Slip Op. 05–83

WEST FRASER MILLS LTD., Plaintiff, v. **UNITED STATES,** Defendant, and **THE COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE,** Defendant-Intervenor.

BEFORE: Restani, Chief Judge
Eaton, Judge
Stanceu, Judge
Consol. Court No. 05–00079

MEMORANDUM ORDER

Defendant United States moves, pursuant to USCIT Rule 7(f), for an order modifying a preliminary injunction that the Court issued by order dated March 7, 2005 in this case and a second preliminary injunction that the Court issued by order dated March 10, 2005 in two cases (Court Nos. 05–00136 and 05–00144) now consolidated in this action. Under the preliminary injunctions, defendant is enjoined, during the pendency of the litigation before this Court, from liquidating, or causing or permitting liquidation, of import entries of softwood lumber from Canada that were produced, exported or imported by the various plaintiffs in this consolidated case. For the reasons discussed herein, the Court orders only those changes to the two injunctions to which all affected parties have consented.

Both preliminary injunctions were ordered with the consent of the parties. Defendant's motion now seeks to remove the names of certain importers of softwood lumber from Canada as identified in Attachment A to the March 7, 2005 injunction and in Exhibit A to the March 10, 2005 injunction. Defendant also seeks an order modifying the March 7, 2005 preliminary injunction by separately listing individual Customs identification numbers for Landmark Truss & Lumber Inc. (A–122–838–230), Frontier Mills Inc. (A–122–838–184), and Fraser Pacific Forest Products, Inc. (A–122–838–180).

All affected parties have consented to the changes that defendant's motion would make to the preliminary injunction entered on March 10, 2005. Defendant obtained consent for the changes it seeks to the

March 7, 2005 preliminary injunction from all affected parties, with the exception of Commonwealth Plywood Co. Ltd., Leggett & Platt Ltd., and Leggett & Platt (B.C.) Ltd.

Defendant seeks to modify the preliminary injunction entered March 7, 2005 by deleting names of several importers that were listed with notations such as "doing business as," "formerly," or "now known as." The March 7, 2005 preliminary injunction identified Commonwealth Plywood Co. Ltd. as "also doing business as Bois Clo-Val and Les Entreprises Atlas." Defendant's motion seeks to remove Bois Clo-Val and Les Entreprises Atlas from Attachment A of the March 7, 2005 preliminary injunction. The March 7, 2005 preliminary injunction identified Leggett & Platt Ltd., and Leggett & Platt (B.C.) Ltd. as "(dba: Leggett Wood)." Defendant seeks to have the notation "(dba: Leggett Wood)" removed from that injunction.

Defendant contends that the company names it would have removed from the preliminary injunctions do not match the names of the companies that participated before the U.S. Department of Commerce ("Commerce") in the administrative review at issue, as established by the administrative record. *See Def.'s Am. Mot. to Modify Inj.* ("*Def.'s Mot.*") at 2. According to defendant, Commerce "cannot recognize company names different from the specific, individual company names provided to Commerce on the record during the administrative review." *Id.* Defendant argues that the proposed modifications are necessary to enable Commerce to properly perform its administrative task of instructing the Bureau of Customs and Border Protection ("Customs") to suspend liquidation of subject entries of softwood lumber from Canada. *See id.* at 4.

Commonwealth Plywood filed a brief in opposition to defendant's motion, arguing that the removal of Bois Clo-Val and Les Entreprises Atlas from the March 7, 2005 preliminary injunction amounts to "a motion to dismiss claims by two divisions of Commonwealth [Plywood] due to an alleged lack of standing." *Pl.'s Opp'n to Def.'s Mot. to Modify Inj.* ("*Pl.'s Opp'n*") at 2. Commonwealth Plywood disputes the factual assertions and legal conclusions asserted in defendant's motion, "*i.e.*, that Commonwealth and its divisions 'did not participate in the review' and that Commerce is 'prohibited' from issuing suspension and liquidation instructions until the injunction is amended." *Id.* at 5. According to Commonwealth Plywood, the Court should address the issues of standing that the defendant raises only after the parties are allowed to fully brief the Court. *See id.* at 6–8.

Defendant filed a motion, pursuant to USCIT Rule 7(f), for leave to submit a reply to Commonwealth Plywood's brief in opposition, which motion the Court is granting. In the reply, defendant maintains that it has "not moved to dismiss Bois Clo[-]Val and Les Entreprises Atlas from this action. There is no need to do so. Neither is a party to this action." *Def.'s Mot. For Leave to File Reply & Def.'s*

Reply to Commonwealth's Opp'n to Def.'s Mot. to Modify Injs. at 3. Defendant also argues that it has "demonstrated" that "Commerce is unable to issue instructions to [Customs] based upon names that do not match the specific, individual names provided to Commerce on the record during the administrative review." *Id.* at 2 & 3.

In general, "courts have inherent power and the discretion to modify injunctions for changed circumstances." *Aimcor, Ala. Silicon, Inc. v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999)(citing *Sys. Fed'n No. 91 v. Wright*, 364 U.S. 642, 647 (1961)). However, the moving party bears the burden of establishing a "change in circumstances that would make the original preliminary injunction inequitable." *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 340 (3d Cir. 1993). To support its argument that defendant has "demonstrated" that Commerce is unable to issue suspension of liquidation instructions to Customs for importers that were not specifically named as parties in the underlying administrative review, defendant cites 19 U.S.C. § 1675 and 19 C.F.R. § 351.213. *See Def.'s Mot.* at 2. The cited provisions, however, address generally the matter of who may request an administrative review and do not address the issue of whether Commerce is prohibited or otherwise precluded from issuing suspension of liquidation instructions to Customs for importers identified in a preliminary injunction.

Defendant has failed to meet its burden of establishing that "changed circumstances, legal or factual, make the continuation of the injunction inequitable" absent a modification to delete the names appearing in the March 7, 2005 preliminary injunction that are associated with the non-consenting plaintiffs. *Aimcor, Ala. Silicon, Inc.*, 23 CIT at 938, 83 F. Supp. 2d at 1299 (citing *Favia*, 7 F.3d at 340). Accordingly, the court denies defendant's motion to the extent that it seeks to remove from the March 7, 2005 preliminary injunction the names "Bois Clo-Val," "Les Entreprises Atlas," and "Leggett Wood." The language of the preliminary injunction dated March 7, 2005 suspending liquidation of the entries subject to the administrative review at issue in this litigation was constructed after negotiation and was consented to by all affected parties. *See Pl.'s Opp'n* at 6. Defendant has failed to present, or even allude to, evidence establishing that the continuation of the March 7, 2005 injunction without removal of the names Bois Clo-Val, Les Entreprises Atlas, and Leggett Wood would render "the original preliminary injunction inequitable." *Favia*, 7 F.3d at 340. Nor has defendant made a showing that Commerce is unable to issue to Customs instructions pertaining to the March 7, 2005 preliminary injunction, or that Customs is unable to follow such instructions, without deletion of these names. Further, defendant has failed to show how it would suffer injury were the Court to reject the contested changes it seeks to the March 7, 2005 injunction.

Commonwealth Plywood, on the other hand, has established that the removal of Bois Clo-Val and Les Entreprises Atlas from the scope of the March 7, 2005 preliminary injunction is likely to cause irreparable injury. Such a modification could result in a loss of an opportunity to challenge the antidumping duty margins and deposit rates applied to import entries identified with those two names. *See Pl.'s Opp'n* at 3. Such a result could occur if Customs liquidates entries made in the name of either Bois Clo-Val and Les Entreprises Atlas. The same considerations require the Court to conclude that defendant has not met the burden of showing that the name "Leggett Wood" should be removed from the March 7, 2005 preliminary injunction.

Because defendant has failed to meet its burden with regard to the contested modifications to the March 7, 2005 injunction, the Court is granting defendant's motion only to the extent that it would effect changes to the two preliminary injunctions that are consented to by the affected parties. The Court is denying defendant's motion to the extent that it would make changes to the preliminary injunction entered March 7, 2005 to which the affected parties have not consented. Accordingly, it is hereby

ORDERED that defendant's motion for leave to file a reply to Commonwealth Plywood's opposition is granted; it is further

ORDERED that defendant's motion to modify the injunctions is denied to the extent that it seeks to delete the names "Bois Clo-Val," "Les Entreprises Atlas" and "Leggett Wood" from the preliminary injunction entered on March 7, 2005; it is further

ORDERED that defendant's motion is granted to the extent that it seeks to modify or delete certain other references to names of plaintiffs in the preliminary injunction entered by this Court on March 7, 2005 in this consolidated action, and accordingly the Attachment A to the preliminary injunction entered by this Court on March 7, 2005 in this consolidated action is hereby modified:

> To delete the reference "Winton Global Lumber Ltd." and to revise the accompanying reference "(formerly The Pas Lumber Company Ltd.)" to read "The Pas Lumber Company Ltd.",
>
> To revise the reference to Bridgeside Higa Forest Industries Ltd. to delete the reference "(now known as Bridgeside Forest Industries Ltd.)",
>
> To revise the reference to Vernon Kiln and Millwork Ltd. to delete the reference "(dba: Paragon Wood-Vernon Division)",
>
> To delete the reference "Western Forest Products Inc." and to revise the accompanying reference "(successor company to Doman Forest Products Limited, Doman Industries Limited, and Doman Western Lumber Ltd.)" to read "Doman Forest

Products Limited, Doman Industries Limited, and Doman Western Lumber Ltd.",

To revise the reference to Landmark Truss & Lumber Inc. to include separate Customs identification numbers for Landmark Truss & Lumber Inc. (Customs identification number A–122–838–230), Frontier Mills Inc. (Customs identification number A–122–838–184) and Fraser Pacific Forest Products, Inc. (Customs identification number A–122–838–180), and

To revise the reference to Tembec Inc. to delete the reference "Gestion PFT Inc.";

it is further

ORDERED that defendant's motion is granted to the extent that it seeks to delete certain references to names from the preliminary injunction entered by this Court on March 10, 2005 in this consolidated action, and accordingly the Exhibit A to the preliminary injunction entered by this Court on March 10, 2005 in this consolidated case is hereby modified:

To revise the reference to "Clair Industrial Development Corp. Ltd. (Waska)," by deleting from that reference the text "(also doing business as Waska Lath Inc.)", and

To revise the reference to Marwood Ltd. by deleting from that reference the text "(also doing business as: Cape Cod Wood Siding Inc., Marwood Inc. and Atlantic Pressure Treating Ltd.)."

Slip Op. 05–84

GERBER FOOD (YUNNAN) CO., LTD. and GREEN FRESH (ZHANGZHOU) CO., LTD., Plaintiffs, v. **UNITED STATES,** Defendant, and **COALITION FOR FAIR PRESERVED MUSHROOM TRADE,** Defendent-Intervenor.

BEFORE: Timothy C. Stanceu, Judge
Court No. 03–00544

[Final results of antidumping administrative review applying "total adverse facts available" remanded for further proceedings upon plaintiffs' motion for judgment on agency record]

Dated: July 18, 2005

Garvey Schubert Barer (*William E. Perry*, *Lizbeth R. Levinson* and *Ronald M. Wisla*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, *David M. Cohen*, Director, Commercial Liti-

gation Branch, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, *Richard P. Schroeder*, Trial Attorney, United States Department of Justice; *Scott D. McBride*, Office of Chief Counsel, United States Department of Commerce, of counsel, for defendant.

Collier Shannon Scott, PLLC (*Michael J. Coursey* and *Adam H. Gordon*) for defendant-intervenor.

OPINION AND ORDER

Stanceu, Judge: Plaintiffs Gerber Food (Yunnan) Co., Ltd. ("Gerber") and Green Fresh (Zhangzhou) Co., Ltd. ("Green Fresh") challenge certain aspects of a decision issued in July 2003 by the International Trade Administration, U.S. Department of Commerce ("Commerce," or the "Department") in an antidumping proceeding. The challenged decision was the culmination of an administrative review of an order, issued in 1999, imposing antidumping duties on imports of preserved mushrooms imported from the People's Republic of China ("China" or the "PRC"). *Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review for Certain Preserved Mushrooms From the People's Republic of China*, 68 Fed. Reg. 41,304 (July 11, 2003) ("*Final Results*"). The administrative review pertained to imported preserved mushrooms from China that were subject to the antidumping duty order and that were entered for consumption during the period of February 1, 2001 through January 31, 2002 ("period of review").

Plaintiffs contend that Commerce exceeded its statutory authority, and failed to support its decision with substantial evidence on the record, in resorting to what Commerce terms "total adverse facts available" to determine the antidumping duty rate Commerce would assess on imports of subject mushrooms associated with Gerber and Green Fresh for the period of review. Relying on statutory provisions allowing it to "use an inference that is adverse to the interests of" a party that "has failed to cooperate by not acting to the best of its ability to comply with a request for information" in the review proceeding, Commerce rejected all data relevant to antidumping duty assessment rates that Gerber and Green Fresh had submitted in response to its information requests. 19 U.S.C. § 1677e(b) (2000); *see* 19 U.S.C. §§ 1677e(a), 1677m(d)–(e) (2000). Although it had calculated preliminary antidumping duty assessment rates for Gerber and Green Fresh of 1.17 percent and 46.61 percent, respectively, Commerce refused to calculate final antidumping duty assessment rates for Gerber and Green Fresh based on the information the two companies had submitted, and Commerce had verified, during the administrative review. Instead, Commerce assigned Gerber and Green Fresh an antidumping duty assessment rate of 198.63 percent, which was the highest rate assigned to any producer or exporter in the challenged review and the previous administrative review. In addition, this rate was the rate assigned to producers and

exporters who could not establish freedom from control of the government of the PRC. Commerce applied this rate to Gerber and Green Fresh even though it previously had found as a fact that both plaintiffs were free of government control.

In the *Final Results*, Commerce gave as a justification for invoking "total adverse facts available" its finding that Gerber and Green Fresh had made misrepresentations to Commerce in claiming that Green Fresh, for some of the mushroom shipments to the United States occurring during the period of review, had acted as Gerber's agent and exporter in return for payment of a commission. Commerce concluded that Green Fresh's role was largely limited to providing blank sales invoices to Gerber and, accordingly, that Green Fresh did not have sufficient involvement in the international sales transactions to justify a claim that it had acted as exporter of Gerber's merchandise. Commerce further concluded that Green Fresh's participation as an agent in Gerber's transactions was a means to allow Gerber to circumvent the cash deposit requirements Commerce had applied to Gerber. Citing to the alleged misrepresentations, Commerce claimed it was justified in rejecting all the responses of both respondents to its inquiries during the entire review proceeding.

The court exercises jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(A) (2000) and 28 U.S.C. § 1581(c) (2000). Gerber and Green Fresh participated as respondents in the administrative review proceeding that resulted in the decision being challenged. Therefore, plaintiffs are "interested parties" within the meaning of 19 U.S.C. § 1677(9)(A) (2000) and, pursuant to 28 U.S.C. § 2631(c) (2000), have standing to challenge the Commerce determination.

The court concludes, for the reasons discussed herein, that Commerce exceeded its statutory authority by rejecting all the data relevant to antidumping duty assessment rates submitted by Gerber and Green Fresh and refusing to calculate specific assessment rates for the two plaintiffs. The court also concludes that certain factual determinations relied upon by Commerce in its invoking of "total adverse facts available" are not supported by substantial evidence. The court remands this matter to Commerce with instructions to conduct further proceedings in conformity with this opinion.

I. BACKGROUND

A. Commerce's Initiation of the Third Administrative Review

Commerce issued its antidumping duty order on preserved mushrooms from the PRC in early 1999. *See Notice of Amendment of Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order for Certain Preserved Mushrooms From the People's Republic of China*, 64 Fed. Reg. 8,308 (Feb. 19, 1999). Approximately three years later, the Department announced the opportunity to re-

quest the administrative review at issue in this case, which was the third such administrative review of the antidumping duty order. *See Opportunity To Request Administrative Review for Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 67 Fed. Reg. 4,945 (Feb. 1, 2002). Gerber and Green Fresh requested this review on February 28, 2002. On that same day, the petitioner in the antidumping investigation, the Coalition for Fair Preserved Mushroom Trade, also requested an administrative review, asking that Commerce review the mushroom import transactions of seven companies, including those of Gerber and Green Fresh. The Coalition for Fair Preserved Mushroom Trade has defendant-intervenor status in this proceeding, having satisfied the requirements for intervention set forth by 28 U.S.C. § 2631(j) and USCIT Rule 24(a). Commerce initiated the administrative review in response to the requests. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 67 Fed. Reg. 14,696, 14,696–97 (Mar. 27, 2002).

B. Cash Deposit Rates for Gerber and Green Fresh During the Period of Review

Under the antidumping statute and regulations, importers who enter merchandise that is within the scope of an antidumping duty order must make a cash deposit of estimated antidumping duties. *See* 19 U.S.C. § 1673d(c)(1)(B)(ii) (requiring the posting of a cash deposit, bond, or other security, as Commerce deems appropriate, in the final antidumping determination Commerce makes in the investigation); 19 C.F.R. § 351.211(b)(2) (requiring cash deposits of estimated antidumping duties at rates Commerce determined in the final antidumping determination, once an antidumping order is in effect); *see also* 19 C.F.R. § 351.221(b)(7) (establishing new cash deposit requirement during an administrative review). Commerce issues instructions to the Bureau of Customs and Border Protection ("Customs") directing the collection of the cash deposits. Actual antidumping duties are determined later, upon liquidation of the entry, which also is performed according to instructions from Commerce to Customs.

Entries of Green Fresh's and Gerber's mushrooms made during the period of review each were subject to changing cash deposit rates. From the beginning of the period of review on February 1, 2001 through July 5, 2001, the cash deposit rate in effect for importations of Gerber's mushrooms was 142.11 percent, the antidumping duty margin established for Gerber in the antidumping investigation concluded in 1999. Gerber's cash deposit rate subsequently was adjusted downward, to 121.33 percent, which was the antidumping duty assessment rate Commerce determined to apply to Gerber's mushrooms that were entered during the period covered by the first administrative review. *See Amended Final Results of First New*

Shipper Review and First Antidumping Duty Administrative Review for Certain Preserved Mushrooms From the People's Republic of China, 66 Fed. Reg. 35,595, 35,596 (July 6, 2001). On July 6, 2001, the 121.33 percent rate became the new cash deposit rate for future entries of Gerber's mushrooms, which cash deposit rate remained in effect for the remainder of the period of review, which ended on January 31, 2002. Green Fresh obtained a cash deposit rate of 29.87 percent as a result of its requesting and obtaining a new shipper review. That cash deposit rate went into effect on August 27, 2001. *See Final Results of New Shipper Review for Certain Preserved Mushrooms From the People's Republic of China*, 66 Fed. Reg. 45,006, 45,007 (Aug. 27, 2001).

Gerber's and Green Fresh's cash deposit rates were set forth in instructions that Commerce issued to Customs. The instructions included individual cash deposit rates to be applied based on the identity of specific exporters and producers. In the instructions, Commerce also addressed the situation arising where an entry covered merchandise for which the producer and exporter were different parties, each of which was the subject of an individual cash deposit rate. In that case, Commerce instructed Customs to apply the exporter's cash deposit rate. As of August 27, 2001, Gerber's cash deposit rate for the subject merchandise was 121.33 percent, and Green Fresh's cash deposit rate was 29.87 percent. Thus, as a result of the way that Commerce structured its cash deposit instructions, any mushrooms produced by Gerber but exported by Green Fresh were subject to a cash deposit rate that was considerably lower than the rate applying if Gerber were both producer and exporter.

C. Agreement between Gerber and Green Fresh on Exports of Mushrooms Produced by Gerber

Approximately midway in the period of review, Gerber and Green Fresh entered into an agreement under which Green Fresh would perform services in the role of exporter for mushrooms produced by Gerber. Under the agreement, which was the subject of a written contract executed in September 2001, Green Fresh agreed to prepare export documents for shipments of mushrooms Gerber produced and to "[a]ct as an agent for [Gerber] to export" its shipments of merchandise to the United States. *See Second Supplemental Resp. of Gerber Food (Yunnan) Co., Ltd. for Certain Preserved Mushrooms from China, Third Review* (Sept. 12, 2002) (Pub. App. to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. 7). In return, Gerber agreed to pay Green Fresh a commission.

Gerber was the producer for a total of 34 shipments of mushrooms exported to the United States during the period of review. For 24 of those 34 shipments, the entry documentation filed in the United States listed Green Fresh as the exporter, and as a result the cash deposits on those 24 shipments were made at the cash deposit rate

applying to Green Fresh, *i.e.*, 29.87 percent, rather than the 121.33 percent rate applying to shipments exported by Gerber. Of the 24 shipments of Gerber-produced mushrooms for which Green Fresh was listed as the exporter, eleven were made pursuant to the Gerber-Green Fresh agreement discussed above, under which Green Fresh agreed to serve as exporter in an agency relationship. Green Fresh actually prepared the export documentation on only the first two of the eleven shipments; on the remaining nine shipments Gerber prepared the export-related commercial documentation, including invoices that it prepared using Green Fresh's blank invoice forms, with Green Fresh's authorization. On the remaining 13 of the 24 shipments of Gerber mushrooms, Green Fresh was listed as the exporter on the entry documentation, including invoices, without Green Fresh's authorization. By that time, Green Fresh had terminated the export agency agreement it had entered into with Gerber.[1] Commerce applied the 198.63 percent assessment rate, in the *Final Results*, to all 34 shipments of Gerber-produced mushrooms made during the period of review.

During the period of review, Green Fresh exported more than 100 shipments of mushrooms produced by an entity other than Gerber, with no participation by Gerber. In the *Final Results*, Commerce applied the 198.63 percent assessment rate to these shipments as well, even though these shipments were not involved in the export agency agreement with which Commerce took issue in its decision.

D. Commerce's Preliminary Results in the Third Administrative Review

Commerce issued the preliminary results of the administrative review in March 2003. *See Preliminary Results and Partial Rescission of Fourth New Shipper Review and Preliminary Results of Third Antidumping Duty Administrative Review for Certain Preserved Mushrooms from the People's Republic of China*, 68 Fed. Reg. 10,694 (Mar. 6, 2003) ("*Preliminary Results*"). In the *Preliminary Results*, Commerce reported its calculated preliminary antidumping duty assessment rates for both respondents. The preliminary antidumping duty

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[1] Gerber and Green Fresh disputed the effect of Green Fresh's notice of termination of the export agency agreement. Green Fresh took the position that the contract ended upon its giving notice to Gerber of termination, which occurred in December 2001. Gerber took the position that the effect of the notice of termination was that the contract would not be renewed after its expiration at the end of May 2002. *Verification of the Resp. of Gerber Foods (Yunnan) Co., Ltd. ("Gerber") in the Third Antidumping Duty Administrative Review of Certain Preserved Mushrooms from the People's Republic of China ("PRC")* at 6–7 (Feb. 12, 2003) (Pub. App. to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. 14); *Verification of the Resp. of Green Fresh Foods (Zhangzhou) Co., Ltd. ("Green Fresh") and Zhangzhou Longhai Lu Bao Food Co., Ltd. ("Lu Bao") the Third Antidumping Duty Administrative Review of Certain Preserved Mushrooms from the People's Republic of China ("PRC")* at 7 (Feb. 12, 2003) (Pub. App. to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. 13).

assessment rate for Gerber was calculated to be 1.17 percent; for Green Fresh the rate was calculated to be 46.61 percent. *See id.* at 10,702. In the *Preliminary Results*, Commerce indicated its disapproval of the agreement between Gerber and Green Fresh under which Green Fresh was to act as exporter of record for Gerber's merchandise. Commerce proposed to act on its disapproval by departing from its normal practice, under which the cash deposit rate for future entries would have been set at the individual assessment rate for each individual respondent. Instead, Commerce proposed to assign both companies the rate of 46.61 percent as a cash deposit rate for future entries. *See id.* Thus, the action would not have changed the cash deposit rate for Green Fresh but would have had as its effect the setting of Gerber's cash deposit rate at 46.61 percent instead of the 1.17 percent cash deposit rate that Commerce ordinarily would have established.

The Coalition for Preserved Mushroom Trade, the petitioner in the original antidumping investigation, criticized as too lenient the way Commerce, in the *Preliminary Results*, had proposed to address the export agency arrangement between Gerber and Green Fresh. In its case brief, filed with Commerce on May 1, 2003, the petitioner argued that Commerce should invoke "total adverse facts available" against both Gerber and Green Fresh by applying to both respondents the highest possible antidumping duty assessment rate for the period of review. Petitioners argued that Commerce's invoking "total adverse facts available" to this degree would be the appropriate response to what petitioners viewed as serious wrongdoing by the two respondents.[2]

The following July, Commerce issued the final decision that plaintiffs challenge in this litigation. *See Final Results*, 68 Fed. Reg. at 41,304. In the *Final Results*, Commerce, after holding an ex parte meeting with petitioner and a subsequent, separate *ex parte* meeting with respondents, took the harshest course of action urged by the petitioner, assessing antidumping duties of 198.63 percent upon all entries of the subject merchandise of both respondents made during the period of review. *See id.* at 41,309.

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[2] Petitioner also proposed several less stringent measures to be applied to the two respondents for use in the event Commerce rejected petitioner's proposal for "total adverse facts available." Among them was a proposal that both respondents be subjected to an assessment rate equal to the cash deposit rate of 121.33 percent assigned to Gerber in the first administrative review. *Issues and Decision Memorandum for the Final Results of the Antidumping Duty New Shipper and Administrative Reviews on Certain Preserved Mushrooms from the People's Republic of China - February 1, 2001, through January 31, 2002* at 5–6 (Pub. App. to Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. B).

E. Commerce's Final Results in the Third Administrative Review

In the *Final Results*, Commerce made several findings of fact, disputed by plaintiffs, the common thread of which is that Commerce disbelieved that Green Fresh actually acted as the exporter for shipments of Gerber's mushrooms to the United States. Commerce based its severe action against Gerber and Green Fresh on its finding that "both companies withheld crucial information prior to verification and actively colluded to circumvent the cash deposit rates in effect during the [period of review] . . . [such that] the use of total adverse facts available is warranted in this case with respect to determining Gerber's and Green Fresh's cash deposit and assessment rates. . . ." *Id.* at 41,306. Commerce found as a fact that "Gerber continually misrepresented in its questionnaire responses the true nature of its relationship with Green Fresh during the [period of review]." *Id.* Commerce concluded that "Gerber's misrepresentations were highly material to the Department's analysis and call into question the veracity of other responses provided by Gerber." *Id.* "Because the Department relies on original sales invoices to verify the accuracy of the sales listing, the information Gerber mis-characterized and withheld was fundamental and material to the Department's analysis. Gerber's actions now lead [Commerce] to question [its] verification findings which were predicated on the reliability of Gerber's own information and records." *Id.* at 41,307.

Commerce drew similar conclusions about Green Fresh. "With respect to Green Fresh, its representations on the record significantly impeded this proceeding as well." *Id.* According to Commerce, Green Fresh had been a willing participant in the "misrepresentation" in that it had claimed to have been Gerber's agent. Commerce concluded that "Green Fresh never acted as Gerber's agent for most of the Gerber/Green Fresh reported transactions." *Id.* at 41,306. Commerce reasoned that "the willingness of Green Fresh to assist another company to evade the payment of legally required cash deposits, as well as its consistent mis-characterization of the facts on the record (despite its representatives' certification of the facts contained in multiple submissions to the Department as truthful when they were not), leads [Commerce] to again question the validity of the books and records examined by the Department at verification." *Id.* at 41,307.

F. Principal Contentions of the Parties

Plaintiffs argue that Commerce's decision to apply the 198.63 percent rate to Gerber and Green Fresh was unsupported by substantial evidence on the record and otherwise not in accordance with law. They assert that substantial evidence did not support Commerce's invoking of the "facts otherwise available" procedure of 19 U.S.C. § 1677e(a) and that therefore, by definition, Commerce did not have

the authority to invoke the "adverse inferences" procedure of 19 U.S.C. § 1677e(b). According to their argument, Gerber and Green Fresh responded to all questionnaires, timely produced all required documentation, and replied to the best of their ability to Commerce's questions about their business relationship as it pertained to the export agency agreement. Plaintiffs characterize the administrative record as containing verified information on U.S. sale prices, moving expenses, proof of payment, factors of production, and all other subjects that is sufficient to allow the Department to calculate individual antidumping margins for both respondents. Rather than a legitimate resort to the "facts otherwise available" and "adverse inferences" procedures in the statute, the Commerce action was, in their view, an unlawful attempt to punish Gerber and Green Fresh for the way in which the two respondents structured their business relationship.

Defendant and defendant-intervenor maintain that Commerce was justified in imposing the 198.63 percent rate because Commerce found, based on substantial evidence, that Gerber and Green Fresh misrepresented the facts concerning the export agency agreement, particularly in stating that Green Fresh acted as an export agent for Gerber's shipments of mushrooms to the United States. They contend that Gerber's and Green Fresh's responses to Commerce's requests for information concerning that agreement reveal that both plaintiffs withheld information and significantly impeded the antidumping proceeding. Those responses justified, in their view, Commerce's determination that none of the information that the two respondents submitted during the entire investigation could be verified. Based on these findings, defendant and defendant-intervenor argue that the criteria for invoking the "facts otherwise available" procedure of 19 U.S.C. § 1677e(a) were met and further argue that Gerber and Green Fresh did not cooperate to the best of their ability in responding to Commerce's requests for information, thus justifying the invoking of "adverse inferences" pursuant to 19 U.S.C. § 1677e(b). They also argue that Commerce's construction of § 1677e(a) and (b) is entitled to deference under the Supreme Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Defendant and defendant-intervenor submit, additionally, that the imposition of the 198.63 percent rate was appropriate as an exercise of Commerce's inherent authority to respond to circumvention of the antidumping duty laws.

II. STANDARD OF REVIEW

This court must evaluate whether the challenged findings by the Department are supported by substantial evidence on the record or are otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence

as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

III. DISCUSSION

This case presents the issue of whether Commerce acted in accordance with law in applying the 198.63 percent rate to the shipments of Gerber and Green Fresh for antidumping duty assessment purposes. The court concludes that Commerce failed to support, with substantial evidence on the record, certain findings of fact in the challenged decision. Because these findings were required for the application of the "facts otherwise available" and "adverse inferences" provisions set forth in 19 U.S.C. § 1677e, the challenged decision exceeded the authority granted by Congress in those provisions. The court further concludes that the *Final Results*, in assigning the 198.63 percent antidumping duty assessment rate to the plaintiffs, cannot be justified by deference to an agency construction of § 1677e, nor can it be justified by deference to a construction of the antidumping laws in general under which Commerce may exercise its "inherent" authority to prevent circumvention of those laws.

In the *Final Results*, Commerce rejected the applicable data pertaining to the calculation of individual assessment rates that Gerber and Green Fresh submitted in response to its questionnaires, and declined to calculate individual antidumping duty assessment rates for Gerber and Green Fresh, even though Commerce had verified those data prior to using them to calculate preliminary antidumping duty assessment rates in the *Preliminary Results*. Instead, Commerce applied both "facts otherwise available" under subsection (a) of § 1677e and "adverse inferences" under subsection (b) of § 1677e, an application that Commerce characterized as "total adverse facts available." Relying on these provisions, Commerce applied an antidumping duty assessment rate of 198.63 percent to both plaintiffs for all entries of mushrooms produced by Gerber or exported by Green Fresh during the period of review. It also established this rate as the new cash deposit rate for future entries, which action plaintiffs also challenge.

Had Commerce adopted in the *Final Results* the antidumping duty assessment rates it had calculated in the *Preliminary Results*, Gerber's assessment rate would have been 1.17 percent and Green Fresh's rate would have been 46.61 percent. The assessment rates in the *Preliminary Results* were intended by Commerce to reflect the amount by which "normal value," as determined for goods of a nonmarket economy country, exceeded the U.S. prices associated with the sales of Gerber's and Green Fresh's subject merchandise during the period of review. As discussed below, Commerce in the *Final Results* did not adopt the 198.63 percent assessment rate with that intent, adopting it instead in response to its disapproval of the export agency agreement entered into by Gerber and Green Fresh and the

way the parties reported that agreement in the responses to the Department's questionnaires. Commerce, however, failed to support with substantial evidence on the record the findings of fact on which it relied in invoking § 1677e. The court reaches this conclusion for two reasons.

The first reason for the court's conclusion is the lack of substantial evidence on the record to support Commerce's apparent finding that the information submitted by both plaintiffs did not qualify for use in calculating actual assessment rates. Commerce apparently rejected all of that information based on findings of fact under 19 U.S.C. § 1677e(a)(2) and § 1677m(e) that neither the information submitted by Gerber, nor the information submitted by Green Fresh, contained in questionnaire responses and necessary to determining actual assessment rates, could be "verified." However, a finding that the information is not verifiable is unsupported by substantial evidence. In fact, the record reveals that Commerce itself had verified both sets of information and used them in calculating the separate assessment rates for Gerber and Green Fresh that it reported in the *Preliminary Results*.

The second reason for the court's conclusion is that Commerce erred in applying 19 U.S.C. § 1677e(b) by determining that the PRC-wide assessment rate should apply as "adverse facts available" and by failing to support that determination with substantial evidence on the record. There is a complete absence of evidentiary support for the specific choice of the 198.63 percent rate, which is the rate Commerce applied in the subject review, and the previous review, to respondents who failed to demonstrate independence from control of the government of the PRC. The record lacks any evidence that either Gerber or Green Fresh is subject to PRC control; moreover, Commerce made findings of fact in the *Preliminary Results*, which it did not subsequently reverse or modify, that both plaintiffs were *not* subject to PRC control.

Absent the substantial evidence necessary to support the findings that Commerce made pursuant to 19 U.S.C. § 1677e, Commerce's determination of the 198.63 percent assessment rate on the basis of "total adverse facts available" exceeded the authority Congress provided in 19 U.S.C. § 1677e. To explain its conclusion that Commerce erred in determining that the PRC-wide rate of 198.63 percent was the appropriate assessment rate for Gerber and Green Fresh, the court, in the discussion below, (A) examines how Commerce incorrectly applied subsection (a) of § 1677e in conjunction with subsection (e) of § 1677m by disregarding verified information relevant to calculating individual assessment rates and by failing to base its findings on substantial evidence on the record, (B) analyzes how Commerce erred in applying subsection (b) of § 1677e by determining that the PRC-wide assessment rate should apply as "adverse facts available" and by failing to support its determination with sub-

stantial evidence on the record, and (C) explains why Commerce's determination is not justified by deference to Commerce's construction of either 19 U.S.C. § 1677e or the antidumping laws in general, which Commerce insists permit it to exercise its "inherent authority" to prevent circumvention of those laws.

A. Commerce Erred in Applying 19 U.S.C. § 1677e(a) by Disregarding Verified, Company-Specific Information for Gerber and Green Fresh Without Basing its Decision on Substantial Evidence on the Record

Commerce erred in applying 19 U.S.C. § 1677e(a) by invoking the "facts otherwise available" procedure when Commerce possessed verified, company-specific information from which to determine the assessment rates for Gerber and Green Fresh. Subsection (a) of § 1677e allows Commerce to invoke "facts otherwise available" when "necessary information is not available on the record" or when any of four conditions specified in subparagraph (a)(2) is met. The four conditions apply to situations where a party:

> (A) withholds information that has been requested by the administering authority . . . under this subtitle, . . .
>
> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title.

19 U.S.C. § 1677e(a)(2). Where a party meets any of these four conditions, the statute provides that Commerce shall, subject to § 1677m(d), "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a). In the *Final Results*, Commerce concluded that the plaintiffs' reporting of the export agency agreement satisfied conditions (A), regarding the withholding of information, (C), concerning significantly impeding a proceeding, and (D), with respect to information that was provided but cannot be verified. *See Final Results*, 68 Fed. Reg. at 41,307.

In subjecting the use of "facts otherwise available" to 19 U.S.C. § 1677m(d), the statute applies a procedure when Commerce determines that a response to a request for information does not comply with the request. In sum, subsection (d) of § 1677m requires that Commerce promptly inform the submitter of the nature of the deficiency and, "to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews un-

der this subtitle." 19 U.S.C. § 1677m(d). If Commerce determines that the response of the submitter is not satisfactory, or if such response is not timely, Commerce then "may, subject to subsection (e) of [§ 1677m], disregard all or part of the original and subsequent responses." *Id.*

When applying subsection (a) of § 1677e, Commerce, pursuant to subsection (d) of § 1677m, must comply with the requirements of § 1677m(e). Accordingly, Commerce must determine whether information is "necessary to the determination" and whether that particular information must be considered even if Commerce concludes that such information does not meet all of its requirements. *See* 19 U.S.C. § 1677m(e) (providing that in reaching administrative review determinations under § 1675, among other determinations, Commerce "shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce]"). The statute provides five criteria, which, if met, preclude Commerce from declining to consider submitted information: (1) the information must be submitted by the deadline; (2) the information must be verifiable; (3) the information must not be "so incomplete that it cannot serve as a reliable basis for reaching the applicable determination"; (4) "the interested party [must] demonstrate[ ] that it acted to the best of its ability in providing the information and meeting the requirements established by [Commerce] with respect to the information"; and (5) the information must be such that it "can be used without undue difficulties." 19 U.S.C. § 1677m(e).

In the *Final Results*, Commerce does not explain adequately why the five criteria in 19 U.S.C. § 1677m(e) are not satisfied by Gerber's and Green Fresh's submission of the subsequently-verified information that was necessary to the calculation of individual assessment rates. Nor does Commerce explain which of its specific "applicable requirements," as referenced in § 1677m(e), were not satisfied by this information.

Commerce regarded as not verifiable the information that Gerber and Green Fresh had submitted during the review and that was necessary to the calculation of individual assessment rates. Commerce concluded that the export agency agreement and the misleading responses or misrepresentations it alleges to have been made by both plaintiffs concerning that agreement caused it to question the veracity of all other information submitted by the parties in the review proceeding:

> For purposes of the [*Final Results*], [the Department] now find[s] that Gerber and Green Fresh's joint efforts during the [period of review] to illegally evade antidumping duty cash deposits and subsequent misleading responses to the Department's questionnaires, illustrate a pattern of behavior intended to undermine the antidumping duty law and the ability of the

> Department to enforce it. Such behavior calls into question the validity of all of the information provided to the Department in the questionnaire responses and leads the Department to question both parties' business practices and the veracity and commercial validity of Gerber['s] and Green Fresh's reported information.

Issues and Decision Memorandum for the Final Results of the Antidumping Duty New Shipper and Administrative Reviews on Certain Preserved Mushrooms from the People's Republic of China - February 1, 2001, through January 31, 2002 at 9 ("*Decision Memorandum*") (Pub. App. to Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. B).

The rationale that Commerce put forth does not justify Commerce's dispensing with the requirements of 19 U.S.C. § 1677m(e). The record evidence concerning the "misrepresentations" alleged to have been made by Gerber and Green Fresh is not sufficient to support a conclusion that none of the submitted information pertaining to the calculation of actual assessment rates – information that was separate from the information the two parties reported concerning the export agency agreement – was "verifiable" for purposes of 19 U.S.C. § 1677m(e)(2) and § 1677e(a)(2)(D). Based on the record evidence, Commerce indicated that Gerber and Green Fresh misrepresented the nature of their export agency agreement in several ways: (1) the use of certain terms in the export agency agreement that Commerce considered to imply a more active role for Green Fresh than Commerce believes Green Fresh to have assumed; (2) the alleged misrepresentation by Gerber and Green Fresh regarding their motive for entering into the export agency agreement; (3) the alleged failure of both parties to disclose initially the fact that they did not adhere to the original terms of the export agency agreement; and (4) the alleged failure of Green Fresh to provide supporting documentation for shipments that Gerber made using Green Fresh's invoices. *Decision Memorandum* at 10–13. This record evidence of "material misrepresentations" uniquely concerns the terms and execution of the export agency agreement between Gerber and Green Fresh. *See id*. at 10, 12. Although Commerce could demonstrate, with record evidence, that one or both of the parties were less than forthcoming regarding certain aspects of the export agency agreement, this record evidence is not sufficient to impugn the veracity of all other record evidence, *i.e.*, record evidence that Commerce used to calculate the assessment rates in the *Preliminary Results*.

Commerce never explained adequately why the other record evidence was not "verifiable." Instead, Commerce offered vague assertions, insisting that it "must have confidence that transactions reviewed at verification are legitimate with no mis-characterization or mislabeling of the information being verified" and added the general notion that "[t]he verification process is highly dependent upon the

accurate and comprehensive characterization by respondents of the facts supporting their books and records, and the information contained therein." *Decision Memorandum* at 9. With respect to Gerber, Commerce then concluded that Gerber is untrustworthy and hence that Commerce cannot treat its findings at verification as accurate. *See id.* at 11. Commerce drew a similar conclusion with respect to Green Fresh; Commerce concluded that it could not rely on any of the information that Green Fresh provided because the misrepresentations it alleged regarding the export agency agreement led Commerce to question the validity of all the information reviewed at verification. *See id.* at 13–14.

At verification, however, other than the record evidence regarding the export agency agreement, Commerce found few discrepancies with the information that Gerber and Green Fresh provided, and Commerce resolved any inaccuracies found during verification. *See Verification of the Resp. of Gerber Foods (Yunnan) Co., Ltd. ("Gerber") in the Third Antidumping Duty Administrative Review of Certain Preserved Mushrooms from the People's Republic of China ("PRC")* (Feb. 12, 2003) ("*Gerber Verification Report*") (Pub. App. to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. 14); *Verification of the Resp. of Green Fresh Foods (Zhangzhou) Co., Ltd. ("Green Fresh") and Zhangzhou Longhai Lu Bao Food Co., Ltd. ("Lu Bao") the Third Antidumping Duty Administrative Review of Certain Preserved Mushrooms from the People's Republic of China ("PRC")* (Feb. 12, 2003) ("*Green Fresh Verification Report*") (Pub. App. to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. 13). Even after noting the alleged misrepresentations concerning the export agency agreement that were discovered at verification, Commerce declined to use "facts otherwise available" and "adverse inferences" when calculating preliminary individual assessment rates and acknowledged that "for assessment purposes, [the Department] verified that the sales data reported by each respondent was accurate and, for purposes of this review, can calculate importer-specific assessment rates using this data." *Memorandum from Louis Apple, Director, Office of AD/CVD Enforcement 2, to Susan Kuhbach, Acting Deputy Assistant Secretary for Import Administration* at 6 (Feb. 28, 2003) (discussing the appropriate cash deposit rates and the calculation of individual assessment rates for Gerber and Green Fresh given the findings regarding the export agency agreement) ("*Cash Deposit Memorandum*") (Pub. App. to Def.-Intervenor's Mem. in Resp. to Pls.' Rule 56.2 Mot. for J. Upon the Agency R. Ex. 24); *see Preliminary Results*, 68 Fed. Reg. at 10,697. Having made such favorable findings concerning the accuracy and suitability of the submitted information needed to calculate assessment rates, and having failed to support with substantial evidence any later findings to the contrary, Commerce may not refuse to consider that information. Commerce cannot maintain plausibly that, for purposes of § 1677m(e)(2), the information cannot be veri-

fied or that, for purposes of § 1677m(e)(4), Gerber and Green Fresh failed to demonstrate that they acted to the best of their ability in providing the information and meeting Commerce's requirements.

As the Court of Appeals for the Federal Circuit has observed, the use of facts otherwise available is to "fill in the gaps" when "Commerce has received less than the full and complete facts needed to make a determination." *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1381 (Fed. Cir. 2003). Legislative history illustrates that Commerce's action in the *Final Results* is based on an impermissible use of the authority under 19 U.S.C. § 1677e. The language of § 1677e was included in the Uruguay Round Agreements Act of 1994, Pub. L. No. 103–465, 108 Stat. 4809 (1994). The Statement of Administrative Action explains that subsection (a) of § 1677e pertains to situations "where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information." *Uruguay Round Agreements Act, Statement of Administrative Action*, H.R. Doc. No. 103–316, at 869 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4198 ("*SAA*").

As Commerce demonstrated in the *Preliminary Results*, it had sufficiently full and complete facts, which Commerce itself had verified, to find that Gerber and Green Fresh were free from PRC-control and to determine the preliminary antidumping assessment rates to be 1.17 percent for Gerber and 46.41 percent for Green Fresh. *See Preliminary Results*, 68 Fed. Reg. at 10,702. The subsequent refusal by Commerce to use the verified sales data was based solely on its disapproval of the export agency relationship and the way in which the two plaintiffs reported that relationship. *See Final Results*, 68 Fed. Reg. at 41,306–07. However, the facts on record pertaining to the export agency relationship do not support a conclusion that the verified information provided by both respondents could not be used to calculate separate assessment rates. Commerce never identified any gaps or deficiencies in that information such as would preclude Commerce from relying on that information for the purpose of calculating assessment rates. Nor did Commerce identify any inaccuracy, mischaracterization, or discrepancy in the information to support a conclusion that the information is no longer "verifiable."

Viewed against the "substantial evidence" requirement as defined in *Consolidated Edison Co.*, 305 U.S. at 229, the record evidence in this case is not such as "a reasonable mind might accept as adequate to support a conclusion" that none of the information submitted by either Gerber or Green Fresh in the third administrative review could be verified for use in calculating individual assessment rates. Because Commerce failed to justify its rejection of that information under the requirements of 19 U.S.C. § 1677m(e), Commerce's rationale for invoking the "facts otherwise available" procedure of 19 U.S.C. § 1677e(a) is insufficient.

In addition to the criterion for invoking "facts otherwise available" that is set forth in § 1677e(a)(2)(D), which is satisfied only if an interested party provides necessary information that "cannot be verified," Commerce also invoked criteria (A) and (C) of § 1677e(a)(2), which are satisfied if the party "withholds information" that Commerce requested, or "significantly impedes a proceeding," respectively. Neither criterion (A) nor criterion (C), however, justifies Commerce's actions in the *Final Results*. Commerce made findings that Gerber and Green Fresh initially withheld information by misrepresenting the nature of the export agency agreement and that these misrepresentations impeded a proper review of the transactions affected by the export agency agreement. *See Decision Memorandum* at 11, 13. Even assuming, *arguendo*, that the two parties initially withheld some information about the export agency agreement, none of the information allegedly withheld was necessary to the calculation of individual antidumping duty assessment rates. Because Commerce did not satisfy the requirements of 19 U.S.C. § 1677m(e) as to the information that actually was necessary to the calculation of individual assessment rates, Commerce's invoking of criterion (A) of § 1677e(a)(2) is insufficient to justify the actions taken in the *Final Results*. With respect to criterion (C) of § 1677e(a)(2), Commerce did not reveal its reasoning and failed to cite to evidence on the record that could support a finding that the administrative review proceeding was "significantly impeded" as a result of actions taken by either Gerber or Green Fresh.

B. Commerce Erred in Its Applying 19 U.S.C. § 1677e(b) by Determining that the PRC-Wide Assessment Rate Should Apply as "Adverse Facts Available" and by Failing to Support its Determination with Substantial Evidence on the Record

Commerce erred further in its applying subsection (b) of § 1677e. If Commerce makes the findings, based on substantial record evidence, that are required for invoking subsection (b) of 19 U.S.C. § 1677e, it may "use an inference that is adverse to the interests of that party [(*i.e.*, the party that failed to cooperate by not acting to the best of its ability to comply with a request by Commerce for information)] *in selecting from among the facts otherwise available*." 19 U.S.C. § 1677e(b) (emphasis added). In selecting from among "facts otherwise available," Commerce can rely on information derived from "the petition," "a final determination in the investigation under this subtitle," "any previous review under 19 U.S.C. § 1675 or determination under 19 U.S.C. § 1675b," or "any other information placed on the record." 19 U.S.C. § 1677e(b).

Subsection (b) of § 1677e cannot properly be read in isolation. In limiting the procedure thereunder to the agency's "selecting from among the facts otherwise available," subsection (b) refers back to subsection (a). Therefore, if it is assumed, *arguendo*, that subsection

(b) is available to be invoked against Gerber and Green Fresh based on each party's failure to respond to the best of its ability to Commerce's requests for information concerning the nature of the export agency agreement, Commerce, in determining assessment rates, nevertheless is confined by subsection (b) to "selecting from among the facts otherwise available." Commerce did not so confine its action.

In the *Preliminary Results*, Commerce made findings of fact based on substantial evidence that both Gerber and Green Fresh were independent of control of the government of the PRC. *See Preliminary Results*, 68 Fed. Reg. at 10,698–99. Gerber was deemed to be independent of government control because it "is wholly owned by persons located outside the PRC." *Id.* at 10,698. As to Green Fresh, Commerce determined in the *Preliminary Results* that Green Fresh has demonstrated absence of both *de jure* and *de facto* government control. *See id.* at 10,698–99. Commerce reported no findings of fact in the *Final Results* that contradicted or cast doubt on its earlier findings related to the matter of government control of either plaintiff.

On the basis of those findings, and consistent with its past practice, Commerce proceeded to calculate separate preliminary antidumping duty assessment rates: 1.17 percent for Gerber and 46.61 percent for Green Fresh. While Commerce, in the *Preliminary Results*, took exception to the way the export agency agreement was reported, Commerce did not invoke its "total adverse facts available" procedure, which encompasses both subsection (a) ("facts otherwise available") and subsection (b) ("adverse inferences"), on the calculation of the assessment rates, instead invoking that procedure to set a higher-than-normal cash deposit rate for future entries of Gerber's merchandise.[3] *See Preliminary Results*, 68 Fed. Reg. at 10,702. Commerce explained that "for assessment purposes, [the Department] verified that the sales data reported by each respondent was accurate and, for purposes of this review, can calculate importer-specific assessment rates using this data. . . . Therefore, *[the Department] do[es] not believe the use of adverse facts available . . .* for each of these respondents *is warranted*." *Cash Deposit Memorandum* at 6 (emphasis added).

In the *Final Results*, however, Commerce invoked the "total adverse facts available" procedure to disregard all data relevant to calculation of actual assessment rates that either party had submitted. Pursuant to its application of its "total adverse facts available" procedure, Commerce offered the unsupported and conclusory statement that "as adverse facts available, in light of record evidence of mate-

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[3] Neither the statute nor Commerce's regulations refer to the procedure Commerce identifies as "total adverse facts available." The statute sets forth two individual, but related, procedures in subsections (a) and (b) of 19 U.S.C. § 1677e.

rial misrepresentations by Gerber as noted above and the potential for future misconduct, the assignment of a cash deposit and assessment rate equal to the PRC-wide rate of 198.63 percent is appropriate." *Decision Memorandum* at 11. Commerce reached the same conclusion for Green Fresh. *See Decision Memorandum* at 13–14. Instead of selecting, and identifying in its decision, facts that were "otherwise available" for use in determining assessment rates, Commerce saddled Gerber and Green Fresh with a punishing assessment rate that was hugely disproportionate to the individual assessment rates it had calculated in the *Preliminary Results*.

But an assessment rate, standing alone, is not a "fact" or a set of "facts otherwise available," and under no reasonable construction of the provision could it be so interpreted. The statute does not permit Commerce to choose an antidumping duty assessment rate as an "adverse inference" without making factual findings, supported by substantial evidence, justifying a conclusion that the body of record information necessary to the calculation of that assessment rate is to be rejected for reasons consistent with the statutory scheme, including in particular § 1677e(b) when read in conjunction with § 1677e(a) and § 1677m(e).

As the Court of Appeals for the Federal Circuit observed, Commerce does not have the discretion under 19 U.S.C. § 1677e(b) to impose an "unjustifiably high, punitive rate" that ignores the facts discovered in the course of its own investigation. *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1033 (Fed. Cir. 2000) ("*De Cecco*"). Although Commerce has considerable discretion in making antidumping determinations and in applying 19 U.S.C. § 1677e(b), that discretion is not boundless. *See De Cecco*, 216 F.3d at 1034 ("By requiring corroboration of adverse inference rates, Congress clearly intended that such rates should be reasonable and have some basis in reality.").[4] Commerce exceeds its discretion if it imposes an "unjustifiably high, punitive rate" that is contrary to its own findings of fact. *See id.* at 1033. The Court of Appeals for the Federal Circuit reiterated these principles in a decision issued in 2002:

> Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin. Obviously a higher adverse margin creates a strong deterrent, but Congress tempered deterrent value with the corroboration requirement. It could only have done so to prevent the petition

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[4] Subsection (c) of § 1677e requires that Commerce, "to the extent practicable," corroborate from independent sources reasonably at its disposal "secondary information" that it relied upon and that was not obtained in the course of an investigation or review. 19 U.S.C. § 1677e(c).

> rate (or other adverse inference rate), when unreasonable, from prevailing and to block any temptation by Commerce to overreach reality in seeking to maximize deterrence.

Ta Chen Stainless Steel Pipe, Inc. v. United States, 298 F.3d 1330, 1340 (Fed. Cir. 2002) (quoting *De Cecco*, 216 F.3d at 1032).

Instead of calculating an assessment rate for Gerber based on record information, Commerce instead took an action that was intended, at least in part, as a punishment of Gerber, stating in the *Decision Memorandum* that "[t]he Department cannot tolerate the existence of schemes to evade the antidumping law, such as the one applied by Gerber in this case" and that "[t]he Department considers the assignment of this rate to Gerber sufficient to encourage it to cooperate with the Department in further reviews, and to ensure that Gerber cannot undermine the efficacy of the antidumping law by posting insufficient and improper deposits." *Decision Memorandum* at 11.

Commerce's statements concerning Green Fresh also reveal the intent to inflict punishment on a respondent. Commerce stated that "[it] considers the assignment of this rate to Green Fresh as sufficient to encourage it to cooperate with the Department in future reviews, and to ensure that Green Fresh does not participate in other schemes to evade the antidumping duty law and payment of appropriate cash deposit rates in the future." *Id.* at 14. The punitive intent of Commerce's action is also apparent because, as noted previously, Commerce in the subject third administrative review applied the 198.63 percent PRC-wide rate to more than 100 shipments of mushrooms exported by Green Fresh and produced by an entity other than Gerber, even though Gerber had no involvement in these shipments. Commerce failed to provide a rational explanation of how Green Fresh's participation in the export agency agreement, and the circumstances surrounding its reporting of that agreement, affected the unrelated information needed to calculate an antidumping duty rate for application to all shipments by Green Fresh of mushrooms subject to the administrative review.

Consistent with the Federal Circuit's instruction that an assessment rate calculated using adverse inferences have some basis in reality, this Court has held that Commerce acts unlawfully in imposing a rate that presumes government control, such as the PRC-wide rate applied in this case, when a respondent has been found to be independent of government control. *See Shandong Huarong Gen. Group Corp. v. United States*, No. 01–00858, 2003 Ct. Intl. Trade LEXIS 153, at *61–*66 (Oct. 22, 2003), *subsequently remanded by Shandong Huarong Gen. Group Corp. v. United States*, 2004 Ct. Intl. Trade LEXIS 121 (Sept. 13, 2004). The Court in *Shandong Huarong* found that "the findings that justified the use of facts available and a resort to adverse facts available with respect to the [respondents'] sales data and factors of production, cannot be used to accord similar

treatment to issues relating to the [respondents'] evidence of independence from state control." *Id.* at *62. As the Court in *Shandong Huarong* explained with regard to the respondents' independence from government control, "[t]he [respondents] supplied the requested information and Commerce has not adequately demonstrated a sufficient reason to disregard the [respondents'] submissions of evidence of their entitlement to separate antidumping duty margins and resort to adverse facts available." *Id.* at *66.

The reasoning in *Shandong Huarong* is pertinent to the issue presented in this case by Commerce's choice of the 198.63 percent PRC-wide assessment rate. Commerce took issue with the way in which the plaintiffs disclosed their agreement under which Green Fresh was to act as exporter of record for Gerber's merchandise, and with the agreement itself. The findings of fact the agency relied upon to support its invoking "total adverse facts available" pertained to the disclosures of the terms of the agreement in questionnaire responses by the two plaintiffs. These findings were factually unrelated to the issue of government control. Commerce neither cited record evidence showing that, nor made a finding of fact that, either plaintiff was subject to the control of the PRC government. As noted previously, Commerce made, and maintained through the review, an actual finding of fact that both Green Fresh and Gerber were *not* subject to government control. Consistent with the decision of the Court of Appeals in *De Cecco* and this Court's decision in *Shandong Huarong*, the court concludes that the determination set forth in the *Final Results* to apply the 198.63 percent assessment rate to the shipments of Gerber and Green Fresh was not supported by substantial evidence and, accordingly, was contrary to law.

The legislative history of 19 U.S.C. § 1677e(b) further illustrates that Commerce's action in the *Final Results* is based on an impermissible use of the authority thereunder. Subsection (b) of § 1677e "permits Commerce and the Commission to draw an adverse inference where a party has not cooperated in a proceeding," by "not act-[ing] to the best of its ability to comply with requests for necessary information." *SAA* at 870, *as reprinted in* 1994 U.S.C.C.A.N. at 4199. The Statement of Administrative Action makes clear that Commerce may not be indiscriminate in drawing an adverse inference. "Where a party has not cooperated, Commerce and the Commission may employ adverse inferences *about the missing information* to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully." *Id.* (emphasis added). Because Commerce is empowered to use adverse inferences only in "selecting from among the facts otherwise available," it may *not* do so in disregard of information of record that is not missing or otherwise deficient under subsection (a). *See* 19 U.S.C. § 1677e(b).

In summary, Commerce erred in applying § 1677e(b) by determining that the PRC-wide rate should apply to Gerber and Green Fresh

as "adverse inferences." The choice of the PRC-wide rate, which Commerce based solely on the existence of the export agency agreement and the way Gerber and Green Fresh had reported that agreement, bore no relationship to record evidence needed to calculate actual antidumping margins pertaining to shipments of mushrooms associated with Gerber or Green Fresh during the period of review. Commerce does not attempt to establish such a relationship. Instead, contrary to § 1677e(b), Commerce assigned the PRC-wide rate to Gerber and Green Fresh to punish them for the existence of the export agency agreement and the manner in which the parties reported it. In this respect as well as the inconsistency with Commerce's findings of fact on the absence of government control, the determination to apply the 198.63 percent assessment rate to the merchandise produced by both plaintiffs was not supported by substantial evidence.

C. Commerce's Choice of the PRC-Wide Assessment Rate Cannot Be Justified by Deference to Commerce's Construction of Either 19 U.S.C. § 1677e or the Antidumping Laws Generally

This court cannot agree with defendant's argument that the principle of deference established by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. at 837, requires the court to uphold Commerce's decision to assign a 198.63 percent antidumping duty assessment rate to the two plaintiffs. According to defendant, that decision must be upheld as an exercise of Commerce's authority to interpret 19 U.S.C. § 1677e or the antidumping laws generally.

Commerce's interpretations of the statute it is charged with administering, whether adopted pursuant to a rulemaking or adjudicative proceeding, are accorded deference consistent with the Supreme Court's decision in *Chevron*. *See Chevron*, 467 U.S. at 842–43; *see also Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1379–82 (Fed. Cir. 2001). As directed by the Supreme Court in *Chevron*, the court first must consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. In the absence of specific findings of fact required under § 1677e and the related provisions under § 1677m, no permissible construction of § 1677e and provisions related thereto could allow Commerce to impose the 198.63 percent assessment rate on the mushroom shipments associated with Gerber and Green Fresh. Although Congress provided Commerce considerable discretion in 19 U.S.C. § 1677e, Congress, in that and related statutory provisions, has spoken directly to the

issue of what findings of fact are necessary to invoke the procedure thereunder. In this case, Commerce did not make all the necessary findings of fact, and significant findings of fact that Commerce did make must be set aside because Commerce failed to support them with substantial evidence on the record.

Defendant and defendant-intervenor make an additional argument that, aside from 19 U.S.C. § 1677e, Commerce's adoption of the PRC-wide assessment rate was justified by Commerce's "inherent authority" to address circumvention of the antidumping laws. Defendant and defendant-intervenor fail to cite a specific statutory provision that conceivably could be construed (reasonably or otherwise) to support this claim of inherent authority. Nor is the court aware of any such provision.

Defendant cites to a number of cases before this Court and the Court of Appeals for the Federal Circuit in support of its claim of "inherent authority," but none of those cases holds, or even suggests, that action of the kind resorted to in this case is a proper exercise of Commerce's discretion. For example, Commerce cites *Tung Mung Development Co. v. United States*, 26 CIT 969, 979–81, 219 F. Supp. 2d 1333, 1343–44 (2002), where the Court deferred to Commerce's interpretation of the relevant antidumping provisions, thereby permitting Commerce to choose an appropriate methodology for computing dumping for transactions involving middlemen. Commerce also cites *Mitsubishi Electric Corp. v. United States*, 12 CIT 1025, 1046, 700 F. Supp. 538, 555 (1988), where the Court deferred to Commerce's discretion to define the scope of an investigation to capture all forms of the subject merchandise. Although Commerce has certain discretion to interpret ambiguous statutory provisions with the purpose of preventing evasion of antidumping duties, in this case, Commerce is invoking inherent authority in an attempt to police the cash deposit requirement through the imposition of an extraordinarily high antidumping duty assessment rate.

Commerce also relies on a recent decision of this Court to argue that Commerce's inherent authority permits it to apply adverse inferences as it has done in the *Final Results*. Commerce cites *Elkem Metals Co. v. United States*, 27 CIT ____ , ____ , 276 F. Supp. 2d 1296, 1303 (2003), where the Court upheld the International Trade Commission's application of best information available to domestic producers who concealed a price-fixing arrangement during a material injury investigation. While both *Elkem Metals* and this case involve a contractual agreement, the agreement in *Elkem Metals* involved price-fixing by domestic producers. In a material injury investigation, price-fixing directly affects the International Trade Commission's determination of whether material injury exists or whether a threat of material injury exists. In this case, however, Commerce has not established how its findings regarding the terms of the export

agency agreement affect the information necessary to calculate antidumping duty assessment rates. To the contrary, Commerce found that the information subsequently revealed regarding the export agency agreement did not compromise Commerce's ability to calculate individual antidumping duty assessment rates. *Cash Deposit Memorandum* at 6.

Applying the PRC-wide rate as "total adverse facts available" based on the applicable record of this administrative review required Commerce to ignore evidence on the record unfavorable to its desired outcome and to act in the absence of required findings of fact. As the Court of Appeals explained, Commerce may consider deterrence when invoking adverse inferences to choose a dumping margin, but it may do so only "so long as the rate chosen has a relationship to the actual sales information available." *Ta Chen Stainless Steel Pipe, Inc.*, 298 F.3d at 1340. Commerce's invoking its "inherent authority" does not justify the exercise of a statutory power in a manner contrary to Congress's clearly expressed intent. As the Court of Appeals stated, "Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin." *Id.* (quoting *De Cecco*, 216 F.3d at 1032). Neither the "adverse inferences" provision of 19 U.S.C. § 1677e(b) nor the general authority granted by the antidumping laws empowers Commerce to assign punitive antidumping duty assessment rates that are unsupported by record evidence and contrary to facts Commerce found in its own review proceeding.

IV. CONCLUSION

The court concludes that Commerce's determination in the *Final Results* to select and apply the 198.63 percent assessment rate to both plaintiffs as "facts otherwise available" and "adverse inferences" is not supported by substantial evidence on the record and is otherwise not in accordance with law. Therefore, plaintiff's motion for judgment on the agency record must be granted.

On remand, Commerce must calculate individual antidumping duty assessment rates for Gerber and Green Fresh in accordance with applicable statutory requirements.[5] These individual assess-

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[5] Commerce, in the *Final Results*, also applied the 198.63 percent rate as the new cash deposit rate for both plaintiffs. Because assessment rates have not been determined pursuant to a final judgment, the court will not direct any action to be taken with regard to cash deposits. *See Inland Steel Bar Co. v. United States*, 18 CIT 14, 843 F. Supp. 1477 (1994) (holding that party was not entitled to a revised cash deposit rate or refund of previous deposits where final judgment had not been entered with respect to the cash deposit rate). In this litigation, moreover, the determination of the assessment rates on remand likely will moot any issues involving cash deposits.

ment rates must be consistent with the findings of fact made by Commerce that each of the two plaintiffs is free of government control.

If Commerce relies on its authority under 19 U.S.C. § 1677e in calculating individual assessment rates, then it must identify what information needed to calculate those assessment rates is unavailable or is deficient according to the statutory requirements for submitted information, including in particular the requirements of 19 U.S.C. § 1677m(e), so as to require the use of the "facts otherwise available" procedure of 19 U.S.C. § 1677e(a). If Commerce determines that any information that was submitted by either plaintiff and is necessary to the calculation of the individual assessment rates is unverifiable, then it must identify that specific information and provide a reasoned and supported analysis of any decision to deem that specific information unverifiable.

If Commerce relies on its authority under 19 U.S.C. § 1677e(a) in calculating an individual assessment rate for either plaintiff, and also, pursuant to 19 U.S.C. § 1677e(b), uses any inferences adverse to either plaintiff in selecting from among the facts otherwise available, Commerce must explain its conclusion, based on substantial evidence on the record, that the party in question failed to cooperate to the best of its ability in providing information that was needed to calculate the individual assessment rate. In that event, Commerce must include in the remand determination its findings of fact and a reasoned analysis supporting its conclusions.

If Commerce does not identify substantial evidence to support the rejection of any of plaintiffs' data that was used to calculate the rates in the *Preliminary Results*, then Commerce must assign Gerber and Green Fresh the assessment rates stated in the *Preliminary Results* or explain with reasoned and supported analysis in the remand determination why assessment rates different from those rates are appropriate for adoption as final assessment rates.

ORDER

For the reasons stated in this Opinion and Order, plaintiff's motion for judgment on the agency record is granted, and it is hereby

ORDERED that this matter is remanded for further administrative proceedings consistent with this Opinion and Order; and it is further

ORDERED that the Department of Commerce may reopen the administrative record if it deems it necessary to do so to allow plaintiffs to submit information required for the calculation, pursuant to 19 U.S.C. § 1675(a), of individual antidumping duty assessment rates for each of the plaintiffs; and it is further

ORDERED that the Department of Commerce shall have ninety (90) days from the date of this order to complete and file its remand

determination; plaintiffs shall have thirty (30) days from that filing to file comments; and Commerce and defendant-intervenor shall have twenty (20) days after plaintiffs' comments are filed to file any reply.

Slip Op. 05–85

CORUS STAAL BV, Plaintiff, v. **UNITED STATES,** Defendant, and **UNITED STATES STEEL CORPORATION,** Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge
Court No. 04–00316

[Results of final administrative review of antidumping duty order on hot-rolled steel from the Netherlands sustained.]

Dated: July 19, 2005

Steptoe & Johnson LLP (*Richard O. Cunningham, Joel D. Kaufman, Alice A. Kipel,* and *Troy H. Cribb*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke*), *Amanda Blaurock*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (*John J. Mangan*) for defendant-intervenor.

OPINION

Restani, Chief Judge: This matter is before the court on the plaintiff Corus Staal BV's ("Corus") motion for judgment on the agency record pursuant to United States Court of International Trade Rule 56.2. At issue are the final results of the first administrative review of an antidumping duty order by the International Trade Administration of the United States Department of Commerce ("Commerce" or "Department") of hot-rolled steel from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands,* 69 Fed. Reg. 33,630 (Dep't Commerce June 16, 2004) (final admin. rev.), *as amended by,* 69 Fed. Reg. 43,801 (Dep't Commerce July 22, 2004) (am. final admin. rev.) [hereinafter *Final Results*].

Corus claims (1) that the agency's use of a "zeroing" methodology is contrary to law, and (2) that its use of the date of entry (instead of the date of sale) for selection of certain export price ("EP") transactions is both contrary to law and unsupported by substantial evidence. Corus claims that zeroing, whereby "negative dumping margins," *viz,* where the U.S. price is higher than the normal value ("NV"), are set to zero in calculating Corus's weighted average dump-

ing margin (and concomitant assessment rate) do not properly allow non-dumped sales to offset dumped sales, introducing an "improper statistical bias into the calculation." Pl.'s Br. at 2. Corus further claims that this court and the Court of Appeals for the Federal Circuit have held that zeroing is not required by statute, and, therefore, this court may only uphold Commerce's methodology if it is reasonable, which Corus asserts it no longer is, given the WTO Antidumping Agreement, *see* Pub. L. No. 103–465, 108 Stat. 4809 (1994), and recent WTO decisions.[1]

In addition, Corus argues that Commerce erred legally and factually by using the date of entry to select certain EP transactions for review, which it asserts is inconsistent with its use of the date of sale for other EP transactions and all constructed export price ("CEP") sales. Because, allegedly, Commerce offered no reasonable explanation for basing its review in some instances on the date of sale and in others on the date of entry, and offered no explanation for deviating from its prior and exclusive use of the date of sale as a selection criterion in its preliminary results,[2] Corus asks the court to enter an order remanding this administrative review to Commerce. Corus also asks this court to instruct Commerce, on remand, (1) to recalculate Corus's dumping margin, cash deposit rate, and assessment rate without resort to zeroing; (2) to use, exclusively, the date of sale to select the transactions to be reviewed during the period of review ("POR") (instead of date of sale for CEP transactions and a combination of date of sale and date of entry for EP transactions); and (3) to refund the amount of estimated antidumping duty deposits collected in excess of the lawful amount.

In response to plaintiff's motion, both the defendant ("Government" or "Commerce"), and the United States Steel Corporation ("U.S. Steel"), the defendant-intervenor, argue that Corus's motion, with respect to zeroing, should be denied because the final results are in accordance with law. Commerce, citing decisions by this court and the Federal Circuit, which have both repeatedly sustained Commerce's methodology, asserts: (1) zeroing is a "reasonable" interpretation of an ambiguous statutory provision regarding dumping margins and weighted average dumping margins, *see* 19 U.S.C. § 1677(35) (2000); and (2) the WTO reports cited by Corus are le-

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[1] *See, e.g.*, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R, 2004 WTO DS LEXIS 18 (Aug. 11, 2004, adopted Aug. 31, 2004) (appellate body report) ("*Softwood Lumber*"); *United States – Sunset Review of Anti-Dumping Duties on Corrosion-resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, 2003 WTO DS LEXIS 218 (Dec. 15, 2003, adopted Jan. 9, 2004) (appellate body report) ("*Corrosion-resistant Steel*"); *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, 2001 WTO DS LEXIS 13 (Mar. 1, 2001, adopted Mar. 12, 2001) (appellate body report) ("*EC-Bed Linen*").

[2] *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 68 Fed. Reg. 68,341 (Dep't Commerce Dec. 8, 2003) (prelim. admin. rev.) [hereinafter *Prelim. Results*].

gally irrelevant, for numerous reasons. U.S. Steel agrees with Commerce's use of zeroing was proper, and that Corus's reliance on WTO decisions is misplaced, but also asserts that zeroing is not merely in accordance with law but that its use is actually required by law.

As for the second issue, regarding Commerce's classification of certain U.S. sales as EP sales, Commerce and U.S. Steel disagree. Commerce asks the court to remand the issue to Commerce to re-classify certain EP transactions; U.S. Steel requests that the plaintiff's motion, in all respects, be denied. U.S. Steel asserts that Corus mischaracterized certain sales (those made to its just-in-time ("JIT") customers) as EP sales, and argues that any sales made after importation must, according to the statutory terms, *see* 19 U.S.C. § 1677a(a)–(b) (2000), be CEP sales. U.S. Steel further argues that the Department properly utilized its standard methodology of using the date of sale during the POR for CEP sales (and for EP-classified sales made after importation, such as CEP sales normally are), and of using the date of entry for ordinary EP sales. As explained below, the court concludes that remand is not appropriate and the final results of the administrative review are sustained.

PROCEDURAL HISTORY

This appeal arises out of the first administrative review of an antidumping duty order regarding hot-rolled steel from the Netherlands. U.S. Steel, a domestic producer of hot-rolled steel, and a defendant-intervenor in these proceedings, was both a petitioner in the investigation that resulted in Commerce's antidumping duty order and an active participant in the administrative proceedings below. Corus, the plaintiff, is a producer of hot-rolled steel in the Netherlands and brought this appeal to challenge two aspects of the final results that pertain to the calculation methodology Commerce used to determine the 4.80% weighted average dumping margin applicable to Corus: (1) zeroing; and (2) the change in selection criterion from date of sale, to date of sale for all CEP transactions and certain EP transactions and date of entry for the remaining post-importation EP sales. *See Final Results*, 69 Fed. Reg. at 33,631 and accompanying *Issues & Decision Mem.* [hereinafter "*Issues Mem. to Steel from the Netherlands*"], at cmts. 4, 10, *as amended by*, 69 Fed. Reg. at 43,802.

On November 29, 2001, Commerce published the antidumping duty order on certain hot-rolled carbon steel flat products from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't Commerce Nov. 29, 2001) (antidumping duty order). On November 1, 2002, Commerce published notice of the opportunity to request an administrative review of certain hot-rolled carbon steel flat products from the Netherlands, covering the period from May 3, 2001, to October 31, 2002. *See*

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation, 67 Fed. Reg. 66,612 (Dep't Commerce Nov. 1, 2002) (opportunity to req. admin. rev.).

On November 26 and 27, 2002,[3] a group of U.S. steel companies, including U.S. Steel, pursuant to 19 C.F.R. 351.213(b)(1) (2004),[4] requested that Commerce, in accordance with 19 U.S.C. § 1675 (2000),[5] conduct an administrative review of Corus's sales of the subject merchandise. On December 26, 2002, Commerce published a notice of initiation of this antidumping duty administrative review, covering the period from May 3, 2001, through October 31, 2002. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78,772 (Dep't Commerce Dec. 26, 2002). On January 9, 2003, Commerce issued its antidumping duty questionnaire to Corus—an ongoing question and response process that lasted from then until May 19, 2003, when Corus responded to Commerce's third supplemental questionnaire. *See Prelim. Results*, 68 Fed. Reg. at 68,342. Commerce then verified Corus's submitted data and requested Corus to report entered value data. *See id.* Also, as a result of the court's decision in *Corus Staal BV v. United States*, 283 F. Supp. 2d 1357, 1358 (Ct. Int'l Trade 2003), the Department will not assess duties on subject merchandise that entered between October, 30, 2001, and November 28, 2001, inclusive. *See also Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 68 Fed. Reg. 60,912, 60,912 (Dep't Commerce Oct. 24, 2003) (final ct. decision & suspension of liquidation).

On December 8, 2003, Commerce published its preliminary results from the administrative review of the antidumping duty order on hot-rolled steel from the Netherlands. *See Prelim. Results*, 68 Fed. Reg. at 68,341. After issuance of these preliminary results, the Department invited comments; and in response, Corus, U.S. Steel, and Nucor filed case briefs on January 14, 2004, and submitted rebuttal briefs on January 23, 2004. *See Final Results*, 69 Fed. Reg. at 33,630. After Corus timely-filed a ministerial error allegation, in accordance with 19 C.F.R. 351.224(c)(2) (2004),[6] the Department revised its antidumping duty margin for Corus, decreasing it from the original 4.94% assessment to the currently contested 4.80% ad valo-

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[3] Nucor Corporation filed its request for administrative review on November 26, 2002; Bethlehem Steel Corporation, National Steel Corporation, and U.S. Steel filed their request on November 27, 2002. *Prelim. Results*, 68 Fed. Reg. at 68,342 n.1.

[4] Allowing domestic interested parties to request an administrative review of an antidumping or countervailing duty order each year during the anniversary month of the order's publication.

[5] Providing for periodic review of duty order amount, at least once during each 12-month period, beginning on the anniversary of the date of publication of the antidumping duty order, if a request for such a review has been received.

[6] Setting five days as the time limit for submitting comments regarding ministerial errors.

rem. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 69 Fed. Reg. 43,801, 43,801–02 (Dep't Commerce July 22, 2004) (am. final admin. rev.). Corus timely commenced this action under 19 U.S.C. § 1516a(a)(2)(A)(i),[7] (B)(iii)[8] (2000), and 28 U.S.C. § 1581(c) (2000).

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2) and 28 U.S.C. § 1581(c). The court, in reviewing one of Commerce's administrative determinations, will uphold the challenged determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Request For Remand Is Denied

Prior to oral argument, the court denied Commerce's request for a remand. The request was both unsupported and unexplained. With respect to the classification of sales as EP or CEP, Commerce simply stated that "[u]pon further review . . . certain transactions were mistakenly classified as EP transactions." Resp. Br. at 26.

In *SKF USA, Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001), the Court of Appeals addressed the issue of a voluntary remand when Commerce's original determination, denying a favorable adjustment to the plaintiff-appellant, was not required by statute. After initially determining, during the administrative review, that the loss incurred on the sale of a subsidiary should be included in the plaintiff's general and administrative ("G&A") expense calculation, Commerce, on appeal before the Court of International Trade, "reversed course," and instead of defending its final results, sought a remand, arguing, in accordance with the plaintiff's position, that the loss should no longer be included in the G&A expense calculation. *Id.* at 1026.

Obviously, this case differs from *SKF* because Commerce's remand request is not so that it may bestow a benefit on the party paying duties. Here, the request is in response to defendant-intervenor U.S. Steel's brief, which claims a misclassification—"because these so-called EP sales did not meet the statutory definition of EP," (*see* Def.-Intervenor's Br. at 25–26)—although U.S. Steel admits it missed the time for filing suit to change the classification. Nonetheless, *SKF*

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[7] Allowing review of administrative determinations on the record within thirty days of the date of publication in the Federal Register.

[8] Defining reviewable determinations to include final determinations by the "administering authority" (Commerce) or the "Commission" (International Trade Commission) under 19 U.S.C. § 1675.

may be instructive because the court explained that an agency may seek a remand (1) to reconsider its decision because of intervening events outside of the agency's control; (2) to reconsider its previous position even if there are no intervening events; or (3) because it believes that its original decision was incorrect on the merits and it wishes to change the result. 254 F.3d at 1028–29.

The first situation does not apply to this case.

With respect to the second situation, the Federal Circuit explained that an agency may "simply state that it had doubts about the correctness of its decision or that decision's relationship to the agency's other policies." *Id.* at 1029. In that situation, the reviewing court has discretion over whether to remand, and may refuse a remand if the agency's request is "frivolous or in bad faith." *Id.* But, "if the agency's concern is substantial and legitimate, a remand is usually appropriate." *Id.* Here, there does not appear to be any substantial or legitimate administrative concern warranting a remand. Commerce's stated reason for requesting a remand was simply "to correct this classification so that its written position is consistent with the factual record." Def.'s Resp. Br. at 26. Commerce articulated no other policy issue or view, nor did it otherwise express any doubts about the correctness of its decision in relation to the agency's other policies.

With respect to the third situation, the court held that a "[r]emand to an agency is generally appropriate to correct simple errors, such as clerical errors, transcription errors, or erroneous calculations." *SKF*, 254 F.3d at 1029. The court explained that "[a]lthough a court need not necessarily grant such a remand request, remand may conserve judicial resources, or the agency's views on the statutory question, though not dispositive, may be useful to the reviewing court." *Id.*

Here, a remand would not seem to preserve judicial resources or permit application of Commerce's views on a statutory question. *See Corus Staal BV v. United States*, 259 F. Supp. 2d 1253, 1257 (Ct. Int'l Trade 2003) ("*Corus Staal I*") ("[C]oncerns for finality do exist and the agency must state its reasons for requesting remand. Further, if only to guard against the 'bad faith' requests of concern to the court in *SKF*, the court must be apprised of the reason for the remand request, whether it be on account of error or merely a change in policy.").

While there was a vague reason given here, which exceeds the information provided in the earlier *Corus Staal I* case, this was still insufficiently informative. There is no real evidence that Commerce erred. While the EP sales at issue appear were invoiced after importation, a hallmark of CEP sales, the statute does permit, inter alia, "post-importation" EP sales where the sale is prenegotiated. *See* 19 U.S.C. § 1677a(a) ("The term 'export price' means the price at which

the subject merchandise is first sold (or agreed to be sold) before the date of importation. . . ."). Thus, if an error did occur, Commerce needed to explain it in detail.

Furthermore, U.S. Steel avers that reclassifying the sales from EP to CEP would have an insignificant effect on the dumping margin, and it does not seek this relief. Accordingly, if the court has discretion over whether to grant this remand request, the court exercises such discretion to deny this request for remand, which likely would simply delay this matter for no substantial reason.

The court is concerned that Commerce is taking some broad language in the *SKF* decision, the holding of which may apply to a very narrow group of cases, out of context, simply to avoid dealing with difficult methodological issues. In this case, Commerce did not even brief the issue of the proper date for selection of EP and CEP sales, relying instead on its unsupported request for remand to delay the day of reckoning. This was a disservice to the court, as the court must resolve this issue. The interests of both plaintiffs and defendants depend on the prompt and orderly resolution of these matters, which Congress clearly intended.[9] The Government must give due regard to finality and cannot simply ask for a do-over any time it wishes.

II. Commerce's Use Of Zeroing Is Reasonable And In Accordance With Law

As Corus noted in its brief, numerous cases before this court and the Federal Circuit have held that "zeroing" is neither required nor prohibited by the U.S. statute, *see* 19 U.S.C. § 1677(35)(A),[10] (B),[11] in either an investigation, *see, e.g.*, *Corus Staal I*, 259 F. Supp. 2d at 1261, or an administrative review, *see, e.g.*, *Timken Co. v. United*

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[9] Reflecting the need for expedition in these matters, United States Court of International Trade Rule 3(g) provides for the precedence of unfair trade cases over most other actions, and the statute contains a series of time limitations on Commerce's actions. *See* USCIT Rule 3(g) (listing an action contesting a determination in a countervailing or antidumping duty proceeding third in order of precedence, following only an action seeking injunctive relief and an action involving the exclusion or redelivery of perishable merchandise); 19 U.S.C. § 1675(a)(3)(A) (requiring, if practicable, "[t]he administrating authority [to] make a preliminary determination [in a review as to the amount of any antidumping duty] within 245 days after the last day of the month in which occurs the anniversary of the date of publication of the order, finding, or suspension agreement for which the review . . . is requested, and a final determination . . . within 120 days after the date on which the preliminary determination is published.").

[10] 19 U.S.C. § 1677(35)(A). The statute states: "The term 'dumping margin' means the amount by which the normal value *exceeds* the export price or constructed export price of the subject merchandise." (emphasis added).

[11] 19 U.S.C. § 1677(35)(B). The statute states: "The term 'weighted average dumping margin' is the percentage determined by dividing the aggregate *dumping margins* determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." (emphasis added).

States, 354 F.3d 1334, 1341–42 (Fed. Cir.), *cert. denied*, 125 S. Ct. 412 (2004) ("*Timken*").

Despite these prior holdings, Corus argues that fundamental structural changes to the U.S. Antidumping statute, as implemented in the Uruguay Round Agreements Act ("URAA"), render zeroing inherently unreasonable, citing recent WTO decisions for further support that zeroing is no longer reasonable. *See supra* note 1. The Federal Circuit, however, in addressing arguments similar to the ones Corus now presents before the court, (1) expressly affirmed the reasonableness of Commerce's use of zeroing in an antidumping administrative review, and (2) accorded no deference to Corus's cited WTO cases, again concluding that WTO decisions are not binding on the U.S. and cannot trump domestic legislation. *See Corus Staal BV v. Dep't of Commerce*, 395 F.3d 1343, 1346–49 (Fed. Cir. 2005) ("*Corus Staal II*") (holding that (1) "[o]ur decision in *Timken* addressed Commerce's interpretation of section 1677(35);" and (2) "[w]e give Commerce substantial deference in its administration of the statute because of the foreign policy implications of a dumping determination"). While it is highly debatable whether the intricacies of margin calculation involve foreign policy, the Government's response to WTO decisions vary; and, as the Federal Circuit noted, a court should "not attempt to perform duties that fall within the exclusive province of the political branches." *Id.* at 1349. Because decisions by the Federal Circuit are binding on this court, Corus's arguments regarding the reasonableness of zeroing, therefore, must fail.

Corus's final argument was also addressed by the Federal Circuit in *Corus Staal II*; however, Corus now relies on changed facts. Specifically, Corus attempts to capitalize on the Federal Circuit's caveat in *Corus Staal II*: "[W]e . . . refuse to overturn Commerce's zeroing practice based on any ruling by the WTO or other international body *unless and until* such ruling has been adopted pursuant to the specified statutory scheme." *Id.* (emphasis added). Corus argues that the WTO's *Softwood Lumber* decision, which prohibited the use of zeroing in calculating dumping margins under the weighted-average-to-weighted-average methodology, has been "adopted pursuant to the specified statutory scheme," and therefore, the court should rule zeroing no longer reasonable, not based on the WTO ruling itself, but on Commerce's re-interpretation of its policy in the wake of the adverse *Softwood Lumber* ruling.

Before any agency regulation or practice can be modified to conform to an adverse WTO ruling, Commerce must follow the particular statutory scheme Congress enacted. *See id.* This process mandates consultation between the various political branches of the Executive and Congress "to determine whether or not to implement WTO reports and determinations and, if so implemented, the

extent of implementation." *Id.*; *see also* 19 U.S.C. §§ 3533(f)–(g), 3538 (2000).[12]

Corus submits that the "critical steps" had already been taken by the time of the Federal Circuit's decision in *Corus Staal II*.[13] In *Corus Staal II*, the Federal Circuit was quite clear that it "reject[ed] *Softwood Lumber* as nonbinding because the finding therein was not adopted as per Congress's statutory scheme." 395 F.3d at 1349. Therefore, until *all* of the statutorily mandated procedures have been fully complied with, it matters not whether the "critical steps" have already been taken. Since the Federal Circuit issued its opinion in *Corus Staal II*, Commerce has subsequently issued both its preliminary and final determinations to implement *Softwood Lumber*. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada*, Pl.'s Addendum 1 (Apr. 15, 2005) ("*Sec. 129 Determ*."). Corus stresses that the determination has been forwarded to the USTR, but Commerce correctly notes that the USTR still must direct the Department to implement the determination, "in whole or in part." *Sec. 129 Determ*. at 1, 38. *See* 19 U.S.C. § 3538(b)(4).[14] Thus, the statutorily mandated procedure is incomplete.

Even if the USTR had directed the Department to implement the determination in full, it still would not be applicable to this case.[15] Unlike a section 123 proceeding, which concerns implementation of panel reports regarding a WTO member's general practices, a section 129 report only affects the implementation of the specific investigation at issue, in this case softwood lumber from Canada. *Com-*

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[12] These steps include: (1) consultation between the U.S. Trade Representative ("USTR"), agency, relevant congressional committees, and the private sector; (2) notice and comment; (3) publication of the modification and its explanation in the Federal Register; and (4) further consultation between the USTR, agency, and relevant congressional committees regarding implementation of the new determination.

[13] Corus identifies the "critical steps" as (1) U.S. notification to the WTO that it would implement the *Softwood Lumber* decision, (2) consultation with Commerce and Congress, and (3) instruction by the USTR directing Commerce to draft a section 129 determination implementing *Softwood Lumber*. Pl.'s Reply Br. at 3 n.2.

[14] 19 U.S.C. § 3538(b)(4) states that "[t]he Trade Representative *may*, after consulting with the administering authority and the congressional committees . . . , direct the administering authority to implement, in whole or in part, the determination. . . ." (showing that even after a final determination, the USTR need not instruct Commerce to implement it) (emphasis added).

[15] On April 27, 2005, in accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, 19 U.S.C. § 3538(b)(4), (c)(1)(B), the USTR, after consulting with Commerce and Congress, directed the Department to implement the determination. *See Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636 (Dep't Commerce May 2, 2005) (final determ. under sec. 129 of URAA) [hereinafter *Final Section 129 Determination*].

pare URAA § 123, 19 U.S.C. § 3533, *with* URAA § 129, 19 U.S.C. § 3538.[16] Moreover, the WTO Appellate Body's report in *Softwood Lumber* made clear that the only issue before it was zeroing "*as applied*" in that case to Canadian lumber: "no methodology, *as such*, has been challenged." *Softwood Lumber*, WT/DS264/AB/R at ¶63 (emphases in original). Further, even if the general methodology were at issue, section 129(c)(1) of the URAA, 19 U.S.C. § 3538(c)(1), explicitly provides that any section 129 redetermination by Commerce will only affect the unliquidated entries of subject merchandise that "are entered, or withdrawn from warehouse, for consumption *on or after* . . . the date on which the Trade Representative directs the administering authority . . . to implement that determination." 19 U.S.C. § 3538(c)(1)(A) (emphasis added). In its section 129 determination, Commerce notes that the "SAA clearly provides, 'such [section 129] determinations have prospective effect only.' " URAA Statement of Administrative Action, accompanying H.R. Rep. No. 103–316, at 1026 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4313 ("SAA"); *Sec. 129 Determ.* at 4; *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,637.

Lastly, even Commerce's section 129 determination implementing *Softwood Lumber* limits the effect of the adverse WTO ruling. In the redetermination, Commerce changed its methodology from using a weighted-average-to-weighted-average methodology, which was the subject of the "as applied" challenge in *Softwood Lumber*, to using an individual-to-individual transaction methodology. *See Sec. 129 Determ.* at 6, *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,637. Commerce's change, however, is "not inconsistent with the findings of the panel or the Appellate Body," *see* 19 U.S.C. § 3538(b)(2), because the individual-to-individual methodology, as the WTO Appellate Body noted, was not addressed by its *Softwood Lumber* ruling. *Softwood Lumber*, WT/DS264/AB/R at ¶ 63. Underscoring the specificity of this change, Commerce noted that by switching its methodology it was "not intending to implement an approach that applies to all antidumping investigations." *Sec. 129 Determ.* at 12; *Final Sec. 129 Determ.*, 70 Fed. Reg. at 22,639. Even with respect to the *Softwood Lumber* investigation, and despite employing the changed methodology, Commerce still used zeroing. In its redetermination, Commerce stated that because the WTO ruling "requires the offset for non-dumped sales [i.e., does not allow zeroing] only for a weighted-

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[16] Section 123(f)(3) discusses generally "whether to implement the [WTO] report's recommendation" and section 123(g)(1) regards "[c]hanges in agency regulations or practice." 19 U.S.C. § 3533(f)(3), (g)(1). Section 129, in contrast, discusses everything in terms of "particular proceedings," from the initial agency action, to the re-determination, to the implementation of the re-determination. 19 U.S.C. § 3538.

average-to-weighted-average comparison, we have not applied the offset for non-dumped sales [i.e., we have used zeroing] in our transaction-to-transaction comparison." *Id.* Therefore, even if the USTR directs Commerce to implement the process in one case, the overall process has not changed.

In sum, the WTO decision-making process operates apart from the decision-making in this court. WTO decision-making starts with an international agreement, which may not match the domestic statute and which is interpreted pursuant to different principles. From there, the process follows an entirely separate implementation scheme. Had the Government appeared here saying it had lost in the WTO, with respect to this very administrative determination, and it had complied with the entire statutory framework, to the effect that it was reversing its position, even as to a *past* determination, then the court would have to consider what to do. This, however, has not happened, and the court is bound by circuit precedent upholding zeroing.

III. Commerce's Change In Methodology For Selecting The Sales Used In The Margin Calculation Is Reasonable And In Accordance With Law

Corus's database consists of two categories of U.S. sales: constructed export price sales, which were made through Corus's U.S. affiliate, and export price sales, which were made by Corus.[17] In the *Preliminary Results*, Commerce selected the U.S. sales to be included in the margin calculation, regardless of whether the sale was CEP or EP, on the basis of whether the date of sale was within the POR. This meant that certain EP sales—those with a date of sale prior to the POR but with an entry date during the POR—were excluded from the margin calculation.

Prior to the *Final Results*, U.S. Steel argued in its case brief that the date of sale methodology used to select U.S. sales was incorrect, as applied to Corus's EP sales. In support, U.S. Steel showed that, consistent with Commerce's antidumping questionnaire, Commerce's normal practice was to use date of sale for CEP sales and date of en-

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[17] " '[E]xport price' means the price at which the subject merchandise is first sold (or agreed to be sold) *before the date of importation* by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c)." 19 U.S.C. § 1677a(a) (emphasis added).

" '[C]onstructed export price' means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States *before or after the date of importation* by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d)." *Id.* at § 1677a(b) (emphasis added).

try for EP sales. *See Commerce's Antidumping Duty Questionnaire* (Jan. 9, 2003), at C–1, P.R. Doc. 207, Def.-Intervenor's App., Tab 1, at 2 ("Report each U.S. sale of merchandise entered for consumption during the POR, except: (1) for EP sales, if you do not know the entry dates, report each transaction involving merchandise shipped during the POR; and (2) for CEP sales made after importation, report each transaction that has a date of sale within the POR."). EP sales, which by statute must take place prior to importation (i.e., date of entry) normally can be tied to entries during the period. CEP sales, on the other hand, which may take place following importation, are often difficult or impossible to tie to specific entries.

In response, Corus argued that the sales-based approach used in the *Preliminary Results* should be applied to all of its sales to ensure no transactions escape review because: (1) date of sale corresponds to its audited financial records and its use would require no end-of-period reconciliations, and (2) given the length of time between entry date and date of sale for the JIT inventory sales, there likely would be entries sold from JIT inventory that would not be invoiced until after the conclusion of the review period and, thus, too late to be captured by the review; and under Commerce's entry date methodology, such sales would never be reported because they could not be included in any subsequent review. *See* Corus's Reply Br., (Jan. 23, 2004), at 7–9, P.R. Doc. 80, Pl.'s App., Tab 3, at 4–6; *see also Issues Mem. to Steel from the Netherlands*, at cmt. 10.

In the final results, Commerce rejected Corus's position. Commerce stated that

> We agree with petitioners. In accordance with the Department's normal practice, for those sales which occurred prior to importation, we have used the date of entry to select those transactions used in our analysis. This methodology comports with the Department's standard administrative review questionnaire, which instructs respondents to report such sales of merchandise which entered for consumption during the POR. This methodology is also consistent with that used in other antidumping duty administrative reviews. Thus, for these final results, we have amended our margin calculation program so that for sales which occurred prior to importation, the entry date was used to define those sales used in our analysis.

Issues Mem. To Steel from the Netherlands (June 16, 2004), at cmt. 10, P.R. Doc. 398, Def.-Intervenor's App., Tab 6, at 4 (citation omitted). In implementing its decision, Commerce did the following: (1) for sales classified as CEP, it continued to use the date of sale; (2) for sales classified as EP, where the sale took place prior to importation, it used the date of entry; and (3) for sales classified as EP, but where the invoice date (and hence the shipment date and presumed date of sale) took place after importation, it used the date of sale.

A. Commerce Properly Used Its Normal Method For Corus's CEP And Pre-Importation EP Sales

Corus argues that Commerce should have used the date of sale methodology for all of its sales. Corus further argues that Commerce may not use different bases (which it refers to as "hybrid") in the same administrative review to select the sales to be analyzed. U.S. Steel disagrees.

The statute does not specify whether Commerce should use the date of entry or the date of sale as the basis on which to select transactions for review. *See Helmerich & Payne, Inc. v. United States*, 22 CIT 928, 933, 24 F. Supp. 2d 304, 310 (1998) ("[T]he statute is silent with respect to the universe of sales to be used in calculating dumping margins. . . ."). Commerce has adopted a regulation, however, that gives it the flexibility to use date of sale, date of export, or date of entry, as appropriate. The regulation provides that

> [f]or requests received during the first anniversary month after publication of an order . . . an administrative review under this section will cover, as appropriate, *entries, exports, or sales* during the period from the date of suspension of liquidation . . . to the end of the month immediately preceding the first anniversary month.

19 C.F.R. § 351.213(e)(1)(ii) (emphasis added).

Commerce's general preference is to use entries during the POR as the basis for selecting the U.S. sales to be analyzed. In *Certain Welded Carbon Steel Pipes and Tubes from Thailand*, 63 Fed. Reg. 55,578, 55,589 (Dep't Commerce Oct. 16, 1998) (final admin. rev.), for example, Commerce analyzed all U.S. sales that entered during the POR, stating that

> [a]lthough the Department's regulations at section 352.213(e) provide some flexibility in this issue, the Department's preference is to review sales based on entry dates unless there are compelling circumstances that warrant a different approach to determining the universe of sales to be examined during a particular review.

Id. at cmt. 9. Similarly, in *Issues & Decision Memorandum to Certain Corrosion-Resistant Carbon Steel Flat Products from Canada*, 70 Fed. Reg. 13,458 (Dep't Commerce Mar. 21, 2005) (final admin. rev.), the Department explained that

> [w]e note that in section 751(a)(2)(A) of the Act [19 U.S.C. § 1675(a)(2)(A)], a dumping calculation should be performed for each entry during the POR. While section 351.213(e) of the Department's regulations does give the Department some flexibility in this regard by stating that the review can be based on entries, exports, or sales, it is our preference to base the review

> on entries where possible. In this case, we find no compelling reason to move away from our standard practice of using entries to determine the universe of U.S. sales to be reported for EP sales.

Id. at cmt. 5. *See also Helmerich*, 22 CIT at 935–36, 24 F. Supp. 2d at 311 (quoting Commerce as stating that its "usual practice in export price situations is to review and assess duties on entries within the POR, regardless of whether the sales occurred prior to the review period"). Therefore, Commerce's review of the EP sales in this case, based on the date of entry, is in accordance with its standard methodology.

Furthermore, the court has upheld Commerce's entry-based methodology as reasonable. In *Helmerich*, the court upheld Commerce's use of the date of entry as a selection criterion, even though the merchandise that entered during the POR came from a foreign trade zone and had been sold to the customer before the POR and before the antidumping duty order had been entered. 22 CIT at 928, 938–39, 24 F. Supp. 2d at 306, 313–14. The court explained that the entry-based approach resulted in a more accurate measure of dumping and ensured that all relevant sales were considered. *Id.* at 937–38, 24 F. Supp. 2d at 313.

Although Commerce's general preference is to use the date of entry, it often uses the date of sale as the selection criterion for CEP sales. This is because, in many CEP situations, the sale is made after importation and it is often difficult or impossible to tie entries to sales. *See id.* at 938 n.9, 24 F. Supp. 2d at 313 ("In certain situations such as CEP situations where Commerce cannot tie entries to future sales, or when the Department cannot ascertain entry dates, Commerce cannot calculate margins based on sales linked to entries. Therefore, Commerce may resort to the less accurate approach of calculating margins based on possibly unlinked sales during the POR."); *see also Dynamic Random Access Memory Semiconductors of One Magabit or Above from the Republic of Korea*, 66 Fed. Reg. 30,688, 30,692 (Dep't Commerce June 7, 2001) (prelim. admin. rev.) (using sales made during the POR to calculate the weighted-average dumping margins for CEP transactions). This approach has been upheld as reasonable.

In *NSK Ltd. v. United States*, 17 CIT 590, 594–95, 825 F. Supp. 315, 320 (1993), for example, the court upheld Commerce's decision to examine exporter's sales price ("ESP") transactions (now CEP transactions under the URAA) on the basis of sales made during the POR. In holding, *inter alia*, that Commerce's review of all CEP sales made during the POR, rather than review of only the subject merchandise entered and sold during the review period, was reasonable and in accordance with the law, the court noted Commerce's reasoning with respect to these CEP sales: (1) there is usually a lag time between entry and sale, (2) entry data is often unavailable, (3) a

dumping margin cannot be determined without a sale, (4) dumping on sales made during the POR is representative of dumping on entries made during the POR, and (5) review of sales, which can cover many entries of merchandise, can eliminate the need for conducting multiple reviews of the same information. *Id.* at 595, 24 F. Supp. 2d at 320; *see also Ad Hoc Comm. of S. Cal. Producers of Gray Portland Cement v. United States*, 19 CIT 1398, 1407, 914 F. Supp. 535, 544 (1995) (upholding Commerce's use of sales, rather than entries, during the POR to calculate a dumping margin as selection criterion for CEP sales). Therefore, Commerce's use of the date of sale as a selection criterion for Corus's CEP sales is in accordance with its standard procedure and is reasonable.

Corus relies on *Hynix Semiconductor, Inc. v. United States*, 248 F. Supp. 2d 1297 (Ct. Int'l Trade 2003), to argue that Commerce's "hybrid" methodology—using date of entry to select those EP transactions where the sale had occurred prior to importation, but using date of sale to select all other EP and all CEP transactions—is unreasonable.[18] In *Hynix*, the court sustained Commerce's decision to use the date of sale as the selection criterion for CEP sales at issue. *Id.* at 1303–04. The court found that Commerce properly abandoned the method used in the preliminary results, where it had calculated the dumping margin by using the CEP sales made during the POR, plus CEP entries made during the period (which were sold after the POR). *Id.* at 1300. The court explained that "nothing in Commerce's regulations supports the use of a hybrid sales plus POR-entries approach for calculating dumping margins." *Id.* at 1304. This case is different. Here, Commerce did not use such a "hybrid" approach; it used two distinct approaches—sales during the POR for CEP transactions and entries during the POR for pre-importation EP transactions—both of which were previously upheld as reasonable.

Furthermore, in *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 63 Fed. Reg. 39,071, 39,072 (July 21,1998) (am. final admin. rev.), Commerce followed this approach, reviewing all CEP sales with a sale date during the POR and all EP sales with an entry date during the POR.

Therefore, Commerce's use of the date of entry to select Corus's pre-importation EP sales, and the date of sale to select Corus's CEP

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[18] Corus also relies on *Hynix* to argue that Commerce should have continued to use the same approach to be consistent with its *Preliminary Results*. Although the *Hynix* court did recognize the value of being consistent *across* administrative reviews, *see* 248 F. Supp. 2d at 1304 (noting that *Hynix* involved the sixth administrative review), the review here, in contrast, is only the first administrative review of Corus's sales and hence, there is no prior review with which to be consistent. *See Helmerich*, 22 CIT at 937 n.8, 24 F. Supp. 2d at 313 ("In contrast [to *Portable Electric Typewriters from Japan*, 56 Fed. Reg. 56,393, 56,393 (Dep't Commerce Nov. 4, 1991), which was a review covering the periods May 1, 1988, through April 30, 1989, and May 1, 1989, through April 30, 1990, for an antidumping duty order entered in May 1980], this case deals with a first administrative review. Therefore, Commerce was not constrained to utilize a sales-based approach to remain consistent.").

sales is reasonable and in accordance with its prior practice. Thus, as to these two categories, there is no error.

B. Commerce's Use Of Sales Date To Select Corus's "Post-Importation" EP Sales Was Proper

Corus also argues that Commerce's methodology was improper because Commerce reviewed Corus's pre-importation EP sales differently from its "post-importation" EP sales.

Commerce did use the date of sale to select those EP-classified sales that Corus invoiced after importation. Yet, as discussed above, the statute defines EP sales as those transactions occurring "before the date of importation" while CEP sales may occur "before or after the date of importation." *See supra* note 17. Thus, because the EP sales at issue could not be treated in the same manner as the other EP sales, Commerce treated them as it treated CEP sales—by reviewing them according to date of sale, because the same matching difficulties that exist for post-importation CEP sales also exist for "post-importation" EP sales, as both sides admitted at oral argument.

Corus argues that because the only parties to these "post-importation" EP sales were Corus and the particular U.S. customer (not a U.S. affiliate), and because Corus maintained its own U.S. inventory and invoicing, the sales, were in fact, properly classified as EP sales and should have been selected on the same basis as other EP sales.[19] In *AK Steel Corp. v. United States*, 226 F.3d 1361, 1369–70 (Fed. Cir. 2000), the Federal Circuit examined the definitions of EP and CEP and noted that the two factors dispositive of the choice between the two classifications are (1) whether the sale takes place inside or outside the United States, and (2) whether it is made by an affiliate. Referring to the CEP definition, the court then defined the term "seller" as "one who contracts to sell" and the term "sold" as the "transfer of ownership or title." *Id.* at 1371.

First, with respect to the location factor, it is undisputed that the invoicing took place in the U.S. after importation, which, as indicated, presents the same entry-sale disconnect normally associated with CEP sales. With respect to the second factor, the record shows that Corus uses a U.S.-based entity to facilitate these sales. This is particularly so in reference to the JIT inventory that Corus maintains in the U.S. for certain customers. Corus's U.S.-based affiliate, Corus Steel USA Inc. ("CSUSA") serves as a "facilitator, communications link and processor of certain documentation for [Corus's] U.S. imports and sales. CSUSA never takes title to, takes possession of, or resells Corus' steel and does not possess negotiating authority

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[19] Corus also argues that because the sales were "agreed to" in the Netherlands before importation, they were EP sales. The definitions of both CEP and EP include the phrase "first sold (or agreed to be sold)." 19 U.S.C. § 1677a(a), (b).

over steel manufactured by [Corus]." *See Corus Resp. to Commerce Antidumping Duty Questionnaire* (Jan. 30, 2003), at A–16, P.R. Doc. 13, Pl.'s App., Tab 7, at 3.

Although CSUSA neither takes ownership of the steel nor becomes involved in the contracting process, it appears that these sales could not be executed without CSUSA. Thus, because these sales (1) were at least finalized in the U.S. post-importation, and (2) were "facilitated" by a U.S.-based affiliate, it was understandable that Commerce selected them using the same basis that it used to select CEP sales.

Finally, Corus could point to no distortion caused by this manner of selection. Commerce, while not treating the sales as CEP sales for other purposes, selected the "post-importation" EP sales for review based on a CEP sales date methodology because such sales had earmarks of CEP sales and posed the same difficulty when trying to connect them to earlier entry dates. Therefore, Commerce's selection of Corus's "post-importation" EP sales on the same basis as its CEP sales is reasonable.

CONCLUSION

Because Commerce's use of zeroing, and its methodology for selecting sales used in the margin calculation are reasonable and in accordance with the law, Corus's Motion for Judgment on the Agency Record is denied, and Commerce's *Final Results* are sustained.

Slip Op. 05–86

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

UNITED STATES, Plaintiff, v. FORD MOTOR COMPANY, Defendant.

Court No. 02–00106

Dated: July 20, 2005

Plaintiff, the Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs"), seeks collection of a civil penalty and customs duties pursuant to 19 U.S.C. § 1592 (1988) concerning entries of automotive dies made by Ford Motor Company ("Ford"), defendant, in 1989. Customs claims that Ford committed fraud, or was grossly negligent or negligent by making material false statements and/or omissions in connection with the entry of the merchandise at issue and, thereby, violated 19 U.S.C. § 1592. Accordingly, Customs seeks $184,495 for unpaid duties, and civil penalties in the amount of $21,314,111 if Ford's conduct is found to be fraudulent; $3,497,080 if Ford was grossly negligent; or $1,748,540 if Ford was negligent. Ford responds that the merchandise at issue was entered at the value known at the time of entry, thus violating no Customs laws. Ford also counterclaims that it is entitled to recoup any overpayment in duties it has tendered.

Held: Pursuant to the findings of fact and conclusions of law, judgment is entered in favor of Customs. Ford's conduct was grossly negligent in its entry of the merchandise subject to this action. Accordingly, Ford is ordered to pay $184,495 for unpaid duties and assessed a penalty of $3,000,000, plus lawful interest.

[Judgment is held in favor of Customs in the amount of $184,495 for unpaid duties and Ford is assessed a penalty of $3,000,000, plus lawful interest.]

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 (*David A. Levitt* and *David S. Silverbrand*); of counsel: *Jeffrey E. Reim* and *Katherine F. Kramarich*, Bureau of Customs and Border Protection, for the United States, plaintiff.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*David M. Murphy*, *Steven P. Florsheim*, *Robert B. Silverman*, and *Frances P. Hadfield*); of counsel: *Paulsen K. Vandevert*, for Ford Motor Company, defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, the Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs")[1], seeks collection of a civil penalty and customs duties pursuant to 19 U.S.C. § 1592 (1988) concerning entries of automotive dies made by Ford Motor Company ("Ford"), defendant, in 1989. Customs claims that Ford committed fraud, or was grossly negligent or negligent by making material false statements and/or omissions in connection with the entry of the merchandise at issue and, thereby, violated 19 U.S.C. § 1592. Accordingly, Customs seeks $184,495 for unpaid duties, and civil penalties in the amount of $21,314,111 if Ford's conduct is found to be fraudulent; $3,497,080 if Ford was grossly negligent; or $1,748,540 if Ford was negligent. *See* Compl. Ford responds that the merchandise at issue was entered at the value known at the time of entry, thus violating no Customs laws. Ford also counterclaims that it is entitled to recoup any overpayment in duties it has tendered.

DISCUSSION

In its complaint, Customs alleges that Ford made false statements and/or material omissions in entering automotive tooling dies and equipment into the United States and that such conduct was fraudulent, grossly negligent, or negligent. *See* Compl. These false statements and/or material omissions include: (1) failing to notify Customs that the prices declared at entry were provisional and subject to upward adjustments; (2) certifying to Customs at entry that the prices declared were true and correct when in fact the invoices failed to include the cost of known engineering changes; and (3) failing to notify Customs "at once" when information was received after impor-

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[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See Homeland Security Act of 2002*, Pub. L. No. 107–296, § 1502, 116 Stat. 2135 (2002); *Reorganization Plan for the Department of Homeland Security*, H.R. Doc. No. 108–32 (2003).

tation indicating that the prices declared at entry had increased due to the value of the engineering changes. *See* Compl. ¶ 6. As a result, Customs claims that the United States was deprived of lawful duty, which it seeks in addition to civil penalties. A bench trial was held on February 28 through March 10, 2005. Parties submitted post-trial briefs on April 15, 2005.

Pursuant to USCIT R. 52(a), "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon. . . ." USCIT R. 52(a) (2002). At trial, the Court heard testimony from sixteen witnesses.[2] Customs produced three witnesses who testified on various factual matters concerning: how Customs' investigations were commenced and conducted; Customs' investigation of Ford ("FN–36 investigation"); and Customs' factual findings during and resulting from the FN–36 investigation. Customs produced Mr. Michael Turner, former Special Agent in the Detroit Customs Office of Enforcement and primary investigator of Ford; Mr. Robert Neckel, former group supervisor of the Detroit Customs Office of Enforcement; and Mr. Richard Hoglund, former Special Agent in Charge of the Detroit Customs Office of Enforcement. Ford produced three witnesses who testified, *inter alia*, about their knowledge of Customs' investigation and the scope of the investigation as it related to Ford: Mr. Harry Gibson, former attorney in Ford's Office of General Counsel; Mr. Donald Cohen, former manager in Ford's International Transportation and Customs Office; and Mr. Kenneth Coakley, former Ford purchasing representative of stamps and dies for the FN–36 program. Messrs. Gibson and Cohen also testified about Ford's customs compliance procedures, compliance record, and Ford's responses to inquiries made by Customs regarding the FN–36 program.

At trial, Customs and Ford introduced documents relating to the FN–36 investigation and the Court admitted such documents into evidence. The Court finds most of this documentary evidence highly probative because it provides contemporaneous accounts of events related to the FN–36 investigation, Ford's responses to the investigation, and Ford's compliance procedures. The Court places substantial weight in the veracity of Customs' Reports of Investigation ("ROI") written contemporaneously to relevant events concerning the commencement of the FN–36 investigation and fact-finding interviews conducted therein. *See* Pl.'s Ex. 2, 33, 93, 94, 99, 112. The Court, however, gives less weight to the ROIs, particularly Ford ROI # 37, which summarize the findings of the FN–36 investigation, because these ROIs were prepared in anticipation of penalty proceedings. *See e.g.*, Pl.'s Ex. 1, 12, 14. The Court finds that the testimony of Messrs. Gibson and Cohen was not highly probative because it was apparent

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[2] Each witness' employment history is described as their employment from 1988 to 1993 with additional relevant information.

from their testimony and demeanor that they did not independently recall specific events relating to the FN–36 investigation. The Court, however, found the testimony of Mr. Turner highly probative because it was apparent from his testimony and demeanor that he had intimate knowledge of relevant events and was able to independently recollect the FN–36 investigation. Messrs. Neckel and Hoglund corroborated Mr. Turner's testimony regarding how Customs commenced and conducted investigations during the relevant time period.

The Court also heard testimony regarding procedures and practices pertaining to the entry of Ford's automotive dies in Seattle and Detroit Customs, issuing and responding to Customs' Requests for Information ("CF 28s"), and general import practices (both Customs' and Ford's) from: (1) Mr. Kent Barnes, former Import Specialist in Seattle Customs; (2) Ms. Helen McCarty, former commodities Import Specialist in Detroit Customs; (3) Ms. Dathrenal Davis, former Field National Import Specialist for the commodity automotive team in Detroit Customs; (4) Ms. Angela Ryan, former Supervisory Import Specialist of the automotive team in Detroit Customs, also the Port Director in Detroit Customs from 2000 until she retired; (5) Ms. Denise Rashke McCandless, former Customs Regulatory Auditor in Detroit Customs; (6) Mr. David LaCharite, former Ford analyst in the International Transportation and Customs Office; (7) Mr. James Brown, former supervisor in Ford's customs operations unit; and (8) Mr. Frank Ciavarro, former employee in Ford's customs unit beginning in October, 1989, and currently in Ford's purchasing unit. Ford and Customs stipulated to the admission of deposition testimony of Mr. Phillip Kruzich, former analyst in Ford's customs and compliance unit.[3] The Court also heard testimony from Mr. Tom Collins, former administrator in General Motors's ("GM") customs office who had knowledge of Mr. Turner's investigation regarding GM, and Mr. Lowell Blackbourn, former Ogihara America Corporation accounting manager. The Court finds the testimony of Mr. Collins and Mr. Blackbourn slightly probative because each witness spoke of their general interaction with Customs during the relevant time frame. Based on their demeanor and given the length of time since the relevant events occurred, the Court finds the testimony of Ms. McCarty, Ms. Davis, Ms. Ryan, Mr. Kruzich, Ms. McCandless, Mr. LaCharite, Mr. Brown, and Mr. Ciavarro slightly probative because each testified to general facts associated with their respective positions. Regarding events relevant to the FN–36 investigation, these witnesses could only attest to events in general terms, even after having their memories refreshed with the exhibits. The Court finds Mr. Barnes' knowledge of his communications with Ford as probative based on

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[3] Mr. Kruzich's testimony was submitted via deposition, taken on August 10, 2004, and February 24, 2005. *See* Joint Exhibit 1 ("Kruzich").

his demeanor and ability to recollect events in addition to the documentary evidence. In accordance with USCIT R. 52(a) and having given due consideration to the testimony of all sixteen witnesses and numerous exhibits presented at trial and admitted by the Court, the Court now enters judgment in favor of plaintiff pursuant to the following findings of fact and conclusions of law.

I. Findings of Fact

A. Findings of Fact Relevant to Ford's FN–36 Program and Entry of the FN–36 Merchandise

1. Ford's program code for the 1990 model year Lincoln Town Car was "FN–36." *See* Trial Transcript ("TT") at 1051; Pretrial Order, Schedule C ¶ 2.
2. Ogihara Iron Works ("OIW") is the parent company of Ogihara America Corporation ("OAC"), the American subsidiary (referred collectively as "Ogihara"). *See* TT at 741–42; PX 40.
3. The subject merchandise includes tooling and stamping dies, which is large machinery used to make automotive body parts. Tooling included dies, welding fixtures, and checking fixtures ("FN–36 dies"). *See* TT at 797 & 1051–52; Pretrial Order, Schedule C ¶ 4. Presses are separate from dies. *See* TT at 800. OIW built the stamping and tooling dies needed for the FN–36 program in Japan. *See* Pretrial Order, Schedule C ¶ 3. The dies were then shipped to Michigan where OAC did the actual stamping of panels for Ford. *See* TT at 202; Pretrial Order, Schedule C ¶ 5. All FN–36 payments were made to OAC, who in turn transferred payment to OIW. *See* TT at 103–04, 156, 1051; Pl.'s Ex. 112.
4. Ford, as importer of record, made eleven entries of FN–36 dies between February 2, 1989, and March 12, 1989, which are the entries in dispute. *See* Pretrial Order, Schedule C ¶ 11; Pl.'s Ex. 69. The entries were handled by Ford's customs broker, J.V. Carr & Sons. *See* TT at 180 & 235; Pretrial Order, Schedule C ¶ 11; Pl.'s Ex. 69.
5. In Detroit, Ford made the following entries: entry number 441–4824795–8 on February 2, 1989; 441–4823061–6 on February 9, 1989. In Los Angeles, Ford entered entry number 989–0021515–7 on February 9, 1989. In Seattle, Ford made the following entries: entry number 441–3103656–6 on February 2, 1989; 441–3103684–8 on February 10, 1989; 441–3103705–1 on February 17, 1989; 441–3103778–8 on February 26, 1989; 441–3103780–4 on February 26, 1989; 441–3103777–0 on February 27, 1989; 441–3103799–4 on March 2, 1989; and 441–3103906–5 on March 12, 1989. *See* Pl.'s Ex. 40, 75, 102.
6. The value of the FN–36 dies declared upon entry was $63,078,426. *See* Pretrial Order, Schedule C ¶ 10.

7. The value of the FN–36 dies declared on the entry summaries ("CF 7501") was the invoice price. *See* TT at 845. The invoice price was the purchase order agreement value. *See* TT at 845; Pl.'s Ex. 71. A tool order is a type of purchase order, but one specifically to purchase a particular die or set of dies.[4] *See* TT at 742. A purchase order is also considered a contract. *See* TT at 742. The base tool order is the initial order made by Ford for the dies. *See* TT at 743.
8. The base tooling order for the FN–36 dies, T510288, was issued on May 27, 1987, in the amount of $42,544,884. *See* Pretrial Order, Schedule C ¶ 3; Pl.'s Ex. 24. Subsequently, 17 amendments were made to the base tool order between May 27, 1987, and January 16, 1991, with the amount on the 17th amendment being $66,075,960. *See* Pretrial Order, Schedule C ¶¶ 6 & 12; Pl.'s Ex. 24. Amendment 17 to the base tool order, dated January 16, 1991, is an audit reduction lowering the price of the FN–36 dies. *See* Pl.'s Ex. 24.
9. 204 separately numbered purchase orders were also issued between November 29, 1988, and November 16, 1989, for engineering changes and other price adjustments ("engineering purchase orders"). *See* Pretrial Order, Schedule C ¶ 6; Pl.'s Ex. 2, 25, 39.
10. To track a program at Ford, purchase order amendments should reference the previous purchase orders issued. This was done by referencing the project number on each purchase order. *See* TT at 775–76 & 838; Pl.'s Ex. 47 & 105; Def.'s Ex. C.
11. The base tool order and the seventeen amendments all have the project number "1D90A00" designation on them to identify them as part of the FN–36 program and to track program costs. *See* TT at 150–51 & 751–54; Pl.'s Ex. 24. The 204 engineering purchase orders also have the project number "1D90A00" designation on them. *See* Pl.'s Ex. 25. Ford employees knew that the project number was a way of tracking purchase orders associated with a particular project. *See* TT at 751–54, 775–76, 837–38.
12. A legend on the base tool order, amendments, and some of the engineering purchase orders states that "[T]he price set forth in this Purchase Order or Amendment shall be adjusted so as to credit buyer in the amount, if any, by which such price exceeds seller's actual cost as verified." followed by the signature of K.J. Coakley and the date signed. *See* Pretrial Order, Schedule C ¶ 9; Pl.'s Ex. 24 & 25.

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[4] Based on the testimony from the witnesses, tool orders and purchase orders were used interchangeably. *See e.g.*, TT at 742. For clarity, the Court uses "tool orders" when referring to the base tool order and seventeen amendments, and "purchase orders" when referring to the 204 engineering changes.

13. To comply with a new seat-belt law in the United States, the FN–36 program had a launch date of August 1, 1989. *See* TT at 747–49. Engineering changes on the dies were frozen by Ford on October 10, 1988, so that the dies could be transported from Japan to Michigan. *See* TT at 213–14, 762–63, 801–02; Pl.'s Ex. 64. The purchase orders, on their face, do not indicate whether they were issued for United States work or foreign source work. *See* TT at 795; Pl.'s Ex. 25.
14. Engineering changes to the dies were known and expected by Ford as designs for the FN–36 program evolved, translating into an increase in the price. *See* TT at 745 & 751; Kruzich at 40–41. Ford knew that the invoice price for the FN–36 dies stated in an entry summary was rarely the final price. *See* TT at 839–40.
15. Tool order amendments 16 and 17 state that: "[T]he amount shown on this invoice represents the actual incurred costs to manufacture or purchase the tooling described in the referenced tooling order and/or amendment(s), does not exceed the amount authorized, and includes only those acceptable categories of cost described in the tooling guidelines provided by Ford." Pl.'s Ex. 24; Def.'s Ex. BBBB.
16. Ford's International Transportation and Customs Office was divided into the customs and traffic units. The customs unit was further divided into compliance and operations units. *See* TT at 753–54 & 818–19; Kruzich at 5–6. Ford's customs compliance unit came into existence in the late 1980s/early 1990s. *See* Kruzich at 15.
17. Ford had an internal policy in place on November 7, 1983, and updated on April 14, 1989, requiring Ford employees in the purchasing department to send copies of each purchase order and amendments to five internal Ford units including the traffic unit. A sixth copy was sent to the supplier. *See* TT at 163–64, 753, 774–76; Kruzich at 19–24; Pl.'s Ex. 2, 47, 48, 105; Def.'s Ex. C.
18. Ford's customs unit would not know about an upcoming entry of imported merchandise unless Ford's purchasing unit had sent them a copy of the purchase order. *See* TT at 821–25 & 830; Kruzich at 27–36; Pl.'s Ex. 99. Ford did not have a formal policy, however, for what its customs unit was to do with the purchase order upon receiving it. *See* TT at 823–25; Pl.'s Ex. 99. There were no internal verification procedures in place to ensure that Ford's customs unit was receiving copies of all the purchase orders issued by purchasing. *See* TT at 823–25 & 830; Kruzich at 27–36; Pl.'s Ex. 40 at 7.
19. With regard to the FN–36 dies, Ford failed to adhere to its internal policy whereby its purchasing unit notified its customs unit of the engineering changes through the transmittal of purchase

orders prior to entry. *See* Pl.'s Ex. 105; *see also* TT at 163–73; Pl.'s Ex. 2.

20. Ford did not have a mechanism in place to verify that the information submitted in an entry summary filed by the broker was based on the correct price of the merchandise. *See* TT at 824–25; Pl.'s Ex. 40 & 99. Ford's customs unit would learn of changes in the purchase order price, usually after entry, when it received payment information from Ford's accounting unit. *See* Kruzich at 30–31. Ford's customs unit was also aware that it did not receive all the purchase orders because of information later uncovered when answering CF 28s. *See* TT at 821–32; Kruzich at 42–45. Ford's customs unit, however, did not advise the purchasing unit supervisors of this issue. *See* Kruzich at 44–45.
21. A Customs CF 28 is a request for information sent to importers when Import Specialists have questions regarding an entry. *See* TT at 347 & 825–26.
22. Ford's customs unit did not consider receipt of a purchase order before entry as important because the entry summary could be amended. The focus at Ford was comparing payments made to vendors against invoices. *See* TT at 850–51.
23. Ford knew it had a duty to report to Customs any additional purchase orders, including engineering changes, that affected the entered value of imported merchandise. *See* Kruzich at 40–42.
24. During the late 1980s to early 1990s, Ford was importing billions of dollars each year. *See* TT at 964.

B. Findings of Fact Related to Customs' Investigation of Ford

25. An investigation could be initiated in different ways. An open investigation could lead into new investigations of either different violations or other importers. *See* TT at 74, 526, 580–81. Investigations could also begin with referrals from import specialists. *See* TT at 489–90, 523, 580. When information obtained in an open investigation led to another, notes regarding the new investigation would be contained in the former investigation's file until a separate file was opened. *See* TT at 526 & 581–82; Pl.'s Ex. 33.
26. Customs investigations would be documented in ROIs in which agents would summarize interviews and investigative activity. ROIs would often be written contemporaneously to the events reported therein, but would also be written at a later date from notes taken during earlier events. *See* TT at 76–77, 158–59, 285–87. Material events that would be recounted in an ROI would include: telling an importer it was under investigation, telling an importer the scope of the investigation had expanded,

discovery that merchandise was undervalued, and requesting documents to be produced. *See* TT at 286–88.

27. An investigative agent's duties included keeping a careful record of the dates relevant information was obtained. *See* TT at 291–97; Def.'s Ex. A.
28. The term "formal investigation" is not defined in any Customs document submitted to the Court. *See* Def.'s Ex. A. Among Customs personnel, a "formal investigation" means a file has been opened within Customs' internal case management system to track cases. The term "formal investigation" has a different meaning when used in Customs' prior disclosure regulations. The term "formal investigation" is not used interchangeably among the two definitions. *See* TT at 548 & 553–54.
29. In the late 1980s, Customs conducted a national investigation entitled, "Rebate Adjustment Program," or "RAP." Operation RAP investigated allegations that certain United States importers were manipulating freight rates in cooperation with foreign shippers to affect the entered value of merchandise to Customs. OAC was one of the companies being investigated and on November 27, 1989, Customs executed a search warrant on OAC's Michigan facility seizing numerous documents. *See* TT at 80–81 & 528–29; Pl.'s Ex. 33; Def.'s Ex. YYY & ZZZ.
30. Mr. Turner took over the Ogihara case in August–September, 1990. *See* TT at 314–15. Mr. Turner was only investigating OAC, but his attention was drawn to Ford while reviewing the seized OAC documents. He began comparing Ford's FN–36 invoices submitted to Customs against Ford's payments made to OAC for the same merchandise. *See* TT at 82–85 & 268; Pl.'s Ex. 33; Def.'s Ex. YYY & ZZZ.
31. On October 18, 1990, Mr. Turner met with Mr. Gibson and after delivering two summonses in an unrelated matter, discussed presses purchased from Ogihara for the FN–36 program. *See* TT at 96–99 & 125–26; Pl.'s Ex. 94. Mr. Turner asked Mr. Gibson to identify an entry number (441–4823061–6). *See* TT at 333 & 893; Pl.'s Ex. 35. Mr. Turner "advised [Ford] that Customs would ask to review Ford's records related to payment for and receipt of the presses purchased from OIW and OAC" for the FN–36 program. Pl.'s Ex. 33; *see also* TT at 98–99 & 339–40; Pl.'s Ex. 94. Mr. Turner did not specifically request records from Ford and did not tell Ford that it was under investigation at this October 18, 1990, meeting. *See* TT at 301–05, 339–40, 893–95; Pl.'s Ex. 33.
32. On December 19, 1990, Mr. Turner told OAC's attorneys that the OAC investigation was expanding to include whether the costs of GM–33 and FN–36 dies from OIW were properly reflected in invoices and entry summaries. *See* TT at 101–02; Pl.'s Ex. 33 &

97. On January 7, 1991, Mr. Turner wrote OAC ROI #8 recording the October 18, 1990, meeting and December 19, 1990, expansion of investigation. *See* TT at 307–08; Pl.'s Ex. 33.

33. Between October 18, 1990, and March 8, 1991, Mr. Turner requested documents from Ford regarding OAC. *See* Pl.'s Ex. 35, 37, 97. On March 8, 1991, Mr. Turner had a phone conversation with Mr. Hamell, of Ford, following up on his previous request for documents regarding FN–36 entries of stamping dies and payments to Ogihara. *See* TT at 109 & 115–19; Pl.'s Ex. 97. Mr. Turner learned that Ford was compiling the requested information and was also conducting an internal audit. *See* TT at 118 & 894–96; Pl.'s Ex. 97. The March 8, 1991, phone conversation is memorialized in Mr. Turner's handwritten notes in the investigatory record, but not included in a ROI. *See* TT at 115 & 316; Pl.'s Ex. 97.
34. By March 8, 1991, Mr. Turner had not only expanded the OAC investigation to include Ford as a witness therein, but also was investigating Ford as a separate target concerning its payments to OAC and declarations to Customs regarding the FN–36 program. *See* TT at 102–03 & 115–19.
35. On April 18, 1991, Detroit Customs Office of Enforcement sent an internal memorandum to Detroit Customs Regulatory Audit requesting an in-depth review of OAC's records for presses and dies, including a comparison of payments made by Ford against OIW's invoices. *See* TT at 119–24; Pl.'s Ex. 77 & 93.
36. On April 30, 1991, Ford completed its internal audit of the FN–36 tooling and dies, entitled "Ogihara America Corporation Tooling Audit" which includes the 204 purchase orders for engineering changes. *See* Pl.'s Ex. 99A; *see also* TT at 855; Pl.'s Ex. 97.
37. In a letter dated May 6, 1991, Ford requested a second extension to answer a CF 28 from Seattle Customs. *See* Pl.'s Ex. 32. The letter also stated that Ford's customs unit had been informed on April 22, 1991, that "final audit results and price adjustments will soon be available" from OIW. Pl.'s Ex. 32; *see also* TT at 476–77. Ford's customs unit knew of the engineering purchase orders, but did not disclose them because Ford was unsure whether the work was done in Japan or the United States. *See* TT at 879–81 & 942–43.
38. In a letter dated May 23, 1991, Ford updated Seattle Customs on its CF 28 response to a different FN–36 entry than the one discussed in its May 6, 1991, letter. *See* Def.'s Ex. Y. The letter stated that Ford wanted to confirm that "the final audit and price adjustments are in agreement" with its CF 28 response. Def.'s Ex. Y.

39. On June 7, 1991, Customs issued Ford a summons for all documents relating to "dies, molds, and any other article" of the FN–36 program and OIW. Pl.'s Ex. 38. The summons requested "all purchase orders and payment records" and "engineering change and modification orders" among other records. Pl.'s Ex. 38; *see also* TT at 126–31 & 600–01; Pretrial Order, Schedule C ¶ 19; Pl.'s Ex. 93 & 112.
40. By June 7, 1991, Ford knew or should have known that it was being investigated by Customs regarding the FN–36 entries. *See* TT at 540–41.
41. In a letter dated July 3, 1991, Ford informed Seattle Customs that any correspondence regarding four FN–36 entries entered at Seattle would now be directed to Detroit Customs. *See* Pl.'s Ex. 54.
42. On August 6, 1991, Ford sent Detroit Customs a "supplemental response" to its previous November 20, 1989, response to the March 28, 1989, CF 28. *See* Pl.'s Ex. 39. Ford reported the 17th amendment to the base tool order and then revealed that there had been an "additional 204 separate Purchase Orders" issued to OAC for dutiable engineering changes that had been "discovered" by Ford's customs unit in April 1991. *See* Pl.'s Ex. 39. This disclosure was the first time Customs was informed of the existence of the 204 engineering purchase orders. *See* TT at 357. The letter estimated $684,417 for unpaid duties owed from an undeclared value of $16.7 million in engineering changes. The unpaid duty owed was determined by applying an allocation method derived from the twelve subject entries. *See* Pl.'s Ex. 39 & 74; *see also* TT at 131–38, 357–61, 627–28; Pretrial Order, Schedule C ¶¶ 20 & 21.
43. Customs reviewed Ford's August 6, 1991, letter and calculated that Ford owed $689,775 for unpaid duties. Customs also accepted the allocation method used by Ford to determine the amount of unpaid duty owed. *See* TT at 361–62 & 627–28; Pl.'s Ex. 40.
44. Each engineering purchase order represents a separate engineering change to the FN–36 dies. The engineering changes affected the price of the FN–36 dies, both increasing and decreasing price. *See* TT at 755–65; Pretrial Order, Schedule C ¶ 7; Pl.'s Ex. 25, 39, 40, 74.
45. The engineering purchase orders were not cross-referenced as amendments to the base tool order because an internal "implementation of a mechanized purchase order system" would not allow the issuance of an amendment until the previous amendment had been processed. The system would allow independent purchase orders to be issued without regard to sequence. *See* Pl.'s Ex. 105, *see also* TT at 167–68; Pl.'s Ex. 2 & 99.

46. On August 21, 1991, Mr. Turner opened a separate file record for the FN–36 investigation. Customs was investigating Ford before August 21, 1991, as part of the OAC investigation. The assignment of a separate case number was an internal mechanism at Customs to track documents and investigative findings. *See* TT at 153–55; Pl.'s Ex. 112; Def.'s Ex. DD.
47. On August 27, 1991, Mr. Turner sent Customs Regulatory Audit a memorandum requesting a separate audit report of Ford's FN–36 transactions from the previously requested audit of OAC. *See* Pl.'s Ex. 77 & 79; Def.'s Ex. DDDD.
48. On November 8, 1991, Ford submitted additional documents to Customs pursuant to the June 7, 1991, summons including copies of the twelve entry summaries of FN–36 dies filed by Ford in the ports of Detroit, Seattle, and Los Angeles. *See* TT at 148–49; Pl.'s Ex. 105.
49. On November 22, 1991, Ford tendered a check to Detroit Customs for $689,775 for unpaid duties owed on the engineering changes in the FN–36 program. *See* Def.'s Ex. BB.
50. On July 6, 1992, Customs Regulatory Audit published its audit report of Ford and the FN–36 program. *See* Pl.'s Ex. 40. Ford cooperated with Regulatory Audit by providing requested information during the compilation of the audit report. *See* TT at 630–31; Pl.'s Ex. 40. Ford, however, did not submit its internal audit dated April 30, 1991 and it was not included in Customs' audit. *See* TT at 641. The audit report states that the dutiable value of the FN–36 program was $79,894,722. *See* Pl.'s Ex. 40. On its entry documents, Ford had declared $63,078,426. *See* Pretrial Order, Schedule C ¶ 10. Thus, Ford had undervalued the FN–36 dies by $16,816,296, which resulted in a loss of revenue in the amount of $689,775. *See* Pl.'s Ex. 40. Customs Regulatory Audit used the same allocation formula as Ford had used in its August 6, 1991, letter to determine the amount of unpaid duty owed. *See* TT at 627–28.
51. The Pre-Penalty Notice was issued on January 10, 1995. *See* Pl.'s Ex. 41. Customs reappraised the dutiable value of the FN–36 dies upon Ford's submission of its internal audit, dated April 30, 1991. *See* TT at 641–46; Pl.'s Ex. 43, 75, 99A. Customs issued a Notice of Penalty reflecting the reappraisal on July 19, 1995. *See* TT at 641–46; Pl.'s Ex. 43. The final appraised value of the FN–36 dies was $84,393,564; the final undeclared value to Customs was $21,314,111; and the final loss of revenue to the United States was $874,270. *See* Pl.'s Ex. 43 & 75. After accounting for Ford's November 1991, payment, the remaining unpaid duty amount owed is $184,495. *See* Pl.'s Ex. 43. Customs again applied the same allocation method used in its audit and by Ford. *See* TT at 381; Pl.'s Ex. 75. The $184,495 difference formed the basis of Customs' complaint. *See* Compl. ¶ 9.

C. Findings of Fact Related to Ford's Provisional Value Policy and Internal Procedures

52. Ford had a *formalized* practice of designating certain entries as "provisional" values or prices. *See* Def.'s Ex. C. Ford's Customs Compliance Manual states: "[i]n the event that the value is not completely and correctly shown, a 'provisional' disclaimer is stated on the invoice, thereby advising customs." Def.'s Ex. C; *see also* Pretrial Order, Schedule C ¶ 1. Ford's Supply Manual states: "[p]rovisional values must be used when actual values are not available and the words 'Provisional Value' must be shown on the commercial invoice." Def.'s Ex. C; *see also* Pretrial Order, Schedule C ¶ 1. Ford defined a "provisional" entry, invoice, value, or price as merchandise imported through Customs without knowledge of the final price. *See* TT at 215–16, 868–69, 1022. Ford would notify Customs that merchandise was entered at provisional value either on the invoice or on a separate memorandum to Customs. *See* TT at 1022–24; Pl.'s Ex. 85 & 86.
53. At the time of the subject entries were made, Ford had an *informal* procedure with its broker when to advise Customs that the invoice price was not the final price. *See* TT at 228–30, 332, 839–40, 869–71, 1022–24. Ford would orally instruct its broker to place the words "provisional pricing or value" on an invoice. *See* TT at 869–71, 992. Ford implemented formal procedures for provisional value with its broker in 1991, after the subject entries. *See* TT at 247 & 332; Pl.'s Ex. 107. The *formal* procedure required that all entries for tooling, dies, molds and machinery be entered with a letter alerting Customs that the value was provisional. *See* Pl.'s Ex. 107.
54. Without indicating provisional value on an entry summary, an import specialist would not know that the price listed was incomplete and to withhold liquidation. *See* TT at 216, 427–28, 493–94.
55. Prior to the FN–36 entries, Ford had used provisional values when entering machinery, tooling, dies, and presses. *See* TT at 868.
56. Ford had previously entered merchandise without alerting Customs that the entry was provisional. Ford would then later advise Custom in a CF 28 response that the prices declared had been provisional. When provisional values were first relayed to Customs in a CF 28 response, the information was accepted, treated as a prior disclosure and possibly subject to penalties. *See* TT at 430–31 & 507–08.
57. Between 1988 and 1991, there were no Customs regulations or directives requiring an importer to use the words "provisional value" or pricing on entry documents. *See* TT at 440, 476, 511, 870.

58. The entry summaries for the FN–36 dies did not indicate that the transaction value was provisional or subject to change. *See* TT at 229–30; Pl.'s Ex. 26E & 113.
59. There was a lack of communication between Ford's internal units about Ford's provisional value policy and when to use it. *See* TT at 705–06, 779–80 (stating "I have never used [provisional value] in 32 years."), 827–29; Pl.'s Ex. 2.
60. Ford had submitted internal customs training videos and manuals to Customs for review and suggestions in 1990–91. *See* Def.'s Ex. D, F, G, H, M.
61. In 2000, Customs published a compliance audit report reviewing Ford's compliance with Customs laws during the 1996 calender year. Overall, Ford is credited as having met an acceptable level of compliance. Areas where Ford was lacking included internal control procedures especially in verifying the reliability of its broker's work, maintenance of records, and ensuring that correct values were reported on entries. *See* Pl.'s Ex. 114.

D. Findings of Fact Related to Customs' CF 28s and Ford's Responses

62. Customs often sent CF 28s to importers when the imported merchandise was an automotive die because most dies usually had tooling or assists, which could affect dutiable value. *See* TT at 347, 388, 468–70. The issuance of CF 28s was fairly routine and it was not uncommon for Ford to request additional time to respond to CF 28s. *See* TT at 478–79 & 832–33. Information submitted as a response to a CF 28 was certified by the importer's signature to be true and correct. *See* Pl.'s Ex. 29, 30, 31, 113.
63. Answering CF 28s was not a high priority at Ford. *See* TT at 826–29 & 851–52.
64. Detroit Customs issued a CF 28 regarding entry 441–4823061–6 on March 28, 1989, to which Ford responded on November 20, 1989, and sent a supplemental response on August 6, 1991. *See* Def.'s Ex. BBBB; *see also* Pretrial Order, Schedule C ¶¶ 13, 15, 20; Pl.'s Ex. 113. Ford's response dated November 20, 1989, did not mention that Ford was conducting an internal audit. *See* Def.'s Ex. BBBB. The letter described the different dies imported for the FN–36 program and included copies of the base tooling order and sixteen of the seventeen amendments. *See* Def.'s Ex. BBBB.
65. Seattle Customs issued a CF 28 regarding entry 441–3103656–6 on March 2, 1989, reissued it on February 28, 1990, to which Ford responded on May 23, 1991, asking for an extension. *See* Pretrial Order, Schedule C ¶¶ 14 & 18; Pl.'s Ex. 29; Def.'s Ex. Y.
66. Seattle Customs issued a CF 28 regarding entry 441–3103684–8 on March 1, 1989, reissued it on December 5, 1990, to which Ford responded on January 9, 1991, and May 6, 1991, asking for

extensions. *See* TT at 480–81; Kruzich at Ex. 5; Pretrial Order, Schedule C ¶ 17; Pl.'s Ex. 31, 32, 51, 52. Ford's May 6, 1991, letter also stated that its delay in responding was because final audit results were soon available. Pl.'s Ex. 32. Seattle Customs met with Ford in late 1990 to finalize Ford's penalties in an unrelated Fuji dies case, after which this unanswered CF 28 was discussed. *See* TT at 872–74 & 897; Pl.'s Ex. 27.

67. Seattle Customs expanded the CF 28 reissued on December 5, 1990, to include entries 441–3103705–1, 441–3103778–8, and 441–3103777–0. *See* Pretrial Order, Schedule C ¶ 16; Pl.'s Ex. 31 & 54. In Ford's response, dated July 3, 1991, to these four Seattle entries, Ford only stated that a summons had been issued by Detroit Customs and that all future correspondence would be directed to the Detroit office. *See* Pl.'s Ex. 54.
68. Seattle Customs also issued a CF 28 for entry 441–3103780–4 on March 16, 1989, to which Ford responded on March 30, 1989, asking for a ninety day extension. *See* Pl.'s Ex. 2 at Ex. 7; Pl.'s Ex. 30.
69. As a practice, Customs accepted disclosures of values that had changed from the entered value in a CF 28 response. If additional duties were paid with the corrected value, Customs would accept the payment, check the information provided, and possibly refer the information to Customs' auditors or special agents for further review. *See* TT at 496–97.
70. Automotive dies were not automatically bypassed by Customs because they often had assists, were not the same type of die in each entry, and were fairly expensive items. *See* TT at 426–27, 448, 499. Ford's dies were not on bypass in Seattle or Detroit. *See* TT at 448 & 499.

II. Conclusions of Law

The Court has jurisdiction pursuant to 28 U.S.C. § 1582 (2000).[5] In actions brought for the recovery of any monetary penalty claimed under section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988), all issues are tried *de novo*, *see* 28 U.S.C. § 2640(a)(6) (2000), including the amount of the penalty. *See* 19 U.S.C. § 1592(e)(1). The level of culpability has a direct correlation to the

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[5] Relevant portions of the statute state:

> The Court of International Trade shall have exclusive jurisdiction of any civil action which arises out of an import transaction and which is commenced by the United States —
>
> (1) to recover a civil penalty under section 592 . . . of the Tariff Act of 1930 . . .
>
> (3) to recover customs duties.

28 U.S.C. § 1582.

maximum amount of penalty that can be assessed. *See* 19 U.S.C. § 1592(c).

Customs has alleged that Ford violated 19 U.S.C. § 1592, thereby depriving the United States of all or a portion of lawful duty through fraud, or in the alternative, gross negligence or negligence. *See* Compl. In pertinent part, 19 U.S.C. § 1592(a) states:

> Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence–
>
> (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of–
>
> (i) any document, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material . . .

19 U.S.C. § 1592(a). An act or omission is deemed material if it has the potential to alter the appraisement or liability for duty. *See* 19 C.F.R. pt. 171, App. B(A) (1988). The issue of materiality is for the Court to determine. *See United States v. Hitachi Am., Ltd.* ("*Hitachi I*"), 21 CIT 373, 386, 964 F. Supp. 344, 360 (1997), *aff'd in part and rev'd in part on other grounds*, 172 F.3d 1319 (Fed. Cir. 1999); *see also United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (stating that "the measurement of the materiality of the false statement is its potential impact upon Customs' determination of the correct duty for the imported merchandise").

A. Customs Failed to Prove that Ford's Conduct was Fraudulent

Fraudulent conduct "results from an act or acts (of commission or omission) deliberately done with intent to defraud" the United States and must be established by clear and convincing evidence. 19 C.F.R. pt. 171, App. B(B)(3); *see also* 19 U.S.C. § 1592(e)(2) (burden is on Customs). Fraud occurs if an importer "knowingly" enters goods by means of a material false statement or omission. *See Hitachi I*, 21 CIT at 402, 964 F. Supp. at 371. "Intent is a factual determination particularly within the province of the trier of fact." *Allen Organ Co. v. Kimball Int'l, Inc.*, 839 F.2d 1556, 1567 (Fed. Cir. 1988).

Based on the evidence and the testimony submitted during trial, the Court finds that Customs has failed to show by clear and convincing evidence that Ford intentionally violated 19 U.S.C. § 1592 when it entered the subject merchandise. Customs failed to show any intent by Ford to deliberately misrepresent the value of the 204 engineering purchase orders from Customs. Customs also did not show that Ford employees intentionally or knowingly misplaced pur-

chase orders or colluded with other employees to defraud the United States. Rather, the evidence demonstrated that Ford had in place internal compliance procedures. Such procedures illustrate Ford's attempt to comply with its legal obligations. Whether Ford's internal procedures ensured that Ford met its statutory obligations is not central to a fraud analysis. Rather, it is significant that Ford had measures in place because they contravene a showing of fraud.

Ford, for example, had customs compliance and supply manuals that instructed its employees to circulate copies of purchase orders to other units for upcoming importations for proper and smooth entry of merchandise. *See* Def.'s Ex. C. Also, Ford's internal provisional value policy was meant to ensure that Ford was forthright, rather than subversive with Customs. *See id*. Moreover, Ford responded to Customs' CF 28s about the subject merchandise rather than ignoring them, albeit often after many months had passed. *See e.g.*, Pl.'s Ex. 113; Def.'s Ex. BBBB; Pretrial Order, Schedule C ¶¶ 13, 15, 20. Ford's CF 28 responses commonly included tenders for unpaid duties. *See e.g.*, Pl.'s Ex. 39. Such procedures illustrate Ford's intent to comply with the statute. Without showing that Ford purposefully disregarded its statutory obligations with the intent to defraud the United States, Customs' allegation of fraud fails. The Court concludes that Customs failed to meet its burden showing that Ford deliberately disregarded its statutory obligations or acted with the requisite intent to defraud the United States.

B. Customs Has Established by a Preponderance of the Evidence that Ford's Conduct was Grossly Negligent.

Gross negligence arises "if it results from an act or acts (of commission or omission) done with actual knowledge of or wanton disregard for the relevant facts and with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. pt. 171, App. B(B)(2). "Wanton" is defined as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences." BLACK'S LAW DICTIONARY 1613 (8th ed. 2004). A defendant is liable for a grossly negligent violation of 19 U.S.C. § 1592 "if it behaved willfully, wantonly, or with reckless disregard in its failure to ascertain both the relevant facts *and* the statutory obligation." *Hitachi I*, 21 CIT at 406, 964 F. Supp. at 374 (emphasis retained). A finding of gross negligence requires the Court to determine that Ford's omissions of information from entry documents and its failure to comply with its statutory obligations was willful, wanton or reckless or that the evidence before the Court illustrates Ford's utter lack of care. *See Mach. Corp. of Am. v. Gullfiber AB*, 774 F.2d 467, 473 (Fed. Cir. 1985) (citation omitted).

Gross negligence involves a type of intent which is a question of fact and not law. *See United States v. Hitachi Am., Ltd.* ("*Hitachi II*"), 172 F.3d 1319, 1326 (Fed. Cir. 1999); *see also Allen*, 839 F.2d at

1567. Customs bears the burden to establish all the elements of the alleged violation. *See* 19 U.S.C. § 1592(e)(3). Customs must establish such elements by a preponderance of the evidence, which "is the general burden assigned in civil cases for factual matters." *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 769 (Fed. Cir. 1993). Preponderance of the evidence is "the greater weight of evidence, evidence which is more convincing than the evidence which is offered in opposition to it." *Id.* (quoting *Hale v. FAA*, 772 F.2d 882, 885 (Fed. Cir. 1985)).

Negligence is either failure "to exercise the degree of reasonable care and competence expected from a person in the same circumstances" or "in communicating information so that it may be understood by the recipient." 19 C.F.R. pt. 171, App. B(B)(1). Consequently, negligence does not require the trier of fact to determine intent. Section 1592(e)(4) of Title 19 of the United States Code derogates from common law negligence (*i.e.*, duty, breach, causation, and injury) by shifting the burden of persuasion to the defendant to show lack of negligence. *See Hitachi I*, 21 CIT at 380, 964 F. Supp. at 355. The statute removes the breach element from Customs' *prima facie* negligence case. *See id.* Accordingly, Customs must establish by a preponderance of the evidence that the materially false act or omission occurred. *See* 19 U.S.C. § 1592(e)(3). Once Customs has met its burden, Ford bears the burden to establish that it exercised reasonable care under the circumstances and that the alleged violation was not caused by its negligence. *See* 19 U.S.C. § 1592(e)(3); 19 C.F.R. pt. 171, App. B; *see also Hitachi I*, 21 CIT at 381, 964 F. Supp. at 355–56.

As a threshold issue, Ford asserts that Customs failed to offer into evidence ten of the eleven entry summaries at issue.[6] *See* Def.'s Post-Trial Br. at 24–26. Ford argues, that without the entry summaries admitted into evidence, the Court has no means of evaluating Customs' claims that the entered values were false or that Ford failed to notify Customs that the prices reflected therein were not final. *See id.* Ford's argument is flawed because the statutory language contemplates violations where the importer of record has either made material omissions or failed to act. *See* 19 U.S.C. § 1592(a). An importer may violate the statute by failing to provide Customs with entry documents in the first place. Pursuant to Ford's argument, the government would be precluded from successfully bringing an action pursuant to 19 U.S.C. § 1592 in instances where entry documents or specific entry information was never submitted to Customs. This

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[6] Ford is actually incorrect. Customs submitted the CF 7501 for entry number 441–3103684–8 as a separate exhibit. *See* Pl.'s Ex. 26E. Other entry summaries were admitted as parts of other exhibits. *See* Pl.'s Ex. 113 (including CF 7501s for entry numbers 441–4824795–8 and 441–4823061–6).

reasoning is untenable and contradicts the plain meaning of the statutory language.

The totality of the evidence submitted at trial provides the Court with ample evidence of the values Ford declared on its entry documents. Ford admitted that the invoice price stated in the entry documents was the purchase order price, and all the purchase orders are in evidence. *See* TT at 845; *see also* Pl.'s Ex. 24, 25, 26E, 71. Furthermore, Ford acknowledged that it did not enter the subject merchandise provisionally or disclose the existence of the 204 engineering purchase orders to Customs until its letter, dated August 6, 1991. *See* TT at 357; Pl.'s Ex. 39. Accordingly, the Court finds that there is sufficient evidence to evaluate Customs' claims that the entered values were false or that Ford failed to promptly notify Customs that the prices reflected therein were not final.

Based on the evidence submitted, the Court finds that Customs established by a preponderance that Ford's conduct was grossly negligent. Ford failed to account for the value of the engineering changes when it entered the subject merchandise. On multiple occasions, Ford failed to promptly notify Customs promptly of the value of the engineering purchase orders. This repeated failure constitutes a material omission because the engineering changes had an impact on the dutiable value of the FN–36 dies. Consequently, Ford's knowledge of and repeated indifference for the value of the engineering changes in its submissions to Customs constitutes a wanton disregard of its obligations.

1. Ford's Failure to Include or Notify Customs of the Engineering Changes at Entry was a Material Omission in Violation of 19 U.S.C. § 1484

Under 19 U.S.C. § 1484, an importer of record has the duty to present true and correct information at entry enabling Customs to properly assess duties on the merchandise. *See* 19 U.S.C. §§ 1484(a) & 1485 (1988); *see also* 19 U.S.C. § 1592(a). True and correct information includes, invoices with the purchase price in the currency of the purchase and any other documentation necessary for proper appraisement and classification. *See* 19 U.S.C. § 1484; *see also* 19 U.S.C. § 1481(a)(5) (1988); *United States v. Thorson Chem. Corp.*, 16 CIT 441, 448, 795 F. Supp. 1190, 1195 (1992). This duty encompasses an importer's obligation to notify Customs if the values on an entry summary are not final. *See Hitachi I*, 21 CIT at 387, 964 F. Supp. at 360 (stating that the importer's omission on entry documents of escalation clauses affecting price "had a potential impact on the correct duty and thus perpetrated a material omission").

During the relevant time, Ford had mechanisms in place to prepare for the entry of the subject merchandise. For example, Ford's internal units had procedures that facilitated the notification of upcoming importations so that each unit could do its job correctly. *See*

e.g., Def.'s Ex. C. Ford also had a provisional value policy designed to transmit information within Ford, to its broker, and ultimately to Customs that the value of certain merchandise would increase after entry. *See* TT at 228–30, 332, 839–40, 869–71, 1022–24; Def.'s Ex. C. Both pre-entry mechanisms failed to occur with the FN–36 entries, resulting in the wanton disregard for the engineering purchase orders. *See* TT at 229–30; Pl.'s Ex. at 24, 25, 26E, 113. Ford argues that the compliance mechanisms it had in place illustrates that it was not wanton. *See* Def.'s Post-Trial Br. at 18–19. Ford cites the following mechanisms in support: instructions to vendors to put "provisional pricing" on invoices; standing instructions to its broker to indicate provisional prices on entries; and a regular filing of a reconciliation of prices and duties to Customs after prices were finalized. *See id*. at 2. Of the three mechanisms Ford cites, the evidence established that the first two mechanisms failed to occur with respect to the FN–36 entries. The existence of the third mechanism is not adequately supported by the evidence.[7] Rather, the minimal mechanisms Ford may have implemented represent an institutional indifference to ensuring that Ford captured and reported the full transaction value of entered merchandise. Ford failed to include the value of the engineering changes known at the time of entry. Moreover, Ford knew that the prices declared at entry were not the final dutiable value and failed to notify Customs that such values were subject to change. Ford's institutional indifference to the existence of the engineering purchase orders constitutes an utter lack of care and therefore, a violation of 19 U.S.C. § 1592.

a. Ford Failed to Include the Value of the Engineering Changes When Entering the FN–36 Dies

An entry summary is the presentation made by an importer to Customs for entry of merchandise declaring classification numbers, rates of duty, and any supporting documents such as invoices. *See* TT at 352–53. Ford argues that it complied with 19 U.S.C. § 1484 because the prices listed on the invoices in the entry summaries were the only prices known at the time of entry. *See* Def.'s Post-Trial Br. at 11–12. Ford's argument fails in two ways. First, the initial entry for the FN–36 dies was made on February 2, 1989, yet the initial engineering purchase order was dated November 29, 1988. *See* Pl.'s Ex. 25, 69, 113; Pretrial Order, Schedule C ¶ 11. Accordingly, the Court concludes that Ford knew or should have known at the time of

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[7] Mr. Gibson testified that Ford reconciled programs after entry by comparing values declared at entry to Customs against amounts actually paid to the supplier. If there was a discrepancy, Ford would tender any additional duties owed to Customs. *See* TT at 870. Conflicting evidence was submitted to the Court about when Ford began conducting reconciliations. *See e.g.*, TT at 875–77 & 884–85; Pl.'s Ex. 2 & 99A. Therefore, the Court finds that Ford failed to show that it had a reconciliation program in place prior to and during the FN–36 program.

importation that the value of the FN–36 dies was not solely the base tool order and amendments. The entry value of the FN–36 dies *should have* included any engineering changes dated before February 2, 1989. Ford, however, failed to provide the true and complete value of the merchandise because it did not include the engineering changes known prior to entry.

Second, on their face, the purchase orders provide enough information to cross-reference the base tool order and amendments to the 204 engineering purchase orders in three different ways. *See* Pl.'s Ex. 24 & 25. First, the 204 engineering purchase orders begin with tool order T524675, which is dated November 29, 1988. *See* Pl.'s Ex. 25. This tool order unambiguously states that it replaces amendments 8, 9 & 10 to the base tool order, T510288. *See id*. Second, amendment 11 to the base tool order has a handwritten notation that states it is "reissued on T524675," which is the initial engineering purchase order. *See* Pl.'s Ex. 24. Third and most significantly, the project number "1D90A00" was printed on the base tool order, amendments, and most of the engineering purchase orders to track changes and costs made in the FN–36 program. *See* TT at 775–76; Kruzich at 19–23; Pl.'s Ex. 24, 25, 105. A review of purchase orders by project number should have encompassed the base tool order, seventeen amendments, and 204 engineering purchase orders. Thus, Ford's customs unit should have been able to account for the engineering changes and convey the correct information to its broker for entry. Ford offered no evidence explaining how its customs unit missed the links between the base tool order and the engineering changes when its accounting unit was able to track all the purchase orders. *See* Pl.'s Ex. 99A (internal audit dated April 30, 1991, capturing all the engineering changes). Accordingly, the Court concludes that Ford exhibited a lack of care and indifference. Ford ignored the timing and cross-references between all the purchase orders which attributed to the undervaluation of the FN–36 dies.

b. Ford Failed to Use or Check Its Provisional Value Policy Regarding the FN–36 Dies

Ford contends that it had no legal obligation to enter the dies "provisionally" and did so voluntarily. *See* Def.'s Post-Trial Br. at 13. Ford also argues that the legend on each purchase order, submitted with Ford's CF 28 response dated November 20, 1989, placed Customs on notice that the prices declared at entry were not final. *See id*. at 3. The plain language of the legend, however, indicates that a final price adjustment could occur in crediting the buyer, *i.e.* Ford receiving a credit on money paid, which is different from an increase in price that would affect dutiable value. *See* Pretrial Order, Schedule C ¶ 9; Pl.'s Ex. 24 & 25. Ford's provisional value policy was a mechanism implemented by Ford to satisfy its 19 U.S.C. § 1484 legal obligation. Provisional value would be marked somewhere on the entry

documents, either on the invoice or on a separate memorandum to Customs, notifying Customs that the value of the merchandise was not final. *See* TT at 215–16, 228–30, 332, 839–40, 868–71, 1022–24; Pl.'s Ex. 85 & 86; Def.'s Ex. C. When Customs knew that an entry's value was not final, it would withhold liquidation until the final value was known. *See* TT at 212–16, 427–28, 493–94. Ford correctly asserts that between 1988 and 1991, there was no Customs regulation or directive requiring an importer to use the words "provisional pricing." *See* TT at 440, 476, 511, 870. Ford, however, should have known its legal duty under 19 U.S.C. § 1484 to notify Customs if the value at entry was not the complete and final value. *See* 19 U.S.C. § 1484.

Ford's duty to be forthright on its entry documents remained regardless if Customs was aware of Ford's provisional value policy. Ford was a sophisticated importer. *See* TT at 964. Moreover, Ford had an internal provisional value policy and had marked entries as provisional before. *See* Pl.'s Ex. 85 & 86; Def.'s Ex. C. Ford understood that it had an obligation to notify Customs if the price at entry was not complete. *See* Kruzich at 40–42. Otherwise Ford would not have implemented its provisional value policy. The evidence demonstrated that automotive dies were a type of merchandise that Ford historically marked as provisional because it knew the price would usually change after entry. *See e.g.*, TT at 868, Pl.'s Ex. 85, 86, 107; Def.'s Ex. C. Ford should have notified Customs that the price stated on the entry summaries was not final because Ford knew that the price of the dies did not include the engineering changes or the price was bound to increase. Ford failed to mark the subject entries as provisional. *See* TT at 229–30; Pl.'s Ex. 26E & 113. This was a direct failure and lapse of Ford's provisional value policy, and a material omission affecting Customs' ability to assess duties correctly.

There was a lack of communication among the Ford units about how and when to apply its provisional value policy. *See* TT at 705–06, 779–80, 827–29; Pl.'s Ex. 2. With respect to the 204 engineering purchase orders omitted from the entry documents, there was a failure within Ford's purchasing unit to transmit copies of these purchase orders to the other Ford units and the broker. *See* Pl.'s Ex. 105; *see also* TT at 163–73; Pl.'s Ex. 2. No witness explained why the 204 engineering purchase orders were either not received by Ford's customs unit or not included in dutiable costs. The only explanation given by Ford was that an internal computer system caused all the engineering purchase orders to be separately numbered rather than issued as amendments to the base tool order. *See* TT at 167–68; Pl.'s Ex. 2, 99, 105. Ford's explanation, however, is not reasonable. Ford should have had control mechanisms in place to ensure that its provisional value policy was being implemented or used properly. Without any control mechanisms, Ford's behavior exhibits

an indifference to whether its provisional value policy was being implemented or not defeating its purpose.

Ford's failure to follow its provisional value policy also affected Ford's communications to its broker. Ford did not formalize its provisional entry policy with its broker until November 1991, well after the subject entries. *See* TT at 247 & 332; Pl.'s Ex. 107. In early 1989, when the FN–36 dies were entered, Ford's policy was to tell its broker to enter certain merchandise provisionally on a case by case basis. *See* TT at 228–30, 839–40, 869–71. Ford would convey this request through verbal or written communication, but did not have a set practice. *See* TT at 869–71 & 992. Even if the broker received copies of the engineering purchase orders per Ford's policies, the broker would not have known to enter any merchandise provisionally unless specifically instructed to do so by Ford. More importantly, Ford did not have post-entry mechanisms in place to verify that the information the broker submitted to Customs was true and correct. *See* TT at 824–25; Pl.'s Ex. 40 & 99. Ford's failure to have a clear policy with its broker on when to use provisional value and its failure to verify information submitted by its broker exhibits Ford's indifference to satisfying its Customs obligations. Ford did not present evidence that it took any steps to ensure the use of its policy, internally or with its broker. Thus, Ford's failure to implement or check its provisional value policy demonstrates an indifference amounting to gross negligence.

2. Ford's Failure to Notify Customs "At Once" of the Engineering Purchase Orders was a Material Omission in Violation of 19 U.S.C. § 1485

Pursuant to 19 U.S.C. § 1485(a), an importer "will produce *at once* to the appropriate customs officer any invoice, paper, letter, document, or information received showing that any such prices or statements are not true or correct." 19 U.S.C. § 1485(a)(4) (emphasis added). The statute obligates importers to immediately report to Customs any new information showing that the prices declared at entry were incorrect. *See Hitachi I*, 21 CIT at 382, 964 F. Supp. at 356. In *Hitachi*, an escalation clause in the contract gave rise to a possible post-entry increase in the value of the imported merchandise. *See id.* at 371, 964 F. Supp. at 344. The importers failed to disclose the escalation clause on any of the entry documents, or later when it made payments under the escalation clause. *See id.* The Court found this failure to be in violation of 19 U.S.C. §§ 1484 and 1485. *See id.* at 381–82, 964 F. Supp. at 356. Under 19 U.S.C. § 1485, an importer must notify Customs of post-entry payments affecting dutiable value "at once" unless other arrangements have been made. *Cf. id.* at 390, 964 F. Supp. at 362–63. Ford failed the 19 U.S.C. § 1485 "at once" duty when it 1) failed to fully answer Cus-

toms' CF 28s, and 2) failed to promptly disclose the information contained in its internal audit of the FN–36 program.

a. Ford Failed to Fully Answer Customs' CF 28s

The testimonial and documentary evidence established that Ford did not have any procedures in place to compare information filed with Customs against purchase orders or payment records unless a CF 28 was issued by Customs. *See* TT at 821–32; Kruzich at 42–45; Pl.'s Ex. 40 & 99. A Customs CF 28 was a request for information sent to importers when Import Specialists had questions regarding an entry. TT at 347 & 825–26. Various Ford employees knew a problem existed between Ford's customs and purchasing units regarding advance notice of upcoming importations because Ford's customs unit would "discover" purchase orders when answering CF 28s. *See* TT at 821–32; Kruzich at 29–45. In some instances, the issuance of a CF 28 was the first time Ford's customs unit even learned that an entry had been made. *See* TT at 821–32; Kruzich at 42–45. Ford's customs unit, however, did not advise the purchasing unit supervisors of this issue, thus nothing was done to remedy the problem. *See* Kruzich at 44–45. The evidence further demonstrated that the accepted practice at Ford was to wait for Customs to issue a CF 28 as a means of checking whether or not Ford had properly declared all dutiable values at entry. *See* TT at 823–30 & 850–52; Kruzich at 27–45; Pl.'s Ex. 40 & 99.

Ford had numerous opportunities to advise Customs of the 204 engineering purchase orders each time it responded to a CF 28. Testimonial evidence explained that Customs had a practice of accepting prior disclosures in CF 28 responses. *See* TT at 496–97. While CF 28s are routine, Ford did not take them very seriously, and made minimal efforts to respond. *See* TT at 826–29 & 851–52. Customs issued CF 28s for seven of the eleven subject entries, to which Ford substantively responded only to two. *See* Pl.'s Ex. 29, 30, 31, 32; Def.'s Ex. BBBB. The documentary evidence shows that of the two substantive CF 28 responses Ford submitted, the earliest response was eight months after the CF 28 was originally issued. *See* Def.'s Ex. BBBB. The other CF 28 response was twenty-six months after Customs initially issued the CF 28. *See* Pl.'s Ex. 31 & 32.

In answering the CF 28s, Ford should have compiled all the information it had about the inquired entry number and attempt to answer each CF 28 completely and thoroughly. If Ford had thoroughly answered each CF 28, a search by project number would have revealed the engineering purchase orders because all the purchase orders had the same project number ("1D90A00") on them. Of Ford's two substantive CF 28 responses, both failed to disclose the engineering changes and their affect on the dutiable value of the FN–36 dies. Ford's CF 28 response dated November 20, 1989, references the base tool order and sixteen amendments for the FN–36 dies. *See*

Def.'s Ex. BBBB. The cost for the FN–36 dies stated in the letter was $67,834,926, which was also the amount listed on amendment 16. *See* Pl.'s Ex. 24; Def.'s Ex. BBBB. Again, the engineering purchase orders were first dated November 28, 1988. *See* Pl.'s Ex. 25. Had Ford's response been complete, it should have reported the 204 engineering purchase orders to Customs in its November 20, 1989, response as a prior disclosure. Ford's CF 28 response dated May 6, 1991, stated that final audit results were not yet available and requested an additional thirty days to respond. *See* Pl.'s Ex. 32. Ford's customs unit was aware of an internal audit, *see* TT at 879–81 & 942–43, yet, Ford still did not disclose the engineering purchase orders to Customs until August 6, 1991, after a summons had been issued. *See* Pl.'s Ex. 38 & 39. Ford's May 23, 1991, response only asked for an extension to "confirm that final audit and price adjustments are in agreement" with its final CF 28 response. Def.'s Ex. Y. For the remaining four CF 28s, Ford first asked for an extension and then informed Seattle Customs that it would be directing its responses to Detroit Customs because of the June 6, 1991, summons. *See* Pl.'s Ex. 31 & 54.

In each of Ford's CF 28 responses to Customs, Ford had enough knowledge to disclose the engineering purchase orders but failed to utilize the opportunity. The Court concludes that Ford's reliance on Customs' practice of sending CF 28s is not a valid excuse for its failure to declare full value at entry or to notify Customs that the invoice price was not final. *Cf. United States v. Nippon Miniature Bearings, Corp.*, 25 CIT 638, 641, 155 F. Supp. 2d 701, 705 (2001) (burden is on the importer to provide true and accurate information to Customs, and not on Customs to ferret out those importers not in compliance). Again, Ford's continual and systematic indifference to the existence of the engineering purchase orders and their affect on dutiable value constitutes grossly negligent conduct.

b. Ford Did Not Disclose the Information Contained in Its Internal Audit "At Once"

The only evidence presented to the Court of a post-entry mechanism that accounted for all the FN–36 costs was an internal audit completed by Ford on April 30, 1991. *See* Pl.'s Ex. 99A. For each engineering order, the internal audit broke down the work attributable to OIW and to OAC. *See* Pl.'s Ex. 99A. This information was important because work completed by OIW in Japan increased the dutiable value of the FN–36 dies. While Customs knew that Ford was conducting an internal audit, Customs had no information as to the scope of the audit or if the audit would affect dutiable value of the subject entries. *See* Pl.'s Ex. 32 & 97; Def.'s Ex. Y. Ford had informed Customs that it was conducting an internal audit on March 8, 1991. *See* TT at 115–19; Pl.'s Ex. 97. Also, in its May 6, 1991, CF 28 response to Seattle Customs, Ford used the audit as an excuse to re-

quest additional time. *See* Pl.'s Ex. 32. Merely notifying Customs that an internal audit was taking place, however, did not provide Customs with the information it had requested to determine whether correct prices had been declared on the entry summaries. Therefore, Customs was not able to calculate proper duties.

Furthermore, the Court finds that Ford knew the values of the engineering purchase orders before its audit was published on April 30, 1991. Ford, for example, issued amendment 17 to the base tool order, dated January 16, 1991, for an audit reduction of $1,758,966. *See* Pl.'s Ex. 24. Customs, however, did not receive amendment 17 until seven months later, as part of Ford's August 6, 1991, letter which also disclosed the 204 engineering purchase orders. *See* Pl.'s Ex. 39. Neither amendment 17 nor the attachments to Ford's August 6, 1991, letter explain the audit reduction. *See* Pl.'s Ex. 24, 39. The Court finds that Ford's failure to disclose its internal audit results "at once" is another example of its indifference and lack of care to fulfill its Customs obligations.

When Ford finally informed Customs for the first time of the existence of the 204 engineering purchase orders, it did so in a letter dated August 6, 1991. *See* Pl.'s Ex. 39; *see also* TT at 357. The letter merely listed the engineering purchase orders and the amount of each, but lacked information about which Ogihara company completed the work. *See* Pl.'s Ex. 39. Ford again did not disclose the relevant information contained in its internal audit to Customs. This information would have helped Customs determine which engineering changes affected the dutiable value of the FN–36 dies. Rather, the contents of Ford's internal audit results were not revealed to Customs until after the Pre-Penalty Notice was issued in 1994. *See* TT at 641–46; Pl.'s Ex. 41 & 43. Testimony at trial established that Ford's internal audit was submitted after Customs published its own audit of the FN–36 program on July 6, 1992. *See* TT at 641–42. Therefore, Ford's internal audit was not used by Customs in its audit, however, Ford had submitted other documents to Customs during their audit. *See* TT at 630–31; Pl.'s Ex. 40. The information contained in Ford's audit about which Ogihara company had done the various engineering changes would have been very relevant to Customs' audit in determining the value of the FN–36 dies. Ford's failure to notify Customs of the changes to the value of the FN–36 dies upon completion of Ford's internal audit violated the "at once" duty of 19 U.S.C. § 1485.

Ford's indifference to the engineering purchase orders is illustrated by the gross failure of its provisional value policy and the lapse of communication between its internal units. Ford also had opportunities to disclose the existence of the 204 engineering purchase orders to Customs in CF 28 responses and repeatedly failed to do so until after Customs issued a summons. Repeated neglect of a legal duty rises to indifference and an utter lack of care. Based on the evi-

dence presented, the Court finds that Ford's indifference to its duty to disclose "at once" the value of the engineering changes constitutes grossly negligent conduct in violation of 19 U.S.C. § 1485.

C. Ford Did Not Make a Valid Prior Disclosure

The maximum penalty an importer may be assessed is significantly reduced if the importer makes a prior disclosure revealing the facts and circumstance relating to a violation. *See* 19 U.S.C. § 1592(c)(4). To make a prior disclosure, the person concerned must disclose the circumstances of a violation before, or without knowledge of, the commencement of a formal investigation and make a tender of any actual loss of duties. *See id.*; 19 C.F.R. § 162.74(a) (1991). A violator "discloses the circumstances of the violation" by providing Customs with a written statement which: (1) identifies the class or kind of merchandise involved; (2) identifies, by entry number or by the port of entry and approximate dates of entry, the importation included in the disclosure; (3) specifies the material omission or false statement made at entry; and (4) sets forth the true and accurate information or data which should have been provided in the original entry documents. *See* 19 C.F.R. § 162.71(e). A formal investigation is considered to be commenced on the earliest of the following: (1) the date recorded in writing in the investigatory record, including contemporaneous notes, as the date upon which an agent believed the possibility of a violation existed; (2) the date an investigating agent properly identified herself or himself and the nature of her or his inquiry, in writing or in person and inquired about the disclosed violation; or (3) the date an investigating agent, after properly identifying herself or himself and the nature of her or his inquiry, requested specific books and records relating to the disclosed violation. *See* 19 CFR § 162.74(d)(4). Furthermore, if before the claimed prior disclosure a person is informed of "the type of or circumstances of the disclosed violation," then the person is "presumed to have had knowledge of the commencement of a formal investigation." 19 C.F.R. § 162.74(f). This presumption, however, may be defeated with evidence that the person did not know an investigation had commenced with respect to the disclosed information. *See id.*

1. Customs Commenced Its Investigation of the FN–36 Program by March 8, 1991.

The evidence established that Ford did not make a prior disclosure because Customs was already investigating the FN–36 dies and Ford knew or should have known it was being investigated by the time it disclosed its violations. Customs began its investigation of Ford as an outgrowth of the OAC investigation. *See* TT at 82–85 & 268; Pl.'s Ex. 33; Def.'s Ex. YYY & ZZZ. Customs argues that it commenced its investigation in October 1990 when Mr. Turner met Mr. Gibson. *See* Pl.'s Post-Trial Br. at 22–23. Ford counters that Customs

did not commence its investigation until August 21, 1991. *See* Def.'s Post-Trial Br. at 22–23. The October 1990 meeting is recorded in OAC ROI # 8, and is described in a few short sentences.[8] *See* Pl.'s Ex. 33. Several pages of the ROI recount meetings Mr. Turner had with GM indicating that his focus was on GM's interactions with OAC at that time. *See id*. Both Messrs. Neckel and Turner stated that Ford was under investigation by late 1990, *see* TT at 339–40 & 536, but the documentary evidence simply does not satisfy 19 C.F.R. § 162.74(d)(4) to sustain such a finding. Therefore, the Court concludes that Ford was not being investigated in October 1990 because of the minimal contemporaneous notes recording the events that transpired therein.

Based on the evidence, the Court concludes that Mr. Turner suspected a violation, regarding Ford, may have existed by March 8, 1991. An investigating agent is required to put a date in writing, in the investigative record including contemporaneous notes, when she or he received or discovered information causing her or him to believe the "possibility" of a 19 U.S.C. § 1592 violation existed. *See* 19 C.F.R. § 162.74(d)(4)(i). On March 8, 1991, Mr. Turner received information that Ford was compiling previously requested documents regarding Ogihara and the FN–36 dies and that Ford was conducting an internal audit. *See* TT at 109, 115–19, 316, 894–96; Pl.'s Ex. 97. Mr. Turner's dated notes are a part of the investigative record, and mention dies; entries in Seattle, Detroit, and Los Angeles; and an internal audit at Ford. *See* Pl.'s Ex. 97. The regulations require that Customs record a date in writing in the investigative record, which specifically includes contemporaneous notes, and Mr. Turner did so with his notes of March 8, 1991. Accordingly, Ford's argument that Customs did not commence its investigation until August 21, 1991, fails. *See* Def.'s Post-Trial Br. at 22–23. If there was still any doubt, the arrival of a Customs summons on June 7, 1991, should have alerted Ford an investigation was underway. Pursuant to 19 CFR § 162.74(d)(4)(i), the Court finds that Mr. Turner's notes along with the trial testimony established that by March 8, 1991, Customs had commenced its investigation of Ford.

2. Ford Knew or Should Have Known of the FN–36 Investigation by June 7, 1991 and Failed to Disclose Its Violation Until August 6, 1991

Ford knew or should have known that it was being investigated by June 7, 1991, when Customs issued a summons for the FN–36 program. *See* TT at 126–31, 540–41, 600–01; Pl.'s Ex. 38 & 112. A person

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[8] In some situations, the presence of a special agent and what transpired at the meeting may indicate that an investigation has commenced. Given the length of time since the events in question, however, the Court relies on the documentary evidence to corroborate the testimony of Messrs. Turner, Neckel, and Gibson.

may still receive prior disclosure treatment if the disclosure was made prior to knowledge of the investigation. *See* 19 U.S.C. § 1592(c)(4); 19 C.F.R. § 162.74(f). A party claiming lack of knowledge of the commencement of an investigation has the burden to prove that lack of knowledge. *See* 19 C.F.R. § 162.74(f). Based on the evidence, the Court finds that Ford failed to prove its lack of knowledge.

The June 7, 1991, summons requested documents from Ford regarding the FN–36 dies and was very expansive in scope. *See* Pl.'s Ex. 38. Ford should have known that it was no longer a potential witness in OAC's investigation, but had become a target of a Customs investigation itself. To deliver the summons, Messrs. Turner and Neckel met with Mr. Gibson and other Ford representatives. *See* TT at 130–31, 541–42, 881–82; Pl.'s Ex. 112. Ford did not offer persuasive evidence that it did not know about Customs' investigation after the June 7, 1991, summons was issued. Therefore, the Court concludes Ford knew or should have known that it was being investigated by June 7, 1991.

Ford's letter dated August 6, 1991, revealed the existence of 204 engineering purchase orders for the first time to Customs.[9] *See* Pl.'s Ex. 39; *see also* TT at 131–38, 355–57, 627–28; Pl.'s Ex. 74. This letter is the only communication that could qualify as a prior disclosure. The letter disclosed the circumstances of Ford's violation because it was a written statement, identifying the merchandise and entry number involved, disclosed the engineering purchase orders, and explained how they affected the dutiable value of the subject entries, thereby satisfying 19 C.F.R. § 162.71(e). The violation addressed in the letter was the material omission of the engineering purchase orders which affected the value of the FN–36 dies and ultimately the duty owed. *See* Pl.'s Ex. 39. Ford also tendered unpaid duties on November 22, 1991, as required by 19 C.F.R. § 162.74(a). *See* Pl.'s Ex. 39; Def.'s Ex. BB.

Customs commenced its investigation of Ford by March 8, 1991. Since Ford had knowledge of the investigation by June 7, 1991, and did not disclose the engineering purchase orders until August 6, 1991, the Court concludes that Ford failed to make a disclosure prior to its knowledge of the investigation. Therefore, Ford did not satisfy the requirements under Customs' regulations for prior disclosure treatment.

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[9] The August 6, 1991, letter also claimed that the engineering purchase orders were "discovered" in April 1991 because they were not cross-referenced to the base tool order. The Court is not persuaded by this claim. Again, all the purchase orders (base tool order, seventeen amendments, and engineering changes) had the same project number on them, precisely so that they could be tracked and cross-referenced.

D. Appraisement of Merchandise and Loss of Revenue

Pursuant to 19 U.S.C. § 1592(d), the United States may collect any lawful duties owed resulting from a 19 U.S.C. § 1592(a) violation notwithstanding 19 U.S.C. § 1514 (finality of liquidations) whether or not a monetary penalty is assessed. *See* 19 U.S.C. § 1592(d). The Court must determine the loss of revenue. *See* 19 U.S.C. § 1592(e). Pursuant to 19 U.S.C. § 1401a(a)(1)(A), imported merchandise is appraised at the transaction value, which is the "price actually paid or payable" plus other enumerated costs. *See* 19 U.S.C. §§ 1401a(a) & (b) (1988).

Customs' Regulatory Audit reviewed the values for the engineering changes submitted by Ford in its August 6, 1991, letter and determined that Ford underdeclared the value of the FN–36 dies by $16,816,296 and owed $689,775 for unpaid duties. *See* Pl.'s Ex. 40. After the Pre-Penalty Notice, dated January 10, 1995, Ford made submissions requesting reappraisal of the value and loss of revenue. *See* Pl.'s Ex. 41, 43. As a result of the reappraisal, Customs' Penalty Notice stated a revised appraisal value of the FN–36 dies as $84,393,564. *See* Pl.'s Ex. 43. Thus, Customs determined that Ford had not declared $21,314,111 in value. *See id.* Customs calculated a loss of revenue in duties to the United States of $874,270, of which $184,495, was unpaid. *See id.* The unpaid duty of $184,495, is the remaining loss of revenue sought by Customs in this action.

Ford argues that the FN–36 dies were only undervalued by $6,697,291 and Customs' total loss of revenue was $274,588.93. *See* Def.'s Post-Trial Br. at 28–30. Ford further states that because Customs only introduced one of the twelve entry summaries into evidence, the loss of revenue must be apportioned *pro rata* over all the entries. *See id.* at 30. Thus, Ford argues the loss of revenue for the admitted entry summary is $39,760.48. *See id.* The Court has already determined that there is substantial evidence establishing the prices Ford stated on its entry summaries. Accordingly, the Court finds Ford's argument is without merit.

Ford argues that it submitted evidence of various adjustments in support of its proposed valuation. *See* Def.'s Post-Trial Br. at 28–30. These adjustments include: United States costs paid to third party vendors, audit credits, FN–36 entries made by OAC, and entries of FN–36 functional panels. *See id.* The Court finds that Ford has failed to show that such adjustments were part of the price actually paid or payable for the FN–36 dies. Ford's proposed United States costs paid to third party vendors do not have a sufficient indicia of reliability that they were included in the cost of the FN–36 dies. *See* Def.'s Ex. III. Ford's proposed audit credits include an audit adjustment that was listed on amendment 17 to the base tool order, which was captured in Customs' Regulatory Audit report. *See* Pl.'s Ex. 40; Def.'s Ex. KKK. Ford also proposed an audit credit payment made on Ford's FN–10 program, which is unrelated to the FN–36 program

and not sufficiently explained by Ford. *See* Def.'s Ex. KKK. The third adjustment Ford claims is for FN–36 entries made by OAC, which are not relevant because Ford was not the importer of record for these entries. *See* CCC, EEE, FFF. The fourth adjustment claimed is for entries of FN–36 functional panels, imported by Ford, *see* Def.'s Ex. PP, Collective Def.'s Ex. QQ, which do not clearly indicate that they are part of the FN–36 dies. Ford claims that the functional panels were purchased under amendment 15 to the base tool order. *See* Def.'s Post-Trial Br. at 29–30. The Court, however, is not persuaded by testimony and there is no supporting link between the tooling breakdown description on amendment 15 and the functional panels. *See* TT at 788–91; Pl.'s Ex. 24; Def.'s Ex. PP, Collective Def.'s Ex. QQ. Customs considered various adjustments that Ford proposed and revised its numbers for the undeclared value and loss of revenue. *See* Pl.'s Ex. 43. The adjustments that Ford claims do not establish a truer value of the FN–36 dies.

Ford also argues that it is entitled to recoup any overpayments it has made to reduce or satisfy any loss of revenue and/or penalties assessed in its counterclaim.[10] *See* Def.'s Post-Trial Br. at 30–31. The Court, however, finds that Ford's appraisement is incorrect and no overpayment exists. Therefore, Ford's counterclaim is dismissed. Based on the documentary and testimonial evidence, the Court determines that Ford undervalued the FN–36 dies by $21,314,111, the loss of revenue to the United States was $874,270, and Ford owes $184,495 for unpaid duties.

E. Assessment of Penalties

For grossly negligent violations of 19 U.S.C. § 1592(a), the maximum penalty is the lesser of the domestic value of the merchandise or four times the loss of duties. *See* 19 U.S.C. § 1592(c)(2); *see also* 19 C.F.R. § 162.73(a)(2). The plain language of the statute only sets maximum penalties and does not establish minimum penalties, nor does it require the Court to begin with the maximum and reduce that amount in light of mitigating factors. *See United States v. Modes, Inc.*, 17 CIT 627, 635, 826 F. Supp. 504, 512 (1993). The court "possesses the discretion to determine a penalty within the parameters set by the statute." *See id.* at 636, 826 F. Supp. at 512 (citations omitted). This court has identified a number of factors to be considered when assessing a penalty in *Modes*, 17 CIT at 636, 826 F. Supp. at 513 and *United States v. Complex Mach. Works Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315 (1999). Those factors are:

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[10] Ford derives its overpayment of $415,186.07 from the $689,775 tendered to Customs on November 22, 1991, minus its loss of revenue calculation of $274,588.93. *See* Def.'s Post-Trial Br. at 31.

1. The defendant's good faith effort to comply with the statute
2. The defendant's degree of culpability.
3. The defendant's history of previous violations.
4. The nature of the public interest in ensuring compliance with the regulations involved.
5. The nature and circumstances of the violation at issue.
6. The gravity of the violation.
7. The defendant's ability to pay.
8. The appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business.
9. That the penalty not otherwise be shocking to the conscience of the Court.
10. The economic benefit gained by the defendant through the violation.
11. The degree of harm to the public.
12. The value of vindicating the agency authority.
13. Whether the party sought to be protected by the statute had been adequately compensated for the harm.
14. And such other matters as justice may require.

See Complex Mach., 23 CIT at 949–50, 83 F. Supp. 2d at 1315 (*citing Modes*, 17 CIT at 636, 826 F. Supp. at 513; *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 764–65 (1st Cir. 1985)(applying an earlier version of 19 U.S.C. § 1592)). The first ten factors relate to deterrence, the next three are public policy concerns, and the final factor is a general discretion provision. *See Complex Mach.*, 23 CIT at 950, 83 F. Supp. 2d at 1316. Given the clear Congressional preference for deterrence, the Court will, give more weight to the deterrence factors than the public policy factors. *See id.* Under 19 U.S.C. § 1592(c), the maximum penalty is the lesser of four times the loss of revenue or the domestic value of the merchandise. *See* 19 U.S.C. § 1592(c). The lawful duty which the United States was deprived of is $874,270, considerably less than the domestic value of the merchandise, which is approximately $84 million. *See* Pl.'s Ex. 43. The maximum penalty the Court may assess is $3,497,080, four times $874,270. Based on an analysis of the deterrence and public policy factors, the Court determines that $3,000,000 represents a just penalty in this case.

1. Analysis of the Deterrence Factors Place Ford in the Higher Range of Potential Penalties

Of the deterrence factors, the first three are indicia of the defendant's character. *See Complex Mach.*, 23 CIT at 950, 83 F. Supp. 2d at 1316. Ford's practices and procedures when entering the FN–36 dies indicates a minimal good faith effort in complying with the statute. Ford was a large sophisticated importer making hundreds of entries each year, and had intimate experience with the Customs laws. *See* TT at 964. Here, however, Ford blatantly failed to follow its pro-

visional value policy, internally and with its broker; failed to account for and promptly report the engineering purchase orders to Customs; and had no mechanisms in place to verify whether all dutiable values had been reported to Customs. In slight mitigation, Ford had internal customs policies with manuals and training videos to apprise its employees of Ford's statutory obligations. *See e.g.*, Def.'s Ex. C, D, F, G, H, M. While Ford made an effort to comply with Customs' obligations, Ford did not have mechanisms in place to check whether its policies were working. Good faith cannot merely be the appearance of an effort before entries are made, but also must encompass post-entry procedures to ensure effectiveness. Ford's conduct rises to an indifference that cannot be characterized as a good faith effort to fulfill its Customs obligations truthfully and correctly.

Ford is also highly culpable. Ford was systematically indifferent to properly declaring the value of the engineering purchase orders. Ford states that its failure to issue the purchase orders as amendments to the base tool order was "to expedite work to meet the launch date of the FN–36." Pl.'s Ex. 105. Regardless, Ford had the burden to ensure that all dutiable values were captured and declared to Customs upon entry or "at once" after receiving knowledge that the value had changed. *See* 19 U.S.C. §§ 1401a, 1484, 1485. Ford's conduct related to the importation of the FN–36 dies implies an internal problem at Ford from 1988 through 1991, which is also evidenced by Ford's multiple Customs violations during the same period. At trial, documentary and testimonial evidence established that Ford was being investigated for other violations occurring contemporaneously to the FN–36 investigation. For example, the primary purpose of Ford's meeting with Seattle Customs in late 1990 was to finalize Ford's penalties in an unrelated Fuji dies case. *See* TT at 872–74 & 897. Ford was also being investigated on whether it had declared all of its assists and indirect payments for vehicles and vehicle components. *See* Def.'s Ex. CCCC. Customs' audit report of the FN–36 program also included an audit of Ford's Tempo project, and concluded a loss of revenue in that project. *See* Pl.'s Ex. 40. Overall, during the subject entries, Ford exhibited an indifference to whether its minimal procedures were carried out correctly, which weighs towards a heavier penalty.

The fourth through sixth factors speak to the seriousness of the offense. *See Complex Mach.*, 23 CIT at 950, 83 F. Supp. 2d at 1316. The public interest at issue is the accurate submission of documentation to Customs and the prompt disclosure of information that affects the proper assessment of duties required on imported merchandise. "These are weighty interests, contravention of which necessitates the imposition of a penalty of some substance." *Id.* at 952, 83 F. Supp. 2d at 1317. The nature and circumstances of the violations at issue present a picture of repeated indifference to reporting the engineering purchase orders resulting from poor internal sys-

tems designed to ensure proper compliance with Customs laws. Ford repeatedly missed opportunities to correct the value of the FN–36 dies. The nature and the circumstances surrounding Ford's entry of the subject merchandise weighs heavily in favor of a significant penalty. The gravity of the violation may be considered in terms of frequency of the violations, amount of duties lost to the United States, and the domestic value of the imported goods. *See id.* at 953, 83 F. Supp. 2d at 1317. Here, Ford failed to properly account for the engineering purchase orders and repeatedly failed to disclose them to Customs. The final domestic value of the FN–36 dies was $84,393,564. *See* Pl.'s Ex. 43 & 75. The duties evaded totaled $874,270, of which $184,495 remains unpaid. *See id.* Thus, the gravity of the violation is serious and supports a significant penalty.

The seventh, eighth, and ninth factors go to the practical effect of the imposition of the penalty. *See Complex Mach.*, 23 CIT at 950, 83 F. Supp. 2d at 1316. Given that the maximum possible penalty is $3,497,080, no evidence was presented to the Court showing Ford's inability to pay the maximum amount. The maximum penalty is appropriate considering the little effect it will likely have on Ford's ability to continue doing business. Furthermore, given that the FN–36 dies were valued over $84,000,000, the amount of the maximum penalty pales in comparison and is not shocking to the conscience.

The tenth factor considers the economic benefit gained by the importer through the violation. *See id.* The parties presented no evidence related to this factor. Circumstantially, however, Ford stated that the engineering purchase orders were numbered separately from the base tool order for expedition so that the dies could be shipped to Michigan. *See* Pl.'s Ex. 105. A delay in the shipment of the dies would have set back production of the 1990 Lincoln Town Car and cost Ford lost profits. *See id.* Thus, the Court will weigh the economic benefit gained by Ford in considering the appropriate penalty.

2. The Public Policy Factors Also Weigh Against Ford

While the first ten factors relate to deterrence, the eleventh, twelfth, and thirteenth factors are public policy concerns which "consider compensation for harm to society." *See Complex Mach.*, 23 CIT at 950, 83 F. Supp. 2d at 1316. While deterrence is the weightier concern when imposing 19 U.S.C. § 1592 penalties, *see id.*, the public policy concerns are also important and weigh against Ford. The amount of harm suffered to the public is not limited to the dollar value of the duties lost, but can also be the depletion of government resources in investigation and enforcement of an importer's violations. *See id.* at 955, 83 F. Supp. 2d at 1319 (citations omitted). Customs has expended significant resources and man hours investigating Ford's violations. The value of vindicating agency authority is also important. Importers should not let their Customs obligations

go to the wayside as Ford did here. "The penalty must be high enough to deter others from committing these customs violations." *See id*. at 956, 83 F. Supp. at 1310. In totality, analysis of the public policy factors also weigh against Ford and are accordingly considered in the penalty.

After careful consideration of the evidence and testimony presented at trial, the Court has determined that the penalty imposed upon Ford must be a substantial one. The Court, however, chooses not to impose the maximum penalty of $3,497,080. Rather, based on the foregoing analysis, the Court determines that $3,000,000 represents a just penalty in this case.

CONCLUSION

The Court finds that Customs has established all the elements of 19 U.S.C. § 1592 proving that Ford's conduct in entering the FN–36 dies was grossly negligent. Ford violated 19 U.S.C. § 1484 by failing to include the engineering changes in the FN–36 prices declared at entry and to notify Customs that the price listed on the entry documents was not the full and final price of the dies through its provisional value policy. Ford also violated 19 U.S.C. § 1485 by failing to disclose value of the 204 engineering purchase orders "at once." Ford knew it had communication problems among its internal units and did not have sufficient post-entry mechanisms to catch all dutiable costs, which together illustrate a reckless disregard for its Customs obligations. Furthermore, Ford does not qualify for prior disclosure treatment because Customs had already commenced its investigation of Ford when Ford finally disclosed the 204 engineering purchase orders in its August 6, 1991, letter. Ford's grossly negligent conduct led to an undervaluation of the FN–36 dies by $21,314,111. The United States was deprived $874,270 for lawful duties, of which $184,495 remains unpaid. Considering the gravity of Ford's conduct and possible mitigating factors, the Court determines that $3,000,000 represents a just penalty in this case. The Court accordingly grants judgment for plaintiff, and orders Ford to tender $184,495 for unpaid duties, and assesses Ford a civil penalty in the amount of $3,000,000, plus lawful interest.