(Slip Op. 03–89)

ALLEGHENY LUDLUM CORP., AK STEEL CORP., BUTLER ARMCO INDEPENDENT UNION, J&L SPECIALTY STEEL, INC., UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, AND ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, PLAINTIFFS, *v.* UNITED STATES OF AMERICA, DEFENDANT.

Court No. 02–00502

[Plaintiffs' motion for judgment upon the agency record is denied.]

(Dated: July 24, 2003)

Collier Shannon Scott, PLLC (*David A. Hartquist, Jeffrey S. Beckington, Adam H. Gordon*), Washington, D.C., for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigations Branch, Civil Division, United States Department of Justice; *Lucius B. Lau*, Assistant Director, Commercial Litigations Branch, Civil Division, United States Department of Justice; *Ada Bosque*, Trial Attorney, Commercial Litigations Branch, Civil Division, United States Department of Justice; *Scott D. McBride*, Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, of Counsel, for Defendant.

OPINION

CARMAN, *Chief Judge*: This matter comes before the Court on a motion for judgment on the administrative record filed by Plaintiffs, Allegheny Ludlum Corporation, AK Steel Corporation, Butler Armco Independent Union, J&L Specialty Steel, Inc., United Steelworkers of America, AFL-CIO/CLC, and Zanesville Armco Independent Organization ("Plaintiffs"), domestic producers of stainless steel plate coils or unions representing workers who produce stainless steel plate coils. Plaintiffs challenge the final results by the United States Department of Commerce ("Commerce") in *Stainless Steel Plate in Coils From Taiwan: Final Results and Rescission in Part of Antidumping Duty Administrative Review*, 67 Fed. Reg. 40,914, 40,916–17 (June 14, 2002) ("*Final Results*"). Plaintiffs seek remand of the antidumping duty proceedings for Commerce to conduct a "meaningful review" of alleged "middleman" dumping by Ta Chen

Stainless Steel Pipe Co., Ltd. ("Ta Chen Taiwan") and its U.S. affiliate, Ta Chen International (CA) Corp. ("TCI") (hereinafter referred to as "Ta Chen" collectively) and to determine a new cash deposit rate; and for Commerce to assign a dumping margin of 10.20% *ad valorem*, the highest margin calculated in a segment of the proceeding, to Yieh United Steel Corp. ("YUSCO"), the Taiwanese producer of the subject merchandise, based on total adverse facts available. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2000).

BACKGROUND

This is the Second Administrative Review of the antidumping duty order against stainless steel plate in coils from Taiwan published by Commerce in 1999. *Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 Fed. Reg. 27,756 (May 21, 1999) ("*Taiwanese Order*").[1] In the underlying investigation that resulted in the antidumping duty order, Commerce determined Ta Chen was engaged in "middleman" dumping of subject merchandise it purchased from YUSCO. *Notice of Final Determination of Sales at Less than Fair Market Value: Stainless Steel Plate in Coils From Taiwan*, 64 Fed. Reg. at 15,494. Specifically, Commerce found that YUSCO sold the subject merchandise to Ta Chen at less than fair value, and Ta Chen sold this merchandise below its acquisition cost. *Id.* Using a combination rate, Commerce calculated the two cash deposit rates for subject merchandise produced by YUSCO: (1) 8.02% *ad valorem* rate for Ta Chen's direct U.S. sales; (2) 10.20% *ad valorem* rate for YUSCO's U.S. sales through middleman Ta Chen, with the additional 2.18% attributable to Ta Chen's dumping of the subject merchandise. *See id.* at 15,507.[2]

In the first administrative review, covering November 4, 1998, to April 30, 2000, Commerce concluded that the subject merchandise Ta Chen sold during the review period was entered prior to the preliminary determination. *Stainless Steel Plate in Coils From Taiwan: Final Rescission of Antidumping Duty Administrative Review*, 66 Fed. Reg. 18,610, 18,612 (Apr. 10, 2001) ("*First Admin. Review, Final Results*"). As a result, Commerce rescinded its review of Ta Chen. *Id.*

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[1] The *Taiwanese Order* followed Commerce's final affirmative decision that the subject merchandise from Taiwan was dumped by the producer/exporter YUSCO and by the exporter Ta Chen. *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan*, 64 Fed. Reg. 15,493, 15,507 (Mar. 31, 1999).

[2] This Court found that Commerce's determination to use a combination rate to calculate the cash deposit rate for middleman dumping was supported by substantial evidence and otherwise in accordance with law. *Allegheny Ludlum Corp. v. United States*, 239 F. Supp. 2d 1381, 1384 (Ct. Int'l Trade 2002), *appeal docketed*, No. 03–1095 (Fed. Cir. Nov. 21, 2002). Appeals of that decision and a parallel decision, *Tung Mung Development Co., Ltd. v. United States*, 219 F. Supp. 2d 1333 (Ct. Int'l Trade 2002), *appeal docketed*, No. 03–1073 (Fed. Cir. Nov. 14, 2002), in which Commerce applied the same methodology of using a combination rate for middleman dumping, are pending before the United States Court of Appeals for the Federal Circuit. (Allegheny Ludlum Corp., et al.'s Rule 56.2 Mem. of Law in Supp. of Mot. for J. Upon the Agency R. ("Pls.' Br.") at 4–5; Def.'s Mem. in Opp'n to Pls.' Mot. for J. on the Agency R. ("Def.'s Br.") at 3.) Plaintiffs have not challenged Commerce's methodology of calculating middleman dumping in this case. (Pls.' Br. at 3 n.2.)

The rescission was affirmed by this Court. *Allegheny Ludlum v. United States*, 240 F. Supp. 2d 1262, 1267 (Ct. Int'l Trade 2002), *appeal docketed*, No. 03–1096 (Fed. Cir. Nov. 22, 2002) ("*Allegheny I*").

On May 1, 2001, Commerce published a notice of opportunity to request an administrative review of the antidumping duty order for the period of May 1, 2000, to April 30, 2001. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 66 Fed. Reg. 21,740 (May 1, 2001). Plaintiffs requested an administrative review of sales of the subject merchandise by YUSCO and Ta Chen. *Final Results*, 67 Fed. Reg. at 40,915. Pursuant to that request, Commerce initiated this administrative review in accordance with 19 U.S.C. § 1675(a) on June 19, 2001. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 66 Fed. Reg. 32,934 (June 19, 2001).

In the course of its investigation, Commerce issued an antidumping duty questionnaire to YUSCO and Ta Chen on July 10, 2001. *Final Results*, 67 Fed. Reg. at 40,915; (Letter from Rick Johnson, Program Manager, Enforcement Group III, Office 9 to Peter J. Koenig, Miller & Chevalier of 07/10/01; Letter from Rick Johnson, Program Manager, Enforcement Group III, Office 9 to William Clinton, White & Case of 07/10/01[3] (Def.'s App. Ex. 1)). The letters accompanying the questionnaires stated:

> All parties are requested to respond to Sections A (Organization, Accounting Practices, Markets and Merchandise), B (Sales in the Home Market or to a Third Country), and C (Sales to the United States). If, after examining Sections A and C of the questionnaire, you conclude that YUSCO [or Ta Chen] and its affiliates did not have any U.S. sales or shipments during the review period identified above, please submit a statement to that effect, following the data submission requirements specified in the general instructions. If you do not submit such a statement for the administrative record in this case, we may conclude that YUSCO [or Ta Chen] has not been responsive to this questionnaire and may proceed on the basis of facts otherwise available.

(Def.'s App. Ex. 1 at 1–4.) The letters note that the respondents could request an extension of time in writing before the due date. (*Id.* at 2, 4.)

Ta Chen responded on August 2, 2001, asking Commerce that it not be required to complete the antidumping duty questionnaire because Ta Chen had no sales, entries, or shipments to the U.S. of the subject merchandise during the period of review. *Final Results*, 67

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[3] The first reference to a document contained in the parties' Appendices will be identified by the title of document and the appropriate Appendix Exhibit number. Subsequent references will cite to the document by the Appendix Exhibit number.

Fed. Reg. at 40,915; (Letter from Peter Koenig, Miller & Chevalier to U.S. Secretary of Commerce of 08/02/01 (Pls.' App. Ex. 4)). If Ta Chen would not be exempted, Ta Chen requested an extension of time to respond to Commerce's questionnaire. (Pls.' App. Ex. 4.) Commerce responded to Ta Chen by a letter dated August 2, 2001, in which Commerce extended the time for Ta Chen to respond to August 14, 2001, and notified Ta Chen that the information submitted will be subject to verification. (Letter from Rick Johnson, Program Manager, Enforcement Group III, Office 9 to Peter J. Koenig, Miller & Chevalier of 08/02/01 (Def.'s App. Ex. 2 at 5–6).) Commerce informed Ta Chen that Commerce was "unable to evaluate [the] request for exemption for filing a response to the questionnaire" at that time. (*Id.* at 5.) Commerce requested additional information concerning sales, entries, or shipments from Ta Chen's affiliates during the period of review and information regarding sales during the period of review by Ta Chen's subsidiaries that "resulted from sales and or shipments from Ta Chen to the United States during the 1st administrative review period (November 4, 1998 through April 30, 2000)." (*Id.*)

On August 14, 2001, Ta Chen responded to the request for specific information by reiterating that it had "no sales, import entries or exports to the United States" of the subject merchandise during the current period of review, May 1, 2000, to April 30, 2001. (Letter from Peter Koenig, Miller & Chevalier to U.S. Secretary of Commerce of 08/14/01 (Pls.' App. Ex. 5).) Ta Chen informed Commerce that none of its affiliates or subsidiaries had U.S. sales or shipments of the subject merchandise in the current period of review or during the first administrative review period. (*Id.*) Ta Chen requested another extension of time to respond to Section A and other portions of the questionnaire, but again asked that it be exempt from responding to the questionnaire because it "[had] no entries subject to dumping duties * * * and [did] not anticipate or plan on having future such entries—i.e., the dumping order fully stopped the imports of concern." (*Id.*) Commerce granted Ta Chen's request for the extension, allowing Ta Chen to respond to Section A by August 20, 2001, and the remaining portions of the questionnaire by August 24, 2001. (Letter from Rick Johnson, Program Manager, Enforcement Group III, Office 9 to Peter J. Koenig, Miller & Chevalier of 08/16/01 (Pls.' App. Ex. 6).)

On August 20, 2001, Ta Chen once again requested to be exempt from answering the questionnaire because of the nonexistence of sales, entries, or shipments of the subject merchandise, with one exception. (Letter from Peter Koenig, Miller & Chevalier to U.S. Secretary of Commerce of 08/20/01 (Pls.' App. Ex. 7).) Ta Chen informed Commerce that one of its affiliates, TCI "had some sales of [the subject merchandise] from its U.S. warehouses during the [current review] period May 1, 2000 to April 30, 2001 (as well as [the first administrative review period] November 4, 1998 to April 30, 2000)

which [were] imported before November 4, 1998 and thus [are] not subject to dumping liability." (*Id.*) Ta Chen reminded Commerce that similar sales of merchandise that entered prior to the suspension of liquidation were reported in the first administrative review and did not lead to the imposition of dumping duties. (*Id.*)

On November 1, 2001, Commerce informed Ta Chen that it was evaluating the request for exemption from the questionnaire and asked Ta Chen to respond to an additional questionnaire by November 14, 2001. (Letter from James C. Doyle, Program Manager, Office IX AD/CVD Enforcement to Peter J. Koenig, Miller & Chevalier of 11/01/01 (Pls.' App. Ex. 8).) On November 7, 2001, Ta Chen informed Commerce that it would not respond to the Supplemental Questionnaire. (Mem. to File from Doreen Chen, Case Analyst of 11/14/01 (Pls.' App. Ex. 9).)

Commerce contacted the U.S. Customs Service ("Customs") on November 20, 2001, and received confirmation that Ta Chen had no entries of the subject merchandise during the period of review. (Mem. to File from Stephen Bailey of 06/07/02 (Pls.' App. Ex. 15); *Issues and Decision Memorandum for the Final Results of Antidumping Administrative Review of Stainless Steel Plate in Coils from Taiwan* ("*Issues and Decision Memorandum*"), cmt. 1 (Pls.' App. Ex. 14 at 3).) YUSCO did not respond to the questionnaire and informed Commerce on January 8, 2002, that it was not participating in the Second Administrative Review. *Final Results*, 67 Fed. Reg. at 40,915; (Letter from William J. Clinton, White & Case to Donald L. Evans, Secretary of Commerce of 01/08/02 (Pls.' App. Ex. 10).) Commerce published the preliminary results of the Second Administrative Review on February 7, 2002. *Stainless Steel Plate in Coils From Taiwan; Preliminary Results and Rescission in Part of Antidumping Duty Administrative Review*, 67 Fed. Reg. 5789 (Feb. 7, 2002) ("*Preliminary Results*"). Pursuant to its regulations and prior practice, Commerce preliminarily rescinded the Second Administrative Review as to Ta Chen. *Id.* at 5790. Commerce based the decision to rescind on inquiries to Customs, which confirmed to Commerce's satisfaction that Ta Chen had no entries of the subject merchandise during the period of review. *Id.*; (Pls.' App. Ex. 15.) Commerce acknowledged that administrative reviews are generally based upon sales during the period of review, rather than entries during the period of review, because of the respondent's general inability to definitively link period of review entries to subsequent sales. *Preliminary Results*, 67 Fed. Reg. at 5790. In this case, however, Commerce was satisfied that Ta Chen was able to establish that sales during the current period of review were linked to entries that predated the suspension of liquidation, given the fact that there were no entries during the current period of review or the First Administrative Review period. *Id., see also Stainless Steel Plate in Coils From Taiwan: Final Rescission of Antidumping Duty Administrative* Review, 66 Fed. Reg. 18,610 (Apr. 10, 2001).

Commerce assigned YUSCO a preliminary margin of 8.02% *ad valorem*, the highest margin rate determined in a prior segment of the proceedings for YUSCO, based upon total adverse facts available due to YUSCO's failure to participate in the review. *Id.* at 5790–91.

Plaintiffs submitted a brief in response to the *Preliminary Results* on March 11, 2002. *Final Results*, 67 Fed. Reg. at 40,915. Commerce issued the *Final Results* on June 14, 2002. *Id.* Commerce noted that it considered Plaintiffs' comments to the *Preliminary Results*, but declined to incorporate them. (Pls.' App. Ex. 14 at 2–7); (Def.'s Br. at 9.) Commerce instead adopted the determinations of the *Preliminary Results*, rescinding the Second Administrative Review as to Ta Chen and assigning YUSCO a rate of 8.02%, based on total adverse facts available. *Final Results*, 67 Fed. Reg. at 40,915–17. The *Final Results* include the two determinations that Plaintiffs contest in the instant case. Plaintiffs commenced this action to challenge the *Final Results* on July 12, 2002.

STANDARD OF REVIEW

This Court will sustain Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted); *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1393 (Fed. Cir. 1997). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 636 F. Supp. 961, 966 (Ct. Int'l Trade 1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

In determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, this Court must consider whether "Congress has directly spoken to the precise question at issue," and if not, whether the agency's interpretation of the statute is reasonable. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–44 (1984). "[A] court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994). Deference is based upon the recognition that "Commerce's special expertise in administering the antidumping law entitles its decisions to deference from the courts." *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002).

DISCUSSION

I. Commerce's Decision to Rescind the Administrative Review with Respect to Ta Chen is Supported by Substantial Evidence or is Otherwise in Accordance with Law.

A. Plaintiffs' Contentions

Plaintiffs advance three challenges to the *Final Results* as pertaining to Ta Chen. First, Plaintiffs assert that Commerce's finding that Ta Chen linked TCI resales to pre-suspension entries is unsupported by substantial evidence on the record. (Pls.' Br. at 9–10.) Second, Plaintiffs assert that Commerce inappropriately assumed Ta Chen's burden of supplying sufficient information on the record because Commerce based its decision on information it obtained from Customs. (*Id.* at 10.) Third, Plaintiffs argue that Commerce's policy of rescinding reviews when U.S. resales are linked to pre-suspension entries is unlawful and Commerce's failure to calculate new cash deposit rates based upon such resales is contrary to the intent of the statute. (*Id.* at 10, 21–31.) Plaintiffs contend that Commerce should have deemed Ta Chen uncooperative and assigned a total adverse facts available rate of 10.20% *ad valorem* to Ta Chen. (*Id.* at 10.)

Plaintiffs assert that substantial evidence does not support a finding that Ta Chen had no entries during the period of review because Ta Chen's certification claiming this fact was nothing more than a bare assertion and the inquiry to Customs resulted in "very scattered and incomplete bits of data." (*Id.* at 20.) Plaintiffs add that substantial evidence is lacking because Ta Chen did not sufficiently cooperate with the investigation because Ta Chen failed to complete Commerce's questionnaire. (*Id.* at 12–14.)

Plaintiffs argue that the fact that Commerce bases its decision on inquiries to Customs, which confirmed Ta Chen's statements, is not sufficient evidence because the information in the record did not come from Ta Chen, but rather from Commerce "unjustifiably assum[ing]" Ta Chen's burden of producing and developing the record. (*Id.* at 10.) Plaintiffs rely on *NTN Bearing Corp. of Am. v. United States*, 997 F.2d 1453, 1458 (Fed. Cir. 1993) to support the proposition that the burden of production in an antidumping proceeding rests upon the respondent, who presumably has control of information relevant to the proceedings. (*Id.* at 12.) Plaintiffs argue that in this case, Commerce inexplicably deviated from this basic principle when it accepted Ta Chen's "unsupported assertions" to Commerce as evidence linking TCI's resales during the period of review to pre-suspension entries and acted on its own to gather evidence to support this assertion by requesting information from Customs to verify Ta Chen's statements. (*Id.* at 15–16, 19–20.) Plaintiffs assert that Ta Chen's failure to cooperate in establishing that TCI's resales during the period of review were linked to pre-suspension entries warrants Ta Chen being assigned a dumping margin rate of 10.20% *ad valo-*

rem, the highest rate from the original investigation based on total adverse facts available. (*Id.* at 10, 20–21.)

In the alternative, Plaintiffs argue that even if Ta Chen is found to have met its burden of establishing that there were no entries of the subject merchandise during the period of review, Commerce should have completed a review of TCI's resales in order "to update as currently and as accurately as possible the cash deposit rate for Ta Chen and Ta Chen's subject merchandise" and comply with the "overriding objective" of the antidumping duty law, which is to calculate the dumping margins as accurately as possible. (*Id.* at 11, 21–22, 25 (citing Trade Agreements Act of 1979, H.R. REP. NO. 96–317, at 69 (1979) and S. REP. NO. 96–249, at 76 (1979)[4]; *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990); *Badger-Powhatan v. United States*, 633 F. Supp. 1364, 1372–73 (Ct. Int'l Trade 1986)).) Plaintiffs do not take the position that pre-suspension entries should be assessed dumping duties. (*Id.* at 22 n.42.) Rather, Plaintiffs stress the need to update the cash deposit rates for Ta Chen and its subject merchandise in order to adhere to the "broad objectives of the antidumping scheme as a whole." (*Id.* at 22.)

Plaintiffs argue that Commerce's policy on rescission, which excludes sales of merchandise that entered prior to the suspension of liquidation from an administrative review because the merchandise is not "subject merchandise," is unlawful. (*Id.* at 24.) Plaintiffs assert that the policy employed in this case serves to "curtail [Commerce's] authority to scrutinize current U.S. resales during the period of review if those resales are not linked to entries that likewise occurred during the period of review" and prevents the calculation of a current cash deposit rate. (*Id.*) Plaintiffs insist that Commerce is not statutorily precluded from conducting an administrative review in cases where there are U.S. resales during the period of review of items that entered prior to the suspension of liquidation. (*Id.* at 25 (citing 19 U.S.C. § 1675(a).) Furthermore, Plaintiffs assert that Commerce's own regulations and prior practices permit review under the circumstances of this case. (*Id.* at 26 (citing 19 C.F.R. § 351.213(e)(1)(I)).)

For the reasons discussed above, Plaintiffs assert that Commerce's decision to rescind the Second Administrative Review as to Ta Chen should be reversed because it is unsupported by substantial evidence on the record and is otherwise not in accordance with law.

B. Defendant's Contentions

Defendant asserts that substantial evidence on the record establishes that Ta Chen had no entries of the subject merchandise dur-

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[4] Plaintiffs cite to the section of the House of Representatives' Report entitled "Assessment of duty" and the corresponding section of the Senate's Report entitled "Assessment of Duty (Section 736 of the Tariff Act of 1930)" as support for their assertion that Congress stressed the importance of cash deposits of estimated antidumping duties. (Pls.' Br. at 21–22.) Section 736 is codified at 19 U.S.C. § 1673e, which outlines the procedures Commerce is to take in assessing and imposing dumping duties.

ing the period of review, and this finding justifies Commerce's application of 19 C.F.R. § 351.213(d)(3), which permits rescission under these circumstances. (Def.'s Br. at 22–26.) Defendant contends that Commerce's regulation and its interpretation of the statutory provisions supporting the regulation, as well as Commerce's decision not to use period of review resales of merchandise that entered the U.S. prior to the suspension of liquidation for calculating the cash deposit rate, are in accordance with law. (*Id.* at 13–22.) Defendant notes that this Court found Commerce's interpretation and application of the statute and regulations in the First Administrative Review to be supported by substantial evidence and otherwise in accordance with law. (*Id.* at 14–23 (citing *Allegheny I*, 240 F. Supp. 2d at 1262).)

In the *Final Results*, Commerce found that evidence on the record established that Ta Chen had no entries of the subject merchandise during the period of review and that any resales by its affiliate TCI during the period of review were attributable to pre-suspension entries. *Final Results*, 67 Fed. Reg. at 40,916; (Pls.' App. Ex. 14 at 5–6). Defendant points to Ta Chen's numerous letters certifying that it had no entries, sales, or shipments of the subject merchandise during the period of review; Commerce's inquires to Customs on November 20, 2001, at the preliminary stage of the administrative review, and on May 28, May 31, June 4, and June 5, 2002, all of which verified Ta Chen's certification; and the findings of the First Administrative Review, as substantial evidence to support Commerce's finding. (Def.'s Br. at 23–25; Pls.' App. Ex. 13 and 15.) Defendant contends that this evidence made it "unnecessary to require Ta Chen to provide further evidence of no exports during the [period of review] and there is no reason to question the accuracy of Customs' conclusion." (*Id.* at 26.) As Commerce explained, neither the statute nor Commerce's regulations instruct Commerce to require Ta Chen to affirmatively link TCI's period of review sales to pre-suspension entries, when there is evidence on the record that establishes that no entries occurred during the period of review. (Pls.' App. Ex. 14 at 6.) In the *Issues and Decision Memorandum*, Commerce acknowledged that it has required respondents to demonstrate clear linkage of period of review sales to entries that occurred outside the period of review where there was uncertainty on record as to the dates of entries. (*Id.*) However, Commerce found that there was no such uncertainty in this case. (*Id.*) Defendant refutes Plaintiffs' challenge of the reliability of the Customs inquiry. (Def.'s Br. at 24–26.) As Commerce explained in the *Issues and Decision Memorandum*, Commerce has "relied on Customs' findings of no entries of subject merchandise [in other administrative reviews] * * * [and] [i]t is reasonable to rely on Customs' finding in this case as well." (Pls.' App. Ex. 14 at 7.)

Commerce decided to rescind the administrative review in accordance with 19 C.F.R. § 351.213(d)(3) because of its determination that Ta Chen had no entries during the period of review, and Com-

merce declined to use sales of non-subject merchandise in calculating a cash deposit rate. *Final Results*, 67 Fed. Reg. at 40,916; (Pls.' App. Ex. 14 at 5–7). Defendant asserts that these determinations are in accordance with law. (Def.'s Br. at 13–22.) In the *Issues and Decision Memorandum*, Commerce explained that 19 C.F.R. § 351.213(d)(3) has been interpreted and applied to "permit the rescission of the review if there were no entries during the [period of review]." (Pls.' App. Ex. 14 at 5 (citing *Carbon Steel Wire Rope From Mexico; Rescission of Antidumping Duty Administrative Review*, 65 Fed. Reg. 58,261 (Sept. 28, 2000); *Stainless Steel Sheet and Strip From the Republic of Korea; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 66 Fed. Reg. 64,950 (Dec. 17, 2001)).)

Defendant contends that this regulation, as applied in this proceeding, is lawful and consistent with the underlying goals of the antidumping statute. (Def.'s Br. at 13–22.) Defendant explains that this regulation is founded upon the definition of "subject merchandise." (*Id.*) Goods purported to be sold in the U.S. at less than fair value become subject to assessments of duties upon Commerce's final determination that merchandise is being sold at less than its fair value. (*Id.* at 13–14.) The date that Commerce orders the suspension of liquidation is the first day upon which merchandise may be labeled "subject merchandise." (*Id.*) Defendant observes that it is upon the order of the suspension of liquidation that "respondents are placed upon notice that their merchandise may be subject to a future antidumping duty order." (*Id.*) Defendant asserts that Commerce will only review and assess dumping duties "upon merchandise that entered the United States *after* the initial order directing suspension of liquidation" because "merchandise that enters prior to the suspension of liquidation is not 'subject merchandise.' " (*Id.* at 14, 18 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed Reg. 27,296, 27,314 (May 19, 1997)).)

Defendant explains that Commerce does not use entries of goods that entered the U.S. prior to the suspension of liquidation in any antidumping duty calculation, including calculating cash deposit rates, because pre-suspension entries are not "subject merchandise," and, therefore, not relevant to the calculations. (*Id.* at 15–17.) Defendant observes that Plaintiffs do not dispute the fact that TCI's resales were of merchandise that entered the U.S. prior to the suspension of liquidation, and, therefore, are not subject to the antidumping duty order or any assessment of duties. (*Id.* at 14 (citing Pls.' Br. at 21–31).) Defendant maintains that Commerce was correct in rejecting Plaintiffs' contention, advanced absent any authority, that sales of merchandise not subject to the antidumping duty order may, nevertheless, be used to calculate the cash deposit rate. (*Id.* at 14.)

Defendant argues that Commerce properly rejected Plaintiffs' interpretation of 19 C.F.R. § 351.213 as permitting Commerce to consider non-subject merchandise sales in calculating cash deposit rates. (*Id.* at 17.) Defendant refutes Plaintiffs' assertion that Congress established an exception for the cash deposit rate, which would permit the use of non-subject merchandise sales to calculate a "new" cash deposit rate, despite the fact that the existing cash deposit rate was calculated using "sales of actual subject merchandise during the investigation." (*Id.* at 16–17.)

Defendant asserts that it is Commerce's practice not to use sales of non-subject merchandise to calculate or update cash deposit rates when there are no entries of the subject merchandise during a period of review, but rather to rescind the review, pursuant to 19 C.F.R. § 351.213(d)(3). (*Id.* at 18–20.) Defendant explains that this practice "ensures that entries are considered only once for purposes of [assessing antidumping duties and cash deposits], thereby promoting the accuracy of the antidumping duty and cash deposit rates." (*Id.* at 22 (citing Pls.' App. Ex. 14 at 7).)

Defendant concludes that the *Final Results* should be affirmed.

C. Analysis

Commerce's determination to rescind the Second Administrative Review as to Ta Chen is supported by substantial evidence on the record and is otherwise in accordance with law.

Commerce's decision not to apply total adverse facts available to Ta Chen is supported by substantial evidence and is otherwise in accordance with law. Pursuant to 19 U.S.C. § 1677e(a), Commerce will make a determination using facts available if

> (1) necessary information is not available on the record, or
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> (2) an interested party * * *—
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> (A) withholds information that has been requested * * *,
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> (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to [19 U.S.C. §§ 1677m(c)(1) and (e)],
>
> (C) significantly impedes a proceeding * * *, or
>
> (D) provides such information but the information cannot be verified.

19 U.S.C. § 1677e(a). Commerce will use adverse facts available if it "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b).

It is true that Ta Chen declined to respond to the additional questions intended to provide information linking TCI's resales to pre-suspension entries. (Pls.' App. Ex. 9.) However, Commerce has the

"discretion to determine whether a respondent has complied with an information request." *Daido Corp. v. United States*, 893 F. Supp. 43, 49–50 (Ct. Int'l Trade 1995) (citations omitted); *see also Allegheny Ludlum Corp. v. United States*, 215 F. Supp. 2d 1322, 1338 (Ct. Int'l Trade 2000); *Maui Pineapple Co. v. United States*, No. 01–01017, 2003 Ct. Intl. Trade LEXIS 55, at *39 (Ct. Int'l Trade Apr. 16, 2003). Additionally, as the statute plainly states, facts available will be used "[i]f necessary information is not available on the record." 19 U.S.C. § 1677e(a)(1). As Commerce stated in the *Issues and Decision Memorandum*, there was sufficient information on the record to establish the lack of sales, entries, or shipments during the period of review and to link TCI's resales to pre-suspension entries without Ta Chen's responses to the questionnaires. (Pls.' App. Ex. 14 at 5–7.) Ta Chen replied to Commerce's requests for information by maintaining that it had no sales or entries of the subject merchandise during the period of review and the resales attributable to TCI were of merchandise that entered prior to the suspension of liquidation. Commerce informed Ta Chen that it would evaluate its request to be exempt from providing additional information. (Pls.' App. Ex. 8.) Thus, Commerce reasonably chose not to label Ta Chen uncooperative.

Commerce relied on substantial evidence on the record to conclude that Ta Chen had no entries of the subject merchandise during the period of review. Furthermore, Commerce's decision to exclude period of review resales by TCI, an affiliate of Ta Chen, from review and from use in cash deposit rate calculations is supported by substantial evidence on the record and is otherwise in accordance with law. Substantial evidence established that the merchandise sold by TCI was not "subject merchandise" because it entered the U.S. prior to the suspension of liquidation. Notably, Commerce received several letters from Ta Chen certifying that Ta Chen did not have any entries during the period of review. (*See* Pls.' App. Exs. 4, 5 and 7.) Commerce then confirmed this fact by its inquiries to Customs during the preparations of both the *Preliminary Results* and the *Final Results*. (Pls.' App. Ex. 15.) Commerce was also able to refer to its determination in the First Administrative Review, which found that Ta Chen had no entries of the subject merchandise during that period of review and any resales by TCI were of goods that entered prior to the suspension of liquidation. *See First Admin. Review, Final Results*, 66 Fed. Reg. at 18,612; *Allegheny I*, 240 F. Supp. 2d at 1267. These results provided answers to some of Commerce's supplemental questions regarding TCI's sales during the First Administrative Review. (Pls.' App. Ex. 8 at 2.)

Plaintiffs' challenge to the quality of information that Commerce was able to obtain from the inquiry to Customs is unpersuasive. "Commerce enjoys wide latitude in its verification procedures. The Court defers to the agency's sensibility as to the depth of the inquiry needed." *FAG Kugelfischer Georg Schafer AG v. United States*, 131 F.

Supp. 2d 104, 133 (Ct. Int'l Trade 2001) (internal quotation and citation omitted). Aside from Plaintiffs labeling the results of the Custom's inquiry as "scattered and incomplete," Plaintiffs have presented nothing that would indicate the need for further examination of the information obtained from Customs that verified Ta Chen's statements. (Pls.' Br. at 20); *see also FAG Kugelfischer*, 131 F. Supp. 2d at 133. Thus, substantial evidence supports Commerce's determination that Ta Chen had no entries during the period of review.

Commerce's decision to accept Ta Chen's certified statements and Commerce's inquiry to Customs to verify these statements are not actions contrary to the proposition that the burden of producing the record lies with the party possessing the information necessary to complete an administrative review. *See NTN Bearings*, 997 F.2d. at 1458; *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993).

Commerce is charged with periodically reviewing antidumping duty orders to determine "the amount of any antidumping duty, and * * * estimated duty to be deposited." 19 U.S.C. § 1675(a)(1)(B). In order to determine the amount of the duty, Commerce is to determine "the normal value and export price * * * of each entry of the subject merchandise, and the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A)(I)—(ii). As this Court observed in the proceedings originating in the First Administrative Review, "[t]he statute does not place specific burdens on the parties, but leaves to Commerce to develop a methodology to 'determine' if dumping took place." *Allegheny I*, 240 F. Supp. 2d at 1265. Commerce articulated its methodology in its regulations implementing the statute. These regulations include a provision permitting rescission of an administrative review where Commerce finds that a particular exporter or producer had no entries, sales, or exports of the subject merchandise during the period of review. *See* 19 C.F.R. § 351.213(d)(3). Unless restricted by statute, regulations, or its prior practice, Commerce is free "to rely on information it discovered through self-initiated investigation." *Allegheny I*, 240 F. Supp. 2d at 1265.

Nothing in this proceeding undermines the justification behind placing the burden of production upon a respondent to link sales to entries made outside a period of review. As Commerce explained in the *Issues and Decision Memorandum*, the policy of requiring respondents to affirmatively link period of review sales to entries outside the period of review is utilized when there is uncertainty in the record as to the dates of the entries, with some entries entering prior to the period of review and others entering during the review period. (Pls.' App. Ex. 14 at 6.) Commerce stated "there was little uncertainty as to the lack of entries of the subject merchandise by Ta Chen during the [period of review]." (*Id.*) Thus, requiring Ta Chen to answer Commerce's questionnaire and supplemental questions would have yielded information that was already established by the

record. Here, as in *Allegheny I*, Commerce did not improperly assume Ta Chen's burden of affirmatively linking TCI's resales to pre-suspension entries.

This Court has already determined that Commerce's interpretation of the statute and the application of its regulation are not contrary to law and setting a new cash deposit rate using nonsubject merchandise is not necessary. *See Allegheny I*, 240 F. Supp. 2d at 1266–67. Plaintiffs have presented nothing to persuade this Court to reach a different holding in the Second Administrative Review.

Here, as in *Allegheny I*, Commerce applied a policy that is premised upon the time constraints contained in the statute. *See id.* "Subject merchandise" is defined as "the class or kind of merchandise that is *within the scope* of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25) (emphasis added). This definition makes clear that subject merchandise is limited by both physical characteristics and time. Commerce's policy of reviewing and assessing duties only on merchandise that entered the U.S. after suspension of liquidation is consistent with the statute, as entries proceeding suspension of liquidation are not subject merchandise. Thus, Commerce's refusal to use pre-suspension entries to calculate or update cash deposit rates is in accordance with law.

Plaintiffs insist that the use of pre-suspension entries to calculate cash deposit rates would result in current and accurate rates. (Pls.' Br. at 11.) However, Plaintiffs provide no authority for this assertion, nor do they explain how the use of non-subject merchandise sales would lead to a more accurate cash deposit rate. This Court holds that Commerce's decision to rescind the review as to Ta Chen, rather than using non-subject merchandise for its calculations, is supported by substantial evidence and is otherwise in accordance with law.

II. Commerce's Decision to Apply an 8.02% *Ad Valorem* Rate to YUSCO Based upon Total Adverse Facts Available Is Supported by Substantial Evidence and Is Otherwise in Accordance with Law.

A. Plaintiffs' Contentions

Plaintiffs argue that Commerce incorrectly applied 8.02% *ad valorem* rate for YUSCO, when the total adverse facts available rate is 10.20% *ad valorem*. (Pls.' Br. at 31–32.) Plaintiffs contend that the reasoning behind Commerce's decision to exclude the 2.18% attributable to Ta Chen's middleman dumping is contrary to law. (*Id.*) Plaintiffs' maintain that both YUSCO and Ta Chen should have been found uncooperative. (*Id.*) Plaintiffs contend that because of the failure of both to cooperate, the record does not support Commerce's finding that YUSCO made no sales of the subject merchandise through Ta Chen. (*Id.* at 32–33.)

Plaintiffs again charge Commerce with excusing Ta Chen and YUSCO of the burden of establishing the record, which led to Commerce "fill[ing] the gap consequently left in the record" to support its choosing 8.02% *ad valorem* rate for YUSCO. (*Id.* at 34.) Plaintiffs allege that "[Commerce's] belief and finding that YUSCO shipped directly to the U.S. during the [period of review] without any involvement by Ta Chen as the middleman are unsubstantiated, because Ta Chen did not respond to [Commerce's] questions and did not link TCI's U.S. resales during the [period of review] to pre-suspension entries." (*Id.* at 35.)

Plaintiffs insist that the most significant factor to consider is the non-responsiveness of Ta Chen and YUSCO in the administrative review. (*Id.*) Plaintiffs state that "[i]n situations like this, the statute calls for adverse facts available as a way of encouraging respondents to submit information to [Commerce]." (*Id.* at 35–36.) Plaintiffs assert that Commerce's failure to use a 10.20% *ad valorem* rate for both Ta Chen and YUSCO would lead these respondents to "the only reasonable conclusion * * * that non-cooperation with [Commerce] is advantageous." (*Id.* at 36.) Plaintiffs continue that nothing in the record supports Commerce's "desire not to ascribe middleman dumping by Ta Chen to YUSCO when YUSCO supposedly had no reason to know or suspect that Ta Chen was engaged in middleman dumping." (*Id.* at 37–38.) Plaintiffs argue that Commerce, instead, should have presumed YUSCO's awareness of Ta Chen's middleman dumping because an adverse inference was warranted and YUSCO was aware that Ta Chen had engaged in middleman dumping as a result of the original investigation. (*Id.* at 38.) Plaintiffs add that Commerce departed from its normal practice of setting a cash deposit rate that uses "[a] single, weighted-average rate * * * to avoid potential manipulation to reduce antidumping duty liability from occurring." (*Id.* at 39.) Therefore, Plaintiffs assert, Commerce should have applied a 10.20% *ad valorem* rate to YUSCO. (*Id.*)

B. Defendant's Contentions

Defendant contends that Commerce's decision to use an adverse facts available rate based on YUSCO's entries, rather than a rate attributable to YUSCO's entries through Ta Chen, is supported by substantial evidence. (Def.'s Br. at 27.) Defendant notes that Commerce has broad discretion to "select an adverse facts rate that will create the proper deterrent to ensure that respondents cooperate with its investigations and to assure a reasonable margin." (*Id.* (citing *F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).) Defendant argues that Plaintiffs' assertion that a different rate should apply "does not render Commerce's decision to apply the 8.02 [adverse facts available] rate unreasonable." (*Id.*) Defendant notes that "[a]ttempts to assail the correctness of Commerce's determination (as opposed to its methodology) are outside the standard of review." (*Id.* at 27–28 (referring to *Timken*

Co. v. United States, 59 F. Supp. 2d 1371, 1376 (Ct. Int'l Trade 1999); *Tehnoimportexport, UCF Am., Inc. v. United States*, 783 F. Supp. 1401, 1406 (Ct. Int'l Trade 1992).)

Defendant refutes Plaintiffs' claim that application of a 10.20% *ad valorem* rate would more effectively encourage respondents to cooperate with administrative reviews. (*Id.* at 28.) Defendant further notes that the record does not support an assumption of middleman dumping. (*Id.*) In the *Issues and Decision Memorandum*, Commerce explained that "[n]either the Act nor the legislative history instructs [Commerce] to presume middleman dumping in light of no entries of the subject merchandise during the [period of review] from the middleman." (Pls.' App. Ex. 14 at 3.)

Defendant argues that Commerce's selection of the 8.02% rate based on adverse facts available is reasonable because the rate "must be a 'reasonably accurate estimate of the respondent's actual rate.'" (Def.'s Br. at 28–29 (citing *F.Lii de Cecco*, 216 F.3d at 1032.) Defendant points out that Commerce's practice in applying adverse facts available is to select the highest margin from any segment of the proceeding attributable to a given party's actions, pursuant to 19 U.S.C. § 1677e(b). (*Id.* at 29 (citing *Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 6812, 6814 (Feb. 22, 1996)).) In the *Issues and Decision Memorandum*, Commerce explained that "it would be reasonable to use an adverse number which, from the record, reflected YUSCO's exports directly to the United States, but illogical to calculate a margin which combined the dumping behavior of two unaffiliated parties." (Pls.' App. Ex. 14 at 3.) Defendant concludes that based upon this Court's recognition of Commerce's discretion to select the appropriate adverse facts to apply, the decision to apply an 8.02% adverse facts available rate for YUSCO should be affirmed. (*Id.* at 30.)

C. Analysis

Commerce's decision to select 8.02% *ad valorem* rate as the adverse facts available rate for YUSCO is supported by substantial evidence and is otherwise in accordance with law. Plaintiffs argument is founded largely upon the premise that both Ta Chen and YUSCO should have been both been labeled "uncooperative." (Pls.' Br. at 34–35.) As discussed above, Commerce correctly declined to label Ta Chen as "uncooperative," thereby eliminating the use of adverse facts as applicable to Ta Chen. This includes the use the 2.18% *ad valorem* rate attributable to Ta Chen's middleman dumping of YUSCO products in the U.S. Further, as discussed above, substantial evidence on the record supports Commerce's finding that there were no entries of the subject merchandise by Ta Chen during the period of review.

Though Commerce has broad discretion "to choose which sources and facts it will rely on to support an adverse inference when a re-

spondent has been shown to be uncooperative * * * Commerce's discretion in these matters * * * is not unbounded." *F.Lii de Cecco*, 216 F.3d at 1032. The Congressional intent behind the adverse inference provision

> is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins* * * * [Congress] intended for an adverse facts available rate to be a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to noncompliance. Congress could not have intended for Commerce's discretion to include the ability to select unreasonably high rates with no relationship to the respondent's actual dumping margin.

Id. In this case, YUSCO is the non-cooperative respondent and a previous segment of these proceedings determined that the dumping rate attributable to YUSCO's actions was 8.02% *ad valorem*, the highest margin calculated in any segment for YUSCO's direct shipments to the U.S. *See Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan, Part III*, 64 Fed. Reg. 15,493, 15,494, 15,507 (Mar. 31, 1999). A 10.02% rate from this segment took into account actions by a non-affiliated party, Ta Chen, who was found to have engaged in middleman dumping. *Id*. In this case, Commerce reasonably relied on substantial evidence on the record to select the 8.02% rate based on total adverse facts available.

Plaintiffs' assertions that it would be appropriate to infer middleman dumping in this proceeding are without merit. Absent any evidence to support such a presumption or to ascribe knowledge of middleman dumping to YUSCO, other than Plaintiffs' arguments that Commerce should so do, Commerce properly exercised its discretion in selecting an adverse facts available rate of 8.02% *ad valorem* for YUSCO's failure to cooperate with the administrative review. Plaintiffs' argument that this choice somehow impacts the cash deposit rate and encourages producers to be uncooperative and manipulative is unpersuasive.

Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law.

CONCLUSION

Upon consideration of Plaintiffs' Rule 56.2 motion for judgment upon the agency record, Defendant's response, and Plaintiffs' reply, Plaintiffs' motion is denied. Commerce's determination to rescind the administrative review as to Ta Chen and to apply an 8.02% *ad valorem* rate based upon adverse facts available for YUSCO is supported

by substantial evidence and is otherwise in accordance with law. The *Final Results* are affirmed in their entirety. This case is dismissed.

GREGORY W. CARMAN,
Chief Judge.

(Slip Op. 03–90)

DANIEL ATTEBERRY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 02–00647

[Defendant's motion for rehearing, modification and/or reconsideration denied.]

(Dated: July 24, 2003)

Daniel Atteberry, Plaintiff *Pro Se.*

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jack S. Rockafellow*); *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, United States Department of Homeland Security, Of Counsel; for Defendant.

MEMORANDUM OPINION

RIDGWAY, *Judge*: Pending before the Court is Defendant's Motion for Rehearing, Modification, and/or Reconsideration ("Def.'s Motion"). That motion is addressed to *Atteberry v. United States*, Slip Op. 03–53, 27 CIT ___ , ___ F. Supp. 2d ___ (May 14, 2003) ("*Atteberry*"), which denied Defendant's motion to dismiss this action for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2636(a)(1) (2000).

The decision to grant or deny a motion for rehearing, modification or reconsideration is committed to the sound discretion of the Court. *See generally, e.g., D&L Supply Co. v. United States*, 22 CIT 539, 540 (1998) (citations omitted). For the reasons set forth below, Defendant's Motion is denied.

ANALYSIS

In this action, the plaintiff importer ("Importer") contests the decision of the United States Customs Service ("Customs")[1] reclassifying for tariff purposes certain merchandise which he imported. *Atteberry* addressed Defendant's motion to dismiss pursuant

[1] Effective March 1, 2003, the Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. 108–32, at 4 (2003).

to 28 U.S.C. § 2636(a)(1), which requires that such an action be commenced "within one hundred and eighty days after *the date of mailing of notice of denial of a protest*." (Emphasis added.) Defendant's Memorandum in Support of Defendant's Motion for Rehearing ("Def.'s Memo on Rehearing") advances two arguments in support of its request for relief, which are addressed in turn below.

Defendant first notes that it moved to dismiss this action for lack of subject matter jurisdiction on two separate and independent grounds—for the Importer's alleged failure to file a timely summons (28 U.S.C. § 2636(a)(1)), and for his failure to pay outstanding duties and interest before filing suit (28 U.S.C. § 2637(a)). Defendant asserts that *Atteberry* "inexplicably decided only the first of the two jurisdictional prongs." Def.'s Memo on Rehearing at 1.

Atteberry was, on its face, confined to the issue of the challenge to subject matter jurisdiction under 28 U.S.C. § 2636(a)(1)—the issue of the timeliness of the summons. *See* Slip Op. 03–53 at 2, 27 CIT at ___ , ___ F. Supp. 2d at ___ ("the Government's motion to dismiss for lack of subject matter jurisdiction pursuant to *§ 2636(a)(1)* must be denied"), 12 ("Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to *28 U.S.C. § 2636(a)(1)* therefore must be, and hereby is, denied.") (emphases added). Further, *Atteberry* expressly noted that "the Government has also moved to dismiss the case for lack of subject matter jurisdiction under 28 U.S.C. § 2637(a) (2000). That motion remains pending* * * *" Slip Op. 03–53 at 11 n.11, 27 CIT at ___ n.11, ___ F. Supp. 2d at ___ n.11. It is thus difficult to understand Defendant's apparent concern that its alternative grounds for dismissal—28 U.S.C. § 2637(a), the requirement for prepayment of outstanding duties—had been overlooked.

Defendant's second basis for reconsideration rests on its assertion that its motion for dismissal under 28 U.S.C. § 2636(a)(1)—the subject of *Atteberry*—was moot. *See* Def.'s Memo on Rehearing at 2–4. Defendant's argument on this point is premised on its claim that its Reply Brief on the motion to dismiss "unequivocally conceded the issue of timeliness of plaintiff's summons." *Id.* at 2, *citing* Defendant's Memorandum in Response to "Plaintiff's Motion for Summary Judgment and for Denial of Defendant's Motion to Dismiss" ("Def.'s Reply Brief") at 3.

However, a review of Defendant's Reply Brief reveals that Defendant's position on the timeliness of the summons was anything but "unequivocal"—particularly in light of its opening submission, Defendant's Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Action for Lack of Subject Matter Jurisdiction ("Def.'s Brief"). In support of its position here, Defendant cites a single statement on page 3 of its Reply Brief. What Defendant notably does not say is that the sentence on which it pins its entire argument (the sentence which it contends "unequivocally conceded" the timeliness issue) appears only in the section of its Reply Brief captioned "Stan-

dard of Review"—and that, even within that section, the sentence is buried in a paragraph of "boilerplate" on the standards governing summary judgment.

Moreover, Defendant ignores the few other relevant statements in its Reply Brief, all of which were—at best—decidedly half-hearted, hedged and ambiguous. *See* Def.'s Reply Brief at 2 n.2 (referring dismissively to "*allegedly responsive* documents" submitted by the plaintiff Importer concerning, *inter alia*, the timing of the mailing of the Notice of Denial of Protest, and conceding only that "one of them, a postmarked envelope, does *tend to show* that the summons was timely filed") (emphases added). *See also id.* at 1 (asserting that "it now *appears* that the summons was filed timely") (emphasis added).

Further, Defendant's motion to dismiss under 28 U.S.C. § 2636(a)(1)—the subject of *Atteberry*—advanced two separate and distinct theories for dismissal of the action as untimely: (1) that the Notice of Denial in this case was in fact mailed (read "postmarked") on April 3, 2002, pursuant to Customs' standard practice and procedure, and (2) that the statute's reference to "date of mailing" (rather than "date of postmark") meant that—even if the Notice was postmarked later than April 3, 2002—the 180-day statutory clock for filing of an action in this Court nevertheless began to run when the Notice was "placed in a box intended solely for U.S. Mail." *See* Def.'s Brief at 5–7 (the first theory); *id.* at 7 n.4 (the second theory).

The only evidence bearing on the first theory which became available between Defendant's opening brief and its Reply Brief was the postmarked envelope submitted by the plaintiff Importer—which, as noted above, the Government denigrated as merely "*tend[ing] to show* that the summons was timely filed." Def.'s Reply Brief at 2 n.2 (emphasis added). Even if Defendant actually (if grudgingly) accepted that evidence as dispositive of its first theory (which is far from clear to a dispassionate reader of Defendant's Reply Brief), the postmarked envelope was irrelevant to Defendant's second theory. Nor did any evidence whatsoever bearing on the Government's second theory come to light between its opening brief and its Reply Brief. Thus, not only was there nothing "unequivocal" about the *language* of Defendant's Reply Brief, there was also nothing in the inherent *logic* of its motion, in light of the evidence adduced, which would have suggested that Defendant intended to abandon its motion under § 2636(a)(1)—particularly its second theory. As it is, the ambiguity of Defendant's Reply Brief is easily read as implicitly acknowledging that the Government would almost certainly lose on its first theory (the date-of-postmark theory), but might still prevail on its second theory (which urged construction of "date of mailing" as date of deposit in a mailbox).

If Defendant truly intended to abandon its motion to dismiss under § 2636(a)(1), it was incumbent on Defendant to alert the Court and the plaintiff to its change of position, to spare them any further

effort. Judges should not be required to be clairvoyant. Nor should they be required to affirmatively undertake to interrogate parties that fail to clearly articulate their positions. *Cf. United States v. Gimbel*, 782 F.2d 89, 92 n.6 (7th Cir. 1986) ("admonish[ing] the Government * * * to be more careful and to present its arguments to the district judge in a much clearer fashion. District judges, who already carry a heavy workload, cannot be burdened with the additional task of deciphering a party's cryptic (and unhelpful) legal argument, even when the issues may be fairly simple. This is particularly true when that party is the federal government which has sufficient resources* * * * ").

Here, Defendant filed nothing which was calculated to properly alert the Court to a such a dramatic change of position: No separate notice, properly captioned, advising the Court and the plaintiff that Defendant was affirmatively withdrawing its motion to dismiss under § 2636(a)(1), no section of Defendant's Reply Brief captioned and devoted exclusively to the point—not even prominent use of terminology such as "withdraw," "abandon," "moot," or "concede."

The requirement that parties clearly articulate their positions is grounded in sound policy. In a situation like this, it is difficult not to be cynical about a litigant's posture. While it is easy to understand why the Government might not want *Atteberry* "on the books," it is difficult not to speculate whether Defendant would have sought reconsideration (arguing that the matter was moot) if that opinion had come out differently—if, for example, *Atteberry* had dismissed this action based on Defendant's second theory (which sought to construe "date of mailing" as date of deposit in a mailbox). Permitting liberal *post hoc* "clarification" of parties' positions in situations such as this might encourage some future litigants to draft their papers with a studied ambiguity, so that if they were unhappy with the court's subsequent decision, they could point after-the-fact to subtle phrases and nuances in their submissions to argue that they had abandoned a particular theory and that the court's opinion therefore should be withdrawn. Litigants cannot "have their cake and eat it too."

Finally, it is worth noting that—even if Defendant had in fact unequivocally withdrawn its motion to dismiss under § 2636(a)(1)—withdrawal would not necessarily have mooted the matter. There are several well-established exceptions to the doctrine of mootness. *See, e.g.*, *Torrington Co. v. United States*, 44 F.3d 1572, 1577 (Fed. Cir. 1995) (recognizing exception for matters "capable of repetition, yet evading review"). Particularly in light of the concerns expressed in *Atteberry* at footnote 10, and their impact on issues such as Customs' right to continue to enjoy the "presumption of regularity," the matter might arguably fall within one of those exceptions. *See* Slip Op. 03–53 at 9–11, 27 CIT at ____ , ____ F. Supp. 2d at ____ .

CONCLUSION

For all the foregoing reasons, Defendant's Motion for Rehearing, Modification, and/or Reconsideration must be, and hereby is, denied.

DELISSA A. RIDGWAY,
Judge.

(Slip Op. 03–91)

UNITED STATES OF AMERICA, PLAINTIFF, *v.* INN FOODS, INC., DEFENDANT.

Court No. 01–01106

The United States ("Government") moves this Court, pursuant to USCIT R. 59, to reconsider its opinion and judgment in *United States v. Inn Foods, Inc.*, 2003 Ct. Intl. Trade LEXIS 49, at *1, Slip Op. 03–50 (May 13, 2003), granting defendant's motion for summary judgment and finding that the Government's complaint was time-barred. Inn Foods, Inc. ("Inn Foods") opposes reconsideration of this action because the Government failed to establish any reason that would justify reconsideration.

Held: or the reasons stated below, plaintiff's motion for reconsideration is denied. [Government's motion is denied.]

(Dated: July 25, 2003)

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*A. David Lafer*, Senior Trial Attorney, and *Michael S. Dufault*) for the United States of America, plaintiff.

Horton, Whiteley & Cooper (*Robert Scott Whiteley* and *Craig A. Mitchell*) for Inn Foods, defendant.

OPINION

TSOUCALAS, *Senior Judge*: The United States ("Government") moves this Court, pursuant to USCIT R. 59,[1] to reconsider its opinion and judgment in *United States v. Inn Foods, Inc.*, 2003 Ct. Intl. Trade LEXIS 49, at *1, Slip Op. 03–50 (May 13, 2003), granting defendant's motion for summary judgment and finding that the Government's complaint was time-barred. Inn Foods, Inc. ("Inn Foods") opposes reconsideration of this action because the Government failed to establish any reason that would justify reconsideration.

The procedural background of this case is set forth in *Inn Foods*, 2003 Ct. Intl. Trade LEXIS 49, at *1, Slip Op. 03–50.

[1] Rule 59 states, in pertinent part, that "[a] new trial or rehearing may be granted to all or any of the parties and on all or part of the issues * * * in an action tried without a jury or in an action finally determined, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States." USCIT R. 59.

DISCUSSION

The decision to grant or deny a motion for reconsideration lies within the sound discretion of the Court. *See Union Camp Corp. v. United States*, 21 CIT 371, 372, 963 F. Supp. 1212, 1213 (1997); *Sharp Elecs. Corp. v. United States*, 14 CIT 1,2, 729 F. Supp. 1354, 1355 (1990); *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990); *V.G. Nahrgang Co. v. United States*, 6 CIT 210, 211 (1983). In ruling on a motion for reconsideration, the Court's previous decision will not be disturbed unless it is "manifestly erroneous." *United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 336, 337, 601 F. Supp. 212, 214 (1984). Reconsideration or rehearing of a case is proper when "a significant flaw in the conduct of the original proceeding [exists]," *Kerr-McGee*, 14 CIT at 583, such as

> (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in the nature of an accident or unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case[,]

and must be addressed by the Court. *Union Camp Corp.*, 21 CIT at 372, 963 F. Supp. at 1213 (citation omitted).

In this case, the Government argues that "reconsideration is warranted because it was the specific, written intent of the parties that [Inn Food's] two-year waiver of the statute of limitations * * * [would] be 'effective through December 14, 2001.' " Pl.'s Mot. for Recons. ("Pl.'s Mot.") at 1 (citation omitted). According to the Government, Inn Foods compiled a package of documents pertaining to this two-year waiver, and mailed it to the United States Customs Service ("Customs")[2] in August, 1999. *See id.* at 4. Included in this package was a "corporate resolution" prepared by Jack Randle, Secretary-Treasurer of Inn Foods, on August 5, 1999, stating as follows:

> A special meeting was called to order by Chairman of the Board, Fred Haas. Other Directors in attendance were Jack Randle, Carol Randle, Gail Haas and Mike Randle.
>
> The purpose of the meeting was to obtain approval and adoption of the Certificate of Corporate Resolution in reference to authorizing issuance of the waiver of statute of limitations in the matter of U.S. Customs Case No. 1995–2305–020060–01. The waiver is made for a twoyear period commencing on December 14, 1999, and effective through December 14, 2001.

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[2] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108–32 (2003).

Id. at 4–5 (quoting Attach. A2). The Government contends that this "resolution" was "adopted at Customs' request, and was sent to Customs, as a package, with the waiver," *id*. at 5, and, that since this waiver was drafted, pursuant to *United States v. Neman Bros. & Assocs*., 15 CIT 536, 777 F. Supp. 962 (1991), the language employed created a waiver that was valid through the two-year anniversary date of its commencement. *See* Pl.'s Mot. at 5. This interpretation mirrors "Inn Foods' actual intent underlying the waiver prior to the time when the waiver's scope was put into controversy by Inn Foods' filing of its motion to dismiss." *Id*. at 5–6.

The Government further argues that the principle of equitable estoppel should prevent Inn Foods from asserting a position before the Court that contradicts its original written intent. *See id*. at 1–2. The Government claims that the "corporate resolution" prepared by Inn Foods and mailed to Customs clearly "induced" the Government to believe that Inn Foods' intent was that the waiver would be effective through December 14, 2001, and that this belief was indicated in an internal letter from Customs' Chief of the Penalties Branch to the Fines, Penalties and Forfeiture Officer. *See id*. at 7 (citation omitted).

The Court, however, will not disturb its prior decision in *Inn Foods*, 2003 Ct. Intl. Trade LEXIS 49, at *1, Slip Op. 03–50, for two reasons. First, the Court agrees with Inn Foods that the Government's present motion fails to demonstrate any grounds which would justify the reconsideration of this case, but rather seeks permission to relitigate the case. The Court in *Kerr-McGee*, 14 CIT at 583, made clear that "[t]he purpose of a rehearing [or reconsideration] *is not* to relitigate a case." (Emphasis added). Nowhere is it alleged that any of the documents cited to by the Government in support of its current motion were recently discovered. To the contrary, the Government admits that it had all such documents in its possession on or about August 5, 1999. *See* Pl.'s Mot. at 4–5. In light of this admission, and the fact that Inn Foods' original summary judgment motion properly framed and addressed the issue of whether the plain meaning or intent of the parties would render the waiver valid through its anniversary date, the Government is now prevented from raising this same issue and introducing new exhibits in a subsequent motion. The Court will not speculate as to whether the Government's failure to address the issue and include the "corporate resolution" and additional exhibits in its original response to Inn Foods' motion for summary judgment was intentional or in error. However, the Court will assert that a party cannot purposely or accidently exclude documents central to the resolution of an issue and later expect the Court to accept those same documents as grounds to reconsider its previous decision. The discretion granted to the Court by USCIT R. 59 is not intended to relieve a party from the negative implications of a calculated strategic decision or sloppy work. *See*

North Am. Foreign Trading Corp. v. United States, 8 CIT 359, 600 F. Supp. 226 (1984), *reh'g denied*, 9 CIT 80, 607 F. Supp. 1471 (1985), *aff'd*, 783 F.2d 1031 (Fed. Cir. 1986) (holding that reconsideration is proper in certain well-established, exceptional circumstances).

Second, the letter that the Government purports to be a "corporate resolution" is in fact Minutes of a "Special Board Of Directors Meeting" held on August 5, 1999, that were compiled over a month after the execution of the waiver agreement at issue. *See* Def.'s Objection Pl.'s Mot. for Recons.; Pl.'s Mot. at Attachs. A–2 & A–6. Inn Foods asserts that it received the letter from the Fines, Penalties & Forfeitures Officer in Laredo, Texas, the same day on which the Directors Meeting was held. According to Inn Foods, the language contained in the Minutes (specifically that "[t]he waiver is made for a two-year period commencing on December 14, 1999, and effective through December 14, 2001") actually reflects the language found in the letter drafted by the Customs' Chief dated June 25, 1999. *See* Pl.'s Attachs. A–2 & A–5. In other words, the letter was read into the Minutes verbatim.

The Court will not address the Government's equitable estoppel arguments because the Government failed to provide a shred of evidence demonstrating that Inn Foods actively attempted to mislead the Government or prevented the Government from bringing a timely action. *See United States v. Nussbaum*, 24 CIT 185, 192, 94 F. Supp. 2d 1343, 1349 (2000) (citations omitted). Accordingly, the Government's motion for reconsideration is denied.

NICHOLAS TSOUCALAS,
Senior Judge.

(Slip. Op. 03–92)

PUBLIC VERSION

FUJIAN MACHINERY AND EQUIPMENT IMPORT & EXPORT CORPORATION, AND SHANDONG MACHINERY IMPORT & EXPORT CORPORATION, PLAINTIFFS, *v.* UNITED STATES, AND THE UNITED STATES DEPARTMENT OF COMMERCE, DEFENDANTS, AND O. AMES COMPANY, DEFENDANT- INTERVENOR.

Court No. 99–08–00532

[Commerce antidumping duty remand determination sustained.]

(Dated: July 28, 2003)

Sidley, Austin, Brown & Wood (*Lawrence R. Walders* and *Neil C. Pratt*) for plaintiffs Fujian Machinery and Equipment Import & Export Corporation and Shandong Machinery Import & Export Corporation.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia McCarthy*, Assistant Director, *Kenneth S. Kessler*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; Office of Chief Counsel for Import Administration, United States Department of Commerce (*Elizabeth Doyle*), for defendants.

Wiley, Rein & Fielding (*Charles O. Verrill, Jr.* and *Eileen P. Bradner*) for defendant-intervenor O. Ames Company.

OPINION

GOLDBERG, *Judge:* This case is before the Court following remand to the United States Department of Commerce ("Commerce"). In *Fujian Machinery and Equipment Import & Export Corp. v. United States*, 25 CIT ___ , 178 F. Supp. 2d 1305 (2001) ("*Fujian I*"), familiarity with which is presumed, the Court sustained in part and remanded in part Commerce's determination with respect to plaintiffs Fujian Machinery and Equipment Import & Export Corporation ("FMEC") and Shandong Machinery Import & Export Corporation ("SMC") in *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China; Final Results and Partial Recission of Antidumping Duty Admin. Reviews*, 64 Fed. Reg. 43,659 (Aug. 11, 1999) ("*Final Results*").

In *Fujian I*, the Court found that Commerce had properly determined that SMC had failed verification and that FMEC had failed verification with respect to one of the four classes of subject merchandise, bars/wedges. However, the Court also held that Commerce had not adduced substantial evidence showing that FMEC had failed verification with respect to the other three classes of subject merchandise, or that SMC's and FMEC's supplier factories, "Factory A" and "Factory B" (collectively, the "Factories") had failed verification. In addition, the Court found Commerce's decision to apply adverse facts available ("AFA") and to apply the PRC-wide dumping

margins to FMEC and SMC to be unsupported by substantial evidence and not otherwise in accordance with law. The Court remanded the matter to Commerce with instructions to accept certain additional evidence from FMEC and thereupon to reconsider, in light of that evidence and the Court's opinion in *Fujian I*, whether: (1) FMEC had failed verification with respect to the other three classes of subject merchandise; (2) Factory A and Factory B had failed verification; (3) SMC's verification failure warranted the application of AFA; and (4) if Commerce determined on remand that FMEC had failed verification, reconsider whether the application of AFA to FMEC was warranted.

Commerce duly complied with the Court's order. After accepting FMEC's additional evidence, Commerce issued draft *Redetermination Results* (Jan. 23, 2002) ("*Draft Remand Results*") and then, after receiving comments from FMEC and SMC, the *Final Results of Redetermination Pursuant to Court Remand* (Feb. 20, 2002) ("*Remand Results*"). In the *Remand Results*, as in the *Draft Remand Results*, Commerce answered each of the above four questions in the affirmative. It then calculated separate rates for FMEC and SMC that were identical to the rates originally selected in the *Final Results*.

FMEC and SMC submitted Comments Regarding the Final Results of Redetermination Pursuant to Court Remand ("Plaintiffs' Comments"), and Commerce submitted its Rebuttal to Plaintiffs' Comments ("Commerce's Rebuttal").

The Court has jurisdiction under 28 U.S.C. § 1581(c) (2000). The Court must uphold Commerce's determination if it is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). After due consideration of these submissions, the administrative record, and all other papers had herein, and for the reasons that follow, the Court sustains the *Remand Results*.

I. *DISCUSSION*

A. Commerce's Determination that FMEC Failed Verification With Respect to All Four Classes of Subject Merchandise Is Supported by Substantial Evidence.

In *Fujian I*, the Court held that FMEC's total failure to report any U.S. sales of bars/wedges justified Commerce's determination that FMEC failed verification with respect bars/wedges, but that same failure did not clearly support Commerce's finding that FMEC had failed verification with respect to the other three classes of subject merchandise. In addition, the Court found that other instances of verification failures cited by Commerce did not constitute substantial evidence, because apparent problems during the verification process had hindered FMEC's ability to supply the requested data. The Court ordered Commerce to accept this data and to reconsider its findings.

In the *Remand Results*, Commerce again found that FMEC had failed verification with respect to the other three classes of subject merchandise. Commerce cites the following reasons for its determination: (1) an overall lack of preparation by FMEC prior to verification; (2) its lack of confidence in the overall accuracy of FMEC's submissions, engendered by FMEC's total failure to report its U.S. sale of bars/wedges; (3) FMEC's failure to provide timely and sufficient information about its other branches and subsidiaries, sufficient to prove that those branches and subsidiaries had no U.S. sales; (4) significant discrepancies with respect to the sales revenue reported on the Hand Tools Department's 1997 financial statements and its income statements; (5) FMEC's failure to submit all its February 1997 sales invoices and vouchers; and (6) FMEC's failure to submit quantity and value worksheets. See Commerce's Rebuttal, at 13–14; *see also Remand Results*, at 10–14.

1. Insufficient or marginal evidence of FMEC's verification failure

The first and second of these reasons do not constitute substantial evidence supporting Commerce's determination. A general reference to a respondent's lack of advance preparation is not itself evidence of a verification failure; it is the manifestations of that unpreparedness that matter. Commerce must point to specific examples of how the alleged unpreparedness impacted the verification process, rather than rely on such a vague, unsupported, conclusory assertion.[1]

The determination that FMEC's failure to report its one U.S. sale of bars/wedges casts a similar shadow over the total veracity of FMEC's responses is also a form of impermissible bootstrapping not consistent with the Court's holding in *Fujian I*. Because "a completely errorless investigation is simply not a reasonable expectation," *Nippon Steel Corp. v. United States*, 25 CIT ___ , ___ , 146 F. Supp. 2d 835, 841 n.10 (2001), it would be unfair to a respondent if Commerce were permitted to extrapolate from a single error, which may well have been an isolated oversight, a conclusion that the entirety of the respondent's submissions concerning other classes of subject merchandise are unreliable.[2]

Commerce's third reason for its determination appears to be more substantive, but is underdeveloped. Commerce cites problems related to financial data for FMEC's branches and affiliates, as well as its short- and long-term investment records, that FMEC did not provide at verification but did provide thereafter pursuant to the Court's Order in *Fujian I*. Before this Court, Commerce argues that

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[1] Moreover, a general reference to the respondent's lack of preparation is particularly unwarranted in this case, since the Court already determined that the FMEC verification was marred by miscommunication.

[2] On the other hand, numerous "oversights" would likely suggest a "pattern of unresponsiveness" justifying not only the application of facts available ("FA"), but of AFA. *See Nippon Steel*, 25 CIT at _____ , 146 F. Supp. 2d at 840. It is incumbent upon Commerce specifically to identify such oversights. Substantial evidence does not comprise broad allusions to the verifiers' gut feelings.

FMEC failed to report other branches that could have had sales of subject merchandise, *see* Commerce's Rebuttal, at 14, but this contention is not borne out by the record. In the *Remand Results*, Commerce devotes a single sentence to a cursory attempt to tie these records to the fourth and fifth shortcomings outlined *supra* and discussed *infra*, but it does not explicate its reasoning. To the extent that this may be a disguised attempt to hold FMEC to account for its failure to provide the data at verification, it contravenes the Court's Order in *Fujian I*. At the same time, the Court observes that FMEC does not refute Commerce's finding in any way in the Plaintiffs' Comments. The Court thus concludes that Commerce's finding on this issue constitutes the proverbial scintilla of evidence, but no more, to show a verification failure.

2. Substantial evidence of a verification failure

By contrast, the Court views the three remaining bases that Commerce cites as rationales for its determination to be particularly probative. Significantly, each of the following problems relates to data that FMEC was permitted to submit, pursuant to the Court's Order in Fujian I, on November 27, 2001, well after the on-site verification.

a. *The Hand Tools Department's financial statements and income statements*

First, Commerce asserts that it could not verify the quantity and value of FMEC's U.S. sales for the hand tool production unit for the period from January through April 1997, when it was known as the "Hand Tools Department."[3] Commerce explains that the verifiers could not reconcile the Hand Tools Department's sales revenue as reported in its departmental financial statements, which data was provided at verification, with the Department's monthly "income statements," which FMEC submitted following *Fujian I*. Confusion over whether a particular value reported on the income statement for April 1997 was cumulative, bi-monthly, or monthly led Commerce to conclude that either FMEC had under-reported sales on its financial statements in the amount of at least [ ] or had over-reported them in the amount of [ ]—a discrepancy of either 15 percent or 47 percent, respectively. *See Remand Results*, at 11.

The Court is inclined to credit FMEC's explanation that the value is cumulative, but this explanation does nothing to dispel the inference that FMEC either over- or under-reported its sales.[4] FMEC offers no colorable excuse for this error. Its argument that the Hand

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[3] In May 1997, the same department came under new management and was renamed the "General Machinery & Tools Department." Commerce reported no difficulty in reconciling the sales income records of the department during this later period.

[4] If, as FMEC maintains, the April 1997 value was cumulative for the first four months of 1997, the total sales reflected in the Hand Tools Department's monthly income statements is [ ]. Total sales revenue listed on the Hand Tools Department's financial statement for the same period is indisputably [ ]. Thus, either the financial statement over-reported sales by 47 percent, the income statement under-reported sales by 32 percent, or neither statement accurately reports sales. In any such event, it is plain that Commerce was unable to determine whether FMEC reported all its U.S. sales.

Tools Department's financial statement is not a part of the administrative record is bogus, as the original FMEC Verification Report[5] plainly references the statement and the value that Commerce cites in its *Remand Results*. *See* FMEC Verification Report, at 8. FMEC also baldly claims that the income statement can be reconciled with the financial statement, but it fails to explain how this can be so given the 47 percent disparity between the reported sales figures in the two documents.

Consequently, as Commerce reasonably concluded, the "nature and size of this reconciliation discrepancy alone makes it impossible for [Commerce] to determine whether FMEC fully and accurately reported its U.S. sales." *Remand Results*, at 24. Because an accurate determination of U.S. sales is critical to the calculation of dumping margins, the discrepancies in the Hand Tools Department's sales records constitute substantial evidence that FMEC failed verification, particularly when taken with the remaining deficiencies, which are equally serious.

b. *The February 1997 sales invoices and vouchers*

The next deficiency cited is FMEC's failure to submit all its February 1997 sales invoices and vouchers.[6] Commerce sought the vouchers for all sales of subject and non-subject merchandise in order to confirm that FMEC had accurately reported its income from all U.S. sales. Rather than request FMEC's vouchers for the entire period of review, however, Commerce sought them only for the month of February 1997. Because of apparent miscommunication at the on-site verification of FMEC, FMEC did not provide them then, but was subsequently granted leave to do so by the Court's Order in *Fujian I*. FMEC turned over only invoices for two U.S. sales and one voucher from a third U.S. sale.[7] In the *Remand Results*, Commerce determined that this data was insufficient to document all U.S. sales, because (1) FMEC substantiated two sales only by invoices, not vouchers, and (2) FMEC did not provide any invoices or vouchers for sales of non-subject merchandise.

FMEC's explanation for these shortcomings is that it substantially complied with Commerce's information request because the invoices and voucher it provided are "samples" of its sales documentation and should be deemed sufficient, since verification is only a "spot check" and a "selective examination rather than testing of an entire universe." *See* Plaintiffs' Comments, at 18–19 (quoting respectively *Micron Tech., Inc. v. United States*, 117 F.3d 1386, 1396 (Fed. Cir. 1997) (citing *Monsanto Co. v. United States*, 12 CIT 937, 698 F. Supp. 275,

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[5] All defined terms not defined herein have the meaning, if any, ascribed to them in *Fujian I*.

[6] Whereas an invoice is a bill of sale, FMEC's sales vouchers indicate the amount of income that FMEC actually receives from a sale.

[7] The invoices and the voucher showed sales in the amount of [ ], [ ], and [ ], respectively, as against total departmental sales of [ ].

281 (1988)), and *Bomont Indus. v. United States*, 14 CIT 208, 733 F. Supp. 1507, 1508 (1990)).

The most charitable view of this argument is that it reflects an outsized optimism about the respondent's role in the verification process. The cases FMEC cites involved claims by various domestic petitioners that Commerce should have conducted more extensive verifications of the foreign respondents. The courts merely pointed out the obvious: time and resources are finite, and Commerce's proven methodology is to survey only a portion of a respondent's data. *See* Department of Commerce Antidumping Manual, chapter 13 § II.D.1, at p.5, *available at* http://ia.ita.doc.gov/admanual/index.html. The choice of which data to sample, however, always rests with Commerce,[8] not the respondent. *See Micron Tech.*, 117 F.3d at 1395 ("Commerce has 'the discretionary authority to determine the extent of investigation and information it needs.' ") (quoting *PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1238 (Fed. Cir. 1992). Commerce quite reasonably chose to sample the Hand Tools Departments' sales documentation by requesting such documentation for only a single month,[9] and having issued that request, it was entitled to FMEC's full compliance. *Cf. Thyssen Stahl AG v. United States*, 19 CIT 605, 606, 608, 886 F. Supp. 23, 25, 26–27 (sustaining determination that respondent failed verification where respondent "provided only one, self-selected, freight invoice to support its calculations").

Commerce is likewise entitled to infer from FMEC's failure to provide the requested documentation for February 1997 that FMEC's related data for the remaining period of review would be similarly unreliable. Because this documentation is important to tracing all U.S. sales, this shortcoming constitutes substantial evidence in support of Commerce's finding that FMEC failed verification.

c. *Quantity and value worksheets*

Finally, FMEC failed altogether to submit any of the quantity and value worksheets that Commerce requested, notwithstanding the Court's express invitation for it to do so in *Fujian I*. *See* 25 CIT at ___ , 178 F. Supp. 2d at 1321. FMEC has not offered any reason for this omission, either to Commerce in its response to the Draft Remand Results, or to the Court in the Plaintiffs' Comments. As Commerce has explained, quantity and value worksheets are the "working basis" by which a respondent prepares its response to the verifiers' questionnaires and subsequent inquiries. *See Remand Results*, at 8. Failure to submit such worksheets, despite several oppor-

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[8] Of course, this presumes the verifiers' good faith. One can postulate a verification request so unreasonably burdensome as to be arbitrary or capricious, but Commerce's request here for the Hand Tools Department's February 1997 sales documentation is far removed from that hypothetical extreme. Otherwise, as suggested by *Fujian I*, the verifiers can require whatever relevant information they wish so long as they afford the respondents a reasonable opportunity to provide it.

[9] In fact, the record suggests that in response to the limitations of FMEC's accounting system, Commerce narrowed its original request to encompass only the February 1997 documentation.

tunities to do so, is the sort of lapse that Commerce may legitimately regard as casting doubt on the quality of FMEC's underlying data.

3. Summary

In *Fujian I*, the Court sustained Commerce's determination in the *Final Results* that FMEC failed verification with respect to bars/wedges. The Court now sustains Commerce's determination in the *Remand Results* that FMEC failed verification with respect to the other three classes of subject merchandise. Commerce has adduced substantial evidence showing that, with respect to each such class of merchandise, FMEC was unable to comply with significant information requests, and thus could not demonstrate that it had fully and accurately reported all U.S. sales. Because of the importance of U.S. sale data, Commerce's determination that FMEC failed verification, and that this failure warranted the application of total FA, is in accordance with law. *Cf. Branco Peres Citrus, S.A. v. United States*, 25 CIT ___ , ___ , 173 F. Supp. 2d 1363, 1370 n.5 (2001) ("Commerce was justified in its use of facts available by virtue of Plaintiff's cost data not having been provided. Indeed, a party's failure to provide requested information is sufficient grounds for the use of facts available.")

4. Irrelevance of the Factories' verifications

As noted, in *Fujian I* the Court sustained Commerce's determination that SMC had failed verification. Because the Court has now found Commerce's determination that FMEC likewise failed verification to be supported by substantial evidence, the Court deems it unnecessary to decide whether the Factories also failed verification. Commerce has emphasized, and the Court agrees, that FMEC's and SMC's verification failures are sufficient to warrant the use of FA (or AFA, as the case may be) regardless of its determination with respect to the Factories. *See, e.g., Remand Results*, at 18. Furthermore, Commerce did not cite the alleged verification failures of the Factories as support for its decision in the Remand Results to apply AFA to FMEC and SMC. Because a review of Commerce's determination with respect to the Factories would have no bearing on the outcome of this case, and would thus be dicta, the Court declines to undertake such a review.

B. Commerce's Determination to Apply AFA to FMEC and SMC Is Supported by Substantial Evidence and Is Otherwise in Accordance with Law.

If a respondent in an antidumping investigation withholds or fails to provide information requested by Commerce, significantly impedes a proceeding, or provides information that is not verifiable, Commerce is directed to "use the facts otherwise available in reaching the applicable determination." 19 U.S.C. § 1677e(a)(2) (2000); *see also Fujian I*, 25 CIT at ___ , 1332; *Reiner Branch GmbH & Co.*

KG v. United States, 26 CIT ___ , ___ , 206 F. Supp. 2d 1323, 1336 (2002). If Commerce determines that the respondent "has failed to cooperate by not acting to the best of its ability to comply with a request for information* * * [Commerce] may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b); *see also Fujian I*, 25 CIT at ___ , 178 F. Supp. 2d at 1332; *American Silicon Techs. v. United States*, 26 CIT ___ , ___ , 240 F. Supp. 2d 1306, 1308 (2002).

FMEC and SMC failed verification by failing to provide requested information and providing unverifiable information, Commerce is required to use the facts available.[10] The sole remaining issue, therefore, is whether in using the facts available Commerce may draw adverse inferences, or in the vernacular, use AFA. "In order for its finding to be supported by substantial evidence, Commerce needs to articulate why it concluded that a party failed to act to the best of its ability, and explain why the absence of this information is of significance to the progress of its investigation." *American Silicon Techs.*, 26 CIT at ___ , 240 F. Supp. 2d at 1311 (citations and internal quotation marks omitted); *see also Branco Peres*, 25 CIT at ___ , 173 F. Supp. 2d at 1371–72 (citing *Nippon Steel Corp. v. United States*, 24 CIT ___ , ___ , 118 F. Supp. 2d 1366, 1378 (2000)). "However, the function of this Court is not to reweigh the evidence, but rather to ascertain whether Commerce's determination is unsupported by substantial evidence on the record." *A.K. Steel Corp. v. United States*, 21 CIT 1265, 1271, 988 F. Supp. 594, 601 (internal brackets, quotation marks, and ellipses omitted) (quoting *Metallverken Nederland B.V. v. United States*, 13 CIT 1013, 1017, 728 F. Supp. 730, 734 (1989)).

1. Application of AFA to FMEC

In the *Remand Results*, Commerce determined that the application of AFA to FMEC was warranted because FMEC had the ability to comply with Commerce's information requests, and that its multiple failures to do so suggest a pattern of nonresponsiveness. Specifically, Commerce found that the information sought must have existed because FMEC would have relied on it in generating its questionnaire responses. Commerce concluded that FMEC's failure to provide such documents at verification, and thereafter as permitted by the Court's Order in *Fujian I*, as well as the fact that FMEC would have benefitted by not providing data related to U.S. sales, suggests a pattern of non-responsiveness. Commerce also emphasizes FMEC's lack of preparation at verification.

FMEC argues that the law requires Commerce to show willful or deliberate noncompliance, and that Commerce has failed to do so. FMEC also objects that Commerce is not entitled to cite its pre-

[10] In addition, these failures were sufficiently extensive that the gaps in the record may not be remedied by the partial use of adverse facts available.

paredness for and conduct at verification as a basis to impose AFA. FMEC understands *Fujian I* to have conclusively determined that the deficiencies at verification were due to inadvertent errors.

These arguments are unconvincing. As an initial matter, the Court notes that FMEC misstates Commerce's obligation. Commerce need not prove willful or deliberate noncompliance; rather,

> Commerce must find that [the respondent] could comply, or would have had the capability of complying if it knowingly did not place itself in a condition where it could not comply. Commerce must also find either a willful decision not to comply or behavior below the standard for a reasonable respondent.

Branco Peres, 173 F. Supp. 2d at 1372.

Moreover, the Court sees no need to resolve the question of the adequacy of FMEC's actions at verification. Aside from the insufficient state of the record on this point,[11] the issue became irrelevant once the Court afforded FMEC the opportunity to submit documents post-verification. Had FMEC used that opportunity to furnish Commerce with all requested documents, Commerce would have no basis to find that FMEC did not comply to the best of its ability. On the other hand, it is precisely because FMEC had this extra time that its noncompliance is particularly egregious. FMEC specifically represented to Commerce and the Court that it would have provided all necessary documents if only the verification had progressed more smoothly. *Ipso facto*, FMEC could comply with Commerce's information requests, or believed that it did. Accordingly, its failure to provide the various data constitutes behavior below the standard for a reasonable respondent. *See Reiner Brach*, 26 CIT at ___, 206 F. Supp. 2d at 1337–38 (upholding choice of AFA against respondent who failed to provide information about home market sales and assumed that the information it submitted was sufficient, and supplied vague answers to other questions). Therefore, the Court sustains Commerce's use of AFA to calculate FMEC's dumping margin.

2. Application of AFA to SMC

The validity of Commerce's decision to apply AFA to SMC requires closer scrutiny, as SMC did not enjoy the opportunity afforded FMEC to submit documents post-verification. Commerce justifies its decision to impose AFA for the following reasons: (1) SMC admitted that it had relied on quantity and value worksheets in preparing its questionnaire responses, yet never disclosed such worksheets to Commerce; (2) SMC did not reconcile certain sales data with its departments' financial statements, because (a) they could not complete

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[11] Both sides devote considerable effort to debating essentially factual issues such as what the verifiers told a particular employee or FMEC's counsel. In *Fujian I*, the Court considered FMEC's consistent and uncontested assertions on this point sufficient to order a remand. In order to issue a final judgment that turned in part on such a factual issue, however, the Court would at a minimum expect to see affidavits from the relevant persons, which neither party has furnished, or else take the extraordinary step of trying the matter.

the task within the time frame of verification because their computerized accounting records did not distinguish sales by market, yet SMC never requested the opportunity to submit the information later, and (b) the two statements are normally reconciled three months after the release of the departmental statements; (3) SMC failed to provide invoices and other sales documentation for transactions involving non-subject merchandise, on the grounds that the sales personnel with the information were absent; (4) SMC failed to report the existence of several departments, which thus prevented Commerce from verifying that the departments had no U.S. sales; and (5) these shortcomings indicate a lack of preparation for verification.[12] See *Remand Results*, at 6–8. Commerce thus concludes that SMC had the ability to furnish the various missing data, and that its failure to do so reflects a pattern of nonresponsiveness as well as serious inattention to its statutory obligations.

SMC's response to these arguments is not persuasive. It cites the SMC Verification Report as proof that it did furnish the requested quantity and value worksheets, but as Commerce notes, the quoted excerpt is selective and misleading.[13] While SMC explains that its accounting records do not distinguish sales by market, this limitation does not justify its failure to first turn over the source documents during verification, and then request the opportunity to manual reconcile the information.

SMC also claims that it was able to reconcile the departmental and company-wide financial statements, and that the only discrepancy was due to a [ ] and it appends to the Plaintiffs' Comments certain record evidence purporting to show this. Commerce, however, disputes this interpretation of the appended documents. Accordingly, the Court must defer to Commerce as the finder of fact, and decline SMC's invitation to resolve this issue. *Cf. Hoogovens Staal BV v. United States*, 25 CIT ___ , ___ , 93 F. Supp. 2d 1303, 1307–08 (2000) (observing that Court may not "reweigh or reinterpret the evidence of record").

Finally, SMC does not justify the absence of certain personnel with sole access to records, or its failure to disclose the existence of certain departments. Instead, SMC details the information that it did supply, and suggests that "[t]his record does not demonstrate the type of willful withholding of evidence that warrants the application of AFA." *Plaintiffs' Comments*, at 14. As explained *supra*, see Part I.B.2, however, respondents do not have the right to respond selectively to relevant information requests, and SMC cannot show that its noncompliance was due to mere inadvertence or oversight. As

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[12] From this, Commerce infers that both that SMC could have accelerated the reconciliation and performed it before verification, and that such a reconciliation should in any event have already been performed as Commerce was requesting 1997 data in late 1998.

[13] The sentence in the SMC Verification Report immediately preceding the one that SMC quotes expressly states that "SMC did not prepare for the verification any of the quantity and value worksheets requested in the Department's sales verification outline." *See SMC Verification Report*, at 7.

this information, along with the other information SMC insufficiently disclosed, was necessary to show that SMC reported all U.S. sales, its relevance cannot be disputed.

Collectively, this evidence is substantial enough to show that SMC had the ability to comply with relevant information requests, but did not do so out of insufficient attention to its statutory obligations. The Court thus finds that in the *Remand Results*, unlike in the *Final Results*, Commerce has adequately articulated its conclusion that SMC failed to cooperate to the best of its ability, and has explained why the absence of this information is significant. *See Branco Peres*, 25 CIT at ___, 173 F. Supp. 2d at 1372–73 (upholding use of AFA because Commerce found that respondent possessed necessary sales and cost data at outset of review, but failed to retain such data despite notice that it might be required); *Pacific Giant, Inc. v. United States of America*, 26 CIT ___, ___, 223 F. Supp. 2d 1336, 1343 (2002) (upholding Commerce's use of AFA where respondent and its supplier were unable to "demonstrate how they calculated any of the ten factors of production" reported to Commerce, as such behavior indicated a "reckless disregard of compliance standards that warrants adverse treatment"); *Reiner Brach*, 26 CIT at ___, 206 F. Supp. 2d at 1337–38.

3. Selection of the dumping margin

In the *Remand Results*, Commerce stated that it complied with the Court's instruction to calculate separate dumping margins for FMEC and SMC, and then proceeded to impose duty rates identical to those applicable to the PRC entity. The Court recognizes that it is not uncommon for Commerce to assign uncooperative respondents the highest margin assigned to any respondent in an antidumping review. Because neither FMEC or SMC object to the margin selected, there is no need to consider whether the margin is unduly punitive.

II. CONCLUSION

For all the foregoing reasons, the Court sustains Commerce's *Remand Results*. A separate order will be entered accordingly.

RICHARD W. GOLDBERG,
Senior Judge.

(Slip Op. 03–93)

DANIEL ATTEBERRY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT

Court No. 02–00647

[Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2637(a) denied.]

(Dated: July 28, 2003)

Daniel Atteberry, Plaintiff *Pro Se.*

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Jack S. Rockafellow*); *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, United States Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* The United States ("Government") has moved to dismiss for lack of subject matter jurisdiction this action in which *pro se* plaintiff Daniel Atteberry contests the decision of the United States Customs Service ("Customs")[1] re-classifying for tariff purposes certain merchandise which he describes as "bike[s]/kart[s]/scooter[s]." Specifically, the Government contends that this action is barred by 28 U.S.C § 2637(a) (2000),[2] which authorizes a civil action challenging Customs' denial of a protest "only if all liquidated duties, charges, or exactions have been paid at the time the [civil] action is commenced." *See* Memorandum in Support of Defendant's Motion to Dismiss Plaintiff's Action for Lack of Subject Matter Jurisdiction ("Def.'s Brief") at 7–8; Defendant's Memorandum in Response to "Plaintiff's Motion for Summary Judgment and for Denial of Defendant's Motion to Dismiss" ("Def.'s Reply Brief") at 4–7.

However, as discussed in greater detail below, Customs failed to bill Mr. Atteberry for the outstanding duties and interest, in flagrant violation of its own regulations. Indeed, although the agency was on notice of his current mailing address as of April 2002—and, in fact, mailed its Notice of Denial of his protest to him at that address—Customs failed to send Mr. Atteberry even a single bill at that (or, for that matter, any other) address at any point in the critical 180-day period that followed, during which Mr. Atteberry would have had to act to perfect jurisdiction before this Court.

Because 28 U.S.C. § 2637(a) plainly contemplates that an importer is on notice of the sum due, and because Customs' failure to

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[1] Effective March 1, 2003, the Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. 108–32, at 4 (2003).

[2] Unless otherwise indicated, all statutory references are to the 2000 version of the United States Code.

render monthly bills—in violation of its own regulations—deprived Mr. Atteberry of that notice, the Government's motion to dismiss for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 2637(a) must be denied.

I. Background

A. *Overview of the Statutory and Regulatory Framework*

All goods imported into the United States are subject to duty or duty-free entry depending upon, *inter alia*, their classification under the Harmonized Tariff Schedule of the United States. Commercial importers are required to specify the classification and valuation of merchandise when an entry is filed. Thus, classification is initially the responsibility of the importer, customs broker or other person preparing the entry papers.[3]

Customs makes its determination on the dutiable status of imported merchandise when the entry is "liquidated,"[4] after the agency has reviewed the entry papers and any other relevant documentation. Even though the merchandise itself may be released to the custody of the importer before Customs' review is complete, the importer's financial liability for the entry is not determined until liquidation is complete. Generally, Customs must complete liquidation within one year from the date of entry.[5] During that time, Customs may seek additional information about the entry—for example, through a Request for Information.

If Customs makes a preliminary determination that an entry cannot be liquidated as entered (for example, because the classification on the entry papers appears to be incorrect), and if that change would result in the imposition of a higher rate of duty, Customs notifies the importer (or the importer's broker or other designee) of the proposed duty rate advancement. The importer then has an opportunity to validate its claimed classification. If the importer fails to respond to the notice, or if Customs is not persuaded by the response, the entry is liquidated in accordance with Customs' determination. Under Customs regulations, official notice of the liquidation is accomplished through the "bulletin notice" which is "posted" or "lodged" for the information of importers in the customhouse at the port of entry. 19 C.F.R. § 159.9(a)–(b).

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[3] Much of this general discussion is taken from a publication of the U.S. Customs Service, Importing Into the United States: A Guide for Commercial Importers (Nov. 1998) at 12–15, 28–30, 46–47.

[4] Customs regulations define "liquidation" as "the final computation or ascertainment of the duties * * * accruing on an entry." 19 C.F.R. § 159.1 (2001).
Unless otherwise indicated, all references to regulations are to the 2001 version of the Code of Federal Regulations, the relevant provisions of which were in place (or substantively identical to provisions in place) throughout the relevant period.

[5] *See* 19 U.S.C. § 1504(a). That deadline is subject to certain exceptions not relevant here. *See generally Intercargo Ins. Co. v. United States*, 83 F.3d 391, 392–93 (Fed. Cir. 1996).

The bulletin notice performs a critical notice function by giving the importer (at least constructive) notice of the fact of the liquidation of its merchandise, and starting the 90-day "clock" for the filing of a "protest" with Customs (as further discussed below).[6] But, significantly, the bulletin notice *does not* specify the duty rate at which the goods were liquidated (other than to indicate whether the goods were liquidated at an "increase"). Nor does the bulletin notice otherwise specify the amount of duties and interest outstanding.[7] That information is provided to the importer only through Customs' billing process.

Customs regulations require that the agency bill an importer for outstanding duties and accrued interest not only at the time of liquidation, but also "*every 30 days after the due date*"—with the "due date" defined as "30 days [after] the date of issuance of the bill"—"*until the bill is paid or otherwise closed*." 19 C.F.R. § 24.3a(d)(1) (emphasis added); 19 C.F.R. § 24.3(e). The regulations specify in some detail the content of bills,[8] including:

> (i) Principal amount due;
> (ii) *Interest computation date*;
> (iii) Late payment date;
> (iv) *Accrual of interest charges if payment is not received by the late payment date*;
> (v) *Applicable current interest rate*;
> (vi) *Amount of interest owed*;
> (vii) Customs office where * * * billing errors may be addressed; and
> (viii) Transaction identification (e.g., entry number * * *).

19 C.F.R. § 24.3a(d)(1) (emphases added).

As a general rule, interest assessed due to an underpayment of duties accrues "from the date the importer of record is required to deposit estimated duties, taxes, fees, and interest to the date of liquidation." 19 C.F.R. § 24.3a(b)(2)(i). If the supplemental duties and

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[6] Importers thus must monitor bulletin postings at the customhouse to ensure their ability to file timely administrative protests of adverse determinations (such as duty rate increases) by Customs. *See, e.g., Goldhofer Fahrzeugwerk GmbH & Co. v. United States*, 13 CIT 54, 58, 706 F. Supp. 892, 895, *aff'd*, 885 F.2d 858 (Fed. Cir. 1989).

In addition to "bulletin notice," Customs regulations further provide that the agency "will endeavor to provide importers" with "Courtesy Notice" of entries "scheduled to be liquidated." It is the bulletin notice which is the legally significant notice, however. As the regulations clearly state, the courtesy notice merely "serve[s] as an informal, courtesy notice and not as a direct, formal, and decisive notice of liquidation." 19 C.F.R. § 159.9(d). *See also Goldhofer*, 885 F.2d at 860.

[7] Defendant's Attachment 22 is a copy of the bulletin notice in this case. Note that it indicates simply that the merchandise at issue has been liquidated at an unspecified "INCREASE." *See also* Letter Memorandum from Counsel for Defendant to Court, dated June 12, 2003 ("Def.'s Letter Memo") ¶22 (conceding that, while bulletin notice gives notice of the fact of liquidation and of the fact of any increase, it does not give notice of the *amount* of the increase).

[8] Defendant's Attachment 18 is a somewhat illegible copy of the initial bill sent by Customs in this action (which, as discussed below, was never received by Mr. Atteberry).

Pursuant to 19 C.F.R. § 24.3a(d)(2), Customs also "report[s] outstanding bills on a Formal Demand on Surety for Payment of Delinquent Amounts Due, for bills more than 30 days past due (approximately 60 days after bill due date), and every month thereafter until the bill is paid or otherwise closed." Defendant's Attachment 20 includes copies of 10 such demands sent to Mr. Atteberry's surety—which include essentially the same information as the bills sent to importers—covering the period up through the commencement of this action.

interest are not paid in full within 30 days of the date of issuance of Customs' initial bill, interest continues to accrue on the unpaid balance until it is paid in full. 19 C.F.R. § 24.3a(b)(2)(ii). The applicable rate of interest varies over time, and is pegged to "the semiannual rate(s) established under [specified sections] of the Internal Revenue Code." 19 C.F.R. § 24.3a(c)(1).[9] The computation of interest is thus a somewhat less-than-straightforward exercise[10]—which is no doubt why the regulation specifying the content of bills addresses interest in such detail. Similarly, so that an importer can rely on its most recent monthly bill to know the precise sum required to pay off its obligation in full, Customs regulations essentially "freeze" interest "for the 30-day period in which * * * payment is actually received at the 'Send Payment To' location designated on the bill." 19 C.F.R. § 24.3a(c)(3).

Although Customs' determination of dutiable status is final for most purposes at the time of liquidation, an importer has the right to challenge Customs' determination, provided that the importer files a "protest" with the agency within 90 days of "[t]he date of [bulletin] notice of liquidation." 19 U.S.C. § 1514 (c)(2); 19 C.F.R. § 174.12(e)(1). Significantly, an importer is not required to pay the outstanding duties and interest in dispute in order to pursue the protest process within Customs. A liquidation is not final until any protest which has been filed against it has been decided by the agency.

Similarly, Customs' denial of a protest is not final until any litigation challenging that determination has become final. An importer is entitled to challenge Customs' denial of its protest in this Court, provided that the importer does two things to "perfect" jurisdiction. Like so much of life, it boils down to a matter of *time* and *money*. Specifically, 28 U.S.C. § 2636(a)(1)—the "time" requirement—mandates that the importer must commence its action by filing a summons with the Court "within [180] days after the date of mailing of [Customs'] notice of denial of [the] protest." In addition, 28 U.S.C

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[9] *See, e.g.*, Quarterly IRS Interest Rates Used in Calculating Interest on Overdue Accounts and Refunds on Customs Duties, 68 Fed. Reg. 40,279 (July 7, 2003).

[10] Indeed, it appears that there is some confusion on the part of the Government here as to the amount of the outstanding duties and accrued interest owed at various points in time.

In its opening brief, the Government asserted that Customs' initial bill, dated October 19, 2001, was for the sum of $542.11. *See* Def.'s Brief at 2. Although Defendant's Attachment 18 (a copy of that initial bill) is not legible, the 10 Formal Demands on Surety included in Defendant's Attachment 20—as well as the Bill Number Query attached to Defendant's Declaration of Karen P. Binder—all indicate that the principal at issue (i.e., the supplemental duties) total $507.42. Moreover, the first Formal Demand on Surety included in Attachment 20 shows a "Run Date" of "02/05/02," and reflects the accrual of $5.87 in interest, for a total due of $513.29. If the total balance due in February 2002 was only $513.29, the initial bill—dated October 19, 2001 (some months earlier)—could not possibly have totaled $542.11.

The last of the 10 Formal Demands on Surety included in Defendant's Attachment 20 shows a "Run Date" of "11/2/02," and reflects the accrual of $32.02 in interest, for a total balance due of $539.44 as of that date. The Bill Number Query attached to the Binder Declaration appears to be dated "12/09/02"—a little more than a month after the tenth Formal Demand on Surety—and reflects the accrual of $34.69 in interest on the principal of $507.42, for a total balance of $542.11 as of that date.

In short, it appears that—contrary to the Government's representations—not only was $542.11 not the total amount due as shown on the initial (October 19, 2001) bill sent to (albeit not received by) Mr. Atteberry, it also was not the amount due as of October 7, 2002, the date this action was commenced.

§ 2637(a)—the "money" requirement—requires that the importer pay the outstanding duties and interest *before* the action is commenced.[11] Moreover, the sum owed must be paid to the very last penny. There is zero margin for error, and no exceptions—not even "for nominal amounts left unpaid at the time the summons is filed."[12]

Reading the two provisions—§ 2636(a)(1) and § 2637(a)—in concert, it is thus clear that, for an importer wishing to seek judicial review of Customs' denial of a protest, the 180-day period following Customs' mailing of the notice of denial of protest is critical. Within that period, the importer must (1) pay any duties and interest that remain outstanding, and then (2) file a summons with this Court.

B. *The Facts of This Case*

The facts of this case are relatively straightforward, and not in dispute. In late May 2001, a shipment of "bike[s]/kart[s]/scooter[s]" from the Netherlands was entered duty-free through the port of Seattle by plaintiff importer, Daniel Atteberry.[13] Mr. Atteberry is a relative novice at importing, with only one prior experience, in October 1999—when, importing apparently the same type of merchandise (albeit through a different port), the goods were liquidated as entered, duty-free.[14] Thus, before the events that gave rise to this case, Mr. Atteberry had no prior experience with Customs' protest process, and no experience with filing an action in this Court to challenge Customs' denial of a protest.[15]

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[11] It is worth noting that the Customs publication, Importing Into the United States, refers specifically only to the 180-day requirement, and does not identify payment of outstanding duties and interest as a prerequisite for litigation. Importing Into the United States, at 47 ("If a protest is denied, an importer has the right to litigate the matter by filing a summons with the U.S. Court of International Trade within 180 days after denial of the protest. The rules of the court and other applicable statutes and precedents determine the course of customs litigation.").

[12] *Penrod Drilling Co. v. United States*, 13 CIT 1005, 1008, 727 F. Supp. 1463, 1466 (1989), aff'd, 925 F.2d 406 (Fed. Cir. 1991).

[13] *See* Defendant's Statement of Undisputed Material Facts ("Def.'s Statement of Facts") ¶1; Plaintiff's Statement of Undisputed Material Facts ("Pl.'s Statement of Facts") ¶1.

[14] *See* Letter from Plaintiff to Commissioner of Customs, dated December 20, 2001 ("Protest"). As a general rule, classification determinations do not have *res judicata* effect. *See generally United States v. Stone & Downer Co.*, 274 U.S. 225, 235–36 (1927).

[15] The Government implies that Mr. Atteberry is a seasoned importer, emphasizing that "as indicated in his protest * * *, the entry subject to this court action is not the first importation made by Mr. Atteberry. By his own admission he imported before, albeit through a different port of entry." Def.'s Letter Memo ¶22. However, as explained above, Mr. Atteberry's prior experience with importing is limited to a single occasion—and one which gave him no exposure to Customs' protest process, or to the processes of litigation in this forum.

Similarly, the Government emphasizes that Mr. Atteberry is a "commercial importer[ ]," who "imported for purposes of resale and/or rent of the merchandise, not for his own use." *Id.* Again, the implication may be misleading. His business ventures have not been a gold mine, to say the least. *See* Letter from Plaintiff to Court, dated Oct. 3, 2002 ("Complaint") (explaining that he gave away most of the scooters "because [he] could not sell them"); Protest (stating that he has "sold or given away 55 bikes in two years").

As his various representations indicate, and as his Motion for Leave to Proceed In Forma Pauperis confirms, Mr. Atteberry is a man of extremely modest means. The record belies any attempt to portray him as a major commercial importer. *See also* Complaint ("I am next to homeless if not homeless. People let me stay at different houses. I have a business if you want to call it that, making under * * * 1000 dollars a month and living on borrowed money* * * * ").

Whatever allowances Customs may or may not make for "small-time" or "relative novice" importers (and whatever accommodations the agency may or may not have made at the administrative level in this case), the standard in this forum is clear. Mr. Atteberry's appointed counsel has withdrawn, and he is now proceeding *pro se*. "Implicit in the right to self-representation is an obligation on the part of the court to make reasonable allowances to protect *pro se* litigants from inadvertent forfeiture of important rights because of their lack of legal training. While the

Based on the relatively smooth sailing that he enjoyed the first time he sought to navigate the waters of importing, Mr. Atteberry was apparently somewhat taken aback when Customs raised various questions concerning this second entry of the same type of merchandise.[16] He nevertheless responded promptly to Customs' two Requests for Information, which were conveyed to him through his broker. On his responses, Mr. Atteberry printed his telephone number in the appropriate box on the Customs form.[17]

In late August 2001, Import Specialist Diana May of Customs in Seattle telephoned Mr. Atteberry, requesting certain additional information, which he supplied in a letter to her several days later, expressing his "concern[ ] * * * at [Customs'] plan[s] to reclassify" his merchandise.[18] By Notice of Action dated September 5, 2001, signed by Ms. May and mailed to his Kenmore, Washington address, Customs formally notified Mr. Atteberry of its proposed reclassification of his merchandise, which would result in a "rate advance" (effectively assessing duties on merchandise which he had entered duty-free). That "Notice of Proposed Rate Advance" advised that the rate advance would take effect "unless [Mr. Atteberry could] show proof to substantiate [his] claim that these bikes are designed for children within 20 days (09/25/01)" from the date of the Notice.[19]

Further telephone communications between Customs and Mr. Atteberry ensued. Following up on one such phone conversation, Christine Furgason, of Customs' "HQ Reconciliation Team" in Washington, D.C., sent an electronic mail ("e-mail") message to Mr. Atteberry at his e-mail address (pedalpedalgokarts@juno.com), acknowledging their conversation and "recommending that [his] response to Seattle's CF29 (Notice of Action), dated September 5, 2001 [the Notice of Proposed Rate Advance] be faxed to CST#789s' attention," at a fax number which Ms. Furgason supplied in her e-mail message.[20] Ms.

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right 'does not exempt a party from compliance with relevant rules of procedural and substantive law,' *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir. 1981), it should not be impaired by harsh application of technical rules. Trial courts have been directed to read *pro se* papers liberally, *Haines v. Kerner*, 404 U.S. at 520* * * * " *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983). *See also Forshey v. Principi*, 284 F.3d 1335, 1357–58 (Fed. Cir. 2002).

[16] *See, e.g.*, Protest (arguing that Customs' imposition of duties on merchandise previously liquidated as duty-free "is a changing of the rules in the middle of the game").

[17] *See* Customs Request for Information, dated June 21, 2001; Fax Memo from Robert Erwin of Landweer & Co., Inc. to Pedal Pedal GoKarts—Attention: Danny, dated June 25, 2001 (transmitting Request for Information dated June 21, 2001); Mr. Atteberry's response to Customs June 21, 2001 Request for Information, dated June 28, 2001; Customs Request for Information, dated July 17, 2001; Fax Memo from Robert Erwin of Landweer & Co., Inc. to PedalPedal Gokarts—Attention: Danny, dated July 27, 2001 (transmitting Request for Information dated July 17, 2001); Mr. Atteberry's response to Customs July 17, 2001 Request for Information, dated August 17, 2001; Plaintiff's Response to Defendant's Memorandum in Response to Motion for Summary Judgment and Denial of Defendant's Motion to Dismiss ("Pl.'s Reply Brief") at 2 (noting that when "Customs was seeking information on the entry [ ] they sent their inquiries to [Mr. Atteberry's] broker, to be sent on to [him]").

[18] *See* Letter from Plaintiff to Diana May, dated Aug. 30, 2001 (referring to her "phone call of Aug 28, requesting additional information").

[19] The reference in the Notice of Proposed Rate Advance to Mr. Atteberry's "letter dated August 31, 2001" appears to be a reference to his letter of August 30, 2001.

[20] *See* E-mail message from Christine Furgason to Plaintiff, dated "Tue, 18 Sep 2001 10:53:38." Mr. Atteberry had previously provided his e-mail address to Customs in the course of various communications with agency personnel. *See* Plaintiff's Response to Judge Delissa A. Ridgway, dated May 31, 2003 ("Pl.'s Letter Memo I") ¶ ¶15–17.

Furgason's e-mail message also provided her own e-mail address, as well as her telephone and fax numbers.

Mr. Atteberry filed a timely response to the Notice of Proposed Rate Advance,[21] but to no avail. By Notice of Action dated September 25, 2001 ("Notice of Rate Advance"), signed by Ms. May and mailed to his Kenmore, Washington address, Customs formally notified Mr. Atteberry that it had taken "rate advance" action on his merchandise "as proposed," which "will result in an increase in duties." That Notice further advised that "[t]he entry is in the liquidation process and is not available for review in this office." The last line of the Notice stated, "As you requested, a copy of the Customs Regulations covering Administrative Protests is included for your convenience." Like the Notice of Proposed Rate Advance, the Notice of Rate Advance was signed by Ms. May and included her telephone number.

A couple of weeks later, in mid-October 2001, Mr. Atteberry vacated the Kenmore, Washington address.[22] His next contact with Customs was on December 20, 2001, when he filed a timely Protest of Customs' action. His letter of Protest—dated December 20, 2001 and addressed to the "Commissioner of Customs" in Seattle—advised the agency that he had "No [mailing] Address at present" and provided his e-mail address (the same e-mail address that Customs had used to contact him several months before, in September 2001: pedalpedalgokarts@juno.com).

In the meantime, Customs had liquidated Mr. Atteberry's merchandise.[23] At about the same time, Customs first billed Mr. Atteberry for the duties and interest assessed as a result of the rate advance. That bill—dated October 19, 2001 and sent to the Kenmore, Washington address—never reached Mr. Atteberry, who had moved from the address only days before.[24] Indeed, that bill was returned to Customs (in Atlanta) as undeliverable on December 26, 2001—the very same day on which Customs (in Seattle) received Mr. Atteberry's Protest, which also advised that he was no longer at the

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[21] Letter from Plaintiff to Ms. May, undated, apparently sent on September 25, 2001. *See* Notice of Action dated September 25, 2001 ("Notice of Rate Advance") (referring to Plaintiff's "letter dated September 25, 2001, in response to [Customs' Notice of Proposed Rate Advance]").

[22] *See* Pl.'s Letter Memo I ¶14 (noting that Mr. Atteberry left the Kenmore, Washington address "on/before Oct 15, 2001"). Mr. Atteberry has explained that he did not file an official change of address form at that time with either the U.S. Postal Service or Customs because he "didn't owe any bills or expect mail from anyone," although he did take his mailbox with him so that "the postman would know [he] was gone." *Id.* Based on the Notice of Rate Advance, Mr. Atteberry "did not expect anything further from Customs" and understood that "the next move was [his], the appeal 12–20–01." Plaintiff's Response to Judge Delissa A. Ridgway, undated, served June 6, 2003 ("Pl.'s Letter Memo II") at 1. As discussed above, his Protest dated December 20, 2001 notified Customs that he had no mailing address at that time.

[23] *See* Def.'s Statement of Facts ¶6 ("On or about October 19, 2001, the subject Entry was liquidated."); Pl.'s Statement of Facts ¶6 (same); Def.'s Att. 22 (Bulletin Notice of Entries Liquidated/Liquidation Date 10/19/01). The record is silent as to whether Mr. Atteberry ever actually saw the bulletin notice for his entry (Defendant's Attachment 22); presumably he did not. The record is also silent as to whether Customs sent him a courtesy notice of liquidation and, if it did, what became of that notice. In any event, neither the bulletin notice nor the courtesy notice is significant in this case because, as discussed in section I.A above, those notices do not specify the amount of duties and interest outstanding. That information is provided to an importer only through Customs' billing process.

[24] *See* Def.'s Att. 18 (Customs bill dated "10–19–01"); Def.'s Letter Memo ¶19 (indicating that bill "was sent on or about October 21, 2001").

Kenmore address but could still be reached via e-mail.[25] Customs nevertheless continued, for some time, to bill Mr. Atteberry at the Kenmore address. Apparently, a total of four bills were sent to that address—the last on February 3, 2002. Then, abruptly, billing stopped. Mr. Atteberry never received any of the four bills sent to the Kenmore address; and, to this day, Customs has never billed Mr. Atteberry for the outstanding duties and interest at any other address.[26]

On April 3, 2002, Customs denied Mr. Atteberry's Protest. That same day, Jeannine Delgado, an Entry Specialist with Customs in Seattle, sent Mr. Atteberry an e-mail message at the e-mail address he had provided on his Protest. Ms. Delgado informed Mr. Atteberry that a decision had been reached on the Protest, and that Customs regulations require that copies of such decisions be delivered via U.S. Mail. She therefore requested that Mr. Atteberry provide her with his "current mailing address." Mr. Atteberry responded via e-mail, and Customs' decision on the Protest was dispatched to him via U.S. Mail on April 9, 2003, at the "current mailing address" he provided to Customs, in Vashon, Washington.[27]

A stamp on the back of Customs' Notice of Denial advised that "A denial of a request [for reliquidation] * * * may be protested under 514(a)(7), TA of 1930." And a handwritten notation on the face of the Notice referred Mr. Atteberry to a highlighted passage on a Customs form attached to the document, which stated:

> NOTE: If your protest is denied, in whole or in part, and you wish to CONTEST the denial, you may do so by bringing a civil action in the U.S. Court of International Trade *within 180 days*

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[25] *See* Def.'s Att. 18 (Customs bill envelope date-stamped "U.S. Customs Service, 2001 Dec 26 A 10:23); Def.'s Statement of Facts ¶11 (Customs received Protest on December 26, 2001); Pl.'s Statement of Facts ¶10 (same). When it was returned to Customs, there was a handwritten notation on the envelope in which the bill was enclosed: "not @ this address." There is no indication in the record who made that notation. Nor is there any indication where the October 2001 bill languished for more than two months—between October 21, 2001 (when it was assertedly mailed) and December 26, 2001 (when it was returned to Customs), or what became of the other three bills that were sent to the Kenmore address. Def.'s Letter Memo ¶19.

[26] Def.'s Letter Memo ¶19 (indicating that Customs sent "a total of four bills * * * to Mr. Atteberry" at the Kenmore address, "the last bill * * * on February 3, 2002"); Pl.'s Letter Memo I ¶1 ("I was never asked by Customs to pay any duties* * * * I never received a Bill"). Although the record gives no indication why Customs stopped billing Mr. Atteberry (and although the reason is immaterial), it seems likely that some Customs official made the decision to stop the billing based on the fact that the October 2001 bill had been returned to the agency unopened. The wisdom of that decision is discussed below. *See* n.33, *infra*.

[27] *See* E-mail message from Jeannine Delgado to Plaintiff (at pedalpedalgokarts@juno.com), dated "Wed, 3 Apr 2002 18:10:24"; Def.'s Letter Memo ¶ 23 ("[A]n entry specialist at the port responsible for mailing notices of denials of protests to importers sent Mr. Atteberry an e-mail on April 3, 2002 requesting his address for the purpose of sending him Customs' decision on his protest. This was done because 'no address at present' was listed as the return address on the protest. Therefore, the denial was sent to Mr. Atteberry at the address provided by him to Customs via email."); Def.'s Att. 18 (handwritten address on Customs envelope, postmarked in Seattle on April 9, 2003 and addressed to Mr. Atteberry).

It is worth noting that—just as the Government initially contended that the Notice of Denial of Protest in this action was mailed on April 3, 2002, and the postmark was later found to be April 9, 2002 (*see Atteberry I*)—so too the Government initially asserted that Customs' Notice of Denial was mailed to Mr. Atteberry at the *Kenmore* address, though it now concedes that the notice was in fact mailed to the *Vashon* address. *Compare* Def.'s Statement of Facts ¶ ¶1 (asserting that Kenmore address is "address of record"), 13 (asserting that "[t]he Denial was mailed to plaintiff at his address of record") *with* Def.'s Letter Memo ¶23. As in *Atteberry I*, this evolution necessarily casts doubt both on the general reliability of representations and assurances by Customs officials and on the "presumption of regularity" as it applies to operations of that agency. *Atteberry I*, Slip Op. 03–53 at 9–11, 27 CIT _____ , _____ , _____ F. Supp. 2d _____ , _____ (May 14, 2003).

> after the date of mailing of Notice of Denial. You may obtain further information concerning the institution of an action by writing the Clerk of U.S. Court of International Trade, One Federal Plaza, New York, NY 10007 (212–264–2800).

(Emphasis added.) The assessment of duties and interest—much less the *amount* of the assessment—was not mentioned in the Notice of Denial, or in any of Customs' telephone and e-mail communications with Mr. Atteberry, either before or after the denial.[28]

In the 180 days that followed the April 9, 2002 mailing of the Notice of Denial, Mr. Atteberry evinced his continued interest in challenging Customs' action, through a course of correspondence with the Office of the Clerk of this Court. By letter dated August 8, 2002, he asked that the Clerk of the Court "send [him] what further information [he] may need to file a civil action" in the Court, giving the Vashon, Washington address as his mailing address. When he had heard nothing by August 22, 2002, he wrote again to request information "on how to move forward in the appeal process * * * * to further appeal the decision of * * * Customs."

Mr. Atteberry's letter of August 22, 2002 crossed in the mails with a letter of the same date from the Court's Chief Deputy Clerk, which advised Mr. Atteberry that a prospective litigant wishing to challenge Customs' denial of a protest "must first exhaust his administrative remedies, and comply with the procedures set forth within Title 28 U.S.C. § 2636 and § 2637." Copies of the statutes were enclosed with the letter, which concluded by noting that the Chief Judge had reviewed Mr. Atteberry's August 8, 2002 letter, had determined that the Court "[did] not have jurisdiction at [the] time over this action," and had instructed the Office of the Clerk not to accept Mr. Atteberry's materials for filing but to instead return the materials to him.[29]

Undeterred, Mr. Atteberry soldiered on. He completed and submitted a Summons, together with a two-page letter dated October 3, 2002 (deemed his Complaint), which were received at the Court and filed on Monday, October 7, 2002. Because that day was the first business day after October 6, which was—in turn—the 181st day following the April 9, 2002 mailing of Customs' Notice of Denial, Mr. Atteberry satisfied the first of two applicable jurisdictional requirements. 28 U.S.C. § 2636(a)(1). *See also Atteberry I*, Slip Op. 03–53, 27 CIT ___ , ___ F. Supp. 2d ___ (May 14, 2003). It is, however, undisputed that he did not pay "all liquidated duties, charges, or exactions" before this action was filed, as required by 28 U.S.C. § 2637(a). It is also undisputed that he first learned of the amount

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[28] Pl.'s Letter Memo ¶ ¶ 1, 4–6, 9, 12–13.

[29] *See* Letter from Plaintiff to Clerk of U.S. Court of International Trade, dated August 8, 2002; Letter from Plaintiff to Clerk of U.S. Court of International Trade, dated August 22, 2002; Letter from Chief Deputy Clerk of U.S. Court of International Trade to Plaintiff, dated August 22, 2002.

of duties and interest assessed only in early January 2003, when he received counsel for Defendant's letter dated December 18, 2002.[30] Mr. Atteberry paid Customs the sum of $542.00 by personal check dated April 23, 2003.[31]

II. *Analysis*

The Government paints this action as a "garden variety," open-and-shut case of failure to comply with 28 U.S.C. § 2637. *See, e.g.*, Def.'s Letter Memo (noting that "the Government believes that [various questions raised by the Court] are irrelevant to the jurisdictional defect present in this case, i.e., the failure to comply with the requirements of 28 U.S.C. § 2637. There is no doubt that all liquidated duties were not paid prior to the commencement of the action and that plaintiff did not comply with the statute.").

As a sovereign, the United States is immune from suit, unless and except to the extent that it consents to be sued. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986), *quoting United States v. Mitchell*, 445 U.S. 535, 538 (1980). On its face, 28 U.S.C. § 2637 constitutes a waiver of sovereign immunity. Asserting that § 2637(a) waives sovereign immunity—and gives this Court subject matter jurisdiction—over civil actions challenging Customs' denial of a protest "only if all liquidated duties, charges, or exactions have been paid at the time the action is commenced," the Government invokes an unbroken line of cases holding that payment is a strict condition precedent to judicial review.[32] Because Mr. Atteberry failed to make payment before filing his summons, the Government contends that this action must be dismissed for lack of jurisdiction. Def.'s Brief at 7–8; Def.'s Reply Brief at 4–7.

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[30] Letter from Counsel for Defendant to Plaintiff, dated December 18, 2002 (requesting, *inter alia*, copies of "any envelopes, papers, items, documents, cancelled checks, or other things * * * which show * * * that [Mr. Atteberry] paid the liquidated duties in this case * * * i.e., a sum which now appears to be $542.11").

[31] *See* PedalPedal Go Karts/Danny Atteberry check for $542.00, payable to U.S. Customs Service, dated April 23, 2003, transmitted by letter from Plaintiff to U.S. Customs Service, dated April 23, 2003.

[32] *See, e.g., Libas, Ltd. v. United States*, 26 CIT _____ , 217 F. Supp. 2d 1289 (2002); *Washington Int'l Ins. Co. v. United States*, 25 CIT _____ , _____ n.2, 138 F. Supp. 2d 1314, 1316 n.2 (2001); *Dazzle Mfg., Ltd. v. United States*, 21 CIT 827, 971 F. Supp. 594 (1997); *Group Italglass U.S.A., Inc. v. United States*, 17 CIT 1205, 1210–11, 839 F. Supp. 868, 873 (1993) (subseq. history omitted); *Peking Herbs Trading Co. v. U.S. Dep't of Treasury*, 17 CIT 1182 (1993); *Bousa, Inc. v. United States*, 17 CIT 144 (1993) (subseq. history omitted); *Melco Clothing Co. v. United States*, 16 CIT 889, 804 F. Supp. 369 (1992); *Mercado Juarez/Dos Gringos v. United States*, 16 CIT 625, 796 F. Supp. 531 (1992); *Apex Oil Co. v. U.S. Customs Service*, 122 B.R. 559, 561 (E.D. Mo. 1990) (subseq. history omitted); *Penrod Drilling Co.*, 13 CIT 1005, 727 F. Supp. 1463 (subseq. history omitted); *Atlantic Steamer & Supply Co. v. United States*, 12 CIT 479 (1988); *Syva Co. v. United States*, 12 CIT 199, 681 F. Supp. 885 (1988); *Glamorise Foundations, Inc. v. United States*, 11 CIT 394, 661 F. Supp. 630 (1987); *Nature's Farm Prods., Inc. v. United States*, 10 CIT 676, 648 F. Supp. 6 (1986), *aff'd*, 819 F.2d 1127 (Fed. Cir. 1987); *Rio Contratos De Costura, S.A. v. United States*, 10 CIT 778 (1986); *Bulova Watch Co. v. United States*, 9 CIT 67 (1985); *Am. Air Parcel Forwarding Co. v. United States*, 6 CIT 146, 150, 573 F. Supp. 117, 120 (1983) (subseq. history omitted). *Cf. United States v. Boe*, 543 F.2d 151, 155–56 (CCPA 1976); *Champion Coated Paper Co. v. United States*, 24 C.C.P.A. 83, 90 (1936); *Eddietron, Inc. v. United States*, 493 F. Supp. 585, 589 (Cust. Ct. 1980); *United States v. Novelty Imps., Inc.*, 341 F. Supp. 1228 (Cust. Ct. 1972), *aff'd*, 476 F.2d 1385 (CCPA 1973).

The sole exception to the "prepayment requirement" is when, as of the date litigation is commenced, Customs already has on hand funds due and owing to the importer which are sufficient to cover the importer's outstanding obligation. *Dynasty Footwear v. United States*, 4 CIT 196, 551 F. Supp. 1138 (1982). *See also Mercado Juarez*, 16 CIT at 626–27, 796 F. Supp. at 532 (where Government did not object, court—following *Eddietron* rationale—reallocated plaintiff's partial payment of duties and interest with respect to all entries so as to make full payment on some entries, to perfect jurisdiction over them; remaining entries were dismissed).

However, this action is clearly distinguishable from the line of cases on which the Government relies. None of the cases on which the Government relies involved a claim that Customs had failed to notify the importer of the duties and interest owed. None of the cases on which the Government relies involved a wholesale failure by Customs to comply with its own regulations governing bills for outstanding duties.

Because regular, accurate monthly billing is so central to importers' ability to "perfect" appeals judicial challenges to Customs' denial of protests—because 28 U.S.C. § 2637 plainly contemplates that an importer will be on notice of the sum to be paid—the Government is far too cavalier about Customs' violations of its own regulations and the implications of those violations for subject matter jurisdiction.

A. *Customs' Failure to Comply With Its Own Regulations*

The Government acknowledges that Customs regulations require the agency to bill importers *on a monthly basis* for outstanding duties and interest, "until the bill is paid or otherwise closed." *See* Def.'s Letter Memo ¶19 (*quoting* 19 C.F.R. § 24.3a(d)(1)). Moreover, the Government admits that Customs failed to do so in this case. Specifically, the Government concedes that only "a total of four bills were sent to Mr. Atteberry," the last of which "was sent on February 3, 2002." *Id*. It is thus undisputed that, although Mr. Atteberry notified Customs of his current mailing address (the Vashon, Washington address) in early April 2002, and although Customs mailed its Notice of Denial to him at that address (triggering the statutory 180-day clock for the filing of a civil action in this Court), Customs sent no bills to Mr. Atteberry—*at that or any other address*—during the critical 180-day period when he had to act to perfect jurisdiction.

The Government seeks to explain away Customs' failure to bill Mr. Atteberry as required by its regulations by asserting that the agency is obligated to send bills to the importer's "address of record" and that Mr. Atteberry failed to file a Customs Form 5106 ("Notification of Importer's Number or Application for Importer's Number, or Notice of Change of Name or Address") to update his "address of record" when he left Kenmore, Washington.[33] Def.'s Letter Memo ¶¶19, 23.

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[33] There are some subtle, inherent inconsistencies in the Government's position here. It is difficult to square the Government's position that Customs always bills the importer at his "address of record," and its position that Mr. Atteberry never properly changed his "address of record," with the conceded fact that Customs completely stopped billing Mr. Atteberry at any address. Logically, it would seem that an importer's "address of record" should—like a "last known address"—remain his "address of record" until replaced by a new "address of record." Customs cannot have it both ways. If, by Customs' logic, the Kenmore address remained Mr. Atteberry's "address of record" until changed via some particular form or procedure, then—by Customs' logic—the agency should have continued to send bills to that address.

Moreover, as a practical matter, there is no reason to assume—simply because a single piece of mail is returned to Customs as "undeliverable"—that future mailings to that same address will necessarily be futile. For example, in the case at bar, no one seems to know who wrote "not @ this address" on the face of the envelope enclosing October 2001 bill and then returned it to Customs. In any given case, such an indication might—or might not—be reliable information; pieces of mail have sometimes been known to be *erroneously* returned to sender as "undeliverable." It is also entirely conceivable that an importer might move without filing a change of address in advance. If the importer gave the Postal Service notice of its change of address only after the move, some of the importer's mail would likely have been returned to senders as "undeliverable"; but later mail addressed to the importer's "ad-

However, the regulation that the Government cites is simply inapposite.

> The Government relies on 19 C.F.R. § 24.5(a), which provides, in relevant part:
>
> Each person, business firm, Government agency, or other organization shall file Customs Form 5106 * * * with the first formal entry which is submitted or the first request for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection.

But, from the record, it seems clear that Mr. Atteberry did nothing after mid-October 2001 which would trigger any obligations under the regulation. Certainly he did not "submit[ ]" a "formal entry" after that time. Nor does it appear that, during that period, he made a "request for services that [would] result in the issuance of a bill or a refund check." Whatever may have been the intent behind the regulation, nothing on its face applied to Mr. Atteberry.

Moreover, even if § 24.5(a) could be read to apply here, Customs' insistence on the use of a particular form for change of address could not be sustained. *See, e.g., Intercargo*, 83 F.3d at 395 (observing that, although regulation governing extension of liquidations requires that Customs notify surety using a specific form, court "would have no difficulty rejecting" any claim that notice given via some other form was invalid; roundly rejecting contention that notice "that does not strictly conform to the 'form and manner' prescribed in the regulation is ineffective"). *Cf. Belton Indus., Inc. v. United States*, 6 F.3d 756, 761 (Fed. Cir. 1993) (an agency is charged with knowledge of the information in its own files; where objections to proposed revocations and terminations in countervailing duty proceeding were filed on behalf of trade association "and its member companies," Commerce should have accepted objections as filed on behalf of eight member companies, because "Commerce's own files revealed, or should have revealed, the identities of the eight companies" as entities which the agency had previously recognized as "interested parties").

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dress of record" on file with Customs would be forwarded to the importer at its new address by the U.S. Postal Service, once the change of address notice filed with the Postal Service took effect. There are other similar potential scenarios as well.

In this case, it is at least conceivable that—if Customs had continued to send bills, *even to the Kenmore address*—one of those bills eventually might have found its way to Mr. Atteberry. *See* Pl.'s Reply Brief at 1–2 (Mr. Atteberry attests that he continued to "check[ ] to see if there was mail from the Address [he] had moved from [i.e., the Kenmore address] for a couple of months after [he] moved. There was nothing from Customs."); Pl.'s Letter Memo II ¶C (Mr. Atteberry explains that he "did go back out to FREEDOM SK8BOARD SHOP, and * * * asked them if they had any mail for [him], [because] they are the ones [he] would see in that compound [at the Kenmore address]. [He] also saw the owners of the property and they would have told [him] if [he] had mail, in both cases [he] went out there after Oct 19, 01, after [he] got back from Cal. Like by the 2nd week in Nov. and then again in Dec. or Jan of 02.").

It is worth noting that one of the inherent virtues of a regulatory scheme of monthly billing is that, even if one properly-addressed bill is somehow waylaid or lost in the mails, subsequent bills will reach their destination. Thus, in such a scheme, notice is not entirely dependent on any one single bill.

In any event, one thing is certain: Bills that are never sent, by definition, can never be delivered. By electing to completely cease sending bills to Mr. Atteberry, Customs ensured that he would never receive them.

More to the point, Customs cannot deny that it was on *actual notice* of Mr. Atteberry's current mailing address as of April 2002, when it mailed its Notice of Denial to him at that address. The Government emphasizes that, unlike most other notices generated by Customs, "notices of denials of protests are *not* computer-generated." Def.'s Letter Memo ¶23. The Government seeks to depict Customs officials as virtually powerless in the face of the computers of Customs' Automated Commercial System ("ACS"), which are used to generate monthly bills. *See generally id.* ("without [a CF 5106 change of address form], no address changes are authorized to be made by Customs in ACS"; "Customs officials had no authority to input an address change into ACS without a CF 5106"). One is left with the distinct impression that Customs' right hand (*e.g.*, the personnel who were handling billing and other computer-related functions) did not know what its left hand (*e.g.*, Ms. Delgado and other officials at the port) was doing.

An agency's "self-imposed bureaucracy, however, is no excuse" for violating its own regulations. *NEC Solutions (America), Inc. v. United States*, Slip Op. 03–80 at 12 n.15, 27 CIT ___, ___ n.15, ___ F. Supp. 2d ___, ___ n.15 (July 9, 2003). And, at least for the present, this remains a country governed by laws, which are in turn implemented and enforced by men and women—not computers.[34] Contrary to the Government's claims, neither 19 C.F.R. § 24.5(a), nor any other authority cited, prevented Customs from updating the agency's records and databases as of April 2002 to reflect Mr. Atteberry's current mailing address and then billing him at that address.[35] Indeed, Customs billing regulations in effect affirmatively required the agency to do so.

By April 9, 2002 at the very latest, Customs was on notice of Mr. Atteberry's Vashon, Washington address.[36] Its failure to send him

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[34] The Government's papers convey some vague sense of infallibility on the part of computers and Customs' Automated Commercial System, which is not borne out by the facts of this case (or, for that matter, others). For example, the Government concedes:

> In the present case, Customs sent "demands" to plaintiff's surety * * * monthly on account of Mr. Atteberry's unpaid bill. The first such demand is dated December 2001, but from statements made by Customs officials, it appears that *due to problems with Customs Automated Commercial System ("ACS"), the December bill was not actually mailed to the surety until March 1, 2002.*

Def.'s Letter Memo ¶20 (emphasis added).

[35] Indeed, contrary to the Government's assertions, 19 C.F.R. § 24.5(a) does not even purport to address (much less restrict) the circumstances in which "address changes are authorized to be made by Customs in ACS." *Compare* 19 C.F.R. § 24.5(a) *with* Def.'s Letter Memo ¶23.

[36] The primary focus of this analysis of Customs' compliance with its own regulations is on the agency's failure to send the required monthly bills to Mr. Atteberry during the six months following Customs' mailing of the Notice of Denial of Protest on April 9, 2002—a period which has critical significance for an importer's perfection of jurisdiction in this Court, and during which Customs was on actual notice of Mr. Atteberry's Vashon address (and, indeed, acted on that information by mailing the Notice of Denial to him at that address).

But Customs was arguably in violation of its regulations even before April 2002. As discussed above, Customs ceased sending monthly bills to Mr. Atteberry—at any address—as of February 2002, notwithstanding 19 C.F.R. § 24.3a(d)(1), which requires monthly billing "until the bill is paid or otherwise closed." In addition, particularly given Customs' prior pattern and practice of communicating with Mr. Atteberry via telephone and e-mail, it could be argued that the agency was obligated either to bill Mr. Atteberry via e-mail or to contact him (via telephone or e-mail) to obtain a current mailing address for billing purposes as early as December 26, 2002, when Customs received Mr. Atteberry's protest advising that he had "No [mailing] Address at present" but could still be reached via e-mail. As of that date, the agency was on actual notice that he was no longer at the Kenmore address—the address to which the agency was sending bills.

monthly bills at that address thereafter constituted a continuing violation of 19 C.F.R. § 24.3a(d)(1).[37]

B. *The Consequences of Customs' Violation of Its Own Regulations*

The determination that Customs stands in violation of its own regulations is not, in and of itself, dispositive of the Government's motion. "There remains the question of what consequence should flow" from those violations. *Cf. Intercargo*, 83 F.3d at 394.

In a line of cases beginning with the seminal *Accardi*, courts have grappled with the consequences of an agency's violation of its own statute or regulations. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding habeus corpus relief proper where agency violated regulations governing procedure for processing and deciding alien's application for suspension of deportation).[38] This Court and the Court of Appeals for the Federal Circuit have made their own substantial contributions to that body of law. *See, e.g.*, *Liesegang v. Sec'y of Veterans Affairs*, 312 F.3d 1368 (Fed. Cir. 2002); *Intercargo*, 83 F.3d 391; *Kemira Fibres Oy v. United States*, 61 F.3d 866 (Fed. Cir. 1995); *Belton Indus.*, 6 F.3d 756; *Neenah Foundry Co. v. United States*, 25 CIT ___ , 142 F. Supp. 2d 1008 (2001); *Cummins Engine Co. v. United States*, 23 CIT 1019, 83 F. Supp. 2d 1366 (1999).

Although most of the caselaw concerns agency failures to observe timing requirements, some cases address other types of violations. *Compare, e.g., James Daniel Good*, 510 U.S. 43 (violation of statutory requirements concerning timing of Customs reporting and of commencement of proceedings concerning forfeitures) *and Kemira*, 61 F.3d 866 (violation of Commerce Department regulations concerning timing of publication of notice of intent to revoke antidumping finding), *with Yellin*, 374 U.S. 109 (violation of congressional com-

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However, there is no need to here decide whether any acts or omissions by Customs prior to April 2002 constituted regulatory violations. It is enough to say that where—as of April 9, 2002, at the latest—Customs was on actual notice of Mr. Atteberry's current mailing address and, indeed, used that address to mail its Notice of Denial of Protest to him (thus triggering the 180-day statutory "clock" for purposes of invoking this Court's jurisdiction), Customs was obligated thereafter to bill Mr. Atteberry at that same address.

[37] Though it may be somewhat strained to characterize the violations themselves as intentional and deliberate, the underlying decisions and actions by agency officials clearly were.

In other words, as discussed above, the Government notably is not claiming that Customs' failure to update its records (including its computer databases) to reflect Mr. Atteberry's current address in April 2002 was the result of mere inadvertence or mistake. Rather, the Government asserts that some internal agency policy or procedure (apparently based on Customs' reading of 19 C.F.R. § 24.5(a)) precluded agency personnel from doing so. So, too, with Customs' decision to cease all billing of Mr. Atteberry after the fourth bill was sent—albeit to the Kenmore address—in early February 2002. (As discussed in note 26 above, the record gives no indication why the billing stopped, although it seems likely that it was because the October 2001 bill was returned to the agency as undeliverable.) In any event, *someone* at Customs made an intentional, deliberate decision to stop sending bills to Mr. Atteberry at any address.

The agency's failure to send monthly bills to Mr. Atteberry at his Vashon, Washington address beginning in April 2002 was thus the product of intentional, deliberate actions and decisions of Customs officials—whether taken with specific knowledge of this particular case, or more generally in the adoption of problematic internal policies and procedures on matters such as maintaining and updating records of importers' "addresses of record," the sharing of data and information among Customs personnel, and the inputting of data into the ACS computer system.

[38] *See, e.g., Service v. Dulles*, 354 U.S. 363 (1957); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Yellin v. United States*, 374 U.S. 109 (1963); *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532 (1970); *United States v. Caceres*, 440 U.S. 741 (1979); *Cornelius v. Nutt*, 472 U.S. 648 (1985); *Brock v. Pierce County*, 476 U.S. 253 (1986); *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993).

mittee rules requiring consideration of witness's request to be heard in executive session) *and Intercargo*, 83 F.3d 391 (failure of notice form to cite any of three possible statutory grounds for Customs' extension of liquidation period).

As it has evolved, this line of precedent recognizes that "[a]n executive agency must be rigorously held to the standards by which it professes its action to be judged." *Vitarelli v. Seaton*, 359 U.S. at 546 (Frankfurter, J., concurring in part and dissenting in part). Thus, "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, * * * even when the administrative action under review is discretionary in nature." *Service v. Dulles*, 354 U.S. at 372 (*citing Accardi*, 347 U.S. 260 (1954)). Moreover, "[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures * * * even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) (citations omitted). "Accordingly, if [agency action] is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed* * * * This judicially evolved rule of administrative law is now firmly established* * * * He that takes the procedural sword shall perish with that sword." *Vitarelli v. Seaton*, 359 U.S. at 546–47 (Frankfurter, J., concurring in part and dissenting in part).

At the same time, the Supreme Court "has frequently articulated the 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.' " *Brock*, 476 U.S. at 260 (*quoting United States v. Nashville, Chattanooga & St. Louis Railway Co.*, 118 U.S. 120, 125 (1886)) (other citations omitted). The caselaw therefore disavows any "presumption or general rule that for every duty imposed upon * * * the Government * * * there must exist some corollary punitive sanction for departures or omissions, even if negligent." *Montalvo-Murillo*, 495 U.S. at 717 (citation omitted). Rather, the courts have emphasized that "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them * * * do not limit their power or render its exercise in disregard of the requisitions ineffectual." *French v. Edwards*, 13 Wall. 506, 511 (1872), *quoted in Montalvo-Murillo*, 495 U.S. at 717–18.

Balancing these competing interests, the Supreme Court has held that "if a statute [or, for that matter, a regulation] does not specify a consequence for noncompliance with [its] timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *James Daniel Good*, 510 U.S. at 63–64 (citations omitted). Thus, "not every failure of an agency to observe timing requirements voids subsequent agency action." *Kemira*, 61 F.3d at 871 (*citing Brock*, 476 U.S. at 260). Nor is the *Brock* rule limited to violations of

timing requirements; it extends to violations of other procedural requirements as well. The *Brock* Court noted that it "would be most reluctant to conclude that every failure of an agency to observe a *procedural requirement* voids subsequent agency action, especially when important public rights are at stake." *Brock*, 476 U.S. at 260 (emphasis added). Thus, the Court concluded, "[w]hen * * * there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." *Id.* (footnote omitted).

The teachings of *Accardi* and its progeny are clear enough. What is entirely unclear are the implications, if any, of that line of cases for the case at bar. Significantly, as the quotes from *Brock* above indicate, the remedy sought by the plaintiffs in *Accardi* and the cases that followed was the ultimate remedy—to "void[ ] subsequent agency action." That plainly is not the situation here. *Compare, e.g.*, *Accardi*, 347 U.S. 260 (admittedly deportable immigrant sought to vacate agency decision denying suspension of deportation); *Yellin*, 374 U.S. 109 (witness who refused to answer questions of House Committee on Un-American Activities sought reversal of conviction for contempt of Congress); *Brock*, 476 U.S. 253 (county sought to avoid repayment of misused federal grant funds); *Cornelius v. Nutt*, 472 U.S. 648 (federal employees sought to overturn discharges from employment); *Montalvo-Murillo*, 495 U.S. 711 (criminal suspect who was clear flight risk sought to establish right to release from pretrial custody); *James Daniel Good*, 510 U.S. 43 (sought dismissal of civil forfeiture action); *Kemira*, 61 F.3d 866 (importer sought revocation of antidumping finding against it); *Intercargo*, 83 F.3d 391 (importer's surety sought to invalidate Customs' notice of liquidation of extension and thus to entirely avoid obligation to pay duties); *Cummins Engine Co.*, 23 CIT 1019, 83 F. Supp. 2d 1366 (importer sought to void liquidation of merchandise as non-originating under NAFTA).

Accardi and its progeny are thus distinguishable from this case. Mr. Atteberry is not here "playing 'gotcha.' " Unlike the plaintiffs in *Accardi* and the other cases cited above, he is not seeking "the ultimate remedy." He is not arguing that he is now "immune" from the collection of duties simply because Customs failed to comply with its own regulations. He makes no claim that, by failing to bill him regularly, Customs has forfeited forever whatever right it may have to exact duties on the merchandise at issue. Quite the contrary—Mr. Atteberry seeks only to protect his right to a *judicial determination* on the *merits* of Customs' right to exact those duties.[39] *Compare, e.g.*,

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[39] Mr. Atteberry thus is not seeking a "windfall." *Compare, e.g.*, *Montalvo-Murillo*, 495 U.S. at 720 ("there is no reason to bestow upon the defendant a windfall and to visit upon the Government and the citizens a severe penalty by mandating release of possibly dangerous defendants every time some deviation from the strictures of [the Bail Reform Act] occurs.").

Indeed, the contrary result—sustaining the Government's position—would confer a "windfall" on the United States and its citizens at Mr. Atteberry's expense, by permitting the Government to "profit" from Customs' viola-

Montalvo-Murillo, 495 U.S. at 720 ("The safety of society does not become forfeit to the accident of noncompliance with statutory time limits where the Government is [belatedly] ready and able to come forward with the requisite showing to meet the burden of proof [to justify pre-trial detention] required by the [Bail Reform Act]."); *Kemira*, 61 F.3d at 873 ("Kemira should not become immune from the antidumping laws because Commerce missed the deadline."); *Intercargo*, 83 F.3d at 396 ("The public interest in the administration of the importation laws should not 'fall victim' to the failure by the Customs Service to use the requisite language in its [liquidation] extension notices, if the oversight has not had any prejudicial impact on the plaintiff.").

The more recent cases involving *Accardi*-type claims that an agency's violation of its statute or regulations voids subsequent agency action reflect a clear two-step analysis. The court first considers whether the statute or regulation at issue specifies the consequences of agency noncompliance. If it does, that is the end of the matter. *See, e.g., James Daniel Good*, 510 U.S. at 64–65 (where "[e]xamination of the structure and history of the internal timing provisions [of the statute] * * * supports the conclusion that the courts should not dismiss a [civil] forfeiture action for noncompliance," Court does not reach issue of prejudice).

On the other hand, if (as is generally the case) the statute or regulation in question does not address the consequences of an agency's failure to comply, the court proceeds to the second step of the analysis, and determines whether the agency's violation may have prejudiced the plaintiff. *See, e.g., Intercargo*, 83 F.3d at 396 (where plaintiff received formal notice that liquidation period was being extended and "omission of the requisite language from the extension notices had no effect on Intercargo's right to challenge the extensions," court "think[s] it clear that Intercargo suffered no prejudice"); *Belton Indus.*, 6 F.3d at 761 (where appellees' counsel had—and, indeed, acted on—actual notice of agency's proposed termination of countervailing duty orders, "Commerce's violation [of regulation requiring agency to give formal written notice to appellees themselves] did not prejudice [them]").

Although it is far from certain whether Mr. Atteberry's claim should properly be subjected to this two-step analysis (because, again, unlike the plaintiffs in *Accardi* and the cases that have followed it, Mr. Atteberry is not seeking to "void[ ] subsequent agency

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tion of its own regulations. Even if Mr. Atteberry is wrong about the merits of his claim against Customs, precluding him from litigating it would unjustly enrich the coffers of the Treasury—at the expense of his statutory right to a judicial determination on the merits—by sparing the Government the costs of that litigation. And if Mr. Atteberry is right about the merits of his case but were to be prevented from litigating it, the coffers of the Treasury would be unjustly enriched even more, by his payment of duties and interest to which the Government is not entitled.

action"), his claim would survive such an analysis (if indeed it is applicable) and would entitle him to relief.[40]

The first step of the analysis requires little ink. Neither Customs' billing regulations nor the related statute—19 U.S.C. § 1505—speak to the consequences of an agency failure to comply. The histories of the relevant provisions are similarly silent. The analysis therefore turns to the second step—the question of prejudice.[41]

"Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect." *Intercargo*, 83 F.3d at 396 (citations omitted).[42] While Customs' billing regulations may be designed, in some measure, to facilitate the operations of the agency and to protect the public fisc, their primary purpose is to ensure that importers have notice of the precise extent of their financial obligations (for jurisdictional and other reasons).[43] Viewed in the context of the entire statutory and regulatory scheme, the "notice" function of a bill for supplemental duties and interest accrued to date is both obvious and critical—particularly in light of 28 U.S.C. § 2637(a), the strict prepayment requirement which is a condition precedent to judicial review of Customs' denial of an importer's protest. *See* section I.A, *supra*.[44]

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[40] *Intercargo*, 83 F.3d at 394—and cases that have followed it, such as *Cummins Engine Co.*, 23 CIT at 1032, 83 F. Supp. 2d at 1378—can be read to extend *Accardi* and its progeny by requiring "harmless error" analysis in *every* case involving an agency's violation of its statute or regulations, without regard to the nature and extent of the remedy sought by the complainant. But it is not clear that *Intercargo* and *Cummins* should be read so broadly. Notably, the plaintiffs in both of those cases, like all the complainants in the *Accardi* line of cases, were seeking the "ultimate remedy"—to void subsequent agency action.

If the two-step test set forth in the progeny of *Accardi* is to be used to determine whether or not subsequent agency action is invalidated, it stands to reason that some other test must govern whether a complainant is entitled to lesser relief, such as that which Mr. Atteberry here seeks.

[41] The caselaw indicates that a showing of prejudice is required only if the violation is of a "procedural" requirement—or, in other words, that prejudice is presumed if the requirement at issue is "substantive." *See, e.g., Kemira*, 61 F.3d at 875 ("Since the requirement at issue is merely procedural, Kemira must establish that it was prejudiced by Commerce's noncompliance * * * "). For purposes of this analysis of Mr. Atteberry's claim (above), it is assumed (but not decided) that Customs' billing regulations—including 19 C.F.R. § 24.3a(d)(1), in particular—are "procedural."

As courts have recognized time and time again over the years, however, the distinction between "procedural" and "substantive" is an elusive one. It is not a distinction that is easily drawn in any context, for any purpose. Because cases are so fact-specific, the terms often seem to be essentially result-driven labels. *See generally Neighborhood TV Co. v. FCC*, 742 F.2d 629, 636–37 (D.C. Cir. 1984) (*quoting Brown Express, Inc. v. United States*, 607 F.2d 695, 701 (5th Cir. 1979)) (" 'Procedure' and its opposite, 'substance,' are not talismanic labels or given premises. Rather, they are legal conclusions which depend on their settings for definition.").

[42] In discussing prejudice, the courts have used various terms interchangeably—including "harmless error," "harmful error," and "substantial prejudice," in addition to "prejudice." *See, e.g., Intercargo*, 83 F.3d at 394 (referring to "principles of harmless error," "[t]he harmless error rule," "prejudicial error," and "conventional principles of harmless error"), 396–97 (discussing "prejudice"); *Cornelius v. Nutt*, 472 U.S. at 657–59 (discussing "harmful error"); *Kemira*, 61 F.3d at 875 (discussing "substantial prejudice") (*quoting American Farm Lines*, 397 U.S. at 539).

[43] Thus, for example, under Customs' regulations, it is not the act of liquidation—but, rather, the bill for supplemental duties and interest—that triggers the importer's obligation to pay. *See* 19 C.F.R. § 24.3(e) (bills for duties and interest are "due and payable within 30 days *of the date of issuance of the bill*") (emphasis added). *See also* 19 U.S.C. § 1505(b) ("Duties, fees, and interest * * * are due 30 days *after issuance of the bill*") (emphasis added). Moreover, billing is mandatory under the statutory and regulatory scheme. It is no mere "courtesy" or formality. *Cf.* 19 C.F.R. § 159.9(d) ("Customs *will endeavor* to provide importers * * * with Customs Notice Form 4333–A, 'Courtesy Notice,' * * * * This notice shall serve as *an informal, courtesy notice* and *not as a direct, formal and decisive notice* of liquidation.") (emphases added).

[44] *Cf. New Zealand Lamb Co. v. United States*, 40 F.3d 377, 381–82 (Fed. Cir. 1994) (holding that, where bulletin notices made no mention of interest, jurisdictional 90-day period for filing of protest did not begin to run until Customs sent importer a bill for interest; proper notice requires that party assessed be "informed of all elements of the charge: liability and quantum, either or both of which it may wish to protest"); *Am. Motorists Ins. Co. v. United States*, 14 CIT 298, 303, 737 F. Supp. 648, 652 (1990) (sustaining adequacy of notice provided by Formal Demand on Surety—equivalent to a bill sent to an importer, *see* n.8, *supra*—where demand specified, *inter alia*, "the *amount due*—listing separately for each bill the *total amount*, *principal amount*, and *interest amount* due, and the

Mr. Atteberry has repeatedly explained that he did not pay the outstanding duties and interest prior to filing this action because he never received a bill.[45] And it is that failure to pre-pay which the Government argues should deprive Mr. Atteberry of his right to a judicial determination on his challenge to the assessment of those duties and interest. Stated another way, had Mr. Atteberry prepaid the duties and interest—which he asserts he would have done if he had received a bill—the Government would have no grounds on which to challenge his right to pursue this action on the merits. Clearly, the potential deprivation of a litigant's right to his "day in court" constitutes prejudice to his interests. Indeed, there could be no greater deprivation for an importer than to cut off his right to judicial review of an adverse Customs determination. *See, e.g., Loui v. Merit Sys. Prot. Bd.*, 25 F.3d 1011, 1014 (Fed. Cir. 1994) (agency's late notice, which resulted in employee's loss of right to appeal, was "obviously not 'harmless error' ").[46]

It is no answer to label as mere speculation Mr. Atteberry's assertion that he would have prepaid the duties and interest had he received a bill, and thus would have perfected jurisdiction as contemplated by the statute. Nothing remotely approaching metaphysical certainty is required. *See, e.g., Cornelius v. Nutt*, 472 U.S. at 650 (endorsing agency's interpretation of statutory "harmful error" standard as "error that causes substantial prejudice to [an employee's] individual rights by *possibly affecting* the agency's decision") (emphasis added), *cited with approval in Kemira*, 61 F.3dat 875 (discussing requirement to show prejudice) *and Belton Indus.*, 6 F.3d at 761 (same).[47]

'age category' of the bills—either 60, 90, or 120 days, or longer") (emphases added); *The A.W. Fenton Co. v. United States*, 55 Cust. Ct. 74, 80 (1965) (in context of Tariff Act of 1930, linking importer's need to know more than merely the "approximate[ ]" sum due if he is to be required to make payment; noting "rational basis" for not requiring pre-payment of duties as prerequisite to protest by importer for reappraisement because such an importer "has not had his duty liquidated and does not know, except approximately, and not always that, what the liquidation duty will be.").

[45] A searching review of the record as a whole indicates that Mr. Atteberry understood that Customs had decided that his merchandise could not be liquidated duty-free, and he expected that he would be billed for supplemental duties—he just didn't know precisely when. Indeed, he expected that he would be billed periodically, on a regular basis (as, in fact, Customs regulations require). *See, e.g.*, Pl.'s Letter Memo I ¶¶4 ("I knew that the Government was going to impose [supplemental duties], [as for] when I did not know."), 13 ("I * * * believed [Customs had] to ask for $$$"); Pl.'s Letter Memo II ¶D ("[A]s for duties I was sure they [Customs] would Notify me, some how and differently with repeat notices or requests that I must pay some duties, some form of mentioning that I owed them.").

[46] In contrast, the Government doesn't even claim to have been prejudiced. Certainly, the Government cannot claim to have been lulled into complacency; nothing in Mr. Atteberry's conduct could have led the Government to believe that he was abandoning his claim. He has vigorously prosecuted his case at every stage throughout the administrative process, and into this forum.

Moreover, the accrual of interest compensates the Government for the loss of use of funds it suffered due to delay in payment. (Significantly, although it might be possible to frame a colorable argument that the accrual of interest was tolled for a substantial period of time here, Mr. Atteberry has not sought any such relief. He has now paid much of the supplemental duties assessed by Customs (together with accrued interest), though apparently he still has not been billed.) Finally, the Government will be free to renew its motion to dismiss if Mr. Atteberry fails to promptly perfect jurisdiction after he is properly billed for the nominal sum that remains outstanding. *Compare Kemira*, 61 F.3d at 873 ("Any harm caused to Kemira by the slight delay in administrative action (and none has been shown) would be disproportionate to the potential harm to domestic industry were we to accept Kemira's argument. We therefore reject the position that Commerce lost its authority to commence an administrative review because of its delay in giving notice [in violation of its regulations].").

[47] *See Cornelius v. Nutt*, 472 U.S. at 657 n.9 (noting that, in a judicial context, "harmful error" means "error that has *some likelihood* of affecting the result of the proceeding") (emphasis added) (*citing United States v. Hasting*, 461 U.S. 499 (1983); *Kotteakos v. United States*, 328 U.S. 750 (1946)). The *Hasting* Court described as "the

Nor is it an answer to argue, as the Government does, that—even absent a bill—"[a] simple inquiry [by Mr. Atteberry] as to how much duties he owed would have led to his knowledge of the exact amount of the outstanding duties." Def.'s Letter Memo ¶22. It would be quite a different matter if Mr. Atteberry was, in fact, on actual notice of the sum due before he filed this action. *See, e.g., Belton Indus.*, 6 F.3d at 761 (where appellees' counsel had—and, indeed, acted on—actual notice of agency's proposed action, "Commerce's violation [of regulation requiring agency to give formal written notice to appellees themselves] did not prejudice [them]").[48] But the Government makes no such claim here. Instead, the Government is arguing, in essence, that a party has an affirmative duty to take action to mitigate the effects of an agency's violation of its own regulations.

In effect, the Government argues that the two-step analysis set forth in the cases that follow *Accardi* is, in reality, a *three-step* analysis: (1) Does the statute or regulation speak to the consequences of the agency's failure to comply? If no, then (2) did the agency's violation prejudice the complainant? If yes, then (3) could/should the complainant have done something to prevent that harm?

Not only is the Government's argument questionable as a matter of policy,[49] but—more importantly—it finds no support in the law. There is nothing in the *Accardi* line of cases to suggest that, in cir-

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essence of the harmless error doctrine that a judgment may stand only when there is *no 'reasonable possibility* that the [practice] complained of *might have contributed to*' " the outcome. 461 U.S. at 506 (emphases added) (citation omitted). In *Kotteakos*, the Court emphasized that the "harmless error" rule is a rule in name only, and that the art is in its application, requiring "judgment transcending confinement by formula or precise rule * * * That faculty cannot ever be wholly imprisoned in words, much less upon such a criterion as what are only technical, what substantial rights; and what really affects the latter hurtfully* * * * *What may be technical for one is substantial for another; what minor and unimportant in one setting crucial in another*." 328 U.S. at 761 (emphasis added) (citation omitted).

_____ *See also, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521 (D.C. Cir. 1983) (in context of APA review of agency action, court must apply rule of prejudicial error, which "requires only a *possibility* that the error would have resulted in *some change*" in the outcome) (emphases added), *quoted with approval in Evans v. Perry*, 944 F. Supp. 25, 29 (D.D.C. 1996) (citation omitted); *Yellin*, 374 U.S. at 120–21(analogizing position of witness convicted on charges of contempt of Congress for refusing to answer questions posed to him in open session by House Committee on Un-American Activities to the position of petitioner in *Accardi*, who applied to the Board of Immigration Appeals for suspension of deportation and, when suspension was denied, asserted that the BIA had not exercised the full discretion delegated to it by the Attorney General, because it was influenced by a list of "unsavory characters" to be deported which the Attorney General released shortly before his application was denied; holding that "This Court held [in *Accardi*] that the Board had failed to exercise its discretion though required to do so by the Attorney General's regulations. Although *the Court recognized that Accardi might well lose, even if the Board ignored the Attorney General's list of unsavory characters*, it nonetheless held that Accardi should at least have the chance given to him by the regulations. The same result should obtain in the case at bar. *Yellin might not prevail, even if the [congressional] Committee takes note of the risk of injury to his reputation or his request for an executive session*. But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in [those rules].") (emphases added).

[48] Also untenable is any claim that Customs' billing regulations themselves sufficed to put Mr. Atteberry on notice of the amount he owed. *See generally, e.g., Kemira*, 61 F.3d at 875 (rejecting argument that "Commerce need not [provide specific written notification to] interested parties in accordance with [a regulation requiring such notice] because the regulation itself places the domestic industry on notice of Commerce's intent to revoke after four consecutive anniversary months"; court reasoned, *inter alia*, that accepting such an argument would render the regulation requiring specific written notice to interested parties "superfluous"); *New Zealand Lamb*, 40 F.3d at 381 (dismissing Customs' argument that regulation providing for interest was itself sufficient to put importer on notice of assessment of interest).

[49] It is a fairly extraordinary proposition to posit that it is the job of private parties to police Executive Branch agencies in the performance of their jobs. Nor should a private party be required to undertake extraordinary measures to force an agency to do that which the law already specifically requires it to do. *See NEC Solutions (America), Inc. v. United States*, Slip Op. 03–80 at 12 n.15, 27 CIT _____ , _____ n.15, _____ F. Supp. 2d _____ , _____ n.15 (July 9, 2003) (rejecting the Government's "brazen[ ] claims" that a party who believes it will be injured by an agency's violation of its own statute " 'is not without remedy' because it can seek relief by petitioning for a writ of mandamus") (citation omitted).

cumstances such as these, establishing "prejudice" requires a showing of due diligence.[50]

Moreover, as a practical matter, this case itself illustrates the folly of any suggestion that a simple phone call to Customs would have yielded the accurate, detailed and precise information which the required bills would have provided to Mr. Atteberry. If—in the relative calm, deliberate and rarefied atmosphere of litigation—there is room for confusion on the part of the Government as to the precise amount owed at a given point in time (*see* n.10, *supra*), it requires little imagination to envision the potential for misinformation and miscommunication in the much more rough-andtumble environment of routine, day-to-day dealings between importers and Customs, with dire consequences for importers. The courts would be called on to referee "he said/she said" disputes pitting an importer against an individual Customs official in a debate over who said what when, as well as arguments about whether or not it was reasonable under the circumstances for an importer to rely on the representations of that—or any other—individual Customs employee.

III. *Conclusion*

Although this case is at the frontier of the law where subject matter jurisdiction and sovereign immunity intersect with the law on an agency's violation of its own statute or regulations, it represents no grand assault on the citadel of sovereign immunity. The holding here is very limited indeed.

This case stands for nothing more—but also nothing less—than the proposition that (under the *Accardi* line of cases, or otherwise) where Customs was on actual notice of an importer's current mailing address (and, in fact, used that address to mail its Notice of Denial

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[50] A showing of due diligence is required for certain types of equitable relief. *See, e.g., US JVC Corp. v. United States*, 22 CIT 687, 690 n.6, 691, 15 F. Supp. 2d 906, 910 n.6, 911 (1998), *aff'd*, 184 F.3d 1362 (Fed. Cir. 1999) (doctrine of equitable tolling requires showing of due diligence; equitable estoppel does not); *Former Employees of Quality Fabricating, Inc. v. U.S. Sec'y of Labor*, 27 CIT _____, _____, 259 F. Supp. 2d 1282, 1285 (2003) (equitable tolling requires due diligence).

However, this opinion does not rely on any equitable doctrine. Accordingly, there is no relevance here to the line of precedent holding that equitable relief from the terms of 28 U.S.C. § 2637(a) is not available, because it involves a sovereign (rather than proprietary) governmental function—"the collection or refund of duties on imports." *See, e.g., Dazzle Mfg.*, 21 CIT at 830, 971 F. Supp. at 597 (*quoting Air-Sea Brokers*, 596 F.2d at 1011); *Mercado Juarez*, 16 CIT at 627, 796 F. Supp. at 533. *Cf. New Zealand Lamb Co. v. United States*, 149 F.3d 1366, 1368 (Fed. Cir. 1998) (equitable estoppel not available against the Government in cases involving the collection or refund of duties on imports) (citations omitted). *But see Atlantic Steamer*, 12 CIT at 480 (noting that, under different circumstances, "the Court might have found some equitable grounds to infer due diligence on the part of the plaintiff and somehow brought the case within the requirements of § 2637(a)"); *US JVC Corp.*, 22 CIT at 690 n.6, 15 F. Supp. 2d at 910 n.6 (criticizing some of the reasoning in *Dazzle Mfg.*).

There is, similarly, no occasion here to consider whether the facts of this case would support a claim of equitable estoppel, much less the extent to which the doctrine can operate against the Government. Nor is there occasion to consider whether, under some ingenious theory, it could be argued that the 180-day statutory "clock" for the filing of an action in this court has not yet been triggered (or, at a minimum, did not expire before Mr. Atteberry tendered his payment of $542—the sum cited by the Government as due and payable in its Reply Brief here). *Cf. New Zealand Lamb Co.*, 40 F.3d 377, 381–82 (holding that, where liquidation notices made no mention of interest, 90-day statutory limitations period for filing of protest was not triggered until Customs rendered bill detailing amount of interest owed).

Finally, where—as here—the agency's actions are in violation of a statute or regulation, there is no need to decide whether the failure to give notice constituted a violation of the Constitution. Neither party here has framed the issue in those terms, although Constitutional concerns of notice and due process are implicated in any such case.

of Protest to him), thus triggering the 180-day statutory "clock" for purposes of invoking this Court's jurisdiction, the agency was thereafter obligated to bill the importer at that same address; and where Customs failed—in violation of its own regulations—to send the importer even a single bill at that address at any point during the critical 180-day period that followed, the importer must have not the "ultimate remedy," but *a remedy*.

Permitting the Government now (however belatedly) to bill Mr. Atteberry—and permitting Mr. Atteberry to pay that bill in full, to perfect jurisdiction—has, in the words of the Supreme Court, both "causal [and] proportional relation to [the] harm caused" by Customs' flagrant, protracted and continued violation of its billing regulations. *Montalvo-Murillo*, 495 U.S. at 721.

Because 28 U.S.C. § 2637(a) clearly contemplates that an importer will be on notice of the sum to be paid, and because Customs' failure to render monthly bills—in violation of its own regulations—deprived Mr. Atteberry of that notice, the Government's motion to dismiss for lack of subject matter jurisdiction pursuant to that provision of the statute must be, and hereby is, denied.

DELISSA A. RIDGWAY,
Judge

(Slip Op. 03–94)

AUTOMATIC PLASTIC MOLDING, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 99–00365

[Application for attorney's fees and expenses denied.]

(Decided: July 28, 2003]

Law Office of George R. Tuttle, A P.C. (*George R. Tuttle III* and *Matthew K. Nakachi*), and *Tonsing Law Offices* (*Michael J. Tonsing*), for Automatic Plastic Molding, Inc.

Peter D. Keisler, Assistant Attorney General, United States Department of Justice; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Graves Walser*); Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection (*Beth C. Brotman*), of counsel, for Defendant.

OPINION

EATON, *Judge*: Before the court is the application of Automatic Plastic Molding, Inc. ("APM"), for fees and expenses pursuant to

USCIT Rule 68 and the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2000). For the reasons set forth below, the court denies this application.

BACKGROUND

In the underlying action APM challenged the United States Customs Service's ("Customs")[1] classification of certain glass containers. After a three-day trial the court held for APM, and found that the merchandise was properly classifiable under subheading 7010.91.50 of the Harmonized Tariff Schedule of the United States ("HTSUS") as "Carboys, bottles, flasks, jars, pots, vials, ampoules and other containers, of glass, of a kind used for the conveyance or packing of goods." *See Automatic Plastic Molding, Inc. v. United States*, 26 CIT ___ , Slip Op. 02–120 (Oct. 5, 2002). Final judgment was entered in this matter on October 5, 2002, and Customs was ordered to "reliquidate the entries that are the subject of this action * * * and, as provided by law, refund with any interest any excess duties paid." *See* Judgment Order of Oct. 5, 2002. Following entry of final judgment, the United States ("Government"), on behalf of Customs, did not pursue an appeal. Thereafter, on January 2, 2003, APM submitted an "Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act" (the "Application"). By this Application APM asks this court to award it costs and expenses for the underlying action in the amount of $119,586.71. The Government actively opposes the Application.

DISCUSSION

The rules of this court permit the awarding of costs and fees. Pursuant to USCIT Rule 68, "[t]he court may award attorney's fees and expenses where authorized by law. Applications must be filed within 30 days after the date of entry by the court of a final judgment." USCIT R. 68(a).[2] An application for fees and expenses "shall contain a citation to the authority which authorizes an award, and shall indicate the manner in which the prerequisites for an award have been fulfilled." USCIT R. 68(b). Here, APM cites the EAJA as authority for

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, at 4 (2003).

[2] APM alleges that the 30 day period for filing the Application did not start to run until the time for appeal expired. *See* Plaintiff's Statement in Supp. Application for Fees and Costs Under the Equal Access to Justice Act, 28 U.S.C. § 2412 ("APM's Mem.") at 2–3 (citing *Former Employees of Shaw Pipe, Inc. v. United States Sec'y of Labor*, 22 CIT 430, 432, 9 F. Supp. 2d 713, 716 (1998)); *see Gavette v. Office of Pers. Mgmt.*, 808 F.2d 1456, 1459 (Fed. Cir. 1986) ("The party seeking an award under the EAJA must submit the application to the court within 30 days of the date when the judgment becomes 'final and not appealable.' Although the Federal Circuit decided Gavette's appeal on the merits on February 1, 1985, the time for filing a petition for certiorari did not expire until 90 days later. Gavette had an additional 30 days, or a total of 120 days from February 1, to file his application for fees and expenses." (footnotes omitted)). Here, APM alleges that the Application was timely filed as the Judgment Order "became final and not appealable, as a matter of law, * * * on December 3, 2002." APM's Mem. at 3. The Government does not contest the timely filing of the Application.

such award.[3] As summarized by the Court of Appeals for the Federal Circuit "[t]he EAJA statute provides that a trial court must award attorney's fees where: (i) the claimant is a 'prevailing party'; (ii) the government's position was not substantially justified; (iii) no 'special circumstances make an award unjust'; and (iv) the fee application is timely submitted and supported by an itemized statement." *Libas, Ltd. v. United States*, 314 F.3d 1362, 1365 (Fed. Cir. 2003) (citing 28 U.S.C. § 2412(d)(1)(A)—(B); *INS v. Jean*, 496 U.S. 154, 158 (1990)). By the Application, APM alleges that: (1) APM was the "prevailing party" in the underlying action; (2) APM meets the net worth requirement and submitted the appropriate supporting documentation; (3) no "special circumstances" exist that would make awarding fees and expenses unjust; and (4) the Government's litigation position at both the administrative and trial level lacked "substantial justification." *See* APM's Mem. at 4; *id.* at schedules A.1, A.2, B, D; *id.* at 9, 21.[4] In response, the Government concedes that APM "was the prevailing party in this litigation and has met the net worth requirements and provide[d] an itemized statement of fees sought required by the Rules of this Court * * * * " Def.'s Opp'n to Pl.'s Application for Attorney's Fees and Costs ("Def.'s Mem.") at 5–6 (footnote omitted). In addition, the Government makes no argument that "special circumstances" existed in the underlying action such that an award of fees and expenses would be unjust.

Thus, as the parties agree that APM was the prevailing party and provided the requisite supporting documentation and, furthermore, there is no argument that "special circumstances" existed in the underlying litigation, the remaining question for the court is whether the Government's position was "substantially justified."

A. *Substantially justified*

Pursuant to statute

> a court shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in any civil action * * * including proceedings for judicial review of agency action * * * *

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[3] The relevant language of the EAJA provides:

(A) * * * [A] court shall award to a prevailing party * * * fees and other expenses * * * incurred by that party in any civil action * * * including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(d)(1)(A)—(B).

[4] Citing *Traveler Trading Co. v. United States*, 13 CIT 308, 382, 713 F. Supp. 409, 411 (1989).

> The [applicant] shall * * * allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

28 U.S.C. § 2412(d)(1)(A), (B). Thus, the statute requires that the Government's position be substantially justified at both the administrative level and at trial. *Am. Bayridge Corp. v. United States*, 24 CIT 9, 10, 86 F. Supp. 2d 1284, 1285 (2000) (citing *Covington v. Dep't of Health & Human Servs.*, 818 F.2d 838, 839 (Fed. Cir. 1987); *Traveler Trading*, 13 CIT at 381, 713 F. Supp. at 411)) ("If the court determines that the applicant prevailed, the government must demonstrate that its position, both at the agency level and throughout the litigation was substantially justified, or that special circumstances make an award unjust."). APM contends that "the Government needlessly continued this litigation after it knew or should have known that its position regarding the classification of the glass containers in question was not substantially justified." APM's Mem. at 6. In support of its position, APM states that "[a]dmittedly, the test for attorney fees and costs under the EAJA is not whether [a party] succeeded on the merits, but whether the government was *clearly* reasonable in asserting its position * * * in view of the law and the facts.' " *Id.* at 13 (emphasis and ellipsis in original) (citing *Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States*, 837 F.2d 465, 467 (Fed. Cir. 1988)).

The Government concedes that it "must demonstrate that its position, both at the agency level and throughout the litigation was substantially justified, or that special circumstances make an award unjust * * * *" Def.'s Mem. at 6 (citing 28 U.S.C. § 2412 (d)(1)(A); *Covington*, 818 F.2d at 839; *Am. Bayridge*, 24 CIT at 10, 86 F. Supp. 2d at 1285).

The Court of Appeals for the Federal Circuit has held that the government bears the burden of showing that its position was substantially justified under the EAJA. *Libas*, 314 F.3d at 1365 (citing *Neal & Co. v. United States*, 121 F.3d 683, 686 (Fed. Cir. 1997)) ("[T]he imperative language of [28 U.S.C.] § 2412(d)(1)(A), 'a court shall award,' requires that the government bears the burden of proving its position was substantially justified."); *see Inner Secrets/Secretly Yours, Inc. v. United States*, 20 CIT 210, 213, 916 F. Supp. 1258, 1261–62 (1996) (*quoting Traveler Trading*, 13 CIT at 381, 713 F. Supp. at 411) ("In this matter, the 'government bears the burden of establishing that its position was substantially justified or that special circumstances should preclude an award under the EAJA.' "). In determining what constitutes substantial justification, the Supreme Court has defined the term to mean " 'justified in substance or in the

main'—that is, justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see Owen v. United States*, 861 F.2d 1273, 1274 (Fed. Cir. 1988) (quoting *Pierce*, 487 U.S. at 565); *Urbano v. United States*, 15 CIT 639, 641, 779 F. Supp. 1398, 1401 (1991), *aff'd*, 985 F.2d 585 (1992) (citing *Pierce*, 487 U.S. at 565; *Owen*, 861 F.2d at 1274); *see also Kerin v. United States Postal Service*, 218 F.3d 185, 189 (2nd Cir. 2000) (Katzmann, J.) (citing *Pierce*, 487 U.S. at 563, 566) ("With respect to the second prong of this test, the government's position was 'substantially justified' if it had 'a reasonable basis both in law and in fact.' 'To be "substantially justified" means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve.' " (citations omitted)). In addition, "'substantial justification' requires that the Government show that it was *clearly* reasonable in asserting its position, including its position at the agency level, in view of the law and the facts. The Government must show that it has not 'persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation.' " *Gavette*, 808 F.2d at 1467 (emphasis in original) (citing *Schuenemeyer v. United States*, 776 F.2d 329, 330–33 (Fed. Cir. 1985); quoting *Gava v. United States*, 699 F.2d 1367, 1375) (Fed. Cir. 1983) (Baldwin, J., dissenting)). Thus, the court now turns to whether the Government has met its burden.

1. *Customs's position at the administrative level was clearly reasonable*

APM first takes issue with the Government's position at the administrative level. APM argues that

> [d]uring the administrative proceeding below, Customs ignored critical evidence and gave selective and conclusory treatment to other evidence before it. As observed by this court in footnote 5 of its decision in the instant case, Customs failed to apply the relevant law in the administrative proceedings:
>
> > Here, Customs' determination [HQRL 962378] that the Merchandise is not classifiable under subheading 7010.90.50 is both selective and conclusory, and simply does not follow from the criteria set out in T.D. 96–7, *Carborundum*, and *Kraft** * * *
>
> In short, this was not a "clearly reasonable" analysis, it was a selective and conclusory analysis.

APM's Mem. at 14 (bracketed material in text; emphases removed) (citing *Automatic Plastic Molding*, 26 CIT at ___, Slip Op. 02–120 at 9 n.5); *see* T.D. 96–7; Tariff Classification of Imported Glassware, 61 Fed. Reg. 223 (Dep't Treasury Jan. 3. 1996) (change of practice); *Kraft, Inc. v. United States*, 16 CIT 483 (1992); *United States v.*

Carborundum Co., 536 F.2d 373 (C.C.P.A. 1976).[5] In support of its position, APM highlights several of the court's findings claiming that they demonstrate Customs "ignored important evidence regarding the lugs," "failed to account for other evidence as to the glass," and made "conclusory findings at the administrative level [that] lacked any explanation and were 'simply unconvincing.' " APM's Mem. at 14, 15. APM concludes that "[i]n short, Customs * * * followed the same pattern administratively as was observed in court. Its unsupported assertion was not only not a 'clearly reasonable' analysis, it was a conclusion supported by *no analysis*. As such, it was clearly unreasonable and arbitrary." *Id.* at 16 (emphasis in original).

In response, the Government argues that "based upon the evidence before it, Customs' position was 'clearly reasonable' and, therefore, substantially justified during its consideration of APM's protest." Def.'s Mem. at 6–7. In support, the Government contends that "[f]rom the outset in its decision, this Court recognized that not all of the evidence presented to the Court was raised before or considered by Customs." *Id.* at 7 (citing *Automatic Plastic Molding*, 26 CIT at ___, Slip Op. 02–120 at 3–4). The Government continues that

> [i]n addition to the testimony of APM's four witnesses, the Court had two samples of the imported jar and various other exhibits presented by APM from which the Court could ascertain the facts necessary to render its decision. On the other hand, Customs had only pictorial representations of the imported jar and limited factual information presented by APM with which it could ascertain the facts necessary to render its decision.

Id. (citing APM's Protest, HQRL 962378, April 8, 1999). The Government further states that

> [a]s clearly set forth in HQ 962378, in determining the proper classification of imported merchandise, Customs considered the terms of the competing headings, reviewed and applied the General Rules of Interpretation ("GRIs"), Additional U.S. Rules of Interpretation ("ARIs"), the Explanatory Notes to the competing provisions, lexicographic reference sources, prior judicial decisions, prior HQ rulings, and T.D. 96–7. Indeed, although additionally considering the Explanatory Notes to the competing provisions and prior HQ ruling letters, Customs considered the very same sources as the Court.

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[5] The court notes that footnote five deals with the application of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *See Automatic Plastic Molding*, 26 CIT at _____ n.5, Slip Op. 02–120 at 9 n.5 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354 (Fed. Cir. 2001)). The court found that HQRL 962378 was not sufficiently thorough to rate *Skidmore* deference. *Rocknell*, 267 F.3d 1357 (holding *Skidmore* deference is appropriate where Customs's classification decision revealed its thorough analysis).

Id. at 7–8 (footnote omitted). The Government concludes that

> [i]nasmuch as Customs' position in HQ 962378 was based upon limited information provided by APM, a correct construction and/or interpretation of the terms of the competing headings, the Explanatory Notes, the GRIs, ARIs, and judicial decisions, and the correct application of the law to the facts before it at that time, it follows that Customs' position regarding APM's protest was clearly reasonable.

Id. at 9.

The court finds that the Government has adequately sustained its burden that Customs's position at the administrative level was substantially justified. While APM notes that several of Customs's arguments at the administrative level were found by this court to be insufficient at trial, Customs nonetheless examined the evidence before it, applied what it considered to be the appropriate legal standard, and provided an analysis based on the facts and law as it understood them.[6] In addition, certain evidence that was before the court was not presented to Customs. For instance, the Government insists that "[n]o evidence that the jar was capable of being used in the hot packing process was submitted to Customs by APM." Def.'s Mem. at 7 (emphasis removed) (citing APM's Protest; HQRL 962378). Further, the Government maintains "[n]o evidence regarding the principal use of the jar was provided by APM to Customs for its use in determining the proper classification of the merchandise." *Id.* (emphasis removed). Thus, Customs reached its position at the administrative level with only pictorial representations of the subject merchandise and a limited factual record. As a result, Customs was in the position of applying the criteria found in T.D. 96–7, *Kraft*, and *Carborundum*,[7] without the benefit of the evidence the court

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[6] A review of the Headquarters Ruling Letter issued in response to protest number 2809–98–100508 shows that, contrary to APM's assertion that Customs's conclusion that the subject merchandise was properly classifiable under HTSUS subheading 7013 was supported by no analysis, Customs did, indeed, acknowledge the factors set out in T.D. 96–7, *Kraft*, and *Carbonundum* and applied those factors to the limited facts before it. *See* HQRL 962378. Customs stated:

> The article appears to be manufactured by automatic machines from ordinary glass. It is similar in shape to an urn. It has a wide opening, moderate length neck, and is configured to hold a rubber lined, wooden l*id*. Because of the unusual and attractive shape, an ultimate purchaser's primary expectation would be to reuse the article after the conveyed or packed goods are used (note also that the article is configured for a wooden lid which allows for repetitive, extremely easy, opening and closing). We note that although the protestant states that the container is sold from the importer to a customer who fills it with Italian cookies, packing cookies for sale in glassware is relatively rare; cookie jars are principally used as storage articles in the home. There is evidence that container is emphasized over the goods packed in it, i.e., molded glass handles and a unique, decorative shape, and the physical form of the article (see above) indicates that this is so. The cost of the cookie filled article ($16.00) supports the conclusion that the glass jar is the primary focus of the purchaser with the contents simply emphasizing a suggested use of the reusable jar. The criterion of commercial use to convey foodstuffs, etc., is addressed by the other criteria (see above and below). There is no evidence that the container is capable of being used in the hot packing process. The physical form of the articles (see above) indicates that rather than using the containers to pack and convey goods to a consumer who discards them after their initial use, the containers, and not their contents, are emphasized to customers. On the basis of these criteria, we conclude that these articles are not principally used for the conveyance or packing of goods.
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> *Id.*

[7] *See Automatic Plastic Molding*, 26 CIT at _____ , Slip Op. 02–120 at 9 n.5

would later have before it. Nothing has been presented to the court that would indicate that Customs's application of the law to these limited facts was not "justified to a degree that would satisfy a reasonable person." *Pierce*, 487 U.S. at 565. Indeed, an examination of the evidence that was before Customs shows that it was susceptible to different interpretations by reasonable people. As such, Customs was clearly reasonable in maintaining its position at the administrative level and that it did not "press[ ] a tenuous position without factual or legal foundation." *Gavette*, 808 F.2d at 1467. Using this standard, the court finds that the Government has satisfied its burden of proof that Customs's position at the administrative level was substantially justified.

2. *Customs's position at trial was clearly reasonable*

In addition to its arguments concerning Customs's actions at the administrative level, APM insists that the Government's litigation position was not substantially justified. APM claims that "the Government presented no evidence that seriously refuted *any* of the facts and supporting evidence made known to it by APM during the discovery process." APM's Mem. at 19 (emphasis in original). Furthermore, APM restates this court's finding that "[a]t trial, the Government made only a limited attempt to justify its classification of the Merchandise as 'Glassware of a kind used for table, kitchen * * * indoor decoration, or similar purposes' under subheading 7013.39.20. Rather, the Government focused its efforts on refuting Plaintiff's asserted classification." *Id.* at 18 (quoting *Automatic Plastic Molding*, 26 CIT at ___ , Slip Op. 02–120 at 11) (ellipsis in original).

The Government strongly contests APM's claim that its litigation position was not substantially justified and insists that its position at trial "was founded on a wide variety of legal and factual bases." Def.'s Mem. at 10. The Government maintains that its litigation position was "based upon a consideration of the class or kind of goods to which the imported articles belong, the physical characteristics of these goods, and the subsequent uses to which the imported jars could be put." *Id.* at 11 n.3.

With respect to the Government's litigation position, APM's claim fails under all of the cited authority. Despite APM having prevailed at trial, and its arguments to the contrary notwithstanding, the Government was clearly reasonable in asserting its position with respect to the criteria found in T.D. 96–7. A reading of the opinion reveals that the court was required to weigh the evidence and make determinations about which reasonable persons might disagree. APM correctly states that the court relied on the factors found in T.D. 96–7 for a portion of its opinion and that in analyzing these factors it found that five of the seven factors supported APM's classification. For its part, though, the Government marshaled evidence to support its position. First, the Government presented witness testimony at

trial. The Government's expert witness, Dr. Sher Paul Singh, a professor of packaging design and materials, testified that the subject merchandise "[did] not have the similarities of the of the types of jars that are used to commercially convey foodstuffs." Trial Tr. at 595:7–9. In addition, the National Import Specialist Associate and the Import Specialist of the Port of San Francisco testified that they examined jars similar to the subject merchandise that could be purchased from Pier 1, Target, JCPenney, Lechter's, and Cost Plus World Market and were sold empty as "storage jars." *See id.* at 483:15–490:4; *id.* at 517:12–527:20. While the court found Plaintiff's position to be more convincing based on the testimony of other witnesses, nothing presented by the Government in the way of testimony would lead to the conclusion that it was "pressing a tenuous factual or legal position, albeit one not wholly without foundation." *Gavette*, 808 F.2d at 1467. Indeed, the witnesses testified with respect to matters about which reasonable people might disagree. Second, at trial the Government submitted storage containers into evidence—Trial Exhibits P and G—and noted their similarity to the subject merchandise in an effort to persuade the court that the subject merchandise was properly classified under heading 7013 of the HTSUS. Although the court distinguished the subject merchandise from Trial Exhibits P and G based on their respective shapes and the quality of the glass used, *see Automatic Plastic Molding*, 26 CIT at __, Slip Op. 02–120 at 6–7, the Government nevertheless presented a clearly reasonable—if ultimately unconvincing—basis for Customs's position. The Government also presented some evidence that the subject merchandise: (1) did not come with a closure that would "provide the seal integrity level required in conveying jars for food packaging," Trial Tr. at 596:5–6; (2) was "significantly of a higher glass distribution and wall thickness than typical jars used for conveying goods in the same volume," *id.* at 595:21–24; (3) was fifteen to twenty percent heavier than jars commonly used for packaging, *id.* at 182:24–183:4; and (4) had handles which were "in a shape and in a region which consumers normally do not use to pick [up] these type of products," *id.* at 600:3–5. Although APM demonstrated to the court that the subject merchandise shared many of the characteristics of merchandise properly classified under heading 7010 of the HTSUS, there was nothing about the Government's evidence with respect to these matters that would suggest its position was not substantially justified, or that it was pressing a tenuous position. *Gavette*, 808 F.2d at 1467. In addition, the court made findings relating to the expectations of the ultimate purchaser based on secondary evidence rather than on direct evidence. *Automatic Plastic Molding*, 26 CIT at ___ , Slip Op. 02–120 at 13–14. Finally, the court's own observation of the merchandise weighed heavily it its decision. For instance, in reaching its decision the court was required to make findings with respect to what constituted a "large opening" and a "short

neck." *Id.*, 26 CIT at ___, Slip Op. 02–120 at 13. While APM did present credible evidence that successfully convinced the court that Customs erred in its classification, it cannot be said that the Government, on behalf of Customs, did not make out a substantial case or that its insistence on its position was not clearly reasonable.

CONCLUSION

As the Government's position in this action was clearly reasonable with respect both to the law and facts it relied on at both the administrative and trial levels, the court is persuaded that the Government was substantially justified in claiming that the subject merchandise was properly classified as "Glassware of a kind used for table, kitchen, * * * indoor decoration or similar purposes" under HTSUS subheading 7013.39.20. Therefore, APM's Application for attorney's fees and expenses is denied.

RICHARD K. EATON,
Judge.

(Slip Op. 03–95)

COMMITTEE FOR FAIRLY TRADED VENEZUELAN CEMENT, PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND CEMEX VENEZUELA, S.A.C.A. ("VENCEMOS"), DEFENDANT-INTERVENOR.

Court No. 00–12–00547

[Plaintiff's USCIT R. 56.2 motion for judgment upon the agency record is denied.]

(Decided: July 28, 2003)

King & Spalding LLP (*Joseph W. Dorn* and *Michael P. Mabile*), for Plaintiff.

Lyn M. Schlitt, General Counsel; *James M. Lyons*, Deputy General Counsel; (*Robin L. Turner*), Office of the General Counsel, United States International Trade Commission, for Defendant.

Manatt, Phelps & Phillips, LLP (*Irwin P. Altschuler*, *Jeffrey S. Neeley*, and *Susan M. Schmidt*), for Defendant-Intervenor.

OPINION

RIDGWAY, *Judge*: In this action, Plaintiff Committee For Fairly Traded Venezuelan Cement ("Venezuelan Cement") contests the five-year "sunset" review determination[1] of the United States Interna-

[1] In a "sunset" review involving a suspended antidumping or countervailing duty investigation, the administering authority and the Commission are required to determine whether termination of the investigation would likely lead to continuation or recurrence of dumping or a countervailable subsidy and of material injury. 19 U.S.C. § 1675(c)(1)(A) (2000).

tional Trade Commission ("Commission") that termination of the suspended antidumping and countervailing duty investigations of gray portland cement and cement clinker[2] from Venezuela would not likely lead to the continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time.[3]

For the reasons set forth below, Plaintiff's motion for judgment upon the agency record is denied.

I. *BACKGROUND*

On May 21, 1991, Venezuelan Cement filed a petition with the Commission and the International Trade Administration of the Department of Commerce ("Commerce"), alleging that an industry in the United States was materially injured or threatened with material injury by reason of gray portland cement and cement clinker imported from Venezuela at less than fair value. Complaint ¶7. After conducting preliminary investigations, the Commission determined that there was a reasonable indication that an industry in the United States was being materially injured by reason of imports from Venezuela. *See Gray Portland Cement and Cement Clinker from Venezuela*, 56 Fed. Reg. 32,589 (July 17, 1991) (import investigation); *Gray Portland Cement and Cement Clinker from Venezuela*, USITC Pub. 2400, Inv. Nos. 303–TA–21 and 731–TA–519 (July 1991) (prelim. determinations and investigation information). *See also* Complaint ¶7.

Commerce issued affirmative preliminary determinations in its antidumping and countervailing duty investigations of cement from Venezuela. *See Gray Portland Cement and Clinker from Venezuela*, 56 Fed. Reg. 56,390 (Dep't Commerce Nov. 4, 1991) (notice of preliminary determinations of sales at less than fair value) (finding dumping margins for certain Venezuelan exporters: 50.02% for Cementos Caribe ("Caribe"), 49.20% for Venezolana de Cementos

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Unless otherwise indicated, all statutory provisions are made in reference to the 2000 version of the United States Code, the relevant provisions of which were in place (or substantively identical to provisions in place) during the relevant time period.

[2] Gray portland cement is currently classifiable under subheading 2523.29 of the Harmonized Tariff Schedule of the United States ("HTSUS"), and cement clinker is classifiable under subheading 2523.10, HTSUS. Gray portland cement has also been entered under subheading 2523.90, HTSUS as "other hydraulic cements." Cement consists of a gray powder that is the binding agent in concrete. Cement clinker is manufactured by heating a ground mix of materials such as limestone, clay, and iron ore at a high temperature in a kiln. Cement is composed of ground clinker and small amounts of other materials, such as gypsum. Cement is then mixed with water, sand, and other aggregates to make concrete. *See* Plaintiff's Brief in Support of Motion For Judgment on the Agency Record ("Pl.'s Brief") at 6 n.2.

[3] The contested determination in this action reviewed: (1) a suspended countervailing duty investigation of gray portland cement and cement clinker from Venezuela; (2) a suspended antidumping investigation of gray portland cement and cement clinkder from Venezuela; (3) an antidumping order on gray portland cement and cement clinker from Mexico; and (4) an antidumping order on gray portland cement and cement clinker from Japan. Only the Commission's negative determination with respect to the suspended countervailing duty and antidumping investigations of gray portland cement and cement clinker from Venezuela is at issue in this action. Complaint ¶1. *See Gray Portland Cement and Cement Clinker From Japan, Mexico, and Venezuela*, 65 Fed. Reg. 65,327 (Nov. 1, 2000).

("Vencemos"),[4] and 49.26% for "all others"); *Gray Portland Cement and Clinker from Venezuela*, 56 Fed. Reg. 41,522 (Dep't Commerce Aug. 21, 1991) (preliminary affirmative countervailing duty determination) (finding countervailable subsidies benefitting Caribe and Vencemos). *See also* Complaint ¶7.

Based on suspension agreements with Venezuela, Commerce suspended the antidumping and countervailing duty investigations of gray portland cement and cement clinker from Venezuela. *See Gray Portland Cement and Clinker from Venezuela*, 57 Fed. Reg. 6706 (Dep't Commerce Feb. 27, 1992) (suspension of antidumping investigation); *Gray Portland Cement and Clinker from Venezuela*, 57 Fed. Reg. 9242 (Dep't Commerce Mar. 17, 1992) (suspension of countervailing duty investigation). *See also* Complaint ¶9.[5]

Effective January 1, 1995, the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103–465, 108 Stat. 4809 § 220 (1994), added a requirement in section 751(c) of the Act, which obligates the Commission and Commerce to conduct five-year "sunset" reviews of countervailing duty orders, antidumping orders, and notices suspending investigations. *See* 19 U.S.C. § 1675(c)(1)(A) (2000).[6] The present action involves the Commission's determination whether termination of the notices suspending the antidumping and countervailing duty investigations "would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy * * * and of material injury." 19 U.S.C. § 1675(c)(1)(A) (2000). As stated by the Statement of Administrative Action to the Uruguay Round Agreements Act of 1994 ("SAA"),[7] a document expressly approved by Congress in relation to the URAA, "[t]he recurrence of material injury standard is prospective in nature." SAA, H.R. Doc. No. 103–316 at 884 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4209. *See also* Pl.'s Brief at 10.

On August 2, 1999, pursuant to 19 U.S.C. § 1675(c)(1)(A), Commerce and the Commission published their respective notices initiating and instituting its "sunset" review of the suspended antidumping and countervailing duty investigations of subject imports from Venezuela. *Gray Portland Cement and Clinker from Japan, Mexico, and Venezuela*, 64 Fed. Reg. 41,915 (Dep't Commerce Aug. 2, 1999) (initiation of five-year reviews); *Gray Portland Cement and Clinker from Japan, Mexico, and Venezuela*, 64 Fed. Reg. 41,958 (Aug. 2, 1999)

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[4] Vencemos, now renamed CEMEX Venezuela, S.A.C.A., is the defendant-intervenor in the present action. *See* Transcript of Oral Argument ("Tr.") at 108 (counsel for Defendant-Intervenor stating that "Vencemos is still understood to be an operative name").

[5] Although the Commission initiated final injury investigations, the investigations were never completed. *See Gray Portland Cement and Clinker from Venezuela*, 56 Fed. Reg. 63,523 (Dec. 4, 1991).

[6] The new requirement applies to "transition orders," i.e., orders and suspended investigations that were in effect on the effective date of the URAA. 19 U.S.C. § 1675(c)(6)(C)(iii) (2000).

[7] The SAA "represents an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." SAA at 656. The SAA notes the Administration's understanding that "it is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*

(institution of five-year reviews). See Complaint ¶11.[8] The Commission published notice of its schedule of reviews and of a public hearing to be held on August 15, 2000 in connection with the reviews. *Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela,* 65 Fed. Reg. 17,901 (Apr. 5, 2000).[9] After conducting a regional industry analysis pursuant to 19 U.S.C. § 1677(4)(C), the Commission published notice of its final negative determination that "termination of the suspended investigations on gray portland cement and cement clinker from Venezuela would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." *Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela,* 65 Fed. Reg. 65,327 (Nov. 1, 2000). *See also Commission Views. See generally* Complaint ¶13.

In a regional industry analysis, the Commission may find "material injury, the threat of material injury, or material retardation of the establishment of an industry * * * even if the domestic industry as a whole * * * is not injured." 19 U.S.C. § 1677(4)(C) (2000). The Commission must satisfy three prerequisites[10] before reaching an affirmative determination in a regional industry analysis. *Texas Crushed Stone Co. v. United States,* 17 CIT 428, 432, 822 F. Supp. 773, 777 (1993) ("*Texas Crushed Stone I*"), *aff'd,* 35 F.3d 1535 (Fed. Cir. 1994) ("*Texas Crushed Stone II*").[11]

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[8] On November 17, 1999, the Commission gave notice that it would conduct full "sunset" reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 "of antidumping duty orders on gray portland cement and cement clinker from Japan and Mexico and * * * the suspension agreement on gray portland cement and cement clinker from Venezuela." *Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela,* 64 Fed. Reg. 62,689 (Nov. 17, 1999). *See* 19 U.S.C. § 1675(c)(5) (2000).

[9] Before the public hearing, Commerce found that termination of the suspended antidumping investigation would likely lead to continuation or recurrence of dumping. *See Gray Portland Cement and Clinker from Venezuela,* 65 Fed. Reg. 41,050 (Dep't Commerce July 3, 2000) (final results of sunset review of suspended antidumping investigation). *See also* Complaint ¶12. Commerce also found that termination of the countervailing duty investigation on imports from Venezuela would likely lead to continuation or recurrence of a countervailable subsidy on imports from Venezuela. *See Gray Portland Cement and Clinker from Venezuela,* 65 Fed. Reg. 11,554 (Dep't Commerce Mar. 3, 2000) (final results of sunset review of suspended countervailing duty investigation). *See also* Complaint ¶12. *See generally* C.D. 193, *Gray Portland Cement and Cement Clinker from Japan, Mexico, and Venezuela,* USITC Pub. 3361, Inv. No. 303–TA–21 and 731–TA–451, 461, and 519 (Oct. 2000) ("*Commission Views*") (final views of the Commission).

Because the administrative record in this action includes confidential information, two versions of that record were prepared. Citations to the public documents are noted as "P.D.," while citations to the confidential version are noted as "C.D."

[10] Namely,

> [t]he Commission must determine that there is: (1) a regional market satisfying the requirements of the statute, (2) a concentration of dumped imports into the regional market, and (3) material injury or threat thereof to producers of all or almost all of the regional production, or material retardation to the establishment of an industry due to the subsidized or dumped imports.
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> *Texas Crushed Stone I,* 17 CIT at 432, 822 F. Supp. at 777.

[11] Due to the "prospective" nature of a "sunset" review, the Commission is not obligated to determine whether subject import levels actually satisfy the import concentration standard during the period of review. The Commission need only determine the likelihood that subject import levels will meet the concentration standard within the reasonably foreseeable future if the suspended investigations are terminated. SAA at 888 ("Neither the Commission nor interested parties will be required to demonstrate that the regional industry criteria currently are satisfied."); *Commission Views* at 27 (same); Pl.'s Brief at 17 (same); Memorandum of Defendant U.S. International Trade Commission in Opposition to Plaintiff's Motion For Judgment on the Agency Record ("Def.'s Response Brief") at 41 (same). *See* 19 U.S.C. § 1675(c)(1)(A) (2000). *See also* 19 U.S.C. § 1675a(a)(8)(2000) ("In determining if a regional industry analysis is appropriate for the determination in review, the Commission shall consider whether the criteria established in section 1677(4)(C) of this title are *likely to be satisfied* if * * * the suspended investigation is terminated.") (emphasis added).

With respect to the first prerequisite, i.e., a regional industry satisfying the requirements of section 1677(4)(C), the Commission determined that "the record again supports finding three separate regional industries, which correspond, or are similar, to those defined in the original investigations." *Commission Views* at 17. *See generally* 19 U.S.C. § 1677(4)(C) (2000). As a result, the Commission found that "a regional industry exists for the State of Florida region." *Id*. at 23. *See also Commission Views* at 15–18, 22–23 (discussing and applying the requirements of section 1677(4)(C) for a regional industry).[12]

However, the Commission majority found that the record did not satisfy the second prerequisite, i.e., a concentration of dumped imports into the regional market. *See* 19 U.S.C. § 1677(4)(C) (2000) (requiring, *inter alia*, "a concentration of dumped imports or imports of merchandise benefiting from a countervailable subsidy into * * * an isolated market"). Instead, it found that "subject imports from Venezuela into the Florida region are not likely to account for a substantial proportion of total U.S. imports of cement from Venezuela in the reasonably foreseeable future if the suspended investigations are terminated." *Commission Views* at 30. *See also* Complaint ¶20. *See generally Commission Views* at 26–30.[13]

The Commission then concluded in its prospective analysis that "termination of the suspended * * * investigations would not be likely to lead continuation or recurrence of material injury to an industry in the United States, pursuant to [19 U.S.C. § 1675(d)(2)]" and ordered the termination of the suspended investigations on subject imports from Venezuela. *Gray Portland Cement and Cement Clinker from Venezuela*, 65 Fed. Reg. 68,974 (Dep't Commerce Nov. 15, 2000) (final determination). *See Commission Views* at 27–30; Complaint ¶14. *See generally* 19 U.S.C. § 1675(d)(2) (2000) (addressing termination of suspended investigations); SAA at 891–92 (same).

While Commissioner Miller determined that there was sufficient evidence to satisfy the import concentration criteria,[14] she declined

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[12] "In determining if a regional industry analysis is appropriate for the determination in the review, the Commission shall consider whether the criteria established in [19 U.S.C. § 1677(4)(C)] are likely to be satisfied if * * * the suspended investigation is terminated." 19 U.S.C. § 1675a(a)(8) (2000). *See* SAA at 887 ("[T]he Commission is not bound by any determination it may have made in the original investigation regarding the existence of a regional industry"), 888 ("Given the predictive nature of a likelihood of injury analysis, the Commission's analysis in regional industry investigations will be subject to no greater degree of certainty than in a review involving a national industry.").

[13] Because the Commission majority did not find the requisite concentration of imports in the regional market, it could not proceed to an analysis of the third prerequisite under section 1677(4)(C), i.e., material injury or threat of material injury to production within the regional market, or material retardation to the establishment of an industry due to dumped or subsidized imports. 19 U.S.C. § 1677(4)(C) (2000). As a result, the Commission never conducted an "analysis of likely continuation or recurrence of material injury." *Commission Views* at 30. *See Texas Crushed Stone I*, 17 CIT at 432, 822 F. Supp. at 777 ("The Commission will move on to the next step only if each preceding step is satisfied."). *See also* Def.'s Response Brief at 21 n.44 (noting that "Plaintiff does not challenge the Commission's determination not to proceed to the third step").

[14] In particular, Commissioner Miller notes that "[w]hile the proportion of total U.S. imports of Venezuelan cement entering Florida has declined, Florida continues to be the primary U.S. market for Venezuelan cement as its U.S. shipments outside Florida are widely dispersed across a number of States, particularly along the east coast." *Separate Views* at 77.

to cumulate the likely volume and effect of imports from Venezuela and Mexico into Florida if the suspended agreements were terminated. C.D. 193, *Separate Views of Commissioner Marcia E. Miller* (Oct. 27, 2000) ("*Separate Views*") at 78–79. *See* Complaint ¶¶27–28.

In its USCIT R. 56.2 motion for judgment upon the agency record, Venezuelan Cement contests the Commission's final negative determination. Specifically, Venezuelan Cement challenges: 1). the Commission majority's finding that subject imports in the Florida region are not likely to satisfy the concentration standard if the suspended antidumping and countervailing duty investigations are terminated; 2). the Commission's finding that subject imports in the Florida region are unlikely to increase in the reasonable future if the suspended investigations are terminated; and 3). Commissioner Miller's decision not to cumulate subject imports from Venezuela and Mexico. Complaint ¶¶21, 24, 28–29.

II. *JURISDICTION*

This action is brought pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and 28 U.S.C. § 1581(c).

As a preliminary matter, the Government raises an issue of exhaustion. The Government claims that Venezuelan Cement is barred from arguing that "Congress changed, and in effect lowered, the standard for the import concentration criterion primarily considered by the Commission in past practice" for the first time on appeal. Def.'s Response Brief at 3, 31. *See also* Tr. at 33, 38, 46–47.

Specifically, the Government objects to Venezuelan Cement's argument that "[t]he standard is now stated to be whether regional imports account for a 'substantial proportion' of national imports * * * plainly indicat[ing] that import concentration can be found where far less than 50 percent of imports enter the region." Pl.'s Brief at 33. *See also id.* ("This new standard supersedes the Commission's prior practice."). According to the Government, Venezuelan Cement did not raise this argument at the agency level, there by failing to exhaust its administrative remedies. *See* Def.'s Response Brief at 3, 31–38. *See generally* Plaintiff's Reply Brief in Support of Motion For Judgment on the Agency Record ("Pl.'s Reply Brief") at 22–29 (contesting Government's claim); Tr. at 90–93 (same).

Generally, courts have recognized that "a litigant may not raise an issue for the first time on appeal." *See, e.g., Cemex S.A. v. United States*, 16 CIT 251, 258, 790 F. Supp. 290, 296 (1992) (subseq. history omitted); *Wieland Werke, A.G. v. United States*, 13 CIT 561, 567, 718 F. Supp. 50, 55 (1989). Indeed, "[t]he doctrine of exhaustion of administrative remedies generally requires that a party present a claim at the agency level prior to raising it before the court." *Usinor Industeel v. United States*, No. 01–00006, 2002 Ct. Intl. Trade LEXIS 151, at *17 n. 12 (Dec. 20, 2002) (*citing Pacific Giant, Inc. v. United*

States, 26 CIT ____ , 223 F. Supp. 2d 1336 (2002); *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998)).

However, it is within the Court's discretion to require the exhaustion of administrative remedies "where appropriate." *See* 28 U.S.C. § 2637(d) (2000). *See, e.g., Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991) (listing "examples of cases where the Court has not required exhaustion of administrative remedies").

In the present case, it appears that Venezuelan Cement formulated its "substantial proportion" argument at the agency level based on Congress's own language regarding the standard for import concentration. SAA at 860. *See* Pl.'s Reply Brief at 22–29. Indeed, Venezuelan Cement interpreted the standard for import concentration as requiring "(1) the import penetration in the region [that] is 'clearly higher' than the import penetration outside the region and (2) subject imports in the region [that] are a 'substantial proportion' of total subject imports into the United States." Pl.'s Reply Brief, Exh. B (C.D. 127, *Prehearing Brief on Behalf of the Domestic Industry*, Inv. Nos. 303–TA–21 (Review) and 731–TA–451, 461, and 519 (Review)) at 29 (*quoting* SAA at 860). *See also* Pl.'s Reply Brief at 23–24.

Even the Government acknowledges that Venezuelan Cement contended at the agency level that "Florida imports accounted for a substantial share of national imports—averaging 54 percent of national imports during 1997–1999" and that the import concentration standard was satisfied. Def.'s Response Brief at 32–33 (*quoting* C.D. 127, *Prehearing Brief* at 32). *See* Pl.'s Reply Brief at 24–25. *See also* P.D. 170, *Posthearing Brief on Behalf of the Domestic Industry*, Inv. Nos. 303–TA–21 (Review) and 731–TA–451, 461, and 519 (Review) at 23 (arguing that "Florida * * * accounted for a 'substantial proportion of total subject imports entering the United States'—54 percent") (citations omitted).

However, the Government claims that Venezuelan Cement "never argued, as it does now, that the criterion had been substantially revised." Def.'s Response Brief at 32 (*citing* P.D. 154, *Hearing Transcript* at 110–11). But in its pre-hearing brief to the Commission, Venezuelan Cement did present its claim that Congress *had since clarified* the standard for finding a concentration of subject imports in the regional industry. C.D. 127, *Prehearing Brief* at 28–29 (*citing* SAA at 860; H. Rep. 103–826, Pt. 1, at 66 (1994); S. Rep. 103–412 at 53–54 (1994)) (emphasis added). Even so,

> [w]hile a plaintiff cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument, [the] plaintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it.

Timken Co. v. United States, 25 CIT ___ , ___ , 166 F. Supp. 2d 608, 628 (2001). *See generally Hormel v. Helvering*, 312 U.S. 552, 557 (1941); *Fabrique de Fer de Charleroi S.A. v. United States*, 25 CIT ___ , ___ , 155 F. Supp.2d 801, 806 (2001); *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 134–35, 583 F. Supp. 607, 609–10 (1984) (subseq. history omitted).

In any event, the Government has suffered no prejudice as a result of Venezuelan Cement's alleged failure to make the specific assertion that Congress had revised its import concentration criterion. *See, e.g., Saarstahl A.G. v. United States*, 20 CIT 1413, 1420–21, 949 F. Supp. 863, 868–69 (noting the "exception to the exhaustion requirement set forth in *Timken* and *Rhone Poulenc*—that exhaustion of administrative remedies is not required when plaintiff raises a new argument purely legal in nature which requires no further agency involvement") (*citing Timken Co. v. United States*, 15 CIT 658, 659–60, 779 F. Supp. 1402, 1404–05 (1991); *Rhone Poulenc, S.A.*, 7 CIT at 137–38, 583 F. Supp. at 611–12), *aff'd*, 177 F.3d 1314 (Fed. Cir. 1999)).[15]

The agency's interpretation of the import concentration standard under section 1677(4)(C) is clearly at the heart of the dispute presented here. *See, e.g.*, Complaint ¶¶17–18, 21–22, 24–25. The Government expresses its concern that Venezuelan Cement's argument "would have this Court rewrite both Commission practice and legislative history to serve [its] interests." Def.'s Response Brief at 33. But Venezuelan Cement's claim that the "new standard supersedes the Commission's prior practice" is part and parcel of its interpretation of the import concentration standard, as expressed in the SAA and legislative history of section 1677(4)(C). Pl.'s Brief at 33. *See also* Def.'s Response Brief at 33. If Venezuelan Cement's overarching arguments with respect to the import concentration standard fail, its claim that Congress "revised" the standard necessarily fails as well. *See, e.g., Rhone Poulenc, S.A.*, 7 CIT at 136, 583 F. Supp. at 610–11 ("It appears to the court that had plaintiffs raised the alternative argument different results would not have materialized in the administrative proceedings. There is no reason to believe that [this alternative argument] would have served any useful function in this case.").

Accordingly, exhaustion of administrative remedies is neither necessary nor appropriate here.

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[15] Instead, Venezuelan Cement alerted the Commission to its view that import concentration exists in a regional industry under section 1677(4)(C) if there is a "substantial proportion" of subject imports in a regional industry. SAA at 860. While Venezuelan Cement may not have specifically expressed its argument as a "revision" of the import concentration standard, it is clear that its interpretation is based on the SAA and legislative history treatment of the import concentration standard. *See generally* Pl.'s Reply Brief at 22–29.

III. *STANDARD OF REVIEW*

An agency determination may be overturned if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). "[S]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Even if two inconsistent conclusions may be drawn from the evidence, the agency interpretation may be supported by substantial evidence. *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966).

Furthermore, "[t]he Commission's decision does not depend on the 'weight' of the evidence, but rather on the expert judgment of the Commission based on the evidence of record." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). Therefore, "[t]he court cannot substitute its judgment for that of the agency, nor may it reweigh the evidence." *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1054 (1995). Instead, the Commission's determination will be sustained when it is reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence." *Mitsubishi Materials Corp. v. United States*, 17 CIT 301, 304, 820 F. Supp. 608, 613 (1993) (subseq. history omitted) (*citing Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556 (Fed. Cir. 1984)). Finally, "if the statute is silent or ambiguous with respect to [a] specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (citation omitted). *See also, e.g., Suramerica de Aleaciones, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992) (stating that courts have a duty to "respect legitimate policy choices made by the agency in interpreting and applying the statute").

IV. *ANALYSIS*

As noted above, in conducting a "sunset" review, the Commission must determine whether the termination of the suspended antidumping and countervailing duty investigations would be likely to: 1). "lead to continuation or recurrence of dumping or a countervailable subsidy"; and 2). material injury.[16] For the purposes of a "sunset" review, the Commission may make a finding of material injury if

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[16] The relevant statute provides:

> 5 years after the date of publication of—
> (A) * * * a notice of suspension of an investigation [pursuant to 19 U.S.C. § 1675(a)(1)],
> the administering authority and the Commission shall conduct a review to determine, in accordance with [19 U.S.C. § 1675a], whether * * * termination of the investigation suspended under [19 U.S.C. § 1671c or

it concludes from a regional industry analysis that subject imports from Venezuela are sufficiently concentrated in a regional industry, thereby resulting in material injury (or the threat thereof) in that regional market. 19 U.S.C. § 1677(4)(C) (2000).

A. Commission's Regional Industry Analysis

The regional industry statute was added to the antidumping and countervailing duty statute as part of the Trade Agreements of 1979 ("1979 Act"), Pub. L. No. 96–39, Title I, § 771(4)(C), 93 Stat. 144, 177. *See* H.R. Rep. No. 96–317, at 73 (1979); S. Rep. No. 96–249, at 61, *reprinted in* 1979 U.S.C.C.A.N. 381, 468–89. *See generally* 19 U.S.C. § 1677(4)(C) (2000).[17] Once the Commission finds a regional market satisfying the requirements of section 1677(4)(C),

> material injury, the threat of material injury, or material retardation of the establishment of an industry may be found to exist with respect to an industry even if the domestic industry as a whole, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of that product, is not injured, if there is a concentration of dumped imports or imports of merchandise benefiting from a countervailable subsidy into such an isolated market* * * *

19 U.S.C. § 1677(4)(C) (2000). By allowing the Commission to make a material injury finding in a regional industry, given certain circumstances, section 1677(4)(C) is "designed to relieve a domestic industry's burden of demonstrating injury on a nationwide basis." *Gifford-Hill Cement Co. v. United States*, 9 CIT 357, 363, 615 F. Supp. 577, 582 (1985) (citations omitted). *See also* Tr. at 72 (counsel for Vencemos noting that the requirement of a concentration of imports "is quite reasonable, since imports nationwide will be affected by a finding of injury to a small portion of the country").

The plain language of the statute does not define "a concentration of dumped or subsidized imports" under section 1677(4)(C). In the absence of the "unambiguously expressed intent of Congress," the Commission's reasonable statutory interpretation is entitled to deference. *Chevron*, 467 U.S. at 843. *See, e.g., United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) ("Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about

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§ 1673c] would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

19 U.S.C. § 1675(c)(1)(A) (2000).

[17] Prior to the Trade Agreements of 1979, the Commission considered regional markets in certain determinations. Def.'s Reply Brief at 18 (*citing Portland Hydraulic Cement from Canada*, Inv. No. AA1921–184, USITC Pub. 918 at 4–5, 13–14, 17–18 (Sept. 1978); S. Rep. No. 93–1298, at 180–81 (1974)). *See also* Pl.'s Brief at 23 n. 11 (*citing Portland Cement from Sweden*, Inv. No. AA1921–16, TC Pub. 10 (1961); *Portland Cement from Belgium*, Inv. No. AA1921–19, TC Pub. 22 (1961); *Portland Gray Cement from Portugal*, Inv. No. AA1921–22, TC Pub. 37 (1961); *Portland Cement from the Dominican Republic*, Inv. No. AA1921–25, TC Pub. 87 (1961)).

which 'Congress did not actually have an intent' as to a particular result. [In such cases], a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen regulation seems unwise, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable.") (*quoting Chevron*, 467 U.S. at 845–846). *See generally* Def.'s Response Brief at 21–22.

In considering the reasonableness of the Commission's statutory interpretation, a court may employ all "traditional tools of statutory construction," including "the statute's structure, canons of statutory construction, and legislative history." *Chevron*, 467 U.S. at 842; *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998). *See also* Def.'s Response Brief at 22; Pl.'s Reply Brief at 2–3.

1. Import Concentration Standard under the URAA

Generally, Venezuelan Cement contests the Commission's application of the import concentration standard in its regional industry analysis under the URAA.[18]

The enactment of the URAA did not change the regional industry statute itself, but the SAA and the legislative history of the URAA established a new two-part import concentration standard. *See* SAA at 860; S. Rep. No. 103–412, at 53 (1994); H.R. Rep. No. 103–826(I), at 66 (1994). *See also* Pl.'s Brief at 32–33; Def.'s Response Brief at 29–30; Defendant-Intervenor Brief in Opposition to Plaintiff's Motion for Judgment on the Agency Record ("Def.-Intervenor's Brief") at 19–20. The first part of the standard ("clearly higher" criterion) requires the Commission to determine whether "the ratio of the subject imports to consumption is clearly higher in the regional market than in the rest of the U.S. market." SAA at 860. *See also* S. Rep. No. 103–412, at 53 (1994); H.R. Rep. No. 103–826(I), at 66 (1994).[19] The Commission concluded that the "clearly higher" criterion was satisfied, noting that "[d]uring the period of review, import penetration

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[18] The Commission's reviewing courts have addressed the import concentration standard under the 1979 Act in *Texas Crushed Stone I*, 17 CIT 428, 822 F. Supp. 773, and *Texas Crushed Stone II*, 35 F.3d 1535. However, it appears that the import concentration standard under the URAA (much less, in a "sunset" review) is an issue of first impression. *See, e.g.*, Tr. at 5 (counsel for Venezuelan Cement noting that ("This is a case of first impression, because the Court has never previously considered the current import concentration test, or considered import concentration in the context of a Sunset Review."), 97 (same); *id.* at 49–50 (counsel for the Commission noting that at the agency level, "[t]here are three * * * regional industry cases that have occurred under the [URAA], and in each of them, the Commission has followed this same practice [of applying its "percent of imports" test] that it has followed before, with the exception that it now applies two tests * * * to every case.").

[19] In the Trade Agreements Act of 1979, the "clearly higher" standard was the sole criterion needed to find the requisite concentration of imports in a regional industry analysis. *See, e.g.*, S. Rep. No. 96–249, at 83 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 469 ("The requisite concentration will be found to exist in at least those cases where the ratio of the subsidized, or lessthan- fair value, imports to consumption of the imports and domestically produced like imports to consumption of the imports and domestically produced like imports is clearly higher in the relevant regional market than in the rest of the U.S. market.").

There is no indication that the "clearly higher" criterion enacted under the URAA differs from its incarnation in the 1979 Act. *Compare, e.g.*, S. Rep. No. 96–249, at 61, *reprinted in* 1979 U.S.C.C.A.N. 381, 468–89 (finding requisite concentration where the ratio of imports in a regional industry is clearly higher than imports in the rest of the U.S. market) *with* SAA at 860 (same). *See* Pl.'s Brief at 33 (stating that the "clearly higher" test in the URAA "is the same as the test announced in the Statements of Administrative Action and legislative history of the 1979 Act"); Pl.'s Reply Brief at 4 (same).

was higher within the Florida region than outside the region." *Commission Views* at 26. *See also id.* at 26 n.87, 30.[20] The Commission's affirmative finding with respect to the "clearly higher" criterion is not challenged here. *See, e.g.*, Def.'s Response Brief at 20–21; Tr. at 7.

The SAA and the legislative history of the URAA established the second part of the import concentration standard in a regional industry analysis, i.e., that the subject imports in the regional industry "account for a substantial proportion of total subject imports entering the United States" ("substantial proportion" criterion). SAA at 860. *See also* S. Rep. No. 103–412 (1994); H.R. Rep. No. 103–826(I) (1994). Venezuelan Cement challenges the Commission's determination that the "substantial proportion" criterion was not satisfied by the record. *See, e.g.*, Pl.'s Brief at 23–55; Pl.'s Reply Brief at 3–45.

2. Commission's "Percent of Imports" Test

Prior to the adoption of the "substantial proportion" criterion, the Federal Circuit upheld the Commission's use of the "percent of imports" test[21] as a reasonable interpretation of the regional industry statute. *Texas Crushed Stone II*, 35 F.3d at 1541–42.[22] The Federal Circuit found that because "Congress has not 'unambiguously' expressed an intent on the question of what test is to be used in determining whether there has been a concentration of dumped imports in a particular region," the Commission could use its "percent of imports" test unless that interpretation was found to be unreasonable. *Id.* at 1541.[23] The court then determined that the Commission "acted

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[20] The Commission found that

> [t]he ratio of subject imports from Venezuela to consumption within the Florida region was 12.0 percent in 1997 and 10.0 percent in 1998 and 1999. In contrast, the ratio of subject imports from Venezuela to consumption outside the Florida region was less than 0.5 percent in 1997 and 1.0 percent in 1998 and 1999.

Commission Views at 26 n.87 (citation omitted).

[21] In its "percent of imports" test, the Commission "considers the percentage of all subject imports that are imported into the region; if the region accounts for a sufficiently large percentage of all the subject imports in light of the facts of the case, the Commission will find that the imports are concentrated." *Texas Crushed Stone I*, 17 CIT at 433, 822 F. Supp. at 777. *See also* Def.'s Response Brief at 23–4 (same).

Venezuelan Cement characterizes the Commission's "percent of imports" test as requiring "the imports into the region to constitute at least 80 percent of total national imports." Pl.'s Reply Brief at 5 (*citing* Pl.'s Brief at 26–27; Def.'s Response Brief at 23–24). But it appears that while "the Commission historically has found sufficient concentration where the percentage of imports in the region is 80 percent or higher of total imports subject to investigation," the Commission has found sufficient concentration with levels falling between 61.2 and 73.7 percent. Def.'s Response Brief at 24, 24 n.53 (citations omitted). *See also id.* at 25 (noting that the Commission has also found sufficient concentration at a level as low as 43 percent).

[22] In *Texas Crushed Stone*, the Commission issued a determination based on a finding that there was no import concentration where imports in the region were less than 60 percent of the total U.S. imports over the period of investigation. *Texas Crushed Stone II*, 35 F.3d at 1540–41.

[23] The Federal Circuit reasoned that because the statute itself offered no guidance, and the legislative history used both mandatory and permissive language with respect to the "clearly higher" criterion, the Commission was not obligated to apply the criterion to find import concentration in a regional industry analysis. *Texas Crushed Stone II*, 35 F.3d at 1541. *Compare* S. Rep. No. 96–259, at 83, *reprinted in* 1979 U.S.C.C.A.N. 381, 469 ("The requisite concentration *will be* found to exist in at least those cases where the ratio of the subsidized, or less-than-fair-value, imports to consumption of the imports and domestically produced like product is clearly higher in the relevant regional market than in the rest of the U.S. market.") (emphasis added) *with* H.R. Rep. No. 96–317, at 73 (1979) (stating that "concentration *could be* found to exist if the ratio of such imports to consumption is clearly higher in the regional market than in the rest of the U.S. market") (emphasis added) *and* Statement of Administrative Action, H.R. Doc. No. 153, Part II, 96th Cong., 1st Sess. 388, 432 (1979) ("Concentration of subsidized or dumped imports *could be* found to exist if there is a clearly higher ratio of such imports to consumption in such market than the ratio of such imports to consumption in the remainder of the United States market.") (emphasis

reasonably and did not abuse its discretion in applying the percent of imports test [that] case." *Id.* at 1542.

Venezuelan Cement states that when the Commission's use of the "percent of imports" test was found reasonable and not inconsistent with its prior practice, the Federal Circuit created "law prior to the URAA * * * that the Commission was not required to use the 'clearly higher' standard of import concentration, even though it was the only standard announced in the Statements of Administrative Action and legislative history of the 1979 Act." Pl.'s Brief at 31. *See also* Pl.'s Reply Brief at 7–8 (stating that "by 1994[,] the Commission no longer used the "clearly higher" test for import concentration").[24]

However, contrary to Venezuelan Cement's view, the Commission's reviewing courts have acknowledged the Commission's discretion to apply either its "percent of imports" test or the "clearly higher" criterion, "or both as seems appropriate to it based on the circumstances of each particular case." *Texas Crushed Stone I*, 17 CIT at 435–36, 822 F. Supp. at 779 (*citing Mitsubishi Materials Corp.*, 17 CIT at 306–07, 820 F. Supp. at 615–16). *See also Texas Crushed Stone II*, 35 F.3d at 1541, 1542 (holding that the Commission's use of its "percent of imports" test is reasonable and not an abuse of discretion); Def.'s Response Brief at 22 (noting that it is within the Commission's discretion to determine "what constitutes sufficient concentration for the statutory requirement to be satisfied," and that "Congress did not change Commission practice regarding [its "percent of imports" test] in 1994, but rather affirmed the Commission's analysis in *Mitsubishi Materials* and left to the Commission the discretion to determine what constitutes a substantial percentage of imports on a case-by-case basis") (*citing* SAA at 860). *See generally* Def.'s Response Brief at 28 (explaining that the Commission historically gave secondary consideration to the "clearly higher" test under certain circumstances prior to the enactment of the URAA).[25]

Next, Venezuelan Cement claims that the import concentration standard in a regional industry analysis was substantially revised by the SAA and the legislative history that accompanied the URAA.

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added). *See also* Pl.'s Brief at 30. Therefore, based on the evidence of Congressional intent, the "clearly higher" criterion was envisioned by Congress, but not mandated. *Texas Crushed Stone I*, 17 CIT at 433–34, 822 F. Supp. at 777–78.

[24] Venezuelan Cement states that the Commission's "percent of imports" test has no basis in the regional industry statute or its legislative history. *See* Pl.'s Brief at 30, 31; Pl.'s Reply Brief at 4–5. *See also* Pl.'s Brief at 26 (claiming that the Commission "strayed from the 'clearly higher' standard established in the 1979 Statements of Administrative Action and legislative history * * * [to] devise[ ] a different import concentration standard that had no basis in the statute or legislative history").

However, as acknowledged by Venezuelan Cement, the Federal Circuit has found that the Commission's "percent of imports" test is a reasonable interpretation of Congressional intent. Pl.'s Brief at 30–31. *See Texas Crushed Stone II*, 35 F.3d 1535 (Fed. Cir. 1994), *aff'g Texas Crushed Stone I*, 17 CIT 428, 822 F. Supp. 773 (1993).

[25] For example, after considering concentration under its "percent of imports" test, the Commission would consider "this alternate way of measuring concentration * * * when the imports outside the region were widely dispersed throughout the rest of the country or when the regional industry accounted for a significant portion of the total national industry." Def.'s Response Brief at 27.

See Pl.'s Brief at 32–33; Pl.'s Reply Brief at 3.[26] The standard in the URAA, it argues, effectively replaced the "percent of imports" test with the "substantial proportion" test. Pl.'s Brief at 33. *See* Def.'s Response Brief at 3, 31–38.[27]

There is nothing in the SAA or the legislative history of the URAA to support this claim. In contrast to the use of both mandatory and permissive language in the SAA and the legislative history of the 1979 Act, the SAA and the legislative history of the URAA provide a uniform mandate for finding import concentration if the "clearly higher" and "substantial proportion" criteria are both satisfied. *See, e.g.*, SAA at 860 ("Concentration *will* be found to exist if the ratio of the subject imports to consumption is clearly higher in the regional market than in the rest of the U.S. market and if such imports into the region account for a substantial proportion of total subject imports entering the United States.") (emphasis added); S. Rep. No. 103–412, at 53 (same); H.R. Rep. No. 103–826(I) (same). There is no mention of the Commission's "percent of imports" test, nor is there any evidence that Congress expressed the "substantial proportion" criterion to the exclusion of any test other than those a "precise mathematical formula" or a " 'benchmark' proportion of imports." SAA at 860. *See also* S. Rep. No. 103–412, at 53–54; H.R. Rep. 103–826(I), at 66.

In fact, although the Commission has continued to apply the "percent of imports" test since 1979, and Congress has since amended the antidumping and countervailing statute a number of times, the import requirement concentration remains unaltered. *Texas Crushed Stone I*, 17 CIT at 434, 822 F. Supp. at 778. *See* Def.'s Response Brief at 22 ("The Commission's consistent practice for considering import concentration has been to use the 'percent of imports' analysis in all regional industry cases.") (citation omitted), 28 (same). *See also id.*

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[26] As the Government notes, Venezuelan Cement's claim that the "revised" import concentration standard "supersedes the Commission's prior practice" falters in light of its reliance on the benchmark concentration level in a pre-URAA case. Def.'s Response Brief at 33. *See also* Pl.'s Brief at 28–29 (discussing *Certain Steel Wire Nails from the Republic of Korea*, USITC Pub. 1088, Inv. No. 731–TA–26 (Aug. 1980)); SAA at 860.

[27] In contrast, the Government avers that Congress signaled its approval of its "percent of import" test by adopting it in the form of the "substantial proportion" criterion of the import concentration standard. Def.'s Response Brief at 28. *See also* Tr. at 37–38 (counsel for the Commission stating that "the Commission's position is that 'pecentage' and 'proportion' do not have a different meaning to them," and that Venezuelan Cement has "more of an issue with the word 'substantial' than [it does] with whether 'proportion' or 'percentage' are * * * the same term. So, our position would be that those terms are interchangeable"). *See also* Tr. at 39, 44, 50 (counsel for Defendant reiterating Commission's understanding that "substantial proportion" means "sufficiently large percentage").

In support of its claim, the Government notes that the SAA and the legislative history of the URAA include a citation to *Mitsubishi Materials*, a case which affirmed the Commission's use of the "percent of imports" test. *See* SAA at 860 (*citing Mitsubishi Materials*, 17 CIT at 306, 820 F. Supp. at 614–15); S. Rep. No. 103–412, at 53–54 (same); H.R. Rep. 103–826(I), at 66 (same). *See generally* Def.'s Response Brief at 28–29. However, Congress cited *Mitsubishi Materials* for the concept that "there is no 'benchmark' proportion of imports * * * which is applicable in every case, and below which the Commission cannot determine that imports are concentrated." *See, e.g.*, SAA at 860 (citation omitted). This concept is an entirely different proposition than the Government's claim that Congress intended to implement the Commission's "percent of import" test by adding the "substantial proportion" criterion to the import concentration standard.

Finally, it is not immediately clear that the "percent of imports" test and "substantial proportion" criterion are one and the same. While the "percent of imports" test finds concentration if there is a "sufficiently large percentage" of subject imports in a regional industry, the "substantial proportion" criterion provides that—assuming the "clearly higher" criterion is satisfied[0096]concentration exists if subject imports in a regional industry "account for a substantial proportion of total subject imports entering the United States." SAA at 860. *See also Texas Crushed Stone I*, 17 CIT at 433, 822 F. Supp. at 777 (describing the Commission's "percent of imports" test).

at 27–28 (noting that prior to the enactment of the URAA, the Commission's reviewing courts approved its practice of using the "percent of imports" test in all regional industry cases) (*citing Texas Crushed Stone II*, 35 F.3d at 1541; *Mitsubishi Materials*, 17 CIT at 306–309, 820 F. Supp. at 615–16). *See generally* 19 U.S.C. § 1677(4)(C) (2000).

Finally, Venezuelan Cement claims that the "clearly higher" criterion enacted under the URAA "is intended to alter the Commission's prior practice by requiring it in every case to consider the [criterion] originally set forth in the 1979 legislative history." Pl.'s Reply Brief at 8. *See also* Pl.'s Brief at 33 ("Congress and the Administration clearly would not have chosen to provide a new test for import concentration in 1994 if they had been satisfied with the Commission's prior practice in applying the import concentration requirement."). There is no indication in the SAA or legislative history of the URAA to suggest that Congress intended to "alter the Commission's prior practice" of applying its "percent of imports" test by merely repeating the 1979 "clearly higher" criterion in the 1994 version of the import concentration standard. *See, e.g.*, SAA at 860; S. Rep. No. 103–412 (1994); H.R. Rep. No. 103–826(I) (1994). *Cf., e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274–75 (1974) ("In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change.").

3. "Substantial Proportion" Criterion of the Import Concentration Standard

Venezuelan Cement's claims related to the import concentration standard enacted under the 1979 Act not withstanding, it is the present antidumping and countervailing duty statute, "as amended by the URAA and interpreted by its accompanying legislative history," that governs the regional industry analysis in this action. Def.-Intervenor's Brief at 17–18. The SAA and the legislative history thus URAA to gauge the reasonableness of the Commission's determination that the record does not satisfy the "substantial proportion" criterion of the import concentration standard. *See Chevron*, 467 U.S. at 842–43 (directing a court reviewing an agency's construction of a statute to first determine Congressional intent, then consider whether the agency's construction is permissible); *Timex V.I., Inc.*, 157 F.3d at 882 (employing "tools of statutory construction" in order to determine Congressional intent) (citation omitted). *See also* Pl.'s Reply Brief at 2–3; Tr. at 8 (same).

As in the SAA and the legislative history of the 1979 Act, Congress declined to "unambiguously" express an intent on the question of what test is to be used in satisfying the twopart import concentration standard in the SAA and legislative history of the URAA. *See*

Texas Crushed Stone II, 35 F.3d at 1541.[28] In fact, Congress expressly noted that neither a "precise mathematical formula" nor a "'benchmark' proportion" could be specified for in an import concentration inquiry. SAA at 860 (citations omitted). *See also* S. Rep. No. 103–412, at 53–54; H. Rep. No. 103–826(I), at 66. Congress therefore reserved for the Commission the discretion to determine import concentration on a "case-by-case basis." SAA at 860. *See Texas Crushed Stone I*, 17 CIT at 437, 822 F. Supp. at 780 ("The Commission needs discretion in this area [of import concentration] to effectively carry out the requirements of 19 U.S.C. § 1677(4)(C), and Congress intended for the [Commission] to have such discretion.").

a. Minimum Benchmark Proportion of 43 Percent

Venezuelan Cement claims that because the Commission is now required to consider whether regional imports account for a "substantial proportion" of national imports, "import concentration can be found where far less than 50 percent of imports enter the region." Pl.'s Brief at 33. *See also* Pl.'s Brief at 36, 38. Because subject imports in the Florida region "accounted for an average of 54 percent of imports from Venezuela (64 percent in 1997, 53 percent in 1998, and 45 percent in 1999)," Venezuelan Cement claims that the record supports a finding of import concentration under the plain meaning of "substantial proportion." Pl.'s Reply Brief at 21–22 (citation omitted). *See also* Tr. at 8–10 (same).

In particular, Venezuelan Cement relies on *Certain Steel Wire Nails from the Republic of Korea* for the proposition that "a concentration of imports could exist where less than 50 percent of national imports of the subject merchandise entered the region." Pl.'s Brief at 35. *See also id.* at 36 (stating that "[t]he SAA and legislative history surely would not have cited *Steel Wire Nails* if the Administration and Congress disagreed with the Commission's reasoning or the outcome in that case"); Tr. at 10 (same). *See generally Certain Steel Wire Nails from the Republic of Korea*, Inv. No. 731–TA–26 (Final), USITC Pub. 1088 (Aug. 1980) at 11 (finding import concentration at a level of 43 percent) (*cited in* SAA at 860; S. Rep. 103–412, at 54; H.R. Rep. 103–826(I), at 66).

Therefore, Venezuelan Cement concludes, the term "substantial" may contemplate a portion less than the majority of a whole. *See* Pl.'s Brief at 33 ("None of the dictionary definitions of the word 'substantial' requires, or even implies, that something must constitute a majority in order to be substantial") (*citing Webster's Encyclopedic Unabridged Dictionary of the English Language* (1994) definition "of

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[28] The language of the statute itself offers no guidance on the method to be used by the Commission in applying the import concentration standard in a regional industry analysis. *See* 19 U.S.C. § 1677(4)(C) (2000). *See, e.g., Texas Crushed Stone I*, 17 CIT at 434, 822 F. Supp. at 778 ("[T]he statute is silent with respect to mandatory methods of analysis, leaving the Court to conclude that Congress intended for the Commission to exercise its discretion in this fact specific area of analysis.").

ample or considerable amount, quantity, size, etc."); Pl.'s Reply Brief at 9 (same); Tr. at 8 (same). *See also* Tr. at 98 (counsel for Venezuelan Cement states that "where the language of a statute, or, in this case, legislative history, has a plain and ordinary meaning, there is a reason for it to be bolstered in some way by something somewhere else in the statute. That ordinary meaning would prevail in the ordinary instance").

However, it is worth considering the context in which Congress used the term "substantial." *See* Pl.'s Brief at 33–34, 34 n.18 (citing a litany of cases of varying relevance involving the term "substantial"). In this "sunset" review, the Commission determined that the subject imports in a regional industry were not sufficiently concentrated to merit a material injury analysis of a regional industry. *See* 19 U.S.C. § 1677(4)(C) (2000). *See also* Def.'s Response Brief at 30–31. As the Government notes, the definition of the term "substantial" that Venezuelan Cement advocates is not supported by "the statute or legislative history * * * in the context of import concentration." Def.'s Response Brief at 34. *Accord* Tr. at 44.[29]

Rather, it is clear that "there is no 'benchmark' proportion of imports that enter the region relative to imports that enter the United States, either 80 percent or any other percentage, which is applicable in every case, and below which the Commission cannot determine that imports are concentrated." SAA at 860 (citation omitted). In fact, "[w]hile the Commission found shipments of 43 percent to be a concentration of the imports at issue in *Steel Wire Nails* * * *, it made it clear that this figure was not a benchmark to be followed in every case. *Congress wanted to provide flexibility, not a 43 percent benchmark*." *Texas Crushed Stone I*, 17 CIT at 436–37, 822 F. Supp. at 780 (emphasis added). *See also Texas Crushed Stone II*, 35 F.3d at 1542 (citing different decisions, including *Steel Wire Nails*, in order to observe that the Commission's "record in this area [of the import

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[29] While Venezuelan Cement acknowledges that it doesn't "support [its] discussion of the plain meaning of the term "substantial" with any reference to anything else than the legislative history or the antidumping and countervailing duty statutes to support that meaning," it maintains that "the ordinary meaning of this term is fully supplied by the dictionary and by court decisions * * *."). Tr. at 98. *See* Pl.'s Brief at 33 (offering dictionary definition of term "substantial"); Pl.'s Reply Brief at 9 (same); Tr. at 8 (same).

"To ascertain whether Congress had an intention on the precise question at issue, we employ the 'traditional tools of statutory construction.' The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning." *Timex V.I., Inc.*, 157 F.3d at 882 (*citing Chevron*, 467 U.S. at 843 n.9; *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1579 (Fed. Cir. 1990)). As the Supreme Court said in *Chevron*, "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. Among the "tools of statutory construction" is the statute's legislative history. *Timex V.I., Inc.*, 157 F.3d at 882 (*citing Chevron*, 467 U.S. at 859–63; *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465 (1997); *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477, 1481 (Fed. Cir. 1997)).

In the present case, Venezuelan Cement proffers the plain meaning of a term found in a statute's legislative history, not the statutory text itself. *See, e.g.*, Tr. at 37 (counsel for the Commission observing that Venezuelan Cement "would have the Court apply rules of statutory construction to legislative history"), 45 ("Plaintiff would have this Court take away the Commission's discretion and define 'substantial.' "). Indeed, the term "substantial" does not appear in the regional industry statute in the context of the import concentration standard. *See* 19 U.S.C. § 1677(4)(C) (2000). *See also, e.g.*, SAA at 860 ("substantial proportion" criterion expressed, but not defined). Therefore, there is no reason to suppose that the plain meaning of a term found in legislative history (a definition offered devoid of context) has overriding authority over the statute and the interpretive aid of the legislative history itself. *See Timex V.I., Inc.*, 157 F.3d at 882 ("This is not to suggest that these other tools [of statutory construction] can override a statute's unambiguous text.") (*citing VE Holding Corp.*, 917 F.2d at 1579).

concentration standard] is one of an individualized case-by-case method of analysis"). *See generally* Tr. at 44.

Thus, there is an incongruity between the congressional intent derived from the proper application of the relevant tools of statutory construction when properly applied, and Venezuelan Cement's claim that a level of 43 percent (or any other percentage less than the majority) mandates a finding of import concentration. It is well settled that "[import] concentration should be assessed on a case-by-case basis * * * because cases before the Commission are likely to involve different factual circumstances." SAA at 860 (citation omitted).

Finally, Congress cited to *Steel Wire Nails* for the proposition that "[no] precise mathematical formula [is] reliable in determining the minimum percentage which constitutes sufficient concentration because cases before the Commission are likely to involve different factual circumstances." SAA at 860 (citation omitted). However, such a citation—alone falls short of a wholesale Congressional approval for the concept that import concentration can exist at a level of less than 50 percent. *See* Def.'s Response Brief at 34–35; Tr. at 40–42, 45–46, 75–76.[30]

b. Minimum Benchmark Proportion of 60 Percent

Counsel for Venezuelan Cement alluded in turn to the notion that the Commission reached its determination by operating under a "sixty percent test." Tr. at 10–13. *See also* Tr. at 24, 25 (counsel for Venezuelan Cement refers to the Commission's "sixty percent floor" or "sixty percent practice"). *But see* Tr. at 33 (counsel for the Commission stating that "[t]he Commission has looked at the facts of the case and has never had a sixty percent benchmark, as Plaintiff has alleged"), 34 (same); *id.* at 42, 45 (generally refuting suggestion that the Commission has relied on benchmark).

While courts have generally found sufficient import concentration where imports entering a regional industry are at least eighty percent of total imports, proper treatment of imports less than eighty percent of total imports is less clear. *See, e.g., Mitsubishi Materials Corp.*, 17 CIT at 306, 820 F. Supp. at 615 ("[T]he Commission has * * * previously found that percentages substantially less than eighty percent to be sufficient concentrations to warrant a regional analysis."). The Government admits that "[s]ince the *Steel Wire Nails* case in 1980, the Commission has not found concentration to be sufficient in any case where the percentage of imports during the

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[30] While there is nothing in the SAA and legislative history of the URAA that expressly precludes the existence of import concentration at levels less than 50 percent, neither is there a Congressional mandate for finding sufficient concentration at such levels. *See* Tr. at 8–9 (counsel for Venezuelan Cement stating that federal courts have found percentages ranging from nine to forty percent to be "substantial"; "[o]ur research turned up no cases that found a percentage within [a] range [between nine and forty percent] to be insubstantial, much less any case finding a percentage over forty percent to be insubstantial"), 98 (same). *But see* Def.'s Response Brief at 33 n.75 (noting that "[s]ince the *Steel Wire Nails* case in 1980, the Commission has not found concentration to be sufficient in any case where the percentage of imports during the period of investigation was lower than 60 percent") (citations omitted). *See also* Tr. at 10–11.

period of investigation was lower than 60 percent." Def.'s Response Brief at 33 n.75 (citations omitted). *See also* Tr. at 10–11.

Indeed, as the Commission acknowledged in this case, Congress has instructed it to avoid methods of analysis employing a "benchmark" proportion. *See* SAA at 860 ("[N]o 'precise mathematical formula [is] reliable in determining the minimum percentage which constitutes sufficient concentration because cases before the Commission are likely to involve different factual circumstances.' ") (citations omitted); *Commission Views* at 23–24, 26–30 (addressing and applying the two-part import concentration standard of the regional industry analysis) (citations omitted). *See also* Def.-Intervenor's Brief at 20 ("At no time can the Commission rely on a *per se* benchmark * * * * The Commission must assess * * * 'concentration' based on the facts on record").

In its prospective analysis, the Commission noted that "the proportion of total subject imports from Venezuela that entered the Florida region * * * declined during the period of review to levels the Commission previously * * * found insufficient to satisfy the concentration test." *Commission Views* at 26. It is not immediately clear that such language indicates a benchmark proportion, much less one at the sixty percent level.[31]

Beyond the Government's general observation that the Commission has never found levels below sixty percent to be sufficient concentration, Venezuelan Cement points to no other evidence that the Commission relied on a "minimum benchmark" level of sixty percent in its regional industry analysis. Tr. at 10–11 (counsel for Venezuelan Cement referring to Def.'s Brief at 33, n.75) *See generally Commission Views* at 23–24, 26–30 (engaging in a prospective review of trends based on import concentration levels during the period of review). Venezuelan Cement's claim is thus without merit.

c. Commission's Finding that Record Does Not Satisfy Import Concentration Standard

In the present case, the Commission majority found that "the percentage of total subject imports from Venezuela entering the Florida region fell substantially and steadily over the period of review, from 64 percent in 1997 to 53 percent in 1998 and 45 percent in 1999."

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[31] Counsel for the Commission advises that the quoted sentence:

> is [one] that the Commission has in its opinion that we should not read that much into. It's an observation. There's a very similar sentence in the same opinion, when they're talking about the market isolation factors regarding the Japanese reviews, when they say the percentage is lower than the range that the Commission typically considers to satisfy the statutory market isolation criteria. In both cases, the Commission then went on at some length, after that, to discuss it, because these were, in both cases, fairly low ranges. So, that sentence, taken by itself, I think is just more of an observation leading into why it felt it needed to go into quite a bit of discussion.

Tr. at 89–90. *But see id.* at 94–95 (counsel for Venezuelan Cement stating that "when [the Commission is] talking about trends in 1997 to 1999 [after the Commission's statement about "levels the Commission previously has found insufficient to satisfy the concentration test"], it's not making a decision that those trends had any particular impact on its determination regarding 1997 to 1999* * * * I don't see that there is any fair way of reading the Commission's statement about the levels the Commission previously has found insufficient any other way than the way we have characterized them.").

Commission Views at 26. *See also* Def.'s Response Brief at 37, 38 ("Not only was the proportion of Venezuelan imports into the region low relative to other similar cases, but it declined substantially during the period of review in direct contrast to the substantial increases in the original investigation.").[32]

In addition, the Commission observed that, while similar volumes of subject imports from Venezuela entered the Florida region during the period of review and during the period reviewed in the original investigation, "the total volume of imports from Venezuela has substantially increased and entered various U.S. markets other than the Florida region, in increasing volumes." Tr. at 52. *See Commission Views* at 28 (during the period of review, the apparent cement consumption in Florida increased by 17.5 percent), 28–29 (in 1999, only 10.3 percent of apparent cement consumption in Florida was composed of cement from Venezuela (compared to 19.2 percent in 1991); *id.* at 26, 29 (while the volume of subject imports entering the Florida region steadily decreased from 64 percent to 45 percent during the period of review, the volume of subject imports into the entire U.S. market increased by 42.5 percent).[33] Thus, the Commission determined that "concentration as a percentage of total imports has declined in the Florida region [during the period of review], not as a result of a decline in the volume of imports entering the Florida region, but because the level of total imports has increased." Tr. at 52–53.

Given these trends, and the prospective nature of "sunset" reviews, the Commission reasonably concluded that because subject import levels in the Florida region were not likely to account for a substantial proportion of total subject imports entering the United States," an import concentration would not exist in the reasonably foreseeable future. *Commission Views* at 27–30.[34]

The Commission's consideration of the record evidence on an individualized basis, as directed by the SAA and legislative history of the URAA, is reasonable and is not an abuse of its discretion. The Commission's finding that import concentration does not exist because subject imports in the Florida region do not "account for a substantial proportion of total subject imports entering the United States" is supported by substantial evidence and is in accordance with law. SAA at 860.

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[32] "In contrast, during the original investigations, the Florida region accounted for an increasing concentration of Venezuelan imports of cement, reaching 98 percent of total Venezuelan imports in 1991." *Commission Views* at 26–27. *See also* Def.'s Response Brief at 37.

[33] *Cf. Separate Views* at 77 ("While the proportion of total U.S. imports of Venezuelan Cement entering Florida has declined, Florida continues to be the primary U.S. market for Venezuelan cement* * * *").

[34] [N]ot only did the 'substantial and steady' trend of decreasing exports to Florida culminate in 1999 with only 45 percent of Venezuela's imports to the United States going to Florida, but also the other conditions that characterize the Florida cement market, cement demand in Florida, the irrelevance of the suspension agreements to the price and volume of cement from Venezuela, and the import practices of Venezuelan exporters. All of these factors were discussed by the Commission in reaching its conclusion that the concentration criterion of the law was not satisfied.
Def.-Intervenor's Brief at 25.

B. Commission's Finding that Subject Imports in Florida Region Are Unlikely to Increase if Suspended Investigations Are Terminated[35]

Venezuelan Cement next challenges the Commission's finding that subject imports in the Florida region are unlikely to increase if the suspended investigations are terminated. Pl.'s Brief at 43–55; Pl.'s Reply Brief at 29–45. *See Commission Views* at 27–30. *See generally* 19 U.S.C. § 1675(c)(1) (2000) (in a "sunset" review, the Commission must determine whether termination of suspended investigations "would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy * * * * ").[36]

In order to determine the likelihood of continuation or recurrence of dumping or a countervailable subsidy, the Commission "must decide the likely impact in the reasonably foreseeable future of an important change in the status quo—the * * * termination of a suspended investigation and the elimination of the restraining effects of that * * * suspended investigation on volumes and prices of imports." SAA at 883–84.

"The determination called for in these types of reviews is inherently predictive and speculative." SAA at 883. *See, e.g. Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966) (holding that even if two inconsistent conclusions may be drawn from the evidence, the agency's interpretation may be supported by substantial evidence); *Mitsubishi Materials Corp.*, 17 CIT at 304, 820 F. Supp. at 613 (stating that the Court will "affirm the determination of the Commission when it is reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence") (*citing Atlantic Sugar, Ltd.*, 744 F.3d 1556 (Fed. Cir. 1984)). *See generally* Def.'s Response Brief at 40–42 (discussing the likelihood standard to the regional industry provision).

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[35] Because the Commission did not find it likely that subject import levels in the Florida region would satisfy the import concentration standard in the foreseeable future if the suspended investigations are terminated, it could not proceed to the final requirement of its regional industry analysis, i.e., material injury in the Florida region. *Commission Views* at 30. *See* 19 U.S.C. § 1675(c)(1)(A) (2000); 19 U.S.C. § 1677(4)(C) (2000).

[36] Venezuelan Cement states that if the Commission had found a concentration of subject imports in the Florida region during the period of review, it would not have been necessary for the Commission to consider whether subject imports in Florida are likely to increase after the termination of the suspended investigations. Pl.'s Brief at 43; Pl.'s Reply Brief at 30 n.22. *See also* Tr. at 14–15, 23–24.

First, whether or not the Commission finds import concentration during the period of review is not germane to this "sunset" review. *See supra* n.11 (in "sunset" review, Commission is not obligated to determine whether import concentration exists during the period of review). Instead, the Commission did what it ought to have done: it conducted a prospective analysis of import levels during the period of review. *See Commission Views* at 27 ("The Commission is not required in a five-year review to demonstrate that the regional industry criteria are currently satisfied. However, the record does not indicate that the proportion of total subject imports from Venezuela entering the Florida region is likely to satisfy the import concentration criteria if the suspended investigations are terminated.").

Second, the Commission was under a statutory mandate to consider whether subject imports in the Florida region would be likely to increase if the suspended investigations were terminated, *regardless* of its finding in its regional industry analysis. *See* 19 U.S.C. § 1675(c)(1)(A) (2000) (in a "sunset" review, the Commission determines whether "termination of the * * * suspended [investigations] would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy * * * *and* of material injury") (emphasis added); 19 U.S.C. § 1677(4)(C) (2000) (in a regional industry analysis, the Commission may find material injury in a regional industry "even if the domestic industry as a whole * * * is not injured"). *See also* 19 U.S.C. § 1675a(a)(8) (2000) (providing special rule for regional industries in a determination of likelihood of continuation or recurrence of material injury). *See generally* Def.-Intervenor's Brief at 26 n.83.

With respect to the Commission's finding, Venezuelan Cement contends: 1). the Commission should have considered import concentration levels outside the period of review (i.e., before and after the investigations were suspended); and 2). the Commission should not have concluded that the suspension agreements had "no appreciable effect on relative subject import levels within and outside of the Florida region." *Commission Views* at 28.

1. Consideration of Record Evidence Outside the Period of Review

Venezuelan Cement claims that the Commission is legally obligated to consider "the level of import concentration prior to an agreement as circumstantial evidence of what is likely to happen if the agreement is terminated." Pl.'s Brief at 47–48; Pl.'s Reply Brief at 32. Further, Venezuelan Cement suggests that the Commission erred by "improperly giving conclusive evidentiary weight to the pattern of distribution of imports from Venezuela during 1997–1999 and disregarding record evidence of changes in the distribution of such imports that occurred during the years immediately following acceptance of the agreements." Pl.'s Reply Brief at 30. *See also id.* at 32, 35, 38. It appears that Venezuelan Cement's arguments reflects a general concern that the Commission's determination is not reasonably based on the record when viewed in its entirety. *See* Pl.'s Brief at 44–46; Pl.'s Reply Brief at 30–33.[37] To the contrary, the Commission acted properly.

a. Consideration of Evidence Prior to the Acceptance of the Suspension Agreements

In particular, Venezuelan Cement claims that the Commission failed to consider the motivations of the Venezuelan importers in reaction to the impending "sunset" review. Pl.'s Brief at 46–47. Venezuelan Cement avers that

> the decline in Florida's share in 1997 to 1999 was a predictable result of the new statutory requirement that the Commission conduct a sunset review. Knowing the review would likely be based on a Florida regional industry, Venezuelan exporters had to be aware that one of their best chances for prevailing in the Sunset Review was to defeat the import concentration requirement.

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[37] *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1954) ("Congress has * * * made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view."); *Atlantic Sugar, Ltd.*, 744 F.2d at 1562 ("Substantial evidence on the record means 'more than a mere scintilla' and 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence.") (*citing SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 382 (Fed. Cir. 1983)).

Tr. at 21. *See also* Tr. at 22 ("The fact that Florida's share declined is most easily explained by the Venezuelan producers' efforts to position themselves favorably for the Sunset Review.").

The Commission may certainly consider the "likely behavior of * * * foreign exporters and the importers in the event the [suspension agreement is terminated]." *See, e.g., Am. Permac, Inc. v. United States*, 831 F.2d 269, 274 (Fed. Cir. 1987) (citation omitted) (in order to determine whether to revoke or deny an antidumping order, Commission "forecasts the likely behavior of the foreign exporters and the importers in the event the order is revoked or modified* * * * Since the principal focus of this phase of the investigation is on the future behavior of the foreign exports and the importers, their intentions are very important"). However, whether the Commission's failure to do so upsets the reasonableness of its determination is another issue. *See, e.g.*, Tr. at 22.

In particular, Venezuelan Cement relies on *Matsushita*, in which the Commission's decision not to revoke or modify an antidumping order was reversed because the determination was not supported by substantial evidence. *Matsushita Elec. Indus.*, 750 F.2d at 928. In particular, the Federal Circuit found that, due to the prospective nature of the agency's review,

> [i]n no case will the Commission ever be able to rely on concrete evidence establishing that, in the future, certain events *will* occur upon revocation of an antidumping order. Rather, the Commission must assess, based on *currently available evidence and on logical assumptions and extrapolations flowing from that evidence*, the likely effect of revocation of the antidumping order on the behavior of the importers.

Matsushita Elec. Indus., 750 F.2d at 933 (emphasis added). *See also* Tr. at 21–22 (counsel for Venezuelan Cement noting that according to *Matsushita*, "it is often necessary in a review proceeding to rely on circumstantial evidence of the foreign producers' incentives or motivations, which the Court said are always relevant and, indeed, may be more reliable than self-serving declarations").

In the present case, it appears that the Commission has no clear explantion why volumes of subject imports in the Florida region remained static, while the Florida and U.S. markets grew.[38] Venezu-

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[38] During the oral argument, counsel for the Commission was asked why the import volumes from Venezuela in the Florida region remained the same, while the Florida market and U.S. market grew. Tr. at 53, 62. Counsel for the Commission stated that the Commission "saw there was no reason [for the market] to shift[ ] because regional industry investigation does not and the suspension agreements did not limit any kind of restraint on the Florida region versus * * * the rest of the United States." Tr. at 53. See *id.* at 54 (counsel for the Commission postulating that subject imports from Venezuela were being shipped to the U.S. market because "[t]here was demand in other parts of the United States"), 59 ("[T]he Commission doesn't have any evidence that it wasn't * * * just because the Venezuelan exporter decided to export more to the U.S. market and decided to move into other markets of the United States, other than the Florida region, which is what it * * * seemed to have * * * did. * * * [T]hat's what the evidence showed."). *See also id.* at 54 (the Court stating that "the record is silent" with respect to an answer to its inquiry), 84–85 (the Court repeated its inquiry to counsel for Vencemos, to which counsel replied "the record shows * * * that the sales outside of Florida were profitable, that the customer base in Florida was not unlimited").

elan Cement offers what may be a plausible reason: the Venezuelan exporters reacted to the impending sunset review by choosing not to increase the volumes of subject imports into the Florida market. *See, e.g.*, Tr. at 21–22. However, the record contains little evidence supporting Venezuelan Cement's theory. *See, e.g.*, Tr. at 60 (counsel for the Commission stating that "Plaintiffs could not only provide us anything more than their conjecture. They also could not provide us any evidence, even in their allegations, * * * if imports left any of these other markets, why they would come back to Florida, or why they would come to Florida."); 65 (counsel for the Commission stating "there's nothing to show, no evidence. There has been nothing offered by Plaintiffs of any kind of evidence that * * * extra volume, despite the fact that demand was-was up, but that extra volume from Venezuela would have entered the Florida market.").[39]

Given this relative dearth of evidence, there is no reason why the Commission is obligated to consider Venezuelan Cement's conjecture without the benefit of evidence. *See Matsushita*, 750 F.2d at 933 (the Commission must based its assessment on "currently available evidence and on logical assumptions and extrapolations flowing from that evidence").[40] Simply put, based on the record before it, the Commission reasonably determined that subject imports from Florida would not be likely to increase in the foreseeable future once the suspended investigations are terminated. *See, e.g.*, Tr. at 58–59. *See generally* Tr. at 61–68.

b. Consideration of Events Immediately After the Acceptance of the Suspension Agreements

Consistent with the Commission's discretion to determine import concentration on an "individualized case-by-case method of analysis," there is nothing in the statute or legislative history to support Venezuelan Cement's contention that the Commission is obligated to consider the change in import volume and import concentration that

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[39] Counsel for Venezuelan Cement claims that it "pointed out * * * several ways in which the [suspension] agreement did constrain the imports." Tr. at 101. *See also id.* (counsel for Venezuelan Cement stating that "the questionnaire responses and the statements made by the Venezuelan exporters to the Commerce Department, which were put in the record of the Commission's proceeding, indicated that there was, in fact, a constraint imposed by the suspension agreements."). Venezuelan Cement then concluded that "this was strong, very strong circumstantial evidence that the suspension agreements were the cause. But the Commission did not, in fact, even address that." *Id. But see* Tr. at 111 (counsel for Vencemos pointing out that "[t]he Commission clearly, in its opinion, indicates it looked at the evidence. It looks at all the evidence that's before it. It just found that because it was mixed, it wasn't compelling, and it was looking more at the trends than it was at specifics, the specific contracts or the allegations about the motivations [of the Venezuelan exporters]. So, it's not that they didn't look at them* * * * "), 112 (same).

[40] Far from requiring the Commission to consider the circumstantial evidence of foreign incentives or motivations, as Venezuelan Cement appears to suggest, *Matushita* "speaks to a * * * different issue." Tr. at 112. In *Matsushita*, after the Commission received "testimony" by counsel for the importers, the subject imports

> increased 400 percent in one quarter, effectively negating counsel's assurances that imports would not increase and counsel's arguments that the decreased volume of [subject imports] was an 'irreversible trend' unrelated to the dumping finding. * * * * Since the importers chose not to provide any direct evidence on their intent, the Commission had no choice but to rely on circumstantial evidence from which to infer likely intent.

Matsushita Elec. Indus., 750 F.2d at 933–34. *See also* Tr. at 112. Similar factual circumstances are not present in this action.

occurred immediately after the acceptance of the suspension agreements. *Texas Crushed Stone II*, 35 F.3d at 1542. *See* Pl.'s Reply Brief at 30, 32, 35, 38, 40. Because the statute does not prescribe a particular method of analysis,"Congress [must have] intended for the Commission to exercise its discretion in this fact specific area of analysis." *Texas Crushed Stone I*, 17 CIT at 434, 436, 822 F. Supp. at 778, 780. *See Chevron*, 467 U.S. at 843. *See generally* 19 U.S.C. § 1677(4)(C) (2000).

However, the Commission is required to consider "whether any improvement in the state of the industry is related to the * * * suspension agreement." 19 U.S.C. § 1675a(a)(1)(B) (2000). According to the SAA, "the Commission should not determine that there is no likelihood of continuation or recurrence of injury simply because the industry has recovered after the imposition of an order or acceptance of a suspension agreement, because one would expect some beneficial effect on the industry." SAA at 884. *See also id*. (commenting that "an improvement in the state of the industry related to * * * [a] suspension agreement may suggest that the state of the industry is likely to deteriorate if the order is revoked or the suspended investigation terminated").[41] The Commission did observe that "imports of gray portland cement from Venezuela into the Florida region during the period of review [were] at a level only slightly above that in 1991, immediately prior to the acceptance of the suspension agreements." *Commission Views* at 28. However, its final determination is based on a variety of factors, such as the consistent decline in subject import levels into the Florida region during the period of review. *See generally id*. 26–30.

Congress has made it clear that "[a]s in the case of injury and threat determinations, the Commission must consider all factors, but no one factor is necessarily dispositive." SAA at 886. *See* 19 U.S.C. § 1675a(a)(5) (2000) (providing that "[t]he presence or absence of any factor which the Commission is required to consider under this subsection shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if * * * the suspended investigation is terminated"). *See also Floral Trade Council v. United States*, 20 CIT 595, 601 (1996) (citation omitted) ("As trier of fact, the Commission must assess the quality of the evidence and give such weight to the evidence that it believes is justified."); *Matsushita Elec. Indus.*, 750 F.2d at 933 ("The Commission's decision does not depend on the 'weight' of the evidence * * * *the question is whether there was evidence which

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[41] Because "one would expect that the imposition of an order or acceptance of a suspension agreement would have some beneficial effect on the industry," Venezuelan Cement's suggestion that the Commission should consider events occurring immediately after the acceptance of the suspension agreements would not likely yield very useful information. SAA at 884.

could reasonably lead to the Commission's conclusion, that is, does the administrative record contain substantial evidence to support it and was it a rational decision?").

2. Commission's Finding that Suspension Agreements Have No Appreciable Effect On Import Concentration in the Florida Region

Venezuelan Cement also contests the Commission's overall conclusion that "the existence or absence of these suspension agreements has no appreciable effect on relative subject import levels within and outside of the Florida region." *Commission Views* at 28. *See* Pl.'s Brief at 44 ("Because it found that the decrease in Florida's share of imports from Venezuela was not the result of the suspended investigations, the Commission concluded that termination of the investigations would not result in increasing the percentage of such imports shipped into Florida."). *See also* Pl.'s Brief at 48–55; Pl.'s Reply Brief at 41–45.

In its prospective analysis, the Commission found that "the record does not indicate that marketing and distribution patterns have been affected by the acceptance of the suspension agreements. *Commission Views* at 27. In particular, the Commission noted that because subject imports from the Florida region during the period of review did not "provide any incentive to ship subject imports to customers outside of the Florida region as opposed to those within that region," the suspension agreements "had no appreciable effect on relative subject import levels within and outside of the Florida region." *Commission Views* at 28.

According to Venezuelan Cement, "[t]he fact that the suspension agreements did not include any formal constraints or incentives that would have caused imports from Venezuela to shift away from Florida during [the period of review] did not logically lead to the Commission's conclusion that the agreements had 'no appreciable effect' whatsoever." Pl.'s Reply Brief at 42. Instead, "the agreements could have affected the regional distribution of imports from Venezuela in some other way." *Id*. *See, e.g.*, Pl.'s Brief at 49 (claiming that "[t]he suspension agreements * * * had a clear impact on increasing the prices of imports from Venezuela"); Tr. at 19–20 (same).

For example, Venezuelan Cement claims that an "immediate effect of the agreements was to shift imports from Venezuela away from Florida to other parts of the United States." *Id*. Therefore, Venezuelan Cement concludes, the suspension agreements resulted in a "dramatic alteration in shipping patterns [by causing] Venezuelan exporters to cease targeting Florida and to disperse their sales more broadly around the southeastern and mid-Atlantic states." *Id*. at 50. *See also* Pl.'s Reply Brief at 42 ("[T]he lack of a formal constraint or incentive should have led the Commission to ask what motivated the

Venezuelan exporters to make such a dramatic shift in the U.S. destinations of their imports, a question the Commission did not ask.").

Venezuelan Cement thus argues that the Commission's determination is erroneous by pointing to other possible outcomes based on the record evidence. *Compare, e.g.*, Def.'s Response Brief at 47–48 (the Commission found that the substantial and steady decline of subject imports from Venezuela into the Florida region during the period of review was "not a result of a decline in the volume of imports entering the Florida region, but rather because the level of total imports has increased") *with* Pl.'s Brief at 51 (Venezuelan Cement explains the decrease in Florida's share of imports from Venezuela as "a predictable consequence of the Commission's impending sunset review"), 51–54 (offering the alternative interpretation that such a decline was a matter of course because the Venezuelan exporters reacted to the impending "sunset" review by "seek[ing] to shift their exports away from Florida in the years immediately preceding the sunset review in order to position themselves favorably for the review.").

However, a reasonable agency determination supported by substantial evidence and in accordance with law cannot be overturned on such grounds. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). *See* Def.'s Response Brief at 51. As the SAA explains:

> [t]he possibility of other likely outcomes does not mean that a determination that revocation or termination is likely to lead to continuation or recurrence of dumping or countervailable subsidies, or injury, is erroneous, as long as the determination of likelihood of continuation or recurrence is reasonably in light of the facts of the case.

SAA at 883. *See, e.g.*, *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966) (holding that even if two inconsistent conclusions may be drawn from the evidence, the agency's interpretation may be supported by substantial evidence).

In addition, Venezuelan Cement objects to the Commission's observation that "the suspension agreements did not include any formal constraints or incentives that would have caused imports from Venezuela to shift away from Florida" during the period of review because such circumstances exist in every "sunset" review of a suspension agreement involving a regional industry. Pl.'s Reply Brief at 42. *See also* Pl.'s Brief at 54.[42] As a result, Venezuelan Cement finds no

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[42] Specifically, the Commission noted that

> [t]he imports of Venezuelan cement have been subject to an antidumping suspension agreement that established a floor price. There has been no cash deposit requirement under the countervailing duty suspension agreement. Thus, the Venezuelan suspension agreements do not limit the quantity of subject imports that can enter the Florida region, or in fact the entire U.S. market, at fairly traded prices. There is no indication on the record that these agreements provide any incentive to ship subject imports to customers outside of the Florida region as opposed to those within that region.

Commission Views at 27–28 (citations omitted). *See id.* at 29 (noting that "there is no evidence to indicate that

logical connection between the lack of formal constraints or incentives and the Commission's conclusion that the suspension agreements had no appreciable effect on the import concentration level in the Florida region. *See* Pl.'s Reply Brief at 42. However, the Commission's determination is not based on any one piece of record evidence.[43] As the Federal Circuit noted, the Court will "affirm the determination of the Commission when it is reasonable and supported by the record as a whole, even where there is evidence which detracts from the substantiality of the evidence." *Mitsubishi Materials Corp.*, 17 CIT at 304, 820 F. Supp. at 613 (*citing Atlantic Sugar, Ltd.*, 744 F.2d 1556 (Fed. Cir. 1984)).

Therefore, the Commission's reasonable determination that subject imports from the Florida region would not increase if the suspended investigations were terminated is supported by substantial evidence on the record and is in accordance with law.

C. Commissioner Miller's Decision Not to Cumulate the Volume and Effect of Imports From Venezuela

Finally, Venezuelan Cement argues that Commissioner Miller abused her discretion by declining to cumulate the volume and effect of imports from Venezuela. Pl.'s Brief at 56–67. *See Separate Views* at 78–79. However, Commissioner Miller's decision does not affect the disposition of the Commission's negative determination, because the determination of the Commission majority is sustained as supported by substantial evidence and is otherwise in accordance with law. *See, e.g., Far E. Textile, Ltd. v. United States,* No. 00–06–00296, 2001 Ct. Int'l Trade LEXIS 106, at 29 (Aug. 14, 2001) ("Where a majority of the commissioners render * * * determinations that are * * * deemed supported by substantial evidence and are in accordance with law, the Court need not reach the propriety of a concurring commissioner's determination, as the ultimate determination would not be disturbed in any event."); *Titanium Metals Corp. v. United States,* 25 CIT ___, ___ n.9, 155 F. Supp.2d 750, 758 n.9 (2001) (finding harmless error where a commissioner relied on dumping margins that the Commission majority did not rely on in its decision). There is, therefore, no need to reach this final issue.

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import patterns likely would shift toward more concentration in the Florida region if the suspended investigations were terminated"). *See also* Tr. at 52 ("An important factor in the Commission's finding that Venezuelan imports likely would not shift toward more concentration in the Florida region if the suspended investigations were terminated was the fact of the similarity in the volume of Venezuelan imports into the Florida region during the original investigation and during the review. The volumes during the period of review were very similar to the 1991 volume in the original investigation."), 56 ("The Commission * * * determined that there was never any evidence that would show that * * * there was a reason for those imports to return to the Florida [region]—or, not return, but more of them to go into the Florida market, because they very easily could have gone into the Florida market during the suspension agreements.").

[43] "As in the case of injury and threat determinations, the Commission must consider all factors, but no one factor is necessarily dispositive." SAA at 886.

V. *CONCLUSION*

For all the reasons set forth above, the Commission's negative final determination is supported by substantial evidence on the record and is in accordance with law. Plaintiff's motion for judgment on the agency record is therefore denied and the Commission's negative final determination in *Gray Portland Cement and Cement Clinker from Venezuela*, 65 Fed. Reg. 68,974 (Dep't Commerce Nov. 15, 2000) is sustained. This action is dismissed.

Judgment will enter accordingly.

DELISSA A. RIDGWAY ,
Judge.

(Slip Op. 03–96)

FORMER EMPLOYEES OF CHEVRON PRODUCTS COMPANY, PLAINTIFFS, *v.* UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 00–08–00409

[Plaintiffs' motion for judgment on the agency record granted in part, and action remanded to Defendant for further proceedings consistent with opinion.]

(Dated: July 28, 2003)

Meeks & Sheppard (Ralph H. Sheppard and *Diane L. Weinberg*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Henry R. Felix*); *Louisa Reynolds*, Office of the Solicitor, United States Department of Labor, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* In this action, Plaintiffs—former employees of the Roosevelt Terminal unit of Chevron Products Company, a division of Chevron, U.S.A.—contest the determinations of the U.S. Department of Labor ("Labor Department") both denying their petition for transitional adjustment assistance under the North American Free Trade Agreement ("NAFTA") Implementation Act, and denying them benefits as "secondarily-affected workers" under the Statement of Administrative Action accompanying the NAFTA Implementation Act.

Before the Court are the Labor Department's determinations pursuant to remand in *Chevron I*, 26 CIT ___ , 245 F. Supp. 2d 1312 (2001), as well as Plaintiffs' Motion for Judgment on the Agency Record, which requests "a judgment * * * certif[ying] plaintiffs as eligible to apply for NAFTA-TAA or qualified as a member of a second-

arily affected group" or, in the alternative, a remand to the Labor Department for further investigation. Memorandum in Support of Plaintiffs' Motion for Judgment of the Agency Record ("Pls.' Remand Brief") at 17; Plaintiffs' Reply to Defendant's Memorandum in Partial Opposition to Plaintiffs' Motion for Judgment on the Agency Record ("Pls.' Remand Reply Brief") at 2, 8. Defendant's Memorandum in Partial Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.'s Remand Brief").

Jurisdiction lies under 28 U.S.C. § 1581(d)(1) (1994).[1] For the reasons set forth below, Plaintiffs' Motion for Judgment on the Agency Record is granted in part, and the action is remanded to the Labor Department—yet again—for further proceedings consistent with this opinion.

I. *The History of This Case*

Like various other Trade Adjustment Assistance ("TAA") and NAFTA-TAA cases before this Court in recent years,[2] this case has taken on a life of its own. Although the Government pointedly characterizes *Chevron I* as "the Court's first remand order" (Def.'s Remand Brief at 3), a brief review of the history of the case reveals that the Labor Department has now had no fewer than seven "bites at the apple," and puts the agency's remand determinations here at bar in proper perspective.

Until their separation on October 31, 1999, Plaintiffs (the "Roosevelt Workers") were employed as "gaugers" by Chevron Products Company ("CPDS"), in Roosevelt, Utah, working at "well head[s] and or crude oil tanks" to perform various tasks to determine whether crude oil should be purchased—"[c]heck[ing] temperature, gaug[ing] the amount of crude in the tank, tak[ing] samples for grav-

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[1] While all statutory citations in this opinion, save where expressly noted, are to the 1994 version of the U.S. Code, the pertinent text of the cited provisions was the same at all times relevant herein.

[2] *Chevron I* included a brief overview of the United States' trade adjustment assistance laws, which are generally designed to address jobs lost due to increased international trade. *See Chevron I*, 26 CIT at _____, 245 F. Supp. 2d at 1317–18, and authorities cited there. Benefits available under the program established by the Trade Act of 1974 ("the TAA program") are denominated "*trade* adjustment assistance" ("TAA benefits"), while those available under the NAFTA Implementation Act, including the related Statement of Administrative Action ("the NAFTA-TAA program"), are referred to as "*transitional* adjustment assistance" ("NAFTA-TAA benefits"). *Id*.

As *Chevron I* explained, the TAA and NAFTA-TAA programs are very similar. Compare Trade Act of 1974 § 221 *et seq*, 19 U.S.C. § 2271 *et seq*. (1994) *with* NAFTA Implementation Act § 501, 19 U.S.C. § 2331 *et seq*. (1994). *See generally Chevron I*, 26 CIT at _____, 245 F. Supp. 2d at 1317–18, and authorities cited there. Much like the TAA program, the NAFTA-TAA program entitles eligible workers to benefits including employment services, appropriate training, job search and relocation allowances, and income support payments. *See* Statement of Administrative Action Accompanying NAFTA Implementation Act, H.R. Doc. No. 103–159, vol.1 at 673–674 (1993); 19 U.S.C. § 2331(d) (1994).

There are some differences between the two statutes' scope of coverage, however. Obviously, NAFTA-TAA coverage is more limited, to the extent that the job losses must be related to Canada or Mexico. But, in another respect, coverage is significantly broader. While the TAA program offers assistance only where job losses result from increased imports, the NAFTA-TAA program also covers job losses due to shifts in production to facilities in Canada or Mexico. *See Chevron I*, 26 CIT at _____ n.12, 245 F. Supp. 2d at 1327 n.12, and authorities cited there.

Finally, the NAFTA-TAA statute requires that—where petitioning workers are found to be ineligible for NAFTA-TAA benefits—the Labor Department is to automatically evaluate their eligibility for benefits under the TAA statute. *See* 19 U.S.C. § 2331(c)(2) (1994).

Since the events at issue here, the new Trade Adjustment Assistance Reform Act of 2002 has been enacted, consolidating the TAA and NAFTA-TAA programs. *See* Trade Adjustment Assistance Reform Act of 2002 § 123, Pub. L. No. 107–210, 116 Stat. 933, 944 (2002). Notably, as discussed in greater detail in section III.A. below, the new statute extends coverage for "shifts in production" beyond Canada and Mexico, to include all other countries.

ity test and grind out for BS&W, and check[ing] the bottom of the tank for water or impurities." AR3.[3] If the samples were satisfactory and all tests were passed, "a crude oil run ticket [was] written up" and "drivers were dispatched to the location * * * [to] load[ ] the crude oil on [their] truck[s] and transport[ ] it" to the refineries. AR 3.

According to the Roosevelt Workers, between 1997 and 1999, an influx of lower-cost crude oil imported from Canada led to dramatic cutbacks in domestic crude oil production (including a reduced demand for gaugers such as the Roosevelt Workers), resulting in the termination of their employment. AR 3.

A. *The TAA Petition*

The Roosevelt Workers immediately filed a petition for certification of eligibility to apply for trade adjustment assistance ("TAA") under the Trade Act of 1974. *See* AR 4. Just a few weeks later, in late November 1999, they got what they thought was good news. The Labor Department notified them that they were already eligible for TAA benefits, under a previously-filed petition which had been granted in July 1999. *See* AR5.

The Roosevelt Workers' relief was short-lived. As officials at the Utah Department of Workforce Services made plans to proceed with training for the gaugers, the officials were dismayed to discover that the men were not on the list of workers eligible for benefits. *See* AR 4. Upon further inquiry, the state officials learned that the pre-existing certification, issued in July 1999, covered only Chevron Production Company—not the Roosevelt Workers' employer, CPDS. *See* AR 5, 32; 64 FR 43722.

The Labor Department had made a mistake. The Roosevelt Workers were not covered by the pre-existing certification.

B. *The Resubmitted TAA Petition*

State officials resubmitted the Roosevelt Workers' original TAA petition to the Labor Department in early January 2000, requesting that it be considered "either as a new petition or * * * as an amend-

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[3] Because this action was remanded to the agency, there are now two separately-paginated administrative records—the initial Administrative Record, and the Supplemental Administrative Record. Moreover, because this action includes confidential information, there are two versions of each of those records. Citations to the public versions of the Administrative Record and the Supplemental Administrative Record are noted as "AR _____ ," and "SAR _____ ." Citations to the confidential versions are noted as "CAR _____ " and "CSAR _____ ," respectively.

The 44-page Administrative Record was before the Court in *Chevron I*. The sole difference between the public and confidential versions of that record is that pages 13 through 15—the "Business Confidential Data Request" questionnaire completed by CPDS's Human Resources Manager—are omitted from the public version, because they include business confidential information.

The 113-page Supplemental Administrative Record was compiled on remand, and is deceptively thick. Aside from the 14-page Remand Determination, the bulk of the record consists of 71 pages of boilerplate-laden contracts, with redundant amendments. While the contracts, several internal memoranda from the Labor Department, and two CPDS job descriptions are designated as confidential, the few remaining documents constitute the public record.

ment to the * * * [existing] certification" covering Chevron Production Company. *See* AR5.

The Labor Department's investigation consisted of a 3-page standard form TAA "Business Confidential Data Request" questionnaire, which was sent to CPDS, the Roosevelt Workers' former employer. *See* AR 11. CPDS's Human Resources Manager, Irene D. Aviani, marked-up the 3-page questionnaire, describing the Roosevelt Workers, in essence, as truck drivers, and providing certain other information reflecting, *inter alia*, (1) decreasing quantities of oil processed at the Roosevelt Terminal; (2) decreasing levels of employment at the Roosevelt Terminal; and (3) increasing levels of imports of crude oil by CPDS. *See* CAR 13–15.

Based solely on the questionnaire response, the agency denied the Roosevelt Workers' petition for TAA, finding that they performed a service and thus did not produce an article within the meaning of the TAA statute. AR 16. The Labor Department also found that the reduction in demand for the workers' services did not originate at a production facility whose workers independently met the statutory criteria for certification. AR 16–17.

C. *The NAFTA-TAA Petition*

While assisting the Roosevelt Workers with their appeal of the Labor Department's denial of the TAA petition, the Utah state officials learned for the first time "that Chevron had been buying Canadian oil." AR 4. In light of the Canadian imports, a new petition was filed—this time seeking NAFTA-TAA benefits. AR 1–5 (Petition for NAFTA Transitional Adjustment Assistance, with attachments.) It is that NAFTA-TAA petition, and the ensuing proceedings, which are directly at issue here. In that petition, the Roosevelt Workers sought certification as workers from a "primary firm" or, in the alternative, as "secondarily-affected workers." Workers in "secondary firms" may be eligible if they either are "supplier[s]" to "primary firms," or they "assemble" or "finish" products made by "primary firms." AR 37; *see also* Statement of Administrative Action, H.R. Doc. No. 103–159, vol. 1 at 674–75 (1993).

Accompanying the NAFTA-TAA petition was an internal memorandum prepared by a representative of the Utah Workforce Services Department, chronicling the events leading up to the filing of that petition, and documenting a significant "lack of cooperation from Chevron." AR 4. The memo noted that CPDS was "very hostile" to the state official who contacted the company concerning the Roosevelt Workers' TAA petition, stating that "it was none of her business." AR 4. The memo further noted that one CPDS official who had provided the Roosevelt Workers with much information "did not want them to use his name as he [was] worried" about retaliation. AR 4.

Also forwarded to the Labor Department were the preliminary Findings and Recommendations of the State of Utah, including the state's determination that "[t]he Chevron Company is receiving all crude oil products from Canada, causing the company in Roosevelt, Utah to layoff workers." *See* Memorandum from State of Utah Department of Workforce Services to U.S. Department of Labor re: NAFTA-TAA Petition Preliminary State Investigation/Chevron (CPDS) (April 10, 2000), included as Exhibit 3 to Memorandum in Support of Plaintiff's Motion for Judgment on the Agency Record ("Plaintiffs' Initial Brief").

With no further investigation whatsoever—and, indeed, apparently without reviewing even the findings and determinations made by the State of Utah[4]—the Labor Department denied the Roosevelt Workers' NAFTA-TAA petition. Relying exclusively on its file on the TAA petition, the Labor Department ruled that the gaugers were "engaged in lifting and transportation of crude oil to domestic refineries" and thus "were engaged in services and did not produce an article" within the meaning of the statute. AR 10; AR 18. In addition, the Labor Department found that the reduction in demand for the gaugers' services did not "originate at a production facility whose workers independently [met] the statutory criteria for certification." AR 19. The Labor Department completely failed to address the Roosevelt Workers' alternative claim to benefits as "secondarilyaffected workers."[5]

D. *The Application for Reconsideration of the NAFTA-TAA Petition*

The Roosevelt Workers promptly sought reconsideration of the denial of their NAFTA-TAA petition. AR 29. The Labor Department's review on reconsideration consisted of a single phone call from a Labor Department investigator to Ms. Aviani, CPDS's Human Resources Manager, sometime in May 2000. Asked about "the type of work being performed by the[ ] workers at the Roosevelt Utah facility," Ms. Aviani stated that "the workers drove trucks and would pick up or deliver crude." AR31. When the investigator asked whether the drivers did pick ups and deliveries only for Chevron wells, Ms. Aviani initially stated that the wells were "either Chevron owned or 'partner' wells." *See* AR 31. Some time later, she called back to retract her earlier statement, indicating instead that "95% of the crude

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[4] *See* Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record at 27 (conceding that "it is unclear from the record whether the agency decisionmaker considered the preliminary findings prior to issuing his decision").

[5] As *Chevron I* noted, the agency's failure to address the Roosevelt Workers' potential status as "secondarily-affected workers" was "likely attributable to the agency's initial decision not to conduct a new investigation in response to the NAFTA-TAA petition, but rather to rely on the results of its earlier investigation. Because the TAA program does not afford relief to secondarily-affected workers, the agency's TAA investigation did not address the elements of such a claim. The oversight is nevertheless telling." 26 CIT at _____ n.25, _____ F. Supp. 2d at _____ n.25.

picked up by the drivers in Roosevelt * * * [was] from 3rd party wells in which Chevron did not have a financial interest, other than purchasing the crude." AR 31.[6]

In late July 2000, the Labor Department denied the Roosevelt Workers' application for reconsideration. This time—although CPDS's earlier three-page questionnaire response (*see* section I.B., *supra*) confirmed the Roosevelt Workers' claims of imports of crude oil during the relevant period, and although the record was entirely devoid of any contradictory evidence on the point—the Labor Department inexplicably found that there were "no company imports of crude oil." AR 33. The agency also reiterated its prior conclusion that the Roosevelt Workers were "engaged in lifting and transporting crude oil," and thus provided a service and did not produce an article within the meaning of the statute. AR 32–35.

In addition, the Labor Department determined that the Roosevelt Workers did not qualify for benefits as service workers based on its findings that (1) "[t]here were no NAFTA-TAA certifications in effect for workers of Chevron Products Company," and (2) the Roosevelt Workers "lifted and transported crude oil that was primarily purchased from unaffiliated firms." AR 32–35. The Labor Department rejected the Roosevelt Workers' claim of eligibility as secondarily-affected workers as well, finding that (1) the Roosevelt Workers' duties were related to "lifting and transporting crude oil"; (2) "the majority of crude oil lifted and transported by the Roosevelt Workers [was] purchased from 3rd parties"; and (3) the Roosevelt Workers did not "supply components, unfinished, or semifinished goods to a directly-affected ('primary') firm nor did they assemble or finish products made by a directly-affected firm." AR 37.

E. *The Filing of This Action and the Government's Consideration of a Voluntary Remand*

The Roosevelt Workers filed a timely appeal with this Court, contesting both the Labor Department's denial of their NAFTA-TAA petition and its decision to decline reconsideration of that denial, as well as the agency's separate determination denying them benefits as secondarily-affected workers. *See* Complaint ¶¶1,3,4,5.

The Government sought and was granted a 40-day extension of time to file its Answer. On the eve of the new deadline, another extension of time was sought—and granted—on the strength of the representation that "the Department of Labor [was then] considering * * * filing a motion for a voluntary remand, which the parties agree[d] could lead to a settlement that would be in the interests of justice." Consent Motion to Extend Time, dated Nov. 9, 2000.

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[6] The only record of that phone call is an undated memorandum—bearing the wrong docket number—consisting of a mere seven lines of text, and drafted sometime well after-the-fact. For the reasons detailed in *Chevron I*, the memo clearly "is not a contemporaneous record memorializing the investigator's contacts, and is of dubious reliability." 26 CIT at _____ n.25, 245 F. Supp. 2d at 1334 n.25.

Neither the "settlement" nor the motion for a voluntary remand materialized. Presumably after a studied and deliberate review of the file to that date, and after using every day of the extension granted to it, the Government advised that it had elected to stand on the administrative record as is. The Roosevelt Workers thereafter sought judgment on the agency record, and the matter was fully briefed.

F. *The Decision in Chevron I and the Remand to the Agency*

Although the opinion speaks for itself, it is fair to say that *Chevron I* was a fairly scathing critique of the Labor Department's investigatory methods, its findings and its determinations in this case. Finding that the agency's investigation was sloppy, incomplete, and "*pro forma* at best," *Chevron I* concluded that the Labor Department "failed to fulfill its affirmative obligation to conduct its investigation 'with the utmost regard' for the interests of the Roosevelt Workers." *Chevron I*, 26 CIT at ___ , 245 F. Supp. 2d at 1334 (citations omitted). Granting in part the Roosevelt Workers' motion, *Chevron I* remanded the action to the Labor Department for further investigation. *Chevron I*, 26 CIT ___ , 245 F. Supp. 2d 1312.

G. *The* De Facto *Voluntary Remand*

Pursuant to *Chevron I*, the Labor Department's final determinations of remand were to be filed no later than January 31, 2003. On that day, in lieu of filing the remand results, the Government sought an extension of time. The Government represented that the Labor Department had forwarded its draft remand results to the Justice Department only three days earlier, and that—following "extensive discussions" concerning those results—"both agencies agreed that *additional investigation* [was] needed concerning the qualification of the former employees of Chevron Products Company as a secondarily-affected worker group." Defendant's Consent Motion for an Extension of Time to File Remand Results, dated January 31, 2003 (emphasis added).

Based on the Government's assurances that the additional time would "ensure that a complete record [was] before the Court" (*id.*), the Government was granted what amounted to a 35-day voluntary remand for further investigation. Yet the record eventually filed with the Court includes no evidence of any such investigation. Indeed, the Government has conceded that—contrary to the implication of its motion for an extension of time—there was no further "investigation," although the agencies did do further review and analysis of the information already on file before the remand results were filed with the Court. *See* Audiotape: Teleconference of Court with Counsel for Plaintiffs and Defendant (July 2, 2003) ("7/2/03 Audiotape").

H. *The Labor Department's Remand Determination and the Roosevelt Workers' Motion*

In the remand results filed with the Court, the Labor Department yet again concluded that the Roosevelt Workers are ineligible for benefits because they were not engaged in production but, rather, performed a service. SAR 104–105. The agency determined that the Roosevelt Workers cannot be certified as service workers because their separation was not "caused importantly by a reduced demand for their services by an affiliated production facility whose workers could have been certified as eligible to apply for NAFTA-TAA." SAR 105. Further, the Labor Department determined that the Roosevelt Workers do not meet the requisite criteria to qualify for benefits as secondarily-affected workers. The Roosevelt Workers have once more moved for judgment on agency record, and matter is fully briefed.

II. *Standard of Review*

Judicial review of a Labor Department determination denying certification of eligibility for trade assistance benefits is confined to the administrative record. *See, e.g., Former Employees of Champion Aviation v. Herman*, 23 CIT 349, 350, (*citing* 28 U.S.C. § 2640(c) (1999) *and Int'l Union v. Reich*, 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998)). The agency's determination must be sustained if it is supported by substantial evidence in the record and is otherwise in accordance with law. 19 U.S.C. § 2395(b) (1994); *Former Employees of Swiss Indus. Abrasives v. United States*, 17 CIT 945, 947, 830 F. Supp. 637, 639 ("*Swiss Indus. Abrasives I*") (*citing Former Employees of General Elec. Corp. v. U.S. Dep't of Labor*, 14 CIT 608, 611 (1990)).

The Labor Department's findings of fact are thus conclusive if they are supported by substantial evidence. *See Former Employees of Galey & Lord Indus., Inc. v. Chao*, 26 CIT ___ , ___ , 219 F. Supp.2d 1283, 1285–86 (2002) (citation omitted). However, substantial evidence is more than a "mere scintilla"; it must be enough to reasonably support a conclusion. *Id.* at 1286 (*citing Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (1987)). And "[a]n assessment of the substantiality of record evidence must take into account whatever else in the record fairly detracts from its weight." *Former Employees of Swiss Indus. Abrasives v. United States*, 19 CIT 649, 651 (1995) (*citing Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)) ("*Swiss Indus. Abrasives II*").

Moreover, all rulings based on the agency's findings of fact must be "in accordance with the statute and not * * * arbitrary and capricious"; to that end, "the law requires a showing of reasoned analysis." *Gen'l Elec. Corp.*, 14 CIT at 611 (*quoting Int'l Union v. Marshall*, 584 F.2d at 396 n.26). In short, although it is clear that

the scope of review here is narrow, and that a court is not free to substitute its judgment for that of the agency, it is equally clear that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Former Employees of Alcatel Telecomms. v. Herman*, 24 CIT 655, 658–659, (*quoting Motor Vehicle Mfrs. Assn'n v. State Farm Mut. Auto Ins.*, 463 U.S.29, 43, 103 S. Ct. 2856, 77 L.Ed.2d 443 (1983) (citations omitted)). Where "good cause [is] shown," a case must be remanded for further investigation and analysis. *See* 19 U.S.C. § 2395(b) (1994); *Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 469, 715 F. Supp. 378, 381 (1989); *Swiss Indus. Abrasives I*, 17 CIT at 947, 830 F. Supp. at 640.

III. *Analysis*

As *Chevron I* observed, the Labor Department "has an affirmative duty 'to conduct a factual inquiry into the nature of the work performed by the petitioners to determine whether it amounted to that of a service or that of production.' " *Chevron I*, 26 CIT at ___ , 245 F. Supp.2d at 1327–28 (*quoting Former Employees of Shot Point Servs. v. United States*, 17 CIT 502, 507 (1993)). Moreover, more generally, "the agency 'has an affirmative duty to investigate whether petitioners are members of a group which Congress intended to benefit' from trade adjustment assistance legislation." *Id.* at 1328 (*citing Former Employees of Hawkins Oil & Gas Inc. v. U.S. Sec'y of Labor*, 17 CIT 126, 129, 814 F. Supp. 1111, 1114 (1993)). The remand results filed with the Court reveal that the Labor Department has, once again, failed to properly discharge those duties.

As *Chevron I* explained, the NAFTA-TAA program includes two separate components, providing benefits both for workers in firms "directly affected by imports from * * * Canada" and for "workers in secondary firms that supply or assemble products by firms that are directly affected." 26 CIT at ___ , ___ F. Supp. 2d at ___ (*quoting* Statement of Administrative Action, H.R. Doc. No. 103–159, vol. 1 at 672, 674 (1993)). The Labor Department's remand results addressed the Roosevelt Workers' petition for certification under both components of the program, which are addressed in turn below.

Eligibility for Assistance to Workers in Directly Affected ("Primary") Firms

Under the NAFTA-TAA statute, as well as the TAA provisions of the Trade Act of 1974, workers in directly affected ("primary") firms may be eligible for assistance either as "production workers" or as "support service workers."

Eligibility for Certification as "Production Workers"

The NAFTA-TAA statute provides, in relevant part, that workers are to be certified as eligible for benefits if the Secretary of Labor determines that:

> * * * a significant number of 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; * * *

19 U.S.C. § 2331(a)(1) (1994) (emphasis added). Thus, on its face, the NAFTA-TAA statute covers, *inter alia*, workers involved in *production* who are displaced due to *imports from Canada or Mexico.*

(1) *Production*

Drawing heavily on *Former Employees of Marathon Ashland Pipeline, LLC v. Chao*, 26 CIT ___ , 215 F.Supp.2d 1345 (2002) ("*Marathon Ashland I*"), which also involved gaugers, *Chevron I* rejected the Labor Department's determination that the Roosevelt Workers were ineligible for NAFTA-TAA benefits, concluding that the administrative record supported "neither the Labor Department's finding as to the nature of the work performed by the Roosevelt Workers, nor its conclusion that they provided services and did not 'produce' an 'article.' " 26 CIT at ___ , 245 F. Supp. 2d at 1323.

Accordingly, *Chevron I* instructed the Labor Department to, *inter alia*, "conduct a thorough investigation of the duties of gaugers such as the Roosevelt Workers, in the context of the oil production scheme of CPDS-related entities" and to "make a reasoned determination on the record as to whether or not the gaugers' work constituted the provision of a service or the 'produc[tion]' of an 'article' within the meaning of the statute." *Chevron I*, 26 CIT at ___ , 245 F. Supp. 2d at 1328.

On remand, the Labor Department sent faxed a 2-page letter to CPDS headquarters in California, requesting information on "the primary function of the Roosevelt Terminal," "the organization of

[CPDS] and its relationship to its parent company," and the relationship between the Roosevelt Terminal and CPDS in Roosevelt, Utah," as well as copies of the "position descriptions or the job duties" for the Roosevelt Workers, and "copies of the contracts and or purchase orders" for the locations where they worked. SAR 2–3. In addition, the agency requested information on CPDS imports of crude oil during 1998 and 1999. *Id*.

Based on the Roosevelt Worker's own descriptions of their duties, the job descriptions provided by CPDS, and the agency's review of the definition of "gauger" in the Dictionary of Occupational Titles, the Labor Department determined that "the duties performed by the [Roosevelt Workers] are related to the transportation of crude oil after the oil has been produced: i.e., the crude oil was already out of the ground by the time the Roosevelt facility gaugers tested it." AR 104–105.

Implicitly, the Labor Department's determination suggests that, in this context, "production" is defined as ending the moment that crude oil clears the surface of the earth. But the agency still has not advanced *any* legal or factual rationale in support of such a definition. Conclusory statements are no substitute for "reasoned analysis evident in the administrative record," which is what the law requires. *See generally SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001) (citations omitted). It simply is not enough to say what "production" *is not*. The agency must affirmatively and definitively explain—in this context—what production *is*, and why.[7]

Not only is the Labor Department's determination that the "production" of crude oil ends the moment that it exits the ground unsupported by any factual or legal basis, it also conflicts directly with *Marathon Ashland II*. *See Former Employees of Marathon Ashland Pipeline v. Chao*, Slip Op. 03–64, 13, 27 CIT ___ , ___ F. Supp. 2d ___ (June 11,2003). In light of the Labor Department's intransigence, the *Marathon Ashland* court's searching opinion looked to

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[7] The Labor Department's continued refusal to articulate its reasoning is particularly egregious given the industry at issue here. Aside form the agriculture industry, the oil and gas industry is the only other industry that the trade adjustment assistance laws expressly address. Specifically, the TAA statute was amended in 1988 to specify that "a firm, or appropriate subdivision of a firm, that engages in exploration or drilling for oil or natural gas, *or otherwise produces oil or natural gas*, shall be considered to be *producing articles* directly competitive with imports of oil and with imports of natural gas." 19 U.S.C. § 2272 (b)(2)(B) (1994) (emphases added). *See generally Former Employees of Marathon Ashland Pipeline v. Chao*, Slip Op. 03–64, 17–20, 27 CIT _____ , _____ , _____ F. Supp. 2d _____ , _____ (June 11, 2003) (discussing 1988 amendments).

The legislative history of the 1988 amendment yields (relative to all other industries) a wealth of information on Congress' understanding of the structure and nature of the industry, and evidences Congress' intent to be (again, relatively speaking) expansive in the definition of "production." Yet the Labor Department has repeatedly refused to articulate its definition of "otherwise produces * * *," even within the meaning of that statute.

Of course, the Roosevelt Workers petitioned for relief not under the TAA statute, but under the NAFTA-TAA statute. Although the Government initially sought to make much of the fact that language comparable to the 1988 amendment was not included in the NAFTA-TAA statute, *Chevron I* pointed out that the Labor Department's own findings appeared to reflect an agency interpretation of the NAFTA-TAA statute to reflect the rationale of the 1988 TAA amendment; that the Government's argument to the contrary amounted to *post hoc* rationalization by litigation counsel; that there was nothing in the legislative history of the NAFTA-TAA statute to suggest that Congress intended to define "production" more narrowly for purposes of the NAFTA-TAA program than for the TAA program, and—most importantly —that the NAFTA-TAA statute requires that, where petitioning workers are found to be ineligible for NAFTA-TAA benefits, the Labor Department is to automatically evaluate their eligibility under the TAA statute. *See Chevron I*, 26 CIT at _____ n.13, 245 F. Supp. 2d at 1327 n.13. While it is not entirely clear, it appears that the Government now concedes this point.

various agency publications, as well as the *Dictionary of Business and Economics*, and the text and history of the legislation to determine whether or not the gaugers were engaged in the "production" of crude oil.

The *Marathon Ashland* court pointed out, for example, that the Labor Department's own *Career Guide to Industries* classifies "gaugers" under the general heading of "production occupations" within the field of oil and gas extraction. *Marathon Ashland II*, Slip O. 03–64 at 13, 27 CIT at ___ , ___ F. Supp. 2d at ___ . The court further noted that, elsewhere, under the heading "Oil and Gas Extraction," the same publication explains: "*Pumpers* and their helpers operate and maintain motors, pumps, and other surface equipment that force oil from wells and regulate the flow * * * * *Gaugers* measure and record the flow, taking samples to check quality." Slip Op. 03–64 at 12, 27 CIT at ___ , ___ F. Supp. 2d at ___ (emphasis in original). As the *Marathon Ashland* court observed, "Labor's descriptions of the oil production process indicate a common understanding that the production process includes the point at which the crude is pumped into 'separation and storage tanks.' Furthermore, at least one bureau within [the agency] places the work done by gaugers squarely within the production process, along with pump system operators." Slip Op. 03–64 at 14, 27 CIT at ___ , ___ F. Supp. 2d at ___ .

The *Marathon Ashland* court also noted that the Labor Department had described the gaugers in that case as "responsible for quality control," but had failed to explain why it did not consider "quality control" to constitute production. As the court pointed out, the *Dictionary of Business and Economics* defines "quality control" as a function which is generally considered part of the production process. Slip Op. 03–64 at 16, 27 CIT at ___ , ___ F. Supp. 2d at ___ .

Further buttressing its reasoning with an analysis of relevant legislative history (Slip Op. 03– 64 at 17–20, 27 CIT at ___ , ___ F. Supp. 2d at ___), the *Marathon Ashland* court concluded that the gaugers in that case were engaged in the production of crude oil. Slip Op. 03–64 at 20, 27 CIT at ___ , ___ F. Supp. 2d at ___ .

Logic and the principle of *stare decisis* compel the same result here. As in *Marathon Ashland II*, the Labor Department here denied the Roosevelt Workers' petition on the grounds that—as gaugers—they were not engaged in "production." And here, as there, the agency has failed and refused to articulate a definition for "production" in the context of the crude oil industry, or even to place on the record any facts or rationale underpinning its assertion that the production process ends the moment the crude clears the earth. Here too, as in *Marathon Ashland II*, the Labor Department has described the work of the gaugers essentially as "quality control," SAR 101, 104, 110, but has then failed to explain why the quality control func-

tion is not an integral part of the production process in the crude oil industry, as it is in other industries.[8]

In light of *Marathon Ashland II*, the Government urges that this case be remanded—yet again—to the Labor Department, to give the agency "an opportunity to reconsider its finding that the Roosevelt workers were not engaged in the production of crude oil, but rather provided support services." Def.'s Remand Brief at 11. The Government also seeks a remand to allow the Labor Department to "reexamine its finding in the context of the TAA statute, if necessary," in light of the requirement, under 19 U.S.C. § 2331(c)(2)(1994), that eligibility for benefits be considered under TAA when NAFTA-TAA eligibility is not found. *Id*.

However, the Labor Department has had more than ample time to consider the similarities and differences between the gaugers in *Marathon Ashland* and the Roosevelt Workers here. Indeed, *Chevron I* expressly drew the attention of the parties and their counsel to the parallels between the cases, and—several weeks after the issuance of that opinion—the Court wrote counsel, providing them with copies of the Labor Department's remand determination in *Marathon Ashland*, and urging them to confer with their *Marathon Ashland* counterparts, to stay abreast of relevant developments. *See, e.g.*, *Chevron I*, 26 CIT at ___ n.7, ___ F. Supp. 2d at ___ n.7 (noting that neither party brought *Marathon Ashland I* to the attention of the court in this action); Letter from the Court to Counsel, dated Nov. 19, 2002. Similarly, the Court immediately notified counsel here of the issuance of *Marathon II*, "so that it [might] be reflected (as appropriate)" in their briefs on the remand results. Letter from the Court to Counsel (June 12, 2003). The Court then granted the Government's request for a one week extension of time for "additional intra-governmental coordination * * * required to complete its response brief to reflect the [*Marathon II*] decision." *See* Defendant's Unopposed Motion for An Extension of Time, dated June 20, 2003.

Yet neither the Labor Department's remand results nor the Government's Remand Brief suggests any reason why the general principle derived from *Marathon Ashland II*—that the function of gaugers is an integral part of the crude oil production process—should not apply with equal force here. Indeed, the Government has acknowledged that *Marathon Ashland II* "undermines the central reasoning underlying [the Labor Department's] determination that the Roosevelt workers were not involved in the production of oil." Def.'s Remand Brief at 8. Further, the Government has candidly conceded that the Marathon Ashland gaugers and the Roosevelt Terminal gaugers are the "same worker group,"adding: "Applying the examination of the court in *Marathon* to the facts of this case, you are left

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[8] Moreover, the Labor Department's finding that the Roosevelt Workers' duties are related to transportation is contradicted by the evidence, relied on by the agency itself, that gaugers perform a quality control function.

with the inescapable conclusion that these workers should be qualified as production workers." *See* Audiotape of the Court's June ___ , 2003 Teleconference with Counsel.

Particularly in light of the Government's concessions, it is unclear what further purpose a remand on this point would serve. The Labor Department already has had seven opportunities to make a reasoned determination as to what constitutes "production" in the crude oil industry, and to apply that finding to the Roosevelt Workers, and yet it has failed to do so. Similarly, the Government has had ample opportunity to distinguish the *Marathon Ashland* gaugers from the Roosevelt Terminal gaugers, and yet has declined to do so.

Nor is there any apparent purpose to remanding this matter to permit the Labor Department to reconsider its finding in light of the TAA statute. To be sure, the agency has had ample time since the issue was first raised in *Chevron I* to consider the implications of any differences between the TAA statute and the NAFTA-TAA statute as applied to the oil and gas industry. *See Chevron I*, 26 CIT at ___ n.12–13. Yet the remand results and the Government's Remand Brief are silent on the point.

As explained in *Chevron I* and summarized in note 8 above, and as the Government apparently now acknowledges, even if the Labor Department were somehow to interpret the NAFTA-TAA statute to exclude gaugers from the definition of "production," the statute would obligate the agency to then consider the Roosevelt Workers' eligibility under the TAA statute, directly implicating *Marathon Ashland II*. In short, whether the Roosevelt Workers are analyzed initially under the NAFTA-TAA statute, or under the TAA statute, the ultimate result seems clear. Applying the rationale of *Marathon Ashland II* to the record in this case, the gaugers here—like their Marathon Ashland counterparts—are engaged in the "production" of crude oil.

(2) *Imports*

To be certified as eligible for NAFTA-TAA benefits, a worker who was engaged in production must also establish that he was displaced due to imports from, or shifts in production to, Mexico or Canada. 19 U.S.C. § 2331(a)(1)(A). Although the linchpin of the Labor Department's negative determination on remand was "the nature of the work being conducted by the Roosevelt facility worker group" (SAR 110), the agency also addressed the issue of the level of imports.

Emphasizing that—for purposes of NAFTA-TAA—only imports from NAFTA countries are relevant, the Labor Department found that, "[f]rom 1998 to 1999, aggregate U.S. imports of crude oil increased, while U.S. imports from Mexico and Canada decreased." SAR 110. But the significance of those findings is entirely unclear.

Even for purposes of a NAFTA-TAA analysis, what matters in this case is not whether or not U.S. imports of crude oil from Mexico

and/or Canada increased *in general*, but—rather—whether imports from those countries by CPDS *in particular* increased. And, indeed, the Labor Department's remand determination states that the agency in fact "confirmed that [CPDS] did import crude oil from Canada during the [relevant] time period." AR 110. The Government nevertheless urges that this action be remanded—yet again—to permit the Labor Department to "investigate the extent to which Chevron imported crude oil from Canada during the relevant review period." Def.'s Remand Brief at 12.

The Government explains that, because the Labor Department "determined that Chevron's imports of crude oil from Canada [were] irrelevant in view of its finding that the Roosevelt workers are not production workers," it "does not appear that *precise data* regarding Chevron's crude oil imports were obtained by [the agency]." *Id.* (emphasis added).[9] The Government asserts that, "[o]n remand, Labor will collect this data as it is relevant to determine whether imports contributed importantly to the Roosevelt worker separations." *Id.*

However, as the Government's hedging suggests, the administrative record is by no means devoid of information on CPDS's crude oil imports—either from Canada, or in general. As the remand determination itself reflects, the Labor Department has independently verified that CPDS imported crude oil from Canada in the specific years of interest. SAR 110. That confirms the claims of the Roosevelt Workers themselves, which must also be credited—particularly where, as here, there is no evidence to the contrary. *See, e.g.*, AR 1 (Roosevelt Workers checked box, attributing job losses to imports from Mexico or Canada); AR 3 (Roosevelt Workers attested to imports of "crude from Canada via a pipleine" starting "[i]n the fall of 1997 * * * and * * * increas[ing] every year since").

To the extent that the Labor Department has failed to date to compile what is—in its eyes—sufficiently "precise data" on Canadian imports for purposes of a NAFTA-TAA analysis, the agency has no one but itself to blame. As detailed above, the Labor Department has had multiple opportunities to obtain the relevant data. Incredibly, even on remand following *Chevron I*, the Labor Department asked CPDS only about crude oil imports in general. The agency failed to ask specifically about imports from Canada. SAR 3.

Apart from the evidence on imports from Canada, there is also record evidence on CPDS's crude oil imports in general, and it too is undisputed. The initial questionnaire completed by CPDS's Human Resources Manager provided data establishing increasing imports of crude oil in the relevant years leading up to the separation of the

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[9] The Labor Department's position here is reflective of a much greater problem—the agency's "piecemeal" approach to TAA and NAFTA-TAA investigations in general. In reviewing a Labor Department determination, it is often impossible to tell whether the fact that a particular element of a claim is not mentioned means that the element has been satisfied, or only that the agency has not investigated or analyzed it. This "cherry-picking" approach is fundamentally inconsistent with Congressional intent and the remedial nature of the trade adjustment assistance statutes.

Roosevelt Workers. CAR 13. That information was corroborated by another CPDS official on remand. SAR 5.

Because the Labor Department is required to consider the Roosevelt Workers' eligibility under the TAA statute if they are determined to be ineligible for NAFTA-TAA benefits, 19 U.S.C. § 2332(c)(2), the Roosevelt Workers' eligibility for assistance does not depend on the country of origin of the competing imports. Thus, as production workers, the Roosevelt Terminal gaugers will be eligible for benefits whether the Labor Department determines that the imports that contributed importantly to their separation were from Canada or Mexico, or from anywhere else in the world. It is therefore unclear what additional investigation is required.

In sum, the relevant evidence on the record may be relatively scant, but that is the fault of the Labor Department itself. And what evidence there is, is consistent, uncontroverted and telling. The information provided by CPDS's Human Resources Manager indicates that the Roosevelt Terminal experienced a steady decline in crude oil processing from 1997 through 1999, at the same time CPDS experienced a massive surge in crude oil imports. CAR 13. Another CPDS official confirmed that CPDS imported crude oil in 1998 and 1999. SAR 5. During the same period, a substantial percentage of Roosevelt Terminal employees, including the petitioners here, were terminated. CAR 13. In addition, there are the Roosevelt Workers' own, uncontradicted statements that increased imports of crude oil resulted in the decline in crude oil production in the Uinta basin, leading to their separation. *See* Complaint ¶¶1, 2; AR 3.

The Roosevelt Workers urge that the Labor Department be ordered to certify them as eligible for benefits. Pls.' Remand Brief at 16–17. However, this is a close case, and certification is a relatively extreme measure. It is not entirely clear that, taken as a whole, the uncontroverted evidence now on the record is sufficient to constitute "substantial evidence" that imports contributed importantly to the Roosevelt Workers' separation, or to establish under which statute certification would be warranted.

Under these circumstances, and particularly in light of the assurances given by counsel for the Government in the Court's July 2, 2003 teleconference with counsel, it cannot be said with certainty that one last, very brief, remand would be futile. *See* 7/2/03 Audiotape.

Eligibility for Certification as "Support Service Workers" or "Secondarily-Affected Workers"

As noted above, the Roosevelt Workers contend—in the alternative—that they are eligible for benefits as "support service workers," or as "secondarily-affected workers" pursuant to the Statement of

Administrative Action accompanying the NAFTA Implementation Act.

In light of the conclusion above that the Roosevelt Workers were engaged in the production of crude oil, there is little reason now to reach the merits of the Labor Department's remand determinations on the gaugers' alternative claims for relief.

It is worth noting, however, that the Government has asserted—now, for the first time in this action, and as a matter of first impression—that the Court lacks subject matter jurisdiction to review the Labor Department's determinations on "secondarily-affected worker" status, because that assistance program is "based on a Presidential Statement of Administrative Action rather than on NAFTA or the Trade Act." SAR 111.

While the question would be a fascinating issue of first impression, it would likely also be a matter of last impression. The remand to the agency on the issue of imports may moot further action in this case; and, as noted above, the newly-enacted Trade Adjustment Assistance Reform Act of 2002 incorporates into the statute the "secondarily-affected worker" language from the NAFTATAA statute, so the issue will not be presented in the future.

IV. *Conclusion*

As detailed above, the Labor Department erred in its determination that the Roosevelt Workers were not engaged in the production of crude oil, whether under the NAFTA-TAA statute or the TAA statute. Similarly, the agency has repeatedly failed and refused to seek relevant data and to make a determination as to whether imports—from Canada, or elsewhere—contributed importantly to the Roosevelt Workers' separation. Out of an abundance of caution and in an exercise of restraint, the Labor Department will be accorded one final, brief, opportunity to do so. All remaining issues are reserved pending further order of the Court.

Accordingly, Plaintiff's motion for judgment on the agency record is granted in part, and this action is remanded to Defendant for further proceedings in conformity with this opinion, with its final determination on remand to be filed with the Court no later than September 2, 2003. No extensions will be granted.

So ordered.

DELISSA A. RIDGWAY,
Judge.

(Slip Op. 03–97)

ILVA LAMIERE E TUBI S.R.L. *and* ILVA S.P.A., PLAINTIFFS, *v.* UNITED STATES, DEFENDANT, *and* BETHLEHEM STEEL CORPORATION *and* UNITED STATES STEEL CORPORATION, DEFENDANT-INTERVENORS.

Court No. 00–00127

[The U.S. Department of Commerce's countervailing duty determination is sustained in part, and remanded for further calculations in accordance with this Opinion.]

(Dated: July 29, 2003)

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OPINION

GOLDBERG, *Senior Judge*: At issue in this case is the method employed by the U.S. Department of Commerce (the "Department") to calculate subsidies in countervailing duty investigations of newly privatized companies. Plaintiffs ILVA Lamiere e Tubi S.p.A. ("ILT") and ILVA S.p.A. ("New ILVA") also challenge the Department's decision to impose countervailing duties on early retirement benefits provided by the Government of Italy.

I. FACTS

The following facts are taken from the Department's original determination in this case. *Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate From Italy*, 64 Fed. Reg. 73,244 (Dec. 29, 1999) ("*Determination*"). Before describing the history of the Plaintiffs, New ILVA and ILT, in greater detail, it is helpful to have a general understanding of the key predecessors to the New ILVA and ILT. In the 1980s and early 1990s, several Italian producers of carbon steel plate were owned by the Italian government's holding company, Istituto per la Ricostruzione Industriale ("IRI"). In 1988, ILVA S.p.A. ("Old ILVA") was formed to replace prior producers of carbon steel plate. In 1993, a subsidiary of

Old ILVA was created to produce the carbon steel plate, named ILVA Lamiere e Tubi ("ILT"). Later in 1993, ILVA Laminati Piani ("ILP") was formed to replace Old ILVA. On April 28, 1995, IRI sold ILP, and consequently its subsidiary ILT, to a group of private investors led by Riva Acciaio S.p.A. ("RIVA"). The RIVA consortium reinstated the name ILVA S.p.A. ("New ILVA") in place of "ILP" in 1997.

The following is a more detailed history of New ILVA and ILT. Prior to 1981, Finsider S.p.A. ("Finsider") was a subsidiary wholly owned by the Italian government's holding company, IRI. Finsider's subsidiary Italsider produced the subject merchandise, carbon steel plate. *Determination* at 73,245.

In 1981, Italy sought and gained approval from the European Commission for a plan to restructure Finsider. *Id.* Finsider was restructured, and most of Italsider's assets were transferred to Nuova Italsider. Italsider became a holding company, with Nuova Italsider's stock as its primary asset. Nuova Italsider became the producer of the subject merchandise. In 1987, due to restructuring by Finsider, Nuova Italsider spun-off its assets to Italsider. *Id.* Italsider reclaimed its position as the producer of the subject merchandise. Nuovo Italsider ceased to exist.

In 1988, Finsider was reorganized again, with the approval of the European Commission. *Determination* at 73,245. The 1988 reorganization resulted in the closure of many of Finsider's facilities and the placement of some assets and liabilities in the newly formed company, Old ILVA. The remaining liabilities and assets remained with Finsider. When Finsider's assets were sold, the excess debt was assumed by IRI. *Determination* at 73,250. Production of the subject merchandise was transferred from Italsider to Old ILVA.

In 1992, a wholly-owned subsidiary of Old ILVA was created, ILT, to produce carbon steel plate. Old ILVA, together with all of its subsidiaries, was wholly-owned by IRI. After becoming insolvent in 1993, Old ILVA entered into liquidation. Also in 1993, the Government of Italy sought the European Commission's approval for restructuring and privatizing Old ILVA. *Determination* at 73,251. The Government of Italy planned to absorb the bulk of Old ILVA's debt. As a condition of approval, the European Commission required Italy to reduce steel production. Since a decrease in production would necessarily lead to workforce reductions, the European Commission authorized Italy to implement early retirement benefits under Law 451/94. Id. at 73,253. Under Law 451/94, up to 17,100 Italian steel workers from 1994 to January of 1997 were allowed to take early retirement. The benefits would continue to each employee until that employee reached his or her natural retirement age. Benefits could not be received for more than ten years.[1] *Id.* at 73,253.

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[1] The Department considered the benefits under Law 451/94 as "recurring grants expensed in the year of receipt." *Determination* at 73,254.

Pursuant to the reorganization and privatization plan, on December 31, 1993, ILP and Acciai Speciali Terni were formed from the main productive assets and some of the liabilities of Old ILVA. ILT was transferred to ILP as its wholly-owned subsidiary. "The remainder of [Old ILVA's] assets and existing liabilities, along with much of the redundant workforce, was placed in ILVA Residua (a.k.a., ILVA in Liquidation)." *Id.* at 73,245.

A competitive public tender by IRI in 1995 resulted in the sale of 100 percent of ILP to a consortium of investors led by RIVA. All shares of ILP were transferred to the consortium on April 28, 1995. After that date, the Government of Italy no longer had any ownership interest in ILP or any of ILP's owners.

On January 1, 1997, RIVA changed the name of ILP to "ILVA S.p.A." ("New ILVA"). New ILVA then owned ILT. The subject merchandise is produced at ILT's Taranto Works facility. In 1998, RIVA owned 82 percent of New ILVA, and two foreign investment companies owned the remaining 18 percent.

II. PROCEDURAL BACKGROUND

In 1999, the Department issued its original determination. *Determination*. The Department found that countervailable subsidies continued to flow to New ILVA during the 1998 calendar year, the period of review for the investigation. The countervailable subsidies included debt forgiveness and equity infusions given to New ILVA's predecessors prior to the privatization sale to RIVA. Additionally, the Department determined that the Government of Italy's pre-privatization early retirement benefits were countervailable subsidies.

While the *Determination* was on appeal to the Court of International Trade, the Federal Circuit issued *Delverde SrL v. United States*, 202 F.3d 1360 (Fed. Cir. 2000) (*Delverde III*). The Federal Circuit in *Delverde III* determined that Congress's intent under 19 U.S.C. § 1677(5)(F)[2] was for the Department to "examin[e] the particular facts and circumstances of the sale and determin[e] whether [the purchaser] directly or indirectly received both a financial contribution and benefit from the government." 202 F.3d at 1364. In light of the Federal Circuit's decision in *Delverde III*, the Court remanded the *Determination* to the Department. *See* Order of Aug. 30, 2000 (granting the Department's motion for voluntary remand) (*ILVA I*). The result of *ILVA I* was the Department's *Final Results of Redetermination Pursuant to Court Remand: ILVA Lamiere e Tubi S.p.A. v.*

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[2] The statute to determine whether a prior subsidy continues to be countervailable to the new owner of a company reads as follows:

> A change in ownership of all or part of a foreign enterprise or the productive assets of a foreign enterprise does not by itself require a determination by an administering authority that a past countervailable subsidy received by the enterprise no longer continues to be countervailable, even if the change of ownership is accomplished through an arm's length transaction.

19 U.S.C. § 1677(5)(F).

United States, Court No. 00–03–00127 (Dec. 28, 2000) ("*First Redetermination*"). The Department concluded that the pre-sale and post-sale ILVA's were the same "person," and thus the post-sale ILVA received a financial contribution and benefit from subsidies given to pre-sale ILVA.[3]

During the Court's review of the *First Redetermination*, Plaintiffs moved for summary judgment, asking the Court to remand the *First Redetermination* to the Department. The Court concluded that the Department's "same-person" test failed to take into account the facts and circumstances of the sale, as directed in *Delverde III*.[4] Accordingly, the Court granted Plaintiffs' motion, and remanded the *First Redetermination* to the Department. *ILVA Lamiere e Tubi S.p.A. v. United States*, 196 F. Supp. 2d 1347 (CIT 2002) ("*ILVA II*"). The Court instructed the Department to examine the facts and circumstances of the sale to determine whether the post-sale ILVA received a financial contribution and a benefit from the Government of Italy. *ILVA II* at 1351; *see also Delverde III* at 1364. The Department reluctantly complied, and issued the *Results of Redetermination Pursuant to Court Remand: ILVA Lamiere e Tubi S.r.L. and ILVA S.p.A. v. United States, Court No. 00–03–00127, Remand Order (CIT March 29, 2002)* (July 2, 2002)("*Second Redetermination*").

There are two remaining issues for the Court to decide. First, the Court must decide whether the Department followed the Court's instructions in the *Second Redetermination*. Plaintiffs and the Department ask the Court to sustain the *Second Redetermination*. Defendant-Intervenors Bethlehem Steel Corporation and United States Steel Corporation (collectively, "Domestic Producers") have moved for summary judgment to remand the *Second Redetermination*. The Domestic Producers argue that the Court should remand again to the Department, with revised instructions on *Delverde III*'s application to the present case. Second, Plaintiffs had previously moved for summary judgment on the Department's decision to impose countervailing duties on preprivatization early retirement benefits provided by the Government of Italy under Law 451/94. The Court did not resolve that issue in *ILVA II*, and will do so now.

The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(c) (1994).

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[3] For ease of reference, "pre-sale ILVA" refers to ILP prior to its sale to RIVA. "Post-sale ILVA" includes both New ILVA and ILP after its sale to RIVA.

[4] The Department has recently published its modified change-in-ownership methodology. The Department has abandoned its "same-person" methodology found in the *First Redetermination*. Instead, the Department has adopted the following analysis:

> The methodology is based on certain rebuttable presumptions * * * [t]he 'baseline presumption' is that nonrecurring subsidies can benefit the recipient over a period of time * * * normally corresponding to the average useful life of the recipient's assets. However, an interested party may rebut this baseline presumption by demonstrating that, during the allocation period, a privatization occurred in which the government sold its ownership of all or substantially all of a company or its assets, retaining no control of the company or its assets, and that the sale was an arm's-length transaction for fair market value.

Notice of Final Modification of Agency Practice Under Section 123 of the Uruguay Round Agreements Act, 68 Fed. Reg. 37,125 (June 23, 2003).

III. STANDARD OF REVIEW

The Court reviews the *Second Redetermination* to determine if it is supported by substantial evidence on the record or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B) (1994). To determine if the Department's interpretation of the statute is in accordance with law this Court "must determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). The expressed will or intent of Congress on a specific issue is dispositive. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 233–237 (1986).

Substantial evidence "means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co., Ltd. v. United States*, 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted).

IV. DISCUSSION

A. The Department Followed the Court's Instructions Regarding Application of *Delverde III* in the *Second Redetermination*

The Court remanded the Department's *First Redetermination*, and directed the Department to "'examin[e] the particular facts and circumstances of the sale and determin[e] whether [plaintiffs] directly or indirectly received both a financial contribution and benefit from the government.' " *ILVA II* at 1351 (quoting *Delverde III*, 202 F.3d at 1364). In the Department's *Second Redetermination*, the Department reluctantly followed the Court's instructions.

The Department analyzed the following facts and circumstances in its analysis:

> We believe that the existence of an open selling process resulting in numerous expressions of interest and multiple bidders submitting offers for the company provided a good indication that full value had been paid. The information on the record of this proceeding shows that IRI sought at the outset of the privatization process to bring in many bidders for ILP. The announcement of its intent to sell ILP and its solicitation of expressions of interest in the company were widely publicized. There were no restrictions placed on foreign ownership of ILP and IRI set no minimum bid price. Further, no level of investment in ILP was stipulated by the [Government of Italy]* * * *

> [C]omparison of the price actually paid for ILP to market valuations of the company show that full and fair market value was paid for ILP.

Second Redetermination at 8–9. The Department concluded, after analyzing the facts and circumstances of the sale and privatization of pre-sale ILVA, that post-sale ILVA did not receive a financial contribution or benefit from the Government of Italy. *Id.* at 10.

The Domestic Producers argue that the Court should remand the *Second Redetermination* to the Department, with new instructions regarding *Delverde III*'s application to the investigation of New ILVA. The Domestic Producers do not raise any legal arguments in their motion for summary judgment that were not already addressed in *ILVA II*. Additionally, the Domestic Producers do not challenge any of the facts relied upon by the Department in its *Second Redetermination*. Therefore, the Domestic Producers motion for summary judgment is denied. Because the Department followed the Court's instructions in *ILVA II*, the Court sustains the Department's *Second Redetermination* on the issue of calculating subsidies in countervailing duty investigations of newly privatized companies. *See generally, Allegheny Ludlum Corp. v. United States*, 26 CIT ___, 246 F. Supp. 2d 1304 (2002) ("*Allegheny*"), and *GTS Industries S.A. v. United States*, 26 CIT ___, 246 F. Supp. 2d 1311 (2002) ("*GTS*") (the Department's determinations were sustained after the Department analyzed the facts and circumstances of the privatization sales).

B. The Department's Determination to Countervail Early Retirement Benefits was in Accordance with Law

Under 19 C.F.R. § 351.513 (2000), New ILVA received a benefit to the extent that the early retirement benefits relieved ILVA of an obligation it normally would incur.[5] Plaintiffs argue that the early retirement benefits are not an obligation that ILVA would normally incur. Absent the European Commission's mandated production cutback in the steel industry, the Italian government would not have needed to provide early retirement benefits under Law 451/94. Plaintiffs also point out that the Department has previously expressed unwillingness to countervail benefits given to foreign producers that are provided to offset any industry-specific, increased legal requirements imposed by the foreign government.

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[5] The applicable regulation, "Worker-related subsidies", reads as follows:
(a) *Benefit.* In the case of a program that provides assistance to workers, a benefit exists to the extent that the assistance relieves a firm of an obligation that it normally would incur.
(b) *Time of receipt of benefit.* In the case of assistance provided to workers, the Secretary normally will consider the benefit as having been received by the firm on the date on which the payment is made that relieves the firm of the relevant obligation.
(c) *Allocation of benefit to a particular time period.* Normally, the Secretary will allocate (expense) the benefit from assistance provided to workers to the yearin which the benefit is considered to have been received under paragraph (b) of this section.
19 C.F.R. § 351.512.

The Department denies that Plaintiffs' characterization of the Department's view is accurate: the Department does not view benefits provided to offset increased legal requirements as not countervailable. *See Determination* at 73,273. Regardless of which view the Department has taken, it is clear that the Department's determination is in accordance with law and supported by substantial evidence. The evidence shows that the capacity reductions and resulting layoffs were merely conditions placed upon pre-sale ILVA by the European Commission. *Determination* at 73,253. Pre-sale ILVA had to satisfy the conditions to receive the European Commission's approval for its 1993–94 reorganization plan. *See Determination* at 73, 253–54, 73, 272–73. Plaintiffs offer no evidence that the reorganization plan approved by the European Commission was imposed upon presale ILVA outside of the Italian Government's request to further subsidize pre-sale ILVA in preparation for its privatization. Therefore, because the Department's determination is supported by substantial evidence and is in accordance with law, the Department's determination that Law 451/94 is countervailable is sustained.

Although the Department was correct that Law 451/94 is a countervailable subsidy, the Department's current antidumping subsidy rate of 2.06 percent *ad valorem* under Law 451/94 cannot stand. In its *Second Redetermination*, the Department failed to recalculate the Law 451/94 countervailable subsidy. Since the *Second Redetermination* concluded that subsidies to pre-sale ILVA are not countervailable, and because many of the payments under Law 451/94 were made to employees that retired prior to new ILVA's privatization, a reassessment of the countervailable subsidy is required. The following payments under Law 451/94 may not be countervailed:

> (1) Payments under Law 451/94 to employees that were transferred to ILVA Residua in 1993 and 1994 are not countervailable.[6] When pre-sale ILVA was reorganized in 1993 and 1994, redundant employees were placed in ILVA Residua. *Determination* at 73,254. The redundant employees were not part of pre-sale ILVA when purchased by RIVA. Therefore, since the Department has determined that subsidies to pre-sale ILVA did not benefit post-sale ILVA, no payments to retired employees of ILVA Residua are countervailable subsidies to the New ILVA.
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> (2) Payments made to employees who retired prior to the share transfer on April 28, 1995, under Law 451/94, are not countervailable subsidies. Because the Department has determined that subsidies to pre-sale ILVA do not benefit New ILVA,

[6] In its *Determination*, the Department had calculated new ILVA's countervailable subsidy to be 0.66 percent *ad valorem* for employees transferred to ILVA Residua. *Determination* at 73,254.

no payments to employees who retired prior to the privatization of pre-sale ILVA are countervailable.

Therefore, the *Determination* is remanded to the Department to calculate the countervailable subsidies under Law 451/94. The countervailable payments under Law 451/94 are payments to those employees who retired from post-sale ILVA after April 28, 1995.

V. CONCLUSION

Thus, the Department's *Second Redetermination* is in accordance with law and supported by substantial evidence on the issue of calculating subsidies in countervailing duty investigations of newly privatized companies. The Domestic Producers motion for summary judgment is accordingly denied. The finding in the *Determination* that Law 451/94 is a countervailable subsidy is in accordance with law and supported by substantial evidence. However, this matter is remanded to the Department to calculate the countervailable subsidy rate under Law 451/94 in accordance with this Opinion. Therefore, the Department's *Determination* and *Remand Determination* are sustained in part and remanded in part.

RICHARD W. GOLDBERG,
Senior Judge.