U.S. Customs and Border Protection

Slip Op. 13–38

SWIFF-TRAIN CO., METROPOLITAN HARDWOOD FLOORS, INC., BR CUSTOM SURFACE, REAL WOOD FLOORS, LLC, GALLEHER CORP. and DPR INTERNATIONAL, LLC, Plaintiffs, v. UNITED STATES, Defendant, and COALITION FOR AMERICAN HARDWOOD PARITY, Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 12–00010

[Remanding finding of material injury arising from imports of multilayered wood flooring from the People's Republic of China.]

Dated: March 20, 2013

William Ellis Perry, Dorsey & Whitney, LLP, of Seattle, WA, for plaintiffs. With him on the brief was *Emily Lawson*.

Mary Jane Alves, Attorney, Office of the General Counsel, U.S. International Trade Commission, Washington, DC, argued for defendant. With her on the brief were *James M. Lyons*, General Counsel, *Andrea C. Casson*, Assistant General Counsel and *Geoffrey S. Carlson*, Attorney. *Alexander V. Sverdlov*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington DC, also appeared for defendant.

Jeffrey Steven Levin, Levin Trade Law, P.C., Washington, DC, for defendant-intervenor.

OPINION

Musgrave, Senior Judge:

This action is before the court on Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record. Swiff-Train Co., Metropolitan Hardwood Floors, Inc., BR Custom Surface, Real Wood Floors, LLC, Galleher Corp., DPR International, LLC (collectively, "Plaintiffs") challenge the final determination of the U.S. International Trade Commission ("Commission") in *Multilayered Wood Flooring from China*, Inv. Nos. 701-TA 476 and 731-TA-1179 (Final), 76 Fed. Reg. 76435 (December 7, 2011) ("Final Determination"), *see also* Views of the Commission Majority (Confidential), Confidential Record Document ("CR") 525 ("*Views*"). Plaintiffs challenge the Commission's determination that the industry in the United States producing multilayered wood flooring ("MLWF") is materially injured by reason of

imports from China that are sold at less than fair value ("LTFV"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

The court held an oral argument on the issues in this case on January 23, 2013. After due consideration of the parties' submissions, the administrative record and all other papers herein and for the reasons that follow the court remands to the Commission for analysis and reconsideration relating to its decision not to investigate domestic producers of hardwood plywood used for flooring, for further explanation of the impact the subject imports had on the domestic industry in light of collapse of the housing market during the period of investigation, and to re-evaluate whether the subject imports were a "but-for" cause of material injury to the domestic industry. The court also remands so that the Commission may make findings on the issue of price suppression/depression. The Commission's determination is upheld in all other respects.

I. *Background*

MLWF is "composed of an assembly of two or more layers or plies of wood veneer(s) in combination with a core." *See Multilayered Wood Flooring from the People's Republic of China: Amended Final Duty Determination of Sales at Less than Fair Value and Antidumping Duty Order*, 76 Fed. Reg. 76690 (Dep't Commerce, Dec. 8, 2010) (Final) ("Final AD Order"). MLWF is a type of wood flooring product that is typically comprised of two to ten layers or plies that include a core sandwiched between a back or bottom layer and a face veneer surface of a desired wood species and finish. ITC Staff Report (Confidential) dated October 27, 2011, CR 507 ("Staff Report") at I-9.

On October 21, 2010, an *ad hoc* association of U.S. manufacturers of MLWF, the Coalition for American Hardwood Parity (Defendant-Intervenor here), filed a petition with the Commission and the Department of Commerce ("Commerce") alleging that the MLWF industry in the United States was materially injured or threatened with material injury by reason of less than fair value ("LTFV") MLWF imported from China. Commerce found that Chinese MLWF was being sold in the United States at LTFV. *See* Final AD Order, and *Multilayered Wood Flooring from the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 76693 (Dep't Commerce, Dec. 8, 2010) (Final CVD Order).

Following its own investigation, the Commission found that the domestic industry was materially injured by reason of Chinese MLWF imports. *Views* at 3. Six commissioners participated in the determination; four voted to find material injury and two dissented.

Id. at 3 n.1. The Commission found that the domestic industry suffered from declining market share "due primarily to the significant volume of subject imports from China that is increasing significantly relative to domestic production and apparent U.S. consumption. . . ." *Views* at 53–54. The subject imports significantly undersold domestic MLWF while the U.S. industry suffered declines in employment and wages and lost money throughout the period under investigation. *Views* at 54. "Based on all the foregoing trends, we find that there is a causal nexus between subject imports and the poor condition of the domestic industry and that the domestic industry is materially injured by reason of subject imports." *Views* at 54.

Two commissioners dissented from the Commission's *Views*. *Dissenting Views of Chairman Deanna Tanner Okun and Commissioner Daniel R. Pearson*, Dec. 5, 2011, CR 526 ("*Dissenting Views*"). The dissenting commissioners found no material injury by reason of the subject imports of MLWF. *Dissenting Views* at 36. The dissenters disagreed with the Commission's findings on several important points. The dissenters found that MLWF was "substitutable" and found attenuated competition between the domestic and imported products, because domestic and imported product tended to be sold in different channels. *Dissenting Views* at 4–6. The dissenters also disagreed with the Commission's findings on volume, price effects and the impact the subject imports had on the domestic producers of MLWF.

> We find that the record does not show a correlation between subject imports and the domestic industry's declining performance indicia during the period of investigation. The deterioration in the domestic industry's performance indicators coincided with the global economic downturn and the fall in residential housing construction appears to be demand driven, occurring while subject imports were decreasing overall during the period examined on an absolute basis.

Dissenting Views at 27.

II. *Standard of Review*

In reviewing the Commission's determination, the court will remand the Commission's determination if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B) (2000).

III. *Discussion*

A. *Composition of Domestic Like Product Industry*

Plaintiffs argue that the Commission should have investigated producers of domestic hardwood plywood used for flooring as part of the domestic like product industry.[1] Defendant argues that this issue was not raised in a timely manner before the Commission and that there was little time for the Commission to perform such an investigation, even if it were warranted.[2] Plaintiffs briefed the issue before and after the Commission's final hearing, and the issue of whether hardwood plywood flooring was within scope was put before the Commission in June, 2011. Pl's Br. at 3–4, Reply Brief in Support of Plaintiff's Rule 56.2 Motion for Judgment on the Agency Record ("Pl's Reply") at 2–4. The court finds that the issue was raised early enough in the proceedings to provide the Commission adequate time to address it, which it did. *See Views* at 8 n. 22. Therefore, the court does not find requiring exhaustion of administrative remedies is appropriate here. *See* 28 U.S.C. 2637(d), *Al Tech Specialty Steel Corp. v. U.S.*, 11 CIT 372, 377, 661 F.Supp. 1206, 1209–10 (1987); *cf. Ad Hoc Shrimp Trade Action Committee v. U.S.*, 33 CIT ___, ___, 675 F.Supp.2d 1287, 1300 (2009) ("[i]t is 'appropriate' for litigants challenging antidumping actions to have exhausted their administrative remedies by including all arguments in their case briefs submitted to Department of Commerce").

The scope of the MLWF LTFV investigation defines the product in part as follows:

> *Multilayered wood flooring is composed of an assembly of two or more layers or plies of wood veneer(s) in combination with a core.* The several layers, along with the core, are glued or otherwise bonded together to form a final assembled product. Multilayered wood flooring is often referred to by other terms, *e.g.*, "engineered wood flooring" or "*plywood flooring*." Regardless of the particular terminology, all products that meet the description set forth herein are intended for inclusion within the definition of subject merchandise.
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> All multilayered wood flooring is included within the definition of subject merchandise, without regard to: dimension (overall thickness, thickness of face ply, thickness of back ply, thickness

[1] *See* 19 U.S.C. § 1677(10); Plaintiff's Rule 56.2 Memorandum in Support of Motion for Judgment Upon the Agency Record ("Pl's Br.") at 3.

[2] Defendant's Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Deft's Br.") at 6–9.

> of core, and thickness of inner plies; width; and length); wood species used for the face, back and inner veneers; core composition; and face grade. *Multilayered wood flooring included within the definition of subject merchandise may be unfinished* (*i.e.*, without a finally finished surface to protect the face veneer from wear and tear) or "prefinished" (*i.e.*, a coating applied to the face veneer, including, but not exclusively, oil or oil-modified or water-based polyurethanes, ultraviolet light cured polyurethanes, wax, epoxy-ester finishes, moisture-cured urethanes and acid-curing formaldehyde finishes). * * *
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> The core of *multilayered wood flooring may be composed of a range of materials, including but not limited to hardwood* or softwood veneer, particleboard, medium-density fiberboard ("MDF"), high-density fiberboard ("HDF"), stone and/or plastic composite, or strips of lumber placed edge-to-edge.

Final Antidumping Order, 76 Fed. Reg. at 76690 (emphasis added).[3]

Plaintiffs argue that the scope definition of MLWF "[is] so broad that hardwood plywood suitable for flooring plainly and necessarily [falls] within the definition". Pl's Br. at 3–4. Defendant and defendant-intervenor argue that hardwood plywood is outside the scope and therefore the Commission's decision not to include domestic manufacturers of hardwood plywood used for flooring should be sustained. Deft's Br. at 4–5, Defendant-Intervenor's Opposition to Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record ("Deft-Int's Br.") at 4–6.

Plaintiffs argued below that the Commission should investigate U.S. hardwood plywood producers as part of the domestic MLWF industry and provided the Commission with a list of domestic hardwood plywood producers. Post-Hearing Br., CR 496 at 15. The Commission declined to investigate whether domestic hardwood plywood was used as flooring and thus whether the producers involved should be included in the domestic like product industry. Pl's Br. at 7–8; Deft's Br. at 7 (the Commission "did not investigate such firms based on the record"). The Commission explained:

> [W]hereas the scope does not include hardwood plywood for flooring or the veneers peeled from plywood or logs, it does, for

[3] After briefing was completed herein, plaintiffs provided supplemental information showing that the scope of the MLWF investigation uses almost identical language as that used in a more recent antidumping investigation involving hardwood plywood. Letter from Dorsey & Whitney, LLP, dated November 5, 2012, *citing Hardwood and Decorative Plywood from the People's Republic of China: Initiation of Antidumping Duty Investigation*, 77 Fed. Reg. 65172 (Dept. of Commerce, Oct. 25, 2012). This information is not part of the record before the court and the court declines to take judicial notice of it.

> example, include as unfinished MLWF those products manufactured by pressing one or more layers of wood veneer to a hardwood plywood core that may or may not yet have a tongue and groove or click-and-lock profile, stain, and/or finish. . . .
>
> We note that the Importer Respondents [plaintiffs herein] do not ask the Commission to define the domestic like product broader than the scope to include hardwood plywood for flooring, and they allege no other basis to include firms producing hardwood plywood for flooring in the domestic industry. Under the statute, only producers of the domestic like product may be included in the domestic industry. As our reviewing court has stated, "[t]he statute clearly provides that 'the effect of . . . dumped imports shall be assessed in relation to the United States production of a *like product*.' 19 U.S.C. § 1677(4)(D) (emphasis added)." *General Motors Corp. v. United States*, [17 CIT 697, 702], 827 F.Supp. 774, 780 (1993). Thus, producers of hardwood plywood for flooring cannot be included in the domestic industry.

Views at 8–9 n. 22. The Commission states that the scope "includes hardwood plywood insofar as it meets the scope definition, *i.e.*, 'unfinished MLWF . . . manufactured by pressing one or more layers of wood veneer to a hardwood plywood core."[4] This statement begs the question posed by plaintiffs, and renders arbitrary the reasoning behind the Commission's refusal to investigate whether those producers should be included within the domestic like product industry. The Commission admits that there is hardwood plywood that falls within the scope, but refuses to investigate that portion of the domestic industry.

The Commission's claim that pressing of a veneer to a hardwood core is required for plywood product to fall within the scope is unsupported by evidence on the record. A veneer is "a thin slice of wood that is rotary cut, sliced or sawed from a log, bolt or flitch. Veneer is referred to as a ply when assembled." Final AD Order, 76 Fed. Reg. at 76690 n.2. "Veneer" is not restricted to the outer layer of MLWF. Staff Report, CR 507 at I-19 ("the core is typically composed of wood veneers"). Therefore, plywood always has an outer veneer, and thus could fall within the scope's definition of MLWF. There is no factual basis for the Commission to distinguish hardwood plywood used for flooring from unfinished MLWF by finding that MLWF requires the addition of a veneer to a core.

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[4] *See also* Deft's Br. at 4 n.3.

The Commission is required to evaluate the entire domestic industry in making injury determinations. *NSK Corp. v. United States*, 34 CIT ___, ___, 712 F.Supp.2d 1356, 1364 n.13 (2010), *citing Nevinnomysskiy Azot v. United States*, 32 CIT 642, 660, 565 F.Supp.2d 1357, 1373 (2008); *cf. Wheatland Tube Co. v. United States*, 21 CIT 808, 815, 973 F. Supp. 149, 158 (1997), *citing United States Steel Group v. United States*, 18 CIT 1190, 1197 n. 6, 873 F.Supp. 673, 683 n.6 (1994) (ITC does not have the authority to exclude from a like product determination merchandise corresponding to that within scope). As the scope itself states, "[a]ll products that meet the description set forth herein are intended for inclusion within the definition of subject merchandise." Final MLWF Antidumping Order, 76 Fed. Reg. at 76690.

The court finds that the Commission's definition of the domestic industry is not supported by substantial evidence and that it failed to evaluate the performance of the entire domestic like product industry in its investigation. While the court agrees that plaintiffs could have brought this particular argument to the Commission's attention earlier, it finds that the issue of the overlap between hardwood plywood for flooring and unfinished MLWF was before the Commission at least as early as June, 2011, well before its final decision was announced. On remand the Commission shall reopen the record to identify and evaluate whether domestic hardwood plywood manufacturers make product that is used for flooring. The Commission shall issue questionnaires to any producers so identified and make findings commensurate with any such new record evidence adduced from the questionnaires, after having given the parties time to comment on any evidence adduced or related findings.

B. *Material Injury Factors*

In finding whether the subject imports materially injured the domestic industry, the Commission must consider the volume, price effects and impact of the subject imports on domestic producers pursuant to 19 U.S.C. § 1677(7)(B). *USX Corp. v. United States*, 11 CIT 82, 84, 655 F. Supp. 487, 489 (1987). In addition to the factors listed therein, the Commission "may consider such other economic factors as are relevant to the determination regarding whether there is material injury by reason of imports." 19 U.S.C. § 1677(7)(B)(ii). After review of the record the court finds that the Commission's findings of the significance of the volume of subject imports is supported by

substantial evidence on the record, but the court finds that the Commission's discussion of the other statutory factors requires further discussion.[5]

(i) *Price Effects Factor*

(a) *Underselling*

In its review of the underselling factor, the Commission found that "quality and price are important factors in purchasing decisions in the U.S. market for MLWF." *Views* at 37. Due to "high substitutability" and its finding of a lack of "attenuated competition" the Commission concluded that "competition in the U.S. primarily depends on price." *Id*. at 37–38. The Commission reviewed factors relevant to underselling and found that "a majority of [the pricing data reported] show subject imports undersold the domestic like product throughout this period." *Id*. at 38 (footnote omitted).

The dissenting commissioners point out that price was second in importance to quality in purchasing decisions, and that respondents chose four other factors ahead of price when asked about each factor's importance in making purchasing decisions. *Dissenting Views* at 15. The dissenters conclude that price "is likely not the most important [factor] in most purchasing decisions." *Id*. The dissenters found mixed underselling and overselling during the period of investigation ("POI"). *Id*. at 16. Evidence showed domestic product undersold imported in products in which the domestic industry was most specialized, whereas the opposite occurred in products where the Chinese product was most specialized. *Id*. The dissenters concluded there was attenuated competition and market segmentation "characterized by (a) traditional high volume products that are price sensitive and (b) higher value, lower volume products that are less price-sensitive". *Id*. The dissenters concluded from the data that there had not been significant underselling by the imported merchandise as compared with the price of domestic merchandise. *Id*. at 17.

The court finds that the Commission's conclusion that there was significant underselling of subject merchandise is supported by substantial evidence on the record. While the validity of the Commission's comparison of sales prices between the products is undermined by the lack of congruity between the volume of sales of 3 of the 8 products chosen for comparison, the data on 4 of the remaining 5 products showed significant underselling of Chinese vs. domestic like product.

[5] Plaintiffs dispute the Commission's refusal to find that the subject MLWF replaced non-MLWF products, but the court finds that the decision was supported by substantial evidence. *See* Pl's Br. at 25–29.

(b) *Price Suppression*

On the issue of price suppression, the Commission concluded that domestic MLWF "faced competition from a large and growing volume of substitutable MLWF that was lower priced and that the domestic industry lowered its prices, including for hand-scraped products." *Views* at 44. The Commission's conclusion depends primarily on evidence from one of the 8 products reviewed. Significantly, the Commission concluded only that there was "*evidence* of adverse effects on the domestic industry's MLWF prices," *id*. at 45 (emphasis added), and did not make an explicit finding of significant price depression (and no finding at all regarding price suppression).

The dissenters point out that for 6 of the 8 products reviewed, the domestic price declines were modest. *Dissenting Views* at 17. Of the remaining 2 products, one Chinese product oversold the domestic product in 11 of 12 quarters reviewed. *Id*. Raw material prices declined during the period and the cost of goods sold to net sales ratio decreased over the period. *Id*. at 17–18. These other factors that may explain the price decline were not addressed by the Commission. The dissenters found "no evidence that subject imports prevented the domestic industry from increasing prices to a significant degree." *Id*. at 18.

Upon review of the record as a whole, the court finds that the Commission's finding on price suppression is not supported by substantial evidence because the finding rests on price information relating to only one of eight products reviewed, and evidence pointing to other reasons for the price reductions was not addressed in the Commission's *Views*. The court directs that on remand the Commission should make explicit findings on the effect of the subject imports on the price suppression and depression factors, discussing not only the factors cited in the Commission's *Views*, but also those economic issues addressed by the *Dissenting Views*.

(ii) *Impact on Affected Domestic Industry*

The Commission evaluates "impact" factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry. 19 U.S.C. § 1677(7)(C)(iii). In assessing the impact of the subject MLWF imports on the domestic industry the Commission noted but did not further discuss the "severe downturn in macroeconomic conditions and in U.S. residential housing" which resulted in a 47% decline in the number of housing starts during the POI and a 12% decline in a leading home remodeling market indicator. *Views* at 25.

> Although the general economic downturn and declining demand for MLWF contributed to the domestic industry's deteriorating performance from 2008 to 2009, as respondents argue, we find that the decline in demand associated with the downturn worked hand in hand with the subject imports in contributing to the domestic industry's deteriorating performance. We note that the domestic industry's performance was poor throughout the period under examination, including prior to the fall in demand, as subject imports held a very substantial share of the U.S. market from the beginning. Moreover, the domestic industry's loss of market share to imports of MLWF from subject producers in China is clearly not a function of demand.

Id. at 48–49. "[W]e do not find that the improvements in a few indicators of the domestic industry's performance are inconsistent with a finding of material injury by reason of subject imports." [6]

According to the dissenting commissioners, record evidence failed to demonstrate that trends in the domestic industry's performance were by reason of the subject imports. "The performance trends of the domestic industry do not correlate to the subject import volumes in any meaningful way." *Dissenting Views* at 23.

> [T]he better explanation for the financial condition of the domestic industry lies in the conclusion of the Commission's staff report, which states that '[t]o the extent that U.S. producers collectively generated gross profit throughout the period, the industry's pattern of consistent operating losses can in general be attributed to its inability to recover corresponding SG&A expenses.'

Dissenting Views at 24, *citing* Staff Report, CR 507 at VI-15. The dissenters cited correlations between the decline and recovery of the U.S. housing market and the profitability of the domestic MLWF industry. *Id*. at 25–26. "On the record in front of us, we cannot conclude that it was the subject imports that were responsible for the lower-than-expected demand; instead, we conclude that it was the recession, with its negative effects centered in the housing industry, that was responsible for the lower demand and therefore, higher unit costs." *Id*. at 24.

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[6] *Views* at 52. The Commission failed to make any findings with regard to the fifth statutory "impact" factor: magnitude of the margin of dumping on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii)(V). The dissenters stated that the final dumping margins found by Commerce were "unusually low for the Chinese industry as a whole". *Dissenting Views* at 20.

Though it mentioned the effect of the collapse of the new housing and home remodeling markets on the domestic MLWF industry, the Commission did not discuss the industry's poor performance in relation to the overall trends that affected their business, other than the subject imports. Without an explanation of how the dramatic collapse of the home building and remodeling markets impacted sales of domestically produced MLWF the court cannot review the Commission's implicit determination that it did not attribute injury from the overall market decline to the subject imports.

> It is paramount in this regard that the Commission 'examine other factors to ensure that it is not attributing injury from other sources to the subject imports.' SAA at 851–52. Especially where the Commission finds one main cause of injury to the domestic industry, this analysis inherently necessitates some degree of comparison between the injurious effects of the subject imports and other unrelated factors because, in some cases, other sources of injury 'may have such a predominant effect in producing the harm as to . . . prevent the [subject] imports from being a material factor.'

Taiwan Semiconductor Indus. Assn. et al v. United States, 23 CIT 410, 416, 59 F.Supp.2d 1324, 1331 (1999), *aff'd*, 266 F.3d 1339 (Fed. Cir. 2001), *quoting Gerald Metals, Inc. v. United States*, 22 CIT 1009, 1014 n.8, 27 F. Supp.2d 1351, 1355 n.8 (1998); Statement of Administrative Action, H.R. Doc. No. 316, 103rd Cong., 2nd Sess. (1994), *reprinted in* Uruguay Round Agreements Act Legislative History, Vol. VI, at 852 ("SAA") (Commission must "examine other factors to ensure that it is not attributing injury from other sources to the subject imports"). "[T]he Commission would abuse its discretion if, by ignoring a relevant economic factor that it could consider under section 1677(7)(B)(ii), the Commission 'entirely failed to consider an important aspect of the problem.'" *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 872–73, *quoting Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). As the court explained in *Hynix Semiconductor v. United States*, 30 CIT 1208, 431 F.Supp.2d 1302 (2006):

> The Federal Circuit, in affirming the CIT's *Taiwan Semiconductor* case, provided the following instructions for the ITC regarding causation: "[T]he [ITC] need not isolate the injury caused by other factors from injury caused by unfair imports. . . . *Rather, the [ITC] must examine other factors to ensure that it is not attributing injury from other sources to the subject imports*."

> *Taiwan Semiconductor Indus. Ass'n v. ITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (quoting H.R. Doc. No. 103316, vol. 1, at 852) (alteration in original). The ITC is charged with the burden of an earnest investigation into whether other factors render the subject imports a tangential, *de minimis* cause of the domestic industry's material injury. An affirmative material injury determination does not rest on substantial evidence when the ITC fails to analyze compelling arguments that purport to demonstrate the comparatively marginal role of subject imports in causing that injury.

Hynix, 30 CIT at 1226–27, 431 F.Supp.2d at 1317 (footnote omitted).

The court finds that the Commission's findings regarding the impact of the subject imports on the domestic industry is unsupported by substantial evidence because the Commission failed to adequately consider the effect that the severe disruption of the home building and remodeling industries had on the domestic like product industry. The court remands this action to the Commission to re-evaluate its findings relating to the impact of the subject imports in comparison with the effects of the severe downturn in the home building and remodeling markets during the POI, while specifically addressing the economic impact issues identified as affecting the domestic like product industry in the *Dissenting Views*.

C. *"By Reason Of" and "But-For" Causation*

The parties disagree over the standard applicable by the Commission in making its material injury determination. The statute directs the Commission to "make a final determination of whether . . . an industry in the United States . . . is materially injured . . . by reason of [the subject] imports[.]" 19 U.S.C. § 1673d(b). The material injury must be "harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A).

After assessing whether the volume, price effects, and impact of the subject imports on the domestic industry are significant, the statutory "by reason of" language implicitly requires the Commission to "determine whether these factors as a whole indicate that the [subject] imports themselves made a material contribution to the injury." *Gerald Metals*, 22 CIT at 1014, 27 F. Supp.2d at 1355 (1998). "[T]he statute requires adequate evidence to show that the harm occurred 'by reason of' the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods."

Gerald Metals, Inc. v. United States, 132 F.3d 716, 722 (Fed. Cir. 1997). Our appellate courts have explained that the "by reason of" language requires application of the "but-for" legal causation standard.

> An important element of the causation inquiry – not necessarily dispositive, but important – is whether the subject imports are the 'but-for' cause of the injury to the domestic industry. As the Supreme Court has explained,
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> > But-for causation is a hypothetical construct. In determining whether a particular factor was a but-for cause of a given event, we begin by assuming that that factor was present at the time of the event, and then ask whether even if that factor had been absent, the event would have transpired in the same way.
> >
> > *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).
>
> In this context, that principle requires the finder of fact to ask whether conditions would have been different for the domestic industry in the absence of dumping.

Mittal, 542 F.3d at 876. The Commission addressed causation in its *Views*. "Although the statute requires the Commission to determine whether the domestic industry is 'materially injured by reason of' unfairly traded imports, it does not define the phrase 'by reason of,' indicating that this aspect of the injury analysis is left to the Commission's reasonable exercise of its discretion."[7] The Commission decided that under the *Gerald Metals* line of cases, "we do not consider ourselves required to apply the replacement/benefit test that was included in Commission opinions subsequent to *Bratsk*."[8] The Commission concluded that "[t]he question of whether the material injury threshold for subject imports is satisfied notwithstanding any injury from other factors is factual, subject to review under the substantial evidence standard." *Views* at 22.

The Commission explains in its brief before this court that it "did not attribute injury to the domestic industry from non-subject imports to [the] subject imports," thus ensuring "that there was a suf-

[7] *Views* at 18. The Commission misunderstands its role in applying the statutory "by reason of" standard (explained in *Gerald Metals* and *Mittal*). While the Commission may, in its discretion, make findings regarding whether the standard is met or choose an evaluation methodology suited to a particular case, its discretion does not extend to defining the standard itself.

[8] *Views* at 22. Commissioner Pinkert dissented from this portion of the Commission's analysis. *Views* at 20 n.87.

ficient causal nexus between [the] subject imports and the material injury to the domestic industry." Deft's Br. at 28–29. But aside from citing to contemporaneous economic data, the Commission cites to little evidence on the record that connects the subject imports to the condition of the domestic industry. *Gerald Metals*, 132 F.3d at 719 ("a showing that economic harm to domestic industry occurred when LTFV imports were also on the market is not enough to show that the imports caused a material injury.") The Commission needs to ensure that the subject imports, as compared to other economic factors affecting the domestic industry, were not a but-for cause of the injury. That is not the end of the analysis, though, because the statute requires that the injury caused be "not inconsequential, immaterial or unimportant." 19 U.S.C. § 1677(7)(A). Thus, the Commission must determine whether the subject imports were a but-for cause of injury, as well as whether the quantum of injury was material or consequential. The court finds that the legal and factual analysis performed by the Commission in this instance misses the mark and thus the conclusion of material injury is not supported by substantial evidence.

Plaintiffs argue that the Commission erred by not applying a "but-for" replacement benefit analysis similar to that applied in *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369 (Fed. Cir. 2006), because non-subject imports were in the market and potential existed for them to increase to replace subject imports. Pl's Br. at 13–15. The court disagrees that the statute in conjunction with our appellate precedent requires us to restrict application of the "but-for" causation standard to a particular factual scenario, or a particular aspect of the material injury inquiry. Rather, the statutory "by reason of" standard clearly applies to the overall causation analysis to be performed by the Commission. In any event, the court finds plaintiff's "replacement" argument speculative and not well-suited to the facts in this case.[9]

Under applicable law, the Commission must reconsider its findings. In particular, the Commission must perform a "but-for" causation analysis of whether the subject imports materially injured the domestic industry. Paraphrasing the standard summarized in *Price Waterhouse*, the Commission should "begin by assuming that [the subject imports were] present at the time of [the POI], and then ask

[9] The court reserves judgment on whether the Commission should find whether MLWF is a "commodity product" for purposes of a *Bratsk*-type inquiry in light of the Commission's finding that the product is highly substitutable. *See*, *e.g.*, Staff Report CR 507 at I-16, n.37 (noting "over 80 percent of U.S. producers, almost one half of responding importers, and over two-thirds of responding purchasers reported that MLWF produced in the U.S. and MLWF imported from China are at least 'frequently' used interchangeably.")

whether even if [the subject imports] had been absent, [the performance of the domestic industry] would have transpired in the same way". *Price Waterhouse*, 490 U.S. at 240. The court directs the Commission to consider the impact of the subject imports "within the context of the business cycle and conditions of competition that are distinctive to the affected industry", while considering whether the subject imports had a material "but-for" impact on the domestic industry. 19 U.S.C. § 1677(7)(C)(iii).

IV. *Conclusion*

For the foregoing reasons, the court finds that the Commission's decision is not supported by substantial evidence. Accordingly, it is hereby

ORDERED that this action is remanded to the International Trade Commission to reconsider its finding that producers of hardwood plywood for flooring cannot be included in the domestic industry. On remand the Commission shall reopen the record to identify domestic hardwood plywood manufacturers and evaluate whether they make product that is used for flooring. The Commission may (a) issue additional questionnaires to domestic producers of hardwood plywood that fits within the MLWF scope definition and revise its findings and conclusions based upon the record evidence so adduced, or (b) further explain its rationale for excluding domestic hardwood plywood producers from the investigation where their product fits within the facial terms of the MLWF scope. The Commission must share any new record information and or proposed explanation with the parties and provide them with an opportunity to address that information or explanation as it applies to the record evidence. The Commission shall then make revised factual findings if necessary based on the additional record evidence or its revised explanation; and it is further

ORDERED that the Commission shall make specific findings on the effect of the subject imports on the statutory price suppression and depression factors, discussing not only the factors cited in the Commission's *Views*, but also those economic issues identified by the *Dissenting Views*; and it is further

ORDERED that the Commission shall reconsider the impact of the subject imports on the domestic industry "within the context of the business cycle and conditions of competition that are distinctive to the affected industry", with particular reference to the economic impact issues identified as affecting the domestic like product industry in the *Dissenting Views*; and it is further

ORDERED that the Commission shall make and support a finding of whether the subject imports had a material "but-for" impact on the domestic like product industry; and it is further

ORDERED that the Commission shall file the remand results with the court on or before September 30, 2013; and it is further

ORDERED that the parties shall file a proposed scheduling order on or before October 31, 2013, for the submission of comments (with page limits) on the remand results.

Dated: March 20, 2013
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 13–41

MUKAND, LTD., Plaintiff, v. UNITED STATES, Defendant, and CARPENTER TECHNOLOGY CORPORATION, Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 11–00401
PUBLIC VERSION

[Plaintiff's Motion for Judgment on the Agency Record under USCIT Rule 56.2 is denied.]

Dated: March 25, 2013

Peter J. Koenig, Squire Sanders (US) LLP, of Washington, DC, for plaintiff.

David D'Alessandris, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant. With him on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Melissa M. Brewer*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Washington, DC.

Grace W. Kim, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenor.

OPINION AND ORDER

Goldberg, Senior Judge:

Plaintiff Mukand Ltd. ("Mukand") contests the final results of the U.S. Department of Commerce's (the "Department" or "Commerce") administrative review of the antidumping duty order on Stainless Steel Bar from India. *Stainless Steel Bar from India*, 76 Fed. Reg. 56,401 (Dep't Commerce Sept. 13, 2011) (final results of antidumping duty administrative review and partial order revocation) ("*Final Results*"). Mukand asserts that the Department erred in applying adverse facts available ("AFA") when calculating Mukand's dumping

margin for the period of review. Alternatively, Mukand argues that even if resort to AFA was appropriate, the Department nonetheless erred in employing "total AFA" instead of "partial AFA" to arrive at the dumping margin. For the reasons set forth below, the court denies Mukand's Rule 56.2 Motion for Judgment on the Agency Record and sustains Commerce's determination to apply total AFA.

FACTUAL BACKGROUND

On March 30, 2010, the Department initiated an administrative review of the antidumping duty order on Stainless Steel Bar from India, pursuant to the request of domestic interested parties. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 75 Fed. Reg. 15,679 (Dep't Commerce Mar. 30, 2010). As part of that review, the Department issued a series of questionnaires to Mukand wherein it sought information designed to assist the Department in calculating Mukand's dumping margin. Most relevant to this case, Commerce requested that Mukand report the costs attributable to producing various sizes of stainless steel bar.[1] According to Commerce, this information was necessary to accurately perform its sales-below-cost test, to calculate the difference in merchandise ("DIFMER") adjustment, and potentially to arrive at a constructed value. *See, e.g.*, Issues & Decision Memorandum, A-533–810 (Aug. 31, 2011), at 26 ("*I&D Mem.*").

Commerce first requested size-specific cost information in its initial questionnaire to Mukand. Admin. R. Pub. Doc. ("P.R.") 54, at D-25. Upon receipt of Mukand's response, Commerce noted that Mukand assigned the same production costs across all product sizes. Informing Mukand that it did "not consider one broad based average cost to be reasonable for purposes of" its calculations, Commerce stated that it was "imperative" that Mukand furnish unique costs regardless of whether it tracked such costs in its normal accounting records. P.R. 108, at 3. Commerce alternatively afforded Mukand the opportunity to "quantify . . . and explain" any reasons the company may have for believing the size-based cost differential to be insignificant. *Id.*

In its response, Mukand declined to provide unique cost information and instead attempted to explain why its costs did not vary from one product size to the other. *Id.* at 3–4. Specifically, Mukand briefly responded that where product grade and type of finishing operation are the same, direct material costs do not vary with size. *Id.* In a subsequent questionnaire, Commerce reiterated its need either for

[1] In this case, size was one of the six product characteristics making up the CONNUM. P.R. 5, at 3 ("*AFA Mem.*"). The remaining characteristics were general type of finish, grade, re-melting, type of final finish, and shape. *Id.*

cost estimates or a more thorough narrative quantifying and explaining Mukand's belief that size-based cost differences were insignificant. P.R. 145, at 8–9. Again, Mukand asserted that when all other physical characteristics remain the same, costs do not vary with size. *Id.* at 9.

Commerce attempted to elicit the information a fourth time, noting that it "would appear as though large sizes would require less processing and would incur less processing than smaller sizes." P.R. 172, at 1. Mukand conceded that "[t]heoretically," there could be a cost difference, but that it was insignificant because smaller sizes could be processed at faster speeds than larger sizes. *Id.* at 2. However, Mukand did not provide any quantifiable data to support its assertion because it believed the costs associated with those calculations were greater than the benefit. *Id.*

Unsatisfied with Mukand's narrative, Commerce sought the information a final time before releasing its preliminary results. In its supplemental questionnaire, Commerce identified and elaborated on several flaws that it perceived in Mukand's response. Specifically, Commerce sought information with respect to two factors, rolling time and weight, that it believed would impact size-based costs.[2] P.R. 206, at 1–5. To assist Mukand in explaining why those factors did not significantly affect costs, Commerce asked a series of targeted and specific questions. *Id.* The Department also instructed Mukand to contact them if their request was unclear, if Mukand was unable to supply the information, or if the Department was otherwise mischaracterizing Mukand's production processes. *Id.* Commerce made clear that failure to cooperate with its request could result in reliance on facts available. *Id.* at 5.

Mukand did not contact the Department, but again attempted to explain its basis for not reporting size-specific costs. Mukand acknowledged that there was likely a cost difference among sizes, however it "fe[lt] from experience" that the difference was insignificant and that, in any event, there was no "reasonable *and* verifiable way" to estimate the costs. *Id.* at 2–4. Mukand apparently thought that Commerce's reliance on rolling time and weight ignored the company's broader production process. Essentially, Mukand maintained that size-based production costs varied depending on the processing stage. For example, while smaller bars incurred greater production costs than larger bars at the hot rolling stage, the opposite was true

[2] With respect to rolling time, Commerce believed that smaller bars would have undergone more rolling and, thus, would be associated with a longer rolling time and an enhanced rolling cost. With respect to weight, Commerce noted that smaller, lighter bars should have a higher per kilogram rolling cost than larger, heavier ones. Therefore, weight would also presumably impact size-based costs. P.R. 206, at 2.

of production costs at the heat treating stage. *Id.* The result of the different production processes, Mukand maintained, was that variable size-based costs were virtually the same on the aggregate. *Id.* Nonetheless, Mukand provided no concrete data in support of this argument, believing there existed no "reasonable *and* verifiable way" to isolate the costs. *Id.* at 2–4.

Ultimately finding Mukand's collective responses deficient, Commerce preliminarily resorted to AFA to calculate Mukand's dumping margin. *Stainless Steel Bar from India*, 76 Fed. Reg. 12,044, 12,047 (Dep't Commerce Mar. 4, 2011) (preliminary results). In comments on the preliminary results, Mukand argued that it materially complied with Commerce's requests since there was no reasonable and verifiable method of reporting size-specific production costs. P.R. 241, at 5–6. However, in a seeming reversal, Mukand offered to submit the same information that it previously maintained was not reasonably obtainable. *Id.* at 10.

In its final results, Commerce refused to consider the new information because it could not review it, solicit interested party comments, and re-calculate a margin within the statutory timetables. *I&D Mem.* at 33. Therefore, Commerce continued to rely on AFA and assigned to Mukand an AFA rate of 21.02 percent. *Id.* at 34. This appeal followed.

SUBJECT MATTER JURISDICTION AND STANDARD OF REVIEW

Mukand commenced this action under section 516A of the Tariff Act of 1930, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006). Accordingly, the Court has jurisdiction pursuant to 28 U.S.C. § 1581(c). This Court must uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Thus, the Court will not displace Commerce's adequately supported conclusions simply because reasonable minds may differ as to the proper outcome. *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999). Commerce enjoys broad discretion when implementing U.S. antidumping law and "factual determinations supporting antidumping margins are best left to the agency's expertise." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000); *see also Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1287, 1304 (2009) (addressing Commerce's broad discretion in determining whether to apply AFA).

The Court employs a two-part analysis when assessing whether Commerce's statutory construction is otherwise "in accordance with law." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984); *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007). Under the *Chevron* rubric, the Court first assesses "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc.*, 467 U.S. at 842. If it has, then the Court must give effect to Congress's unambiguously expressed intent. *Id.* at 842–43. If, however, the statute is silent or ambiguous with respect to the pertinent issue, the Court defers to Commerce's reasonable statutory construction. *Id.* at 843.

LEGAL FRAMEWORK FOR DETERMINATIONS BASED ON AFA

In an administrative review of an antidumping duty order, Commerce must determine whether the subject merchandise "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1). To facilitate that determination, Commerce evaluates "the normal value and export price (or constructed export price) of each entry of the subject merchandise" and "the dumping margin for each such entry." *Id.* § 1675(a)(2)(A). U.S. law defines the dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* § 1677(35)(A). And that margin serves as "the basis for the assessment of . . . antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." *Id.* § 1675(a)(2)(C).

To assist in calculating a dumping margin, Commerce requests information from respondents through questionnaires. If a respondent (for any reason) fails to satisfactorily respond to Commerce's requests for "necessary information," Commerce must use "facts otherwise available" to fill the gap in the record caused by respondent's failure. *Id.* § 1677e(a); *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003) (noting that (a) focuses on respondent's failure to provide information, not on the reason for the failure). However, before resorting to facts otherwise available, Commerce must satisfy the statutory requirements of 19 U.S.C. § 1677m(d) and (e). 19 U.S.C. § 1677e(a); *see also Gerber Food (Yunnan) Co. v. United States*, 29 CIT 753, 763–64, 387 F. Supp. 2d 1270, 1280–81 (2005).

Pursuant to § 1667m(d), Commerce shall "promptly inform the person submitting the response of the nature of the deficiency" and "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established" for completion of the review. Though the burden of creating a

complete, accurate record ultimately rests on the respondent, Commerce must still ensure that the respondent is "fully aware of what information the Department [seeks] and the form in which it [seeks] the data." *SKF USA Inc. v. United States*, 29 CIT 969, 980, 391 F. Supp. 2d 1327, 1336 (2005).

If Commerce finds that the party's proffered explanation is unsatisfactory or untimely, it may "disregard all or part of the original and subsequent responses." 19 U.S.C. § 1677m(d). Conversely, Commerce "shall not decline to consider" necessary information if:

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

Id. § 1677m(e).

After determining that the use of facts otherwise available is appropriate, Commerce may further find that the record deficiency was caused by respondent's failure to act "to the best of its ability" in complying with Commerce's requests. *Id.* § 1677e(b). If Commerce reaches that conclusion, it may use an "adverse" inference—known as AFA—when selecting among facts otherwise available. *Id.* The statute does not define what an adverse inference entails, but it should be a "reasonably accurate estimate of the respondent's actual rate . . . with some built-in increase intended as a deterrent to noncompliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032. [3]

DISCUSSION

I. Commerce reasonably used AFA to calculate Mukand's dumping margin

Mukand's first challenge to the *Final Results* relates to Commerce's application of AFA when selecting Mukand's dumping margin. Mukand asserts that since it complied with Commerce's requests for

[3] The corroboration requirement in 19 U.S.C. § 1677e(c) constrains Commerce when selecting among potential AFA rates. Pursuant to § 1677e(c), when Commerce relies on "secondary information" for its AFA rate (as it has here), it must corroborate that information "to the extent practicable." The court does not address corroboration since Mukand has not raised it.

size-specific cost information, Commerce erred in concluding that Mukand failed to respond to the best of its ability. Pl.'s Mot. for J. on Agency R. ("Pl.'s Br.") at 2. And because a respondent's failure to act to the best of its ability is a prerequisite to the application of AFA, Mukand maintains that Commerce's AFA determination was unlawful. *Id.*

Mukand's argument rests on the wording of Commerce's questionnaires. Specifically, Mukand justifies its non-responsiveness on two grounds: (1) Commerce's questionnaires only technically asked for size-specific costs if there existed a reasonable, verifiable way of isolating and reporting those costs, and (2) in lieu of reporting size-based costs, Commerce authorized Mukand to narratively explain why it believed that any cost differences attributable to product size were insignificant. *Id.* at 3–4. Mukand asserts that it fully complied when it explained to Commerce that there existed no reasonable, verifiable way of reporting size-specific costs, and that in any event, variable costs did not significantly vary across product sizes. *Id.*

The Government maintains that Mukand's reliance on semantics masks the obvious meaning of Commerce's request—namely, that Mukand either report size-based costs or quantify and explain in a detailed narrative why it believes that size had an insignificant impact on variable costs. Def.'s Opp'n to Pl.'s Mot. for J. on Agency Record ("Def.'s Br.") at 14–16. Despite Commerce's five separate attempts to elicit the necessary cost information, suggestions regarding how Mukand could compile that information, and offers to clarify the substance of its requests, Mukand failed to comprehensively address Commerce's questions. As a result, Commerce asserts, it reasonably concluded that Mukand failed to act to the best of its ability during the proceeding. *Id.* at 20.

A. Necessary information was absent from the record

Mukand did not provide necessary information to Commerce in the proceeding below. To accurately perform its less than fair value analysis, Commerce must compare "the normal value and export price (or constructed export price) of each entry of the subject merchandise." *Id.* § 1675(a)(2)(A).[4] When calculating normal value, Commerce disregards foreign like product sales occurring below the cost of production. *Id.* § 1677b(b)(1). If no sales remain after disregarding below cost sales, Commerce constructs its own normal value for the subject

[4] "'[T]he preferred methodology in reviews [is] to compare average [normal values] to individual export prices.'" *Kyd, Inc. v. United States*, 35 CIT __, __, 779 F. Supp. 2d 1361, 1369 n.3 (2011) (citing Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316, at 843 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4178).

merchandise. *Id.* Additionally, when Commerce compares physically dissimilar merchandise, it adjusts normal value to ensure a fair comparison between the foreign like product and the subject merchandise. *Id.* § 1677b(a)(6); 19 C.F.R. § 351.411 (2012). Commerce cannot calculate that DIFMER adjustment without knowing how certain physical characteristics affect the non-identical foreign like product's variable manufacturing cost. 19 C.F.R. § 351.411; *Thai Plastic Bags Indus. Co. v. United States*, 34 CIT __, __, 752 F. Supp. 2d 1316, 1325 n.22 (2010).

In this case, Mukand's failure to report size-based costs prevented Commerce from performing a sales-below-cost analysis, calculating a constructed value, and making applicable DIFMER adjustments. *See I&D Mem.* at 26. In sum, Commerce did not have all the information necessary to calculate Mukand's dumping margin.

B. Commerce provided adequate notice of the record deficiency

Commerce also complied with its notification duties under 19 U.S.C. § 1677m(d). On five occasions, Commerce attempted to elicit size-specific cost information. On all but the first occasion, Commerce made clear that it was unsatisfied with Mukand's response and reiterated both what it needed and why that information was important. In its final questionnaire, Commerce even created a table for Mukand and offered to respond to any questions.

Thus, Mukand's assertion that Commerce never directly requested size-specific cost information is meritless.[5] Instead, the record reflects that Commerce repeatedly asked for "imperative" size-based costs regardless of whether the company tracked such costs in its normal books and records. Mukand's narrow focus on Commerce's direction to report those costs using a "reasonable" and "verifiable" method misses the broader picture. Based on the record as a whole, Commerce clearly included that language to *obtain* useable and necessary information, not to provide Mukand with a basis for evading its requests.[6]

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[5] The court is mindful of the fact that Mukand is comprised largely of non-English speakers; however, that is true of most respondents in these proceedings. If Mukand was experiencing such difficulty in understanding Commerce's requests, it should have accepted Commerce's invitation for further discussion.

[6] Mukand does not appear to directly challenge Commerce's decision to disregard Mukand's narratives explaining why costs do not vary across product sizes. Nonetheless, Commerce was within its discretion in not accepting Mukand's vague, unsupported assertions. Commerce instructed Mukand to "explain" and "quantify" why size did not influence product costs, and Commerce reasonably found that Mukand's responses fell short of that threshold.

C. An adverse inference was appropriate under the circumstances

Lastly, Commerce reasonably adopted an adverse inference when selecting among the facts otherwise available. The proper inquiry for AFA is not whether Mukand intended to thwart Commerce in its efforts to complete the record. Rather, "[t]he 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." *Nippon Steel*, 337 F.3d at 1383. A respondent fails to act to the best of its ability if it does not to "do the maximum it is able to do." *Id.* at 1382. Phrased differently, AFA is appropriate when a respondent has failed to "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *Id.*

Mukand consistently avoided the substance of Commerce's size-based cost questions by offering only vague, unsupported assertions that the requested information was not reasonably available and that size did not significantly impact costs. Despite Mukand's repeated assertions that the information was not part of their normal records and otherwise not possible to track, it was suddenly able to provide the requested information after Commerce's preliminary decision to apply AFA. Moreover, Mukand's substantial experience with Commerce proceedings and the fact that other respondents were able to isolate size-based costs lends further support to Commerce's findings. Based on the foregoing, Commerce reasonably found that Mukand did not do the maximum it was able to do and that AFA was appropriate.

II. Commerce reasonably employed total AFA

Mukand next argues that even if resort to AFA was reasonable, application of total AFA was not. Mukand claims that resort to total AFA violated Commerce's statutory mandate to accurately calculate dumping margins. Pl.'s Br. at 7. Further, Mukand maintains, Commerce's decision was inconsistent with its practice in prior proceedings of applying total AFA only to "far more egregious conduct" and not to the comparatively less egregious conduct exhibited in this case. *Id.* at 8. Because Mukand's sole failure was in not reporting size-specific costs, Mukand believes Commerce should have employed partial AFA. *Id.* at 9.

The Government asserts that it acted consistently with its past practice. In support, it cites numerous instances where it employed total AFA in response to a foreign company's failure to provide product-specific cost of production or DIFMER adjustment information. Def.'s Br. at 18–20. The Government argues that Mukand's

responses similarly warranted total AFA since they were "so incomplete" that they could not serve as a reliable basis for reaching a final determination and could not be used without undue difficulty. *See I&D Mem.* at 30.

A. Framework for distinguishing total AFA and partial AFA

Neither statutory nor regulatory law reference the concept known as total AFA, but Commerce uses it administratively to refer to "Commerce's application of adverse facts available not only to the facts pertaining to specific sales for which information was not provided, but to the facts respecting all of respondents' sales encompassed by the relevant antidumping duty order." *Shandong Huarong Mach. Co. v. United* States, 30 CIT 1269, 1271 n.2, 435 F. Supp. 2d 1261, 1265 n.2 (2006). Partial AFA, by contrast, is used "where there is useable information of record but the record is incomplete." *Wash. Int'l Ins. Co. v. United States*, Slip Op. 09–78, 2009 WL 2460824, at *8 n.18 (CIT July 29, 2009).

Case law has illuminated the circumstances Commerce should consider when deciding whether to apply total AFA or partial AFA. Total AFA is appropriate "where none of the reported data is reliable or usable" because, for example, all of the "submitted data exhibited pervasive and persistent deficiencies that cut across all aspects of the data." *Zhejiang Dunan Hetian Metal Co. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011); *see also Foshan Shunde Yongjian Housewares & Hardware Co. v. United States*, Slip Op. 11–123, 2011 WL 4829947, at *14 (CIT Oct. 12, 2011) (noting that total AFA involves a deficiency pertaining to "core, not tangential" information). Partial AFA may be required when the deficiency is only "with respect to a discrete category of information." *Foshan Shunde*, 2011 WL 4829947, at *14.

When applying total or partial AFA, Commerce is also bound by statutory constraints on its ability to disregard deficient information. Specifically, pursuant to 19 U.S.C. § 1677m(e), Commerce may only disregard "information" if it fails to meet any of five enumerated requirements. This court has previously deferred to Commerce's interpretation of "information" to encompass *all* the information that a respondent submits as opposed to discrete categories of information. *Steel Auth. of India, Ltd. v. United States*, 25 CIT 482, 486, 149 F. Supp. 2d 921, 928 (2001). This interpretation is reasonable. If Commerce was constrained to consider some submissions, but not others, respondents could manipulate the process by submitting only benefi-

cial information. *Id.* As a result, "[r]espondents, not the Department, would have the ultimate control to determine what information would be used for the margin calculation," and the Department could not reliably calculate dumping margins. *Id.*

B. Commerce adequately supported its total AFA determination

In this case, Commerce decided that Mukand's submitted information collectively failed to satisfy at least two of the five requirements of § 1677m(e). In particular, in its Issues & Decisions Memorandum, Commerce found that:

> Mukand's failure to provide the requested data renders its response unusable for these final results under section 782(e) [§ 1677m(e)] of the Act. The information Mukand did provide was so incomplete that it could not serve as a reliable basis for reaching a final determination because without the cost information based on size, the Department cannot conduct an adequate sales-below-cost test or calculate an accurate DIFMER adjustment for size. For example, size specific sales prices are compared to size specific costs in the sales below cost test, so without size specific costs, an accurate sales-below-cost test cannot be performed. Furthermore, because the information was so incomplete, we find it cannot be used without undue difficulty.

I&D Mem. at 30.

Commerce could have reasonably concluded that Mukand's persistent failure to report size-based costs made the remaining information so incomplete that it could not "serve as a reliable basis for reaching a final determination." *See* 19 U.S.C. § 1677m(e)(3). To make an antidumping determination, the Department needs respondent data on U.S. sales, home market sales, cost of production, and constructed value. *Steel Auth. of India, Ltd.*, 25 CIT at 482, 149 F. Supp. 2d at 927. In this review, Commerce was missing a piece of cost information necessary to calculate the cost of production and constructed value. The absence of information so "vitally interconnected with other elements of the dumping determination" could have made Mukand's submitted information too incomplete for Commerce to reliably calculate a margin. *See* Issues & Decision Memorandum, A-533–810 (Sept. 14, 2004), at cmt. 1, p.12.

Moreover, because Commerce was unable to calculate cost of production or constructed value, it could have been unduly difficult for Commerce to apply partial AFA. Without cost information, Commerce

could not disregard below cost sales. In that scenario, normally Commerce would find as AFA that all home market sales were below cost and, accordingly, look to constructed value. *See* Issues & Decision Memorandum, A-533–810 (Aug. 10, 2000), at Facts Available cmt. 1. However, here Commerce would also be unable to calculate constructed value without size-based cost information.[7] Although Mukand posits that Commerce should have used other respondents' size-based data to fill the record gap, doing so would have impermissibly rewarded Mukand by allowing it to benefit from information provided by cooperative respondents.

Lastly, the fact that Commerce typically applies total AFA to more egregious conduct is not dispositive. While most total AFA cases do involve more severe record deficiencies, Mukand has not persuasively cited any authority establishing that Commerce's practice is to employ partial AFA in analogous factual circumstances. Based on the facts of this case, Commerce adequately supported its total AFA determination. Commerce has repeatedly noted that cost information is a vital part of its dumping analysis. *See I&D Mem.* at 30; Issues & Decision Memorandum, A-533–810 (Sept. 14, 2004), at cmt. 1; Issues & Decision Memorandum, A-489–808 (Mar. 21, 2000), at cmt. 1. Given its importance, Mukand's missing cost information did not create a deficiency with respect to a "discrete category of information" such that only partial AFA would be appropriate. *See Foshan Shunde*, 2011 WL 4829947, at *14. Rather, Commerce reasonably found that Mukand's missing information was essential for multiple calculations, thereby warranting total AFA.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby ordered that Mukand's Rule 56.2 Motion for Judgment on the Agency Record is **DENIED** and the *Final Results* are **SUSTAINED**.

Dated: March 25, 2013
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG SENIOR JUDGE

[7] In this regard, the instant case is distinct from the prior stainless steel proceeding upon which Mukand relies to support its partial AFA argument. *See* Issues & Decision Memorandum, A-533–810 (Aug. 10, 2000). There, certain cost information was absent from the COP database, and Commerce found as AFA that all home market sales were below cost. *Id.* at Facts Available cmt. 1. Turning to CV, Commerce found that the respondent did submit useable CV information, but not in the format Commerce desired. *Id.* Commerce decided that a partial AFA was warranted given the deficiency, but rejected total AFA since the information was "sufficiently complete to serve as a reliable basis for reaching a determination without creating undue difficulties." *Id.* Unlike in that proceeding, Mukand did not submit *any* size-based costs.

Slip Op. 13–45

CUTTER & BUCK, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 04–00624

[Summary judgment granted for Defendant; summary judgment denied for Plaintiff; case dismissed in part for lack of jurisdiction.]

Dated: April 3, 2013

Taylor Pillsbury, Meeks, Sheppard, Leo & Pillsbury, of Newport Beach, CA, argued for plaintiff.

Amy M. Rubin, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge, International Trade Field Office. Of counsel on the brief was *Yelena Slepak*, Office of Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington, DC.

OPINION AND ORDER

Goldberg, Senior Judge:

Cutter & Buck ("C&B") and the United States have filed cross-motions for summary judgment. C&B contests the U.S. Customs and Border Protection's ("Customs") valuation of 168 entries of apparel. Specifically, C&B asserts that Customs improperly failed to adjust the transaction value of each entry downward by deducting international freight charges. C&B requests that the court enter summary judgment in its favor and direct Customs to reliquidate the subject entries with a duty allowance. The Government claims that the Court lacks jurisdiction over five of the 168 entries and that Customs properly declined a duty allowance with respect to the remaining entries. For the following reasons, the court grants the Government's summary judgment motion.

BACKGROUND

Between July 2002 and March 2003, C&B entered 168 shipments of apparel into the Port of Seattle. Pl.'s Corrected Statement of Material Facts as to Which There is No Genuine Issue to Be Tried ("Pl.'s Facts") ¶ 2. Those particular entries were late shipments and not shipped in the manner C&B and seller had originally contemplated (i.e., free on board ("FOB")).[1] *See id.* ¶ 3. Instead, the shipments were governed by the provisions of a late delivery clause contained in

[1] FOB is one of multiple Incoterms referenced in the briefing in this case. An Incoterm is "[a] standardized shipping term, defined by the International Chamber of Commerce, that apportions the costs and liabilities of international shipping between buyers and sellers."

C&B's purchase orders. *Id.* ¶¶ 4–5. The pertinent portion of the clause shifted freight responsibility from C&B to the seller, but did not otherwise expressly change the terms of sale from FOB to cost and freight ("CFR")[2] or provide for a reduction in the price of the goods. *See* Pl.'s Mot. and Mem. in Supp. of Summ. J. ("Pl.'s Br.") at Ex. A.

Upon importation, C&B paid the original FOB purchase price and claimed a deduction in the transaction value[3] of each shipment on the basis that the "price actually paid or payable" included international freight charges. *See id.* at 2. The applicable statute authorizes the deduction of international freight charges from the "price actually paid or payable" in certain defined circumstances. 19 U.S.C. § 1401a(b)(4) (2006). However, Customs found that a deduction was unwarranted and disallowed C&B's claimed deduction. Pl.'s Br. at 2.

C&B then filed thirteen protests and subsequent requests for review challenging Customs's appraisement of the 168 entries. *See* Def.'s Statement of Additional Material Facts as to Which There Are No Genuine Issues to Be Tried ("Def.'s Facts") ¶ 3. In response to one of the applications for further review, Customs issued HQ 548432 (May 20, 2004). In that ruling, Customs found that the "evidence did not show there was a change in the terms of sale from FOB to CFR" and denied the protest. *Id.* According to Customs, such a shift was necessary because Customs treats freight costs as *separate* from a FOB price, but *included* in a cost, insurance, freight ("CIF") or CFR price. Therefore, freight deductions are available for CIF and CFR transactions and not for FOB transactions. Because Customs believed the totality of the circumstances did not support a shift in the terms of the sale, a duty allowance was unwarranted.

In the instant action, C&B argues that the undisputed facts demonstrate that C&B and the seller intended to effect a change to the

Black's Law Dictionary 835 (9th ed. 2009). According to the Incoterms, FOB "means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards." Int'l Chamber of Commerce, *Incoterms 2010*, at 87 (2010) ("*Incoterms 2010*").

[2] CFR "means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination." *Incoterms 2010*, at 95.

[3] Transaction value is the preferred method for appraising imported merchandise. The transaction value is defined as the "price actually paid or payable for the merchandise when sold for exportation to the United States" with certain enumerated additions and deductions. 19 U.S.C. § 1401a(b). In this case, C&B claims a deduction.

purchase price and create a *de facto* CFR transaction. The Government avers that the facts support Customs's finding that a deduction was unavailable.

STANDARD OF REVIEW

Summary judgment is available when the movant shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). A fact is material if it could affect the outcome of the action. *See, e.g.*, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A factual dispute is genuine "if the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.* at 248.

The Court reviews legal aspects of Customs's protest denials *de novo*. 28 U.S.C. § 2640(a)(1). On *de novo* review, the Court accords deference to Customs's rulings "in proportion to their 'power to persuade.'" *Michael Simon Design, Inc. v. United States*, 501 F.3d 1303, 1305 (Fed. Cir. 2007) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001)); *see also Peerless Clothing Int'l, Inc. v. United States*, 33 CIT __, __, 602 F. Supp. 2d 1309, 1315 (2009). The degree of deference accorded "depend[s] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

SUBJECT MATTER JURISDICTION

C&B challenges the denial of its thirteen protests covering the 168 disputed entries in this case. Neither the Government nor C&B contest the Court's jurisdiction over 163 of the entries. Accordingly, as to those 163 entries, jurisdiction is proper pursuant to 28 U.S.C. § 1581(a).

As to the remaining five entries, further analysis is necessary. The Government avers that C&B's alleged failure to timely protest Entry Numbers WC4–5003386–3, WC4–5003406–9, WC4–5003501–7, WC4–5003502–5, and WC4–5003503–3 deprives this Court of jurisdiction over those appeals. Def.'s Cross-Mot. for Summ. J. ("Def.'s Br.") at 5–8. C&B submits that Protest Number 3001–03–100211 was timely filed, and in support offers a FedEx overnight airbill dated one day before expiration of the ninety-day protest period. *See* Pl.'s Resp. Br. in Opp'n to Def.'s Cross-Mot. for Summ. J. ("Pl.'s Resp. Br.") at Ex. B. C&B asserts that it lacks more proof because Customs did not notify C&B of a timeliness problem as required by 19 C.F.R. § 174.30. *Id.* at 3. Due to this procedural irregularity, C&B requests that the court disregard the jurisdictional argument. *Id.* at 3–4.

This court has previously found that it may set aside government action violative of 19 C.F.R. § 174.30 when the party complaining of the errors is prejudiced. *See Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990). Thus, addressing C&B's arguments involves inquiry into (1) whether C&B received adequate notice of the reasons for the protest denial, and (2) if not, whether Customs's notification deficiencies prejudiced C&B.

C&B did not receive the notice mandated by law. 19 C.F.R. § 174.30 and its statutory counterpart, 19 U.S.C. § 1515, require that a protest denial include "a statement of the reasons for the denial, as well as a statement informing the protesting party of the right to a civil action contesting the denial of the protest." The protest denial at issue referred C&B to its previous ruling in HQ 548432, but did not state that the protest was untimely. *See* Pl.'s Resp. Br. at Ex. C. Further, Customs did not check the box on the protest form reserved for untimely filed protests. *Id.* The law requires that Customs identify *the reasons* for the denial, and by merely identifying *a reason*, Customs fell short of its notification burden.

Nonetheless, Customs's procedural shortcomings did not prejudice C&B. When C&B filed its summons in December 2004, it needed to establish this Court's jurisdiction over each protest. *See Global Sourcing Grp., Inc. v. United States*, 33 CIT __, __, 611 F. Supp. 2d 1367, 1372 (2009); *VWP of Am., Inc. v. United States*, 30 CIT 1580, 1584 (2006). Customs indicated that it received the protest in question on October 17, 2003—one day after the expiration of the ninety-day protest window. Pl.'s Resp. Br. at Ex. C; *see also* 19 C.F.R. § 174.12(e). Since the Customs receipt date is considered the protest file date, C&B should have noted any discrepancy when it filed its summons. *See* 19 C.F.R. § 174.12(f). At that point, it still could have pulled shipping records to establish the protest's timeliness. In sum, although Customs did not fulfill its duty in this case, Customs's failure did not relieve C&B of its own duty to verify the jurisdictional basis for its action.

C&B has not met its burden of proving jurisdiction over the five contested entries. Customs officials enjoy a presumption of correctness when performing their duties. *See Prosegur, Inc. v. United States*, 25 CIT 364, 367, 140 F. Supp. 2d 1370, 1375 (2001). The sole document C&B offers to rebut that presumption is a FedEx airbill, but there is no guarantee that the protest was mailed on the date specified on the airbill or that Protest No. 3001–03–100211 accompanied the airbill. Thus, the Court is without jurisdiction over five of the entries covered by that protest.

DISCUSSION

Turning to the substantive issue in this case, C&B argues that Customs erred by imposing a "heightened standard" on C&B when C&B attempted to claim a duty allowance. Pl.'s Br. at 9. According to C&B, Customs based its denial of the duty allowance on the fact that the terms of trade did not expressly change from FOB to CFR. *Id.* C&B asserts that isolated reliance on those Incoterms was improper since the totality of the circumstances otherwise demonstrated an intent to deduct air freight from the price actually paid or payable. *Id.* at 12. The Government denies that Customs focused exclusively on the Incoterms and instead argues that the totality of the circumstances weighed against a freight deduction. Def.'s Br. at 9.

In addressing the parties' arguments, the court begins with the statutory provision governing freight deductions. The plain language of 19 U.S.C. § 1401a(b), combined with persuasive case law and Customs rulings interpreting that provision, establish a framework for the court when examining the undisputed facts in this case. Based upon a review of applicable law and the facts of the instant case, the court finds that Customs properly rejected C&B's attempts to claim a freight deduction and that summary judgment in the Government's favor is appropriate.

I. Relevant legal framework

A. Statutory restraints on the deduction of freight charges

19 U.S.C. § 1401a(b) defines transaction value as the "price actually paid or payable for the merchandise when sold for exportation to the United States." The "price actually paid or payable" is defined as

> the *total payment* (whether direct or indirect, and *exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services* incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) *made, or to be made*, for imported merchandise *by the buyer to, or for the benefit of, the seller*.

Id. § 1401a(b)(4)(A) (emphasis added). As that definition makes clear, the price the buyer paid for the merchandise must have either directly or indirectly included transportation costs for those costs to be excludable. Absent such evidence, a freight deduction is unavailable.

B. The court's prior guidance on the deduction of freight charges

Although case law interpreting the contours of 19 U.S.C. § 1401a(b)(4)(A) is sparse, this court has previously considered the effect of a late delivery agreement on an importer's ability to claim a deduction. *See Esprit de Corp v. United States*, 17 CIT 195, 817 F. Supp. 975 (1993). In *Esprit*, an importer and a seller agreed to effect late shipment by air at seller's expense. *Id.* at 195. Specifically, the parties agreed that the importer would make payment according to the original terms of the purchase orders and would later receive reimbursement from the seller for the difference between air and ocean freight. *Id.* Therefore, upon importation, the importer paid the FOB price and separately paid air freight. *Id.* at 196.

Customs appraised the entries at their invoice value, as opposed to the invoice value less the freight differential. *Id.* The importer appealed, maintaining that the agreement regarding the exporter's payment of the freight differential constituted a price discount in the amount of the freight differential. *Id.* at 196–97. Rejecting the importer's arguments the court found that the evidence did not "support a finding that shipping was part of, or that price reductions were made to, the price actually paid or payable." *Id.* at 198. Accordingly, the proper transaction value was the invoice price without any deductions. *Id.*

C. Persuasive Customs rulings addressing freight deductions

Customs has also issued several rulings interpreting the value statute in the context of late shipping clauses shifting freight responsibility. Those rulings provide persuasive guidance on what Customs examines when considering the availability of a freight deduction.

Initially, Customs treats the Incoterms displayed on shipping documents as important evidence of intent. If a shipping document displays FOB or a related Incoterm, Customs considers the FOB price to exclude freight and will not deduct freight charges. *See, e.g.*, HQ 548432 (May 20, 2004). But if a shipping document displays CFR or one of its variants, Customs considers the CFR price to include freight and often authorizes a freight deduction. *Id.* The purpose behind this practice is "to arrive at essentially an FOB or ex-factory price for the goods subject to appraisement." HQ 544646 (Dec. 23, 1991). Crucial to Customs's disparate treatment of those Incoterms, then, is its assumption that the CFR price *includes* freight.

Although Incoterms are helpful in deciphering the parties' intent, Customs has appropriately rejected blind reliance on the accuracy of

those terms. For example, in HQ 545121 (Jan. 31, 1994), Customs considered a late shipment clause wherein seller was to air freight late goods at its own expense and importer was to reimburse seller in the amount of estimated sea freight for timely shipped goods. The parties agreed that the delivery terms would change on the invoice from FOB to CFR. Like in *Esprit*, the importer asserted that the late shipment agreement itself established a price discount for the late goods in the amount of the freight differential. Customs disagreed, finding that (1) "the parties [did] not appear to contemplate a change in the price of the goods" and (2) no evidence "support[ed] a finding that freight charges were ever part of the price." *Id.* The only change was in "who will assume the additional shipping costs," and Customs noted that was insufficient to support a freight deduction even with a CFR notation. *Id.*

As that ruling suggests, Customs reasonably looks beyond Incoterms to the actual circumstances of the transaction governed by a late shipment agreement. As part of that holistic inquiry, Customs has asked three different questions: (1) whether "the price of the imported merchandise [was] renegotiated prior to the exportation of the merchandise"; (2) whether "the delivery terms [were] changed from FOB to [CFR]," and (3) whether "the [CFR] price includes freight charges." HQ 167196 (Jan. 20, 2012).

Customs answered those three questions affirmatively when examining a proposed late shipment clause in HQ 544911 (Apr. 6, 1993). The purchase order clause in that ruling expressly provided that a seller's failure to timely deliver merchandise would reduce the contract price by the difference between estimated ocean and air freight.[4] The importer noted that sometimes the price renegotiation may be reflected in a pre-shipment change of the delivery terms from FOB to CFR. Customs concluded that based on those facts, a freight offset would be warranted "assuming that the [CFR] renegotiated price does include freight charges." *Id.*

However, Customs rejected a freight deduction when reviewing a different late shipment clause in HQ 167196 (Jan. 20, 2012). The clause in that ruling authorized a late seller to ship late goods at their own expense via air freight CPT.[5] The importer asked Customs if it could deduct air freight charges from its vendors' invoices in that

[4] In HQ 546422 (May 7, 1997), Customs addressed a similar price reduction clause, except that the clause appeared on either a commercial invoice or a letter of credit. Customs found that letters of credits and commercial invoices are not as closely tied to the purchase and sale of merchandise as the purchase orders and sales agreements. Thus, while a price reduction clause in a purchase order may offer sufficient evidence of intent to reduce the price, "providing such language on the L/C's or merely altering the terms of sale on a commercial invoice would not suffice as evidence of a price reduction."

[5] CPT or "carriage paid to" is the multi-modal equivalent of CFR. *Incoterms 2010*, at 33.

scenario. Finding that the importer could not, Customs distinguished its ruling in HQ 544911 on two grounds. First, the late delivery clause in HQ 544911 "specifically stated that the contract price for the merchandise would be reduced by the difference between" estimated ocean and air freight. *Id.* Second, the invoices in HQ 544911 would have been changed prior to shipment to reflect the renegotiated price. In sum, because there was no price reduction clause, there was no "evidence that the transacting parties actually contemplated and effected a reduction to the price actually paid or payable for the merchandise" and no way to conclude that the CPT price included freight. *Id.*

D. Summary

As the statute, case law, and Customs rulings demonstrate, Incoterms help isolate the parties' intent, but they are not dispositive. The use or non-use of the CFR acronym does not guarantee a freight deduction unless the importer proves with sufficient formality (for instance, by including an explicit price reduction clause) that freight was actually included in the price that the importer paid for the imported merchandise. If the evidence does not on the aggregate demonstrate that shipment costs were part of buyer's total payment to seller, Customs will not (and, pursuant to 19 U.S.C. § 1401a(b)(4)(A), cannot) grant a freight offset.

II. The undisputed facts surrounding C&B's late shipments

Returning to the instant case, C&B argues that notwithstanding the contracting parties' apparent failure to update the shipping terms, the evidence shows that they "intended to effect an adjustment to the price actually paid or payable for the imported merchandise prior to exportation and that air freight charges for late shipments were part of that price." Pl.'s Br. at 1. C&B asserts that in light of this clear intent, it is immaterial whether the invoice terms of sale actually changed from FOB to CFR. *Id.*

To evaluate C&B's arguments, it is necessary to examine the undisputed facts underlying their position. Those facts indicate that the seller was between twenty-two to twenty-eight days late in shipping 168 entries of apparel. Def.'s Br. at 11. The terms and conditions incorporated into C&B's purchase orders contemplated an incremental penalty in the case of late shipments:

> LATE SHIPMENT OF CONTRACT: Unless prior approval by Cutter & Buck is obtained, the results of late shipment of each contract due to factory error or cause . . . are:

1. 15–21 days late from agreed purchase order ship date vendor pays air charge ground freight. (This means the goods are altered and Cutter & Buck only pays the ocean portion of the total air freight bill.)
2. 22–28 days late-Vendor pays 100% [of] all freight via air using a freight company/forwarder of buyer's choice.
3. 29–34 days late- Point 2 above and the F.O.B. price paid per item will be reduced 10%. . . .

Pl.'s Br. at Ex. A. In compliance with the terms and conditions, seller shipped the late goods by air at its own expense. Pl.'s Facts ¶ 5. C&B then claimed a deduction based on the international freight costs provided by the seller. *Id.* ¶ 6.

Most of the entry documents for the 168 shipments identify FOB, FCA,[6] or something similar as the relevant shipping term.[7] *See* Def.'s Facts ¶ 12. However, the commercial invoices for thirty-nine of the 168 entries have FCA crossed out and CFR handwritten instead. *See* Def.'s Br. at 10 n.4. In addition to Incoterms, at least some commercial invoices quantify the actual freight costs and list them as a NDC or non-dutiable charge. Pl.'s Facts ¶ 6; Def's Resp. ¶ 6. Entry documents further indicate shipment via pre-paid air freight into Seattle. Pl.'s Facts ¶ 6.

III. The totality of the undisputed facts do not support C&B's position

C&B is correct that the Incoterm on a shipping document does not end the freight deduction inquiry. Rather, Customs looks at the circumstances of the transaction more holistically, while according due weight to the Incoterms appearing on the shipping documents. Based on a holistic review of the facts, the court agrees with the conclusion Customs reached in HQ 548432 and with the general principles underlying its ruling.

Initially, many of C&B's invoices identify FOB or FCA as the relevant shipping term, and those prices do not include freight. Customs has previously overlooked some typographical errors on shipping

[6] FCA or "free carrier" is the multi-modal equivalent of FOB. *Incoterms 2010*, at 23.

[7] The Incoterms contained on the shipping documents are not consistent. Approximately twenty-nine of the entries specify FOB as the shipping term. Def's Resp. to Plaintiff's Corrected Statement of Material Facts as to Which There Are No Genuine Issues to Be Tried ("Def.'s Resp.") ¶ 3. Twelve of those twenty-nine invoices are further qualified as "FOB by Air," which is an inappropriate use of the FOB Incoterm since FOB applies only to water transport. *See* Def.'s Br. at 10. A larger number contain the FCA Incoterm. Def.'s Resp. ¶ 3. And about thirty-nine of the entries have FCA crossed out and CFR hand-written instead. Def.'s Br. at 10 n.4.

documents, but generally only when other documents specified CFR or a contrary intent was otherwise clear. And although certain commercial invoices in this case *did* contain a handwritten CFR designation, that is not dispositive. Indeed, Customs has previously concluded that "merely altering the terms of sale on a commercial invoice would not suffice as evidence of a price reduction." *See* HQ 546422.

More importantly, even if CFR had appeared on all the shipping documents, C&B has not demonstrated how that term reflected reality given the circumstances of its sales. Simply asserting that a transaction occurred on a CFR basis and that the invoice price included freight does not make it so. C&B needed to present corroborating facts supporting its assertions, especially since C&B paid the same price it would have paid had the goods been timely shipped on an FOB (freight-exclusive) basis. *See* Def.'s Facts ¶ 14. It may be that C&B and seller actually intended to reduce the purchase price by air freight *and* shift air freight responsibility, with the effect that the price C&B ultimately paid included freight. However, the undisputed facts before the court do not support that conclusion.

In fact, the primary document upon which C&B relies for support (the terms and conditions in the purchase order) actually supports the Government's position. As reproduced above, the terms and conditions call for different penalties depending on the length of the delay in shipping. According to the terms, the seller was responsible for 100 percent of the freight charges for shipments between twenty-two and twenty-eight days late. But for goods between twenty-nine and thirty-four days late, the seller incurred all freight charges and there was a corresponding reduction in the FOB price per item. While the twenty-nine to thirty-four day provision expressly called for an adjustment to the price actually paid or payable, the twenty-two to twenty-eight day provision clearly did not. Moreover, continued use of the FOB term contravenes C&B's argument that the terms of sale shifted to CFR. Although C&B argues that the twenty-nine to thirty-four day provision simply provided for another reduction, that argument does not find substantial support in any documentation before the court.

In sum, the applicable terms and conditions neither call for a price reduction for the 168 entries nor mandate a change in the shipment terms from FOB to CFR; the bulk of the shipping documents identify FOB or FCA as the relevant shipping term; and nothing on the record proves that the price C&B actually paid included shipping costs. When faced with this deficiency, the court cannot conclude that the totality of the circumstances support C&B's position. Instead, the evidence suggests that the exclusive penalty for these shipments was

to relieve C&B of paying the freight charges it normally would have incurred for timely shipments. Accordingly, the requirements for a freight deduction under 19 U.S.C. § 1401a(b)(4)(A) were not satisfied and Customs properly rejected a freight deduction.

CONCLUSION AND ORDER

For the foregoing reasons, the court dismisses C&B's claims as they pertain to the five disputed entries covered by Protest No. 3001–03–100211 and, as to the remaining entries, sustains Customs's denial of C&B's attempted freight deduction. Accordingly, it is hereby

ORDERED that the Government's Cross-Motion for Summary Judgment is granted;

ORDERED that C&B's Motion for Summary Judgment is denied; and

ORDERED that C&B's claims related to Entry Numbers WC4–5003386–3, WC45003406–9, WC4–5003501–7, WC4–5003502–5, and WC4–5003503–3 are dismissed for lack of jurisdiction.

Dated: April 3, 2013
New York, New York

/s/ Richard W. Goldberg

RICHARD W. GOLDBERG SENIOR JUDGE