brief at 7), those are overstatements, to say the least.

Thus, while the Government claims that "Pop-Up Wackaroos has only one simple instruction [or "rule"], to hit the heads," the Government also concedes – as it must – that "rules" need not be in writing, and that they may be very "simple." *See* Def.'s Brief at 16 & n.3. It is, moreover, clear – as detailed in section III.A.1.b, above – that, contrary to the Government's assertion, each individual critter head not only must be *hit*, but must be hit *at the appropriate time* (*i.e.*, as it as it randomly pops up, and before it disappears back into its hole) and *before the allotted time expires*.

Further, here – as with the miniature pinball machine in *Mego* – no instructions or rules for play are really necessary, because both the objective of play and the operation of the merchandise are relatively "obvious." *See Mego*, 62 CCPA at 19. In any case, Pop-Up Wackaroos are, in fact, packaged with a sheet of simple written Instructions (or "rules") that state: "Turn [the base unit] on, watch as [the cute critters] come out of their holes, then try to pop them back into place. Players win when all the critters have been pounded to stay down." *See* Def.'s Exh. C (sample merchandise).

The bottom line is that, because Pop-Up Wackaroos is relatively simple, it has relatively simple rules. But rules, indeed, it has – both "expressed" and "self-evident." Thus, to the extent that tariff classification as a "game" requires such rules, Pop-Up Wackaroos satisfies that requirement.

Indeed, as detailed above, Pop-Up Wackaroos satisfies all of the valid established criteria for tariff classification as a "game." It involves (1) "a competition or contest with the objective of winning"; (2) "play activity" between a child and "the game itself"; and (3) skill (and/or luck). Pop-Up Wackaroos is thus *prima facie* classifiable as a "game" under heading 9504.

2. *Heading 9503: The Definition of "Toy"*

The determination that Pop-Up Wackaroos are *prima facie* classifiable under heading 9504 does not conclude the analysis. If merchandise is *prima facie* classifiable under two or more headings, GRI 3 applies. Here, the Government argues forcefully for Customs' classification of Pop-Up Wackaroos as "toys," under heading 9503. *See, e.g.*, Def.'s Brief at 22–28. If, indeed, the merchandise is *prima facie* classifiable under both headings 9503 and 9504, then resort must be had to GRI 3.

Heading 9503 of the HTSUS covers "[o]ther toys; reduced-size ('scale') models and similar recreational models, working or not; puzzles of all kinds; and accessories thereof." Defining "toy" as "an article *principally used* for [ ] amusement, diversion, or play," the Government reasons that heading 9503 is a "principal use" provision. *See* Def.'s Brief at 22 (emphasis added). As such, the Govern-

ment asserts that heading 9503 is covered by Additional U.S. Rule of Interpretation ("ARI") 1(a). Def.'s Brief at 22–23.

ARI 1(a) addresses the classification of merchandise under a principal use provision, specifying that classification "is to be determined in accordance with the use in the United States . . . of goods of that class or kind to which the imported goods belong." ARI 1(a), HTSUS. Thus, the Government argues, the classification of Pop-Up Wackaroos is controlled by the "use of the 'class or kind' of merchandise" to which Pop-Up Wackaroos belongs, explaining that goods are of the same "class or kind" if they are *commercially fungible* with one another. Def.'s Brief at 23 (*quoting Primal Lite, Inc. v. United States*, 182 F.3d 1362 (Fed. Cir. 1999)).

The Government asserts that Pop-Up Wackaroos is commercially fungible with "toys" "inasmuch as it moves in the same channels of trade as and [is] advertised, marketed and displayed with other toys."[21] Def.'s Brief at 24–25. To support that claim, the Government points to various wholesale catalogs produced by Fisher-Price. The Government emphasizes that Pop-Up Wackaroos is not listed or featured with the merchandise designated as "games" in the tables of contents and indices of the catalogs, but rather with the merchandise designated as "preschool." The Government's argument, in a nutshell, is that Fisher-Price itself "classif[ied]" Pop-Up Wackaroos alongside "toys" in its "advertising and marketing materials," and that Pop-Up Wackaroos therefore "moves in the same channels of trade as and [is] advertised, marketed and displayed with other toys." Def.'s Brief at 25–26.[22]

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[21] The factors to be considered in determining whether merchandise falls within a particular "class or kind" include: (1) the general physical characteristics of the merchandise; (2) the channels of trade in which the merchandise moves; (3) the environment of the sale of the merchandise (*i.e.*, accompanying accessories and the manner in which the merchandise is advertised and displayed); (4) the use of the merchandise in the same manner as merchandise which defines the class; (5) economic practicality of so using the import; (6) the recognition in the trade of this use; and (7) the expectations of the ultimate purchaser. *See* Def.'s Brief at 24 (*citing United States v. Carborundum Co.*, 63 CCPA 98, 536 F.2d 373 (1976)).

[22] Only select pages of catalogs are included in the Government's exhibits. It is thus impossible to fully assess the overall organization of the catalogs or to definitively determine whether there are other "games" featured alongside the "preschool" merchandise. In any event, it is worth noting that, for example, in the 1994 catalog, Pop-Up Wackaroos is featured along with "Pop 'n Pinball," which the catalog describes as an "electronic pinball *game*." *See* Def.'s Exh. D (emphasis added). Similarly, the layout, graphics, and text arguably link Pop-Up Wackaroos and Pop 'n Pinball together, and contrast them with the other merchandise on the page. In short, it is not at all clear – from the few pages in the record – what the significance is of the organization of the catalogs.

Even more to the point, it is far from clear that the tables of contents, indices, and layouts of the catalogs reflect separate channels of trade, separate marketing, and separate displays. Indeed, the catalogs may be read to suggest just the opposite. Toys and games are marketed together, in one catalog, with whimsical and apparently fluid product categories like "Little People," "Super Toys," and "Great Adventures." *See* Def.'s Exh. D. Further, the

The Government further contends that Pop-Up Wackaroos is "akin to the classic work bench hammer and pegs activity"of Fisher-Price's "Tap 'n Turn Bench," and is thus also a toy. Def.'s Brief at 26. The Government asserts, in essence, that the whacking involved in playing Pop-Up Wackaroos and the hammering used on the Tap 'n Turn Bench "require similar skills," and that Pop-Up Wackaroos is "merely a more sophisticated hammer and toy peg activity." *See* Def.'s Brief at 27–28. *But see* n.20, *supra* (distinguishing Pop-Up Wackaroos from the Tap 'n Turn Bench).[23]

In the end, it is unnecessary to reach the merits of the Government's arguments on this issue. For the reasons outlined below, even assuming that Pop-Up Wackaroos is, in fact, *prima facie* classifiable as a "toy," the merchandise is nevertheless ultimately classifiable as a "game machine" under heading 9504.

B. *GRI 3: Goods* Prima Facie *Classifiable Under Two or More Headings*

As discussed in section II.A.1 above, Pop-Up Wackaroos are *prima facie* classifiable as "game machines" under heading 9504. But, if the merchandise is also *prima facie* classifiable as "toys" under heading 9503, then its classification is governed by GRI 3. In any event, as Mattel observes, the application of GRI 3 results in classification as "game machines" under heading 9504. *See* Pls.' Brief at 11–13; Pls.' Reply Brief at 10–11.[24]

GRI 3(a) provides that "[t]he heading which provides the most specific description shall be preferred to headings providing a more general description." Under this so-called "rule of relative specificity," merchandise is classified under the heading with the "requirements that are more difficult to satisfy and that describe the article with the greatest degree of accuracy and certainty." *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1441 (Fed. Cir. 1998). Here, there can be no doubt that heading 9504 (which covers "[a]rticles for arcade, table, or parlor games . . .") is more specific than heading 9503 (which refers broadly to "[o]ther toys . . ."). Classification under GRI 3(a) would thus lead conclusively to heading 9504.

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catalogs themselves reveal little about channels of trade generally, and nothing about retail trade.

[23] The Government's logic on this point is somewhat less than transparent. It is not at all clear why similarities between hammering and whacking should have any bearing on whether Pop-Up Wackaroos is classifiable under heading 9503 as a "toy." Indeed, the whacking involved in playing Pop-Up Wackaroos is virtually identical to the whacking required to play the arcade game Whac-a-Mole. Yet the Government here concedes that the latter *is* a "game," while insisting that the former is not. *See* Def.'s Brief at 17.

[24] Because the Government staked its case in this matter entirely on GRI 1, its briefs here include no substantive GRI 3 analysis. *See* Def.'s Brief at 22 n.4; Def.'s Reply Brief at 9–10.

Moreover, even were headings 9503 and 9504 to be deemed equally specific (such that GRI 3(a) could not control), classification under GRI 3(c) would lead to the same result.[25] When merchandise cannot be classified pursuant to the other principles of GRI 3, GRI 3(c) dictates that it is to be classified under "the heading which occurs *last in numerical order* among those which equally merit consideration." (Emphasis added.) Whatever else may remain unsettled in the field of customs law, this much is clear: Heading 9503 precedes heading 9504.

In sum, all roads lead to the classification of Pop-Up Wackaroos as "game machines" under heading 9504. To be sure, the merchandise is *prima facie* classifiable under that heading. And even if it also *prima facie* classifiable as "toys" under heading 9503, heading 9503 is "trumped" by heading 9504 under both GRI 3(a) and GRI 3(c).

C. *Customs' Classification Ruling and* Skidmore *Deference*

As a final matter, the Government contends that Customs' interpretation of headings 9503 and 9504 in its ruling letter in this case should be accorded *Skidmore* deference. *See* Def.'s Brief at 28–35; Def.'s Reply Brief at 10–13. Customs' ruling letters are entitled to deference proportional to their persuasiveness. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (*citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In evaluating the persuasiveness of a Customs classification ruling, factors to be considered include "the writers' thoroughness, logic, and expertness, [the ruling's] fit with prior interpretations, and any other sources of weight." *Id.* at 235. Applying those factors to this case, Customs' classification ruling is entitled to no deference.

Customs' ruling letter was not adopted pursuant to a deliberative notice and comment rulemaking process. While that fact is by no means determinative, it is nevertheless an important consideration in assessing the first *Skidmore* factor – the thoroughness of the ruling's reasoning. *See Structural Indus., Inc. v. United States*, 356 F. 3d 1366, 1370 (Fed. Cir. 2004) (*citing Rubies Costume Co., v. United States*, 337 F.3d 1350, 1356 (Fed. Cir. 2003)); *Russ Berrie & Co., v. United States*, 27 CIT ___ , ___ , 281 F. Supp. 2d 1351, 1353 (2003).

Customs fares even worse on the second *Skidmore* factor – the logic of its ruling. As discussed at length above, the agency erred in determining that "a method or system of scoring" is an essential element of a game. The agency premised its logic and reasoning on an incorrect reading of the relevant case law, a distortion (or an ignorance) of dictionary definitions, and a disregard for the common meaning of the tariff term "game." *Cf. Filmtec Co., v. United States*,

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[25] GRI 3(b) concerns the classification of "[m]ixtures, composite goods . . . , and goods put up in sets for retail sale," and thus has no relevance here.

27 CIT ___ , ___ , 293 F. Supp. 2d 1364, 1370 (2003) (according no deference where Customs relied on an incorrect reading of the Explanatory Notes and the tariff heading at issue).

The logic of Customs' ruling was also undermined by its reliance on previous rulings involving quite different merchandise. Customs based its analysis of whether Pop-Up-Wackaroos is a "game" or a "toy" on previous classification rulings involving a set of plastic paddles and two air shuttlecocks (used in a tossing game), flying frisbee discs, and collectible paperboard drink tops (*see* Customs' Ruling Letter at 3–4) – articles that are very different from Pop-Up-Wackaroos (and, indeed, are not even machines). Determining whether an article is a "game" or a "toy" is a very fact-intensive inquiry, turning largely on the specific characteristics of the article in question. Thus, "prior rulings with respect to similar but non-identical items are . . . of little value in assessing the correctness of the classification of a similar but non-identical item." *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1371 (Fed. Cir. 2004).

The third *Skidmore* factor – the agency's body of expertise – is the sole factor weighing in favor of deference here. It is axiomatic that Customs has "specialized experience" in the classification of goods. *Mead*, 533 U.S. at 534 (quotations omitted). However, that element weighs in favor of deference to every classification ruling. Accordingly, it cannot be determinative. Here, it is clearly outweighed by other considerations.

For reasons discussed in section III.A.1.a above, the fourth *Skidmore* factor – the ruling's consistency with prior interpretations – also counsels against deference in this case. As that section explains, Customs has not treated a "method or system of scoring" as a "hard and fast" requirement for classification as a "game." Indeed, as noted there, it is unclear what the agency means by a "system of scoring."

A final consideration weighing against deference in this case are the numerous factual errors that pockmark Customs' ruling. For example, Customs erroneously described Pop-Up-Wackaroos as having five cavities with critter-heads. (There are, in fact, six.) Customs also stated that the "large red button in the bottom left corner of the unit turns the motor 'on' and 'off.'" In fact, as the Instructions that accompany the merchandise clearly explain, the red button only turns the game "on." In addition, Customs indicated that a player must hit all of the critter heads "in the correct order." In fact, the order in which the heads are hit in no way affects the outcome of the game.

At first blush, some of those factual errors may seem relatively minor. But it cannot be assumed that all are irrelevant to Customs' classification analysis – particularly since the question of whether Pop-Up-Wackaroos is a game turns on a detailed factual analysis of the product's features. And, in any event, such errors belie any suggestion that the agency's determination reflects an in-depth familiar-

ity with the merchandise. Indeed, the errors in Customs' ruling here are particularly disconcerting because they did not appear in the Headquarters Decision Memo, which predated this ruling. *Compare* Customs Headquarters Decision Memo *with* Customs' Ruling Letter. In any event, errors such as these undermine the credibility of the agency's decision-making.

Taking into consideration all of the above factors, the balance tips decisively against *Skidmore* deference here.

IV. *Conclusion*

For all the reasons set forth above, Pop-Up Wackaroos is properly classified as a "game machine" under subheading 9504.90.40 of the HTSUS. Mattel's motion for summary judgment is therefore granted, and the Government's cross-motion is denied.

Judgment will enter accordingly.

Slip Op. 04–106

FORMER EMPLOYEES OF SUN APPAREL OF TEXAS, ROSA TUCKER, RODOLFO BRICENO, DIANA CASTRO, DIANA SANDOVAL, AND REFUGIO GARCIA, Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 03–00625
PUBLIC VERSION*

[Plaintiff's motion for judgment on the agency record granted in part. Action remanded to defendant for further proceedings.]

Dated: August 20, 2004

Texas Rural Legal Aid, Inc. (*Carmen E. Rodriguez*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen Finn*), *Stephen Jones*, Office of the Solicitor Division of Employment & Training Legal Services, United States Department of Labor, of counsel, for defendant.

OPINION

RESTANI, Chief Judge: Former Employees of Sun Apparel of Texas, Rosa Tucker, Rodolfo Briceno, Diana Castro, Diana Sandoval,

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* Business confidential information has been deleted from the public version of this opinion where indicated by brackets.

and Refugio Garcia ("Plaintiffs") appeal from negative determinations of the United States Department of Labor ("Labor") regarding their eligibility for Trade Adjustment Assistance ("TAA") benefits.[1] *See Negative Determ. Regarding Eligibility to Apply for Worker Adjustment Assistance*, TA–W–51,120 (Dep't Labor Apr. 7, 2003), P.R. Doc. 22 [hereinafter *Negative Determination*]; *Notice of Determs. Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 68 Fed. Reg. 20,176, 20,177 (Dep't Labor Apr. 24, 2003); *Notice of Determs. Regarding Application for Reconsideration*, P.R. Doc. 34 (Dep't Labor July 1, 2003), *published at* 68 Fed. Reg. 41,847 (Dep't Labor July 15, 2003) [hereinafter *Reconsideration Determination*]. Sun Apparel filed the petition on behalf of its former employees, but, based on information gleaned from the petition and the company's human resources manager, Labor determined that the workers did not meet the statutory criteria for eligibility.[2] *Negative Determ.*, at 3. Upon reconsideration, Labor further investigated Plaintiffs' contentions that Sun Apparel laid off its U.S. workers in order to transfer production to Mexico, but the agency affirmed its previous determination that the layoffs were not attributable to a shift in production or increased imports.[3] *Reconsideration Determ.* 68 Fed. Reg. at 41,847–48. For the reasons that follow, the court concludes that Labor's determinations are not supported by substantial evidence on the record and that good cause exists to remand this action to Labor for further investigation.

BACKGROUND

Plaintiffs are former employees of Sun Apparel of Texas, Inc., Armour Facility, located in El Paso, Texas.[4] Plaintiffs were employed

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[1] Under the TAA program, workers who are displaced as a result of import competition from, or shifts in production to, the United States's trading partners are eligible for a variety of benefits to provide them with "the new skills necessary to find productive employment in a changing American economy." *Former Employees of Chevron Prods. Co. v. United States Sec'y of Labor*, 245 F. Supp. 2d 1312, 1317 (Ct. Int'l Trade 2002) (quoting S. Rep. No. 100–71, at 11 (1987)) ("*FEO Chevron*").

[2] In separate proceedings, Labor certified workers producing jeans and laundering jeans at Sun Apparel's Armour Facility for TAA benefits. *Notice of Determs. Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Assistance*, 65 Fed. Reg. 2432, 2433 (Dep't Labor Jan. 14, 2000).

[3] As discussed *infra*, Labor certified Sun Apparel's Print Shop employees for TAA eligibility upon reconsideration, after finding that there was in fact a shift in production of like or directly competitive articles from Sun Apparel's El Paso facility to Mexico. Labor denied certification for all other workers at that facility. *Reconsideration Determ.*, 68 Fed. Reg. at 41,848.

[4] Sun Apparel had two other facilities in El Paso. Its Warehouse Facility included laundry workers, workers producing trim for clothing, and administrative staff. Workers at the Goodyear Facility were forklift operators and shipping and receiving clerks. *Negative Determ.*, at 2. Labor investigated the former employees' claims for all three facilities concurrently and issued joint determinations. *See id.* at 2–3; *Reconsideration Determ.*, 68 Fed.

in various positions related to the production of sample garments. As a result of layoffs in the company, a number of petitions for worker adjustment assistance were filed by and on behalf of the former employees.[5] At issue here is petition TA–W–51,120, which was filed by Sun Apparel's human resources ("HR") manager on behalf of approximately 243 workers allegedly displaced on March 3, 2003. *Petition* (Jan. 8, 2003), at 1, P.R. Doc. 11. In her petition, the HR manager indicated that the displaced workers produced men's and junior's jeans,[6] but she stated that job losses were not due to a shift in production to a foreign company or increased imports. *Id.*

Labor instituted its investigation of Sun Apparel's petition on March 11, 2003. *Investigations Regarding Certifications of Eligibility To Apply for Worker Adjustment Assistance*, 68 Fed. Reg. 16,095, 16,095–96 (Dep't Labor Apr. 2, 2003). In order to determine whether increased imports or a shift in production contributed to the layoffs,

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Reg. at 41,847–48. The discussion herein, however, is confined to the facts and determinations relevant to the present appeal.

[5] For example, workers in the Armour Facility's cutting room and laundry facility—who were directly involved in the production of jeans—were certified for TAA benefits in 2000 due to a shift in production to Mexico. *See infra* n.12 and accompanying text. Another group of former employees, who apparently worked in similar roles as Plaintiffs but lost their jobs in August 2002, petitioned for NAFTA-TAA benefits, but their petition was denied after Labor determined that there had been no shift in production or increased imports of patterns from Mexico. *Petition for NAFTA-TAA* (Aug. 30, 2002), P.R. Doc. 2; *Negative Determ. Regarding Eligibility to Apply for NAFTA-Transitional Adjustment Assistance* (Dep't Labor Oct. 8, 2002), at 2, P.R. Doc. 7. Under the statutory regime at that time, workers who were displaced as a result of increased imports or shifts in production to Canada or Mexico filed for "transitional adjustment assistance" under the NAFTA-TAA program, while the traditional TAA regime was limited to providing benefits to workers displaced due to increased imports alone. *See Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377, 1379 n.1 (Fed. Cir. 2004) ("*FEO Barry Callebaut*"). The workers' request for reconsideration in the earlier NAFTA-TAA case was rejected by the agency as untimely filed, *see infra* n.9, and they never appealed the negative determination to this court.

Also in August 2002, the TAA statute was amended and the NAFTA-TAA statute was repealed. *Id.* As amended, the TAA statute contains provisions essentially identical to the repealed NAFTA-TAA provision, except that it is not limited to increased imports or shifts in production to Canada or Mexico. *Id.* In addition, the new TAA statute allows certification of "secondary workers," i.e., those whose firms are or were downstream producers or suppliers to firms whose employees were certified for TAA benefits. *Id.*; *see infra* n.19 (defining "downstream producer" and "supplier").

Plaintiffs, who were displaced in 2003, filed for TAA benefits under the new TAA program. The administrative record in this case contains the entire record from the 2002 NAFTA-TAA investigation, because those workers performed similar functions as Plaintiffs and Labor considered those materials in making the determinations at issue. As a result, Plaintiffs' challenges to the contents of the record in this case must fail. In certifying and filing the administrative record on appeal, Labor must include all evidence the agency considered in reaching its conclusions. *See, e.g.*, *Defenders of Wildlife v. Dalton*, 24 CIT 1116, 1118 (2000) ("[T]he 'whole' administrative record has come to be seen as 'all documents and materials directly or indirectly considered by agency decisionmakers and includes evidence contrary to the agency's position.' "), *aff'd sub nom. Defenders of Wildlife v. Hogan*, 330 F.3d 1358 (Fed. Cir. 2003), *cert. denied*, 124 S. Ct. 2093 (2004).

[6] A confidential document completed by Labor near the time of initiation similarly indicated that the affected workers produced jeans, but it stated that the layoffs occurred at a later date. *See Petition Screening & Verification Guide* (Mar. 17, 2003), at 2, C.R. Doc. 16.

Labor sent Sun Apparel's HR manager a business confidential data request, seeking information regarding the organizational structure of the firm, layoffs, recent declines in either sales or production, shutdowns, shifts in production, increases in imports, as well as sales, production, and worker data for 2001 and 2002. *Fax to HR Manager* (Mar. 17, 2003), P.R. Doc. 17. Labor did not seek information concerning 2003, although the layoffs had allegedly occurred in March of that year. The HR manager responded to the confidential data request as well as to several follow-up questions transmitted to her via e-mail.[7]

Meanwhile, on March 14, 2003, a group of former employees of Sun Apparel's Armour Facility filed their own petition for TAA benefits with the Texas Workforce Commission. *Workers' Petition* (Mar. 14, 2003), at 2, P.R. Doc. 14. Their petition alleged that 450 workers who were engaged in the production of sample garments at the facility were displaced because Sun Apparel shifted production of samples to an affiliated facility in Durango, Mexico. The petition also alleged that the Armour Facility was closing. *Id.* A letter accompanying the workers' petition from the Sun & Jones Apparel Workers Committee, a group of displaced employees, indicated that they sought reconsideration of Labor's October 2002 denial of their NAFTA-TAA petition or, in the alternative, the initiation of a new petition. *Id.* at 3–4; *see supra* n.5 (describing prior NAFTA-TAA investigation). The workers claimed that, prior to June of 2002, Sun Apparel had more than one thousand workers employed in El Paso, but that employees were gradually dismissed as the company trans-

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[7] In the business confidential data request, the HR manager indicated that [ ] and that [ ], but claimed that [ ]. *Response from HR Manager* (Apr. 1, 2003), at 1, C.R. Doc. 18. That form did not state the impacted article; ostensibly, it should have related to men's and junior's jeans, the impacted article according to the company's petition. Sun Apparel also provided annual data on its production and salaried workers. The data provided by the company indicated that there were [ ] production workers in 2001 and [ ] in 2002. For the period of January through October of 2001, there were [ ] production workers, compared with [ ] for the same period one year later. Salaried workers only decreased by [ ] between 2001 and 2002 as a whole, but decreased from [ ] to [ ] for the January – October period in those years. *Id.* at 3.

On April 1, 2003, Labor's investigator sent some follow-up questions to the HR manager seeking to clarify the organizational structure of each of the three El Paso facilities. *Follow-up Questions* (Apr. 1, 2003), at 1, P.R. Doc. 19. Specifically, Labor inquired: (1) "What does [sic] all three of these facilities do?"; (2) "How many workers at each facility?"; (3) "Which of the three facilities are closing?"; and (4) "Are the numbers you provided me (sales/production) etc., for ALL facilities or just the 11201 Armour facility?" *Id.* Sun Apparel explained that the Armour Facility [ ]. *Follow-up Response* (Apr. 1, 2003), at 1, C.R. Doc. 20. In response to Labor's request for worker data for each facility, the HR manager indicated that only [ ] total workers were employed at all three facilities, which was significantly fewer than the number of production workers alone in 2002: the Armour Facility employed [ ] workers, the Sun Warehouse Facility, [ ], and [ ] workers were employed at the Goodyear Facility. *Id.* The HR manager did not indicate the time frame for these employment data numbers and did not separate the figures by salaried and production workers. *See id.*

ferred its operations to Mexico. *Workers' Petition*, at 3. In addition, the workers alleged that, at the end of 2002, El Paso employees were sent to train personnel in Mexico, and that personnel from Mexico were similarly sent to El Paso to receive training. *Id.* Finally, the workers shed more light on sample production at the Armour Facility:

> This department of the company is the initiator and terminator of a product. Textiles are designed, cut, sewn, washed, dried, ironed, packaged, and then sent [to the end user]. Hundreds of samples are sold to different parts of the country, so that production of thousands of these samples can also be done in Mexico.

Id. at 4. The Texas Workforce Commission transmitted the petition and letter to Labor via fax on March 21, 2003. *Id.* at 1. Less than one week later, the Assistant General Counsel of the Texas Workforce Commission forwarded nine letters written in Spanish by individual displaced workers in support of their petition/reconsideration request. *Letter from Comite de Sun-Jones Apparel with Attachments* (Mar. 20, 2003), at 4, 7, & 8–17, P.R. Doc. 25. As in the earlier letter sent by the Sun & Jones Apparel Workers Committee, the letters by the individual workers alleged that their jobs associated with the production of samples were transferred to Mexico by Sun Apparel. *Id.* at 8–17. Labor never acknowledged receipt of the petition, never published any notices in the Federal Register, and failed to initiate an investigation of the employees' claims.

Approximately two and a half weeks later, on April 7, 2003, Labor issued a negative determination on Sun Apparel's petition for TAA benefits. *Negative Determ.*, at 3. Rather inexplicably, Labor stated that "[t]he workers at the Armour Facility firm produce patterns."[8]

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[8] Nothing in the record specifically related to TA–W–51,120 contains any reference to pattern production at the Armour Facility. In fact, as discussed *supra*, the company had indicated in its petition on the workers' behalf that men's and junior's jeans were produced at the facility. The workers' uninitiated March 14, 2003 petition, by contrast, claimed that the affected workers produced sample garments. A confidential document in the 2002 NAFTA-TAA investigation, however, contains some evidentiary support for Labor's conclusion. *See Letter from Jacquelynn I. Dayton, Texas Workforce Commission to U.S. Department of Labor to Labor* (Sept. 25, 2002), at 3, C.R. Doc. 5. An employee for the Texas Workforce Commission wrote to Labor that, on September 26, 2002—some time after the NAFTA-TAA investigation was initiated and Sun Apparel completed the confidential data request form—the company's HR manager stated by telephone that patterns for jeans are produced at the Armour Facility for use in jean production at a facility in Mexico. *Id.* The Texas official subsequently updated Sun Apparel's confidential data request form in the NAFTA-TAA investigation to reflect this new information, but only in a "comments" section. *Id.* at 3. The company data as to sales, production, workers, etc. were not changed. *Id.*

Relying upon the HR manager's new representations, the negative determination in that case found that the former employees of the Armour Facility "were engaged in the development of patterns used to produce jeans." *Negative Determ. Regarding Eligibility To Apply for NAFTA-Transitional Adjustment Assistance*, NAFTA–6530 (Dep't Labor Oct. 8, 2002), at

Id. at 2. Further, while the record in TA–W–51,120 contained no evidence to support its findings, Labor nevertheless determined that Sun Apparel did not increase its imports of jean patterns and did not shift production of patterns abroad. *Id.* at 3; *see supra* n.8. Accordingly, Labor denied Sun Apparel's petition for eligibility to apply for worker adjustment assistance. *Negative Determ.*, at 3. As shown, the agency's negative determination wholly ignored the allegations made in the workers' March 14, 2003 petition and accompanying letters.[9]

_____ Subsequently, the former employees, apparently under the mistaken belief that their own petition had been investigated and denied, requested reconsideration of Labor's negative determination by letter dated May 22, 2003. *Letter from Former Employees to Timothy F. Sullivan, Director, Division of Trade Adjustment Assistance, Employment and Training Administration* (May 22, 2003), at 1–2, P.R. Doc. 29 ("*Reconsideration Request*"). In their request, the workers made new factual allegations in support of their claim that production had in fact shifted to Mexico. They alleged that not only did they produce sample garments at the Armour Facility, but that they also produced articles for the Polo Ralph Lauren trademark, and that their jobs were transferred to a Sun Apparel facility in Durango, Mexico, over an extended period of time. *Id.*

Eight individual employees also submitted reconsideration requests in May of 2003.[10] *Id.* at 3–10. Plaintiff Rosa Tucker alleged in a letter that she produced sample garments that were shipped to customers in Mexico, Japan, and Canada. *Id.* at 3. Other employees stated that, in addition to pants for the Polo mark, the workers at the Armour Facility produced Just My Size, Faded Glory, and Quick Silver articles, among others, through most of 2002, but that production had virtually ceased by March of 2003. *Id.* at 4, 8. This allegation was corroborated by another letter reporting that, in early March 2003, at least 40 workers were laid off; another former em-

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2, P.R. Doc. 7 [hereinafter *NAFTA-TAA Determination*]. Labor denied the petition because "[t]he investigation revealed that there was no shift in plant production to Canada or Mexico or company imports of patterns from Canada or Mexico during the relevant period." *Id.* The HR manager's oral statement, however, is the only evidence in the record supporting Labor's conclusions there; there was no evidence that Labor actually investigated whether imports of patterns or a shift in production of patterns abroad contributed to the layoffs.

[9] While Labor's negative determination in the TAA investigation failed to respond to the substantive allegations in the employees' March 2003 petition and letters, Labor did eventually deny as untimely the employees' alternative request for reconsideration of the NAFTA-TAA determination. *Letter from Elliott S. Kushner, Certifying Officer, U.S. Dep't of Labor, Division of Trade Adjustment Assistance to Sun & Jones Workers Committee* (Apr. 28, 2003), P.R. Doc. 27.

[10] While the original letters were written in Spanish, translated versions were supplied by the Government in an appendix to their brief in opposition of Plaintiff's motion for judgment on the agency record.

ployee similarly stated that employment had dropped at the Armour Facility from approximately 1000 workers in 2002 to approximately 150 employees as of March 3, 2003. *Id.* at 6–7. Labor did not respond to the reconsideration requests submitted by the former employees in May.

The former employees reiterated their request for reconsideration in June. Two workers, including Plaintiff Tucker, sent Labor a letter on June 10, 2003. *Letter Regarding Reconsideration Request* (June 10, 2003), at 1–2, P.R. Doc. 30. They alleged that "massive" layoffs began at the Armour Facility in early 2000. They explained that they not only produced sample jeans and pants, but also jackets, dresses, skirts, overalls, shirts, and shorts that were distributed to various customers in the United States, such as Mervyn's, Wal-Mart, and Big K-Mart *Id.* at 1. The workers described various departments involved in the production of sample garments, including pattern making, cutting, sewing, laundry, packing, and shipping. They also explained how the trim department performed auditing functions for articles produced both in El Paso and in Mexico. *Id.* A letter written by a former supervisor on June 11, 2003 elaborated that approximately 1000 production workers had been laid off by Sun Apparel since July 2002. *Reconsideration Request*, at 10. The former employees reiterated their request that Labor reconsider its negative TAA determination in order to help them obtain job training and other benefits.

After obtaining the employees' repeated requests for reconsideration, Labor finally initiated an investigation into Plaintiffs' claims. On June 17, 2003, Labor wrote two e-mails to Sun Apparel's HR manager and asked her the following four questions: (1) whether the workers at the Armour Facility produced jeans after January 8, 2002 and, if so, what percentage of the work was devoted to this production; (2) whether the workers produced "articles" of any kind for Ralph Lauren, Polo; (3) whether the workers produced anything other than apparel samples; and (4) whether the workers sewed labels on apparel after January 8, 2002. *Questions from Susan Worden to Tina Montes* (June 18, 2003), at 1, C.R. Doc. 31 ("*Questions*"); *Follow-up Questions and Responses from Susan Worden to Tina Montes* (June 23, 2003), at 2, C.R. Doc. 32 ("*Follow-up Questions & Responses*"). The HR manager responded that the facility only produces patterns and markers for cutting in Mexico "which [are] shipped primarily via electro[n]ic dat[a] interface," as well as samples and production approval garments. *Questions*, at 1. Regarding sewing, the HR manager stated that [ ]. *Follow-Up Questions & Responses*, at 2. The following day, Labor followed up with several additional questions, including a request for the HR manager to amend or add to a list of comprehensive work functions performed by workers at the Armour Facility, a list that was gener-

ated by Labor.[11] *Id.* at 1–2. Significantly, Labor characterized the pattern/marker production as "electronically generated and sent to Mexico in this form," which the HR manager did not amend, despite her more limited previous statement that these products were only primarily shipped electronically. *Compare Questions* (emphasis added) *with Follow-up Questions & Responses*. These e-mail exchanges constituted the full extent of Labor's investigation into the workers' claims.

Labor officially granted the workers' request for reconsideration and issued its *Reconsideration Determination* on July 1, 2003. 68 Fed. Reg. at 41,847. Labor found that the workers at the Armour Facility produced patterns and markers used to manufacture jeans at an affiliated plant in Mexico, as well as samples (also known as "production approval garments") produced for a variety of domestic customers. *Reconsideration Determ.*, 68 Fed. Reg. at 41,847. Because Labor found that the patterns and markers "were electronically generated and transmitted," Labor concluded that there was no "production" of those articles as required by the statute. *Id.* With respect to the sample production that has ceased at the Armour Facility, Labor found that "sample production has never occurred at the Mexican affiliate, so no production of samples was shifted. Further, the company does not import samples. (As samples are produced for internal use, there is no issue in regard to customer imports.)" *Id.* The agency also found that the workers employed in the shipping and receiving facility, as well as employees in the Trim Department, performed services "mainly" for articles produced at a Mexican production facility. *Id.* at 41,847–48. While Labor acknowledged that service workers can be certified for TAA under limited circumstances, the agency did not analyze whether Sun Apparel's service workers fit the criteria or draw any specific conclusions on their eligibility as service workers. *See id.* at 41,848. Next, Labor noted the employees' allegations that they trained workers in similar functions as those performed at the Armour Facility and that they performed regular production of apparel for specific customers, but stated that a company official reconfirmed "that the subject facility produces apparel for sample purposes only and that all other apparel production was shifted from the subject facility in 2000."[12] *Id.* Because print shop

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[11] Labor also asked for clarification on functions performed at the facility's print shop. In her response, the HR manager admitted that the print shop was running both in El Paso and in Mexico, but that the company elected to eliminate positions in El Paso starting in August 2002. She stated that the print shop closed on March 28, 2003. *Response from Tina Montes* (June 23, 2003), at 1, C.R. Doc. 33. As discussed *infra*, the print shop employees were eventually certified as eligible to apply for TAA benefits.

[12] Labor noted that workers producing jeans and laundering jeans at the Armour Facility were previously certified for TAA on July 7, 2000. At that time, a company official had confirmed that all mass production of apparel had shifted from the subject facility to Mexico. *Reconsideration Determ.*, 68 Fed. Reg. at 41,848. Because that shift occurred outside the pe-

production had ceased in El Paso and production of like or directly competitive articles was shifted to Mexico, however, Labor determined that former print shop employees had met the criteria for eligibility for TAA benefits. *Id*. All other workers, however, were denied eligibility to apply for worker adjustment assistance based on Labor's conclusion that neither increased imports nor a shift in production contributed importantly to their separation from Sun Apparel. *Id*.

JURISDICTION AND STANDARD OF REVIEW

Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (2000). The agency's determination must be sustained if it is supported by substantial evidence in the administrative record and is otherwise in accordance with law. *See* 19 U.S.C.A. § 2395(b) (West Supp. 2004). While the Secretary of Labor's findings of fact are conclusive if supported by substantial evidence, the court may remand the case and order the Secretary to further investigate for "good cause shown." *Id*.

DISCUSSION

Plaintiffs are eligible to apply for trade adjustment assistance if Labor determines that the statutory criteria are met. 19 U.S.C.A. § 2272 (West Supp. 2004). First, Labor must determine that a significant number or proportion of the workers at Sun Apparel have become, or are threatened to become, totally or partially separated. *Id*. § 2272(a)(1). Second, Labor must find that one of the following has occurred: (1) Sun Apparel's sales, production, or both have decreased absolutely, that imports of "articles" like or directly competitive with articles produced by Sun Apparel have increased,[13] and that the increase in imports "contributed importantly"[14] to the workers' separation and to such decline in sales or production; or (2) Sun Apparel shifted production of articles like or directly competitive with the articles produced by Sun Apparel's Armour Facility to

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riod of investigation, Labor stated that it could not be used to certify the current group of displaced workers. *Id*.

[13] The term "article" is not statutorily defined. The court has used the term "product" interchangeably with "article." *See, e.g., Former Employees of Henderson Sewing Machs. v. United States Sec'y of Labor*, 265 F. Supp. 2d 1346, 1358 (Ct. Int'l Trade 2003). The court has similarly explained that "TAA was intended to benefit those who ha[ve] been engaged in the production of an import-impacted article, and courts have noted the common meaning of 'production,' *i.e.*, to 'give birth, create or bring into existence.' " *Former Employees of Pittsburgh Logistics Sys., Inc. v. United States Sec'y of Labor*, 2003 WL 716272, at *5 (Ct. Int'l Trade Feb. 28, 2003) (citing *Woodrum v. Donovan*, 5 CIT 191, 198, 564 F. Supp. 826, 831 (1983), *aff'd sub nom. Woodrum v. United States*, 737 F.2d 1575 (Fed. Cir. 1984)). "[I]t is . . . clear that 'mere' repair and maintenance on an existing article, or work that does not involve transformation of a thing into something 'new and different,' will not suffice for TAA eligibility." *Id*. (citing *Nagy v. Donovan*, 6 CIT 141, 145, 571 F. Supp. 1261, 1264 (1983)).

[14] This term "means a cause which is important but not necessarily more important than any other cause." 19 U.S.C. § 2272(c)(1).

Mexico. *Id*. § 2272(a)(2). There is no dispute that a significant number of workers at Sun Apparel have become totally or partially separated or that sales or production have decreased absolutely. Accordingly, the sole issue is whether there is substantial evidence in the administrative record to support Labor's determination that neither a shift of production nor increased imports of like or directly competitive articles contributed to the layoffs at Sun Apparel's Armour Facility in March 2003.

In their motion for judgment upon the agency record, Plaintiffs argue that the court should certify them for TAA benefits or, in the alternative, remand the case to Labor for further investigation. Plaintiffs first attack the record and investigation in this matter because the agency wholly failed to initiate an investigation of their petition for TAA benefits and instead relied upon evidence collected in other investigations. Plaintiffs also argue that the investigation was inadequate because Labor relied solely upon the unverified information provided by one individual, Sun Apparel's HR manager, who they claim gave incomplete, contradictory, and inconsistent statements throughout several investigations and upon reconsideration. Plaintiffs also point out that Labor drew broader conclusions from the information provided than the evidence supports. Finally, the former employees claim that the time period covered in the agency's investigation is insufficient to discern the gradual shift in production occurring at the Armour Facility.

The Government responds that there is substantial evidence on the record to support Labor's determination and that, accordingly, the determination should be sustained. The Government heralds the breadth of the administrative record, which includes information obtained from several investigations into job losses at Sun Apparel's El Paso facilities, as sufficient to support the negative TAA determination, despite Labor's failure to initiate a separate investigation into Plaintiffs' petition. Further, Defendant asserts that Labor's reliance on the data provided by Sun Apparel's HR manager was appropriate given her credibility and position within the company and that, based on the information she provided, it is clear that pattern and sample production did not shift to Mexico and that Sun Apparel did not import patterns and samples. Thus, the Government concludes that the court should deny Plaintiffs' motion for judgment upon the agency record and sustain Labor's negative TAA determination.

While Labor has "considerable discretion" in conducting its investigation of TAA claims, "there exists a threshold requirement of reasonable inquiry. Investigations that fall below this threshold cannot constitute substantial evidence upon which a determination can be affirmed." *FEO Chevron*, 245 F. Supp. 2d at 1318 (quoting *Former Employees of Hawkins Oil & Gas v. United States Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993)). The court has comprehensively reviewed the administrative record in this manner and

agrees with the Plaintiffs that good cause exists to remand this case to Labor for further investigation.[15] As an initial matter, the court notes that the agency's failure to respond in any way to the former employees' petition for TAA benefits was not in accordance with law. The statute requires the Secretary of Labor to "promptly publish notice in the Federal Register that the Secretary has received the petition and initiated an investigation." 19 U.S.C.A. § 2271(a)(3) (West Supp. 2004). It is undisputed here that Labor never acknowledged its receipt of Plaintiffs' petition and wholly failed to initiate an investigation thereof. While it is true that Labor was investigating a petition filed on the workers' behalf by Sun Apparel at or around the same time the workers' petition was filed, and that the workers' allegations were eventually considered by the agency upon reconsideration of its initial *Negative Determination*, Labor is under a mandatory duty to "conduct an investigation into each properly filed petition" and to publish the notice required by statute. *Woodrum v. Donovan*, 4 CIT 46, 51, 544 F. Supp. 202, 205–06, *rehr'g denied* 4 CIT 130 (1982). The error was prejudicial to Plaintiffs. *See id.* (finding that Labor's failure to comply with these procedural requirements of the statute "prejudiced the rights of plaintiffs" and remanding the action for further proceedings in conformity with statutory requirements).

Due to Labor's disregard of its statutory duty, the displaced workers' claims were ignored for over three months while the agency completed its investigation into Sun Apparel's petition and issued its negative determination. The entire investigation consisted of two communications with only one individual, Sun Apparel's HR manager. In response to Labor's business confidential data request seeking data from Sun Apparel for 2001 and 2002 and one follow-up e-mail, the HR manager provided information that Labor failed to verify or otherwise corroborate. *See supra* n.7. Such a limited investigation fails to provide substantial evidence upon which Labor could base its determination, because, as discussed *infra*, the information provided by the HR manager was too incomplete and unreliable upon which to base a negative determination. *See Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 370 F.3d 1375, 1385 (Fed. Cir. 2004) ("The Secretary is entitled to base an adjustment assistance eligibility determination on statements from company officials," but only "if the Secretary reasonably concludes that those statements are creditworthy and are not contradicted by other evidence."); *FEO Barry Callebaut*, 357 F.3d at 1383 (holding that sworn affidavits supplied by three members of management "were sufficiently trustworthy to constitute substantial evidence").

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[15] Accordingly, the court will not reach the issue of whether the Court of International Trade is empowered to order the Secretary to certify Plaintiffs for TAA benefits.

The information provided by Sun Apparel's HR manager regarding the work performed at the Armour Facility was inconsistent, contradictory, and evidences an apparent lack of comprehension of the full array of operations, tasks, and activities undertaken by Sun Apparel's former employees. For example, in the petition that she filed on the workers' behalf in 2003, the ultimate determination of which is at issue here, the HR manager stated that the articles produced at the facility were men's and juniors' jeans. It follows that the data she provided in the sole data request form likely was based on those affected products, not sample or pattern production.[16] *See supra* n.7. Further, while the nature and extent of Labor's investigation are matters within the agency's discretion, *FEO Chevron*, 245 F. Supp. 2d at 1318, Labor only investigated Sun Apparel's activities in 2001 and 2002. The court agrees with Plaintiffs that the limited extent of the investigation failed to provide substantial evidence to support Labor's findings regarding the March 2003 layoffs at the Armour Facility. As a result, the court finds that the information Labor obtained from Sun Apparel's HR manager provides limited, if any, support for Labor's *Negative Determination* in this matter, and it was unreasonable for the agency to conclude otherwise.[17]

In addition to providing contradictory and irrelevant information, the confidential data request form completed by Sun Apparel's HR manager during Labor's initial investigation was incomplete. The manager failed to fill out an entire section of the form regarding the organizational structure of the firm, specifically Sun Apparel's parent companies and affiliates, including those that manufacture products similar to those made at the Armour Facility. Had the HR manager completed this section, the response would have provided crucial data regarding the relationship between the El Paso and Durango, Mexico facilities and the articles produced at each.[18] Labor issued its *Negative Determination* without investigating these is-

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[16] The data request form does not include the article at issue, so it is ostensibly based upon the article listed in the petition. Here, the company's petition stated that men's and juniors' jeans were the products produced by the affected worker group. *Petition*, at 1.

[17] Although there was some evidence in the record of the workers' prior NAFTA-TAA investigation that the Armour Facility produced patterns that were used to produce jeans in Mexico, there was no evidence whatsoever regarding the pattern production process. *See supra* n.8. In this investigation, the HR manager only admitted that patterns, markers, and sample garments were produced at the Armour Facility in response to an e-mail upon reconsideration regarding the specific functions of each of Sun Apparel's El Paso facilities. As a result, the information in the record at the time of Labor's *Negative Determination* was largely irrelevant to a determination on the workers' claims that their jobs in sample production were shifted to Mexico.

[18] Such information might have shown that Sun Apparel's workers qualify as adversely affected secondary workers. *See supra* n.5 (defining "secondary workers"). A "downstream producer" is "a firm that performs additional, value-added production processes for a firm or subdivision, including a firm that performs final assembly or finishing, directly for another firm (or subdivision), for articles that were the basis for a certification of eligibility" for the primary workers. 19 U.S.C. § 2272(c)(3). A "supplier" is "a firm that produces and

sues. Accordingly, the court concludes that the initial investigation into Plaintiffs' eligibility for TAA benefits was inadequate because it was based upon incomplete and unreliable data, which resulted in a determination that reached the unsupported conclusion that the affected workers produced only patterns. *See supra* n.8 and accompanying text. Such an investigation does not meet the threshold requirement of "reasonable inquiry" or comport with Labor's duty to conduct itself with the "utmost regard" for the petitioning workers. *See FEO Chevron*, 245 F. Supp. 2d at 1318; *Miller v. Donovan*, 9 CIT 473, 477, 620 F. Supp. 712, 717 (1985).

The record reflects significant confusion on the part of the workers as to the status of their petition and, ultimately, the workers were forced to appeal the company's petition once it was denied. It was not until the agency finally granted Plaintiffs' repeated requests for reconsideration that, upon further investigation, Labor was able to more fully define the articles produced at Sun Apparel's Armour Facility and investigate whether the statutory criteria was met for those products. Nevertheless, the investigation upon reconsideration was perfunctory at best.

In its investigation of the numerous new allegations raised by the former employees, Labor asked the HR manager only eight questions, which yielded the following new information from the company: (1) Sun Apparel is a division of Jones Apparel Group, Inc., a Pennsylvania corporation; (2) it is both a manufacturer and contractor (although details regarding the articles manufactured and the work performed under contract were not provided);[19] (3) the displaced workers at the Armour Facility have never manufactured retail jeans; (4) Armour employees produced only salesman samples and/or production approval garments as well as patterns and markers used for cutting in Mexico, which are "shipped primarily" via electronic data interface; and (5) the workers on the sample sew line also did miscellaneous repair work (including sewing labels) on inbound shipments from Mexico. *Questions*, *Follow-up Questions*, & *Responses*, C.R. Docs. 31–33. Labor failed to require any documentary or other evidence to support the HR manager's assertions, to verify the company's responses, or to otherwise ensure the truthfulness of the HR manager's claims. Because the HR manager's statements were directly contradicted by the employees' allegations—for example, that they produced articles for specific clothing brands, not just samples and patterns, and that production of these articles had in fact shifted to Mexico—Labor was required to further investigate

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supplies directly to another firm (or subdivision) component parts for articles that were the basis for a certification for eligibility." *Id.* § 2272(c)(4).

[19] The company is a manufacturer for [ ] and is a contractor for [ ]. *Follow-up Questions & Responses*, at 1.

these issues. *See FEO Chevron*, 245 F. Supp. 2d at 1325 ("[T]he inconsistency between the statements of the [workers] and statements of the company official alone would have necessitated further agency investigation of the precise nature of the [employees'] work."). Further, while there is no dispute that Sun Apparel's facilities in Mexico produce jeans, there is no evidence in the record that Labor made any inquiries whatsoever into other articles produced at the facility or whether Sun Apparel or its customers imported patterns or sample garments. Thus, like the initial investigation, the investigation upon reconsideration fell below the benchmark standard of "reasonable inquiry" in light of the former employees' allegations. *See id.* at 1318, 1325–26 (holding that it was unreasonable for Labor to rely on the unverified statements of a HR manager when contradicted by the workers' descriptions of their own jobs).

As a result of the deficiencies in the investigation upon reconsideration, the court holds that there is insufficient evidence in the record to support Labor's findings that (1) "patterns and markers . . . were electronically generated and transmitted, and thus do not constitute production," (2) "sample production has never occurred at the Mexican affiliate, so no production of samples was shifted," (3) "the company does not import samples," (4) samples are produced for internal use, with no effect on imports for customers, and (5) "the subject facility produces apparel for sample purposes only and that all other apparel production was shifted from the subject facility in 2000." *Reconsideration Determ.*, 68 Fed. Reg. at 41,847. Regarding pattern and marker production, while the company stated that patterns and markers were "shipped primarily" via electronic means, Labor made the much broader conclusion that the patterns and markers were generated and shipped electronically and, on the basis of this finding, Labor summarily concluded that no "production" occurred. There is insufficient evidence to support this conclusion. Labor also failed to make basic inquiries into these items to determine if they were in fact articles under the TAA regime or whether increased imports or a shift in production of patterns contributed to Plaintiffs' displacement.[20] The record is also devoid of

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[20] While it is true that the HR manager failed to correct Labor's characterization of pattern and marker production in a list generated by Labor, Labor failed to make any inquiries into the process. Labor failed to ask questions such as: What actual work was performed in order to produce a pattern at the Armour Facility? Were the workers pattern designers? In what form did the patterns exist when they were produced at Armour? What was done to a pattern in order to complete it before sending it to Mexico for use in the actual production of jeans? If the patterns were only primarily shipped electronically, what were the other means of shipment? What volume of patterns was being produced or developed at Armour before the layoffs, and what volume was being produced at the time of Plaintiffs' displacement? Are workers in Mexico performing similar tasks now? If not, from where is the company getting its patterns?

any evidence to support Labor's conclusion that Sun Apparel did not shift its production of sample garments to Mexico or increase its imports of sample garments.[21] As discussed *supra*, Labor failed to conduct further inquiry into regular production of apparel at the Armour Facility, which it should have done in light of the contradictory allegations of the former employees. Labor also failed to investigate the nature and purpose of Sun Apparel's use of U.S. workers to train Mexican workers, the relationship between Sun Apparel and its customers, and whether the customers are now importing articles formerly produced at the Armour Facility. Finally, Labor wholly failed to conduct a meaningful review of whether Sun Apparel's service workers are eligible for TAA benefits.[22] Upon remand, Labor shall conduct a full investigation into these issues.

CONCLUSION

Because there is good cause to remand this case to Labor for further investigation, Plaintiffs' motion for judgment on the agency record is granted in part. Upon remand, Labor shall fulfill its affirmative obligation to conduct a full and complete investigation into the former employees' allegations and to reach a conclusion on Plaintiffs' eligibility for TAA benefits that is reasonable and supported by substantial evidence in the administrative record. Labor must be specific in its findings regarding the period of review and the impacted article(s) included in the scope of the investigation. A redetermination shall be filed within 45 days.

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[21] Labor should have determined where Sun Apparel's samples are being produced if not at the El Paso facility. Is the production of those articles now being performed at Sun Apparel's Mexican facilities? If samples are not produced in Mexico, is Sun Apparel manufacturing these articles at another domestic facility, or is the company importing like or directly competitive articles?

[22] Service workers, which are not directly engaged in the production of an article, may be eligible for TAA benefits. *See Abbott v. Donovan*, 6 CIT 92, 100–01, 570 F. Supp. 41, 49 (1983). Here, Labor stated that certain employees of Sun Apparel were service workers but did not analyze their eligibility for benefits as such.

Slip Op. 04–107

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CONSOLIDATED BEARINGS COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Court No. 98–09–02799

[Commerce's *Remand Redetermination* is affirmed. Case dismissed.]

August 20, 2004

Pillsbury Winthrop LLP (*Christopher R. Wall*) for Consolidated Bearings Company, plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); of counsel: *Patrick Gallagher*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States, defendant.

OPINION

I. Standard of Review

The Court will uphold the agency'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) (2000). 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) (citations omitted).

II. Background

In *Consolidated Bearings Co. v. United States* ("*Consolidated I*"), 25 CIT 546, 560, 166 F. Supp. 2d 580, 593 (2001), this Court remanded the case to the United States Department of Commerce, International Trade Administration ("Commerce") to "annul the Liquidation Instructions issued by Commerce on August 4, 1998." On November 6, 2001, Commerce filed the *Final Results of Redetermination Pursuant to Court Remand* for *Consolidated I*, which were vacated by *Consolidated Bearings Co. v. United States* ("*Consolidated II*"), 26 CIT ___ , 182 F. Supp. 2d 1380 (2002). This Court ordered, in *Consolidated II*, 26 CIT at ___ , 182 F. Supp. 2d at 1384, that Commerce "liquidate all Consolidated Bearings' imports of FAG

Kugelfischer's merchandise imported during the period of review in accordance with the September 9, 1997, liquidation instructions." On April 1, 2002, Commerce filed the *Final Results of Redetermination Pursuant to Court Remand* (*Remand Results II*) that were subsequently upheld by this Court in *Consolidated Bearings Co. v. United States* ("*Consolidated IV*"), 2002 Ct. Intl. Trade LEXIS 63 (July 9, 2002). The Court of Appeals for the Federal Circuit ("CAFC") in *Consolidated Bearings Co. v. United States* ("*Consolidated V*"), 348 F.3d 997 (Fed. Cir. 2003), *reh'g denied*, 2003 U.S. App. LEXIS 26770 (Fed. Cir. Dec. 30, 2003), and the CAFC's mandate of January 6, 2004, reversed, vacated and remanded the judgment of the Court in *Consolidated IV*, 2002 Ct. Intl. Trade LEXIS 63 (July 9, 2002).

This Court remanded the case to Commerce to examine the following questions: (1) whether Commerce had a consistent past practice with respect to imports from unrelated resellers not covered by the administrative review at issue; (2) whether Commerce departed from a consistent past practice; and (3) whether any such departure was arbitrary. *Consolidated V*, 2004 Ct. Intl. Trade LEXIS 8 (Jan. 30, 2004). Pursuant to the Court's order, dated January 30, 2004, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Redetermination*") with the Court on April 28, 2004.

III. Discussion

Plaintiff, Consolidated Bearings Company ("Consolidated"), argues that "without any notice or explanation, Commerce changed its [past] practice and issued liquidation instruction pursuant to the automatic liquidation provision at the cash deposit rate." Pl.'s Mem. Opp'n Def.'s Redetermination ("Consolidated's Mem.") at 2. Consolidated asserts that Commerce's *Remand Redetermination* "denies any change in its practice, [and] merely restates its new practice and offers *post hoc* arguments as to why it says this has been its practice all along." *Id.* The examples provided by Commerce are liquidation instructions issued less than thirty days before the disputed liquidation instructions. *See id.* Consolidated argues that these examples "show that the practice was developed specifically for this case and are, in fact, evidence of an arbitrary departure from Commerce's actual consistent past practice." *Id.* at 7. Consolidated argues that Commerce's past practice has been to apply the weighted average of the manufacturer's dumping rates in the final results to an importer that imports merchandise produced by a manufacturer from an unaffiliated reseller not covered by the administrative review. *See id.* at 8.

As the CAFC noted, 19 U.S.C. § 1675(a)(2)(c)(2000) "requires Commerce to apply the final results of an administrative review to all entries covered by the review." *Consolidated V*, 348 F.3d at 1005. Consequently, when a review does not include a particular import-

er's transactions, then the importer's entries are not statutorily entitled to the rates established by the review. *Id.* at 1005–06. In the instant case, Consolidated did not request a review and Commerce did not collect or analyze information regarding Consolidated's imports of the subject merchandise. *See Remand Redetermination* at 7. Commerce asserts that its "past practice has been to assess the reseller's sales separately from those of the manufacturer, provided that the manufacturer does not have knowledge that its sales to the reseller are ultimately destined for the United States." *Id.* at 6 (citing *Final Rule: 19 CFR Parts 351, 353, and 355 Antidumping Duties; Countervailing Duties* ("*1997 Final Rule*"), 62 Fed. Reg 27,296, 27,303 (May 19, 1997)). Commerce asserts that it treats a reseller who has not requested a review as an unreviewed company, and Commerce assesses a duty at the rate required at the time of entry. *See id.* Here, Commerce asserts that "[i]t would be inappropriate to assess final duties on Consolidated's entries at the same rate as [FAG Kugelfischer's ("FAG")] entries because FAG's rate was calculated based on importer-specific sales information which had no relationship to Consolidated's entries made during the period of review." *Id.* at 7. Without information on a reseller's sales, Commerce asserts that it is unable to calculate a specific rate for the "reseller sales or an imported-specific liquidation rate for the associated imports of the subject merchandise." *Id.* Furthermore, prior to giving the instructions at issue in this case, Commerce announced its decision "to continue its current practice with respect to automatic assessment; *i.e.*, if an entry is not subject to a request for review, [Commerce] will instruct Customs Service to liquidate that entry and assess duties at the rate in effect at the time of entry." *1997 Final Rule* at 27,313–14.

The CAFC found that for this case the *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties* ("*Assessment Clarification*"), 68 Fed. Reg. 23,954, 23,959 (May 6, 2003), is inapplicable for determining Commerce's past practice. *See Consolidated V*, 348 F.3d. at 1006–07. The CAFC indicated, however, that "[a]t most, Commerce's recent policy statements may help identify Commerce's consistent past-practice." *Id.* at 1007. Commerce states that "[b]ased on [its] *prior-practice*, when an entity has not been assigned a rate from a previously completed segment of a proceeding and that entity does not participate in a current review, that entity is subject to the all-others rate and its imports of subject merchandise are assessed at that rate." *Assessment Clarification*, 68 Fed. Reg. at 23,959. Commerce explains that the *Assessment Clarification* is not consistent with its past practice of liquidating resellers' merchandise at the cash-deposit rate in effect at time of entry because it calls for assessing resellers' entries at the all-others rate. *See Remand Redetermination* at 12–13. Commerce further explains that, in this case, the liquidation of unreviewed entries is governed by 19 C.F.R. § 353.22(e)(1) (1998), which Commerce has interpreted

"to mean that, regarding entries for which no administrative review is requested, [Commerce] is to instruct the [United States] Customs Service to liquidate those unreviewed entries at the cash-deposit rate in effect at the time of entry of the subject merchandise." *Remand Redetermination* at 13–14. *See also J.S. Stone, Inc. v. United States*, 27 CIT ___ , ___ , 297 F. Supp. 2d 1333, 1345 (2003) (noting that when a company makes the required cash deposit and does not request an administrative review, "the cash deposit rate ultimately becomes the rate at which the company is assessed antidumping duties"). The *Assessment Clarification* does not support Consolidated's argument that Commerce's policy at the time it entered the subject merchandise was to assess the manufacturer's rate to reseller transactions. *See United States v. ITT Industries, Inc.*, 28 CIT ___ , ___ , 2004 Ct. Intl. Trade LEXIS 80, at *48 (CIT July 8, 2003). Commerce indicates that "the *Assessment Clarification* altered [Commerce's] past practice of assessing certain unreviewed entries at the cash-deposit rate to assessing them at the all-others rate." *Remand Redetermination* at 13.

Consolidated maintains that Commerce's position, in *ABC International Traders, Inc. v. United States* 19 CIT 787 (May 23, 1995), demonstrates Commerce's past practice of liquidating entries from unrelated resellers that do not have their own liquidation rate at the manufacturer's rate. *See* Consolidated's Mem. at 3. In that case, Commerce liquidated entries from an unrelated reseller at the manufacturer's rate determined during an administrative review. *See id.* Consolidated further argues that Commerce has failed to support its assertion that its consistent past practice was to liquidate entries from resellers who do not have their own liquidation rates at the cash-deposit rate. *See id.* at 7. Consolidated also asserts that the Court "has already determined that Commerce's past practice was to liquidate entries from an unrelated reseller at the manufacturer's rate established in an administrative review, regardless of whether the reseller requested an administrative review." *Id.* at 16 (citing *Nissei Sangyo America, Ltd. v. United States*, 2003 Ct. Intl. Trade LEXIS 103 (CIT Aug. 18, 2003), and *Renesas Tech. Am., Inc. v. United States*, 2003 Ct. Intl. Trade LEXIS 105 (CIT Aug. 18, 2003).

Commerce explains that, when its has not applied the cash-deposit rate in liquidating resellers' merchandise, "there were *special circumstances* in each case that made the application of a rate other than the original cash deposit to the reseller more appropriate and accurate." *Remand Redetermination* at 10. On the occasions that Commerce has ignored its regulation, 19 C.F.R. § 353.22(e)(1)[1], and

[1] The regulation states that absent a timely request for an administrative review, Commerce "will instruct the [United States] Customs Service to assess antidumping duties on the merchandise . . . at rates equal to the cash deposit of, or bond for, estimated antidumping duties required on that merchandise at the time of entry. . . ." 19 C.F.R. § 353.22(e)(1).

instructed Customs to liquidate an importer's entries of merchandise at the manufacturer's rate established in an administrative review, two factors were present: (1) the importer who purchased the merchandise entered did not participate in the administrative review; and (2) no other rate other than the manufacturer's rate was assessed by Commerce in the review proceedings. *See ITT Industries*, 2004 Ct. Intl. Trade LEXIS 80, at *38 n.27.

Consolidated did not participate in the administrative review and meets the first factor Commerce has considered when it has not adhered to its regulation. Consolidated, however, does not meet the second factor because rates other than the manufacturer's rate were assessed by Commerce to other resellers. *Compare ABC Int'l*, 19 CIT at 790 (finding the assessment of the manufacturer's rate to plaintiff-importer was appropriate because the importer should have known that it would be assessed the only existing rate, the manufacturer's rate). *See also Nissei*, 2003 Ct. Intl. Trade 103 (finding Commerce's liquidation instructions to assess the manufacturer's deposit rate to importer's merchandise was arbitrary and capricious because the instructions contradicted prior instructions directing Customs to assess the duties at the rate determined in the administrative review for the importer's manufacturer and no other rate was assessed in the review); *Renesas*, 2003 Ct. Intl. Trade LEXIS 105 (same). Consequently, Consolidated did not have a reasonable expectation that Commerce would apply a weighted average of the final results to its imports. Commerce sent Customs liquidation instructions similar to that received with respect to Consolidated for imports from all of the other countries involved in the first review of anti-friction bearings.

Therefore, upon review of the record, and the arguments presented by the parties on remand, the Court finds that the *Remand Redetermination* is supported by substantial evidence on the record and in accordance with law. Accordingly, it is hereby

ORDERED that the *Remand Redetermination* is affirmed in all respects; and it is further

ORDERED that Commerce instruct Customs to liquidate Consolidated's entries of merchandise according to the direction outlined in the August 4, 1998, liquidation instructions; and it is further

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

Slip Op. 04–108

AK STEEL CORPORATION, Plaintiff, v. UNITED STATES, Defendant, AND THYSSENKRUPP NIROSTA GMBH AND THYSSENKRUPP VDM GMBH, Defendant-Intervenors.

Before: MUSGRAVE, JUDGE
Court No. 03–00102

[On Rule 56.2 motion for summary judgment regarding deductibility of indirect selling expenses and inference on missing data at antidumping duty administrative review, judgment for the defendant.]

Decided: August 25, 2004

Collier Shannon Scott, PLLC, Washington D.C. (*David A. Hartquist, Jeffrey S. Beckington, Adam H. Gordon*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Cristina C. Ashworth*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Elizabeth Doyle, Bernice Brown*), of counsel; Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Ellen Daly*), of counsel, for the defendant.

Hogan & Hartson L.L.P. (*T. Clark Weymouth, Craig Lewis,* and *Behnaz L. Kibria*), Washington, D.C., for the defendant-intervenors.

OPINION

Plaintiff AK Steel Corporation, a domestic petitioner, contests *Stainless Steel Sheet and Strip in Coils From Germany; Notice of Final Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 6716 (Feb. 10, 2003) ("*Final Results*"), PR[1] 50 (amended at 68 Fed. Reg. 14193 (Mar. 24, 2003), PR 54), as administered by the Department of Commerce, International Trade Administration ("Commerce" or the "Department"). This opinion presumes familiarity with general antidumping law. The administrative review of the outstanding antidumping order[2] covers the period July 1, 2000, through June 30, 2001 ("POR"), and entries of subject merchandise from respondent ThyssenKrupp Nirosta GmbH ("ThyssenKrupp"), defendant-intervenor herein.

AK Steel raises two claims. The first is that Commerce improperly failed to deduct all relevant indirect selling expenses from the constructed export price of the subject merchandise before making the statutory comparison to normal value. The other is that Commerce

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[1] The public and proprietary documents of the administrative record are herein referenced "PR" and CR," respectively. "Stainless steel sheet and strip" is occasionally referenced in the administrative record as "S4."

[2] *See Notice of Amended Final Determination of Sales at Less than Fair Value and Antidumping Duty Order; Stainless Steel Sheet and Strip in Coils from Germany*, 64 Fed. Reg. 40557 (July 27, 1999).

erred by failing to apply partial adverse facts available to certain home market sales that were reported with incomplete data. Commerce and the defendant-intervenors argue in favor of sustaining the *Final Results* as is. For the following reasons, judgment for the defendant is appropriate.

Jurisdiction and Standard of Review

This Court has jurisdiction over the matter pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c). A final antidumping duty review determination unsupported by substantial evidence on the record or otherwise not in accordance with law will not be sustained. 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. *Indirect Selling Expenses*

AK Steel's first claim concerns certain statutory adjustments to the U.S. price of the subject merchandise. Each of Thyssenkrupp's sales to the U.S. consisted of an "upstream" sale from the German producer/exporter to an affiliated U.S. reseller, and a "downstream" sale from the affiliate to an unaffiliated U.S. customer. During the first three months of the POR, the subject merchandise entered the U.S. through Krupp Hoesch Steel Products, Inc. ("KHSP"); thereafter, it entered through ThyssenKrupp Nirosta North America, Inc. ("TKNA"), a newly formed subsidiary into which the KHSP's sales functions were consolidated.[3] *See* CR1/PR 10 at A–9 — A–10, A–17. Under the antidumping statute, such transactions are valued for antidumping duty purposes at "constructed export price" ("CEP"). *See* 19 U.S.C. § 1677a(b).[4] CEP essentially takes the "downstream" sale price to the first unaffiliated purchaser and adjusts it to approximate, "as closely as possible, a price corresponding to an export price between non-affiliated exporters and importers." Statement of Administrative Action Accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316, Vol. I, 103d Cong. 2d Sess, at 823 (1994) ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4163. The objective of such deductions is to make comparable comparisons, at the same

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[3] In a separate segment of the proceeding, Commerce examined the respondent's corporate reorganization and determined *inter alia* ThyssenKrupp Nirosta GmbH to be the successor-in-interest of Krupp Thyssen Nirosta, GmbH ("KTN") and TKNA to be the successor-in-interest of Krupp Thyssen Nirosta North America, Inc. ("KTNA"). *See Stainless Steel Sheet and Strip in Coils from Germany: Final Results of Changed Circumstances Antidumping Duty Administrative Review*, 67 Fed. Reg. 61319 (September 30, 2002). In the interest of clarity, KTN as well as ThyssenKrupp VDM GmbH are included in references to "ThyssenKrupp" as the context may require.

[4] *See also* 19 U.S.C. §§ 1675(a)(2)(A), 1677(35)(A).

level of trade, to "normal value." *See Micron Technology, Inc. v. United States*, 243 F.3d 1301, 1304 (Fed. Cir. 2001).

Among the expenses to be deducted are indirect selling expenses (ISEs), *i.e.*,

> expenses which do not meet the criteria of "resulting from and bearing a direct relationship to" the sale of the subject merchandise, do not qualify as assumptions, and are not commissions. Such expenses would be incurred by the seller regardless of whether the particular sales in question are made, but reasonably may be attributed (at least in part) to such sales.

SAA at 824, 1994 U.S.C.C.A.N. at 4164. According to Commerce, deductible ISEs must be "associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser," and where the expense was borne or when it was paid is irrelevant that consideration. 19 C.F.R. § 351.402(b). The Court of Appeals for the Federal Circuit has held that to be deductible an ISE must "aris[e] specifically out of the sale of the subject merchandise in the United States to an unaffiliated purchaser, as opposed to those general expenses incurred by the foreign producer or exporter in all sales, without regard to the identity or location of the purchaser." *Micron*, 243 F.3d at 1309 (quoting SAA at 824, 1994 U.S.C.C.A.N. at 4164).

AK Steel's claim concerns ISEs that ThyssenKrupp reported as relating to the CEP transactions with TKNA. ThyssenKrupp reported these in field DINDIRSU of its database and explained in its narrative that TKNA (and KHSP) had incurred ISEs in Germany that related to "sales to the U.S. market" which were paid or borne by ThyssenKrupp. The ISEs included technical services, marketing, sales support, and transportation support. CR 2/PR 12 at C–39.[5] AK Steel argues that ThyssenKrupp "acknowledged" that these activities were "directly related" to the downstream sales, that the selling functions and expenses were "low" or "minimally" related to the CEP transactions, that ThyssenKrupp "incurs all U.S. transportation expenses," that the staffs of Krupp Thyssen Nirosta Export (an affiliated German exporter) and TKNA "always" serve as points of contact for U.S. sales negotiations, and that ThyssenKrupp's staff members "occasionally" participated in U.S. sales visits and discussions with U.S. customers. Pl's Br. at 15 (referencing CR 1/PR 10 at Ex's A–4–B & A–4–C; CR 7/PR 22 at C). Mainly, however, AK Steel's position is

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[5] The allocation of the "expenses associated with these activities are reported in Field DINDIRSU[; s]eparate rates were calculated for non-precision band sales to the U.S. via KHSP and KTNA and precision band sales to the U.S. via" ThyssenKrupp's Canadian affiliated reseller. PR 12/CR 2 at C–39. ThyssenKrupp also reported certain ISEs as relating to the downstream sales in a separate Field (INDIRSU). The deduction of these ISEs in the calculation of CEP, as well as the deduction of "upstream" ISEs involving KHSP (*see infra*), is uncontested.

that the ISEs should have been deducted because they are identical in nature to ISEs that had been deducted in the prior review. AK Steel argues that Commerce must be consistent in its application of the law, and that there has been no significant change of circumstances justifying different treatment in this review. Further, it argues that Commerce's justification is based upon mere inclusion in this administrative record of the issues and decision memorandum from the preceding review, which does not constitute substantial evidence justifying the different decision here from that reached in the preceding review. Pl's Br. at 13–19.[6]

ThyssenKrupp argues that it never "acknowledged" that the DINDIRSU ISEs were "directly related" to the downstream sales. Although ThyssenKrupp staff "occasionally visited and sat in on talks with customers," the German exporter/producer was not involved in negotiating sales with U.S. customers. Def-Int's Br. at 6 (referencing PR Doc 22 at C–8). ThyssenKrupp highlights the explanation and examples of ISEs in Commerce's *Antidumping Manual* and argues that the ISEs at issue here relate to the CEP level of sale and are not expenses associated with economic activity occurring in the United States:

> The CEP deduction is limited to the expense of economic activity occurring in the United States. The SAA also specifies that direct selling expenses may only be deducted to the extent they are incurred after importation (*See* SAA at 153/823.) Accordingly, all U.S. direct expenses incurred in the United States associated with the sale to the first unaffiliated U.S. customer would be included in this deduction, as would all indirect expenses incurred in the United States by a U.S. affiliate of the foreign exporter. Direct and indirect expenses incurred in the foreign market on behalf of U.S. sales (e.g. lodging expenses paid for by the respondent for U.S. customer's technicians taking training in the respondent's country (direct) and salaries of salesmen in the respondent's country who take orders from the U.S. affiliate, and foreign inventory carrying costs (indirect)) do not form part of the deduction. . .
>
> As a rule of thumb, if the expense is incurred in the United States by the affiliated importer or the exporter, it should be deducted. However, if the expense is for a foreign activity, it should not be deducted.

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[6] In that review, covering the period January 8, 1999 through June 30, 2000, Commerce verified the reported ISEs and deducted them in the CEP calculation because it considered that the expenses were associated with economic activities in the United States. *See Issues and Decision Memorandum for the Administrative Review of Stainless Steel Sheet and Strip in Coils From Germany: January 4, 1999 through June 30, 2000* (Feb. 11, 2002) (Comment 4), *referenced in* 67 Fed. Reg. 7668, 7670 (Feb. 20, 2002) ("99–00 Issues Memo"). *See also* PR 28/CR 10 at 3.

Antidumping Manual at Chapter 7, Section III.C at 12 (Court's omission).

In the *Final Results*, Commerce did not deduct from CEP the ISEs charged by ThyssenKrupp to TKNA because, Commerce concluded, they were associated with the CEP level of sale. Commerce explained that the deduction of similar ISEs in the preceding review was the result of "a unique situation" relating to the closure of KHSP during which ThyssenKrupp had "played a more active role [in] sales to the unaffiliated U.S. customer." *See* PR 47 at 14–15.

At first blush, the ISEs appear to be the same kinds of activities in both administrative reviews. Thus, AK Steel's assertion that there is "no evidence of any change in the nature of the expenses or the activities to which they relate[,] only the identity of KTN's affiliated U.S. reseller, on whose behalf these expenses were incurred, changed"[7] impugns Commerce's conclusion that ThyssenKrupp was "more active" in sales to the unaffiliated U.S. customer(s) in the preceding review. The Court does not opine on whether the deduction in the preceding review was proper, but the determination at issue involves not a change of position[8] but the application of agency discretion to the deductibility of ISEs after considering the degree of producer/exporter activity to be imputed to the downstream sales. That is, Commerce considered AK Steel's argument on interpreting the ISEs at issue as related to the downstream sales but came to a different conclusion regarding their relationship to downstream sales. AK Steel's argument shows neither detrimental reliance nor unreasonableness in Commerce's explanation for the different result in this review, and a different conclusion may not be judicially superimposed because "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, 86 S.Ct. 1018, 1026 (1966) (citations omitted). Substantial evidence and law therefore support Commerce's determination.

II. *Incomplete Product Characteristics Data*

AK Steel also contests Commerce's conclusion that ThyssenKrupp acted to the best of its ability in responding that data for certain product characteristics could not be provided without being unduly burdensome. ThyssenKrupp claimed it could not provide complete

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[7] Pl's Repl. at 2.

[8] The general proposition is that Commerce may change a previously-held position if it explains the basis for the change and the change is in accordance with law and supported by substantial evidence. *See, e.g., Viraj Forgings, Ltd v. United States*, 27 CIT ____ , ____ , 283 F. Supp.2d 1335, 1342–43 (2003); *Cultivos Miramonte S.A. v. United States*, 21 CIT 1059, 1064, 980 F. Supp. 1268, 1274 (1997).

data for rolling process (hot or cold), gauge, finish, width, and temper for an affiliated home market reseller, Nirosta Service Center GmbH ("NSC"), because

> a small number of German sales, primarily non-prime merchandise, were sold as "product bundles," comprised of miscellaneous products. For such sales, NSC groups a large number of products together and sells the group when the product characteristics of the sold goods [are] irrelevant to the purchaser (*e.g.*, sales to a stainless scrap consumer).

PR 12/CR 2 at B–7, B–8—B–11.

Commerce issued a supplemental questionnaire requesting that ThyssenKrupp either remedy the missing product characteristics or explain in detail why it was unable to provide the requested information. PR 19/CR 6. ThyssenKrupp submitted answers to the supplemental questionnaire on April 26, 2002. PR 22/CR 7. In response, ThyssenKrupp explained that NSC had sold some items in "bundles," that the product characteristics for such merchandise bundles could only be extrapolated from the invoices and "could vary from package to package within each invoice line-item," and that in order to provide the requested information, which involved a large number of missing data observations, NSC would have to review the packing lists manually, "an exercise that was not possible within the time period" allowed. *Id*. at B–3—B–4.

Commerce sent a second supplemental questionnaire again asking ThyssenKrupp for the missing information. PR 27. ThyssenKrupp responded that it had attempted to the best of its ability to fill in the missing product characteristics but, for a small number of sales, could not supply the necessary information:

> The sales in question consist mostly of non-prime merchandise sales by Nirosta Service Center ("NSC") and a very small subset of prime merchandise sales by NSC and Thyssen Schulte ("TS"). In preparing their earlier-filed databases for submission to the Department, these companies attempted to the best of their ability to fill in missing product characteristic data through the means available to them. For NSC, product characteristic data was merged from the company's electronic packing list. For TS, company personnel manually reviewed over 3,000 invoices to fill in missing product characteristic data. The data that has been provided to the Department reflects the results of these efforts.
>
> The remaining sales with missing product characteristic data either will not factor into the Department's analysis or represent an inconsequential portion of home market sales. . . . Except for a very small quantity of non-prime resales of returned merchandise, the U.S. importers sold only prime merchandise

> in the U.S. market. Therefore, . . . non-prime home market sales without product characteristics will not factor into the Department's analysis. The remaining . . . prime merchandise sales without certain product characteristics [is insignificant in terms of] the total home market prime merchandise sales quantity, which we respectfully submit is inconsequential to the Department's analysis.

PR 30/CR 12 at S2–1—S2–2.

In the preliminary determination, Commerce applied partial adverse facts available because ThyssenKrupp "had the opportunity to suggest reporting the missing characteristics in an alternative form, yet it failed to do so." 67 Fed. Reg. at 51203, PR 34. Commerce noted that the preceding administrative review involved a "similar situation" in which ThyssenKrupp did not initially report complete data for rolling process (hot or cold), gauge, finish, width, and temper for a number of home market sales but was able to remedy the missing characteristics either by calculating the average finish, gauge, and width from its packing list data or, eventually, by reporting the actual transaction-specific information. *Id*. (citations omitted). Commerce considered ThyssenKrupp "a sophisticated company with experience in the procedures of an antidumping investigation and administrative review" and therefore deemed it appropriate, preliminarily, to apply partial adverse facts available.[9] *Id*. *See* 19 U.S.C. § 1677m(c).

By the final results, however, after considering the parties' case and rebuttal briefs Commerce decided to apply neutral facts available. PR 47. Similar to the situation of the preceding review, ThyssenKrupp suggested using average verified values as substitutes for the missing finish, gauge, width, temper, and hot/cold rolled data. Although ThyssenKrupp did not provide the calculations for its suggested alternative data, Commerce noted that it had, however, provided a computer program which would make such calculations. Commerce thus decided that the omission did not warrant an adverse inference and that ThyssenKrupp had acted to the best of its ability because it provided "the most precise data available from its accounting system" by "merging its product characteristics with NSC's electronic packing list[.]" Further, substituting average values for the missing finish, gauge, width, hot/cold rolled, and temper data

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[9] As partial adverse facts available, Commerce matched home market NSC sales missing product characteristics "to the lowest-priced product of the same grade sold in the United States by assigning the home market transaction the corresponding U.S. control number." 67 Fed. Reg. at 51204, PR 34. For any home market sales of grades not sold in the United States which had missing characteristics, the Department assigned to the product "the home market control number of the highest-priced product of the same grade in the home market." *Id*.

"is consistent with the methodology utilized in the first review of this case." *Id*.

AK Steel relies on *Nippon Steel Corp. v. United States*, 337 F. 3d 1373 (Fed. Cir. 2003), to argue that Commerce incorrectly interpreted 19 U.S.C. § 1677e(b) in reaching its determination not to draw an adverse inference with respect to the missing data. Pl's Br. at 22. The appellate panel in *Nippon Steel* stated that an importer or respondent must "keep and maintain full and complete records documenting the information that a reasonable importer should anticipate being called upon to produce[,]" 337 F.3d at 1382, and AK Steel stresses the panel's express statement that inadequate recordkeeping is not condoned. Thus, AK Steel argues that the heart of the inquiry here is whether substantial record evidence supports a determination that ThyssenKrupp, an experienced, resourceful, and sophisticated respondent, did the maximum it could do to provide all requested information, particularly since it knew what information would be requested, having been called upon to produce it in the previous review. AK Steel contends that Commerce's determination to permit ThyssenKrupp to report incomplete data, when the record shows that ThyssenKrupp was *not* "unable" to report all required product characteristics, is inconsistent with *Nippon Steel*'s instruction that a respondent put forth maximum effort in complying with Commerce's requests for information. Pl's Br. at 22.

The government and ThyssenKrupp respond that application of neutral facts available is supported by substantial evidence and is otherwise in accordance with law. They argue that Commerce correctly determined that ThyssenKrupp had acted to the best of its ability by providing alternatives and explanation for the missing product characteristics, and that the determination is reasonable since it reflects the approach followed in the preceding review. Def's Br. at 22; Def-Int's Br. at 27–28.

Nippon Steel was decided after Commerce reached its determination, but it stands for the proposition that section 1677e(b) does not inject a *mens rea* consideration into Commerce's discretion on whether to apply an adverse or neutral inference to a given set of facts. Although the term "may" in section 1677e(b) is clearly permissive, not mandatory, the Court of Appeals for the Federal Circuit admonished that

> [a]n adverse inference may not be drawn merely from a failure to respond, but only under circumstances in which it is reasonable for Commerce to expect that more forthcoming responses should have been made[,] *i.e.*, under circumstances in which it is reasonable to conclude that less than full cooperation has been shown. While intentional conduct, such as deliberate concealment or inaccurate reporting, surely evinces a failure to cooperate, the statue does not contain an intent element. "Inadequate inquiries" may suffice. The statutory trigger for

> Commerce's consideration of an adverse inference is simply a failure to cooperate to the best of respondent's ability, regardless of motivation or intent.

337 F.3d at 1383.

In other words, the agency's discretion *may* be influenced, but it is not precluded, by a respondent's inadvertence or unintentional mistake. Conversely, "a respondent satisfies the statutory mandate to act to the best of its ability when the respondent does 'the maximum it is able to do' in meeting Commerce's requests for information." *China Steel Corp. v. United States*, 28 CIT ___ , ___ , 306 F.Supp.2d 1291, 1303–04 (2004) (quoting *id.* at 1382). "[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *F.Lli De Cecco Di Filippo Fara S. Martino S.p. A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). *See, e.g., American Silicon Technologies v. United States*, 24 CIT 612, 626–27, 110 F.Supp.2d 992, 1003–04 (CIT 2000) (remand appropriate where Commerce applied adverse inference without determining whether respondent had the ability to respond).

AK Steel apparently interprets *Nippon Steel* to require Commerce to prove that an importer cooperated to the best of its ability every time that the agency decides *not* to apply adverse facts available.[10] This runs counter to the discretion afforded to Commerce by section 1677e(b) in the application of adverse facts available. The Court concludes that Commerce's determination on this matter is consistent with *Nippon Steel*, and there is substantial evidence on the record from which to infer that ThyssenKrupp acted to the best of its ability in attempting to comply with requests for information.

As described above, in both its November 6, 2001, and its April 29, 2002 submissions ThyssenKrupp explained that it could not provide product characteristics for a small number of its affiliate NSC's home market sales because those sales were "non-prime merchandise" sold in "bundles" to customers such as scrap metal companies for whom product characteristics were unimportant and whose invoices did not list the product characteristics Commerce desired. PR 12/CR 2 at B–7—B–11; PR 22/CR 7 at B–3—B–4. ThyssenKrupp's first supplemental response explained that it had not been possible within the time provided for it or NSC to manually go through all the packing lists and obtain the missing information. PR 22/CR 7 at B–3—B–4. ThyssenKrupp's second supplemental response explained that it had attempted to comply with Commerce's request by merging data from NSC's electronic packing list, and personnel had manually reviewed over 3,000 invoices of another company in order to track down some of the missing product characteristic data, and

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[10] *See* Pl. Br. at 23.

ThyssenKrupp respectfully submitted that the prime merchandise sales which remained without complete product characteristics data represented a *de minimis* percentage of the total home market prime merchandise sales quantity which ought to be considered "inconsequential" for purposes of Commerce's analysis. PR 30/CR 12 at S2–1—S2–2. Following the preliminary determination, ThyssenKrupp reiterated its position and provided alternatives to remedy the deficiency. PR 39/CR 18 at CB–18 ("most of the sales are non-prime and would not match to U.S. prime merchandise sales that account for [nearly all of the] sales of the subject merchandise" and the prime NSC sales account for a *de minimis* percentage of total home market sales).

In the *Final Results*, Commerce determined that ThyssenKrupp had retained reasonable records and acknowledged that ThyssenKrupp had "extend[ed] its attempt to remedy the [missing] physical characteristics[.]" Commerce noted that although ThyssenKrupp had not calculated averages for the *Preliminary Results*, it "fully explain[ed] the circumstances wherein product characteristics were missing, and provide[d] a computer program to attribute average product characteristics to those sales in which product characteristics were missing." PR 47 at 19. *See* PR 30/ CR 12 at Exhibits 1–5; PR 39/CR 18 (attachments to case brief providing alternative methodologies to fill the gap in product information). Since Commerce had previously accepted an alternative source of information for NSC's missing characteristics in the prior review, it was reasonable for Commerce to infer that ThyssenKrupp could reasonably expect that similar missing information in this period of review would not be an obstacle to the application of neutral, rather than adverse, facts available. *See* PR 47 at 19. Commerce's conclusion that ThyssenKrupp cooperated to the best of its ability is reasonable, not an abuse of discretion, and supported by substantial evidence. The Court may not substitute a different view of the matter.[11] *See Consolo, supra*, 383 U.S. at 620.

Conclusion

For the foregoing reasons, judgment will enter for the defendant.

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[11] The government also points out that it appears to be inconsistent for AK Steel to argue for "administrative regularity" regarding the deduction of indirect selling expenses while asserting, essentially, "that Commerce must change course and apply adverse facts" despite the application of neutral facts under similar circumstances in the prior period of review. *See* Def's Br. at 22–23.