Slip Op. 07-117

MITTAL STEEL USA, INC. (formerly INTERNATIONAL STEEL GROUP, INC.), Plaintiff, v. UNITED STATES, Defendant, and UNION STEEL MANUFACTURING CO., LTD.; DONGBU STEEL CO., LTD.; POSCO; and HYUNDAI HYSCO CO., LTD., Deft.-Ints.

Before: Richard K. Eaton, Judge:

Consol. Court No. 05–00308
Public Version

[United States Department of Commerce's final results of the tenth administrative review of the antidumping duty order applicable to corrosion-resistant carbon steel flat products from Korea sustained.]

Dated: August 1, 2007

Stewart and Stewart (*Wesley K. Caine, Caryn B. Schenewerk* and *Sarah V. Stewart*), for plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Patricia M. McCarthy*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Ada Loo* and *Irene H. Chen*), of counsel, for defendant.

Troutman Sanders LLP (*Donald B. Cameron* and *Brady W. Mills*), for defendant-intervenors Union Steel Manufacturing Co., Ltd. and Dongbu Steel Co., Ltd.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Spencer S. Griffith*, *Warren E. Connelly, Jaehong D. Park, Jarrod M. Goldfeder, Jason A. Park* and *Lisa W. Ross*), for defendant-intervenors POSCO and Hyundai HYSCO Co., Ltd.

OPINION

Eaton, Judge: This consolidated action[1] is before the court on plaintiff Mittal Steel USA, Inc.'s ("Mittal") motion for judgment upon

[1] This action includes court numbers 05–00308 and 05–00309. *See Mittal Steel USA ISG, Inc. v. United States*, Consol. Ct. No. 05–00308 (Oct. 5, 2005) (order granting plaintiff's consent motion to consolidate cases). Court number 05–00309 involved plaintiff's challenge to the final results of the new shipper review.

the agency record pursuant to USCIT Rule 56.2. By its motion, plaintiff contests certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") final results of the tenth administrative review of the antidumping duty order applicable to imports into the United States of corrosion-resistant carbon steel flat products ("CORE") from Korea made during the period of review ("POR") August 1, 2002, to July 31, 2003. *See* Certain CORE from the Republic of Korea, 70 Fed. Reg. 12,443 (Dep't of Commerce Mar. 14, 2005) (tenth admin. rev.) ("Final Results"). In addition, plaintiff contests portions of the Department's conclusions with respect to Hyundai HYSCO Co., Ltd.'s ("HYSCO") new shipper review, which was part of the same determination. *See* 19 U.S.C. § 1675(a)(2)(B) (2000). Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000), and 19 U.S.C. § 1516a(a)(2)(B)(iii). For the reasons set forth below, Commerce's Final Results are sustained.

BACKGROUND

Plaintiff is a domestic producer of CORE products. On August 19, 1993, Commerce published the antidumping duty order applicable to imports into the United States of CORE from Korea. *See* Certain CORE From Korea, 58 Fed. Reg. 44,159 (Dep't of Commerce Aug. 19, 1993) ("CORE Order"). After having conducted nine prior administrative reviews of the CORE Order, Commerce, on August 1, 2003, published notice that it would consider requests for what would be the tenth review. *See* Certain CORE from Korea, 68 Fed. Reg. 45,218 (Dep't of Commerce Aug. 1, 2003) (notice). Thereafter, on August 29, 2003, plaintiff asked Commerce to conduct an administrative review with respect to the behavior and market activities of certain Korean respondents including: POSCO; Dongbu Steel Co., Ltd. ("Dongbu"); and Union Steel Manufacturing Co., Ltd. ("Union"). The tenth administrative review was initiated on September 30, 2003. *See* Initiation of Antidumping and Countervailing Duty Reviews, 68 Fed. Reg. 56,262, 56,263–64 (Dep't of Commerce Sept. 30, 2003) (notice). In addition, during the proceeding, HYSCO sought a new shipper review of its sales of CORE to the United States pursuant to 19 U.S.C. § 1675(a)(2)(B), which Commerce initiated on October 3, 2003. *See* Certain CORE from Korea, 68 Fed. Reg. 57,423 (Dep't of Commerce Oct. 3, 2003) (notice).

On March 14, 2005, Commerce published the Final Results of both the tenth administrative review and HYSCO's new shipper review. *See* Final Results, 70 Fed. Reg. at 12,443. Based on its analysis, Commerce assigned subject imports from POSCO a 2.34 percent dumping margin; Union and Dongbu received *de minimis* margins;[2]

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[2] Under the statute, Commerce is required to "disregard any weighted average dumping margin that is de minimis as defined in section 1673b(b)(3) of this title." 19 U.S.C.

and HYSCO, as a result of the new shipper review, received a margin of zero. *See id.* at 12,445.

STANDARD OF REVIEW

When reviewing a final antidumping determination the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting Consol. *Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

In addition, "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137, 1139 (Fed. Cir. 1987).

DISCUSSION

I. Model Match Methodology

Plaintiff's first claim is that the Department unreasonably denied its request that respondents be asked to provide more detailed product data for use in Commerce's model match criteria.[3] The agency employs these criteria to ensure that the merchandise sold in the U.S. market is being compared "with a suitable home-market product" for purposes of calculating antidumping duties. *Koyo Seiko Co. v. United States*, 66 F.3d 1204, 1209 (Fed. Cir. 1995); *see also* 19 U.S.C. § 1677(16)(C)(iii).

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§ 1673d(a)(4). "[A] weighted average dumping margin is de minimis if the administering authority determines that it is less than 2 percent ad valorem or the equivalent specific rate for the subject merchandise." 19 U.S.C. § 1673b(b)(3). Thus, Union and Dongbu were not required to pay antidumping duties on their entries.

[3] The criteria include: type; reduction process; metallic coating process; clad material/coating metal; quality; yield strength; metallic coating weight; minimum thickness; width; form; temper rolling; and leveling. Letter from Stewart and Stewart, Wesley K. Caine, to Commerce (May 28, 2004) Ex. A, at A– 2.

Commerce maintains that, in accordance with its practice, it chose the model match criteria during the initial sales at less than fair value investigation and has used them in each review since in order to provide a "consistent methodology from review to review" upon which respondents could rely. Def.'s Resp. Pl.'s Mot. J. Agency R. ("Def.'s Resp.") 9; *see also* Certain CORE From Korea, 58 Fed. Reg. 37,176 (Dep't of Commerce July 9, 1993).

It is plaintiff's position that, had respondents been asked for more specific product data, it would have been able to conduct a more detailed analysis and possibly uncover a compelling reason for changing the criteria, thus enabling Commerce to produce more accurate results. *See* Pl.'s Mem. Supp. Mot. J. Agency R. ("Pl.'s Mem.") 12 ("Commerce refused even to request that respondents submit the more precise data. This precluded Mittal from analyzing detailed sales information that might have substantiated Mittal's fair concerns . . . .") (emphasis omitted).[4]

For Commerce, the need for consistency in the model match criteria stems from its duty to calculate antidumping rates as accurately as possible. *See, e.g., Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994). Because consistency is, according to Commerce, linked inextricably to accuracy, the Department maintains that it changes its model match criteria only if a participant can demonstrate a "compelling reason" for the modification. Def.'s Resp. 9; *see also* Mem. from Eric B. Greynolds, Program Manager, Office of AD/CVD Enforcement VI, to Melissa G. Skinner, Dir., Office of AD/CVD Enforcement VI (Aug. 27, 2004) ("Model Match Mem.") at 5 (citing Steel Wire Rope From Malaysia, 66 Fed. Reg. 12,759 (Dep't of Commerce Feb. 28, 2001); Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From France; et al., 57 Fed. Reg. 28,360, 28,366 (Dep't of Commerce June 24, 1992); Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof, From Japan, 56 Fed. Reg. 41,508, 41,509 (Dep't of Commerce Aug. 21, 1991)).

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[4] For instance, plaintiff states:

> Commerce defined "widths" by reference to the following four measurement groups: (a) > = ½″ but <24″; (b) > = 24″ but <40″; (c) > = 40″ but <60″; and (d) > = 60″. Similarly, it defined "thickness" by reference to these 11 separate groups: (a) <0.014″; (b) > = 0.014″ but <0.015″; (c) > = 0.015″ but <0.016; (d) > = 0.016″ but <0.018″; (e) > = 0.018″ but <0.022″; (f) > = 0.022″ but <0.028″; (g) > = 0.028″ but <0.044″; (h) > = 0.044″ but <0.060″; (i) > = 0.060″ but <0.085″; (j) > = 0.085″ but <0.130″; and (k) > = 0.130″. Thus, to identify goods for price comparisons, Commerce would treat as "identical" articles all CORE within a given range, so far as the particular criterion was concerned. Put differently, articles with different physical dimensions could still be treated as "identical," and Commerce could directly compare their prices in antidumping margin calculations.

Pl.'s Mem. 6. In Mittal's view, requiring respondents to provide product data on a narrower range of dimensions might have provided a compelling reason to change the criteria. That is, more specific data could, according to plaintiff, have demonstrated a substantial difference between the subject merchandise and the purportedly comparable foreign like product.

Plaintiff first introduced its concerns in a letter from its counsel to Commerce. *See* Letter from Stewart and Stewart, Wesley K. Caine, to Commerce (May 28, 2004) ("May 28 Letter"). By this letter, plaintiff sought to demonstrate the necessity of demanding more specific data by claiming that the product ranges in Commerce's questionnaire, for thickness, width, type and quality did not correspond with the actual data contained in Union's, Dongbu's and POSCO's pricing sheets. *See* May 28 Letter at 2. To bolster its position that Commerce should have asked respondents for additional product and pricing information, plaintiff compared merchandise within Commerce's ranges to the prices charged.[5] Mittal concluded that Commerce's ranges produced a variance in prices sufficient to warrant the agency's issuance of a supplemental questionnaire. *See* Pl.'s Mem. 27 ("This should have prompted the agency to at least request more precise data, which would have allowed it and Mittal to pursue the matching issues more deeply via computer analysis. However, the agency refused to request the information, much less perform analyses, which left valid issues un-addressed.") (emphasis omitted); *see also* Pl.'s Mem. 27 (citing *Freeport Minerals Co. v. United States*, 776 F.2d 1029, 1033 (Fed. Cir. 1985)). Before the court, plaintiff continues to press this claim insisting, however, that it is not "asking the Court at this point to rule categorically that Commerce's methodology completely fails as a matter of law." Pl.'s Mem. 27 n.13.

According to Commerce, it found the issuance of a supplemental questionnaire was not required because plaintiff's May 28 Letter, and the various price analyses contained therein, failed to establish its necessity. As Commerce stated in its Model Match Memorandum:

> Regarding the price lists cited by [plaintiff] in [its] submission, we find there is no evidence indicating that the price lists reflect actual transaction prices, and, thus, we find that they do not necessarily reflect the Korean respondents' actual sales and pricing practices. In addition, several of the price lists cited by [plaintiff] are exclusive to the Korean respondents' home market and, thus, offer no information on how the products are sold in the U.S. market. Therefore, we find that the internal pricing guidelines cited by [plaintiff]: (1) fail to indicate a change in the Korean respondents' production/pricing practices and (2) do not necessarily reflect the norms of the Korean respondents.

Model Match Mem. at 5–6.

Commerce further argues that plaintiff "overstates the case that narrower bands for model matches will necessarily create more accu-

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[5] Specifically, plaintiff [[ ]] Pl.'s Mem. 8. For instance, with respect to thickness, plaintiff contends that it examined [[ ]]

Pl.'s Mem. 8 (emphasis omitted). Plaintiff contends that it found similar results after analyzing [[ ]]. *See* Pl.'s Mem. 8–10.

rate results." Def.'s Resp. 14. The Department insists that "the more bands that are applied, the fewer actual sale to sale matches there will be — requiring Commerce to resort to constructed value for additional United States sales." Def.'s Resp. 14.

As has been noted, plaintiff does not demand a change in the Department's methodology. Mittal's sole claim is that Commerce should have sought more information from the respondents. The stated purpose of plaintiff's request is to uncover additional information that it hopes will provide a basis for a challenge to Commerce's model match criteria. Therefore, the court is asked to determine whether Commerce supported with substantial evidence its decision not to issue a supplemental questionnaire seeking additional model match data. The court finds that Commerce has justified its decision.

First, as noted by Commerce, the price lists plaintiff references are just what they appear to be – price lists. This being the case, Commerce was justified in finding that they did not necessarily reflect actual sales. Commerce, on the other hand, had obtained actual sales data from the questionnaire responses upon which it reasonably relied. Also, Commerce observed that some of plaintiff's evidence of respondents' pricing practices related solely to home market sales, which shed no light on the price of CORE sold by respondents in the United States. Moreover, Commerce was not unreasonable in finding that plaintiff's demand to narrow the range of dimensions compared would create more inaccuracies in dumping calculations because fewer actual sales would be available for direct comparison.

Thus, because plaintiff has not made out a sufficient case for the issuance of a supplemental questionnaire and because the Department had in its possession all of the information needed to make a fair and reasonable product comparison, the court sustains Commerce's decision not to seek additional product and sales data.

II. Constructed Export Price: Deduction of Selling Expenses

A. Location of Incurred Costs

Plaintiff next insists that Commerce unlawfully failed to deduct from constructed export price ("CEP") certain[6] "core selling ex-

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[6] Constructed export price ("CEP") is

> the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d) of this section.

19 U.S.C. § 1677a(b). CEP, or U.S. price, is then compared to normal value to calculate the dumping margin. Normal value is defined as

> the price 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

penses[7] associated with resale transactions of subject merchandise in the United States . . . merely because [the expenses] involved activities that occurred 'outside' the United States." Pl.'s Mem. 33. More specifically, plaintiff asserts that Commerce committed legal error by its unwillingness to make a downward adjustment to CEP equal to the claimed selling expenses incurred by the Korean parents in facilitating the resales of CORE to unaffiliated U.S. customers.[8] *See* Pl.'s Mem. 12–13. For plaintiff, under 19 U.S.C. § 1677a(d),[9] if "the activities and associated expenses relate to the resales in the United States," the deduction must be made regardless of when and where the expenses were incurred. Pl.'s Mem. 12.

With respect to plaintiff's legal contention, Commerce does not disagree. That is, the Department maintains that it makes justified CEP deductions no matter where expenses are incurred or paid. *See* Def.'s Resp. 16 (noting that Commerce deducts from CEP selling expenses that "relate directly to the sale to an unaffiliated purchaser, even if, for example, the foreign parent of the affiliated U.S. importer pays those expenses") (internal quotation marks & citation omitted). Rather, Commerce urges that its decision here not to deduct certain costs from CEP was appropriate because the amounts expended by respondents related to sales to affiliated U.S. importers and not to unaffiliated U.S. customers. *See* Def.'s Resp. 14; *see also* 19 C.F.R. § 351.402(b) (2005);[10] Issues & Decisions for the Final Re-

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trade as the export or constructed export price . . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

[7] Plaintiff's reference to "core" selling functions is apparently intended to describe such activities as negotiating price, entering into sales contracts and approving resales; however, neither the statute nor the regulations define the phrase. *See* Pl.'s Mem. 39 (suggesting that Commerce define "core" functions, if necessary).

[8] The Korean parent companies are respondents: Union, Dongbu, POSCO and HYSCO.

[9] Subsection 1677a(d) provides, in pertinent part:

[T]he price used to establish [CEP] shall also be reduced by—

(1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—

(A) commissions for selling the subject merchandise in the United States;

(B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;

(C) any selling expenses that the seller pays on behalf of the purchaser; and

(D) any selling expenses not deducted under subparagraph (A), (B), or (C) . . . .

19 U.S.C. § 1677a(d)(1).

[10] The regulation provides:

In establishing [CEP] under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. The Secre-

sults of the Antidumping Duty New Shipper Review and the Antidumping Duty Administrative Review of Certain CORE from Korea (Dep't of Commerce Mar. 7, 2005) ("Issues & Decs. Mem.") at 10.

Moreover, at no point does Commerce state that it did not deduct the expenses because they were incurred in Korea. Rather, it is apparent that Commerce's justification for its decision to not deduct from respondents' CEP certain expenses is its conclusion that selling expenses can only be deducted from CEP when they are incurred in connection with the sale of merchandise to an unaffiliated U.S. customer. Thus, plaintiff's legal argument that Commerce acted unlawfully by refusing to deduct from CEP selling expenses incurred by respondents simply because those expenses were from activities taking place outside the United States is without merit.

B. Costs Related to Resales of CORE to Unaffiliated U.S. Purchasers

Plaintiff also raises the factual argument that respondents did, in fact, incur core selling expenses "associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser . . . ." 19 C.F.R. § 351.402(b). Commerce's failure to deduct those expenses from CEP was, in Mittal's view, unsupported by substantial evidence.

To buttress its point, plaintiff sets forth what it believes were the selling functions performed by each respondent in the resale of its merchandise in the United States. For instance, with respect to Union's relationship with its affiliate DKA, plaintiff states:

> Union sold CORE to DKA, its U.S. affiliate, who in turn resold the merchandise to unrelated U.S. buyers in reportable CEP transactions. The record shows that Union, the parent, performed many selling functions in the affiliate's U.S. *re-sales*. In fact, describing the affiliate's limited role, Union reported that DKA was the importer of record for all of Union's U.S. sales and acted as a communications liaison between U.S. customers and Union and as a processorof sales-related documentation. Thus, while DKA receives inquiries from customers and may propose a price for the purchase, it does not have the authority to accept or reject the order. In fact, DKA does not even take possession of the imported goods; rather, Union ships the goods directly to DKA's U.S. customer.

Pl.'s Mem. 13 (internal quotation marks & citations omitted) (emphasis in original). In addition, plaintiff states that Union engaged

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> tary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act.

19 C.F.R. § 351.402(b).

in other activities aimed at selling CORE to unrelated U.S. customers including handling claims for defective CORE soldin the U.S. and sending company engineers directly to a customer's plant in order to assist that customer with streamlining its facility. *See* Pl.'s Mem. 13.[11] Thus, it is plaintiff's contention that the costs absorbed by Union in the resale of CORE to an unaffiliated U.S. customer should have been deducted from CEP.

Plaintiff makes similar claims with regard to POSCO, Dongbu and HYSCO. Based on its construction of the facts, plaintiff maintains that the record reveals a substantial level of involvement by the respondents in the resale of CORE to unaffiliated U.S. purchasers. That is, Mittal insists that the respondents incurred selling expenses related to the resale of CORE to unaffiliated buyers in the United States and, thus, in accordance with 19 U.S.C. § 1677a(d)(1) and 19 C.F.R. § 351.402(b), Commerce is required to deduct the costs from CEP. *See* Pl.'s Mem. 33, 37–38.

Despite plaintiff's contentions, the court finds that Commerce supported with substantial evidence its decision to refrain from deducting the selling expenses identified by plaintiff as being associated with the resale of CORE to unaffiliated purchasers in the United States. Commerce must deduct from the starting price only those expenses that are "associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser . . . ." 19 C.F.R. § 351.402(b). Commerce, however, "will not make an adjustment [to CEP] for any expense that is related solely to the sale to an affiliated importer in the United States . . . ." *Id.*

Here, "Commerce requested and received from respondents information regarding all business or operational relationships affecting the development, product, sale or distribution of the subject merchandise," verified that information, and found that respondents' expenses did not relate to sales to unaffiliated U.S. buyers. Def.'s Resp. 16. For example, verification of Dongbu's questionnaire responses revealed:

> [S]ales negotiations begin with Dongbu USA [Dongbu's United States affiliate] and the U.S. customer. Dongbu USA informs Dongbu of the sales order, then Dongbu inputs the sales order into Dongbu's sales system, at which time the merchandise is produced to order. Company officials stated that Dongbu ships directly to the port of the customer's request, which is stated in the sales contract between Dongbu USA and customer. Company officials added that the shipment arrangements are made by Dongbu according to the terms that are negotiated between the customer and Dongbu USA. . . . Company officials also stated that Dongbu USA clears the merchandise through Cus-

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[11] Moreover, plaintiff suggests that Union [[ ]] Pl.'s Mem. 13.

> toms and arranges for the payments of the customs broker and customs duties. . . . Company officials stated that Dongbu USA generally issues the invoice to the customer after it has been shipped, but before it arrives to the United States. . . . They stated that the customer pays Dongbu USA . . . .

Dongbu Verification Mem. (Dep't of Commerce Feb. 1, 2005) at 29; *see also id.* at 30 ("We reviewed the list of selling activities performed by Dongbu and Dongbu USA for each market, and distribution channel. We also reviewed the list of selling activities and confirmed with company officials the level of activity in each market . . . . We noted no discrepancies."). The Department understood this evidence to indicate that Dongbu's U.S. affiliate, not Dongbu, incurred the selling expensesresulting from U.S. resales of CORE. Because "[t]here is no evidence on the record to suggest [Dongbu's] reported . . . selling expenses are directly attributable to U.S. sales," Commerce concluded that these expenses were not deductible from CEP. Issues & Decs. Mem. at 10.

Commerce made similar findings with respect to the level of involvement in resales of CORE to unaffiliated U.S. purchasers upon verifying Union's, POSCO's and HYSCO's responses and likewise found the reported incurred expenses to be unrelated to those sales. *See* Union Verification Mem. (Dep't of Commerce Feb. 1, 2005) at 20; Sales Verification Rep. for POSCO (Dep't of Commerce Feb. 1, 2005) at 26; Verification of Sales and Cost Information Submitted by HYSCO (Dep't of Commerce Feb. 1, 2005) at 9.

As discussed above, plaintiff interprets the record evidence to indicate a higher level of involvement by the respondents in the resale of CORE than that found by the Department. Commerce, however, considered the verification data and determined that there was "no evidence on the record to suggest respondents' reported . . . selling expenses [were] directly attributable to U.S. sales." Issues & Decs. Mem. at 10. In fact, after verifying respondents' questionnaire responses, the Department found that the expenses respondents incurred in selling CORE to their affiliates in the United States were general and not related to resales of CORE to unaffiliated buyers. *See id.*

An examination of Commerce's analysis and of the evidence submitted by plaintiff confirms that Commerce was justified in its findings. That is, plaintiff has not made a case that the selling functions performed by the parent companies were mischaracterized by Commerce. In addition, Commerce has adequately explained its conclusions. Thus, despite plaintiff's claim to the contrary, the court finds that the Department "articulate[d] a[ ] rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

Based on the foregoing, the court sustains as supported by substantial evidence Commerce's refusal to deduct selling expenses from

CEP because the Department reasonably concluded that respondents' reported expenses were not directly associated with resales of CORE to unaffiliated purchasers in the United States.

III. Dongbu and POSCO CEP Offset Adjustments

Next, plaintiff takes issue with Commerce's grant of a CEP offset to normal value to both POSCO and Dongbu to adjust for their home-market sales having been made at a more advanced stage of distribution than their sales in the United States.[12] *See* 19 U.S.C. § 1677b(a)(7)(B). Specifically, plaintiff asserts that "Commerce acted unreasonably when it allowed the . . . 'CEP offsets' to respondents who failed to provide full descriptions of all selling activities at the CEP [level of trade]." Pl.'s Mem. 24. For these purposes, CEP sales involve the resale of goods from the U.S. affiliate to an unaffiliated U.S. buyer. Because it is often the case that the U.S. affiliate will absorb the majority of the selling expenses and perform most, if not all of the selling functions in the resale to an unaffiliated buyer, Commerce looks to the "sale *to* the affiliate, not the affiliate's resale transaction" for purposes of determining the CEP level of trade ("LOT"). Pl.'s Mem. 18 (emphasis in original); *see also* Certain Hot-Rolled Carbon Steel Flat Products from Romania, 70 Fed. Reg. 72,984, 72,987 (Dep't of Commerce Dec. 8, 2005) (prelim. results) (stating that "[f]or CEP sales, the U.S. level of trade is the level of the constructed sale from the exporter to the affiliated importer").[13] Because neither Dongbu nor POSCO reported any selling expenses

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[12] The Federal Circuit has stated that "the level of trade adjustment is designed to ensure that the normal value and U.S. price are being compared . . . at the same level of trade, that is, at the same marketing stage in the chain of distribution that begins with the manufacturer." *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1314 (Fed. Cir. 2001). Indeed, an adjustment to normal value is necessary because "[e]ach more remote level of trade must be characterized by an additional layer of selling activities, amounting in the aggregate to a substantially different selling function." *Id.* (internal quotation marks, alteration & citation omitted).

[13] While CEP is statutorily defined as "the price at which the subject merchandise is first sold . . . in the United States before or after the date of importation by . . . a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter," 19 U.S.C. § 1677a(b), for purposes of comparing the level of trade for CEP sales, Commerce examines the selling functions performed by the foreign producer or exporter in selling the merchandise to its U.S. affiliate. *See* Preamble to Final Rule, 62 Fed. Reg. 27,296, 27,370 (Dep't of Commerce May 19, 1997) ("[T]he Department will base the LOT of CEP on the U.S. affiliate's starting price in the United States . . . .").

In an unrelated investigation, Commerce explained its procedure for determining the CEP LOT:

> First, the indirect selling expenses incurred in the United States by [U.S. affiliate] CIC's sales departments are, pursuant to [19 U.S.C. § 1677a(d)(1)(D)], properly excluded from the price calculated for the U.S. CEP sales. Pursuant to this and other . . . adjustments, [the U.S. affiliate]'s price to its unaffiliated customer (the "starting price") is transformed into a constructed export price, i.e., a constructed equivalent of a market-based sale by [foreign producers/exporters] Cinsa or ENASA to CIC [the U.S. affiliate]. This is the point at which the level of trade comparison is made.

incurred for sales to their U.S. affiliates, plaintiff insists that the record does not support Commerce's grant of a CEP offset.

Commerce is required by statute to make an LOT adjustment to normal value to account for the price differential resulting from a respondent's sales in the home market being made at a more advanced LOT than its sales to the United States.[14] *See* 19 U.S.C. § 1677b(a)(7)(A). The statute further provides that the Department only makes an LOT adjustment to normal value if "the difference in [LOT] . . . is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different [LOTs] in the country in which normal value is determined." 19 U.S.C. § 1677b(a)(7)(A)(ii).

Where the record contains insufficient data to make an LOT adjustment, a CEP offset to normal value may be granted.[15]

> When normal value is established at a[n] [LOT] which constitutes a more advanced stage of distribution than the [LOT] of the [CEP], but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a[n] [LOT] adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product. . . .

19 U.S.C. § 1677b(a)(7)(B). Unlike an LOT adjustment, then, the CEP offset does not demand evidence of an effect on price comparability. Indeed, the CEP offset can only be used in the absence of such evidence. *See* 19 C.F.R. § 351.412(f)(3) ("Where available data permit the Secretary to determine under paragraph (d) of this section whether the difference in [LOT] affects price comparability, the Secretary will not grant a [CEP] offset. In such cases, . . . the Secretary will make a[n] [LOT] adjustment.").

Porcelain-on-Steel Cookware From Mexico, 63 Fed. Reg. 38,373, 38,378 (Dep't of Commerce July 16, 1998) (final results).

[14] The Federal Circuit has noted that "[n]either the statute nor the accompanying Statement of Administrative Action . . . defines the phrase 'same level of trade.' " *Micron Tech.*, 243 F.3d at 1305 (citation omitted). Nonetheless, the Court has interpreted 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." *Id.*

[15] Congress anticipated the situation where the record would support a finding that sales were made at different levels of trade but would fall short of establishing that the difference had a measurable effect on price comparability and thus created the CEP offset adjustment. *See* Statement of Administrative Action, Uruguay Round Agreements Act, accompanying H.R. Rep. No. 103–316, 656, 830–31 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4169 ("SAA").

> The constructed export price offset adjustment will only be made where normal value is established at a level of trade more remote from the factory than the level of trade of the constructed export price; i.e., where the [LOT] adjustment . . . if it could have been quantified, would likely have resulted in a reduction of the normal value.

Id. at 831, 1994 U.S.C.C.A.N. at 4169.

Finding sales to be at a more advanced stage of distribution can be shown by evidence that the foreign producer or exporter performs more selling activities, and thus incurs more selling expenses, in its home market than it does in the United States. *See Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1305 (Fed. Cir. 2001) ("The effect [of the CEP offset] is to reduce the price of the more advanced level of trade by 'indirect selling expenses' that have been included in the price on the apparent theory that such costs would not have been incurred if the sale had been made on a less advanced [LOT].").

Here, Commerce allowed both Dongbu and POSCO a CEP offset. In reaching its decision to grant the offset, Commerce examined the data submitted by each respondent for its home-market and United States sales.

After comparing Dongbu's selling functions in the home market to its selling functions in the United States, the Department "found a less advanced level of trade in the U.S. market." Calculation Mem. for Dongbu (Dep't of Commerce Aug. 30, 2004) ("Dongbu Offset Mem.") at 2. For that reason, Commerce found warranted the grant of a CEP offset in order to "match[ ] the U.S. CEP sales to sales at the same level of trade in the home market." *Id.*

The Department also reviewed POSCO's reported home-market selling activities and

> granted a CEP offset because we found that the home market sales[16] were at a different stage of distribution compared to sales to the U.S. [stage of distribution] with respect to the [home market] [stage of distribution]. Because the [stage of distribution] of the U.S. sales is different than the home market[stage of distribution] and there is no home market [stage of distribution] comparable to that of the CEP sales, there is no reliable basis for quantifying a[n] LOT adjustment . . . . Therefore, a CEP offset was applied to [normal value] for the [normal value]-CEP comparisons.

Id. at 10.

Plaintiff's principal claim is that Commerce lacked evidence sufficient to justify a CEP offset. *See* Pl.'s Mem. 39–40. Mittal argues that "[i]n its initial questionnaire Commerce instructed all respondents to identify all selling activities relevant to claims for any LOT adjustments, *ergo* CEP offsets. . . . Both POSCO and Dongbu responded to Commerce's questionnaire. They did not, however, provide information regarding selling activities in sales at the CEP LOT." Pl.'s Mem. 40. In other words, plaintiff maintains that the absence of information regarding respondents' selling expenses incurred in making

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[16] Commerce calculated net home market price using a formula set forth in the POSCO Offset Memorandum. The formula appears to have taken into account various expenses including packing, credit and rebates. POSCO Offset Mem. at 5–6.

CORE sales to their U.S. affiliates should have prompted Commerce to ask respondents for that data before granting the respondents a CEP offset.

Plaintiff further argues that this absence of information does not mean that there were no such expenses and that the inclusion of these expenses would likely indicate that the home-market LOT was not more advanced than that at the CEP level. *See* Pl.'s Mem. 43. For plaintiff,

> both POSCO and Dongbu actively assist their U.S. affiliates in reselling merchandise inthe United States. Since those resales are *affiliates'* sales, it is fair to conclude that the Korean parents perform the activities to promote *their own* sales to the affiliates at the CEP LOT. Therefore, Commerce should have weighed the activities in the analysis of offset claims.

Pl.'s Mem. 42 (emphasis in original); *see also* Pl.'s Mem. 42–43.

Despite plaintiff's arguments, the court finds Commerce's grant of a CEP offset to POSCO and Dongbu supported by substantial evidence and in accordance with law. In particular, the court concludes that the Department, while not having sufficient evidence to make an LOT adjustment, reasonably relied on evidence of the selling functions performed by POSCO's and Dongbu's U.S. affiliates in deciding to grant the companies a CEP offset.

In making its determination, the Department "review[ed] the distribution system in each market (i.e., the 'chain of distribution') [for both Dongbu and POSCO] including selling functions, class of customer ("customer category") and level of selling expenses for each type of sale." Issues & Decs. Mem. at 11.

With respect to Dongbu, Commerce's analysis of that company's verified questionnaire responses revealed that in its home market, "Dongbu sold [CORE] through two channels of distribution to two customer categories, and claimed one level of trade in the home market." Dongbu Offset Mem. at 2. Commerce determined that, although Dongbu reported selling CORE in Korea through two channels of distribution, "the two home market channels of distribution . . . constitute one of level of trade." *Id.* Plaintiff does not dispute this finding.

Commerce also analyzed Dongbu's sales to the United States for purposes of determining whether an offset was necessary. Of importance here are two findings. First, as plaintiff acknowledges, Dongbu completed Commerce's questionnaire asking that it "list . . . all the selling and activities performed and services offered in the U.S. market and the foreign market." Pl.'s Mem. 40. Plaintiff claims that Dongbu's answers were deficient even though Commerce verified the answers. *See* Pl.'s Mem. 40; Def.'s Resp. 21. That is, plaintiff insists that Dongbu must have had more selling expenses with respect to its sales at the CEP LOT, i.e., sales to its U.S. affiliate, Dongbu USA,

than it reported. Commerce, though, in verifying Dongbu's responses, found only that "Dongbu's activities for U.S. sales are limited to foreign movement expenses." Dongbu & Union Br. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. 40 (quoting Dongbu's Section A Resp. at18). Thus, while plaintiff may insist that there were other unlisted expenses, the verified evidence on the record indicates otherwise.

Commerce further found that "Dongbu made only CEP sales through its U.S. affiliate, Dongbu USA, to unaffiliated customers in two customer categories, end-users and distributors, and had only one level of trade for U.S. sales." Dongbu Offset Mem. at 2. Noting that Dongbu USA "perform[ed] most of the selling functions in the United States," Commerce concluded that Dongbu's sales in the United States were at a less advanced stage of distribution than its sales in its home market of Korea, and granted Dongbu the CEP offset. *See id.*

After performing the same analysis for POSCO, Commerce found that the company sold CORE in Korea to three different types of customer categories through three channels of distribution. *See* POSCO Offset Mem. at 9. Commerce concluded that because the selling activities undertaken in each of the three channels of distribution "differed only slightly, . . . the home market channels of distribution constituted one level of trade." *Id.* at 10.

Commerce also "examined the sales to [POSCO's] affiliated resellers and examined the selling functions performed by POSCO . . . on behalf of its affiliate and found only one level of trade." *Id.* The Department found that, "[i]n the U.S. market, [POSCO] made only CEP sales of subject merchandise," through only one channel of distribution. *Id.* Further, sales were made by POSCO's affiliate to unaffiliated U.S. trading companies. *Id.* Plaintiff does not dispute these findings.

POSCO, too, submitted timely and complete responses to Commerce's questionnaire and the Department subsequently verified the answers. *See* POSCO & HYSCO Opp'n Pl.'s R. 56.2 Mot. J. Agency R. ("POSCO & HYSCO Br.") 28. POSCO's questionnaire responses showed that the company performed a substantial number of selling activities when selling CORE in Korea, but did not perform these activities when selling CORE in the United States. *See* POSCO & HYSCO Br. 28 (listing home-market selling activities including, but not limited to "sales and marketing; freight and delivery arrangement; market research; quality control; computer, legal, and accounting assistance and business-systems development assistance; . . . [and] sales force development and end user contact and support"). Based on this verified information, Commerce found that "the home market sales were at a different stage of distribution compared to sales to the U.S. LOT." POSCO Offset Mem. at 10.

As has been noted by defendant, plaintiff's objections do not amount to much more than speculation. Indeed, plaintiff's conten-

tion that Commerce unreasonably granted a CEP offset because "a reasonable mind would recognize, as a matter of common commercial sense, that affiliates engage in numerous inter- company activities when performing complementary and overlapping roles in marketing goods internationally," finds no evidentiary support. Pl.'s Mem. 42–43. Commerce issued Dongbu and POSCO questionnaires, the respondents provided timely and complete answers, the Department then verified those responses and found no discrepancies. As a result, Commerce determined that the hypothetical costs Mittal insisted had to exist simply did not.

Further, plaintiff's related claim that Commerce lacked sufficient evidence to grant the CEP offset because of Dongbu's and POSCO's incomplete submissions is directly contradicted by Commerce's verification of the companies' questionnaire responses, which revealed no inconsistencies and which provided sufficient evidence with respect to selling activities in both the home and U.S. markets. The court cannot, therefore, credit plaintiff's unsubstantiated assertion that commercial realities render insufficient the evidence Commerce relied upon in making its decision to grant Dongbu and POSCO a CEP offset.

Thus, the court sustains as supported by substantial evidence and in accordance with law the Department's grant of a CEP offset to both POSCO and Dongbu.

IV. Duty Drawback Adjustment

Plaintiff further contends that Commerce should not have allowed for a duty drawback adjustment to CEP because it claims the Korean drawback system is susceptible to manipulation.[17] As part of this claim, plaintiff maintains that Commerce's current standard for making drawback adjustments amplifies the potential for distorted dumping margins on Korean products, in part, because a Korean exporter is not required to allocate its total rebates over all of its shipments. Mittal's specific complaint is that the Department acted unlawfully by refusing to ask respondents for further data thus "allowing for fair and appropriate allocations" of the rebate received to the total lot of respondents' shipments of CORE. Pl.'s Mem. 45 (emphasis omitted).

The antidumping statute provides that "[t]he price used to establish . . . [CEP] shall be . . . increased by . . . the amount of any import duties imposed by the country of exportation which have

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[17] Generally, a "drawback" is "[a] government allowance or refund on import duties when the importer reexports imported products rather than selling them domestically." Black's Law Dictionary 532 (8th ed. 2004); *see also E.I. du Pont Nemours & Co. v. United States*, 24 CIT 1045, 1046 n.2, 116 F. Supp. 2d 1343, 1345 n.2 (2000) ("[D]uty drawback" generally, is the refund of duties paid on goods imported into the United States when those goods, or domestic goods of the same kind and quality, are used in the manufacture or production of articles which are subsequently exported.").

been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States . . . .” 19 U.S.C. § 1677a(c)(1)(B). Based on the statute, Commerce has created a two-prong test that must be satisfied prior to the grant of a drawback adjustment. The first prong requires the exporter to establish that “the import duty and rebate are directly linked to, and dependent upon, one another.” *Far East Mach. Co. v. United States*, 12 CIT 972, 974, 699 F. Supp. 309, 311 (1988) (internal quotation marks & citation omitted). The second prong demands that “the company claiming the adjustment [must] demonstrate that there were sufficient imports of imported raw materials to account for the duty drawback received on the exports of the manufactured product.” *Id.*, 699 F. Supp. at 311; *see also* Issues & Decs. Mem. at 13. For over twenty years, Commerce has consistently applied, and this Court has consistently upheld, this test. *See, e.g.*, *Carlisle Tire & Rubber Co. v. United States*, 11 CIT 168, 171, 657 F. Supp. 1287, 1290 (1987); *Far East Mach. Co. v. United States*, 12 CIT 428, 431–33, 688 F. Supp. 610, 612 (1988) (citation omitted); *Hornos Electricos de Venezuela, S.A. v. United States*, 27 CIT 1522, 1525, 285 F. Supp. 2d 1353, 1358 (2003); *Wheatland Tube Co. v. United States*, 30 CIT ___ , ___ , 414 F. Supp. 2d 1271, 1286–87 (2006).

Here, following verification, Commerce found that the respondents had satisfied the two-prong test. *See* Issues & Decs. Mem. at 13. Mittal does not fault this finding. Rather, plaintiff questions the utility of the test as applied to exports from Korea. According to plaintiff, “Korea’s duty drawback law effectively allows exporters to choose the export shipments on which they base drawback claims on exportations,” which in turn permits an exporter to manipulate its dumping margin. Pl.’s Mem. 24. That is, for plaintiff, if an exporter is allowed to apply its drawback claims solely to shipments intended for the United States, CEP increases artificially and the dumping margin decreases. Plaintiff insists that this potential for distorted results should have induced the Department to ask respondents for additional specific information relating to their drawback claims, which, in turn, Commerce could have used “to determine whether drawback claims were in fact disproportionate and excessive.” Pl.’s Mem. 46.

In essence, Mittal seeks the addition of a third prong to Commerce’s current two-prong test. That is, Mittal believes that the opportunity for margin manipulation would diminish if an exporter were required to demonstrate that it had allocated its rebates across all of its shipments. Plaintiff observes that, as in the United States, the Korean drawback scheme does not require such an allocation and thus opens the door for inaccurate dumping calculations. In Mittal’s view:

> Although unquestionably lawful in Korea, the Korean system makes it possible to manipulate U.S. antidumping

> results. . . . We can assume that Korean "Producer X" produces only one product, CORE, and that it uses steel scrap as the basic input. We can further assume that "X" imports 50 percent of its scrap consumption (paying import duties on the same) and obtains the balance locally. We can finally assume that "X" sells 50 percent of its total production for export to the United States and 50 percent to Canada. Under these imagined circumstances, in conjunction with the Korean law, "X" could limit its claims for drawback solely to shipments to the United States while claiming nothing on shipments to Canada – with U.S. antidumping motivations in mind.

Pl.'s Mem. 44–45. Thus, plaintiff insists that a required shipment-wide allocation of drawback would eliminate the distortion of dumping margins and maintain the integrity of the antidumping statute.

The court finds that Commerce's two-prong test is a reasonable interpretation of 19 U.S.C. § 1677a(c)(1)(B) and that it properly applied the test to the Korean respondents in this case. As noted, pursuant to 19 U.S.C. § 1677a(c)(1)(B), there are two requirements for adjusting upward CEP based on rebated import duties. First, there must be "import duties imposed by the country of exportation . . . ." 19 U.S.C. § 1677a(c)(1)(B). Second, those duties must either be rebated or not collected by the exporting country "by reason of the exportation of the subject merchandise to the United States." *Id.* As this Court has held previously, nothing in the statute requires an exporter to demonstrate that it allocated its rebated or non-collected duties across the totality of its subject shipments. *See Far East Mach. Co.*, 12 CIT at 979, 699 F. Supp. at 315 (finding that Commerce's "approach is not an unfair way of proceeding," and that the "method seems reasonably calculated to arrive at a proper adjustment to price"); *Avesta Sheffield, Inc. v. United States*, 17 CIT 1212, 1216, 838 F. Supp. 608, 612 (1993) ("As a matter of policy in drawback cases, [Commerce] does not require exporters to account for a sufficient amount of imported product to cover all products sold to third countries, as well as to the United States."). Thus, the statute and the two-prong test put the emphasis on proof of a direct link between the rebate of the import duty and on evidence of sufficient imports to account for the duty drawback and the exports of subject merchandise. The court, therefore, agrees with defendant that "[t]here is no legal basis for the argument that Commerce should not make a duty drawback adjustment unless it can allocate the total pool of duty drawback on a proportional basis among all countries to which respondents export the subject merchandise." Def.'s Resp. 24;[18] *see also Pesquera Mares Australes Ltda. v. United States*, 266

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[18] The court notes that Commerce has sought public comment on the two-prong test. *See* Duty Drawback Practice in Antidumping Proceedings, 70 Fed. Reg. 37,764 (Dep't of Com-

F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to deference under *Chevron*.").

In addition, the court finds that the Department supported with substantial evidence its decision to make an upward adjustment to CEP to account for the drawback respondents received from the Korean government on their imports of raw materials. Commerce verified that respondents received drawback for their imports of raw materials used to produce the subject merchandise and that the amount of raw materials imported covered the amount of the drawback. *See* Issues & Decs. Mem. at 13. In other words, the Department reasonably concluded that respondents satisfied the two-prong test and, thus, were entitled to the CEP adjustment.

Based on the foregoing, the court sustains as supported by substantial evidence and otherwise in accordance with law Commerce's duty drawback adjustment to respondents' U.S. price of CORE.

V. Section 201 Safeguard Duties

Plaintiff next insists that Commerce erred by declining to deduct from CEP certain duties imposed on imports of steel into the United States pursuant to Section 201 of the Trade Act of 1974, 19 U.S.C. § 2251 ("Section 201 Duties").

In the Final Results, Commerce determined that the Section 201 Duties were not deductible from CEP under 19 U.S.C. § 1677a(c)(2)(A). Pursuant to that provision, when calculating dumping margins, Commerce reduces U.S. price by "the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, *and United States import duties*, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . . ." 19 U.S.C. § 1677a(c)(2)(A) (emphasis added). Based on its interpretation of the phrase "United States import duties," Commerce customarily deducts from CEP "normal customs duties"[19] but does not deduct either unfair trade duties or Section 201 Duties.

With respect to Section 201, that provision "permit[s] the President of the United States to impose safeguard measures in reaction to threats posed to domestic industry by identified imported items."

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merce June 30, 2005) (request for comments). Plaintiff claims that "[i]f Commerce's practice might very well change, Mittal should get the benefit now, not just in future reviews." Pl.'s Mem. 48. As yet, however, Commerce has not altered its treatment of duty drawback adjustments. Thus, "Commerce's potential rulemaking has no effect here." *Rhone-Poulenc, Inc. v. United States*, 20 CIT 573, 584 n.5, 927 F. Supp. 451, 461 n.5 (1996).

[19] Commerce apparently understands the phrase "normal customs duties" to include, *inter alia*, import duties as set out in the Harmonized Tariff Schedule of the United States and the Harbor Maintenance Tax. In other words, Commerce deducts from CEP those permanent, generally applicable duties fixed at the time of importation.

Wheatland Tube Co., 30 CIT at ___ , 414 F. Supp. 2d at 1272 n.1. For example, the President "may, for purposes of taking action under [19 U.S.C. § 2253(a)(1)] . . . proclaim an increase in, or the imposition of, any duty on the imported article . . . ." 19 U.S.C. § 2253(a)(3). The President may take action, however, only "[i]f the United States International Trade Commission [("ITC" or "Commission")] determines under [19 U.S.C. § 2252(b)] that an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry . . . ." 19 U.S.C. § 2251(a). Thus, the President may not act unilaterally to increase duties on imports. Rather, there must first be an affirmative serious injury, or threat of serious injury finding from the ITC.

At issue here is the 2002 Presidential Proclamation that imposed duties to counteract a surge in steel imports. On December 19, 2001, pursuant to 19 U.S.C. § 2252, the Commission submitted to the President its affirmative determination that certain steel products were "being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or threat of serious injury, to the domestic industries producing like or directly competitive articles." Presidential Proclamation 7529 To Facilitate Positive Adjustment to Competition From Imports of Certain Steel Products ("Proclamation 7529"), 67 Fed. Reg. 10,553 (Mar. 5, 2002). As a result, on March 5, 2002, the President, pursuant to 19 U.S.C. § 2253(a)(3)(A), imposed a duty of 15 percent *ad valorem* on, among other things, imports into the United States of cold-rolled steel "for a period of 3 years plus 1 day . . . ." Proclamation 7529, 67 Fed. Reg. at 10,555. This Section 201 Duty applied to the CORE imports into the United States that were the subject of the instant review. Upon entering their merchandise, respondents paid to U.S. Customs and Border Protection ("Customs") the Section 201 Duty. There is no dispute over the amount of the duty charged, nor is there any complaint that respondents failed to pay the duty owed.

Here, as in the past, the Department concluded it would not deduct Section 201 Duties from CEP

> because 201 duties are not "United States import duties" within the meaning of the statute, and to make such a deduction effectively would collect the 201 duties a second time. Our examination of the safeguard[ ] and antidumping statutes, and their legislative histories indicates that Congress plainly considered the two remedies to be complementary and, to some extent, interchangeable. Accordingly, to the extent that 201 duties may reduce dumping margins, this is not a distortion of any margin to be eliminated, but a legitimate reduction in the level of dumping.

Issues & Decs. Mem. at 15.

Mittal insists that Commerce acted unreasonably in not deducting the Section 201 Duties from U.S. price. Plaintiff's principal argument is that Section 201 Duties are closer to being normal customs duties than they are to antidumping duties and thus constitute "United States import duties," which must be deducted from CEP. *See* Pl.'s First Supplemental Br. 3. While plaintiff does not dispute Commerce's practice of not deducting antidumping and countervailing duties from U.S. price under 19 U.S.C. § 1677a(c)(2)(A), it maintains that Section 201 Duties arenot of the same nature as those duties. In plaintiff's view, Section 201 Duties are more akin to normal customs duties because they share a common purpose, i.e., "both types of duties are protective in nature." Pl.'s Supplemental Br. 3.

Since the completion of briefing in this case, the Federal Circuit has considered the appeal of this Court's decision in *Wheatland Tube Co.*, which held that Section 201 Duties must be deducted from United States price when calculating a respondent's dumping margin under 19 U.S.C. § 1677a(c)(2)(A). *Wheatland Tube Co.*, 30 CIT at ___ , 414 F. Supp. 2d at 1285–86. In reversing *Wheatland Tube Co.*, the Federal Circuit made two related findings. First, it found that the Department's "interpretation that 'United States import duties' do not include § 201 safeguard duties was the result of its formal notice-and-comment rulemaking process," and thus that Commerce's interpretation "is entitled to deference as required by . . . [*Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] if its interpretation is reasonable." *Wheatland Tube Co. v. United States*, Nos. 2006–1524, 2006–1525, 2007 WL 2119824, at *4 (Fed. Cir. July 25, 2007). Second, it concluded that,

> [i]n light of the legislative history of the Antidumping Duty Act of 1921, the similarities between antidumping duties and § 201 safeguard duties, and the likelihood that deducting § 201 safeguard duties from the [United States price] would result in collecting a double remedy, we hold that Commerce's interpretation that "United States import duties" does not include § 201 safeguard duties for the purposes of determining the [United States price] and calculating the dumping margin is reasonable.

Wheatland Tube Co., 2007 WL 2119824, at *7. Thus, based on the Federal Circuit's holding in *Wheatland Tube Co.*, the court sustains as reasonable Commerce's interpretation of "United States import duties" to exclude Section 201 Duties and its decision to not deduct those duties from United States price.

CONCLUSION

Based on the foregoing, the court sustains Commerce's Final Results. Judgment shall be entered accordingly.

MITTAL STEEL USA, INC. (formerly INTERNATIONAL STEEL GROUP, INC.), Plaintiff, v. UNITED STATES, Defendant, and UNION STEEL MANUFACTURING CO., LTD. DONGBU STEEL CO., LTD.; POSCO; and HYUNDAI HYSCO CO., LTD., Deft.-Ints.

Before: Richard K. Eaton, Judge:

Consol. Court No. 05–00308
Public Version

JUDGMENT

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision, it is hereby

ORDERED that the United States Department of Commerce's final results of the tenth administrative review of the antidumping duty order applicable to imports into the United States of CORE from the Republic of Korea are sustained; and it is further

ORDERED that this case is dismissed.

Slip Op. 07–131

TIANJIN MACHINERY IMPORT & EXPORT CORP. and SHANDONG HUARONG MACHINERY CO., LTD., Plaintiffs, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Deft.-Int.

Before: Richard K. Eaton, Judge
Court No. 05–00522
Public Version

[United States Department of Commerce's final results of the thirteenth administrative review of the antidumping duty order covering imports into the United States of heavy forged hand tools from the People's Republic of China are sustained in part and remanded.]

Dated: August 28, 2007

Hume & Associates, PC (*Robert T. Hume*), for plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Civil Division, Commercial Litigation Branch, United States Department of Justice; *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch,

United States Department of Justice (*Stephen C. Tosini*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Scott McBride*), of counsel, for defendant.

Wiley Rein, LLP (*Timothy C. Brightbill* and *Charles O. Verrill*, Jr.), for defendant-intervenor.

OPINION AND ORDER

Eaton, Judge: This matter is before the court on the USCIT Rule 56.2 motion for judgment upon the agency record of plaintiffs Tianjin Machinery Import & Export Corp. ("TMC") and Shandong Huarong Machinery Co., Ltd. ("Huarong"). By their motion, plaintiffs challenge certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") final results of its thirteenth administrative review of the four antidumping duty orders applicable to imports into the United States of heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC"). *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 54,897 (Dep't of Commerce Sept. 19, 2005) (final) ("Final Results"); *see also* HFHTs, Finished or Unfinished, With or Without Handles From the PRC, 56 Fed. Reg. 6622 (Dep't of Commerce Feb. 19, 1991) (notice) ("HFHTs Orders").

Jurisdiction is had pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons, Commerce's Final Results are sustained in part and remanded.

BACKGROUND

Plaintiffs are producers and exporters of HFHTs in the PRC. Their exports to the United States are subject to the HFHTs Orders covering axes/adzes, bars/wedges, hammers/sledges and picks/mattocks. On February 27, 2004, plaintiffs (and defendant-intervenor) asked Commerce to conduct an administrative review of the HFHTs Orders, the thirteenth such review, for the period of review February 1, 2003, to January 31, 2004 ("POR"). *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 70 Fed. Reg. 11,934, 11,935, 11,937 (Dep't of Commerce Mar. 10, 2005) (prelim.) ("Preliminary Results").

The Department initiated its review on March 26, 2004, and published the Preliminary Results on March 10, 2005. Commerce determined preliminarily that plaintiffs sold HFHTs at less than normal value and further found appropriate the use of facts otherwise available and adverse facts available ("AFA") pursuant to 19 U.S.C. § 1677e(a), (b). *See id.* at 11,934–35. In the Final Results, Commerce confirmed its preliminary findings. *See* Final Results, 70 Fed. Reg. at 54,898. Accordingly, the Department assigned plaintiffs the following rates: Huarong's and TMC's sales of axes/adzes – 174.58 percent; Huarong's and TMC's sales of bars/wedges – 139.31 percent;

TMC's sales of hammers/sledges – 45.42 percent; and TMC's sales of picks/mattocks – 98.77 percent. *See id.* at 54,899.

Before the court, plaintiffs raise two primary objections to the Department's conclusions in the Final Results and seek a remand of this case. First, plaintiffs insist that Commerce was not justified in its use of AFA. Second, in the event the court finds warranted the use of AFA, plaintiffs urge that Commerce failed to support with substantial evidence its determination of the AFA rates. *See* Pls.' Mot. J. Agency R.("Pls.' Mem.") 7–8.[1]

STANDARD OF REVIEW

When reviewing a final antidumping determination from Commerce, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The court determines the existence of substantial evidence "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Id.* (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

I. The Department's Use of AFA

A. Application of AFA to "Agent" Sales

Where a respondent in an administrative review "significantly impedes" a Commerce proceeding, the agency is permitted to "fill[ ] gaps in the record" using facts otherwise available. *See* Statement of Administrative Action, Uruguay Round Agreements Act, accompanying H.R. Rep. No. 103–316, 656, 830–31 (1994), *reprinted in* 1994

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[1] In addition, plaintiffs contend that Commerce erroneously included within the scope of the HFHTs Orders their exports of the multi-use tough tool ("MUTT") and thereby calculated incorrectly the AFA rate for axes/adzes. *See* Pls.' Mem. 8. The court, however, has since sustained Commerce's inclusion of the MUTT within the scope of the order applicable to axes, adzes and similar hewing tools. *See Olympia Indus., Inc. v. United States*, 30 CIT ____ , ____ , Slip Op. 06–110 at 2–3 (July 24, 2006) (not reported in the Federal Supplement) ("Because the MUTT's utility as a tool comes from its steel head with a sharp blade that can be used for cutting and chopping, the court finds that it is a hewing tool similar to an axe or adze and, thus, sustains Commerce's Final Scope Ruling."). The 60-day period for appealing that decision has come and gone without an appeal having been filed. *See* Fed. R. App. P. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.").

U.S.C.C.A.N. 4040, 4199; *see also* 19 U.S.C. § 1677e(a)(2)(C). Here, Commerce states that it used facts available "because Huarong and TMC . . . significantly impeded the instant proceeding." Issues & Decision Mem. for the th Admin. Rev. of HFHTs from the PRC (Dep't of Commerce Sept. 6, 2005) ("Issues & Dec. Mem.") at 5. Specifically, the Department claims that the "use of the 'agent' sales schemes by [plaintiffs] impeded [its] ability to complete this administrative review . . . , impose antidumping duties and issue instructions to [U.S. Customs and Border Protection ("Customs")] to assess the correct antidumping duties . . . ." *Id.* at 6 (citations omitted). In addition, Commerce decided to use AFA because, in its view, each company failed to cooperate to the best of its ability by not disclosing the true nature of the agency relationship, i.e., that TMC was merely a vehicle by which Huarong could export its goods to the United States at a lower rate. *See* Def.'s Resp. Pls.' Mot. J. Admin. R. ("Def.'s Resp.") 8. In reaching its conclusion, Commerce found that the companies' relationship was such that TMC did nothing more than forward its blank invoices to Huarong, thus enabling Huarong to benefit from TMC's lower dumping margin when making sales to the United States.

The relevant section of the antidumping duty statute, 19 U.S.C. § 1677e, requires Commerce to undertake a bifurcatedanalysis in determining whether to use facts otherwise available and, if reliance on such facts is warranted, whether to use an adverse inference in selecting from among those facts. First, under the pertinent part of subsection 1677e(a):

> If—
>
> (1) necessary information is notavailable on the record, or
> (2) an interested party or otherperson . . .
>
> (C) significantly impedesa proceeding under this subtitle, . . .
>
> the administering authority . . . shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

19 U.S.C. § 1677e(a)(C). It is well settled that a party's intent is irrelevant to a decision to use facts available. *See Ferro Union, Inc. v. United States*, 23 CIT 178, 199 n.44, 44 F. Supp. 2d 1310, 1330 n.44 (1999) ("A respondent could impede a review without intending to do so, for example, because it did not understand the questions asked."). Thus, subsection (a) mandates the use of facts available when a respondent significantly impedes Commerce's investigation, irrespective of the respondent's intent.

Once it determines that the use of facts otherwise available is required, Commerce may, if the conditions warrant, use an inference adverse to the interests of the respondent in selecting from those

facts.[2] The Court of Appeals for the Federal Circuit in *Nippon Steel Corp. v. United States*, 337 F.3d 1373 (Fed. Cir. 2003), stated that, as distinguished from subsection (a),

> subsection (b) permits Commerce to "use an inference that is adverse to the interests of [a respondent] in selecting from among the facts otherwise available," only if Commerce makes the separate determination that the respondent "has failed to cooperate by not acting to the best of its ability to comply." The focus of subsection (b) is respondent's *failure to cooperate to the best of its ability*, not its failure to provide requested information.

Nippon Steel Corp., 337 F.3d at 1381 (quoting 19 U.S.C. § 1677e(b)) (alteration & emphasis in original). While the statute does not define the phrase "to the best of its ability," the Federal Circuit has held those words to "require[ ] the respondent to do the maximum it is able to do." *Id.* at 1382.

Here, the Department resorted to facts otherwise available and drew an adverse inference from those facts in determining plaintiffs' dumping margins for their "agent" sales because it found that plaintiffs: (1) significantly impeded the administrative review by continuously misrepresenting the nature of their "agency" relationship; and (2) failed to cooperate to the maximum they were able to by not revealing the true nature of their agency relationship.

Plaintiffs, however, maintain that they neither impeded the review nor failed to act to the best of their ability to provide Commerce with all data regarding their "agent" sales in the requested form and manner. *See* Pls.' Mem. 19–20. In making their argument, plaintiffs point to their initial responses to Commerce's Section A Questionnaire:

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[2] Pursuant to subsection 1677e(b):

> If the administering authority . . . 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 . . ., the administering authority . . . , 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 undersection 1675 of this title [periodic review] or determination under section 1675b of this title [countervailing duty injury investigations], or
>
> (4) any other information placed on the record.

19 U.S.C. § 1677e(b).

> Huarong reported that it made sales through an agent. Huarong provided a copy of its agent agreement. Huarong also included a copy of previous verification reports where similar "agent" sales were made. . . . In addition, Huarong clearly indicated that TMC was used as an agent. Likewise, TMC properly identified that it acted as an agent during this period of review. Additionally, Huarong and TMC properly responded to all of the [Department]'s interrogatories. For example, Huarong provided 1) Copies of the purchase orders, commercial invoices, and proofs of order entry dates for all direct sales of bars during the POR, 2) Copies of the purchase orders, commercial invoices, and proofs of order entry dates for all agent sales of bars during the POR through TMC, and 3) Copies of the purchase orders, commercial invoices, and proofs of order entry dates for all direct sales of scrapers during the POR.

Pls.' Mem. 19–21 (footnotes omitted). Thus, plaintiffs insist that they did not impede the review and "complied to the best of [their] ability to answer all questions the [Department] posed." Pls.' Mem. 21.

Plaintiffs further claim that they participated in a *bona fide* agency relationship and thus did not undermine the administrative review proceedings.

> Commerce erred in stating [plaintiffs] used agents in an attempt to circumvent payment of antidumping duties. This is not correct because [plaintiffs] reported their respective agent sales and the information required to calculate dumping margins. Plaintiffs' intent was never to have their respective importers avoid dumping duties. If Plaintiffs had the intent of circumventing the antidumping duty order the Plaintiffs would not have requested, and participated in, the instant administrative review.
>
> In addition, Commerce mistakes analyzing the relationship of Plaintiffs and confounding [sic] this with the separate issue of the importer of record. Plaintiffs have participated in this review giving forth valid information regarding its agent sales and relationship with various businesses. Plaintiffs have never deceived Commerce nor provided improper information. To the contrary, Plaintiffs have been forthcoming with all [their] dealings. No action taken by the [plaintiffs] undermined Commerce's ability to "impose accurate antidumping duties" . . . . Commerce, in fact, has not pointed to a specific law that has been violated.

Pls.' Mem. 23–24 (footnotes omitted).

With respect to Commerce's use of an adverse inference in selecting from among the facts otherwise available, plaintiffs insist that they acted to the best of their ability in providing Commerce with

timely and complete responses to the questionnaires regarding their "agent" sales and, thus, an adverse inference was not supported by the record. *See* Pls.' Mem. 24.

As previously noted, Commerce used facts otherwise available to determine plaintiffs' dumping margins for their agent sales because it concluded that plaintiffs significantly impeded the review by failing to disclose the true nature of their business relationship. In reaching this conclusion, the Department rejected plaintiffs' general claim that, because they revealed their involvement in an agency relationship, Commerce was precluded from determining their dumping margins based on facts otherwise available. In fact, Commerce provided specific reasons for using facts available in determining plaintiffs' margins for their claimed agent sales. First, the Department maintained that plaintiffs misrepresented the nature of their business relationship throughout the administrative review:

> After reviewing the record evidence, the Department found that both Huarong and TMC continually misrepresented the true nature of their relationship with their principal or "agent," as appropriate, during the POR. In their questionnaire responses, Huarong and TMC claimed that their relationships with their "agents" or principals were *bona fide* business arrangements. However, only through issuing multiple supplemental questionnaires to each [plaintiff] did the Department learn that nearly all of the sales functions were conducted by the principal, and that the "agent's" participation was limited, for the most part, to supplying blank invoices to the principal with an intention to circumvent the order.

Issues & Dec. Mem. at 6. That is, because plaintiffs made it appear in their initial Section A responses that their agent sales were made pursuant to a legitimate agency relationship, they impeded the investigation. *Id.* at 7.

The Department then justified its use of adverse inferences in selecting from among the facts available in accordance with 19 U.S.C. § 1677e(b) when determining plaintiffs' dumping margins: "[T]he Department has determined that both Huarong and TMC failed to cooperate by not acting to the best of their ability to comply with [its] requests for information." *Id.* In Huarong's case, Commerce found that

> an adverse inference [was] warranted because Huarong: (1) continually misrepresented the true nature of its relationship with the "agent" during the POR by portraying the company as a *bona fide* "agent" for the vast majority of Huarong's "agent" sales; (2) participated in an "agent" sales scheme in order to avoid payment of the appropriate cash deposit and assessment

> rate and circumvent the antidumping duty order; and (3) undermined [Commerce's] ability to issueinstructions to [Customs] to assess accurate antidumping duties.

Id. at 7–8. Likewise, for TMC, the Department concluded that

> an adverse inference [was] warranted because TMC: (1) continually misrepresented the true nature of its relationship with the principal during the POR by portraying itself as a *bona fide* "agent" for the vast majority of TMC's "agent" sales; (2) participated in an agent sales scheme in order to avoid payment of the appropriate cash deposit and assessment rate and circumvent the antidumping duty order; and (3) undermined [Commerce's] ability to issue instructions to [Customs] to assess accurate antidumping duties.

Id. at 8. Thus, in the Final Results, Commerce applied AFA to Huarong's and TMC's claimed agent sales of bars/wedges.

The court finds reasonable Commerce's decision to determine plaintiffs' dumping margins for their claimed "agent" sales based on AFA. First, pursuant to 19 U.S.C. § 1677e(a), the Department acted reasonably in resorting to the facts otherwise available on the record. By its Section A questionnaire response, Huarong claimed that it "made some direct sales and some sales through an agent," and further insisted that "the agent sales [were] exported by the agent and should be properly reported by the agent." Huarong Resp. to Apr. 14, 2004, Questionnaire, Sec. A (May 11, 2004) ("Huarong Sec. A Resp.") at A–2. In addition, Huarong submitted a copy of the purported "agency" agreement. *See* Huarong Sec. A Resp., Ex. 3; *see also* Mem. from James C. Doyle, Dir., AD/CVD Operations, Import Administration to Barbara E. Tillman, Acting Deputy Assistant Secretary for ImportAdministration, Application of AFA to Huarong (ITA Feb. 28, 2005) at 1–2 ("Huarong provided the Department with two copies of the "agent" contract with TMC, one which predates the [POR] and one which was during the POR. According to the contract, TMC is to act as Huarong's 'agent' for certain sales and receive a commission for its services.") (internal citations omitted).

Plaintiffs fail to acknowledge, however, that Commerce discovered, after the issuance of several supplemental questionnaires, that the business relationship between Huarong and TMC was nothing more than a scheme apparently directed toward circumventing the antidumping duties applicable to Huarong's HFHTs sales to the United States. *See* Issues & Dec. Mem. at 6 ("[O]nly through issuing multiple supplemental questionnaires to each [r]espondent did the Department learn that nearly all of the sales functions were conducted by the principal, and that the 'agent's' participation was limited, for the most part, to supplying blank invoices to the principal . . . ."). Thus, while the record shows that the companies reported an "agency" arrangement, it is apparent that both Huarong and TMC

withheld the actual details of their arrangement, information over which they had complete command. In other words, the mere statement that sales were made through an agent when, in reality, the agent's role was simply to provide the principal with blank invoices, is not enough to preclude Commerce from resorting to facts otherwise available. Thus, the Department reasonably concluded that Huarong's and TMC's failure to provide the details of their arrangement significantly impeded the review.

Huarong's and TMC's failure to disclose fully their true business relationship in their initial questionnaire responses further impeded the review by preventing Commerce from issuing accurate liquidation instructions to Customs. Indeed, without knowing the identity of the actual seller, any "assessment rate calculated by the Department would be rendered meaningless because it would not be applied to all appropriate entries." Issues & Dec. Mem. at 6; *see also id.* at 7 ("The record evidence gathered by the Department demonstrates that the cash deposit and assessment rates calculated by the Department for these 'agent' sales either would not have been the appropriate rate or would not have been assessed by [Customs]."). Put another way, by entering its merchandise using TMC's invoice, Huarong avoided the higher duties that would normally attach to its entries and instead received the lower rate applicable to TMC's entries.

It is apparent from the court's review of the record that plaintiffs' failure to submit accurate and complete data in response to the Department's initial questionnaire prevented the agency from considering correct sales data. Thus, the court finds that the Department reasonably concluded that Huarong and TMC significantly impeded the review and thus that the Department was justified in its reliance on the facts otherwise available under 19 U.S.C. § 1677e(a).[3]

Given that the record supports using facts otherwise available to determine plaintiffs' dumping margins with respect to their claimed "agent" sales, the court must now determine whether the Department lawfully used an adverse inference when selecting from among the facts otherwise available in accordance with 19 U.S.C. § 1677e(b). Under that provision, Commerce may use an adverse inference if the respondent "has failed to cooperate by not acting to the *best of its ability* to comply with a request for information . . . ." 19 U.S.C. § 1677e(b) (emphasis added). Here, both Huarong and TMC possessed information regarding the true nature of their purported

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[3] Plaintiffs have previously made these arguments before this Court in litigation dealing with the twelfth administrative review of the HFHTs Orders. *See Shandong Huarong Mach. Co. v. United States*, 30 CIT ____, ____, 435 F. Supp. 2d 1261, 1269–70 (2006) ("[E]ven though the Companies ultimately disclosed the circumstances surrounding their 'agency' relationships, their failure to do so until after the issuance of several supplemental questionnaires surely significantly impeded Commerce's investigation by requiring the agency to prolong its review.").

"agency" relationship that was material to Commerce's determination of their antidumping duty margins, yet both submitted that data only after the issuance of several supplemental questionnaires. Thus, as this Court has previously held, plaintiffs' "failure initially to provide the relevant information with respect to their invoicing arrangement, information that was fully within their command, justified Commerce's application of AFA" to plaintiffs' claimed "agent" sales. *Shandong Huarong Mach. Co. v. United States*, 30 CIT ___ , ___ , 435 F. Supp. 2d 1261, 1270 (2006).

B. Company Specific Applications of AFA

In addition to applying AFA to Huarong's and TMC's "agent" sales, Commerce also applied AFA to both companies with respect to some of their remaining sales. Specifically, the Department applied AFA to certain of Huarong's sales of scrapers[4] and to certain of TMC's sales of picks/mattocks.

1. Application of AFA to Huarong's Scraper Sales: Movement Expenses

As previously noted, the application of AFA is the product of a two-step analysis. *See* 19 U.S.C. § 1677e(a), (b). In the Final Results, the Department found warranted the use of facts otherwise available in calculating the rate applicable to Huarong's scraper sales because, in its view, Huarong "withheld information that [was] requested by the Department."[5] Issues & Dec. Mem. at 22. Specifically, Commerce found that Huarong failed to disclose that it shipped its merchandise to a distribution warehouse prior to shipping the goods to the United States despite the Department's repeated requests for that information.

As Commerce correctly notes, under the statute, a respondent is required to report those expenses "incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States . . . ." 19 U.S.C. § 1677a(c)(2)(A); *see also* Issues & Dec. Mem. at 22 ("As has been established in prior administrative cases, the respondent must report all movement expenses, which includes transportation and other expenses, such as warehousing."). Reporting this information is important to the dumping calculation because Commerce deducts from either constructed export price or export price the amount of the movement expenses. This deduction reduces the United States price

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[4] Scrapers are subject to the antidumping duty order covering axes/adzes from the PRC. *See Olympia Indus., Inc.*, 30 CIT at ____ , Slip Op. 06–110 at 2–3.

[5] Pursuant to 19 U.S.C. § 1677e(a)(2)(A), Commerce is directed to rely on facts available when reaching its determination if a respondent "withholds information that has been requested by [Commerce] . . . ."

of respondent's merchandise and, thus, increases its dumping margin.

Here, Commerce asked Huarong twice to report the movement expenses relating to its scraper sales, yet, Commerce found,

> [i]n its questionnaire responses, . . . Huarong reported that it did not ship the subject merchandise from the factory to a distribution warehouse, and, thus, did not incur this movement expense. At verification, however, the Department noted that the loading notification notice for one sale listed an unreported movement expense. The Department asked for and received the loading notification notice for other sales, which also listed this unreported movement expense. Moreover, when Huarong was asked about this expense, Huarong stated that this expense is incurred for all merchandise even though the Department noted that it was not reported in Huarong's U.S. sales database. Accordingly, the Department was not aware until it was discovered at verification that Huarong had not reported further movement expenses.

Issues & Dec. Mem. at 22; *see also* Verification of Sales and Factors of Production for Huarong (ITA May, 17 2005) ("Huarong Verification Rep.") at 17. Thus, because Commerce did not learn that Huarong incurred this movement expense until verification, it concluded that Huarong withheld information. *See* Def.'s Resp. 12 ("Verification is meant to confirm the accuracy of data already reported, not to restart the period for providing data.").

In addition, the Department found that Huarong failed "to put forth its maximum efforts to report and obtain information from its records regarding all incurred movement expenses as requested." Issues & Dec. Mem. at 23. That is, Commerce found justified the taking of an adverse inference in selecting from among the facts otherwise available. *See id.*; *see also* 19 U.S.C. § 1677e(b). For the Department:

> Huarong's knowledge of this movement expense and its decision not to report it, despite repeated questionnaires, properly warrants the use of AFA. A reasonable [r]espondent would have reviewed the Department's questionnaires and its records and reported the movement expenses. The [r]espondents cannot unilaterally decide what requested information to provide. Accordingly, Huarong did not cooperate to the best of its ability with regard to the Department's request for information during the course of the administrative review. It was only at the Department's request at verification that Huarong acknowledged that this unreported movement expense was incurred for all sales of axes/adzes. Therefore, consistent with the Department's practice in cases where a respondent fails to cooperate to the best of its ability, and pursuant to [19 U.S.C. § 1677e(b)],

> the Department finds that the use of partial AFA is warranted for Huarong's unreported movement expense.

Issues & Dec. Mem. at 23.

As a result of Huarong's failure to provide the movement expense data, Commerce

> us[ed] as an adverse inference the highest number of days, between the date of invoice and the shipment date, as the time period in which [the] expense . . . occurred for all sales in which this movement expense was not reported. Additionally, the Department [valued] this unreported movement expense for all sales with a publicly available Indian surrogate value because there is no surrogate value information on the record due to Huarong's failure to disclose this movement expense.

Id.[6]

Huarong contests both Commerce's use of facts otherwise available and its taking of an adverse inference in calculating the dumping margin for certain of Huarong's scraper sales. It argues that the application of AFA was unjustified because it "cooperated to the best of [its] ability by reporting [its] data as completely and as accurately as possible as can be demonstrated by the multiple questionnaire responses submitted as per the Department's requests." Pls.' Mem. 28. That is, Huarong urges that Commerce lacked a sufficient basis for applying partial AFA to its sales of scrapers under the axes/adzes order because Huarong eventually complied fully with the Department's requests for information. *See* Pls.' Mem. 28 ("The [p]laintiff[ ] behaved responsibly and reported [its] sales and other data to the best of [its] ability. [It] certainly did not refuse to cooperate.").

Huarong raises a final point in support of its claim that partial AFA were not applicable. It contends that, "[i]f the Department ha[d] concerns regarding the movement expenses of these sales, . . . the Department should [have] request[ed] further information from [r]espondents regarding these movement expenses." Issues & Dec. Mem.

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[6] Specifically, Commerce stated that in calculating Huarong's rate for its scraper sales:

> As an adverse inference, the Department calculated the highest number of days [[ ]], between the date of invoice and the shipment date, from Huarong sales traced at verification, as the period incurred for all sales that did not report this movement expense. The Department valued this unreported movement expense with a publicly available Indian surrogate value, which was deflated to be reflective of the POR. The Department took the surrogate value and multiplied it by the [[ ]], which was applied as the unreported movement expense incurred for all Huarong's sales of axes/adzes.

Analysis for the Final Results of HFHTs from the PRC: Huarong (ITA Sept. 6, 2005) ("Calculation Mem.") at 9 (citations omitted). In addition, Commerce provided the formula used in calculating Huarong's axes/adzes rate using partial AFA for the unreported movement expense. *See* Calculation Mem. at 10–11.

21. In other words, the Department should have voiced its concerns about the questioned movement expense prior to verification.

Despite Huarong's contentions, the court finds that the record supports Commerce's decision to use AFA. First, the court finds reasonable the Department's conclusion that Huarong withheld requested information by not reporting all of its incurred movement expenses. Here, the record confirms that Commerce, through the issuance of several questionnaires, repeatedly asked Huarong to report its movement expenses associated with its sales to the United States of merchandise under the axes/adzes order, yet the Department did not learn that Huarong shipped its goods to a domestic warehouse until verification. *See* HFHTs From PRC – Huarong's Resp. to Questionnaire Secs. C & D (June 9, 2004) at C–23 ("Huarong did not ship to a distribution warehouse."); *see also* HFHTs From PRC – Huarong's Resp. to Supplemental Sec. C Questionnaire (Aug. 13,2004) at C–9. While Huarong officials revealed at verification that the company shipped all of its axes/adzes to a domestic warehouse prior to exporting the goods to the United States, this late revelation does not remedy Huarong's multiple failures to respond fully to Commerce's questionnaires. *See Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F. Supp. 1507, 1508 (1990) ("[V]erification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness."). Thus, because the use of facts available requires nothing more than a respondent's failure to provide the Department with requested information, Huarong's failure to report that it shipped its goods to a domestic warehouse prior to shipping the merchandise to the United States justified Commerce's reliance on facts otherwise available.

Second, the court finds reasonable the Department's taking of an adverse inference in selecting from among those facts based on Huarong's failure to put forth its maximum effort in responding to Commerce's questions regarding the company's expenses incurred in transporting its scrapers from the factory to the United States. In its responses to Sections C and D of Commerce's questionnaire, Huarong stated that it did not ship its scrapers to a distribution warehouse. At verification, however, Commerce discovered that, in fact, Huarong did ship its scrapers to a domestic distribution warehouse prior to shipping the goods to the United States.[7] Nothing prevented Huarong from providing Commerce with the details of this

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[7] While verifying Huarong's questionnaire responses:

> Analysts noted that the "Loading Notification" for [[ ]] states: [[ ]]. We asked company officials about the [[ ]] and they stated that the [[ ]]. We note that Huarong reported for all sales]] of scrapers in their Section C database that the goods were not sent to a[ ] domestic intermediate location . . . , including a distribution warehouse, before the merchandise was shipped to the United States.

Huarong Verification Rep. at 17.

unreported expense prior to verification. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT ___ , ___ , 353 F. Supp. 2d 1294, 1305 (2004) ("A reasonable respondent acting to the best of its ability would have ensured that the information set forth in its . . . questionnaire response was comprehensive.").

In addition, Huarong erroneously contends that, if Commerce had concerns about Huarong's reported (or unreported) movement expenses, it should have asked for more information. When Huarong submitted the response in which it stated that it did not ship its merchandise to a domestic warehouse prior to moving the goods to the United States, Commerce had no reason to doubt that statement's accuracy. As a result, it was not until verification, when Commerce discovered that Huarong had not disclosed the expense, that the Department could have been expected to question the accuracy of Huarong's response. Thus, because it had no reason to believe there were domestic warehouse expenses prior to verification, Commerce was under no obligation to issue a supplemental questionnaire concerning Huarong's movement expenses.

It is evident, therefore, that Huarong, by withholding data concerning its movement expenses, created a gap in the record that Commerce rightly filled using facts otherwise available. It is equally apparent that Huarong failed to cooperate by doing the maximum it could do to respond completely to Commerce's questionnaires. As a result, the court sustains the Department's decision to account for Huarong's unreported moving expense using facts otherwise available and its accompanying decision to use an adverse inference when selecting from among those facts.

2. Application of AFA to TMC's Sales of Picks/Mattocks: Supplier's Factors of Production

Next, plaintiffs maintain that the Department unlawfully applied AFA to TMC's sales of picks/mattocks because of its "inability to verify one of TMC's supplier's factors of production of picks/mattocks . . . ." Pls.' Mem. 29–30. Because it was unable to verify this information, the Department first applied facts available and then used an adverse inference when selecting from among those facts.

According to TMC, it had no control over the events that led to its supplier's factors of production data becoming inaccessible. TMC makes the following representations:

> On April 18, 2005, TMC officials informed the Department that the Tianjin Tax Authority had seized one of its suppliers accounting books and records. This event was completely out of TMC's control. TMC officials could not have anticipated that the Tianjin Tax Authority would seize its supplier's accounting books and records for a random tax audit. The Department confirmed this event with the supplier's general manager. Moreover, because the relevant documents had been seized, the sup-

> plier could offer no alternative method to verify [its] factors of production.

Pls.' Mem. 30 (emphasis & footnotes omitted). Therefore, TMC insists that it failed verification through no fault of its own, and thus Commerce should not have applied AFA to TMC's sales of picks/mattocks.

The Department maintains that its decision to apply AFA in response to TMC's failure to provide its supplier's factors of production information for verification was reasonable. *See* Issues & Dec. Mem. at 41 ("TMC provided factors of production . . . data that the Department was unable to verify for TMC's sales of picks/mattocks."). First, Commerce explains its use of facts otherwise available:

> On April 18, 2005, the day the Department began verification, TMC notified the Department that the books and records of its supplier of picks/mattocks, Dagang, were seized by the Tianjin Tax Authority. . . . On April 19, 2005 the Department conducted verification at Dagang's facilities to confirm that these records were no longer in the possession of Dagang and concluded that Dagang's [factors of production] were unverifiable. As a result of the [Tianjin Tax Authority]'s seizure of Dagang's FY 2003–2004 books and records, the Department was unable to verify TMC's [factors of production] data. In addition, as Dagang was TMC's sole supplier of picks/mattocks, the Department does not have a verified [factors of production] database upon which to calculate a normal value. Therefore, the Department must rely on the facts otherwise available in order to determine a margin for TMC . . . .

Id. (footnote omitted). Thus, for Commerce, while the Tianjin Tax Authority's ("TTA") seizure of Dagang's books and records might have been outside of TMC's control, it nevertheless created a void in information necessary to the calculation of TMC's dumping margin that Commerce needed to fill with facts otherwise available. *See* 19 U.S.C. § 1677e(a)(D).

With respect to its use of an adverse inference pursuant to 19 U.S.C. § 1677e(b), Commerce states:

> We find that an adverse inference is warranted in determining the facts otherwise available because TMC failed to act to the best of its ability for two reasons. First, TMC failed to notify the department in a timely manner that Dagang's books and records had been seized. TMC did not notify the Department of the seizure until April 18, 2005. The TTA seized Dagang's books and records on April 1, 2005, and TMC learned of the seizure on April 4, 2005. On April 4, 2005, the same date . . . TMC learned of the seizure, TMC requested that the Department postpone verification so that TMC could attend the "Canton Trade Fair."

> Thus, we have reason to question whether TMC misrepresented the reason for the request to postpone verification. In any event, on April 5, 2005, TMC withdrew its request to postpone verification, making no mention of the seizure of Dagang's books and records. When asked why it had not informed the Department of the seizure, TMC responded that it was not [their] concern." As the Department was verifying TMC's [factors of production], it was incumbent upon TMC to inform the Department of any issue related to the scheduled verification.
>
> Second, TMC failed to provide any alternative methodology to verify its factors of production. In the verification outline released to TMC, the Department advised TMC to make available documents relating to its reported [factors of production]. [19 U.S.C. § 1677m(c)(1)] provides that, if an interested party is unable to submit the information requested or in the requested form, that party is required to notify the Department promptly and must suggest a reasonable alternative. As stated above, TMC did not notify the Department in a timely manner. Nor is there any evidence that TMC made an effort to contact TTA to ascertain, for example, how long the documents would be held or whether the documents or copies could be made available to the Department. In addition, while the Department requested at verification that Dagang provide an alternative method of verifying its [factors of production], neither TMC nor Dagang were prepared to proffer alternatives.

Issues & Dec. Mem. at 41–42. Thus, (1) because it found that TMC failed to notify the Department of the seizure until approximately two weeks after it learned that the records were taken, and (2) because neither TMC nor Dagang made any effort to obtain either the factors of production data itself or provide an alternative information source, Commerce insists that the application of AFA was justified. *See* Def.'s Resp. 14 ("An adverse inference was warranted because a reasonable respondent would have made some effort to ensure Commerce would be able to verify the information that it had reported.").

The court finds that the record supports Commerce's application of AFA in constructing TMC's factors of production for its sales of picks/mattocks. First, by failing to have available for inspection information necessary to verify the calculation of its dumping margin, TMC triggered the Department's use of facts otherwise available. *See Nippon Steel Corp.*, 337 F.3d at 1383. That is, Commerce was unable to verify TMC's factors of production data and thus was required to determine TMC's dumping rate using facts available.

Second, the court's review of the record reveals substantial support for Commerce's use of an adverse inference pursuant to 19 U.S.C. § 1677e(b). As previously noted, the Department may use an

adverse inference when selecting from among the facts otherwise available if it determines that the respondent has "failed to cooperate by not acting to the best of its ability to comply with a request for information" from Commerce. 19 U.S.C. § 1677e(b). Here, the record makes clear that TMC became aware of the seizure of Dagang's factors of production data on April 4, 2005. *See* Verification of Sales for TMC in the 13th Admin. Rev. of HFHTs from the PRC (ITA May 23, 2005) at 12 ("TMC officials stated that they did not know about this situation until April 4, 2005 when they were faxed copies of the 'Notice on Tax Investigation' and 'Notice on Holding Account Ledgers for Tax Investigation.' "). Rather than inform the Department of this, TMC instead asked that verification be postponed so that it could attend a trade fair, a request that it subsequently withdrew. TMC only made known the fact that Dagang's books and records had been seized at verification, which took place two weeks after TMC concedes it learned of the seizure. *See* Issues & Dec. Mem. at 42.

Moreover, it is clear from the record that TMC neither made any effort to secure from the TTA copies of the seized records, nor attempted to suggest an alternative method for calculating the factors of production as was its right under 19 U.S.C. § 1677m(c)(1).[8] Indeed, Commerce stated that "[h]ad TMC provided the information in a timely manner the Department may have had time to pursue any proposed alternatives, including, for example, alternative methods of verifying TMC's factors of production data . . . ." Issues & Dec. Mem. at 42. Thus, it is apparent that by failing to inform the Department of the seizure, and by making no effort to obtain copies of the documents or suggest a potential solution to the problem, TMC did not do the maximum it was able to do to respond to Commerce's request. *See Nippon Steel Corp.*, 337 F.3d at 1382.

Based on the foregoing, the court finds that Commerce's application of AFA to TMC's sales of picks/mattocks is supported by the record.[9]

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[8] That subsection provides:

> If an interested party, promptly after receiving a request from the administering authority . . . for information, notifies the administering authority . . . that such party is unable to submit the information requested in the requested form and manner, together with a full explanation and suggested alternative forms in which such party is able to submit the information, the administering authority . . . shall consider the ability of the interested party to submit the information in the requested form and manner and may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

19 U.S.C. § 1677m(c)(1).

[9] Because the court finds Commerce's application of AFA to Huarong and TMC to be supported by substantial evidence and in accordance with law, it further finds without merit plaintiffs' contention that the Department should have instead applied combination cash deposit rates to plaintiffs' merchandise.

III. AFA Rates for Bars/Wedges, Axes/Adzes and Picks/Mattocks

Huarong and TMC next claim that the rates imposed by the Department on their sales of bars/wedges, axes/adzes and picks/mattocks as a result of the application of AFA were unreasonable. *See* Pls.' Mem. 11–18.

A. AFA Rate for "Agent" Sales of Bars/Wedges

Plaintiffs insist that even if the application of AFA to their sales of bars/wedges as a result of their purported "agency" relationship is warranted, the rate applied as AFA is not. For its part, Commerce maintains that the 139.31 percent rate, which was taken from TMC's calculated rate in the eighth review of the HFHTs Orders, was reasonable. *See* Issues & Dec. Mem. at 9; *see also* Def.'s Resp. 16–17. According to the Department:

> Because the AFA rate is based on TMC's actual sales data, it directly bears a "rational relationship" to TMC. The Department also finds that this rate "bears a rational relationship" to Huarong's commercial activity because both Huarong and TMC export identical products covered by the bars/wedges order and compete for sales within the U.S. market.

Issues & Dec. Mem. at 10. Thus, for Commerce, while the rate is relevant to TMC because it was calculated using that company's sales data in an earlier review, the rate is equally applicable to Huarong based on its participation in the same market as TMC.

In addition to the rate's relevance, the Department further states that

> this rate is appropriate because it has been upheld [in *Shandong Huarong General Corp. v. United States*, 25 CIT 1226, 177 F. Supp. 2d 1304 (2001)] as reflective of TMC's recent commercial activity in exporting bars/wedges to the United States. This rate is also the PRC-wide rate of 139.31 percent for bars/wedges published in the most recently completed administrative review of this antidumping duty order. Moreover, this rate is the highest rate in the proceeding and was calculated using verified information provided by TMC during the 8th administrative review of the bars/wedges order. Accordingly, the Department continues to find that this rate, instead of other recently calculated rates, offers a more adequate incentive to induce Huarong and TMC to cooperate in this proceeding.

Id.

For their part, plaintiffs argue that the 139.31 percent rate "is punitive and does not reflect a reasonable dumping margin." Pls.' Mem. 16. In support of its position, plaintiffs rely on this Court's decision in *Shandong Huarong General Group Corp. v. United States*, 28 CIT ___ , Slip Op. 05–129 (Sept. 27, 2005) (not reported in the Fed-

eral Supplement), remanding Commerce's decision to apply the 139.31 percent rate to the companies' sales of bars/wedges in the ninth administrative review of the HFHTs Orders. In that case, the court concluded that the 139.31 percent rate was both aberrational and punitive. *See id.* at ___ , Slip Op. 05–129 at 21. On remand, Commerce lowered the 139.31 percent to 47.88 percent. The court sustained this rate as both reliable and bearing a rational relationship to the respondents. *See Shandong Huarong Gen. Group. Co. v. United States*, 31 CIT ___ , ___ , Slip Op. 07–4 at 8 (Jan. 9, 2007) (not reported in the Federal Supplement) ("[T]he court finds that Commerce has explained adequately the reliability and relevance of the 47.88 percent rate with respect to the Companies' sales of bars and wedges."). Plaintiffs cannot discern a difference between the facts of that review and those presently before the court. As a result, plaintiffs seek a remand of Commerce's decision to apply the 139.31 percent rate to their sales of bars/wedges.[10]

Where Commerce relies on secondary information in determining dumping margins, it is statutorily mandated to "corroborate that information from independent sources that are reasonably at their disposal." 19 U.S.C. § 1677e(c). The Federal Circuit has stated that "[i]t is clear from Congress's imposition of the corroboration requirement in 19 U.S.C. § 1677e(c) that it intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.Lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). That is, "Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin." *Id.* As this Court has held, "[a]n AFA rate must be both reliable and bear and a rational relationship to the respondent." *Shandong Huarong Gen. Group Corp.*, 31 CIT at ___ , Slip Op. 07–4 at 9. In other words, Commerce may not simply select as AFA the highest possible rate as punishment for a respondent's unwillingness to cooperate. *See Gerber Food (Yunnan) Co. v. United States*, 31 CIT ___ , 491 F. Supp. 2d 1326, 1348 (2007) ("The statute does not permit Commerce to choose an antidumping duty assessment rate as an adverse inference without making factual findings, supported by substantial evidence.") (internal quotation marks & citation omitted); *see also Shandong Huarong Mach.*

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[10] Plaintiffs further contend that Commerce is precluded from using TMC's calculated rate from the eighth review because that rate was calculated using Indian data that plaintiffs insist were distorted by subsidies. The court notes that: (1) plaintiff put no actual evidence of subsidization on the record, either in this review or during the eighth review; and (2) the issue of subsidization was not raised during plaintiffs' challenge to the final results of the eighth review before this Court. *See Shandong Huarong Gen. Corp. v. United States*, 25 CIT 1226, 177 F. Supp. 2d 1304 (2001). As a result, plaintiffs are foreclosed from making their claim now.

Co., 30 CIT at ___ , 435 F. Supp. 2d at 1274–75. Finally, this Court has interpreted Congress's intent as requiring Commerce to select an AFA rate that is both reliable and bears a rational relationship to the respondent, not just the industry on the whole. *See Shandong Huarong Gen. Group Corp.*, 31 CIT at ___ , Slip Op. 07–4 at 7 ("[T]he law requires that an assigned rate relate to the company to which it is assigned.") (internal quotation marks & citation omitted).

Commerce has failed to meet these standards in making the case for its use of the 139.31 percent rate for TMC's and Huarong's sales of bars/wedges. With respect to the "agent" sales, Commerce has no verified information from which to calculate an actual rate. Thus, Commerce selected a rate from a previous review. In support of its application of the 139.31 percent rate to TMC, Commerce relies solely on the evidence that the rate was calculated for TMC using that company's own verified information in the eighth administrative review of the HFHTs Orders (for the period of review 1998–1999). While Commerce has shown that the rate, having been calculated using the respondent's own verified data, was reliable when calculated, it has failed to explain how the rate is relevant to TMC's sales activity during the thirteenth review. Such an explanation is particularly warranted here where there are more recent rates for TMC that are lower. *See, e.g.*, HFHTs From the PRC, 66 Fed. Reg. 48,026, 48,029 (Dep't of Commerce Sept. 17, 2001) (final results) (assigning TMC's sales of bars/wedges between February 1, 1999, and January 31, 2000, a rate of 0.56 percent); HFHTs From the PRC, 64 Fed. Reg. 43,659, 43,671 (Dep't of Commerce Aug. 11, 1999) (final results) (assigning TMC's sales of bars/wedges between February 1, 1997, and January 31, 1998, a rate of 47.88 percent). In failing to explain how the facts and circumstances present here justify a higher rate than those earlier reviews, Commerce has failed in its duty to estimate "respondent's actual rate" during the POR. *See De Cecco*, 216 F.3d at 1032.

With respect to Huarong, the Department does nothing more than state that, because Huarong is involved in the same industry as TMC, the 139.31 percent rate is relevant to Huarong. In other words, that rate is reflective of what Huarong's rate would have been had it complied, albeit with an increase intended to deter future uncooperative behavior. As noted, Commerce must demonstrate that the rate it selects as a result of the application of AFA is both reliable and relevant to the individual respondent, not simply the subject industry as a whole. By merely noting that Huarong and TMC are participants in the same industry, Commerce has not sufficiently explained how the 139.31 percent rate relates to Huarong. In other words, the Department has not articulated how the 139.31 percent rate is a reasonable estimate of what Huarong's rate would have been had it complied together with a built-in increase as a deterrent.

Based on the foregoing, the court remands the issue to Commerce with instructions to: (1) explain (a) how the 139.31 percent rate applied to TMC's and Huarong's sales of bars/wedges is a reasonably accurate estimate of TMC's actual rate with a built-in increase to deter non-compliance and, in particular, how that rate is more accurate than other rates calculated for TMC; and (b) explain in detail how any rate assigned to Huarong is reliable and bears a rational relationship to the company itself; or (2) reopen the record and calculate an AFA rate to be applied to Huarong's and TMC's sales of bars/wedges, with an additional amount to deter future non-compliance.

B. AFA Rate for Huarong's Sales of Axes/Adzes

As discussed *supra*, the Department found warranted the application of AFA to Huarong's sales of axes/adzes based on the company's failure to report fully its movement expenses, i.e., that Huarong failed to report that it shipped its merchandise to a domestic storage warehouse prior to shipping the goods to the United States. Commerce, therefore, as it had in several prior cases, used "as an adverse inference the highest number of days, between the date of invoice and the shipment date, as the time period in which [the movement expense] occurred for all sales in which this movement expense was not reported." Issues & Dec. Mem. at 23. The Department further decided to "valu[e] this unreported movement expense for all sales with a publicly available Indian surrogate value because there is no surrogate value information on the record due to Huarong's failure to disclose this movement expense." *Id.* For the Department, this method ensured that "Huarong's margin for sales of axes/adzes was calculated using Huarong's information." Def.'s Resp. 17. As a result, certain of Huarong's sales of axes/adzes received a calculated rate of 174.58 percent.

Plaintiffs do not contest the Department's methodology employed in calculating the unreported movement expense, rather they contend that Commerce's reliance on Indian surrogate data is misplaced. Plaintiffs first state that Commerce is precluded by its own past practice from using Indian surrogate data "because of Indian subsidies." Pls.' Mem. 11.

In addition, plaintiffs maintain that the axes/adzes rate is artificially inflated because of Commerce's improper inclusion of scraper sales. According to plaintiffs, "[t]he Department should have excluded scrapers from the calculated PRC-Wide and AFA rate for axes/adzes as these rates were based solely on Huarong's sales of scrapers." Pls.' Mem. 17. Plaintiffs apparently contend that, had Commerce excluded Huarong's scraper sales, here the sales of the MUTT scraper, the AFA rate would be substantially lower.

The court finds that the Department has supported with substantial evidence its determination to use AFA to calculate the rate applicable to Huarong's sales of axes/adzes. In this case, Huarong's failure

to report the movement expense resulted in the absence from the record of a surrogate value for that expense. That is, because it was not known that the expense had been incurred, no party put a surrogate value on the record. Commerce, therefore, relied on a publicly available Indian surrogate value to calculate the unreported movement expense. While plaintiffs insist that the surrogate value Commerce employed was distorted by subsidies, they have provided no evidence to support their assertion. Thus, the court cannot credit plaintiffs' subsidy objection.

The court also finds no merit in Huarong's assertion that the inclusion of its sales of the MUTT scraper under the terms of the order applicable to axes/adzes was in error and increased artificially the AFA rate. This Court has held that the MUTT is, in fact, subject to the terms of the axes/adzes order. *See Olympia Indus., Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–110 at 2–3 (July 24, 2006) (not reported in the Federal Supplement) ("Because the MUTT's utility as a tool comes from its steel head with a sharp blade that can be used for cutting and chopping, the court finds that it is a hewing tool similar to an axe or adze and, thus, sustains Commerce's Final Scope Ruling.").

Therefore, the court sustains as supported by substantial evidence and otherwise in accordance with law Commerce's calculation of the 174.58 percent rate.

C. AFA Rate for TMC's Sales of Picks/Mattocks

The Department selected 98.77 percent, "the highest margin from this or any prior segment of the proceeding," as an AFA rate for TMC's sales of picks/mattocks based on the company's failure to have available for inspection at verification its sole supplier's factors of production data. Issues & Dec. Mem. at 43 ("The Department . . . has determined to use a rate calculated for another respondent and the PRC-wide rate as AFA."). The selected rate was first "calculated in the 5th review and corroborated in the Final Results of the 12th review as amended." Final Results, 70 Fed. Reg. at 54,899; *see also* HFHTs From the PRC, 62 Fed. Reg. 11,813, 11,819 (Dep't of Commerce Mar. 13, 1997) (final results) (fifth admin. rev.); HFHTs From the PRC, 69 Fed. Reg. 55,581 (Dep't of Commerce Sept. 15, 2004) (final results) (twelfth admin. rev.). In support of its decision not to calculate a rate, Commerce explains that it "was unable to conduct verification of the factors of production used in the preliminary rate calculation." Issues & Dec. Mem. at 43. Further, Commerce maintains that its use of a previously calculated rate as AFA "from the current or a prior segment of the proceeding," renders the rate reliable. *See* 19 U.S.C. § 1677e(c).

For their part, plaintiffs reassert their arguments that the selected AFA rate was calculated using subsidized prices and bears no relation to TMC.

While, for the reasons previously stated, the court does not credit plaintiffs' subsidy argument, it finds that Commerce has not explained adequately why it selected the 98.77 percent rate to apply to TMC's sales of picks/mattocks. As previously mentioned, "[t]he statute requires Commerce to select an antidumping duty rate that is a reasonably accurate estimate of the respondent's actual rate." *Gerber Food (Yunnan) Co.*, 31 CIT at ___ , 491 F. Supp. 2d at 1348–49 (internal quotation marks & citations omitted). In addition, the rate must be both reliable and relevant to the company to which the rate is assigned. Here, because Dagang was TMC's sole supplier of picks/mattocks, the absence of that company's factors of production data meant that the Department did not have verified facts to rely on in calculating an actual rate for TMC.

Commerce justifies the chosen rate's reliability by stating that it was calculated for another respondent in a prior segment of these proceedings. This, however, is not sufficient for the court to find that the selected rate was a reasonably accurate reflection of what TMC's actual rate would be during the POR. This is particularly the case where there have been other lower rates recently calculated for TMC's sales of picks/mattocks. *See, e.g.*, HFHTs From the PRC, 69 Fed. Reg. 55,581 (Dep't of Commerce Sept. 15, 2004) (assigning a 4.76 percent rate to TMC's picks/mattocks for February 1, 2002, through January 31, 2003); HFHTs From the PRC, 66 Fed. Reg. 48,026, 48,029 (Dep't of Commerce Sept. 17, 2001) (assigning a 0.02 percent rate to TMC's sales of picks/mattocks from February 1, 1999, through January 31, 2000). The 98.77 percent rate, therefore, may not represent a reasonable estimate of what TMC's rate would have been had the respondent cooperated, albeit with a built-in increase to deter future non-compliance. *See De Cecco*, 216 F.3d at 1032. While the record may not contain evidence sufficient to permit Commerce to calculate an actual dumping margin for TMC, the Department must nonetheless justify its decision to select a rate from a prior review as an AFA rate. In other words, the absence of verifiable evidence does not release Commerce from its obligation to apply an AFA rate that is reasonable, bears a rational relationship to the respondent and reasonably reflects what the respondent's actual rate would have been. Thus, Commerce must do more than simply select a high rate from a prior review. On remand, the Department is instructed to: (1) explain (a) how the 98.77 percent rate for TMC's picks/maddocks is a reasonablyaccurate estimate of TMC's actual rate with a built-in increase to deter non-compliance; and (b) why it did not select as an AFA rate for TMC's sales of picks/mattocks one of the previously assigned lower rates, albeit with a built-in increase to deter future non-compliance; or (2) reopen the record and obtain evidence to support an actual calculated rate for TMC's sales of picks/mattocks.

CONCLUSION

Based on the foregoing, the court remands Commerce's Final Results for further action in accordance with this opinion. Remand results are due on November 28, 2007. Comments on those remand results are due on December 28, 2007. Replies to such comments are due on January 8, 2008.

Slip Op. 07–139

JULIE NGUYEN, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06–00138

[Plaintiff's motion for judgment on the agency record denied.]

Dated: September 14, 2007

Wilmer Cutler Pickering Hale and Dorr LLP (*John D. Greenwald* and *Lynn M. Fischer Fox*) for the Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Richard P. Schroeder*), for the Defendant.

OPINION

Gordon, Judge: The court has jurisdiction over this action pursuant to Section 142 of the Trade Act of 2002, as amended, 19 U.S.C. § 2395 (Supp. 2004).[1] Plaintiff Julie Nguyen challenges the denial of trade adjustment assistance ("TAA"). For the reasons set forth below, the court denies Plaintiff's motion for judgment on the agency record and affirms the agency's denial of trade adjustment assistance.

I. Background

In November 2004 the Foreign Agricultural Service ("FAS") of the United States Department of Agriculture ("USDA") certified shrimpers landing their catch in Texas as eligible to apply for fiscal year 2005 TAA benefits. *Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 69,582 (Dep't of Agric. Nov. 30, 2004) (notice of certification). The 90-day period to apply for those benefits began on November 29, 2004, and closed on February 28, 2005. *Id.*

[1] All further citations to the Trade Act of 1974, as amended by the Trade Act of 2002, are to the relevant provision in Title 19 of the U.S. Code, 2004 Supplement.

Plaintiff's husband, Be Nguyen ("Mr. Nguyen"), is a Texas shrimper. On February 17, 2005, Mr. Nguyen timely filed an individual application for fiscal year 2005 benefits with the local Farm Service Agency ("county agent") that administers the TAA program in Jefferson/Orange County, Texas. (Pub. R. at 30.[2]) The county agent granted the application on August 22, 2005, and paid Mr. Nguyen $10,000 in adjustment assistance.

After receiving this payment the Nguyens learned that a husband and a wife engaged in a farming operation as a joint venture are both eligible to receive TAA benefits. The Nguyens subsequently submitted a revised application to the county agent on December 29, 2005, listing both Plaintiff and her husband as eligible producers, and re-attaching the certifying documentation submitted with Mr. Nguyen's individual application. (Pub. R. at 1.) The revised application was filed four months after Mr. Nguyen received his $10,000 application period for fiscal year 2005 benefits. The USDA denied the application as untimely. Because the application was untimely, the agency did not consider the merits of the application.

Ms. Nguyen subsequently challenged the USDA's decision by commencing an action in the Court of International Trade. On February 5, 2007, the court issued an opinion and order remanding the matter for further consideration by USDA. *See Nguyen v. United States Sec'y of Agric.*, 31 CIT ___, 471 F. Supp. 2d 1350 (2007). Among other things, the court held that the agency had not addressed whether the Nguyens' application was "subject to the 90-day deadline of [19 U.S.C. § 2401e(a)(1)], or [was] instead governed by some non-statutory application deadline, which the agency has the discretion to waive or modify under 7 C.F.R. § 1580.501." *Nguyen*, 31 CIT at ___, 471 F. Supp. 2d at 1352. The court also noted that the administrative record indicated that the agency had incorrectly stated that the Nguyens were seeking TAA benefits "as individuals and not jointly as originally filed." *Id.* (internal citations omitted). This misstatement of material fact necessitated a remand because Mr. Nguyen originally applied as an individual, and the Nguyens' revised application was for a "joint operation." *Id.* The court thus remanded the matter "for consideration of the revised application in its proper context." *Id.* at 1353.

On remand USDA acknowledged that Mr. Nguyen originally applied as an individual, and that the Nguyens subsequently applied as a joint operation for the same year. Reconsideration upon Remand of the Application of Be and Julie Nguyen at 1–2, *Nguyen v. United States Sec'y of Agric.*, No. 06–00138 (Apr. 16, 2007) ("Remand Determination"). With respect to the whether the December 29, 2005, application was governed by the 90-day deadline of 19 U.S.C.

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[2] The public version of the administrative record is cited as "Pub.R."

§ 2401e(a)(1), or a non-statutory application deadline that the agency could waive under 7 C.F.R. § 1580.501, USDA concluded that the 90-day statutory deadline applied and that it lacked authority to consider the Nguyens' revised application past the February 28, 2005, deadline. Remand Determination at 4.

USDA also concluded that, even if it had the authority to waive the statutory application deadline, it still would have found that the Nguyens would have been entitled only to the statutory maximum payment of $10,000 because their documentation in support of their application mandated that they be combined as one person for payment limitations purposes. *Id.* at 5; *see* 19 U.S.C. § 2401e(c). Accordingly, the agency concluded that even if the application had been timely filed, Ms. Nguyen would not have been eligible for any additional benefits. Remand Determination at 5.

II. Standard of Review

The court upholds the USDA's denial of trade adjustment assistance unless it is unsupported by substantial evidence on the record. 19 U.S.C. § 2395(b). This standard in essence requires the court to consider whether the agency's determination is reasonable given the administrative record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006). On legal issues the court upholds the agency's determination if it is "in accordance with law." *See Lady Kim T. Inc. v. United States Sec'y of Agric.*, 30 CIT ___ , ___ , 469 F. Supp. 2d 1262, 1263 (2006) (citing *Former Employees of Elec. Data Sys. Corp. v. U.S. Sec'y of Labor*, 28 CIT ___ , ___ , 350 F. Supp. 2d 1282, 1286 (2004)).

III. Discussion

As noted above, on remand the agency concluded that a revised application like the one filed by Ms. Nguyen is subject to the 90-day statutory deadline of 19 U.S.C. § 2401e(a)(1). Remand Determination at 4. The agency therefore denied the Nguyens' revised application as untimely because it was filed 10-months after the deadline. To avoid the operation of the statutory deadline, Plaintiff invokes the doctrine of equitable tolling. Pl.'s Objections to Remand Determination at 4–5. The doctrine of equitable tolling permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence plaintiff is unable to obtain essential information regarding the existence of plaintiff's claim. *Weddel v. Sec'y of Health & Human Servs.*, 100 F.3d 929, 931 (Fed. Cir. 1996); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 453 (7th Cir. 1990) ("[A] plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after [plaintiff] has obtained, or by due diligence could have obtained, the necessary information.").

For a timely filed but defective submission like the Nguyens', the defendant's misleading conduct may prove relevant if it somehow affects plaintiff's diligence in correcting the error, but it is not a technical requirement ons. *See Frazer v. United States*, 288 F.3d 1347, 1353 n.3 (Fed. Cir. 2002) ("Timely filed but defective submissions differ; the defect need not necessarily be due to misleading governmental conduct."). The "critical inquiry" is plaintiff's diligence. *Bensman v. United States Forest Serv.*, 408 F.3d 945, 964 (7th Cir. 2005), *see also Chung v. United States Dep't of Justice*, 333 F.3d 273, 278–79 (D.C. Cir. 2003) (distinguishing equitable tolling from equitable estoppel).

Plaintiff's affidavit in support of her motion to proceed *in forma pauperis*, (filed before Plaintiff obtained the assistance of *pro bono* counsel) contains some evidence supporting a possible equitable tolling claim. In her affidavit Plaintiff alleges that she "tried to apply for the grant at the same time" as her husband but "was told at the time that only one person is qualif[ied] for it," and that she "tried to apply again but the [USDA] told [her] that it was too late." Aff. In Support of Mot. to Proceed *In Forma Pauperis* at 1–2, *Nguyen v. United States Sec'y of Agric.*, No. 06–00138 (May 30, 2006). Plaintiff offers no further information that explains her and her husband's dilligence in seeking to correct Mr. Nguyen's timely filed application from one that sought individual benefits to one that sought joint benefits. Nothing indicates when or how Plaintiff learned that a husband and wife were eligible for joint benefits and how quickly they endeavored to correct the previous filing. Without more information about Plaintiff's diligence, the court cannot justify a futher remand to the agency.

IV. Conclusion

The court denies Plaintiff's motion for judgment on the agency record and will enter judgment in favor of Defendant affirming the denial of Plaintiff's application for fiscal year 2005 TAA benefits.

JULIE NGUYEN, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06–00138

JUDGMENT

Upon consideration of Defendant's Reconsideration Upon Remand of the Application of Be and Julie Nguyen, dated April 16, 2007, Plaintiff's Objections to Defendant's Reconsideration Upon Remand

of the Application of Be and Julie Nguyen, Defendant's Response to Plaintiff's Objections, and all other papers filed and proceedings in this action, it is hereby

ORDERED that Defendant's Reconsideration Upon Remand of the Application of Be and Julie Nguyen is affirmed.

Slip Op. 07–140

CORUS STAAL BV, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, *et al.*, Defendant-Intervenors.

Before: Judith M. Barzilay, Judge
Court No. 07–00270

[Plaintiff's application for preliminary injunction is denied.]

Dated: September 19, 2007

Steptoe & Johnson, LLP, (*Joel D. Kaufman*), *Alice A. Kippel*, *Jamie B. Beaber*, and *Richard O. Cunningham* for Plaintiff Corus Staal BV.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; (*Claudia Burke*), Commercial Litigation Branch, Civil Division, United States Department of Justice for Defendant United States.

Skadden Arps Slate Meagher & Flom, LLP, John J. Mangan, (*Jeffrey D. Gerrish*), and *Robert E. Lighthizer* for Defendant-Intervenor United States Steel Corporation.

Wiley Rein, LLP, (*Timothy C. Brightbill*) and *Alan H. Price* for Defendant-Intervenor Nucor Corporation.

Stewart and Stewart, (*William A. Fennell*) and *Terence P. Stewart* for Defendant-Intervenor Mittal Steel USA, Inc.

OPINION

BARZILAY, Judge: Plaintiff Corus Staal BV ("Corus"), moved this court for a preliminary injunction to enjoin the Defendant[1] United States (the "Government") from liquidating certain entries of hot-rolled carbon steel flat products from the Netherlands ("HRCS") that are subject to antidumping duties. *See Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 59,565 (Dep't Commerce Nov. 29, 2001) ("*AD Order*"). Corus has participated in several proceedings before the Court contesting the Government's use of "zeroing" to calculate dumping margins. *See Corus Staal BV v. United States*, 29 CIT ___ , 387 F. Supp. 2d 1291 (2005) ("*Corus Staal I*"), *aff'd*, 186 F. App'x 997 (Fed. Cir. 2006), *cert. denied*, 127 S. Ct. 3001 (2007); *see also Corus Staal*

[1] Nucor Corporation ("Nucor"), United States Steel Corporation ("U.S. Steel"), and Mittal Steel USA, Inc. ("Mittal Steel") join as Defendant-Intervenors.

BV v. United States, 31 CIT ___ , 493 F. Supp. 2d 1276 (2007) ("*Corus Staal 5AR*"); *Corus Staal BV v. United States*, Slip Op. 06–112, 2006 WL 2056401 (July 25, 2006) (not reported in F. Supp.); *Corus Staal BV v. U.S. Dep't of Commerce*, 27 CIT 388, 259 F. Supp. 2d 1253 (2003). This opinion follows this court's decision from the bench on August 1, 2007, denying Plaintiff's application for a preliminary injunction. Despite clear statutory guidelines to the contrary, Corus contends that the Department of Commerce ("Commerce") may not impose antidumping duties on its imports unless there is a valid determination of dumping pursuant to 19 U.S.C. § 1673. The Government moved to dismiss this action under USCIT Rules 12(b)(1) and 12(b)(5).

Whether Corus satisfies the criterion for a preliminary injunction was thoroughly discussed in a previous opinion issued by another judge of this Court.[2] *See Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1281. As that case was dismissed on jurisdictional grounds, the four-part preliminary injunction analysis included in the opinion is *dicta. See id.* at 1288. The facts of this case, however, are legally distinguishable from *Corus Staal 5AR*, and the court finds that jurisdiction here is proper under 28 U.S.C. § 1581(i). Although the factual distinctions mentioned above provide grounds for jurisdiction, they do not affect the merits of Corus's claim. In other words, Corus cannot meet the criteria for a preliminary injunction in this case for the same reasons outlined in *Corus Staal 5AR*.

I. Background

On November 29, 2001, Commerce issued an antidumping order on HRCS after applying a methodology called "zeroing"[3] to determine whether the subject entries were sold at less than fair value. *See AD Order*, 66 Fed. Reg. 59,565 (Dep't Commerce Nov. 29, 2001); *Notice of Amended Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 66 Fed. Reg. 55,637 (Dep't Commerce Nov. 2, 2001). Corus, a Dutch producer of HRCS; challenged the use of "zeroing" during the first administrative review. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 67 Fed. Reg. 78,772 (Dep't Commerce Dec. 26, 2002); *see also Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Preliminary Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 68,341 (Dep't

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[2] The case was brought pursuant to the fifth administrative review and challenged Commerce's liquidation instructions under 28 U.S.C. § 1581(i).

[3] "Commerce used a methodology called 'zeroing' . . . whereby only positive dumping margins (i.e., margins for sales of merchandise sold at dumped prices) were aggregated, and negative margins (i.e., margins for sales of merchandise sold at nondumped prices) were given a value of zero." *Corus Staal BV v. U.S. Dep't of Commerce*, 395 F.3d 1343, 1345–46 (Fed. Cir. 2005).

Commerce Dec. 8, 2003). In the final results, Commerce reaffirmed the use of "zeroing" and imposed an adjusted weighted-average dumping margin on the subject entries. *See Certain Hot-Rolled Carbon Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 33,630 (Dep't Commerce June 16, 2004) ("*Final Results*").

Corus sought review of the *Final Results* in this Court pursuant to 28 U.S.C. § 1581(c). *See Corus Staal I*, 29 CIT at ___ , 387 F. Supp. 2d at 1292–93. Before issuing its judgment, the court entered an injunction that prohibited Customs from liquidating the subject entries during the pendency of the litigation. Ultimately, the court upheld the *Final Results*. *See id.* at ___ , 387 F. Supp. 2d at 1297–1301, 1305. On appeal, the Federal Circuit affirmed in a per curiam opinion, whereupon Corus submitted a petition for rehearing en banc, which was denied. *See Corus Staal BV*, 186 Fed. App'x 997. The Supreme Court denied certiorari. *See Corus Staal*, 127 S. Ct. 3001. Consequently, the injunction expired, and Commerce instructed Customs to liquidate Corus's entries pursuant to the *Final Results* on July 6, 2007. *See* 19 U.S.C. 1516a(c) & (e). In response, Corus moved this court for a temporary restraining order ("TRO") to "maintain the *status quo* pending a hearing on preliminary injunctive relief." Pl. Br. 3. The court granted the TRO until July 30, 2007, which was subsequently extended through August 1, 2007, the date of the preliminary injunction hearing.

While Corus was disputing its claims in our domestic courts, the European Communities ("EC") initiated a proceeding before the World Trade Organization ("WTO"), challenging the United States' practice of "zeroing" to calculate dumping margins.[4] *See* Request for Consultations by the European Communities, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/1 (June 19, 2003) ("*Request for Consultations by EC*"). The WTO panel concluded that Commerce's use of "zeroing" violated U.S. obligations under the WTO Antidumping Agreement ("*AD Agreement*") with respect to antidumping investigations.[5] *See*

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[4] The EC challenged the use of "zeroing" in 15 antidumping investigations and 16 administrative reviews. The investigation of Corus was among those challenged before the WTO Panel. *See Request for Consultations by EC*, WT/DS294/1, at 2. However, none of the administrative reviews of HRCS were included in the proceeding. According to Defendants, since Section 129 proceedings apply only to specific administrative actions, such as a particular administrative review, the Section 129 determination at issue in this case has no effect on the subject entries. The court rejects this argument because the Section 129 proceeding revoked the *AD Order* without exception. *See Implementation of the Findings of the WTO Panel in US—Zeroing (EC): Notice of Determinations Under Section 129 of the Uruguay Round Agreements Act and Revocations and Partial Revocations of Certain Antidumping Duty Orders*, 72 Fed. Reg. 25,261, 25,262 (Dep't of Commerce May 4, 2007) ("*Section 129 Determination*").

[5] [U]nlike in a new investigation, in an administrative review [Commerce] does not compare the average US price (export price) to the average home market price (normal

Panel Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* ("*Zeroing*"), ¶¶ 8.2, 8.4, WT/DS294/R (Oct. 31, 2005) ("*Panel Report*"). The United States appealed certain aspects of the Panel Report, but the determination concerning "zeroing" remained intact. *See* Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins*, ¶ 263, WT/DS294/AB/R (Apr. 18, 2006) ("*Appellate Body Report*"). Moreover, the Appellate Body held that the use of "zeroing" was also impermissible during administrative reviews. *See id.* ¶¶ 132–35, 2263(a)(i).

Accordingly, the United States started the process of implementing the decision outlined in the *Panel Report. See Implementation of the Findings of the WTO Panel in US Zeroing (EC): Notice of Initiation of Proceedings Under Section 129 of the URAA; Opportunity to Request Administrative Protective Orders; and Proposed Timetable and Procedures*, 72 Fed. Reg. 9306 (Dep't Commerce Mar. 1, 2007). The administrative procedures for implementing such a decision are contained in Sections 123 and 129 of the Uruguay Round Agreements Act ("URAA"), codified in 19 U.S.C. §§ 3533(g)[6] and 3538,[7] re-

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value) for the whole investigation period. Instead, [Commerce's] practice is to compare the US net price for each individual US transaction to the most contemporaneous monthly average normal value. The total value of the dumping margin is then calculated by aggregating only the transaction-specific positive dumped values and then multiplying the quantity sold in the US market for each model by the unit dumped value to arrive at the total dollars dumped. Comparisons of individual US transactions to weighted-average monthly normal value that yield negative margins are ignored (effectively treated as zero). . . . [Commerce's] methodology of aggregating the values of only the positive dumping margins based on the individual transactions means that there is no offset against the positive values at any stage.

Request for Consultations by EC, WT/DS294/1, at 5.

[6] Section 3533(g)(1) reads:

(g) Requirements for agency action

(1) Changes in agency regulations or practice

In any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until—

(A) the appropriate congressional committees have been consulted under subsection (f) of this section;

(B) the Trade Representative has sought advice regarding the modification from relevant private sector advisory committees established under section 2155 of this title;

(C) the head of the relevant department or agency has provided an opportunity for public comment by publishing in the Federal Register the proposed modification and the explanation for the modification;

(D) the Trade Representative has submitted to the appropriate congressional committees a report describing the proposed modification, the reasons for the modification, and a summary of the advice obtained under subparagraph (B) with respect to the modification;

(E) the Trade Representative and the head of the relevant department or agency have consulted with the appropriate congressional committees on the proposed

spectively.[8] *See also* 19 U.S.C. § 3511 (implementing URAA). In the Section 123 proceeding, Commerce eliminated the practice of "zeroing" in " 'all current and future antidumping investigations' " as of February 22, 2007.[9] *Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1280 (quoting *Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investi-*

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contents of the final rule or other modification; and
(F) the final rule or other modification has been published in the Federal Register.

§ 3533(g)(1).

[7] In relevant part, § 3538 provides:
(a) . . . .
(6) Revocation of order
If, by virtue of the Commission's determination . . . , an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission . . . is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 . . . or this subsection, the Trade Representative may, after consulting with the congressional committees . . . , direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.
(b) . . . .
(4) Implementation of determination
The Trade Representative may, after consulting with the administering authority and the congressional committees . . . , direct the administering authority to implement, in whole or in part, the determination . . . .
(c) . . . .
(1) Effects of determinations
Determinations concerning title VII of the Tariff Act of 1930 . . . that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise . . . that are entered, or withdrawn from warehouse, for consumption on or after—
(A) in the case of a determination by the Commission . . ., the date on which the Trade Representative directs the administering authority . . . to revoke an order pursuant to that determination. . . .

§ 3538.

[8] Congress has established two procedures by which a negative WTO decision may be implemented into domestic law. The first method, a Section 123 proceeding, is the mechanism to amend, rescind, or modify an agency regulation or practice in order to implement a decision by the WTO that such is inconsistent with U.S. treaty obligations. Section 123 requires the United States Trade Representative ("USTR") to consult with appropriate congressional committees, private sector committees, and provide for public comment before determining whether and how to change an agency regulation or practice. . . . The second method, a Section 129 proceeding, is discrete. Section 129 sets forth a procedure to implement a negative WTO decision with respect to a *specific* administrative determination that was the subject of a WTO dispute. Importantly, a Section 129 determination is prospective in nature: it becomes effective only for unliquidated entries of merchandise that are entered or withdrawn from warehouse for consumption on or after the date the USTR directs Commerce to implement that determination.

Corus Staal 5AR, 31 CIT at ____ n.2, 493 F. Supp. 2d at 1280 n.2 (citations omitted).

[9] The effective date of the Section 123 Determination was changed from January 16, 2007 to February 22, 2007. *See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margins in Antidumping Investigations; Change in Effective Date of Final Modification*, 72 Fed. Reg. 3783 (Dep't Commerce Jan. 26, 2007); *Section 123 Determination*, 71 Fed. Reg. at 77,725.

gation; Final Modification, 71 Fed. Reg. 77,722 (Dep't Commerce Dec. 27, 2006) ("*Section 123 Determination*")). In addition, Commerce commenced Section 129 proceedings to "recalculate the dumping margins in each . . . antidumping investigation[ ] . . . . without zeroing." *Id.* After performing this recalculation, Commerce adjusted Corus's dumping margin to zero and revoked the *AD Order*. *See Section 129 Determination*, 72 Fed. Reg. at 25,262. The effective date of the *Section 129 Determination* was April 23, 2007. *Id.*

During this period, Commerce also initiated the fifth administrative review of the *AD Order* at the request of three domestic steel companies.[10] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 71 Fed. Reg. 77,720 (Dep't Commerce Dec. 27, 2006). However, the domestic producers decided to rescind their request for an administrative review, *see Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands: Notice of Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 15,105, 15,106 (Dep't Commerce Mar. 30, 2007), which prompted Commerce to issue liquidation instructions on Corus's entries.[11] *See* 19 C.F.R. § 351.212(c). At the time Commerce issued these particular instructions, the *Section 129 Determination* was not in effect. *See Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1281; *see also Section 129 Determination*, 72 Fed. Reg. at 25,261. Corus objected to the recision of the fifth administrative review and argued that Commerce was precluded from issuing liquidation instructions that imposed antidumping duties since the *Section 123 Determination* prohibited the use of "zeroing" in dumping investigations. Commerce rejected this argument. Corus then sought judicial review in this Court pursuant to § 1581(i), claiming that Commerce's liquidation instructions to Customs were unlawful. *See Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1284; *cf. Shinyei Corp. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004); Consol. *Bearings Co. v. United States*, 348 F.3d 997, 1001 (Fed. Cir. 2003). That case was dismissed for lack of jurisdiction. *See Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1288. In the case at bar, Corus has essentially raised the same claim under § 1581(i) for entries made during the first administrative review, with the crucial exception that here the *Section 129 Determination* went into effect before Commerce issued its liquidation instructions. Compl. ¶¶ 1, 2, 4, 5. On August 1, 2007, this court denied Corus's application for a preliminary injunction.

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[10] The three domestic participants included Nucor, U.S. Steel, and Mittal Steel.

[11] To clarify, the entries at issue in the fifth administrative review were made between November 1, 2005 and October 31, 2006, and are distinct from those at issue in this case.

II. Discussion

A. Subject Matter Jurisdiction

Jurisdiction is proper in this case because revocation of the *AD Order* as implemented through the *Section 129 Determination* had occurred at the time Commerce instructed Customs to liquidate the subject entries on July 6, 2007. This distinction provides a basis for jurisdiction under § 1581(i).[12]

"Congress provided this Court with broad residual jurisdiction under 28 U.S.C. § 1581(i) to hear 'any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs [or] duties . . . on the importation of merchandise for reasons other than the raising of revenue,' as well as cases challenging Commerce's 'administration and enforcement with respect to the matters referred to' in the remainder of § 1581." *Parkdale Int'l., Ltd. v. United States*, Slip Op. 07–122, 2007 WL 2261379 (CIT Aug. 8, 2007) (not reported in F. Supp.) (quoting § 1581(i)(2), (4)) (brackets & ellipses in original); *see Am. Signature, Inc. v. United States*, 31 CIT ___ , ___ , 477 F. Supp. 2d 1281, 1287 (2007). "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). It was "enacted to avoid conflict in jurisdiction with the district courts and to ensure judicial review for various unspecified challenges to enforcement of import laws." *Associacao Dos Industriais de Cordoaria E Redes v. United States*, 17 CIT 754, 757, 828 F. Supp. 978, 982–83 (1993). The " 'mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling . . . we look to the true nature of the action in the district court in determining jurisdiction . . . .' " *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quoting *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986) (ellipses in original).

As Corus already exhausted all avenues to jurisdiction under § 1581(c) by challenging the results of the first administrative review, *see Corus Staal I*, 29 CIT at ___ , 387 F. Supp. 2d at 1295, the

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[12] Defendant-Intervenor U.S. Steel contends that Corus is barred from raising the present claim under the doctrine of *res judicata* because it raised the same claim, after revocation of the *AD Order*, during its petition for certiorari. Def.-Int. Br. 10 n.2; *see* Petition for Writ of Certiorari at *6–9, *Corus Staal BV v. United States*, No. 06–1057, 2007 WL 275951 (Jan. 25, 2007); Reply Brief of Petitioner at *4–7, *Corus Staal BV v. United States*, No. 06–1057, 2007 WL 1655119 (June 8, 2007). However, the doctrine of *res judicata* does not apply in this situation because the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." *Atl. Coast Line R.R. Co. v. Powe*, 283 U.S. 401, 403–04 (1931); *see Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003) (requiring final judgment on merits to preclude later adjudication of same claim).

only possible basis for Corus to obtain jurisdiction is pursuant to § 1581(i). *Cf. Am. Signature, Inc.*, 31 CIT at ___ , 477 F. Supp. 2d at 1287–89. Corus cites § 1581(i)(2) and (4) as providing jurisdiction in this case "on the grounds that the authority necessary for imposition of antidumping duties under 19 U.S.C. [ ]§ 1673, . . . namely, the existence of a valid final determination of dumping, did not exist at the time of issuance of the challenged liquidation instructions and does not now exist." Pl. Br. 5. As previously mentioned, the *Section 129 Determination* became binding on April 23, 2007. Corus filed this action on July 19, 2007. Since the *Section 129 Determination* revoked the *AD Order*, there no longer exists a valid determination of dumping with respect to HRCS. Therefore, after April 23, 2007, Corus contends that Commerce lost authority under 19 U.S.C. §§ 1673 and 1673d(c)[13] to impose antidumping duties on the subject HRCS.[14] Pl. Reply Br. 4–6.

Both sides dispute whether jurisdiction is proper under s 1581(i)(4). Pl. Br. 4; Def. Br.10; Def.-Int. Br. 9; Pl. Reply Br. 12–14. Corus claims that Commerce's liquidation instructions are unlawful and therefore subject to review under the administration and enforcement subsection of § 1581(i). Pl. Br. 4; Pl. Reply Br. 12–14. De-

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[13] In relevant part, §§ 1673 and 1673d(c) provide:

> If—
>
> . . . .
>
> (2) the Commission determines that—
>
> (A) an industry in the United States—
>
> (i) is materially injured . . .
>
> . . . .
>
> by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,
>
> then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the normal value exceeds the export price . . . for the merchandise. . . .

§ 1673.

> (2) Issuance of order; effect of negative determination . . . .
>
> If . . . such determination[ ] is negative, the investigation shall be terminated upon the publication of notice of that negative determination and the administering authority shall—
>
> (A) terminate the suspension of liquidation . . . , and
>
> (B) release any bond or other security, and refund any cash deposit. . . .

§ 1673d(c)(2).

[14] Notably, the facts in *Corus Staal 5AR* are distinguishable. In that case, Commerce issued its liquidation instructions on April 16, 2007, one week before the *Section 129 Determination* went into effect. *See Corus Staal 5AR*, 31 CIT at ____ , 493 F. Supp. 2d at 1286. The effective date of the *Section 129 Determination* carries legal significance because it represents the point at which Commerce was bound by the revocation of the *AD Order*. Prior to April 23, 2007, there was no legal basis for Corus to aver that Commerce acted outside of its authority in issuing the liquidation instructions. *See SKF USA, Inc. v. United States*, 31 CIT ____ , ____ , 491 F. Supp. 2d 1354, 1365 (2007) ("[T]here is no reason to overturn Commerce's zeroing practice based upon a ruling by the WTO 'unless and until such ruling has been adopted pursuant to the specified statutory scheme.' ") (quoting *Paul Muller Industrie GmbH & Co. v. United States*, 30 CIT ____ , ____ , 435 F. Supp. 2d 1241, 1245 (2006)).

fendants argue, however, that jurisdiction under § 1581(i)(4) is inappropriate because "a challenge to liquidation instructions must contend that the liquidation instructions themselves do not accurately reflect the results of the underlying proceeding." Def. Br. 11; Def.-Int. Br. 11–13; *see Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1285 (citing *Shinyei Corp.*, 355 F.3d at 1302–03). As Corus admits that Commerce's instructions accurately reflect the final results of the first administrative review, Defendants claim that jurisdiction cannot lie under § 1581(i)(4). Pl. Br. 12; Def. Br. 11; Def.-Int. Br. 11.

Although the cited cases in which jurisdiction was proper under § 1581(i)(4) involve situations where Commerce issued inconsistent instructions with the underlying proceeding,[15] *see Shinyei Corp.*, 355 F.3d at 1309–10; *Consol. Bearings Co.*, 348 F.3d at 1001–02, there is no rule precluding review of liquidation instructions that are consistent with the underlying proceeding, but nonetheless illegal because of an intervening change in the legal landscape. In this case, Corus has initiated a fundamental challenge to Commerce's legal authority to impose antidumping duties following a change in U.S. trade law that extinguished the very basis for imposing those duties. Accordingly, there is a distinct basis for jurisdiction here apart from that recognized in the line of cases that rely on an inconsistency in the underlying determination and the "resulting" liquidation or instructions to confer jurisdiction under § 1581(i)(4).

Jurisdiction lies under § 1581(i)(4) because the question before the court concerns whether Commerce has authority to *enforce* the final determination in the first administrative review. Corus's claim constitutes an "unspecified challenge[ ] to [the] enforcement of import laws." *Associacao Dos Industriais de Cordoaria E Redes*, 17 CIT at 757, 828 F. Supp. at 983. Corus could not dispute Commerce's authority to issue liquidation instructions in the § 1581(c) proceeding because the *AD Order* was still in effect. *See Corus Staal I*, 29 CIT at ___ , 387 F. Supp. 2d at 1298; *SKF USA, Inc.*, 31 CIT at ___ , 491 F. Supp. 2d at 1365. A new cause of action arose under § 1581(i) following revocation of the *AD Order* based upon arguably conflicting authority, namely §§ 1673 and 3538(c). Furthermore, questioning the foundation of Commerce's authority to impose antidumping duties represents a challenge to "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." § 1581(i)(2). Therefore, jurisdiction is proper under § 1581(i)(2) as well.

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[15] For purposes of this case, the underlying determination is the final results of the first administrative review. *See Final Results*, 69 Fed. Reg. at 33,630.

B. Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted

The Government claims that "Corus has failed to state a claim upon which relief may be granted because its complaint seeks to require Commerce to violate the statute." Def. Br. 12. To survive a motion to dismiss for failure to state a claim, "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true even if doubtful in fact." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1959 (2007). The Government contends that 19 U.S.C. § 1516a "requires that liquidation instructions reflect the final court decision and does not provide Commerce or [Customs] any discretion not to liquidate the entries. . . ." Def. Br. 13; *see* § 1516a. Thus, "Corus [is] ask[ing] this [c]ourt to hold that Commerce should have issued liquidation instructions that were *not* in accordance with the final court decision." Def. Br. 14. Because Corus "acknowledges that the liquidation instructions are in accordance with the final court decision and with the Secretary's determination," the Government argues that this contention "highlights Corus's claims as merely a challenge to the antidumping duty rate assessed in the final results." Def. Br. 14.

The Defendants have mischaracterized the nature of Corus's complaint. Corus asks the court to examine Commerce's authority to impose antidumping duties following revocation of the underlying antidumping order. Therefore, this inquiry concerns whether the guidelines outlined in § 3538(c) supercede the broad requirements necessary to impose antidumping duties under § 1673. The only way the court could "justify abandoning the statutory requirements regarding liquidation" would be pursuant to an intervening change in law that mandated such a result. Def. Br. 14. Otherwise, Defendants are correct that Commerce is required to issue instructions that reflect the court's ruling as stated in § 1516a(e). Since Corus is not attempting to contravene § 1516a, Defendants' motion to dismiss is denied.

C. Preliminary Injunction

To obtain a preliminary injunction, the petitioner must satisfy four criterion: "(1) immediate and irreparable injury to the movant [if an injunction is not granted]; (2) the movant's likelihood of success on the merits; (3) the public interest; and (4) the balance of hardship on all parties." *U.S. Ass'n of Impts. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1346 (Fed. Cir. 2005) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). "The failure to prove likelihood of success on the merits presents a formidable obstacle to the granting of an injunction, particularly where the injury factor is weak." *FMC Corp. v. United States*, 3 F.3d 424, 431 (Fed. Cir. 1993). Indeed, "[a]bsent a showing that a movant is likely

to succeed on the merits,[16] we question whether the movant can ever be entitled to a preliminary injunction unless some extraordinary injury or strong public interest is also shown." *Id.* at 427. In the interest of judicial economy, the court will not address elements (1), (3), and (4), as they have been thoroughly and clearly discussed in *Corus Staal 5AR*, 31 CIT at ___ , 493 F. Supp. 2d at 1281–84, 1286–88.

(i.) Likelihood of Success on the Merits

The court again finds that "Corus does not meet even the reduced burden of showing that i[t] has a fair chance of success on the merits." *Id.* at ___ , 493 F. Supp. 2d at 1284. Implementation of the *Section 129 Determination* carries no legal significance with regard to Corus's application for a preliminary injunction because § 3538(c) is specific and clearly governs whether the disputed entries are subject to the *AD Order*.

"Ordinarily, where a specific provision conflicts with a general one, the specific governs." *Edmond v. United States*, 520 U.S. 651, 657 (1997). "[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). "[A] specific policy embodied in a later federal statute should control our construction of the [earlier] statute, even though it ha[s] not been expressly amended." *Id.* at 143 (quotations & citations omitted) (brackets in original). As a general rule, Commerce cannot impose antidumping duties without a valid determination of dumping. *See* §§ 1673 & 1673d(c); *see also* 19 C.F.R. § 351.212. However, the statute that governs implementation of a WTO panel report explicitly states that revocation of an antidumping order applies prospectively on a date specified by the USTR. *See* § 3538(c); *Section 129 Determination*, 72 Fed. Reg. at 25,261.

In this case, there existed a valid determination of dumping that was subsequently revoked. *See AD Order*, 66 Fed. Reg. at 59,565; *Section 129 Determination*, 72 Fed. Reg. at 25,261. Taken together, the *Section 129 Determination* and § 3538(c) clearly mandate that HRCS "that are entered, or withdrawn from warehouse, for consumption on or after" April 23, 2007 are not subject to antidumping duties. § 3538(c); *see Section 129 Determination*, 72 Fed. Reg. at 25,261. Since Corus entered the subject HRCS between May 3, 2001

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16 "The CAFC appears to have accepted a sliding scale approach regarding the standard for likelihood of success on the merits: the greater the potential harm to the movant if the court denies injunctive relief, the lesser the burden on the movant to make the required showing of likelihood of success on the merits." *Corus Staal 5AR*, 31 CIT at ____ n.10, 493 F. Supp. 2d at 1284 n.10 (citing *Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1293 (Fed. Cir. 2006)).

and October 31, 2002, they remain bound by the *AD Order*. *See Statement of Admin. Action* at 1026, *reprinted in* 1994 U.S.C.C.A.N 4040, 4313. It is undisputable that the guidelines for implementing a WTO decision outlined in §§ 3538(c) supercede the broad requirements of § 1673 for imposing antidumping duties. *See* §§ 3538(c), 1673, 1673d(c). Therefore, Corus cannot obtain relief under the current statutory scheme.

Conclusion

For the foregoing reasons, Plaintiff's application for a preliminary injunction is denied.

SLIP OP. 07–141

TROPICANA PRODUCTS, INC., Plaintiff, and LOUIS DREYFUS CITRUS, INC., and FISCHER S/A AGROINDUSTRIA, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and A. DUDA & SONS, INC., CITRUS WORLD, INC., FLORIDA CITRUS MUTUAL, SOUTHERN GARDENS CITRUS PROCESSING CORP., and THE COCA-COLA COMPANY, Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Court No. 06–00109

[Defendant United States' determination of material injury by reason of subject imports REMANDED.]

Dated: September 19, 2007

Neville Peterson, LLP (*John M. Peterson*, *Catherine C. Chen*, *George W. Thompson*, and *Michael K. Tomenga*) for the plaintiff.

Vinson & Elkins, LLP (*Christopher A. Dunn* and *Valerie S. Ellis*) for the plaintiff-intervenor Louis Dreyfus Citrus, Inc.

Kalik Lewin (*Robert G. Kalik* and *Brenna S. Lenchak*) for the plaintiff-intervenor Fischer S/A Agroindustria.

Peter D. Deisler, Assistant Attorney General; *James E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael J. Dierberg*), for the defendant.

James M. Lyons, General Counsel, U.S. International Trade Commission (*David A.J. Goldfine* and *Andrea C. Casson*) for the defendant.

Barnes, Richardson & Colburn (*Stephen W. Brophy*) for defendant-intervenor A. Duda & Sons, Inc., Citrus World, Inc., Florida Citrus Mutual, and Southern Gardens Citrus Processing Corp.

Crowell & Moring, LLP (*Jeffrey L. Snyder* and *Alexander H. Schaefer*) for the defendant-intervenor the Coca-Cola Company.

OPINION

Restani, Chief Judge: This matter arises from Plaintiff Tropicana Products, Inc.'s ("Tropicana") challenge to the International Trade Commission's ("Commission") determination that an industry in the United States producing conventional and organic frozen concentrated orange juice for further manufacturing ("FCOJM") and conventional and organic not-from-concentrate orange juice ("NFC") (collectively "certain orange juice") is materially injured by reason of imports of certain orange juice from Brazil.[1] Following parties' cross-motions for judgment on the agency record, the court remanded for the Commission to reconsider its determination. *See Tropicana Prods., Inc. v. United States*, 484 F. Supp.2d 1330, 1353–54 (CIT 2007) ("*Tropicana I*"). On remand, the Commission again found that the domestic orange juice industry is materially injured by reason of imports of certain orange juice from Brazil. *See Certain Orange Juice from Brazil*, USITC Pub. 3930, Inv. No. 731–TA–1089 (June 2007), List 1, P.R.Doc. 371R ("*Remand Determination").*

BACKGROUND

This matter began on December 27, 2004, when several domestic producers of certain orange juice[2] filed a petition with the Commission and the Department of Commerce ("Commerce"), claiming that an industry in the United States was materially injured, or threatened with material injury, by reason of imports of certain orange juice from Brazil. Commerce instituted an antidumping duty investigation and found that certain orange juice from Brazil was being sold at less then fair value ("LTFV"). *Certain Orange Juice from Brazil*, 71 Fed. Reg. 2183 (Dep't Commerce Jan. 13, 2006) (notice of final determination of sales at less than fair value and affirmative final determination of critical circumstances). Thereafter, the Commission gave its final determination to Commerce.

After examining data from crop year ("CY") 2001/02 through CY 2004/05, the Commission determined that the domestic industry producing certain orange juice is being injured by reason of imports of certain orange juice from Brazil. Tropicana appealed and the court remanded the decision to the Commission. *See Tropicana I*, 484 F. Supp. 2d at 1353–54. The court found that the Commission "did not examine all of the significant issues relating to the shortfall in do-

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[1] Fischer S/A Agroindustria ("Fischer") and Louis Dreyfus Citrus, Inc. ("Dreyfus") join the action as Plaintiff-Intervenors. A. Duda & Sons, Inc., Citrus World, Inc., Florida Citrus Mutual, Southern Gardens Citrus Processing Corp., and the Coca-Cola Company join as Defendant-Intervenors.

[2] The petitioners were Florida Citrus Mutual, A. Duda & Sons, Inc., Citrus World, Inc., Peace River Citrus Products, Inc., and Southern Garden Citrus Processing Corp. *Certain Orange Juice from Brazil–Staff Report*, Inv. No. 731–TA–1089 (Jan. 27, 2005), at I–1, List No. 1, P.R. Doc. 329 ("*Final Staff Report*").

mestic production of certain orange juice, the opposition of certain domestic orange juice processors to the petition, or the impact of non-subject imports." *Id.* at 1343. The court instructed the Commission to consider on remand: "the full effects of a shortage in the supply of domestic round oranges, and how that affects the Commission's volume and price effects analysis"; "the opposition to the petition by a large portion of the domestic industry; [and,] whether, if prices were adjusted to account for the LTFV margin, non-subject imports would displace subject imports." *Id.* at 1353. "Given the relatedness of the issues," the court also asked the Commission to "consider the totality of the evidence anew." *Id.*

Upon remand, the Commission reconsidered each issue and determined that the domestic orange juice industry is materially injured by reason of imports of certain orange juice from Brazil.[3] *Remand Determination*, at 1. Tropicana contests the Commission's determination, arguing that the Commission did not properly consider each issue as instructed by the court.

The court has reviewed the Commission's remand determination and found at least two significant flaws – the Commission did not properly examine the inverse correlation between domestic production and subject imports, and the Commission did not conduct a proper analysis of the impact of non-subject imports. The Commission should address these issues before the court proceeds further in this case.

STANDARD OF REVIEW

The court will uphold the Commission's final determination in an antidumping duty investigation unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

As stated in *Tropicana I*, to make an affirmative determination, "the Commission must find: (1) a 'present material injury or a threat thereof,' and (2) causation of such harm by reason of subject imports." *Tropicana I*, 484 F. Supp. 2d at 1333 (quoting *Hynix Semiconductor, Inc. v. United States*, 431 F. Supp. 2d 1302, 1306 (CIT 2006)). The Commission must show both that "the harm suffered by the domestic industry is 'not inconsequential, immaterial, or unimportant,' " *Tropicana I*, 484 F. Supp. 2d at 1342 (quoting 19 U.S.C.

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[3] Six commissioners participated in this remand determination. *Remand Determination*, at 1 n.2, n.4. Three Commissioners (Vice Chairman Aranoff and Commissioners Lane and Pinkert) reached an affirmative determination while three Commissioners (Chairman Pearson and Commissioners Okun and Williamson) reached a negative determination. *Remand Determination*, at 1 n.5. Pursuant to 19 U.S.C. § 1677(11) (2000), a tie vote is resolved in favor of an affirmative determination.

§ 1677(7)(A)), and that there exists a "causal – not merely temporal – connection between the [subject imports] and the material injury." *Gerald Metals, Inc. v. United States*, 132 F.3d 716, 720 (Fed. Cir. 1997). It "must analyze contradictory evidence or evidence from which conflicting inferences could be drawn, to ensure that the subject imports are causing the injury . . . ." *Taiwan Semiconductor Indus. Ass'n v. ITC*, 266 F.3d 1339, 1345 (Fed. Cir. 2001) (citations and quotation marks omitted)).

Further, the Commission must consider three factors in conducting its determination: "(I) the volume of imports of the subject merchandise, (II) the effect of imports of that merchandise on prices . . . for domestic like products, and (III) the impact of imports of such merchandise on domestic producers of domestic like products, but only in the context of production operations in the United States." 19 U.S.C. § 1677(7)(B)(i). The Commission "may [also] consider such other economic factors as are relevant to the determination . . . ." 19 U.S.C. § 1677(7)(B)(ii).

As stated previously, the Commission has failed to consider properly the inverse correlation between domestic production and subject imports, and the impact of non-subject imports.

I. Inverse Correlation Between Domestic Production and Subject Imports

In *Tropicana I*, the court noted that subject imports "fluctuated from year to year, increasing when domestic production was higher and decreasing when domestic production was lower."[4] *Tropicana I*, 484 F. Supp. 2d at 1344. The court remarked that this correlation may be "explained by the need of the domestic producers of certain orange juice [to] maintain relatively large bulk juice inventories to ensure their supply of certain orange juice during fluctuations in domestic production," and instructed the Commission to examine the issue. *Id.* at 1345–46 (citation and quotation marks omitted).

On remand, the Commission found that "[t]o the extent there is an inverse correlation between domestic production and subject imports, . . . the magnitude of any such correlation is questionable on this record" given that "[s]ubject import volumes were virtually identical in two crop years when domestic production levels varied substantially." *Remand Determination*, at 8–9 n.47. The Commission stated that in CY 2002/03, subject imports totaled 227.3 million gallons SSE,[5] while domestic production totaled 203 million gallons

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[4] Likewise, "the level of subject imports held in domestic inventory was inversely correlated to the level of production of the domestic like product – rising when production levels fell and vice-versa." *Tropicana I*, 484 F. Supp. 2d at 1345.

[5] Single strength equivalent ("SSE") gallons are a standard volume measurement for ready-to-drink orange juice. *Final Determination*, at 17 n.132.

SSE, and that in CY 2004/05, subject imports totaled 231.7 million gallons SSE, while domestic production totaled 149.6 million gallons SSE. *Id.* at 9 n.47.

The court, however, is uncertain how the Commission obtained its data regarding domestic production. The table to which the Commission cites does not provide the domestic production values that the Commission states in its remand determination. *See Final Staff Report*, at Table C–3. Instead of stating that domestic production was 203 million gallons SSE in CY 2002/03 and 149.6 million gallons SSE in CY 2004/05, the table to which the Commission cites provides that domestic production was 1.23 billion pounds in CY 2002/03 and .97 billion pounds in CY 2004–05. *Id.* It is unclear whether the Commission had converted the figures listed in the table from pounds to gallons SSE and if so, whether the Commission had used a proper conversion rate.

Further, if domestic production levels and subject import volumes are compared using data expressing the values in the same unit of measurement, gallons SSE, the inverse correlation between the two figures becomes readily apparent. As stated in *Tropicana I*,

> The domestic production of certain orange juice decreased from approximately 1.432 billion gallons SSE in CY 2001/02 to 1.246 billion gallons SSE in CY 2002/03 before increasing to 1.471 billion gallons SSE in CY 2003/04 and then decreasing significantly to 1.006 billion gallons SSE in CY 2004/05. *Final Staff Report*, at Table IV–6. Meanwhile, the volume of subject imports increased from 109.7 million gallons SSE in CY 2001/02 to 227.3 million gallons SSE in CY 2002/03, then decreased to 154.2 million gallons SSE in CY 2003/04 before rising again to 231.7 million gallons SSE in CY 2004/05. *Final Determination*, at 17 n. 133.

Tropicana I, 484 F. Supp. 2d at 1343 n.20. As seen from these data, the volume of subject imports increases when domestic production decreases and vice versa. As previously stated, this strong correlation may be "explained by the need of the 'domestic producers of certain orange juice [to] maintain relatively large bulk juice inventories' to ensure their supply of certain orange juice during fluctuations in domestic production." *Tropicana I*, 484 F. Supp. 2d at 1345 (quoting *Final Determination*, at 15.)

The Commission, however, did not provide a sustainable analysis of this issue but instead dismissed the magnitude of this correlation by referring to unexplained data. Thus, the court remands this issue for the Commission to consider again.

II. Non-Subject Imports

The court also instructed the Commission to consider whether it would have to analyze the effect of non-subject imports on the do-

mestic industry as required by *Gerald Metals*, 132 F.3d at 720, and *Bratsk Aluminium Smelter v. United States*, 444 F.3d 1369, 1373 (Fed. Cir. 2006). As discussed in *Tropicana I*, in *Gerald Metals*, the Federal Circuit found that the Commission should have examined whether non-subject imports would have replaced all or a great part of subject imports when non-subject imports were perfect substitutes for subject imports and frequently undersold the domestic like product. *Gerald Metals*, 444 F.3d at 718–19. The Federal Circuit expanded upon this holding in *Bratsk*, stating that:

> Where commodity products are at issue and fairly traded, price competitive, non-subject imports are in the market, the Commission *must explain* why the elimination of subject imports would benefit the domestic industry instead of resulting in the non-subject imports' replacement of the subject imports' market share without any beneficial impact on domestic producers.

Bratsk, 444 F.3d at 1373 (emphasis added). The Federal Circuit required the Commission to make such an explanation "whenever the antidumping investigation is centered on a commodity product, and price competitive non-subject imports are a significant factor in the market." *Id.* at 1375. Because the Commission did not make such an inquiry, the court remanded the issue to the Commission.

On remand, the Commission found that the first factor of the test was met as certain orange juice is a "commodity product." *Remand Determination*, at 18. As to the second factor of the test, the Commission found that "price competitive non-subject imports are not a significant factor in the U.S. market based on the relatively low market share held by such imports." *Id.* In particular, the Commission noted that the three largest non-subject sources of certain orange juice in the United States did not account for a large percentage of U.S. imports[6] and U.S. apparent consumption in the final year of the POI.[7] *Id.* at 18–19. The Commission commented that "even at their high-

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[6] "[B]y quantity, non-subject imports comprised 40.8% of total imports in CY 2001/02, 20.8% in CY 2002/03, 29.4% in CY 2003/04, and 34.2% in CY 2004/05." *Tropicana I*, 484 F. Supp. 2d at 1350. While non-subject imports are not a majority of imports, it is difficult to say that numbers ranging from above 20% to above 40% are not large.

[7] The share of U.S. *apparent consumption comprised* of non-subject imports and of subject imports is as follows:

Crop Year	2001/02	2002/03	2003/04	2004/05
U.S. Apparent Consumption Comprised of Non-Subject Imports	5.2%	4.2%	4.5%	8.0%
U.S. Apparent Consumption Comprised of Subject Imports	7.6%	15.9%	10.7%	15.4%

Remand Determination, at I–11.

The following lists the three largest non-subject import countries' share of U.S. imports (by quantity) and apparent consumption of certain orange juice:

est level of 8.0 percent of apparent consumption, non-subject imports' market share was only at the level held by subject imports before the subject imports' surge late in the POI." *Id.* at 18. The Commission further found that projected exports from non-subject Brazilian producer Citrovita to the U.S. for CY 2005/06 and 2006/07 were modest compared to subject Brazilian producer's projected exports to the U.S. in CY 2005/06 and 2006/07. *Id.* at 19. Thus, the Commission found that non-subject imports are not a significant factor in the U.S. and did not complete the final step of a *Bratsk* test.

Although non-subject imports here did comprise a smaller portion of the domestic market during the POI than those at issue in *Bratsk*, as the court observed previously, they are nevertheless not "an indisputably insignificant factor in the market." *Tropicana I*, 474 F. Supp. 2d at 1351. Thus, the court required the Commission upon remand to examine this issue. It did so, but did not base its conclusion of insignificance on substantial evidence. Given the existence of an important Brazilian non-subject producer not reflected in the major exporter non-subject import totals[8] and given that the Commission found that the volume of subject imports of other countries comprising between 7.6% to 15.9% of apparent consumption during the POI was significant enough to cause harm, the court cannot accept the Commission's conclusion that the volume of non-subject imports comprising only a slightly smaller percentage of apparent consumption and as much as 40.8% in the first year of the POI of all imports is insignificant. *See Remand Determination*, at I–10. Further, the volume of such non-subject imports as a share of apparent consump-

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Crop Year		2004/05
Mexico	Percentage of U.S. Imports	15.6%
	Percentage of U.S. Apparent Consumption	3.7%
Belize	Percentage of U.S. Imports	8.6%
	Percentage of U.S. Apparent Consumption	2.0%
Costa Rica	Percentage of U.S. Imports	8.4%
	Percentage of U.S. Apparent Consumption	2.0%

Id. at I–10–11.

See infra note 8 regarding Brazilian imports.

[8] In its remand determination, the Commission noted that Citrovita, a major Brazilian orange juice producer, was subject to an antidumping duty order during the POI and exported little or no juice to the U.S. during the POI. *Remand Determination*, at 19. The Commission then examined projected imports from Citrovita but did not examine Citrovita's projected production and whether Citrovita would have exported more to the United States if subject imports had been fairly priced. *Id.* This does not require the Commission to look into the future, an inquiry to which the Commission objects, so much as to hypothesize as to what the present players, such as Citrovita, would have done in a situation of fair trade.

tion had surged during the last two years of the POI from 4.5% to 8.0%, suggesting that their presence is increasing. *Id.* at I–11. Relatedly, such non-subject imports' share of total imports has also increased steadily from the second year of the POI to the last. *Id.* at I–10. Based on these figures, the court cannot sustain the conclusion that the level of non-subject imports is so insignificant as to relieve the Commission of its obligation to perform a more complete *Bratsk* analysis.[9]

Furthermore, in this case it may not be particularly difficult, even at this late date, for the Commission to examine whether the non-subject imports here would be able to replace subject imports. Although the Commission is generally obligated to examine the impact of non-subject imports from various sources, the Commission already has much of this information, including projected production figures relating to non-subject Brazilian producer Citrovita, on which Tropicana focuses much concern. *See Final Staff Report*, at Table VII–7. Given that the Commission has not provided a sufficient reason for its conclusion that non-subject imports are such an insignificant factor in the market that the *Bratsk* test may be ignored and that the Commission has detailed information regarding one of the primary non-subject producers of concern, the Commission must examine whether non-subject imports would replace subject imports if prices of subject imports reflected fair value. How the Commission chooses to carry out this task under the facts of this case is for it to determine in the first instance.

The Commission has expressed its displeasure with the *Bratsk* test, but just as the Commission must obey the directions of this Court, this Court must obey the directions of its appellate court.[10] It is not the court's province to reduce the *Bratsk* test to a simple restatement of the causal requirement. As far as the court can discern, the test requires the Commission to do more than say, "Whatever harm the non-subject imports may have caused or may in the future cause, the subject imports also caused harm or threaten to do so." The Commissioners in the controlling determination appear to understand that but have decided that on these facts that a complete *Bratsk* test need not be applied. For the reasons stated, the court does not agree.

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[9] This is not to say that volume of non-subject imports is unimportant. It must, however, be considered in the context of the complete analysis.

[10] The *Bratsk* test is not found in the plain words of the statute but, in the view of the Federal Circuit, is necessary to fulfill the intent of the statute. Even the Commission majority seems to accept that the holding of *Bratsk* is binding precedent on this Court and on the Commission. Therefore, the Commission is not free to avoid using the new methodology that the Court of Appeals requires when, as in this investigation, the Commission found that commodity prices are at issue and fairly traded, price competitive, non-subject imports are in the market.

CONCLUSION

Accordingly, the court remands the affirmative determination to the Commission. The Commission has failed to explain correctly its conclusions as to the inverse correlation between subject imports and domestic production, and has failed to conduct a sufficient *Bratsk* analysis as required by the circumstances of this case.[11] The Commission has thirty days to consider these issues again.

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[11] The court accepts the Commission's statement that "in any remand" it considers "the entire record in light of any new findings" it has made. *Remand Determination*, at 15–16.