Decisions of the United States Court of International Trade

(Slip Op. 02–72)

CONSOLIDATED BEARINGS CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 98–09–02799

(Dated July 24, 2002)

ORDER

TSOUCALAS, *Senior Judge:* Upon receipt and consideration of the defendant's motion for clarification dated July 18, 2002, and the plaintiff's comments to the aforesaid motion dated July 22, 2002, this Court recognizes that there was an error committed in handling of the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand: Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China ("Remand Results II")* (April 17, 2002), issued pursuant to the Court's order in *Consolidated Bearing Co. v. United States,* 26 CIT ____, 182 F. Supp. 2d 1380 (2002).

Commenting on the *Remand Results II,* the plaintiff raises the following points: (a) in its pursuit of the course of action designated in the *Remand Results II,* "Commerce hopes to avoid [Commerce's] inevitable day of reckoning [of dumping margins specifically for the merchandise entered by the plaintiff during the period of review ("POR") at issue] as well as [Commerce's] responsibility as an agency to issue *appropriate instructions";* (b) in the *Remand Results II,* Commerce "chose a result that ha[s] no relevance to [the plaintiff's] imports of [the merchandise at issue during [the POR]"; and (c) the course of actions chosen by Commerce in the *Remand Results II* would "divulge proprietary data [of another entity] *to* [the plaintiff, and this wrongful act by Commerce is feasible since that proprietary data] is not subject to [a] judicial protective order in this proceedings." Pl.'s Comments Concerning Def.'s Mot. Clarification ("Pl.'s Comments") at 2–3 (emphasis supplied).

The Court is not convinced by these arguments. There could be no "inevitable day of reckoning" for Commerce, same as there is no Commerce's "responsibility * * * to issue *appropriate instructions"* under the holdings of *Consolidated Bearing Co. v. United States ("Consolidated I"),* 25 CIT ____, 166 F. Supp. 2d 580 (2001), and *Consolidated Bearing Co. v. United States ("Consolidated II"),* 26 CIT ____, 182 F. Supp. 2d 1380 (2002), since both cases required Commerce to liquidate all plaintiff's imports of the subject merchandise imported during the POR "in accordance with the September 9, 1997, liquidation instructions." *Consolidated II,* 26 CIT at ____, 182 F. Supp. 2d at 1384. Thus, the only "appropriate instructions" are the September 9, 1997, liquidation instructions, and the only "reckoning" that Commerce was obligated to execute was the reckoning included in the text of the September 9, 1997, liquidation instructions.

Furthermore, since, under the September 9, 1997, liquidation instructions, "the merchandise [which was] produced by [a particular manufacturer] and imported by certain designated importers, the list of which did not include [the plaintiff, had to be liquidated] at certain rates," *Consolidated I,* 25 CIT at ____, 166 F. Supp. 2d at 582, these very rates, the ones determined under the September 9, 1997, liquidation instructions, are the only rates applicable to the plaintiff's merchandise. Therefore, Commerce's decision to "instruct [the United States Customs Service ("Customs")] to use *ad valorem* rates [for] each class or kind of [the plaintiff's merchandise that would be equal to the rates Commerce] calculated" under the September 9, 1997, liquidation instructions for corresponding classes or kinds of merchandise imported by another entity, would not create "a result that ha[s] no relevance to [the plaintiff's] imports of [the merchandise at issue during" the POR. *Compare* ("Pl.'s Comments") at 2.

Therefore, having re-reviewed the *Remand Results II,* it is hereby

ORDERED that the *Remand Results II* are affirmed in their entirety,[1] the Court's order of July 9, 2002, is vacated; and it is further

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

[1] This reconsideration of the *Remand Results II* is given on the merits of the *Remand Results II,* as read in light of *Consolidated I,* 25 CIT ____, 166 F. Supp. 2d 580, and *Consolidated II,* 26 CIT ____, 182 F. Supp. 2d 1380. While the Court appreciates Commerce's reminders that: (a) Commerce is not equipt with the power to actually liquidate the plaintiff's entries (versus instructing Customs to do so); and (b) Commerce is prohibited from instructing Customs to liquidate the plaintiff's entries prior to the issuance of a final Court's decision, these issues are irrelevant either to the merits of this case or to the grounds for the Court's reconsideration.

(Slip Op. 02–73)

SHINYEI CORP. OF AMERICA, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 94–05–00271

(Dated July 25, 2002)

ORDER

TSOUCALAS, *Senior Judge:* Plaintiff Shinyei Corporation of America ("Shinyei") requests this Court to: (a) hold unlawful liquidations by the United States Customs Service ("Customs") executed with regard to the merchandise at issue in this action; and (b) remand this matter to Customs with instructions to re-liquidate the merchandise at issue in accordance with such instructions as the United States Department of Commerce, International Trade Administration ("Commerce") may issue. Commerce, in turn: (a) admits that Customs erred in liquidating the consumption entries at issue at the rate at which estimated antidumping duties were required to be deposited upon entry of the merchandise at issue; and (b) requests this Court to remand this case to Commerce for the purpose of issuing instructions to Customs on the basis of Commerce's *Final Determinations of Sales at Less Than Fair Value; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Japan ("Final Results"),* 54 Fed. Reg. 19,101 (May 3, 1989) and this Court's decisions with respect to the *Final Results,* 54 Fed. Reg. 19,101. Based on the foregoing, it is hereby

ORDERED that this case is remanded to Commerce to issue instructions to Customs to re-liquidate the merchandise at issue in accordance with Commerce's determination made in the *Final Results,* 54 Fed. Reg. 19,101, and pertinent decisions of this Court; and it is further

ORDERED that the remand results are due within ninety (90) days of the date that this order is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date the responses or comments are due.

(Slip Op. 02–74)

FORMER EMPLOYEES OF GALEY & LORD INDUSTRIES, INC., PLAINTIFFS *v.* ELAINE L. CHAO, U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 01–00130

[Upon appeal from the denial of certification of eligibility to apply for trade adjustment assistance, judgment for the defendant.]

(Decided July 30, 2002)

Buckley & Klein, LLP (Edward D. Buckley) for the plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen,* Director, and *Lucius B. Lau,* Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Delfa Castillo);* and Office of the Solicitor, Division of Employment & Training Legal Service, U.S. Department of Labor *(Jay Reddy),* of counsel, for the defendant.

MEMORANDUM

AQUILINO, *Judge:* This action arises out of two current, pervasive and yet different American phenomena, namely, the discontinuance of domestic manufacturing and displacement of workers therein, and the reliance on the *Internet* even for matters formerly composed with greater care. In this instance, upon reception of an amorphous transmittal on or about April 9, 2001,

and consistent with established practice, the Clerk of this Court of International Trade deemed the content thereof to be a timely appeal from a denial by the U.S. Department of Labor's Employment and Training Administration ("ETA") of a petition on behalf of employees "engaged in yarn manufacturing at Galey & Lord Ind., Inc. plant in Shannon, Georgia"[1] for certification of eligibility to apply for trade adjustment assistance. *See* ETA, *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 66 Fed.Reg. 9,599 (No. TA-W–38,376) (Feb. 8, 2001).

I

That petition was filed on ETA Form 8650 for assistance under the Trade Act of 1974, as amended, 19 U.S.C. §2271 *et seq*. It pointed to Galey & Lord product(s) described as

> [c]otton and cotton blended carded and combed yarns used in the production of cotton and cotton blended fabrics, primarily twills and poplins[[2],]

[1] Plaintiffs' packet contains materials which include apparent facsimiles of reports on Forms 8–K and 10–K filed in 2001 with the Securities and Exchange Commission in the name of Galey & Lord, Inc., while defendant's administrative record ("AR"), such as it is and which has been filed herein, references plaintiffs' erstwhile employer as Galey & Lord *Industries*, Inc.

Insofar as this decision is concerned, the court assumes this corporate-name discrepancy is not of moment.

[2] AR, p. 2.

and reported related worker separations totalling 120 and 480 on November 20 and 27, 2000, respectively. *See* AR, p. 2. The petition concluded with the following averment:

> During the last several years there has been a significant increase in the quantity of yarn imports into the U.S. in the categories (300—Carded Yarns, 301—Combed Yarns) produced at the Shannon, Georgia facility. At the same time, there have been equally significant increases in the importing of the fabrics for which these yarns are used (Categories 317—Cotton Twills and 314—Cotton Poplin and Broadcloth). The continued growth of imported yarns and fabrics in the U.S. market has resulted in significant downward pressure on the price of those products realized by the Company which has resulted in the erosion of profit margins.
>
> The factors; continued growth of imports in the U.S. market, negative pricing pressure and profit erosion with no prospect for change in the trend have made any significant capital investment for modernization impractical. The result is the closure of the previously identified yarn manufacturing operations.

Id. at 3.

Plaintiffs' packet of papers now part of the court's case file contains a letter to one of the displaced Galey & Lord employees from the Georgia Department of Labor that refers to "pursuing other options that may be of assistance to the workers laid off", as well as a copy of a petition on ETA Form 9042 for NAFTA Transitional Adjustment Assistance filled out by hand in the name of that and two other employees presumably similarly situated and bearing the scribbled date April 6, 2001, or just before this action commenced.

Above-named counsel then formally appeared in this action on behalf of the plaintiffs, whereupon traditional give-and-take ensued between the parties as to scheduling and also whether or not the Form 9042 had been forwarded to the Governor of Georgia, as contemplated by 19 U.S.C. §2331(b)(1), and, if so, whether he had timely notified the defendant thereof, as is required by section 2331(b)(2)(A). In any event, their interchange was followed by defendant's Consent Motion for Remand to the Department of Labor for Reconsideration, which was granted.

The results of that remand have been filed herein, and the plaintiffs present a formal response. Defendant's reply thereto prays for judicial affirmance of its negative determination(s) of eligibility for adjustment assistance and for dismissal of this action.

The court's jurisdiction to grant such relief is pursuant to 19 U.S.C. §2395 and 28 U.S.C. §§ 1581(d)(1), 2631(d)(1).

II

Under the Trade Act of 1974, as amended, the Secretary of Labor shall certify workers as eligible to apply for adjustment assistance if she determines

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have be-

> come totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

19 U.S.C. §2272(a). Subsection 2272(b)(1) defines "contributed importantly" to mean "a cause which is important but not necessarily more important than any other cause."

On this statute's face, and as reaffirmed by the courts, all three of the foregoing requirements must be satisfied by petitioners for assistance. *See, e.g., Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. United States,* 22 CIT 712, 713, 20 F.Supp.2d 1288, 1290 (1998). In reviewing ETA determinations,

> the findings of fact by the Secretary of Labor * * *, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary to take further evidence * * *.

19 U.S.C. §2395(b). *See* 28 U.S.C. §2640(c). *See also Former Employees of Shaw Pipe, Inc. v. United States,* 21 CIT 1282, 1284, 988 F.Supp. 588, 590 (1997) (such determinations must be in accordance with law). "Substantial evidence * * * must be enough reasonably to support a conclusion". *Ceramica Regiomontana, S.A. v. United States,* 10 CIT 399, 405, 636 F.Supp. 961, 966 (1986), *aff'd,* 810 F.2d 1137 (Fed.Cir. 1987), citing *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed.Cir. 1984). "Good cause [to remand] exists if the Secretary's chosen methodology is so marred that his finding is arbitrary or of such a nature that it could not be based on substantial evidence". *Former Employees of Barry Callebaut v. United States,* 25 CIT ____, ____, 177 F.Supp.2d 1304, 1308 (2001), citing *Former Employees of Linden Apparel Corp. v. United States,* 13 CIT 467, 469, 715 F.Supp. 378, 381 (1989), quoting *United Glass & Ceramic Workers of North America, AFL-CIO v. Marshall,* 584 F.2d 398, 405 (D.C.Cir. 1978). But, in general, "the nature and extent of the investigation are matters resting properly within the sound discretion of the administrative officials". *Former Employees of CSX Oil & Gas Corp. v. United States,* 13 CIT 645, 651, 720 F.Supp. 1002, 1008 (1989), quoting *Cherlin v. Donovan,* 7 CIT 158, 162, 585 F.Supp. 644, 647 (1984).

A

The ETA's initial negative determination herein states that its investigation of the facts and circumstances of plaintiffs' lost jobs revealed that the criteria of 19 U.S.C. §2272(a)(3), *supra,* were not met because

> [t]he yarn produced by the workers at the subject firm was produced for internal consumption in the company's manufacturing process. Galey & Lord did not import yarn in the time period relevant to the investigation.

AR, p. 35. *See* 66 Fed.Reg. at 9,599. Upon reconsideration after the court-ordered remand, the ETA affirmed its original notice, denying eligibility to apply for adjustment assistance for the plaintiffs. That affirmance reports, in sum and substance:

> On remand, the Department contacted officials of Galey & Lord to obtain clarification of the production and employment data provided with respect to the worker group in Shannon, Georgia. Although workers at the plant produced yarn and fabric, the petition was filed by a company official on behalf the [*sic*] workers at the plant producing yarn. The information obtained * * * on remand[] show [*sic*] that the production data provided for 1998 through November 2000[] was [*sic*] specifically for yarn production. The employment data provided by the subject firm for that same time period was [*sic*] for all workers at the Shannon * * * plant. The workers are separately identifiable between yarn and fabric production.
>
> Other findings on remand show that the company imported insignificant quantities of yarn and fabric during the time period relevant to the investigation. Those imports were for evaluation purposes only and were not imported on a sustained basis.

Supplemental AR, pp. 4–5.

Plaintiffs' counsel are seemingly unable to take exception to this determination, predicated as it is upon 19 U.S.C. §2272(a)(3), *supra. See* Plaintiffs' Response to the Department of Labor's Redetermination Upon Remand *passim.* Indeed, there is enough evidence on the record to reasonably support it. The record indicates, for example, that Galey & Lord was seeking to maximize efficiency and assure long-term profitability by closing the yarn operation and modernizing its remaining weaving division. The production of yarn was to be outsourced to Parkdale Mills Inc., a North Carolina-, as opposed to foreign-, based company, enabling Galey & Lord to acquire yarn as needed at lower cost. Money saved by the closing was for purchase of "state-of-the-art looms for the weaving operation." AR, p. 5. Moreover, the yarn that had been produced by the displaced workers was not for the open market; it was consumed by Galey & Lord itself in manufacturing fabrics. Thus, that yarn was not in direct competition with the imports. *See, e.g., Former Employees of Hewlett-Packard Co. v. United States,* 17 CIT 980, 985–86 (1993) (ETA exercise of its discretion sustained when it determined that the causal nexus required by the statute not satisfied by the mere presence of imports in U.S. market).

B

The essence of the response interposed by counsel to defendant's remand results is that

> [c]ertification should be granted to the former employees of Galey & Lord under the NAFTA amendment to the Trade Act of 1974, 19 U.S.C. §2331. It is noteworthy that certification was granted under NAFTA-TAA for workers from a Galey & Lord plant in Eagle Pass, Texas due to a shift in production to Mexico (NAFTA No. 2966). In the instant case, under 19 U.S.C. §2331(1)(iii) [*sic*], there has been a shift in production by Galey & Lord to Mexico of articles like or directly competitive with articles which were produced by the yarn workers who are Petitioners herein. Galey & Lord admits as much in the papers it ha filed with the Department of Labor. Consequently, its former yarn workers are entitled to receive Transitional Adjustment Assistance.

Plaintiffs' Response, pp. 6–7.

This court cannot concur. Section 2331 of Title 19, U.S.C. is the codification of the NAFTA Worker Security Act adopted by Congress as Subtitle A of Title V of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2149–54 (Dec. 8, 1993). That subtitle added the NAFTA Transitional Adjustment Assistance Program to Title II, Chapter 2 of the Trade Act of 1974, Pub. L. 93–618, 88 Stat. 1978, 2019–30 (Jan. 3, 1975). Part of that program was to add a subsection (t) to section 3306 of the Internal Revenue Code, defining "self-employment assistance program" to encompass, among other things, individuals who "are eligible to receive regular unemployment compensation * * * under State law"[3] and who "are participating in self-employment assistance activities which * * * are approved by the State agency"[4]. Congress further provided therein that such program "meet[] such other requirements as the Secretary of Labor determines to be appropriate." 26 U.S.C. §3306(t)(6). In sum, the road to NAFTA transitional adjustment assistant begins in particular displaced workers' home states, before connecting to Washington, to wit:

> **(b) Preliminary findings and basic assistance**
>
> **(1) Filing of petitions**
>
> A petition for certification of eligibility to apply for adjustment assistance under this subpart may be filed by a group of workers * * * with the Governor of the State in which such workers' firm or subdivision thereof is located.
>
> **(2) Findings and assistance**
>
> Upon receipt of a petition under paragraph (1), the Governor shall—
>
> **(A)** notify the Secretary [of Labor] that the Governor has received the petition;

[3] 26 U.S.C. §3306(t)(3)(A).

[4] 26 U.S.C. §3306(t)(3)(C).

(B) within 10 days after receiving the petition—

(i) make a preliminary finding as to whether the petition meets the criteria described in subsection (a)(1) of this section (and for purposes of this clause the criteria described under subparagraph (A)(iii) of such subsection shall be disregarded), and

(ii) transmit the petition, together with a statement of the finding under clause (i) and reasons therefor, to the Secretary for action under subsection (c) of this section; and

(C) if the preliminary finding under subparagraph (B)(i) is affirmative, ensure that rapid response and basic readjustment services authorized under other Federal law are made available to the workers.

(c) Review of petitions by Secretary; certifications

(1) In general

The Secretary, within 30 days after receiving a petition under subsection (b) of this section, shall determine whether the petition meets the criteria described in subsection (a)(1) of this section. Upon a determination that the petition meets such criteria, the Secretary shall issue to workers covered by the petition a certification of eligibility to apply for assistance described in subsection (d) of this section.

(2) Denial of certification

Upon denial of certification with respect to a petition under paragraph (1), the Secretary shall review the petition in accordance with the requirements of subpart A of this part to determine if the workers may be certified under such subpart.

19 U.S.C. §2331(b) and (c).

Notwithstanding the existence in plaintiffs' packet of the copy of the handwritten petition for such transitional adjustment assistance on ETA Form 9042, which may have been engendered by the March 21, 2001 letter from the Georgia Department of Labor at the behest of that state's Governor, the record at bar does not show either that the petition was ever duly presented (returned) to the Governor in accordance with the foregoing statute or that he timely carried out his responsibilities thereunder, including transmitting the petition to the defendant Secretary for action. In fact, given the date on that petition (April 6, 2001), and of plaintiffs' packet herein (April 9), that petition may well have bypassed both Atlanta and Washington on its way to this court in New York. Clearly, that would not have been the right routing, but plaintiffs' counsel have not responded in a different direction to government queries on this issue[5].

Of course, careful preparation and delivery of such a petition for assistance in accordance with law is of critical importance, in particular giv-

[5] *Compare* Defendant's Consent Motion for an Extension of Time to Request a Voluntary Remand or Reply to Plaintiffs' Response to Labor's Negative Determination, pp. 1–2 (March 14, 2002) *and* Defendant's Motion for an Extension of Time to Reply to Plaintiffs' Response to Labor's Negative Determination, pp. 1–2 (April 4, 2002) *with* Defendant's Reply to Plaintiffs' Response, pp. 3 n. 2, 7–11 (April 18, 2002).

en the magnitude of the dislocations the statute seeks to redress. Lawful presentment and processing of the ETA Form 9042 in this action, however, probably would not have engendered different analysis on the merits. While a preliminary finding by the Governor under 19 U.S.C. §2331(b)(2)(B)(i), *supra,* shall disregard the criteria of section 2331(a)(1)(A)(iii), regarding imports from Mexico or Canada, upon his referral of the petition to the ETA, that agency cannot disregard those criteria per section 2331(c)(1), *supra,* and, if its determination under that paragraph (c)(1) is negative, the ETA shall review, per paragraph (c)(2), the petition in accordance with 19 U.S.C. §§ 2271–75. While that subpart A of this Trade Act is not restricted to imports from the two NAFTA partners of the United States, the criteria of 19 U.S.C. §2272(a), *supra,* are defined similarly to those of section 2331(a)(1), *e.g.,* "increase[s] of [in] imports * * * contributed importantly to such * * * separation * * * and to * * * decline in sales or production." Indeed, the controlling definition of "contributed importantly" in 19 U.S.C. §2272(b)(1), *supra,* is *in haec verba* that of subsection 2331(a)(2). Hence, the same analytical approach to a petition on an ETA Form 9042 for NAFTA transitional adjustment assistance, presented with care and processed on the record developed herein, probably would not have resulted in a determination different from the agency's negative determination(s) under section 2272.

III

In view of the foregoing, defendant's negative determination(s) regarding eligibility to apply for trade adjustment assistance must be affirmed and this action dismissed. Judgment will enter accordingly.

(Slip Op. 02–75)

USINOR INDUSTEEL, S.A., DUFERCO CLABECQ, S.A., AG DER DILLINGER HÜTTENWERKE, SALZGITTER AG STAHL UND TECHNOLOGIE, AND THYSSEN KRUPP STAHL AG, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP. AND U.S. STEEL GROUP, A UNIT OF USX CORP., DEFENDANT-INTERVENORS

Consolidated Court No. 01–00006

[ITC motion to certify for interlocutory appeal denied.]

(Dated July 30, 2002)

Barnes, Richardson, & Colburn (Gunter von Conrad and *Stephen W. Brophy)* for plaintiff Usinor Industeel, SA.

White and Case LLP (Walter J. Spak, Lyle B. Vander Schaaf, Joseph H. Heckendorn, and *Caleb W. Sullivan)* for plaintiff Duferco Clabecq, S.A.

DeKieffer and Horgan (J. Kevin Horgan and *Marc E. Montalbine)* for plaintiffs AG der Dillinger Hüttenwerke, Salzgitter AG Stahl und Technologie and Thyssen Krupp Stahl AG.

Lyn M. Schlitt, General Counsel, *James M. Lyons,* Deputy General Counsel, United States International Trade Commission *(Rhonda M. Hughes),* for defendants.

Dewey Ballantine LLP (Alan Wm. Wolff, Kevin M. Dempsey, and *Rory F. Quirk)* and *Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan,* and *James C. Hecht)* for defendant-intervenors Bethlehem Steel Corporation and U.S. Steel Group, a unit of USX Corporation.

OPINION

RESTANI, *Judge:* This matter is before the court on Defendant's motion to amend and certify the court's April 29, 2002 order for interlocutory appeal and for stay of the proceeding pending appeal. Defendant, the U.S. International Trade Commission ("Commission" or "ITC") argues that the court's conclusion regarding the definition of "likely" for injury determinations in sunset reviews was incorrect and involves controlling questions of law so as to warrant immediate interlocutory appeal pursuant to 28 U.S.C. § 1292(d)(1). Defendant's motion is denied.

Interlocutory appeals are a departure from the well-established final judgment rule and are reserved for exceptional cases. *See, e.g., Marsuda-Rodgers Int'l v. United States,* 13 CIT 886, 888 (1989); *Washington Int'l Ins. Co. v. United States,* 12 CIT 259, 260 (1988). 28 U.S.C. § 1292(d)(1) provides that the deciding court *may* certify the case for immediate appeal where (1) a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion; and (2) an immediate appeal from that order may materially advance the ultimate termination of the litigation.

The Commission argues that the court erred in finding that the term "likely" in 19 U.S.C. § 1675a should be given its ordinary meaning.[1] *Usinor Industeel, SA v. United States,* Slip-Op. 02–39 (Ct. Int'l Trade April

[1] The interpretation of "likely" directly affects not only the Commission's ultimate injury determination but its intermediate findings concerning, *inter alia,* competition overlap, cumulation, and price effects. *See* 19 U.S.C. § 1675a(a)(1) (likelihood of injury upon revocation); § 1675a(a)(2) (volume); § 1675a(a)(3) (price effects); § 1675a(a)(4) (impact on domestic industry); and § 1675a(a)(7) (cumulation, competition overlap, discernible adverse impact).

29, 2002). Repeating its previous position, the Commission again argues that the Statement of Administrative Action, ("SAA") accompanying H.R.Rep. No. 103–826(I), at 883, *reprinted in* 1994 U.S.C.C.A.N. 4040, 4212, contains an alternative definition and should control. With no support, the Commission argues that any order requiring it to apply the ordinary meaning will disrupt all sunset reviews and, ultimately, diminish the significance of the SAA.

The court does not, as the Commission suggests, dispute that the SAA is the authoritative expression of the Uruguay Round Agreements Act, Pub. L. No. 103–465, 108 Stat. 4809 (1994) ("URAA"). *See NTN Bearing Corp. v. United States*, 155 F.Supp.2d 715, 721 (2001). There is no question that the SAA is the authoritative guide in interpreting the URAA. *Allied Tube & Conduit Corp. v. United States,* 127 F.Supp.2d 207, 216–17 n.2 (2000). If a statutory term or phrase were ambiguous and in need of interpretation, the court would look to the SAA first and foremost for direction. *See Taiwan Semiconductor Industry Ass'n v. United States,* 23 CIT 410, 413 n.6, 59 F.Supp.2d 1324, 1328 n.6 (1999). Apart from its statutory approval in 19 U.S.C. § 3512(d), in practical terms the SAA is more compelling than ordinary statutory legislative history. Because unfair trade laws are passed pursuant to fast track procedure with only an up or down vote, normally there is not the possibly conflicting and confused legislative history that often accompanies legislation as it evolves. The SAA is a more detailed and coherent expression of legislative intent.

The Commission argues, however, that, because 19 U.S.C. § 3512(d) provides that the SAA is the authoritative expression of the URAA, the SAA is an extension of the statute and, therefore, its alternative "definition" should be considered statutory and controlling. The court does not read § 3512(d) to transform the SAA into a controlling "statutory" provision that can trump the actual statute. Because the court determined that the undefined term "likely" as found in the statute itself is clear, the inquiry ends there. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842–43 (1984). Undefined terms in a statute are deemed to have their ordinary meaning. *Koyo Seiko Co. v. United States,* 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994).[2] The court need not resort to the SAA to interpret what the statute makes clear.[3]

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[2] The Commission submits a variety of alternative definitions from various dictionaries and submits an argument that probable is different from likely. Semantics aside, the dispute is whether the Commission based its determination on the mere possibility of dumped future subject imports. In making its determination, the Commission relied heavily upon Plaintiff's excess capacity to determine that future volume, and therefore future harm, was likely. Generally, excess capacity figures identify how much of a particular product a subject producer could *possibly* manufacture and, perhaps, export to the United States.

It is unclear what standard was actually used here because the Commission and its counsel refused to explain further. It is important to note that, from the beginning, Plaintiffs argued that future imports were *unlikely* and, in support, *inter alia,* presented considerable evidence to the Commission identifying significant changes in the European Community since the initial investigation. Rather than respond, the Commission summarily declared that it was "unconvinced" and found that future imports were likely. On remand, the court required the Commission to explain why significant import volume was likely, not simply possible, in light of Plaintiffs' argument.

[3] The court's adoption of the ordinary meaning of likely is consistent with other Federal Circuit decisions. For example, in *American Lamb Co. v. United States,* the court explained that the statutory phrase "reasonable indication" meant more than a mere possibility. 785 F.2d 994, 1001 (Fed. Cir. 1986). A "reasonable indication" of injury is a lesser standard than likely injury. If "possibility" is insufficient for the former, it is certainly insufficient for the latter. The lesser standard also makes clear that Congress knows how to write different standards into the unfair trade laws.

The Commission incorrectly cites to three cases for the proposition that the Federal Circuit has used the SAA to construe statutory provisions "even when the court had found the statutory language to be unambiguous." Def. Br. at 4. *SKF USA, Inc. v. United States,* 263 F.3d 1369 (Fed. Cir. 2001);[4] *Micron Technology, Inc. v. United States,* 243 F.3d 1301, 1305 (Fed. Cir. 2001);[5] *AK Steel Corp. v. United States,* 226 F.3d 1361, 1366 (Fed. Cir. 2000). In all three, the court merely reaffirmed the established principle that the SAA is the authoritative expression interpreting the URAA. In fact, the court's opinion here is entirely consistent with *AK Steel:*

> When a word is undefined in a statute, the agency and the reviewing court normally give the undefined term its ordinary meaning. *See Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). * * * Since there can be no real ambiguity about these terms, contrary to the assertions of the appellees, we are not required to do any analysis under the second part of the *Chevron* test."

226 F.3d at 1371.

Even if the SAA were controlling, the SAA does not contain a definition of "likely". Instead, the SAA attempts to provide some guidance for the inherently prospective sunset review analysis:

> The determination called for in these types of reviews is inherently predictive and speculative. There may be more than one likely outcome following revocation or termination. The possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonable in light of the facts of the case.

SAA at 883. While the Commission cites to this paragraph *ad nauseam* as the "statutorily-endorsed" definition, the context of the excerpt does not suggest that it was intended as a definition but rather as a *caveat* against any presumption that the facts of a particular case can support only one outcome.[6] The Commission adamancy does not make a significant legal argument out of such nebulous matter.

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[4] The Federal Circuit itself recognized that *SKF USA Inc.* was factually unique:

> In *SKF USA Inc. v. United States,* 263 F.3d 1369, 1379–80 (Fed.Cir.2001), we resolved an apparent anomaly in the antidumping statute where the definition of a key statutory term appeared to apply solely to one part of the statute, in which the term did not even appear. Absent our interpretation applying that definition to the part of the statute in which the term actually appeared, the definition was meaningless.

FAG Italia S.p.A. v. United States, 291 F.3d 806, 817 (Fed. Cir. 2002).

[5] In *Micron,* the court did not determine that the term "level of trade" was unambiguous yet still look to the SAA for meaning. Rather, the court was explaining its understanding in the absence of a definition in either the statute or the SAA.

> Neither the statute nor the [SAA] defines the phrase "same level of trade." However, we understand the term to mean comparable marketing stages in the home and United States markets, e.g., a comparison of wholesale sales in Korea to wholesale sales in the United States. *See* 19 C.F.R. § 351.412(c)(2) ("The Secretary will determine that sales are made at different levels of trade if they are made at different marketing stages (or their equivalent).").

Micron, 243 F.3d at 1305.

[6] The court does not dispute that the Commission may evaluate evidence as it see fit or that different conclusions can be drawn from the same evidence.

Although the court finds that there is no basis for the ITC's difference of opinion and need not reach the second ground, intervention of the court of appeals at this stage will not advance the termination of this litigation. Quite apart from the lack of merits of the legal issue, it may ultimately be of no consequence here. The Commissioners might reach the same result under the proper standard. Further, delaying finalization of reviews is counterproduction. Staff changes, commissioners change and lack of familiarity is not likely to lead to better results.

CONCLUSION

The court finds that, because the provision at issue is clear, there is no substantial ground for a difference of opinion and further that certification will not advance disposition of this matter. Defendant's motion to certify for interlocutory appeal is hereby denied; thus stay is not warranted.

(Slip Op. 02–76)

TOY BIZ, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 96–10–02291

[Plaintiff's motion for partial summary judgment denied, Defendant's cross-motion for partial summary judgment granted in part and denied in part.]

(Decided July 30, 2002)

Singer & Singh, (Sherry L. Singer and *Indie K. Singh),* for Plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Mikki Graves Walser); Beth C. Brotman,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* This action involves the tariff classification of dozens of action figures from various Marvel Comics series (including the X-Men, Spider-Man, and the Fantastic Four), as well as a doll sold as "Jumpsie." Plaintiff Toy Biz, Inc. ("Toy Biz") imported the merchandise from China, through the ports of Seattle and Los Angeles, in 1993 and 1994. The United States Customs Service

("Customs") classified the merchandise as "[d]olls representing only human beings and parts and accessories thereof," under subheading 9502.10.40 of the Harmonized Tariff Schedule of the United States

("HTSUS") (1993 and 1994),[1] and assessed duties at the rate of 12% *ad valorem*.[2] Toy Biz contests that classification.

The goods at issue in this opinion are the "X-Men Projectors" (Assortment No. 49110).[3] Toy Biz here contends that—even if the specific X-Men figures which house the projector mechanisms represent humans, and thus would alone be classifiable as "dolls"—the existence of the projector feature and the film disks packaged with the Projectors justify their classification as "other toys" under subheading 9503.90.60, HTSUS, or as "toy sets" under subheading 9503.70.80, HTSUS (both dutiable at 6.8% *ad valorem*).[4] *See* Complaint ¶ 30; Memorandum In Support of Plaintiff's Motion For Summary Judgment ("Plaintiff's Brief") at 8–12; Memorandum of Plaintiff Toy Biz, Inc. In Reply to Defendant's Memorandum In Opposition to Plaintiff's Motion For Summary Judgment and In Opposition to Defendant's Cross-Motion For Summary Judgment ("Plaintiff's Reply Brief") at 14–17.

This action has been designated a test case pursuant to USCIT Rule 84, and is before the Court on cross-motions for summary judgment. Jurisdiction is predicated on 28 U.S.C. § 1581(a) (1994). Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640 (1994).

For the reasons set forth herein, the Court denies the parties' cross-motions for partial summary judgment on the classification of the Projectors as "other toys" vs. "dolls" based on the existence of the projector mechanism or feature. As explained below, Customs properly ruled that the Projectors are composite goods to be classified pursuant to General Rule of Interpretation ("GRI") 3(b). However, the record before the Court is not sufficient at this time to permit a determination as to the "essential character" of the Projectors, as required by GRI 3(b).

The Court further finds, as discussed below, that the film disks packaged with the Projectors do not justify their classification as "toy sets." Accordingly, Toy Biz's motion for partial summary judgment on that issue is denied, and the Government's cross-motion is granted.

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[1] At the time the Projectors were imported, subheading 9502.10.40, in its entirety, covered "[d]olls representing only human beings and parts and accessories thereof: [d]olls, whether or not dressed: [o]ther: [n]ot over 33 cm in height." HTSUS, subheading 9502.10.40. The subheading numbers at the time of importation are used throughout this opinion.

[2] Certain action figures were packaged with "Official Marvel Universe Trading Cards," which Customs separately classified as "[o]ther printed matter, including printed pictures and photographs" under subheading 4911.99.60, dutiable at 0.4% *ad valorem*. *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995).

[3] In *Toy Biz, Inc. v. United States ("Toy Biz I"),* 24 CIT ___, 123 F. Supp. 2d 646 (2000), the Court denied the parties' cross-motions for partial summary judgment on the classification of the action figures as "dolls" (under heading 9502) or "toys" (under heading 9503) based on their "human" vs. "non-human" characteristics. Toy Biz's motion for partial summary judgment seeking classification of the "X-Men Steel Mutants" (Assortment Nos. 49210 and 49220) and "Silver Samurai" (Assortment Nos. 4900 I and 49605–II) as toy "tin soldiers and the like" under heading 9503 was denied, and the Government's cross-motion on the same issue was granted, in *Toy Biz, Inc. v. United States,* 25 CIT ___, ___, 132 F. Supp. 2d 17, 18 (2001) *("Toy Biz II"). See also Toy Biz II,* 25 CIT at ___, 132 F. Supp. 2d at 18 (noting that "the analysis [of *Toy Biz II]* applies with equal force both to the Steel Mutants packaged as dueling duos and to the Steel Mutants in the ["Kay-Bee Collectors Edition X-Men Special Metallic Edition" (Assortment Nos. 49605–I and 49605–II)]").

[4] In its entirety, subheading 9503.90.60 covered "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds; and accessories thereof: [o]ther: [o]ther: [o]ther toys (except models), not having a spring mechanism." HTSUS, subheading 9503.90.60. Similarly, subheading 9503.70.80, in its entirety, covered "[o]ther toys; * * * [o]ther toys, put up in sets or outfits, and parts and accessories thereof: [o]ther: [o]ther." HTSUS, subheading 9503.70.80.

I. Background

The "X-Men Projectors" at issue are colorful, poseable plastic action figures—specifically, "Cyclops," "Magneto," and "Wolverine"—each of which stands approximately seven-and-one-half inches tall, and has a built-in miniature slide projector mechanism housed in a cavity in its upper torso.[5] The projector mechanism consists of a small light bulb (powered by two AAA batteries, which are not included) behind a small lens through which images are projected. The lens of the projector protrudes markedly from the figure's chest. Packaged with each Projector are three different, interchangeable film "action disks," each of which consists of multiple "still" frames (slides) of various action scenes (resembling frames of a comic strip). *See* Sample "Bishop" and "Dr. Octopus" Projectors; Plaintiff's Brief, App. A at 10; Toy Biz 1994 Catalog at 14–15; Toy Biz 1995 Catalog at 13.

A button on the back of the Projector figure permits the user to turn on the projector's light bulb and to project one of the various images on the film disk onto any surface in front of the figure. Turning a knob on the back of the figure advances the film disk to another "frame," changing the projected image. Twisting the lens on the front of the figure focuses the image.

In classifying the "X-Men Projectors," Customs determined that each was "a composite article (consisting of a figure and a projector) with accessories (consisting of three film disks)." *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995). Applying GRI 3(b), Customs further determined that "[e]ach article's essential character is imparted by the doll or toy animal/creature component." *Id*. Customs therefore classified the Projectors here at issue as "[d]olls representing only human beings" under subheading 9502.10.40, HTSUS. *Id*.

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[5] The Projectors at issue are three of the five items in Assortment 49110. Because samples of the "Wolverine," "Magneto" and "Cyclops" Projectors were not available, Toy Biz instead submitted samples of a "Bishop" Projector and a "Dr. Octopus" Projector.

Several of Toy Biz's submissions mistakenly refer to the "Hobgoblin" Projector—one of the "Spider-Man Projectors" (Assortment No. 47220). *See*, *e.g.*, Plaintiff's Statement of Material Facts For Which There Is No Issue To Be Tried ("Plaintiff's Statement of Material Facts") ¶¶ 70–71; Plaintiff's Brief at 8, App. A at 12; Plaintiff's Reply Brief at 14. *See also* Defendant's Response to Plaintiff's Statement of Material Facts For Which There Exists No Issue To Be Tried ("Defendant's Response to Plaintiff's Statement of Material Facts") ¶¶ 70–71. Similarly, Toy Biz's Complaint referred to Projectors in Assortment Nos. 47220, 48130 and 48210, as well as Assortment No. 49110. *See* Complaint ¶ 25. However, the parties now agree that the "Wolverine," "Magneto" and "Cyclops" Projectors of Assortment 49110 are the only Projectors at issue in this action. *See* generally Stipulation (filed Oct. 19, 2000) (submitted under cover of Defendant's Consent Motion to File Its Response to Plaintiff's Complaint Out of Time [sic; Consent Motion to File Stipulation Out of Time]).

In light of such errors and discrepancies in the parties' submissions, as well as the large number of items involved, the parties entered into a Stipulation identifying all items at issue in this action and superseding all prior statements on the subject. The Stipulation is annotated to reflect the parties' agreement "as to the evidence (samples, photographs and catalogs) to be considered in ruling on the pending motions for summary judgment." *See Toy Biz I,* 24 CIT at ____, 123 F. Supp. 2d at 646 n.1.

Since the Stipulation was reached, it has been clarified, and superseded in part, by several more recent developments. *See* Letter from Counsel for Toy Biz (Oct. 23, 2000) (noting that Stipulation references to "Robin Wolverine" should read "Robot Wolverine"); Affidavit of JoAnn E. McLaughlin (Oct. 23, 2000), *filed with* Plaintiff's Memorandum in Opposition to Defendant's Motion *In Limine* (same); Notice from Counsel for Toy Biz (Oct. 20, 2000) (noting submission of additional samples, as listed). In addition, Toy Biz has "abandoned its claims with regard to all of the figures in Assortment 4810F," and the Government has agreed to the classification of "Beast," "Robot Wolverine," "Cameron Hodge," and "Vulture" as "[t]oys representing animals or non-human creatures" under subheading 9503.49.00, and "Bonebreaker" as "[o]ther toys" under subheading 9503.90.00. *See* Declaration of Alice Wong ¶ 3 (April 5, 2001). *See also* Affidavit of JoAnn E. McLaughlin (May 24, 2001).

II. STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and * * * the moving party is entitled to [ ] judgment as a matter of law." USCIT R. 56(c). Customs' classification decisions are reviewed through a two-step analysis—first construing the relevant tariff headings, then determining under which of those headings the merchandise at issue is properly classified. *Bausch & Lomb, Inc. v. United States,* 148 F.3d 1363, 1365 (Fed. Cir. 1998) (*citing Universal Elecs., Inc. v. United States,* 112 F.3d 488, 491 (Fed. Cir. 1997)).

Interpretation of the relevant tariff headings is a question of law, while application of the terms to the merchandise is a question of fact. *See id*. Summary judgment is thus appropriate where the nature of the merchandise is not in question, and the sole issue is its proper classification. *See id.* (it is "clear that summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is)" (citation omitted).

On the other hand, "summary proceedings are not intended to substitute for trial when it is indeed necessary to find material facts." *Scripps Clinic & Research Found. v. Genentech, Inc.,* 927 F.2d 1565, 1570 (Fed. Cir. 1991) (*citing Meyers v. Brooks Shoe, Inc.,* 912 F.2d 1459, 1461 (Fed. Cir. 1990)). Thus, it remains a function of the court to "determine whether there are any factual disputes that are material to the resolution of the action. The court may not resolve or try factual issues on a motion for summary judgment." *Sea-Land Service, Inc. v. United States,* 23 CIT 679, 684, 69 F. Supp. 2d 1371, 1375 (1999) (*quoting Phone-Mate, Inc. v. United States,* 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988)). *See also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986) (on summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Accordingly, summary judgment must be denied where there is a "dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l, Inc. v. United States,* 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (*quoting Pfaff Am. Sales Corp. v. United States,* 16 CIT 1073, 1075 (1992)).

On review, Customs' classification decisions are afforded a measure of deference proportional to their power to persuade, in accordance with the principles set forth in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). *See United States v. Mead Corp.,* 533 U.S. 218, 235 (2001); *Mead Corp. v. United States,* 283 F.3d 1342, 1346 (Fed. Cir. 2002).

III. ANALYSIS

The General Rules of Interpretation ("GRIs") provide a framework for the classification of merchandise under the HTSUS, and are considered statutory provisions of law for all purposes. *See Orlando Food Corp. v. United States,* 140 F.3d 1437, 1439 (Fed. Cir. 1998). The *Harmonized Commodity Description and Coding System: Explanatory Notes*

(1st ed. 1986) ("Explanatory Notes") function as an interpretative supplement to the HTSUS. While the Explanatory Notes "do not constitute controlling legislative history," they "are intended to clarify the scope of HTSUS subheadings and offer guidance in interpreting its subheadings." *Mita Copystar Am. v. United States,* 21 F.3d 1079, 1082 (Fed. Cir. 1994) (*citing Lynteq, Inc. v. United States,* 976 F.2d 693, 699 (Fed. Cir. 1992)).

Most goods are classified pursuant to GRI 1, which provides that "classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions [Rules 2 through 6]." GRI 1. According to the Explanatory Notes, GRI 1 is "intended to make it quite clear that the terms of a heading and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification." Explanatory Notes at GRI 1(V). *See also Orlando Food Corp.,* 140 F.3d at 1440 ("Only after determining that a product is classifiable under the heading should the court look to the subheadings to find the correct classification for the merchandise.") (citation omitted).

The relevant GRIs here are GRI 1 and GRI 3. The parties disagree as to their application to the Projectors in the cross-motions at bar.

A. Projectors as Dolls with "Parts and Accessories" vs. "Other Toys"

1. GRI 1

Although Customs classified the Projectors pursuant to *GRI 3(b)*, the Government argues for the first time here that the Projectors actually can be classified as "dolls" under heading 9502 pursuant to *GRI 1* instead.[6] *Compare* HQ 957636 (Oct. 11, 1995) *and* HQ 957688 (Oct. 11, 1995) *with* Memorandum In Support of Defendant's Motion to Dismiss and In Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendant's Cross-Motion for Summary Judgment ("Defendant's Brief") at 18–19, 24–26 *and* Memorandum In Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment ("Defendant's Reply Brief") at 12–15.

Toy Biz responds that, even if the Projector figures represent humans, the Projectors cannot be classified under heading 9502, because the projector mechanism renders the Projectors "more than" dolls. *See* Plaintiff's Brief at 10–11; Plaintiff's Reply Brief at 15. Under the "more than" doctrine, created by the courts and applied in a line of cases under the Tariff Schedules of the United States ("TSUS"),[7] goods which constitute "more than" a particular article—because they possess additional significant features or perform additional nonsubordinate functions—are not classifiable as that article. *See, e.g., Digital Equip. Corp. v. United States,* 889 F.2d 267, 268 (Fed. Cir. 1989).

[6] The Government's change of position is discussed at somewhat greater length below. *See* section III.A.2, *infra*.

[7] The TSUS is the predecessor of the HTSUS.

However, the "more than" doctrine has been subsumed by the GRIs, and therefore does not apply where—as here—classification is governed by the HTSUS. *See, e.g.*, *JVC Co. of Am. v. United States,* 234 F.3d 1348, 1353–54 (Fed. Cir. 2000) (deciding the viability of the "more than" doctrine under the HTSUS as "an issue of first impression" and expressly "settl[ing] [it] * * * for the benefit of future adjudication of classification cases"). Accordingly, Toy Biz's reliance on the "more than" doctrine is unavailing.

That is not to say that the Government's reliance on GRI 1 is well-founded. The Government maintains that the presence of the projector mechanism is entirely compatible with the Projectors' classification as "dolls." *See generally* Defendant's Brief at 24; Defendant's Reply Brief at 12–15. The Government emphasizes that the Explanatory Notes to heading 9502 provide that the dolls classified under that heading "may be jointed and *contain mechanisms which permit limb, head or eye movements as well as reproductions of the human voice, etc." See generally* Defendant's Brief at 19, 24 *and* Defendant's Reply Brief at 13–14 (*quoting* Explanatory Note 95.02, emphasis added). The Explanatory Notes further specify that "[*p*]*arts and accessories* of dolls of this heading include: heads, bodies, limbs, eyes * * *, moving mechanisms for eyes, *voice-producing or other mechanisms*, wigs, dolls' clothing, shoes and hats." *See* Defendant's Brief at 24 *and* Defendant's Reply Brief at 13–14 (*quoting* Explanatory Note 95.02, emphasis added).

But the Government's attempt to analogize the projector feature to mechanisms such as those "which permit limb, head or eye movements" or reproduce the human voice is in vain. The Government mistakenly characterizes the projector mechanism as "a mechanism [that] produces voices." Defendant's Reply Brief at 13–14. In fact, although some images on the film disks depict characters "speaking" via dialogue "bubbles" drawn over the heads,[8] the Projectors produce no sound whatsoever—human voice or otherwise. *See* Sample "Bishop" and "Dr. Octopus" Projectors.

Read in context, it is apparent that the "other mechanisms" referred to in the Explanatory Notes are mechanisms that contribute to a figure's lifelike human simulation. *See generally Janex Corp. v. United States,* 80 Cust. Ct. 146, 155–56 (1978) (night light function of "Raggedy Ann and Andy Nite-timers"—essentially plastic dolls housing night lights—is distinguishable from "features commonly incorporated in dolls as mechanisms that create tears, cause the arms or legs to move, produce a voicelike sound, or otherwise contribute to a lifelike simulation").

The projector mechanism cannot be said to contribute to the Projectors' lifelike human simulation. Clearly, human beings do not project film images from their chests. As Customs properly ruled, the Projectors

[8] For example, the film disks included with the sample "Bishop" Projector depict action scenes in which "Bishop" is portrayed as exclaiming "Run, run!" and "I'll find you!" *See* Sample "Bishop" Projector (with disk).

are composite goods—consisting of two components, a figure and a projector mechanism—which cannot be classified pursuant to GRI 1.

2. GRI 3

GRI 3 governs the classification of goods—including composite goods—that are *prima facie* classifiable under two or more headings. In such cases, GRI 3 requires that:

> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the * * * composite goods * * *, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) * * * [C]omposite goods * * * made up of different components * * * which cannot be classified by reference to 3(a), shall be classified as if they consisted of the * * * component which gives them their essential character * * *
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

GRI 3(a) is thus known as the rule of "relative specificity"; GRI 3(b) reflects the "essential character" test; and GRI 3(c), the default rule, provides for classification by "numerical order." The Explanatory Notes specify that these three methods of classification "operate in the order in which they are set out in the Rule," so that "Rule 3(b) operates only if Rule 3(a) fails in classification, and if both Rules 3(a) and (b) fail, Rule 3(c) will apply." Explanatory Note to GRI 3(I).

The parties agree that the Projectors are "composite goods." *See, e.g.*, Plaintiff's Reply Brief at 16–17; Defendant's Reply Brief at 13, 16 n.5, 17. However, in its briefs filed with the Court, the Government has raised for the first time an argument that GRI 3 is not applicable here because, the Government now suggests, the Projectors are not *prima facie* classifiable under two or more headings. *See* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

The Government's new argument is premised on its view that the various potentially relevant headings are mutually exclusive. It reasons that the application of GRI 3 in such a case would violate GRI 1's mandate to classify goods "according to the terms of the headings and any relevant section or chapter notes." GRI 1. *See generally* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

The Government points out, for example, that the Explanatory Notes state that heading 9503 captures "[a]ll toys *not included* in *headings 95.01* and *95.02*," so that heading 9503 is a "basket" (residual) provision which covers "other toys." *See* Explanatory Note 95.03(A) (emphasis in original). The Government therefore concludes that the Projectors cannot be *prima facie* classifiable under both heading 9502 (for the figure) and 9503 (for the projector mechanism), because the two headings are assertedly mutually exclusive. *See generally* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

Similarly, the Government asserts that, since projectors are classifiable under heading 9008 (which covers "[i]mage projectors"), "the competing tariff provision[s]" for classification of the Projectors would be headings 9502 and 9008—not headings 9502 and 9503.[9] *See* Defendant's Reply Brief at 16 n.5. But again, the Government points out that Note 1(ij) to Chapter 90 excludes from classification under Chapter 90 articles that are classifiable under Chapter 95. Thus, the Government reasons, because the two provisions are mutually exclusive, the Projectors cannot be *prima facie* classifiable under both heading 9502 (for the figure) and 9008 (for the projector mechanism). *Id.*

There are at least three problems with the Government's new argument. First, it cannot be reconciled with Customs' position at the administrative level. In ruling on Toy Biz's protest, Customs clearly applied the "essential character" test of GRI 3(b) to the Projectors. Customs ruled:

> We consider each X-Men Projector to be a *composite article* (consisting of a figure and a projector) * * * Each article's *essential character* is imparted by the doll or toy animal/creature component.

HQ 957636 (Oct. 11, 1995) (emphases added). *See also* HQ 957688 (Oct. 11, 1995) (same). By the express terms of GRI 3 (as discussed above), Customs could not have reached GRI 3(b) if it had not first determined that the Projectors were *prima facie* classifiable under at least two headings.[10]

Second, the Government's precise position is less than clear. In support of summary judgment, the Government agreed with Toy Biz that "[d]efendant's position regarding the classification of the imported items [including the Projectors] is reflected in the * * * rulings issued by U.S. Customs Service," including HQ 957636 (Oct. 11, 1995) and HQ 957688 (Oct. 11, 1995)—the Customs rulings classifying the Projectors under GRI 3(b). *See* Plaintiff's Statement of Material Facts ¶ 6; Defendant's Response to Plaintiff's Statement of Material Facts ¶ 6. The Government thus seemed to endorse Customs' classification of the Projectors pursuant to GRI 3(b).

In contrast, the Government's opening brief seemed to argue unequivocally that the Projectors are not *prima facie* classifiable under

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[9] Heading 9008, HTSUS, in its entirety, covered "[i]mage projectors, other than cinematographic; photographic (other than cinematographic) enlargers and reducers; parts and accessories thereof." The related Explanatory Notes provide that the "instruments of this heading are designed for projecting still images." *See* Explanatory Note 90.08(A).

Because the parties differ in their proposed classifications for the projector component (with the Government asserting that it is properly classifiable under heading 9008, while Toy Biz asserts that it is classifiable under heading 9503), the parties also differ in their view of the competing headings for the Projector as a whole. Moreover, although the Customs rulings implicitly acknowledge the existence of two competing headings, they do not expressly identify how Customs would have classified the projector component alone. *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995).

In any event, because the proper classification of the projector component is material (if at all) only if it is determined that the projector feature imparts to the Projectors their "essential character," the ultimate disposition of the pending motions (below) renders it unnecessary to reach the issue of the classification of the projector component at this time.

[10] *See generally* Plaintiff's Reply Brief at 14 (noting that Government's claim that GRI 3 is not applicable is "at variance with the position it has previously, repeatedly, taken," and pointing out that, at the administrative level, Customs classified the Projectors under GRI 3(b)).

Although Toy Biz takes pains to highlight the Government's apparent efforts to disavow Customs' basis for classifying the Projectors, Toy Biz has stopped short of arguing that the Government is prohibited from affirmatively espousing a theory of classification that differs so fundamentally from Customs' rationale. *Id.*

two or more headings, and therefore cannot be classified under GRI 3. *See* Defendant's Brief at 17–18, 25–26. But, even then, the brief gave no indication that the Government recognized that it was repudiating Customs' position. Indeed, the brief made no reference to the basis for Customs' classification of the Projectors, much less proffer an explanation for the apparent reversal of position, or expressly "confess error." *Id*. And the

Government's reply seemed to temper the position taken in its opening brief—appearing, at least in some places, to treat its new argument in opposition to the application of GRI 3 as an alternative or "fallback" position.[11] *Compare* Defendant's Brief at 17–18, 25–26 *with* Defendant's Reply Brief at 15–16 (where, *e.g.*, the Government asserts that its opening brief "did not depart from our prior position regarding the classification of [the Projectors] pursuant to GRI 3(b)"). Indeed, the Government's final words on the subject can be read to endorse the classification of the Projectors "based upon the essential character of the good," an argument the Government characterizes as "consistent with" GRI 3(b). *See* Defendant's Reply Brief at 17.

Finally, the Government cited no case law in support of its new "mutual exclusivity" argument, in either of its briefs. *See* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 16–17. Toy Biz reasons simply that "[w]hile it is true that a figure cannot be classifiable as both a doll and a non-human creature (toy), it does not follow that an item cannot be a composite article consisting of a doll portion and a toy portion." Plaintiff's Reply Brief at 16–17.

While, at first blush, there is a certain appeal to the seeming logic of the Government's new argument, it merits close scrutiny. *Better Home Plastics* includes what is perhaps the most thoughtful and comprehensive analysis of an argument similar to Government's "mutual exclusivity" argument here. *See Better Home Plastics Corp. v. United States,* 20 CIT 221, 916 F. Supp. 1265 (1996), *aff'd*, 119 F.3d 969 (Fed. Cir. 1997).

Better Home Plastics concerned the classification of imported shower curtain sets consisting of a textile outer curtain, an inner plastic magnetic liner, and plastic hooks. Customs had applied GRI 3(c), classifying the merchandise under subheading 6303.92.0000, HTSUS—the subheading for the textile outer curtain. In contrast, Better Home Plastics argued that GRI 3(b) controlled, and that the merchandise should be classified based on the inner plastic liner, under subheading 3924.90.1010, HTSUS.[12]

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[11] It is not clear whether or not the Government intended in its opening brief to disavow Customs' rationale for the classification of the Projectors. But the rather more muted argument in the Government's Reply may be the result of Toy Biz's Reply Brief, which cast the spotlight on the Government's change of position. Specifically, Toy Biz intimated that the Government's new antipathy for GRI 3 is a tacit acknowledgment that the proper application of GRI 3 will not sustain the classification of these Projectors as "dolls." *See* Plaintiff's Reply Brief at 14 ("Defendant, apparently recognizing the obvious result of its own earlier reasoning, has now decided to shift gears, and claim that the items are classifiable as dolls under the *eo nomine* principle.").

[12] Subheading 6303.92.0000, in its entirety, covered "[c]urtains (including drapes) and interior blinds; * * * [o]ther: [o]f synthetic fibers." HTSUS, subheading 6303.92.0000. Subheading 3924.90.1010, in its entirety, covered "[t]ableware, kitchenware, other household articles and toilet articles, of plastics: [o]ther: [c]urtains and drapes, including panels and valances; * * * [c]urtains and drapes." HTSUS, subheading 3924.90.1010.

The Government argued that classification under GRI 3(b) was inappropriate, asserting that the shower curtain sets could not be classified based on the plastic liner because certain Chapter Notes precluded classification of the sets under Chapter 39. Specifically, as the court observed:

> Note 1 to Chapter 39 provides [that] "any reference to 'plastics' * * * does not apply to materials regarded as textile materials of Section XI." Section VII, Chapter 39, Note 1, HTSUS. In addition, Note 2(a) of the same chapter provides that Chapter 39 does not cover "goods of section XI (textiles and textile articles)[.]" *Id*. at Note 2(1).

Better Home Plastics, 20 CIT at 225, 916 F. Supp. at 1268. In short, as the Court put it, the Government argued in that case—much as it has in this case—that "under GRI 1, * * * the prohibition contained in the chapter notes * * * take precedence over an application of GRI 3(b)." 916 F. Supp. at 1268. *Compare* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16.

The *Better Home Plastics* court found the Government's argument unpersuasive. The court reasoned that the purpose of exclusions such as those in the Chapter Notes that the Government relied on in that case—like those that the Government cites here—is to ensure that the classification system does not yield absurd or incongruous results. *See Better Home Plastics,* 916 F. Supp. at 1268–69 (discussing Explanatory Note GRI 1(V) and observing that, absent the relevant Chapter Note, a mixture of sodium and chloride (*i.e.*, salt) would be classified as a Chapter 31 fertilizer). The court held that, in contrast:

> The application of GRI 3(b) results in the classification of a set pursuant to the component that imparts the set's essential character, * * * the plastic liner. Under this fiction, the set is to be treated as if it consists wholly of the plastic curtain.

20 CIT at 226, 916 F. Supp. at 1269. As the court explained, the very nature of the "essential character" test of GRI 3(b) ensures that it does no violence to the merchandise being classified:

> Classification of the textile curtain under the provision for plastic goods would not deprive the set of its "plastic" qualities. It is the essential character of the set—derived in part from the plastic's ability to repel water—that denotes the set's utility, purpose, and accordingly, character. Inclusion of the textile curtain with the classification for the plastic liner does little to change the qualities or the basic nature of the set in meeting this purpose.

Id.

Accordingly, the court in *Better Home Plastics* rejected the Government's argument that prohibitions (or exclusions) in Chapter Notes—such as those at issue here—precluded the application of GRI 3(b) to classify the shower curtain set at issue in that case. Applying GRI 3(b) and concluding that the "essential character" of the set was derived from the inner plastic liner, the court held that the set was properly classifiable under Chapter 39, Chapter Notes notwithstanding.

So, too, in this case, the Chapter Notes and Explanatory Notes cited by the Government are no bar to the application of GRI 3.[13] As Customs here properly ruled, the Projectors are composite goods consisting of two components—a figure and a projector mechanism—which are *prima facie* classifiable under two or more headings. The Projectors are therefore subject to classification under GRI 3.

a. GRI 3(a)—"Relative Specificity"

While Toy Biz agrees that the Projectors are composite goods subject to GRI 3, Toy Biz contends that the Projectors can be classified under GRI 3(a). Accordingly, Toy Biz argues, Customs' resort to GRI 3(b) and its "essential character test" was improper. *See* Plaintiff's Brief at 9–11; Plaintiff's Reply Brief at 16.

Toy Biz asserts that, even if the Projector figures represent humans, the presence of the projector mechanism justifies the classification of the Projectors as "other toys" under GRI 3(a). *See generally* Plaintiff's Brief at 9–11; Plaintiff's Reply Brief at 14–17. Paraphrasing GRI 3(a), Toy Biz reasons that "[s]ince the projector and the figure portions of the [Projectors] are separately classifiable, Customs is required to classify the item under 'the heading which provides the most specific description' rather than under a heading which provides a more 'general description.'" Plaintiff's Reply Brief at 16. Toy Biz concludes that "[u]nder this principle, classification under 9503.90.60 is applicable since this provision encompasses the various features of the item, not only one feature." *Id*.

But Toy Biz ignores the express caveat to GRI 3(a)'s rule of "relative specificity." That caveat, set forth in the second sentence of the GRI 3(a), provides that where—as here—the competing headings "each refer to part only" of the composite good, "those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods." *See* GRI 3(a).

In the motions at bar, Toy Biz assumes for the sake of argument that the figure components of the Projectors would be classifiable as "dolls" under heading 9502. *See* Plaintiff's Brief at 10 ("[t]he issue of whether the figure represents a human or a non-human is irrelevant to the classification of these items"); Plaintiff's Reply Brief at 16 ("[t]he existence of the projector necessarily removes the article from classification within the doll provision [of the HTSUS], *regardless of whether the figure represents a human")* (emphasis added), 17 ("[i]f we assume, *arguendo,*

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[13] Significantly, GRI 1 refers only to *Section* Notes and to *Chapter* Notes. *See* GRI 1 (classification to be determined according to terms of headings "and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to [the other GRIs that follow]"). The notes of concern in *Better Home Plastics* were *Chapter* Notes, as are the notes on which the Government here relies vis-a-vis heading 9008. *See Better Home Plastics,* 20 CIT at 225–26, 916 F. Supp. at 1268; Defendant's Reply Brief at 16 n.5. However, the notes that the Government cites vis-a-vis heading 9503 are merely *Explanatory* Notes, which are not mentioned in GRI 1. *See* Defendant's Brief at 17–18, 25–26; Defendant's Reply Brief at 15–16. While Explanatory Notes "may offer guidance in interpreting subheadings in the HTSUS, they are not considered controlling." *Rocknel Fastener, Inc. v. United States,* 267 F.3d 1354, 1360 (Fed. Cir. 2001). In sum, while even "mutually exclusive" prohibitions in *Chapter* Notes do not bar the application of GRI 3 in cases such as this, the argument on prohibitions in *Explanatory* Notes is weaker still.

that the figures housing the projectors represent human beings, this in itself does not dictate classification as dolls") (emphasis in original). The projector feature is *prima facie* classifiable under either heading 9008 ("image projector") or heading 9503 ("other toys"). *See*, *e.g.*, Defendant's Reply Brief at 16 n.5 (identifying competing headings as headings 9502 and 9008); Plaintiff's Reply Brief at 14 (implicitly identifying competing headings as headings 9502 and 9503), 17 (asserting that projector alone would be classifiable under heading 9503).

Whether the competing headings are 9502 and 9503, or headings 9502 and 9008, each refers to "part only" of the Projectors. Accordingly, under GRI 3(a), the competing headings are deemed equally specific, and classification under GRI 3(b) is appropriate.[14]

b. GRI 3(b)—"Essential Character"

Customs classified the Projectors pursuant to GRI 3(b), applying the "essential character" test of that rule. Specifically, Customs concluded:

> We consider each X-Men Projector to be a composite article (consisting of a figure and a projector) with accessories (consisting of three film disks). *Each article's essential character is imparted by the doll or toy animal/creature component.*

HQ 957636 (Oct. 11, 1995) (emphasis added); HQ 957688 (Oct. 11, 1995) (emphasis added). Because the figure ("doll or toy animal/creature") components of the Projectors here at issue were determined by Customs to represent humans, Customs classified the Projectors as dolls.

The GRIs offer only the most general guidance on the interpretation of the "essential character" test. The Explanatory Notes to GRI 3(b) state simply:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Explanatory Notes to GRI 3(b)(VIII). Nor are there many reported cases on point decided under the HTSUS. Accordingly, the courts have looked to case law under the TSUS for guidance. *See Better Home Plastics Corp. v. United States,* 20 CIT 221, 224, 916 F. Supp. 1265, 1267 (1996), *aff'd*, 119 F.3d 969 (Fed. Cir. 1997).

The challenge in this case, however, is not the relative paucity of case law. Indeed, application of the "essential character" test is, by definition, a fact-intensive analysis. *See*, *e.g.*, *Takashima U.S.A., Inc. v. United States,* 16 CIT 1030, 1037, 810 F. Supp. 307, 313 (1992) (referring to "a fact-intensive 'essential character' analysis"); *Canadian Vinyl Indus., Inc. v. United States,* 76 Cust. Ct. 1, 2, 408 F. Supp. 1377, 1378 (1976) (noting that "[d]iscernment" of "essential character" is not "an

[14] Significantly, Toy Biz has pointed to no case where composite goods which were *prima facie* classifiable under two or more headings were classified pursuant to GRI 3(a). Indeed, independent research suggests that there is no such case.

exact science"), *aff'd*, 555 F.2d 806 (CCPA 1977). The challenge here is that Customs failed to elaborate on the rationale for its determination that the figure component imparted to the Projectors their "essential character"; and the parties' briefs are virtually silent on the subject as well.

As discussed above, the Government argued that GRI 3 was not applicable, because the Projectors were classifiable under GRI 1. *See* Defendant's Brief at 24–25; Defendant's Reply Brief at 12–15. And Toy Biz argued that GRI 3(b) was not applicable, because the Projectors were classifiable under GRI 3(a). *See* Plaintiff's Brief at 9–12; Plaintiff's Reply Brief at 14–17. In short, the record in this case is virtually devoid of much of the type of argument and evidence generally considered in applying the "essential character" test.[15] While representative samples of the merchandise are available, and while they are indeed "potent witnesses" (*see, e.g., Simod Am. Corp. v. United States,* 872 F.2d 1572 (Fed. Cir. 1989)), it seems ill-advised to decide this issue without the benefit of submissions from the parties. *See, e.g., Golding Bros. v. United States,* 6 CIT 118, 121 (1983) (denying cross-motions for summary judgment and declining to determine "essential characteristic" of merchandise on incomplete record consisting of "shallow affidavits and * * * laboratory reports"), *dismissed upon receipt of further evidence*, 9 CIT 48 (1985).

Accordingly, to the extent that the parties' cross-motions seek partial summary judgment on the argument that the existence of the projector component alone is sufficient to warrant the Projectors' classification as "other toys" under heading 9503, those motions are denied. Further proceedings will be scheduled, as appropriate.

B. Projectors as "Toy Sets"

Toy Biz argues in the alternative that, even if the Projectors represent humans, and even if it is the figure component—and not the projector feature—that gives the Projectors their "essential character," the Projectors nevertheless are classifiable as "[o]ther toys, put up in sets or outfits" ("toy sets"), under subheading 9503.70.80, HTSUS. *See* Plaintiff's Brief at 11.

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[15] In addition to the representative factors set forth in the Explanatory Notes to GRI 3(b)—"the nature of the material or component, its bulk, quantity, weight or value, * * * [and] the role of a constituent material in relation to the use of the goods," *Better Home Plastics* listed some other factors to be considered in determining "essential character," including the respective indispensability of the properties of the components of the merchandise, the respective cost of the components of the merchandise, the basis for a consumer's decision to purchase the merchandise, the respective duration and/or frequency of the use of the components, and the manner in which the merchandise is invoiced. *See* Explanatory Notes to GRI 3(b)(VIII); *Better Home Plastics,* 20 CIT at 224–25, 916 F. Supp. at 1267–68. Other decisions have considered factors such as the manner in which merchandise is marketed and advertised. *See, e.g., Dominion Ventures, Inc. v. United States,* 10 CIT 411, 413 (1986), and authorities cited there. The record in this case is essentially barren of evidence on such factors.

Clearly, the figure component of the Projector constitutes the "bulk" of the item, in terms of sheer mass. *See* Sample "Bishop" and "Dr. Octopus" Projectors. On the other hand, Toy Biz emphasizes—albeit in another context—that the articles are called "Projectors" and that the word "Projector" is prominently displayed on the packaging of the merchandise. *See* Plaintiff's Brief at 9; *see also* Sample "Bishop" and "Dr. Octopus" Projectors (in packaging). But those factors alone are not dispositive. The Government asserts—although, again, in another context—that the Projector figure retains its play value even if the projector feature is inoperable or broken. *See* Defendant's Reply Brief at 15. But the reverse is true as well: The projector feature—which is housed in the Projector's torso—would still be usable even if the Projector figure were decapitated and dismembered. Additional evidence and argument are needed to decide this issue.

The Explanatory Notes define a "set" as "two or more different types of articles (principally for amusement), put up in the same packing for retail sale without repacking. Simple accessories or objects of minor importance intended to facilitate the use of the articles may also be included." Explanatory Notes at Subheading 9503.70. *See* Explanatory Notes 95.03(A) (listing examples of toy sets, including "toy arms, tools, gardening sets, tin soldiers, etc." and referring to "[c]ollections of articles, the individual items of which if presented separately would be classified in other headings").

It is not clear from the briefs whether Toy Biz is claiming as a "set" the Projectors themselves (consisting of both a figure and a projector), or the Projector together with the three film disks with which each is packaged. Neither argument has merit.

The Government assumes that Toy Biz is claiming that the Projector is a "set," in and of itself, and makes short work of the theory. *See* Defendant's Brief at 26. As the Government correctly observes, under the definitions and examples of sets in the Explanatory Notes, a Projector itself cannot be considered a "set," but is rather a single composite item consisting of two different components (a figure and a projector). *Id*.

The better argument for Toy Biz is that the Projectors, together with the film disks, constitute a set. But, as Customs ruled, the film disks in fact are mere "accessories." *See* HQ 957636 (Oct. 11, 1995); HQ 957688 (Oct. 11, 1995).

Note 3 to Chapter 95 provides that "accessories which are suitable for use solely or principally with articles of this Chapter are to be classified with those articles." Note 3 to Section XX, Chapter 95. Because the HTSUS does not define the term "accessory," it is accorded its common and popular meaning. *See*, *e.g.*, *Rollerblade, Inc. v. United States,* 282 F.3d 1349, 1352 (Fed. Cir. 2002). A standard dictionary definition of "accessory" is "a thing of secondary or subordinate importance." *Merriam Webster's Collegiate Dictionary* 7 (10th ed. 1997).

An examination of the film disks packaged with the Projectors makes it clear that they are "accessories" within the dictionary definition of that term. The film disks are designed and sized specifically to fit inside the miniature projector housed within the Projector figure. The film disks are therefore "suitable for use solely or principally" with the accompanying Projector. Note 3 to Section XX, Chapter 95. Further, the film disks have no play value independent of the Projector, and are of secondary or subordinate importance.

Accordingly, contrary to Toy Biz's assertions, the inclusion of film disks with the Projectors does not convert the Projectors into "toy sets." Customs properly treated the film disks as "accessories," which are to be classified with the Projectors. Toy Biz's motion for partial summary judgment classifying the Projectors as "toy sets" is therefore denied, and the Government's cross-motion is granted.

IV. CONCLUSION

For the reasons set forth above, the Court denies the parties' cross-motions for partial summary judgment on the argument that the existence of the projector mechanism is alone sufficient to warrant the Projectors' classification as "other toys" under subheading 9503.90.60, HTSUS. In addition, Toy Biz's motion for partial summary judgment classifying the Projectors as "toy sets" under subheading 9503.70.80, HTSUS is denied, and the Government's cross-motion on that issue is granted.

A separate order will be entered accordingly.

(Slip Op. 02–77)

CARPENTER TECHNOLOGY CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

VIRAJ IMPOEXPO LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 00–09–00447

[Antidumping duty review determination sustained in part, reversed and remanded in part.]

(Decided July 30, 2002)

Collier Shannon Scott, PLLC, (Robin H. Gilbert), Washington, D.C., for the plaintiff Carpenter Technology Corporation.

Miller & Chevalier (Peter Koenig), Washington, D.C., for the plaintiff Viraj Impoexpo Ltd.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Lucius Lau, Kenneth J. Guido),* for defendant The United States; (of counsel: *William G. Isasi,* Esq., U.S. Department of Commerce).

OPINION

MUSGRAVE, *Judge:* Carpenter Technology Corporation ("Carpenter") and Viraj Impoexpo Ltd. ("Viraj") brought separate lawsuits to contest certain aspects of *Stainless Steel Bar From India: Final Results of Antidumping Duty Administrative Review and Initiation of Antidumping New Shipper Review,* 65 Fed. Reg. 48965 (Aug. 10, 2000) *("Final Results").*[1] The *Final Results* utilize Viraj's reported data except for U.S. sales for which lacking corresponding third-country sales data, for which the office of International Trade Administration, U.S. Department of Commerce ("Commerce" or "the Department") utilized "facts otherwise available" to determine the margin of dumping. *See* 19 U.S.C.

[1] The official public and confidential records are herein abbreviated "PDoc" and "CDoc", respectively.

§ 1677e. Carpenter contests Commerce's reversal of its preliminary determination that Viraj's questionnaire responses warranted an adverse inference and also its model matching methodology. Viraj contests Commerce's resort to facts available and also its choice thereof. Commerce contends the *Final Results* are correct.

BACKGROUND

Viraj's stainless steel bar entered the United States commerce subject to *Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan,* 60 Fed. Reg. 9661 (Feb. 25, 1995). The *Final Results* cover the period February 1, 1998 through January 31, 1999 ("POR") and were initiated on March 29, 1999.[2] Commerce sent to Viraj the department's standard questionnaire requesting *inter alia* information on the home market values of merchandise under review. *See* PDoc 950. The questionnaire referred a respondent to an attached Appendix III, which specified that hot rolled ("black") stainless steel bars as well as cold rolled ("bright") bars were reportable.

In its first response(s), dated June 3, 1999 and July 12, 1999, Viraj indicated that it had not made home market sales of certain merchandise under review and therefore it was providing only data on third country sales. PDocs 978, 1267. Specifically, in several places Viraj indicated that it was reporting sales of bright bars as the only merchandise under review that had been sold in the United States during the POR. Commerce therefore sent Viraj a supplemental questionnaire on August 17, 1999 requesting confirmation that Viraj had reported all home market sales of all merchandise under review as described in Appendix III of the initial questionnaire. *See* PDoc 1062. On September 23, 1999, Viraj confirmed that it had properly reported all sales of the merchandise under review in the United States, the home market, and third country markets. Viraj again stated that it was reporting "all sales of the subject merchandise as the total stainless steel bright bars activity." PDoc 1291.

Not convinced, Commerce therefore issued a second supplemental questionnaire on January 18, 2000. PDoc 1219. This instructed Viraj to "reconfirm that [it is] reporting all sales of stainless steel bars (*not just bright bars*) * * * to the United States, the home market, and to third countries" and set a deadline of February 1, 2000 for responding. *Id*. (at Fr. 2) (highlighting added). On January 24, 2000, Viraj requested an extension of time, which Commerce granted to February 8, 2000 with the caveat that in view of the pending deadline for the preliminary determination, no further extension of time would be granted. PDocs 1232, 1238. Viraj submitted data disclosing home market sales of black bar on February 8 and 9, 2000 (PDocs 1287, 1289), however it submitted the narration for the data on February 14, 2000. Commerce rejected that submission as untimely and excluded it from the administrative record on February 17, 2000. *See* PDoc 1552.

[2] 64 Fed. Reg. 14860 (Mar. 29, 1999). The proceeding was later combined with a new shipper review. *See* 64 Fed. Reg. 18601 (Apr. 15, 1999).

On March 8, 2000, Commerce published the preliminary results *sub nom. Stainless Steel Bar From India; Preliminary Results of Antidumping Duty Administrative Review and New Shipper Review and Partial Rescission of Administrative Review,* 65 Fed. Reg. 12209 (Mar. 8, 2000). Commerce determined that because Viraj's last response was not timely, it had not responded to the best of its ability, it had therefore failed to cooperate, and it was therefore necessary to assign a margin based on total adverse facts otherwise available.[3] *Id.* at 12210. *See* 19 U.S.C. § 1677e. The preliminary margin was 21.02 percent.

On April 28, 2000, Viraj filed comments on the preliminary results. PDoc 1379. Viraj explained to Commerce that information provided by its counsel showed Commerce authorizing other respondents to exclude sales of black bar, and it thought that such exception applied to it because it had not sold black bar in the United States. Because the correspondence from Commerce to other parties indicated that black bar was fundamentally different from bright bar, Viraj explained that it concluded that black bar was not a "foreign like product" or "comparable" to the only "subject merchandise" it had sold in the United States, *i.e.*, bright bar. Viraj stated that it had clearly explained in its earlier responses that it was only reporting sales of bright bar and never intended to mislead Commerce. It also explained that the narrative response to its second supplemental response was submitted after the deadline due to the short time available to respond and the time pressures on the one person capable of compiling the information for the response. Additionally, Viraj argued that even without the narrative the data were sufficiently complete to enable comparison to U.S. sales. *Id.*

In the final determination, Commerce again declined consideration of Viraj's home market data on the ground that the narrative response had not been submitted by the required deadline. Nonetheless, Commerce determined that Viraj's responses had been "due to confusion and not lack of cooperation" and therefore reversed its earlier conclusion that the circumstances warranted an adverse inference. Commerce then determined that Viraj's reported foreignmarket sales were sufficiently complete to serve as a basis for comparison to U.S. sales. It grouped stainless steel bar by the physical characteristics of type (hot- or cold-rolled), grade, remelting process, final finish, and shape. Because Commerce determined that Viraj did not report complete variable cost of manufacturing information, for size it "banded" the foreign market sales based on whether bar was above or below 20 millimeters, in accordance with Viraj's reported cost of manufacturing information. Commerce then matched sales, and for unmatched U.S. sales Commerce

[3] According to the February 28, 2000 facts available memorandum:

> no description of any product characteristics was given; no answers to our questions about customer product codes, relationships, or channels of distribution were provided; no explanation of the invoicing system was offered; and no indication were [*sic*] given as to the basis for determining date and terms of payment. Furthermore, Viraj offered no explanation for why it did not provide credit expense data, variable cost of manufacturing data, or any selling expense information. Nor did Viraj provide any explanation as to why it did not provide a narrative response to questions regarding its policies relating to the use of discounts, rebates, and interest revenue.

PDoc 1329 at 4.

utilized as facts available the "all-others" rate of 12.45% established at the original less than fair value ("LTFV") investigation in 1994. *See Stainless Steel Bar From India*, 59 Fed. Reg. 66915 (Comment 1) (Dec. 28, 1994). This resulted in a weighted-average margin of dumping of 2.50 percent for Viraj during the POR. 65 Fed. Reg. at 48967–68 (Aug. 10, 2000).

Discussion

Jurisdiction over this matter is pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) via 28 U.S.C. § 1581(c). The standard of review is whether "any [contested] determination, finding or conclusion" found by Commerce is "unsupported by substantial evidence on the record, or is otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *E.g., Mitsubishi Heavy Indus. v. United States,* 275 F.3d 1056, 1060 (Fed. Cir. 2001) (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938) via *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 477 (1951)).

In an administrative review of an antidumping duty order, Commerce is required to determine the applicable antidumping duty margin, if any, for each entry of "subject merchandise." 19 U.S.C. § 1675(a)(2)(A). The margin is the difference between the "normal value" ("NV") and the "export price" ("EP") or "constructed export price" ("CEP)" (as applicable) of the subject merchandise. 19 U.S.C. § 1677b(a). Subsection (1) of section 1677b(a) provides that the NV of such subject merchandise "shall" be a

(B) Price

* * * * * * *

> (i) * * * at which the foreign like product is first sold (or in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the [EP] or [CEP], or
>
> (ii) in a case to which subparagraph (C) applies, the price at which the foreign like product is so sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if—
>
> > (I) such price is representative,
> >
> > (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is 5 percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export to the United States, and
> >
> > (III) [Commerce] does not determine that the particular market situation in such other country prevents a proper comparison with the export price or constructed export price.

(C) Third Country Sales

This subparagraph applies when—

(i) the foreign like product is not sold (or offered for sale) for consumption in the exporting country as described in subparagraph (B)(i),

(ii) [Commerce] determines that the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold in the exporting country is insufficient to permit a proper comparison with sales of the subject merchandise to the United States, or

(iii) the particular market situation in the exporting country does not permit a proper comparison with the [EP] or [CEP].

For purposes of clause (ii), the aggregate quantity (or value) of the foreign like product sold in the exporting country shall normally be considered to be insufficient if such quantity (or value) is less than 5 percent of the aggregate quantity (or value) of sales of the subject merchandise to the United States.

19 U.S.C. § 1677b(a)(1). If necessary information is missing from the administrative record, Commerce must make a determination on the basis of available information pursuant to 19 U.S.C. § 1677e, which provides in relevant part:

(a) In general

If—

(1) necessary information is not available on the record, or

(2) an interested party or any other person—

* * * * * * *

(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,

[Commerce] * * * shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

(b) Adverse inferences

If the administering authority or the Commission (as the case may be) finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission (as the case may be), in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available. Such adverse inference may include reliance on information derived from—

(1) the petition,

(2) a final determination in the investigation under this subtitle,

> (3) any previous review under section 1675 of this title or determination under section 1675b of this title, or
> (4) any other information placed on the record.

19 U.S.C. § 1677e. *See also* 19 C.F.R. §§ 351.221, 351.308 (2000).

I

Carpenter contends the record lacks substantial evidence to support the determination that Viraj had acted to the best of its ability. It argues that Viraj, having participated in prior proceedings, was "well-acquainted" with departmental procedures and the contents of the agency's standard questionnaire, and it contends that Commerce violated departmental policy by not considering the three factors it generally considers in determining whether to apply adverse facts available: (1) the level of experience of the respondent in other investigations and orders; (2) whether the respondent has control of the data at issue; and (3) the extent to which the respondent may have benefitted from its own lack of cooperation. *See* Def.-Int.'s Br. at 19–26 (citing *inter alia Stainless Steel Sheet and Strip Coils from Taiwan*, 64 Fed. Reg. 30592 (June 8, 1999) (final LTFV determination); *Roller Chain Other Than Bicycle, From Japan*, 62 Fed. Reg. 60472, 60477 (Nov. 10, 1997) (final review results); *Certain Welded Carbon Steel Pipes and Tubes from Thailand,* 62 Fed. Reg. 53808, 53820–21 (Oct. 16, 1997) (final review results)). Carpenter argues for remand and consideration in accordance with Commerce's own policy.

Assuming *arguendo* that the foregoing amounts to administrative policy, the Court can discern nothing of record to justify remand for such consideration. The generic experience of a respondent in prior proceedings offers little, if any, insight into its actions during a particular proceeding. *Nippon Steel Corp. v. United States*, 25 CIT ____, ____, 146 F. Supp. 2d 835, 839 (2001). The second and third factors are predicated on finding a lack of cooperation. None has been determined, and there is no indication that Viraj intended to or did benefit from withholding information. Moreover, 19 U.S.C. § 1677e(b) is permissive in scope. *See Hoogovens Steel BV v. United States,* 24 CIT ____, ____, 86 F. Supp. 2d 1317, 1332 (2000). Therefore, even if Viraj had not acted to the best of its ability the law does not compel an adverse inference.

Of course, clear communication is prerequisite to avoiding confusion. *Cf.* 19 U.S.C. §§ 1677m(c) & 1677m(d). In this matter, Commerce sought the same information three times. But the apparent need for the second supplemental questionnaire would have been obviated had Commerce specifically requested confirmation in the first supplemental questionnaire of whether Viraj had reported all home market sales *including black bar*. On the other hand, the fact that Commerce sought confirmation *at all* (*i.e.*, whether all home market sales had been reported) should have acted as a red flag to Viraj regarding its reporting of home market sales.

The purposes of the antidumping laws are not furthered by erroneous assumption. Time is a precious commodity in these administrative proceedings. If a request from Commerce is unclear, it is incumbent upon parties to assist the administrative process and clarify the precise information sought. *See* 19 U.S.C. §§ 1675(a)(3)(A) & 1675(c)(5); *Atlantic Sugar, Ltd. v. United States,* 744 F.2d 1556, 1560 (Commerce is dependent upon the cooperation of respondents to provide necessary information in order to determine dumping margins "within the extremely short statutory deadlines which the Congress has built into the * * * antidumping law"); *Persico Pizzamiglio, S.A. v. United States,* 18 CIT 299, 304 (1994) ("any ambiguity should have been resolved through consultation with Commerce before the time * * * the response was due"); *Sugiyama Chain Co. v. United States,* 16 CIT 526, 531, 797 F. Supp. 989, 994 (1992) ("if the burden of compiling, checking, rechecking, and finding mistakes in [a] submission * * * were placed upon Commerce, it would transform the administrative process into a futility").

In any event, the standard of review is whether there is substantial record evidence to support the agency's determination that Viraj had acted to the best of its ability. There is, namely: (1) the letter from Commerce to counsel exempting Isibars from reporting black bar sales, on which Viraj claims to have relied, (2) the generality of the first supplemental questionnaire request, (3) Viraj's reiteration of its original response that it was reporting "all sales of the subject merchandise as the total stainless bright bars activity,"[4] and (4) Viraj's general diligence and responsiveness to Commerce's requests for information. *See* PDoc 1477 (Comment 4). *See also* PDocs 1219, 1379 at 2. Given the context, Commerce could reasonably conclude that Viraj had been confused as to its reporting requirements, and that even considering the late narrative Viraj had been responsive. The determination that Viraj had acted to the best of its ability is therefore sustained. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (the possibility of drawing inconsistent conclusions from the same "evidence does not prevent an agency's finding from being supported by substantial evidence"); *Inland Steel Industries, Inc. v. United States,* 188 F.3d 1349, 1359 (Fed. Cir. 1999) (reviewing courts do not weigh the evidence to determine whether a different conclusion is possible).

II

Viraj spends much of its brief criticizing Commerce's decision to reject the narrative as untimely and disregard the home market data and base normal values (NVs) on third country sales. At the same time, however, Viraj complains of being forced to respond to a six-page, single-spaced document in a mere two weeks, albeit with a one-week extension. The second supplemental questionnaire was a consequence of the nonspecific request in the first supplemental questionnaire to confirm that all home market sales had been reported, which Viraj contends was inadequate notice "of the nature of the deficiency" in accordance with 19 U.S.C. § 1677m(d), particularly in light of awareness of the exemption

[4] PDocs 1267, 1291 at 2.

"granted" to other respondents from reporting black bar sales in the home market on the ground that they had sold only bright bar in the U.S. market. Viraj further contends that because its situation was the same as those other respondents, in light of their exemptions the reporting requirement imposed on it was arbitrary and capricious. Viraj's Br. at 5.

The judicial standard of review in a challenge such as this is whether the determination *on the record* is unsupported by substantial evidence or not in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1995). Of course, an agency record that reveals an arbitrary or capricious decision would not be in accordance with law, but that inquiry is narrower than the substantial evidence standard and asks whether there was a rational basis in fact for the decision. *Suwanee Steamship Co. v. United States,* C.D. 4708, 79 Cust.Ct. 19, 23–24, 435 F.Supp. 389, 392 (1977). If so, a court may not substitute its judgment for that of the agency. *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Automobile Ins. Co.,* 463 U.S. 29, 43 (1983). *See, e.g., Melamine Chemicals, Inc. v. United States,* 732 F.2d 924, 933–34 (1984) ("Commerce's decision to disregard margins caused solely by temporary fluctuations in the exchange rate, and to reach a Final Negative Determination, was reasonable and neither arbitrary nor in violation of law."); *Bowe Passat v. United States,* 17 CIT 335, 338 (1993) (decision to reject supplemental information arbitrary and capricious and an abuse of discretion). *See also* 5 U.S.C. § 706(2)(A).

As a general matter "it is Commerce, not the respondent, that determines what information is to be provided for an administrative review." *Ansaldo Componenti, S.p.A. v. United States,* 10 C.I.T. 28, 37, 628 F. Supp. 198, 205 (1986). The government here distinguishes Commerce's treatment of Viraj on the ground that those other respondents specifically requested an exemption whereas Viraj did not. But, of course, Commerce may neither abrogate its statutory mandate to inquire into all matters that may bear on the margin calculation nor engage in partiality. By exempting respondents with no sales of black bar in the United States from reporting home market sales of such, Commerce obviously concluded that home market black bar information was not necessary for calculating their NVs in accordance with 19 U.S.C. § 1677b(a)(1). Whether that decision was correct, Commerce was aware that Viraj had sold only bright bar in the U.S. market, and that circumstance necessarily superseded the mandate to use facts otherwise available "if an interested party or any other person * * * fails to provide such information by the deadlines for submission of the information or in the form and manner requested" under 19 U.S.C. § 1677e(a)(2)(B). Respondents have a right to expect fair, impartial, and consistent treatment in agency proceedings. *See*, *e.g.*, *NEC Corp. v. U.S. Dep't of Commerce,* 151 F.3d 1361 (1998); *Melamine Chemicals v. United States,* 732 F.3d 924, 933 (1984); *Torrington Co. v. United States*, 44 F.3d 1572, 1579 (1995). It was incumbent upon Commerce to apply its rationale to all respondents similarly situated.

Be that as it may, in view of the fact that Viraj limited its initial response to third country sales data at the outset of the proceeding, it appears that Viraj's fundamental concern is the margin calculated on the basis of facts otherwise available, and that the basis of market data used to calculate NV is immaterial to Viraj. The foregoing therefore appears to be academic.

III

A margin determination requires the identification of the "foreign like product" used for purposes of comparison. *See* 19 U.S.C. § 1677(16). In comparing the foreign and U.S. merchandise, if a difference in price is "established to the satisfaction of the administering authority to be wholly or partly due to * * * other differences in the circumstances of sale[,]" 19 U.S.C. § 1677b(a)(6)(C) authorizes Commerce to make a so-called difference in merchandise ("difmer") adjustment. In considering any such adjustment, Commerce proceeds on the assumption that variable costs of manufacturing account for all differences in the physical characteristics of the products to be compared:

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

19 C.F.R. § 351.411 (1998). If the value of the difmer exceeds 20 percent of the total manufacturing costs (variable plus fixed costs), Commerce will presume that products are not comparable in the absence of circumstances that would make such difference reasonable. *See Antidumping Manual,* Ch. 8 at 49–52 (U.S. Dep't of Comm., Feb. 10, 1998); *see also Import Administration Policy Bulletin* 92.2 (U.S. Dep't of Comm., July 29, 1992).

Commerce concluded that Viraj provided total cost of manufacturing data but incomplete variable cost of manufacturing ("VCOM") data. Commerce therefore determined to resort to facts otherwise available for such VCOM data, and its method of accounting for such was to "band" (to use the parties' term) foreign-market and U.S.-export sales based on Viraj's representation that production processes differed between bar of less than 20 millimeters and bar greater than 20 millimeters. *See* CDoc 1266 at D–3; CDoc 1290 at D–14.

Carpenter believes size matters. It argues that there is a fundamental difference between banding sales and banding manufacturing costs, and that without VCOM data, third-country and U.S. sales could not be properly matched. The effect of the methodology, Carpenter contends, was to assign identical product matches irrespective of actual bar size:

> In cases where the Department has allowed averaging of cost data for VCOM, that decision only determined the magnitude of the DIFMER when a match between non-identical U.S. and foreign

> products occurs. Banding sales together by size range actually changes the manner by which sales are matched. Instead of seeking to match 15 mm prices in the U.S. to 15 mm prices in the third-country market, the Department has allowed a 15 mm product in the United States to match a 5, 8, 12, 16, or 19 mm product in the foreign market. Thus, the specific price differences are obviated and the most accurate possible measure of dumping is masked.

Def.-Int.'s Reply Br. at 7, 11. Thus, according to Carpenter, Commerce's method had the effect of masking differences in Viraj's cost of production and "rewarding" Viraj because Commerce could not make the requisite difmer adjustments.

The government responds that the question here is simply whether Commerce has reasonably met the requirements of 19 U.S.C. § 1677b(a)(6)(C) to account for the absence of VCOM information. It contends that Carpenter's argument assumes that Commerce's method is distorted without evidence thereof. Rather, according to the government, the data Viraj supplied enabled calculation of all legally-mandated adjustments to NV under 19 U.S.C. § 1677b(a)(6) (*e.g.*, inland freight, insurance, brokerage) and accounted for five out of the six physical characteristics that Commerce customarily uses in matching these products (type, grade, remelting process, final finish, and shape). Def.'s Br. at 33. *See* CDoc 1266 at B8–B10. According to the government, the lack of precise VCOM information affected only the comparability of size, which impacted the "customary" adjustment for "any other differences." *See* 19 U.S.C. § 167b(a)(6)(C)(ii).

Commerce has implicit authority to develop and apply reasonable model-matching methodologies in order to determine a relevant "foreign like product" under 19 U.S.C. §§ 1677b and 1677(16), and its statutory interpretation thereof is entitled to *Chevron* deference.[5] *See, e.g.*, *NTN Bearing Corp. v. United States,* 26 CIT ____, ____, 186 F. Supp. 2d 1257, 1302 (2002). *See also Koyo Seiko Co. v. United States,* 66 F.3d 1204, 1209–10 (Fed. Cir. 1995) ("Congress has implicitly delegated authority to Commerce to determine and apply a model-match methodology necessary to yield 'such or similar' merchandise"); *Timken v. United States*, 10 CIT 86, 98, 630 F. Supp. 1327, 1338 (1986). On the other hand, the methodology chosen must comport with law and the standards of substantial evidence and reasonableness. *See* 19 U.S.C. § 1516a; *see, e.g.*, *Allied Tube & Conduit Corp. v. United States,* 132 F. Supp. 2d 1087, 1096 (CIT 2001) (rejecting Commerce's unreasoned reliance on simple average in lieu of more accurate weighted average in non-adverse facts available context); *Mannesmannrohren-Werke AG et al. v. United States*, 24 CIT ____, ____, 120 F. Supp. 2d 1075, 1088–89 (2000) (Commerce's use of average facts available methodology upheld in absence of evidence that a more specific methodology would be more accurate); *Koenig & Bauer-Albert AG, et al. v. United States*, 22 CIT 574, 581–584, 15 F. Supp. 2d

[5] *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842–43 (1984) ("if 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").

834, 844–46 (1998) (Commerce's use of a facts otherwise available methodology upheld because the methodology bore a rational relationship to the subject matter at issue), *aff'd in part, rev'd on other grounds,* 259 F.3d 1341 (Fed. Cir. 2001); *Federal-Mogul Corp. et al. v. United States,* 18 CIT 785, 807–808, 862, F. Supp. 384, 400 (1994) (Commerce has discretion in the choice of methodology as long as the chosen methodology is reasonable and its conclusions are supported by substantial evidence on the record).

Carpenter's analysis demonstrates that Commerce's method matched more sales than would have been the result had resort to facts otherwise available occurred after a determination on model matching, but that analysis does not, in itself, demonstrate that Commerce's method was unreasonable and not in accordance with law. As above noted, a difmer adjustment is required to the extent that a difference in price is "established *to the satisfaction of* the administering authority to be wholly or partly due to * * * other differences in the circumstances of sale[.]" 19 U.S.C. § 1677b(a)(6)(C) (highlighting added). Carpenter's argument does not effectively demonstrate that differences in VCOMs (assuming they exist) among the different individual sizes of stainless steel bar were of such magnitude that they would exceed the difmer test's twenty percent allowance before incomparability is presumed. In other words, Carpenter's argument does not demonstrate that Commerce's method of accounting for the absence of VCOM information for matching purposes was *per se* unreasonable and therefore not in accordance with law. *Cf. Koyo Seiko*, *supra*, 66 F.3d at 1208–11 (sum-of-deviations without ten percent cap model matching methodology sustained); *Makita Corp. v. United States*, 21 CIT 734, 974 F. Supp. 770, 779 (1997) (Commerce has authority to pool home market merchandise for matching purposes); *Federal-Mogul Corp. v. United States*, 20 C.I.T. 234, 248–49, 918 F. Supp. 386, 400 (1996); *Torrington Co. v. United States*, 19 CIT 403, 414, 881 F. Supp. 622, 635 (1995) (sustaining family model matching methodology); *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 996, 834 F. Supp. 413, 417–18 (1993) (division of alloys into groups, difmer adjustments based on London Metal Exchange prices of copper and zinc for each grade within each group, and derivation of weighted-average group price as the basis for comparison, held to be in accordance with 19 U.S.C. 1677(16); exact alloy matching not required by statute).

On the other hand, Carpenter points out that the issues and decision memorandum states that Commerce undertook banding "in order to obtain more identical matches." PDoc 1466 at 13. This explanation appears results-oriented. In *Hyster Co. v. United States*, 18 CIT 119, 127, 848 F. Supp. 178, 185–86 (1994), the court examined seemingly similar statements of Commerce[6] relating to an announced change in matching methodology but concluded that there were other factors putting those

[6] *See Hyster*, 18 CIT at 127, 848 F. Supp. at 185–86 ("Our main concern is that we find the most similar merchandise that is sold in commercial quantities in the home market[.] This approach appears to be a reasonable solution in that it simplifies the matching process and creates the likelihood of a greater number of matches") .

statements into perspective and were not *the* justification for the change in Commerce's model matching methodology. While an agency determination might be sustained despite "less than ideal clarity if the agency's path may be reasonably discerned[,]" *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.,* 419 U.S. 281, 286 (1974), the "path" here is cluttered by apparent disparate treatment between Viraj and Panchmahal, the latter, as Carpenter points out, having been required to provide for matching purposes cost data in *range* form and specific product sizes but penalized for not providing cost information to enable *exact-s*ize product matching. *See* Def.-Int.'s Br. at 11–12 (citing PDoc 1466 at 2–7 & CDoc. 1284). This Court therefore cannot conclude that the *Final Results* do not reflect a desire to produce a particular result, and the matter requires remand for clarification and, as necessary, reconcilation.

IV

Under prior law, when considering a non-adverse (or "second tier") facts otherwise available situation, Commerce would ordinarily use the higher of the original LTFV margin determined for the respondent's merchandise or the highest calculated margin during the review at issue for the same class or kind of merchandise. *See*, *e.g.*, *Koyo Seiko Co. v. United States*, 92 F.3d 1162, 1167 (Fed. Cir. 1996). In this proceeding, because Viraj was not a party to the original LTFV investigation, Commerce utilized as non-adverse facts otherwise available the LTFV all-others rate, a weighted-average of a verified margin of 3.87% found for Grand Foundry, a cooperative respondent, and a derived margin based on the petitioner's allegations of 21.02% determined against Mukand, an uncooperative respondent. Because that rate was based on adverse inferences, Viraj argues that its use impermissibly perpetuated pre-URAA law[7] and violated an international obligation of the United States.[8]

The government essentially argues that the URAA requires only prospective determination of non-adverse all-others rates, a position it contends is in accordance with judicial precedent that all-others rates are valid and unalterable until such time as they are specifically invali-

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[7] The underlying LTFV investigation was initiated on January 27, 1994 and decided on December 28, 1994. *See* 59 Fed.Reg. 3844 and 59 Fed.Reg. 66915. On January 1, 1995 section 219(b)(2) of the URAA went into effect:

> For purposes of preliminary and final LTFV determinations the estimated all-others rate shall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title.

19 U.S.C. § 1673d(c)(5)(A). *See* 19 U.S.C. § 1677e.

[8] Viraj's Br. at 3 (citing *Federal Mogul Corp. v. United States*, 93 F.3d 1572, 1581 (Fed. Cir. 1995) ("[S]tatutes should not be interpreted to conflict with international obligations.")). Viraj notes that the URAA sought to bring U.S. law into compliance with the United States' WTO obligations, including the provision on permissible all-others rates. *See Ferro Union Inc. v. United States*, 23 CIT 178, 197, 44 F. Supp. 2d 1310, 1328 (1999). Article 9.4 of the WTO Antidumping Duty Agreement, reflected in 19 U.S.C. § 1673d(c)(5)(A), states that

> any antidumping duty applied to imports from exporters or producers not included in the examination [*i.e.* an all-others rate] shall not exceed the weighted average dumping margin with respect to the selected exporters or producers. * * * Provided that the authorities shall disregard for purposes of this paragraph any zero and *de minimis* margins established under the circumstances referred to in paragraph 8 or Article 6 [, *i.e.*, margins based on adverse-inference facts otherwise available].

See, e.g., United States Antidumping Measures on Certain Hot-Rolled Steel Products from Japan, WTO Panel Report WT/DS184/R (Feb. 28, 2001).

dated. Def's Br. at 23 (citing *Federal-Mogul Corp. et al. v. United States*, 17 CIT 442, 449, 822 F. Supp. 782, 788 (1993); *Federal-Mogul Corp. et al. v. United States*, 18 CIT 785, 801, 862 F. Supp. 384, 400 (1994)). *See also D&L Supply Co. v. United States*, 113 F.3d 1220, 1223 (Fed. Cir. 1997); *Pulton Chain Co. v. United States*, 21 CIT 1290, 1292 (1997). Pre-URAA all-others rates have not been invalidated and are valid record information for use as facts available, the government argues (irrespective of any adverse-inference basis), since decisions of this Court (according to the government) regard all-others rates as non-adverse in the context of unreviewed exporters. Def.'s Br. at 23 (citing *The Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States,* 23 CIT 88, 112, 44 F. Supp. 2d 229, 252 (1999); *Borden Inc. v. United States*, 22 CIT 233, 265, 4 F. Supp. 2d 1221, 1247 (1996) (if Commerce does not draw an adverse inference, it may apply a lower rate, including an all-others rate)). Therefore, the government argues, it is logical to regard a pre-URAA all-others rate as non-adverse for purposes of facts otherwise available. Further, according to the government, all-others rates conform to the "common sense inference" that the margins determined at the LTFV investigation are the most indicative of current market conditions,[9] whereas taking Viraj's argument to its logical extreme "would prevent the application of the all-others rate against non-reviewed exporters." Def.'s Br. at 22.

However, *American Brake and Drum* and *Borden* each considered the application of an all-others rate that had been determined after the URAA took effect. They do not provide guidance on the applicability of a pre-URAA rate based on adverse inferences to a cooperative respondent reviewed post-URAA. Likewise, *Allied Signal* interpreted Commerce's permissible presumption under pre-URAA law and is not dispositive. Commerce has authority to select from among any "information or inferences which are reasonable under the circumstances as facts otherwise available for a cooperative respondent[.]"[10] But, the authority to utilize "any other information placed on the record"[11] as adverse facts otherwise available is restricted to respondents deemed uncooperative in accordance with 19 U.S.C. § 1677e(b), which Viraj was not. Post-URAA, it appears Commerce must, by definition, presume non-adversity in the case of a cooperative respondent, and the Court therefore concludes that an all-others rate based in whole or in part on adverse inferences cannot be said to constitute "non-adverse" facts otherwise available. The all-others rate was therefore an inappropriate choice of

[9] *Allied Signal v. United States*, 996 F.2d at 1192. Commerce further states such presumption might have been overcome had Viraj simply provided the requested information within the deadlines established. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185 (Fed. Cir. 1990).

[10] Statement of Administrative Action, H.R.Rep. No. 103–826(I) 656, 869 ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4198.

[11] 19 U.S.C. § 1677e(b)(4).

facts otherwise available and the matter will be remanded for further consideration.[12]

CONCLUSION

In view of the foregoing, this matter will be remanded to Commerce for further proceedings not inconsistent with this opinion. Commerce shall have 60 days for redetermination, the parties shall have 30 days from the date thereof for commenting thereon, and 15 days thereafter for replies.

(Slip Op. 02–78)

CARNIVAL CRUISE LINES, INC., HAL ANTILLEN, N.V., HAL SHIPPING LTD., AND WIND SURF LIMITED, PLAINTIFFS *v.* UNITED STATES, DEFENDANT

Consolidated Court No. 93–10–00691

[On remand, the Court considered Plaintiffs' arguments (1) that the Harbor Maintenance Tax ("HMT") should not be imposed on passenger cruises that begin and end at ports which are exempt from the HMT, but which make layover stops at ports covered by the HMT, and (2) that the "value" on which the HMT is assessed should only be the actual cost of transportation. Defendant argued that the Court of Appeals for the Federal Circuit decided in *Princess Cruises, Inc. v. United States*, 201 F.3d 1352 (Fed. Cir. 2000), that layover stops alone give rise to HMT liability and that this Court is bound to follow that decision. Defendant also argued that the Court should defer to Customs' rulings on the proper calculation of the "value"of the cruise on which the HMT is assessed.

Held: (1) Based on the Federal Circuit's decision in *Princess*, Plaintiffs are liable for payment of the HMT on passengers who disembark the ship at layover ports covered by the HMT, but only after the issuance of HQ 112511 (Jan. 27, 1993), which resolved the ambiguity in the statute and regulation on this issue; (2) Customs' method of calculating the "value" of the cruise fare for HMT assessment purposes is correct except for the inclusion of "port taxes," charges for "U.S. Customs and U.S. Immigration and Naturalization services," and the inclusion of charges for airfare and certain landbased services and commissions prior to 1993, which are inconsistent with the HMT statute. Plaintiff's motion for partial summary judgment is granted in part, and Defendant's motion for summary judgment is granted in part.]

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[12] Considering what would be appropriate facts otherwise available, there must be "a rational relationship between data chosen and the matter to which they are to apply." *Manifattura Emmepi S.p.A. v. United States,* 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992). *See also National Steel Corp. v. United States,* 18 CIT 1126, 1132, 870 F. Supp. 1130, 1136 (1994). On that basis, the 1994 Grand Foundry rate would be a tenuous fit as facts otherwise available. Viraj argues that the zero percent margin determined against it in 1997 is more probative of its current market conditions than other information of record, and it contends that where Commerce is unable to calculate a margin for certain sales of a cooperative respondent, it has used as facts otherwise available a weighted-average margin based on acceptable sales from the respondent's own database. Viraj's Br. at 4 (citing *Static Random Access Memory From Taiwan*, 63 Fed. Reg. 8909, 8920 (Feb. 23, 1998) *("SRAM")).* The government argues that *SRAM* was merely the initial LTFV investigation and thus "there was no higher rate from an earlier initial LTFV determination available for use." Def.'s Br. at 20. The Court fails to see the distinction. Rummaging among facts available for a "high" margin to use for a cooperative respondent would be *prima facie* results-oriented and in derogation of *Manifattura's* rational relationship test if such is not probative. *Cf. Rhone Poulenc, Inc. v. United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990) (rejecting low margin information for demonstrably less probative high margin information would be punitive BIA). Commerce may use a cooperative respondent's own data if appropriate to do so. *See*, *e.g.*, *Nippon Steel v. United States*, 25 CIT ____, n.6, 146 F. Supp. 2d 835, n.6 (2001); *Mannesmannrohren-Werke AG v. United States*, 24 CIT ____, ____, 120 F. Supp. 2d 1075, 1080–1081, 1088–89 (2000).

(Dated July 31, 2002)

Paul, Weiss, Rifkind, Warton & Garrison (Robert E. Montgomery, Jr. and *Robert P. Parker)* for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Lara Levinson* and *Michael Duclos),* and *Richard McManus,* Office of Chief Counsel, United States Customs Service, of counsel, for Defendant.

OPINION

MUSGRAVE, *Judge:* In this action, plaintiffs Carnival Cruise Lines, Inc., HAL Antillen, N.V., HAL Shipping, Ltd., and Wind Surf Limited (collectively "Carnival") contest the assessment and collection of the Harbor Maintenance Tax ("HMT")[1] on passenger cruise ships by defendant the United States Customs Service ("Customs"). This matter began in 1992 when Customs audited the HMT paid by HAL Antillen for the period from April 1, 1987 through December 31, 1991 and assessed $322,311.00 for alleged underpayments. According to an August 20, 1992 letter from the Regional Director of Customs' Regulatory Audit Division the underpayments resulted from HAL Antillen's failure to pay the HMT for cruises that made only layover stops at ports subject to the HMT and its deduction of travel agents' commissions from the "value" of the cruise fare on which the HMT was based. After receiving formal notification of the audit results on April 6, 1993, HAL Antillen filed a timely protest. On October 6, 1993 it requested accelerated disposition its protest pursuant to 19 C.F.R § 174.22(a). After receiving no decision for 30 days, the protest was deemed denied pursuant to 19 C.F.R § 174.22(d) on November 5, 1993.

Carnival commenced this action in October 1993 and an appeal from the denial of HAL Antillen's protest was added by an amended complaint. Subsequently, Carnival moved for partial summary judgment on the issues of (1) whether the HMT should be assessed on cruises that begin and end at ports that are exempt from the tax, but make layover stops at ports subject to it, and (2) whether the "value" of the cruise on which the HMT is assessed should include anything more than the actual cost for transportation. Following the Supreme Court's decision in *United States Shoe Corp. v. United States,* 523 U.S. 360 (1998), *aff'g* 114 F.3d 1564 (Fed. Cir. 1997), *aff'g* 19 CIT 1284, 907 F. Supp. 408 (1995), holding the HMT unconstitutional as applied to exports, Carnival amended its complaint a second time adding a constitutional challenge. This Court held that the HMT was unconstitutional as applied to passenger cruises; therefore it did not reach the other issues raised by Carnival. *See Carnival Cruise Lines, Inc. v. The United States*, 22 CIT 486, 8 F. Supp. 2d 877 (1998). The Court of Appeals for the Federal Circuit reversed this Court's holding on the constitutional issue and remanded this action for consideration of the remaining legal issues. *See Carnival Cruise Lines, Inc. v. United States,* 200 F.3d 1361, 1369 (Fed. Cir. 2000).

[1] The HMT is a tax on port use calculated at a rate of 0.125 percent of the value of the commercial cargo. It was enacted pursuant to the Water Resources Development Act of 1986, Pub. L. No. 99–662, Title XIV, § 1402, 100 Stat. 4266 (1986), and is codified at 26 U.S.C. § 4461–62.

For the reasons which follow, the Court holds that the Federal Circuit's decision in *Princess Cruises, Inc. v. United States,* 201 F.3d 1352 (Fed. Cir. 2000), is controlling on the issue of whether cruise lines are liable for the HMT when a vessel makes a layover stop at a port subject to the HMT. Nevertheless, since the Federal Circuit found that the law was ambiguous with respect to layover stops prior to the issuance of HQ 112511 (Jan. 27, 1993), the Court holds that cruise lines are not liable for the HMT on cruises which made only layover stops at HMT covered ports prior to January 27, 1993. The Court also holds that Customs should not have included "port taxes" and charges for "U.S. Customs and U.S. Immigration and Naturalization services" in the cruise "value"on which the HMT is assessed, but was otherwise correct in assessing the HMT on the price paid for the cruise, exclusive of land-based services and commissions. Therefore, Carnival's motion for partial summary judgment is granted in part and Customs motion for summary judgment is granted in part.

I. JURISDICTION AND STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 1581(i) the Court has jurisdiction over Carnival's claim for restitution of the amount of HMT that it allegedly overpaid, and pursuant to 28 U.S.C. § 1581(a) the Court has jurisdiction over the counts in Carnival's First Amended Complaint appealing the denial of HAL Antillen's protest. Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CIT Rule 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

II. ASSESSMENT OF HARBOR MAINTENANCE TAXES FOR LAYOVER STOPS

The HMT is "a tax on any port use," 26 U.S.C. § 4461(a), and "port use" is defined as "the loading of commercial cargo on, or * * * the unloading of commercial cargo from a commercial vessel at a port," 26 U.S.C. § 4462(a)(1). "The term 'commercial cargo' means any cargo transported on a commercial vessel, including passengers transported for compensation or hire." 26 U.S.C. § 4462(a)(3)(A). Ports in Alaska, Hawaii, and possessions of the United States are exempt from the tax. 26 U.S.C. § 4462(b). Although the statute itself does not explain how the HMT is to be assessed on passengers, 19 C.F.R. § 24.24(e)(4) states that "when a passenger boards or disembarks a commercial vessel at a port within the definition of this section, the operator of that vessel is liable for the payment of the port use fee." In HQ 112511 Customs addressed for the first time the issue of whether a passenger who "temporarily goes ashore and subsequently gets back on the vessel [at a layover stop] is considered to have 'disembarked' or 'boarded' at that port for purposes of 19 C.F.R. § 24.24(e)(4) so as to incur liability on behalf of the vessel operator for the payment of a port use fee." Customs concluded that cruise operators are liable for the HMT on passengers who leave the vessel at these interim stops and that there is a rebuttable presumption that every passenger does so.

Subsequently, this issue came before the Federal Circuit in an action brought by Princess Cruises. The Federal Circuit held that both 26 U.S.C. § 4461–62 and 19 C.F.R. § 24.24(e)(4) were ambiguous with regard to layover stops by cruise ships and gave *Chevron* deference[2] to Customs' interpretation of the regulation. *See Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1359 (Fed. Cir. 2000). The Federal Circuit concluded that:

> In light of the clear intent of Congress to impose a fee on all port use as revealed in the legislative history, the Customs interpretation including stopovers and layovers in the port use covered by the HMT is not unreasonable. The HMT is intended to charge those using the ports for the expense of maintaining the ports. It is not apparent to us that the use of the port to discharge passengers for shopping and sight-seeing in a port and then reboard those same passengers is any less of a use or has any less impact on the port than boarding or discharging passengers at the beginning or end of a cruise.

Id. at 1360.

In the present action, Carnival challenges Customs' assessment of the HMT for layover stops on grounds that it is inconsistent with the language of the act, the legislative history, and Customs' procedures. *See* Pl.s' Mot. for Partial Summ. J. at 13–25. Customs asserts that *Princess* is dispositive of this issue. *See* Def.'s Mem. in Supp. of its Cross-Mot. for Summ. J. and in Opp'n to Pl.s' Renewed Mot. for Partial Summ. J. at 12–13. Nevertheless, Carnival argues that *Princess* is no longer valid following the decisions in *United States v. Mead Corp.*, 533 U.S. 218 (2001), *aff'g*, 185 F.3d 1304 (Fed. Cir. 1999),[3] because the Customs ruling at issue was not adopted pursuant to the Administrative Procedure Act. *See* Mem. of Points and Authorities in Support of Pl.s' Renewed Mot. for Partial Summ. J. at 17 n.14. Therefore, Carnival concludes that the Court should consider its substantive legal arguments. Pl.s' Supplemental Mem. in Supp. of their Renewed Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. at 3–4.

The Court agrees with Customs that *Princess* is still valid precedent. Unlike the ruling in *Mead,* the ruling at issue in *Princess* did not interpret a statute, but interpreted a regulation that interpreted a statute. In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court held that an agency's interpretation of its own regulation is controlling unless it is

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[2] Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984), if a "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. "A court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id*. at 844.

[3] In *Mead* the Supreme Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." 533 U.S. at 226–27. "[R]elatively formal administrative procedure tending to foster * * * fairness and deliberation" is one of the primary indicators that an administrative action is intended to carry the force of law. *Id*. at 230.

"plainly erroneous or inconsistent with the regulation." 519 U.S. at 461 (citation omitted). *See also Bowles v. Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945); *Barnhart v. Walton,* ____ U.S. ____, 122 S. Ct. 1265, 1269 (2002). Therefore, based on the Federal Circuit's decision in *Princess*, the Court holds that Carnival is liable for payment of the HMT on passengers who disembark the ship at layover ports covered by the HMT.

As a separate issue Carnival contends that *Princess* only upholds Customs' assessment of the HMT for layover stops from the time HQ 112511 was issued in 1993 and does not address the legality of Customs' retroactive application of that ruling. Carnival argues that prior to Customs' pronouncement in HQ 112511 that all passengers were, in the absence of contrary evidence, presumed to "disembark" at layover ports, cruise line operators were not required to maintain records of which passengers went ashore and which remained aboard ship and were unaware that they needed to record such information. *See* Pl.s' Mot. for Partial Summ. J. at 23. Carnival argues that HQ 112511 announced a change of procedure for which there was no "fair notice" given and cites a number of cases from the Federal Circuit and the United States Court of Appeals for the District of Columbia Circuit including *NEC Technologies v. United States*, 54 F.3d 736 (Fed. Cir. 1995), *General Electric Co. v. EPA,* 53 F.3d 1324 (D.C. Cir. 1995), *Creswell Trading Co. v. United States,* 15 F.3d 1054 (Fed. Cir. 1994), and *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1 (D.C. Cir. 1987), for the proposition that an administrative agency cannot penalize a party for non-compliance with an administrative rule or impose a new evidentiary burden without first providing adequate notice. *See* Mem. of Points and Authorities in Support of Pl.s' Renewed Mot. for Partial Summ. J. at 11–15; Pl.s' Reply in Supp. of their Renewed Mot. for Summ. J. and Opp'n to Def.'s Cross-Mot. for Summ. J. at 26–30. Customs responds to Carnival's allegations stating:

> Customs plainly has not applied any ruling or regulation "retroactively." Carnival's method of HMT payment and the audit leading to the payments sought in this action are critical. Pursuant to regulation, cruise lines are responsible for calculating HMT owed and making quarterly HMT payments. 19 C.F.R. § 24.24(e)(3)(ii). Prior to 1993, in making these payments, Carnival interpreted the HMT statute in its favor to exclude layover stops, though the statute applies to "any port use," including "loading [and] unloading" of passengers. 26 U.S.C. § 4461 & 4462(a)(1).
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> In 1993, Customs audited the cruise lines, and exercised its authority to collect underpayments discovered in the audit. *See* 19 U.S.C. § 1509(b); 19 C.F.R. § 24.24(h). Those underpayments include charges for layover stops. Thus, Customs' actions were not a reversal of any earlier official position, but merely its reasoned consideration of the issue presented.

Def.'s Reply to Pl.s' Reply Mem. in Supp. of Its Mot. for Summ. J. and in Opp'n to Def.'s Cross-Mot. for Summ. J. at 10–11.

The Court agrees that Carnival should not be held liable for HMT payments on cruises which made only layover stops at HMT covered ports prior to the issuance of HQ 112511. The Court concludes that general principles of tax law bear directly on this issue. In *International Business Machine Corp. v. United States,* 201 F.3d 1367, 1371–72 (Fed. Cir. 2000), the Federal Circuit determined that the HMT is an internal revenue tax. *See also Citgo Petroleum Corp. v. United States,* 25 CIT ____, 104 F. Supp. 2d 106, 107–08 (2000). The Supreme Court has held that:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government and in favor of the citizen.

Gould v. Gould, 245 U.S. 151, 153 (1917) (citations omitted).[4] *See also Union Pacific Corp. v. The United States,* 5 F.3d 523, 525 (Fed. Cir. 1993) ("[T]he Supreme Court counsels to construe any reasonable doubts about the meaning of a tax statute in favor of the taxpayer."). Customs position on this matter, as stated above, is that the statute unambiguously imposes the HMT on "any port use" involving "'loading [and] unloading' of passengers." This notion is contrary to the Federal Circuit's findings in *Princess* that: (1) "the language of the statute is not clear and unambiguous about whether the HMT is to be imposed on stopovers and layovers at HMT-covered ports;" (2) "[the] legislative history provides some indication that Congress intended for the HMT to apply when a cruise ship made a stopover or layover in an HMT-covered port, [but] it is not sufficient evidence to indicate an 'unambiguous intent;'" and (3) "the regulation itself is ambiguous." 201 F.3d at 1359. Therefore, based on the precedent of the Supreme Court and the holdings of the Federal Circuit, the Court concludes that Carnival is not liable for the HMT assessed on layover stops prior to January 27, 1993, the date on which HQ 112511 was issued.

III. CALCULATION OF THE "VALUE" OF THE CRUISE FARE

The statute imposing the HMT provides that "[t]he amount of the tax imposed * * * on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved." 26 U.S.C. § 4461(b). Elsewhere, the HMT statute defines the term "value" in the context of the transportation of passengers as "the actual charge paid for such service or the prevailing charge for comparable service if no actual charge is paid." 26 U.S.C. § 4462(a)(5)(B). Customs' regulation, 19 C.F.R. § 24.24(e)(4)(i), essentially follows the language of the statute, stating that "[t]he fee is to be based upon the value of the actual charge for transportation paid by the passenger or on the prevailing charge for

[4] In *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996), the Supreme Court stated that "[w]here * * * a court is addressing transactions that occurred at a time when there was no clear agency guidance, it would be absurd to ignore the agency's current authoritative pronouncement of what the statute means." *Id.* at 744 n.3. Although *Gould* and *Smiley* appear to conflict, this Court follows *Gould* in the present action since it deals specifically with the resolution of ambiguity in a tax statute, which is the precise issue presented.

comparable service if no actual charge is paid." In HQ 112511 (Jan. 27, 1993) Customs addressed what it "consider[ed] 'transportation costs' for purposes of 19 C.F.R. 24.24(e)(4)" stating:

> In calculating the value of the "actual charge for transportation paid by the passenger" * * * it was Customs' position that this should include those expenditures which comprise the normal fare the cruise line would charge a passenger for a particular trip, including any travel agent's commission and those transportation and lodging costs included in the overall cruise package in bringing the passenger to and from the port of embarkation, provided the passenger actually availed himself of such transportation and lodging. ([HQ] 543896, dated May 13, 1987). * * *
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> Upon further review of this matter, Customs remains of the opinion that the "transportation costs" for passengers of cruise vessels includes all "embarkation-to-disembarkation" costs as reflected on passenger tickets, including commissions paid to travel agents, port taxes, charges for pilotage, U.S. Customs and U.S. Immigration and Naturalization services, wharfage, and "suite amenities" provided they are contracted and paid for prior to the commencement of the voyage (*i.e.*, included in the cost of the ticket). However, after numerous discussions with representatives of the cruise industry, Customs is now of the opinion that the costs of land-based lodging and connecting air transportation are not to be included in Customs' calculation of the transportation costs under consideration regardless of whether a passenger avails himself of such transportation and lodging. Although this position represents a divergence from [HQ] 543896 cited above, Customs believes this revised position constitutes an equitable resolution of this matter. * * *

In HQ 112844 (Oct. 28, 1993) Customs reaffirmed its conclusions in HQ 112511 except with regard to travel agents' commissions, on which it concluded that:

> [T]he inclusion of the entire amount of a travel agent's commission in the calculation of the aforementioned transportation costs without regard to whether any portion of such commission is attributable to the costs of land-based lodging and connecting air transportation is inconsistent with our position that the transportation costs include all "embarkation-to-disembarkation" costs. Accordingly, accurate apportionment of travel agents' commissions clearly distinguishing that portion of the commissions attributable to land-based lodging and connecting air transportation will result in the exclusion of any such costs from Customs' calculation of the "value of the actual charge for transportation paid by the passenger" for purposes of [19 C.F.R. §] 24.24(e)(4).

Carnival argues that Customs' interpretation is inconsistent with the statute, relevant caselaw, and the Internal Revenue Service's interpretations of similar taxes, and contends that charges for services, amenities, and "pass through" charges should be excluded from the fare amount on which the HMT is imposed. *See* Pl.s' Mot. for Partial Summ. J. at 27–37. Customs, on the other hand, argues that the Court must defer to its interpretation of the statute. *See* Def.'s Mem. in Supp. of its

Cross-Mot. for Summ. J. and in Opp'n to Pl.s' Renewed Mot. for Partial Summ. J. at 4–8.

The Court concludes that when the disputed language is read in the context of the entire statute, the intent of Congress is clear.[5] One of the fundamental aspects of the HMT is that it is assessed based on "value" rather than tonnage or simply as an equal assessment on all vessels using a port. In the case of commercial cargo, a shipment of gold would be charged more HMT than a shipment of lead. Therefore, when 26 U.S.C. § 4462(a)(5)(B) defines "value" in the context of the transportation of passengers for hire as "the actual charge paid for such service" it follows that the phrase "such service" refers to the shipboard service that the passenger is buying. In the case of a cruise, the passenger is buying services and amenities as well as transportation. Calculating the HMT on basic transportation costs alone would essentially render the tax a flat fee assessed per passenger.

It is also consistent with the statute to include the percentage of any travel agent commission that is attributable to making shipboard arrangements as part of the overall shipboard service. Nevertheless, it is inconsistent to include, as Customs has, port taxes and Customs and Immigration and Naturalization Service charges in the cruise "value." While these are passed along to the passenger as part of the cruise fare, they are not part of the cruise service, but are additional charges imposed by the relevant government agencies. Thus the Court concludes that the HMT for passenger cruise ships is properly calculated based on the costs included in the cruise fare, excluding costs for air transportation to the port of embarkation and land-based services, the percentage of travel agents' commissions attributable to the air transportation and land-based services, port taxes, and Customs and Immigration and Naturalization Service charges. Accordingly, Carnival is entitled to a refund to the extent that it paid the HMT on amounts that should have been excluded from the cruise "value."

IV. CONCLUSION

For the forgoing reasons Carnival's motion for partial summary judgment is granted in part as to (1) the retroactive application of HQ 112511, regarding the assessment of the HMT for layover stops, (2) the inclusion of "port taxes" and charges for "U.S. Customs and U.S. Immigration and Naturalization services," and (3) the inclusion of charges for airfare and certain land-based services and commissions prior to the issuance of HQ 112511 and HQ 112844. Customs' motion for summary judgment is granted as to all other issues presently before the Court.

[5] "Where 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. 837, 842 (1984).

The parties shall confer with each other (i) in an effort to reach a stipulation on the amount of a final judgment in this matter and (ii) regarding such additional proceedings as may be necessary in this action, and shall submit a status report to the Court on the results of their conference within 60 days.