Decisions of the United States
Court of International Trade

Slip Op. 03–114

VIRAJ FORGINGS, LTD. & ISIBARS, LTD. PLAINTIFFS, *v.* UNITED STATES, DEFENDANT.

PUBLIC VERSION

Before: WALLACH, Judge

Court No. 01–00889

[Plaintiff's Rule 56.2 motion for judgment upon the agency record is granted in part and denied in part; United States Department of Commerce's final results are remanded]

Dated: September 3, 2003

Miller & Chevalier Chartered, (Peter Koenig) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director; Patricia M. McCarthy, Assistant Director; Stephen C. Tosini, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and James K. Lockett, Senior Attorney-Advisor, Office of Chief Counsel for Import Administration U.S. Department of Commerce, of Counsel, for Defendants.

OPINION

Wallach, Judge

I.
Introduction

This matter comes before the Court on Plaintiff, Viraj Forgings, Ltd.'s, ("Viraj") Motion for Judgment on the Agency Record, pursuant to USCIT Rule 56.2. At issue are certain aspects of the United States Department of Commerce's ("Commerce") decision in Certain Stainless Steel Flanges from India; Final Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 48,244 (Sept. 19, 2001) ("Final Results") and the accompanying Memorandum from Joseph A. Spetrini, Deputy Assistant Secretary AD/CVD Enforcement

Group III, to Fayar Shirzad, Assistant Secretary for Import Administration, Issues and Decision Memorandum for the Final Results in the Antidumping Duty Administrative of Certain Stainless Steel Flanges from India (Sept. 19, 2001) ("Decision Memoranda"). Pub. Doc. 158; Defendant's Public Appendix for Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment Upon the Agency Record, 2 ("Pub. App."). For the reasons set forth below, the Court remands the challenged determination.

II.
Background

Plaintiff Viraj is an Indian manufacturer of stainless steel flanges.[1] In 1994, Commerce published an antidumping duty order for stainless steel flanges from India in Amended Final Determination and Antidumping Order; Certain Forged Stainless Steel Flanges from India, 59 Fed. Reg. 5,994 (Feb. 9, 1994).

In 2000, Commerce published the opportunity to request a review of the antidumping order. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 65 Fed. Reg. 7,348 (Feb. 14, 2000). In conformity with 19 C.F.R. § 351.213(b)(1) (1999), petitioners Gerlin Inc., Ideal Forging Corporation, and Maas Flange Corporation requested reviews of manufacturers Isibars, Panchmahal, Patheja, and Viraj. Commerce subsequently published a notice of initiation of antidumping duty administrative reviews covering the period of investigation from February 1, 1999 through January 31, 2000. Initiation of Antidumping and Countervailing Duty Administrative Reviews, 65 Fed. Reg. 16,875 (Mar. 30, 2000). The scope of the administrative review covered "certain forged stainless steel flanges from India both finished and not-finished," and included five general types of flanges that also generally matched the American Society for Testing and Materials ("ASTM") specification A–182. Final Results, 66 Fed. Reg. at 48,244.

In April of 2000, as part of the antidumping review, Commerce sent an antidumping questionnaire to respondents. Certain Forged Stainless Steel Flanges From India; Preliminary Results of Antidumping Duty Administrative Review, 66 Fed. Reg. 14,127, 14,128 (Mar. 9, 2001) ("Preliminary Results"). Plaintiff stated in its questionnaire responses that the cost of the raw materials, mainly stainless steel, accounted for the preponderance of the cost of production during the period of review. Plaintiff also stated that the costs of the other factors of production such as labor, fixed overhead, and variable overhead were roughly proportional to the cost of materials.

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[1] During oral argument counsel for Plaintiff stated that Isibars, Ltd., an original plaintiff in this action, had abandoned its claim challenging Commerce's determination.

The petitioners filed sales-below-cost allegations based on Plaintiff's questionnaire responses and Commerce initiated an investigation to determine whether Plaintiff's sales of flanges during the period of investigation were made below the cost of production. Id. at 14,129.

Commerce verified the information provided by Plaintiff and preliminarily determined that Plaintiff's dumping margin was 21.10 percent. Id. at 14,130. On September 19, 2001, Commerce published the Final Results containing the weighted-average dumping margin for the firms under review, which adopted the 21.10 percent dumping margin from the preliminary determination for Viraj. Final Results, 66 Fed. Reg. at 48,245. On October 18, 2001, Plaintiff filed a summons with the Court initiating this suit and challenging Commerce's final results. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000).

III.
Standard of Review

This Court will not sustain determinations, findings or conclusions of Commerce that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Fujitsu General Ltd. v. United States, 88 F.3d 1034, 1038 (Fed. Cir. 1996); 19 U.S.C. § 1516a(b)(1)(B) (1999). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 299, 59 S. Ct. 206, 83 L. Ed. 126 (1938)). Therefore, in order for Commerce's determination to be sustained, the determination must be reasonable, supported by the record as a whole, and the grounds that the administrative agency acted upon clearly disclosed. See Atlantic Sugar, Ltd. v. United States, 744 F.2d 1556, 1563 (Fed. Cir. 1984); Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984); see also SEC v. Chenery Corp., 318 U.S. 80, 94, 63 S. Ct. 454, 462 (1943).

IV.
Arguments

Plaintiff challenges the Final Results on three grounds. First, Plaintiff claims that Commerce impermissibly ignored its past precedent and regulations when it selected Germany as the third-country comparison market pursuant to 19 U.S.C. § 1677b(a)(1)(B)(ii) (1999) and 19 C.F.R. § 351.404(e) (1999). Second, Plaintiff argues that Commerce impermissibly compared non-comparable merchandise and ignored its past precedent and regulations when it treated United States ASTM standard forgings and German Deutsches Institut für Normung e.V. ("DIN") standard flanges as foreign like products under 19 U.S.C. § 1677(16) (1999). Third, Plaintiff con-

tends that Commerce's decision to calculate the dumping margin on a per-kilogram basis rather than a per piece basis resulted in an inaccurate dumping margin, was an unexplained departure from its past precedents, and was contrary to law.

V.
Discussion

A.
Background

Antidumping laws require that Commerce impose antidumping duties on imported merchandise sold, or likely to be sold, in the United States at less than its fair value when those sales injure or threaten injury to a United States industry. 19 U.S.C. § 1673 (1999). The amount of duty that Commerce imposes is the amount by which the price charged for the subject merchandise in the home market or the "normal value" exceeds the price charged in the United States. 19 U.S.C. § 1677b(a)(1)(A), (B). In most instances, Commerce bases normal value calculations on sales of the foreign like product in the home market. However, Plaintiff stated in its questionnaire response that it sold no flanges in its home market, India. Based on this fact, Commerce concluded that Plaintiff's sales to a third country should be used as the basis for normal value calculations. Preliminary Results, 66 Fed. Reg. at 14,128–14,129; see 19 U.S.C. § 1677b(a)(1)(C); see also 19 C.F.R. § 351.404(b).

The initial threshold for determining whether a third country constitutes a viable comparison market is whether "[t]he Secretary is satisfied that sales of the foreign like product in that country are of sufficient quantity to form the basis of normal value." 19 C.F.R. § 351.404(b)(1). Sufficient quantity for a third country comparison market "is 5 percent or more of the aggregate quantity (or value) of its sales of the subject merchandise to the United States." 19 C.F.R. § 351.404(b)(2) (2000). In this review, Commerce had to calculate normal value as the price at which the flanges were first sold for consumption, in one of the three countries plaintiff listed in its questionnaire (Australia, Canada, or Germany) in usual commercial quantities and in the ordinary course of trade.

In calculating normal value based on prices in a third country, "where prices in more than one third country satisfy the criteria of section 773(a)(1)(B)(ii) of the Act . . . [Commerce] generally will select the third country based on the following criteria:

> (1) The foreign like product exported to a particular third country is more similar to the subject merchandise exported to the United States than is the foreign like product exported to other third countries;

> (2) The volume of sales to a particular third country is larger than the volume of sales to other third countries;
>
> (3) Such other factors as the Secretary considers appropriate."

19 C.F.R. § 351.404(e). Plaintiff indicated in its questionnaire responses that its exports of flanges to Australia comprised the smallest market; its exports to Canada had 12 times the required 5 percent threshold with 60 percent of U.S. Sales; and its exports to the largest market, Germany, had 20 times the required 5 percent threshold with 104 percent of U.S. sales. Plaintiff Viraj's Reply to the Defendant's Reply to Viraj's Rule 56.2 Motion for Judgment on the Agency Record ("Plaintiff's Reply") at 19; see also Defendant's Memorandum in Opposition to Plaintiff Viraj's Motion for Judgment upon the Agency Record ("Defendant's Opposition") at 4. In order to calculate normal value for this review, Commerce chose Germany, the largest market Plaintiff reported, as the third country comparison market and verified that the German sales were above the cost of production. Preliminary Results, 66 Fed. Reg. at 14,128–29 (stating that "[w]e found no reason to determine that quantity was not the appropriate basis for these comparisons.").

In addition to determining the appropriate third country comparison market, Commerce must also choose "foreign like products"[2] to compare to the merchandise exported to the United States. Pesquera Mares Australes LTDA. v. United States, 266 F. 3d 1372, 1375 (Fed. Cir. 2001). The statute governing foreign like product provides that

> "foreign like product" means merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
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> (A) The subject merchandise and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> (B) Merchandise—
>
> (i) produced in the same country and by the same person as the subject merchandise,
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> (ii) like that merchandise in component material or materials and in the purposes for which used, and
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> (iii) approximately equal in commercial value to that merchandise.

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[2] The words "such or similar merchandise" were used in 19 U.S.C. § 1677(16) prior to 1995, and were replaced (following the enactment of the Uruguay Round Agreement Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 (1994)) by the term "foreign like product."

> (C) Merchandise—
>
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
>
> (ii) like that merchandise in the purposes for which used, and
>
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

19 U.S.C. § 1677(16) (1999). Accuracy, as well as the statute, requires Commerce to first look for identical merchandise with which to match the United States model to the comparable home market or third country model.[3] See Torrington Co. v. United States, 146 F. Supp. 2d 845, 874 (CIT 2001); 19 U.S.C. § 1677(16). If identical merchandise is unavailable, Commerce must look to merchandise under the second category, and, if that is not available, under the third category. 19 U.S.C. § 1677(16). Whenever possible, Commerce must make an "apples-to-apples" comparison of merchandise to effectuate a fair comparison between the normal value and United States price. See Torrington Co. v. United States, 68 F.3d 1347, 1352–53 (Fed. Cir. 1995). Thus, in "accordance with the statutory mandate, [of 19 U.S.C. § 1677(16)] absent identical merchandise, Commerce must 'choose the most similar merchandise for comparison.' " Hussey Copper, Ltd. v. United States, 17 CIT 993, 995, 834 F. Supp. 413, 417 (1993) (quoting Timkin Co. v. United States, 10 CIT 86, 96, 630 F. Supp. 1327,1336 (1986)).

Commerce determined the cost of production by calculating "the sum of the costs of materials and fabrication employed in producing the foreign like product, plus selling, general, and administrative expenses (SG&A) and packing." Defendant's Opposition at 5; Preliminary Results, 66 Fed. Reg. at 14,129. Commerce next calculated German market sales prices and excluded sales that were less than the cost of production. Defendant's Opposition at 5. Where Plaintiff sold less than 20 percent of the German merchandise below the cost of production, Commerce averaged the cost of all merchandise sales. Id.; see 19 U.S.C. § 1677b(b)(2)(C). Where Plaintiff sold more than 20 percent at below the cost of production Commerce excluded all below cost sales from the sample it averaged. Defendant's Opposition at 5; see § 1677b (b)(2)(C), (D).

Commerce then developed a methodology to compare the German DIN proof or fully machined flanges to the ASTM rough forgings, be-

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[3] The term "identical merchandise" does not require Commerce to make comparisons of merchandise that are "exactly the same," rather Commerce is permitted to compare merchandise that is "the same with minor differences." Pesquera, 266 F. 3d at 1383 (Fed. Cir. 2001).

cause the merchandise sold to Germany and the United States were made to these two different industrial standards.[4] In the Decision Memoranda, Commerce agreed with the petitioners that flanges, " 'whether produced to DIN standards or ASTM standards, will still look the same, serve the same function and be of comparable size and weight . . . [and] [w]hile conceding that flanges produced to DIN standards could be slightly different from the merchandise sold in the United States, the actual differences . . . . are very likely minor or nonexistent.' " Decision Memoranda at 29; Pub. App. 2 at 38. In order to make the merchandise comparable, Commerce converted all flanges and forgings from cost-per-piece, which is how Plaintiff sold the merchandise, to cost-per-kilogram. Preliminary Results, 66 Fed. Reg. at 14,128 (stating that "[t]he record demonstrates that there can be large differences between the weight (and corresponding cost and price) of stainless steel flanges based on relative sizes, so comparisons of aggregate data would be distorted for these products if volume comparisons were based on the number of pieces."). In its cost of production analysis, Commerce "determined that only grade, type, size, pressure rating, and finish were required to define models for purposes of matching." (collectively "matching criteria"). Id. at 14,129.

The antidumping statute provides for adjustments to normal value if differences in physical characteristics between the foreign like product and the merchandise exported to the United States exist. See 19 U.S.C. § 1677b(a)(6)(C). Therefore, Commerce adjusts normal value for the "difference in cost attributable to the difference in physical characteristics" if the foreign like product is not identical to the merchandise exported to the United States. Mitsubishi Heavy Indus. v. United States, 23 CIT 326, 340, 54 F. Supp.2d 1183, 1196 (1999). Commerce applied the standard 20 percent difference in merchandise ("DIFMER") deviation gap to exclude Plaintiff's products that had a greater than 20 percent difference in cost of production per kilogram from the dumping margin calculations.[5] Id.; Deci-

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[4] Standardization, in manufacturing, means establishing "desirable criteria for the shape, size, quality and other aspects of a product." See Dictionary of Materials and Manufacturing 375 (Vernon John ed., 1990). The Deutsches Institut fur Normung ("DIN") is a non-governmental organization established to promote the development of standardization in Germany. See id. The American Society for Testing and Materials ("ASTM") is the main body in the United States responsible for issuing standards covering materials, procedures and tests. See id. at 15.

[5] Although dated July 29, 1992, the Import Administration Policy Bulletin 92.2, Differences in Merchandise; 20% Rule, continues to be applied. See U.S. Import Administration, Policy Bulletin 92.2, Differences in Merchandise; 20% Rule (1992) ("Policy Bulletin"); see also Mitsubishi Heavy Indus. v. United States, 23 CIT 326, 340, 54 F. Supp.2d 1183, 1196 (1999). The bulletin explains that:

> To limit the potential differences in commercial value caused by physical differences, we employ the 20% guideline. If the commercial value of two products is greatly different, then a comparison is not reasonable. . . . When the variable cost difference exceeds

sion Memoranda at 24–26; see also Plaintiff's Reply, Attachment 9 at 48.

B.
Commerce's Selection of Germany as the Third Country Comparison Market was Inconsistent with its Prior Determination and Unsupported by Substantial Evidence

During an administrative review, Commerce recalculates a company's dumping margin in order to determine whether that company has continued to sell its merchandise in the United States for less than a comparable foreign like product sold in either the company's home market or the applicable third country comparison market. See NTN Bearing Corp. v. United States, 295 F.3d 1263, 1267 (Fed. Cir. 2002); 19 U.S.C. § 1675(a)(2)(A) (1999). Plaintiff argues that Commerce's selection of Germany as the third country comparison market in this review was inconsistent with its own regulations and prior determination. Commerce claims that it chose Germany as the third country comparison market for the purpose of calculating normal value because Germany was the largest market of the three countries Plaintiff listed. Defendant's Opposition at 14, Decision Memoranda at 29–30; Pub. App. 2 at 38–39.

Commerce considers the legal interpretations of prior antidumping and countervailing duty determinations precedential. Citrosuco Paulista, S.A. v. United States, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988); MM&P Maritime Advancement, Training, Education & Safety Program, 729 F.2d 748, 755 (Fed. Cir. 1984). Commerce need not "forever hew" to its precedents, but should the agency reverse itself, as a result of the sagacity acquired from experience and changed circumstances, it must confront the issue squarely and explain why its departure was reasonable. Davila-Bardales v. INS, 27 F.3d 1, 5 (1st Cir. 1994); see also Baoding Yude

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> 20%, we consider that the probable differences in values of the items to be compared is so large that they cannot reasonably be compared. Since the merchandise is not identical, does not have approximately equal commercial value, and has such large differences in commercial value that it cannot reasonably be compared, the merchandise cannot be considered similar. . . . Sales of products in domestic or third country markets with variable manufacturing cost differences exceeding 20% of the total average cost of manufacture, on a model specific basis, of the product exported to the United States will normally not be utilized in determining foreign market value. Any use of products with the cost of merchandise differences exceeding 20% shall be noted and fully explained.

Id. Commerce may conduct a DIFMER analysis when foreign merchandise is not identical to the exported merchandise, Mitsubishi Heavy Indus., Ltd. v. United States, 97 F. Supp. 2d 1203, 1206 n.4 (CIT 2000), and the analysis "adjusts normal value for the difference in cost attributable to the difference in physical characteristics." Id.; See also Mitsubishi Heavy Indus., Ltd. v. United States, 275 F.3d 1056, 1059 (Fed. Cir. 2001) (explaining that, unless otherwise justified, Commerce will make a finding that the merchandise cannot be reasonably compared should the DIFMER exceed 20 percent).

Chem. Indus. v. United States, 170 F. Supp. 2d 1335, 1340 (CIT 2001). The flexibility to change its position, requires that the agency must explain the basis for its change, and that explanation must be in accordance with law, and supported by substantial evidence. Cultivos Miramonte S.A. v. United States, 21 CIT 1059, 1064, 980 F. Supp. 1268, 1274 (1997). During oral argument, Defendant stated that Commerce "weighed the relative importance of markets, to having an exact model match, and in this case determined that the market was more important."[6]

In a prior review of stainless steel flanges from India, Commerce chose Canada as the appropriate third country comparison market rather than the largest available market, Japan. See Certain Forged Stainless Steel From India; Final Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 51,263 (Oct. 1, 1996) ("Akai Decision"). The exporter in that review, Akai Impex, Ltd. ("Akai") argued against the use of Canada as its third country comparison market. Plaintiff's Reply, Attachment 10 at 67. Akai claimed that Japan was the more appropriate comparison market because Japan was the largest of the third country markets available for comparison. Id. Additionally, Akai wanted Commerce to determine normal value by comparing Akai's sales made to the United States ASTM standard to sales made to the Japanese Industrial Standards ("JIS"). Id. Akai's reasoning was that "the merchandise end use, raw material and process of manufacturing is [sic] same" and the end product in terms of "Dollar per K.G." could be a reasonable comparison methodology. Id. However, Commerce chose the smaller market, Canada, which had goods made to the similar ASTM standard, and compared the merchandise on a price-per-piece basis rather than engaging in the methodology Akai proposed.

Commerce has changed its position in this review and used the method previously proposed by Akai, yet eschewed by Commerce. Defendant admits to a change in position in its brief but claims that "Commerce explained in the Decision Memorandum that, in this case, the German market was decidedly the largest market, whereas, in the earlier decision, the two markets were of roughly equal size." Defendant's Opposition at 14. Thus, Defendant alleges that Commerce adequately explained its factual distinction and departure from Akai. Id.; Decision Memoranda at 30; Pub. App. 2 at 39. Specifically, Commerce stated in the Decision Memorandum that it chose Germany because (1) "in volume, Viraj's German market surpasses its Canadian market significantly;" (2) the Akai Impex precedent "involved a different set of markets, of relative different size;"

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[6] Counsel for the defendant also stated during oral argument that Germany was chosen as the third market country because it has a large open market. This of course was notwithstanding the fact that Canada has a large open market and that Viraj exported identical, rather than similar, merchandise to Canada. See Defendant's Opposition at 11.

and (3) Germany was the "largest available comparison market." Decision Memoranda at 30; Pub. App. 2 at 39.

Commerce's reasoning assumes and reiterates its conclusion that Germany is the appropriate comparison market without adequate explanation or support. Neither the preliminary nor final results in the Akai Decision mention that the size of the Canadian and Japanese markets was a factor in the previous determination. See Certain Forged Stainless Steel Flanges from India; Preliminary Results of Antidumping Duty Administrative Review, 61 Fed. Reg. 14,073 (Mar. 29, 1996); Akai Decision, 61 Fed. Reg. 51,263. Moreover, Defendant does not provide the court with evidence that the size of the market in the Akai Decision was a determining factor. If the factual distinction that Commerce is attempting to make is that the size of the market had bearing on Commerce's determination, then that distinction must be supported by evidence. Without such evidence, Commerce's claim is merely unsupported conjecture. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." Motor Vehicle Mfrs. Ass'n. v. State Farm, 463 U.S. 29, 50, 103 S. Ct. 2856, 2870, 77 L. Ed. 2d 443, 462 (1983). The Court cannot speculate on Commerce's claims of a (1) "different relative size;" (2) whether the markets were of "roughly equal size;" or (3) whether market size was even a factor in the Akai Decision.

The only evidence provided to the court regarding Commerce's prior practice for determining the appropriate comparison market is the published results from the Akai Decision and the public records from Akai that Plaintiff provided. Plaintiff's Reply, Attachment 10 at 67. That evidence indicates that previously, Commerce's practice has been to chose a smaller market where merchandise was made to the same industrial standard. Lacking further evidence, the Court must view Defendant's claim as unsupported by the prior review.

On remand, Commerce must either rationally articulate the basis for its departure from its previous practice or provide adequate evidence to support its claim of a factual distinction.

i.

Commerce's Claim of a Longstanding Policy of Choosing the Largest Available Third Country Market as the Comparison Market is Unsupported by Substantial Evidence

Defendant also claims that in this determination "Commerce . . . followed its longstanding policy of giving more weight to market size, where product differences are easily adjusted, to conclude that German and U.S. market flanges were substantially similar and that the substantially larger size of the market in Germany made it the

best available comparison market."[7] Defendant's Opposition at 13–14; See also Decision Memoranda at 29–30; Pub. App. 2 at 38–39. During oral argument, Defendant was unable to provide any evidence to support its claim of a longstanding policy or practice. Plaintiff contends that Commerce's claim of a longstanding practice is unsupported and its decision was an impermissible, unexplained departure from its prior precedent.

Commerce may base its normal value calculations on third-country prices pursuant to 19 U.S.C. § 1677b(a)(1)(B)(ii). The appropriate third country comparison market is generally chosen based on: (1) a more similar foreign like product to the subject merchandise exported to the United States than other third countries; (2) the volume of sales is larger than the volume of sales to other third countries; and (3) other factors as the Secretary considers appropriate. 19 C.F.R. § 351.404(e). Defendant argues that Commerce followed the same practices that it did in prior reviews and that "weighing all of the 19 C.F.R. § 351.404(e) factors, Commerce determined that Germany was the most comparable third-country market." Defendant's Opposition at 15.

The comments to the 1997 regulations in Antidumping Duties; Countervailing Duties, 62 Fed. Reg. 27,296, 27,358 (May 19, 1997), explain that "§ 351.404(e) is sufficiently clear that (1) not all of the three criteria need be present in order to justify the selection of a particular market, and (2) *no single criterion is dispositive*." Antidumping Duties; Countervailing Duties, 62 Fed. Reg. at 27,358 (emphasis added). Therefore, pursuant to 19 C.F.R. § 351.404(e), Commerce is not required to choose the appropriate comparison market *solely* because the goods are identical, any more than it is required to choose the appropriate comparison market *solely* because the market is the largest available.

Defendant's claim, without evidence, that it is following a longstanding policy, is problematic for the Court because Plaintiff has provided evidence that Commerce used sales of merchandise to a third country market that was not the largest available in a prior review. See Akai Decision, 61 Fed. Reg. 51,263. Hence, Commerce's conclusory statement that it is following a longstanding policy without providing adequate evidence that such a practice exists, as well as its failure to conform itself to its prior review, renders its decision unsupported by substantial evidence and not in accordance with its regulations.

On remand, Commerce must conform itself to its prior precedent, adequately explain the basis for its departure from its prior precedent, or provide substantial evidence of its longstanding practice.

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[7] The Decision Memorandum states that "[w]e agree with petitioners that Viraj fails to provide justification for deviating from our general practice, which is to use the largest comparison market." Decision Memorandum at 30; Pub. App. 2 at 39.

ii.
Plaintiff's Claim that Commerce was Required to Choose Canada as the Appropriate Third Country Comparison Market is Unavailing

Plaintiff argues that Commerce should have determined that Canada was the appropriate third country comparison market, because the merchandise it sold in Canada was made to the same ASTM standards as the merchandise sold in the United States. Plaintiff's sales to Canada meet the statutory requirements for third country comparison markets. First, Plaintiff's exports to Canada had 12 times the required 5 percent threshold, with 60 percent of U.S. Sales. Second, the exports to Canada were made to the same standard as the exports to the United States, thus, meeting the criteria of § 351.404(e)(1). Finally, while both Australia and Canada flanges are made to ASTM standards, Plaintiff's exports to Canada exceed those to Australia; thus, Canada meets the requirements of § 351.404(e)(2).

Had Commerce initially determined that Canada was the appropriate market, it could have easily conformed its determination to prior reviews and compared identical merchandise. However, Commerce chose to use Germany, and § 351.404(e) states that the factors should *generally* be used to determine which market is the appropriate third country market.

Defendant accurately points out the court must defer to Commerce's choice of market when Commerce has assessed and weighed "market size and strength, product and market similarity, and other factors it deems relevant." Defendant's Opposition at 13. Defendant's reason for choosing Germany was that "Commerce weighed both of the enumerated factors and followed its longstanding policy of giving more weight to market size." Id. Because of the prior precedent, and Defendant's failure to provide evidence of the longstanding policy, the court is unable to uphold Commerce's determination that Germany was the appropriate market.

However, Plaintiff's conclusion that Commerce's failure to provide adequate evidence requires that Commerce chose Canada as the third country comparison market is inaccurate. The evidence before the Court is that three markets meet the third country market viability requirements and that Germany was the largest, followed by Canada, and finally, Australia. Commerce has not provided evidence, pursuant to § 351.404(e)(1), that certain "foreign like products" are more similar than others, as explained below. Nor has Commerce provided the Court with evidence of any other criteria it may have used in determining the appropriate market. Thus, Plaintiff's assumption that Canada was the only appropriate third country comparison market, although compelling, is premature. Therefore, the Court rejects Plaintiff's claim that the only appropriate comparison market is Canada.

C.
Commerce's Claim that ASTM Forgings and DIN Proof Machined and Fully Machined Flanges are Comparable is Unsupported by Substantial Evidence

Plaintiff argues that the rough forgings sold in the United States should not be compared to proof-machined or fully machined flanges sold in Germany. Commerce claimed that ASTM forgings and DIN flanges could be compared by adjusting for the matching criteria. See Preliminary Results, 66 Fed. Reg. at 14,129. Defendant stated that "because United States and German market flanges are manufactured to different standards, Commerce applied 19 U.S.C. § 1677(16) (B) to match the appropriate foreign like products to corresponding U.S. market flanges." Defendant's Opposition at 17; Decision Memoranda at 26–28; Pub. App. 2 at 35–37.

Commerce's methodology for making the German DIN standard proof or fully machined flanges comparable to the ASTM standard United States rough forgings consisted of converting all flanges and forgings from a cost-per-piece basis, which is how Plaintiff sold the merchandise, to a cost-per-kilogram basis. Preliminary Results, 66 Fed. Reg. at 14,129. In its cost of production analysis, Commerce determined that it would define comparable models based on matching criteria, of (1) grade, (2) type, (3) size, (4) pressure rating, and (5) finish. Id. Finally, Commerce applied the standard 20 percent difference in merchandise ("DIFMER") deviation gap to exclude products that had a greater than 20 percent difference in cost of production per kilogram from the dumping margin calculations. Id.; Decision Memoranda at 24–26; Pub. App. 2 at 33–35.

Commerce agreed with petitioners that flanges, "whether produced to DIN standards or ASTM standards, will still look the same, serve the same function and be of comparable size and weight [, and] [w]hile conceding that flanges produced to DIN standards could be slightly different from the merchandise sold in the United States, the actual differences . . . . are very *likely* minor or nonexistent."[8] Decision Memoranda at 29; Pub. App. 2 at 38; Defendant's Opposition at 7 (emphasis added). During oral argument Defendant admitted that the petitioners had not provided evidence for their assertion that any differences between German flanges and United States

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[8] The types of flanges covered in this review were (1) weld neck, used for butt-weld line connection; (2) threaded, used for threaded line connections; (3) slip-on and lap joint, used with stub-ends/butt-weld line connections; (4) socket weld, used to fit pipe into a machined recession; and (5) blind, used to seal off a line. Final Results, 66 Fed. Reg. at 48,244. Flanges are used for connecting pipes. See Letter from Ablondi, Foster, Sobin & David, to U.S. Secretary of Commerce, Stainless Steel Flanges From India at 2; Defendant's Non Public Appendix for Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record, Non Public Document ("NPD") 2 at 16 ("Non Pub. App.") (discussing the use of flanges for connecting pipes).

flanges were in fact "*likely*" insignificant or minor. See Decision Memoranda at 29; Pub. App. 2 at 38 (emphasis added).

Commerce must determine the appropriate "foreign like product," in accordance with 19 U.S.C. § 1677(16)(B), and must "make a fair comparison between the United States price charged for the subject merchandise . . . and the price charged for the corresponding "foreign like product." Pesquera, 266 F.3d at 1375. While it is certainly simpler for Commerce to identify and compare identical merchandise when it exists; lacking identical goods for comparison Commerce must find similar merchandise in order to make a proper comparison with the United States imports. See NTN Bearing Corp. of Am. v. United States, 127 F.3d 1061, 1063 (Fed. Cir. 1997). The Tariff Act of 1930, broadly defines "such or similar," and the methodology that Commerce may use to match U.S. products with third country products.[9] See Koyo Seiko Co. v. United States, 66 F.3d 1204, 1209 (Fed. Cir. 1995). Because the Act does not specify a model match method, the Act implicitly authorizes Commerce to choose a method by which to identify such or similar merchandise. Id. However, when Commerce has chosen a methodology that is patently unreasonable, unsupported by the evidence, or contrary to the antidumping laws, Commerce's determination may not be sustained by this Court. See NTN Bearing Corp. v. United States, 14 CIT 623, 633, 747 F. Supp 726, 736 (CIT 1990); see also Zenith Elecs. Corp. v. United States, 77 F.3d 426, 430 (Fed. Cir. 1996); 19 U.S.C. § 1516a(b)(1)(B).

Commerce apparently used the second criteria of § 351.404(e), the larger market size of Germany, in order to deem the DIN flanges and ASTM forgings substantially similar foreign like products. Commerce's determination begs the question of whether the merchandise is similar by propagating a conditional fallacy that the antecedent, Germany as the appropriate market because it is the largest market available, affirms the consequent, German DIN flanges and ASTM forgings are similar and comparable merchandise. This argument errs because there is no record evidence that Commerce independently determined that the foreign like product that Commerce used, German DIN flanges, were in fact either fundamentally identical or similar to the United States ASTM forgings for the purposes of the 19 U.S.C. § 1677(16) hierarchy; nor has Defendant provided evidence of a longstanding policy.[10]

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[9] Cases involving claims made prior to 1995 use the term "such or similar merchandise," subsequently replaced by the term "foreign like product" see infra p. 7 note 2.

[10] During oral argument when the Court questioned Defendant as to whether it would be more accurate for Commerce to compare finished flanges to finished flanges, and ASTM standard merchandise to other ASTM standard goods. Defendant responded that it would not be more accurate as the larger market size was more correctable. However, Defendant failed to explain how market size made differences between the merchandise more correctable.

In response to Commerce's supplemental questions, Plaintiff indicated that rough forgings were sold in United States while only proof or fully-machined flanges were sold to Germany.[11] Plaintiff requested that proof and fully-machined flanges made to DIN standards be compared to proof and fully-machined flanges made to ASTM standards for the United States. Plaintiff asserted that "[a] customer who has ordered an [ASTM] 304L flange will not accept a [DIN] 1.4541 flange as a substitute," and that DIN flanges weighed significantly less than the rough forgings sold to the U.S. and yet were higher in both cost and value. Plaintiff's Reply, Attachment 8 at 41. Plaintiff claimed that the ASTM forgings that Commerce compared to DIN flanges were not functional without significant further processing and that "comparing a rough forging to a flange is like comparing a cloth and a garment made from cloth—the two cannot be compared." Plaintiff's Reply, Attachment 10 at 64. Additionally, Plaintiff stated that DIN standard flanges and ASTM standard forgings are sold to different end users.[12]

The lack of interchangeability between products will not defeat a finding of "similar merchandise." See Sony Corp. of America v. United States, 13 C.I.T. 353, 359, 712 F. Supp. 978, 983 (1989). Pursuant to 19 U.S.C. § 1677(16)(B)(ii), Commerce must find that the third country comparison product is "like" the subject merchandise in the purpose for which it is used. Koyo Seiko Co., 66 F.3d at 1210.

In this review, Commerce assumed that the merchandise was comparable because of market size without adequately elucidating any comparable qualities of ASTM forgings and DIN flanges or supporting its choice with substantial evidence. Conversely, Plaintiff provided record evidence that suggests that the ASTM forgings and DIN flanges that Commerce compared were not similar.[13] Plaintiff argues

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[11] Commerce verified Viraj's sales and Plaintiff indicated that "80% of flanges sold in the United States are unfinished" whereas 100% of flanges sold in Germany are either proof or fully machined. Memorandum from Thomas H. Killiam, Financial Analyst, to The File, Antidumping Duty Order on Certain Forged Stainless Steel Flanges from India—Analysis Memorandum for Preliminary Results of New Shipper Administrative Review (Sept. 25, 1996) ("Analysis Memo"); Plaintiff's Reply, Attachment 1.

[12] Rough forgings are a raw material supplied to machine shops in the United States who then machine the final product to make a flange. Once machined, the machine shop sells the product to a distributor. Plaintiff's Reply, Attachment 10 at 66. Fully machined flanges are sold to distributors who sell the product to the end user—oil refineries, food processing industries, etc. Id.

[13] In addition to the physical evidence, provided by Viraj, Plaintiff cited two Customs cases to illustrate that flanges and forgings were not comparable. Plaintiff's Reply at 5; see Decision Memoranda at 26; Pub. App. 35; see also Midwood Industries, Inc. v. United States, 64 Cust. Ct. 499, 507–08, 313 F. Supp. 951, 956–57 (Cust. Ct. 1970); see also Boltex Mfg. Co., L.P. v. United States, 140 F. Supp. 2d 1339, 1346–51 (CIT 2000). Commerce claimed that the cases "were not directly applicable to the question of merchandise comparability for antidumping purposes, since they involved Customs classification issues." Decision Memoranda at 26; Non Pub. App. 35. The Court agrees with Commerce that the classification issues are not directly applicable, however, the discussion in these cases of the

and the record shows that first, the materials used in producing the flanges and forgings are of different composition. The type of liquid that is going to pass through the flange generally dictates the grade of steel used. See Plaintiff's Reply, Attachment 7 at 36. German DIN flanges use steel with a higher level of nickel and titanium, and it is the addition of nickel which improves the quality of the steel. The European flanges Plaintiff sells are used in "highly corrosive areas where better corrosion capacity of steel is always preferred." Plaintiff's Reply at 17; Plaintiff's Reply, Attachment 6 at 32. Accordingly, Plaintiff states that these general chemical differences between German DIN standard merchandise and United States ASTM merchandise exist and are critical to the buyer.[14]

Second, Plaintiff provided evidence that the DIN and ASTM flanges' physical structure differs, and that flanges must meet different standards and specifications. "Standards are determined by the type of liquid which will pass through a system (e.g., acid, water), the pressure, and the flow-rate of the liquid." Plaintiff's Reply, Attachment 7 at 36. A DIN flange that is put to the same application as an ASTM flange has a different outside diameter and a DIN standard flange is thinner than its ASTM counterpart.

Finally, and perhaps most importantly, given Commerce's use of cost-per-kilogram price comparisons, the record evidence regarding the differences between DIN and ASTM flanges, reveals that DIN standard flanges weigh less than the supposedly similar ASTM forg-

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differences between forgings and finished flanges is illustrative of differences between the two goods. In Midwood, this court stated that,

> the imported articles, referred to . . . as 'forgings' of one kind or another, are *producers*' goods which are not in fact used by the consumer in such state of manufacture and are not capable of use by the consumer in that state. . . . [T]he imported forgings are made as close to the dimensions of ultimate finished form as is possible, they, nevertheless, remain forgings unless and until converted by some manufacturer into *consumers*' goods, i.e., flanges and fittings. And as *producers*' goods the forgings are a material of further manufacture, having, as such, a special value and appeal only for manufacturers of flanges and fittings. But, as *consumers*' goods the flanges and fittings produced from these forgings are end use products, having, as such, a special value and appeal for industrial users and for distributors of industrial products. Consequently, the two classes of goods, namely, the imported forgings, and the fittings and flanges made therefrom, are different articles of commerce in a tariff sense.

Midwood, 64 Cust. Ct. at 507–08. More recently, Boltex explained that Midwood has not been overruled and reiterated the Midwood opinion's discussion of the various processes involved in converting forgings into fittings and flanges. Boltex, 140 F. Supp. 2d at 1346–51.

[14] Plaintiff provided information regarding the percentage difference between the chemical composition of the merchandise Commerce compared:

	ASTM 304L	DIN 1.4541	% Difference
Nickel (Ni)	8–12	9–12	5%
Carbon (C)	.030	.080	166%
Chromium (Cr)	18–20	17–19	5%
Titanium (Ti)	NIL	.70	Infinite

Plaintiff's Reply, Attachment 8 at 41.

ings. The record indicates that extensive machining may be required to convert a rough forging into a finished flange made to the German DIN standard. This machining may result in a 30% average weight loss from forging to finished flange. Memorandum from Michael Heaney, Sr. Import Compliance Specialist and Thomas Killiam, Import Compliance Specialist, to The File, Sales Verification of Viraj Forgings—Certain Forged Stainless Steel Flanges from India at 35 (Feb. 7, 2001); Plaintiff's Reply at 4, n. 4; Plaintiff's Reply, Attachment 7 at 35.

The court can only uphold Commerce's determination if it is based on substantial evidence. Substantial evidence "must be enough reasonably to support a conclusion." Ceramica Regiomontana, S.A. v. United States, 10 C.I.T. 399, 405, 636 F. Supp. 961, 966 (1986). It is not necessary for Commerce to compare merchandise that is "technically substitutable, purchased by the same type of customers, or applied to the same end use as the U.S. model," Koyo Seiko Co., 66 F.3d at 1210, and thus, a comparison of DIN flanges and ASTM forgings might be permissible should Commerce determine and provide substantial evidence that the products are "like" merchandise in accordance with 19 U.S.C. § 1677(16). However, the court "cannot defer to a decision which is based on inadequate analysis or reasoning." USX Corp. v. United States, 11 CIT 82, 88, 655 F. Supp. 487, 492 (1987).

While Plaintiff's evidence and reasoning in and of itself does not indicate that Commerce could not compare ASTM and DIN flanges and forgings, it does indicate that differences exist between forgings and flanges. Without adequate record evidence as to whether the differences are insignificant, the Court cannot uphold Commerce's determination that the differences are "likely" minor or insignificant and thus, the products "like" for the purposes of calculating normal value pursuant to 19 U.S.C. § 1677(16).

D.
Commerce's Comparison of ASTM Forgings and DIN Proof Machined and Fully Machined Flanges is a Departure from its Prior Determination and its Reasoning is Unsupported by Substantial Evidence

As noted above, Commerce compared Viraj's U.S. sales with contemporaneous sales in Germany and considered stainless steel flanges identical based on the matching criteria. See Preliminary Results, 66 Fed. Reg. at 14,129. In the Akai Decision, Commerce chose Canada, which uses the same standards as the U.S., as the appropriate third country comparison market. Akai Decision, 61 Fed. Reg. at 51,263–65. Plaintiff claims that in order to be consistent with previous determinations, Commerce should have used the Canadian mar-

ket and compared ASTM flanges to other ASTM standard merchandise.[15] Plaintiff's Motion at 6–7; Plaintiff's Reply at 19.

In the Akai Decision, Commerce determined the most similar third-country model, based on the alloy grade, size, type, and the ASTM standard, and compared the merchandise to the U.S. model on a cost-per-piece basis; and then adjusted for product differences using DIFMER.[16]

> [T]he Department selected alloy grade, size, type, and the ASTM standard designation as the hierarchy of physical characteristics to use in determining the identical or most similar third-country model to compare to each U.S. model . . . in determining NV, the Department must base its valuation on the price of "such or similar merchandise" sold in the home market (third country) (see 19 U.S.C. § 1677b(a)(1)(A)). . . . When several third-country models are equally similar in physical characteristics, we choose the third-country model which, when

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[15] On September 25, 1995, Viraj requested a new shipper review. The method and explanation Commerce provided is similar to the Akai Decision. The analysis memorandum for its preliminary results discusses the model match methodology that Commerce used in determining Viraj's New Shipper dumping margin. Plaintiff's Reply, Attachment 1 at 2; Memorandum from Thomas H. Killiam, Financial Analyst, to The File, Antidumping Duty Order on Certain Forged Stainless Steel Flanges from India—Analysis Memorandum for Preliminary Results of New Shipper Administrative Review (Sept. 25, 1996) ("Memo"). The Memo states that:

> In accordance with section 771(10) of the Act, we searched for the third country model which is most like or most similar in characteristics with each U.S. model. To perform the model match, we first searched for the most similar third country model with regard to alloy. *If there were several third country models with identical alloy, we then searched for the most similar third country model with regard to . . . type and standard.* If, as a result of this analysis, several third country models were deemed equally similar, we chose the third country model which, when compared to the U.S. model, had the lowest difference in variable cost of manufacturing (difmer), provided the difmer did not exceed 20 percent of the total cost of manufacturing of the U.S. model.

Plaintiff's Reply, Attachment 1 at Pages 3–4 (emphasis added).

[16] DIFMER allows differences between products to be increased or decreased by "the amount of any difference (or lack thereof) between the export price . . . and the [amount] wholly or partly due to—the fact that merchandise described in subparagraph . . . (B) and (C) of section 1677(16) of this title is used in determining normal value. 19 U.S.C. § 1677b(a)(6)(C). Sections (B) and (C) of § 1677(16), provide for the determination of "foreign like product" from,

> (B) Merchandise—
> (i) produced in the same country and by the same person as the subject merchandise,
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
> (iii) approximately equal in commercial value to that merchandise.
>
> (C) Merchandise—
> (i) produced in the same country and by the same person and of the same general class or kind as the subject merchandise,
> (ii) like that merchandise in the purposes for which used, and
> (iii) which the administering authority determines may reasonably be compared with that merchandise.

> compared to the U.S. model, has the lowest difference in variable costs of manufacturing, provided the difmer does not exceed 20 percent of the total cost of manufacturing of the U.S. model. . . . The Department's adoption of the "20 percent difmer" test, pursuant to 19 CFR § 353.57(b)(1992), ensures the selection of the home market (third-country) model with the greatest commercial similarity to the U.S. model. Therefore, when the four physical criteria of alloy, type, size, and ASTM standard designation were equally similar, we matched the U.S. model to the third-country model having the least difference in variable costs between it and the U.S. model, provided the cost difference was no greater than 20 percent.

Akai Decision, 61 FR at 51,264–65 (citations omitted); See also Certain Forged Stainless Steel Flanges From India, 61 Fed. Reg. 14,073.

In this review, Commerce converted all of the merchandise to cost-per-kilogram, determined that differences in the goods were likely minor, and compared Plaintiff's U.S. sales with contemporaneous sales of the foreign like product in Germany by

> consider[ing] stainless steel flanges identical based on the following five criteria: grade, type, size, pressure rating, and finish . . . us[ing] a 20 percent difference-in-merchandise (difmer) cost deviation cap as the maximum difference in cost allowable for similar merchandise, which we calculated as the absolute value of the difference between the U.S. and comparison market variable costs of manufacturing divided by the total cost of manufacturing of the U.S. product.

Preliminary Results, 66 Fed. Reg. at 14,129. Commerce has broad discretion to devise model-match methodologies to determine what constitutes similar merchandise. See, e.g. Torrington Co. v. United States, 881 F. Supp. 622, 635 (CIT 1995). However, the product's standard was apparently not used as one of the criteria because Commerce agreed with petitioners that the actual differences between ASTM and DIN standard merchandise were "very likely minor or non-existent." Decision Memoranda at 29–30; Pub. App. 2 at 38–39. Commerce's previous model-match methodology compared ASTM standard merchandise and then used DIFMER to adjust for differences on a cost-per-piece basis.

Defendant's insistence during oral argument that by selecting the largest comparison market, merchandise might be rendered comparable, is a significant departure from its prior method for determining comparable merchandise. While Commerce has the flexibility to change its methodology, its change must be reasonable. See Cultivos Miramonte S.A., 980 F.Supp. at 1274. Volume of sales to a particular third country market compared to sales with other third countries is certainly a factor that Commerce may consider, pursuant to 19 C.F.R. § 351.404(e), in determining the appropriate third country

comparison market and merchandise. However, Commerce's premise, that forgings and flanges "likely" had minor differences, and, thus, DIN and ASTM merchandise were sufficiently comparable, is neither supported by substantial evidence nor born out by the administrative record, prior administrative reviews, or illustrative case law. Commerce's insufficient assertion, that differences between ASTM forgings and DIN flanges are "likely" minor and that use of the largest comparison renders merchandise comparable, ultimately results in its model match methodology and reasoning unsupported by substantial evidence.

Therefore, because Commerce changed its methodology and matching criteria from previous reviews, and no record evidence exists to support its claims that the goods are similar, the Court finds that Commerce has departed from its prior precedent without adequate explanation or support by substantial evidence.

E.
Commerce's Calculation of the Antidumping Margin Based on Per Kilogram Prices is Not in Accordance with Law

Plaintiff alleges that in prior antidumping reviews Commerce has held that if merchandise is sold per piece, not by weight, the dumping margin must be calculated per piece in order to avoid distortion in the dumping margin. See Final Determination of Sales at Less than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from Thailand, 57 Fed. Reg. 21,065, 21,069–70 (May 18, 1992) ("Carbon Steel"). Defendant claims that it has long been Commerce's policy to compare prices for similar steel products across markets by weight, and "in all cases where the agency made per piece comparisons, the weights of the compared products were identical." Defendant's Opposition at 21.

The Defendant mentions two instances in which per piece costs were used and questions Plaintiff's reliance on the first, Carbon Steel, in its brief because Carbon Steel was a "decade-old decision."[17] Id. Defendant states that "the use of per-piece comparisons in earlier reviews comparing identical products does not tie the agency to such a methodology where weight governs the cost of production of different products." Decision Memoranda at 24; Pub. App. 2 at 33. Additionally, Commerce stated that "Viraj has not cited, nor can we find, any examples of cases in the past six years to substantiate the assertion that per-piece analysis was continued beyond the early and distinct instances." Analysis Memo, Comment 13. The calculation of the dumping margin in Commerce's previous review of Plaintiff, as well

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[17] The other determination was a per piece comparison made in the 1995 investigation involving Isibars, Ltd. In that review, Commerce used the home market sales rather than third country sales.

as in Plaintiff's New Shipper review, was accomplished on a per piece basis. See Plaintiff's Reply at 8; Plaintiff's Attachment 1; Non Pub. App., NPD 2 at 3. In prior reviews when the Plaintiff's comparison market and United States sales were similar rather than identical, due to physical differences, including weight, the DIFMER adjustment was made on the dumping margin calculation to account for differences. See Plaintiff's Reply, Attachment 1.

The court is concerned with Commerce's easy dismissal of past precedents. Precedent, unless inapplicable or properly invalidated, binds this court and Commerce. The court agrees with Commerce to the extent that an agency is not forever tied to a methodology. However, if an agency departs from its prior precedent without adequate explanation, its actions are unlawful. MM&P Advancement Training, Education Safety Program v. DOC, 729 F.2d 748, 755 (Fed. Cir. 1984). The Final Results in Carbon Steel state that Commerce "converted all prices and adjustments from a weight basis to a unit (per piece) basis *because* merchandise is sold by piece instead of weight."[18] Carbon Steel, 57 Fed. Reg. at 21,065 (emphasis added). Among the explanations in Defendant's brief, what remains clear is that Defendant's arguments sublimate the results of the Carbon Steel determination into a different form. Commerce argues that the Carbon Steel comparisons were de facto per-kilogram comparisons because the products were identical; and therefore, the Carbon Steel determination is distinguishable. Defendant's explanation for its departure, which it claims is not actually a departure at all, is that "in Carbon Steel, whenever Commerce *seemingly* made comparisons of merchandise on a per-piece basis, the comparisons were of identical merchandise." Defendant's Opposition at 21. (Emphasis added). If the comparison by weight or by piece was truly unimportant in cases of identical merchandise, this Court is left to speculate on why Commerce would bother converting from cost-per-weight to cost-per-piece in Carbon Steel because, according to Defendant, it should not mat-

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[18] In Carbon Steel, Commerce applied the 10/90/10 test and determined that home market sales were inadequate. Under the test, if between 90% and 100% of the home market sales for a model were below the cost of production, and the below-cost sales occurred over an extended period, Commerce considered the remaining above-cost sales to be inadequate and used constructed value to calculate foreign market value.

The respondent requested that Commerce apply the 10/90/10 test for measuring sales below cost of production on a product weight basis and claimed that price and cost were directly related to product weight. The petitioners argued that respondent's request was an attempt to obscure the significance of respondents below-cost sales and that because respondent sold its merchandise on a per piece basis, and respondent had not supported its claim that applying the 10/90/10 rule on a per piece basis would not account for differences among the heavy and light pipe fittings, and requested that Commerce apply the 10/90/10 test on a per piece basis.

Ultimately, Commerce agreed with the petitioner and stated that it was Commerce's standard practice to apply the 10/90/10 test on the basis on which the subject merchandise is sold. Commerce converted the prices and adjustments reported on a per weight basis to a per piece basis because the respondent sold pipe fittings on a per piece basis.

ter how the merchandise was compared if it was identical. Yet in Carbon Steel, Commerce specifically explained that it was going to convert from per weight to per piece "because" that was the way the merchandise was sold.

Because Defendant has not submitted any evidence to the contrary, the court bases its decision on Commerce's prior determinations and the reasoning stated in the Carbon Steel review, that Commerce converted all prices and adjustments from a weight basis to a per piece basis *because* the merchandise was sold by piece instead of weight.

Therefore, Commerce must either conform itself to its prior precedent and compare Plaintiff's merchandise in the manner in which it is sold, or adequately explain its departure and support all of its factual arguments with substantial evidence.

F.
Commerce's Reasoning for Its Price Per Kilogram Methodology for Comparing Rough Forgings to Proof-Machined and Finished Flanges is Unsupported by Substantial Evidence

Plaintiff claims that Commerce, by converting Viraj's reported per piece prices and costs to per kilogram amounts, increased the dumping margin from 8.95 percent to 21.1 percent. Plaintiff's Motion at 3. Defendant argues that in cases where differences in the cost of production of similar products are almost entirely attributable to weight, Commerce has consistently harmonized the process by using weight as the common denominator rather than per piece price comparisons. Defendant claims that Commerce "took careful note of the commercial realities of the flange market" and that the "raw material costs dominate the cost of production." Defendant's Opposition at 22, 26. Therefore, Defendant stated that logically "if a flange has a higher weight, and the cost of raw materials predominates, one expects a higher cost and a higher price . . . [and a]ccordingly Commerce explained in the Final Results, as well as in earlier decisions, why weight is a better basis in this type of scenario." Id. at 22. Hence, "Commerce agreed with the petitioners and determined that it would follow its standard methodology of comparing prices by weight," Defendant's Opposition at 8.

Plaintiff supplied Commerce and the Court with merchandise comparisons that show that Commerce's comparisons of forgings to flanges by cost-per-kilogram create significantly different results than those claimed by Commerce. See Plaintiff's Reply, Attachment 10 at 70. The record indicates that, on average, a forging has a 30 percent weight loss when machined from its rough state into a finished state. Plaintiff's Reply at 4–5 & n.4. Additionally, a finished flange can have up to a 50 percent higher price per piece than its heavier rough forging counterpart. See Plaintiff's Reply, Attachment

10 at 64. The record also indicates that the cost-per-kilogram, for a proof machined flange, may be up to 167 percent more than the rough forging; and a fully finished flange may be up to 234 percent more than the rough forging. See Plaintiff's Reply, Attachment 4 at 17–19. Thus, given the 30 percent weight loss, the value added from the machining process gives the lighter flange a higher cost of production on a per kilogram basis than the heavier rough forging.

If Defendant's claim were accurate, then logically, a heavier forging should cost more per-kilogram than the lighter flange. The record evidence indicates the opposite. See Non Pub. App., NPD 2 at 3. Commerce has broad discretion to determine similar merchandise, however, its methodology and reasoning must be supported by substantial record evidence. In this case, Plaintiff claims, and the record evidence suggests, that the value added from machining gives the lighter proof or fully machined flange a higher cost of production on a cost-per-kilogram basis, than the heavier rough forging, even though on a cost-per-piece basis the heavier forging costs more.[19] See Non Pub. App., NPD 2 at 3, 5, 47–50; Plaintiff's Reply, Attachment 4 at 16–19. Therefore, the record evidence indicates that the finish must be more determinative of cost than the weight of the piece.

Additionally, Defendant contends that Commerce has referred to the use of weight as "our standard methodology" since 1993 and cites to Notice of Final Results of Antidumping Duty Administrative Reviews and Determination Not to Revoke in Part: Certain Corrosion-Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate from Canada, 66 Fed. Reg. 3543 (Jan. 26, 2001) ("Corrosion-Resistant Carbon Steel") and accompanying Memorandum from Joseph A. Spetrini, Deputy Assistant Secretary, to Troy H. Cribb, Assistant Secretary for Import Administration, Issues and Decision Memo for the Final Results of the Antidumping Duty Administrative Reviews and the Determination not to Revoke in Part of Certain Corrosion Resistant Carbon Steel Flat Products and Cut-to-Length Carbon Steel Plate from Canada—8/01/98 through 7/31/99 (Jan. 16, 2001 ("Carbon Steel Memo"). In Corrosion-Resistant Carbon Steel, the product under review was sold on a weight basis.

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[19] Plaintiff explained in its supplemental answers that where grade, size, and type are the same, the following effect occurs for the same flange with different finishes:

Finish of Flange	Weight Per Piece	$ Price per Piece	$ Price Per Kilogram
1. Rough	7.100 kg.	$16.29	$ 2.294
2. Proof-Machined	6.500 kg.	$15.27	$ 2.349
3. Fully-Finished	5.200 kg.	$15.72	$ 3.023

Therefore, Plaintiff claims that the price of the product is not more correlative with weight, as Commerce claimed, but rather with finish. See Non Pub. App., NPD 2 at 3, 5, 47–50; Plaintiff's Attachment 4 at 16–19.

Commerce stated that the use of weight "provided the Department with results which are both consistent and predictable in formulating the margin analysis." Carbon Steel Memo at Comment 1. However, Commerce also stated that it used weight comparisons because

> a large number of steel products are most commonly priced using weight as the standard measurement. Because weight is so commonly used in this manner, many companies track costs based on a weight unit measure for determining selling expenses, inputs and other information. Thus, the Department is able to make comparisons between steel products on a consistent unit basis by using a weight based standard.

Id.

Plaintiff argues that, unlike the products in Corrosion-Resistant Carbon Steel, stainless steel flanges and forgings are not sold on a weight basis nor does Plaintiff track its costs on a weight basis. During the review, Plaintiff argued to Commerce that in all past flange cases, Commerce calculated the dumping margin on a per piece basis, and that no adequate explanation had been given for why, for the first time, the dumping margin calculation was done on a per kilogram basis. Plaintiff's Attachment 10 at 58. Additionally, Plaintiff contended that the dumping analysis should be done on the "basis of prices as they actually exist in the market, not on artificially created prices that have no market or real world basis." See id. Plaintiff claims that no meritorious justification has been offered by Commerce as a rationale for departing from real world prices and using artificially created per kilogram prices and that by comparing the merchandise on a cost-per-kilogram basis, Commerce compared and treated as comparable flanges with greatly different per piece weights.

Commerce considers differences in physical characteristics of similar merchandise pursuant to 19 U.S.C. § 1677b(a)(6)(C)(ii)[20] and 19

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[20] Section 1677b deals with determining the normal value and requires a fair comparison between the export price or constructed export price and normal value. The price is increased or decreased by the amount of any "difference (or lack thereof) between the export price or constructed export price and the price . . . that is established to the satisfaction of the administering authority to be wholly or partly due to—

> (i) the fact that the quantities in which the subject merchandise is sold or agreed to be sold to the United States are greater than or less than the quantities in which the foreign like product is sold, agreed to be sold, or offered for sale,
>
> (ii) the fact that merchandise described in subparagraph (B) or (C) of section 1677(16) of this title is used in determining normal value, or
>
> (iii) other differences in the circumstances of sale.

19 U.S.C. § 1677b(a)(6)(C)(ii).

C.F.R. § 351.411 (1999).[21] In response to Plaintiff's arguments, Defendant states that Plaintiff's concerns regarding the comparison of dissimilar merchandise are addressed by including size among the comparison criteria, and using the DIFMER to remove those results that were greater than 20 percent. Defendant's Opposition at 25. The DIFMER adjustment to normal value is used to account for the differences in cost attributable to differences in physical characteristics between merchandise. Defendant claims that "Commerce explained in the Final Results as well as in earlier decisions, why weight is a better basis in this type of scenario." Defendant's Opposition at 22.

In past flange cases, Commerce calculated the dumping margin on a cost-per-piece basis. Commerce has previously determined that weight was a better basis for comparison in steel cases where the product was sold based on its weight. Plaintiff's products are not priced strictly according to weight but rather the amount of machining and finishing involved. Therefore, Commerce's decision in Corrosion-Resistant Steel Plate and its decision in Stainless Steel Flanges do not appear to be analogous.

Plaintiff claims that had its merchandise been compared on cost-per-piece basis, rather than Commerce's cost-per-kilogram basis, the comparisons Commerce made would not have passed the DIFMER margin. Hence, Plaintiff claims that the resulting differences, between DIFMER done on a per-piece-basis and DIFMER calculated on a cost-per-kilogram basis, are indicative of an improper comparison by Commerce. The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620, 86 S. Ct. 1018, 1026, 16 L. Ed. 2d 131, 141 (1966). As long as the agency's decisions are rational, the Court may not substitute its judgment for that of the agency. American Silicon Techs. v. United States, 23 CIT 589, 591, 63 F. Supp. 2d 1324, 1326 (1999). Thus, the court does not find that Commerce may not make weight comparisons of flanges. However, the record evidence provided by Plaintiff indicates that Commerce made an erroneous assumption regarding the comparability of rough

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[21] Sec. 351.411 Differences in physical characteristics.

(a). In comparing United States sales with foreign market sales, the Secretary may determine that the merchandise sold in the United States does not have the same physical characteristics as the merchandise sold in the foreign market, and that the difference has an effect on prices. In calculating normal value, the Secretary will make a reasonable allowance for such differences. (See section 773(a)(6)(C)(ii) of the Act.)

(b). Reasonable allowance. In deciding what is a reasonable allowance for differences in physical characteristics, the Secretary will consider only differences in variable costs associated with the physical differences. Where appropriate, the Secretary may also consider differences in the market value. The Secretary will not consider differences in cost of production when compared merchandise has identical physical characteristics.

forgings and proof and fully machined flanges in this review. If Commerce decides to use weight on remand, it must ensure that it is in fact comparing the most similar products and that its methodology and reasoning comport with its results.

The record does not contain sufficient evidence of the comparability of ASTM standard forgings and DIN standard flanges. In addition, Commerce's explanation for its comparison of rough forgings and finished flanges on a cost-per-kilogram basis, based upon the Defendant's stated reasoning that a heavier forging that weighs more cost more than the same standard good in a fully finished state, is inaccurate. The evidence presented and verified by Commerce indicates that the cost of production is substantially different when comparing ASTM forgings to DIN flanges on a cost-per-kilogram and cost-per-piece basis. While inconsistent results are permitted, Commerce must base its determinations on substantial evidence. Plaintiff has presented sufficient evidence to support the conclusion that Commerce's new cost-per-kilogram methodology and comparison of rough forgings to finished flanges is distortive, and thus, unreasonable. While Commerce has discretion to determine and apply a methodology necessary to yield similar merchandise comparisons under 19 U.S.C. § 1677(16), when such patent inconsistencies appear in Commerce's determination, it may not be upheld. See Koyo, 66 F.3d at 1209.

V.
Conclusion

This court is vested with the power to order a remand to Commerce pursuant to 28 U.S.C. § 2643(c)(1) (1994). For the reasons stated above, this determination is remanded to Commerce. The remand results are due within 90 says from the date of this opinion; Plaintiff shall have 30 days thereafter within which to file comments; and Commerce may reply within 11 days of Plaintiff's filing.

Evan J. Wallach, Judge

Date: September 3, 2003
New York, New York

Slip Op. 03–129

FORMER EMPLOYEES OF OXFORD AUTOMOTIVE U.A.W. LOCAL 2088, PLAINTIFFS, *v.* UNITED STATES DEPARTMENT OF LABOR DEFENDANT.

Court No. 01–00453 Public Version

[Labor's NAFTA-TAA determination remanded.]

Dated: October 2, 2003

Serko & Simon, LLP (Jerome Leonard Hanifin and Joel K. Simon) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Delfa Castillo); Jayant Reddy, Office of the Solicitor, Division of Employment & Training Legal Services, United States Department of Labor, Attorney, for defendant.

OPINION

RESTANI, Judge:

This matter is before the court on Plaintiffs' Second Motion for Judgment on the Agency Record pursuant to USCIT Rule 56.1. Plaintiffs, former employees of Oxford Automotive U.A.W. Local 2088 ("Plaintiffs"), challenge the United States Department of Labor's ("Labor") negative determination in Notice of Negative Determination on Reconsideration on Remand, 67 Fed. Reg. 70,464 (Dep't Labor 2002) [hereinafter Second Remand Determination] (denying Plaintiffs' certification of eligibility for North American Free Trade Agreement-Transitional Adjustment Assistance ("NAFTA-TAA")).[1] Plaintiffs contend that Labor's determination is contrary to law and not supported by substantial evidence in the administrative record. Accordingly, Plaintiffs seek to set aside this determination and obtain a court order requiring Labor to certify Plaintiffs as eligible for NAFTA-TAA benefits. In the alternative, Plaintiffs request a third remand to Labor to conduct a thorough and complete investigation of Plaintiffs' request for NAFTA-TAA benefits.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 2395(a) (2000). The court will uphold Labor's determination of eligibility for NAFTA-TAA benefits if it is supported by substantial evidence in the record and is otherwise in accordance with the law. Woodrum v. Donovan, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), aff'd, 737 F.2d 1575 (Fed. Cir. 1984). The court may remand Labor's determi-

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[1] Plaintiffs also contest Labor's previous determinations. See infra Factual and Procedural History; Pls.' Mot. for J. on Agency R. at 2 ("Pls.' First Mot.").

nation "for good cause shown," if the investigation was "so marred that [its] finding was arbitrary, or that it was not based upon substantial evidence." 19 U.S.C. § 2395(b); Estate of Finkel v. Donovan, 9 CIT 374, 381, 614 F. Supp. 1245, 1250 (1985).

FACTUAL AND PROCEDURAL HISTORY

Oxford Automotive, Inc. ("Oxford") is a global supplier of metal components, assemblies, mechanisms, and modules used by original equipment automotive manufacturers, or Oxford's customers ("customers"). See Oxford's Form 10–K at 2 ("Form 10–K").[2] Oxford's primary products are "assemblies containing multiple stamped parts, forgings, various . . . components and locking and release mechanisms." Id.

In May 2000, Oxford began production in Ramos Arizpe, Mexico ("Mexico facility"), a "metal stamping and manufacturing center." Id. at 15. In June 2000, Oxford's Argos, Indiana location ("Argos facility") began laying off workers, and layoffs continued until the facility closed in June 2001. PAR1 at 28.[3] Labor claims that layoffs were attributable to the Argos facility's primary customer ceasing production,[4] while Plaintiffs contend layoffs were due to Oxford's decision to transfer an 180-inch press line to Mexico. PAR1 at 2, 19, 45. The Argos facility was engaged in the production of various types of automobile and truck parts.

On December 4, 2000, Plaintiffs requested certification for NAFTA-TAA benefits through the Indiana Department of Workforce Development ("state agency").[5] NAFTA-TAA benefits, which are available to eligible workers, include "employment services, appropriate training, job search and relocation allowances, and income support payments." See Former Employees of Chevron Prods. Co. v. United States Sec'y of Labor, No. 00–08–00409, Slip Op. 03–96 at 3 n.2 (July 28, 2003) (citing 19 U.S.C. § 2331(d); Statement of Admin-

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[2] Oxford electronically filed its Form 10–K on June 20, 2000 with the United States Securities and Exchange Commission. Pls.' First Mot. at 19 n.4. Form 10–K is "the annual report that most reporting companies file with the Commission. It provides a comprehensive overview of the registrant's business." Descriptions of SEC Forms at http://www.sec.gov/info/edgar/forms.htm (last modified May 29, 2001).

[3] PAR1 and CAR1 refer to the initial public and confidential administrative records filed with the court on August 3, 2001. PAR2 and CAR2 refer to the supplemental public and confidential records, filed on October 23, 2001. PAR3 and CAR 3 refer to the supplemental public and confidential records, filed on November 6, 2002.

[4] The Argos facility's primary customer was [ ] ("primary customer"), which purchased over [ ] percent of the items produced at the Argos facility, including, [ ]. CAR1 at 10, 16, CAR3 at 8.

[5] To qualify for NAFTA-TAA benefits, a group of workers must file a petition for certification of eligibility with the appropriate state labor authority. After 10 days, the state authority forwards its preliminary findings and recommendation to Labor, which conducts an investigation and reaches a final determination on the petition. 19 U.S.C. § 2331(b)–(c)) (2000).

istrative Action Accompanying NAFTA Implementation Act, H.R. Doc. No. 103–159, vol 1 at 673–674 (1993)). Plaintiffs sought certification under 19 U.S.C. § 2331, which states in relevant part:

> A group of workers . . . shall be certified to be eligible to apply for adjustment assistance under this subpart . . . if the Secretary determines that a significant number or proportion of workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated, and either—
>
> (A) that—
>
> (I) the sales or production, or both, of such firm or subdivision have decreased absolutely,
>
> (ii) imports from Mexico or Canada of like or directly competitive with articles produced by such firm or subdivision have increased, and
>
> (iii) the increase in imports under clause (ii) contributed importantly to such workers separation or threat of separation and to the decline in the sales or production of such firm or subdivision; or
>
> (B) *that there has been a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly competitive with articles which are produced by the firm or subdivision.*[6]

19 U.S.C. § 2331 (emphasis added). In their petition, Plaintiffs alleged that their job losses were due to a shift in production to Mexico and loss of sales to customers who were importing products from Mexico. PAR1 at 2. Plaintiffs further specified that articles affected by the shift in production included the " '180 inch Automated Press Line' for 'car side panels.' " Id.

On December 21, 2000, the state agency conducted a preliminary investigation into Plaintiffs' petition and submitted its findings to Labor for review and final determination.[7] On February 20, 2001, Labor determined that Plaintiffs produced "automotive side panels" and denied them NAFTA-TAA certification of eligibility, concluding that layoffs were attributable not to a shift in production from the Argos facility to Mexico, but instead to "the customer's decision to take back the production of side panels . . . at the customer['s] U.S. plants." PAR1 at 19; Notice of Determinations Regarding Eligibility

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[6] Congress recently repealed 19 U.S.C. § 2331, consolidating the NAFTA-TAA and the Trade Act of 1974 ("TAA") into the Trade Act of 2002. See Pub. L. No. 107–210, § 123, 116 Stat. 933, 944 (2002). Because Plaintiffs' petition precedes November 4, 2002, the effective date of the revised statute, the earlier statute applies here. Id.

[7] The state agency [
]. CAR1 at 10.

To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, 66 Fed. Reg. 10,916, 10,917 (Dep't Labor 2001). In addition to the state agency's findings, Labor's investigation was based on a letter from and two telephone conversations with Oxford's representatives.[8]

In response to denial of their petition, Plaintiffs asked Labor to reconsider its decision. In support of their request for reconsideration, Plaintiffs attached an Oxford Appropriation Request Form, which showed Argos' request for $60,000 to reassemble an 180-inch line "for transfer to another Oxford Automobile plant in Mexico." PAR1 at 48. On May 9, 2001, Labor denied Plaintiffs' request for administrative reconsideration, because "some of the machinery was sent to Mexico, [but] . . . it was not being used." Notice of Negative Determination Regarding Application for Reconsideration, 66 Fed. Reg. 23,732 (Dep't Labor 2001).

On June 13, 2001, appearing *pro se* before this court, Plaintiffs sought judicial review of Labor's negative determinations. On August 28, 2001, the court granted Labor's consent motion for a voluntary remand. See Former Employees of Oxford Automotive v. Dep't of Labor, No. 01–00453 (Ct. Int'l Trade Aug. 22, 2001). Labor's remand investigation consisted of sending an email to Oxford to determine whether it had imported side panels from Mexico or Canada. See Notice of Negative Determination on Reconsideration on Remand; PAR2 at 4–6. Oxford responded negatively and on October 19, 2001, Labor again denied Plaintiffs' petition. Id.

In March 2002, Plaintiffs were appointed counsel, and on June 28, 2002, they contested Labor's negative determination and the court again granted Labor a voluntary remand. See Former Employees of Oxford Automotive, No. 01–00453 (Ct. Int'l Trade Aug. 20, 2002). On November 22, 2002, Labor affirmed its negative determination of Plaintiffs' eligibility to apply for NAFTA-TAA benefits, explaining that "[a]lthough some of the machinery from the Argos plant had been moved to Mexico . . . [it] was idle. The layoffs at the plant were attributable to the customer's decision to take back the production of the side panels." Second Remand Determination. Labor based its decision on information it received from Oxford, including a list of products sold to Argos facility's primary customer. Labor also obtained verbal confirmation from the primary customer that all products it previously purchased from the Argos facility were subsequently purchased from other domestic Oxford facilities. Id. Finally, Oxford informed Labor that the 180-inch press line and two other

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[8] The letter explained that [
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CAR1 at 15. One telephone call [
]. Another call [
]. CAR1 at 16, 17.

major presses (10 presses total and one blanking press), that were transferred to Mexico, were never been put into production. Id.

DISCUSSION

I. A Remand is Necessary

In a NAFTA-TAA case, the court "for good cause shown, may remand the case to [Labor] to take further evidence." 19 U.S.C. § 2395(b). In this case, Labor's determination denying Plaintiffs NAFTA-TAA eligibility warrants a remand because: (1) Labor failed to comply with the applicable statute; and (2) the administrative record does not include relevant evidence submitted by Plaintiffs.

A. 19 U.S.C. § 2231(a)(1)

Under 19 U.S.C. § 2231(a)(1), for workers to be certified as eligible for NAFTA-TAA benefits, Labor must determine that there was either: (A) an increase in imports from Mexico or Canada which contributed to workers separation; or (B) "a shift in production by such workers' firm or subdivision to Mexico or Canada of articles like or directly competitive with articles which are produced by the firm or subdivision." 19 U.S.C. § 2231(a)(1)(A)–(B). At issue here is subsection (B). In its Second Remand Determination and Response ("Labor Resp."), Labor asserted that Plaintiffs failed to satisfy the requirements under 19 U.S.C. § 2231(a)(1)(A) or (B). Plaintiffs have made it clear, however, that subsection (A) is not applicable; they challenge only Labor's ruling regarding subsection (B)—whether there was a "shift in production" to Mexico. Pls.' Second Mot. for J. on Agency R. at 13–14 ("Pls.' Second Mot."). Labor's lengthy arguments regarding 19 U.S.C. § 2331(a)(1)(A) are therefore not relevant in this case.[9] Furthermore, Labor's determination that Plaintiffs are ineligible to apply for NAFTA-TAA benefits under 19 U.S.C. § 2231(a)(1)(B) is not supported by substantial evidence and not in accordance with the law.

1. "Like or directly competitive" articles

The statute requires Labor to determine whether articles produced in Mexico are "like or directly competitive" with articles formerly produced by plaintiffs at U.S. facilities. 19 U.S.C. § 2231(a)(1)(B). Rather than applying the "like or directly competitive" standard here, however, Labor incorrectly focused on "product

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[9] The court reminds Labor that if Plaintiffs meet only the requirements under subsection (B), they are eligible for certification under the statute. See Former Employees of Rohm & Haas Co. v. Chao, 246 F. Supp. 2d 1339, 1348 (Ct. Int'l Trade 2003) (noting that under the statute, "a shift in production [to Mexico or Canada] is ipso facto sufficient to confer eligibility for NAFTA-TAA . . . [and does not require] . . . a causal nexus between increased imports of like articles on the one hand, and worker separations and a decline in the domestic firm's sales or production (as manifested by the shift abroad) on the other").

scope." Its findings are therefore inconsistent with the law. See Former Employees of Gen. Elec. Corp. v. U.S. Dep't of Labor, 14 CIT 608, 611 (1990) (noting that an agency's rulings made on the basis of factual findings must be "in accordance with the statute") (quoting Int'l Union v. Marshall, 584 F.2d 390, 396 n.26); see also Abbott v. Donovan, 6 CIT 92, 100, 570 F. Supp. 41, 49 (1983) (noting that "the court will reject the agency's interpretation or application of a statute when it is inconsistent with the legislative purpose of the statute or frustrates Congress' intent"). On remand, Labor must make its determination based on the statute. Labor must first accurately identify the articles produced by Plaintiffs at the Argos facility, and then determine whether Oxford's facilities in Mexico produced "like or directly competitive" articles.

First, Labor must accurately identify the articles produced by Plaintiffs at the Argos facility. In its Second Remand Determination, Labor found that Plaintiffs produced "automotive side panels."[10] But in making this determination, Labor failed to consider evidence in the administrative record regarding the automobile parts production process. In order to accurately identify the articles produced by Plaintiffs at the Argos facility, Labor must have an understanding of this industry. See Gropper v. Donovan, 6 CIT 103, 104, 569 F. Supp. 883, 884 (1983) (reviewing textile manufacturing process to affirm that knit fabric garments are not "like or directly competitive" with finished fabric); United Rubber, etc. v. Donovan, 652 F.2d 702, 704 (7th Cir. 1981) (examining assembly of and uses for rubber and metal components to determine whether imported mounts are "like or directly competitive" with domestic bushings); United Shoe Workers of Am. v. Bedell, 506 F.2d 174, 186–87 (D.C. Cir. 1974) (examining stage of processing to determine shoe components are not "like or directly competitive" with shoes).

Plaintiffs' claim involves the transfer of an "180-inch automated press line" to Mexico. PAR1 at 2. Labor should therefore investigate how this press line operates. Plaintiffs' exhibit A describes the world's largest hydraulic tandem press line, stating that it "will produce complete body sides for automobiles and pickups for various customers."[11] It is clear from this information that press lines are designed to produce many different kinds of parts, for various vehicles, and to adapt to new models as they are introduced.[12] It is

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[10] Although Labor claimed that it focused on "automotive side panels," its investigation actually narrowed further to [ ]. CAR1 at 37, 38.

[11] The administrative record also includes information regarding how the press lines at the Argos facility operated. [

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CAR3 at 7.

[12] Labor conceded at oral argument that in the automobile industry, models change every year. By narrowing the articles produced by Plaintiffs at the Argos facility down to a

therefore likely that workers on a press line could be involved in the production of a variety of parts for different car models.[13] On remand, in order to accurately determine the articles produced by Plaintiffs at the Argos facility, Labor should examine how the 180-inch press line functioned and determine the variety of articles it produced.

Second, after identifying the articles produced by Plaintiffs at the Argos facility, the statute requires Labor to determine whether they are "like or directly competitive" with those produced in Mexico. 19 U.S.C. § 2331(a)(1)(B). Labor failed, however, to even inquire into the articles Oxford produced in Mexico, and instead relied erroneously on unverified statements by Oxford that the press lines transferred there were never used.[14] On remand, in investigating whether the articles produced in Mexico are "like or directly competitive" with those produced by Plaintiffs at the Argos facility, Labor must follow TAA regulations.[15]

Pursuant to TAA regulations, "like articles" are defined as "those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which the articles are made, appearance, quality, texture, etc.);" and "directly competitive articles" are "those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes (i.e., adapted to the same uses and essentially interchangeable therefor)." 29 C.F.R. § 90.2 (2002). In addition, under case law governing TAA cases, "it is well established that an imported article is 'like or directly competitive' with a domestic product if it is 'interchangeable with or substitutable for' the article under investiga-

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specific automobile part and model, therefore, Labor essentially precluded the possibility of identifying a "like or directly competitive" article produced in Mexico. See discussion infra.

[13] Information in the record states that the Argos facility produced [ ] different automobile parts. CAR3 at 8.

[14] Labor's reliance on these statements is erroneous because Oxford's statements do not address the issues Labor was required by the statute to investigate. See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 43 (1982) (noting that "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider"). Even if the information regarding idle press lines was relevant, however, Labor erred by failing to verify the statements that seemed at odds with Oxford's Form 10–K. See Former Employees of Barry Callebaut v. Herman, 177 F. Supp. 2d 1304, 1313 (Ct. Int'l Trade 2001) (ordering Labor to verify sworn statements from the employer in the face of contradictory evidence); Former Employees of Kleinert's, Inc. v. Herman, 23 CIT 647, 655, 74 F. Supp. 2d 1280, 1288 (1999) (finding Labor should not have relied on unverified company statements when factual discrepancies exist in record); Former Employees of Swiss Indus. Abrasives v. United States, 17 CIT 945, 949, 830 F. Supp. 637, 641 (1993) (finding Labor erred by relying exclusively on company's unsubstantiated statement that imports were not in competition with domestic products).

[15] Labor conceded at oral argument that although it has not issued regulations specifically interpreting NAFTA-TAA, TAA regulations apply here. Similarly, in Former Employees of Carhartt, Inc. v. Chao, No. 99–12–00734, Slip Op. 01–71 at 9 n.5 (Ct. Int'l Trade June 13, 2001), the court noted that "in its interpretation of NAFTA-TAA, [it] is guided, where appropriate, by the TAA regulations."

tion." Int'l Bhd. of Elec. Workers, 10 CIT 524, 527, 642 F. Supp. 1183, 1186 (1986). See also Bedell, 506 F.2d at 185 (noting that the terms "like" and "directly competitive" are not synonymous or explanatory of one another and that "many products can be directly competitive without having identical or nearly identical physical characteristics").

As discussed above, the Argos facility's press lines had the capacity to produce various automobile parts, including " 'car side panels' . . . [and car] tunnel[s]."[16] PAR1 at 2. And, Oxford's Mexico facility was producing "the door, hood, and underbody assemblies for a new [customer] program."[17] Form 10–K at 3, 15. Under the statute, therefore, Labor must determine whether car side panels and tunnels are "like or directly competitive" with car doors and underbodies. 19 U.S.C. § 2231(a)(1)(B). Moreover, pursuant to TAA regulations, Labor must widen its focus from "automotive side panels" to encompass the variety of articles produced by Plaintiffs at the Argos facility that may be "substantially identical in inherent or intrinsic characteristics" or "adapted to the same uses" as the products produced by Oxford in Mexico. 29 C.F.R. § 90.2.

2. "Shift in production by such workers' firm" to Mexico

The statute also requires Labor to determine whether there has been a "shift in production by such workers' firm or subdivision to Mexico" of "like or directly competitive" articles. 19 U.S.C. § 2331(a)(1)(B) (emphasis added). Because Labor focused here on the primary customer's shift of production within the United States, rather than properly investigating whether Oxford shifted production of "like or directly competitive" articles to its Mexico facility, its findings are inconsistent with the statute. Labor itself noted that "any shift in production is required to have been made by Oxford Automotive or its subdivision." Labor Resp. at 25. Moreover, Labor's analysis is inconsistent with its own precedents. In a recent NAFTA-TAA case, Labor denied workers reconsideration of a negative determination because it was based on the "allegation that 'a major customer . . . switch[ed its] purchases . . . from the subject firm in favor of producing the products at the customer's affiliated location in Mexico.' " Fernandez v. Chao, No. 02–00183, Slip Op. 03–123 (Ct. Int'l Trade Sept. 17, 2003) (quoting Notice of Negative Determination Regarding Application for Reconsideration, 67 Fed. Reg. 35,157

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[16] The tunnel is the underbody of the automobile, made up of approximately 13 different sections. Pls.' Second Mot. at 20.

[17] Labor argues that the new program referenced in Oxford's Form 10–K "suggests that the articles referred to relate to vehicles not even in existence when the Argos plant was in operation" and therefore cannot be "like or directly competitive." Labor Resp. at 27. The court disagrees, as the term "like or directly competitive" does not mean exact. Bedell, 506 F.2d at 180–81.

(Dep't Labor 2002)). Thus, in previous NAFTA-TAA cases, a shift in production by a customer of the workers' firm was found to be insufficient to constitute a "shift in production by such workers' firm or subdivision." 19 U.S.C. § 2331(a)(1)(B). Labor's focus here on the primary customer's shift in production of automotive side panels is other than its settled position. Because Labor's findings are not in accordance with the statute, and because Labor failed to "follow its existing precedents or provide a reasonable explanation for its deviation or noncompliance," a remand is necessary. W. Conference of Teamsters v. Brock, 13 CIT 169, 181, 709 F. Supp. 1159, 1169 (1989) (quoting ILWU Local 142 v. Donovan, 9 CIT 620, 625 (1985)).

B. Extra-Record Evidence

Plaintiffs contend that exhibits attached to their motions, although "extra-record evidence, . . . clearly demonstrate[ ] that [Labor's] investigation of Plaintiffs' petition has been inadequate and has ignored factors relevant to [its] determination." Pl. Reply at 7. Plaintiffs therefore ask the court to consider the documents. Labor, on the other hand, argues that because it "did not consider that information . . . [nor] include those documents in its second remand supplemental record," the court should disregard Plaintiffs' exhibits. Labor Resp. at 8. Labor contends that even if the exhibits were considered, the "non-record evidence . . . does not conclusively demonstrate" that Plaintiffs are eligible for certification. Id. at 25–26. In Former Employees of Tyco Elecs. v. United States Dep't of Labor, 264 F. Supp. 2d 1322, 1330 (Ct. Int'l Trade 2003), the court held that "Labor's rejection of . . . information voluntarily submitted by the Plaintiffs was a result of Labor's arbitrary and capricious treatment of [the] . . . investigation." Similarly here, Labor's failure to examine Plaintiffs' relevant submissions and offer any satisfactory explanation for its actions renders its findings arbitrary and capricious. See Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

On June 28, 2002, Plaintiffs' filed their first motion and exhibits A, B and C with the court.[18] Labor was therefore aware of these documents prior to taking a voluntary remand and conducting further investigation.[19] See Former Employees of Oxford Automotive, No. 01–00453 (Ct. Int'l Trade Aug. 20, 2002) (granting second voluntary remand). During its remand investigation, Labor considered additional evidence from Oxford and its primary customer, which it included in a supplemental administrative record. At the same time, however, Labor refused to consider Plaintiffs' exhibits. It is unfair for

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[18] Exhibits C, D and E were attached to Plaintiffs second motion, filed on February 4, 2003 after the second voluntary remand. Labor should review all exhibits on the remand ordered here.

[19] This was in fact the second voluntary remand and fourth opportunity for Labor to investigate Plaintiffs' request.

Labor to consider submissions from one party while ignoring those from another. Furthermore, "because of the *ex parte* nature of the certification process, and the remedial purpose of the trade adjustment assistance program, [Labor] is obliged to conduct [its] investigation with the utmost regard for the interests of the petitioning workers." Stidham v. Dep't of Labor, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (citing Abbott v. Donovan, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984)). By ignoring Plaintiffs' exhibits here, Labor failed to fully "investigate whether [Plaintiffs] are members of a group which Congress intended to benefit from the [NAFTA-TAA] legislation," and a remand is necessary. Former Employees of Barry Callebaut v. Herman, 240 F. Supp. 2d 1214, 1228 (Ct. Int'l Trade 2002).

Although it may be true that Plaintiffs' exhibits may not "conclusively demonstrate" that Plaintiffs meet the statutory qualifications for NAFTA-TAA eligibility, the documents are relevant to Labor's investigation and warrant further analysis. Although a court cannot substitute its judgment for that of an agency, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " Former Employees of Alcatel Telecomms. Cable v. Herman, No. 98–03–00540, Slip Op. 00–88 at 7 (Ct. Int'l Trade July 27, 2000) (quoting State Farm Mut. Auto. Ins., 463 U.S. at 43). See also Former Employees of Pittsburgh Logistics Sys., Inc. v. United States Sec'y of Labor, No. 02–00387, Slip Op. 03–21 at 11 (Ct. Int'l Trade Feb. 28, 2003) (finding that "[t]he developed record must evince substantial evidence to confirm or refute relevant issues encountered during the investigation"); Esch v. Yeutter, 876 F.2d 976, 991 (D.C. Cir. 1989) (noting extra-record evidence may be considered by the court "when the agency failed to consider factors which are relevant to its final decision"). Here, Plaintiffs' exhibits include information about press lines in the automotive industry and facts about Oxford's Mexico facility. As discussed above, this information is relevant to whether Plaintiffs are eligible to be certified for NAFTA-TAA benefits and must be examined by Labor on remand.

II. Certification is Denied

Plaintiffs argue that, "based on substantial evidence in the administrative record . . . along with the fact that [Labor] has already investigated plaintiffs petition four times," the court should certify Plaintiffs as eligible for NAFTA-TAA benefits. Pls.' Second Mot. at 22. Although "[o]rdering [Labor] to certify the Plaintiffs' claims is within the court's discretion," an additional PAGE 16 COURT NO. 01–00453 remand is necessary here to fully develop the record before the court. Former Employees of Barry Callebaut, 240 F. Supp. 2d at 1228. Labor should nonetheless be aware that if it does "not perform a competent . . . investigation upon remand, the court will not re-

mand for [an additional] investigation." Former Employees of Tyco Elec., 264 F. Supp. 2d at 1332 (quoting Former Employees of Barry Callebaut, 177 F. Supp. 2d at 1312).

CONCLUSION

Accordingly, Labor's Second Remand Determination is remanded for the purpose of reconsidering Plaintiffs eligibility for certification of NAFTA-TAA benefits. Labor's findings must be in accordance with 19 U.S.C. § 2331(a)(1)(B) and must consider all relevant evidence. Remand results must be reported within forty-five days of this opinion.

Jane A. Restani
JUDGE

Dated: New York, New York
This 2nd day of October, 2003

Slip Op. 03–130

OKAYA (USA), INC. PLAINTIFF, *v.* UNITED STATES DEFENDANT.

Before: MUSGRAVE, JUDGE

Court No. 02–00642

[On the matter of liquidation instructions from U.S. Department of Commerce to former U.S. Customs Service allegedly divergent from final changed circumstances and partial revocation of antidumping order results, plaintiff's motion for judgment denied, defendant's motion to dismiss counts I and II of the complaint and cross-motion for judgment on the agency record granted.]

Decided: October 3, 2003

Willkie Farr & Gallagher LLP, Washington D.C. (*Matthew R. Nicely, Carrie L. Owens*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice, (*Ada E. Bosque*); Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Amanda Blaurock*), of counsel, for the defendant.

OPINION

Plaintiff Okaya (USA) Inc. ("Okaya") moves for judgment by default or on the merits of a three-count complaint alleging that liquidation instructions from the U.S. Department of Commerce ("Com-

merce") to the U.S. Customs Service[1] ("Customs") regarding partial revocation of the antidumping duty order on certain tin mill products from Japan were not in accordance with the underlying changed circumstances determination. The government moves to dismiss counts I and II of the complaint and for judgment on the administrative record. For the following reasons, the Court grants the government's motions and denies the plaintiff's.

Background

The United States has a "retrospective" assessment system for antidumping and countervailing duties: final liability is determined after merchandise is imported. *See* 19 C.F.R. §§ 351.212(a), 351.213(a). During the anniversary month of publication of the antidumping duty order an affected producer, exporter or importer may request an "administrative" review for assessment of duties on its subject merchandise entered during the relevant "period of review." 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 351.213(b)(3). The period of review is typically the 12-month period beginning on the anniversary of the date of publication of the order.[2] *See* 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 351.213(e)(1)(i). The rate determined at such review be-

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[1] Renamed, effective March 1, 2003, the U.S. Bureau of Customs and Border Protection per that Homeland Security Act of 2002, Pub. L. 107–296 § 1502, 116 Stat. 2135, 2308–09 (Nov. 25, 2002) and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32 at 4 (2003).

[2] Under prior law, Commerce generally administered each required automatic review as including the one-year period preceding and the one-year period succeeding the date of review. *See American Spring Wire Corp. v. United States*, 7 CIT 2, 4–5, 578 F.Supp. 1405, 1407 (1984). *Cf.* 19 U.S.C. § 1675(a)(1) (1982). Congressional amendment was "designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority." H.R. Rep. No. 98–1156, 98th Cong., 2d Sess. at 181 (1984), reprinted in 1984 *U.S.C.C.A.N.* 5220, 5298. *Cf.* Trade Agreements Act of 1979, Pub. L. No. 96–39, § 101, 93 Stat. 175 (1979) *with* Uruguay Round Agreements Act, Pub. L. No. 98–573, § 611(a)(2)(A), 98 Stat. 2948, 3031 (1984). However, it resulted in no change to the singular nature of each "period of review," and Commerce continues to administer multiple administrative reviews in a single proceeding when efficient to do so. *See, e.g., Final Results of Antidumping Duty Administrative Review; Spun Acrylic Yarn From Italy*, 55 Fed. Reg. 18925 (May 7, 1990); *Television Receivers, Monochrome and Color, From Japan; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 54 Fed. Reg. 35517 (Aug. 28, 1989); *Drycleaning Machinery From West Germany; Final Results of Administrative Review of Antidumping Finding*, 50 Fed. Reg. 32154 (Aug. 8, 1985). *Cf. Rubberflex Sdn. Bhd. v. United States*, 23 CIT 461, 472, 59 F.Supp.2d 1338, 1348 (1999) (observing that "each administrative review is a separate proceeding"). On the other hand, it is also remains true that Commerce interprets the period of review flexibly to include more or less than twelve months as circumstances require. *See, e.g., Stainless Steel Sheet and Strip in Coils From Italy: Final Results of Antidumping Duty Administrative Review*, 67 Fed. Reg. 1715 (Jan. 14, 2002) (amended, 68 Fed. Reg. 11521 (Mar. 11, 2003)); *Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands; Final Results of Antidumping Administrative Review*, 61 Fed. Reg. 51406 (Oct. 2, 1996); *Polyethylene Terephthalate Film, Sheet, and Strip from Japan; Final Results of Antidumping Duty Administrative Review*, 60 Fed. Reg. 32133 (June 20, 1995).

comes the cash deposit rate for future entries. 19 U.S.C. § 1675(a)(2)(C). If Commerce does not receive a timely review request, or if it receives a timely request for less than all of the entries during the review period, then without further notice it will issue automatic liquidation instructions to Customs for assessment of antidumping duties on non-reviewed entries at rates equal to the cash deposit of or bond for estimated antidumping or countervailing duties required at the time of entry or withdrawal from warehouse for consumption. 19 C.F.R. § § 351.212(c)(1)&(2).

An interested party may also request a determination on whether revocation of the antidumping order in whole or in part is warranted via a "changed circumstances" review. 19 C.F.R. § 351.216(b). *See* 19 U.S.C. § 1675(d)(1). The request may be made at any time, however a showing of "good cause" is required if the request is made prior to the second anniversary of publication of the order. *Id.* & § 351.216(c). If a changed circumstances or administrative review is initiated, then liquidation of the affected entries is suspended until Commerce publishes final review results. *See, e.g., Wirth Ltd. v. United States*, 22 CIT 285, 288, 5 F.Supp.2d 968, 972 (1998); *American Permac, Inc. v. United States*, 16 CIT 672, 800 F.Supp. 952 (1992). *See also* 19 U.S.C. § 1675(a)(1). Reviews are conducted in accordance with the procedures outlined at 19 C.F.R. § 351.221 governing, *inter alia*, notice, comment, verification, and publication of review results. If Commerce finds changed circumstances sufficient to justify revocation, the effective date of revocation is within Commerce's discretion. *See* 19 U.S.C. § 1675(d)(3). Suspension of liquidation pending review is considered removed upon publication of the final results in the federal register. *See, e.g., Fujitsu General America, Inc. v. United States*, 110 F.Supp.2d 1061, 1077 (2000), *aff'd* 283 F.3d 1364, 1380 (Fed. Cir. 2002); *International Trading Co. v. United States*, 110 F.Supp.2d 977, 986 (2002), *aff'd* 281 F.3d 1286 (Fed. Cir. 2002). *See also* 19 C.F.R. § 351.222(g)(4) (when Commerce revokes an order either in whole or in part based upon changed circumstances, it "will order the suspension of liquidation ended on the effective date of the notice of revocation").

On December 3, 2001, approximately fifteen months after Commerce imposed *Certain Tin Mill Products From Japan: Notice of Antidumping Duty Order*, 65 Fed. Reg. 52067 (Aug. 28, 2000), Okaya requested revocation in part with respect to a particular type of steel[3] pursuant to changed circumstances in accordance with 19

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[3] Specifically, "steel coated with metallic chromium layer between 100–200 mg/m2 and a chromium oxide layer between 5–30 mg/m2; chemical composition of 0.05% maximum carbon, 0.03% maximum silicon; 0.60% maximum manganese, 0.02% maximum sulfur; maximum flux density of 10kg minimum and a coercive force of 3.8 ore minimum." 67 Fed. Reg. at 3686.

U.S.C. § 1675(d)(1). *See* PDoc 1.[4] Since the request was made prior to the second anniversary of the order, in accordance with 19 C.F.R. § 351.216 Okaya argued that "good cause" existed for revocation. Okaya also requested expedited review and retroactive revocation. No other administrative review had been requested or initiated at the time.

Commerce published notice of the request on January 25, 2002. *See Certain Tin Mill Products From Japan: Notice of Initiation of Changed Circumstances Review of Antidumping Duty Order*, 67 Fed. Reg. 3686 (Jan. 25, 2002). The notice acknowledged the request for "partial revocation . . . retroactively for all unliquidated entries" and the fact that no domestic producer expressed opposition. *Id.* at 3686, 3688. On March 8, 2002, Commerce issued *Certain Tin Mill Products From Japan: Preliminary Results of Changed Circumstances Review*, 67 Fed. Reg. 10667 (Mar. 8, 2002) announcing its preliminary decision to "revoke this order, in part, with respect to future entries of certain tin-free steel . . . based on the fact that domestic interested parties have expressed no interest in the continuation of [that part of] the order[.]"[5] *Id.* The preliminary results did not state an "effective date" for revocation, only that the effective date of the order was March 8, 2002. *Id.* The established estimated antidumping duties cash deposit rate remained in effect pending the final results. *See id.*

Because the preliminary results reflected revocation only as to prospective entry, on March 22, 2002, Okaya requested a meeting with Commerce. During the meeting and in its case brief, Okaya emphasized that 19 C.F.R. § 351,222(g)(4) clearly states that if Commerce's "Secretary revokes an order, in whole or in part, . . . the Secretary . . . *will* instruct the Customs Service to release *any* cash deposit or bond[.]"[6] Okaya also argued that there were "myriad" examples of the administrative practice of retroactive revocation which refunded "with interest any estimated antidumping duties collected for all unliquidated entries entered or withdrawn from warehouses on or after the date of the original order.[7] In short, Okaya argued

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[4] References to the public administrative record herein abbreviated "PDoc."

[5] As part of its request, Okaya submitted evidence that all known U.S. tin producers were not or were uninterested in producing this product. *See* PDoc 1 at 5, Att. C (Dec. 3, 2001).

[6] *See* PDoc 10 ("Okaya Case Br.") at 4 (Okaya's emphasis) & PDoc 13 (Memo from Analyst/IA Re: Meeting with Wilkie Farr dated Apr. 12, 2002).

[7] Okaya Case Br. at 4 & n.8, referencing the following final results of changed circumstances reviews: *Vector Supercomputers From Japan*, 66 Fed. Reg. 22213 (May 3, 2001); *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom*, 65 Fed. Reg. 13713 (Mar. 14, 2000); *Certain Fresh Cut Flowers from Ecuador*, 64 Fed. Reg. 56327, 56328 (Oct. 19, 1999); *Stainless Steel Hollow Products from Sweden*, 60 Fed. Reg. 42529 (Aug. 16, 1995); *Roller Chain, Other then Bicycle from Japan*, 64 Fed. Reg. 66889 (Nov. 30, 1999); *Fresh Kiwifruit from New Zealand*, 64 Fed. Reg. 50486 (Sep. 17, 1999); *Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada*, 60 Fed. Reg. 48691 (Sep. 20, 2000).

that refund of deposits on "all unliquidated entries" is "both *required* by the regulations and is standard practice."[8] On July 1, 2002, Commerce published its final ruling, the relevant portions of which read:

> . . . On December 3, 2001, Okaya . . . requested that the Department revoke in part the antidumping duty order on certain tin mill products from Japan. Okaya also requested that the partial revocation apply retroactively for all unliquidated entries.
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> No domestic producers of tin mill products have expressed opposition to the partial revocation of the tin mill products order following the Initiation Notice and the Preliminary Results. For these reasons the Department is partially revoking the order on tin mill products from Japan, effective August 1, 2001, with respect to all unliquidated entries for consumption of tin-free steel which meets the specifications detailed above. . . . We will instruct [Customs] . . . to liquidate without regard to antidumping duties, as applicable, and to refund any estimated antidumping duties collected for all unliquidated entries of certain tin mill products (i.e., certain tin-free steel) meeting the specifications indicated above.

Certain Tin Mill Products From Japan: Final Results of Changed Circumstances Review, 67 Fed. Reg. 44177, 44177, 44179, PDoc 16 (July 1, 2002).

On July 31, 2002, automatic liquidation instructions issued to Customs from Commerce bearing boilerplate wording which explained that Commerce does not automatically conduct administrative reviews of antidumping duty orders, that such reviews must be requested in accordance with 19 C.F.R. § 351.213, and that since Commerce had not received a request for an administrative review of the antidumping duty order for the period "04/12/2000–07/31/2001" on the merchandise listed on the instructions, Customs was instructed to assess antidumping duties on merchandise entered or withdrawn from warehouse for consumption at the cash deposit or bonding rate in effect on the date of entry. Msg. No. 2256202 (July 31, 2002).

Thereafter, on September 16, 2002, beyond the statute of limitations for challenging the final results, Customs posted the following revocation instructions from Commerce, dated September 13, 2002, on its electronic bulletin board:

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[8] *Id.* at 5 & n.10 (Okaya's emphasis), referencing *Certain Corrosion-Resistant Carbon Steel Flat Products From Japan*, 67 Fed. Reg. 7356, 7357 (Feb. 19, 2002), which Okaya characterized as "retroactively refunding duties for *all unliquidated entries* without mention of a specific time period" (Okaya's emphasis).

> Customs is directed to terminate the suspension of liquidation for all shipments of certain tin-free steel entered, or withdrawn for consumption from warehouse, for consumption on or after 08/01/2001. All entries of certain tin-free steel that were suspended on or after 08/01/2001 should be liquidated without regard to antidumping duties (*i.e.*, release all bonds and refund all cash deposits).

Instructions to Customs Re: Revocation of Dumping Order in Part on Tin-Free Steel from Japan, Msg. No. 2256202 (Sep. 13, 2002).

On October 8, 2002, Okaya filed a summons and a three-count complaint asserting jurisdiction under 28 U.S.C. § 1581(i). Count I alleges that "Commerce did not properly explain the basis for its revocation instructions to treat entries before August 1, 2001 differently from those that entered on or after that date" and that therefore Commerce's instructions "were arbitrary, capricious, an abuse of discretion, and were otherwise not in accordance with law." Compl. ¶9. Count II alleges that "Commerce's decision to treat identical products differently based solely upon the entry date is neither supported by any evidence on the record nor Commerce's prior practice" and that the decision was therefore "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Id.* ¶10. Count III alleges that "Commerce's instructions to implement revocation procedures are inconsistent with the plain language of its final results in the changed circumstances review" and that they were therefore "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law." *Id.* ¶11.

On December 16, 2002, the government filed a motion to dismiss counts I and II of the complaint for lack of subject matter jurisdiction under 28 U.S.C. § 1581(i) and it submitted a proposed order for Okaya to file an amended complaint within 30 days, to which the government would then respond after 30 more days. The motion was filed untimely.[9] However, subject matter jurisdiction may be chal-

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[9] CIT Rules 12(a)(1)(A) and 6(a) allow the government 60 days to respond to a complaint unless the response would be due on a Saturday, Sunday, or legal holiday, in which event the response is due on the next day which is not such a day. CIT Rule 6(a) states that "the day of the act, event, or default from which the designated period of time begins to run shall not be included" in the computation of the period allowed for a responsive pleading. When service upon a party is by mail, CIT Rule 6(c) adds five days "to the prescribed or allowed period[.]" In this matter, the summons and complaint were served upon the government on October 8, 2002 by mailing in accordance with CIT Rule 4(i). *See* Exhibits to Def.'s Opposition to Pl.'s Mot for Default Judgment (*sic* – such a motion had not been filed at the time). The 60th day from that date was Saturday, December 7, 2002. The government contended that in accordance with CIT Rule 6(a), the "prescribed or allowed period" for a responsive pleading, assuming hand-delivery of service, was Monday, December 9, 2002. Including the five-day period for mailing, the fifth day from and excluding December 9, 2002, was December 14, 2002, another Saturday, and therefore the government argued that a responsive pleading was due Monday, December 16, 2002, the date it filed its motion to dismiss counts I and II of the complaint. However, the government's interpretation is incorrect and is at

lenged at any time, since a court has a duty to determine whether it has jurisdiction over matters presented for disposition.[10]

"Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). *See also JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000); *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992). The government argued that counts I and II in reality sought to contest the "rejection" of Okaya's request for retroactive application of partial revocation and that such a claim is time-barred because Okaya failed to initiate suit within 30 days of publication. *See* 19 U.S.C. § 1516a(a)(2); 28 U.S.C. § 1581(c). The government contended that if Okaya believed the final results to be ambiguous, then it should have challenged that ambiguity pursuant to 28 U.S.C. § 1581(c).

Okaya bore the burden of proving its jurisdictional allegations. *Gibbs v. Buck*, 307 U.S. 66 (1939). *See, e.g., MBL (USA) Corp. v. United States*, 14 CIT 161, 164, 733 F.Supp. 379, 382 (1990); *Smith Corona Group, SCM Corp. v. United States*, 8 CIT 100, 102, 593 F.Supp. 414, 417 (1984). Okaya contended that its complaint contested only the alleged divergence in the liquidation instructions from the final results that resulted from Commerce's decision, without explanation, to treat entries differently depending upon their en-

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odds with the fact of service in this matter. The Court's Rules contemplate that the period allowed for mailing is to be added directly to the original "prescribed or allowed period" and the total is treated as a single period for purposes of computation. Mailing is not treated as a separate, additional period. *Cf.* Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, 4B *Federal Practice & Procedure* § 1171 (3d ed. 1998) ("Service by Mail," *et cetera*) (interpreting Federal Rule of Civil Procedure ("F.R.C.P.") 6(e)). In other words, the government's responsive pleading was due sixty-five days from October 8, 2002, the date of mailing of the summons and complaint, *i.e.*, by Thursday, December 12, 2002.

[10] *See, e.g., Renesas Technology America Inc. v. United States*, Slip Op. 03–106 (CIT Aug. 18, 2003); *Shinyei Corp. of America v. United States*, Slip Op. 03–19 (CIT Feb. 14, 2003). Generally, a pleading's allegations of jurisdiction are taken as true unless denied or controverted by the movant. A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction serves one of two purposes: either it challenges the sufficiency of the pleading under Rule 8, or it presents a defense by way of abatement. On such a motion, the moving party challenges either the sufficiency of the pleadings or the factual basis underlying the pleadings. In the first instance, all facts alleged in the non-moving party's pleadings are accepted as true. If the 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction, in which instance only uncontroverted facts are accepted as true, and the remaining facts are subject to fact-finding by the Court. By contrast, a motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) goes to the sufficiency of the pleading under Rule 8(a)(2), and the only information necessary for a decision on the motion is to be found in the pleading itself; if outside evidence is considered, the motion is converted into one for summary judgment. *See generally* 5A Wright *et alia*, *Federal Practice & Procedure* § 1363. *See, e.g., Cedars-Sinai Medical Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Kemet Electronics Corp. v. Barshefsky*, 21 CIT 912, 929, 976 F.Supp. 1012, 1027 (1997).

try date; therefore, Okaya argued, section 1581(i) jurisdiction is appropriate to contest such divergence on the authority of *Consolidated Bearings Co v. United States*, 25 CIT ___ , 166 F.Supp.2d 580 (2001) and *Heveafil Sdn. Bhd. v. United States*, 23 CIT 447 (1999).[11] Pl.'s Opp. to Mot. to Dismiss at 5–9. Okaya further explained that at the time the final results were issued, it understood Commerce to grant revocation as to "all" entries that were unliquidated as of the effective date of revocation, as it had requested, and that it was not until the liquidation instructions were posted on Customs' web site, beyond the statute of limitations for challenging the final changed circumstances determination, *see* 28 U.S.C. § 1581(c), that Okaya realized Commerce had issued an interpretation that differed from what Okaya considered to be the "proper" interpretation of the final results.

The parties' arguments implicated the factual basis of Okaya's jurisdictional allegations, *i.e.*, the proper interpretation of the final results. Since Okaya's jurisdictional allegations depend upon the correctness of its interpretation of the final results, and since the government's motion to dismiss depends upon the reasonableness of Okaya's interpretation, the Court determined that the jurisdictional allegations are intertwined with the merits and that it was appropriate to reserve decision until final disposition. *See Renesas Technology, supra*; *Nissei Sangyo America v. United States*, Slip Op. 03–105 (CIT Aug. 18, 2003); *Takashima U.S.A., Inc. v. United States*, 19 CIT 673, 886 F.Supp. 858 (1995); *PPG Industries Inc. v. United States*, 84 Cust. Ct. 256 (1980). *Cf. Martin By Martin v. Secretary of Health and Human Services*, 62 F.3d 1403, 1406 (Fed. Cir. 1995) ("the distinction between facts necessary to establish jurisdiction and those necessary to prove a claim is often a close one, carrying significant legal consequences").

On the other hand, the government's untimely motion presented a jurisdictional challenge only to a part of the complaint. The government agreed, on the authority of *Heveafil*, that the allegations of count III appeared sufficient to confer subsection (i) jurisdiction, since the claim alleges that the liquidation instructions were inconsistent with the final results. *See* Def.'s Mot. to Dismiss In Part at 7. Although subject matter jurisdiction may neither be waived nor

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[11] *Heveafil* instructs that the Court's residual jurisdiction is appropriate when reviewing Commerce's instructions to Customs because "Commerce, not Customs, is the agency responsible for issuing instructions and determining the amount of antidumping duty to be assessed." 23 CIT at 449. *See also id.* at 450 (the Court "reviews Commerce's liquidation instructions . . . and will find them unlawful if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' ") (quoting Administrative Procedure Act ("APA") in part, 5 U.S.C. § 706(2)(A)). *Consolidated Bearings* instructs that liquidation instructions are not reviewable under 28 U.S.C. § 1581(c), since they are not part of the final results, and will be considered arbitrary and capricious if they diverge from the final results and Commerce fails to explain their basis. Under such circumstances, subsection (i) provides the appropriate basis for review. 166 F.Supp.2d at 583.

agreed among the parties, the Court concurred that count III sounded in 1581(i) jurisdiction. Since the government had not provided timely substantive responses to any part of the complaint nor timely moved for an extension of time to answer the complaint, Okaya moved for entry of default and for leave to file a motion for default judgment. The government opposed Okaya's motion for entry of default on the ground that the motion to dismiss had not been untimely. The Court concluded that the motion to dismiss in part did not alter the time within which to answer the remainder of the complaint not addressed by such motion. *See Gerlach v. Michigan Bell Tel. Co.*, 448 F.Supp. 1168, 1174 (D.C. Mich. 1978) ("separate counts are, by definition, independent bases for a lawsuit and the parties are responsible to proceed with litigation on those counts which are not challenged by a motion under F.R.C.P. 12(b)"). *Cf.* CIT Rule 7(a) ("There shall be a complaint and . . . an answer"); CIT Rule 12(a) ("the United States . . . shall serve an answer to the complaint . . . within 60 days of service"); CIT Rule 12(b) ("Every defense, in law or fact, to a claim for relief in any pleading, . . . shall be asserted in the responsive pleading thereto"). *But see* Wright *et alia*, 5A *Federal Practice & Procedure* § 1346 ("[T]his approach also has the disadvantages of requiring duplicative sets of pleadings in the event that the motion is denied, and of causing confusion over the proper scope of discovery during the motion's pendency. A more considered solution might be to hold that a partial Rule 12(b) motion expands the time for answering the entire pleading, relying on the prospect of Rule 11 sanctions to deter the abusive use of such a motion). *See also Brocksopp Engineering, Inc. v. Bach-Simpson, Ltd.*, 136 F.R.D. 485 (E.D. Wisc. 1991) (partial motion to dismiss extends defendant's time to answer all claims). After considering such authority as could be discerned in this area, the Court concluded that discovery was not an issue in this matter and that any "duplicative" pleadings rather would be the result of the defendant's piecemeal approach to pleading, the first of which was untimely. Therefore, accepting the reasons advanced by Okaya, the Court granted its motion for entry of default on February 3, 2003. *Cf. LaPerla Fashions, Inc. v. United States*, 22 CIT 385 (1998) (noting entry of default); *Syva v. United States*, 12 CIT 199, 681 F. Supp. 885 (1988) (noting entry of default).

On February 24, 2003, the government moved for reconsideration pursuant to CIT Rule 55(c), which allows setting aside an entry of default for "good cause shown." The Rule parallels F.R.C.P. 55(c), which is generally interpreted to require of a defendant seeking to have entry of default set aside to show: (1) good cause for their default; (2) quick action to correct it; and (3) a meritorious defense to the plaintiff's complaint. *See, e.g., Union Pacific Railroad Co. v. Progress Rail Services Corp.*, 256 F.3d 781, 782–83 (8th Cir. 2001) (referencing *Pioneer Investment Services Co. v. Brunswick Associates LP*, 507 U.S. 380, 394–95 (1993) and considering (1) the length and

reason for the delay in filing and whether the defendant acted in good faith, (2) the prejudice the plaintiff incurred by the delay, and (3) whether the defendant has a meritorious defense); *Action S.A. v. Marc Rich & Co., Inc.*, 951 F.2d 504, 507 (2d Cir.1991) (considering (1) whether the default was willful, (2) whether setting aside the default would prejudice the adversary, and (3) whether a meritorious defense is presented), *cert. denied*, 503 U.S. 1006 (1992). Federal courts have generally looked for guidance on "good cause" in F.R.C.P. Rule 60(b), which includes "mistake, inadvertence, surprise, or excusable neglect." *See Medunic v Lederer*, 64 F.R.D. 403 (D.C. Pa 1974).

The government essentially reiterated argument presented in its response to Okaya's motion for entry of default that its motion to dismiss had not been untimely. On March 5, 2003, Okaya filed opposition, which contended that the government's "mistake" was not excusable. Okaya further noted, among other things: "[e]ven now, almost three months after the deadline [for answering], and after this Court has issued an entry of default, defendant still refuses to answer the complaint." Pl.'s Resp. in Opp. to Mot. for Recon. at 2. That was true as to count III, however the Court had not yet ruled on the motion to dismiss. Nonetheless, the Court agreed that the government's "liberal" interpretation of the Court's Rules for responsive pleading had not been reasonable and therefore denied reconsideration on March 27, 2003. The order therefor acceded to Okaya's demand to include language requiring the defendant "to answer all counts of the Complaint forthwith" in order to receive one, complete, responsive pleading from the government.

The government filed its answer April 2, 2003, denying every fact alleged in the complaint and setting out the affirmative defense of lack of jurisdiction over counts I and II and failure to exhaust administrative remedies. Okaya then moved for entry of default judgment or judgment upon the administrative record under CIT Rules 55(b), 55(e), and 56.1. The government responded by renewing its motion to dismiss counts I and II and by requesting judgment upon the agency record.

Discussion

I

Entry of default judgment may be appropriate against a party who has failed to plead or otherwise defend against a claim brought by another party. *See Black's Law Dictionary* 417 (6th ed. 1990). On a motion for default judgment, a court should take into account "considerations of social goals, justice and expediency . . . within the domain of the trial judge's discretion[,]" *Gomes v. Williams*, 420 F.2d 1364, 1366 (10th Cir. 1970), which may include the amount of money involved, whether material issues of fact or issues of substantial

public importance are at issue, whether the default is largely technical, whether the plaintiff has been substantially prejudiced by the delay involved, whether the grounds for default are clearly established or are in doubt, the harshness of the effect of default judgment, whether default was caused by a good-faith mistake or by excusable or inexcusable neglect on the part of the defendant, and whether the plaintiff itself engaged in dilatory behavior. *See generally* Wright *et alia*, 10A *Federal Practice and Procedure* § 2685.

However, the "preferred" resolution of litigation is consideration on the merits. *See e.g.*, *Brady v. United States*, 211 F.3d 499 (9th Cir. 2000); *Coon v. Grenier*, 867 F.2d 73 (1st Cir. 1989); *Mason v. Lister*, 562 F.2d 343, 345 (5th Cir. 1977) *Schwab v. Bullock's Inc.*, 508 F.2d 353 (9th Cir. 1974); *Pulliam v. Pulliam*, 478 F.2d 935 (D.C. Cir. 1973); *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969); *Hutton v. Fisher*, 359 F.2d 913 (3rd Cir. 1966). Furthermore, CIT Rule 55(e) provides that "[n]o judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." As with other Rules, CIT Rule 55(e) parallels F.R.C.P. 55(e), which

> rests on the rationale that the taxpayers at large should not be subjected to the cost of a judgment entered as a penalty against a government official which comes as a windfall to the individual litigant. The private party must first demonstrate that there is some basis on which he is entitled on the merits of his claim to receive judgment. A court should accord respect to this policy beyond the confines of Rule 55(e)'s strict coverage when it can do so without running against a countervailing consideration.

Campbell v. Eastland, 307 F.2d 478 (5th Cir 1962), *cert. denied* 371 U.S. 955 (1963). *See generally* Wright *et alia*, 10A *Federal Practice and Procedure* § 2702.

Apart from Okaya's right to relief, addressed below, on its motion for entry of default judgment Okaya contends that it has been prejudiced by the government's delay of disposition of this matter by an additional four months and five separate briefings requiring time and effort to address and that the government's actions continue to deprive it of monies rightfully owed to it Pl.'s Reply in Support of Its Mot. for Judgm. or Judgm. Upon the Agency Record at 10. The Court agrees with the proposition that unjust delays in litigation would be prejudicial to a plaintiff. *Cf. Robinson v. United States*, 734 F.2d 735, 739 (11th Cir. 1984) ("being deprived of this substantial sum of money for [such a significant period of time] is undoubtedly a significant burden") (citing *United States v. $23,407.69 in United States Currency*, 715 F.2d 162, 166 (5th Cir. 1983). Moreover, "[t]he fact that a court has allowed a party in default to proceed in the suit and

answer the complaint does not automatically put the defaulting party in the position of one who is making a timely response to a complaint." *Bavouset v. Shaw's of San Francisco*, 43 F.R.D. 296, 299 (S.D. Tex. 1967). However, the Court is not persuaded that the government's motion to dismiss counts I and II, filed on its assumption that it was timely, was a mere delaying tactic. Moreover, at the time of Okaya's motion for entry of default, the Court also acceded to Okaya's request to seek leave to move for entry of default judgment since, at the time, the government had not filed an answer to the complaint. At common law, joinder of issue occurs when "the parties to a cause arrive at that stage of it in their pleadings, that one asserts a fact to be so, and the other denies it." *Black's Law Dictionary* 836. In this instance, joinder of issue occurred *after* entry of default as a result of the plaintiff's request for joinder. Moving for entry of default judgment at this stage, although permitted by the Order of March 27, 2003, appears to be a procedural contradiction. On balance, the Court exercises its discretion to address this matter on its own merits.

II

Normally, the Court is asked to consider whether there is ambiguity in the authorizing statute upon which a clear agency determination rests. In this instance, the Court is asked to consider the reverse. The antidumping statute provides that "[a] determination under this section to revoke an order or finding or terminate a suspended investigation shall apply with respect to unliquidated entries of the subject merchandise which are *entered*, or withdrawn from warehouse, for consumption *on or after* the date determined by the administering authority." 19 U.S.C. § 1675(d)(3) (highlighting added). The meaning of this provision is plain: merchandise which entered prior to the effective date of revocation decided by Commerce, a matter within its discretion, does not receive the benefit of revocation. In this matter, however, it is the meaning of the operative language of the final results that is implicated, if not contested, the allegation being liquidation instructions not in conformity therewith.

Although the parties apparently disagree over the extent of suspended liquidations included within the ambit of Commerce's revocation policy, at least one aspect of the briefing is abundantly clear: except for the instant matter, the effect of the date chosen by Commerce as the effective date of revocation is *prospective* in application.[12] This comes as no surprise, in light of the plain meaning of section 1675(d)(3). The final results underlying the instant matter

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[12] *See, e.g.*, Pl.'s Reply in Support of Its Mot. for Judgm. or Judgm. Upon the Agency Record at 18 (table and footnotes). *See also* footnote 7, *supra*, and cases cited. Page

are therefore defective to the extent that they make revocation "effective August 1, 2001, with respect to all unliquidated entries." They do not use the words "entered on or after," which would have clearly signaled the usual prospective effect of revocation from the effective date.

In the absence of such language, and since the final results further stated, *e.g.*, that Commerce will instruct Customs to "refund any estimated antidumping duties collected for *all* unliquidated entries of certain tin mill products (*i.e.*, certain tin-free steel) meeting the specifications indicated[,]" 67 Fed. Reg. at 44,179 (highlighting added), Okaya argues it was reasonable to conclude that refunds would be issued, as long as the entries were unliquidated as of August 1, 2001. Okaya does not (and cannot) argue that the final results were ambiguous: it argues that their meaning was plain, or at least as it interpreted them. That is, Okaya argues it was reasonable to interpret the final results to mean that Commerce had granted its retroactive revocation request in full and that it applied revocation "to any entries that remained unliquidated *as of* that date[.]" Pl.'s Opp. to Mot. to Dismiss at 3 (highlighting added). However, the Court must conclude that the absence of "entered on or after" in the final results does not result in the "unambiguous" interpretation Okaya advocates. In light of section 1675(d)(3), Okaya's interpretation is inherently contradictory since it renders "effective August 1, 2001" superfluous as well as the significance of any antidumping duties that attached at entry prior to such effective revocation date. Further, it does not logically follow from the fact that the final results omitted "entered on or after" that Commerce granted Okaya's request for retroactive revocation as to all dumping duty deposits regardless of the date of entry. For the argument to have merit, Okaya would have to demonstrate in accordance with section 1675(d)(3) not only that "effective August 1, 2001" was *not* intended as the date of revocation but it must also demonstrate which date *was* intended for revocation, which can only have prospective effect in accordance with section 1675(d)(3). Okaya has not done so. Furthermore, Okaya agrees that Commerce announced an effective date of revocation in the final results, *i.e.* August 1, 2001. Consequently, the argument that the final results literally (and therefore unambiguously) made revocation effective as to "all unliquidated entries" regardless of entry, due to the absence of "entered on or after," is argument for enforcement of a determination that is not in accordance with 19 U.S.C. § 1675(d)(3) and is therefore unlawful, because that provision is clear as to its "prospective" application. Such a determination would therefore be unenforceable, as would literal liquidation instructions emanating from it.

Accordingly, to give effect to the final results, the Court must construe the defects in operative language in accordance with law to the extent possible. The Court finds that although the final results omit

the words "entered on or after," Commerce nonetheless announced August 1, 2001 as the effective date of revocation, and that revocation was to have prospective effect from such date, in accordance with section 1675(d)(3). Also in accordance with that provision, "all unliquidated entries" as used in the final results must be construed as all unliquidated entries that obtain the benefit of revocation, *i.e.*, those that entered on or after such effective date of revocation. The liquidation instructions, based thereon, describe subject merchandise "entered, or withdrawn from a warehouse, for consumption on or after 08/01/2001." Okaya is correct in alleging that they appear facially inconsistent with the final results as issued; however, based upon the foregoing, the Court must find the liquidation instructions in accordance with the effective date of revocation determined in the final results and in accordance with law, since they are in accordance with section 1675(d)(3). They are therefore not legally inconsistent with the final results.

Conclusion

Based upon the foregoing, the Court must conclude that Okaya's proper remedy lay in challenging the final results within 30 days of issuance pursuant to 28 U.S.C. § 1581(c). The Court concludes that it lacks jurisdiction over counts I and II and therefore grants the defendant's motion to dismiss these counts. Since the liquidation instructions are not inconsistent with the final results and are in accordance with law, judgment will enter for the defendant.

R. KENTON MUSGRAVE, JUDGE

Dated: October 3, 2003
New York, New York

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C03/47 9/29/03 Carman, C.J.	Group Italglass USA Corp.	98–2–00345	7013.39 Various rates	7010.90.50 Free of duty	Agreed statement of facts	San Francisco Glass jars

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*VALUATION*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
V03/8 9/29/03 Eaton, J.	La Perla Fashions, Inc.	01–00812	Transaction value	Invoice price actually paid by LPF to the exporter, Gruppo La Perla, S.p.A.	Agreed statement of facts	New York Newark Various articles of wearing apparel