Slip Op. 08–52

ARCELORMITTAL USA INC., Plaintiff, v. UNITED STATES, Defendant, and DONGBU STEEL CO., LTD., *ET AL.*, Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 06–00085
Public Version

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

Dated: May 15, 2008

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Troutman Sanders LLP (*Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, 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*, *J. David Park*, *Jarrod M. Goldfeder*, and *Lisa W. Ross*), for defendant-intervenor POSCO.

Eaton, Judge: This action is before the court on plaintiff agency record.[1] By its motion, plaintiff contests certain aspects of the United States Department of Commerce's ("Commerce" or the "Department") final results of the eleventh administrative review of the antidumping duty order applicable to imports into the United States of corrosion-resistant carbon steel flat products ("CORE") from Korea for the period of review August 1, 2003, through July 31, 2004.

[1] During the pendency of this action, the court granted plaintiff's consent motion to amend the caption and all filings in this proceeding to reflect its corporate name change, from Mittal Steel USA Inc. to ArcelorMittal USA Inc. *See ArcelorMittal USA Inc. v. United States*, Court No. 06–00085, Jan. 28, 2008 (order).

See Certain CORE from the Republic of Korea, 71 Fed. Reg. 7,513 (Dep't of Commerce Feb. 13, 2006) (eleventh admin. review), *as amended by* Certain CORE from the Republic of Korea, 71 Fed. Reg. 13,692 (Dep't of Commerce Mar. 20, 2006) (amended final results) (collectively, the "Final Results"). Jurisdiction lies 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. *See* Pl.'s Mot. J. Agency R. ("Pl.'s Br.") 4. On August 19, 1993, following its investigation, Commerce published the antidumping duty order *See* Certain CORE From Korea, 58 Fed. Reg. 44,159 (Dep't of Commerce Aug. 19, 1993) (the "CORE Order"). On August 3, 2004, after having conducted ten prior administrative reviews of the CORE Order, Commerce published notice that it would consider requests for the eleventh review. *See* Opportunity to Request Admin. Review, 69 Fed. Reg. 46,496 (Dep't of Commerce Aug. 3, 2004) (notice). Thereafter, on August 31, 2004, plaintiff asked Commerce to conduct a review of the behavior and market activities of certain Korean respondents including Pohang Iron & Steel Co., Ltd. ("POSCO"), Dongbu Steel Co., Ltd. ("Dongbu"), Hyundai HYSCO Co., Ltd. ("HYSCO"), and Union Steel Manufacturing Co., Ltd. ("Union"). The eleventh administrative review was initiated on September 22, 2004. *See* Initiation of Antidumping and Countervailing Duty Admin. Reviews and Request for Revocation in Part, 69 Fed. Reg. 56,745 (Dep't of Commerce Sept. 22, 2004) (notice).

On February 13, 2006, Commerce published its Final Results. *See* Final Results, 71 Fed. Reg. at 7,513. Based on its analysis, the Department assigned imports from POSCO a 2.16 percent dumping margin; those from Union a *de minimis* margin;[2] and those from Dongbu a 2.26 percent dumping margin. *See id*. at 7,514. Defendant-intervenor HYSCO received a margin of zero. *See id*.

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

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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. § 1673d(a)(4). "[A] weighted average dumping margin is de minimis if [Commerce] 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).

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

Plaintiff's motion presents four issues[3] in challenging Commerce's Final Results. The court is mindful that similar issues were considered in *Mittal Steel USA, Inc. (formerly International Steel Group, Inc.) v. United States*, 31 CIT ___ , Slip Op. 07–117 (Aug. 1, 2007) ("*Mittal*")[4] (not reported in the Federal Supplement), by which the final results of Commerce's tenth administrative review were sustained. The issues raised by plaintiff's motion are resolved as follows.

I. Model Match

Plaintiff's first claim is that Commerce abused its discretion by failing to request the more detailed product information from Dongbu, HYSCO, POSCO, and Union (collectively, "defendant-

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[3] An additional issue was resolved by the United States Court of Appeals for the Federal Circuit (the "Federal Circuit") during the pendency of plaintiff's action. Plaintiff argued that "safeguard" duties are "United States import duties" and therefore that Commerce must deduct these duties in order to accurately arrive at appropriate *ex factory* United States prices for comparison with *ex factory* prices for comparable home market sales. *See* Pl.'s Br. 45–47. As *Mittal Steel USA, Inc. (formerly International Steel Group, Inc.) v. United States*, 31 CIT ____ , Slip Op. 07–117 (Aug. 1, 2007) (not reported in the Federal Supplement), acknowledged, the Federal Circuit recently held, in *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1363 (Fed. Cir. 2007), that the phrase " 'United States import duties' does not include § 201 safeguard duties for the purposes of determining the [United States price] and calculating the dumping margin. . . ." Therefore, the court again sustains as reasonable Commerce's interpretation of "United States import duties" to exclude Section 201 duties and likewise sustains Commerce's decision to not deduct those duties from United States price. *Id.*

[4] The court's January 28, 2008 order amending the caption in this matter to reflect plaintiff's corporate name change does not extend to the *Mittal* case, which dealt with the prior, tenth administrative review of the same company.

intervenors"), that plaintiff believed was necessary for use in Commerce's model match comparisons. As a result, plaintiff insists that Commerce's model match results were not supported by substantial evidence, because incomplete information "likely yielded inaccurate results." Pl.'s Br. 2.

Model match criteria are used by Commerce to ensure that the merchandise sold in the United States 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). In this eleventh review, Commerce used a CORE-specific questionnaire to gather information to identify "identical" merchandise for use in its model match methodology. *See, e.g.*, Letter Dated Nov. 1, 2004 from Commerce to POSCO, and accompanying Request for Information, CORE from Korea (the "Questionnaire"), Public Doc. ("PD") No. 19. The Questionnaire employed twelve criteria including "width," "thickness," "type," and "quality." *See* Questionnaire, PD No. 19 at 3–5. For certain categories of data sought, the Questionnaire asked for information based on ranges of characteristics rather than precise measurements.[5] *See* Questionnaire, PD No. 19 at 3–5. "Thus, to identify goods for price comparisons, Commerce would treat as factually 'identical' all CORE within a given range . . . [such that] articles with different actual dimensions could still be treated as 'identical'. . . ." Pl.'s Br. 5. Commerce's questions relating to "type" and "quality" also used groupings of characteristics rather than requiring exact product matches.[6] Questionnaire, PD No. 19 at 3–5.

Before Commerce in the tenth administrative review and before this court in *Mittal*, plaintiff made similar arguments by presenting to Commerce a submission employing certain of defendant-intervenors' own price lists. *See* Pl.'s Br. 7. According to plaintiff, this

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[5] For instance, Commerce's Questionnaire uses four measurement groups for widths, "a. >= ½″ but <24″ b.> = 24″ but <40″ c. > = 40″ but <60″ [and] d. > = 60″." Questionnaire, PD No. 19 at 4. Similarly, it defines "minimum thickness" by employing 11 separate groups as follows: " 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″." Questionnaire, PD No. 19 at 4.

[6] For "type" Commerce asked defendant-intervenors to indicate, among other things, whether or not the merchandise was painted and, if so, whether the paint was "PVDF" (polyvinyledene flouride) or "all other." Questionnaire, PD No. 19 at 2. Further, for "quality," Commerce's questionnaire specified four groups, as well as an "other" response. The four "quality" groups, in addition to the "other" category, were:

> (a) Commercial, Lock Forming, or Structural; (b) Drawing (whether or not special killed); (c) Bake Hardened/Dent Resistant; and (d)Deep Drawing Steels (e.g., Deep Drawing Quality, Deep Drawing Quality Special Killed, Extra Deep Drawing Quality, Extra Deep Drawing Quality Special Killed, Deep Drawing Quality Special Killed Fully Stabilized, Deep Drawing Quality Special Killed Fully Stabilized, Interstitial Free).

Questionnaire, PD No. 19 at 3.

submission demonstrated that Commerce's model match methodology yielded aberrant results and that this "should have prompted the agency to at *least request* more precise data" such that Commerce and plaintiff "could have pursued the matching issues in greater depth *via* computer analysis." Pl.'s Br. 26.

In the tenth administrative review, as it has here, Commerce rejected plaintiff's submission and its request to seek more precise information primarily because the price lists submitted by plaintiff did not reflect actual transaction prices. Further, "several of the price lists cited . . . are exclusive to the Korean respondents' home market and, thus, offer no information on how the products are sold in the U.S. market." Pl.'s Br. 8 (quoting Memorandum from Eric. B. Greynolds to Melissa Skinner Regarding Petitioners' Proposal to Change the Model Match Methodology (Dep't of Commerce Aug. 27, 2004 (the "Tenth Review Model Match Memo"), Confidential R. Doc. ("CR") No. 1 at 5–6).

In this eleventh review, Commerce "reaffirmed" its reasoning from the tenth administrative review and again declined to seek all of the information requested by plaintiffs. *See* Issues and Decisions for the Final Results of the Eleventh Administrative Review of the Antidumping Duty Order on Certain CORE from Korea (2003 – 2004) (Dep't of Commerce Feb. 6, 2006) (the "I&D Memo"), PD No. 226 at Comment 1. Before doing so, however, the Department issued supplemental questionnaires to defendant-intervenors responsive to certain of plaintiff's requests. *See* Def.'s Resp. Mot. J. Agency R. ("Def.'s Br.") 3. By these supplemental questionnaires, Commerce sought additional information regarding "the physical characteristics of the goods sold in Korea and in the United States and associated cost of production information." Def.'s Br. 3 (citations omitted). Commerce did not, however, "request actual measurement data for each model sold because such a request 'would have been extremely burdensome for [defendant-intervenors].' " *See* Def.'s Br. 3 (citations omitted). Thus, although Commerce did obtain more detailed information, particularly with respect to type, quality, and cost of production, it did not request all of the data asked for by plaintiff. *See, e.g.*, Dongbu Suppl. Questionnaire Sections A–D (Dep't of Commerce May 17, 2005), PD No. 117 (requesting information concerning corporate structure, financial statements, distribution process, type, and quality). In addition, unlike in the tenth review, Dongbu, POSCO, and HYSCO voluntarily submitted additional data reflecting exact widths and thicknesses of the products covered by sales they reported to Commerce. *See* I&D Memo, PD No. 226 at 4–5; *see also* Pl.'s Br. 11.

Notwithstanding this more detailed information, plaintiff continues to insist that it needs more data so that it can "demonstrate the likely inaccuracy of Commerce's methodology so far as quality and

type were concerned." Pl.'s Br. 11 ("Since no respondent voluntarily submitted more precise 'Type' or 'Quality' information, Mittal was unable to test for those factors.").

Having reviewed the record, the court finds that Commerce made a reasonable decision not to seek all of the information sought by plaintiff. Here, plaintiff's submission, which purports to demonstrate that Commerce's results were aberrant, relies on the identical price lists it presented in the tenth review. Unsurprisingly, Commerce again concluded that "the price lists submitted by [plaintiff] contained no evidence indicating that the price lists reflect actual transaction prices, and, thus, . . . do not necessarily reflect the Korean [defendant-intervenors'] actual sales and pricing practices." I&D Memo, PD No. 226 at 6. Commerce further observed that "several of the price lists cited by [plaintiff] were exclusive to the [Korean defendant-intervenors'] home market and offered no information concerning how the products are sold in the United States."[7] Def.'s Resp. 11. Thus, for Commerce, this evidence is less reliable and less accurate than the actual sales data it obtained. *See generally* I&D Memo, PD No. 226 at Comment 1.

With respect to this evidence, the *Mittal* Court found that Commerce was justified in relying upon the actual Unites States sales data it obtained, rather than price lists for merchandise sold in the Korean home market. *See Mittal*, 31 CIT at ____ , Slip Op. 07–117 at 11–12.

As to plaintiff's argument that Commerce has not supported its conclusions with substantial evidence because it did not request the additional information plaintiff asked for, Commerce, in fact, had in its possession all of the information needed to make a fair and reasonable product comparison. That is, Commerce had sufficient information—submitted in response to its initial Questionnaire, the follow-up questionnaires, and voluntarily submitted by defendant-intervenors—about product details such as type, reduction and coating processes, clad material, quality, yield strength, metallic coating weight, width, thickness, form, temper rolling, and leveling. See Questionnaire, PD No. 19 at 3–5. "Commerce enjoys broad discretion in conducting . . . reviews under the antidumping statute, particularly in . . . [making] decisions regarding relevant evidence." *See*

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[7] Commerce's Issues & Decisions Memorandum explains:

> It is important to note that [plaintiff's] arguments and analysis in this review are similar to those submitted in the tenth administrative review. In particular, our findings with respect to [plaintiff's] arguments on price-list information has already been addressed in our Tenth Review Model-Match Memo . . . As we also found in the tenth administrative review, the price lists submitted by [plaintiff] contained no evidence indicating that the price lists reflect actual transaction prices, and, thus, we found that they do not necessarily reflect the Korean [defendant-intervenors'] actual sales and pricing practices.

I&D Memo, PD No. 226 at 6 (footnotes omitted).

E.I. DuPont de Nemours & Co. v. United States, 22 CIT 19, 32, Slip Op. 98–7 (Jan. 29, 1998) (not reported in the Federal Supplement); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) ("It is the [Department's] task to evaluate the evidence it collects during its investigation."); *but see Ceramica Regiomontana, S.A.*, 10 CIT at 405, 636 F. Supp. at 966 ("Of course, this Court will not allow an agency, under the guise of lawful discretion, to contravene or ignore the intent of the legislature or the guiding purpose of the statute.").

Plaintiff, seemingly aware that it cannot demonstrate a compelling need for Commerce to change its model match methodology, relies on the argument that, if Commerce obtained more information, then perhaps it could demonstrate a compelling need. This, however, is mere speculation. While it may be that more information might be useful, plaintiff's submission did not demonstrate that it is necessary. *See* I&D Memo, PD No. 226 at Comment 1. Commerce "cannot possibly account for every difference between products. . . ." *See* Tenth Review Model Match Memo, CR No. 1 at 6. Therefore, Commerce's decision not to request additional information was a "reasonable means of effectuating the [antidumping law's] statutory purpose. . . ." *Ceramica Regiomontana, S.A.*, 10 CIT at 404–05, 636 F. Supp. at 966. Accordingly, Commerce's model match results are sustained as supported by substantial evidence.

II. Constructed Export Price: Deduction of Selling Expenses

As it did in the tenth administrative review, plaintiff argues that Commerce, in calculating constructed export price ("CEP"), acted unlawfully and rendered a determination unsupported by substantial evidence by not deducting certain expenses incurred by the Korean exporter parent companies.[8] *See* Pl.'s Br. 22–23, 30–36. According to plaintiff, when the Korean parent companies perform "core selling functions[9] in connection with their U.S. affiliates' resales," Com-

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[8] CEP refers to

> 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 United States 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 trade as the export price or constructed export price. . . .

19 U.S.C. § 1677b(a)(1)(B)(i).

[9] Plaintiff makes reference to "core selling functions," "core reselling functions," and "core selling expenses," but these phrases are not defined in the statute or in Commerce's regula-

merce must deduct these expenses when calculating CEP.[10] Pl.'s Br. 22–23. Plaintiff maintains that "[a]ny other conclusion undermines the concept of 'CEP' as contemplated by the statute and construed by the Federal Circuit." Pl.'s Br. 22–23.

Plaintiff's motion notes that, while the facts it relies on are company-specific, a "common theme exists" for all of the defendant-intervenors.[11] Pl.'s Br. 12. Accordingly, plaintiff alleges the following:

A. Union

Defendant-intervenor Union sold CORE to its American affiliate, which in turn resold the CORE to unrelated United States purchas-

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tions. Plaintiff's briefs and its counsel's representations at oral argument, however, make clear that these phrases are intended to describe such activities as price negotiations, entering into sales contracts, and approving resales, as well as certain travel expenses and information sharing. *See* Pl.'s Br. 39; Transcript of Oral Argument at 18–19, Court No. 06–00085 (Sept. 21 2007).

[10] 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)—
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> (A) commissions for selling the subject merchandise in the United States;
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> (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
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> (D) any selling expenses not deducted under subparagraph (A), (B), or (C). . . .

19 U.S.C. § 1677a(d)(1). Commerce's regulation further provides:

> In establishing [CEP] under section [19 U.S.C. § 1677a(d)(1)], 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 Secretary 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 CFR § 351.402(b).

[11] Plaintiff's brief explains its characterization of the facts:

> Basically, parent companies in Korea sell CORE to their U.S. subsidiaries, who in turn resell the merchandise to unaffiliated U.S. buyers in so-called "back to back" CEP transactions. The evidence shows that the parent companies participate in varying degrees in the subsidiaries' U.S. resales, *i.e.*, they effectively perform selling functions in the resale operations. Oftentimes they perform these activities outside the United States –*i.e.*, in Korea — and the associated selling expenses appear on their own books in Korea. The location of the activities, however, does not change the basic fact that the activities and associated expenses relate to the U.S. *resale* transactions, to be distinguished from the sales by the parents *to* the affiliates. . . . [Plaintiff] contends that all expenses associated with core reselling functions are "CEP selling expenses" for purposes of CEP calculations under 19 U.S.C. 1677a(d), and are therefore deductible as such. Commerce, however, rejected the contention and refused to deduct the relevant amounts in all cases except for HYSCO.

Pl.'s Br. 12 (citations and footnotes omitted).

ers in reportable CEP transactions. Pl.'s Br. 12 (citing Union Sections A–C Questionnaire Resp. ("Union Quest. Resp."), PD No. 59 at 15, 17). Plaintiff alleges that record evidence demonstrates that Union performed numerous selling functions in the resales, including having final authority to accept or reject orders and shipping the goods directly to purchasers, as well as "process[ing] claims for defective merchandise sold in the U.S. market." *See* Pl.'s Br. 13 (citing Union Quest. Resp., PD No. 59 at 7, 15). Plaintiff argues that Commerce, despite inquiring in two supplemental questionnaires about these activities, was wrong in concluding that the record evidence did not demonstrate that these selling expenses should have been deducted in CEP calculations. *See* Pl.'s Br. 13–14.

B. POSCO

Defendant-intervenor POSCO had two Korean affiliates that sold CORE to its United States affiliate, which then resold the goods to unrelated United States buyers in CEP reportable transactions. *See* Pl.'s Br. 14 (citing POSCO Sections A–D Questionnaire Resp. ("POSCO Quest. Resp."), PD No. 68 at 7–11). Plaintiff alleges that one of POSCO's Korean affiliates negotiated sales terms and that its United States affiliate simply assisted in these negotiations and communications. Pl.'s Br. 14. Furthermore, according to plaintiff, the Korean affiliates performed market research, computer/legal/accounting work, engineering services, and advertising. *See* Pl.'s Br. 14–15 (citing POSCO Quest. Resp., PD No. 68 at 25–28). Plaintiff further alleges that some of these activities *had* to relate to United States resales, not simply sales to POSCO's United States affiliate. Thus, it again argues that Commerce should have concluded that there was substantial evidence on the record demonstrating that these selling expenses should have been deducted in CEP calculations. *See* Pl.'s Br. 15.

C. Dongbu

Defendant-intervenor Dongbu sold CORE to its United States affiliate which then resold the CORE to United States purchasers in CEP reportable transactions. *See* Pl.'s Br. 15 (citing Dongbu Section A Questionnaire Resp. ("Dongbu Quest. Resp."), PD No. 57 at A–13, A–18). According to plaintiff, Dongbu's United States affiliate played a self-described "liaison" role. Plaintiff insists that Commerce did not ask for sufficient information for Commerce to understand the true role of the United States aaffiliate. *See* Pl.'s Br. 15–16. Thus, plaintiff asserts that, because Commerce had incomplete information, it is "unclear whether [the Department] ultimately deducted sufficient selling expenses in the CEP calculations." Pl. Br. 16.

D. HYSCO

Plaintiff insists that the record contained evidence that HYSCO performed most of the functions in resales by its United States affiliate. Thus, plaintiff agrees that Commerce has supported with substantial evidence its decision to include a portion of these selling expenses in its CEP calculations for HYSCO. *See* Pl.'s Br. 16–17. For plaintiff, however, "all [defendant-intervenor] parent companies participated in their subsidiaries' U.S. resales, particularly Union and POSCO." *See* Pl.'s Reply Br. 10. Therefore, plaintiff characterizes Commerce's treatment of HYSCO as contradictory behavior by the agency. It maintains that "the government undercuts its own position by the action it took on HYSCO's facts," when it purportedly made similar showings for all defendant-intervenors. *See* Pl.'s Reply Br. 10.

For its part, Commerce maintains that, with respect to three of the defendant-intervenors, it "reasonably determined not to deduct home market indirect selling expenses from [CEP]." Def.'s Br. 13. Commerce asserts that the antidumping statute and the statute's legislative history, as well as its "longstanding practice," confirm that a deduction is not warranted for indirect selling expenses that are "general in nature" and "not associated specifically with United States affiliates' resales to unaffiliated customers." Def.'s Br. 13–14. The Department further claims that record evidence demonstrates that the expenses cited by plaintiff were general in nature, i.e., attributable to all sales not simply United States resales. Def.'s Br. 17–18. For Commerce, plaintiff's arguments are misguided:

> [Plaintiff] asserts that Commerce should have deducted certain expenses incurred by the foreign parent for selling activities like price negotiation because without these activities, the United States sales would not have occurred. Yet, [plaintiff] fails to recognize the critical distinction, *i.e.*, that these types of expenses are general in nature because they are incurred regardless of whether the sale in question is an export price sale (direct to the unaffiliated United States customer) or a constructed export price sale. The expenses that Commerce deducts pursuant to 19 CFR § 351.402(b) are *only* those associated with the additional selling activities that the foreign parent or its United States affiliate must undertake in selling constructed export price subject merchandise to unaffiliated United States customers.

Def.'s Br. 17 (citations omitted).

Additionally, Commerce notes that it made the deduction where warranted, i.e., when "HYSCO had reported that it, not its United States affiliate, performed most of the resale activities in the United States market." Def.'s Br. 18 (citing I&D Memo, PD No. 226 at Com-

ments 5, 15, and 23). Therefore, Commerce argues that it "correctly applied the law to the facts" and asks that this court sustain its determinations. Def.'s Br. 17–18.

A resolution of this dispute revolves around whether Commerce misinterpreted the evidence before it. The court finds that it did not. With respect to the deductibility of these expenses, the only material difference between *Mittal* and the present case is the treatment of HYSCO. Thus, *Mittal* is useful here. *Mittal* sustained as lawful and supported by substantial evidence Commerce's refusal to deduct expenses it found to be general in nature. *See Mittal*, 31 CIT at ___, Slip Op. 07–117 at 14–16.

Here, as in *Mittal*, there is nothing in the record to indicate that Commerce did not request and receive all of the business information required in order to ascertain the respective levels of involvement of the Korean companies and their United States affiliates in the United States sales. That is,

> Commerce requested and received from [defendant-intervenors] information regarding all business or operational relationships affecting the development, product[ion], sale or distribution of the subject merchandise in the home and United States markets. . . . [and] then concluded that [t]he reported indirect selling expenses were general in nature and not attributable to [CEP] resales to unaffiliated United States purchasers.

Def. Br. 17–18; *see also* I&D Memo at Comments 5 (Dongbu), 14 (Union), and 23 (POSCO); I&D Memo at Comment 11 (HYSCO).

Although "plaintiff maintains that the record reveals a substantial level of involvement by the [defendant-intervenors] in the resale of CORE to unaffiliated U.S. purchasers," Commerce disagrees. *See Mittal*, 31 CIT at ___, Slip Op. 07–117 at 17; *see also U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) ("It is the [Department's] task to evaluate the evidence it collects during its investigation."). Commerce's position is based upon its assessment of verified information.[12] Here, "plaintiff has not made a case that the selling functions performed by the parent companies were

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[12] In this review, Commerce relied on its verifications from the tenth review. In that regard, Commerce verified Dongbu's home-market indirect selling expenses in the tenth review and confirmed that they were unrelated to sales between its United States affiliate and unaffiliated United States buyers. *See* I&D Memo, PD No. 226 at 15. Commerce likewise relied on its verification from the tenth review for Union and POSCO. *See* I&D Memo, PD No. 226 at 28–29, 35. Commerce's reliance on prior verifications was proper. *See* Trade and Tariff Act of 1984, H.R. Rep. 98–725, at 43, reprinted in 1984 U.S.C.C.A.N. 5127, 5170 (1984) ("The Committee . . . believes it is essential to proper enforcement of the laws that information used in determining annually the actual amount of any . . . antidumping duty to be assessed under outstanding orders is accurate to the extent possible. At the same time, the Committee is concerned that requiring verification in every review would result in an unnecessary additional administrative burden on the Department of Commerce for perfunctory verifications. Therefore, verification would not be required if an interested party does

mischaracterized by Commerce." *Mittal*, 31 CIT at ___ , Slip Op. 07–117 at 20.[13] Thus, the court finds that, while plaintiffs and Commerce have a difference of opinion as to the characterization of the parent companies' activities, Commerce adequately applied the law to the facts and has " 'articulate[d] a[ ] rational connection between the facts found and the choice made.' " *See Mittal*, 31 CIT at ___ , Slip Op. 07–117 at 20–21 (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

Plaintiff's argument that Commerce's decision to deduct HYSCO's selling expenses (and not other defendant-intervenors' selling expenses) is somehow demonstrative of Commerce's contradictory behavior is not convincing. Commerce is entitled to treat companies differently if it articulates its reasoning for doing so and if its conclusions are supported by substantial evidence. Here, Commerce agreed with plaintiff that the "record evidence indicates that HYSCO performed most of the functions involved in [its United States affiliates'] resales." *See* I&D Memo, PD No. 226 at 22 (detailing Commerce's review of HYSCO's selling functions chart and explaining that HYSCO "stated that it negotiated and approved U.S. sales transactions"). Plaintiff has simply not demonstrated that the sell-

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not request it in a timely manner, or after recent verifications have taken place unless shown to be warranted.").

[13] *Mittal* discussed Commerce's efforts in collecting and verifying data:

> . . . 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 Customs 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 expenses resulting 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 Mittal*, 31 CIT at _____ , Slip Op. 07–117 at 18–19.

ing functions performed by the other parent companies were mischaracterized by Commerce.

Based on the foregoing, the court sustains as supported by substantial evidence and according to law Commerce's determination not to deduct selling expenses from CEP because (1) Commerce had all of the necessary information before it; and, (2) the Department reasonably concluded that the defendant-intervenors' reported selling expenses were general in nature and not specifically associated with resales of CORE to unaffiliated purchasers in the United States.

III. CEP Offset Adjustments

In its investigation, Commerce was required by statute to take into account level of trade ("LOT") differences to account for any price differential resulting from a Korean exporter's sales in Korea being made at a more advanced LOT than its sales to the United States. *See* 19 U.S.C. § 1677b(a)(7)(A). Commerce is directed to make an actual LOT adjustment to normal value only 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).

Under 19 U.S.C. § 1677b(a)(7)(B), where the record contains insufficient data to make a LOT adjustment, a CEP offset to normal value calculations may be granted. *See* 19 U.S.C. § 1677(a)(7)(b).

> When normal value is established at a [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 [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); *see also Mittal*, 31 CIT at ___ , Slip Op. 07–117 at 24 (citing 19 CFR § 351.412 (f)(3)).[14]

In deciding whether to grant a CEP offset, Commerce will analyze a party's LOT for its home market and for its CEP sales. *See* Def. Br. 20. "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." *Mittal*, 31 CIT at ___ , Slip Op. 07–117 at 25 (citing *Micron Tech., Inc. v. United*

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[14] This provision provides: "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 [LOT] adjustment." 19 CFR § 351.412 (f)(3).

States, 243 F.3d 1301, 1305 (Fed. Cir. 2001) ("The effect [of the CEP offset] is to reduce the price of the more advanced [stage of distribution] 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 [stage of distribution].")).

Here, Commerce allowed CEP offsets for all defendant-intervenors in the review. It did so based upon information requested and received "relating to channels of distribution, categories of customers, and all selling activities performed and services offered in the United States and foreign markets." Def.'s Br. 5.

> Commerce analyzed the defendant-intervenors' selling functions in the United States and the Korean markets and determined that sales for all four defendant-intervenors involved a single level of trade in both the home and United States markets, and that the four defendant-intervenors' respective [LOT] in the United States market were at a less advanced stage of distribution than their home market [LOT].

Def.'s Br. 6 (internal citations omitted).

Plaintiff maintains that Commerce's analyses and conclusions regarding CEP offsets were improper because Commerce "ignored [plaintiff's] contention that none of the [defendant-intervenors] had described *all* of the selling activities at the so-called CEP LOT. . . ." Pl.'s Br. 18. That is, plaintiff asserts that the record was incomplete and that Commerce did not have sufficient evidence on the record to "perform fair comparisons of activities at the two respective LOT[s]." Pl.'s Br. 18. "Because Commerce refused to ask questions that would have revealed the selling activities at the so-called CEP [LOT] . . . , it was not possible for Commerce to determine that the parents' sales to their U.S. affiliates were at a less advanced LOT than sales to non-affiliates in the home market." *See* Pl.'s Reply Br. 13; Pl.'s Br. 39. Plaintiff argues that Commerce's failure to remedy these deficiencies in the record demonstrates that the CEP offsets "are unsupported by substantial evidence because no reasonable mind would accept Commerce's analysis of the facts on the basis of the record as made." Pl.'s Br. 18.

Specifically, plaintiff insists that defendant-intervenors provided incomplete information in response to Commerce's initial and supplemental questionnaires requesting information about "*all* the selling functions" at the CEP LOT. Pl.'s Br. 37 (citations omitted). Plaintiff further argues that its comments to Commerce "called attention to [the defendant-intervenors'] failure to show entitlement to the offsets they claimed." Pl.'s Br. 38. According to plaintiff, the defendant-intervenors collectively engaged in a "pattern" of "active[ly] assist[ing] their affiliates in reselling in the United States," and thereby promoting their own sales to their affiliates at the CEP LOT. Pl.'s Br. 38. Plaintiff asserts that Commerce did not exercise

"common commercial sense" by not inquiring further into these activities at the CEP LOT, thus failing to perceive "that affiliates engage in numerous inter-company activities when performing complementary and overlapping roles in marketing goods internationally."[15] Plaintiff further asserts that Commerce's failure to seek more information about sales made by defendant-intervenors to their United States affiliates "means that the record cannot support the agency's determination that home market sales were made at a LOT 'more advanced' than the CEP LOT, as judged by a reasonable mind." Pl.'s Br. 39. Therefore, plaintiff seeks a remand to have the record made complete.[16] Pl.'s Br. 40.

Notwithstanding plaintiff's arguments, the court finds that Commerce's grant of CEP offsets to defendant-intervenors are supported by substantial evidence. For each defendant-intervenor, Commerce determined that there was sufficient evidence in the record to determine that: (1) each had a single LOT in its home market and a single LOT in the United States market, and (2) their home market sales were at more advanced LOT than their United States CEP sales. *See* I&D Memo, PD No. 226 at Comments 6, 8, 14, 24; *see also* Def.'s Br. 21. Thus, the Department reasonably relied on the extensive information provided by defendant-intervenors concerning their selling functions in the Korean and United States markets in granting each a CEP offset. *See* I&D Memo, PD No. 226 at Comments 6, 8, 14, 24; *see also* Def.'s Br. 21; *Mittal*, 31 CIT ___ , Slip Op. 07– 117 at 19.

Specifically, for Dongbu, Commerce reviewed its questionnaire responses and concluded that the same selling activities occurred in both of its two home market distribution channels in "comparable frequency" and found "that the two home market channels of distribution alleged by [Dongbu] constitute one [LOT]." Calculation Memo. for Dongbu Steel, Co., Ltd. ("Dongbu Calc. Memo"), CR No. 79 at 2. Furthermore, Commerce noted that, "[i]n the U.S. market, Dongbu made only CEP sales through its U.S. affiliate, Dongbu

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[15] According to plaintiff, "[t]hese [activities] include, among other things, continuing inter-company communications, coordinate efforts, travel and visits, joint planning, information sharing, and presumably other activities as well." Pl.'s Br. 39.

[16] Plaintiff takes issue with Commerce's explanation responsive to its observations. Plaintiff argues that Commerce gave similar and equally inadequate explanations in granting each of the defendant-intervenors offsets. Pl.'s Br. 38–39. Regarding Union, for example, Commerce wrote:

> Contrary to [plaintiff's] assertions that Union's selling activities in the HM [home market] via sales intermediaries were not significantly different from its CEP sales made to its affiliate . . . we find that Union provided sufficient information for the Department to compare selling functions and the difference in the degree of selling functions in the two markets. For example, information provided by Union demonstrates that Union's selling functions for the [home market] sales are different and more extensive than those associated with Union's sales to [its affiliate]. Therefore, we conclude that [home market] sales are at a more advanced LOT than its U.S. sales.

Pl.'s Br. 39 (quoting I&D Memo, PD No. 226 at 25).

USA, to unaffiliated customers in two customer categories, end-users and distributors." Dongbu Calc. Memo, CR No. 79 at 2. Commerce "compared the selling functions in the home market to the selling functions in the U.S. market at the CEP LOT, and found a less advanced [LOT] in the U.S. market."[17] Dongbu Calc. Memo, CR No. 79 at 2. Based upon this selling function analysis, Commerce concluded that Dongbu's home market sales were "made at a different, and more advanced, stage of marketing than the LOT of CEP sales." Commerce, however, found that it lacked the price data needed to make a LOT adjustment. Dongbu Calc. Memo, CR No. 79 at 2. Therefore, Commerce reasoned:

> Dongbu did not sell subject merchandise in the home market at the same LOT as that of the CEP, and there [was] no other data on the record that would allow the Department to establish whether there is a pattern of consistent price differences between sales at different [LOTs] in the comparison market. Accordingly, while we determined that a LOT adjustment may be appropriate for CEP sales . . . we are unable to make such an adjustment. Instead, we have made a CEP offset to NV [normal value]. . . .

Dongbu Calc. Memo, CR No. 79 at 3.

With regard to HYSCO, Commerce undertook a similar analysis and reached the same conclusion, i.e., that "the evidence on the record was sufficient to demonstrate that HYSCO's [home market] sales were at a more advanced LOT than its CEP sales, and that the data available does not provide an appropriate basis to determine an LOT adjustment." *See* I&D Memo, PD No. 226 at 19 (citing Calculation Memo. for Hyundai Hysco (Dep't of Commerce Aug. 31, 2005) ("HYSCO Calc. Memo"), PD No. 181). To reach this conclusion, Commerce reviewed HYSCO's questionnaire responses and selling function charts.[18] HYSCO Calc. Memo, PD No. 181 at 2.

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[17] Commerce's Calculation Memorandum for Dongbu indicates [[ ]] Dongbu Calc. Memo, CR No. 79 at 2.

[18] Commerce's analysis was as follows:

> In the home market, HYSCO sold through one channel of distribution to affiliated and unaffiliated local distributors and end users, and provided the same selling services to all customers.
>
> In the U.S. market, HYSCO made only CEP sales through its U.S. affiliate, Hyundai Pipe America (HPA), to unaffiliated U.S. customers. According to HYSCO's questionnaire response, HYSCO conducted all sales and marketing activities in Korea.
>
> HPA, which did not have a separate sales force for subject merchandise, relayed price and sales information between potential customers and HYSCO, and also received payment from HYSCO's customers on HYSCO's behalf.
>
> . . . HYSCO provided an updated U.S. selling function chart and requested a [LOT] adjustment or CEP offset, stating that HYSCO performed the same functions for its sales to unaffiliated customers, whether in the home market or the United States, and that

Likewise, Commerce undertook the same kind of analysis for Union and reached the conclusion, that Union was entitled to a CEP offset. *See generally* I&D Memo, PD No. 226 at Comment 14. Commerce found that all of Union's Korean sales were made at one LOT, which was more advanced than the LOT of its affiliate's United States sales, and that "it [was] not possible to quantify the extent to which sales at different LOTs in the [home and United States markets] differ in price." *See* I&D Memo, PD No. 226 at 25.[19] Commerce again based this conclusion on its review of Union's questionnaire responses and selling function chart. *See* I&D Memo, PD No. 226 at 25.

Commerce reached the same conclusions for POSCO. It found that record evidence demonstrated that its home market sales were at a more advanced LOT than its CEP sales, and granted POSCO a CEP

> HYSCO performed very few functions in connection with its sales to HPA.
>
> HYSCO's updated selling function chart . . . indeed shows few selling activities at the CEP [LOT]. Based on our review of the selling functions that are related to CEP and home market sales, we have determined that HYSCO's home market sales are made at a different, and more advanced, stage of marketing than the LOT of the CEP sales. . . . Accordingly, while we have determinated that an LOT adjustment may be appropriate for CEP sales . . . we are unable to make such an adjustment.

HYSCO Calc. Memo, PD No. 81 at 2–3 (citations omitted). 226 at 25.19

[19] Commerce's Issues & Decisions Memorandum notes that Commerce specifically requested that Union demonstrate that its home market LOT was more advanced that the CEP LOT. *See* I&D Memo, PD No. 226 at 25. Union did so to Commerce's satisfaction. Commerce's analysis is as follows:

> In the home market, Union sold through three channels of distribution to unaffiliated local distributors and end-users, and provided the same selling services to all customers. Union reported all home market sales at the same LOT. In the home market, Unico sold through two channels of distribution to local unaffiliated local [sic] distributors and end-users. In the U.S. market, Union made only CEP sales through its U.S. affiliate, DKA, to distributors and end-users.
>
> With respect to sales made by Union and Unico in the home-market and the U.S. market, Union identified the following selling activities: [[ ]]
>
> [W]e asked Union to update . . . the selling function chart . . . to account for all activities performed by Union in selling goods at the CEP LOT. Union added [[ ]] to the revised selling function chart. . . .
>
> . . . [W]e compared the selling functions performed for home-market sales with those performed with respect to the CEP transactions, after deductions for economic activities occurring in the United States . . . to determine if the home-market [LOT] constituted a different [LOT] than the CEP [LOT]. We compared the selling functions in the home market to the selling functions in the U.S. market at the CEP LOT, and found a less advanced [LOT] in the U.S. market. . . . Union provided [[ ]] or [[ ]] selling activities in the U.S. market, as compared to the home market for [[ ]] selling functions identified. . . .
>
> . . . Based on our review of the selling functions that are related to CEP and home market sales, we have determined that Union's home market sales are made at a different, and more advanced stage of marketing than the LOT of the CEP sales.

Calculation Memo. for Union ("Union Calc. Memo"), CR No. 77 at 2 (Dep't of Commerce Aug. 31, 2005).

offset. *See* I&D Memo, PD No. 226 at 35–36. Commerce again did so based upon its review of POSCO's questionnaire responses and selling chart.[20] *See* I&D Memo, PD No. 226 at 35–36. As noted, plaintiff takes issue with Commerce's findings because it claims that the Department lacked sufficient evidence to justify the offsets. Plaintiff claims that there was incomplete information in the record to demonstrate that defendant-intervenors' home market sales were made at a more advanced LOT more advanced than the CEP LOT. Plaintiff, however, cites no record evidence to demonstrate that defendant-intervenors' reporting to Commerce was lacking; rather it relies upon "common commercial sense." Commerce, however, is entitled to at least some deference when gauging the adequacy of the factual representations made to it. *See U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) ("It is the [Department's] task to evaluate the evidence it collects during its investigation."). Without more, plaintiff's reference to "common commercial sense" is unavailing. *See Ceramica Regiomontana, S.A.*, 10 CIT at 404–05, 636 F. Supp. at 966 ("As 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."). Therefore, "[t]he court cannot . . . credit plaintiff's unsubstantiated assertion that commercial realities render insufficient the evidence Commerce relied upon in making its decision" to

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[20] Commerce's calculation memorandum details the analysis it undertook leading to its conclusion that POSCO's home market LOT was more advanced than its CEP LOT.

> The Department found that the level of [home market] selling activities was [[ ]] with regard to [[ ]] of the [[ ]] selling activities reported for the three channels of distribution (*i.e.*, [[ ]]). For [[ ]] of the remaining selling activities (*i.e.*, [[ ]]) associated with the three channels of distribution, we found that there was [[ ]] selling activity reported. There was [[ ]] selling activity reported for [[ ]] of the [[ ]] selling activities (*i.e.*, [[post sale warehousing and technical advice]]) associated with the three channels of distribution. Only [[ ]] selling activities (i.e., [[ ]] were not consistently found among all three channels of distribution in the home market. Since the level of selling activities was generally consistent among the three channels of distribution, we found that the home market channels of distribution constitute one [LOT].
>
> . . . . We examined the sales to the affiliated resellers and the selling functions performed by POSCO or the POSCO Group on behalf of its affiliate and found only one [LOT]. [[ ]] of the selling activities (*i.e.*, [[ ]] incurred in the United States were [[ ]]. The selling activities were [[ ]] for [[ ]] of the selling activities (*i.e.*, [[ ]]).
>
> The CEP [LOT] differed from the home market [LOT] with respect to [[ ]] selling activities associated with [[ ]] . These selling activities were [[ ]] for the United States, and [[ ]] in at least [[ ]] of the channels of distribution in the home market. Therefore, we found that the CEP [LOT] differs from the home market [LOT] and is at a less advanced stage of distribution than the home market [LOT].

Calculation Memo. for POSCO (Dep't of Commerce Aug. 31, 2005) ("POSCO Calc. Memo"), CR Doc. No. 75 at 2–3.

grant CEP offsets here. *Mittal*, 31 CIT at ___ , Slip Op. 07–117 at 31.

Thus, the court finds that in light of Commerce's detailed factual findings, and in accordance with the statutory scheme, Commerce supported with substantial evidence its grant of CEP offsets to the defendant-intervenors. That is, under 19 U.S.C. § 1677b(a)(7)(B), Commerce determined that "the data available [did] not provide an appropriate basis to determine . . . a [LOT] adjustment," and thus Commerce reasonably relied on the evidence of the selling functions performed by defendant-intervenors' United States affiliates in deciding to grant the companies a CEP offset. *See Mittal*, 31 CIT at , Slip Op. 07–117 at 27–28; *see also Timken Co. v. United States*, 12 CIT 955, 962, 699 F. Supp. 300, 306 (Fed. Cir 1988) ("It is not within the Court's domain either to weigh the adequate quality or quantity of the evidence for sufficiency or to reject a finding on grounds of a differing interpretation of the record.") (citations omitted).

Accordingly, the court sustains as being supported by substantial evidence Commerce's grant of CEP offsets to Dongbu, HYSCO, Union, and POSCO.

IV. Duty Drawback Adjustment

A "[d]rawback is the reimbursement of duties paid on goods imported into the United States and then used in the manufacture or production of articles which are subsequently exported." *Chrysler Motors Corp. v. United States*, 14 CIT 807, 809, 755 F. Supp. 388, 390 (1990); *see also E.I. du Pont de Nemours and Co. v. United States*, 24 CIT 1045, 1046 n.2, 116 F. Supp. 2d 1343, 1345 n.2 (2000). 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 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). The second prong demands that "the company claiming the adjustment 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.* at 974, 699 F. Supp. at 311. 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.*, 12 CIT at 431–33, 688 F. Supp. at 612; *Hornos Electricos de Venezuela, S.A. v. United States*, 27 CIT 1522, 1525, 285 F. Supp. 2d 1353, 1358 (2003).

Plaintiff argues that Commerce should not have permitted a duty drawback adjustment to the Korean companies' CEP because the Korean drawback system is susceptible to manipulation.[21] *See* Pl.'s Br. 18–20. According to plaintiff, Commerce's current method of making drawback adjustments amplifies the potential for distorted dumping margins on Korean products, in part, because "Korean law allows substitution-type drawback, and this allows Korean exporters to pick and choose the export shipments on which they base their drawback claims when they export from Korea." Pl.'s Br. 19–20. Plaintiff argues that Commerce wrongfully denied its request "to require [defendant-intervenors] to submit certain aggregate data" in order "to test the fairness of their claims." Pl.'s Br. 20. According to plaintiff, "[t]his data would have permitted Commerce to analyze whether any [defendant-intervenor] claimed excessive amounts on U.S. sales." Pl.'s Br. 20. Thus, plaintiff maintains that it was foreclosed from pursuing this "theme" of argument before Commerce. Pl.'s Br. 20.

Moreover, plaintiff asserts that Commerce's failure to request further information was an abuse of its discretion, particularly because Commerce itself "has called into question its current methodology for drawback adjustments." Pl.'s Br. 43–44. Plaintiff points the court to a Federal Register notice of June 30, 2005, in which Commerce stated that it "is considering whether changes to its practice, including the two-prong test . . . , may be appropriate." *See* Duty Drawback Practice in Antidumping Proceedings, 70 Fed. Reg. 37,764, 37,765 (Dep't of Commerce June 30, 2005) (notice) (the "First Request for Comments"). This First Request for Comments,[22] according to plain-

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[21] Plaintiff's brief explains its manipulation argument with the following hypothetical:

> Although unquestionably lawful in Korea, the Korean system makes it possible to manipulate U.S. antidumping results. . . . The following hypothetical scenario can occur.
>
> 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 the shipments to the United States while claiming nothing on shipments to Canada – with U.S. antidumping motivations in mind. As a further hypothetical assumption, we can even assume that "X" could do this even if, as a matter of fact, none of the exports to the United States actually used any imported scrap, but were produced solely from domestic scrap. In circumstances such as these, the result would be a clear distortion so far as U.S. antidumping results are concerned. The claims may be normal and lawful in Korea, but the effect distorts U.S. antidumping calculations in a way that reduces antidumping margins to the disadvantage of U.S. producers. They result in disproportionate upward adjustments to reported United States prices.

Pl.'s Br. 41 (citations omitted).

[22] The First Request for Comments reads in pertinent part:

tiff, represented an "implicit recognition" that Commerce's two-prong test may be invalid in particular circumstances and, as such, it is unfair to make plaintiff "wait for the agency to complete is current review to get reconsideration of the drawback adjustments. Pl.'s Br. 44.

Plaintiff further notes that, on October 19, 2006, Commerce published another Federal Register notice that it characterizes as an admission by the Department that its methodology "might change" because it "is subject to manipulation and can be unfair." Pl.'s Reply Br. 14 (citing Antidumping Methodologies: Market Economy Inputs, Expected Non-Market Economy Wages, Duty Drawback; and Request for Comments, 71 Fed. Reg. 61,716, 61,723–24 (Dep't of Commerce Oct. 19, 2006) (notice) (the "Second Request for Comments")). In its Second Request for Comments, Commerce wrote:

> The Department previously requested and received comments regarding its practice with respect to duty drawback adjustments to export price in antidumping proceedings. . . . In past cases, certain parties have argued that the Department should allocate the total amount of relevant drawback received to total exports, regardless of destination, to ensure that the adjustment claimed on U.S. sales is not overstated.

> The Department is *considering* whether changes to its practice, including the two-prong test . . . , may be appropriate. For instance, some parties have argued that the Department's practice should be modified by requiring a respondent party seeking a duty drawback adjustment to demonstrate payment of import duties on raw material inputs used to produce merchandise sold in the home market. They argue that such a requirement is consistent with principles of price comparability and the implementation of Congressional intent with respect to the duty drawback adjustment. In addition, according to such parties, any duty drawback adjustment made should also be limited to the amount of duties actually paid on material inputs used to produce merchandise sold in the home market. Certain parties have also argued that the Department should allocate the total pool of relevant drawback available under some systems to total exports of subject merchandise to ensure that the adjustment claimed on U.S. sales is not overstated.
>
> Parties advocating a change in Department practice argue that in creating the duty drawback adjustment, Congress intended that an increase in the export price resulting from the duty drawback adjustment was designed to offset an increase in the home market price resulting from the payment of import duties on inputs. As a result, the duty drawback adjustment was designed to prevent dumping margins from arising simply because of the rebate (or non-collection) of import duties on the inputs resulting from the export of subject merchandise to the United States. Yet, these parties argue, to permit a drawback adjustment where home market sales do not include import duties leaves nothing for the rebate or exemption to offset.
>
> *In order to fully consider and address these claims* as well as other concerns about the Department's practice regarding duty drawback, the Department is providing an opportunity for the public to comment. . . . The Department is particularly interested in comments relating to questions and possible approaches set forth in the Appendix to this notice, including comments on the consistency with the statute and Congressional intent.

First Request for Comments, 70 Fed. Reg. at 37,765 (internal citations omitted) (emphasis added).

Second Request for Comments, 71 Fed. Reg. at 61,723 (citation omitted). It then stated:

> The Department *agrees* with these commenters and proposes to modify its approach by limiting the duty drawback adjustment in certain circumstances. *The Department generally agrees that it should allocate the total amount of duty drawback received across all exports that may have incorporated the duty-paid input in question, regardless of destination, to ensure that the adjustment claimed on U.S. sales is not overstated.*

Id. at 61,723–24 (emphasis added). According to plaintiff, this language constitutes "an outright admission that a change in practice should and will in due course be made." Pl.'s Reply Br. 15. Plaintiff argues that, in circumstances like this, where Commerce has stated that its methodology will change, "there is no basis for the Court to [continue to] defer to Commerce's admittedly flawed precedents." Pl.'s Reply Br. 15. Therefore, plaintiff seeks a remand in order to "receive the benefit [of a change in Commerce's practice] now, not just in future reviews." Pl.'s Br. 44.

The *Mittal* Court upheld Commerce's two-prong test as "a reasonable interpretation of 19 U.S.C. § 1677a(c)(1)(B)" and held that Commerce, in the tenth review, "properly applied the test to the Korean [defendant-intervenors] in this case." 31 CIT at ___ , Slip Op. 07–117 at 35–36. Here, the court likewise agrees with Commerce that, at this time, there is "no statutory requirement that Commerce" must, as plaintiff suggests, "proportionateley allocat[e] the total duty drawbacks to [defendant-intervenors]' exports to all countries." Def.'s Br. 23; *Mittal*, 31 CIT at ___ , Slip Op. 07–117 at 36; *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory proceedings are entitled to judicial deference under *Chevron*.").

Furthermore, the court finds that Commerce properly supported with substantial evidence its decision to make an upward adjustment to CEP in order to account for the drawback defendant-intervenors received from the Korean government on their imports of raw materials. *See Huaiyin Foreign Trade Corp. (30)*, 322 F.3d at 1374 (Fed. Cir. 2003) (citations omitted); Def. Br. 23 (noting that plaintiff "does not contest the substantial record evidence that support's Commerce's determination pursuant to its longstanding, Court-approved practice"). An examination of the evidence reveals that Commerce reasonably concluded that defendant-intervenors satisfied the two-prong test and, thus, were entitled to the CEP adjustment.[23]

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[23] As in *Mittal*, plaintiff's argument concerning margin manipulation essentially seeks to add a third prong to Commerce's two-prong test. That is, plaintiff insists that a third prong "requir[ing] shipment-wide allocation of drawback would eliminate the distortion of dump-

The only new argument that plaintiff presses in hopes of distinguishing the instant review from the tenth review (and avoiding the holdings of *Mittal*), is plaintiff's reference to Commerce's two Requests for Comments. Plaintiff's reliance on these requests, however, is misplaced. In the administrative setting

> two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision-making process, it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.

Bennett v. Spear, 520 U.S. 154, 178 (1997) (quotations and citations omitted).

The court's acceptance of these notices as binding recognition that Commerce's methodology was invalid or might be invalid would contravene the administrative process and hold the agency to a decision that is not final. This is the case despite Commerce's statement that it "agrees with [the] commenters and proposes to modify its approach." Second Request for Comments, 71 Fed. Reg. at 61,723. Commerce is still "welcom[ing] comment on this *proposed* methodology," *see id*. at 61,724 (emphasis added), and therefore the Second Request for Comment is just that—a call for comments. Thus, Commerce's methodology and its interpretation of 19 U.S.C. § 1677a is entitled to deference until the Department completes its administrative processes. *See Wieland-Werke AG v. United States*, 31 CIT ___ , ___ , 525 F. Supp. 2d 1353, 1360 (2007) ("The court must defer to the agency's reasonable interpretation of a statute even if the court might have preferred another.") (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978)); *see also Timken Co. v. United States*, 11 CIT 786, 806, 673 F. Supp. 495, 514 (1987); *Moore v. East Cleveland*, 431 U.S. 494, 525 (1977) ("By requiring exhaustion of administrative processes the courts are assured of reviewing only final agency decisions arrived at after considered judgment."). "Commerce's *potentia*l 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) (emphasis added).

Furthermore, while courts have recognized that policy statements may constitute rules, even if they are not promulgated through notice and comment rulemaking, this is not the general practice. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 n. 13 (D.C. Cir. 2000). That is,

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ing margins and maintain the integrity of the antidumping statute." *Mittal*, 31 CIT at ____ , Slip Op. 07–117 at 35. The court declines plaintiff's invitation to alter Commerce's reasonable interpretation of 19 U.S.C. § 1677a(c)(1)(B).

> [t]he general consensus is that an agency statement, not issued as a formal regulation, binds the agency only if the agency intended the statement to be binding. . . . The primary consideration in determining the agency's intent is whether the text of the agency statement indicates that it was designed to be binding on the agency.

Farrell v. Dep't of Interior, 314 F.3d 584, 590–91 (Fed. Cir. 2002) (citations omitted); *see also Hamlet v. United States*, 63 F.3d 1097, 1103 (Fed. Cir. 1995) ("Obviously, not every piece of paper released by an agency can be considered a regulation entitled to the force and effect of law.").

Here, even a cursory review of the First and Second Requests for Comments reveals that Commerce did not intend them to be binding on the agency or enforceable in this Court. Accordingly, Commerce's First and Second Requests for Comments do not demonstrate that Commerce erred in refusing to request additional information or otherwise acted improperly in this review by adhering to its established methodology. *See NSK Ltd. v. United States*, 510 F.3d 1375, 1384 (Fed. Cir. 2007) (holding that Commerce's public recommendation to change its methodology was not a final decision where it "has not yet abandoned its previous methodology or adopted a new one").

Based on the foregoing, the court sustains as supported by substantial evidence and otherwise in accordance with law Commerce's duty drawback adjustment to defendant-intervenors' United States price of CORE.

CONCLUSION

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

Slip Op. 08–63

UNITED STATES, Plaintiff, v. OPTREX AMERICA, INC., Defendant.

Court No. 02–00646
Before: Judge Judith M. Barzilay

[Judgment for Plaintiff.]

Dated: June 9, 2008

Gregory G. Katsas, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; (*Steven C. Tosini*), Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Amy M. Rubin*, International Trade Field Office, U.S. Department of Justice; *Frederick B. Smith*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of counsel, for Plaintiff United States.

Sonnenberg & Anderson, (*Steven P. Sonnenberg*), *Michael J. Cunningham*, and *Paul S. Anderson* for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BARZILAY, JUDGE: These findings of fact and conclusions of law follow a bench trial held on June 5th and 6th, 2007, and represent the final chapter in a case that has endured more than its share of legal proceedings before the Court.[1] In this claim for penalties under 19 U.S.C. § 1592(a), Plaintiff United States (the "Government") contends that Defendant Optrex America, Inc. ("Optrex") failed to exercise reasonable care in classifying certain Liquid Crystal Display products ("LCDs") entered at various ports in the United States between October 12, 1997 and June 29, 1999. *See* § 1592(a); Compl. ¶¶1, 4. This court has jurisdiction over claims for civil penalties pursuant to 28 U.S.C. § 1582. *See* § 1582(1).

The majority of LCDs at issue in this case are "glass panels," and after years of disagreement between the parties, the Federal Circuit recently held that Optrex's LCD glass panels are properly classified under heading 9013 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] *See Optrex Am., Inc. v. United States*, 475 F.3d 1367, 1371–72 (Fed. Cir. 2007) ("*Optrex II*"). Prior to that decision,

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[1] Familiarity with *United States v. Optrex Am., Inc.*, Slip Op. 06–73, 2006 WL 1330333 (May 17, 2006) (not reported in F. Supp.); *United States v. Optrex Am., Inc.*, Slip Op. 05–160, 2005 WL 3447611 (Dec. 15, 2005) (not reported in F. Supp.); *United States v. Optrex Am., Inc.*, 28 CIT 1231 (2004) (not reported in F. Supp.); *United States v. Optrex Am., Inc.*, Slip Op. 04–79, 2004 WL 1490418 (July 1, 2004) (not reported in F. Supp.); *United States v. Optrex Am., Inc.*, Slip Op. 04–80, 2004 WL 1490419 (July 1, 2004) (not reported in F. Supp.) is presumed.

[2] Included in Plaintiff's list of entries subject to penalties are a small number of LCD character display modules. Pl. Trial Ex. 14 at 10. LCD modules are distinguishable from panels because they include an integrated electronic circuit in the form of a row or column

Optrex had classified its LCD glass panels under HTSUS heading 8531 as "[e]lectric sound or visual signaling apparatus," which carries a lower tariff rate than HTSUS heading 9013.[3] Pl. Trial Ex. 7 at 2, 7–11; Pl. Trial Exs. 16–19. In 1997, however, the Federal Circuit affirmed this Court's decision to classify LCD glass panels with similar characteristics under HTSUS heading 9013. *See Sharp Microelecs. Tech., Inc. v. United States*, 122 F.3d 1446, 1452 (Fed. Cir. 1997) ("*Sharp*"), *aff'g* 20 CIT 793, 932 F. Supp. 1499 (1996). After the issuance of *Sharp*, counsel for Optrex, Sonnenberg & Anderson ("Sonnenberg"), advised the company to seek a binding customs ruling concerning the proper classification of its LCD glass panels. Pl. Trial Ex. 1. Optrex never sought such a ruling from Customs. Because Optrex did not exercise reasonable care under the facts of this case, including the failure to follow the advice of counsel, the court holds that it is subject to penalties under § 1592(c).

Following a series of court decisions concerning discovery of privileged information, and another prohibiting Plaintiff from asserting higher levels of culpability, the court ultimately denied Defendant's motion for summary judgment, *see Optrex Am., Inc.*, Slip Op. 06–73, 2006 WL 1330333, at *14, and referred this case to mediation, where the parties proved unable to reach a settlement. The case returned to this court and was ordered to trial after the denial of Plaintiff's motion for summary judgment. Pursuant to USCIT Rule 52(a), the court's findings of fact and conclusions of law are enumerated below. *See* USCIT R. 52(a).

I. FINDINGS OF FACT

1. Optrex is a Michigan corporation and wholly owned subsidiary of its Japanese parent company Optrex Corporation ("Optrex Japan"), and is the importer of record of the subject merchandise. Pl. Trial Ex. 4 at G000408; Pretrial Order, Schedule C–Uncontested Facts ¶¶1–2 ("P.O. Schedule C").

2. The subject merchandise consists of articles referred to as liquid crystal displays or LCDs. P.O. Schedule C ¶3.

3. LCDs are high technology products that use liquid crystals to respond to an electric field by twisting along their axes, thereby changing their optical qualities. The LCDs at issue enable visual character displays, dot matrix displays, and/or the display of information through permanently etched icons. LCD glass panels consist of two glass substrates adhered together with the polarizer materi-

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driver that is capable of supplying data to the LCD independently. *See Optrex Am., Inc.*, Slip Op. 06–73, 2006 WL 1330333, at *1.

[3] To clarify, the issue in this case is not what distinguishes LCD glass panels from other LCDs for purposes of classification under HTSUS heading 9013, but rather whether there was sufficient notice that LCD glass panels were properly classified under heading 9013 and whether Optrex acted with reasonable care in responding to those notifications.

als on each side of the glass substrates; liquid crystal fluid inside those substrates; and sometimes a pin connection; a flexible interconnect; or some method of connecting that glass to a circuit board or some other electronic device. The incorporation of row and column drivers makes an LCD module distinct from an LCD panel. P.O. Schedule C ¶¶4–6; Trial Tr. I at 121–23.[4]

4. Optrex imported the subject LCDs from Japan for distribution and sale to its corporate customers in the United States. P.O. Schedule C ¶2.

5. The terms "glass panel," "LCD panel," "glass sandwich," and "LCD glass panel" are interchangeable. P.O. Schedule C ¶7.

6. Between October 12, 1997 and June 29, 1999, Optrex imported 535 entries of LCD glass panels and a small number of character display modules through ports in Detroit, Michigan and Chicago, Illinois.[5] P.O. Schedule C ¶10.

7. Optrex represented to Customs in entry documentation including entry summaries, customs invoices, and other documents, that its LCD glass panels were properly classifiable under HTSUS heading 8531 as "Electric sound and visual signaling apparatus." Pl. Trial Exs. 16–19.

8. On April 7, 1999, Customs formally notified Optrex that it was under investigation for "alleged misclassification of imported merchandise, and failure to report indirect tooling payments and assists to [Customs]." Among other things, the notification alerted Optrex that a formal examination of its books and records was forthcoming. Def. Trial Ex. A; P.O. Schedule C ¶¶11–12.

9. On May 13, 1999, Sonnenberg provided Optrex with a document called the "decision tree," which formally summarized the company's classification methodology. Pl. Trial Ex. 3.

10. On November 12, 1999, Sonnenberg presented Customs with the "decision tree" for the first time. Pl. Trial Ex. 7. On November 19, 1999, Sonnenberg sent a letter to Customs explaining the company's process of classification, as reflected in the "decision tree." Def. Trial Ex. O at 01525–39. In the letter, Sonnenberg stated that the "procedure developed by Optrex entailed massive data analysis of engineering diagrams, product specifications, and end-use indicators such as product brochures for the thousands of part numbers it imports." Def. Trial Ex. O at 01528.

11. Between 1997 and 1999, Optrex used Nippon Express ("Nippon") as a customs broker. Pl. Trial Ex. 4 at G000413. During that period, Ms. Ann Fitzpatrick was the only licensed customs broker at Nippon. She testified that Optrex did not seek advice concerning

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[4] Throughout this decision, the June 5 and 6, 2007 trial transcripts are cited as "Trial Tr. I" and "Trial Tr. II," respectively.

[5] Approximately 95% of the entries under review were entered at the Port of Detroit. The remaining entries were entered at the Port of Chicago. Trial Tr. I at 86.

classification; rather it provided Nippon with all classification information for its LCDs. Trial Tr. I at 127, 140, 143. Nippon made no decisions with regard to classification of the subject merchandise. Trial Tr. I at 129. The court finds Ms. Fitzpatrick's testimony credible.

12. On November 15, 1999, Customs issued a summons to Nippon requesting production of "entry summary packages for every importation handled by [Nippon] for [Optrex] for the time period January 1, 1995 to present." Pl. Trial Ex. 5 at E000181.

13. On November 15, 1999, Customs issued a summons to Optrex requesting production of a "complete list of individuals, whether former or current employees, who are/were responsible for making classification determinations for the Liquid Crystal Display glass panels imported by [Optrex] between January 1, 1995 to present." Pl. Trial Ex. 5 at E000184. Customs also requested "the names of all individuals who have been responsible for working with Optrex'[s] broker, [Nippon] during this same time period." Pl. Trial Ex. 5 at E000184. The deadline for producing the names of these individuals was November 29, 1999. Pl. Trial Ex. 5 at E000184.

14. On September 21, 2001, Customs issued another summons to Optrex requesting production of "all records connected to Optrex's classification of LCD products imported by or on behalf of Optrex during the period January 1, 1994 to date." Pl. Trial Ex. 5 at E000171. Specifically, Customs requested "all records reviewed in connection with the statement contained in the [letter dated] November 24, 1999," which stated that " 'the procedure developed by Optrex (to classify LCD's) entailed massive data analysis of engineering diagrams, product specifications, and end-use indicators such as product brochures for the thousands of part numbers it imports.' " Pl. Trial Ex. 5 at E000171.

15. On September 21, 2001, Customs issued a corresponding summons requesting that Optrex produce "for testimony . . . the current Optrex employee or employees who can provide an explanation for Optrex classification decisions related to LCD products imported by or on behalf of Optrex between January 1, 1994 to date." Pl. Trial Ex. 5 at E000173.

16. Optrex designated Mr. Alan Houck, the Engineering Manager, as the witness to respond to this summons. Trial Tr. II at 60–62.

17. Sonnenberg represented that Optrex would be unable to comply with the requested record production until 2002. Pl. Trial Ex. 8 at G000392.

18. On November 2, 2001, following a meeting held at Optrex on October 22, 2001, Customs granted Optrex an extension of time in which to comply with the summonses provided that "Optrex Engineering Manager, Alan Houck, will be made available to give testimony in connection with specified Optrex products and classification decisions connected to them . . . ."Pl. Trial Ex. 8 at G000392–93. Customs set a deadline of November 14, 2001 to question Mr. Houck.

Second, Optrex was required to "provide copies of the master part number files that correspond to the products listed in the attachment." The deadline to produce these records was November 21, 2001. Pl. Trial Ex. 8 at G000393.

19. On December 4, 2001, Customs officers interviewed Mr. Houck, who was unable to answer questions concerning "Optrex's classification decisions for each part without first being able to review the relevant part files." Pl. Trial Ex. 9 at G000344; Pl. Trial Ex. 21 at 3. Sonnenberg sent a follow-up letter on December 7, 2001, in which it indicated that requested files "each containing the part description, function, and diagram, were to be provided to Customs on December 21, 2001." Pl. Trial Ex. 9 at G000344. On that date, "Optrex agreed that Mr. Houck would present himself for further testimony pursuant to the original summons." Pl. Trial Ex. 9 at G000344.

20. On March 6, 2002, Customs sent a letter to Sonnenberg, which stated that "pursuant to the records summons, Special Agent Jay Ratterman ("Ratterman") received some of the summonsed files. These files represented less than 50% of the summonsed records. In addition, [Sonnenberg] proposed that Mr. Houck provide summons testimony on March 4, 2002. By correspondence on February 6, 2002, we advised [Sonnenberg that] we indeed wished to take Mr. Houck's summons testimony on March 4, 2002." Pl. Trial Ex. 9 at G000344–45. Customs further complained that "[o]ver the course of several phone conversations between [Sonnenberg] and [Ratermann] on the dates of, but not limited to, February 5, 11, 22, 25, 26, and March 1, 2002, Optrex has failed to provide a firm date for the delivery of the remaining summoned records, and has failed to agree to a firm date for the re-interview of Mr. Houck, despite our repeated requests. Consequently, [Customs] must insist that Optrex produce and deliver all records responsive to the summons . . . [by] March 11, 2002. In addition, Mr. Houck shall present himself and provide testimony responsive to the previously issued summons [by] March 11, 2002. Failure to produce the records and Mr. Houck for testimony will result in Customs pursuing a court order to compel compliance with the summons pursuant to 19 U.S.C. § 1510." Pl. Trial Ex. 9 at G000345.

21. On March 18, 2002, Customs agents interviewed Mr. Houck for the second time. He was unable to answer questions regarding classification. Trial Tr. II at 5–6; Trial Tr. I at 31–32; Pl. Trial Ex. 22.

22. Mr. Houck testified during the trial that he was not qualified to respond to questions concerning classification of Optrex's merchandise. Trial Tr. I at 113–15. Throughout his tenure at Optrex, Mr. Houck has never been responsible for the classification of LCDs. Trial Tr. I at 90–91.

23. After Customs had initiated the investigation, Optrex concluded that it overpaid duties and commenced protests at the Ports

of Detroit and Chicago. Def. Trial Ex. U at 05023. The Port of Detroit denied all of Optrex's protests. Of the twenty-nine protests filed at the Port of Chicago, only one was approved. Def. Trial Ex. U at 05023; Trial Tr. I at 86. The others were suspended or denied. Trial Tr. I at 86; Pl. Trial Ex. 15.

24. Customs issued a pre-penalty notice on May 24, 2002, claiming that Optrex had violated § 1592 and, as a result, sought lost revenue in the amount of $2,033,562.10 and monetary penalties of $4,067,124.20. Pl. Trial Ex. 11.

25. On June 13, 2002, Customs sent Optrex a formal penalty notice, claiming that "during the period July 1997 through June 1999, Optrex America, Inc., . . . entered/introduced or caused the entry/introduction into the commerce of the United States LCD panels and components imported from Japan. The entry summaries covering the merchandise contained material false statements and omissions culpable under 19 U.S.C. [§] 1592." Pl. Trial Ex. 11.

26. On October 11, 2002, the Government commenced this action pursuant to § 1592, twice amending its complaint to correct clerical errors and withdraw claims for lost revenue and penalties. P.O. Schedule C ¶20.

27. Plaintiff's Trial Exhibit 14 identifies all LCD products that are subject to this action. P.O. Schedule C ¶22; Pl. Trial Ex. 14.

28. All part numbers beginning with the prefix "DMC" describe LCD character display modules. P.O. Schedule C ¶9; Pl. Trial Ex. 14 at 10.

29. All part numbers beginning with the prefixes "FRS," "FSD," "FSS," "FTD," "FTS," "GTD," "NRD," "NSD," "NTD," "NTX," "VTS," and "WSD" describe LCD glass panels. P.O. Schedule C ¶24.

30. The parties stipulate that Optrex part numbers identified as LCD glass panels in *Optrex Am., Inc. v. United States*, 30 CIT ___ , 427 F. Supp. 2d 1177 (2006) ("*Optrex I*"), *aff'd*, 475 F.3d 1367 (Fed. Cir. 2007), and included in Plaintiff's Exhibit 14, are indeed LCD glass panels. P.O. Schedule C ¶23.

31. The court finds that entries 2–13 in Exhibit 14 are LCD glass panels based upon trial testimony and documentary evidence. Trial Tr. I at 105–06; Pl. Trial Ex. 16 at 001198.

32. The court finds that pursuant to trial testimony from Mr. Houck part number WSD–16770ACPZ–CU is an LCD glass panel. Trial Tr. I at 101–02.

33. Optrex classified a very small number of entries of LCD panels under HTSUS heading 9013. These entries were from a different exporter and were entered by a different customs broker than were the bulk of entries at issue in this case. Three such entries are subject to this action. Pl. Trial Ex. 17.

34. Optrex itself determined classification for all subject entries exported by Optrex Japan. Pl. Trial Ex. 16–19.

35. In 1991, there was an internal discussion among Customs import specialists as to the proper classification of LCD panels. National import specialist, Ms. Barbara Kiefer, concluded that Optrex's LCD glass panels should be classified under HTSUS heading 8531. Def. Trial Ex. O at 01048, 01078, 01083; Trial Tr. I at 54–56.

36. In 1994, Optrex analyzed its import liability with knowledge that Customs was reviewing its classification policy with regard to "glass only" parts. As a precaution, Optrex maintained an accrual spreadsheet that tracked its potential liability under a blended tariff rate. Def. Trial Ex. K; Pl. Trial Ex. 2; Trial Tr. II at 66–68. Ms. Michelle Marsh, the former accounting manager at Optrex, testified that the company applied a blended rate in the accrual calculation, which included HTSUS heading 9013. Trial Tr. II at 51, 66–68. She further testified that the practice was in accordance with generally accepted accounting principles, was reported to Optrex's external auditors, and appeared on Optrex's financial statements. Trial Tr. II at 67–68. The court finds Ms. Marsh's testimony on this issue credible.

37. On May 15, 1995, Sonnenberg sent Customs a letter explaining Optrex's classification of LCD panels and modules. Based on past meetings with Customs, Sonnenberg claimed that "LCD glass panels and LCD modules are properly classified as 'indicator panels' within HTSUS subheading 8531.20.00 . . . ." Def. Trial Ex. O at 02283.

38. On September 2, 1997, the Federal Circuit issued *Sharp*, which affirmed this Court's decision holding that certain LCD glass displays used in computers are properly classified under HTSUS heading 9013. *See Sharp*, 122 F.3d at 1452.

39. On October 30, 1997, Sonnenberg sent Optrex a letter ("1997 Letter") notifying the company of the *Sharp* decision. Pl. Trial Ex. 1. Although Sonnenberg expressed the belief that Optrex did not import LCD glass panels similar to those at issue in *Sharp*, they nevertheless thought it advisable for Optrex "to seek a binding ruling from Customs concerning the tariff classification of LCD 'glass only' displays." Pl. Trial Ex. 1 at 1. They also advised Optrex to review its product line "to determine whether it imported any graphic LCD 'glass only' displays" and to "immediately begin classifying any such LCD glass panels within tariff subheading 9013.80.70, HTSUS, in keeping with the *Sharp* decision." Pl. Trial Ex. 1 at 4.

40. Optrex continued to classify its LCD glass panels under HTSUS heading 8531 after the issuance of *Sharp*. There is no evidence that Optrex sought a customs ruling pursuant to the 1997 Letter. Trial Tr. II at 56; Trial Tr. I at 42–44.

41. Sonnenberg stated in the 1997 Letter that "it is Optrex's responsibility to determine the proper tariff classification of merchandise which it imports." Pl. Ex. 1 at 3. Ms. Fitzpatrick testified that "[b]asically, the importer is responsible for the classification." Trial Tr. I at 127, 146.

42. Although Nippon assumed a more active role in determining classification for other clients, classification of Optrex's LCDs was left to the company because of past practice and the highly technical nature of the merchandise. Trial Tr. I at 138–40.

43. Sonnenberg provided Nippon with a copy of the "decision tree" around 2002. Trial Tr. I at 130.

44. Ms. Marsh testified that she did not have any responsibilities with regard to classification until 2002. Trial Tr. II at 51, 130, 132. She further testified that the company's customs compliance manual has been completed since she assumed responsibility for customs issues. Trial Tr. II at 130–131, 135.

45. Ms. Marsh testified that Optrex's controller, engineering department, sales director, president, and Sonnennberg were probably responsible for the decision to continue classifying LCD glass panels under HTSUS heading 8531 following the *Sharp* decision. Trial Tr. II at 57–58.

46. Ms. Marsh did not identify Optrex's president, Mr. Matsushita, as a qualified witness in response to Customs's summonses. Mr. Matsushita remained affiliated with the company until 2005. Trial Tr. II at 52–53, 61–63.

47. Ms. Terry Banas, Optrex's former controller, was hired in 1989. She gained responsibility over classification sometime between 1995 and 1996 and remained in charge until May 1998. Trial Tr. II at 73–74. She testified that Optrex initiated the process of writing a formal Customs compliance manual in the 1990s, but never completed it. Ms. Banas further testified that the *Sharp* decision prompted Optrex's management to develop a formal process of classification. Trial Tr. II at 76–77. The court finds her testimony credible.

48. Ms. Banas testified that after *Sharp*, the sales director and president made final classification determinations for certain LCD products that were difficult to classify. Trial Tr. II at 80–81, 96.

49. Ms. Banas testified that she left her position at Optrex because of disagreements with senior management including those concerning customs classification. Trial Tr. II at 82.

II. CONCLUSIONS OF LAW

A. Standard of Review

In "actions brought for the recovery of any monetary penalty claimed under 19 U.S.C. § 1592, all issues are tried *de novo*, including the amount of the penalty." *United States v. Complex Mach. Works Co.*, 23 CIT 942, 946, 83 F. Supp. 2d 1307, 1311 (1999) (citing § 1592(e)). The "law requires the court to begin its reasoning on a clean state. It does not start from any presumption that the maximum penalty is the most appropriate or that the penalty assessed or sought by the government has any special weight." *Id.*

B. LCD Glass Panels: Negligent Classification & Reasonable Care

The Government contends that Optrex negligently misclassified 535 entries of LCD glass panels and character display modules under HTSUS heading 8531, despite clear judicial guidance from *Sharp* and advice from counsel that such LCDs are properly classified under HTSUS heading 9013.

> Section 1592(a)(1) provides in relevant part:
>
> > Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—
> >
> > (A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of—
> >
> > (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
> >
> > (ii) any omission which is material
> >
> > . . . .

§ 1592(a)(1). As defined by the governing regulation, "[a] document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding . . . [d]etermination of the classification, appraisement, or admissibility of merchandise . . . ." 19 C.F.R. pt. 171 app. B(B); *see United States v. Inn Foods, Inc.*, 31 CIT ___ , ___ , 515 F. Supp. 2d 1347, 1357 (2007). If "the monetary penalty is based on negligence, the United States shall have the burden of proof to establish the act or omission constituting the violation, and the alleged violator shall have the burden of proof that the act or omission did not occur as a result of negligence." § 1592(e)(4). Therefore, "[s]tatutory negligence under § 1592, unlike common-law negligence, shifts the burden of persuasion to the defendant to demonstrate lack of negligence." *United States v. Ford Motor Co.*, 463 F.3d 1267, 1279 (Fed. Cir. 2006). In other words, "Customs has the burden merely to show that a materially false statement or omission occurred; once it has done so, the defendant must affirmatively demonstrate that it exercised reasonable care under the circumstances." *Id.* The guidelines for imposition of penalties under § 1592 provide:

> A violation is determined to be negligent if it results from an act or acts (of commission or omission) done through either the failure to exercise the degree of reasonable care and competence expected from a person in the same circumstances either: (a) in ascertaining the facts or in drawing inferences therefrom, in ascertaining the offender's obligations under the statute; or

> (b) in communicating information in a manner so that it may be understood by the recipient. As a general rule, a violation is negligent if it results from failure to exercise reasonable care and competence: (a) to ensure that statements made and information provided in connection with the importation of merchandise are complete and accurate; or (b) to perform any material act required by statute or regulation.

19 C.F.R. pt. 171 app. B(C)(1).

Customs extended the concept of reasonable care to penalty cases after Congress passed the Customs Modernization and Informed Compliance Act ("Mod Act"), which requires importers to exercise reasonable care in entering merchandise into the United States pursuant to 19 U.S.C. § 1484. *See* H. Rep. No. 103–361 at 120–21, *reprinted in* 1993 U.S.C.C.A.N. 2552, 2670–71 (1993); *Optrex Am., Inc.*, Slip Op. 06–73, 2006 WL 1330333, at *9 n.7. To establish a defense of reasonable care,

> the Committee believes that an importer should consider utilization of one or more of the following aids to establish evidence of proper compliance: seeking guidance from the Customs Service through the pre-importation or formal ruling program; consulting with a Customs broker, a Customs consultant, or a public accountant or an attorney; or using in-house employees such as counsel, a Customs administrator, or if valuation is an issue, a corporate controller, who have experience and knowledge of customs laws, regulations, and procedures . . . .
>
> For example, in seeking advice for a classification issue, the Committee expects an importer to consult with an attorney or an in-house employee having technical expertise about the particular merchandise in question.
>
> . . . .
>
> The following are two examples of how the reasonable care standard should be interpreted by Customs: (a) the failure to follow a binding ruling is a lack of reasonable care; and (b) an honest, good faith professional disagreement as to correct classification of a technical matter shall not be lack of reasonable care unless such disagreement has no reasonable basis (e.g., snow skis are entered as water skis).

H. Rep. No. 103–361 at 120.[6]

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[6] The Customs regulation explains that:

> All parties, including importers of record or their agents, are required to exercise reasonable care in fulfilling their responsibilities involving entry of merchandise. These responsibilities include, but are not limited to: providing a classification and value for the merchandise; furnishing information sufficient to permit Customs to determine the final

In response to the Government's claim for penalties under § 1592, Optrex posits the following four defenses: (1) Optrex exercised reasonable care in classifying the subject entries; (2) the parties had a professional disagreement as to the proper classification of LCD glass panels; (3) the Government has not demonstrated that Optrex misclassified those entries excluded from the judgment in *Optrex I*; and (4) some of the Government's claims are barred by the doctrine of *res judicata*. Def. Post-Trial Br. 23–33.

The court finds that Customs has proven by a preponderance of the evidence that Optrex made material false statements or omissions in its entry documents concerning LCD glass panels. *See United States v. Ford Motor Co.*, 29 CIT 827, 847, 395 F. Supp. 2d 1190, 1208 (2005), *aff'd in part, rev'd in part on other grounds*, 463 F.3d 1267 (Fed. Cir. 2006). There is little doubt that the classification of merchandise as presented in customs entry documentation has the tendency to influence Customs' decision in assessing duties and therefore constitutes a material statement under the statute. *See* 19 U.S.C. § 1484(a)(1)(B); *Ford Motor Co.*, 29 CIT at 847, 395 F. Supp. 2d at 1208; *United States v. Thorson Chem. Corp.*, 16 CIT 441, 448, 795 F. Supp. 1190, 1195–96 (1992); *see also* § 1592(a)(1). During the period under review, Optrex classified LCD glass panels under HTSUS heading 8531, which the Federal Circuit has since declared the wrong classification for such devices. *See Optrex I*, 427 F. Supp. 2d at 1197–98. Optrex was on notice of this possibility by virtue of the *Sharp* decision and advice from its counsel. *See Sharp*, 122 F.3d at 1452; Pl. Trial Ex. 1.

Defendant argues that "[c]lassification of the subject LCDs is controlled by the legal analysis recently provided in [*Optrex I*]." Def. Post-Trial Br. 23. Because certain entries currently before this court were excluded from the court's judgment in *Optrex I*, Defendant claims that in the absence of a formal judgment, there is no basis for concluding that those entries were misclassified. The court rejects this argument. In *Optrex I*, the court determined that Optrex's LCD glass panels shared the same characteristics for purposes of classification as those in *Sharp*, and held that they were properly classified under HTSUS heading 9013. *See Optrex I*, 427 F. Supp. 2d at 1198. Though some of the entries included in this action for penalties were

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classification and valuation of merchandise; taking measures that will lead to and assure the preparation of accurate documentation, and determining whether any applicable requirements of law with respect to these issues are met. In addition, all parties, including the importer, must use reasonable care to provide accurate information or documentation to enable Customs to determine if the merchandise may be released. Customs may consider an importer's failure to follow a binding Customs ruling a lack of reasonable care. In addition, unreasonable classification will be considered a lack of reasonable care (e.g., imported snow skis are classified as water skis). Failure to exercise reasonable care in connection with the importation of merchandise may result in imposition of a section 592 penalty for fraud, gross negligence or negligence.

19 C.F.R. pt. 171 app. B(D)(6).

not covered by the court's judgment in *Optrex I*, the parties have stipulated that the vast majority of LCDs in this case constitute glass panels, and therefore have the same technical characteristics as those covered by the judgment in *Optrex I*[7]. For the remaining LCDs not covered by the stipulation, the court is convinced that those entries are also glass panels with the exception of entry 1 in Plaintiff's Trial Exhibit 14.[8] Thus, all of the alleged LCD glass panels listed in Plaintiff's Trial Exhibit 14, with one exception, are indeed LCD glass panels.

With regard to misclassification, *Optrex I* defined the proper classification scheme for the company's LCDs. Pursuant to that decision, classification of LCD glass panels outside of HTSUS heading 9013 is wrong. There is also no requirement that the Court must declare each entry misclassified pursuant to 28 U.S.C. § 1581(a) before this court may impose penalties for negligent conduct in classifying such merchandise. *See* 19 U.S.C. § 1592(a) & (d). The court, therefore, rejects Defendant's contention that some LCD glass panels included in this action may not be subject to civil penalties without a formal ruling on classification.[9] Optrex misclassified the LCD glass panels currently before the court, which amounts to a false statement under § 1592(a). Accordingly, the Government has established that Optrex is responsible for submitting entry documents that contained material false statements. *See* § 1592(a); Pl. Trial Ex. 13. The burden now shifts to Optrex to demonstrate that it exercised reasonable care. *See* § 1592(e)(4).

In assessing whether this burden has been met, the court is particularly influenced by Optrex's response to the 1997 Letter in which Sonnenberg advised the company to seek a binding customs ruling concerning the proper classification of LCD glass panels in light of *Sharp*. Pl. Trial Ex. 1. After reviewing the trial testimony and documentary evidence, the court finds no justification for Optrex's failure

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[7] In the Pretrial Order, the parties stipulated that Plaintiff's Trial Exhibit 14 identified all LCD products subject to this action. Pl. Trial Ex. 14. The parties also stipulated that all part numbers with prefixes "FRS," "FSD," "FSS,' "FTD," "FTS," "GTD," "NRD," "NSD," "NTD," "NTX," "VTS," and "WSD" describe LCD glass panels. P.O. Schedule C ¶24.

[8] The court concludes that entries 2–13 in Plaintiff's Trial Exhibit 14 constitute LCD glass panels based upon trial testimony and documentary evidence. Trial Tr. I at 105–06; Pl. Trial Ex. 16 at 001198. The court is also satisfied that part number WSD–16770ACPZ–CU is an LCD glass panel pursuant to trial testimony by Mr. Houck. Trial Tr. I at 101–02. However, because the court cannot find a reference for entry 1 in Plaintiff's Trial Exhibit 14, it will be excluded from the penalty calculation and total lost revenues. Pl. Trial Ex. 14 at 1.

[9] As a peripheral matter, Optrex contends that the doctrine of *res judicata* precludes the court from imposing penalties on those entries covered by *Optrex I*. This argument lacks merit. While judgment is indeed final with respect to the classification of entries in *Optrex I*, the government may pursue civil penalties against an importer for the negligent importation of that merchandise into the commerce of the United States. *See* § 1592(a) & (d). The two causes of action involve wholly independent claims. *Cf. United States v. Murray*, 5 CIT 102, 108, 561 F. Supp. 448, 454–55 (1983).

to act in accordance with the well informed advice of its attorneys. Pl. Trial Ex. 1. In relevant part, the 1997 Letter states as follows:

> The *Sharp* decision may have an impact on the manner in which certain LCD displays imported by Optrex are classified. *At a minimum, it may be advisable for Optrex to seek binding rulings from Customs with regard to certain products.*
>
> . . . .
>
> As you know, it is Optrex's responsibility to determine the proper tariff classification of merchandise which it imports. It is our understanding that Optrex does not import any "glass only" panels similar to those described in the *Sharp* decision. Rather, it is our understanding that the "glass only" panels imported by Optrex are "character" displays with less than 80 characters. *Nevertheless, we believe that it would be advisable for Optrex to seek a binding ruling from Customs regarding the tariff classification of LCD character "glass only" displays.*
>
> . . . .
>
> We also recommend that Optrex review its product line to determine whether it imports any graphic LCD "glass only" displays. In keeping with the *Sharp* decision, *there is a strong argument that any such LCD glass panels are properly classifiable within tariff subheading 9013.80.60, HTSUS. We would recommend that Optrex immediately begin classifying any such LCD glass panels within tariff subheading 9013.80.70, HTSUS, in keeping with the Sharp decision.*
>
> Please note, however, we may be able to argue that the *Sharp* decision does not dictate the tariff classification of certain graphic LCD "glass only" displays depending upon their structure and function. *In that case, we would recommend that Optrex request a binding ruling from Customs regarding the tariff classification of the specific graphic LCD "glass only" displays. In the interim, we would still recommend that Optrex classify the graphic LCD "glass only" displays in keeping with the Sharp decision.* We could then ask Customs to withhold the liquidation of these entries pending the resolution of our ruling request. If Customs liquidates these entries prior to the resolution of our ruling request, we can file protests in order to secure the refund of any excess duties paid at the time of entry.

Pl. Trial Ex. 1 at 1, 3–4 (emphasis added).

Optrex contends that if properly construed, the 1997 Letter suggests that its classification scheme is consistent with the "decision tree" and *Sharp*. Def. Post-Trial Reply Br. 5–6; Pl. Trial Ex. 7. It cites the following excerpt from the 1997 Letter to support this interpretation: "It is our understanding that Optrex does not import any

'glass only' panels similar to those described in the *Sharp* decision. Rather, it is our understanding that the 'glass only' panels imported by Optrex are 'character' displays with less than 80 characters." Pl. Trial Ex. 1 at 3; Trial Tr. II at 65–66; Def. Post-Trial Reply Br. 6. This language supposedly relieved Optrex of an obligation to seek a binding customs ruling because Sonnenberg expressed doubt with regard to the technical similarities between Optrex's LCD glass panels and the LCD glass panels in *Sharp*. Def. Post-Trial Reply Br. 5–6. Therefore, according to Optrex's understanding of the 1997 Letter, the classification scheme outlined in *Sharp* did not apply to its line of LCDs. Optrex further argues that "the law does not and should not go so far as to require that each importer seek a binding ruling in order to show that it exercised reasonable care." Def. Post-Trial Br. 26. It also claims to have "extensively consulted with both [Customs professionals and in-house technical experts] and used that information along with information provided directly or indirectly from Customs to create an accurate, reliable, and dependable . . . classification system," thereby fulfilling its duty to exercise reasonable care under § 1592. Def. Post-Trial Br. 27.

The court accepts that Optrex established a system for classification of LCDs, as reflected in the 1995 letter from Sonnenberg to Customs and ultimately memorialized in the November 19, 1999 letter to Customs, which contained the "decision tree." Def. Trial Ex. O at 02283–84; Pl. Trial Ex. 1 & 3; Trial Tr. II at 75–76, 85–86.[10] The court also acknowledges that Customs changed its position, albeit internally, with regard to the classification of LCD glass panels prior to 1997. Def. Trial Ex. O at 01048, 01078, 01083; Trial Tr. I at 54–56. Though of little relevance to the proper classification of LCD glass panels, the court understands that classification of LCD modules has been difficult over the years in light of rapid advances in LCD technology. Trial Tr. I at 85; Pl. Trial Ex. 7 at 5, 8–9; Pl. Trial Ex. 10 at 11.

Taken together, however, these factors do not justify Optrex's decision to disregard the formal legal advice of its attorneys. Despite Sonnenberg's apparent uncertainty as to whether Optrex imported "glass only" displays similar to those in *Sharp*, there is an unmistakeable theme of caution throughout the 1997 Letter, which is manifested in Sonnenberg's repeated suggestions that Optrex seek a binding ruling to determine the proper classification of its LCD panels. Pl. Trial Ex. 1 at 1, 3, 4. As Optrex's sole legal advisor in this matter, Sonnenberg represented the only source of credible advice regarding the classification of LCDs. None of the witnesses presented at trial communicated an independent understanding of

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[10] Ms. Banas testified that Optrex began writing a Customs compliance manual sometime during the mid 1990s, which had not been completed in 1998 when Ms. Banas left the company. Trial Tr. II at 75.

Sharp or seemed sufficiently knowledgeable to determine the proper classification of a given LCD.[11] Trial Tr. II at 76–79. In response to Customs summonses during the penalty investigation, Optrex was unable to produce a single witness with formal training in customs classification. Mr. Houck is an engineer with technical knowledge of LCDs; however, he is not qualified to advise the company on the proper classification scheme for its merchandise. Trial Tr. I at 110–15. The fact that Mr. Houck "would have advised Optrex that the *Sharp* opinion [did] not apply because [the LCD panels were] an entirely different type of LCD – outside of Optrex's market" carries little weight considering Mr. Houck's limited training in customs matters. Def. Post-Trial Br. 13; Trial Tr. II at 112; Trial Tr. I at 110–15. That the classification process required collaboration among various departments is also unavailing. Ultimately, there was an officer within the company who had authority to make classification decisions. Trial Tr. II at 81–82, 96. Optrex did not produce that officer as a witness.[12] Moreover, Optrex did not rely on its customs broker for classification advice. *See* H.R. Rep. No. 103–361 at 120. It adopted the opposite practice of supplying its broker with classification information and updating that information as needed. The court rejects Optrex's attempt to shift responsibility for classification to its customs broker, as it is well settled that the *importer* bears responsibility for classification of its merchandise. *See* § 1484(a); Pl. Trial Ex. 1 at 3; Trial Tr. I at 127, 146; Def. Post-Trial Reply Br. 7–8.[13]

Accordingly, the court assigns considerable weight to the 1997 Letter and views the carefully considered professional advice contained therein as placing an affirmative duty on Optrex to actively respond. The fact that Optrex seems to have disregarded the advice of its attorneys demonstrates a lack of reasonable care and outweighs its argument that the continued misclassification of LCD glass panels constitutes a good faith professional disagreement. Def. Post-Trial Br. 30–31. In support of this argument, Optrex claims that it classified LCD glass panels on the basis of their "end use" or "principal use" as signaling devices. *See, e.g.*, *Agatec Corp. v. United States*, Slip Op. 07–92, 2007 WL 1649841, at *4 (2007) (not reported in F. Supp.); *see also Avecia v. United States*, 30 CIT ___ , ___ , 469 F. Supp. 2d 1269, 1290 (2006); Trial Tr. I at 45–47; Trial Tr. II at 106; Pl. Trial Ex. 7 at 4. This classification methodology may have been

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[11] Ms. Banas testified that Optrex sent employees Mike Manese and Dee Tolbert to a two-day training course on Customs classification. She did not characterize it as "formal training." Trial Tr. II at 74.

[12] Ms. Banas testified that Optrex's president and sales director made the final decisions with regard to classification. Trial Tr. II at 80–82.

[13] This is not to say that in some circumstances an importer may rely on its customs broker to classify imported merchandise, and that such reliance might mitigate the penalty for an importer's negligent conduct under § 1592(a). Because Optrex adopted the opposite approach with Nippon, there is little support for this defense. Def. Post-Trial Reply Br. 7–8.

reasonable prior to *Sharp*, but the Federal Circuit clarified the proper standard for classifying LCD glass panels, rejecting the characterization of heading 9013 as a "basket provision," and instead focusing the analysis on whether LCD glass panels fit within the technical description of liquid crystal devices contemplated under HTSUS heading 9013 and the accompanying Explanatory Notes. *See Sharp*, 122 F.3d at 1449–50. In other words, the "relative specificity" analysis discussed in *Sharp* defines the standard for classifying LCD glass panels, thereby eliminating "end use" as a relevant consideration. *Id.*; Trial Tr. I at 82; Pl. Trial Ex. 7 at 4. Similarly, Optrex cannot rely on disagreements among Customs trade specialists that predate *Sharp* to justify its classification practices after receiving the 1997 Letter.[14] Def. Post-Trial Br. 7–11; Trial Tr. I at 50–56, 83–84.

Optrex made no effort to comply with the 1997 Letter, nor did it voice disagreement with its recommendations. While the act of consulting with an attorney, in itself, does not establish reasonable care under these circumstances, *see* H.R. Rep. No. 103–361 at 120, surely after receiving the formal advice of its attorneys, Optrex was under an obligation to actively pursue the issues raised, which it failed to do. As a result, Optrex continued to classify LCD glass panels under the false premise that classification under HTSUS heading 8531 was proper. This constitutes negligence.

Although the Government seeks to collect penalties for Optrex's misclassification of LCD glass panels prior to receiving the 1997 Letter, the court cannot assign the same level of culpability for acts committed during that period.[15] Recognizing that the *Sharp* decision provided notice that the basis for classifying LCD glass panels depended on certain design characteristics rather than "end use," the court is nonetheless sympathetic to Optrex's view that the LCD glass panels at issue in *Sharp* were distinguishable based on their size and resolution and that "end use" remained a relevant factor in clas-

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[14] Defendant also makes much of the fact that the Port of Chicago ruled in favor of Optrex in a protest submitted on part number NTD–16210ABD–CD, which is a type of LCD glass panel included in Plaintiff's Exhibit 14. Pl. Trial Ex. 14. Optrex challenged classification under HTSUS heading 8531, and sought classification under HTSUS heading 8473 as part of an automatic processing machine. Def. Trial Ex. U at 05023. The Port of Chicago granted the protest, but provided no explanation for its decision. Based on the credible testimony of Gregory Westrick, this protest determination appears to be an aberration, as the overwhelming majority of protests submitted by Optrex were denied. Trial Tr. I at 85–86. Accordingly, Optrex cannot rely on this determination as evidence of Customs' confusion over the proper classification of LCDs. Furthermore, while it is disturbing that subsequent protests concerning LCD glass panels with identical part numbers to those at issue here have been awarded classification outside of HTSUS heading 9013, those protests occurred well after the period under review. Def. Trial Ex. U at 04950, 04956.

[15] Optrex's maintenance of an accrual spreadsheet does not demonstrate that it knowingly misclassified LCD glass panels. Pl. Trial Ex. 2. As Ms. Marsh testified, Optrex applied a "blended rate" that incorporated various HTSUS headings, including heading 9013, to track potential liability for duties on unliquidated entries. Trial Tr. II at 66–68. It is a standard accounting practice. Trial Tr. II at 67.

sifying such LCDs. Trial Tr. II at 102–03, 106, 112; Trial Tr. I at 117–19; Def. Trial Ex. O at 01686; Pl. Trial Ex. 7 at 4. In this instance, the 1997 Letter triggered a duty on the part of Optrex to *actively* investigate whether its classification of LCD glass panels was in accordance with law.[16] It therefore established a dividing line between conduct that is negligent and conduct that could be construed as reasonable. For these reasons, Optrex is subject to penalties for negligent classification of LCD glass panels between November 13, 1997 through June 29, 1999.[17]

C. LCD Character Display Modules

The Government also seeks penalties for negligent misclassification of certain LCD character display modules. Pl. Post-Trial Br. 19–20; Pl. Trial Ex. 14 at 10; Trial Tr. I at 96–98.[18] Optrex classified these entries under HTSUS heading 8531 as "dedicated to a specific signaling function." Pl. Trial Ex. 1 at 2; *see Optrex I*, 427 F. Supp. 2d at 1191–92. The Government argues that Customs "has developed a guideline for determining if a character display module is principally used for signaling." Pl. Post-Trial Br. 19. It states that "if a character display module can display no more than 80 characters, then, in the absence of any information to the contrary, it is deemed to belong to the class or kind of merchandise that is principally used for signaling." Pl. Post-Trial Br. 19. Consequently, "character display modules that can display more than 80 characters are deemed not to belong to the class or kind of merchandise that is principally used for signaling." Pl. Post-Trial Br. 19. The Government asserts that Optrex "was aware of this '80 character rule' when it made its subject entries by virtue of CBP's rulings upon the subject." Pl. Post-Trial Br. 19.

> In *Optrex II*, the Court of Appeals explained the "80 character rule" as follows:
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> Under this principle, Customs considers LCD modules capable of displaying eighty characters or less as being operationally limited to performing signaling functions. Because Customs has consistently applied this guideline . . ., it is due some deference . . . . Moreover, it is merely a guideline in determining

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[16] The court does not consider the "decision tree" a sufficient response to the 1997 Letter. It was created in 1999, two years after receiving the 1997 Letter, and after Optrex learned it was under investigation. Furthermore, the "decision tree" merely outlines the company's classification scheme without addressing the specific questions raised in the 1997 Letter.

[17] The court has determined that 10 business days after Sonnennberg sent the 1997 Letter is a reasonable point from which to begin assessing penalties.

[18] The invoice part numbers for these entries are: DMC 40457, DMC 40457N, DMC 40457N–EB, DMC 40457N–SEW–B, DMC 40457NYJ–LY–D, and DMC 40457NY–LY–B. Pl. Trial Ex. 14 at 10.

> whether a good is operationally limited to signaling. When properly used as a guideline, and not as a rigid rule, we see no harm in the analysis. However, an importer should not be precluded from establishing that a device capable of displaying more than eighty characters is operationally limited to signaling, or that a device capable of displaying eighty characters or less is not so operationally limited. Ultimately, the inquiry must remain whether the device performs a signaling function.

475 F.3d at 1371.

The court holds that Optrex exercised reasonable care in classifying its LCD character display modules during the period under review. It was permissible for Optrex to classify these devices under HTSUS heading 8531 based on characteristics that limited their function to signaling. Contrary to Plaintiff's suggestion, the 1997 Letter does not explicitly instruct Optrex to classify these particular LCDs according to the "80 character rule." Pl. Post-Trial Br. 19. The court reads the 1997 Letter as recommending that Optrex classify a given LCD character display module under HTSUS heading 8531 if the device is either "dedicated to a specific signaling function" or "[has] less than 80 characters." Pl. Trial Ex. 1 at 2. Because the LCD character display modules at issue had permanently etched icons, Optrex reasonably concluded that they were limited to signaling, despite exceeding 80 characters. P.O. Schedule C ¶5. Although this has since been deemed improper, it does not constitute negligence.

D. Damages

1. Recovery of Duties

Pursuant to 19 U.S.C. § 1592(d), "if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed." § 1592(d). As a result of Defendant's violation of § 1592(a) discussed herein, Customs is entitled to lost revenues in the amount $959,635.04, which reflects the difference in duties owed under HTSUS heading 9013 and duties actually paid on the merchandise negligently classified under heading 8531 between October 12, 1997 through June 29, 1999. This amount shall be reduced by $45,992.54 to offset duties already imposed on entries subject to the court's judgment in *Optrex I*. *See generally Optrex I*, 427 F. Supp. 2d 1177; Def. Post-Trial Br. Attach. C. This amount shall further be reduced by $69.71, which reflects the alleged loss of duty from entry 1 in Plaintiff's Trial Exhibit 14. Pl. Trial Ex. 14 at 1. Therefore, Customs is entitled to $913,572.79 in lost revenue with interest. *See, e.g.*, *United States v. Yuchius Morality Co., Ltd.*, 26 CIT 1224, 1240 (2002) (not reported in F. Supp.).

2. Civil Penalties

Under § 1592(c)(3), "[a] negligent violation of subsection (a) of this section is punishable by a civil penalty in an amount not to exceed . . . the lesser of . . . the domestic value of the merchandise" or "two times the lawful duties, taxes, and fees of which the United States is or may be deprived" or "if the violation did not affect the assessment of duties, 20 percent of the dutiable value of the merchandise." § 1592(c)(3). It is "within the court's discretion to 'determine a penalty within the parameters set by the statute.' " *United States v. Matthews*, 533 F. Supp. 2d 1307, 1316 (2007) (quoting *United States v. Modes, Inc.*, 17 CIT 627, 636, 826 F. Supp. 504, 512 (1993)). The Court has outlined fourteen non-exclusive factors that may be considered in determining civil penalties under § 1592(c). *See Complex Mach. Works Co.*, 23 CIT at 949–50, 83 F. Supp. 2d at 1315; *United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1354, 1356–57 (Fed. Cir. 2007); *Ford Motor Co.*, 463 F.3d at 1285. They include:

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

Complex Mach. Works Co., 23 CIT at 949–50, 83 F. Supp. 2d at 1315. The court will address only those factors that it considers relevant under the circumstances.

(i) Defendant's Good Faith Effort to Comply with the Statute

The court cannot credit Optrex with having made a good faith effort to comply with the statute. *See* 19 C.F.R. Pt. 171 app. B(G)(2). The guidelines suggest that "[t]o obtain the benefit of this factor, the violator must exhibit extraordinary cooperation beyond that expected from a person under investigation for a Customs violation." *Id.* Optrex did not exhibit this level of cooperation in responding to Customs' repeated summonses for records and documents and requests to produce persons responsible for classification decisions. Pl. Trial Ex. 5. Apart from the delay in producing the requested docu-

ments, Optrex provided an unresponsive witness in Mr. Houck, as he was unqualified to answer questions concerning classification. Trial Tr. I at 112–115. This is especially troubling in light of Ms. Banas's testimony identifying Optrex's sales manager and president as the officers with authority to make borderline classification decisions. Trial Tr. II at 80–81, 96. Indeed, the court questions Optrex's sincerity in designating only Mr. Houck as the witness most qualified to respond to the carefully articulated requests contained in the summonses. Pl. Trial Ex. 5 at E000173, E000184. Thus, the court finds no reason to mitigate based on Optrex's efforts to comply with the investigation.

(ii) Defendant's History of Previous Violations

This factor works in favor of Optrex, as there is no evidence of past violations of § 1592(a).

(iii) Public Interest in Ensuring Compliance With the Regulations Involved

There is a significant public interest in upholding certain standards of conduct in the importation of foreign goods into the United States. While in this case Optrex is assigned the lowest level of culpability under § 1592(a), for the benefit of the trade community it is important to clearly define conduct that is negligent. In addition, this particular decision will encourage the practice of "shared compliance," as Optrex's liability for negligence arises in large part from its failure to request a binding classification ruling from Customs. These considerations do not favor mitigation.

(iv) Economic Benefit Gained by Defendant Through the Violation

Optrex obtained a substantial economic benefit from classifying LCD glass panels under HTSUS heading 8531, rather than heading 9013. The former carried duties between 0.5% to 1.4% *ad valorum* during the period under review, whereas the latter carried a much higher duty, between 1.6% and 6.3% *ad valorum*. Pl. Trial Ex. 13; Compl. ¶7. According to Plaintiff's Exhibit 14, this amounted to $959,635.04 in unpaid duties. Pl. Trial Ex. 13 at 81; Pl. Trial Ex. 14 at 9–10; Compl. ¶16. Regardless of the relative size of Optrex's overall revenues, this represents a considerable economic benefit. The court again finds no evidence warranting mitigation.

These factors demonstrate a lack of cooperation during the investigation and strong policy reasons for a heightened penalty, except the fact that Optrex has no past violations, which carries some weight because it suggests that this may be an isolated violation, as opposed to habitual misconduct under the statute. This court has found no mandate requiring that the default starting point for imposing pen-

alties should be the statutory maximum.[19] *See United States v. Modes, Inc.*, 17 C.I.T. 627, 635, 826 F. Supp. 504, 512 (1993). The "plain language of the statute establishes only a *maximum* penalty, but makes no provision for a minimum penalty." *Id.* (emphasis in original); *see* § 1592(c). Therefore, acting with the discretion taught by case law, the court will begin the evaluation of the penalty amount at the midpoint where it may be subject to upward or downward departure based on mitigating and aggravating factors. After careful consideration, the court holds Optrex liable for one and one-half "times the lawful duties, taxes, and fees of which the United States [was] deprived" between November 13, 2007 through June 29, 1999. § 1592(c)(3)(A)(ii). This amount reflects a heightened penalty for the aggravating factors mentioned above, with a partial reduction for an otherwise clean record.

If any of these conclusions of law shall more properly be findings of fact, they shall be deemed so.

Slip Op. 08–65

CANADIAN LUMBER TRADE ALLIANCE, *et al.*, Plaintiffs, v. THE UNITED STATES, *et al.*, Defendants.

Before: Pogue, Judge
Consol. Ct. No. 05–00324

JUDGMENT

This consolidated case having been duly submitted for decision, and the Court, after due deliberation, having rendereddecisions herein; and

Said decisions having been appealed to the Court of Appealsfor the Federal Circuit; and

Said appeal having resulted in a decision affirming-in-part,vacating-in-part, and remanding, *Canadian Lumber Trade Alliance v. United States*, 517 F. 3d 1319 (Fed. Cir. 2008); and

The Federal Circuit having issued its mandate after appeal; hereby

Now, in conformity with those decisions and mandate, it is

ORDERED that the motion of the Government of Canada for judgment on the agency record is **denied;**

ORDERED that the motions of the Defendants and Defendant-

[19] There are regulatory guidelines to be applied by Customs personnel in administrative pre-penalty proceedings. See 19 C.F.R. Pt. 171 app. B. These are not binding on the court.

Intervenors for judgment on the agency record as against the Government of Canada are **granted;**

ORDERED that the motion of the Canadian Wheat Board for judgment on the agency record is **granted;**

ORDERED that the motions of the Defendant and Defendant-Intervenors for summary judgment as against the Canadian WheatBoard are **denied;**

ORDERED that the complaints of the Canadian Lumber Trade Alliance, Norsk Hydro Canada, Inc., Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and the Free Trade Lumber Council are **dismissed as moot;** and it is further

ORDERED that the Government of Canada's complaint is **dismissed;** and it is further

ORDERED, ADJUDGED and DECREED that pursuant to Section 408 of the North American Free Trade Implementation Act, 19 U.S.C. § 3438,the Continued Dumping and Subsidy Offset Act of 2002, 19 U.S.C. § 3438, does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico; and it is further

ORDERED, ADJUDGED and DECREED that Defendant W. Ralph Basham, Commissioner of the United States Bureau of Customs and Border Protection, his employees, officers, agents, attorneys, and successors in office are **permanently enjoined**, as of July 14, 2006 from making any continued dumping and subsidy offsets, payments or distributions, to affected domestic producers, as defined by 19U.S.C. § 1675c (2005), to the extent they derive from duties assessed pursuant to countervailing duty orders, antidumping duty orders, or findings under the Antidumping Act of 1921, upon hardred spring wheat from Canada imported into the United States.

Slip Op. 08–66

TRUSTEES IN BANKRUPTCY OF NORTH AMERICAN RUBBER THREAD CO., INC., FILMAX SDN. BHD., HEVEAFIL USA, INC., AND HEVEAFIL SDN. BHD., Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg, Senior Judge
Consol. Court No. 05–00539

[Commerce's refusal to initiate a changed circumstances reviewis remanded.]

Date: June 10, 2008

Miller & Chevalier Chartered (*Peter J. Koenig*) for Plaintiff Trustees in Bankruptcy of North American Rubber Thread Co., Inc.

White & Case, LLP (*Walter J. Spak, Emily Lawson, and Jay C. Campbell*) for Plaintiffs Filmax Sdn. Bhd., Heveafil USA, Inc., and Heveafil Sdn. Bhd.

Gregory G. Katsas, Acting Assistant Attorney General; United States Department of Justice; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, (*Stephen C. Tosini*); *David W. Richardson*, Of Counsel, Office of Chief Counsel for Import Administration, Department of Commerce for Defendant United States.

OPINION

GOLDBERG, Senior Judge: This case is before the Court following a court-ordered remand. *See Tr. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 31 CIT ___ , 533 F. Supp. 2d 1290 (2007) (***"NART"***). In *NART*, the Court ordered the U.S. Department of Commerce (**"Commerce"**) to provide a reasonable explanation for its departure from past agency practice, or in the alternative to conduct a changed circumstances review. For the reasons stated below, the Court remands Commerce's results for further proceedings consistent with this opinion.

I. *STANDARD OF REVIEW*

The Court has jurisdiction under 28 U.S.C. § 1581(i). When reviewing an action under section 1581(i), the Court will set aside a decision of Commerce if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000); *see* 28 U.S.C. § 2640(e) (2000).

II. *BACKGROUND*

The procedural history of this case is set forth in greater detail in the Court's previous opinions. *See NART*, 31 CIT at ___ , 533 F. Supp. 2d at 1291–93; *Tr. in Bankr. of N. Am. Rubber Thread Co. v. United States*, 30 CIT ___ , ___ , 464 F. Supp. 2d 1350, 1351–53 (2006). However, the relevant facts are as follows: In 1992, Commerce published an antidumping duty order on imports of extruded

rubber thread from Malaysia. When North American Rubber Thread Co. (**"NART"**),[1] the sole domestic manufacturer of extruded rubber thread, filed for bankruptcy, Filmax Sdn. Bhd, Heveafil USA Inc., and Heveafil Sdn. Bhd (collectively **"Heveafil"**) requested a changed circumstances review. NART agreed that the antidumping duty order should be revoked as to entries after October 1, 2003. Heveafil, however, argued that the order should be revoked back to October 1, 1995; a date effectively encompassing all of its entries.[2] Upon investigation, Commerce revoked the antidumping duty order as to entries after October 1, 2003.

After this review, NART changed its position and asked Commerce to conduct a second changed circumstances review to determine whether the order should be revoked to October 1, 1995. Commerce refused, arguing that revoking an order subject to a completed administrative review would violate long-standing agency practice. NART and Heveafil challenged this refusal.[3] In *NART*, the Court noted that Commerce, contrary to its position that it was long-standing agency practice not to revoke an order subject to a completed review, had done so on several occasions. Accordingly, the Court ordered Commerce to explain its departure from its past practice, or in the alternative, to conduct a changed circumstances review. On remand, Commerce again refused to conduct a changed circumstances review arguing: (1) it lacked the authority to revoke the antidumping duty order; and (2) that the Court incorrectly interpreted its prior conduct as establishing an agency practice.

III. *DISCUSSION*

Commerce must conduct a changed circumstances review whenever an interested party has shown a change "sufficient to warrant a review." 19 U.S.C. § 1675(b)(1) (2000). Here, Commerce's refusal to conduct a second changed circumstances review was not based on the merits of NART and Heveafil's request, but instead on its interpretation of the statutory framework. In *NART*, the Court provided specific remand instructions and the Court must now analyze whether Commerce's results comply with these instructions.

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[1] NART refers both to the former company and the plaintiffs in the current case, Trustees in Bankruptcy of North American Rubber Thread Co., Inc., its successor-in-interest.

[2] Revocation of the order through October 1, 1995 would result in the revocation of any duties incurred between October 1, 1995 and September 30, 1996 only. Liquidation during this period was suspended due to ongoing litigation related to Commerce's periodic review of that period. *See Heveafil Sdn. Bhd. v. United States*, Appeal Nos. 02–1085, 02–1086, 02–1087 (Fed. Cir. Mar. 19, 2003) (unpublished). That case has been stayed pending the outcome of the current action. All entries from the other periods have previously been liquidated.

[3] NART and Heveafil brought separate actions challenging Commerce's refusal to conduct a second changed circumstances review. These actions were consolidated to form the present action.

A. Commerce's Interpretation of the Statutory Antidumping Framework

In Commerce's view, its decision not to conduct a changed circumstances review was based on the fact that the only unliquidated entries, the entries for the period from October 1, 1995 to September 30, 1996, were already subject to a completed review. In Commerce's view, the principle of "administrative finality" unambiguously prevails over any discretion the agency has in selecting an effective date of revocation; or in short, that the completion of an administrative review unambiguously precludes the agency from retroactively revoking an order. The *NART* Court, however, already rejected this argument. *See NART*, 31 CIT at ___ , 533 F. Supp. 2d at 1293–95. Commerce's current remand results are only a more thorough attempt to support an already rejected interpretation of the statutory framework.

B. Commerce is Unable to Provide a Reasonable Explanation for Its Deviation From Past Agency Conduct

Commerce also fails to provide a reasonable explanation for its departure from its past practice. Generally, " 'an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.' " *SKF USA, Inc. v. United States*, 263 F.3d 1369, 1382 (*quoting Transactive Corp. v. United States*, 91 F.3d 232, 237 (D.C. Cir. 1996)). Here, Commerce argues that it is not agency practice to revoke orders already subject to completed administrative reviews. According to Commerce, the prior scope rulings which appear to adopt this practice were instead the result of litigation settlements. *See, e.g., Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands*, 67 Fed. Reg. 9956, 9956–57 (Dep't Commerce Mar. 5, 2002) (final results of changed circumstances review). In Commerce's view, any subsequent confusion regarding its past practice was solely due to "inartful drafting" by the agency. The *NART* Court, however, already rejected Commerce's argument that its prior scope rulings lack precedential value. *NART*, 31 CIT at ___ , 533 F. Supp. 2d at 1296 n.9. Additionally, Commerce has previously revoked orders pursuant to its authority under 19 U.S.C. § 1675(b) and (d) and/or § 1677m(h), or its ability to determine an effective date of revocation. *See, e.g., Porcelain-on-Steel Cookware from Mexico*, 67 Fed. Reg. 19553, 19554 (Dep't Commerce Apr. 22. 2002) (final results of changed circumstances review). Commerce fails to provide any explanation for treating the current situation differently–beyond the litigation settlement rationale rejected in *NART*. *See NART*, 31 CIT ___ , 533 F. Supp. 2d at 1296 n.9. As such, Commerce has again failed to provide a reasonable explanation for its deviation from past agency practice.

IV. *CONCLUSION*

For the foregoing reasons, this matter is remanded for further proceedings consistent with this opinion. On remand, Commerce shall conduct the second changed circumstances review requested by NART and Heveafil. A separate order will be issued accordingly.