Slip Op. 04–37

HYUNDAI ELECTRONICS INDUSTRIES CO., LTD. and HYUNDAI ELECTRONICS AMERICA, INC., PLAINTIFFS, v. UNITED STATES, DEFENDANT, and MICRON TECHNOLOGY, INC. DEFENDANT-INTERVENOR.

PUBLIC VERSION

Cons. Court No. 00–01–00027

[Plaintiffs' motion for judgment on agency record is granted in part and denied in part.]

Date: April 16, 2004

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OPINION

GOLDBERG, Senior Judge: In this consolidated action, Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America, Inc. (collectively "Hyundai") challenges the final results of the Department of Commerce's ("Commerce") fifth administrative review regarding Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") from the Republic of Korea covering the period of May 1, 1997 through April 30, 1998. *See Dynamic Random Access Memory Semiconductors of One Megabit Or Above from the Republic of Korea*, 64 Fed. Reg. 69694 (Dec. 14, 1999) ("*Final Results*"). At issue in this case are DRAMs produced by LG Semicon

Co., Ltd. ("LG Semicon")[1] and Hyundai. For the reasons that follow, the Court sustains in part and reverses and remands in part the *Final Results*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

I. *BACKGROUND*

On May 10, 1993, Commerce published the antidumping duty order on DRAMs from the Republic of Korea. *See Dynamic Random Access Semiconductors of One Megabit or Above from the Republic of Korea*, 58 Fed. Reg. 27520 (May 10, 1993). In response to a request by Defendant-Intervenor Micron Technology, Inc. ("Micron"), a domestic producer of DRAMs, Commerce initiated the fifth administrative review of the antidumping order on June 29, 1998. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part*, 65 Fed. Reg. 35188 (June 29, 1998).

On June 8, 1999, Commerce published the preliminary results for the fifth administrative review. *See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Preliminary Results of the Antidumping Administrative Review and Notice of Intent Not to Revoke Order*, 64 Fed. Reg. 30481 (June 8, 1999) ("*Preliminary Results*"). Commerce applied partial adverse facts available in calculating the dumping margin for LG Semicon because it found that it had reported as third-country sales "a substantial number of U.S. sales that it knew or should have known were U.S. sales," and concluded that LG Semicon "failed to cooperate to the best of its ability." *Id.* at 30482.

Commerce published the *Final Results* on December 14, 1999. Commerce determined that in selling DRAMs to customers in Germany and Mexico, LG Semicon knew or should have known that the ultimate destination of the products was the United States. *See Final Results*, 64 Fed. Reg. at 69717. Further, Commerce concluded that LG Semicon failed to cooperate to the best of its ability by failing to report the sales to customers in Germany and Mexico as U.S. sales and also because of the inadequacy of the information supplied. *See id.* at 69696. As a result, Commerce based the final dumping margin on total adverse facts available. *See id.* Using total adverse facts available for LG Semicon, Commerce applied the highest rate calculated in the *Final Results*, which was the margin for Hyundai. *See id.*

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[1] After the fifth adminstrative review was completed, respondent Hyundai acquired respondents LG Semicon Co., Ltd. and LG Semicon America, Inc. (collectively "LG Semicon"). Hyundai challenges the *Final Results* as they pertain to LG Semicon and Hyundai. In this opinion, Hyundai-as-successor-in-interest-to-LG Semicon is referred to as LG Semicon.

In addition, Commerce recalculated the research and development ("R&D") expenses for LG Semicon and Hyundai. *See id.* Commerce recalculated these expenses because of alleged distortions due to changes in LG Semicon and Hyundai's accounting methodologies. *See id.* at 69699. Previously, the companies had expensed R&D costs in the year incurred, but in the period of the fifth review they switched to capitalizing the costs. *See id.* Commerce achieved its recalculation by allocating R&D expenses of all semiconductors produced by LG Semicon and Hyundai over the total semiconductor cost of goods sold. *See id.* at 69702.

II. *STANDARD OF REVIEW*

The Court must sustain the *Final Results* 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). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). It is only if the Court concludes that "Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's construction under *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). In addition, "[s]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court will not substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

III. *DISCUSSION*

A. Commerce's Treatment of LG Semicon DRAMs Sold Through Germany

LG Semicon challenges the treatment of sales to a customer in Germany that Commerce determined entered the United States.

On September 14, 1999, three weeks before the scheduled final determination, Commerce placed a memorandum on the record regarding information about sales made by LG Semicon to [ ] ("the customer"). *See* Brief of Plaintiffs Hyundai Electronics Indus. Co., Ltd. and Hyundai Electronics America, Inc. in Support of Plaintiffs' Motion for Judgment Upon the Agency Record ("Pl. LG Semicon's Br.") at 6; Appendix to Pl. LG Semicon's Br. ("Pl. LG Semicon's Br. App."), C.R. 53 (Commerce Memorandum Regarding LG Semicon's

Sales to Germany).[2] The memo indicated that the German subsidiary of [ ] ("the customer's German subsidiary"), after purchasing DRAMs from LG Semicon, shipped them to its manufacturing facility in Puerto Rico ("the customer's Puerto Rican manufacturing facility"). It noted that within days of LG Semicon's sale of DRAMs to the customer's German subsidiary, a significant amount of DRAMs entered the United States via the customer. *See* Pl. LG Semicon's Br. App., C.R. 53 at 2.

The memo contained information regarding Commerce's receipt of an e-mail on January 4, 1999. *See* Pl. LG Semicon's Br. App., C.R. 53, Ex. 1. The e-mail, sent by a former employee of LG Semicon, stated that LG Semicon was "knowingly and willfully" dumping DRAMs into the United States by shipping DRAMs to the customer's German subsidiary, which would then ship the DRAMs to the customer's Puerto Rican manufacturing facility. *See id*. The e-mail also alleged that LG Semicon sold DRAMs to Germany in order to evade U.S. dumping duties and that LG Semicon's senior management both knew and approved of these sales. *See id*.

The memo also disclosed for the first time information regarding Commerce's meeting with Mark Vecchiarelli, another former employee of LG Semicon. *See* Pl. LG Semicon's Br. App., C.R. 53, Ex. 4; C.R. 63 (Commerce Memorandum Explaining andAttaching Draft and Final Versions of Exhibit 4 to Commerce's 09/13/1999 Memorandum). In this meeting, Vecchiarelli informed Commerce that LG Semicon sold DRAMs to the customer's German subsidiary with the knowledge that the ultimate destination for the DRAMs was the customer's Puerto Rican manufacturing facility. *See* Pl. LG Semicon's Br. App., C.R. 53 at 2.

1. Commerce's Determination that LG Semicon Knew or Should Have Known that DRAMs It Sold Were Destined for the United States Is Supported by Substantial Evidence.

Commerce applies a "knowledge test" to determine whether a foreign producer knew or should have known, at the time of sale, that subject merchandise was destined for the United States. *See Wonderful Chemical Indus., Ltd. v. United States*, 27 CIT ___ , ___ , 259 F. Supp. 2d 1273, 1279 (2003); *LG Semicon Co., Ltd. v. United States*, 23 CIT 1074, 1077 (1999). Commerce's test is consistent with Congressional intent, as demonstrated by the Statement of Administrative Action accompanying the Trade Agreements Act of 1979, which provides: "if the producer knew or had reason to know the goods were for sale to an unrelated U.S. buyer . . . the producer's sales prices will be used as 'purchase price' to be compared with that pro-

[2] Citations to the administrative record include references to proprietary documents ("C.R.") and public documents ("P.R.").

ducer's foreign market value." H.R. Doc. No. 96–153; *see also LG Semicon*, 23 CIT at 1077. The knowledge test does not require Commerce to prove that the producer had actual knowledge, as such a requirement would "eviscerate the acknowledged standard." *Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1434–35, 215 F. Supp. 2d 1322, 1332 (2000); *see also Wonderful Chemical*, 27 CIT at ___, 259 F. Supp. 2d at 1279.[3]

LG Semicon claims that Commerce's decision was based solely on the statement made by Vecchiarelli. *See* Pl. LG Semicon's Br. at 22. LG Semicon contends that Vecchiarelli's statement is not truthful and accurate. *See id.* at 23. LG Semicon argues that even assuming that Vecchiarelli's statement was truthful and accurate, his statement still fails to establish LG Semicon's knowledge that particular sales to the customer's German subsidiary were destined for the United States. *See id.* LG Semicon suggests that Vecchiarelli's statement exaggerated the scope of his role in the contested transactions. *See id.* Vecchiarelli maintained that he "was responsible for servicing all of the semiconductor requirements of [ ] upon a worldwide basis," and "was responsible for the pricing and supply decisions for all sales worldwide to [ ]." Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.'s Mem. in Opp'n") at 11; Appendix to Def.'s Mem. in Opp'n ("Def.'s Mem. in Opp'n App."), C.R. 54 (Letter from DOC re declaration attached to unreportedsales memo) at ¶2. LG Semicon argues that "he was not personally involved in filling individual orders placed by [ ] overseas locations with LG Semicon's overseas subsidiaries." *See* Pl. LG Semicon's Br. at 23. LG Semicon derives this conclusion from statements made by Vecchiarelli's successor, Mr. Pizarev, describing the scope of his authority as LG Semicon's Global Accounts Manager for the customer.[4]

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[3] LG Semicon's selective use of passages from certain decisions misleadingly suggests both directly and indirectly that actual knowledge is the proper standard. *See, e.g., NSK Ltd. v. United States*, 21 CIT 617, 645–46, 969 F. Supp. 34, 61 (1997), *aff'd in part*, 190 F.3d 1321, 1333–35 (Fed. Cir. 1999); *INA Walzager Schaeffler KG v. United States*, 21 CIT 110, 123, 957 F. Supp. 251, 263 (1997), *aff'd*, 180 F.3d 1370 (Fed. Cir. 1999); *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic Of China; Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 61276 (Nov. 17, 1997) ("*Tapered Roller Bearings*"). For example, LG Semicon quotes language from *Tapered Roller Bearings*, in which Commerce states "[l]acking evidence of *actual knowledge* that *particular sales* were destined for the United States, *we cannot assume such knowledge, regardless of general knowledge that some merchandise was intended for exportation to the United States.* Pl. LG Semicon's Br. at 13 (quoting *Tapered Roller Bearings*, 62 Fed. Reg. at 61291 (emphasis added)). Here, LG Semicon underscores the words "actual knowledge." This Court has rejected this understanding of the knowledge test. *See LG Semicon*, 23 CIT at 1077–79.

[4] Pizarev stated that "I did not have authority to deal with [ ] abroad. These [ ] were dealt with by LG's regional people. Thus, for example, LG staff in Germany dealt with [ ] German [ ] . . . for these sales, [ ] in Germany would have talked directly to LG Germany to place orders for the products that it needed." *See* Pl.

The Court finds that Commerce had substantial evidence indicating that it was within the ambit of Vecchiarelli's employment to know that the DRAMs sold by LG Semicon's German affiliate ("LG-Germany") to the customer's German subsidiary were destined for the customer's Puerto Rican manufacturing facility. At the very least, Vecchiarelli was in a position to be aware of the transactions between LG Semicon and the customer. Vecchiarelli regularly briefed LG Semicon corporate officials about the status of the customer's account, including the pricing and supply arrangements that he arranged with the customer, thus suggesting that Vecchiarelli knew the price, volume, and destination for LG Semicon DRAMs at the time of their sale. *See* Def.'s Mem. in Opp'n App., C.R. 54 at 2, ¶3. Additionally, there was documentation submitted at verification that repeatedly listed Vecchiarelli as the World Wide Sales Manager and provided information regarding the product needs for the customer's Puerto Rican manufacturing facility. *See* Def.'s Mem. in Opp'n App., C.R. 51 (Verification Report of LG Semicon), Ex. 69 at 1, 4, 48. A statement made by Y.S. Yin, LG Semicon's General Manager for Global Accounts, confirms Vecchiarelli's position and responsibilities as Global Accounts Manager for the customer. *See* Def.'s Mem. in Opp'n App., C.R. 51 at 6. Furthermore, even assuming that Vecchiarelli was not in a position to know the specific whereabouts of each DRAM sold, there is substantial evidence indicating that he had specific knowledge that the ultimate destination of the DRAMs sold by LG-Germany to the customer's German subsidiary was the customer's Puerto Rican manufacturing facility. Vecchiarelli expressly stated that he established a sales channel to ensure the customer's access to LG Semicon DRAMs "because LG's pricing structure included a floor price and I was not permitted to sell DRAMs to the United States through LGSA below this floor price." Def.'s Mem. in Opp'n App., C.R. 54 at 3–4, ¶5. Vecchiarelli also indicated that "[t]o [his] knowledge, [ ] did not subcontract, anywhere in the world, the production of memory modules using the discrete DRAMs LG sold to [ ]." *See* Def.'s Mem. in Opp'n App., C.R. 54 at 4, ¶6. Vecchiarelli asserted that he knew that any sale of discrete DRAMs to a division of the customer was intended for the customer's Puerto Rican manufacturing facility. *See* Def.'s Mem. in Opp'n App., C.R. 53 at 2.

LG Semicon maintains that the prices of DRAMs sold to the customer's German subsidiary were not lower than the prices of DRAMs sold to the customer's Puerto Rican manufacturing facility, thus ne-

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LG Semicon's Br. at 23–24; *see* Pl. LG Semicon's Br. App., C.R. 64 (LG Semicon's Submission of Factual Information Regarding LG Semicon's Sales to Germany) at ¶5. Pizarev also stated that Vecchiarelli never informed him about any arranged shipments from LG Semicon's German affiliate ("LG-Germany") to the customer's German subsidiary for further resale to the customer's Puerto Rican manufacturing facility. *See* Pl. LG Semicon's Br. at 24 n.17; Pl. LG Semicon's Br. App., C.R. 64 at ¶8.

gating the necessity for the sales channel. *See* Pl. LG Semcicon's Br. at 24. Additionally, LG Semicon offers several statements made by the customer in support of its argument that Vecchiarelli had no way of knowing the ultimate destination of the DRAMs was the United States. In these statements, the customer indicated that its [ ] did not just purchase DRAMs for the customer's Puerto Rican manufacturing facility but for its other manufacturing operations or their contract manufacturers all over Europe. *See* Pl. LG Semicon's Br. App., C.R. 65 (Letter from LG Semicon's Customer to Commerce Regardingits Purchases of DRAMs from LG Semicon) at 2–3. The customer also maintained that its Puerto Rican manufacturing facility was not its only entity that used discrete DRAMs. *See id*. Furthermore, the customer stated that it did not inform its sources of the ultimate destination of their products and that Vecchiarelli would not know the ultimate destination of the DRAMs that its German subsidiary purchased. *See id*.

The Court finds that LG Semicon's assertion that the sales price to the customer's German subsidiary was higher than the U.S. sales price is neither supported by the record nor materialto Vecchiarelli's establishment of the sales channel. Even assuming that the price was higher, it is irrelevant to the fact that Vecchiarelli established the sales channel to avoid reporting these sales as U.S. sales. The information and statements made by the customer fail to convince the Court that Vecchiarelli did not know that the DRAMs sold to the customer's German subsidiary were intended for the United States. In light of Vecchiarelli's position and responsibilities, his detailed statements of an established sales channel, and the lack of specific evidence suggesting that the customer's Puerto Rican manufacturing facility was not the sole destination for discrete DRAMs, the Court finds that Vecchiarelli's testimony supports Commerce's determination that LG Semicon knew or should have known that its DRAMs were destined for the United States.

2. Customs' Data Corroborate Vecchiarelli's Statement.

Commerce determined that data from the United States Customs Service ("Customs") that it placed upon the record corroborate Vecchiarelli's statement. *See Final Results*, 64 Fed. Reg. at 69696. Commerce claims that the Customs data support the existence of the sales channel that Vecchiarelli stated that he constructed. *See* Def.'s Mem. in Opp'n at 15.

Commerce notes that after LG-Germany made sales to the customer's German subsidiary, a significant portion of the DRAMs arrived in the United States within days of the initial sale by LG-Germany. *See id*. Commerce claims that these entries frequently consisted of the identical quality and value of DRAMs reported on the sales invoices from LG-Germany to the customer's German sub-

sidiary.[5] Commerce further claims that the data indicated that numerous other transactions, involving shipments of the exact quantity and value by LG-Germany to the customer's German subsidiary, arrived within days to the customer's Puerto Rican manufacturing facility via the customer's German subsidiary. *See* Def.'s Mem. in Opp'n App., C.R. 61 (Revision to unreported sales data and excerpts from Customs unreported sales data) at 3b. Additionally, Commerce notes that when it randomly selected several invoices, it found out that not only were the DRAMs manufactured by LG Semicon, but that these samples possessed the exact same configurations that Vecchiarelli described in his statement. *See* Def.'s Mem. in Opp'n App., C.R. 61 at 3c;, C.R. 50 (DOC verification report re LG Semicon DRAMs sales). Finally, Commerce asserts that the focus of the examination was not to prove that every DRAM sold by LG-Germany to the customer's German subsidiary entered the United States, but rather to independently test the accuracy of Vecchiarelli's statement. *See* Def.'s Mem. in Opp'n at 16.

The Court finds Commerce's reliance on this corroborating evidence reasonable. The Customs data sufficiently corroborate Vecchiarelli's assertions, thereby supporting a finding that LG Semicon knew or should have known that the DRAMs sold to the customer's German subsidiary were destined for the United States.

Accordingly, the Court holds that Vechiarelli's statement and corroborating Customs data constitute substantial evidence to support Commerce's determination that LG Semicon knew or should have known that its DRAMs were destined for the United States.

B. Commerce Did Not Violate LG Semicon's Right to a Fair and Honest Proceeding.

LG Semicon alleges that Commerce's administrative review was not a "fair and honest" proceeding. *See* Plaintiffs' Memorandum of Points and Authorities in Support of Count Nine ("Pls. Mem. in Supp. of Count Nine") at 5. LG Semicon argues that Commerce failed to remain impartial by "(1) not providing the parties adequate opportunity to rebut harmful allegations, actions which violated the statutory provision governing *ex parte* communications; and (2) failing to consider exculpatory evidence." *Id.*

"[A]n importer may be entitled to procedural due process regarding the resolution of disputed facts involved in a case of foreign commerce when the importer faces a deprivation of 'life, liberty, or prop-

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[5] Commerce offers the following examples: (1) on May 6, 1997, LG-Germany sold [ ] DRAMs to the customer's German subsidiary for $[ ]; (2) on May 12, 1997, the customer entered [ ] DRAMs for $[ ]; (3) on June 18, 1997, LG-Germany sold [ ] DRAMs to the customer's German subsidiary for $[ ]; and (4) on June 19, 1997, the customer entered [ ] DRAMs for $[ ]. Def.'s Mem. in Opp'n App., C.R. 61 at Ex. 36, C.R. 78 (DOC unreported sales memorandum (Germany)) at 4.

erty' by the Federal Government." *NEC Corp. v. United States*, 151 F.3d 1361, 1370 (Fed. Cir. 1998). The parties involved in an antidumping proceeding are entitled to a fair and honest process. *See id*. Furthermore, "the right to an impartial decision maker is unquestionably an aspect of procedural due process." *Id*. The notion of transparency is fundamental to an antidumping proceeding, including access to information on which decisions are based. *See* S. Rep. No. 96–249 at 41, 98; Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103–316 (1994).

1. Commerce Did Not Violate the *Ex Parte* Meetings Statute.

LG Semicon alleges that Commerce failed to timely disclose *ex parte* meetings, thereby denying them a meaningful opportunity to respond to the allegations made during these respective meetings. *See* Pls. Mem. in Supp. of Count Nine at 5.

19 U.S.C. § 1677f(a)(3) governs *ex parte* meetings, providing that:

> (3) The administering authority and the Commission shall maintain a record of any ex parte meeting between—
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> (A) interested parties or other persons providing factual information in connection with a proceeding, and
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> (B) the person charged with making the determination, or any person charged with making a final recommendation to that person, in connection with that proceeding, if information relating to that proceeding was presented or discussed at such meeting. The record of such an ex parte meeting shall include the identity of the persons present at the meeting, the date, time and place of the meeting, and a summary of the matters discussed or submitted. The record of the ex parte meeting shall be included in the record of the proceeding.

19 U.S.C. § 1677f(a)(3).

Section 1677f(a)(3) requires that memoranda of *ex parte* meetings submitted on the record must include a summary of the discussion and the information submitted. *See Nippon Steel Corp. v. United States*, 24 CIT 1158, 1164, 118 F. Supp. 2d 1366, 1373 (2000). A failure to timely notify a party of *ex parte* meetings deprives the party a full opportunity to respond, thus violating procedural due process. *Id*. at 1374.

a. *Commerce's Receipt of an E-Mail Message from a Former LG Semicon Employee Does Not Constitute an Ex Parte Meeting.*

LG Semicon argues that the January 4, 1999 e-mail message from a former employee of LG Semicon falls within the statutory defini-

tion of an *ex parte* meeting. Pls. Mem. in Supp. of Count Nine at 7; Plaintiffs' Reply Brief Concerning Count Nine of the Amended Complaint ("Pls. Reply Br. Concerning Count Nine") at 5–7. LG Semicon draws an analogy between e-mail messages and phone calls, the latter of which have been recognized as an *ex parte* meeting. *See F.LLI De Cecco Di Fillipo Fara San Martino S.P.A. v. United States*, 21 CIT 1124, 980 F. Supp. 485 (1997); Pls. Reply Br. Concerning Count Nine at 7. In light of the plain language of the statute, the Court concludes that the e-mail does not constitute an *ex parte* meeting. Section 1677f(a)(3) explicitly refers to *ex parte meetings* (emphasis added). Unlike a telephone call, which LG Semicon claims is comparable to an e-mail, the unsolicited e-mail message in this case was a one-way communication. This negates any facially reasonable notion that a meeting occurred. Accordingly, Commerce's handling of the e-mail did not violate LG Semicon's procedural due process.

b. *Commerce's Placement of its Meeting with Vecchiarelli on the Record Within Eighteen Days Does Not Constitute a Violation of LG Semicon's Procedural Due Process.*

Commerce interviewed Vecchiarelli on August 27, 1999. Commerce placed this information on the record on September 14, 1999, 18 days later. *See* Pls. Mem. in Supp. of Count Nine at 8; Pl. LG Semicon's Br. App., C.R. 53, Ex. 4. LG Semicon claims that by waiting 18 days, Commerce sought to "maximize the element of surprise." *See* Pls. Reply Br. Concerning Count Nine at 9. LG Semicon argues that this was contrary to *Nippon Steel*, which held that memoranda must be "drafted expeditiously in all cases, reviewed by a person in attendance at the meeting and placed in the record as soon as possible." 24 CIT at 1166, 118 F. Supp. 2d at 1374. In sum, according to LG Semicon, Commerce "did not provide an adequate opportunity for Plaintiffs to inspect the *ex parte* communication, seek clarification and/or provide rebutting information." *See* Pls. Mem. in Supp. of Count Nine at 8.

The Court finds that Commerce provided LG Semicon with adequate opportunity to respond. Section 1677f(a)(3) does not provide a specific time frame in which Commerce must put information on the record. Commerce is only required to have timely memoranda drafted and filed in order for parties to view them at a useful point during the proceeding. *See Nippon Steel*, 24 CIT at 1165, 118 F. Supp. 2d at 1373. The instant case is distinguishable from *Nippon Steel*, where Commerce was found to have violated § 1677f(a)(3) when it placed one *ex parte* memorandum on the record on or about the day of the final determination. *See Nippon Steel*, 24 CIT at 1163–66, 118 F. Supp. 2d at 1372–74. Here, the Court finds that the disclosure of the *ex parte* meeting within 18 days of the actual meeting was timely, as long as it provided LG Semicon with a meaningful opportunity to respond.

In regards to LG Semicon's ability to respond, the Court finds that the three weeks afforded to LG Semicon to submit factual information and comments on the contested issues was sufficient. Commerce afforded LG Semicon several opportunities to comment. After the initial disclosure of Vecchiarelli's allegations, Commerce gave LG Semicon until October 4, 1999 to submit factual information, a total of 21 days. *See* Pl. LG Semicon's Br. App., P.R. 157 (LG Semicon's Request for an Extension of Time to Respond to Commerce's 09/13/1999 Memorandum). After LG Semicon requested an extension, Commerce permitted LG Semicon to submit this information on October 7, 1999. On October 7, 1999, LG Semicon submitted factual information to rebut Vecchiarelli's allegations. *See* Pl. LG Semicon's Br. App., C.R. 64 (LG Semicon's Submission of Factual Information Regarding LG Semicon's Sales to Germany). Furthermore, LG Semicon filed its case brief on October 21, 1999, which included challenges to the e-mail and Vecchiarelli's statements. *See* Pl. LG Semicon's Br. App., C.R. 67 at 87–115. LG Semicon also raised these same contentions during a public hearing on November 4, 1999. *See* Pl. LG Semicon's Br. App., P.R. 178 (Public Hearing Transcript) at 6, 25–31, 131–32. In sum, Commerce gave LG Semicon over three weeks to submit its initial comments and information. This included two separate extensions that in total extended Commerce's initial deadline by two weeks. Accordingly, the Court concludes that Commerce provided LG Semicon with a meaningful opportunity to respond.

2. Commerce Did Not Ignore Exculpatory Evidence.

LG Semicon argues that Commerce did not act as an impartial decision maker by consciously ignoring exculpatory evidence. LG Semicon maintains that Commerce's refusal to consider and confirm this evidence was evident throughout the investigation. *See* Pls. Mem. in Supp. of Count Nine at 9.

First, LG Semicon points to Commerce's failure to question LG Semicon senior officials about the diversion of LG Semicon's German sales to the United States. *See id.* LG Semicon suggests that this questioning was essential because both the January 4, 1999 e-mail and Vecchiarelli's statement alleged that senior management knew of the diverted sales, and actual or constructive knowledge is a necessary requirement for Commerce's determination. *See id.* at 9–10. LG Semicon notes that even though Commerce failed to specifically question these officials during the April 1999 verification period, Commerce continued to make various requests for information and documents motivated by the allegations contained within the e-mail. *See id.* at 10. Furthermore, LG Semicon argues that Commerce never directly asked for information regarding LG Semicon's German sales. *See id.* It claims that it was Commerce's responsibility to disclose the subject of the investigation so that LG Semicon could provide the appropriate information. *Id.* LG Semicon argues that

had it known about the e-mail, verification would have been the proper time for it to answer questions and present exculpatory evidence. *See id.*

Second, LG Semicon notes that Commerce failed to take the opportunity to view documents and evidence at LG-Germany, the site that LG Semicon felt had the most relevant information. *See id.* LG Semicon asserts that because the alleged diversion started in Germany, certainly LG-Germany contained useful information and documents. *Id.* at 11.

Third, LG Semicon takes issue with Commerce's refusal to speak with the customer regarding the alleged sales channel. *See id.* Specifically, LG Semicon points out that a letter sent by the customer to Commerce contained several statements that directly contradicted Vecchiarelli's statement. LG Semicon argues that Commerce's failure to respond to an offer of assistance by the customer and its disregard for the contents of the customer's letter demonstrate Commerce's lack of impartiality. *See id.* at 11–12.

The Court finds that Commerce did not fail to remain impartial in its proceedings by refusing to consider exculpatory evidence. Commerce is afforded broad discretion in the manner in which it conducts antidumping proceedings. *See Torrington Co. v. United States*, 25 CIT ___ , ___ , 146 F. Supp. 2d 845, 897 (2001) ("Commerce enjoys wide latitude in its verification procedures."); *Union Camp Corp. v. United States*, 23 CIT 264, 283, 53 F. Supp. 2d 1310, 1328 (1999) (Commerce, in weighing the competing interests of efficient investigations and accurate fact-finding, must make choices of administrative practice and procedure). Here, Commerce did not clearly act outside the bounds of its discretion in conducting verification. *See Hontex Enter., Inc. v. United States*, 27 CIT ___ , ___ , 248 F. Supp. 2d 1323, 1335 (2003) (finding that Commerce's decision in an antidumping proceeding not to question the owners of the company about their knowledge of an employee's actions was not unfair, especially since the plaintiffs had an opportunity to comment on the matter at a later point). Notwithstanding the issue of whether it was within Commerce's discretion not to question LG Semicon senior officials, it is clear that Commerce did in fact question these officials. LG Semicon officials, including Yin, gave statements to Commerce indicating their belief that "all sales made to the United States by LG Semicon are processed through LG Semicon's U.S. affiliate, LGSA." Def.'s Mem. in Opp'n App., C.R. 50 (DOC verification report re LG Semicon DRAMs sales) at 6. These assertions were considered by Commerce against Vechiarelli's assertions to the contrary. *See* Defendant's Supplemental Memorandum In Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record at 16.

Commerce also properly exercised its discretion in its decision not to investigate LG-Germany. As a result of LG Semicon's insistence that its U.S. affiliate, LGSA, was the only entity responsible for U.S.

sales, it was reasonable for Commerce to believe that it had all the relevant information. Likewise, an investigation of the German facility was not necessary because Commerce already had Vecchiarelli's statement and LG Semicon's sales data as evidence. LG Semicon had an adequate opportunity to submit relevant information regarding LG-Germany but failed to avail itself of this opportunity.

Finally, Commerce acted within the bounds of its discretion when it chose not to pursue further contact with the customer involved in the present matter. Commerce afforded the customer the opportunity to submit information and comments, and the customer availed itself of this opportunity. Thereafter, Commerce reasonably decided that it was not necessary to discuss anything further. As there is a presumption that Commerce has considered all evidence on the record, LG Semicon has failed to provide any evidence that overcomes this presumption. *See Fujitsu Ltd. v. United States*, 23 CIT 46, 50 n.5, 36 F. Supp. 2d 394, 398 n.5 (1999).

Accordingly, the Court holds that Commerce did not fail to disclose *ex parte* meetings nor fail to consider exculpatory evidence.

C. Commerce Erred in Applying Total Adverse Facts Available to LG Semicon's Entire U.S. Sales Database.

LG Semicon challenges Commerce's application of total adverse facts available to LG Semicon's entire U.S. sales database. Commerce used total adverse facts available because of undisclosed sales to [ ] German subsidiary, see *supra* III(1), in addition to undisclosed sales to [ ] ("the unaffiliated Mexican customer") that were ultimately destined for the United States.

Commerce is required to consider information submitted by a party only if:

> (1) the information is submitted by the deadline established for its submission, (2) the information can be verified, (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements . . ., and (5) the information can be used without undue difficulties.

19 U.S.C. § 1677m(e).

19 U.S.C. § 1677e(a) provides that Commerce is required to use facts otherwise available if:

> (2) an interested party or any other person—
>
> (A) withholds information that has been requested by the administrating authority or the Commission under this subtitle,

> (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested . . .
>
> (C) significantly impedes a proceeding under this subtitle, or
>
> (D) provides such information but the information cannot be verified. . . .

19 U.S.C. § 1677e(a).

Furthermore, if Commerce 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, Commerce has the discretion to "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). If Commerce concludes that a party's response to a request for information did not comply with its request, then Commerce must notify the party of this deficiency and provide them with an opportunity to remedy or explain the deficiency. 19 U.S.C. § 1677m(d).

Commerce maintains that use of facts available was proper because LG Semicon failed to provide information or complete responses to Commerce's requests as required by § 1677e(a) and that an adverse inference was justified because LG Semicon failed to act to the best of its ability as required by § 1677e(b). *See* Def.'s Mem. in Opp'n at 22. Even though Commerce provided LG Semicon with several opportunities to remedy or explain deficiencies in regards to its U.S. sales as required under § 1677m(d), Commerce asserts that LG Semicon chose to "treat these sales as third country sales in spite of the record evidence to the contrary." *Id.* at 24. Commerce maintains that the burden is on the respondent to submit accurate information, and even if Commerce has information on the record that can correct the error, a respondent cannot expect Commerce to correct the information or guarantee its accuracy. *See id.*; *see also Mannesmannrohren-Werke AG v. United States*, 24 CIT 1082, 1097, 120 F. Supp. 2d 1075, 1087 (2000) ("*Mannesmannrohren II*") ([I]t is [the respondent's] burden to respond to Commerce's questionnaires and to develop the record."). Furthermore, Commerce asserts that the information submitted by LG Semicon did not meet the statutory requirements set forth in § 1677m(e).

Commerce's justification for using adverse facts for the Mexican sales revolves around LG Semicon's decision to claim that these sales were third country sales. LG Semicon submitted to Commerce computer sales listings for sales to the unaffiliated Mexican customer. *See* Pl. LG Semicon's Br. App., C.R. 15 (LG Semicon's Second Supplemental Questionnaire Response) at App. SS–8. Commerce claims that it did not calculate them as U.S. sales because LG Semicon insisted that these sales were not U.S. sales, in spite of evidence on the record indicating that LG Semicon knew or should have

known that the destination of these sales was the United States. *See* Def.'s Mem. in Opp'n at 19, 25–28. According to Commerce, LG Semicon's submission of the Mexican sales was untimely because Commerce chose not to verify the information due to LG Semicon reporting the sales as third country sales. *See id.* at 25. Commerce notes that "LG Semicon submitted U.S. expense information only in the alternative, and never admitted during the administrative proceeding that the sales . . . were sales ultimately destined for the United States." *Id.* Additionally, Commerce contends that the "U.S. sales information was so incomplete that it could not be used without undue difficulties and the use of facts available." *Id.* at 27. Finally, Commerce points out that the "unreported" Mexican sales, when combined with the "unreported" German sales, represented approximately [ ] percent of LG Semicon's U.S. sales. *See id.* at 25. Because such a substantial portion of LG Semicon's U.S. sales were unreported and unverified, Commerce argues that LG Semicon's response was substantially incomplete and an unreliable basis for determining its dumping margin. *See id.* at 25–26. Commerce asserts that because the sales issue in the fifth administrative review was identical to the fourth administrative review, in which Commerce determined that LG Semicon knew or should have known that these sales were diverted to the United States, LG Semicon's insistence that these sales were third country sales rendered the information untimely, unusable, and unverifiable. *See id.* at 25–28.

With respect to the sales to the unaffiliated Mexican customer, the Court finds that Commerce not only failed to meet the requisite finding for adverse facts available, but also failed to demonstrate the need to apply facts otherwise available. The application of adverse facts available requires a finding that "an interested party has failed to cooperate by not acting to the best of its ability." *Mannesmannrohren-Werke v. United States*, 23 CIT 826, 838, 77 F. Supp. 2d 1302, 1313 (1999) ("*Mannesmannrohren I*"). It is "not sufficient for Commerce to simply assert this legal standard as its conclusion or repeat its finding concerning the need for facts available." *Id.*

Commerce erred in concluding that LG Semicon's insistence that the sales to the unaffiliated Mexican customer were third country sales rendered the data untimely, unusable, and unverifiable. At the beginning of the fifth administrative review, LG Semicon notified Commerce that it planned to treat these sales as third country sales, although Commerce had determined otherwise in the fourth review. This Court's disposition of the fourth administrative review in *LG Semicon v. United States*, 23 CIT 1074 (1999) was issued on December 30, 1999, 16 days after the *Final Results* were issued on December 14, 1999. It is indisputable that LG Semicon timely submitted computer sales listings and subsequently amended its submission in response to further information placed by Commerce upon the

record. *See* Def.'s Mem. in Opp'n at 19. Although Commerce is not required to verify each piece of information, Commerce may not arbitrarily disregard timely-submitted information. *See AL Tech Specialty Steel Corp. v. United States*, 20 CIT 1344, 1353– 54, 947 F. Supp. 510, 519 (1996) ("Commerce cannot apply . . . time limits arbitrarily or capriciously by refusing to accept information submitted before the applicable deadline."). Because the U.S. sales were subject to verification, it was unreasonable for Commerce not to consider the sales to the unaffiliated Mexican customer at verification solely because the information would have been irrelevant if these sales were deemed to be third country sales. Furthermore, even if Commerce found LG Semicon's response and explanations to its questionnaires unsatisfactory, it was still required to use LG Semicon's information if § 1677m(e)'s requirements were met. *Mannesmannrohren I*, 23 CIT at 838, 77 F. Supp. 2d at 1313; *Borden, Inc. v. United States*, 22 CIT 233, 262–63, 4 F. Supp. 2d 1221, 1245–46 (1998).

With respect to the German sales, the Court holds that Commerce's use of adverse facts available is supported by substantial evidence. As discussed above, Commerce established that LG Semicon knew or should have known that DRAMs sold to the customer's German subsidiary were destined for the U.S. market. As LG Semicon did not submit these sales to Commerce as U.S. sales, the Court finds that Commerce did not err in concluding that LG Semicon did not act to the best of its ability to comply with its requests for information regarding the German sales, thus justifying use of adverse facts available under § 1677e(b).

Since the Court has determined that Commerce erred in using adverse facts available for the sales to the unaffiliated Mexican customer, use of total adverse facts available is not warranted. Accordingly, the Court remands to Commerce on this issue with instructions to recalculate LG Semicon's dumping margin using the sales data submitted by LG Semicon for the Mexican sales and using adverse facts available only for LG Semicon's sales to the customer's German subsidiary.

D. Commerce's Treatment of LG Semicon's and Hyundai's Research and Development Costs

LG Semicon and Hyundai challenge two aspects of Commerce's treatment of their research and development costs used in constructing the cost of production. The two issues are (1) whether Commerce was reasonable in incorporating Plaintiffs' R&D costs for all semiconductor production based on cross-fertilization; and (2) whether Commerce properly rejected Plaintiffs' accounting methodology for R&D costs. Hyundai makes three additional R&D claims separately from LG Semicon. The Court will now address each of these R&D-related claims.

1. Commerce's Decision Not to Calculate Costs On a Product-Specific Basis Is Not Supported By Substantial Evidence.

In the *Final Results*, Commerce's calculation of R&D costs incorporated R&D costs of all semiconductor products, instead of costs applicable only to subject merchandise. 64 Fed. Reg. at 69702. 19 U.S.C. § 1677b(f)(1)(A) provides that:

> Costs shall be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise. The administering authority shall consider all available evidence on the proper allocation of costs.

LG Semicon and Hyundai argue that Commerce erred by including R&D costs for all semiconductor products in calculating their respective costs of production. They contend that Commerce improperly deviated from its practice of calculating costs on the most product-specific basis available based on the level of detail in a company's accounting records. LG Semicon argues that because it maintained "accurate and fully verified records" that listed product expenses according to particular products, including DRAMs, Commerce should only include R&D costs associated with producing DRAMs in LG Semicon's cost of production. *See* Pl. LG Semicon's Br. at 41. Hyundai argues that since its accounting records distinguish between memory and non-memory products, its cost of production should only include R&D costs linked to production of its memory products. *See* Memorandum of Points and Authorities in Support of Motion by Plaintiffs Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America for Judgment on the Agency Record ("Pl. Hyundai's Br.") at 33.

Commerce and Micron maintain that there are intrinsic benefits that occur between R&D expenditures on non-subject merchandise and production of subject merchandise, and therefore R&D costs for non-subject merchandise should be included in the cost of production analyses. Commerce contends that R&D cross-fertilization occurs in the semiconductor industry based on the findings of its expert, Dr. Murzy Jhabvala, Chief Engineer, Instrument Technology Center, National Aeronautics and Space Administration — Goddard Space Flight Center.

In the *Final Results*, Commerce determined that "DRAM-specific R&D account entries do not by themselves reflect all costs associated with the production and sale of subject merchandise." 64 Fed. Reg. at 69702. According to Commerce, it followed a "long-standing practice, where costs benefit more than one product, to allocate these costs to all the products which they benefit." *Id*. This Court has held that it

is appropriate to include R&D expenditures for non-subject merchandise in calculating the cost of producing the subject merchandise if substantial evidence supports such a determination. *Micron Tech., Inc. v. United States*, 19 CIT 829, 832, 893 F. Supp. 21, 27 (1995).

LG Semicon offers verified records that show product-specific R&D costs at each of its laboratories demonstrating non-DRAM R&D efforts do not benefit the production of DRAMs. *See* Pl. LG Semicon's Br. App., C.R. 49 (Commerce's Cost Verification Report for LG Semicon), Ex. 8. Similarly, Hyundai offers evidence in the form of questionnaire responses showing that its R&D costs are separated into memory and non-memory categories. *See* Appendix to Pl. Hyundai's Br. ("Pl. Hyundai's Br. App.") at 18. Plaintiffs also submit the opinions of three experts that explain how cross-fertilization of R&D expenditures within the semiconductor industry is limited or non-existent. *See* Appendix to Pl. LG Semicon's Reply Br. ("Pl. LG Semicon's Reply Br. App."), P.R. 56. Plaintiffs have submitted substantial evidence to demonstrate why R&D expenses for non-subject merchandise should not be applied to subject merchandise. *See Micron*, 19 CIT at 832, 893 F. Supp. at 28 (describing substantial evidence as "ample citation to verified record evidence that the subject merchandise did not derive an intrinsic benefit from R&D related to other semiconductor products").

In arguing that cross-fertilization occurs between DRAMs and non-DRAM merchandise with respect to R&D costs in this case, Commerce relies on the expert opinion of Jhabvala. According to Jhabvala, "SRAMs represent along with DRAMs the culmination of semiconductor research and development. Both families of devices have benefitted from the advances in photolithographic techniques. . . . Clearly, three distinct areas of semiconductor technology are converging to benefit the SRAM device performance." See Final Results, 64 Fed. Reg. at 69701 (citing September 8, 1997 Memorandum from Murzy Jhabvala to U.S. Department of Commerce, Sept. 8, 1997).

Jhabvala's opinion is based upon his research for a prior antidumping investigation regarding SRAMs. *See id.* However, DRAMs, and not SRAMs, are the focus of this review. *Id.* at 69694. Moreover, the plaintiffs in the prior SRAM investigation do not overlap with Plaintiffs in this investigation. In fact, Jhabvala had no direct contact or experience with Plaintiffs' practices during this review. *See* Def.'s Mem. in Opp'n at 33. Therefore, because the evidence submitted by Commerce concerns different products and different parties to that of the current review, the Court finds that Commerce has not offered substantial evidence for the Court to sustain Commerce's determination on the theory of cross-fertilization.

Accordingly, the Court remands this issue to Commerce to provide additional information specifically pointing to the effect of non-

subject merchandise R&D on the R&D for the subject merchandise, or alternatively, recalculating R&D costs on the most product-specific basis possible for both LG Semicon and Hyundai.

2. Commerce's Rejection of Plaintiffs' Method of Accounting for R&D Expenses is Not Supported by Substantial Evidence.

Commerce included all R&D costs incurred during the fifth administrative review in determining the R&D expenses for LG Semicon and Hyundai. *Final Results*, 64 Fed. Reg. at 69700. Plaintiffs disagree with Commerce's rejection of their accounting methodology in calculating R&D expenses for the cost of production.

Specifically, LG Semicon and Hyundai maintain that amortization of R&D costs over five years and the deferral of certain R&D costs until relevant revenue from those R&D expenditures is first realized are reasonable accounting practices, and in accordance with the generally accepted accounting principles ("GAAP") of the exporting country, South Korea. *Final Results*, 64 Fed. Reg. at 69699. Under 19 U.S.C. § 1677b(f)(1)(A), the cost of production calculation should follow GAAP of the exporting country.

While Commerce does not disagree that the accounting methodology is in accordance with Korean GAAP, Commerce finds that the cost of production calculations for the companies have been distorted for this period of review because of the switch to the practice of amortization and deferral from the practice of expensing all R&D costs incurred during a period. *Final Results*, 64 Fed. Reg. at 69699. Although this Court has previously recognized amortization of R&D costs as an "established practice," Commerce may also enjoy judicial deference when abandoning an established practice if there is reasoned analysis behind Commerce's decision. *Micron*, 19 CIT at 833, 893 F. Supp. at 28.

Here, Commerce argues that this is not the first time that LG Semicon and Hyundai have changed accounting methodologies.[6] According to Commerce, Plaintiffs' practice of "continually changing" methodologies produces "aberrationally high amounts of R&D expense in some years, and aberrationally low amounts of R&D expense in other years, that do not reasonably reflect [production] costs." *Final Results*, 64 Fed. Reg. at 69699. However, Plaintiffs' previous changes in accounting methodology are not relevant in this case as the Court is concerned with the actions of the parties with

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[6] In 1991, both LG Semicon and Hyundai amortized R&D costs. Preliminary Results, 64 Fed. Reg. at 30485. LG Semicon switched to expensing full R&D costs in the year incurred in its 1993 financial statements. *Id.* Hyundai also switched to expensing R&D costs in the year incurred sometime between 1991 and 1996. Id. In 1997, LG Semicon and Hyundai changed again to amortizing R&D costs. Id. In addition, Hyundai began deferring costs on long-term R&D projects in 1996, and LG Semicon followed suit in 1997. *Id.*

respect to their R&D costs only for this period of review. Moreover, Commerce rules out any implication of deliberate manipulation to artificially lower costs by Plaintiffs through their switch in accounting methodologies. Def.'s Mem. in Opp'n at 36.

Commerce also points out that the inadvertent result of the change in accounting practice allows LG Semicon and Hyundai to recognize less than one-fifth of the current year's R&D costs as a result of the change in methodology. *Final Results*, 64 Fed. Reg. at 69699. However, in switching from expensing to amortization, a difference in costs will likely occur, as amortization by definition permits the allocation of costs over the market life of the product,[7] while expensing costs during the period incurred necessarily implies a one-time charge.

In evaluating Plaintiffs' cost allocations, Commerce shall also consider whether the accounting methodology has been historically used by the exporter or producer, particularly for establishing appropriate amortization and depreciation periods. *See* 19 U.S.C. § 1677b(f)(1)(A). While LG Semicon and Hyundai have no immediate historical basis for their preference in amortizing R&D expenses, both companies have amortized R&D costs in the past. In addition, this Court found in *Micron* that the amortization period afforded by Korean GAAP of three to five years is generally consistent with the actual DRAM life cycle of three and one-half to four years. *Micron*, 19 CIT at 834, 893 F. Supp. at 29.

In addition to switching to amortization during the review period, Plaintiffs adopted the practice of indefinitely deferring the costs of R&D projects that were not linked to any current production or revenue. Commerce claims that the practice of indefinite deferral of R&D costs is inconsistent with the conservatism principle in accounting. *Final Results*, 64 Fed. Reg. at 69699. Conservatism in accounting calls for the recognition of expenses when incurred if the probability of associated revenue is remote or uncertain. *Id*.

Plaintiffs point out that their methodology, which is in accordance with Korean GAAP, does follow the principle of conservatism in accounting. Under Article 70.5 of Korean GAAP, any unamortized balance remaining for R&D costs will be expensed immediately if the possibility of realizing revenue from a specific R&D project becomes remote. Pl. Hyundai's Br. at 27.

Only R&D costs that are related to the production and revenue of the subject merchandise for the review period should be included in Commerce's calculations. *See* 19 U.S.C. § 1677b(f)(1)(A). Thus, if R&D expenditures for long-term projects affect the production and revenues for subject merchandise for the review period, those costs

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[7] *See* BLACK'S LAW DICTIONARY (7th ed. 1999). Amortization is defined as the "act . . . of apportioning the initial cost of a usually intangible asset . . . over the asset's useful life." *Id*.

should be allocated into the cost of production calculation. Commerce has not provided specific evidence on the record to show that R&D costs that are currently deferred actually affect production and revenue for this review period.

Accordingly, the Court remands to Commerce to provide specific evidence regarding how Plaintiffs' actual R&D costs for this period of review are not reasonably accounted for in its amortized R&D costs. The Court also instructs Commerce to provide additional information and to present substantial evidence on the record showing how R&D costs for long-term projects might affect current projects for this review period with respect to deferral.

3. Commerce's Calculation of Hyundai's R&D Cost Allocation Ratio Is Reasonable.

To determine Hyundai's R&D expenses, Commerce calculated the company's R&D allocation ratio by dividing R&D expenses for semiconductors by the cost of semiconductors sold ("COGS") to arrive at a per unit cost of R&D. This formulation of the R&D allocation ratio has been used consistently by Commerce in the past. *See Notice of Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From Taiwan*, 64 Fed. Reg. 56308, 56311–12 (Oct. 19, 1999); *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative, Partial Rescission of Administrative Review and Notice of Determination Not to Revoke Order,* 63 Fed. Reg. 50867, 50870 (Sept. 23, 1998); *Notice of Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke Order in Part: Dynamic Random Access Memory Semiconductors of One Megabyte or Above from the Republic of Korea*, 62 Fed. Reg. 39809, 39823 (Jul. 24, 1997); and *Final Determination of Sales at Less Than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea*, 58 Fed. Reg. 15467, 15470 (Mar. 23, 1993). Commerce then multiplied the R&D allocation ratio by the cost of semiconductors manufactured ("COM") to determine the R&D expenses for semiconductors.

Hyundai argues that COM instead of COGS should be used in the denominator of the R&D allocation ratio. Differences, if any, between cost of manufacturing and cost of goods sold should generally be "random," since the cost of goods sold should be a *reasonable approximation* of the cost of manufacturing. *See* Pl. Hyundai's Br. at 37–38. However, Hyundai points out the difference between COGS and COM in this proceeding is not random, but inherent to the DRAM industry in general, as each new generation of DRAMs is more costly to produce than the prior generation due to a consistent trend towards higher density products. *Id.*

The fact that the use of COGS might reflect historical production costs rather than account for cost increases during the period of review is not reason alone to reject a COGS-based approach to calculating costs. *See AIMCOR, Alabama Silicon, Inc. v. United States*, 18 CIT 1106, 1116, 871 F. Supp. 455, 463–64 (1994). Moreover, Hyundai has not provided sufficient evidence to show that the extent of the difference between COGS and COM is systematic in nature. *See, e.g., Camargo Correa Metais. S.A. v. United States*, 21 CIT 1249, 1255–56 (1997) (explaining systematic difference between COGS and COM can occur when historical figures used in COGS may not take into account the rapidly rising costs used to calculate COM during a period of extreme hyperinflation). Hyundai provides data to indicate a constant relationship between manufacturing costs and the cost of goods sold for the accounting periods of 1995, 1996, 1997, and the first half of 1998 to show that COM is higher than COGS for the company. *See* Pl. Hyundai's App. 25. The limited data, however, indicates that the differences between the figures are still reasonably close approximations of each other, except for the accounting period of 1997, which happens to overlap with the period of this review.

Accordingly, the Court finds that Commerce reasonably applied COGS to the R&D allocation ratio.

4. Hyundai Does Not Provide Sufficient Evidence of Double Counting by Commerce.

In determining Hyundai's total R&D costs, Commerce included costs incurred by Hyundai Electronics Industries Co., Ltd. ("Hyundai International") for certain long-term R&D projects in addition to expenses incurred by Hyundai Electronics America, Inc. ("Hyundai America"), a subsidiary, for work performed for Hyundai International on a portion of the same R&D projects. Hyundai argues that Hyundai International reimbursed Hyundai America for this R&D work, and therefore the inclusion by Commerce of the costs incurred by Hyundai America should not be counted at all.

Commerce recognizes that Hyundai America received payments from Hyundai International for certain R&D projects. *See* Def.'s Mem. in Opp'n at 39. However, Hyundai does not provide evidence of its own records verifying that Hyundai International actually made the payments to Hyundai America. *See id.* at 39. Hyundai, as plaintiff and possessor of the necessary documents, bears the burden of producing the evidence to provide an accurate record in the antidumping investigation. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1336 (Fed. Cir. 2002) (quoting *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993)). Accordingly, without evidence on the record to determine otherwise, the Court affirms Commerce's determination in the *Final Results* on this issue.

5. Commerce's Treatment of Hyundai's Interest Earned on Severance Deposits Is Reasonable.

In the *Final Results*, Commerce included the cost of severance payments in Hyundai's labor cost, but did not use the interest income generated from the severance payments as an offset to interest expense. *See* 64 Fed. Reg. at 69707. Hyundai argues that this interest income should be treated as an offset. *See* Pl. Hyundai's Br. at 44.

Hyundai contends that the interest income at issue is generated from severance deposits that the company is required to maintain with insurance companies to finance current severance and retirement payments. *See* Pl. Hyundai's Br. at 43. Furthermore, Hyundai explains that it has chosen to deposit the full amount of severance benefits with the insurance companies in order to qualify for tax benefits. *Id.*

Interest income will be treated as an offset if there is a showing that the interest income is related to the "general operations" of the firm. *Timken Co. v. United States*, 18 CIT 1, 9, 852 F. Supp. 1040, 1048 (1994). Although the income does not have to relate specifically to production of subject merchandise, the interest income should be related to the ordinary operations of the firm. See id. at 7, 852 F. Supp. at 1046. Interest income generated from loans and short-term deposits that was "temporarily free" until used to fund the company's business qualifies as an offset. Id. at 10, 852 F. Supp. at 1049. Interest income generated from investment activity is generally not allowed as an offset. *NTN Bearing Corp. of America v. United States*, 19 CIT 1221, 1237, 905 F. Supp. 1083, 1096 (1995) (Commerce may disallow an offset because no distinction was made between interest income generated from investment activity and manufacturing operations). However, interest income may be treated as an offset where there is sufficient evidence that the interest income from long-term investment is related to the current operations of a company. *Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT 1013, 1038, 981 F. Supp. 630, 651 (1997).

In the *Final Results*, Commerce decided not to treat the interest income generated from the severance benefits as an offset, but did offset interest income earned on collateral deposited with the Korea Development Bank. 64 Fed. Reg. at 69707. The funds deposited with the Korea Development Bank were a prerequisite for Hyundai to receive loans for its business operations, and accordingly, Commerce concluded that the interest income generated was tied to specific loans related to the general operations of the company. In addition, the interest income from the Korea Development Bank deposits served to lower the effective interest rate from banks, thereby decreasing the financing costs of current operations. *Id.*

Hyundai fails to adequately explain how interest income earned on deposits of severance payments is directly related to current operations. Commerce may treat short-term interest income generated

from payroll-related accounts as an offset because the funds are part of working capital accounts necessary for current operations. See Notice of Final Determination of Sales at Less than Fair Value: Certain Preserved Mushrooms from India, 63 Fed. Reg. 72246, 72252 (Dec. 31, 1998). However, payroll expenses do not necessarily include severance pay. See Holland v. Burlington Industries, Inc., 772 F.2d 1140, 1146 (4th Cir. 1985) (distinguishing between severance pay as an "employee welfare benefit plan" available only after termination of employment and payroll as "general asset compensation during employment"); Matter of Hughes-Bechtol, Inc., 117 BR 890, 902 (Bankr. S.D. Ohio 1990) (explaining "normal gross payroll includes vacation . . . and other group benefits, but excludes severance"). Unlike the funds deposited by Hyundai with the Korea Development Bank that were a requirement to receive loans for business operations, Hyundai chose to deposit the full amount of the severance benefits with the insurance companies in order to receive the maximum benefits of a tax deduction. *See* Pl. Hyundai's Br. at 43. In light of this reasoning, the Court finds Commerce's position that severance insurance deposits are long-term investments not tied to current operations was not arbitrary or capricious.

Accordingly, the Court affirms Commerce's decision not to treat income interest generated from severance deposits as an offset to Hyundai's interest expense.

IV. *CONCLUSION*

For the aforementioned reasons, the *Final Results* are sustained in part and reversed and remanded in part. Accordingly, Plaintiffs' motion for judgment on the agency record is granted in part and denied in part.

A separate order will be issued accordingly.

Slip Op. 04–44

ALLEGHENY BRADFORD CORPORATION, d/b/a TOP LINE PROCESS EQUIPMENT COMPANY, PLAINTIFF, v. THE UNITED STATES, DEFENDANT.

Court No. 02–00073

[Defendant enjoined from reliquidating entries to correct liquidation in violation of court injunction.]

Dated: April 29, 2004

Womble Carlyle Sandridge & Rice PLLC, (*James K. Kearney*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, *James H. Holl, III*, and *Paul D. Kovac*), *Philip J. Curtin*, Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce, *Christopher Chen*, Senior Attorney, Office of the Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant.

OPINION & ORDER

RESTANI, Chief Judge:

INTRODUCTION

Plaintiff Allegheny Bradford Corporation, d/b/a Top Line Process Equipment Company ("Top Line") asks the court to find Defendant United States ("Government") in contempt for failing to obey a court-ordered injunction of the liquidation[1] of its stainless steel butt-weld tube fittings. Because the Government's proposed reliquidation of the entries is unsuitable for restoring the *status quo ante*, the court finds it necessary to take action in connection with the enforcement of the injunction.

BACKGROUND

The court's injunction was entered in connection with Top Line's suit, which claims that the Commerce Department improperly ruled that the company's tube fittings are within the scope of an antidumping order issued in 1993. *See Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Stainless Steel Butt-Weld Pipe Fittings from Taiwan*, 58 Fed. Reg. 33,250 (Dep't Comm. 1993) (final admin. rev.) [hereinafter "*Final Antidumping Order*"].

The scope proceedings began on April 12, 2001, with Top Line's request for a scope ruling from Commerce regarding its tube fittings imported from Taiwan. The scope request culminated in a final ruling by Commerce that Top Line's tube fittings are within the scope of the Antidumping Order and thus subject to antidumping duties upon entry. *See Final Scope Ruling on the Antidumping Duty Order on Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Allegheny Bradford Corporation d/b/a Top Line Process Equipment*, 66 Fed.

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[1] Liquidation is defined as the "final computation or ascertainment of the duties or drawback accruing on an entry." 19 C.F.R. § 159.1. Reliquidation is "the re-calculation of the duties or drawback accruing on an entry." *Shinyei Corp. of America v. United States*, 355 F.3d 1297, 1310 n.8 (Fed. Cir. 2004).

Reg. 65899 (Dept. Commerce Dec. 21, 2001) ("*Final Affirmative Scope Ruling*").

In response to the unfavorable scope ruling, Top Line filed suit under 28 U.S.C. § 1581(c) and thereafter filed a Motion For Judgment Upon the Agency Record on June 17, 2002, alleging that the *Final Affirmative Scope Ruling* was "unsupported by substantial evidence on the record and otherwise not in accordance with law." Petitioner's Scope Br. at 1. This motion is pending before the court.

Top Line moved for an injunction of liquidation in order to preserve the status quo. Injunctive relief is made available under such circumstances by 19 U.S.C. § 1516a(c)(2), which permits the Court to enjoin the liquidation of merchandise subject to an affirmative scope determination during the pendency of the litigation. *See* 19 U.S.C. § 1516a(c)(2) (allowing for injunctive relief in the case of determinations described under 19 U.S.C. § 1516a(a)(2), including scope determinations under (a)(2)(B)(vi)); *see also AK Steel*, 281 F.Supp. 2d at 1318. In this case, the court granted the motion on February 26, 2002, enjoining the liquidation of Top Line's tube fittings from Taiwan during the pendency of the litigation reviewing the *Final Affirmative Scope Ruling*. In the pertinent part of the order, the court:

> ORDERED that the Defendant, together with its delegates and officers, agents, servants and employees of the United States Customs Service and/or the United States Department of Commerce be, and they hereby are, enjoined during this litigation from the liquidation from the liquidation of any and all entries of stainless steel butt-weld tube fittings from Taiwan which are covered by the Final Affirmative Scope Ruling on December 10, 2001, and notice of which was published in the Federal Register on December 21, 2001, 66 Fed. Reg. 65899, and which entries remain unliquidated at the close of business on the day following the day on which a copy of this order is personally served by Plaintiff on the following individuals and received by them or their successors or their delegates: (1) Ann Sebastian, A.P.O. Coordinator, U.S. Department of Commerce, 14th andConstitution Avenue, N.W., Room 1870, Washington, D.C.; and (2) Hon. Robert C. Bonner, Commissioner of Customs, Attention: Alfonso Robles, Chief Counsel, U.S. Customs Service, Suite 4.4B, 1300 Pennsylvania Avenue, N.W., Washington, D.C.

Order (Ct. Int'l Trade Feb. 26, 2002).[2] Top Line served the injunction on Commerce and Customs on March 4, 2002.

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[2] On February 28, 2002—two days after the issuance of the injunction but before it was served by Top Line—Commerce instructed Customs to liquidate "all entries for all firms exporting SSBWPF [stainless steel butt-weld pipe fittings] from Taiwan to the United States

Commerce's procedure for handling injunctions such as the one issued in this case is as follows: the Import Administration's office director passes a copy of the injunction to the program manager; the program manager passes it to the analyst handling the case; the analyst prepares instructions for Customs regarding the implementation of the injunction; the instructions are reviewed by the program manager; the analyst forwards the approved instructions to another Commerce employee who transmits the instructions to Customs; Customs headquarters reviews the instructions and then posts them on the Customs' Electronic Bulletin Board ("CEBB"). Def.'s Opp'n Mot., Decl. of Edward Yang at ¶6.

As for Customs, it has a parallel procedure: a staffperson in the Chief Counsel's office delivers copies of the order to the staff assistant to the Executive Director of Trade Compliance and Facilitation, Office of Field Operations; the Executive Director or a subordinate passes a copy of the order to Chief of the Other Government Agencies Branch ("OGA"); the Chief of the OGA delivers the copy to the appropriate OGA Program Manager; the OGA Program Manager verifies that instructions for the implementation of the order have been received from Commerce; if no instructions have been received, the OGA Program Manager contacts Commerce, obtains the instructions, reviews them, and eventually posts them on the CEBB. Def.'s Opp'n Mot., Decl. of Alfred S. Morawski at ¶3.

In this case, the standard procedure did not survive the initial steps, either at Commerce or Customs. As noted above, Commerce was served by Top Line on March 4, 2002. That same day, Commerce's docket center forwarded the injunction to Edward Yang, the Import Administration Office Director with responsibility for stainless steel butt-weld pipe fittings from Taiwan. Def.'s Opp'n Mot., Decl. of Edward Yang at ¶5. Mr. Yang signed for the injunction, but thereafter the injunction languished. According to Mr. Yang, a heavy workload caused the standard procedure to break down, preventing the prompt transmission of instructions to Customs. *Id.* at ¶7.

Similarly, Customs received a copy of the order on March 4. The appropriate staffperson in the Chief Counsel's office delivered a copy of the order to the staff assistant to the Executive Director of Trade Compliance and Facilitation on March 6, 2002. Here the trail ends. The Chief of the OGA does not recall receiving the order from the Executive Director's staff assistant, speculating instead that the order was "misplaced" and that the standard procedures "were not followed." Def.'s Opp'n Mot., Decl. of Alfred S. Morawski at ¶4. At the time, Customs did not keep records that would reveal the fate of the

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during the 2000–01 period, except for SSBWPF exported by Ta Chen Stainless Steel Pipe, Ltd., Laing Feng Stainless Steel Fitting Co., and Tru-Flow Industrial Co., Ltd." Def.'s Opp'n Mot., Decl. of Edward Yang at ¶3. The exports of those named firms were under administrative review at the time and were not imported by Top Line, which imports its tube fittings from King Lai International Co., Ltd.

copy of the order. Customs has since implemented tracking procedures in an attempt to remedy this deficiency. *Id*.

For whatever reason, the standard procedures did not result in the prompt issuance of proper instructions to Customs. Instead, on February 28, 2002, Commerce instructed Customs to liquidate entries of stainless steel butt-weld pipe fittings entered between June 1, 2000 and May 31, 2001, without excepting imports from Top Line's Taiwanese manufacturer, King Lai. Though the injunction order was served on Commerce and Customs several days later, it was not until June 4, 2002, that Commerce issued instructions implementing the order.[3] Though these instructions were sent on June 4, they were not posted by Customs on its electronic bulletin board until June 10. In the interim, on June 7, Customs acted under its February 28 orders from Commerce and liquidated fourteen entries of Top Line's tube fittings.

On June 18, 2002—after it was clear that liquidation had been enjoined—Customs port officials advised Top Line of the liquidations and advised Top Line of the need to protest them in order to avoid finality. *Id*. at ¶8; Pl.'s Mem. in Supp. of Contempt Mot., Ex. 2, Affs. of Kevin J. O'Donnell and Charles M. Watson. Top Line paid all duties indicated on Customs' invoices, which were issued as a result of the enjoined liquidations, Pl.'s Mem. in Supp. of Contempt Mot., Ex. 2, O'Donnell Aff. at ¶5, and which itemized the duties and fees assessed by Customs on each entry. *See* Pl.'s Mem. in Supp. of Contempt Mot., Ex. 2, Watson Aff., Exs. Top Line filed a protest on July 22, 2002. *Id*. Customs refused Top Line's request to reverse these liquidations.

On August 29, 2002, Top Line filed a motion for an order to show cause why the Government should not be held in contempt pursuant to Rules 7 and 63 of this Court. The motion asks the court to order Customs to reverse the liquidations and pay the costs and attorneys' fees incurred by Top Line in protesting the June 7 liquidations. The court heard oral argument on the motion on April 6, 2004.

At oral argument, the Government waived any other action on the motion for order to show cause. Accordingly, the court proceeded directly to the underlying issue of whether the Government should be held in contempt. At the conclusion of oral argument, the court gave the parties two weeks in which to agree on a procedure that would

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[3] The eventual issuance of instructions was set in motion when the Justice Department sent a copy of the injunction to an attorney in Commerce's Office of the Chief Counsel. The Commerce attorney then alerted the program manager on May 17, 2002, as to the need to respond to the injunction. Finally, on June 4, Commerce transmitted to Customs notification of the injunction on SSBWPF from Taiwan manufactured or exported by King Lai along with instructions to: (1) refrain from liquidating entries of subject merchandise from King Lai which were unliquidated at the close of business of March 5, 2002; and (2) unset immediately any entries that might be set for liquidation. Def.'s Opp'n Mot., Decl. of Edward Yang at ¶11.

cancel the liquidations and return to Top Line the monies it paid on those liquidations. At the end of the two weeks, the Government submitted to the court a status report describing the Government's intention to reliquidate the entries and make refund with interest on or before June 19, 2004. Def.'s Status Report (Apr. 20, 2004). The Government did not explain how it can reliquidate entries before the final rates of duties are known. While Top Line is not altogether adverse to the proposed "reliquidation," Top Line rejected this arrangement as inadequate because it failed to reimburse Top Line for the costs and attorneys' fees incurred in the course of the protest and litigation. Pl.'s Resp. to Def.'s Status Report (Apr. 21, 2004). Top Line also seems to disagree with some aspects of the proposed "reliquidation." *Id*.

DISCUSSION

I. JURISDICTION

Despite engaging in settlement negotiations with Top Line after oral argument, the Government appears to challenge the jurisdiction of the court. Citing the statutory scheme for protesting Customs' determinations, 19 U.S.C. § 1514, the Government maintains that the illegal liquidations should be dealt with at the administrative level. *See Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) ("When administrative remedies have not been exhausted, judicial review of administrative action is inappropriate") (internal quotations omitted).

The Government originally argued that 19 U.S.C. § 1514 offered the sole remedy by which Top Line could prevent the improper liquidations from becoming final and conclusive. Def.'s Opp'n Br. at 8–9. The Government now argues that, under § 1514(b), the pendency of the litigation prevents the liquidations from becoming final, thereby making them unripe for judicial review. Def.'s Mot. at 3–4 (Apr. 1, 2004). Under this view, it is unclear when, if ever, finality attaches. It is also unclear when an administrative remedy becomes exhausted and thus ripe for judicial review. In essence, the Government argues that Customs is free to delay action until the conclusion of the scope litigation, and that, in the interim, the court is powerless to ensure that the injunction protects Top Line. See 19 U.S.C. § 1516a(c); Zenith Radio Corp. v. United States, 710 F.2d 806, 809–10 (Fed. Cir. 1983) (interpreting § 1516a(c) to require that an injunction be granted only where the party shows that it will otherwise be immediately and irreparably injured). The Government's argument fails to grasp the defining aspect of this dispute: the liquidations violated a valid order of the court. In such a situation, it is manifestly inadequate to delay relief to the party protected by the

order until a time when the need for the order has passed.[4] It is also inappropriate to suggest that court orders may be ignored when a party finds it efficient to do so.

A. Section 1514 and the Exhaustion of Administrative Remedies

In creating the § 1514 protest procedure, Congress expressed a preference for administrative protest as a precursor to judicial review. *See United States v. A.N. Deringer, Inc.*, 593 F.2d 1015, 1021 (C.C.P.A. 1979). Recognizing the import of § 1514, the courts rejected the proposition that, where a Customs decision violated an existing *agency* order, the decision was void and the party was able to bypass the requirements of the protest procedure. *See United States v. Cherry Hill Textiles, Inc.*, 112 F.3d 1550, 1557 (Fed. Cir. 1997) ("the underlying policy of section 1514 . . . is to channel challenges to liquidations through the protest mechanism") (citing *Deringer*, 593 F.2d at 1021). In those cases, the precedent of the Federal Circuit "does not recognize a distinction between 'void' and 'voidable' liquidations for purposes of determining the applicability of the protest requirement of section 1514." *Cherry Hill Textiles*, 112 F.3d at 1559 (citing *Omni U.S.A., Inc. v. United States*, 840 F.2d 912 (Fed. Cir. 1988), and *Juice Farms, Inc. v. United States*, 68 F.3d 1344 (Fed Cir. 1995)).

These cases, however, do not address a situation in which Commerce and Customs have failed to effectuate a § 1516a(c) court-ordered injunction. Instead, they involve liquidations that were improper because they conflicted with prior *administrative* decisions. In *Omni*, liquidations were suspended by Commerce. 840 F.2d at 912. The same was the case with *Juice Farms*, 68 F.3d at 1345. In *Deringer*, Customs liquidated goods that were subsequently rejected by the Food and Drug Administration. The predecessor to the Federal Circuit held that § 1514 "contemplates both the legality and correctness of a liquidation be determined, at least initially, via the protest procedure." *Deringer*, 593 F.2d at 1020. The Federal Circuit,

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[4] The Government's argument, by insisting that the improper liquidations may not be reviewed until the conclusion of the underlying scope litigation, overemphasizes the effect that should be given to § 1514(b). Section 1514(b), in relevant part, prevents certain determinations of Customs from becoming final when an action is commenced with this Court. 19 U.S.C. § 1514(b). Section 1514(b) was enacted in 1979, before the Court had power to enjoin liquidation pursuant to § 1516a(c). *Cemex, S.A. v. United States*, 279 F.Supp. 2d 1357, 1362 (Ct. Int'l Trade 2003). Because the injunction power allows the Court to protect an importer from liquidations that might otherwise become final and unreviewable, "§ 1514(b) seems somewhat redundant." *Id.* The court finds it unreasonable to construe § 1514(b)—a statutory provision with an ambiguous purpose—to preclude review of the improper liquidations and thereby frustrate the intent of an injunction order granted pursuant to § 1516a(c), a provision with the clear purpose of providing temporary protection to parties who contest agency determinations.

in deciding *Juice Farms*, took this to mean that "all liquidations, whether legal or not, are subject to the timely protest requirement." 68 F.3d at 1346.

These interpretations of § 1514, including their rejection of the voidance doctrine, are distinguished from the instant case by the fact that they did not involve a violation of a court order. Indicating that administrative procedures are not always a necessary precursor to judicial review, the Federal Circuit circumscribed the seemingly broad reach it had previously given to the § 1514 protest procedure in *Shinyei Corp. of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004):

> [Section 1514(a)] is fairly construed to prohibit a challenge to "decisions" of the Customs Service "as to" liquidation outside the protest provisions of section 1514(a). It is not, however, fairly construed to prohibit reliquidation in all cases, particularly when the alleged error is with Commerce instructions. . . . Underlying the government's argument as to section 1514 is the notion that Congress has placed significant value on the finality of liquidation, and that finality should not be disturbed outside the provisions of section 1514. We do not agree. To begin with, no section in the statute provides that liquidations are final except within the narrow confines of section 1514; the statute's discussion of finality relates to decisions of Customs. Indeed, the very existence of section 1514 suggests that Congress recognized the necessity of providing relief in situations in which errors occurred.

Id. at 1311. Recognizing the limits of the applicability of § 1514, the *Shinyei* court refused to construe the statute in a way that would prevent a court from addressing an agency's failure to comply with a court order: "short of compelling legislative history or statutory evidence, we decline to find that the statute as a whole was intended to preclude judicial enforcement of court orders after liquidation." *Id.* at 1312.

Thus, the Federal Circuit has not immunized agency actions from the force of pre-existing court orders through the wholesale rejection of the voidance doctrine. Instead, it rejected the voidance doctrine where Customs made a determination that violated an existing administrative order or regulation and where a meaningful administrative remedy was available. In those cases, there were sound reasons for requiring the exhaustion of administrative remedies. Those reasons do not apply here, where further administrative review will only delay relief and frustrate the intent of the injunction order.

The exhaustion doctrine seeks to protect administrative agency authority and promote judicial efficiency. *Sandvik Steel*, 164 F.3d at 600. The interest of administrative authority is concerned with allowing an administrative agency "to perform functions within its

special competence—to make a factual record, to apply its expertise, and to correct its own errors." *Id.* (citing *Parisi v. Davidson*, 405 U.S. 34, 37 (1972)). Judicial efficiency is served by allowing an agency "to correct its own errors so as to moot judicial controversies." *Id.*

It serves neither purpose to require Top Line to use the protest procedure or wait until the conclusion of the litigation on the merits. Neither Commerce nor Customs has a special competence which enables it to determine whether a court order should be obeyed. "[W]here Congress has not clearly required exhaustion, sound judicial discretion governs." *Id.* (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992). Sound jurisprudence dictates that exhaustion is not required where a party seeks enforcement of a court order that was issued to protect that party.

B. Customs is an Inappropriate Administrative Forum

Even if exhaustion were appropriate, Customs is the wrong forum for it. In arguing that the liquidations have yet to become final, the Government relies heavily on § 1514(b), which pertains to the finality of Customs' determinations. 19 U.S.C. § 1514(b). The Government overlooks the fact that a determination by Customs is not the source of Top Line's injury.

Section 1514(b) provides that "determinations of the Customs Service" with respect to entries subject to final antidumping or countervailing duty determinations will be final and conclusive unless an action is filed with this Court. *Id.* What is being challenged here is not such a "determination." At the beginning of this case, Commerce made a determination that the merchandise was subject to antidumping duties. *See* 19 U.S.C. § 1516a(a)(2)(B)(vi) (providing that Commerce's scope determinations are reviewable by the Court). Commerce then ordered Customs to liquidate entries in accordance with its determination. That determination is not at issue here. What is being challenged is the liquidation of merchandise in violation of a court-ordered injunction.

Even assuming Customs had made a determination in liquidating the June 7 entries, the Government has not demonstrated that the decision to liquidate was an exercise of Customs' discretion. In implementing the instructions of Commerce to liquidate entries subject to an antidumping or countervailing duty order, Customs' actions are ministerial in nature. *Yancheng*, 277 F.Supp. 2d at 1364 (quoting *Springfield Indus. v. United States*, 11 CIT 123, 655 F.Supp. 506, 507 (Ct. Int'l Trade 1987)). Further, Customs has no authority, statutory or otherwise, to determine whether a court-ordered injunction of liquidation should be enforced. That is, when a party protests a liquidation in violation of a court order, the outcome is foreordained. Yet despite the obvious injury to the party protected by the order, the effect of the Government's position is to delay relief until the conclusion of the litigation. This, of course, would allow the eco-

nomic detriment of a liquidation and exaction of funds to persist through the course of the litigation, thereby frustrating Congress' intent to provide injunctive relief from liquidations pursuant to 19 U.S.C. § 1516a(c). *See Zenith Radio Corp.*, 710 F.2d at 811 ("The greatest concern [of Congress] warranting modification of the prior law was the inadequacy of prospective relief").

To require Top Line to utilize administrative remedies is to require Top Line to engage in a futile undertaking that will only delay relief. *See Yancheng*, 277 F.Supp. 2d at 1364. Indeed, the essential problem here is not with Customs. Where Commerce is alleged to have committed an error in providing liquidation instructions, § 1514 does not apply. *Shinyei*, 355 F.3d at 1304. Instead, an action challenging Commerce's liquidation instructions is a challenge to the administration and enforcement of final results, and accordingly finds its jurisdictional basis in 28 U.S.C. § 1581(i)(4). *Id.* at 1305 (citing *Consolidated Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003)).[5]

C. The Voidance Doctrine

The application of the voidance doctrine is supported by the inadequacy of administrative remedies and the inappropriateness of Customs as a forum for any such remedies. Here, as in other cases where liquidations violated an order of this Court, there is no meaningful protest to be had the administrative level nor is a determination of Customs really at issue. *See, e.g.*, *Eurodif S.A. v. United States*, 2004 Ct. Int' Trade LEXIS 4 (Ct. Int'l Trade 2004); *AK Steel Corp. v. United States*, 281 F.Supp. 2d 1318 (Ct. Int'l. Trade 2003); *Yancheng*, 277 F.Supp. 2d 1349. Put simply, a court-ordered suspension of liquidations creates a whole different ball game apart from the standard protest and judicial review framework provided by Congress. *See LG Electronics U.S.A., Inc. v. United States*, 21 CIT 1421, 1428 , 991 F.Supp. 668, 675 (Ct. Int'l Trade 1997) ("The importer's ordinary obligation to watch for notices of liquidation is suspended where the court has issued an order forbidding liquidation"). Liquidations in violation of a valid court order have no legal effect, *LG Electronics*, 21 CIT at 1428, 991 F.Supp. at 675, and it is futile to place a legal nullity within Congress' statutory scheme. *See Yancheng*, 277 F.Supp. 2d at 1364 ("The Court rejects the Government's contention that a protest under § 1514 is the appropriate remedy for this matter").

In *AK Steel*, the Court rejected the application of the finality doctrine "where liquidation occurs through an illegal act of Customs and in the absence of a protestable event." The plaintiff in *AK Steel*

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[5] In this case, however, jurisdiction is also a necessary corollary to the court's jurisdiction under 28 U.S.C. § 1581(c) to issue the injunction in the first instance.

was not an importer and so lacked standing to protest liquidations. Here, Top Line is an importer and, depending on one's view of whether any protestable event occurred, might be able to file a valid protest. The court sees no reason, however, why—under these facts—the existence of a protestable event in this case would shield the illegal liquidations from prompt remedial action. The crucial factor is the violation of a court order. *See Peer Chain Co. v. United States*, No. 01–00297, 2004 Ct. Int'l Trade LEXIS 19, *23 n.11 (Ct. Int'l Trade 2004) (declining to apply the void *ab initio* doctrine because, unlike *AK Steel*, no court-ordered injunction prevented Customs from liquidating plaintiff's entries). Indeed, the authority suggests that—regardless of the plaintiff's ability to protest—liquidations in violation of a court order are qualitatively different from other liquidations, and so should be considered void *ab initio*.

Top Line is thus correct in arguing that the improper liquidations are void *ab initio*, and that it is inappropriate to subject a legal nullity to reliquidation and other administrative action before this Court may provide a remedy. "The proper means to enforce an order of this Court against the Government is to seek relief in this Court; it is not to file a protest with Customs." Yancheng, 277 F.Supp. 2d at 1364.

II. MERITS

It should be uncontroversial to insist that court orders be obeyed, but, based on the Government's arguments in this and other cases, *see, e.g., AK Steel*, 281 F.Supp. 2d 1318; *Yancheng*, 277 F.Supp. 2d 1349; *D&M Watch Corp. v. United States*, 16 CIT 285, 795 F. Supp. 1160 (Ct. Int'l Trade 1992), it seems this proposition needs reinforcing. While the court appreciates the Government's good faith efforts to resolve this dispute after oral argument, it is important to review briefly the potentially contemptuous nature of the Government's actions in this case.

To establish contempt, a plaintiff must show: (A) the existence of a valid court order; (B) defendant's knowledge of the order; and (C) defendant's disobedience of the order. *Ammex, Inc. v. United States*, 193 F.Supp. 2d 1325 1327 (Ct. Int'l Trade 2002). Liquidations in violation of a court order are illegal liquidations. *AK Steel*, 281 F. Supp.2d at 1322 (referring to liquidations in violation of a court order as "illegal liquidations").

A. The Validity of the Court's Order

Section 19 U.S.C. § 1516a(c)(2) permits the Court to enjoin the liquidation of merchandise subject to an affirmative scope determination under appropriate circumstances. *See* 19 U.S.C. § 1516a(c)(2)

(allowing for injunctive relief in the case of determinations described under 19 U.S.C. § 1516a(a)(2), including scope determinations under (a)(2)(B)(vi)); *see also AK Steel*, 281 F.Supp. 2d at 1318. The Government does not challenge the validity of the order, and the court reaffirms that the order is valid.

B. The Government's Knowledge of the Order

Top Line served the order on both Commerce and Customs on March 4, 2001. The Government does not dispute that it had knowledge of the order, and the court finds that it did indeed have knowledge.

C. The Government's Disobedience of the Order

The Government admits that it failed to comply with the order. Def.'s Opp'n Br. at 1 ("Certain entries subject to the Court's February 26, 2002 preliminary injunction were liquidated contrary to that order. Full compliance did not occur here."). The Government characterizes this failure as mere bureaucratic oversight. By claiming that the illegal liquidations were "inadvertent" and not "willful," the Government suggests that its conduct did not rise to the level of disobedience necessary for a finding of contempt. A finding of willful disobedience is not necessary when dealing with civil—as opposed to criminal—contempt. Civil contempt is "a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance." *Yancheng*, 277 F.Supp. 2d at 1357 (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949)). Civil contempt allows a court to remedy noncompliance regardless of the intent of the noncomplying party. *Id.* at 1363 (citing *McComb*, 336 U.S. at 191).

While the Government's illegal liquidations are sufficient to support a finding of contempt, the more alarming aspect of this case is the Government's subsequent refusal to rectify the situation. Instead of reversing the liquidations and restoring the *status quo ante*, the Government informed Top Line (incorrectly) that it would have to file a protest to avoid the finality of the liquidations. No further action was taken to remedy the harm to Top Line. The Government was content to keep the money paid by Top Line to satisfy the duties wrongly assessed to it, forcing Top Line to bear the burden of the Government's illegal conduct. Thus, the government is not asking merely to be excused from an illegal liquidation, it is also asking to be excused from repairing the harm done to the plaintiff by the illegal liquidation.

The Government submitted affidavits from Commerce and Customs officials who attributed the illegal liquidations to heavy workloads and a failure to follow standard procedures for the han-

dling of court orders. The Government's position in this litigation appears to ask the court to tolerate noncompliance with its orders as the unavoidable cost of doing business with the modern administrative bureaucracy. If noncompliance was unavoidable in this case, the cost of doing business should be borne by the government, not by the party whom the order was designed to protect. For the court to excuse the Government's conduct on the grounds that it is busy would be to weaken the force and effect of any court order over the Government.

III. REMEDIES

To remedy liquidations that violate a valid court order, the Court "possesses all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585; *see also AK Steel*, 281 F.Supp. 2d at 1323 (ordering the Government to comply with the Court's order without making a finding of contempt). This includes the power to grant "any other form of relief that is appropriate in a civil action." 28 U.S.C.§ 2643; *see also Shinyei*, 355 F.3d at 1312 (finding an order of reliquidation permitted by § 2643).[6]

CONCLUSION

Accordingly,

1. As any liquidation is enjoined, and cancellation and refund are the proper remedies, defendant shall not reliquidate the 14 entries at issue. The court, however, has no interest in maintaining an injunction no longer desired by the party for whose protection it was issued. Thus Top Line, if it so desires for its own purposes, may move for amendment of the injunction to permit reliquidation, although it is unclear to the court what type of reliquidation could take place at this juncture.

2. If the Government makes refund with interest of the monies exacted pursuant to the enjoined liquidation on the schedule set forth on its status report, any contempt which may have existed would be purged.

3. Upon a final and conclusive decision on the underlying action, the Government shall liquidate the 14 entries at issue in accordance with the rate of duties set forth in such decision.

4. At this point in the litigation, as it is unclear how the equities will ultimately lie in his matter and what injuries Top Line will have suffered, the court sees no reason to take immediate action on Top

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[6] Here, of course, reliquidation as a final recalculation of the duties owed on an entry is not possible, as the underlying litigation continues and the final and conclusive rates of duty have yet to be determined.

Line's request for costs and attorneys' fees incurred as a result of its protest and litigation on this matter.[7]

SO ORDERED.

Slip Op. 04–45

FORMER EMPLOYEES OF MURRAY ENGINEERING, INC. PLAINTIFF, v. ELAINE L. CHAO, UNITED STATES SECRETARY OF LABOR, DEFENDANT.

Court No. 03–00219

[Remanded to the Secretary of Labor for further investigation.]

Decided: May 4, 2004

Ken Walter, Pro Se, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, *Stephen C. Tosini*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jayant Reddy*, Attorney, Of Counsel, Office of the Solicitor, U.S. Department of Labor, for Defendant.

OPINION

POGUE, Judge: In this action, Ken Walter ("Plaintiff"), as a former employee of Murray Engineering, Inc. ("Murray"), challenges the determination of the Department of Labor ("Labor" or "Defendant") that he is not eligible for trade adjustment assistance ("TAA") under the Trade Act of 1974 ("the Act"). Labor found that Plaintiff was not eligible for TAA based on its determinations that Murray neither produced an "article,"[1] nor a "component part" for a TAA-

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[7] In another case where the Government liquidated entries in violation of a court order, this Court found that attorneys' fees could not be awarded to a plaintiff because the Government had not waived its sovereign immunity for such an award. *See Yancheng Baolong Biochemical Products Co., Ltd. v. United States*, No. 01–00338, Slip Op. 04–42 (Ct. Int'l Trade Apr. 28, 2004). *Yancheng* does not foreclose the possibility that attorneys' fees may be available in the instant case. The holding in *Yancheng* was based in part on the fact that the party seeking attorneys' fees was not the prevailing party in the underlying litigation. *Id.*, Slip Op. at 22. Because the instant scope litigation remains pending, it has yet to be determined whether the same situation will apply in this case. Furthermore, *Yancheng* does not represent settled law, and, as an opinion of the same level court, does not bind the court. These considerations lead the court to reserve decision as to the availability of attorneys' fees.

[1] Section 222 of the Trade Act of 1974, as amended, is codified at 19 U.S.C.A. § 2272 (West Supp. 2003). It reads, in pertinent part:

certified business within the meaning of the Act.[2] Because Labor's first determination relies on its flawed interpretation of the terms of the Harmonized Tariff Schedule of the United States ("HTSUS"), 19 U.S.C. § 1202 (2003), the Court remands this action to Labor for further investigation.[3] The Court reserves review of the second issue until Labor has made a second determination on remand.

BACKGROUND

Plaintiff is a former employee of Murray Engineering, Inc.[4] Plaintiff worked at Murray producing custom designs[5] for industrial machinery. In response to Plaintiff's petition for TAA certification,[6] La-

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(a) In general

A group of workers . . . shall be certified by the Secretary as eligible to apply for adjustment assistance under this part . . . if the Secretary determines that—

(1) a significant number or proportion of the workers in such workers' firm, or an appropriate subdivision of the firm, have become totally or partially separated . . .; and . . .

(2)(A)(ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased.

19 U.S.C.A § 2272(a) (West Supp. 2003).

[2] Congress re-authorized trade adjustment assistance, as provided by the Act, in 2002. Trade Adjustment Assistance Reform Act of 2002, Pub. L. No. 107–210, § 111, 2002 U.S.C.A.A.N. (116 Stat.) 935, 936. Congress also amended the Act to cover "adversely affected secondary workers." *Id.* at § 113. This new coverage is codified at 19 U.S.C.A. § 2272(b). 19 U.S.C.A. § 2272(b) (West Supp. 2003). This provision grants eligibility for trade adjustment assistance to workers whose firm is a supplier of "component parts" to a producer already certified for adjustment assistance. *Id.*

[3] The Court notes that there are two administrative records in this case: the record as it was developed up to the point of voluntary remand, and a supplemental administrative record developed after the voluntary remand. For each of these records, there is a public and a confidential version. Citations to the public version of the administrative record up until the voluntary remand are referred to by the name of the document, followed by "P.R. Doc. No." followed by the document number. Citations to the confidential version of the administrative record up until the voluntary remand are referred to by the name of the document, followed by "C.R. Doc. No." followed by the document number. Citations to the public and confidential versions of the supplemental administrative record are in the same format, except that "Supp." precedes "P.R." or "C.R." in the citations. Because the supplemental administrative record largely duplicates the documents available in the record up until voluntary remand, the majority of the Court's citations are to the supplemental record.

[4] Plaintiff appears to have worked for a division of Murray called "Complete Design Service." *See, e.g.*, Letter from Ken Walter to the Hon. Donald C. Pogue, Judge, U.S. Ct. of Int'l Trade, at 2 (Oct. 17, 2003); Response of James S. Murray, Pres., Murray Eng'g Inc. to Letter from Christiane Plante, Trade Analyst, U.S. Dep't of Labor, Supp. C.R. Doc. No. 1 at 4–5 (Jan. 22, 2003) (Labor's questionnaire filled in, signed, and returned by James S. Murray on Jan. 22, 2003).

[5] Although Labor refers to the items Murray produces variously as "designs," "drawings," and "schematics", the Court throughout its opinion refers to the items created by Murray as "designs." Such terminology is not indicative of whether or not the items are "articles" for purposes of 19 U.S.C.A. § 2272(a) (West Supp. 2003), but is used only because "designs" is not a term already used by the statutes at issue in this litigation.

[6] The petition as it appears in the administrative record is undated. *See* Petition for NAFTA Transitional Adjustment Assistance, Supp. C.R. Doc. No. 3 at 33. Although Plaintiff

bor initiated an investigation into Plaintiff's eligibility in January 2003. *See* Consent Motion for Voluntary Remand, Supp. C.R. Doc. No. 3 at 44 (June 17, 2003). Labor denied Plaintiff's petition in February 2003. *See Notice of Determinations Regarding Eligibility to Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance*, 68 Fed. Reg. 8,619, 8,620 (Dep't Labor Feb. 24, 2003). Plaintiff requested an administrative reconsideration, which was subsequently denied. *Murray Engineering, Inc., Complete Design Service, Flint, MI*, 68 Fed. Reg. 18,264, 18,265 (Dep't Labor Apr. 15, 2003) (notice of negative determination regarding application for reconsideration). Plaintiff then appealed his case to the Court. Petition for Judicial Review, Supp. C.R. Doc. No. 3 at 40 (Apr. 30, 2003). The case, however, was voluntarily remanded to Labor. *See Former Employees of Murray Eng'g v. United States*, slip op. 03–71, at 1 (CIT June 27, 2003).

Neither in its original determination, nor on remand did Labor make any factual findings regarding the nature of the items produced by Plaintiff's employer or regarding Plaintiff's eligibility for TAA. Rather, Labor made a legal determination that the terms of the HTSUS precluded Murray's designs from being considered to be "articles" under the Act, and that Murray's employees similarly failed to qualify as adversely affected secondary workers because Murray did not supply a "component part" to a TAA-certified business. *See Murray Engineering, Inc., Complete Design Service, Flint, MI*, 68 Fed. Reg. 53,395, 53,396–97 (Dep't Labor Sept. 10, 2003) (notice of negative determination on remand) ("*Remand Determ*.").

After remand, the case now returns before the Court on Plaintiff's challenge to Labor's determinations regarding assistance both as a former employee of a company that manufactures an "article" and as an adversely affected secondary worker. *Id.*; *see also* Letter from Ken Walter to the Ct. of Int'l Trade (Sept. 30, 2003); Letter from Ken Walter to the Hon. Donald C. Pogue, Judge, U.S. Ct. of Int'l Trade at 9 (Oct. 17, 2003).

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filed for NAFTA transitional adjustment assistance, which is authorized by the North American Free Trade Implementation Act of 1993, Labor treated the petition as one for trade adjustment assistance under the Act. *See* 19 U.S.C. §§ 3352–3356 (2000); Information in Support of Former Employees of Murray Engineering Inc.'s Claim for Trade Adjustment Assistance, Supp. C.R. Doc. No. 3 at 17 n.8 (Aug. 1, 2003); *see e.g.*, Response of James S. Murray, Pres., Murray Eng'g Inc. to Letter from Christiane Plante, Trade Analyst, U.S. Dep't of Labor, Supp. C.R. Doc. No. 1 at 4 (Jan. 22, 2003) (Labor's questionnaire filled in, signed, and returned by James S. Murray on Jan. 22, 2003).

STANDARD OF REVIEW

The Act contains a provision for judicial review of Labor's eligibility determinations. *See* 19 U.S.C. § 2395(a) (West Supp. 2003).[7] Subsection (b) of this provision requires that, in reviewing a denial of certification of eligibility, "[t]he findings of fact by the Secretary of Labor . . ., if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 2395(b) (West Supp. 2003). The statute, however, does not mention how this Court is to treat Labor's legal determinations. That Congress would provide for a deferential level of review for Labor's factual findings, but not mention questions of law, could suggest that Congress meant for this Court to conduct a *de novo* review of Labor's legal determinations under the Act. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (arguing that one can infer from "statutory circumstances" whether deference is due to an agency's legal interpretations).

In the case at issue here, however, Labor seeks to interpret the terms of the Act through its interpretation of the terms of another federal statute, the HTSUS. Regardless of whether Congress intended to give Labor the scope to interpret the Act, *see id.*,[8] the HTSUS contains no indication that Congress intended for Labor to have authority to interpret its terms. Rather, the agency charged by Congress with applying and interpreting the HTSUS is the United States Bureau of Customs and Border Protection.[9] *See* 19 U.S.C. § 1500. Nor is there any reason to believe that Labor possesses any

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[7] 19 U.S.C. § 2395(a) reads, in part:

(a) Petition for review; time and place of filing

A worker, group or workers, . . . or group aggrieved by a final determination of the Secretary of Labor under section 2273 of this title . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.

19 U.S.C. § 2395(a) (West Supp. 2003).

[8] The Court notes that the presence of formal rulemaking or adjudicative procedures in making an interpretation may be indicative of agency authority to interpret ambiguous statutes. *See Mead Corp.*, 533 U.S. at 229–30. In this case, to the extent that Labor has issued regulations on eligibility determinations, these regulations, in the main, simply restate the statutory requirements. *Cf.* 29 C.F.R. § 90.16 (2003), *with* 19 U.S.C.A. §§ 2272–2273 (West Supp. 2003). Moreover, there is no regulation on the definition of "articles," although Labor has defined other terms by regulation. *See* 29 C.F.R. § 90.2. Neither does a formal adjudicative process appear to have been followed in this case. Although Labor claims that "traditionally," it regards the production of designs on a computer as a service, rather than the production of an "article" within the meaning of 19 U.S.C.A. § 2272 (West Supp. 2003), it points to no particular previous adjudication for which this holds true. *See Remand Determ.*, 68 Fed. Reg. at 53,396.

[9] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

particular expertise in regard to the HTSUS. *Cf. NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256–57 (1995). Therefore, there appears to be no Congressional intent for this Court to grant deference to Labor's interpretation of the HTSUS under the doctrine articulated in *Chevron U.S.A. Inc v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("*Chevron*").[10]

Moreover, even had Congress delegated to Labor the authority to enforce or administer the HTSUS, *Chevron* still requires that the agency's interpretation be "reasonable." *Chevron*, 467 U.S. at 844. Labor's interpretation of the HTSUS, however, for reasons discussed below, is faulty, because of its misapprehension as to the scope and coverage of the schedule. *See infra* pp. 9–12. In addition, the flaws in Labor's interpretation of the HTSUS deprive that interpretation of the "power to persuade." *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The terms of the Act's provision regarding judicial review, the failure of Congress to assign Labor a role in the administration of the HTSUS, and the failure of Labor to put forth a reasonable or persuasive interpretation of the HTSUS all lead the Court to conclude that deference is not warranted in this case. Therefore, on the record here, Labor's statutory interpretation is subject to *de novo* review.

DISCUSSION

Having identified the standard of review appropriate to this case, the Court now turns to the legal issues. Labor has made two legal findings in its negative determination on remand: that Plaintiff is not eligible for TAA because Plaintiff's company does not produce "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp. 2003) and that Plaintiff is not eligible for assistance as an "adversely affected secondary worker" because Plaintiff's company does not produce a "component part" for a certified company within the meaning of 19 U.S.C.A. § 2272(b) (West Supp. 2003). *See Remand Determ.*, 68 Fed. Reg. at 53,397; *see also* 19 U.S.C.A. § 2272(a–b) (West Supp. 2003). The Court's opinion will focus on the first finding.

Defendant bases its negative determination of eligibility for assistance under 19 U.S.C.A. § 2272(a) (West Supp. 2003) on two

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[10] The "*Chevron* doctrine" holds that where an agency interprets ambiguous statutory language, a court should defer to the agency's interpretation, even if it is not the one the court would have reached, as long as it is "reasonable." *See Chevron*, 467 U.S. at 842–44.

However, there must be indicia that Congress intended for the agency's interpretations to be granted deference. The Court notes that Customs' own interpretations of the HTSUS are not granted *Chevron* deference, at least when embodied in the form of letter rulings. *Mead Corp.*, 533 U.S. at 221 (2001). Labor's determination here appears analogous to a letter ruling, as it was not made subject to formal procedures, and there is no indication that it is meant to bind parties or persons other than those under review. *See id.* at 231–32; *see also supra* note 8.

sources — the HTSUS and the North American Industry Classification System ("NAICS") — both of which it cites as support for the legal finding that Plaintiff's company does not produce "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp. 2003). *See Remand Determ.*, 68 Fed. Reg. at 53,396–97. The Court discusses each in turn.

Labor argues that the HTSUS furnishes a guide for determining whether Murray's designs are "articles." *See Remand Determ.*, 68 Fed. Reg. at 53,396; *see also* Def.'s Mem. Opp'n to Pl.'s Comments Regarding Def.'s Remand Determ. at 10–11 ("Def.'s Mem."). Labor appears to argue that recourse must be had to the HTSUS to determine whether a given object is an "article" because "[t]hroughout the Trade Act, an article is often referenced as something that can be subject to a duty." *Remand Determ.*, 68 Fed. Reg. at 53,396. Indeed, the Act does so reference articles. *See, e.g.*, 19 U.S.C. §§ 2119, 2252(d)(4)(B)–(C)(2000) (discussing "rate of duty on any article", "amount of duty with respect to any article," suspension of liquidation "with respect to an imported article," and imposition of duty "with respect to an imported article").

Labor therefore looked to the HTSUS in deciding whether or not the designs created by Murray were "articles," or objects that could be subject to a duty. *See Remand Determ.*, 68 Fed. Reg. at 53,396; Def.'s Mem. at 10–11. Specifically, Labor looked to the terms of heading 4906, HTSUS, which provide, in part, for "[p]lans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes, being originals drawn by hand." *See Remand Determ.*, 68 Fed. Reg. at 53,396; Def.'s Mem. at 11.; *see also* heading 4906, HTSUS. Labor appears to have taken this provision, which singles out hand-drawn originals, to imply that Congress intended to deny to plans and drawings made with the aid of computers the status of "articles." *Remand Determ.*, 68 Fed. Reg. at 53,396–97, Def.'s Mem. at 11. The provisions of the HTSUS, however, do not support the implication that Labor drew.

Heading 4906 is located within chapter 49 of the HTSUS. Chapter 49 deals generally with printed matter. Chapter 49, HTSUS. While it contains numerous headings for specific types of printed matter, it also contains a basket provision, heading 4911, HTSUS, for "[o]ther printed matter." Heading 4911, HTSUS. The basket provision does not discriminate between printed matter that is generated with the aid of a computer and other types of printed matter. *Id.* Because engineering plans and drawings have already been placed into the scope of chapter 49 by their inclusion in heading 4906, HTSUS, the logical implication is that heading 4911, HTSUS, for "[o]ther printed matter," encompasses Murray's computer-generated designs, at least

to the extent that these are printed. In fact, this conclusion is explicitly indicated by the Explanatory Notes to the HTSUS.[11]

Explanatory Note 49.06 states, in part: "[t]his heading does not cover . . . printed plans and drawings (*heading 49.05* or *49.11*)." Harmonized Commodity Description and Coding System, Explanatory Note 49.06 (3d ed. 2002) at 905 (emphasis in original).[12] The reference to heading 4911 in this Explanatory Note indicates that because printed plans and drawings are not covered specifically within a tariff provision of chapter 49, they should fall into heading 4911, HTSUS; chapter 49's "basket provision." *See* chapter 49, HTSUS, heading 4911, HTSUS.[13] Thus, it appears that Murray's designs, when printed, are covered "articles." However, in addition to heading 4906, for plans and drawings, there exists in one of the general notes to the HTSUS language which might appear to exempt drawings and plans from the HTSUS's definition of "goods" and therefore, from the Act's definition of "articles."

General note 19 of the HTSUS provides a list of items which are exempted from the HTSUS. General note 19, HTSUS. General note 19 states, in part: "[f]or the purposes of general note 1– . . . records, diagrams and other data with regard to any business, engineering or exploration operation whether on paper, cards, photographs, blueprints, tapes or other media . . . are not goods subject to the provisions of the tariff schedule." General note 19, HTSUS. Such goods, therefore, cannot be the subject of a duty, and would fall outside of the meaning of "articles" under the Act. Thus, because "records, diagrams and other data" may appear to include "plans and drawings," the language of general note 19(c) might seem to be in tension with the language of headings 4906 and 4911, HTSUS, which provide for the classification of "[p]lans and drawings for architectural, engineering, industrial, commercial, topographical or similar purposes,"

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[11] While not legally binding, the Explanatory Notes furnish a helpful guide to the interpretation of the HTSUS. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 n.1 (Fed. Cir. 1999) (citation omitted).

[12] Heading 4905 covers "[m]aps and hydrographic or similar charts of all kinds, including atlases, wall maps, topographical plans and globes, printed." Heading 4905, HTSUS. Because the designs provided by Murray would not appear to be "maps" or "topographical plans," they would therefore fall into heading 4911, which as noted above, covers "[o]ther printed matter." Heading 4911, HTSUS.

[13] The Court notes that subheading 9813.00.30, HTSUS, covering "[a]rticles intended solely for testing, experimental or review purposes, including specifications" may cover engineering designs. Subheading 9813.00.30, HTSUS. The *Oxford English Dictionary* defines "specification" as "[a] detailed description of the particulars of some projected work in building, engineering, or the like, giving the dimensions, materials, quantities, etc., of the work, together with directions to be followed by the builder or constructor; the document containing this." XVI *Oxford English Dictionary* 159 (2d ed. 1989). Though such a definition might include Murray's designs, the designs are not for "experimental or review purposes," and so the Court does not discuss the provision in detail. However, because the provision does not restrict the form that the specifications take, it lends credence to the notion that Congress did not mean to exclude non-hand-drawn designs from the definition of "articles."

whether hand-drawn or printed. Heading 4906, HTSUS; *see also* heading 4911, HTSUS. Unfortunately, a survey of lexicographical resources does not dispel this tension.[14]

The *McGraw-Hill Dictionary of Scientific and Technical Terms*, defines all three terms — "diagram," "drawings," and "plans." However, it defines them in a way that makes for very little reasonable difference between them. The definition of "drawing" is "[a] surface portrayal of a form or figure in line." *McGraw-Hill Dictionary of Scientific and Technical Terms* 650 (6th ed. 2003). A "diagram" is defined as "[a] line drawing that represents an object or area according to a scale." *Id.* at 588. There appears from these definitions no particular difference between a drawing and a diagram. Similarly, a "plan" is defined as "[a]n orthographic drawing on a horizontal plane, as of an instrument, a horizontal section, or a layout." *Id.* at 1607.[15] There would appear, then, to be some question as to whether a principled difference exists between "diagrams," "drawings," and "plans." A survey of other technical reference books by the Court has not clarified this problem; most sources define none of the terms, and those that define even one often contain definitions unsupported by the other reference books.[16]

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[14] When interpreting the HTSUS, the United States Court of International Trade has recourse to the current common and commercial meanings of the words therein. *See GKD-USA, Inc. v. United States*, 20 CIT 749, 754–55, 931 F. Supp. 875, 879–80 (1996) (citation omitted). In identifying the common and commercial meanings of words, the Court looks to dictionaries, encyclopedias, and other lexicographical sources. *See id.* Because this case, to the extent it requires the Court to distinguish "diagrams" from "plans and drawings," refers to them as they exist in the specific world of engineering, the Court has looked to technical and scientific dictionaries and encyclopedias for guidance.

[15] In addition to the *McGraw-Hill Dictionary of Scientific and Technical Terms*, the Court has consulted the following sources for a definition of "drawing," "diagram," "plan," or "engineering drawing," and their plurals: IV *McGraw-Hill Encyclopedia of Science and Technology* 552 (9th ed. 2002); the *ASTM Dictionary of Engineering Science & Technology* 180 (9th ed. 2000), the *McGraw-Hill Encyclopedia of Engineering* 421 (2d ed.180 (9th ed. 1993), *Van Nostrand's Scientific Encyclopedia* (7th ed. 1989), the *Dictionary of Manufacturing Terms* (1st ed. 1987), *Marks' Standard Handbook for Mechanical Engineers* (8th ed. 1978), *Gerrish's Technical Dictionary: Technical Terms Simplified* (2d ed. 1976), the *Engineering Encyclopedia* 349–50 (3d ed. 1963), *The Harper Encyclopedia of Science* (1st ed. 1963), *Kent's Mechanical Engineer's Handbook: Design and Production Volume* (12th ed. 1956), and *Kidder-Parker Architects' and Builders' Handbook* (18th ed. 1956). None of these sources elucidates a difference between the terms. They either fail to define the terms, define them in terms of one another, or contain particular and idiosyncratic definitions which do not appear to have any bearing on this case. *See infra* note 16.

[16] For instance, a "drawing," as defined by the *ASTM Dictionary of Engineering Science and Technology*, is "an architectural, structural, mechanical, or electrical plan, elevation, or section indicating in isometric perspective or in axonometric perspective the detailed location, dimension, quantity, or extent of material, product, or member to be furnished." *ASTM Dictionary of Engineering Science and Technology* 180 (9th ed. 2000). This definition insists on a high level of detail inherent in a "drawing," a feature which none of the other sources reflect. However, the *ASTM Dictionary of Engineering Science and Technology* defines neither "diagram" nor "plan." Similarly, the *Engineering Encyclopedia* provides a definition of "diagram" which is supported by none of the other reference works which the Court has consulted, stating that "[d]iagrams are used for obtaining unknown factors in a problem with-

The Court therefore must examine the legislative history of the relevant statutory provisions. The legislative history of general note 19(c), HTSUS, in particular, indicates that there is a distinction to be made between those "diagrams" that fall under general note 19(c) and those "plans and drawings" which fall under headings 4906 and 4911, HTSUS.

The earliest version of the general note 19(c) exemption for "diagrams" was added to the Tariff Act of 1930, as amended, by Congress in 1962, as Para. 1827, a duty-free tariff provision encompassing "records, diagrams, and other data with regard to any business, engineering, or exploration operation conducted outside the United States, whether on paper, cards, photographs, blueprints, tapes or other media." Act of May 21, 1962, Pub. L. No. 87–455, 76 Stat. 72 (1962).[17]

The next act passed by Congress was the adoption of the Tariff Schedules of the United States, ("TSUS"), the predecessor to the HTSUS. (Tariff Classification Act of 1962, Pub. L. No. 87–456, 76 Stat. 72 (1962). With the adoption of the TSUS, "Para. 1827" of the Tariff Act of 1930, as amended, became subheading 870.10, TSUS. See subheading 870.10, TSUS (1963). The newly adopted TSUS included, in addition to subheading 870.10 covering "records" and "diagrams," a provision for engineering "drawings and plans" under headings 273.45–.55, TSUS. *See* subheadings 273.45–.55, TSUS (1963).

When the language of heading 870.10, TSUS, was originally proposed as a tariff provision in 1962, it was described as providing for the duty-free importation of documents from the foreign offices of U.S. companies. 108 Cong. Rec. 8,009 (1962) (statement of Rep. Mills). In explaining the provision, Rep. Mills assured his fellow congressmen that the documents that would be covered by the provision were not those which are for sale, but which are the internal documents of the importing business.[18] *Id.* This legislative history indicates that designs sold by one company to another company, when

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out carrying out the calculations required in figures" and that "[o]ften diagrams are useful for visualizing a trend or tendency, because a curve will show this much more clearly than a set of figures." *Engineering Encyclopedia* 349–50 (3d ed. 1963). However, the *Engineering Encyclopedia* defines neither "drawing" nor "plan."

[17] The phrase "conducted outside the United States" was apparently meant to narrow the language so that the duty-free provision would not apply to business records merely processed abroad and then re-imported into the United States. *See infra* note 18. The language was removed in 1982. *See infra* note 20.

[18] Representative Mills stated:

> The gentleman from Iowa [Mr. Gross] understands that this type of information is not for sale.
>
> This is something that an American business in its operation abroad has developed for its own use, that it desires to bring back to the main office in the United States. On the basis of existing provisions of the Tariff Act that material would be subject to payment of duty. This would provide that it may enter duty free. . . . The provision would

imported, would not be covered by the language of subheading 870.10, TSUS, but rather that the language of general note 19(c) is restricted to internal business documents.

In 1982 it was proposed that heading 870.10, TSUS, be struck, and that rather than providing for duty-free entry of internal business documents, such documents should be exempted from the schedule entirely. *See* H.R. Rep. No. 97–837, at 37 (1982). The reason for this change is not particularly clear, but its sponsor appears to have proposed the change as part of a series of changes meant to clarify entry procedures generally.[19] 128 Cong. Rec. 24,249 (1982) (statement of Rep. Frenzel). Nothing in the legislative history of this change contradicts the statements made in 1962 that the language of subheading 870.10, TSUS, was meant to apply only to internal documents.[20] Accordingly, because the legislative history of general

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not, of course, apply to business records processed abroad when no other phase of the business operations to which the records pertain occurs abroad.

108 Cong. Rec. 8,009–10 (1962) (statement of Rep. Mills) (alteration in original).

An explanatory excerpt from the report on the bill prepared by the Senate Finance Committee accompanied the bill when it was passed by the Senate, and included language that supports Representative Mills' statements. 108 Cong. Rec. 6,329–6,330 (1962); *see also* 1962 U.S.C.C.A.N. 1639, 1639–40 (reprinting S. Rep. No. 87–1318 (1962)). The excerpt stated:

> The amendment [providing for duty-free entry of business documents] would clarify a situation now causing extra work for the Bureau of the Customs and putting a burden on business firms with oversea branches. Data with regard to business, engineering, or exploration operations collected abroad and brought back to the United States for consideration by the executives of the firm may be subject to various rates of duty depending more on the type of material upon which the data are recorded than on the content or meaning. These records are not salable, their customs valuation is frequently in doubt, and delays and uncertainties are troublesome for business firms as well as for the Federal Government.

108 Cong. Rec. 6,330 (1962) (quoting S. Rep. No. 87–1318 (1962), *reprinted in* 1962 U.S.C.C.A.N. 1639–40).

[19] By federal regulation, items considered "intangibles" under the general notes to the TSUS could be brought into the country without the making of entry. *See* 19 C.F.R. § 141.4 (1981)–(1983). The substance of this regulation remains in the Code of Federal Regulations to this day, and was in force at the time Plaintiff brought his petition before Labor, although it had been amended to reflect the change from the TSUS to the HTSUS, and the subsequent changed numbering of the general notes. *See* 19 C.F.R. § 141.4 (2003). Thus, by striking heading 870.10, TSUS, and reinstating it as an exemption, Congress ensured entry procedures would not have to be followed with regards to internal business documents brought into the United States. Statements made by the sponsor of the proposed changes, when read in conjunction with the language of H.R. Rep. No. 97–837, indicate that the changes proposed were prompted by the rise of international courier services. Making entry on internal business documents brought into the country by such couriers was burdensome; moreover, changes needed to be made to the HTSUS to regulate the making of entry with regard to other sorts of articles brought into the country by couriers who were not the ultimate owners or purchasers of the good. *See* 128 Cong. Rec. 24,249 (1982) (statement of Rep. Frenzel); H.R. Rep. No. 97–837, at 36–37 (1982).

[20] Representative Frenzel first proposed a bill to exempt business documents in House bill number 5170. *See* 127 Cong. Rec. 30,766 (1981) (noting introduction of bill and referral to House Ways & Means Committee). This small bill, along with other small proposed changes to the TSUS, was collected into a larger bill comprised of additional changes to the

note 19(c) specifies that it applies only to business documents created for internal use, the Court cannot conclude that general note 19(c) precludes a plain language interpretation of the scope of headings 4906 and 4911, HTSUS.[21] Therefore, because Murray creates its designs not for its own internal use, but solely for sale to a customer, the general note 19(c) exemption does not apply.

Labor's finding that Murray's products are not "articles" within the meaning of the Act is therefore in error. However, the classification of engineering designs, according to the provisions of the HTSUS, may vary according to the form in which they are embodied. The Court therefore remands this matter to the Secretary of Labor for further investigation into the actual nature of the items produced

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TSUS, House bill number 6867. *See* H.R. Rep. No. 97–837, at 36–37 (1982). House bill number 6867 was referred to multiple committees in the House; the Committee on Ways and Means removed the phrase "conducted outside the United States," from the language. *See* H.R. 6867, 97th Cong. at 19 (Union Calendar No. 519, as reported on Sept. 17, 1982). The report on House bill 6867 filed concurrently by the House Ways and Means Committee does not explain the change, although in combination with the statements made by Representative Mills at the time that the language was originally passed, it would appear that the Committee was concerned to include internal business documents exported to branch offices and subsequently re-imported in the exemption. *See* H.R. Rep. No. 97–837, at 36–37 (1982); 108 Cong. Rec. 8,009–10 (1962) (statement of Rep. Mills) (alteration in original).

The amended portion of House bill number 6867 concerning business documents was then added to House bill number 4566, which also concerned miscellaneous tariff amendments. *See* H. Conf. Rep. No. 97–989, at 40 (1982), *reprinted in* 1982 U.S.C.C.A.N. 4137, 4140. House bill number 4566 was passed as Public Law 97–446 in January, 1983. Act of Jan. 12, 1983, Pub. L. No. 97–446, 96 Stat. 2329 (1983).

[21] The Court notes that classification of some of Murray's designs could possibly be affected by the form in which they are embodied. Although Labor made no factual findings on the question, the record indicates that Murray provides its designs, according to the customer's wishes, either printed, on CD-ROM, on computer diskette, or via electronic mail. *Remand Determ.*, Fed. Reg. at 53,396. CD-ROMs and diskettes containing recorded information fall under subheading 8524.39.40, HTSUS, covering:

> Records, tapes, and other recorded media for sound or other similarly recorded phenomena . . .
>
> Other:
>
> For reproducing representations of instructions, data, sound, and image in a machine readable binary form. * * *
>
> Subheading 8524.39.40, HTSUS.

Presumably, heading 8524 would also cover other forms of storage devices that can be removed from a computer. *See* Headquarters Ruling ("HQ") 965276 (Jan. 23, 2002) (suggesting that software embodied in a non-removable storage device, such as a computer's harddrive, are not classifiable in heading 8524). The heading does not discriminate between the type of information recorded on the storage device, whether it be picture files, songs, software, or other information; it requires only that some data be recorded onto the media. Arguably, this would include saved files representing designs such as those provided by Murray to its customers. In CD-ROM or 3.5-inch diskette form, then, these designs, so long as they are not internal "records" or "diagrams" under general note 19(c), appear to be goods or "articles" within the meaning of the HTSUS, and hence "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp. 2003). Designs which cross the border via electronic mail, however, are exempt under the HTSUS, and are therefore not "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp. 2003). General note 19(b), HTSUS; *see also* HQ 114459 (Sept. 17, 1998); HQ 960179 (Apr. 17, 1997). As Labor has made no determinations regarding how this issue affects Plaintiff's claim, the Court will not consider the issue here.

by Murray, for investigation into what proportion of them are printed, or embodied on CD-ROM or diskette, and for investigation as to how this affects Plaintiff's claim for TAA.

Having discussed the effect of the HTSUS on the status of Murray's designs as "articles," the Court moves on to discuss the effect of the NAICS on this question. The NAICS is a system developed jointly by the governments of the United States, Mexico, and Canada for statistical purposes. United States Census Bureau, North American Industry Classification System (NAICS), *at* http://www.census.gov/epcd/www/naics.html (last visited May 4, 2004). NAICS classifies various industries as either manufacturing or service sector industries. *See id.* Because "engineering design" is classified in the NAICS as a service, Labor argues that the engineering designs drafted by Murray are not goods or "articles" within the meaning of 19 U.S.C.A. § 2272(a) (West Supp. 2003). *See* Def.'s Mem. at 9, 11–12; United States Census Bureau, 2002 NAICS Definitions: 541330 Engineering Services, *at* http://www.census.gov/ epcd/naics02/def/ND541330.HTM#N541330 (last visited May 4, 2004).

However, as Labor has already argued, the word "articles" is used in the Act to refer to items that may be subject to a duty. Whether or not an item is dutiable is not the subject of the NAICS. The NAICS is therefore not relevant to the case at bar. Moreover, even to the extent it might be relevant, Labor's citation of the NAICS begs the question: while the NAICS appears to classify engineering design as a service, it does not speak to the status of the designs resulting from the service.[22]

CONCLUSION

The Court therefore remands this case to the Secretary of Labor for further investigation into the nature of the designs produced by Murray, and into the manner or form in which these designs are sold as "articles," and into how Plaintiff's claim is affected by Murray's production of designs embodied in various formats: printed, or included on CD-ROM or diskette. The Court reserves the second issue in this case, whether Plaintiff is eligible under 19 U.S.C.A. § 2272(b) (West Supp. 2003) for assistance as an adversely affected secondary worker, until such time as Labor has completed its further investigation on the first issue.

Labor shall have until July 2, 2004 to submit its remand determination. The parties shall have until July 16, 2004 to submit com-

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[22] The Court notes that the record suggests that Murray's customers view themselves as purchasing a product, rather than a service. The record suggests that many of Murray's customers pay by the design, and not by the hour. This could suggest that contracts between Murray and its customers are framed as contracts to purchase a product, rather than to pay for services rendered. *See* Fax from James Murray, President, Murray Eng'g, Inc., to Del-Min Amy Chen, U.S. Dep't of Labor, Supp. C.R. Doc. No. 2 at 8A (July 28, 2003).

ments on the remand determination. Rebuttal comments shall be submitted on or before July 23, 2004.

Slip Op. 04–46

TA CHEN STAINLESS STEEL PIPE, LTD., *Plaintiff*, v. UNITED STATES, *Defendant*, and ALLOY PIPING PRODUCTS, INC., ET AL., *Defendant-Intervenors.*

ALLOY PIPING PRODUCTS, INC., FLOWLINE DIVISION, MARKOVITZ ENTERPRISES, INC., GERLIN, INC. and TAYLOR FORGE STAINLESS, INC., *Plaintiffs*, v. UNITED STATES, *Defendant.*

Consolidated Court No. 01–00027

[Final Results of U.S. Department of Commerce's administrative review of antidumping duty order remanded for further action consistent with this opinion.]

Decided: May 4, 2004

Miller & Chevalier Chartered (*Peter J. Koenig* and *Kristen Smith*), for Plaintiff Ta Chen Stainless Steel Pipe, Ltd.

Collier Shannon Scott, PLLC (*David A. Hartquist* and *Jeffrey S. Beckington*), for Plaintiffs/Defendant-Intervenors Alloy Piping Products, Inc., *et al.*

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Lucius B. Lau*); *Berniece A. Browne*, Senior Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant United States.

OPINION

RIDGWAY, Judge:

This consolidated appeal contests the final results of the administrative review of the antidumping duty order covering certain stainless steel butt-weld pipe fittings from Taiwan, conducted by the U.S. Department of Commerce for the period of June 1998 through May 1999. *See Final Results of Antidumping Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 65 Fed. Reg. 81,827 (Dec. 27, 2000) ("*Final Results*"), adopting the *Issues and Decision Memorandum* (Dec. 15, 2000), Pub. Doc. 105 ("*Decision Memo*").

Jurisdiction is predicated on 28 U.S.C. § 1581(c) (1994).[1] The Commerce Department's findings, conclusions and determinations in the Final Results must be sustained unless they are "unsupported

[1] All statutory citations are to the 1994 version of the U.S. Code. However, the pertinent text of the cited provisions remained the same at all times relevant herein.

by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B).

Pending before the Court are two motions for judgment on the agency record, both of which challenge certain aspects of the Final Results.

Ta Chen Stainless Steel Pipe, Ltd. ("Ta Chen") — a Taiwanese producer and exporter of fittings subject to the antidumping duty order and the administrative review here at issue — is the plaintiff in one of the two cases consolidated into this action. Ta Chen's Motion for Judgment on the Agency Record contests the Commerce Department's determination that Ta Chen had agreed to reimburse its U.S. importer for antidumping duties — a determination which caused the agency to double Ta Chen's dumping margin. *See* Plaintiff's Memorandum of Law in Support of Motion for Judgment on the Agency Record ("Ta Chen Brief") at 5–22. In addition, Ta Chen disputes the Commerce Department's calculation of profit for the company's constructed export price ("CEP") sales, as well as the agency's decision to deny the company a CEP offset adjustment. Ta Chen Brief at 22–33, 33–39. Ta Chen concludes that — if the asserted agency errors are corrected — Commerce Department regulations require that the antidumping duty order against it be revoked, because the company's dumping margin falls to 0% for the period of review at issue here, and because the company has not been found to be dumping in prior years. Ta Chen Brief at 39–40; 19 C.F.R. § 351.222(b) (2000).[2]

The other pending motion was filed by four domestic fittings producers (the "Domestic Producers") who commenced their own action challenging the Final Results, which was consolidated with Ta Chen's case (in which they appear as Defendant-Intervenors).[3] The Domestic Producers' motion is much more limited, challenging only the Commerce Department's choice of financial statements used to calculate U.S. indirect selling expenses. The Domestic Producers charge that the data used by the agency understate those expenses and, thus, the Final Results understate Ta Chen's dumping margin. *See* Domestic Producers' Memorandum of Law in Support of Motion for Judgment on the Agency Record ("Dom. Prod. Brief") at 9–21; Defendant-Intervenors' Reply to Defendant's Memorandum in Partial Opposition to the Motions for Judgment Upon the Agency Record Filed by Plaintiff and Defendant-Intervenors ("Dom. Prod. Reply Brief") at 4–12.

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[2] All citations to agency regulations are to the 2000 version of the Code of Federal Regulations. However, the pertinent text of the cited provisions remained the same at all times relevant herein.

[3] The Domestic Producers — Alloy Piping Products, Inc.; Flowline Division, Markovitz Enterprises, Inc.; Gerlin, Inc.; and Taylor Forge Stainless, Inc. — were the four domestic petitioners in the administrative review here at issue.

Defendant, the United States ("the Government"), contends that the Final Results should be sustained in all respects, save one. Thus, the Government — joined by the Domestic Producers — urge that the reimbursement issue be remanded to the Commerce Department, and that Ta Chen's motion be denied in all other respects. *See* Defendant's Memorandum in Partial Opposition to the Motions for Judgment Upon the Agency Record ("Gov't Brief") at 32–34 (urging remand on reimbursement issue), 18–32, 34–55; Response of Defendant-Intervenors to Ta Chen Stainless Pipe Co., Ltd.'s Motion for Judgment on the Agency Record ("Dom. Prod. Response Brief") at 2 n.2 (urging remand on reimbursement issue), 8–32. And the Government asserts that the Domestic Producers' motion should be denied in its entirety. Gov't Brief at 55–61.

For the reasons set forth below, the Domestic Producers' motion is denied. Ta Chen's motion is granted in part, and this action is remanded to the Department of Commerce for reconsideration of its determinations on the alleged reimbursement agreement and the calculation of constructed export price ("CEP") profit.

I. *Background*

A. *The Legal Framework*

Dumping takes place when goods are imported into the U.S. and sold at a price lower than their "normal value" — *i.e.*, the foreign market value of the goods. 19 U.S.C. § §1673, 1677(34). The difference between the normal value and the U.S. price is the "dumping margin." 19 U.S.C. § 1677(35); *See generally* Antidumping Manual, Chap. 6 at 1–2 (Dept. of Comm., Jan. 22, 1998) ("AD Manual"). When normal value is compared to the U.S. price and dumping is found, antidumping duties equal to the dumping margin may be imposed. 19 U.S.C. § 1673(2)(B).

Normal value is calculated using the exporting market price (*i.e.*, the market where the goods are produced), an appropriate third country market price, or the cost of production of the goods. 19 U.S.C. § 1677b. The U.S. price is calculated in one of two ways — export price ("EP") or constructed export price ("CEP") — depending on the relationship between the producer or exporter and the U.S. purchaser. 19 U.S.C. § 1677a. Where the U.S. purchaser is unaffiliated with the producer or exporter, the U.S. price is based on the export price (EP) (*i.e.*, the transaction price). 19 U.S.C. § 1677a(a). Where the U.S. purchaser is affiliated with the producer or exporter, the U.S. price is based on the first sale from the affiliated purchaser to an unaffiliated purchaser in the U.S. This is the basis for constructed export price (CEP). 19 U.S.C. § 1677a(b).

Because the sale prices used to determine normal value and the U.S. price (either EP or CEP), occur at different points in the chain of commerce, and under different circumstances, certain adjust-

ments are made to attempt to make them comparable. For example, packing expenses, duties and taxes, and shipping and handling costs may affect normal value and the U.S. price differently, and therefore could preclude the fair comparison of prices, distorting the dumping margin. Thus, at least in theory, adjustments to account for such costs ensure "apples to apples" price comparisons.

Certain other special adjustments are made when the price to be calculated is CEP. Among these are adjustments to account for selling expenses incurred in the U.S. by the entity affiliated with the foreign producer or exporter, such as commissions, guarantees and warranties, and credit expenses. 19 U.S.C. § 1677a(d)(1).

1. *CEP Profit*

In addition to the adjustments for selling expenses, the CEP is reduced to account for the portion of profit attributable to those selling expenses. 19 U.S.C. § 1677a(d)(3). In calculating this CEP profit adjustment, the Commerce Department determines the "total actual profit" earned on all sales, foreign and domestic, of the subject goods. 19 U.S.C. § 1677a(f)(2)(D). To that end, the agency calculates the "total expenses," foreign and domestic, incurred in the production and sale of the goods. *See* 19 U.S.C. § 1677a(f)(2)(C). Total profit is what remains once expenses are subtracted from revenue. *See Ausimont SPA v. United States*, 25 CIT ___ , ___ , 2001 WL 1230596 at *20 (2001).

To calculate the portion of profit attributable to U.S. selling expenses — *i.e.*, the CEP profit — the total actual profit figure is multiplied by the "applicable percentage." 19 U.S.C. § 1677a(f)(1). This statutorily governed figure is arrived at by dividing the "total U.S. expenses" — the selling expenses incurred in the U.S.[4]—by the "total expenses." 19 U.S.C. § 1677a(f)(2). Thus, the amount of total profit to be designated as U.S. profit is based on the ratio of U.S. expenses to total expenses. This calculation may be expressed as an equation:

$$\text{Total profit allocated to U.S. expenses} = \text{Total Actual Profit} \times \frac{\text{Total U.S. Expenses}}{\text{Total Expenses}}$$

2. *Level of Trade/CEP Offset*

The Commerce Department also must make adjustments to the CEP to account for any differences in the "level of trade" ("LOT") between the exporting market and the U.S. market that affect the comparability of prices. 19 U.S.C. § 1677b(7)(A). Differences in LOT occur where, for example, the sales in the foreign market are made at different marketing stages from the U.S. market, such that there is

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[4] In some circumstances, other expenses not relevant here may also be included in "total U.S. expenses." *See* 19 U.S.C. § 1677a(f)(2)(B).

a "difference in the actual functions performed by the sellers" in each market. Statement of Administrative Action for the Uruguay Round Agreements Act of 1994, H.R. Doc. No. 103–316 at 829 (1994) ("SAA"), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4167; 19 C.F.R. § 351.412(c)(2).

A special adjustment called the "CEP offset" must be made when the agency determines that the LOT of the exporting market (*i.e.*, normal value) is at a more advanced stage of distribution than the LOT of the U.S. market (*i.e.*, constructed export price), and that — despite the best efforts of the producer or exporter — the available data do not provide an adequate basis upon which to determine whether the difference in the levels of trade affects the comparability of prices. 19 U.S.C. § 1677b(a)(7)(B); 19 C.F.R. § 351.412. In such cases, the agency reduces normal value by the amount of indirect selling expenses for the goods at issue in the foreign market, capped by the amount of indirect expenses used in determining constructed export price (in the U.S. market). *Id.*

B. *The Facts of This Case*

Ta Chen is a Taiwanese producer and exporter of stainless steel butt-weld pipe fittings subject to an antidumping duty order dating from 1993.[5] *See Amended Final Determination and Antidumping Duty Order: Certain Welded Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 58 Fed. Reg. 33,250 (June 16, 1993). Ta Chen sells its fittings to its U.S. subsidiary, Ta Chen International ("TCI"), located in California. TCI, in turn, sells the fittings to unaffiliated U.S. customers. Non-Pub. Doc. 1. As the importer of record, TCI is responsible for any duties on the fittings.

At the request of both Ta Chen and the Domestic Producers (who were petitioners in the proceedings before the agency), the Commerce Department conducted an administrative review of the antidumping order for the period of June 1, 1998 through May 31, 1999. Pub. Docs. 2, 3.[6] In the preliminary results of that review, the Commerce Department determined that all of Ta Chen's U.S. sales

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[5] Stainless steel butt-weld pipe fittings are manufactured in a variety of shapes, including elbows, tees, reducers, stub-ends and caps. They are widely used in piping systems subject to, for example, high pressure or extreme temperatures, and in systems where contamination and/or corrosion are concerns. *Final Results* at 81,828.

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

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

should be classified as constructed export price ("CEP") sales, because all of the company's sales to unaffiliated buyers occurred in the United States, between Ta Chen's subsidiary TCI and U.S. customers. *See Preliminary Results of Antidumping Duty Review and Intent To Not Revoke in Part: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 65 Fed. Reg. 41,629, 41,630–31 (July 6, 2000) ("*Preliminary Results*").

Because all of Ta Chen's sales were classified as CEP sales, certain additional adjustments to the sales prices were required, to account for the selling expenses and profit incurred by TCI. *See generally* 19 U.S.C. § 1677a(d); section I.A, *supra*. However, because the Commerce Department found that "the [level of trade] in the home market [*i.e.*, Taiwan] matched the [level of trade] of the CEP transactions [*i.e.* the U.S. sales]," the agency did not make a CEP offset adjustment to normal value. *Preliminary Results* at 41,632; 19 U.S.C. § 1677b(a)(7)(B).

After conducting verifications of Ta Chen's data in Taiwan and in California, the Commerce Department issued its verification reports. Non-Pub. Docs. 41, 43. Thereafter, Ta Chen and the Domestic Producers filed their administrative case briefs with the agency. The Domestic Producers' case brief disputed, *inter alia*, the agency's calculation of U.S. indirect selling expenses using TCI's October 31, 1998 income statement (rather than the 1999 statement). *See* Non-Pub. Doc. 46 at 6. Ta Chen's case brief challenged the Commerce Department's CEP profit calculation, but made no mention of the agency's decision to deny Ta Chen a CEP offset adjustment to normal value. *See* Non-Pub. Doc. 45.

Several weeks after the parties' case briefs were filed, the Commerce Department extended the deadline for completion of the administrative review, to allow it to address "a new issue on which interested parties [had] not had the opportunity to comment." Pub. Doc. 89. The Department asserted that its examination of various financial statements submitted by Ta Chen and TCI evidenced an agreement under which "the president of Ta Chen and TCI has agreed to reimburse TCI for dumping duties" imposed on Ta Chen's fittings, although the agency conceded that "such reimbursement may not have yet taken place." Pub. Doc. 90. *See generally Notice of Postponement of Final Results of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 65 Fed. Reg. 67,348 (Nov. 9, 2000).

Ta Chen filed comments with the Commerce Department responding to the agency's allegations. Pub. Doc. 92. But the company's submission was rejected because it also addressed the Department's decision to deny the company a CEP offset adjustment — an issue beyond the scope of the agency's request for comments. Pub. Doc. 95. In addition, the agency objected to Ta Chen's inclusion of "untimely new factual information" relating to the reimbursement issue. Pub.

Doc. 96. That information included documentary evidence which, according to Ta Chen, proves that there was no agreement to reimburse TCI and that there had been no reimbursement of TCI's antidumping duties during the period of review. *See* Non-Pub. Doc. 49. Ta Chen filed a revised submission, deleting all discussion of the CEP offset issue, and omitting the documents supporting its arguments on the issue of reimbursement. Non-Pub. Doc. 51.

The Final Results published by the Commerce Department found that evidence pointing to a reimbursement agreement dating from 1992 to 1994 raised "a rebuttable presumption that the agreement [was] still in effect during [this period of review]." *Decision Memo* at 9. The agency therefore concluded that the dumping margin assigned to Ta Chen should be doubled. *Decision Memo* at 12.

The Final Results also rejected Ta Chen's request that the Commerce Department make certain adjustments for imputed credit and inventory carrying costs in calculating CEP profit. Reviewing Policy Bulletin 97.1 (which explains the agency's methodology for such calculations), the Commerce Department stated that it does not include imputed interest in the calculation of CEP profit because it already accounts for actual interest. *Decision Memo* at 25–26. Referring to the policy bulletin, the agency further stated that accepted accounting principles only permit the deduction of actual booked expenses — not imputed expenses — in determining profit. *Id.*

Finally, in calculating U.S. indirect selling expenses, the Commerce Department continued to rely on the figures in TCI's October 31, 1998 income statement, rather than the October 31, 1999 statement urged by Domestic Producers. *Decision Memo* at 28. Explaining that it prefers "to utilize *actual, verified* data for . . . final results," the Department pointed out that the figures in TCI's 1998 statement had been verified by the agency, and that the Domestic Producers' proposed calculation "incorporate[d] an *estimate* of the antidumping legal fees and Section C expenses reported elsewhere for the fiscal year ending October 31, 1999." *Decision Memo* at 29 (emphasis added). In addition, the agency stated that "[b]asing [U.S. indirect selling expenses] on the 1998 fiscal year data is . . . consistent with the Department's use of the verified 1998 fiscal year data for Ta Chen's G&A [general and administrative] and interest expenses." *Decision Memo* at 29.

The Final Results were challenged by Ta Chen, as well as the Domestic Producers, in two separate appeals, which were consolidated into this action.

II. Analysis

A. *The Determination on Reimbursement*

The Commerce Department's regulations contemplate that, in certain cases, antidumping duties may be imposed that exceed the ac-

tual dumping margins found. Where the Commerce Department finds that an exporter or producer either paid antidumping (or countervailing) duties directly on behalf of the importer or reimbursed the importer for such duties, the regulations provide that the amount of the payment is to be deducted from the export price or constructed export price. 19 C.F.R. § 351.402(f). This effectively increases the dumping margin by lowering the U.S. price (*i.e.*, the export price or constructed export price), thus increasing the difference between the U.S. price and normal value.

As discussed in section I.B above, the Final Results here at issue found that evidence of a reimbursement agreement dating from 1992 to 1994 raised "a rebuttable presumption that the agreement [was] still in effect during [this period of review]." *Decision Memo* at 7–8. Relying on its reimbursement regulation, the Commerce Department therefore doubled the dumping margin assigned to Ta Chen. *Decision Memo* at 9. Ta Chen attacks the agency's reimbursement determination on evidentiary, procedural, and legal grounds. *See generally* Ta Chen Brief at 5–22.

First, Ta Chen argues that the agency's reimbursement determination is unsupported by any evidence, much less "substantial evidence." *See generally* Ta Chen Brief at 5–12. Ta Chen argues, *inter alia*, that the mere existence of an agreement by the president of Ta Chen and TCI to reimburse TCI for antidumping duties incurred from 1992 through 1994 cannot constitute evidence that reimbursement occurred during this period of review. *See* Ta Chen Brief at 6. Ta Chen points to its certified statement, submitted to the agency, attesting to the absence of any reimbursement agreement covering this period of review. *See* Ta Chen Brief at 7 (*citing* Non-Pub. Doc. 49). Ta Chen emphasizes that the Commerce Department itself determined — in the administrative review following the review at bar — that the reimbursement agreement on which the agency here relies "was limited solely to the 1992–1994 [periods of review]." Ta Chen Brief at 7 (*quoting Preliminary Results of Antidumping Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 66 Fed. Reg. 36,555, 36,559 (July 12, 2001)).

Second, Ta Chen asserts that — as a matter of procedure — the Commerce Department abused its discretion when it rejected the documentary evidence proffered by the company to prove that there was no reimbursement agreement and that TCI's antidumping duties had not been reimbursed during the relevant period of review. Ta Chen argues that the agency failed to even raise the reimbursement issue until very late in the proceeding, and then unreasonably denied the company the opportunity to present evidence on the issue on the ground that the evidence was "untimely." Ta Chen Brief at 12–13. Ta Chen concludes that — although the Commerce Department stated that its determination was based on a *rebuttable* presumption that the earlier reimbursement agreement continued in ef-

fect during the period of review — the agency in fact imposed an illegal, *irrebuttable* presumption, by denying Ta Chen the opportunity to present contradictory evidence. Ta Chen Brief at 14–16.

Finally, Ta Chen challenges — as a matter of law — the validity of the reimbursement regulation itself. Specifically, Ta Chen contends that, because the regulation authorizes the imposition of antidumping duties in excess of the dumping margins actually calculated, the regulation contravenes the U.S. antidumping statute, as well as the United States' international obligations. According to the company, under both domestic and international law, dumping duties may offset only the amount of any dumping, and no more. Ta Chen Brief at 20–22.

The Government mounts a vigorous defense of the legality of the Commerce Department's reimbursement regulation, arguing — in short — that the regulation is a reasonable interpretation of the antidumping statute that has been endorsed at least implicitly (if not explicitly) by Congress. *See* Gov't Brief at 19–32.[7] However, even the Government now concedes that Ta Chen was "denied a meaningful opportunity to rebut [the Commerce Department's] presumption of reimbursement [as a result of] the agency's decision to reject the factual information Ta Chen attempted to submit. . . ." Gov't Brief at 13. The Government — joined by the Domestic Producers — therefore urges that the reimbursement issue be remanded to the Commerce Department, and that "the Court . . . defer ruling upon the question whether Commerce's finding of reimbursement is supported by substantial evidence and otherwise in accordance with law pending the results of the remand." Gov't Brief at 32–34; Dom. Prod. Response Brief at 2 n.2.

Considerations of judicial economy and judicial restraint counsel remand where, as here, that course may moot a significant legal issue — in this case, the legality of the reimbursement regulation. On remand, the Commerce Department shall reconsider the bases for its determination concerning the alleged reimbursement agreement, in light of any relevant factual evidence, as well as the agency's own findings, conclusions, and determinations in other matters (including its determination — in the administrative review following the review at bar — that the reimbursement agreement on which it here relies was limited solely to the 1992–1994 periods of review), and the applicable law.[8]

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[7] In their briefs filed with the Court, the Domestic Producers take no position on the legality of the reimbursement regulation. *See* Dom. Prod. Response Brief, *passim*.

[8] The Government argues, in essence, that the reimbursement regulation is a legitimate exercise of the Commerce Department's authority under the statute to promulgate implementing regulations. But the matter is not as open-and-shut as the Government suggests.

The Government's argument implicitly assumes that the antidumping statute is, on its face, silent on the imposition of duties that exceed the actual amount of dumping. However,

B. *The Calculation of CEP Profit*

In determining Ta Chen's constructed export price (CEP), the Commerce Department was required to calculate the percentage of profit attributable to the U.S. selling expenses of Ta Chen's subsidiary, TCI. As discussed in section I.A above, CEP profit is determined by multiplying total actual profit by the ratio of total U.S. expenses to total expenses.

In applying the statutory equation in this case, the Commerce Department calculated "total actual profit" by totaling the profit for all subject fittings sold in the U.S. and in the exporting market, reflecting only *actual, booked expenses* — that is, imputed credit and inventory carrying costs were not included. Imputed credit and inventory carrying costs were excluded as well in calculating the "total expenses" denominator of the statutory ratio. In contrast, the same imputed credit and inventory carrying costs were *included* in "total U.S. expenses," the numerator of the statutory ratio. *See* Gov't Brief at 34–35.[9]

Ta Chen attacks the Commerce Department's calculation of the CEP profit adjustment as unsupported by substantial evidence and otherwise not in accordance with law. *See generally* Ta Chen Brief at 22–33. Ta Chen argues that the Department's CEP profit calculation resulted in an overstatement of the company's profit deduction, thus significantly increasing its dumping margin. Ta Chen faults the agency for, *inter alia*, failing to include imputed credit and inventory carrying costs in both the "total actual profit" and "total expenses" portions of the CEP profit calculation. Ta Chen asserts that the Commerce Department essentially "ignored[d] enormous . . . inven-

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the statute expressly authorizes the Commerce Department to impose antidumping duties "in an amount equal to the amount by which normal value exceeds the export price (or the constructed export price) of the merchandise" (*i.e.*, in an amount equal to the dumping margin) — language that can easily be read to *preclude* the imposition of duties that *exceed* the dumping margin. 19 U.S.C. § 1673a(1)(B). Moreover, the statutory scheme addresses in detail the agency's calculation of normal value, export price, and constructed export price, including the adjustments to be made in those calculations. Indeed, the statute specifically enumerates — in lists that appear to be exhaustive, rather than merely illustrative — those adjustments that the agency is authorized to make. *See* 19 U.S.C. §§ 1677a, 1677b. Nowhere in the statute is there language authorizing an adjustment to normal value, export price, or constructed export price, to account for the reimbursement of dumping duties to an importer.

Recent developments — in Congress, in the courts, and before the World Trade Organizations — may also bear on the legality of the Commerce Department's reimbursement regulation (raising issues such as whether the imposition or distribution of duties in excess of the actual dumping margin effectively converts the remedial antidumping regime into a punitive scheme).

[9] Imputing credit costs is based on the time value of money. Thus, for example, where goods are warehoused for longer periods prior to sale, the opportunity cost is higher than where the seller receives payment soon after production. Similarly, where a seller extends longer terms of payment, greater credit expenses are incurred. These expenses are usually incorporated into the price of the goods. *See, e.g.*, Import Administration Policy Bulletin 98.2 (Feb. 23, 1998).

tory carrying and credit costs," making U.S. sales appear overly profitable in comparison to home market sales. Ta Chen Brief at 25.

The Government and the Domestic Producers dispute Ta Chen's charges, and urge that the Commerce Department's CEP profit calculation be sustained. *See generally* Gov't Brief at 34–46; Def. Prod. Response Brief at 19–32. The Government dismisses Ta Chen's claim that the methodology used to calculate the CEP profit adjustment distorted the CEP profit allocation, and maintains that the methodology here was consistent with established agency practice. Gov't Brief at 38–40.

The Government asserts that the financial data used to calculate "total actual profit" already include "net interest expenses" (*i.e.*, actual interest expenses) and thus "there is no need to include imputed interest in determining total profit." Gov't Brief at 39. The Government states that imputed expenses are excluded from the "total expenses" calculation since, as with "total actual profit," those expenses are already reflected in the net expenses used in the CEP profit calculation. Gov't Brief at 40. Thus, according to the Government, excluding imputed expenses from both total actual profit and total expenses avoids double-counting of interest expenses. *Id*. Seeking to further bolster the agency's case on exclusion of imputed expenses from the total actual profit and total expenses calculations, the Government asserts that "normal accounting principles only permit the deduction of actual book expenses — not imputed expenses — for purposes of determining profit." Gov't Brief at 42.

The Government states that — although the Commerce Department excludes imputed expenses elsewhere in the CEP profit equation — it includes such expenses in the "total U.S. expenses" numerator because it considers them to be selling expenses within the meaning of the statute. Gov't Brief at 38.

Although the courts have had several occasions to address the Commerce Department's calculation of CEP profit, the precedent is — as the Government so delicately puts it — "mixed." Gov't Brief at 43. The parties therefore point to different lines of cases in their efforts to support their positions.

Ta Chen relies on a line of authority in which courts have found that the plain language of the CEP statute makes clear that "total U.S. expenses" is a subset of "total expenses." *See, e.g., SNR Roulements v. United States*, 24 CIT 1130, 1138, 118 F. Supp.2d 1333, 1340 (2000).[10] Thus, those courts have reasoned, any expenses in the U.S. expenses numerator must logically also be included in the total expenses denominator. By that logic, that line of cases has consistently

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[10] *See also, Fag Italia, S.p.A. v. United States*, 24 CIT 1311, 1318, 2000 WL 1728317 at *6 (2000); *Fag Kugelfischer Georg Schafer AG v. United States*, 25 CIT ____ , ____ , 131 F. Supp. 2d 104, 114 (2001); *NTN Bearing Corp. of America*, 25 CIT ____ , ____ , 155 F. Supp. 2d 715, 743 (2001).

held that, when the Commerce Department includes imputed expenses in "total U.S. expenses," "[imputed expenses] must be included in 'total expenses' as well." *SNR Roulements* at 1341.

Thai Pineapple took a rather different approach vis-á-vis the Commerce Department's exclusion of imputed expenses from "total actual profit" and "total expenses." The court there noted the agency's obligation to properly allocate profit to U.S. sales. Focusing on the "total actual profit" side of the equation, the court found "some ambiguity" in the language of the CEP statute, such that "it may not be an unreasonable interpretation to conclude that imputed expenses should be excluded in the actual profit calculation. . . ." *Thai Pineapple Canning Indus. Corp. v. United States*, 23 CIT 286, 296 (1999) ("*Thai Pineapple I*"), *aff'd in part, rev'd in part*, 273 F.3d 1077 (Fed. Cir. 2001).

However, *Thai Pineapple I* also emphasized that "nothing categorically prevents the inclusion of imputed expenses" in the CEP profit calculation. *Id.* The court explained that the exclusion of imputed expenses could be proper "*if* that construction can be squared with the necessity of a properly calculated statutory ratio." *Id.* (emphasis added). The court concluded that imputed expenses should be excluded "*if* they duplicate expenses already accounted for." *Id.* (emphasis added).[11]

The Government invokes *Ausimont SPA v. United States*, 25 CIT ___, 2001 WL 1230596 (2001), which sustained the Commerce Department's CEP profit methodology. *See* Gov't Brief at 43–44. Similarly, *Timken* held the agency's exclusion of imputed expenses from the "total expenses" calculation to be "a reasonable interpretation of the statute." *See Timken Co. v. United States*, 26 CIT ___, ___, 240 F. Supp. 2d 1228, 1246 (2002).

Timken thus broke with the holding in the *SNR Roulements* line of cases that mathematical logic and the plain language of the CEP profit statute require that "total U.S. expenses" be calculated as a subset of "total expenses."[12] But *Timken*, like *Ausimont*, found *U.S. Steel Group v. United States*, 225 F.3d 1284 (Fed. Cir. 2000) ("*U.S.*

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[11] Finding that the Commerce Department had not established that the imputed expenses were already accounted for in the "total expenses" denominator, *Thai Pineapple I* remanded the matter to the agency for further proceedings. 23 CIT at 296. In *Thai Pineapple II*, the court sustained the Commerce Department's CEP profit calculations. 24 CIT 107, 115 (2000). The court accepted the agency's "theory" that the particular data used to calculate the "total expenses" denominator reflected the interest expenses captured in the "total U.S. expenses" numerator. *Id.* The court then considered whether there was any reason why that theory would be inapplicable to the facts of that case. The court concluded that the petitioner had failed to demonstrate that the agency's exclusion of imputed expenses resulted in a distortion in the CEP profit calculations. The court also noted that the petitioner failed to counter the agency's argument that excluding imputed expenses avoided double counting. *Id.*

[12] *Thai Pineapple I*, like the *SNR Roulements* line of cases, also found that the CEP statute defines "total U.S. expenses" as a subset of "total expenses." *Thai Pineapple I* at 296.

Steel"), controlling. The Court of Appeals there held that the "plain language and the structure" of the statute do not require symmetry between the definitions of "total U.S. expenses" and "total expenses." 225 F.3d at 1290.[13]

"Symmetry" is not truly in question here, however, because the Government maintains that the Commerce Department included the costs at issue in the "total expenses" denominator. Nor is it clear that *U.S. Steel* controls. As the Government concedes, *U.S. Steel* dealt with a different agency methodology that includes movement expenses in the "total expenses" denominator of the CEP profit ration, but excludes them from "total U.S. expenses." *See* Gov't Brief at 43–44. Thus, when the *U.S. Steel* court accepted the agency methodology there at issue, it approved the agency's *inclusion* of the certain expenses in the "total expenses" denominator. 255 F.3d at 1288. Here, the agency has *excluded* the expenses at issue from the total expenses denominator — and they are, in any event, different from the expenses at issue in *U.S. Steel*. Moreover, the Court of Appeals reasoned in *U.S. Steel* that the statute equates "total expenses" with "all expenses," and thus "does not exclude movement expenses, but rather suggests their inclusion with the breadth of [the] definition of 'total expenses.' " *Id.* at 1290. Thus, to the extent that *U.S. Steel* is relevant here, its broad reading of "total expenses" would appear to favor Ta Chen.

In any event, even if the Commerce Department's exclusion of imputed expenses from the "total actual profit" and "total expenses" calculations is based on a reasonable interpretation of the statute, "it is possible for the application of that methodology to be unreasonable in a given case when a more accurate methodology is available and has been used in similar cases." *Thai Pineapple Canning Ind. Corp. v. United States*, 273 F.3d 1077, 1085 (Fed. Cir. 2001) (finding that the agency's standard methodology for matching costs to sales made during the period of review unreasonably caused distortions in the calculation of respondent's dumping margin).

Here, as Ta Chen argued before the agency, the Commerce Department's methodology finds TCI's U.S. sales to be "staggeringly profitable — in sharp contrast to reports . . . that U.S. market prices for fittings were at unprofitable levels." *Decision Memo* at 17. Ta Chen explains that TCI's sales of subject fittings had exceptionally long average inventory time, resulting in inventory carrying costs greatly

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[13] The Government points to *Ausimont SPA v. United States*, 25 CIT ____ , 2001 WL 1230596 (2001), for the proposition that the reasoning of *U.S. Steel* undercuts Ta Chen's claim that the agency's CEP profit methodology is contrary to law. Gov't Brief at 42–43. In *Ausimont*, the court indeed stated that *U.S. Steel* "appears" to undercut the respondent's arguments regarding symmetry. 25 CIT at ____ , 2001 WL 1230596, at *21. Nevertheless, the *Ausimont* court was careful to note that *the record* there did not support a finding that the agency's methodology caused a distortion in the CEP profit calculation. *Id.*

exceeding the actual interest costs allocated by the agency. Ta Chen Brief at 25.

Further, Ta Chen maintains, and the Government fails to dispute, that the Commerce Department has previously included imputed expenses in CEP profit calculations of TCI's U.S. sales, while avoiding double counting. *Compare* Ta Chen Brief at 27–29 (*citing Final Determination of Sales at Less Than Fair Value: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan*, 58 Fed. Reg. 28,556, 28,558 (May 14, 1993)), *with* Gov't Brief at 45. Indeed, it does appear that the agency previously avoided double counting by calculating an offset to TCI's actual interest costs to account for the portion reflecting imputed credit and inventory carrying costs. *Id.* at 28.

Moreover, the Commerce Department here actually "ran a test program which added imputed credit and inventory carrying costs to the total expenses used in the calculation of the total profit ratio." *Decision Memo* at 29 n.9. Although the agency asserted that the resulting change in the CEP profit ratio was "insignificant," the very fact of that test program casts doubt on the Government's claim that accepted accounting principles prohibit the inclusion of imputed expenses in determining profit (and/or any claim that the agency adheres religiously to those principles in all cases). In any event, as Ta Chen observes, the agency failed to include any documentation of its test program in the administrative record filed here, effectively precluding independent analysis and judicial review. Ta Chen Brief at 32 n.16.

The evidence of record suggests that the agency's CEP profit methodology in this case in fact may have distorted the allocation of profit to TCI's U.S. sales, as Ta Chen claims. Thus, the case must be remanded to afford the agency an opportunity to explain why, in this case, actual expenses are an adequate proxy for imputed expenses, or — if necessary — to recalculate Ta Chen's CEP profit to properly reflect TCI's imputed expenses. Further, it is not clear from the record whether, in other cases, the Commerce Department has indeed used other methodologies for calculating CEP profit that avoid double counting while more accurately accounting for imputed expenses. On remand, the agency will have an opportunity to explain whether and, if so, in what circumstances, it includes imputed expenses in the total expenses denominator of the statutory CEP profit ratio, and in the calculation of total actual profit.

C. *The Calculation of TCI's Indirect Selling Expenses*

In calculating Ta Chen's constructed export price, the Commerce Department was required to make deductions to account for indirect selling expenses incurred in the U.S. by Ta Chen's subsidiary, TCI. *See* 19 U.S.C. § 1677a(d)(1)(D). Indirect selling expenses are expenses — such as salespersons' salaries — that are incurred regard-

less of whether particular sales have been made, but are reasonably attributable to such sales. SAA at 824; AD Manual, Chap. 8 at 44.

In this case, the Commerce Department based its calculation of indirect selling expenses on figures in TCI's income statement for fiscal year 1998. *Decision Memo* at 22. The Domestic Producers contend that the figures in the statement for fiscal year 1999 should have been used instead. *See generally* Dom. Prod. Brief at 9–21; Dom. Prod. Reply Brief at 4–12. The Domestic Producers assert that the 1998 data are inherently less accurate, given the period of review at issue (June 1, 1998 through May 31, 1999), because — while the 1998 data overlap with *five* months of the period of review — the 1999 data cover the period from November 1, 1998 to October 31, 1999, and thus overlap with *seven* months of the period of review. Dom. Prod. Brief at 15–16; Dom. Prod. Reply Brief at 2 n.2.

The antidumping statute does not specify how indirect selling expenses are to be calculated. *Koenig & Bauer-Albert AG v. United States*, 22 CIT 574, 580, 15 F. Supp.2d 834, 843 (1998), *rev'd on other grounds*, 259 F.3d 1341 (Fed. Cir. 2001). The Commerce Department's usual practice is to use the audited fiscal year financial statements that most closely correspond to the period of review. Gov't Brief at 57 (*citing Final Results of Antidumping Duty Administrative Review: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, From Japan*, 66 Fed. Reg. 11,555 (Feb. 26, 2001) (*Issues and Decision Memorandum* at comment 3, 2001 WL 193868)). However, that practice is not carved in stone, and the agency deviates from it, where appropriate.[14]

In this instance, as discussed in section I.B above, the Commerce Department justified its reliance on TCI's 1998 income statement (rather than the data for fiscal year 1999) by explaining its preference for the use of "*actual*, verified data for . . . final results." *Decision Memo* at 29 (emphasis added).[15] *See generally* Gov't Brief at

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[14] *See, e.g., Final Results of Antidumping Duty Administrative Reviews: Certain Corrosion Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448, 18,456 (Feb. 11, 1998) (indirect selling expenses calculated based on *monthly* financial statements from the period of review); *see generally Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24,329, 24,354 (May 6, 1999) (explaining that the Commerce Department alters its methodology for allocating certain indirect expenses where "case specific facts . . . clearly support a departure from [the agency's] normal practice . . . ").

[15] As further justification for its reliance on TCI's 1998 income statement (rather than that for 1999), the Commerce Department explains that the 1998 data were subjected to verification. *Decision Memo* at 29. As the Domestic Producers observe, however, the verification process is essentially a "spot-check," so that not all data that was eventually used was actually reviewed during verification. Dom. Prod. Brief at 16–17. Moreover, the 1999 data were within the scope of the agency's verification outline here. Dom. Prod. Brief at 17–18. The Domestic Producers therefore contend that the fact that the 1998 data were verified should not elevate them above the 1999 data. Dom. Prod. Brief at 16. It does appear that the Commerce Department may somewhat overstate the significance of the verification.

55–61. As the Department pointed out, the 1999 data include *estimates* for certain legal fees and other expenses. *Decision Memo* at 29. And, as the agency further observed, the use of 1998 data to calculate U.S. indirect selling expenses had the added virtue of being consistent with the agency's use of 1998 data in calculating indirect expenses in Ta Chen's home market. *Decision Memo* at 29. Finally, as the agency noted, Ta Chen expressed concern that the 1999 data reflect certain extraordinary expenses incurred in the five months after the period of review, which could have distorted the Commerce Department's calculations. *Decision Memo* at 29.[16]

The Domestic Producers advance no reason, beyond the two-month difference in overlap, for favoring the 1999 income statement over the earlier statement on which the agency relied. And that difference in overlap is essentially *de minimis* — that is, two twelfths, or one sixth, to be precise. Moreover, the uncontroverted statements of Ta Chen concerning extraordinary expenses incurred in 1999, but outside the period of review, further support the conclusion that the 1998 data more accurately reflect the indirect expenses that TCI actually incurred during the period of review.

Under the circumstances, the Commerce Department's reliance on the 1998 income statement based entirely on actual data, rather than the 1999 statement incorporating estimates, was reasonable; and the agency's articulated rationale for deviating from its typical practice passes muster. Accordingly, the Commerce Department's calculation of TCI's indirect selling expenses must be sustained, and the Domestic Producers' objections must be rejected.

D. *The Denial of a CEP Offset Adjustment*

Ta Chen's final attack on the Commerce Department's determination targets the agency's decision to deny the company a "CEP offset" adjustment to "normal value" to reflect asserted "level of trade" differences between the home (Taiwan) market and the market in the U.S. *See generally* Ta Chen Brief at 4, 33–39. As explained in section I.A above, a CEP offset adjustment is appropriate where "normal value is established at a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price" (thus justifying a "level of trade" adjust-

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But that does not change the result here. The agency's decision to use the 1998 data rather than the 1999 data would be reasonable, even if those data had not been verified.

[16] Ta Chen's brief in support of its Motion for Judgment on the Agency Record did not anticipate the Domestic Producers' challenge to the calculation of TCI's selling expenses. And Ta Chen elected not to file a reply brief in this action. However, the company addressed the issue at the administrative level, defending the Commerce Department's use of data from the income statements for fiscal year 1998, and expressing concern that the 1999 data reflect certain extraordinary expenses incurred after the period of review. *See* Pub. Doc. 88 at 4.

ment), but where the data available are not sufficient to determine a level of trade adjustment. 19 U.S.C. § 1677b(a)(7)(B); 19 C.F.R. § 351.412(f).

Ta Chen asserts that a CEP offset adjustment was warranted in this case because, *inter alia*, "[the Commerce Department] itself verified two selling activities/functions — inventory and selling effort — as (a) only occurring for [Ta Chen's] home market fitting sales and not its U.S. CEP sales to its affiliate TCI and (b) involving costs of about 5% of price on home market sales." Ta Chen Brief at 37.

Whatever may have been the merits of Ta Chen's claim to a CEP offset adjustment, that claim was doomed by the company's failure to raise the issue before the Commerce Department in a timely fashion. In short, it is undisputed that the Commerce Department's Preliminary Results included a specific finding that Ta Chen was not entitled to such an offset. *See* Preliminary Results, 65 Fed. Reg. at 41,632 (Commerce Department findings that Ta Chen not entitled to CEP offset because "any differences in selling activities [between the Taiwan and U.S. markets] are not significant" and "the LOT [level of trade] in the home market matched the LOT of the CEP transactions"). *See also* Gov't Brief at 48; Ta Chen Brief at 36; Dom. Prod. Response Brief at 9, 11. It is also undisputed that Ta Chen failed to challenge that finding in the case brief that it filed with the Commerce Department following the issuance of the Preliminary Results, and that the company raised the issue for the first time only in its November 20, 2000 response to the agency's request for comments on the reimbursement issue. Gov't Brief at 48; Ta Chen Brief at 39 n.23; Dom. Prod. Response Brief at 9, 11. Ta Chen thus failed to properly exhaust its administrative remedies.[17]

As a general matter, the doctrine of exhaustion holds that "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (*quoting McKart v. United States*, 395 U.S. 185, 193 (1969)) (internal quotations omitted). The prescribed remedy for challenging Preliminary Results issued by the Commerce Department is to file a case brief with the agency setting forth objections. By regulation, the Department affords interested parties the opportunity to submit such briefs within 30 days after Preliminary Results are published. The regulations specifically require that such briefs "present *all* arguments . . .

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[17] Ta Chen's brief in support of its Motion for Judgment on the Agency Record did not anticipate the exhaustion arguments advanced by the Government and by the Domestic Producers. Moreover, as indicated in note 16 above, Ta Chen elected not to file a reply brief. Accordingly, the Court has not had the benefit of Ta Chen's views on the doctrine of exhaustion and its application here.

relevant to the Secretary's . . . final results, including any arguments presented before the date of publication of the . . . preliminary results." 19 C.F.R. § 351.309(c)(1)–(2) (emphasis added).

This Court has "generally take[n] a strict view of the need [for parties] to exhaust [their] remedies by raising all arguments" in a timely fashion so that they may be appropriately addressed by the agency. *Pohang Iron and Steel Co. v. United States*, 23 CIT 778, 792 (1999). The underlying principle is that "courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). The doctrine of exhaustion thus works to serve two basic purposes: It allows the administrative agency to perform the functions within its area of special competence (to develop the factual record and to apply its expertise), and — at the same time — it promotes judicial efficiency and conserves judicial resources, by affording the agency the opportunity to rectify its own mistakes (and thus to moot controversy and obviate the need for judicial intervention). *See Parisi v. Davidson*, 405 U.S. 34, 37 (1972); *Richey v. United States*, 322 F.3d 1317, 1326 (Fed. Cir. 2003) (exhaustion serves "the twin purposes . . . of protecting administrative agency authority and promoting judicial efficiency") (citation omitted).

In this case, the policy considerations underlying the doctrine of exhaustion cut against Ta Chen. Because Ta Chen failed to raise the CEP offset issue in its Case Brief filed following the issuance of the Preliminary Results, the petitioners did not address the issue in their rebuttal brief and the Commerce Department was not put on timely notice of the company's objection. *See* Non-Pub. Doc. 47. And, while it might have been at least theoretically possible for the Department to consider the issue later (*e.g.*, when it addressed the reimbursement issue), the agency was under no obligation to do so. Permitting even one party to "flout[ ] . . . administrative processes could weaken the effectiveness of an agency by encouraging [others] to ignore its procedures." *McKart v. United States*, 395 U.S. at 195. In this context, the consequences of flouting agency processes could be potentially devastating, given the extraordinarily tight time constraints prescribed by Congress in the statutes governing international trade.

Congress has expressly mandated that this Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). In an antidumping case such as this, where "Congress has prescribed a clear, step-by-step process for a claimant to follow, . . . the failure to do so precludes [the claimant] from obtaining review of that issue in the Court of International Trade." *JCM*,

Ltd. v. United States, 210 F.3d 1357, 1359 (Fed. Cir. 2000) (*citing Sandvik Steel Co.*, 164 F.3d at 599–600).[18]

In sum, because Ta Chen failed to timely raise before the Commerce Department its claim that it was entitled to a CEP offset adjustment, it cannot now be heard to criticize the agency for denying it that offset. By its silence, Ta Chen waived its right to raise the issue on appeal. *See AIMCOR v. United States*, 141 F.3d 1098, 1111–12 (Fed. Cir. 1998).

III. *Conclusion*

For the reasons set forth above, the Domestic Producers' Motion for Judgment on the Agency Record is denied in its entirety, and Ta Chen's motion is granted in part. This action is remanded to the Department of Commerce to permit it to reconsider the factual and legal bases for its determination concerning the alleged reimbursement agreement; to allow it to reconsider its calculation of CEP profit; and to accord it the opportunity to fully articulate the reasoning underlying its findings, conclusions and determinations on those issues.

A separate order will enter accordingly.

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[18] None of the established exceptions to the doctrine of exhaustion is relevant here. *See generally Luoyang Bearing Factory v. United States*, 26 CIT ____, ____ n.26, 240 F. Supp. 2d 1268, 1297 n.26 (2002). For example, Ta Chen had timely access to the confidential administrative record. *Compare Philipp Bros., Inc. v. United States*, 10 CIT 76, 80, 630 F. Supp. 1317, 1321 (1986). And Ta Chen does not charge that the agency failed to adhere to some clearly applicable precedent. *Compare* 10 CIT at 79–80, 630 F. Supp. at 1320–21. There is no indication that it would have been futile for the company to have timely raised its CEP offset argument before the agency. *Compare PPG Indus., Inc. v. United States*, 14 CIT 522, 542–43, 746 F. Supp. 119, 137 (1990). No judicial interpretation has intervened. *Compare Timken Co. v. United States*, 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986). And the CEP offset issue is not a pure question of law. *Compare Hercules, Inc. v. United States*, 11 CIT 710, 735, 673 F. Supp. 454, 476 (1987). *See generally Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991) (surveying cases where exhaustion has not been required); Layton & Fine, *The Draft and Exhaustion of Administrative Remedies*, 56 Geo. L.J. 315, 322–31(1967) (discussing exceptions to requirement of exhaustion) (*cited in McKart v. United States*, 395 U.S. at 193 n.9).