Slip Op. 04–35

P. L. THOMAS PAPER CO., INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 99–00671

[After trial, judgment entered for defendant.]

Dated: April 15, 2004

Law Offices of David C. Williams (*David C. Williams*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Graves Walser*), *Sheryl A. French*, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, for defendant.

OPINION

RESTANI, Chief Judge:

This matter is before the court following trial. At issue is the proper classification of certain entries of paper intended for conversion into reinforced gummed tape for sealing cartons. The classification of the United States Bureau of Customs and Border Protection ("Customs"), then known as the United States Customs Service, was properly protested and suit was timely filed after denial of the relevant protests. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2000) (denial of protest).

The following facts are not in dispute:

1. Plaintiff, P. L. Thomas Paper Company, Inc., is the owner and importer of record of the merchandise at issue.

2. The entries at issue are:

No. 204–0648151–3, made on February 15, 1996;

No. 030–0132020–3, made on October 22, 1997;

No. 030–0132148–2, made on October 29, 1997;

No. 204–1756657–5, made on May 7, 1997; and

No. 204–1757045–2, made on May 22, 1997.[1]

3. The importer described the paper imported under cover of these entries as follows:

> [T]he paper [is] MG pure Swedish natural brown unbleached plain sulphate kraft paper. The paper is made from 100% virgin unbleached Swedish kraft pulp and is uncoated. . . . The paper is supplied on rolls maximum of 40″ in diameter with varying widths from 49 to 97″, each roll weights about 1,000 kilos. The paper has a minimum basis weight of 38 grs/ms (23#-24x36/500); a caliper reading of .002″ +/−; and a high porosity measurement of 40/50 seconds 10cc gurley.

Pretrial Order Sch. C ¶8.

4. The paper is imported in bulk and is intended for use and actually used in conversion to reinforced carton sealing tape.

5. At all times relevant to this action, the Harmonized Tariff Schedule of the United States ("HTSUS") provided the following statutory provisions:

Chapter 48 Note 5	In this chapter "*kraft paper and paperboard*" means paper and paperboard of which not less than 80 percent by weight of the total fiber content consists of fibers obtained by the chemical sulfate or soda processes.	
Heading 4804	Uncoated kraft paper and paperboard, in rolls or sheets, other than that of heading 4802 or 4803:	
	* * * *	
	Other kraft paper and paperboard weighing 150 g/m2 or less:	
Subheading 4804.31	Unbleached:	
	* * * *	
Subheading 4804.31.40	Wrapping paper.	Free
Subheading 4804.31.60	Other	2.8% *ad valorem*

[1] This is a test case which may affect 157 other entries covered in other actions before the court.

Subheading 4804.39	Other:	
	* * * *	
	Other:	
Subheading 4803.39.60	Other	2.8% *ad valorem*

6. The paper at issue is "kraft paper" and is classifiable under Heading 4804, HTSUS.

7. Customs liquidated the imported kraft paper under subheading 4804.39.60, HTSUS, pursuant to Customs Headquarters Ruling Letter 961068 (dated June 3, 1999), as "Uncoated kraft paper and paperboard, in rolls or sheets, other than that of heading 4802 or 4803: Other kraft paper and paperboard weighing 150 g/m2 or less: Other: Other" at a duty rate of 2.8% *ad valorem*.

8. Plaintiff, P. L. Thomas, claims that the imported merchandise is properly classified under subheading 4804.31.40, as "Other kraft paper and paperboard weighing 150 g/m2 or less: Unbleached: Wrapping paper," a duty-free provision.

9. The tariff term "wrapping paper" is not statutorily defined. It is also not defined in the *Explanatory Notes* to the HTSUS.

10. "Wrapping paper" is a class or kind of kraft paper which is manufactured, sold, and principally used for wrapping purposes.

At trial, plaintiff's witness, its president Richard Greene, testified. He has more than three decades of experience in the paper business. It was Mr. Greene's testimony that wrapping paper is a broad category of unbleached kraft paper falling within an 18–70 pound range, which is known for its strength, and that is principally used in the United States to make paper bags. Tr. at 18–19, 21. He testified further that, as imported, the paper at issue fits within this definition of wrapping paper. Tr. at 41. Mr. Greene's testimony also revealed: The imported paper is made with a shiny, smooth machine glaze finish on one side and an unsmooth machine finish on the other side. Tr. at 12. It has a porosity measurement of 40 to 60 seconds, 100 cc. gurley, which indicates that it is a tight sheet suitable for coating with another substance. Tr. at 14–15. The imported paper has a minimum weight of 38 g/m^2, which is 23 pounds. Tr. at 13. The imported merchandise is a specialty paper known commercially as "gumming paper." Tr. at 46, 48. Subsequent to importation, the imported paper was laminated and coated with glue stain to make gummed sealing tape. Tr. at 17, 24, 59–60.

The government's witness, Robert Sexton, has an equally long acquaintance with the paper industry, as well as formal academic training in the pulp and paper industry. He testified as follows: The imported paper does not move in the same channels of trade as "wrapping paper." Tr. at 91–92. Typically, wrapping paper was sold

to manufacturers of counter rolls.[2] Tr. at 91; *see also* Tr. at 25 (Greene). Presently, the primary paper industry is one of the largest users of wrapping papers for protecting large paper rolls and cut-sized sheets of photocopy paper. Tr. at 105; *see also* Tr. at 25 (Greene). Gumming paper, on the other hand, "would go to a gummer." Tr. at 91–92. The imported paper is not used in the same manner as "wrapping paper." Tr. at 107. Wrapping paper is coarse, unfinished paper used to wrap products. Tr. at 84, 93. Gumming paper is the raw material used to manufacture reinforced gummed tape and is not economically practical for wrapping purposes. Tr. at 92, 114.

The witnesses agreed that gumming papers and wrapping papers are both unbleached kraft paper with a base weight between 18.5 and 79 pounds, but that the other specifications for each type of paper differ. Tr. at 16, 18 (Greene), 100–01 (Sexton). Bulk paper destined to be gummed for use as reinforced tape is made to tight specifications that make it suitable for its intended end use. Tr. at 12–14, 17, 42 (Greene), 85–86, 116–17 (Sexton); *see supra* Uncontested Facts ¶3 (describing specifications of imported paper). Strength, porosity, and surface smoothness are important physical characteristics of gumming paper. Tr. at 17 (Greene), 90 (Sexton). Gumming paper also requires specifications for base weight, thickness, moisture content and wet strength, among other things. Tr. at 13–17 (Greene), 90 (Sexton). Wrapping paper, by contrast, has few required specifications beyond weight and strength, but the specifications can be customized for particular end uses. Tr. at 18, 27–28, 38 (Greene), 90, 108–11, 117 (Sexton). Counter roll paper does not require specifications other than weight. Tr. at 16, 42 (Greene), 108–09, 117 (Sexton).

The finished product, a roll of reinforced gummed tape (72mm x 114.3M) was admitted as Plaintiff's Exhibit 8. A sample of the paper as imported was admitted as Plaintiff's Exhibit 1.

DISCUSSION

The tariff interpretation issue, as framed by the parties at trial, is whether "wrapping paper" is a broad term covering all bulk kraft paper of an appropriate weight or whether the term is a more narrow one limited to paper intended for a wrapping or enclosing function. Defendant argues for a very narrow definition limited to paper intended for making counter rolls. It is not necessary, however, to reach such a narrow definition to resolve this case, as even a broader definition does not encompass the product at issue.

Although the parties presented evidence at trial, it was largely to help the court understand the meaning of a tariff term, an issue of

---

[2] Counter rolls are not as widely used as they once were, but they are the familiar rolls of usually brown paper sometimes used in retail stores to wrap packages for customers. Counter rolls largely have been supplanted by bags or sacks. Tr. at 31.

law.[3] The court is guided as to tariff interpretation principally by the one case on point, *D. C. Andrews & Co. of Mass. v. United States*, 55 Cust. Ct. 354 (1965). The merchandise at issue there was paper board, which plaintiff claimed was classifiable as "wrapping paper." The court held that the determination of whether a class of paper is "wrapping paper" under the tariff schedules is governed by the paper's "chief use."[4] *Id.* at 357. In ruling against the plaintiff, the court stated:

> [A]ll of the witnesses who were asked to comment upon the matter distinguished paper such as is here involved from the kind of coarse paper which the trade might consider to be wrapping paper and agreed that the subject paper was of a class or kind used for the making of tags, labels, and file folders. These are uses which we do not find synonymous with, nor so related to, the process of enclosing and covering a package, as to respond to characterization as wrapping paper uses.

Id. at 361. The court also noted plaintiff's attempt, similar to that of plaintiff here, to include a large variety of papers within the term "wrapping paper." It also relied on various dictionary definitions to ascertain the common meaning of that term. *Id.*; *see Myers*, 21 CIT at 662, 969 F. Supp. at 73 ("In ascertaining common meaning, the court may rely on its own understanding of the term used, and may consult dictionaries, scientific authorities, and other reliable sources of information.").

Here, several dictionary definitions were agreed on by the parties. They are similar to those relied on in *D. C. Andrews* and are as follows:

1. *The Oxford English Dictionary* (2d ed. CD-ROM 1999), defines the term "wrapping paper" as a "special make of strong paper for packing and wrapping up parcels."

2. The term "wrapping paper" is defined in John R. Lavigne's *Pulp & Paper Dictionary* 477 (1986) as "[p]aper with high strength and of different weights made especially to be used for wrapping purposes."

3. The American Paper Institute, Inc.'s *The Dictionary of Paper* 456 (4th ed. 1980) provides that "wrapping paper" is "[a] general term applied to a class of papers made of a large variety of furnishes

---

[3] "It is well-settled that the meaning of tariff terms is a question of law, while the determination whether a particular item fits within that meaning is a question of fact." *E.M. Chemicals v. United States*, 920 F.2d 910, 912 (Fed. Cir. 1990). Thus, as a matter of law, Customs's construction of a tariff term will be reviewed by the court *de novo*. *Myers v. United States*, 21 CIT 654, 662, 969 F. Supp. 66, 73 (1997).

[4] If the tariff classification had aspects of an *eo nomine* provision, this would not change the outcome as common meaning would still control. *Becker Glove Int'l, Inc. v. United States*, No. 02–00278, Slip Op. 02–55 at 2 (Ct. Int'l Trade June 18, 2002) (construing *eo nomine* designation that was not defined in the HTSUS "according to its common and popular meaning"); *see infra* n.5.

on any type of paper machine and used for wrapping purposes. Strength and toughness are predominant qualities." *See also The Dictionary of Paper* 482 (3d ed. 1965).

4. *The Dictionary of Paper* 389 (2d ed. 1951) defines "wrapping paper" as being: "[a] general term applied to a class of papers made of a large variety of furnishes on a Fourdrinier, cylinder, or Yankee machine and used for wrapping purposes. Strength and toughness are predominant qualities."

The one dictionary which assists plaintiff is E. J. Labarre's *Dictionary and Encyclopedia of Paper and Paper-Making* 373 (2d ed. 1952), published in Amsterdam, Netherlands, which lists over thirty uses for "wrapping paper" including "sealings." This lone and somewhat old source does not convince the court that the *D. C. Andrews* common meaning definition is wrong.[5] First, this foreign source may not reflect current HTSUS meaning of the term "wrapping paper." Second, as recognized by *D. C. Andrews*, the common understanding of the term "wrapping paper" is paper chiefly used to wrap or envelop an object. There is no dispute that the "particular class or type" of gumming paper imported here is specifically engineered for conversion to reinforced gummed tape. In examining the product as imported, Plaintiff's Exhibit 1, it is readily apparent that one side has been made very smooth in preparation for glue coating and conversion to gummed tape. Moreover, as the uncontradicted testimony of Mr. Sexton revealed, it is not commercially practical to use this type of paper as wrapping paper. Accordingly, the court holds that the imported gumming paper does not fall within the common understanding of "wrapping paper."[6] *See D. C. Andrews*, 55 Cust. Ct. at 357, 361. Plaintiff has not met its burden of proving that "there is a different commercial meaning in existence which is definite, uniform, and general throughout the trade." *Rohm & Hass Co.*, 727 F.2d at 1097 (internal quotation marks and citation omitted).

The court does not decide whether papers made to bag or sack specifications are or are not "wrapping papers." Bags and sacks envelop items in a way that sealing tape does not, and their classification is not at issue here.

Accordingly, judgment shall enter for the defendant.

---

[5] "When a tariff term is not clearly defined by either the HTSUS or its legislative history, the meaning of the term is generally resolved by ascertaining its common and commercial meaning." *Myers*, 21 CIT at 662, 969 F. Supp. at 73 (citing *W.Y. Moberly, Inc. v. United States*, 924 F.2d 232, 235 (Fed. Cir. 1991)); *see also Rohm & Haas Co. v. United States*, 727 F.2d 1095, 1097 (Fed. Cir. 1984) ("The meaning of a tariff term is presumed to be the same as its common or dictionary meaning in the absence of evidence to the contrary.").

[6] Plaintiff did not argue that the tape end product is used to envelop anything, and in fact it does not. The tape is only 2.8″ wide and is used only to seal packages.

Slip Op. 04–36

ELKEM METALS COMPANY and GLOBE METALLURGICAL INC., PLAINTIFFS, v. UNITED STATES, DEFENDANT, -and- COMPANHIA BRASILEIRA CARBURETO DE CÁLCIO, INTERVENOR-DEFENDANT.

Consolidated Court No. 01–00098

Memorandum & Order

[Upon motion for relief from results of antidumping-duty administrative review, remand to International Trade Administration.]

Decided: April 15, 2004

Verner, Liipfert, Bernhard, McPherson and Hand, Chartered (*William D. Kramer, Jessie Marie Brooks* and *Virginia C. Dailey*) for the plaintiffs.[1]

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Reginald T. Blades, Jr.*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*John F. Koeppen*), of counsel, for the defendant.

Dorsey & Whitney LLP (*Philippe M. Bruno* and *Rosa S. Jeong*) for the intervenor-defendant[2] and Eletrosilex S/A.

AQUILINO, Judge: This case commenced pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I) and (B)(iii) and 28 U.S.C. §§ 1581(c) and 2631(c) consolidates complaints filed by Companhia Brasileira Carbureto de Cálcio ("CBCC") and Eletrosilex S/A, CIT No. 01–00082, and by Elkem Metals Company and Globe Metallurgical Inc., CIT No. 01–00098, each praying for relief from *Silicon Metal From Brazil; Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke in Part*, 66 Fed.Reg. 11,256 (Feb. 23, 2001), promulgated by the International Trade Administration, U.S. Department of Commerce ("ITA").[3] In pertinent part, those *Final Results* were weighted average antidumping-duty margins of 0.63 percent for CBCC and 93.20 percent for Eletrosilex. *See* 66 Fed.Reg. at 11,257. The former led to the following reported rationale:

---

[1] Samuel J. Waldon and Matthew T. West of Baker Botts LLP, counsel for Elkem Metals Company and Globe Metallurgical Inc. in CIT No. 01–00082, which has been consolidated herein, have filed papers in opposition to the motion of Eletrosilex S/A for judgment on the agency record.

[2] Subsequent to the service of his motion papers herein, Philippe M. Bruno filed a notice of substitution of attorneys for this party by Greenberg Traurig, LLP.

[3] The above-encaptioned plaintiffs ("Elkem & Globe") were granted leave to intervene as parties defendant in the first matter, from which resultant adverse posture they interposed a motion to dismiss Eletrosilex as a party with any actionable claim, alleging lack of standing. That motion has been denied per the court's slip opinion 02–34, 26 CIT ____, 196 F.Supp.2d 1367 (2002), familiarity with which is presumed.

> After review of the record, the Department determines that although CBCC has had zero or *de minimis* dumping margins for the previous two review periods, during the current review CBCC's weight-averaged dumping margin is determined to be 0.63 percent, above the *de minimis* rate . . . 0.50 percent . . . . Consequently, CBCC has not made sales of subject merchandise "at not less than NV for a period of at least three consecutive years" as required by the Department's regulations. Because one of the requirements to qualify for revocation has not been met, . . . we determine not to revoke this order with respect to CBCC.

Id. at 11,256–57. The notice of the *Final Results* adopts the ITA's Issues and Decision Memorandum for discussion of the points pressed by the parties, including Eletrosilex. *See id.* at 11,256. That memorandum explains the margin for this exporter, in part, as follows:

> Eletrosilex, an experienced participant in the antidumping proceedings since the 1991–1992 POR[ ] was on notice as provided by the Department's past practice that if it failed to act to the best of its ability, and the Department applied adverse FA, the rate selected could very well be the highest calculated rate in the proceediing, *i.e.*, the 93.20 percent rate obtained in the LTFV investigation. In determining the FA rate here, the Department considered the fact that, in the 1993–1994 and 1994–1995 PORs, [it] calculated dumping margins of 61.58 percent for CBCC and 81.61 percent for RIMA, respectively, while at the same time, calculating zero or single digit rates for other respondents, demonstrating that in this particular market, some companies may continue to dump at substantial margins while others have eliminated or substantially lowered their margins. The fact that these disparate rates have continued throughout the reviews since the original LTFV investigation, combined with [ ] Eletrosilex's failure to respond to the request for information, supports our conclusion that the 93.20 percent rate from the investigation remains reasonable and relevant. The Department's determination here is in accordance with [it]s policy of selecting the highest calculated rate in the entire proceeding in order to induce future cooperation of a respondent.[4]

---

[4] Appendix 8 to Brief in Opposition to Plaintiff Eletrosilex's Motion for Judgment Upon the Agency Record, p. 15. The references "POR", "FA", "LTFV", and "RIMA" are abbreviations for "period of review", "facts available", "less than fair value", and for the respondent "Rima Industrial S.A.", respectively.

I

The plaintiffs Elkem & Globe have interposed a motion for judgment upon the ITA record pursuant to USCIT Rule 56.2. The sole thrust of the motion is that the agency failed to fulfill its statutory obligation of calculating the cost of production ("COP") and constructed value ("CV") based on the actual costs incurred by the producer or exporter under investigation, which failure, according to them, has given rise to the issue of

> whether the Department erred in calculating the financial expenses included in COP and CV for CBCC, the producer and exporter of the subject merchandise, based on the financial statements of its indirect Belgian parent, Solvay & Cie, when the actual financial costs incurred by CBCC greatly exceeded the financial costs calculated by the Department.

Plaintiffs' Brief, p. 2.

The defendant and CBCC each accept this as the issue between them and the plaintiffs for resolution. *See* Defendant's Memorandum, p. 2; Defendant-Intervenor's Brief in Opposition, p. 1. And each defends the ITA's approach on the basis of existing agency practice and case law. Their papers, understandably, cite and discuss the litigation *sub nom*. *American Silicon Technologies v. United States*, CIT No. 97–02–00267, one of a series of suits contesting the final results of ITA administrative reviews of the same antidumping-duty order. The action bearing that CIT docket number entails judicial review of the ITA's reliance, in re CBCC, on the consolidated financial statements of Solvay & Cie of Belgium, not Brazil. *See, e.g.*, *American Silicon Technologies v. United States*, 23 CIT 237, 244–45 (1999). That opinion rejected as without merit the agency's claimed established practice of using such consolidated statements of a respondent's parent corporation, rather than those of the respondent itself, whenever the record establishes, *prima facie*, parental corporate control. The court also was unable to find the requisite substantial evidence on the record in support of that approach, whereupon it remanded

> the calculation of CBCC's financial expenses with the instruction that Commerce base those expenses upon the consolidated financial statements of CBCC and its immediate parent Solvay do Brasil.

Id. at 245. The ITA complied with the court's order, and the results of the remand on that issue were affirmed. *See American Silicon Technologies v. United States*, 25 CIT ___ , ___ , Slip Op. 01–109, pp. 3–6 (Aug. 27, 2001).

By the time of that affirmance, the actions comprising this consolidated case had commenced, and, a few months later, CBCC, a party

to those prior proceedings, noticed a timely appeal from that affirmance that has resulted in the following decision, to quote from it in part:

> . . . [T]he trial court . . . remand . . . limited Commerce's examination to CBCC's transactions with Brasil. This order prevented Commerce from further assessing the relationship between Brasil and Solvay or CBCC and Solvay. This limit on the remand methodology further inhibited Commerce's ability to ensure an accurate assessment of CBCC's financial costs. As Commerce notes on appeal, during the remand proceedings, Commerce gathered more information about the relationship between CBCC and Brasil, but not with regard to the relationship between CBCC or Brasil and Solvay. Thus, the record in the remand is deficient because Commerce could not compare the consolidated statements of Solvay with the consolidated statements of Brasil. By sharply limiting Commerce's inquiry, the trial court's remand actually prevented Commerce from undertaking a fully balanced examination that might have produced more accurate results.
>
> Therefore, this court reverses and remands with instructions to require Commerce to carry out its statutory duty of accurately assessing "general costs" . . . .

American Silicon Technologies v. United States, 334 F.3d 1033, 1038–39 (Fed.Cir. 2003).

While the facts underlying that contested ITA administrative review are still *sub judice*[5], the issue posited above by the plaintiffs Elkem & Globe in this case has been resolved as a matter of law by the court of appeals adversely to their position, *viz.*:

> As a legal matter, the Court of International Trade had an obligation to defer to Commerce's reasonable methodology in the first place, but no such deference was afforded. Thus, according proper deference, *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570, 1575 (Fed.Cir. 1994), this court sustains as reasonable Commerce's well established practice of basing interest expenses and income on fully consolidated financial statements.

Id. at 1038. Hence, plaintiffs' motion for judgment upon the agency record must be, and it hereby is, denied.

---

[5] This court notes in passing that, pursuant to the order of remand, *American Silicon Technologies v. United States*, 27 CIT ____ , Slip Op. 03–109 (Aug. 25, 2003), the ITA has filed its determination of 0.37 percent as the weighted-average margin for CBCC for the particular period of review at issue. *See Silicon Metal from Brazil: Final Results of Redetermination Pursuant to Court Remand*, p. 6 (Dec. 15, 2003).

II

The motion of CBCC and Eletrosilex for such a judgment on their behalf propounds the following issues for the court's adjudication:

> 1. Whether . . . Commerce's selection of the surrogate interest rate to calculate CBCC's imputed credit expense was supported by substantial evidence on the record and otherwise in accordance with law.
>
> 2. Whether . . . Commerce's rejection of the interest rate based on CBCC's borrowing experience was supported by substantial evidence on the record and otherwise in accordance with law.
>
> 3. Whether the Department's use of adverse inference in applying total fact[s] available to Eletrosilex was supported by substantial evidence on the record and otherwise in accordance with law.
>
> 4. Whether the Department properly corroborated thetotal facts available applied to Eletrosilex as total facts available, in accordance with law.

A

On its part, the defendant would compress the first two of these enumerated issues into one, namely, whether the ITA properly calculated CBCC's home-market imputed credit expense based upon an established Brazilian commercial reference rate rather than a higher rate based upon a CBCC loan that was due after only several days. Defendant's Memorandum, p. 3. This formulation apparently has been derived from that part of the controlling Decision Memorandum that sets forth the ITA's determination to use Brazil's *Taxa Referencial ("TR")* rate to calculate CBCC's imputed home-market credit costs.[6] Be that as it may, defendant's counsel eschew any defense now on this issue, requesting instead a remand to the ITA for reconsideration and to give this determination "full and fair consideration under the applicable law." *Id.* at 2.

CBCC welcomes this request, while the plaintiffs take the position that the *TR* is an appropriate surrogate rate for calculating Brazilian home-market credit expenses when a respondent does not have short-term borrowings during the period under review. *See* Plaintiffs' Brief in Opposition to Defendant-Intervenor's Motion for Judgment *passim*.

---

[6] *See* Appendix 8 to Brief in Opposition to Plaintiff Eletrosilex's Motion for Judgment Upon the Agency Record, p. 19.

Having perused and carefully considered that entire brief, the court nonetheless concludes that defendant's remand request should be granted, in part in the light of the ITA's *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 67 Fed.Reg. 6,488 (Feb. 12, 2002), which was published just prior to that and the other briefs at bar and in which the accompanying Issues and Decision Memorandum found that the *TR* is "the index for savings accounts" and therefore concluded that it was "not reasonable to use the TR rate as a surrogate interest rate for short-term commercial borrowings". A–351–806, ARP 7/1/99–6/30/00 (Feb. 12, 2002) (Comment 1), available at *http://ia.ita.-doc.gov/frn/summary/2002feb.htm*.

B

Given the protracted and continuing administrative and judicial proceedings centered on the ITA's antidumping-duty order governing imports into the United States of silicon metal from Brazil and its administrative reviews thereof, the adverse inferences spelled out by Congress in 19 U.S.C. § 1677e(b) and drawn by the agency and the courts upon failure to provide information within the meaning of section 1677e(a) surely have been, and continue to be, well-understood by all the parties there- and hereto. Indeed, experienced counsel do not claim otherwise.

All that is claimed by the government herein is that "Eletrosilex chose not to respond to the Department's . . . *supplemental* questionnaire".[7] However, as discussed in *Mannesmannrohren-Werke AG v. United States*, 23 CIT 826, 842, 77 F.Supp.2d 1302, 1316 (1999), for example,

> failing to respond does not have to be read negatively. A respondent can fail to respond because it was not able to obtain the requested information, did not properly understand the question asked, or simply overlooked a particular request. Thus, without further explanation by Commerce, the Court will not infer that a respondent's failure to respond constitutes substantial evidence that it failed to cooperate to the best of its ability.

That is, the agency must "articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of th[at] information is of significance to the progress of its investigation". 23 CIT at 839, 77 F.Supp.2d at 1313–14. *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382–83 (Fed. Cir. 2003).

Upon reading the ITA's reported reasoning[8] and reviewing the record filed herein, such as it is, the court cannot concur that the

---

[7] *Id*. at 12 (emphasis added). *See* Defendant's Memorandum, p. 36.

[8] *See supra*, note 6, pp. 11–15.

supplemental information requested was "critical"[9] . To be sure, the agency's responsibility of prescribing mathematical margins of dumping is always a most daunting task. But, as indicated, this consolidated case is not proceeding on an empty slate. For example, in *American Silicon Technologies v. United States*, 24 CIT 612, 624, 110 F.Supp.2d 992, 1002 (2000), both the ITA and the court seemingly recognized "Eletrosilex's history of compliance". *See, e.g., Silicon Metal From Brazil: Preliminary Results of Antidumping Duty Administrative Review*, 63 Fed.Reg. 42,001, 42,007 (Aug. 6, 1998):

> . . . In the past, Eletrosilex has demonstrated an understanding for requests of additional information by the Department.

In fact, that history led the court to opine that it actually supports the claim that Eletrosilex was unable to respond to the no-less-than-three supplemental agency requests for information at issue. *See* 24 CIT at 624, 110 F.Supp.2d at 1002. That is,

> it does not follow that simply because Eletrosilex was able to respond to prior questionnaires it was able to respond to the . . . questionnaires at issue here . . . when viewed in light of Eletrosilex's notification to Commerce that "it is undergoing top to bottom management reviews, and because of changes in staffing, it is *not able* to respond in a timely manner".[10]

In sum, the court concluded:

> Commerce has not made the necessary finding that Eletrosilex failed to respond to *the best of its ability*. After reviewing Commerce's reasoning, the Court concludes that the primary basis for its determination was the mere fact that Eletrosilex failed to respond to the two supplemental questionnaires. As previously noted in *Borden*[, Inc. v. United States, 22 CIT 233, 4 F.Supp.2d 1221 (1998),] and *Mannesmannrohren-Werke, supra*, this is only a recitation of the standard for the application of facts available under 19 U.S.C. § 1677e(a)(2)(B) and is inadequate justification for making an adverse inference pursuant to 19 U.S.C. § 1677e(b). Accordingly, the Court remands this issue for reconsideration and instructs Commerce to reopen the administrative record and collect additional evi-

---

[9] *Id*. at 13.

[10] 24 CIT at 624, 110 F.Supp.2d at 1002 (emphasis in original). The excuses proffered by Eletrosilex herein are not dissimilar. *See, e.g.,* Brief in Support of [CBCC & Eletrosilex] Plaintiffs' Rule 56.2 Motion, p. 31.

On their part, the gist of Elkem & Globe's motion to dismiss Eletrosilex from this consolidated case for lack of standing was that it

> no longer manufactures, produces or exports silicon metal. Thus, pursuant to the plain language of . . . 19 U.S.C. § 1516a . . . , Eletrosilex is not an interested party and cannot participate in this appeal, as a matter of law.

> dence concerning Eletrosilex's claimed inability to respond to the supplemental questionnaires.

24 CIT at 625, 110 F.Supp.2d at 1003 (emphasis in original).

After this remand (and commencement of this consolidated case), the court was able to find substantial evidence developed on the record in support of the ITA's approach:

> . . . [T]he reason Eletrosilex could not answer Commerce's supplemental questionnaires was because it dedicated the personnel capable of answering those questions to preparing information requested by Eletrosilex's potential purchaser. . . . . The record shows that Eletrosilex decided to suspend certain operations, including participation in antidumping proceedings, during the period in question in order to curtail costs in anticipation of the sale of the company. . . . . While Eletrosilex was facing bankruptcy during the period in question, the fact remains that it allocated its resources toward satisfying the requests of the prospective purchaser rather than Commerce.

American Silicon Technologies v. United States, 26 CIT ___ , ___ , 240 F.Supp.2d 1306, 1311 (2002).

C

Given this overlap of cases and related claims, the question arises as to whether or not this court can assume similar results of any remand on the issue of Eletrosilex's ability to have provided the requested supplemental information to the ITA. Presuming it can, the related question remains whether the 93.20 percent margin sought to be imposed is "relevant, and not outdated, or lacking a rational relationship". *Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F.Supp.2d 1310, 1335 (1999). Stated another way, an adverse-facts-available rate should be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed.Cir. 2000). *Accord*: *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1340 (Fed.Cir. 2002).

The court's slip opinion 02–123 in *American Silicon Technologies* points out that the actual margins calculated for Eletrosilex in other ITA administrative reviews fluctuated between 18.87 and 51.84 percent. Also, the

> highest calculated rates for the first through fifth administrative reviews were 53.63 percent, 51.84 percent, 61.58 percent, 67.93 percent, and 39.00 percent respectively. . . . The Court also finds it significant that the period of review in question began six years after the Less Than Fair Value Investigation in which the 93.20 percent margin was calculated. This fact along

> with the fact that this margin is 25.27 percent higher than the highest margin calculated based on actual information in the intervening administrative reviews (*i.e.* the 67.93 percent margin calculated in the fourth administrative review) leads the Court to conclude that the 93.20 percent margin is inconsistent with actual commercial practices at and around the time in question . . . [and] is so far removed from being "a reasonably accurate estimate of the respondent's actual rate" that it is disproportionately punitive in nature.[11]

Whereupon that matter was remanded a second time to the ITA, which thereafter duly reported a revised rate of 67.93 percent that has been affirmed by the court, *American Silicon Technologies v. United States*, 27 CIT ___ , 273 F.Supp.2d 1342 (2003).

III

While the court in that case has since stayed the judgment of affirmance therein

> pending the final determination of the dumping margins in the fourth administrative review of the antidumping duty order on silicon metal from Brazil, *sub nom. American Silicon Technologies v. United States*, Consolidated Court No. 97–02–00267[,[12]]

this court hereby grants the USCIT Rule 56.2 motion of CBCC and Eletrosilex[13] to the extent of remand now to the defendant of this consolidated case to impute anew (1) CBCC's home-market credit costs and (2) Eletrosilex's margin of dumping for the period of review implicated that is in accordance with law and supported by substantial evidence on the record.

Should this remand at this time not be in the interests of advancement of all of the existing, related Brazilian silicon metal matters to final resolution, the parties to this particular consolidated case may confer and propose to this court a mutually-more-desirable schedule. Otherwise, the defendant may have 45 days herefrom within which to carry out this remand and to report the results thereof to the court and the other parties, which may then comment thereon within 30 days of receipt thereof.

So ordered.

---

[11] 26 CIT at ____ , 240 F.Supp.2d at 1213–14. *Cf.* Reply of Plaintiffs [CBCC & Eletrosilex] in Support of Their Motion for Judgment Upon the Agency Record, pp. 6–8.

[12] *American Silicon Technologies v. United States*, 27 CIT ____ , ____ , Slip Op. 03–144, p. 2 (Oct. 30, 2003).

[13] The quality of the papers filed in support of and opposition to this motion and the motion of the plaintiffs obviated any need to grant their joint motion for oral argument.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/22 4/13/04 Pogue, J.	Buxton Co.	00–04–00186	4202.21.60 10% 4202.22.15 19.2%, 18.8% or 18.4%	4202.31.60 8% 4202.32.10 12.1¢kg ÷ 4.6%	Agreed statement of facts	Boston Wallets