# Decisions of the United States Court of International Trade

Slip Op. 04–32

TUNG FONG INDUSTRIAL CO., INC., *Plaintiff*, v. UNITED STATES, *Defendant.*

Court No. 01–00070

[U.S. Department of Commerce's antidumping duty determination is remanded for action consistent with this opinion.]

Decided: April 7, 2004

*Miller & Chevalier* Chartered (*Peter J. Koenig*), for Plaintiff.
*Peter D. Keisler*, Assistant Attorney General; *David M. Cohen*, Director, and *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *William G. Iasi*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

## OPINION

RIDGWAY, Judge:

This action contests the final affirmative antidumping determination of the U.S. Department of Commerce, imposing substantial duties on certain stainless steel butt-weld pipe fittings ("fittings") produced in the Philippines and exported to the United States by companies including plaintiff Tung Fong Industrial Company, Inc. ("Tung Fong"), a small, family-owned manufacturer of such fittings. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Butt-Weld Pipe Fittings From the Philippines*, 65 Fed. Reg. 81,823 (Dec. 27, 2000) ("*Final Determination*"), adopting the *Issues and Decision Memo* (Dec. 27, 2000), Pub. Doc. 141 ("*Decision Memo*").

Jurisdiction is predicated on 28 U.S.C. § 1581(c) (1994).[1] In a matter such as this, the Commerce Department's findings, conclusions

[1] Except as otherwise expressly noted, statutory citations in this opinion are to the 1994 version of the U.S. Code. However, the pertinent text of the cited provisions remained the same at all times relevant herein.

and determinations must be sustained unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994).

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which Tung Fong urges the revocation of the antidumping duty order associated with the determination at issue here, because the petition that ultimately led to that determination falsely alleged that Tung Fong had "home market" sales of the relevant merchandise. *See* Plaintiff's Memorandum of Law in Support of Motion for Judgment on the Agency Record ("Pl.'s Brief") at 1–4; Plaintiff's Reply to [the Department of Commerce's] Opposition Memorandum ("Pl.'s Reply Brief") at 2–3.

In the alternative, Tung Fong challenges both the Commerce Department's decision to resort to the use of "adverse facts available" in calculating the company's dumping margin, and the particular adverse facts selected by the agency for use in those calculations. *See* Pl.'s Brief at 4–6; Pl.'s Reply Brief at 4–8. And, finally, Tung Fong disputes the Commerce Department's "all others" rate, charging that it impermissibly includes dumping margins based on "adverse facts available." *See* Pl.'s Brief at 6–7; Pl.'s Reply Brief at 8.

Plaintiff's motion is opposed by defendant, the United States ("the Government"), which maintains that the determination at issue should be sustained in all respects. *See* Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.'s Brief") at 1, 12–13, 35.

Plaintiff's motion is granted in part. For the reasons discussed below, this action is remanded to the Department of Commerce to enable it to reconsider the adequacy of the underlying antidumping duty petition, and the consequences of the falsity of the petition's allegations of home market sales by Tung Fong; to allow the Department to reconsider its decision to resort to adverse facts available in calculating Tung Fong's antidumping duty margin (and, if appropriate, to reevaluate the particular adverse facts selected); and to accord the agency the opportunity to fully articulate the reasoning underlying its findings, conclusions and determinations.

## I. ***Background***

### A. *The Legal Framework*

Dumping occurs when goods are imported into the U.S. and sold at a price lower than their "normal value." 19 U.S.C. §§ 1673, 1677(34). Normal value is calculated using either the exporting market price (i.e., the price in the "home market" where the goods are produced), or an appropriate third country market price, or the cost of production of the goods. 19 U.S.C. § 1677b. The difference between the normal value of the goods and the U.S. price is the "dumping margin." 19 U.S.C. § 1677(35). When goods imported into the U.S. are deter-

mined to have been dumped, antidumping duties equal to the dumping margin may be imposed against the goods. 19 U.S.C. § 1673(2)(B).

When normal value is based on sales of goods that are physically similar — but not identical — to the goods sold in the U.S., adjustments may be made to normal value to account for the differences in the goods' costs of production. 19 U.S.C. §§ 1677(16) (B)–(C), 1677b(6)(C)(ii); 19 C.F.R. § 351.411. Those difference in merchandise ("difmer") adjustments are calculated based on the differences in the costs of materials, labor, and variable factory overhead attributable to the physical differences in the goods. Antidumping Manual, Chap. 8 at 49–50 (Dept. of Comm., Jan. 22, 1998) ("AD Manual").

A U.S. industry claiming injury due to dumping may petition the Department of Commerce for an antidumping investigation into the alleged dumping. 19 U.S.C. § 1673a(b). The petition must allege both dumping and injury to the industry as a result of that dumping, and must also include "information reasonably available to the petitioner" supporting those allegations. 19 U.S.C. §§ 1673, 1673a(b)(1). In addition, to the extent that it is reasonably available, the petition must include factual information (i.e., documentary evidence) relevant to, for example, the calculation of the normal value of the allegedly dumped goods. 19 C.F.R. § 351.202(b)(7)(i)(B).

When an antidumping petition is filed with the Commerce Department, the agency must verify that the petition includes the requisite allegations of dumping and injury. 19 U.S.C. § 1673a(c). Further, on the basis of sources readily available to it, the agency must confirm "the accuracy and adequacy of the evidence provided in the petition." 19 U.S.C. § 1673a(c)(1)(A)(i); 19 C.F.R. § 351.203(B)(1). If the Commerce Department determines that the petition fulfills all statutory and regulatory requirements, an antidumping investigation is initiated. 19 U.S.C. §§ 1673a(b)(1), 1673a(c)(1)(A)(i).

Generally, all known exporters and producers of the goods at issue are investigated individually, and are therefore assigned individual dumping margins, unless it would be impracticable to do so. 19 U.S.C. § U.S.C. 1677f–1(c); 19 C.F.R. § 351.204(c)(1). Where it would be impracticable for the Commerce Department to individually investigate all known exporters and producers, a subset of the exporters and producers may be selected for individual investigation. 19 U.S.C. § 1677f–1(c)(2); 19 C.F.R. § 351.204(c)(2). Exporters and producers that are not individually investigated are assigned an estimated "all others" rate. AD Manual, Chap. 6 at 10. The "all others" rate is a dumping margin equal to the weighted average of the dumping margins established for the exporters and producers that are individually investigated (with certain exceptions not relevant here). 19 U.S.C. § 1673d(c)(5)(A).

Exporters and producers that are selected to be investigated individually are considered "mandatory respondents." AD Manual, Chap.

4 at 14–15. Exporters and producers that are not selected as mandatory respondents may request to be designated "voluntary respondents." AD Manual, Chap. 4 at 14–15. Unless it would be "unduly burdensome" for the Commerce Department, exporters and producers that request treatment as voluntary respondents are investigated individually. 19 U.S.C. § 1677m(a); 19 C.F.R. § 351.204(d)(2). However, voluntary respondents must submit the same information required from mandatory respondents, on the same timetable. 19 U.S.C. § 1677m(a); 19 C.F.R. § 351.204(d)(2).

An antidumping questionnaire is issued to all mandatory respondents, as well as to those exporters and producers requesting treatment as voluntary respondents. AD Manual, Chap. 4 at 14–15. Generally, the antidumping questionnaire consists of five sections, numbered A through E, plus several appendixes. AD Manual, Chap. 4 at 2–8. Section A requires respondents to submit general information about their corporate structure and business practices, as well as information concerning the allegedly dumped goods. AD Manual, Chap. 4 at 2. Section B requires respondents to list sales transactions of the goods in the appropriate foreign market (either the exporting "home country" market or the third country market), in order to determine the normal value of the goods. AD Manual, Chap. 4 at 3. Section C requires respondents to list U.S. sales transactions, for use in determining the U.S. price against which normal value is compared. AD Manual, Chap. 4 at 6. Section D, which is not required in all investigations, solicits information on the costs of producing the goods under investigation. AD Manual, Chap. 6 at 6–7. Section E, also not required in every investigation, seeks information about value added in the U.S. to the goods, prior to delivery to unaffiliated U.S. customers. AD Manual, Chap. 4 at 7.

The antidumping questionnaire is designed to elicit all information necessary to determine whether a respondent is dumping and, if so, to calculate the dumping margin. AD Manual, Chap. 6 at 11. However, where the Commerce Department is unable to obtain all of the necessary information from a respondent, the agency may use "facts available" as a substitute. 19 U.S.C. § 1677e(a); 19 C.F.R. § 351.308. Thus, for example, the Commerce Department may use facts available where a respondent withholds information or fails to provide it on time or in the form requested, or where the information provided by the respondent cannot be verified. 19 U.S.C. § 1677e(a)(2); 19 C.F.R. § 351.308(a). The agency may use as "facts available" any acceptable information it can find to substitute for the missing information. AD Manual, Chap. 6 at 11.

Moreover, where a respondent affirmatively "fail[s] to cooperate by not acting to the best of its ability" in responding to the agency's requests for information, the Commerce Department may resort to "adverse facts available," by applying an inference that is adverse to that respondent in selecting among the "facts available." 19 U.S.C.

§ 1677e(b); 19 C.F.R. § 351.308(a). *See also* AD Manual, Chap. 6 at 14–16. Where it is warranted, the Commerce Department may use "facts available" or "adverse facts available" as a substitute for all or part of the information required to calculate a respondent's dumping margin. *See* 19 U.S.C. § 1677e; 19 C.F.R. § 351.308.

B. *The Facts of This Case*

The antidumping investigation here at issue was initiated based on a petition filed with the Commerce Department and the International Trade Commission by a group of fitting manufacturers in the United States ("Domestic Manufacturers"). *See Initiation of Antidumping Duty Investigation: Stainless Steel Butt-Weld Pipe Fittings from Germany, Italy, Malaysia and the Philippines*, 65 Fed. Reg. 4595 (Jan. 31, 2000). The petition alleged, in relevant part, that two Philippine producers — Enlin Steel Corporation ("Enlin") and Tung Fong — were selling fittings under 14 inches in diameter[2] in the U.S. at less than their home market prices. Pub. Doc. 1 at 7.[3] The petition further indicated that Tung Fong and Enlin account for 100 percent of exports of the subject fittings from the Philippines to the United States. Pub. Doc. 1 at 34–35.

1. *The Domestic Manufacturers' Antidumping Petition*

The allegations in the Domestic Manufacturers' petition were based largely on a confidential market research report commissioned by, and funded by, the Domestic Manufacturers. The report purported to provide "prices for actual recent sales by [Tung Fong and Enlin] to unaffiliated end users in the Philippines." Pub. Doc. 1 at 34. Relying on the asserted "home market" price data in that report, and comparing it to data on U.S. sales by Enlin and Tung Fong, the Domestic Manufacturers estimated dumping margins ranging from 26.1% to 68.5%. Pub. Doc. 1 at 37.

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[2] Stainless steel butt-weld pipe fittings are manufactured in a variety of shapes including elbows, tees, reducers, stub-ends and caps. They are widely used in piping systems in, for example, chemical plants, refineries, pharmaceutical plants, food processing facilities and waste treatment facilities. *See Antidumping Duty Petition: Certain Stainless Steel Butt-Weld Pipe Fittings From Germany, Italy, Malaysia and the Philippines* (Dec. 29, 1999), Pub. Doc. 1 at 11, 37.

[3] The administrative record in this case consists of two sections, designated "Public" and "Business Proprietary," respectively. The "Public" section consists of copies of all documents in the record of this action, with all confidential information redacted. The "Business Proprietary" section consists of complete, unredacted copies of only those documents that include confidential information.

Citations to documents in the "Public" section of the administrative record are noted as "Pub. Doc. _____ ." Citations to documents in the "Business Proprietary" section are noted as "Non-Pub. Doc. _____ ." All page numbers refer to the original, internal pagination of the documents.

Upon receipt of the Domestic Manufacturers' petition, the Commerce Department reviewed it — as required by statute — to evaluate, *inter alia*, the accuracy and adequacy of the evidence provided by the Domestic Manufacturers. 19 U.S.C. § 1673a(c)(1)(A)(i). In a January 12, 2000 teleconference conducted as part of its review process, the Domestic Manufacturers' market researcher represented to Commerce Department personnel that he had obtained "home market" sales information from specified highly reliable sources. Non-Pub. Doc. 7.

Based on the petition and on the assurances provided in its teleconference with the Domestic Manufacturers' market researcher, the Commerce Department concluded that the evidence provided by the Domestic Manufacturers was "sufficient to justify the initiation of [an] antidumping investigation[ ]." Pub. Doc. 13 at 13–14. However, as the Commerce Department would soon learn, neither Enlin nor Tung Fong actually had home market sales. The allegations of the Domestic Manufacturers and their market researcher were false. And the Domestic Manufacturers' petition alleged no grounds other than "home market" sales to justify an antidumping investigation.

2. *The Commerce Department's Antidumping Questionnaires*

As soon as the antidumping investigation was initiated, the Commerce Department sent Enlin and Tung Fong section A of its antidumping duty questionnaire, seeking information regarding the companies' corporate structure and accounting practices, and general information regarding sales of the goods under investigation. Pub. Docs. 17, 18. The agency required Enlin and Tung Fong to submit their responses to Question 1 — regarding sales in the U.S., the home market, and third country markets — by February 7, 2000, with the remainder of section A due one week later.

Enlin and Tung Fong returned timely responses to Question 1, each attesting — under oath — that it had no home market sales of the merchandise at issue. Pub. Docs. 25, 26. Explaining that it is a "very small company, with limited resources and staff, [who were] basically answering [the] questions themselves," Tung Fong sought — and was granted — a two-week extension of time to file its responses to the remainder of section A of the questionnaire. Pub. Doc. 29 at 2; Pub. Doc. 31. Indeed, Tung Fong emphasized that it was "by far" the smallest of all the respondents — not only in the Philippines, but in the three other countries under investigation as well.[4] *Id.* Enlin sought and was granted the same extension of time to file

[4] Although only Enlin and Tung Fong manufacture in the Philippines, the Commerce Department was investigating 16 other fittings manufacturers in Germany, Italy, and Malaysia. *See Stainless Steel Butt-Weld Pipe Fittings From Germany, Italy, Malaysia and the Philippines*, 65 Fed. Reg. at 4597.

the remainder of its response to section A of the questionnaire. Pub. Docs. 30, 32.

As Tung Fong explained to the Commerce Department, the company "has no authority to sell fittings in the home market — i.e., [it] is prohibited from doing so," because of its status as an *export* producer operating within a Philippine economic zone. Pub. Doc. 53 at 32. That status permits the company to purchase raw materials duty-free, provided that its products are manufactured for export only. Pub. Doc. 124 at 5.

Enlin and Tung Fong submitted their responses to the remainder of section A of the questionnaire on February 22, 2000. Pub. Docs. 36, 38. Tung Fong responded in detail to each question posed by the Commerce Department, consistently reiterating — where appropriate — the fact of its lack of "home market" sales. Pub. Doc. 38 at 5.

Less than a week later, over the objections of Tung Fong, the Commerce Department selected Enlin as the sole mandatory respondent for the Philippine investigation. The Commerce Department asserted that, given its limited resources, it "would be able to investigate only one such company." The agency chose Enlin as the mandatory respondent "because it was the respondent with the greatest export volume."[5] *See Notice of Preliminary Determination of Sales at Less than Fair Value: Stainless Steel Butt-Weld Pipe Fittings From the Philippines*, 65 Fed. Reg. 47,393, 47,394 (Aug. 2, 2000) ("*Preliminary Determination*") (further asserting that, given the "complexities expected to arise" in the investigation, it "was not practicable . . . to examine all known producers/exporters of the subject merchandise"). Tung Fong protested that it "wishe[d] to fully participate in [the] investigation, answering [Commerce's] questionnaires. . . ." Pub. Doc. 41.

On March 9, 2000, the Commerce Department issued to Enlin additional sections of the agency's antidumping duty questionnaire. Pub. Doc. 43. After seeking and being granted an extension of time, Enlin responded on May 1, 2000. Although the Commerce Department had denied it consideration as a mandatory respondent, Tung Fong also responded to sections B and C of the questionnaire on the same schedule, "pursuant to [the Commerce Department's] Respondent Selection Memorandum as to voluntary respondents, in the hope that [the agency] [would] be able to consider it[s] [response]." Pub. Doc. 51.

The Commerce Department did not respond to Tung Fong's submissions and, instead, continued to focus its investigation solely on Enlin. In early June 2000, the agency began investigating Enlin's

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[5] The Commerce Department's Preliminary Determination refers to the agency's "Respondent Selection Memorandum," dated March 1, 2000. *Preliminary Determination*, 65 Fed. Reg. at 47,394. That document appears to be missing from the administrative record filed with the Court.

costs of production, to account for differences between the company's merchandise sold in the U.S. and its third country sales. The Commerce Department therefore requested that Enlin respond to section D of the agency's questionnaire. *See Preliminary Determination*, 65 Fed. Reg. at 47,394. On June 22, when its section D questionnaire responses were already nearly a week overdue, Enlin informed the Commerce Department that it would not respond to any further agency requests for information. Pub. Doc. 74.

Only then did the Commerce Department decide to investigate Tung Fong as a voluntary respondent. Tung Fong responded to section D of the agency's questionnaire, which required the company to supply extensive data on its production costs. Non-Pub. Doc. 68. Tung Fong's responses to section D — filed on July 5, 2000 — explained that the company did not have an established "formal cost accounting system" to allocate costs between its many different products. *Id.* at 10. Thus, for purposes of responding to the section D questionnaire, Tung Fong was required to develop — for the first time — a methodology to allocate its raw material, labor, and overhead costs for each type of fitting subject to the investigation.

In an attempt to allocate its costs of production, Tung Fong first "group[ed] its total production into thirteen categories of fitting subgroups," based on its analysis of which products pass through which production processes. Non-Pub. Doc. 68 at 16. Tung Fong then allocated raw material and labor costs among the 13 individual categories on the basis of the weight of the fittings, reasoning that material and labor costs increase as the weight of the fittings increase. *Id.* at 17; Pub. Doc. 105 at 47 However, in contrast to the weight-based methodology it used to allocate material and labor costs, Tung Fong treated the depreciation of factory machinery differently, indicating that it was "allocat[ing] depreciation per category based on the share of *machine time* used by each production stage." Non-Pub. Doc. 68 at 17 (emphasis added). Significantly, this usage of the phrase "machine time" proved to be the source of much confusion on the part of the Commerce Department, which was not fully resolved until the agency conducted its verification some months later.

In mid-July 2000, the Commerce Department sent Tung Fong a supplemental questionnaire, following up on the company's earlier responses to sections A through D (some of which had been submitted to the agency as early as February 2000). Pub. Doc. 86. Among other things, the agency's 21-page supplemental questionnaire probed the allocation of costs using product weight versus machine times. Specifically, the Commerce Department asked Tung Fong to "explain why machine times cannot be used to allocate costs to each product rather than weight; provide a schedule that identifies the machine times used to allocate costs to each product group; explain how these machine times are determined and provide a sample copy

of the source document used to determine these times; and, clarify how the machine times have been used to allocate costs in the response." Pub. Doc. 86 at 18–19.

In the meantime, the Commerce Department's affirmative Preliminary Determination issued on August 2, 2000. Because the agency had not begun to investigate Tung Fong's costs of production until late in the process, it was unable to make a preliminary calculation of a company-specific dumping margin. Instead, the agency assigned Tung Fong the non-adverse "all others" rate — consisting of the simple average of the margins proposed in the petition (34.67%). *Preliminary Determination*, 65 Fed. Reg. at 47,395–96.

Some of Tung Fong's responses to the Commerce Department's supplemental questionnaire were filed within the amount of time initially specified by the agency. Tung Fong sought, and was granted, additional time to respond to other supplemental questions, including the questions concerning its cost allocation methodology. Pub. Docs. 93, 94. On that point, Tung Fong's supplemental questionnaire responses explained that the company did not have "machine times" for the huge number of fittings that it produces, and that it simply was not feasible to generate such machine times within the time constraints of the agency's investigation:

> Tung Fong is a very small company and does not maintain machine times on all items it produces. To maintain machine times for over [700] different types of fittings alone . . . is . . . an impossible task for Tung Fong. There is also a certain level of difficulty in maintaining machine times as Tung Fong employees often perform above par when their performances are being monitored. . . . Tung Fong does not have the resources to specially conduct a measurement of machine time in order to provide a machine timetable for this response as this would entail the special manufacture of [more than 700] different types of fittings.

Pub. Doc. 109 at 4.

Notwithstanding Tung Fong's explanation of the impracticability of determining "machine times" for its wide range of products, the Commerce Department sent the company a second supplemental section D questionnaire dated September 1, 2000, directing Tung Fong to report its costs of production using a "machine time" based method of allocation. *See* Pub. Doc. 113. Tung Fong's response to that second supplemental questionnaire clarified that, in fact, "machine times *were not* used to allocate costs" — even for the depreciation of machinery. Pub. Doc. 117 at 6 (emphasis added). The reference to "machine times" in the company's initial section D questionnaire responses was actually shorthand for "machine time *factors*" derived from depreciation expenses. Pub. Doc. 24 at 21. Indeed, Tung Fong explained that — although it had experimented with machine times

— it ultimately rejected their use, because it discovered that they led to grossly disproportionate allocations of costs (actually erring in Tung Fong's favor, by allocating *too few* costs to the fittings under investigation, thus giving Tung Fong an "unfair advantage"). Pub. Doc. 117 at 6–7.

3. *The Agency's Verification Process*

From September 25 through September 29, 2000, Commerce Department personnel conducted a verification of Tung Fong's cost of production and constructed value data, visiting the company's facility in the Philippines. In the course of the verification process, agency personnel confirmed that Tung Fong had no pre-existing cost accounting system that could be used to allocate costs among its many products, and thus had been forced to develop such a system for the investigation. *Verification Report*, Pub. Doc. 124 at 8. Commerce Department personnel further confirmed that Tung Fong "had experimented with various allocation methods . . . not all of [which] were used." *Id.* at 20.

In particular, the Commerce Department personnel conducting the verification noted that Tung Fong had initially attempted to allocate certain depreciation expenses by using so-called "machine time *factors*." But the agency personnel quickly discovered that they had misunderstood the nature of those "machine time *factors*." The "machine time factors" that Tung Fong had tried to use were not, in reality, actual "machine times" as the agency generally understands the term. Indeed, the agency personnel conducting the verification confirmed that Tung Fong in fact "does not track machine times." *Id.* at 20–21. The "machine time *factors*" that the company had initially sought to use to allocate depreciation expense thus were not "machine times" at all but, rather, reflected "each production process' proportional share of total depreciation expense of the specific machines used in the process." *Id.* In any event, as agency personnel reported, Tung Fong had ultimately rejected the use of "machine time factors" as inaccurate — that is, they "incorrectly distributed too much depreciation to product groups made up of low-volume lightweight fittings," because higher volume (higher weight) products typically cost more to produce. *Id.* at 20–21.

Significantly, the Commerce Department's verification personnel did not dispute Tung Fong's assessment that there were inherent inaccuracies in the use of "machine time *factors*," as the agency personnel now understood them. Indeed, the agency's verification personnel expressly conceded that — while the company's experimentation with "machine time *factors*" evidenced its realization "that each [item under investigation] should not be assigned the same per-unit depreciation cost" — the "machine time *factors*" methodology in particular "may *or may not* have calculated reasonable costs." *Id.* (emphasis added).

The Commerce Department's verification personnel also reviewed Tung Fong's attempt to allocate per-unit direct labor costs for certain "time-driven" production processes by using "machine time *estimates.*" The agency personnel found that, since Tung Fong does not track actual "machine times," the company had asked employees assigned to the specified processes "to *estimate* how much time they spend on each fitting." *Id.* (emphasis added). However, as agency personnel reported, that cost allocation method was eventually rejected because, *inter alia*, it was unrealistic — that is, "the time estimates provided by the employees would produce [a] production volume that exceeded the actual capabilities of the machines." *Id.*[6]

Significantly, the Commerce Department verification personnel did not dispute Tung Fong's conclusion that its employees' "time estimates" were inaccurate. Thus, when the agency personnel "compared the [discredited time *estimates* for select products] to those [times] reported in the cost file [which had been generated using Tung Fong's weight-based method of allocating costs]," it should have been no surprise to anyone "that the results generated by Tung Fong's weight and time-based methods did not mirror each other" — precisely because the "time-based method[ ]" to which the agency referred was based on the "time estimates" that had already been disavowed. *Id.* at 21.

But, instead, the Commerce Department verification personnel inexplicably seized on the discrepancy as an indictment of Tung Fong's weight-based methodology, emphasizing that the company had earlier advised the Department "that the [company's] weight-based method should provide similar results as a time-based approach." *Verification Report*, Pub. Doc. 124 at 21. The agency personnel apparently misunderstood the point that Tung Fong had sought to make — that, since heavier fittings generally take longer to process, the relative weights of various fittings should be a rough proxy for time in allocating costs among the company's products. In other words, Tung Fong's point was that its "weight-based method should provide similar results as [*an accurate*] time-based approach" — not just *any* time-based approach (and certainly not an approach based on employees' "time estimates," which the company had first explored and then rejected as inaccurate).

The Commerce Department verification personnel offered no justification or other explanation for their reliance on already discredited "machine time *estimate*" data as a basis for attempting to discredit other data. Nor did they offer any explanation as to why — even if the machine time estimate data *had not* been discredited — a dis-

[6] As the Commerce Department personnel noted, there would be at least one additional problem with a cost allocation methodology relying on "time estimates" — its "fail[ure] to account for the production of non-subject merchandise and caps." *Id.*

crepancy between those data and Tung Fong's "weight-based" data would necessarily mean that the machine time estimate data were more reliable.

#### 4. *The Commerce Department's Final Determination*

The Commerce Department's affirmative Final Determination assigned Tung Fong a dumping margin of 33.81 % — the highest margin calculated for any company in all the countries investigated, and the same margin assigned to Enlin Steel and to "All Others." *See Final Determination*, 65 Fed. Reg. at 81,825; *Antidumping Duty Orders: Stainless Steel Butt-Weld Pipe Fittings From Italy, Malaysia, and the Philippines*, 66 Fed. Reg. 11,257, 11,258 (Feb. 23, 2001), Pub. Doc. 153.

In calculating Tung Fong's dumping margin, the Commerce Department used the company's sales data where fittings sold in the U.S. had identical matches in the third country. However, the Department rejected the weight-based data proffered by Tung Fong for the agency's use in making "differences in merchandise" — "difmer" — adjustments where there were no such identical matches. Deeming Tung Fong's weight-based data inaccurate, and asserting that the "time-based allocation method" that the company had abandoned "provided per-unit costs at a greater level of detail than the [company's] reported [weight-based] method because it relied on each model's unique process and production time," the Commerce Department concluded that Tung Fong had withheld relevant information requested by the agency. Accordingly, the Department resorted to "facts available" for all non-identical price-to-price comparisons. *Decision Memo* at 7, Pub. Doc. 141 at 7.

Indeed, the Commerce Department not only resorted to "facts available," it used "adverse facts available" against Tung Fong. Specifically, the agency concluded that — because Tung Fong did not allocate costs using a "time-based allocation method" — the company "failed to cooperate [in the investigation] by not acting to the best of its ability." *Id.* at 8. The agency further asserted that the company "fail[ed] to perform due diligence on its assertions," reasoning that "[h]ad Tung Fong performed a simple comparison of its submitted costs developed using time-based [cost allocations], it would have found that the two methods do not calculate similar results, as [agency personnel] found at verification." *Id.* The Commerce Department maintained that Tung Fong had the information necessary to generate the type of time-based cost allocation data requested by the agency, and that the verification personnel had demonstrated that the calculations could be performed with the information supplied by the company. *Id.* at 8.

In addition, the Commerce Department found that Tung Fong "hindered the proceeding by providing untimely responses," noting that the agency granted the company "several extensions on its al-

ready extended deadlines for responding to questionnaires." The agency concluded that Tung Fong should "easily have been able to calculate the necessary [time-based cost] allocations within the extended time allotted." *Id.*

Based on its determination that Tung Fong had "failed to cooperate by not acting to the best of its ability" to comply with the agency's requests for information, the Commerce Department applied an adverse inference in selecting the "facts available" used to calculate Tung Fong's dumping margin. Thus, for all non-identical price-to-price comparisons, the agency used the highest margin found for any U.S. sale whose margin was calculated from an identically matched price-to-price comparison. *Id.*

Tung Fong filed a timely appeal, and this litigation ensued.

## II. ***Analysis***

### A. *The Sufficiency of the Domestic Manufacturers' Petition*

As a threshold matter, Tung Fong attacks the adequacy of the Domestic Manufacturers' antidumping petition, asserting that it was insufficient to justify the initiation of the investigation at issue here. Pl.'s Brief at 1. In particular, Tung Fong argues that an antidumping petition must include evidence of dumping, and that the Domestic Manufacturers' petition failed to meet that burden because it was based on the false premise that Tung Fong had home market sales. *Id.* at 1–4.

In support of its argument, Tung Fong points to the statute, which provides, in relevant part, that "[a]n antidumping proceeding shall be initiated whenever an interested party . . . files a petition with [the Commerce Department] which alleges the elements necessary . . . and which is accompanied by information reasonably available to the petitioner supporting those allegations." Pl.'s Brief at 1–2 (*quoting* 19 U.S.C. § 1673a (b)(1) ). Tung Fong notes that Commerce Department regulations require that the agency "determine that the petition satisfies the relevant statutory requirements before initiating an antidumping . . . investigation." 19 C.F.R. § 351.203(a); Pl.'s Brief at 2. Tung Fong further emphasizes that the regulations require that an antidumping petition include:

> [a]ll factual information (*particularly documentary evidence*) relevant to the calculation of . . . the normal value of the foreign like product (if unable to furnish information on foreign sales or costs, provide information on production costs in the United States, adjusted to reflect production costs in the country of production of the subject merchandise).

Pl.'s Brief at 2; 19 C.F.R. § 351.202(b)(7)(i)(B) (emphasis added)

Tung Fong bolsters its argument with references to the United States' international obligations, which require that antidumping

petitions contain "*evidence* of . . . dumping," and which specify that "[s]imple assertion, *unsubstantiated by relevant evidence*, cannot be considered sufficient . . . " to warrant the initiation of an investigation. Pl.'s Brief at 2 (emphasis added) (*citing Agreement on Implementation of Article VI of the GATT 1994*, Part 1, Articles 5.2 and 5.3).

The United States' international obligations are reflected in the history of the Commerce Department's regulations implementing the Uruguay Round Agreements Act, which had as its purpose bringing this country into conformity with its WTO obligations. There, the Commerce Department expressly rejected the notion that "the mere provision of *any* documentation [by a domestic industry] is . . . necessarily sufficient" (emphasis in the original), and emphasized the agency's "statutory obligation to examine the *accuracy and adequacy* of the evidence provided in [a] petition" to determine whether initiation of an investigation is warranted. *Final Rule: Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,307 (May 19, 1997) (emphasis added).

In an effort to minimize its "statutory obligation to examine the accuracy and adequacy of the evidence" set forth in a petition, the Government asserts that the Commerce Department may decline to initiate an investigation only where the investigation would be "clearly frivolous" or where the petitioner has failed to provide information reasonably available to it. *See* Def.'s Brief at 14–15. The Government further asserts that, once an investigation is launched, the process marches inexorably on — absent an intervening negative determination by either the Commerce Department or the International Trade Commission — until a final affirmative determination is made and an antidumping duty order is issued. Def.'s Brief at 15–16.

It is true that Commerce Department personnel in this case telephoned the Domestic Manufacturers' market research firm on January 12, 2000 to verify, *inter alia*, the statements concerning Tung Fong's alleged home market sales. Pub. Doc. 12. But the fact remains — undisputed by the Government — that, contrary to the Domestic Manufacturers' claims and without regard to any assurances given by the Domestic Manufacturers' market research firm in the course of the January 12, 2000 telephone call, Tung Fong had no home market sales. And, by February 7, 2000 at the latest, Tung Fong had put the Commerce Department squarely on notice of that fact. Pub. Doc. 26.

The Government relies heavily on a pair of cases to argue, in essence, that after-acquired information concerning inaccuracies in a petition does not require the Commerce Department to rescind the initiation of an investigation. *See* Def.'s Brief at 20–21 (*citing Luciano Pisoni Fabbrica Accessori Instrument Musicali and Enzo Pizzi, Inc. v. United States*, 10 CIT 424, 427–28, 640 F. Supp. 255,

258 (1986) (finding that the "statutory scheme offers no basis for [the] position that Commerce is required to rescind a notice of initiation of an investigation upon discovering inaccuracies in a petition.") *and United States v. Roses Inc.*, 1 Fed. Cir. 39, 706 F. 2d 1563, 1566 (1983) ("[W]hen there is a petition sufficient on its face, and as checked against other 'facts within the public domain,' even if the investigation would appear unwarranted to one who knew all the facts, surely the investigation must still be commenced.")). But those cases are simply inapposite here, for at least three reasons.

First, the "inaccurate" information supplied in the instant petition did not concern some minor, peripheral, collateral or ancillary point. Rather, that information was the very linchpin of the investigation. Because their petition alleged no other basis for an investigation, the truth of the Domestic Manufacturers' claims of Tung Fong's home market sales was absolutely indispensable to the adequacy of the petition. Moreover, the source of the Domestic Manufacturers' claims of home market sales by Tung Fong was not some external, third party source, but — rather — research expressly commissioned, and paid for, by the Domestic Manufacturers themselves. Thus, they cannot be heard to disclaim responsibility for its reliability. Finally, it elevates form over substance to characterize as merely "inaccurate" the false information at issue here. The spectre of fraud hangs heavy in the air. At a bare minimum, the record suggests that someone very close to the Domestic Manufacturers was making damaging allegations with full knowledge of their consequences and a reckless disregard for their truth.

The Government's reading of the statute and the regulations would seem to leave the Commerce Department and innocent respondents at the mercy of hypothetical unscrupulous petitioners willing to fabricate evidence and able to sustain their lie at least long enough to get an investigation launched. But there can be no suggestion that Congress intended to license domestic industries to prevaricate in order to initiate investigations, which could then be used as "fishing expeditions" in a quest for other, *truthful* evidence of dumping.

Although Tung Fong asserts that, under the circumstances here, "[t]he anti-dumping order resulting from [the] investigation must be revoked," the case on which it relies does not support that proposition. Pl.'s Brief at 4 (*citing Mitsui v. United States*, 18 CIT 185 (1994)). As discussed below, this action must be remanded to the Commerce Department for other reasons. On remand, both at the administrative level and then before the Court, the parties will have ample opportunity to grapple with the consequences of the falsehoods tainting the petition underlying this matter.

B. *The Agency's Use of "Adverse Facts Available"*

Tung Fong also asserts that — assuming, *arguendo*, that the investigation here was proper — the Commerce Department's use of "adverse facts available" in calculating the company's dumping margin was not in accordance with law. Specifically, Tung Fong disputes the Department's determination that the company "failed to cooperate by not acting to the best of its ability" in responding to the agency's requests for information. Pl.'s Brief at 5.[7]

As summarized in section I.A above, the statute restricts the Commerce Department's use of "facts available" to situations where "necessary information is not available" or where a party withholds information, fails to provide requested information by the deadline or in the form and manner requested, significantly impedes the investigation, or where the proffered information cannot be verified. 19 U.S.C. § 1677e(a); 19 C.F.R. § 351.308(a).

As section I.A explains, the statute also restricts the Commerce Department's discretion in selecting among the "facts available." Thus, the agency may invoke an "adverse inference" in selecting among facts available only if it makes the further finding that the party in question has "failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b); *see also Borden, Inc. v. United States*, 22 CIT 233, 263–64, 4 F. Supp. 2d 1221, 1246 (1998) (faulting Commerce Department's failure to adequately consider whether the respondent was capable of responding to agency's data requests). Any such finding must be "reached by 'reasoned decisionmaking,' including . . . a reasoned explanation supported by a stated connection between the facts found and the choice made." *Elec. Consumers Res. Council v. Fed. Energy Reg. Comm.*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (*citing Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962)). Commerce Department actions which are unsupported by reasoned explanation may be deemed "arbitrary and capricious." *See Steel Auth. of India, Ltd. v. United States*, 25 CIT ____ , ____ n.10, 149 F. Supp. 2d 921, 929 n.10 (2001).

The essence of the Commerce Department's justification for the use of "adverse facts available" here is its claim that Tung Fong withheld information. The Department found that Tung Fong "had the information necessary to perform a time-based calculation [ ] be-

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[7] Tung Fong asserts, in the alternative, that the Commerce Department's selection of "a high aberrant calculated dumping margin as adverse [facts available]" was unwarranted. Pl.'s Brief at 5. Tung Fong thus challenges both the use of "adverse facts available" and the particular adverse facts selected by the agency for use in calculating the company's dumping margin.

However, as explained more fully below, the Commerce Department failed to adequately justify its resort to adverse facts available against Tung Fong. There is, therefore, no need to reach the company's alternative claim.

fore the initiation of the case, and certainly at the time it received the [antidumping investigation] questionnaire." *Decision Memo* at 8, Pub. Doc. 141 at 8. But the agency's determination that Tung Fong could have provided "time-based" cost allocation data (based on "machine times") cannot be squared with the record facts.

As discussed in section I.B above, the Commerce Department was understandably confused by Tung Fong's use of the term "machine times" in its initial section D questionnaire responses. However, as section I.B further explains, there was no longer any room for confusion by the time the agency had completed its verification. The Commerce Department verification personnel specifically confirmed that Tung Fong does not track actual "machine times." The agency personnel further determined that the "machine time factors" that the company initially attempted to use to calculate depreciation expense were not, in fact, machine times. In addition, they determined that the "machine times" that Tung Fong had considered, then rejected, as a basis for allocating certain direct labor costs were actually "machine time *estimates*"— estimates that, according to Tung Fong's uncontroverted statements of explanation, were unreliable. *Verification Report* at 21, Pub. Doc. 124 at 21.

There is thus no basis in fact — much less the record — for the finding in the Commerce Department's Decision Memo that Tung Fong had "model specific processing times available" and refused to "explain why it would not provide this information." *Verification Report* at 7, Pub. Doc. 124 at 7. Certainly the agency verification personnel knew that the company did not have such "machine times" available; all the company had were "machine time *estimates*" — and even those were not available for all fittings and processes. Even more importantly, as Tung Fong advised the Commerce Department, the estimates were proven to be unreliable.

Although its precise position is somewhat unclear, the Government appears to suggest that — even if Tung Fong did not have true "machine times" available for all of its 700-plus fittings at the beginning of the investigation — it had ample time to obtain the data in the course of the investigation, notwithstanding its "limited number of employees." Def.'s Brief at 28. "After all," the Government concludes, "Commerce's verifiers were able to allocate costs using the time method for 13 products without difficulty during the verification." *Id.* (citation omitted). There are at least two flaws in such a position.

First, the Commerce Department made no findings on the extent of Tung Fong's resources (or lack thereof), and pointed to no evidence to support the Department's conclusory assertion that — notwithstanding the company's limited resources — "had it chosen to do so, [the company] would easily have been able to calculate the necessary allocations" within the time allotted. Nothing in the record effectively refutes Tung Fong's claim that:

> Tung Fong, an extremely small family-owned Philippine company, run by one person, was not able to provide [the Commerce Department with the] requested cost data within the limited time available given (a) Tung Fong's lack of a cost accounting system; and (b) [the fact that] Tung Fong sold over 700 different types of fittings, making the development of any allocation of cost[s] based on *observed processing time* to produce each type of fitting difficult.

Pl.'s Brief at 5 (emphasis added).

Nor does the handful of allocation calculations performed by the Commerce Department's verification personnel — which the Government appears to cite as evidence — prove anything about the feasibility of obtaining true "machine times" for all of Tung Fong's fittings. As discussed above, the verification personnel used mere "machine time *estimates*" — not actual, observed "machine times,"as the Government seems to suggest. And those "machine time estimates" were data that Tung Fong had on hand; the agency verification personnel did nothing to collect the data. Moreover, the estimates were incomplete (*i.e.*, there were estimates for only a limited number of processes) and, in any event, they had been proven to be unreliable.

In short, the record is simply devoid of evidence to support either the Commerce Department's finding that Tung Fong withheld critical information that it had in its possession, or the agency's finding that it would have been — as a practical matter — feasible for Tung Fong to have obtained actual "machine times" to respond to the agency's request for time-based cost allocation data during the course of the investigation.

The Government maintains that the Commerce Department's resort to "adverse facts available" was also justified because Tung Fong allegedly "fail[ed] to perform due diligence on its assertions about the accuracy and reliability" of the weight-based cost allocation data that the company provided to the Department. Def.'s Brief at 23 (*citing Decision Memo* at 7). In an effort to support that charge, the Government points to the analysis performed by Commerce Department verification personnel, which concluded that "the results generated by Tung Fong's weight and time-based methods did not mirror each other." Def.'s Brief at 29 (*quoting Verification Report* at 21). The Commerce Department criticizes Tung Fong for not performing that analysis itself.

However, for all the reasons detailed in section I.B above, the Commerce Department's reasoning on this point is fundamentally flawed. In sum, the discrepancy between the verification personnel's cost allocation calculations using the discredited "machine time *estimate*" data and those using Tung Fong's weight-based methodology was to be expected. And Tung Fong can hardly be faulted as lacking in "due diligence" simply because it failed to perform an illogical

analysis using data which had been proven to be unreliable, which would — at most — have established what the company already knew (and, indeed, had told the Commerce Department).

Moreover, as section I.B explains, the discrepancy identified by the verification personnel's analysis does nothing to cast doubt on the reliability of Tung Fong's weight-based cost allocation methodology. Thus, there can be no suggestion that the use of adverse facts available was warranted because Tung Fong provided Commerce with an alternate allocation method *that was found at verification to be inaccurate*." Def.'s Brief at 29 (emphasis added). Contrary to the Government's claims, the Commerce Department has pointed to no evidence to substantiate its accusation that Tung Fong "provid[ed] an inaccurate cost allocation methodology." *Id.*

In the alternative, the Government argues that the Commerce Department was entitled to resort to adverse facts available because Tung Fong assertedly "fail[ed] to provide information [to the agency] in a timely manner." Def.'s Brief at 23. According to the Government:

> Commerce also found that Tung Fong was uncooperative because of the frequency with which it responded in an untimely manner to Commerce request[s] for information. Moreover, Tung Fong filed untimely responses despite numerous extensions that were granted by Commerce. Finally, there were several instances where Tung Fong submitted responses to questions after the required deadline, in effect granting itself an extension.

Def.'s Brief at 29 (*citing Decision Memo* at 7–8).

To be sure, the Commerce Department may resort to "facts available" where a party fails to make timely submissions. *See Seattle Marine Fishing Supply Co. v. United States*, 12 CIT 60, 71, 679 F. Supp. 1119, 1128 (1988). However, the agency may resort to "*adverse* facts available" only where it finds that the party failed to act to the best of its ability. *See, e.g., Nippon Steel Corporation v. United States*, 24 CIT 1158, 1169, 118 F. Supp. 2d 1366, 1377 (2000), *vacated in part on other grounds after remand*, 337 F.3d 1373 (Fed. Cir. 2003). The Government points to no evidence here which would support such a finding.

In seeking extensions of time, Tung Fong explained, for example, that the questionnaire process was "overwhelming for a small company the size of Tung Fong," emphasizing that the "individual answering the questionnaire [was] also running the company." Pub. Doc. 98. The burden on Tung Fong was further compounded by the fact that — as the Commerce Department confirmed — the company had no pre-existing accounting system allocating costs among the more than 700 different fittings in its product line. *Verification Report*, Pub. Doc. 124 at 20.

As discussed above, the Commerce Department failed to point to any concrete evidence to substantiate its charge that Tung Fong could have complied with the agency's requests for information in a more timely fashion. Indeed, the record suggests that even the most well-heeled respondent might have had trouble meeting the tight deadlines that the Commerce Department imposed on Tung Fong in this investigation.

As discussed above in section I.B, the Commerce Department did not treat Tung Fong even as a voluntary respondent until late in the investigation, after Enlin (the agency's designated "mandatory respondent") withdrew from the investigation. Thus, the Commerce Department did not even begin the supplemental questionnaire process vis-a-vis Tung Fong until late July 2000 — several months later than the other respondents in the other countries subject to the investigation. Pub. Doc. 139 at 7. Indeed, in opposing Tung Fong's participation as a voluntary respondent in the investigation, the Domestic Manufacturers themselves expressed concern that — even with an "aggressive timetable" — a full investigation of Tung Fong could not "reasonably be completed" within the time then remaining on the statutory clock for the investigation. Pub. Doc. 75 at 29.

As noted elsewhere, the Commerce Department made no findings on the extent of Tung Fong's resources (or lack thereof), and pointed to no evidence to support its conclusory assertion that — notwithstanding Tung Fong's limited resources — the company could have responded to the agency's requests for information in a more timely fashion. Accordingly, like the agency's other proffered justifications for resort to adverse facts available, this rationale too must fail.

In sum, based on the record compiled in this matter, the Commerce Department improperly resorted to adverse facts available — instead of using the weight-based cost allocation data provided to the agency by Tung Fong — in calculating the company's dumping margin.

### C. *The Calculation of the "All Others" Rate*

Tung Fong's final argument challenges the "all others" dumping margin for non-investigated Philippine producers, which the Commerce Department set at equal to the weighted-average dumping margin for Tung Fong.[8] The "all others" rate thus reflects the use of "adverse facts available." *Final Determination*, 65 Fed. Reg. at 81,825. Tung Fong maintains that the Commerce Department may

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[8] Although Tung Fong's briefs frame its argument on this point in terms of the use of adverse facts available in calculating its dumping margin, the Commerce Department also resorted to adverse facts available in calculating Enlin's margin. *Decision Memo* at 11, Pub. Doc. 141 at 11. The conclusion in section II.B above thus does not moot Tung Fong's argument, since the "all others" rate will reflect the use of adverse facts available even if they are not used to calculate Tung Fong's rate.

not include dumping margins based on adverse facts available in the calculation of the "all others" rate, because — according to the company — such a use of adverse facts available is prohibited by the antidumping statute and the related Statement of Administrative Action, and contravenes the United States' WTO obligations. Pl.'s Brief at 8.

The Government, notably, does not defend the propriety of the Commerce Department's calculation of the "all others" rate. Rather, the Government argues that, because Tung Fong was individually investigated and assigned its own margin rate, the company "has not been injured in fact and [therefore] lacks constitutional standing" to raise this argument. Def.'s Brief at 34. The Government reasons, in other words, that because Tung Fong is not subject to the "all others" rate, it may not challenge it.

Tung Fong counters that it is affected by the "all others" rate, because — in the future — other Philippine companies intending to export to the United States conceivably could subcontract the manufacture of fittings to Tung Fong. Tung Fong reasons that, since any such companies would be subject to the "all others" rate, "[t]he 'all others' rate [would] affect[ ] . . . Tung Fong's ability to enter into [subcontracting] transactions." Pl.'s Reply Brief at 8.

Quite apart from the issue of the legality of the calculation of the "all others" rate in this case, a party granted its own dumping margin generally lacks standing to challenge the "all others" rate. *See Torrington Co. v. United States*, 21 CIT 251, 263, 960 F. Supp. 339, 349 (1997); *Fag Italia S.p.a. v. United States*, 20 CIT 1377, 1384–85, 948 F. Supp. 67, 73 (1996). Tung Fong advances no compelling reason why that principle should not apply with equal force here.

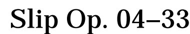
Tung Fong's argument that it may, in the future, enter into subcontracts with companies subject to the "all others" rate is simply too speculative. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1991) (holding that environmental groups that might someday return to a contested habitat did not meet the "actual or imminent" standard required for "injury in fact"). Thus, because there is no showing that Tung Fung may suffer cognizable injury as a result of the "all others" rate, the company's challenge to the calculation of that rate must be rejected for lack of standing.

## III. *Conclusion*

For the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record is granted in part. This action is remanded to the Department of Commerce to enable it to reconsider the adequacy of the Domestic Manufacturers' petition, and the consequences of the falsity of their allegations of home market sales by Tung Fong; to allow the Department to reconsider its decision to resort to adverse facts available in calculating Tung Fong's antidumping duty margin (and, if appropriate, to reevaluate the particular adverse facts se-

lected by the agency); and to accord the Department the opportunity to fully articulate the reasoning underlying its findings, conclusions and determinations.

A separate order will enter accordingly.



Slip Op. 04–33

SHANGHAI FOREIGN TRADE ENTERPRISES CO., LTD., AND SHANGHAI PUDONG MALLEABLE IRON PLANT, PLAINTIFFS, v. UNITED STATES, DEFENDANT, and ANVIL INTERNATIONAL, INC. AND WARD MANUFACTURING, INC. DEFENDANT-INTERVENORS.

Court No. 03–00218

[Antidumping determination remanded.]

Decided: April 9, 2004

*Lafave & Sailer LLP*, (*Francis J. Sailer* and *Arthur J. Lafave III*), for Plaintiffs.

*Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, *Jeanne E. Davidson*, Deputy Director, *Stefan Shaibani*, Trial Attorney, United States Department of Justice; *Michael D. Stroud*, Office of Chief Counsel, U.S. Department of Commerce, of Counsel, for Defendant.

*Schagrin Associates*, (*Roger B. Schagrin*), for Defendant-Intervenors.

## OPINION AND ORDER

STANCEU, Judge:

### *I. INTRODUCTION AND SUMMARY*

Plaintiffs, Shanghai Foreign Trade Enterprises Co., Ltd. and Shanghai Pudong Malleable Iron Plant, challenge certain aspects of a final antidumping duty determination, and the resulting antidumping duty order, that the United States Department of Commerce ("Commerce") issued in 2003 on imported non-malleable cast iron pipe fittings from the People's Republic of China. Shanghai Foreign Trade Enterprises is a Chinese exporter of this merchandise, and Shanghai Pudong is a Chinese producer. Anvil International, Inc. and Ward Manufacturing, Inc., domestic producers of non-malleable cast iron pipe fittings, participated as petitioners in the antidumping investigation before Commerce and have intervened in this action in support of the position of the defendant United States. The matter is before the court on plaintiffs' motion for judgment upon an agency record, brought under Rule 56.2 of the Rules of this Court.

In their motion, plaintiffs challenge the method by which Commerce calculated the antidumping duty rate that was applied to their exports in the administrative proceedings at issue in this case. *See Notice of Antidumping Duty Order: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China*, 68 Fed. Reg. 16,765 (April 7, 2003); *Notice of Final Determination of Sales at Less Than Fair Value: Non-Malleable Cast Iron Pipe Fittings From the People's Republic of China* ("*Final Determination*"), 68 Fed. Reg. 7,765 (Feb. 18, 2003). As is its practice, Commerce calculated the antidumping duty rate using "surrogate" data from a market economy country (in this case, India) in place of data pertaining to the actual production and sale of the merchandise exported from the People's Republic of China ("China," or the "PRC"), which Commerce considers to be a nonmarket economy country.

Plaintiffs do not contest the selection of India as the surrogate country but instead challenge Commerce's selection of particular surrogate data from India. Plaintiffs allege, first, that Commerce improperly relied on non-industry-specific data obtained from the Reserve Bank of India to calculate the surrogate values for selling, general and administrative expenses, factory overhead, and profit. Second, plaintiffs contend that Commerce used inappropriate surrogate data to value the cost of the foundry pig iron used as a material in manufacturing the exported non-malleable cast iron pipe fittings.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(A)(i). This court grants plaintiffs' motion and remands this matter to Commerce because the findings in Commerce's decision are not supported by substantial evidence on the record, because that decision did not provide adequate explanations for the choices of surrogate values, and because the decision did not explain adequately the departures from Commerce's established administrative practices.

## *II. BACKGROUND*

### *A. Determining Normal Value of Goods Produced in a Nonmarket Economy Country*

Under the antidumping laws, antidumping duty represents the amount by which the "normal value" of the imported merchandise that was the subject of the Commerce Department's investigation (identified as the "subject merchandise") exceeds the "export price" for that merchandise. 19 U.S.C. § 1673. "Normal value" usually is determined by the price for which the "foreign like product" corresponding to the subject merchandise (generally, identical or like merchandise made by the same foreign producer in the same foreign country, as determined according to 19 U.S.C. § 1677(16)) is first sold, or offered for sale, for consumption in the exporting country. 19 U.S.C. § 1677b(a)(1). "Export price" usually refers to the price at

which the subject merchandise is first sold, before the date of importation into the United States, by the producer or exporter outside of the United States, to an unaffiliated purchaser. 19 U.S.C. § 1677a(a).

Because it deems China to be a nonmarket economy country, Commerce generally considers information on sales in China and financial information obtained from Chinese producers to be unreliable for determining, under 19 U.S.C. § 1677b(a), the normal value of the subject merchandise. Accordingly, Commerce invokes a different statutory procedure for determining normal value if the subject merchandise is exported from a nonmarket economy country.

Under the substitute procedure, Commerce calculates the normal value by determining and aggregating "surrogate values" for various "factors of production" used in producing the subject merchandise, to which it also adds an amount for general expenses and profit as well as amounts for the cost of containers, coverings, and other expenses. 19 U.S.C. § 1677b(c)(1). The factors of production include, but are not limited to, labor hours, raw materials, energy and other utilities, and representative capital cost, including depreciation. 19 U.S.C. § 1677b(c)(3). The statute requires Commerce to base its valuation of the factors of production on the "best available information regarding the values of such factors in a market economy country or countries considered appropriate by the administering authority [*i.e.*, Commerce]." 19 U.S.C. § 1677b(c)(1).

To implement the statutory directive to add amounts for "general expenses and profit," Commerce usually calculates separate values for selling, general and administrative ("SG&A") expenses, manufacturing overhead and profit, using ratios derived from financial statements of one or more companies that produce identical or comparable merchandise in the surrogate country. To calculate the SG&A ratio, the Commerce practice is to divide a surrogate company's SG&A costs by its total cost of manufacturing. *See, e.g., Manganese Metal From the People's Republic of China; Final Results of Second Antidumping Administrative Review*, 64 Fed. Reg. 49,447, 49,448 (Sept. 13, 1999). For the manufacturing overhead ratio, Commerce typically divides total manufacturing overhead expenses by total direct manufacturing expenses. *Id.* Finally, to determine a surrogate ratio for profit, Commerce divides before-tax profit by the sum of direct expenses, manufacturing overhead and SG&A expenses. *Id.* These ratios are converted to percentages ("rates") and multiplied by the surrogate values assigned by Commerce for the direct expenses, manufacturing overhead and SG&A expenses. *Id.*

In this investigation, Commerce determined that financial information from producers of identical or comparable merchandise was unavailable or unsuitable for use as surrogate data. Based on that

determination, Commerce chose to calculate the ratios based on aggregated financial information compiled by the Reserve Bank of India from a survey of 1,914 Indian manufacturing companies. Using the Reserve Bank of India data, Commerce established a rate for SG&A expenses of 25.93 percent, a factory overhead rate of 20.42 percent and a profit rate of 5.51 percent.

### *B. Administrative Proceedings Culminating in This Litigation*

Domestic producers of non-malleable cast iron pipe fittings petitioned Commerce (and concurrently, the U.S. International Trade Commission) on February 21, 2002, seeking the imposition of antidumping duties on non-malleable cast iron pipe fittings from the PRC. On September 25, 2002, Commerce published an affirmative preliminary dumping determination for the period of investigation from July 1, 2001 to December 31, 2001. *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Non-Malleable Cast Iron Pipe Fittings From the People's Republic of China* ("*Preliminary Determination*"), 67 Fed. Reg. 60,214 (Sept. 25, 2002). Plaintiffs and another Chinese producer, Jinan Meide Casting Co. (also a respondent in the proceedings before Commerce), filed responses alleging clerical errors in the Commerce preliminary determination. In its *Final Determination*, Commerce acknowledged errors in the *Preliminary Determination*, which it corrected in the final determination but viewed as insufficient to require an amended preliminary determination. *See Final Determination*, 68 Fed. Reg. at 7,766. The *Final Determination* assigned an antidumping rate (weighted average margin) of 6.34 percent to exports of the subject merchandise by plaintiff Shanghai Foreign Trade Enterprises, 7.08 percent to subject merchandise produced by Jinan Meide Casting Co., and 75.50 percent to all other subject merchandise from China. *Id.* at 7,768. After the U.S. International Trade Commission notified Commerce, on March 24, 2003, of its final determination that the industry in the United States producing non-malleable cast iron pipe fittings was threatened with injury by reason of imports of the subject merchandise, Commerce issued its antidumping duty order.

## ***III. CONTENTIONS OF THE PARTIES***

Plaintiffs challenge two classes of surrogate values chosen by Commerce in calculating the antidumping duty rates, and specifically the 6.34 percent antidumping duty rate that Commerce assigned to merchandise produced and exported by plaintiffs. They contend that the determinations by Commerce to use these surrogate values are unsupported by substantial evidence on the administrative record or otherwise are not in accordance with law.

### *A. Challenge to the Use of Reserve Bank of India Data for SG&A, Overhead, and Profit*

Plaintiffs contend that Commerce's use of the Reserve Bank of India data to calculate surrogate financial ratios for SG&A expenses, overhead, and profit was improper because the record contained a better source of financial data, specifically, the financial data of Indian producers of merchandise that plaintiffs claim to be comparable to the subject merchandise. Plaintiffs submit that the consistent prior practice of Commerce, as reflected in its regulations, is to use record evidence obtained from producers of comparable merchandise in the surrogate country and that Commerce departed from this practice without adequate explanation. Plaintiffs contend that Commerce should have used data from the financial reports of Jayaswals Neco Ltd., an Indian producer of iron and steel castings including brake rotors, and Kalyani Brakes Ltd., an Indian manufacturer of ferrous and aluminum castings for brake assemblies and other automotive parts. According to plaintiffs, Commerce should have regarded these two Indian companies as producers of merchandise comparable to non-malleable cast iron pipe fittings.

Plaintiffs object to Commerce's use of Reserve Bank of India information because that information was not obtained from Indian producers of iron castings and instead was derived from financial data of various manufacturing enterprises in India. Specifically, the source of the Reserve Bank of India data is the 1999–2000 combined income, value of production, expenditure and appropriation account for a sample of 1,914 public limited companies in India, as reported in the June 2001 *Reserve Bank of India Bulletin.*

Defendant United States asserts that Commerce acted within its discretion in using the Reserve Bank of India data to determine surrogate financial ratios for SG&A expenses, manufacturing overhead, and profit. While acknowledging the Commerce preference for surrogate values derived from producer-specific data pertaining to identical or comparable merchandise, defendant contends that Commerce was compelled to rely upon broader industry groupings once it had determined that the surrogate companies identified on the administrative record either were unprofitable or did not produce identical or comparable merchandise.

Defendant contends that Commerce, based on substantial evidence on the record, properly declined to use the financial data of Jayaswals Neco Ltd. because the 2000–2001 financial statement of that company, which statement corresponded to the fiscal year overlapping the period of investigation (July 1, 2001 to December 31, 2001), showed a financial loss. In the proceeding below and in previous cases, Commerce has taken the position that financial data of a company reporting a loss are not reliable for use as surrogate values in nonmarket economy antidumping investigations. Although the Jayaswals financial data for 1998–1999 showed a profit, Commerce

rejected the use of these data because, in its view, no party provided justification for such use. Defendant maintains that Commerce was justified in rejecting the financial data of Kalyani Brakes Ltd. because, it contends, the record did not demonstrate that this company manufactured merchandise comparable to the subject merchandise.

### *B. Challenge to the Use of Indian Import Statistics to Value Foundry Pig Iron*

Plaintiffs argue that Commerce acted improperly in assigning what they view as an aberrantly high surrogate value to foundry pig iron, a material used in producing non-malleable cast iron pipe fittings. The value Commerce used was $0.228 per kilogram, which it derived from import data published in the *Monthly Statistics of the Foreign Trade of India* ("Indian Import Statistics"), using the statistics corresponding to the six-month period of investigation. Plaintiffs contend that Commerce should have determined the surrogate value for pig iron according to publicly available price information from two sources in India, as placed on the record below by plaintiff Shanghai Foreign Trade and adjusted to remove the effect of domestic taxes.

Plaintiffs view the Indian Import Statistics as unrepresentative of the true pig iron price in the Indian market. They point out that the total quantity of pig iron imported into India for the six month period, according to the Indian Import Statistics, was a mere 1,132 tons and represented, in their estimation, less than one-tenth of one percent of Indian domestic consumption. Plaintiffs estimate that total pig iron consumption in India was at least 1.5 million tons for the six-month period, based on information in the petition identifying the output of 6,000 foundries in India. The minuscule percentage indicates, according to plaintiffs, that domestic demand for pig iron in India is satisfied almost exclusively by domestic pig iron, with the result that import prices must be viewed as an unreliable indicator of the market price.

According to plaintiffs, Commerce should have followed its practice of rejecting surrogate values obtained from import data that are shown to be aberrational. They assert that the value chosen by Commerce is 20 percent higher than the prices for pig iron reported in an Indian domestic publication of the Joint Plant Committee, the *JPC Bulletin*. They further argue that the prices shown in the *JPC Bulletin* are corroborated by those for pig iron reported weekly on IndiaInfoline.com, a privately-owned website providing financial services and economic information regarding India.

A third objection raised by plaintiffs concerns the effect of domestic internal taxes on the prices for pig iron in the Indian market. Plaintiffs assert that Commerce typically will not include domestic taxes in calculating surrogate values and further assert that relatively high domestic taxes inflate Indian domestic pig iron prices.

They argue that Commerce should base its surrogate value on the Indian domestic pig iron prices established by the *JPC Bulletin* and IndiaInfoline.com and then adjust these prices to remove the effect of domestic taxes. When this is done, they contend, the resulting prices are $0.15 per kilogram and $0.16 per kilogram, respectively—substantially less than the $0.228 price that Commerce used in the antidumping investigation.

Defendant maintains that Commerce's use of the Indian Import Statistics was justified and supported by substantial evidence on the record. Commerce properly rejected the use of the *JPC Bulletin* and IndiaInfoline.com price information, defendant contends, because neither source discloses information on the quantity of pig iron used in deriving the reported price information and because Shanghai Foreign Trade, in urging the use of this information in the investigation, did not place on the record any such quantity information. Defendant argues that given the absence of this quantity information, Commerce was justified in concluding that it had no record evidence upon which it could conclude that the price data in the *JPC Bulletin* and IndiaInfoline.com were derived from statistically or commercially significant quantities.

Responding to plaintiffs' argument that during the antidumping investigation Commerce never requested the quantity information on pig iron sales from Shanghai Foreign Trade or any other respondent and never contacted *JPC Bulletin* or IndiaInfoline.com to request that quantity information, defendant argues that plaintiffs, in the administrative proceeding below, had the burden of developing the record by submitting factual information. Because they did not do so, according to the argument of defendant, Commerce was well within its discretion in rejecting the price information of *JPC Bulletin* and IndiaInfoline.com in favor of price information gathered from official Indian import statistics.

## *IV. DISCUSSION*

### *A. Standard of Review*

This court must evaluate whether the challenged findings by Commerce are supported by substantial evidence on the record or are otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229 (1938); *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). The standard of review for a Commerce construction of the governing statute is not relevant as none is challenged in this case.

*B. Commerce's Decision to Use Reserve Bank of India Data*

In the antidumping investigation, Commerce chose to use Reserve Bank of India data to calculate the surrogate financial ratios for SG&A expenses, manufacturing overhead and profit. As discussed above, Commerce obtained those data from the 1999–2000 combined income, value of production, expenditure and appropriation account for a sample of 1,914 public limited companies in India, as reported in the June 2001 *Reserve Bank of India Bulletin.* Commerce made this choice after rejecting the use of data on the record that was contained in financial statements of four Indian manufacturers, Rajesh Malleables Ltd., Rico Auto Industries, Ltd., Jayaswals Neco Ltd., and Kalyani Brakes Ltd.

The choice to use the Reserve Bank of India data was a departure from the established Commerce procedure. Commerce has included in its regulations a rule under which manufacturing overhead, general expenses and profit "normally" will be valued using "information gathered from producers of identical or comparable merchandise in the surrogate country." The rule, codified at 19 C.F.R. § 351.408(c)(4), states as follows:

> *Valuation of Factors of Production.* For purposes of valuing the factors of production, general expenses, profit, and the cost of containers, coverings, and other expenses (referred to collectively as "factors") under section 773(c)(1) of the Act the following rules will apply:
>
> . . . .
>
> (4) *Manufacturing overhead, general expenses, and profit.* For manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country.

Although the rule allows for some deviation from the prescribed procedure by including the word "normally," the rule does not identify an alternate method or alternate source of information.

Commerce's own characterization of 19 C.F.R. § 351.408(c)(4) is that "[w]henever possible, the Department has used producer-specific data. Unlike industry-specific data, which tends to be broader in terms of merchandise included, product-specific data pertains directly to the subject merchandise." *Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China* ("*Issues and Decision Memorandum*") at 19, Pub. Doc. 213 (Feb. 7, 2003). The data obtained from the Reserve Bank of India does not qualify even as "industry-specific," as it was derived from a sample of 1,914 public limited companies in India. In *Yantai Oriental Juice Co. v. United States*, which involved a chal-

lenge to the use of Reserve Bank of India data to calculate Indian surrogate values for manufacturing overhead, SG&A expenses and profit in an antidumping investigation concerning Chinese apple juice concentrate ("AJC"), this Court observed that the Reserve Bank of India data "appears to bear little relationship to the actual costs of an Indian AJC producer." 26 CIT ___ , ___ , Slip Op. 02–56 at 27 (June 18, 2002).

At issue in this case is the administrative decision by Commerce to deviate from its general, promulgated rule—under which it would have used information gathered from producers of merchandise identical or comparable to the subject merchandise—and to use, instead, the nonspecific information compiled by the Reserve Bank of India. This court would be required to conclude that Commerce's decision is supported by substantial evidence on the record before it could uphold the final antidumping determination. The court also would need to discern in the Commerce decision a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962); *Neenah Foundry Co. v. United States*, 25 CIT ___ , ___ , 142 F. Supp. 2d 1008, 1014 (2001). Because its decision is a departure from its practice and the rule of 19 C.F.R. § 351.408(c)(4), Commerce in this proceeding has an additional duty "to explain its departure from prior norms." *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Saha Thai Steel Pipe Co., Ltd. v. United States*, 19 CIT 273, 279–280, 879 F. Supp. 1331, 1336–1337 (1995).

This court is unable to sustain the Commerce decision affecting manufacturing overhead, SG&A expenses, and profit. Commerce's decision is not supported by substantial evidence on the record and does not demonstrate a rational connection between the record evidence and the decision to use the Reserve Bank of India data. Commerce also failed to explain its departure from its rule and practice to use producer-specific data in the calculation of the surrogate values. These shortcomings result generally from the conclusory way in which Commerce addressed the issue of "comparable merchandise" manufactured in the surrogate country, India.

In the investigation, respondents placed financial statements of Rajesh, Rico, Kalyani and Jayaswals on the record, arguing at various times that one or more of these four companies were producers of cast iron merchandise that is comparable to the subject merchandise. Commerce rejected using any of these four sets of data. The Rajesh financial data was rejected because during the period of investigation Rajesh had suffered through a long labor strike, experienced financial difficulty, and did not make a profit. No party questions that determination before this court. Commerce declined to use the Rico financial information on the ground that it could not "find any evidence demonstrating that Rico produces cast iron automobile

components."[1] *Issues and Decision Memorandum* at 21. Commerce also claimed that any cast-iron products represented only 1.66 percent of Rico's raw material consumption. No party asserts in this litigation that Rico's financial statements should have been used.

Commerce decided not to use the financial data in the Jayaswals 1999–2000 annual report on the claim that no party argued for the use of those data. *Issues and Decision Memorandum* at 20. Because information on the record indicates that Jayaswals did not make a profit during that period, the record contains evidence to support that decision. However, Commerce also decided to reject the data presented in the 1998–1999 Jayaswals annual report (which showed a profit), concluding that no interested party "provided justification for using" those data. That decision, however, is unsupported by the record and in fact is contradicted by Commerce's own findings as set forth in the *Issues and Decisions Memorandum*. Jinan Meide argued in the investigation for the use of financial data from Jayaswals, Rico and Kalyani in the calculation of the profit ratio and, as an alternative to the Rajesh financial data, for use of that data in the calculation of the SG&A expenses and manufacturing overhead ratios as well. Jinan Meide, noting that Rajesh made malleable cast iron pipe fittings, argued specifically that Indian cast iron brake rotor manufacturers (*i.e.*, Jayaswals, Rico and Kalyani) produced the merchandise which was the next most comparable to the subject merchandise. Commerce specifically acknowledged that Jinan Meide advanced these arguments. *Issues and Decision Memorandum* at 20.

Commerce decided not to use the Kalyani financial information on the premise that respondent Jinan Meide did not show how Kalyani "is representative of a manufacturer that produces identical or comparable merchandise." *Id.* Here too, the record contradicts the Commerce premise. Commerce itself summarized, five pages earlier in the *Issues and Decision Memorandum*, a detailed argument by Jinan Meide presenting the reasons why the products made by Kalyani constituted merchandise comparable to the subject merchandise. *Issues and Decision Memorandum* at 15 ("JMC [Jinan Meide] states that these cast iron brake rotors are made with strikingly similar materials, methods, foundry equipment, and finishing procedures as

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[1] While plaintiffs do not challenge Commerce's rejection of Rico as a surrogate, the court finds unsupportable Commerce's assertion that it cannot find evidence that Rico is a producer of cast iron automobile components. In antidumping proceedings for brake rotors from China, Commerce used the financial statements of Jayaswals, Kalyani and Rico, among others, because they "produced both brake drums and brake rotors." *See Notice of Final Determination of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China*, 62 Fed. Reg. 9,160, 9,168 (Feb. 28, 1997). In the *Brake Rotors From the People's Republic of China: Preliminary Results of the Sixth Antidumping Duty New Shipper Review*, Commerce calculated SG&A expenses using the 1998–1999 Jayaswals annual report, the 2000–2001 Kalyani annual report, and the 1998–1999 Rico annual report. *See* 67 Fed. Reg. 38,251, 38,253 (June 3, 2002). The period of review for that determination was April 1, 2001 to September 30, 2001.

the subject merchandise. JMC contends that the similarities in the production processes of brake rotors and pipe fittings outweigh the differences in their end uses.").[2]

In the investigation, the petitioners favored the use of the Reserve Bank of India data and urged Commerce to reject the use of financial data from the Indian brake rotor producers. The *Issues and Decision Memorandum* describes petitioners' position that brake rotors are not comparable merchandise because they do not share the same physical characteristics (meaning size and shape) as pipe fittings and do not share the same end use. *Issues and Decision Memorandum* at 17. Missing from the document, however, is an analysis setting forth Commerce's own findings and reasoning on this issue. The Commerce treatment of the issue presents little more than paraphrases of the contentions of the parties and the conclusory statements, contradicted by the record, that no party "provided justification" for use of the Jayaswals information and that no party showed how the Kalyani products were comparable to the subject merchandise. Most notably, Commerce fails to discuss why merchandise made by Jayaswals and Kalyani, including in particular cast iron brake rotors, is or is not comparable to the subject merchandise.

To determine if a product produced by a company in the surrogate country is comparable, Commerce's established practice is to apply a three-part test that examines "physical characteristics, end uses, and production processes." *Issue and Decision Memorandum* at 19, citing *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 Fed. Reg. 48,612 (July 25, 2002) ("*Pencils Final Results*") and accompanying Issues and Decision Memorandum at Comment 5. Neither the Federal Register notice announcing the *Final Determination* nor the *Issues and Decision Memorandum* provides reasons why Commerce, in this case, departed from its practice by omitting an analysis of its application of the three-part test or another such test. As a result, the Commerce decision, failing to address the record evidence concerning Indian producers of cast iron products, does not adequately explain why Commerce considered Reserve Bank of India data preferable to the company-specific data for

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[2] In the case brief it submitted to Commerce in the investigation, Jinan Meide had argued as follows:

> Brake rotors and non-malleable pipe fittings are made of the same material: gray iron. The factors valuation memorandum for the recent *Sixth Antidumping Duty New Shipper Review of Brake Rotors from the People's Republic of China* lists pig iron, steel scrap, ferrosilicon, ferromanganese, limestone, and lubrication oil as the material inputs and lists firewood, electricity, and coking coal as the energy inputs. These are precisely the same factors of production consumed in JMC's casting, smoothing and threading workshops. The Department has verified that the brake rotors and pipe fittings are molded, cast, and cleaned using congruent facilities and methods.

Pub. Doc. 192 at 8 (footnotes omitted; emphasis in original).

its surrogate value analysis. The court's understanding on this point is not furthered by the statement in the *Issues and Decision Memorandum* that the Reserve Bank of India information "contains a number of potentially comparable producers of pipe fittings." *Issues and Decision Memorandum* at 22. This assertion, which is not further explained or justified by any reference to record evidence, seems incongruent with the generalized nature of the Reserve Bank of India data as derived from a broad sampling of Indian companies. It also invites questions concerning which publicly owned companies in India included in the Reserve Bank of India compilation are "potentially comparable producers of pipe fittings" and why Commerce did not consider using financial data from those producers for calculating SG&A expenses, manufacturing overhead and profit.

In some past cases in which Commerce has applied its three-part "comparable merchandise" test to two classes of products made using similar materials and production processes, it has found comparability despite differences in shape, size and end use. *See Notice of Preliminary Determination of Sales at Less than Fair Value and Postponement of Final Determination: Lawn and Garden Fence Posts From the People's Republic of China*, 67 Fed. Reg. 72,141, 72,145 (Dec. 4, 2002) (rejecting use of Reserve Bank of India data after finding circular steel pipe to be comparable to steel fence posts because they have similar production processes and material inputs); *see also Glycine from the People's Republic of China: Final Results of New Shipper Administrative Review*, 66 Fed. Reg. 8,383 (Jan. 31, 2001) and accompanying Issues and Decision Memorandum at Comment 7 (finding that similarity in production processes of glycine, a food additive, and phenylglycine, a toxic ingredient in dyes, outweighed any difference in the final end use of the products); *see also Pencils Final Results* and accompanying Issues and Decision Memorandum at Comment 5 (finding that wooden cabinets, doors and handicrafts were comparable to pencils based on similarities in production and rejecting use of generic Reserve Bank of India data). In some cases, Commerce has given the term "comparable" an expansive interpretation. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, From Romania: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 37,194, 37,199 (July 11, 1997) ("As the Department noted . . . in defending the use of data from the Turkish pipe and tube industry, 'the term "comparable" encompasses a larger set or products than "such or similar.' " Thus we have supported the use of pipe industry data in earlier reviews of this proceeding as being sufficiently 'comparable' to tapered roller bearings."). If steel fence posts are comparable to steel pipes and pipe fittings, if a food additive is comparable to a toxic dye ingredient, if pencils are comparable to furniture, and if bearings are comparable to steel pipes, then Commerce must explain, in the context of its established practice,

how cast iron pipe fittings are not comparable to cast iron brake rotors.

With regard to the Jayaswals financial statements, Commerce also apparently overlooked evidence that Jayaswals may qualify as a producer of comparable merchandise other than brake rotors. The record indicates that Jayaswals has a diversified casting business: "Jayaswals produces iron and steel castings, including drainage pipes and cylinder heads, that weigh 500 grams to 5 tonnes." *Def.'s Mem. in Opp'n to Pls.' Rule 56.2 Mot. for J. upon the Agency R.* at 32 (Sept. 26, 2003) (*citing* 1999–2000 Jayaswals Annual Report, Pub. Doc. 1, Ex. 20). If Commerce determines that brake rotor manufacturers produce comparable merchandise, then Jayaswals would appear to qualify as a brake rotor producer. If Commerce determines that brake rotors are not comparable merchandise, it also must consider whether Jayaswals would qualify as a producer of identical or comparable merchandise based on its larger casting business, which apparently includes pipes and other products.

In summary, Commerce's decision not to use the data contained in the 1998–1999 Jayaswals and the 2000–2001 Kalyani financial statements fails because it is not supported by substantial evidence. It also fails because it lacks a rational connection between its conclusion and the evidence in the record and also lacks a justification for the departure from Commerce's rule and past practice.

Accordingly, the court remands this case to Commerce for correction of the inadequacies in its determination concerning the surrogate values for SG&A expenses, manufacturing overhead and profit. On remand, Commerce either must follow the general rule of 19 C.F.R. § 351.408(c)(4) by calculating these values using "non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country," or it must provide an explanation sufficient to justify its use of information that falls short of that standard. That explanation must be grounded in evidence on the record and must explain the rational connection between the record evidence and the conclusion reached. Commerce must determine whether cast iron brake rotor manufacturers produce merchandise comparable to the subject merchandise. If it concludes that they do not, then it must state its reasons for that conclusion and justify its determination that a product made with similar materials and production processes is not comparable to the subject merchandise. Even if Commerce determines that brake rotors are not comparable merchandise, then it must explain why Jayaswals, which the record indicates to have a significant iron casting business, is not a producer of comparable merchandise.

### *C. Valuation of Pig Iron*

Commerce obtained its surrogate value of $0.228 per kilogram (10.99 Rupees per kilogram) for pig iron, a primary material in the

manufacturing of non-malleable cast iron pipe fittings, from Indian Import Statistics corresponding to the six-month period of investigation. As discussed previously, plaintiffs challenge this surrogate value on various grounds, alleging in particular that it is based on a quantity of pig iron, 1,132 metric tons for the six-month period, that is so small as to be statistically and commercially insignificant when viewed against the total Indian domestic consumption of pig iron.

Plaintiffs also assert that the surrogate value chosen by Commerce is substantially higher than prices for pig iron shown in two Indian domestic references for pig iron prices. During the investigation, Shanghai Foreign Trade placed on the record two such sources: the *JPC Bulletin*, an Indian government publication of market prices in six major cities in India, and the website IndiaInfoline.com. Plaintiffs identified a pig iron price of 9.12 Rupees/kg. (7.21 Rs/kg. excluding excise tax) based on *JPC Bulletin* and a price of 9.852 Rs/kg. (7.79 Rs/kg. excluding excise tax) based on IndiaInfoline.com. *Mem. in Supp. of Mot. for J. on the Agency R. under Rule 56.2 filed by Pls.* ("*Pls.' Br.*"). at 25–26 (July 7, 2003). Plaintiffs urge that Commerce use these two sources, exclusive of the excise tax, to calculate the pig iron surrogate value.

The governing statute grants considerable discretion to Commerce in choosing among surrogate values for the factors of production. *See, e.g.*, *Nation Ford Chemical Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). Nevertheless, the statute requires that "the valuation of the factors of production shall be based on the best available information regarding the values of such factors in a market economy country or countries" that Commerce considers "appropriate." 19 U.S.C. § 1677b(c). In addition, it is Commerce's duty to ensure that the antidumping rates are as accurate as possible. *See Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990).

Consistent with the statutory mandate to use the best available information, Commerce must evaluate all data in the record to determine reliability. *See Olympia Industrial, Inc. v. United States*, 22 CIT 387, 390, 7 F. Supp. 2d 997, 1001 (1998) ("Commerce has an obligation to review all data and then determine what constitutes the best available information or, alternatively, to explain why a particular data set is not methodologically reliable."). In fulfilling this duty, Commerce's practice is to discard as unreliable proposed surrogate market values that are aberrational compared to other market values on the record. *See Pencils Final Results*, 67 Fed. Reg. 48,612, and accompanying Issues and Decision Memorandum at Comment 4 (citing *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China; Final Results of Antidumping Duty Administrative Reviews*, 60 Fed. Reg. 49,251, 49,253 (Sept. 22, 1995) ("*Hand Tools Final Results*")).

Commerce has a preference for using import statistics to value material inputs because they are "publicly available published information" and do not include domestic taxes or subsidies. *See Hand Tools Final Results*, 60 Fed. Reg. at 49,252. However, if the import statistics are based on a small quantity of imports for the period of investigation, the Commerce practice is to determine if the price for those imports is aberrational. *See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999). If the price is aberrational, Commerce will consider the statistics unreliable and use a different source. *See Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From the People's Republic of China*, 62 Fed. Reg. 61,964, 61,981 (Nov. 20, 1997) ("For pig iron, we were unable to use the Indian *Monthly Statistics* as we determined that the import price was aberrational because the Indian data was based on a very small quantity and was almost two times the price of the Indonesian pig iron."); *see also Hand Tools Final Results*, 60 Fed. Reg. at 49,253 (Commerce's practice is to check import statistics against "sources of market value if the total quantity imported under a specific category was small, and, if the value was found to be aberrational, i.e., too high or too low, [Commerce has] chosen another surrogate value.").

The Commerce decision that the Indian import data was the "best available information" from which to calculate a surrogate value for pig iron, as set forth in the *Issues and Decision Memorandum*, suffers from two shortcomings. Commerce does not "explain its departure from prior norms." *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. at 808. Nor does Commerce present a "rational connection between the facts found and the choice made." *Burlington Truck Lines, Inc. v. United States*, 371 U.S. at 168. A Commerce decision to rely on potentially aberrational data without explanation and contrary to its own practice is not based on substantial evidence and cannot be sustained. *See Shakeproof Assembly Components*, 59 F. Supp. 2d at 1360.

Commerce's explanation of its decision to use the Indian Import Statistics is conclusory and inadequately supported. Commerce claimed that it was "not persuaded" to stop using the import statistics and that Shanghai Foreign Trade failed to show how the *JPC Bulletin* and IndiaInfoline.com data "are a more accurate representation of competitive prices in the Indian market." *Issues and Decision Memorandum* at 26. Commerce also indicated that *JPC Bulletin* and IndiaInfoline.com do not disclose the amount of pig iron sold in the period and that Commerce, therefore, had no evidence that the prices are "derived from statistically or commercially significant quantities." *Id.* There is little in the decision, beyond these

conclusory allegations, to support the choice to use the import data.[3] Commerce's decision to use the Indian Import Statistics suffers from the same flaw that Commerce alleges as a basis for its rejecting plaintiffs' alternatives. The Commerce decision fails to establish that the small amount of pig iron imported by India during the period of investigation was statistically or commercially significant and demonstrates no apparent consideration of that issue. Commerce did not address the issue whether the Indian Import Statistics were based on too small a sample to be reliable. Commerce did not explain its decision to deviate from its past practice, under which it normally would ensure that a small quantity of imports did not produce a price that is aberrational relative to other sources of market value. Before Commerce can choose among various values to select the most accurate, it must, consistent with its practice, discard those that are unreliable. In this case, Commerce summarily discarded the alternatives as flawed but did not evaluate the reliability of its own choice.

The court's examination of the record reveals indications that the 1,132 metric tons of pig iron imported into India during the period of investigation are not commercially significant. First, plaintiffs submitted for purposes of valuing the factors of production the 2000 Indonesian import statistics. *See* Pub. Doc. 95, Dickstein, Shapiro, Morin & Oshinsky, LLP Letter to Commerce, June 21, 2002. Those statistics show that Indonesia imported 107,542 metric tons of pig iron (excluding 30,774 metric tons from the PRC) in 2000. When divided in half to represent a six-month period equivalent to the period of investigation, this amount indicates that Indonesia imported approximately fifty times the amount of pig iron imported into India. Second, Jayaswals, which consumes and produces pig iron, produced 384,176 metric tons of pig iron in 1998, according to its annual re-

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[3] The Commerce analysis of this issue in the *Issues and Decision Memorandum* is contained entirely in the following excerpt:

> With regard to SFTEC's [Shanghai Foreign Trade's] claim that the data supplied by SFTEC from the *JPC Bulletin* and the "Indiainfoline.com" are superior to the data from the Indian Import Statistics, we note that the Department has long used Indian Import Statistics values for other investigations and reviews, and is not persuaded by SFTEC's argument that it should disregard this source in this investigation. *See HFHTs Final* [*Hand Tool Final Results*], and accompanying Issues and Decision Memorandum, at Comment 10. SFTEC has provided no record evidence substantiating its claim that the information provided from "Indiainfoline.com" and the *JPC Bulletin* are a more accurate representation of competitive prices in the Indian market. Further, SFTEC has offered no support for its assertion that the import quantities from the Indian Import Statistics are neither statistically nor commercially significant. In addition, SFTEC did not indicate the quantity of pig iron reported in the *JPC Bulletin* or "Indiainfoline.com." Therefore, the Department has no evidence that SFTEC's surrogate values for pig iron, based on prices from the *JPC Bulletin* and "Indiainfoline.com," are derived from statistically or commercially significant quantities. Thus, for this final determination, we have continued to calculate the surrogate value for pig iron using India import statistics data. . . .

*Issues and Decision Memorandum* at 26.

port. *See* Pub. Doc. 175, O'Melveny & Myers Letter to Commerce, Nov. 4, 2002, Ex. 3B. The Jayaswals data indicates that the amount imported into India was one-half of one percent of half the annual amount produced by just one Indian domestic company.[4]

In addition to the indications on the record that the India Import Statistics were based on a commercially insignificant quantity of pig iron, the record contains indications that the price for pig iron obtained from those statistics is aberrational relative to other sources for determining market value. If an adjustment is made for the effect of excise taxes, as urged by plaintiffs, the *JPC Bulletin* price for pig iron is 66 percent of the Indian Import Statistics price and the IndiaInfoline.com price is 71 percent of that price. In addition, Indonesian import statistics for 2000 priced pig iron at $0.13, which constitutes only 56 percent of the Indian Import Statistics price. The court finds that Commerce failed to justify the departure from its usual practice of using import statistics only after concluding that they are based on commercially and statistically significant quantities. Commerce also failed to explain its disregard of record evidence indicating that the 1,132 metric tons of pig iron imported into India during the period of investigation may be too small a quantity to support a reliable determination of market value in the surrogate country. Moreover, Commerce does not address whether the value it chose is aberrational relative to other record evidence of the market value of pig iron.[5] Had Commerce considered that evidence and the evidence that the Indian Import Statistics were not based on a sufficient quantity, it then would have been in a position to make the determination the statute requires, *i.e.*, whether the value it chose was "based on the best available information."

On remand, Commerce's analysis must address whether the price for pig iron obtained from the Indian Import Statistics is based on a statistically or commercially insignificant quantity. To do this, Com-

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[4] Plaintiffs, in briefs before this court, used record evidence to compare the six-month quantity of pig iron imported into India with an estimated amount of Indian domestic consumption. Plaintiffs based this estimate on the lowest rate of pig iron usage per unit of finished product of any of the suppliers of subject merchandise to Shanghai Foreign Trade. Plaintiffs applied that rate to the total output from Indian manufacturers of products that contained pig iron. By this method, plaintiffs estimated that during the six month period of investigation India consumed 1.5 million metric tons of pig iron. *Pls.' Br.* at 28. The Indian Import Statistics amount of 1,132 metric tons represents 0.075% of this figure. However, the record does not show that plaintiffs presented this calculation to Commerce during the investigation.

[5] At oral argument, defendant's counsel mentioned one method of determining whether an Indian Import Statistics price is aberrational: when import statistics include imports from several countries, Commerce will compare the price from countries with small quantity imports against those with large quantity imports, and Commerce will discard small quantity import prices if they are aberrational. *See Shakeproof Assembly Components*, 59 F. Supp. 2d at 1360. However, this method is not applicable in this case. If the combined quantities are commercially insignificant, then no fraction of that amount can have a measure of reliability.

merce must state its method for determining what is an insignificant quantity. If Commerce concludes that the quantity is insignificant, then it must determine if the Indian Import Statistics price is aberrational relative to other market-based sources for pig iron prices. Commerce must state how it determines what qualifies as an aberrational price relative to those other sources. If Commerce concludes that the value obtained from the Indian Import Statistics is unreliable because it is aberrational relative to other sources for pig iron prices, then Commerce must fulfill its statutory obligation to use the best available information by looking to other sources to value pig iron. If those alternative sources are drawn from domestic information from India, Commerce must address plaintiffs' argument that domestic excise taxes should not be included in the pig iron price established by Commerce. If necessary, Commerce should re-open the record to establish a market value to compare to the Indian Import Statistics price or to obtain another source for valuing pig iron.

### *V. CONCLUSION AND ORDER*

Upon consideration of plaintiffs' Rule 56.2 Motion for Judgment upon an Agency Record, plaintiffs' briefs in support of said motion, and defendant's and defendant-intervenors' opposition thereto, upon all relevant papers and proceedings had herein, and upon due deliberation; it is hereby

ORDERED that determinations by the United States Department of Commerce ("Commerce") in the *Antidumping Duty Order: Non-Malleable Cast Iron Pipe Fittings from the People's Republic of China*, 68 Fed. Reg. 16,765 (April 7, 2003), and the *Final Determination of Sales at Less Than Fair Value: Non-Malleable Cast Iron Pipe Fittings From the People's Republic of China*, 68 Fed. Reg. 7,765 (Feb. 18, 2003), are remanded for proceedings consistent with this opinion and order; and it is further

ORDERED that Commerce shall have ninety (90) days, until July 8, 2004, to complete and file its remand determination; plaintiffs shall have thirty (30) days from that filing to file comments, and Commerce and defendant-intervenors shall have twenty (20) days after plaintiffs' comments are filed to file any reply.

Slip Op. 04–34

FORMER EMPLOYEES OF TYCO ELECTRONICS, FIBER OPTICS DIVISION, PLAINTIFFS, v. UNITED STATES DEPARTMENT OF LABOR, DEFENDANT.

Court No. 02–00152

[Defendant's Revised Determination on Remand is affirmed and this case is dismissed.]

*Williams Mullen, P.C.*, (*Jimmie V. Reyna, Francisco J. Orellana*) for Plaintiffs.

*Peter D. Keisler*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Stephen Carl Tosini*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice, for Defendant.

Dated: April 14, 2004

## OPINION

This matter comes before the Court on Plaintiffs', Former Employees of Tyco Electronics, Fiber Optics Division, Glen Rock, Pennsylvania, submission of a letter dated March 11, 2004, in which Plaintiffs accepted, with certain reservations, the United States Department of Labor's determination in *Tyco Electronics, Fiber Optics Division, Glen Rock, PA; Notice of Revised Determination on Remand*, 68 Fed. Reg. 41,185 (July 10, 2003) ("*Second Remand Results*"), as implemented by a letter dated February 27, 2004, from Lenita Jacobs-Simmons, Regional Administrator, United Sates Department of Labor, to the Honorable Stephen Schmerin, Secretary of Labor and Industry, Commonwealth of Pennsylvania ("Jacobs-Simmons Letter"). Based on the foregoing, and in the interest of expediting the process by which Plaintiffs will obtain North American Free Trade Agreement Transitional Adjustment Assistance ("NAFTA-TAA") benefits, this Court affirms the Department of Labor's *Second Remand Results*, as implemented by the Jacobs-Simmons Letter; orders that the Clerk of this Court include the Jacobs-Simmons Letter and Plaintiffs' letter to the Court of March 11, 2004, as part of the record before the Court; and dismisses this action.

## BACKGROUND

The Court provided a full recitation of the background facts in its two prior opinions issued in this case. *See Former Employees of Tyco Elecs. v. United States Dep't of Labor*, 264 F. Supp. 2d 1322, 1323 (Ct. Int'l Trade 2003) (denying Plaintiffs' second motion for judgment on the agency record and remanding the case to Defendant); *Former*

*Employees of Tyco Elecs. v. United States Dep't of Labor*, 259 F. Supp. 2d 1246, 1248 (Ct. Int'l Trade 2003) (denying Plaintiffs' first motion for judgment on the agency record and accepting Defendant's remand results out of time). The background facts that are pertinent to this decision are summarized herein.

On July 27, 2001, Plaintiffs petitioned for certification under 19 U.S.C. § 2331[1] for NAFTA-TAA benefits, based on their belief that their job loss was a result of a shift in production of fiber optic components to Mexico. (Pub. Admin. R. at 2, 53.) The Pennsylvania Department of Labor and Industry denied Plaintiffs' petition after an initial investigation. On September 4, 2001, Defendant initiated an investigation of Plaintiffs' NAFTA-TAA certification eligibility petition. *Investigations Regarding Certifications of Eligibility to Apply for NAFTA Transitional Adjustment Assistance*, 66 Fed. Reg. 48,708 (Sept. 21, 2001). After its initial investigation, the Department of Labor denied Plaintiffs' petition on the grounds that imports from Mexico did not contribute importantly to Plaintiffs' separation and there was no shift in production to Mexico. *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 66 Fed. Reg. 53,250, 53,252 (Oct. 19, 2001). The Department of Labor denied Plaintiffs' request for administrative reconsideration. *Tyco Electronics Fiber Optics Division, Glen Rock, Pennsylvania; Notice of Nega-*

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[1] Section 2331(a)(1) provides:

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

19 U.S.C. § 2331(a)(1) (2000).

The Court notes that Congress repealed 19 U.S.C. § 2331, on August 6, 2002, folding the NAFTA-TAA program into a new trade adjustment assistance scheme under the newly-revised version of the Trade Act of 1974 renamed the Trade Act of 2002. *See* Pub. L. No. 107–210, § 123(a), 116 Stat. 933, 944 (2002). However, Plaintiffs' petition antecedes the November 4, 2002, effective date of the revised statute; thus, they cannot benefit from the terms of the revised statute. *See id.* at § 151, 116 Stat. 953–54.

*tive Determination Regarding Application for Reconsideration*, 67 Fed. Reg. 5,299 (Feb. 5, 2002).

Plaintiffs appealed the Department of Labor's negative determination by filing a complaint in this Court on January 30, 2002. (Pls.' Compl. at 1.) Immediately after Plaintiffs filed a motion for judgment on the agency record, Defendant sought Plaintiffs' consent to a voluntary remand. (Def.'s Unopposed Mot. for Voluntary Remand at 2.) In seeking a voluntary remand, Defendant stated that "[a]fter review of the administrative record in light of the arguments petitioners made in their Rule 56.1 motion, defendant seeks a remand to Labor to conduct a further investigation and make a redetermination." (*Id.*) Pursuant to the request for voluntary remand, this Court ordered Defendant to conduct a remand investigation and submit remand results by October 7, 2002. *Former Employees of Tyco Elecs. v. United States*, No. 02–00152 (Ct. Int'l Trade Aug. 6, 2002) (order granting voluntary remand). Due to Defendant's delay, as detailed in this Court's earlier opinion, the Department of Labor's results in the first remand, *Tyco Electronics, Fiber Optics Division; Glen Rock, PA; Notice of Negative Determination on Reconsideration on Remand*, 68 Fed. Reg. 5,655 (Feb. 4, 2003) ("*First Remand Results*"), were filed out of time on January 17, 2003. *Former Employees of Tyco Elecs.*, 259 F. Supp. 2d at 1248. Again, the Department of Labor denied Plaintiffs' eligibility to receive NAFTA-TAA benefits. *First Remand Results*, 68 Fed. Reg. 5,655. Plaintiffs filed their second motion for judgment on the agency record challenging the *First Remand Results*. *Former Employees of Tyco Elecs.*, 264 F. Supp. 2d at 1323. In its response to Plaintiffs' motion, Defendant conceded that a second remand was necessary because the *First Remand Results* "[were] deficient in so far as they did not address information obtained from the Plaintiffs" as directed in this Court's order granting Defendant's request for voluntary remand. (Def.'s Mem. in Partial Opp's to Pls.' Cmts. on Def.'s Negative Determination on Remand at 8.)

In May 2003, this Court remanded the case to the Department of Labor "for further consideration and investigation of 1) the [ ] information submitted by Plaintiffs; 2) the propriety of conducting an import analysis to support the information contained in the customer surveys, 3) the seemingly contradictory information provided by Tyco Electronics regarding sales; and 4) the arguments made in Plaintiffs' 56.1 Motion regarding a shift in production in light of the data contained in the [ ] information [obtained from Plaintiffs]." *Former Employees of Tyco Elecs.*, 264 F. Supp. 2d at 1333. On July 10, 2003, the Department of Labor published the *Second Remand Results* certifying Plaintiffs as eligible to receive NAFTA-TAA benefits. *Second Remand Results*, 68 Fed. Reg. 41,185.

## DISCUSSION

In the *Second Remand Results*, the Department of Labor stated that it had "requested and obtained new and additional information and clarification from the company regarding plant production shifts to Mexico." *Id.* After reviewing this information, Defendant "conclud[ed] that there was a shift of production to Mexico that contributed importantly to the worker separations and sales or production declines at the subject facility." *Id.* Based on this analysis, the Department of Labor certified Plaintiffs eligible to receive NAFTA-TAA benefits. *Id.*

Only July 25, 2003, Plaintiffs filed their response to the *Second Remand Results* stating that they were satisfied with Defendant's certification. (Pls.' Cmts. on Def.'s Revised Determination on Remand at 1.) However, in late August, Plaintiffs were informed by the Pennsylvania Department of Trade and Labor, the state agency responsible for administering the NAFTA-TAA benefits, that Plaintiffs would not receive basic trade readjustment allowances ("TRA") because the statutory 104-week eligibility period for those allowances had expired during the pendency of this litigation. (*See* Jacobs-Simmons Letter at 1–2 ("Federal law provides that a worker otherwise meeting basic TRA eligibility requirements may receive basic TRA only during the 104-week period following the worker's most recent total qualifying separation. . . . Since [Plaintiffs'] certification was issued after the expiration of the 104-week eligibility period for basic TRA for most covered Tyco workers[,] . . . it was not possible for most of the workers to qualify for any basic TRA.")); *see also*, 19 U.S.C. § 2293(a)(2) ("trade readjustment allowance shall not be paid for any week after the close of the 104-week period . . . that begins with the first week following the week in which the adversely affected worked was most recently totally separated").

The Court convened a teleconference to discuss this matter on September 3, 2003. During the teleconference, the parties assured the Court that they would "work together to resolve this issue" so that benefits would be made available to Plaintiffs. (Letter from Def.'s Counsel to the Court dated 09/03/03.) From September 2003 to March 2004, the parties worked together to solve this problem and kept the Court apprised of the situation through weekly status reports. On February 27, 2004, Lenita Jacobs-Simmons, Regional Administrator for the United States Department of Labor sent a letter to the Honorable Stephen Schmerin, Secretary of Labor and Industry for the States of Pennsylvania advising Secretary Schmerin that, with respect to Plaintiffs, the Department of Labor was "modifying [its] interpretation of Federal law requirements for TRA." (Jacobs-Simmons Letter at 1.) Specifically, the Department of Labor advised Secretary Schmerin that:

> The special circumstances of the litigation involved in this situation dictate that we provide some flexibility to allow Tyco workers to obtain the NAFTA-TAA benefits they otherwise would have been able to obtain except for the long dely in issuing the certification. Where there has been undue and extreme delay in issuing a certification due to circumstances of litigation, and plaintiffs' actions did not substantially contribute to the delay, the 104-week basic TRA eligibility period shall not begin until the certification is issued. In this case, the Tyco litigation was unusually lengthy and involved multiple remands, and the certification was issued only after the expiration of the 104-week eligibility period for most (if not all) Tyco workers. Equity and good conscience dictate that the Tyco workers be "made whole" by being restored to the position they would have occupied had there been no delay in issuing the certification.

(Jacobs-Simmons Letter at 2.) The Department of Labor explicitly limited the application of this equitable solution to this case, stating that "this action is unique and is a remedy only for this specific situation; it may not be construed by Pennsylvania or any other state as precedent-setting in state TAA or NAFTA-TAA benefit determinations for workers covered under other certifications." (Jacobs-Simmons Letter at 4.)

After reviewing the Jacobs-Simmons Letter, Plaintiffs informed the Court that they would accept the letter as resolution of this matter, but with reservations. (Letter from Pls.' Counsel to the Court of 03/11/04, at 2.) First, Plaintiffs were concerned that the letter only granted prospective benefits; thus, some expenses that Plaintiffs had incurred, which would have been reimbursable had the workers been certified when they originally filed their petition, would not be reimbursed because the 104-week time limit had expired. (*Id.*) Second, Plaintiffs were concerned that Defendant explicitly limited the scope and application of its solution only to this particular case. (*Id.*) Plaintiffs noted that this problem was likely to recur with other workers who seek judicial review of the Department of Labor's eligibility determinations in this Court. (*Id.*) Plaintiffs were pleased that Defendant was willing to expand the time limits for Plaintiffs in "equity and good conscience," but questioned why Defendant would not "demonstrate equity and good conscience with respect to other and future workers similarly situated." (*Id.* at 2–3.) Plaintiffs' Counsel informed the Court on March 12, 2004, that Plaintiffs had received notice from the Pennsylvania Department of Labor and Industry that they were eligible to receive TRA benefits in accordance with the Jacobs-Simmons Letter. (*See* Letter from Pls.' Counsel to the Court of 03/12/04.) After stating their reservations, Plaintiffs expressed their appreciation that the Department of Labor had worked with them to find "the means to make them as whole as possible, un-

der the circumstances." (Letter from Pls.' Counsel to the Court of 03/11/04.)

The Court notes Plaintiffs' reservations and affirms the Department of Labor's certification of Plaintiffs eligibility to receive NAFTA-TAA benefits.

## CONCLUSION

The Court observes that the Department of Labor failed to follow this Court's specific instructions on remand. *Compare Former Employees of Tyco*, 264 F. Supp. 2d at 1333 (directing Defendant to consider specific information obtained from Plaintiffs), *with Second Remand Results*, 68 Fed. Reg. 41,185 (failing to mention any information obtained from Plaintiffs and granting certification based on "new and additional information and clarification from the company"). However, because Plaintiffs are satisfied with the Department of Labor's determination as implemented by the Jacob-Simmons Letter, (*see* Letter from Pls.' Counsel to the Court of 03/11/04), this Court affirms the *Second Remand Results* and orders the Clerk of this Court to include the Jacobs-Simmons Letter and Plaintiffs' letter to the Court of March 11, 2004, as part of the record before the Court. Accordingly, this case is dismissed.