Decisions of the United States
Court of International Trade

SLIP OP. 04–140

ACCIAI SPECIALI TERNI S.p.A. and ACCIAI SPECIALI TERNI USA, Plaintiffs, v. UNITED STATES, Defendant, and ALLEGHENY LUDLUM CORP., et al., Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 99–06–00364
PUBLIC VERSION

[Defendant's Remand Determination remanded for further investigation.]

Decided: November 12, 2004

Hogan & Hartson L.L.P. (*Lewis E. Leibowitz*, *Richard L.A. Weiner*, *Lynn G. Kamarck*, *H. Deen Kaplan*), for Plaintiffs.

Robert D. McCallum, Assistant Attorney General; *David M. Cohen*, Director; *Lucius B. Lau*, Assistant Director; *Brent McBurney*, Assistant Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Robert E. Nielsen*, Senior Attorney; *John McInerney*, Chief Counsel, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, for Defendant United States.

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OPINION

WALLACH, Judge.

I
INTRODUCTION

This matter is before the Court following the issuance of the United States Department of Commerce's ("Commerce") *Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States*, Court No. 99–06–00364 (June 3, 2002) ("Redetermination"). Plaintiffs challenge Commerce's finding that the 1994 sale of Acciai Speciali Terni S.p.A. ("AST") to private parties extinguished subsidies received from the Government of Italy ("GOI") prior to the sale. Commerce claims that it reached this result following the court's remand instructions in *Ac-*

ciai Speciali Terni S.p.A. and Acciai Speciali Terni USA v. United States ("*Acciai I*"), Slip Op. 02–10, 2002 Ct. Int'l Trade Lexis 25 (Feb. 1, 2002). In *Acciai I*, this Court reviewed the *Final Results of Redetermination Pursuant to Court Remand, Acciai Speciali Terni S.p.A. v. United States* (2001) ("Remand Determination"), in which Plaintiffs' challenged the voluntary remand of Commerce's decision in *Final Affirmative Duty Determination; Stainless Steel Plate in Coils in Italy*, 64 Fed. Reg. 15,508 (1999) ("Final Determination").

The court finds that Commerce failed to abide by and misinterpreted the court's remand instructions in *Acciai I* and thus finds invalid Commerce's Redetermination. This court has jurisdiction pursuant to 19 U.S.C. § 1581(c) (2004).

II
BACKGROUND

On March 31, 1998, Allegheny Ludlum Corp., *et al.*, ("Allegheny"), the Defendant-Intervenors, filed a countervailing duty petition with Commerce arguing that AST, a privatized corporation, continued to benefit from subsidies bestowed upon its predecessors from the GOI. *See Initiation of Countervailing Duty Investigations: Stainless Steel Plate in Coils From Belgium, Italy, the Republic of Korea and the Republic of South Africa*, 63 Fed. Reg. 23,272 (April 28, 1998) ("Initiation Notice"). On March 31, 1999, Commerce published its Final Determination, 64 Fed. Reg. 15,508 (March 31, 1999). After the United States International Trade Commission ("ITC") made an affirmative injury determination, *see Investigations Nos. 701–TA–376, 377, and 379 (Final) and Investigations Nos. 731–TA–788–793 (Final); Certain Stainless Steel Plate From Belgium, Canada, Italy, Korea, South Africa, and Taiwan*, 64 Fed. Reg. 25,515 (May 12, 1999), Commerce issued a countervailing duty ("CVD") order[1] for stainless steel plate from Italy. *See Notice of Amended Final Determinations: Stainless Steel Plate in Coils from Belgium and South Africa; and Notice of Countervailing Duty Orders: Stainless Steel Plate in Coils from Belgium, Italy and South Africa*, 64 Fed. Reg. 25,288 (May 11, 1999).

Commerce based its CVD determination on a *per se* test under which any subsidy and benefit conferred on an entity "passed through" regardless of any sale or change in ownership of that entity. Under the *per se* test, an arm's length sale was irrelevant in deter-

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[1] CVDs are imposed, pursuant to 19 U.S.C. § 1671(a)(1), when

> (1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States. . . .

mining the existence of a "benefit," pursuant to 19 U.S.C. § 1677(5)(B) (1999).[2]

On February 2, 2000, the Federal Circuit ruled in *Delverde, SRL v. United States*, 202 F.3d 1360, 1364 (Fed. Cir. 2000) ("*Delverde III*"), that Commerce could no longer rely upon its *per se* methodology. *See also Allegheny Ludlum Corp. v. United States* ("*Allegheny II*"), 367 F. 3d 1339, 1341–42 (Fed. Cir. 2004). At issue in *Delverde III* was the Tariff Act's definition of a subsidy in 19 U.S.C. § 1677(5)(B). The Federal Circuit concluded that

> the Tariff Act as amended did not allow Commerce to presume that subsidies granted to the former owner of Delverde's corporate assets automatically 'passed through' to Delverde following the sale. Rather, the Tariff Act required that Commerce make a determination by examining the facts and circumstances of sale and then determining whether Delverde directly or indirectly received both a financial contribution and benefit from the government.

Delverde III, 202 F.3d at 1364. *Delverde III* set out three requirements: (1) that Commerce examine all the facts and circumstances, including the terms of the transaction; (2) that it must determine whether the purchaser directly or indirectly received a countervailable subsidy; and (3) that Commerce could not apply a *per se* rule. *See also Allegheny II*, 367 F. 3d at 1347.

On August 14, 2000, pursuant to the Government's Motion for Voluntary Remand, this court ordered Commerce to issue a determination in this matter in accordance with the Federal Circuit's decision in *Delverde III*.[3] On December 19, 2000, Commerce issued its Re-

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[2] The following description of a subsidy is provided in 19 U.S.C. § 1677(5)(B):

(5) Countervailable Subsidy

. . .

(B) Subsidy described

A subsidy is described in this paragraph in the case in which an authority—

(i) provides a financial contribution,

(ii) provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or

(iii) makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments

to a person and a benefit is thereby conferred. For purposes of this paragraph . . . , the term "authority" means a government of a country or any public entity within the territory of the country.

[3] The court's Order, dated August 14, 2000, provided "that the investigation at issue in this action, *Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from Italy*, 64 Fed. Reg. 15508 (Mar. 31, 1999) was remanded to Commerce to issue a

mand Determination in which it announced it had formulated a new "same person" test[4] to replace the *per se* rule for its contribution and benefit analysis. Commerce argued that, where the pre-sale entity and the post-sale entity are the "same person," as opposed to "distinct persons," further investigation was unnecessary because the contribution and benefit conferred on the former flow to the latter. Commerce thus reaffirmed the conclusion in its Final Determination that KAI Italia S.r.L. ("KAI")-owned AST benefitted from prior subsidies.

On February 1, 2002, in *Acciai I*, this court remanded the case for further investigation by Commerce. The court held that a subsidy contribution may travel when a government owned entity is privatized. That finding alone, however, does not establish that the associated benefit continues, as defined in the statute. Although Commerce properly applied the "same person" test in *Acciai I* to determine whether the pre- and post-sale AST were the same person for legal purposes, the test itself was yet another *per se* rule prohibited under the rationale in *Delverde III* and unsupported by substantial evidence. The Court held that Commerce had to demonstrate the existence and extent of the benefit that GOI-AST had conferred on KAI-AST. Familiarity with the decision in *Acciai I* is presumed.

On June 3, 2002, Commerce issued its Redetermination replacing its "same person" test with a "full value" test[5] in which it determined that if KAI paid "full value" for AST the original benefit was extinguished and thereby not countervailable. Although Commerce examined the purchase process of AST and found a number of circumstances surrounding the sale might raise questions whether fair market value was actually paid, upon examining the price KAI paid for AST alongside the market valuations of the company, Commerce determined that full value was paid. Thus, Commerce concluded that the original subsidy ceased to be countervailable as a result of the privatization transaction and imposed a countervailing duty rate of 1.62 percent *ad valorem*. Commerce's treatment of the "full value" sale as *per se* determinative of the extinguishment of the countervailable subsidy is the primary focus of this litigation.

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determination consistent with United States law, interpreted pursuant to all relevant authority, including the decision of the Court of Appeals for the Federal Circuit in *Delverde, SRL v. United States*, 202 F.2d 1360 (Fed. Cir. 2000). . . ."

[4] Commerce's same person test consists of four prongs, (1) continuity of general business operations, (2) continuity of production facilities, (3) continuity of assets and liabilities, and (4) retention of personnel.

[5] Commerce claims that the court requested it to "determine whether the price paid by KAI for the shares of AST constituted 'full value' for AST, and to find that, to the extent that KAI paid 'full value' (and so did not receive new benefit from the transaction) the original benefit to AST was not longer countervailable." Redetermination at 4. Thus, it appears that Commerce believed it was ordered by the court in *Acciai I* to apply a "full value" test.

III
STANDARD OF REVIEW

The court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (2000). The Court must determine whether the evidence and reasonable inferences from the record support Commerce's finding. *Dae Woo Elecs. v. United States*, 6 F.3d 1511, 1520 (Fed. Cir. 1993); *Timken Co. v. United States*, 25 CIT 939, 941 (2001). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

IV
DISCUSSION

A
The *Per Se* "Full Value" Test for Determining Whether a Subsidy Has Been Extinguished Is Not in Accordance with *Delverde III* or *Allegheny II*

Allegheny argues that Commerce has formulated a *per se* rule in contravention of *Delverde III* that subsidies are extinguished through change in ownership: Commerce determined that because the buyers of AST paid fair market value ("FMV"), the effect of the subsidies was severed. Redetermination at 15; Comments of the Domestic Industry in Response to the Second Redetermination Issued by the Department of Commerce ("Allegheny's 7–25 Remand Comments") at 2–3. In arguing that Commerce did not comply with *Acciai I*, Allegheny points to the court's statement that "the purchase price of a public entity's assets at fair market value is not dispositive of a benefit determination. . . ." Redetermination at 15 (quoting *Acciai I*, Slip Op. 02–10 at 42); Allegheny's 7–25 Remand Comments at 3. Thus, Allegheny contends that Commerce should revise its methodology so as not to make the arm's length, FMV sale determinative of the extinguishment of a subsidy.

Conversely, Plaintiffs argue that Commerce complied with the court's instructions "to consider certain material facts as part of its analysis, including but not limited to the impact the purchase price paid by KAI for AST's assets has upon whatever benefit KAI-AST

may have enjoyed." Redetermination at 16 (citing *Acciai I*, Slip Op. 02–10 at 54); *see also* Plaintiffs' Comments on Department of Commerce Remand Redetermination ("Plaintiffs' 7–25 Remand Comments") at 2. Plaintiffs claim that Commerce complied with the court's instructions in *Acciai I* by focusing on whether the buyers paid full value for the company.

Commerce claims that because the court essentially found the "same person" test to be a *per se* test prohibited by *Delverde III*, the court ordered Commerce to " 'examine and consider certain material facts as part of its analysis, including but not limited to the impact of the purchase price paid by KAI for AST's assets has upon whatever benefit KAI-AST may have enjoyed.' " Redetermination at 17 (citing *Acciai I*, Slip Op. 02–10 at 54). Commerce asserts that it abided by the court's instructions and "analyzed the facts and circumstances of the transaction, including the purchase price and other record evidence regarding the value of AST at the time it was sold, to determine whether the buyers *i.e.*, the new owners received a benefit as a result of the privatization of AST." *Id*. at 17. Because Commerce determined that the "buyers of AST (KAI) paid full value for the shares of the company," it then found that " 'the original subsidy to AST ceased to be countervailable.' "[6] Defendant's Response to Plaintiffs' and Defendant-Intervenors' Comments Concerning the Second Remand Determination Issued by the United States Department of Commerce ("Defendant's Response") at 4 (citing Redetermination at 14–15). Commerce also disputes Allegheny's assertion that it applied a *per se* rule because it claims "if we had found that KAI had paid less than fair market value, we believe that we could have been free under the Court's order to find that not all of the original subsidies to AST were extinguished." Redetermination at 17; *see also* Defendant's Response at 8.

In the Redetermination, Commerce has formulated a new methodology, the "full value" test, which deems an arms-length, FMV transaction as *per se* extinguishing the original subsidy granted to AST by the GOI. As this court stated in *Acciai I*, "the Federal Circuit appears to have been concerned about *any per se* assumption regarding the presence of a contribution and a benefit following a change in ownership. . . ." Slip. Op. 02–10 at 30 (emphasis in original). In a key passage, *Delverde III* discusses 19 U.S.C. § 1677(5)(F) Change in Ownership[7]:

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[6] Defendant as well as the Defendant-Intervenors argue that *Delverde III*'s holding regarding a prohibition on a *per se* test in the change in ownership analysis only applies to the sale of assets due to the facts of that case. In *Allegheny II*, however, the Federal Circuit rejected Commerce's argument that *Delverde III* did not apply to sale of stock. The court stated that the language of 19 U.S.C. § 1677(5), as interpreted by *Delverde III*, required Commerce to treat stock and asset sales equivalently. *Allegheny II*, 367 F.3d at 1347.

[7] Pursuant to 19 U.S.C. § 1677(5)(F) Change of Ownership,

This provision clearly states that a subsidy cannot be concluded to have been extinguished solely by an arm's length change of ownership. However, it is also clear that Congress did not intend the opposite, that a change in ownership always requires a determination that a past countervailable subsidy continues to be countervailable, regardless whether the change of ownership is accomplished through an arm's length transaction or not. If that had been Congress's intent, the statute would have so stated. Rather, the Change of Ownership provision simply prohibits a per se rule either way. Furthermore, this provision does not direct Commerce to use any particular methodology for determining the existence of a subsidy in a change of ownership situation. Reading this provision together with the previous subsections' clear directions for determining the existence of a subsidy, we conclude that the statute does not contemplate any exception to the requirement that Commerce determine that a government provided both a financial contribution and benefit to a person, either directly or indirectly, by one of the acts enumerated, before charging it with receipt of a subsidy, even when that person bought corporate assets from another person who was previously subsidized. In other words, the Change of Ownership provision does not change the meaning of "subsidy." A subsidy can only be determined by finding that a person received a "financial contribution" and a "benefit" by one of the acts enumerated in §§ 1677(5)(D) and (E)[8].

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

[8] Pursuant to 19 U.S.C. § 1677(5)(D) and (E),

(D) Financial contribution

The term "financial contribution" means—

(i) the direct transfer of funds, such as grants, loans, and equity infusion, or the potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenues that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods.

(E) Benefit conferred

A benefit shall normally be treated as conferred where there is a benefit to the recipient, including--

(i) in the case of equity infusion, if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made,

Delverde III, 202 F. 3d at 1366. Prohibition of a *per se* rule, assuming that a change in ownership either necessarily extinguishes or carries over a countervailable subsidy, was reiterated in *Allegheny II*, 367 F.3d at 1344. The Federal Circuit noted that the "statute[19 U.S.C. § 1677(5)(F)] requires a fact-intensive inquiry into the circumstances surrounding the transfer of ownership, beyond the simple inquiry into whether the transaction occurred at arm's-length." *Allegheny II*, 367 F. 3d at 1344.

Although Commerce claims it has not formulated a *per se* rule with respect to the paying of FMV, Commerce apparently found determinative the existence of a countervailable subsidy as the basis of whether or not there was a FMV sale. Commerce claims that it believed

> that the court intended the Department to determine whether the price paid by KAI for the shares of AST constituted "full value" for AST, and to find that, to the extent that KAI paid "full value" (and so did not receive a new benefit from the transaction) the original benefit to AST was no longer countervailable. . . .
>
> . . . In sum, we conclude that KAI paid at least fair market value for the shares of AST. Under the Court's reasoning as we understand it, we are, therefore, directed to find that the original subsidies to AST are no longer countervailable.

Redetermination at 4 (citing *Acciai I*, Slip Op. 02–10 at 41–43). Commerce, however, erroneously derived its conclusion from the court's discussion of the importance of a Commerce finding that FMV had been paid during the sale of AST in which the court concluded: "[a]lthough the court recognizes that the purchase of a public entity's assets at fair market value *is not dispositive* of a benefit determination under the statute, the fact must be fairly considered in arriving at that determination." *Acciai I*, Slip Op. 02–10 at 43 (emphasis added). Further evidence that Commerce used a *per se* FMV test is its statement that had it found KAI had paid less than FMV, it would not

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> (ii) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on a market,
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> (iii) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority, and
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> (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration.

have found that all the benefit from the subsidies had been extinguished.[9] Redetermination at 17.

Commerce's *per se* FMV test *prima facie* fails to comply with the law because, as previously considered by this court, "it misses the mark and 'the fundamental issue whether any such alleged "successor" actually received a market benefit during the period of review with regard to the products under investigation.' " *Acciai I*, Slip Op. 02–10 at 42. By arguing that payment of FMV *per se* indicates the extinguishment of a subsidy and its benefits, Commerce again "appears to have substituted one inadequate methodology for a second inadequate methodology not taking into account the full and complete analysis under *Delverde III* requiring an evaluation of whether the post-privatized entity continues to enjoy the pre-privatization subsidies." *Allegheny II*, 367 F.3d at 1350.

The Federal Circuit in *Delverde III* stated that 19 U.S.C. § 1677(5) as a whole "clearly requires that in order to find that a person received a subsidy, Commerce determine that that person received from a government both a *financial contribution* and *benefit*, either directly or indirectly . . . " and the determination should hinge on the "*particular facts* and *circumstances* of the sale." 202 F.3d at 1364, 1366 (emphasis added). In other words, *Delverde III* unequivocally rejects the use of a *per se* rule by Commerce to arrive at its determination and requires a fact specific, case-by-case inquiry.

Clearly 19 U.S.C. § 1677(5) does not require Commerce to use any particular methodology in finding if a countervailable subsidy exists where there is a change in ownership. *See Delverde III*, 202 F.3d at 1366. Indeed, Commerce's factual findings regarding the FMV nature of the sale in this case are supported by substantial evidence since it adequately considered the facts and circumstances of the privatization sale. It may be that the existence of an FMV sale translates into the extinguishment of a subsidy – as the term "FMV" itself assumes that the sale price would include and take into account subsidies given and benefit conferred. This determination, however, cannot be put forward by Commerce as a *per se* test. Commerce should instead employ a methodology which explains, upon consideration of the factual aspects of the sale, whether the FMV transaction extinguished the subsidy as well as the benefit conferred. In its analysis, Commerce should articulate under what conditions an FMV sale definitively demonstrates that a benefit has been extinguished. This court remands this issue to Commerce so that it can revise its methodology to conform to the requirements of 19 U.S.C. § 1677(5) and explain its reasoning using the case-specific inquiry required under *Delverde III* and *Allegheny II*.

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[9] "If we had found that KAI had paid less than fair market value, we believe that we could have been free under the Court's order to find that not all of the original subsidies to AST were extinguished." Redetermination at 17.

B

The "Same Person" Test Is Not in Accordance with the Law

Allegheny reads *Acciai I* to support the continued use of the "same person" test in evaluating the continuity of a subsidy with some modifications. Defendant-Intervenors' 4–30–02 Comments on Second Remand Redetermination ("Allegheny's 4–30 Comments") at 2–3; Allegheny's 7–25 Remand Comments at 4. It argues that Commerce unduly eliminated the "same person" test from its analysis because the Court had found fault with Commerce's insufficient application of the test rather than with the test itself. Commerce, Allegheny claims, should have more closely considered the nature of the potential benefit enjoyed by the privatized AST by considering "certain mitigating factors." Redetermination at 17.

Commerce argues that while the Court agreed that the "same person" test was effective in determining that AST after privatization was the same "legal person" that had been the recipient of the GOI subsidy, the Court had directed Commerce to determine that, to the extent that KAI paid fair market value for AST, the original benefit to AST was eliminated. *Id.* at 18.

Although this court in *Acciai I* held that Commerce had correctly applied the four prong "same person" test to show that the GOI-owned and KAI-owned AST were the same person, the court also found the "same person" test to be inherently flawed and contrary to the holding in *Delverde III*. Slip Op. 02–10 at 30–38. In addition to the court's decision in *Acciai I*, the Federal Circuit in *Allegheny II*, 367 F.3d at 1350, held that Commerce may not employ the "same person" methodology to calculate countervailing duties. Upholding this court's determination in *Allegheny Ludlum Corp. v. United States* ("*Allegheny I*"), 246 F. Supp. 2d 1304 (CIT 2002), the Federal Circuit in *Allegheny II* stated that

> although the same-person methodology masquerades as a test with factual components, the trial court correctly perceived that it is a *per se* rule for all practical intents and purposes, completely ignoring the complexity inherent in a privatization. Without regard to the specifics of the privatization, the same-person methodology merely determines whether the pre-privatization and post-privatization entity is the same corporate person. To be sure, four factors govern this determination, including the continuity of general business operations, the continuity of production facilities, the continuity of assets and liabilities, and the retention of personnel. But should Commerce determine that the same person survived the privatization, the liability for the countervailing duty prior to privatization would automatically and necessarily carry over to

> the post-privatization entity without regard to all relevant facts and circumstances. For instance, the same-person methodology would never consider whether the purchasers adequately compensated the seller (*i.e.*, the foreign government) for the entirety of the acquired business and thus repaid any past subsidies. This facile determination is therefore a *per se* rule in disguise. Delverde III expressly prohibits such an abbreviated approach in examining the totality of the economic circumstances to determine whether the pre-privatization countervailable subsidy carries over post-privatization.

367 F.3d at 1347–48 (citing *Delverde III*, 202 F.3d at 1366). Allegheny has not distinguished this case sufficiently to justify an alternate result. Therefore, the "same person" test is still not in accordance with the law.

C
Commerce's Change-in-ownership Analysis Needs to Be in Compliance with U.S. Statute and Case Law and Requires a Benefit Analysis

Allegheny argues that Commerce should revise its change-in-ownership analysis by clarifying how the benefit from prior subsidies continues even upon changes in ownership. Redetermination at 18–19. Allegheny claims that CVD law shows that a reexamination of the benefit concept is not required. *Id*. at 19.

Commerce argues that it provided adequate explanation of the evidence underlying its "same person" methodology in the Remand Determination, which is consistent with *Delverde III*. *Id*. Even though Commerce states that it "does not agree with the Court's reading of *Delverde III*," it claims it is "bound by its decision" and "properly undertook the analysis contemplated" by the court. *Id*.; Defendant's Response at 10.

In light of the holding that both *per se* tests – the "same person" test, in *Acciai I*, and the "full value" test, here – contravene U.S. statute and case law, Commerce must conduct its change in ownership analysis based on the methodology it develops pursuant to 19 U.S.C. § 1677(5), *Delverde III*, and *Allegheny II*. It is insufficient for Commerce to point to facts supporting its discredited "same person" methodology and to incorporate them by reference to justify its position in this Redetermination. Furthermore, because Commerce has employed the *per se* "full value" test, it has equated AST's full value sale with the benefit received. This becomes apparent when one compares Commerce's arguments in Comment 7 in the Redetermination, concerning whether there had been an FMV transaction, with facts it used in the text of the Redetermination in its purported benefit

analysis.[10] *See* Redetermination at 23–26, 7–14. The issue is therefore remanded to Commerce to examine and explain how, despite the change of ownership, the *benefit* of prior subsidies to KAI continues to exist.[11]

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[10] In the text of the Redetermination, Commerce begins its analysis of the privatization of AST stating: "[i]n determining whether KAI received a *benefit* from purchasing AST pursuant to the Court's order of remand. . . ." Redetermination at 7 (emphasis added). Commerce, however, concludes its discussion at the end of the same section saying

> Therefore, although there were aspects of the sales process that potentially limited the number of competitors seeking to purchase AST causing the Department to question whether *full value* was paid for the company, comparison of the price actually paid for AST to market valuations of the company show that *full value* was paid for AST.

Id. at 14 (emphasis added).

[11] Article 1.1 of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement") deems that a subsidy exists if

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"). . .
>
> . . .
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred.

Section 1677(5)(B) of the U.S. Code closely tracks this definition. Article 14, Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient, of the SCM Agreement provides that

> any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph1 of Article1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:
>
> (a) government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member;
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> (b) a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts;
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> (c) a loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee. In this case the benefit shall be the difference between these two amounts adjusted for any differences in fees;
>
> (d) the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. The adequacy of remuneration shall be determined in relation to prevailing market condi-

D
The Purchase Price Does Not Have to Specifically Itemize the Repayment of Subsidies, But the Repayment of Subsidies Should Be Addressed in the Change in Ownership Analysis

Allegheny argues that, absent a specific itemization in the AST Purchase Agreement that a portion of the purchase price is dedicated to the repayment, the original subsidies to AST continue to be countervailable. Redetermination at 18; Allegheny's 7–25 Remand Comments at 11–15. Allegheny also claims that Commerce should revise its methodology to determine whether the buyers repaid the prior subsidies. Redetermination at 19. Allegheny derives this latter argument from a specific exchange between the court and counsel for Defendant to suggest that an "additional payment" beyond the fair market value purchase price needed to be shown in order to extinguish past subsidies.[12] Allegheny's 4–30 Comments at 4–5 (emphasis

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tions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

By neither having a statutory provision nor a regulation under U.S. law that defines "benefit," the U.S. Government has seemingly abdicated its international obligations.

The term "benefit" also has been litigated in the WTO dispute settlement system. First, the WTO Appellate Body ("AB") in *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, ¶ 154 (Aug. 2, 1999) ("*Canada – Aircraft*"), upon examination of Article 1.1(b) of the SCM Agreement, determined that "benefit" refers to the benefit to the recipient of the subsidy and not the "cost to government." The AB also stated that the "marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred . . . .' " *Canada – Aircraft*, ¶ 157. Second, in *United States – Countervailing Measures Concerning Certain Products from the EC*, WT/DS212/AB/R (Jan. 8, 2003) ("*US – Countervailing Measures*"), the AB reversed the lower panel's finding that there is an irrebutable presumption that following an FMV privatization sale any benefit from a prior financial contribution is extinguished. The AB instead determined that a rebuttable presumption of the extinguishment of the subsidy exists. The AB reasoned that the WTO Member's investigating authority should consider the nature of the market within which the sale occurred and conduct an inquiry on the basis of the facts in the case. It should be noted that the AB in *US – Countervailing Measures* also found that Commerce's "same person" methodology was WTO-inconsistent.

Neither the WTO legal texts nor the AB and panel reports have direct applicability under U.S. law. The reasoning in those materials, however, can useful for clarifying the subsidy provisions at issue in this case.

[12] *The court*: {S}upposing, given the facts of this case, in fact not only had a full purchase price been paid, but there had been an arm's length negotiation where they said, "Look, there were these subsidy benefits conferred, They're worth this much. And here is what we paid for them."
Mr. Lau: My understanding is that the concept of repayment still exists . . . I looked through these remand results with great detail, and unless I'm mistaken, I don't see a lot of discussion of that . . . Perhaps this is one of those issues that must await another day - must -
The court: Hmm, interesting.
Mr. Lau: - await a situation where there's a transaction out there, and part of the purchase price is specifically paid -
The court: Oh, I know what you're saying.

in original). Allegheny asserts that the previous subsidy benefits were not accounted for in the price paid for AST, as evidenced in the Purchase Agreement, and therefore AST continued to benefit from the privatization transaction. *Id*. at 7; Redetermination at 20.

Plaintiffs argue that nothing in *Acciai I* requires that Commerce's methodology take into account whether there has been an express repayment of prior subsidies. Redetermination at 20. Plaintiffs say that such requirement would be contrary to the holding in *Delverde III* as it made no such explicit requirement. Redetermination at 20; Plaintiffs' 7–25 Comments at 9.

Commerce argues that while the Purchase Agreement does not contain an explicit provision concerning the repayment of subsidies, that description is not dispositive. Redetermination at 21. Commerce states that using Defendant-Intervenor Allegheny's approach that explicit itemization is required would assume a new *per se* rule. *Id*. at 18. Commerce asserts that, regardless of how the parties have chosen to depict the nature of the sale in the Purchase Agreement,

> we believe that the Court directed the Department to determine whether the price paid by KAI was equal to the fair market value of the company. Where that condition was satisfied, we believe that we were required to find that the original subsidies to AST were extinguished, regardless of how that price may have been described in the purchase agreement.

Id. at 18, 21.

In conducting its analysis under 19 U.S.C. § 1677(5) to determine whether prior subsidies have been extinguished, Commerce needs to consider whether the subsidies have been repaid. In *Allegheny II*, the Federal Circuit explained that one of the deficiencies of the same-person methodology was that

> [i]n seeking any benefit that the purchaser might have indirectly received from the prior subsidies, that methodology refused to consider that the state . . . may have received full remuneration for the subsidy. *In other words, Commerce refused to inquire whether the privatization transaction fully repaid the subsidy to the state.*

367 F. 3d at 1346 (emphasis added). The Federal Circuit further argued that in using the same-person *per se* test, the

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Mr. Lau: - so as to - so as to re-pay the prior countervailable subsidies. I simply do"t know what the answer is, and perhaps the Agency, itself, doesn't know the answer until the facts are presented before it.

(Transcript of Oral Argument Before Judge Evan J. Wallach in *Acciai Speciali Terni, S.p.A. v. United States*, January 23, 2002 at 15, 25.) Discussions with the court at oral argument are, of course, just that, discussions, unless they represent a ruling by the court or a binding concession by a party. The colloquy here is neither.

> methodology precluded consideration of all the particulars of the transactions and instead unnecessarily limited the assessment to non-market factors such as the identity of the pre- and post-privatization facilities and personnel. These limited inquiries [did] not directly address the economic indicators of the *repayment of a past subsidy*.

Id. (emphasis added). Moreover, the Federal Circuit faulted the same-person methodology for not considering "whether the purchasers adequately compensated the seller . . . for the entirety of the acquired business and thus repaid any past subsidies." *Id*. at 1347. The Federal Circuit's language suggests that Commerce must conduct a change in ownership analysis, avoiding a *per se* test, that evaluates whether prior subsidies have been repaid.

In this Redetermination, Commerce has presented this court with another *per se* methodology, the "full value" test. As discussed *supra*, the "full value" test is facially the type of abbreviated and factually presumptive approach, which was prohibited by *Delverde III*. *See Allegheny II*, 367 F.3d at 1347–48 (citing *Delverde III*, 202 F.3d at 1366). Commerce should examine *the totality of the economic circumstances* to determine whether the pre-privatization subsidy carries over to the post-privatization entity. *See Id*. (emphasis added). Employing yet another *per se* test for determining whether a subsidy and its benefits have been extinguished with regard to the repayment of subsidies raises the same issues discussed by the Federal Circuit in *Allegheny II*. The test, for example, fails to take into account market and non-market factors that may affect the *actual value* of the prior subsidy as opposed to the *actual currency value* of the subsidy when it was paid by the GOI.[13] *See Allegheny I*, 246 F. Supp. 2d at 1310 (emphasis added). In other words, the FMV character of a sale may not definitively quantify the value of a subsidy which has been repaid and extinguished.

Commerce is ordered on remand to consider whether there has been a repayment of subsidies when it considers the totality of eco-

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[13] This court in *Allegheny I* presented an effective example of this point

> if a corporation had a full fair-market value of $ 100 million at the time of sale and received a $ 50 million subsidy, Plaintiffs would require that the new purchasers/ owners pay $ 150 million to extinguish the subsidies. However, if the corporation invested the $ 50 million subsidy in property, plant and equipment that became outdated or unproductive, the value of the corporation could change significantly. It could be determined that the full fair market value of the corporation and the subsidies given prior to and/ or during privatization, is $ 125 million. In addition to the reasons given in this simplistic example, there are numerous reasons why the full fair-market value of the corporation, including the value of subsidies, is less than the absolute dollar value of $ 150 million. Conversely, there could be conditions where a previous subsidy could become so valuable that new purchasers/ owners would be willing to pay a premium for the corporation, which could increase the full fair-market value beyond $ 150 million.

246 F. Supp. 2d at 1310.

nomic circumstances that surrounded the privatization of AST. Although Commerce is not required to request itemization or explicit repayment of pre-privatization subsidies, it must show that the circumstances of the sale demonstrate the extinguishment of the subsidy. Counsel for Defendant during the October 16, 2003, oral argument argued that it is not Commerce's practice to look beyond the currency value of a subsidy bestowed to determine the amount of the subsidy. Pragmatically, in order to comply with the statute and the case law in its benefit analysis, Commerce, for example, may analyze the value of the subsidy to the purchaser and in turn if it was repaid. It is, however, within Commerce's discretion to derive the most accurate methodology to analyze privatization transactions. *GTS Indus. S.A. v. United States*, 182 F. Supp. 2d 1369, 1379 (CIT 2002) (citing to *Delverde III*, 202 F.3d at 1367, citing H.R. Rep. No. 103–826(I), at 110 (1994)). Therefore, the court remands this issue so Commerce can employ a methodology which takes into account the court's instructions.

E
Commerce's Determination that the Sale of AST Was an FMV Transaction Is Supported by Substantial Evidence and Is in Accordance with Law

Allegheny contends that the sale of AST by GOI was not through a FMV transaction for three alleged reasons: 1) a faulty bidding process, 2) the incorrect valuation of AST, and 3) conditions of the sale, not considered by Commerce, which affected the price of AST. Redetermination at 21. Defendant and Plaintiffs, however, argue that the terms of the transaction engendered a full value sale. Commerce's determination that the sale of AST was an FMV transaction is supported by substantial evidence.[14]

1
Commerce's Finding that the Bidding Processes Which Led to the Sale of AST Provided for an FMV Transaction Is Supported by Substantial Evidence

Allegheny claims the presence of only one final bid, due to restrictions on and obstacles to the potential bidders, precluded a FMV transaction. Redetermination at 21.

Plaintiffs argue that the bidding process at issue produced a full value sale. Plaintiffs argue that Instituto per la Riconstruzione's

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[14] If it were to examine Commerce's determination *de novo*, the court might find otherwise. The court, however, may not reweigh the evidence or substitute its own judgment for that of the agency. *See Granges Metallverken AB v. United States*, 13 CIT 471, 474 (1989).

("IRI")[15] intention to sell AST and the solicitations of expressions of interest in the company were publicized, yielding nineteen expressions of interest. Plaintiffs' 7–25 Comments at 4. Plaintiffs claim that two months (March 15 to May 13) were a sufficient period of time in which to prepare final bid offers for AST, that final offers were indeed submitted, and that any company in the position to be a purchaser of AST had sufficient time to make a timely offer. Redetermination at 22; Plaintiffs' 7–25 Comments at 5–6. In addition, Plaintiffs claim that [a certain fee] requirement, a [certain amount] when AST's estimated net worth at the time was estimated at [a certain amount], was not an undue obstacle or restriction in the purchase process for AST, again particularly for those companies which were able to buy a large steel company. *Id*. at 22; Plaintiffs' 7–25 Comments at 6–7. Plaintiffs also claim that the perception that the GOI would favor a bid including Italian partners was unfounded and it would have violated EU and Italian law, the terms of the privatization plan, and IRI's intention to sell to the highest bidder. *Id*. at 23; *see* Plaintiffs' 5–24–02 Comments on Second Remand Redetermination ("Plaintiffs' 5–24 Comments") at 4; Plaintiffs' 7–25 Comments at 7–8.

Commerce found that, even though the bidding process for the sale of AST was at times suspect, it did produce a full value sale. Commerce disagrees with Plaintiffs that sufficient time and information about AST were afforded to the bidders in the final bid process. Redetermination at 23. Commerce notes that the bid by, Ugine, was rejected as Ugine offered to purchase only 35 percent of AST because it did not have enough time to finalize agreements with potential partners to bid for the remaining shares of AST. Redetermination at 23. On the issue of the single final bid, Commerce agrees that the various facets of the bidding process may have hampered participation in the process; there were eventually two bids - one which was rejected and the other subject to further negotiations. Though Commerce finds that more bids might have shown that a FMV transaction had occurred, it says that the existence of one or two final bids does not mandate an opposite conclusion. Redetermination at 24.

Commerce further says that while it is unclear that [a certain fee] itself affected the final bidding process, it may have placed more impediments in the bidding process in conjunction with the other factors particularly for smaller bidders. Redetermination at 23. Also, regarding the favoring of Italian bidders, Commerce notes that Krupp and Ugine clearly believed that the GOI was planning to favor bidders with Italian partners. Commerce states that while it is unclear whether this was a misperception regarding the bidding process, the

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[15] As noted in *Acciai I*, IRI was the GOI's holding company that owned AST at the time of the privatization.

belief that the GOI would act in this fashion was sufficient to affect the bidding process. Redetermination at 24.

Commerce's determination that the bidding processes that led to the sale of AST did not affect the FMV nature of the sale, however, is supported by substantial evidence. In considering the sale, Commerce states that

> although there were aspects of the sales process that potentially limited the number of competitors seeking to purchase AST causing the Department to question whether full value was paid for the company, comparison of the price actually paid for AST to market valuations of the company show that full value was paid for the AST.

Redetermination at 14. Commerce has shown through its factual analysis that it has come to its conclusion that the bidding process produced a full value sale, by considering certain competitive and less competitive aspects of the sale. Commerce has conceded that the bidding process became more restrictive through the final days of the process. In addition, Commerce has stated that more final bids would have been a better indicator of a full value sale. Commerce has also considered that, if the company, Krupp's, perception was correct and the GOI had favored Italian bidders, this might have reduced the likelihood of a full value sale. Commerce has thus confronted those issues which call into question the reasonableness of its findings and nevertheless determined that the bidding processes did not affect the full value nature of the sale. The court affirms Commerce's factual determinations as long as they are reasonable and supported by the record, "including whatever fairly detracts from the substantiality of the evidence." *See Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984). Commerce's decision is supported by substantial evidence and must, therefore, be affirmed.

2
Commerce's Determination that AST Was Correctly Valued Is Within Its Discretion

Allegheny claims that AST was undervalued and thus the sale was not an FMV transaction. Allegheny argues that the studies prepared in preparation for the sale of AST underestimated its actual value. Redetermination at 21. Defendant-Intervenor points to the IMI Report which showed, in a questionable accounting maneuver, that [a certain amount] was moved from equity to a provision for restructuring to reduce AST's net worth from [a certain amount] to [a certain amount]. Redetermination at 21–22. Allegheny also refers to the Morgan Grenfell Report which reported that deferred tax assets could increase AST's price by [a certain amount]. Redetermination at

21–22. Allegheny argues these factors were erroneously unaccounted for in Commerce's inquiry.

Commerce argues that the valuations of AST did provide for the full or market value of AST. Commerce does not believe the classification of equity as contingent liability should be considered an accounting maneuver, as it was essentially an adjustment of AST's May 1993 balance sheet and did not result in an undervaluation. *See* Redetermination at 24–25. Also, Commerce states that while deferred tax assets were not included in the Morgan Grenfell report's value determination, the value of assets is dependant on the AST's taxable income and the [amount] cited by Morgan Grenfell is what the deferred tax assets "could" be worth. Redetermination at 25. Commerce comments that even if the *highest* estimated value of the deferred tax credits were added to the *highest* estimated value of AST, the total would only exceed the price KAI paid for AST by [a certain amount]. Redetermination at 25 (emphasis in original).

Plaintiffs argue that Commerce correctly dismissed Allegheny's contention that the valuation studies provided inadequate information of the full or market value of AST. Plaintiffs' 7–25 Comments at 2. Plaintiffs claim that Commerce found rightly that the valuation reports did not misclassify AST's equity or misrepresent a tax shield. Plaintiffs' 7–25 Comments at 2.

Commerce's decision that the valuations of AST did provide for the full or market value of AST is supported by substantial evidence. It was within Commerce's discretion to accept and interpret the evidence before it in coming to its conclusion. "This Court lacks authority to interfere with the Commission's discretion as trier of fact to interpret reasonably evidence collected in the investigation." *Negev Phosphates, Ltd. v. United States*, 12 CIT 1074, 1092 (1988) (citing *Copperweld Corp. v. United States*, 12 CIT 148 (1988)). Therefore, Commerce's determination that AST was valued correctly is supported by substantial evidence.

3
Commerce's Determination that the Terms of AST's Sale Permitted a Full Value Transaction Is Supported by Substantial Evidence

Allegheny claims that the presence of conditions, such as retention of workers, limitations on the freedom of new shareholders, and restrictions on KAI's resale of AST and its subsidies, that affected the valuation of AST, were not considered by Commerce in determining the presence of a FMV transaction. Redetermination at 21; Allegheny's 4–30 Comments at 9; Allegheny's 5–24 Comments at 19. Because of these conditions, Allegheny argues that the GOI's control over AST extended beyond the 1994 sale and affected the price parties were willing to bid for the company. Redetermination at 22. Allegheny further argues that there had been massive aid and debt for-

giveness to the company and that privatization "engendered *additional* subsidies to the company." Allegheny's 4–30 Comments at 10 (emphasis in original). Plaintiffs claim that Commerce did not closely enough examine the terms of the Purchase Agreement which evidences that such terms and conditions could not have been part of a full value sale. Redetermination at 22; *see* Allegheny's 5–24 Comments at 4–5, 15.

Commerce states that the terms of the privatization offered by IRI produced a full value sale. Commerce argues that it is not in a position to speculate on what would have been different had IRI offered a different "package" when AST was privatized. Redetermination at 26.

Plaintiffs argue that Commerce correctly found that the terms of the sale allowed the sale to be at full value. Plaintiffs' 7–25 Comments at 2. Plaintiffs state that Commerce's approach of looking at the full package offered by IRI was correct. *Id*. at 2–3.

Commerce's determination that the privatization "package" offered by IRI engendered a full value sale is supported by substantial evidence. Commerce says that it looked at the sale as it was fashioned by IRI to determine whether the process was open and competitive and whether the price IRI received was in line with the valuations made by outside parties. Redetermination at 26. Based on those facts, Commerce determined that KAI had paid full value for AST. Commerce has looked at the privatization "package" and does not have to consider a hypothetical set of facts for a point of comparison. Accordingly, Commerce's finding that the terms of AST's sale produced a full value sale is supported by substantial evidence and is in accordance with law.

V
CONCLUSION

Based on the reasons set forth above, the court remands this matter to Commerce so that it may conduct further proceedings consistent with this opinion.

SLIP OP. 04–152

BEFORE: RICHARD K. EATON, JUDGE

ELKEM METALS CO., APPLIED INDUSTRIAL MATERIALS CORP., AND CC METALS & ALLOYS, INC. PLAINTIFFS, v. UNITED STATES OF AMERICA, DEFENDANT.

CONSOL. COURT NO. 99–00628

[Defendant's motion for reconsideration denied; opinion and order in *Elkem VI* modified and clarified]

Dated: December 3, 2004

Piper Rudnick, LLP (*William D. Kramer, Martin Schaefermeier,* and *Clifford E. Stevens, Jr.*), *Eckert Seamans Cherin & Mellott, LLC* (*Dale Hershey*), and *Howrey Simon Arnold & White, LLP* (*John W. Nields, Jr.* and *Laura S. Shores*) for Plaintiff Elkem Metals Co.

Williams Montgomery & John, Ltd. (*Theodore J. Low*) for Plaintiff Applied Industrial Materials Corp.

Arent Fox Kintner Plotkin & Kahn, PLLC (*George R. Kucik*) for Plaintiff CC Metals & Alloys, Inc.

Dangel & Mattchen, LLP (*Edward T. Dangel, III*) for Plaintiff-Intervenor Globe Metallurgical, Inc.

Lyn M. Schlitt, General Counsel, United States International Trade Commission, *James M. Lyons,* Deputy General Counsel, United States International Trade Commission (*Marc A. Bernstein*) for Defendant.

Kaye Scholer, LLP (*Julie C. Mendoza*) for Defendant-Intervenor Ferroatlantica de Venezuela.

Hogan & Hartson, LLP (*Mark S. McConnell*) for Defendant-Intervenor General Motors Corp.

Greenberg Traurig, LLP (*Philippe M. Bruno*) for Defendant-Intervenors Associao Brasileira dos Productores de Ferroligas e de Silico Metalico, Companhia Brasileira & Companhia Ferroligas, Nova Era Silicon S/A, Italmagnesio S/A-Industria e Comercio, Rima Industrial S/A, and Companhia Ferroligas Minas Gerais-Minasligas.

MEMORANDUM OPINION AND ORDER

EATON, *Judge*: This matter is before the court on the motion for reconsideration of Defendant United States International Trade Commission ("ITC" or "Commission") pursuant to USCIT Rule 59(a), (e). By its motion, the ITC asks the court to reconsider portions of its most recent decision in this action. Familiarity with that decision is presumed. *See Elkem Metals Co. v. United States*, 28 CIT ___ , slip op. 04–49 (May 12, 2004) (not reported in the Federal Supplement) ("*Elkem VI*"). In *Elkem VI*, the court considered whether an established price-fixing conspiracy was a significant condition of competition that had affected prices charged by U.S. ferrosilicon producers during the Prior Period, the Conspiracy Period, and the Subsequent

Period.[1] *Id.* at 28 CIT ___ , slip op. 04–49 at 8. As the court has sustained the ITC's determination with respect to the Prior Period and the Conspiracy Period,[2] the Commission directs its motion to matters relating to the Subsequent Period. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(ii) (2000). The granting of a motion for rehearing, reconsideration, or retrial under Rule 59(a) is within the sound discretion of the court, *Kerr–McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990) (not reported in the Federal Supplement); however, a court will not normally do so unless the decision at issue is "manifestly erroneous." *Ammex, Inc. v. United States*, 26 CIT ___ , ___ , 201 F. Supp. 2d 1374, 1375 (2002). Although the ITC's arguments do not rise to the level of the "manifestly erroneous" standard, they are meritorious in some respects. Therefore, the court will treat the Commission's motion as one for modification and clarification. *See Federal-Mogul Corp. v. United States*, 17 CIT 1110, 834 F. Supp. 1388 (1993).

By its motion, the ITC seeks reexamination of the court's holding that substantial evidence did not support the Commission's finding that the price-fixing conspiracy affected prices during the Subsequent Period. In the brief supporting its motion, the ITC insists that the court erred in three specific respects: (1) that "[t]he Court misunderstood a [c]entral [ITC] [f]inding" with respect to pricing patterns, (2) that "the Court improperly remanded [to] the [ITC] on grounds not raised by Plaintiffs," and (3) that "[s]everal of the remand instructions . . . appear to require the [ITC] to engage in inquiries that do not reflect the requirements of the antidumping and countervailing duty laws." Mot. of Def. ITC for Reconsideration ("Def.'s Mot.") at 8, 10, 5. For the reasons set forth below, the court modifies and clarifies portions of its Opinion and Order in *Elkem VI*.

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[1] The "Original POI" covered the period from 1989 through 1993. *See Elkem Metals Co. v. United States*, 27 CIT ____ , ____ , 276 F. Supp. 2d 1296, 1299 (2003) ("*Elkem V*"). The "Conspiracy Period" is the period from late-1989 through mid-1991. *Id.*, 27 CIT ____ , ____ , 276 F. Supp. 2d at 1300. The portion of the Original POI preceding the Conspiracy Period, i.e., the first three quarters of 1989, is referred to as the "Prior Period." The portion of the Original POI following the Conspiracy Period, i.e., from mid-1991, to mid-1993, is referred to as the "Subsequent Period."

[2] The court sustained the finding that the price-fixing conspiracy was a significant condition of competition that affected prices during the Conspiracy Period, *see Elkem V*, 27 CIT at ____ , 276 F. Supp. 2d at 1313; and, following remand, that the price-fixing conspiracy was not a significant condition of competition during the Prior Period, *see Elkem VI*, 28 CIT at ____ , slip op. 04–49 at 8.

DISCUSSION

I. The Court Did Not Misunderstand a Central Commission Finding

First, the ITC claims that the court misunderstood the "cental commission finding" that " 'the conspirators'[3] pricing patterns did not significantly shift in the period following the Conspiracy Period. . . ." Def.'s Mot. at 8. In *Elkem VI*, the court found that

> substantial evidence does not support the ITC's conclusion that the price-fixing conspiracy affected prices during the Subsequent Period. The ITC based this conclusion on its finding that "there are no significant differences in pricing patterns between the latter part of the Conspiracy Period and the Subsequent Period." The ITC found that the effects of the conspiracy were felt in the Subsequent Period because . . . there was "no significant shift in the conspirators' pricing patterns with respect to other domestic producers in the period following the Conspiracy Period," i.e., the Conspirators "frequently maintained higher prices or failed to match domestic competitors' price declines in the Subsequent Period. . . ."

Elkem VI, 28 CIT at ___ , slip op. 04–49 at 15–16 (internal citation omitted). Consequently, as part of its holding, the court found that substantial evidence did not support the ITC's finding that the Conspirators "frequently maintained higher prices." *Id*. at 16.

The ITC, however, argues that the court misunderstood the Commission's finding:

> The manner in which the Court framed the Commission's finding does not comport with the Commission's description of its finding quoted above. In its opinion, the Commission did not make a categorical finding that the Conspirators "frequently maintained higher prices." Instead, it stated that the Conspirators "frequently maintained higher prices *or* failed to match competitors' price declines" . . . the word "frequently" was clearly intended to modify both clauses of the sentence.

Def.'s Mot. at 9 (emphasis in original). Thus, the ITC apparently claims that its finding should properly be read as—the Conspirators *frequently* maintained higher prices or *frequently* failed to match competitors' price declines. Indeed, that is how the court read the Commission's words. This being the case, it is difficult to see how the ITC would be relieved from the requirement that it support, with substantial evidence, its finding that the conspirators "frequently

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[3] The conspirators were plaintiffs Elkem Metals Co., American Alloys, Inc., and SKW Metals & Alloys, Inc., the predecessor firm to CC Metals & Alloys, Inc. *See Elkem V*, 27 CIT at ____ , 276 F. Supp. 2d at 1300.

maintained higher prices." *Elkem VI*, 28 CIT at ___ , slip op. at 16. As CC Metals ("CCM") points out:

> [T]he agency asks that Part II.B. of the opinion be rescinded because the Court read the first part of the ITC's statement that the conspirators "frequently maintained higher prices or failed to match competitors price declines," to mean what it plainly says – that the conspirators frequently maintained higher prices.

CCM's Opp'n to Def.'s Mot. for Reconsideration ("CCM's Opp'n") at 3.

It may be that the Commission wished to express a different thought than was conveyed by the plain meaning of the words used in the Second Remand Determination.[4] Nonetheless, the record contains only the quoted words, and it is those that must be considered. The court finds that, as the ITC relies on the entire sentence to justify its determination, it must provide substantial evidence to support the meaning of the entire sentence. On remand, the ITC may explain itself more clearly but, in any event, it must support its findings by complying with the evidentiary standard.

The ITC also insists that the court's criticism with respect to its failure to address marketplace conditions was the result of the court's misunderstanding of the Commission's Remand Determination. *See* Def.'s Mot. at 9. Here, however, the ITC appears to have misunderstood the court's criticism. The ITC states that it need not examine marketplace conditions in order to justify its findings based on a comparison of the prices charged by the conspirators, and those charged by non-conspiring domestic producers, because both "were facing the same marketplace conditions." Def.'s Mot. at 10. In this assertion, the ITC is no doubt in the right. The court's observations, however, were substantially directed at the ITC's conclusion that "prices charged by both the conspirators *and the domestic industry as a whole* during the Subsequent Period were not the result of competitive marketplace conditions." *Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 22 (quoting Second Remand Determination at 13) (emphasis added). Absent a discussion of market conditions, the court found the Commission's assertion that non-market factors elevated all domestic producers' prices to be unjustified. Indeed, it is not immediately obvious to the court how the ITC can continue to make this finding without discussing marketplace conditions. That is, if the Commission believes prices for the industry as a whole were not set by the market, it must substantiate this belief. Because a discussion of market conditions would have been useful in determining if the Commission's findings were its opinion in this respect.

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[4] *See* Ferrosilicon from Brazil, China, Kazakhastan, Russia, Ukraine, and Venezuela, USITC Pub. 3627, Invs. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–641 (Sept. 2003), List 1, Doc. 620R ("Second Remand Determination").

II. The Court Properly Remanded to the ITC

The ITC next argues that the court improperly remanded this matter on grounds not raised by Plaintiffs. Def.'s Mot. at 10. Specifically, the ITC argues that CCM, the lone responding party, did not challenge the findings relating to pricing patterns and the effect of long-term contracts on those pricing patterns. As a result, the ITC maintains:

> The Court should reconsider its decision to review [the] Commission['s] factual findings *sua sponte*. There is no authority of which we are aware–and none is cited by the Court–providing the Court the authority to challenge a factual finding in a Commission determination when a litigant has not done so. To the contrary, 28 U.S.C. § 2639(a)(1) emphasizes that, in actions such as the instant case brought before the Court of International Trade:
>
> > the decision of the . . . International Trade Commission is presumed to be correct. The burden of proving otherwise shall rest upon the party challenging such decision.
>
> Consequently, the plain language of the statute makes clear that *a litigant* has the burden of challenging the Commission's decision. When a litigant does not attempt to discharge this burden, the Commission's decision must be presumed to be correct. The statute does not contemplate that a reviewing court can challenge the Commission's decision on theories it raises *sua sponte*.

Def.'s Mot. at 11–12.

First, 28 U.S.C. § 2639(a)(1) (2000), the statute cited by the Commission, primarily addresses the burden of proof as between the litigants. The scope and standard of review for this case, however, is governed by 28 U.S.C. § 2640(b) (2000) and 19 U.S.C. § 1516a(b)(1)(B)(i) (2000), which provide that the Court of International Trade "shall hold unlawful any determination, finding, or conclusion found . . . unsupported by substantial evidence on the record, or otherwise not in accordance with law." Thus, the court bases its holding on its review of the record.

Second, from the commencement of this case, the Plaintiffs' central claim has been that the price-fixing conspiracy was ineffective. *See, e.g.*, CCM Compl. ¶ 56 (Oct. 28, 1999) and CCM Compl. ¶ 56 (April 19, 2001) (stating that the Commission's presumption that "the price-fixing conspiracy had successfully eliminated price competition between the U.S. commodity ferrosilicon producers and the importers [was] factually and legally erroneous . . . and otherwise not in accordance with the law"); *see also* Elkem Comments on ITC's Remand Determination at 6 ("[I]n this particular case, the conspiracy to keep prices *up* was largely ineffective in the face of the flood of

low-priced imports.") (Oct. 18, 2002). Hence, the ITC cannot now claim that this issue has been raised here for the first time, or that it is surprised in any way that questions continue to be raised about the effect of the conspiracy during the Subsequent Period.

Third, this matter is now before the court following remand, and the court is examining the extent to which the ITC has complied with, or failed to comply with, the court's remand instructions beginning with *Elkem V*.[5] "There can be no question that courts have inherent power to enforce compliance with their lawful orders. . . ." *Shillitani v. United States*, 384 U.S. 364, 370 (1966); *see Hook v. Arizona, Dept. of Corrections*, 972 F.2d 1012, 1014 (1992) ("A district court retains jurisdiction to enforce its judgments. . . ."); *cf.* 28 U.S.C. § 1585 (2000) ("The Court of International Trade shall possess all the powers in law and equity of . . . a district court of the United States."). Thus, the court is unconvinced by the Commission's contention that it may not review underlying issues pertaining to its own remand instructions.

III. The Court's Remand Instructions

A. True Market Price

With respect to the remand instructions themselves, the ITC complains that

> several of the remand instructions the Court formulated . . . appear to require the Commission to engage in inquiries that do not reflect the requirements of the antidumping and countervailing duty laws. These [instructions] direct the Commission to quantify price effects and to attempt to calculate what market prices would have been under different conditions of competition than those actually present in the market.

Def.'s Mot. at 5. The ITC then directs its attention to three of these instructions.

The first instruction to which the ITC objects reads: "On remand, the ITC shall (1) determine the 'true' market price the ITC referenced in its Second Remand Determination at 10. . . ." *Elkem VI*, 28 CIT at ____, slip op. 04–49, at 19. According to the ITC, "[T]he Court's instructions compelling the [ITC] to derive quantitative mea-

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[5] The court in *Elkem V* instructed:

> On remand the ITC shall . . . (1) state with specificity the evidence that the price-fixing conspiracy affected prices during the entire Original POI; (2) weigh the evidence in the record concerning those portions of the Original POI where the conspiracy was not judicially found to be operative [i.e., the Prior Period and Subsequent Period]; and (3) explain with specificity what information in the record, if any, supports the adverse inference made on remand that the conspiracy affected prices during the periods preceding and following the Conspiracy Period.

Elkem V, 27 CIT at ____, 276 F. Supp. 2d at 1315–16.

sures of pricing on remand is not consistent with the statutory provisions of the antidumping and countervailing duty laws, their legislative history, or the pertinent case law." Def.'s Mot. at 7. In other words, the ITC claims that the antidumping and countervailing duty laws do not require it to quantify its findings. This instruction, however, like the other remand instructions to which the ITC specifically objects, is based on the court's conclusion that substantial evidence did not support the ITC's findings as to pricing. Specifically, the first challenged instruction was meant to address a portion of the ITC's conclusion that "the data indicate that there were no sudden shifts in domestic ferrosilicon producers' pricing patterns immediately after the conclusion of the Conspiracy Period." *Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 16 (internal quotation omitted). In its Second Remand Determination, the ITC stated:

> [I]n the third quarter of 1991 (the quarter immediately following the last quarter of the Conspiracy Period), prices charged by both the conspirators and the domestic industry as a whole were higher than those of the immediately preceding quarter. By contrast, if the effects of the conspiracy on prices were limited solely to the Conspiracy Period, *one would expect an immediate decline* from prices established by a conspiracy, which would be at inflated levels relative to a "*true*" market price, to prices established by marketplace considerations.

Second Remand Determination at 11 (emphasis added).

As noted by CCM, it was the Commission, not this court, that introduced the notion of a "true" market price into these proceedings. CCM's Opp'n at 2 ("[T]he ITC asks that it not be CONSOL. COURT NO. 99-00628 PAGE 11 required to respond to this Court's demand for further evidence and explanation to support findings that were made by the ITC itself in the decision under review.") (emphasis omitted). The purpose of the ITC's finding, as to an expected drop in prices following the Conspiracy Period, was to substantiate its conclusion that the conspiracy affected prices beyond the Conspiracy Period. Having stated that finding, however, the ITC must support it with substantial evidence. As counsel for the ITC noted at oral argument:

> I think it's acknowledged by all the parties that a conspiracy would raise prices to levels higher than they would be absent a conspiracy and that was frankly the concept that the Commission was trying to get across. If on the termination date of the Conspiracy Period the conspiracy ceased to exist and everything was determined by truly–by solely marketplace forces there would be other things–*other things being equal* . . . a decline in prices.

Tr. Civ. Cause for Mot. Reconsideration at 18.

The ITC's counsel has put his finger precisely on the problem, i.e., that "all other things [were] equal." Simply put, there is no indication that the ITC made an effort to determine if marketplace conditions did remain equal, or changed in some material respect following the Conspiracy Period. The ITC cannot simply rely on the idea that "one would expect an immediate decline from prices established by a conspiracy" without demonstrating that this expectation was warranted by then-existing conditions. Second Remand Determination at 11. Thus, the ITC must establish that the term "true market price" has some useful meaning.

On the invitation of the court following oral argument, the ITC now proposes that, if it should continue to rely on the term "true market price," it will define the term and provide substantial evidence supporting any findings it makes based on the use of the term, but should not be required to quantify the term. *See* Letter from ITC to the court of 8/30/04, at 2.[6]

Elkem objects to the ITC's proposal because, in its view, the change would mean that the ITC could "no longer . . . be required to provide substantial evidence in support of any finding regarding price changes that should have occurred absent continued effects from the conspiracy." Elkem's Comments on ITC's Proposed Remand Instructions ("Elkem's Comments") at 6. "The court should make clear that, while quantification of the term " 'true' market price" is not required, any such finding must be supported by substantial evidence." *Id*.

Although the ITC's complaints do not rise to a level sufficient for a finding that the remand instruction is "manifestly erroneous," they do have merit. Thus, the court finds that it may be possible for the ITC to make findings based on "true market price" that are supported by substantial evidence without quantifying the actual price itself. The court also finds that the ITC may abandon the use of the term "true market price," although it is difficult to see how it can persist in maintaining that the conspiracy affected prices in the Subsequent Period if it does so. In order to clarify that all findings must be supported by substantial evidence, however, the court incorpo-

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[6] The ITC proposes to the court the following revised instructions pertaining to "true market price":

> The ITC shall (1) define the term " 'true' market price" it referenced in its Second Remand Determination at 10, should it continue to desire to rely on the term, and provide substantial evidence supporting any findings it makes based on use of the term, but is not required to provide a quantification of the " 'true' market price," (2) account for the factors it relied upon so heavily in its prior determinations, e.g., demand and U.S. apparent consumption, (3) clearly explain how these factors either support or do not support its finding that the conspiracy affected domestic prices in the Subsequent Period, and (4) evaluate the relevant economic factors it finds to exist in the marketplace for the entire Subsequent Period, not merely the first quarter of the Subsequent Period.

Letter from ITC to the court of 8/30/04, at 2.

rates Elkem's proposed instructions[7] into those proposed by the ITC. The modified remand instruction regarding "true market price" shall read as follows:

> Should it continue to rely on the term "true market price," the ITC shall (1) define the term "true market price" it referenced in its Second Remand Determination at 10, and provide substantial evidence supporting any findings it makes regarding price changes that should have occurred in the absence of continued effects from the conspiracy, including any findings based on use of the term "true market price," but is not required to provide a quantification of that term; (2) account for the factors it relied upon heavily in its prior determinations, e.g., demand and U.S. apparent consumption; (3) clearly explain how these factors either support or do not support its finding that the conspiracy affected domestic prices in the Subsequent Period; and (4) evaluate the relevant economic factors it finds to exist in the marketplace for the entire Subsequent Period, not merely the first quarter of the Subsequent Period.

B. ITC Must State Price Differences With Specificity

Next, the ITC claims that, on remand, it should not be required to "state with specificity what difference in price it would consider material in the context of this inquiry, and why."[8] Def.'s Mot. at 5 (internal citation omitted). This instruction results from the ITC's finding that there was "no significant shift in the [C]onspirators' pricing pat-

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[7] Elkem proposes the following revised language to the court's instructions regarding "true market price":

> The ITC shall . . . define the term " 'true' market price" it referenced in its Second Remand Determination at 10, should it continue to desire to rely on the term, and provide substantial evidence supporting any findings it makes *regarding price changes that should have occurred in the absence of continued effects from the conspiracy, including any findings* based on use of the term " '*true*' *market price*", but is not required to provide a quantification of *that term*. . . .

Elkem's Comments at 6 (emphasis added).

[8] On remand, the court instructed the ITC to

> revisit its finding that the Conspirators frequently maintained higher prices than their domestic competitors in the Subsequent Period and (1) consider evidence with respect to the non-price factors that existed during the entire Subsequent Period, not only the first, second, third, and fourth quarters of that period, or explain the absence of such evidence in the record and the steps it has taken to account for any missing data, (2) state with specificity the non-price factors it found to exist during the Subsequent Period and explain their relevance to the ITC's finding that the Conspirators frequently maintained higher prices than their domestic competitors, (3) consider data for each of the Conspirators, i.e., disaggregate the pricing data, and either (a) identify sufficient record evidence to support its finding, or (b) reconsider whether the record fairly supports its finding, and (4) state with specificity what difference in price it would consider material in the context of this inquiry, and why.

Elkem VI, 28 CIT at _____ , slip op. 04–49 at 26–27.

terns with respect to other domestic producers in the period following the Conspiracy Period" and "prices charged by both the [C]onspirators and the domestic industry as a whole during the Subsequent Period were not the result of competitive marketplace conditions." Second Remand Determination at 11, 13. While the court found that substantial evidence supported some of the ITC's findings used to reach this conclusion (i.e., "that the Conspirators' prices, considered in the aggregate, either declined by less or increased by fractions of a penny more than those of other domestic producers," *Elkem VI*, 28 CIT ___ , slip op. 04–49 at 22), the court also found that substantial evidence did not support the finding that the "Conspirators frequently maintained higher prices than their non-conspiring domestic competitors during the Subsequent Period." *Id*. at ___ , slip op. 04–49 at 23 (internal quotation omitted). The court discussed the evidence relating to this conclusion at some length in *Elkem VI*. Since the record indicates that "the data from the quarters considered by the ITC are, at best, mixed," the ITC must establish its finding "that there was 'no significant difference' in the incidence of underselling during the Conspiracy Period and the Subsequent Period" by substantial evidence.[9] *Elkem VI*, 28 CIT at ___, slip op. 04–49 at 26, 32 (internal citation omitted). The remand instruction about which the ITC complains is designed to elicit from the ITC—even granting some greater prices—what price differential would be significant. As the court used the word "material" rather than the word "significant" in its instruction, the ITC may, if it wishes, comply with the instruction by substituting the word "significant."

C. Baseline Price

The ITC further objects to the court's observation that "[s]hould the ITC hope to establish by substantial evidence that the conspiracy affected prices during the Subsequent Period, a baseline [price] would be useful." Def.'s Mot. at 5 (quoting *Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 32). This observation refers to the ITC's underselling analysis and was preceded by the sentence:

> While it is true that the ITC was not explicitly obliged to go through the exercise of quantifying the effects the conspiracy had on prices during the Subsequent Period in order to find that the conspiracy affected prices during that time frame, it may well be that the demands of substantial evidence indicate its necessity in light of its previous findings.

Elkem VI, 28 CIT at ___ , slip op. 04–49 at 32.

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[9] The "data" referred to here was evidence examined by the court in *Elkem VI*. *See generally Elkem VI*.

Here, the court's observation should not be construed as a remand instruction but, rather, as guidance from the court as to the type of evidence that might be useful in order to satisfy the demands of substantial evidence, should the ITC continue to find that the conspiracy affected prices in the Subsequent Period.

D. Disaggregation of Data

Finally, the ITC appears to object to the court's remand instruction that, in revisiting its finding that "the Conspirators frequently maintained higher prices than their domestic competitors in the Subsequent Period," it should "consider the data for each of the Conspirators, i.e., disaggregate the pricing data, and either (a) identify sufficient record evidence to support its finding, or (b) reconsider whether the record fairly supports its finding. . . ." *Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 26. The ITC claims that "there is no explanation in the Court's opinion concerning why its instruction . . . is one required by the antidumping and countervailing duty law." Def.'s Mot. at 7.

While not specifically asking for any particular relief, it is apparent to the court that the ITC finds the instruction objectionable. It is true that "the ITC has broad discretion in the choice of its methodology." *CEMEX v. United States*, 16 CIT 251, 255, 790 F. Supp. 290, 294 (1992), *aff'd*, 989 F.2d 1202 (Fed.Cir. 1993) ("As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not . . . question the agency's methodology") (internal quotation omitted). Conclusions based on a chosen methodology, however, must still be based on substantial evidence. The court has previously gone through the exercise of examining the pricing data found in the Remand Staff Report and found that it tended not to support the conclusion that "the Conspirators frequently maintained higher prices." *Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 26. Even with this in mind, the Commission's objections have some merit and it is possible that the ITC can respond to the court's concerns without disaggregating the data. Thus, the court's remand instruction is amended to read as follows:

> (3) in revisiting its finding that the Conspirators frequently maintained higher prices than their domestic competitors during the Subsequent Period, consider the data for each of the Conspirators and either (a) disaggregate the pricing data or (b) explain why its method of aggregating the data is reasonable considering the court's discussion of that data, and, in any event, identify sufficient record evidence to support its finding, and explain how that evidence supports its finding.

CONCLUSION

Upon consideration of the issues discussed herein, the court modifies and clarifies its Opinion and Order in *Elkem VI* as described herein, and denies the ITC's motion for consideration.

This matter continues to be remanded to the ITC. Remand results are due within ninety days of the date of this order, comments are due thirty days thereafter, and replies to such comments eleven days from their filing. Neither comments nor replies to such comments shall exceed thirty pages in length.

Slip Op. 04–153

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

BRATSK ALUMINUM SMELTER and RUAL TRADE LIMITED, Plaintiffs, and SUAL HOLDING and ZAO KREMNY; and GENERAL ELECTRIC SILICONES LLC, Plaintiff-Intervenors, v. UNITED STATES, Defendant, and GLOBE METALLURGICAL INC. and SIMCALA, INC., Defendant-Intervenors.

Consol. Court No. 03–00200

JUDGMENT

This Court, having received and reviewed the United States International Trade Commission's ("Commission") *Views of the Commission* ("*Remand Determination*") in *Bratsk Aluminum Smelter v. United States*, 28 CIT ___ , 2004 Ct. Int'l Trade LEXIS 70 (CIT June 22, 2004), and comments of Globe Metallurgical Inc. and SIMCALA, Inc., Defendant-Intervenors, finds that the Commission duly complied with the Court's remand order, and it is hereby

ORDERED that the *Remand Determination* filed by the Commission on September 15, 2004, is affirmed in its entirety; and it is further

ORDERED that since all other issues have been decided, this case is dismissed.

Slip Op. 04–154

BEFORE: GREGORY W. CARMAN

COSCO HOME AND OFFICE PRODUCTS, and FEILI FURNITURE DEVELOPMENT LIMITED, FEILI GROUP (FUJIAN) CO., LTD., NEW-TEC INTEGRATION (XIAMEN) CO., LTD., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, and MECO CORPORATION, Defendant-Intervenor.

Consolidated Court No. 03–00928

[Plaintiffs' Motions for Judgment upon the Agency Record are denied. Plaintiffs' Motion to Supplement the Administrative Record is denied. Plaintiffs' Amended Consent Motion for Oral Argument is denied. This Court holds the Department of Commerce's *Certain Folding Metal Tables and Chairs from the People's Republic of China: Notice of Partial Rescission of First Antidumping Duty Administrative Review* is supported by substantial evidence on the record or otherwise in accordance with law. This case is dismissed.]

Dated: December 7, 2004

Collier Shannon Scott, P.L.L.C. (*Laurence J. Lasoff, Mary T. Staley, Gina N. Dennis*), Washington, D.C., for Plaintiff, Cosco Home and Office Products.

White & Case LLP (*William J. Clinton, Adams C. Lee, Jonathan Seiger*), Washington, D.C., for Plaintiffs, Feili Furniture Development Limited, Feili Group (Fujian) Co., Ltd., and New Tec Integration (Xiamen) Co., Ltd.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jeanne M. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Michael D. Panzera*, Of Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Paul Kovac*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Jonathan J. Engler*, Of Counsel, Senior Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, for Defendant.

Akin Gump Strauss Hauer & Feld (*Warren E. Connelly, Anne K. Cusick*), Washington, D.C., for Defendant-Intervenor, Meco Corporation.

OPINION

CARMAN, Judge: In this consolidated action, Plaintiffs challenge the United States Department of Commerce's ("Commerce") decision to rescind its administrative review as to Feili Furniture Development Limited, Feili Group (Fujian) Co., Ltd., and New-Tec Integration (Xiamen) Co., Ltd. (collectively "Feili and New-Tec") in *Certain Folding Metal Tables and Chairs from the People's Republic of China: Notice of Partial Rescission of First Antidumping Duty Administrative Review*, 68 Fed. Reg. 66,397 (Nov. 26, 2003) ("*Partial Rescission of Review*"). The issue before this Court is whether Plaintiffs Feili and New-Tec timely filed their request for review. Plaintiffs filed Motions for Judgment on the Agency Record, a Motion to Supplement the Administrative Record ("Feili/New-Tec Suppl. Mot."), and an Amended Consent Motion for Oral Argument. This

Court denies Plaintiffs' motions and holds that Commerce's *Partial Rescission of Review* is supported by substantial evidence on the record or otherwise in accordance with law.

STANDARD OF REVIEW

In analyzing a challenge to Commerce's final determination in an antidumping duty administrative review, the court will uphold Commerce's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Maritime Comm'n*, 383 U.S. 607, 620 (1966) (citations omitted). Moreover, "the court may not substitute its judgment for that of the [agency] when the choice is 'between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*.' " *Am. Spring Wire Corp. v. United States*, 8 CIT 20, 22, 590 F. Supp. 1273, 1276 (1984) (*quoting Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951)).

This Court will defer to the agency interpretation of a statute it administers so long as it is reasonable. *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (*quoting Koyo Seiko Co. Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994)). Furthermore, "[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) (*citing Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

BACKGROUND

On June 27, 2002, Commerce issued *Antidumping Duty Order: Folding Metal Tables and Chairs from the People's Republic of China*, 67 Fed. Reg. 43,277 (June 27, 2002). On June 2, 2003, Commerce published *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 68 Fed. Reg. 32,727 (June 2, 2003) ("*Notice of Opportunity*"). In response to that notice, Defendant-Intervenor Meco Corporation ("Defendant-Intervenor" or "Meco") in this case, filed a timely request for review. (Letter from Meco to Commerce of 6/30/03.) Defendant-Intervenor's petition included Plaintiffs Feili and New-Tec. (*Id.*) On July 29, 2003, Commerce published *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Requests for Revocation in Part and Deferral of Administrative Reviews*, 68 Fed. Reg. 44,524 (July 29, 2003) ("*Notice of Initiation*").

On October 21, 2003, when Defendant-Intervenor contacted Feili and New-Tec regarding their review request, Feili and New-Tec apparently realized that "a copy of [their] official stamped request for review was not in [Commerce's] Central Records Unit" in compliance with 19 C.F.R. § 351.103(b). (Letter from White & Case to Commerce of 10/31/03, at 2.) On October 27, 2003, Defendant-Intervenor timely requested that Commerce partially rescind the review for products manufactured or exported by Feili and New-Tec. (Letter from Akin Gump Strauss Haeur & Feld to Commerce of 10/27/03.) On October 30, 2003, after receiving Defendant-Intervenor's request for partial rescission, Commerce sent a letter to Feili and New-Tec asking that they produce a copy of an official stamped request for review. (Letter from Commerce to White & Case of 10/30/03.) In response to Commerce's letter, Feili and New-Tec admitted that they had "not yet found a copy of the official stamped request for review" and had "not yet found evidence that the request had been appropriately served on all interested parties." (Letter from White & Case to Commerce of 10/31/03, at 2.)

On November 3, 2003, Cosco Home and Office Products ("Cosco"), an interested party in the underlying proceeding and plaintiff in this case, requested that Commerce continue the review as to Feili and New-Tec. (Letter from Collier Shannon Scott to Commerce of 11/3/03.) Commerce declined Cosco's request because Feili and New-Tec's failed to properly file. On November 26, 2003, Commerce announced its decision to rescind review as to Feili and New-Tec by publishing *Partial Rescission of Review*. Cosco filed a separate appeal from Feili and New-Tec. This Court granted a consent motion to consolidate these appeals. It is undisputed that an official request for review by Feili and New-Tec is not part of the administrative record in this case. (*See* Feili/New-Tec Suppl. Mot. at 2; Def.'s Mem. in Opp'n to Mot. for J. upon the Agency R. and Mot. to Supplement the Admin. R. ("Def.'s Opp'n") at 10.)

PARTIES' CONTENTIONS

A. Plaintiffs' Contentions

Plaintiff Cosco states that Feili and New-Tec intended to file a request for an administrative review, although there was apparently some defect with the official filing of that request. (Pl.'s Br. in Supp. of Pl.'s Rule 56.2 Mot. for J. upon the Agency R. ("Cosco 56.2 Br.") at 14.) Plaintiffs emphasize that Commerce had the courtesy copy of [Feili and New-Tec's] June 30, 2003 review request. (Feili/New-Tec Suppl. Mot. at 7; Cosco 56.2 Br. at 9.) Plaintiffs contend that Commerce may continue a review where it is aware of a party's interest, and in this case, Commerce was aware of Feili and New-Tec's interest based on the courtesy copy of their review request. (Feili/New-Tec 56.2 Mem. at 14, 16; Cosco 56.2 Br. at 14, 17–18.) Plaintiffs Feili and

New-Tec assert that all information presented to or obtained by Commerce is part of the administrative record and request that this Court grant their Motion to Supplement the Administrative Record with the courtesy copy of the review request. (Feili/New-Tec Suppl. Mot. at 13.)

Plaintiff Cosco points out that the statute requires Commerce to conduct a review "if a request for such a review has been received and after publication of notice of such review in the Federal Register." (Cosco 56.2 Br. at 15–16 (quoting 19 U.S.C. § 1675(a)(1)).) Plaintiff Cosco urges that the courtesy copy was "received" by Commerce and therefore the statute's filing requirement was met. (Cosco Reply Br. at 6.) Plaintiffs contend that Commerce's decision to rescind the review is without merit because Commerce used information from Feili and New-Tec's courtesy copy of the review request. (Feili/New-Tec 56.2 Mem. at 9; Cosco 56.2 Br. at 10.) Plaintiffs urge this Court to note that the *Notice of Initiation* "specifically identified the companies [that were] identified in the request filed by Feili and New-Tec, not the request filed by Meco." (Cosco 56.2 Br. at 16 (citing *Notice of Initiation*, 68 Fed. Reg. at 44,525)[1]; Feili/New-Tec 56.2 Mem. at 11–12.)

Plaintiffs contend that Defendant violated Feili and New-Tec's due process rights by failing to notify the parties of the filing defects. (Feili/New-Tec 56.2 Mem. at 24; Cosco 56.2 Br. at 39.) Furthermore, Plaintiff Cosco asserts that because Commerce relied on the courtesy copy and a Commerce analyst failed to notify Feili and New-Tec's counsel of filing defects during a telephone conversation, Commerce should be estopped from rescinding review as to Feili and New-Tec. (Cosco 56.2 Br. at 29–31.) Plaintiffs further assert that Commerce broke with its past practice of exercising discretion to continue reviews despite improper filing, citing an apparent defective filing of another respondent, Wok and Pan, in the same review. (Feili/New-Tec 56.2 Mem. at 14–15; Cosco Reply Br. at 7.) In addition, Plaintiffs denote that Commerce continued with the review in *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 53,808 (Oct. 16, 1997) ("*Thai Pipe & Tube*"). (Feili/New-Tec Reply Br. at 10; Cosco 56.2 Br. at 19.) Plaintiffs claim their facts parallel those in *Thai Pipe*

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[1] Plaintiffs note that the *Notice of Initiation* contained nine company names: "Feili Furniture Development Ltd.; Feili Furniture Development Co., Ltd.; Feili Group (Fujian) Co., Ltd.; Feili (Fujian) Co., Ltd.; Dongguan Shichang Metals Factory Co., Ltd.; Dongguan Shchang Metals Factory Co.; Maxchief Investments Ltd.; New-Tec Integration Co.,; Ltd.; Wok and Pan Industry, Inc." (Feili/New-Tec 56.2 Mem. at 11–12 (*citing Notice of Initiation*, 68 Fed. Reg. at 44,525).) Plaintiffs claim Defendant-Intervenor's request for review only contained four of the companies listed in Commerce's *Notice of Initiation*: "Feili Furniture Development Co., Ltd and Feili (Fujian) Co., Ltd.; Dongguan Shichang Metals Factory Co., Ltd.; New-Tec Integration Co. Ltd." (Feili/New-Tec 56.2 Mem. at 12.)

& Tube to warrant the same result of review continuance. (Feili/New-Tec 56.2 Mem. at 20; Cosco 56.2 Br. at 19–20.)

Plaintiffs Feili and New-Tec remind this Court that without a review they will be subject to the estimated cash deposit rates and will not have an actual calculated assessment rate for their entries. (Feili/New-Tec 56.2 Mem. at 19.) Plaintiff Cosco further notes that Commerce's decision to rescind the review prevents Feili and New-Tec "from obtaining a refund of any portion of its duty deposit on the antidumping duty order placed on folding metal tables and chairs from the People's Republic of China through the administrative review process." (Cosco 56.2 Br. at 7.)

B. Defendant's Contentions

Defendant contends that Feili and New-Tec never filed a request for review. (Def.'s Opp'n at 14.) Defendant points out that Feili and New-Tec "admitted that there was no evidence that they had ever officially filed a request for review with Commerce." (*Id.* at 15.) Defendant also notes that Feili and New-Tec did not present any evidence to Commerce that they served the interested parties. (*Id.* at 14–15.) Defendant states that Defendant-Intervenor, the only party that properly filed a request for review of these companies, timely withdrew its request in accordance with Commerce's regulations. (*Id.* at 15.) Defendant explains "in the absence of any review request on the record at the end of the expiration period, Commerce properly rescinded the review as to Feili and New-Tec." (*Id.* at 15–16.)

Defendant asserts that Commerce is not obligated to give unfiled courtesy copies the same legal effect as documents filed in compliance with the regulations. (*Id.* at 16.) Defendant contends that if Commerce were required to act upon unfiled and unserved courtesy copies of documents in its review proceedings then parties would never know when and if a document was properly filed. (*Id.* at 33.) Defendant also states that contrary to Plaintiffs' assertions, "mere expression of 'interest' is insufficient for purposes of requesting review." (*Id.* at 28.)

Defendant rejects Plaintiffs' argument that Commerce was obligated to continue the review because Commerce relied on information in Feili and New-Tec's courtesy copy of the review request. (*Id.* at 22.) Defendant points out that the record demonstrates that Commerce did not rely on the document for purposes of initiating the review. (*Id.*) Defendant refutes Plaintiffs' claim that Commerce's decision to rescind the review violated Feili and New-Tec's due process rights because there is no right to import. (*Id.* at 38 (citing *Arjay Associates, Inc. v. Bush*, 891 F.2d 894, 896 (Fed. Cir. 1989)).)

Defendant argues that Commerce's decision not to continue the review is consistent with its past practice. (Def.'s Opp'n at 29.) Defendant asserts that Plaintiffs' reliance on *Thai Pipe & Tube* is misplaced because that case is clearly distinguishable. (*Id.* at 20.) In

Thai Pipe & Tube, the petitioner provided substantial evidence that it had, "in fact, officially filed a review request notwithstanding the absence of a date-stamped copy in the administrative record." (*Id.* at 21.) Defendant notes that "Feili and New-Tec have offered no such evidence that the review request was ever filed" (*id.* at 20 (emphasis original)) or "alleged extenuating circumstances to explain failure to timely file a review request" (*id.* at 34).

In addition, Defendant asserts that Commerce has no fiduciary responsibility to parties with respect to filings. (*Id.* at 36.) Defendant offers that the responsibility to ensure that official documents are properly and timely filed rests solely with the interested parties. (*Id.*) Defendant states that " 'no document will be considered as having been received by the Secretary unless it is submitted to the Import Administration Dockets Center in Room 1870 and is stamped with the date and time of receipt.' " (*Id.* at 45 (*quoting* 19 C.F.R. § 351.103).) Thus, Defendant contends that the administrative record properly excludes the courtesy copy and urges this Court to deny Plaintiffs' Motion to Supplement Administrative Record. (*Id.* at 44.)

C. Defendant-Intervenor's Contentions

Defendant-Intervenor was the only official petitioner for the initiation of the review and for rescission of the review regarding Feili and New-Tec. Defendant-Intervenor's contentions are essentially the same as Defendant's, have been duly considered, and, thus, will not be reiterated in their entirety. Defendant-Intervenor does, however, provide information about Wok and Pan's involvement in the review.

Defendant-Intervenor distinguishes Wok and Pan's filing irregularity from Feili and New-Tec's non-filing. (Br. of Meco Corp. in Opp'n to Pls.' Mot. for J. upon the Agency R. at 22) Defendant-Intervenor notes that a key factual distinction between Plaintiffs' record and Wok and Pan's record is that "Commerce officially received Wok & Pan's review request on June 16, 2003, which was well within the June 30, 2003, deadline." (*Id.*) Defendant-Intervenor explains that Wok and Pan nevertheless failed to serve its subsequent questionnaire responses on the interested parties. (*Id.*) Defendant-Intervenor states that although Feili and New-Tec also failed to observe the service requirement, this was not the basis for Commerce's decision to rescind the review. (*Id.* at 22–23.) Defendant-Intervenor concludes that "[a]ccordingly, Commerce's initial acceptance of Wok & Pan's review request, despite the lack of service, is irrelevant." (*Id.* at 23.)

ANALYSIS

The issue before this Court is whether Plaintiffs Feili and New-Tec properly commenced an administrative review request in compliance with Commerce regulations. It is undisputed that the record reflects

no official request for review was filed by Feili and New-Tec. This Court holds that Commerce's decision to rescind the review as to Feili and New-Tec is supported by substantial evidence on the record or otherwise in accordance with law. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c) (2000).

A. Commerce Regulations

1. Commerce regulations are reasonable and clear

Congress amended the statutory provisions regarding administrative requests for review by eliminating mandatory annual review and implementing review request requirement. *See* 19 U.S.C. § 1675(a)(1) (2000)[2]; *cf.*, 19 U.S.C. § 1675(a)(1) (1982) (prior statute requiring annual reviews without request provision). Plaintiffs note that "the statute is otherwise silent with respect to precisely where or when a request must be filed." (Cosco 56.2 Br. at 16.) Commerce filled this statutory gap by promulgating regulations to govern official procedures regarding administrative reviews. *See* 19 C.F.R. §§ 351.103, 351.213, 351.303 (2003). Commerce explains that the rationale underlying these procedures is to create certainty and predictability for the parties as to when the document is actually filed. (Def.'s Opp'n at 9 (*quoting Decision Memorandum, A–570–868* (Nov. 20, 2003).) This Court acknowledges that filing requirements are important to the efficient administration of agencies; otherwise, the "cumulative burden on the agencies would be enormous." *Antidumping Duties: Final Rule*, 54 Fed. Reg. 12,742 (cmt. on § 353.31(e) (March 28, 1989) (to be codified at 19 C.F.R. at pt. 363)). This Court holds that Commerce's rationale and interpretation of its regulations is reasonable within the *Chevron* framework and is supported by substantial evidence on the record and otherwise in accordance with law. *Chevron*, 467 U.S. at 837.

Reading the plain language of the regulations, this Court finds that Commerce provided sufficient notice of the filing requirements for review requests when it published the notice of opportunity to request a review of the antidumping duty order on folding metal tables and chairs from the People's Republic of China on June 2, 2003. *No-*

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[2] The amended statute states: "At least once during each 12-month period beginning on the anniversary date of publication of . . . an antidumping order under this subtitle . . ., the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall– (A) review. . . ." 19 U.S.C. § 1675(a)(1) (2000).

tice of Opportunity, 68 Fed. Reg. at 32,728[3]; *see also* 19 C.F.R. § 351.303(b)–(c).

2. Commerce properly applied its regulations

Upon learning that Feili and New-Tec's review request was not a part of the public record, Defendant-Intervenor subsequently requested that Commerce rescind its review as to Feili and New-Tec pursuant to 19 C.F.R. § 351.213(d).[4] Commerce then provided opportunity for Feili and New-Tec to provide proof of a proper filing. (Letter from Commerce to White & Case of 10/30/03.) However, Feili and New-Tec admitted there was no evidence that they had officially filed a review request with Commerce. (Letter from White & Case to Commerce of 10/31/03, at 2.) Moreover, Plaintiffs concede that the record reflects that "there is no copy of [Feili and New-Tec's request for] review in the official files of [Commerce]."[5] (Cosco Reply Br. at 3.) With Defendant-Intervenor's timely request for review rescission, there was no longer any review request on the record for Feili and New-Tec. Accordingly, Commerce decided to rescind the review as to Feili and New-Tec pursuant to 19 C.F.R. § 351.213(d)(1). This Court holds that Commerce's decision to rescind the review as to Feili and New-Tec is supported by substantial evidence on the record or otherwise in accordance with law.

Due process is not applicable to the case at bar because there is no right to import in trade cases. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 149 n.19 (*quoting Robertson v. California*, 328 U.S. 440, 458 (1946) (holding that the commerce clause is not a guaranty of the right to import)). Nevertheless, it would seem that if due process were applicable, Commerce provided ample notice to all interested parties by publishing the *Notice of Opportunity* as well as the later occasion for Feili and New-Tec to demonstrate that they properly requested review.

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[3] The notice reiterated the regulatory filing procedures to request a review:

> Six copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, Room 1870, U.S. Department of Commerce, 14th Street & Constitution Avenue, NW., Washington, DC 20230. The Department also asks parties to serve a copy of the requests to the Office of Antidumping/Countervailing Enforcement, Attention: Sheila Forbes, in room 3065 of the main Commerce Building. Further, in accordance with § 351.303(f)(l)(I) of the regulations, a copy of each request must be served on every party on the Department's service list.

Notice of Opportunity, 68 Fed. Reg. at 32,728; *see also* 19 C.F.R. § 351.303(b)–(c).

[4] "The Secretary will rescind an administrative review under this section, in whole or in part, if a party that requested a review withdraws the request within 90 days of the date of publication of notice of initiation of the requested review." 19 C.F.R. § 351.213(d)(1).

[5] Plaintiffs Feili and New-Tec admit their mistake of not officially filing. (*See* Feili/New-Tec Reply Br. at 14 ("Feili and New-Tec fully recognize that rules for filing format, procedures, and deadlines must be respected. However, mistakes happen.").)

3. Commerce did not break with past practice

Plaintiffs contend that Commerce has a past practice of continuing reviews despite improper filings. Although Plaintiffs point to petitioner Wok and Pan, its situation is distinguishable from Feili and New-Tec because Wok and Pan filed a review request with Commerce but failed to serve parties with their questionnaire responses in accordance with 19 C.F.R. § 351.303(f). (Letter from Commerce to Wok & Pan of 11/5/04.) In contrast, Feili and New-Tec failed to properly file and serve in accordance with 19 C.F.R. § 351.103 and § 351.303.

This Court finds Plaintiffs' citation of authority to *Thai Pipe & Tube*, 62 Fed. Reg. at 53,808, inapposite. The *Thai Pipe & Tube* facts are easily distinguishable. In that matter, although the record was unclear as to whether there was an official filing, the *Thai Pipe & Tube* petitioners were able to reconstruct and prove proper filing through affidavits and extrinsic evidence.[6] *Thai Pipe & Tube*, 62 Fed. Reg. at 53,809. Given the same opportunity to produce proof of official filing and proper service, Feili and New-Tec admitted they had no such extrinsic evidence. (Letter from White & Case to Commerce of 10/31/03, at 2.) This Court holds Plaintiffs' contention that their situation is similar to the *Thai Pipe & Tube* petitioners is unsupported by substantial evidence on the record or otherwise not in accordance with law.

B. Equity Arguments

Plaintiffs' estoppel claims against the government fail. This Court finds that Commerce's reliance on the courtesy copy for the ministerial purpose of correctly identifying or confirming names is irrelevant to compliance with filing procedures. This Court finds that estoppel based on Feili and New-Tec's counsel's telephone conversation with a Commerce analyst fails since it is well-established that a party cannot claim estoppel against the government based upon the actions of an employee. *See Princess Cruise Lines, Inc. v. United States*, 201 F.3d 1352, 1360 (Fed. Cir. 2000). This Court holds that Plaintiffs' estoppel claims are unsupported by substantial evidence on the record or otherwise not in accordance with law.

This Court also rejects Plaintiffs' invitation to make an exception to Commerce's technical requirements and continue the review where Plaintiffs maintain no substantive harm or prejudice occurs. (Feili/New-Tec Reply Br. at 14 n1.) The record shows that Defendant-Intervenor complied with all regulatory requirements for

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[6] For example, the petitioners produced: an affidavit from the Commerce Dockets Center employee, attesting to the fact that the document had in fact been date-stamped; proof of service upon all the parties of the review request; and an affidavit from the courier service that filed the document with Commerce on a timely date. *See Ferro Union v. United States*, 23 CIT 178, 179, 44 F. Supp. 2d 1310, 1313–14 n.5 (1999).

initially requesting review and subsequently withdrawing its review request. This Court finds that granting Plaintiffs' request to continue review would prejudice Defendant-Intervenor and Defendant, and therefore, Commerce was justified in rescinding review as to Feili and New-Tec. This Court holds that if interested parties were free to depart from the filing requirements, the cumulative administrative burden on Commerce would be enormous. Furthermore, filing procedures create certainty and predictability for all parties as to when a document has been properly and timely filed.

CONCLUSION

Based on the foregoing analysis, this Court denies Plaintiffs' Motions for Judgment upon the Agency Record, Plaintiffs' Motion to Supplement the Administrative Record, and Plaintiffs' Amended Consent Motion for Oral Argument. This Court holds Commerce's determination to rescind the administrative review as to Feili and New-Tec is supported by substantial evidence on the record or otherwise in accordance with law. This case is dismissed, and judgment shall be entered accordingly.

Slip Op. 04–155

CANADIAN REYNOLDS METALS COMPANY, c/o REYNOLDS METALS COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 00–00444

[Defendant's motion to dismiss granted.]

Decided: December 8, 2004

LeBoeuf, Lamb, Greene & MacRae, LLP (*Gary P. Connelly*, *Melvin S. Schwechter*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Acting Attorney-in-Charge, International Trade Field Office, *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff Canadian Reynolds Metals Company ("CRMC" or "Plaintiff") seeks to invoke the Court's jurisdiction to challenge the denial of its administrative protest. Plaintiff's protest

sought to challenge the imposition of certain Merchandise Processing Fees ("MPF") on Plaintiff's imports.

Defendant United States Bureau of Customs and Border Protection[1] ("Customs" or "Defendant") moves for dismissal claiming lack of subject matter jurisdiction because Plaintiff failed to properly and timely file its protest. Because Plaintiff's protest, which objected to three separate actions by Customs, was untimely as to two of the actions, and because the third action was not protestable under 19 U.S.C. § 1514 (2000)[2], Defendant's motion to dismiss is granted.[3]

I. Background

Plaintiff's administrative protest has a twelve-year history, a review of which is necessary background for the motion at issue here. On December 15, 1992, CRMC made a voluntary disclosure to Customs under 19 U.S.C. § 1592(c)(4), admitting that it had failed to pay certain MPF on unwrought aluminum products imported into the United States between 1990 and the date of disclosure. Def.'s Mem. Supp. Mot. Dismiss at 1–2 ("Def.'s Mot."); Pl.'s Opp'n to Mot. Dismiss at 1 ("Pl.'s Opp'n"). On September 19, 1994, Customs requested that CRMC tender $54,487.69 to perfect the voluntary disclosure. Complaint of CRMC at para. 5. CRMC paid the requested amount on October 6, 1994. *See* Letter from John Barry Donohue, Jr., Assoc. Gen. Counsel, Reynolds Metals Co., to William D. Dietzel,

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* 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).

[2] Because Plaintiff filed its summons in 2000, Summons of CRMC at 2, the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred. The Court notes that subsection (c) of 28 U.S.C. § 1491, *see infra* note 25, was redesignated from subsection (b) to subsection (c) in 1996. *See* Administrative Dispute Resolution Act of 1996, Pub. L. No. 104–320 § 12, 110 Stat. 3870, 3874 (codified as amended at 28 U.S.C. § 1491 (2000)).

[3] In *Canadian Reynolds Metals Co. v. United States*, slip. op. 04–39 (CIT Apr. 23, 2004), the Court granted Defendant's motion. However, pursuant to USCIT R. 59(a) (stating that a "rehearing may be granted . . . in an action finally determined"), the Court, on June 8, 2004, and on July 14, 2004, vacated its earlier judgment and denied Defendant's motion to dismiss. See *Canadian Reynolds Metals Co. v. United States*, slip. op. 04–85 (CIT July 14, 2004). Due to the probable relevance of an issue which had not been briefed by the parties – the applicability of the holding in *U.S. Shoe Corp. v. United States*, 114 F.3d. 1564 (Fed. Cir. 1997) that passive acceptance of funds does not constitute a protestable Customs decision – the Court ordered its July 14, 2004 judgment stayed pending further briefing. *See* Order (CIT Aug. 12, 2004). The Court now withdraws that opinion and order.

Dist. Dir., Customs, Pl.'s Ex. A at 1,[4] 3 (Oct. 6, 1994) ("October 6 Letter").[5]

Along with its payment, CRMC submitted a letter in which it advised Customs of its intent to appeal the MPF determination, as it considered its entries exempt from the MPF rate demanded by Customs. *Id.* at 1. CRMC argued that the unwrought aluminum products were of Canadian origin, and thus qualified for special treatment pursuant to the United States-Canada Free Trade Agreement ("USCFTA"). Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D at 4, 4–5 (Feb. 1, 1995) ("February 1 Letter").[6] Customs, on the other hand, had previously concluded that due to a non-Canadian additive, CRMC's entries failed to qualify for the reduced MPF rate provided by the USCFTA. *Id.* at 5. CRMC, in turn, argued that pursuant to the doctrine of *de minimis non curat lex*, the foreign additive in the Canadian entries should be disregarded for country of origin purposes. *Id.* CRMC informed Customs in its payment tender letter that it expected a full refund of the tender amount along with accrued interest in the event that subsequent litigation was successful. October 6 Letter, Pl.'s Ex. A at 1.

Customs responded in a letter dated November 8, 1994, stating that it had received CRMC's tender of MPF, but rejected all conditions imposed by CRMC in connection to this payment. Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., Customs, to John Barry Donohue, Reynolds Metals Co., Pl.'s Ex. B at 1 (Nov. 8, 1994) ("November 8 Letter"). Subsequently, Customs and CRMC concluded an escrow agreement on December 20, 1994, in which they agreed to let the decision in a designated test case[7] control whether a full refund of

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[4] Documents appended to Pl.'s Opp'n are referred to as "Pl.'s Ex." followed by the corresponding letter.

[5] The record shows that all correspondence and documentation referred to in this decision was either addressed to or sent by Reynolds Metals Company, in its capacity as owner of Canadian Reynolds Metals Company. Reynolds Metals Company also owns Aluminerie Becancour, Inc., which is the Plaintiff in a companion case before the Court. *Aluminerie Becancour, Inc. v. United States*, Court No. 00–00445, slip op. 04–156 (CIT December 8, 2004).

[6] Barnes, Richardson & Colburn was Plaintiff's legal representative at the time. *See* February 1 Letter, Pl.'s Ex. D at 4.

[7] In subsequent amendments to the escrow agreement, concluded on October 28, 1996, and July 13, 1998, the parties identified the designated test case as *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), originally referred to as St. Albans Protest No. 0201–93–100281 (HQ 955367) and subsequently appealed to the Federal Circuit Court of Appeals. Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 3, 4 (Oct. 30, 1996); Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 5, 6 (July 13, 1998); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999).

CRMC's MPF payment was appropriate. Agreement between Canadian Reynolds Metals Company and U.S. Customs Service, Pl.'s Ex. C at 1 (Dec. 20, 1994) ("Escrow Agreement" or "the Agreement"). In the event that the test case decision was favorable to CRMC, Customs further agreed to refund the full tendered amount "together with such interest as may be required by law." *Id.* at 1–2.

On February 6, 1995, CRMC filed an administrative protest. *See* Letter from Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D. at 1 (Feb. 6, 1995) ("February 6 Letter"); Protest No. 0712–95–100131, Pl.'s Ex. D at 3 (Feb. 6, 1995) ("Protest Form").[8] In its protest, Plaintiff appeared to make three objections to Customs' actions. First, Plaintiff stated that it objected to the assessment and payment of MPF. February 1 Letter, Pl.'s Ex. D at 4. Second, it protested "contingencies not anticipated in the [escrow] [a]greement[,] or unanticipated frustration" of the same. *Id.* at 5–6. Plaintiff then appears to have made a third objection, referring to Customs' acceptance of payment. *Id.* at 4. In support of this third objection, Plaintiff noted that a copy of Customs' letter dated November 8, 1994, as well as a receipt of payment made out by Customs on November 7, 1994, was enclosed with the protest. *Id.*; *see also* Collection Receipt from U.S. Bureau of Customs & Border Prot., to Canadian Reynolds Metals Co., Pl.'s Ex. A at 5 (Nov. 7, 1994) ("Receipt"). Plaintiff clarified in its protest that it did not expect Customs to act in response to its objections until final judgment was rendered in the pending test case. February 1 Letter, Pl.'s Ex. D at 6.

On January 5, 1999, the Federal Circuit Court of Appeals issued its decision in the test case, *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999). The *Alcan Aluminum Corp.* Court held that the foreign additive in question was subject to the principle of *de minimis non curat lex*, and therefore, the entries were considered of Canadian origin. 165 F.3d at 902. The *Alcan Aluminum Corp.* decision became final on April 5, 1999. Pl.'s Opp'n at 4.

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[8] The "protest package" provided as Exhibit D by Plaintiff contains copies of two letters along with a copy of a completed Customs Form 19 (Protest No. 0712–95–100131); the first letter is dated February 1, 1995, and the second letter is dated February 6, 1995. *See* Pl.'s Ex. D. Accordingly, it appears as though Plaintiff first attempted to forward a protest to Customs on February 1, 1995, but that for reasons unclear to the Court, the protest was not filed until February 6, 1995, the date Customs received and stamped the protest form. Protest Form, Pl.'s Ex. D at 3. The implementing regulation for filing of protests confirms that a protest is considered filed on the date it is received by Customs. 19 C.F.R. § 174.12(f) ("The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed."). Additionally, both parties agree that the protest was filed on February 6, 1995. *See* Def.'s Mot. at 2; Pl.'s Opp'n at 3. As the February 6 Letter merely serves as a complement to the original protest attempt on February 1, 1995, however, the Court will treat the letter dated February 1, 1995, as part of the protest filed on February 6, 1995. *See* February 6 Letter, Pl.'s Ex. D at 1 ("[W]e forwarded protests, dated February 1, 1995, in which CRMC . . . protested the assessment and payment of Merchandise Processing Fee ('MPF').").

Because CRMC's entries qualified for preferential trade status under the USCFTA as a result of the favorable decision in *Alcan Aluminum Corp.*, Customs refunded to CRMC the deposited MPF amount in full "[o]n or about" February 7, 2000.[9] Compl. of CRMC at 3.

Customs, however, failed to tender interest pursuant to the escrow agreement when it made the refund to CRMC. Def.'s Mot. at 2; Pl.'s Opp'n at 4. CRMC then sent, on February 10, 2000, a request for accelerated disposition of its protest. *See* Pl.'s Opp'n at 4; Letter from F. D. "Rick" Van Arnam, Jr., Barnes, Richardson, & Colburn, to Port Dir., Customs, Pl.'s Supp. Ex. A (Feb. 9, 2000); Certified Mail Receipt, Pl.'s Supp. Ex. B. (Feb. 10, 2000) Following what CRMC considered a denial of the original protest by operation of law, it filed a summons with the Court on September 7, 2000. Summons of CRMC at 2. Plaintiff subsequently, on September 30, 2002, filed its complaint seeking relief. Compl. of CRMC at 6. The thrust of Plaintiff's complaint is that Customs failed to pay interest on the refunded MPF. *Id.* at 3–4. As noted above, Defendant Customs moves to dismiss for lack of subject matter jurisdiction.

II. Standard of Review

Because Plaintiff is seeking to invoke the Court's jurisdiction, it has the burden to establish the basis for jurisdiction. *See Former Employees of Sonoco Prods. Co. v. United States Sec'y of Labor*, 27 CIT ___ , ___ , 273 F. Supp. 2d 1336, 1338 (2003) (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, "the Court assumes 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.' " *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

III. Discussion

Defendant moves to dismiss, alleging that because CRMC failed to timely protest any Customs decision, subject matter jurisdiction under 28 U.S.C. § 1581(a) is lacking. *See* Def.'s Mot at 3–4. That statute, upon which Plaintiff's claim relies, provides for the review of the denial of a protest made under section 515 of the Tariff Act of 1930, as amended at 19 U.S.C. § 1515. Compl. of CRMC at 1; 28 U.S.C. § 1581(a). Subsection (a) of § 1515 authorizes Customs "to review and deny or allow a protest as long as it is filed in accordance with 19 U.S.C. § 1514. 19 U.S.C. § 1515(a). A suit attempting to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a) must therefore be based on a protest whichcomplies with the requirements of § 1514.

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[9] No supporting exhibit was provided, but Defendant does not deny this statement. *See* Def.'s Mem. at 2.

Section 1514 states the requirements for protests, two of which are at issue here. First, the protest must be of a "decision" of the Customs service. 19 U.S.C. § 1514(a). Second, the protest must be timely filed - that is, no more than ninety days after the protested decision. 19 U.S.C. § 1514(c)(3).[10]

In its protest, Plaintiff appears to make three objections. *See* February 1 Letter, Pl.'s Ex. D at 4–6. First, Plaintiff protests the assessment and payment of MPF. *Id.* at 4. To the extent Plaintiff challenged its own payment of the MPF, the protest is invalid; Plaintiff's tender of payment may be the result of its own decision to do so, but it is not a Customs decision. The demand for tender, however, appears to be a Customs decision; Customs actively demanded payment of the owed amount. *See* Complaint of CRMC at para. 5; Escrow Agreement, Pl.'s Ex. C at 1. The demand occurred on September 19, 1994, but Plaintiff did not file its protest until February 6, 1995. Complaint of CRMC at para. 5; Protest Form, Pl.'s Ex. D at 3. Because a time period of more than ninety days elapsed between the demand and the protest, Plaintiff's protest fails to present a timely challenge to the assessment and payment of MPF.

Second, Plaintiff protests unanticipated frustration of, and contingencies not foreseen in, the escrow agreement. February 1 Letter, Pl.'s Ex. D at 5–6. While Customs' eventual refusal to pay interest as required by the escrow agreement may have been a protestable decision, the February 6, 1995 protest is simply untimely with regard to Customs' alleged failure to pay interest as required by law. Title 19 U.S.C. § 1514(c)(3) states that parties must file protests "within ninety days after *but not before* . . . the date of the decision as to which protest is made." *Id.* (emphasis added). The decision the protesting party objects to must therefore occur prior to the filing of the protest. As previously stated, CRMC filed its protest on February 6, 1995. Protest Form, Pl.'s Ex. D at 3. To the extent that Plaintiff objects to the unanticipated event of Customs' decision to refund MPF without interest in February 2000, that event had not yet occurred at the time the protest was filed.[11] Accordingly, under a plain read-

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[10] Title 19 U.S.C. § 1514(c)(3) provides as follows:

> A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3).

[11] Plaintiff claims that Customs made the decision not to pay interest as early as November 8, 1994, the day it sent the November 8 Letter. *See* Pl.'s Opp'n at 6. However, the parties subsequently signed the Agreement, whereby Customs agreed to refund the MPF amount and "interest as may be required by law" if related litigation was successful. Escrow Agreement, Pl.'s Ex. C at 1–2. Thus, even presuming that Customs made the decision to deprive

ing of 19 U.S.C. § 1514(c)(3), Plaintiff's protective protest was untimely and invalid. *See A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988) (holding that a protest was invalid either because it was filed the day before Customs denied a previous claim for relief or barred by the provision allowing only one protest per entry of merchandise).

Third, Plaintiff appears to object to Customs' acceptance of its MPF tender. *See* February 1 Letter, Pl.'s Ex. D at 4. But the mere passive acceptance of funds does not constitute a Customs decision under *United States Shoe Corp. v. United States*, 114, F.3d 1564 (Fed. Cir. 1997). That case found that Customs' collection of Harbor Maintenance Tax was not protestable, as Customs merely passively accepted the taxes paid pursuant to statute. *Id.* at 1569. Customs was not involved in calculation of the tax; in fact, the burden of calculation and payment was entirely on the taxed party. *Id.* Customs' function of collection involved no independent thought process on its part, and its collection of funds therefore gave rise to no protestable decision. *Id.*

The facts here are somewhat different than those in *United States Shoe Corp.* Here, Customs actively demanded the payment of the owed MPF. *See* Escrow Agreement, Pl.'s Ex. C at 1. While acceptance of that demanded payment might be considered passive, and therefore not a "decision" under the rule in *United States Shoe Corp.*, Customs did not merely accept Plaintiff's tender. Rather, Customs rejected the contingencies which Plaintiff placed on its tender. *See* October 6 Letter, Pl.'s Ex. A at 1; November 8 Letter, Pl.'s Ex. B at 1. This rejection required some independent thought on Customs' part; the Court is therefore persuaded that the rejection of contingencies could be regarded as a protestable decision, and thus the acceptance of Plaintiff's tender could have been protestable.

But the fact remains that on February 6, 1995, when Plaintiff protested the acceptance of tender and the rejection of Plaintiff's contingencies, the parties' relationship to one another had been changed by the conclusion of the Agreement. In the Agreement, Customs appears to have changed its position on payment of interest, and agreed that it would pay such interest "as may be required by law." *See* Escrow Agreement, Pl.'s Ex. C at 2. The complained-of decision, then, would appear to be moot, being void as a matter of law. Plaintiff, however, argues that the Agreement does not moot the November 8 decision not to pay interest. *See* Pl.'s Supp. Letter Br. at 3–4

CRMC of interest at such an early stage, that decision was later vitiated by the terms of the Agreement before the filing of the protest. Moreover, the language of the protest - objecting to unanticipated frustration of the Agreement- clearly refers to decisions which had not yet been made, and not to the November 8 Letter.

(Nov. 30, 2004). Plaintiff avers that the contingency it placed on its tender was not the requirement to pay "such interest as may be required by law," but rather, simply to pay "interest." *Id.* at 4–5. Because the tender flatly demanded the payment of interest, with or without legal authorization, and the Escrow Agreement only required payment of interest as required by law, Plaintiff argues that there remains a non-mooted, protestable element to the November 8 rejection of contingencies.

The Court is not persuaded. Plaintiff's escrow agreement was a contract with an arm of the federal government. Federal agencies cannot contract as they choose; their authority to contract is necessarily constrained by the statutes under which the agency operates, by regulations, and by applicable case law. When Plaintiff demanded the payment of interest on its tender, it was, or should have been, well aware that all it could demand of Customs was that Customs pay back such interest as might be required by law. This is precisely what Customs bound itself to in the Agreement.[12,13]

Therefore, the mere acceptance of Plaintiff's funds was not protestable pursuant to the rule stated in *United States Shoe Corp.*, and the rejection of contingencies, which had constituted an active and protestable decision, was void as a matter of law as a result of the Agreement.

Accordingly, the protest upon which this case was brought was untimely filed as to two of the decisions to which Plaintiff objected, and the third objected decision was void as a matter of law and therefore not protestable. Accordingly, Customs' motion to dismiss is hereby granted, and the Court enters judgment for Defendant.

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[12] The Court is hard pressed to understand why Plaintiff would have entered into the Agreement were the refund of its money along with "such interest as may be required by law" manifestly disagreeable to it. The Agreement moots the November 8 letter either because it represents Customs' acceptance of contingencies, or because it represents Plaintiff's negotiated determination to abandon its claim to forms of interest other than those "required by law."

[13] Because the Court finds that the protestable portion of the November 8 letter was rendered legally void by the escrow agreement, the Court need not reach the question of whether the protest was timely filed as to this issue.

Slip Op. 04–156

ALUMINERIE BECANCOUR, INC., c/o REYNOLDS METALS COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 00–00445

[Defendant's motion to dismiss granted.]

Decided: December 8, 2004

LeBoeuf, Lamb, Greene & MacRae, LLP (*Gary P. Connelly*, *Melvin S. Schwechter*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Acting Attorney-in-Charge, International Trade Field Office, *James A. Curley*, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Attorney, Of Counsel, Office of Assistant Chief Counsel, U.S. Bureau of Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff Aluminerie Becancour, Inc. ("Aluminerie" or "Plaintiff") seeks to invoke the Court's jurisdiction to challenge the denial of its administrative protest. Plaintiff's protest sought to challenge the imposition of certain Merchandise Processing Fees ("MPF") on Plaintiff's imports.

Defendant United States Bureau of Customs and Border Protection[1] ("Customs" or "Defendant") moves to dismiss, claiming lack of subject matter jurisdiction because Plaintiff failed to timely file its protest. Because Plaintiff's protest, which objected to three separate actions by Customs, was untimely as regards two actions, and because the third action was not protestable under 19 U.S.C. § 1514 (2000)[2], Defendant's motion to dismiss is granted.[3]

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[1] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* 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).

[2] Because Plaintiff filed its summons in 2000, Summons of Aluminerie at 2, the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred.

[3] In *Aluminerie Becancour, Inc. v. United States*, slip. op. 04–40 (CIT Apr. 23, 2004), the Court granted Defendant's motion. However, pursuant to USCIT R. 59(a) (stating that a "rehearing may be granted . . . in an action finally determined"), the Court, on June 8, 2004, ordered reconsideration of its April 23 opinion and on July 14, 2004, vacated its earlier judgment and denied Defendant's motion to dismiss. *See Aluminerie Becancour, Inc. v. United States*, slip. op. 04–86 (CIT July 14, 2004). Due to the probable relevance of an issue which had not been briefed by the parties - the applicability of the holding in *U.S. Shoe*

I. Background

Plaintiff's administrative protest has a twelve-year history, a review of which is necessary background for the motion at issue here. On December 15, 1992, Aluminerie made a voluntary disclosure to Customs under 19 U.S.C. § 1592(c)(4), admitting that it had failed to pay MPF on unwrought aluminum products imported into the United States between 1990 and the date of disclosure. Def.'s Mem. Supp. Mot. Dismiss at 1–2 ("Def.'s Mot."); Pl.'s Opp'n to Mot. Dismiss at 1 ("Pl.'s Opp'n"). On September 9, 1994, Customs requested that Aluminerie tender $88,542.87 to perfect the voluntary disclosure. Complaint of Aluminerie at para. 5. Aluminerie paid the requested amount on October 6, 1994. *See* Letter from John Barry Donohue, Jr., Assoc. Gen. Counsel, Reynolds Metals Co., to William D. Dietzel, Dist. Dir., Customs, Pl.'s Ex. A at 1,[4] 4 (Oct. 6, 1994) ("October 6 Letter").[5]

Along with its payment, Aluminerie submitted a letter in which it advised Customs of its intent to appeal the MPF determination, as it considered its entries exempt from the MPF rate demanded by Customs. *Id.* at 1. Aluminerie argued that the unwrought aluminum products were of Canadian origin, and thus qualified for special treatment pursuant to the United States-Canada Free Trade Agreement ("USCFTA"). Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D at 4, 4–5 (Feb. 1, 1995) ("February 1 Letter").[6] Customs, on the other hand, had previously concluded that due to a non-Canadian additive, Aluminerie's entries failed to qualify for the reduced MPF rate provided by the USCFTA. *Id.* at 5. Aluminerie, in turn, argued that pursuant to the doctrine of *de minimis non curat lex*, the foreign additive in the Canadian entries should be disregarded for country of origin purposes. *Id.* Aluminerie informed Customs in its payment tender letter that it understood that Customs would refund the full amount, with interest, were Plaintiff to be successful in its appeal to

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Corp. v. United States, 114 F.3d. 1564 (Fed. Cir. 1997) that passive acceptance of funds does not constitute a protestable Customs decision - the Court ordered its July 14, 2004 opinion and order stayed pending further briefing. *See* Order (CIT Aug. 12, 2004). The Court now withdraws that opinion and order.

[4] Documents appended to Pl.'s Opp'n are referred to as "Pl.'s Ex." followed by the corresponding letter. The document appended to Plaintiff's motion for leave to amend its memorandum of opposition is referred to as "Pl.'s Attach."

[5] The record shows that all correspondence and documentation referred to in this decision was either addressed to or sent by Reynolds Metals Company, in its capacity as owner of Aluminerie Becancour, Inc. Reynolds Metals Company also owns Canadian Reynolds Metals Company, which is the Plaintiff in a companion case before the Court. *Canadian Reynolds Metals Co. v. United States*, Court No. 00–00444, slip op. 04–155 (CIT December 8, 2004).

[6] Barnes, Richardson & Colburn was Plaintiff's legal representative at the time. *See* February 1 Letter, Pl.'s Ex. D at 4.

the Court of International Trade of Customs decision to collect the MPF. October 6 Letter, Pl.'s Ex. A at 1.

Customs responded in a letter dated November 8, 1994, stating that it had received Aluminerie's tender of MPF, but rejected all conditions imposed by Aluminerie in connection to this payment. Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., Customs, to John Barry Donohue, Reynolds Metals Co., Pl.'s Ex. B at 1 (Nov. 8, 1994) ("November 8 Letter"). Subsequently, Customs and Aluminerie concluded an escrow agreement on December 20, 1994, in which they agreed to let the decision in a designated test case[7] control whether a full refund of Aluminerie's MPF payment was appropriate. Agreement between Reynolds Metals Company and U.S. Customs Service, Pl.'s Attach. at 1 (Dec. 20, 1994) ("Escrow Agreement" or "the Agreement").[8] In the event that the test case decision was favorable to Aluminerie, Customs further agreed to refund the full tendered amount "together with such interest as may be required by law." *Id.* at 2.

On February 6, 1995, Aluminerie filed an administrative protest. *See* Letter from Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, to Dist. Dir., Customs, Pl.'s Ex. D at 1 (Feb. 6, 1995) ("February 6 Letter"); Protest No. 0712–95–100130, Pl.'s Ex. D at 3 (Feb. 6, 1995) ("Protest Form").[9] In its protest, Plaintiff appeared to make three objections to Customs' actions. First, Plaintiff stated that it ob-

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[7] In subsequent amendments to the escrow agreement, concluded on October 28, 1996, and July 13, 1998, the parties identified the designated test case as *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), originally referred to as St. Albans Protest No. 0201–93–100281 (HQ 955367) and subsequently appealed to the Federal Circuit Court of Appeals. Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 3, 4 (Oct. 30, 1996); Letter from Charles D. Ressin, Chief, Penalties Branch, Int'l Trade Compliance Div., to Frederic D. Van Arnam, Jr., Barnes, Richardson & Colburn, Pl.'s Ex. C at 5, 6 (July 13, 1998); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999).

[8] Reynolds Metals Company concluded the agreement with Customs on behalf of Plaintiff. *See* Escrow Agreement, Pl.'s Attach. at 1.

[9] The "protest package" provided as Exhibit D by Plaintiff contains copies of two letters along with a copy of a completed Customs Form 19 (Protest No. 0712–95–100130); the first letter is dated February 1, 1995, and the second letter is dated February 6, 1995. *See* Pl.'s Ex. D. Accordingly, it appears as though Plaintiff first attempted to forward a protest to Customs on February 1, 1995, but that for reasons unclear to the Court, the protest was not filed until February 6, 1995, the date Customs received and stamped the protest form. Protest Form, Pl.'s Ex. D at 3. The implementing regulation for filing of protests confirms that a protest is considered filed on the date it is received by Customs. 19 C.F.R. § 174.12(f) ("The date on which a protest is received by the Customs officer with whom it is required to be filed shall be deemed the date on which it is filed."). Additionally, both parties agree that the protest was filed on February 6, 1995. *See* Def.'s Mot. at 2; Pl.'s Opp'n at 3. As the February 6 Letter merely serves as a complement to the original protest attempt on February 1, 1995, however, the Court will treat the letter dated February 1, 1995, as part of the protest filed on February 6, 1995. *See* February 6 Letter, Pl.'s Ex. D at 1 ("[W]e forwarded protests, dated February 1, 1995, in which [Aluminerie] protested the assessment and payment of Merchandise Processing Fee ('MPF').").

jected to the assessment and payment of MPF. February 1 Letter, Pl.'s Ex. D at 4. Second, it protested "contingencies not anticipated in the [Escrow] [A]greement[,] or unanticipated frustration" of the same. *Id*. at 5–6. Plaintiff then appears to have made a third objection, referring to Customs' acceptance of payment. *Id*. at 4. In support of this third objection, Plaintiff noted that a copy of Customs' letter dated November 8, 1994, as well as a receipt of payment made out by Customs on November 7, 1994, was enclosed with the protest. *Id*.; *see also* Collection Receipt from U.S. Bureau of Customs & Border Prot., to Aluminerie Becancour, Pl.'s Ex. A at 6 (Nov. 7, 1994) ("Receipt"). Plaintiff clarified in its protest that it did not expect Customs to act in response to its objections until final judgment was rendered in the pending test case. February 1 Letter, Pl.'s Ex. D at 6.

On January 5, 1999, the Federal Circuit Court of Appeals issued its decision in the test case, *Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999). The *Alcan Aluminum Corp.* Court held that the foreign additive in question was subject to the principle of *de minimis non curat lex*, and therefore, the entries were considered of Canadian origin. 165 F.3d at 902. The *Alcan Aluminum Corp.* decision became final on April 5, 1999. Pl.'s Opp'n at 4.

Because Aluminerie's entries qualified for preferential trade status under the USCFTA as a result of the favorable decision in *Alcan Aluminum Corp.*, Customs refunded to Aluminerie the deposited MPF amount in full "[o]n or about" February 7, 2000.[10] Compl. of Aluminerie at 3.

Customs, however, failed to tender interest pursuant to the Agreement when it made the refund to Aluminerie. Def.'s Mot. at 2; Pl.'s Opp'n at 4. Aluminerie then sent, on February 10, 2000, a request for accelerated disposition of its protest. *See* Pl.'s Opp'n at 4–5; Letter from F. D. "Rick" Van Arnam, Jr., Barnes, Richardson, & Colburn, to Port Dir., Customs, Pl.'s Supp. Ex. A (Feb. 9, 2000); Certified Mail Receipt, Pl.'s Supp. Ex. B (Feb. 10, 2000). Following what Aluminerie considered a denial of the original protest by operation of law, it filed a summons with the Court on September 7, 2000. Summons of Aluminerie at 2. Plaintiff subsequently, on September 30, 2002, filed its complaint seeking relief. Compl. of Aluminerie at 6. The thrust of Plaintiff's complaint is that Customs failed to pay interest on the refunded MPF. *Id*. at 3–4. As noted above, Defendant Customs moves to dismiss for lack of subject matter jurisdiction.

II. Standard of Review

Because Plaintiff is seeking to invoke the Court's jurisdiction, it has the burden to establish the basis for jurisdiction. *See Former*

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[10] No supporting exhibit was provided, but Defendant does not deny this statement. *See* Def.'s Mem. at 2.

Employees of Sonoco Prods. Co. v. United States Sec'y of Labor, 27 CIT ___ , ___ , 273 F. Supp. 2d 1336, 1338 (2003) (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, "the Court assumes 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.' " *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

III. Discussion

Defendant moves to dismiss, alleging that because Aluminerie failed to timely protest any Customs decision, subject matter jurisdiction under 28 U.S.C. § 1581(a) is lacking. *See* Def.'s Mot at 3–4. That statute, upon which Plaintiff's claim relies, provides for the review of the denial of a protest made under section 515 of the Tariff Act of 1930, as amended at 19 U.S.C. § 1515. Compl. of Aluminerie at 1; 28 U.S.C. § 1581(a). Subsection (a) of section 1515 authorizes Customs "to review and deny or allow a protest as long as it is filed in accordance with 19 U.S.C. § 1514." 19 U.S.C. § 1515(a). A suit attempting to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a) must therefore be based on a protest which complies with the requirements of section 1514.

Section 1514 states the requirements for protests, two of which are at issue here. First, the protest must be of a "decision" of the Customs service. 19 U.S.C. § 1514(a). Second, the protest must be timely filed - that is, no more than ninety days after the protested decision. 19 U.S.C. § 1514(c)(3).[11]

In its protest, Plaintiff appears to make three objections. *See* February 1 Letter, Pl.'s Ex. D at 4–6. First, Plaintiff protests the assessment and payment of MPF. *Id*. at 4. To the extent Plaintiff challenged its own payment of the MPF, the protest is invalid; Plaintiff's tender of payment may be the result of its own decision to do so, but it is not a Customs decision. The demand for tender, however, is a Customs decision; Customs actively demanded payment of the owed amount. *See* Complaint of Aluminerie at para. 3; Escrow Agreement, Pl.'s Attach. at 1. The demand occurred on September 9, 1994, but Plaintiff did not file its protest until February 6, 1995. See Complaint of Aluminerie at para 5; Protest Form, Pl.'s Ex. D at 3. Be-

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[11] Title 19 U.S.C. § 1514(c)(3) provides as follows:

> A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with the Customs Service within ninety days after but not before—
>
> (A) notice of liquidation or reliquidation, or
>
> (B) in circumstances where subparagraph (A) is inapplicable, the date of the decision as to which protest is made.

19 U.S.C. § 1514(c)(3).

cause a time period of more than ninety days elapsed between the demand and the protest, Plaintiff's protest fails to present a timely challenge to the assessment and payment of MPF.

Second, Plaintiff protests unanticipated frustration of, and contingencies not foreseen in, the escrow agreement. February 1 Letter, Pl.'s Ex. D at 5–6. While Customs' eventual refusal to pay interest as required by the escrow agreement may have been a protestable decision, the February 6, 1995 protest is simply untimely with regard to Customs' alleged failure to pay interest as required by law. Title 19 U.S.C. § 1514(c)(3) states that parties must file protests "within ninety days after *but not before* . . . the date of the decision as to which protest is made." *Id*. (emphasis added). The decision the protesting party objects to must therefore occur prior to the filing of the protest. To the extent that Plaintiff objects to the unanticipated event of Customs' decision to refund MPF without interest in February 2000, that event had not yet occurred at the time the protest was filed.[12] Accordingly, under a plain reading of 19 U.S.C. § 1514(c)(3), Plaintiff's protective protest was untimely and invalid. *See A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988) (holding that a protest was invalid either because it was filed the day before Customs denied a previous claim for relief or barred by the provision allowing only one protest per entry of merchandise).

Third, Plaintiff appears to object to Customs' acceptance of its MPF tender. *See* February 1 Letter, Pl.'s Ex. D at 4. But the mere passive acceptance of funds does not constitute a Customs decision under *United States Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997). That case found that Customs' collection of Harbor Maintenance Tax was not protestable, as Customs merely passively accepted the taxes paid pursuant to statute. *Id*. at 1569. Customs was not involved in calculation of the tax; in fact, the burden of calculation and payment was entirely on the taxed party. *Id*. Customs' function of collection involved no independent thought process on its part, and its collection of funds therefore gave rise to no protestable decision. *Id*.

The facts here are somewhat different than those in *United States Shoe Corp*. Here, Customs appears to have actively demanded payment of the owed MPF. *See* Escrow Agreement, Pl.'s Attach. at 1.

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[12] Plaintiff claims that Customs made the decision not to pay interest as early as November 8, 1994, the day it sent the November 8 Letter. *See* Pl.'s Opp'n at 6. However, the parties subsequently signed the Agreement, whereby Customs agreed to refund the MPF amount and "interest as may be required by law" if related litigation was successful. Escrow Agreement, Pl.'s Attach. at 1–2. Thus, even presuming that Customs made the decision to deprive Aluminerie of interest at such an early stage, that decision was later vitiated by the terms of the Agreement before the filing of the protest. Moreover, the language of the protest - objecting to unanticipated frustration of the Agreement - clearly refers to decisions which had not yet been made, and not to the November 8 Letter.

While acceptance of that demanded payment might be considered passive, and therefore not a "decision" under the rule in *United States Shoe Corp.*, Customs did not merely accept Plaintiff's tender. Rather, Customs rejected the contingencies which Plaintiff placed on its tender. *See* October 6 Letter, Pl.'s Ex. A at 1; November 8 Letter, Pl.'s Ex. B at 1. This rejection required some independent thought on Customs' part; the Court is therefore persuaded that the rejection of contingencies could be regarded as a protestable decision, and thus the acceptance of Plaintiff's tender could have been protestable.

But the fact remains that on February 6, 1995, when Plaintiff protested the acceptance of tender and the rejection of Plaintiff's contingencies, the parties' relationship to one another had been changed by the conclusion of the Agreement. In the Agreement, Customs appears to have changed its position on payment of interest, and agreed that it would pay such interest "as may be required by law." *See* Escrow Agreement, Pl.'s Attach. at 2. The complained-of decision to reject contingencies would therefore be moot, being void as a matter of law. Plaintiff, however, argues that the Agreement does not moot the November 8 decision not to pay interest. *See* Pl.'s Supp. Letter Br. at 3–4 (Nov. 30, 2004). Plaintiff avers that the contingency it placed on its tender was not the requirement to pay "such interest as may be required by law," but rather, simply to pay "interest." *Id.* at 4–5. Because the tender flatly demanded the payment of interest, with or without legal authorization, and the Escrow Agreement only required payment of interest as required by law, Plaintiff argues that there remains a non-mooted, protestable element to the November 8 rejection of contingencies.

The Court is not persuaded. Plaintiff's escrow agreement was a contract with an arm of the federal government. Federal agencies cannot contract as they choose; their authority to contract is necessarily constrained by the statutes under which the agency operates, by regulations, and by applicable case law. When Plaintiff demanded the payment of interest on its tender, it was, or should have been, well aware that all it could demand of Customs was that Customs pay back such interest as might be required by law. This is precisely what Customs bound itself to in the Agreement.[13,14]

Therefore, the mere acceptance of Plaintiff's funds was not protestable, under the rule stated in *United States Shoe Corp.*, and

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[13] The Court is hard pressed to understand why Plaintiff would have entered into the Agreement were the refund of its money along with "such interest as may be required by law" manifestly disagreeable to it. The Agreement moots the November 8 letter either because it represents Customs' acceptance of contingencies, or because it represents Plaintiff's negotiated determination to abandon its claim to forms of interest other than those "required by law."

[14] Because the Court finds that the protestable portion of the November 8 letter was rendered legally void by the escrow agreement, the Court need not reach the question of whether the protest was timely filed as to this issue.

the rejection of contingencies, which had constituted an active and protestable decision, was void as a matter of law as a result of the Agreement.

Accordingly, the protest upon which this case was brought was untimely filed as to two of the decisions to which Plaintiff objected, and the third objected decision was void as a matter of law and therefore not protestable. Accordingly, Customs' motion to dismiss is hereby granted, and the Court enters judgment for Defendant.

Slip Op. 04–157

ALCAN ALUMINUM CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 01–00095

[Defendant's motion to dismiss granted.]

Decided: December 8, 2004

Lawrence A. Salibra, II and *Elisa P. Pizzino*, for Plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *James A. Curley*, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Yelena Slepak*, Of Counsel, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, for Defendant.

OPINION

Pogue, Judge: Plaintiff Alcan Aluminum Corporation ("Alcan") seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a)(2000)[1] to contest the denial of its February 8, 1995 administrative protest.[2] *See* Compl. of Alcan at paras. 1, 20. Defendant

[1] Because Alcan filed its summons in 2001 (Summons of Alcan at 2), the Court will refer to the 2000 versions of the statutes or regulations. The Court acknowledges, however, that because the events related to this action took place over an extended period of time, various versions of each of the statutes and regulations involved may apply. Accordingly, the Court has reviewed the versions from 1994 until the present and found that no amendments affecting the outcome of this case have occurred.

[2] On February 10, 1995, Alcan filed a second administrative protest. *See* Compl. of Alcan at paras. 12, 13. This second protest is not properly before the Court for two reasons: first, although it is discussed in the complaint, it is not mentioned in the summons in this action. *See id*.; Summons of Alcan at 1.

Second, the February 10 protest appears to cover the same entries as the first; however, 19 U.S.C. § 1514(c)(1) permits only a single protest for any given entry or set of entries. *See* 19 U.S.C. § 1514(c)(1). In its complaint, Alcan alleged that the first protest covered entries made at the port of Detroit, Michigan, while the second protest covered entries made at the

United States Bureau of Customs and Border Protection[3] ("Customs") moves to dismiss this action for lack of subject matter jurisdiction, alleging that Alcan failed to timely file its protest.

Because the Court concludes that the subject protest was not timely or properly filed, Defendant's motion to dismiss is granted.[4]

BACKGROUND

This dispute began with Alcan's December 24, 1992, voluntary disclosure informing Customs that it did not pay the Merchandise Processing Fee ("MPF") on imports of unwrought aluminum products entered into the United States before 1993.[5] *See* Def.'s Mem. Supp.

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port of Ogdensburg, New York. *See* Compl. of Alcan at paras. 12, 13. However, Alcan now concedes that the two protests cover the same entries. *See* Letter from Lawrence A. Salibra, II, Senior Counsel, Alcan Aluminum Corp., to Honorable Donald C. Pogue, Ct. Int'l Trade, at 3 (June 18, 2004)("June 18 Letter"). Because 19 U.S.C. § 1514(c)(1) precludes the filing of two protests relating to the same entries and the same category of merchandise, "[t]o effectuate the Congressional intent in the one protest per entry rule . . . only the *first* protest received by Customs for filing may practicably be treated as valid." *Russ Togs, Inc. v. United States*, 79 Cust. Ct. 119, 122 (1977) (emphasis in original). Therefore, the Court will not address the second protest, dated February 10, 1995.

[3] 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).

[4] In *Alcan Aluminum Corp. v. United States*, slip. op. 04–99 (CIT Aug. 9, 2004), the Court denied Defendant's motion to dismiss. However, the Court ordered the decision stayed pending briefing by the parties on the effects of *U.S. Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997) on the case, and now withdraws its August 9 decision.

[5] Facts related to Alcan's voluntary disclosure are contained in Alcan's protest to Customs. That protest consisted of several documents ("Protest Package"): a copy of Customs Form 19, as filled out by Alcan (and later marked on and stamped by Customs), a letter dated February 6, 1995, elaborating upon the reasons for the protest, and several exhibits to that letter. *See* Protest Package, Ex. 1 to Letter from James A. Curley, Trial Attorney, to the Hon. Donald C. Pogue, Ct. Int'l Trade (May 4, 2004) ("Def.'s Supp. Br. Letter"). In the explanatory letter which formed part of the Protest Package, Alcan stipulated that the protested entries were of unwrought aluminum products imported from Canada between January 1, 1989 and December 31, 1992. *See* Letter from Rufus E. Jarman, Jr., Barnes, Richardson & Colburn, to Dist. Dir. of Customs, United States Customs Service (February 6, 1995)("February 6 Letter"), Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 2 (May 4, 2004).

The exhibits to the February 6 Letter are labeled A, B, and C. *See* February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at Exs. A–C. (May 4, 2004). Exhibit A is a letter from Customs to Alcan, dated October 18, 1994. *See* Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, U.S. Customs Service, on behalf of William D. Dietzel, Dist. Dir., to Peter Shea, Alcan Aluminum Ltd. ("October 18 Letter"), Ex A. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). Exhibit B consists of a letter from Customs to Barnes, Richardson & Colburn, dated November 17, 1994. *See* Letter from Charles J. Reed, Fines, Penalties & Forfeitures Officer, on behalf of William D. Dietzel, Dist. Dir., United States Customs Service, to Rufus E. Jarman, Barnes, Richardson & Colburn (November 17, 1994)("November 17 Letter"), Ex. B. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). In addition, attached to the November 17 Letter is a Customs receipt memorializing acceptance of $378,496.53 paid by Alcan. *See* Collection Receipt from U.S. Customs Service to Alcan Aluminum Corp.(November 15, 1994)("Receipt"), Attachment to Ex. B to February 6 Letter, Protest Package, Ex. 1 to Def.'s

Mot. Dismiss at 1–2 ("Def.'s Mot."); Compl. of Alcan at para. 4. In response to Alcan's disclosure, on October 18, 1994, Customs requested that Alcan remit $378,496.53 to satisfy its obligation to pay the MPF. *See* October 18 Letter, Ex A. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004); Compl. of Alcan at para. 5. Alcan paid the requested amount to Customs on or about November 11. *See* Compl. of Alcan at para. 6. Customs accepted Alcan's tender and issued a receipt for the same on November 15, 1994.[6] *See* Receipt, Attachment to Ex. B to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004).

Recognizing a dispute between them regarding payment of MPF, on December 12, 1994, Alcan and Customs entered into an escrow agreement. *See* Agreement, Ex. C. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004); Compl. Of Alcan at para. 8. Under that Agreement, Customs agreed to refund the tendered MPF with "interest as may be required by law," if it was later determined upon resolution of a designated test case that the tendered amount was not owed. *See* Agreement, Ex. C. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004) at paras. 1–2.[7]

Subsequent to the Agreement, on February 8, 1995, Alcan filed an administrative protest. *See* Def.'s Mot. at 2; Compl. of Alcan at para. 12. Alcan protested Customs' "assessment and [Alcan's] payment . . . of $378,496.53 for Merchandise Processing Fee." February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1 (May 4, 2004). In addition, Alcan protested the "possibility of contingen-

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Supp. Br. Letter (May 4, 2004). Finally, Exhibit C is the escrow agreement executed by Alcan and Customs, dated December 12, 1994 ("Agreement"). Agreement, Ex. C. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp.Br. Letter (May 4, 2004).

[6] *See* notes 12 and 14, *infra*.

[7] In an amendment to the Agreement, the parties designated *Alcan Aluminum Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436 (1997), as the test case. *See* Amend. To Agreement, Ex. 1 to Letter from Elisa P. Pizzino, Alcan Aluminum Corp. To Hon. Donald C. Pogue, Ct. Int'l Trade (May 3, 2004) ("Pl.'s Supp. Br.Letter"). In that case, Alcan contested the MPF imposed by Customs on imports of unwrought aluminum that entered the United States during 1993. *See* Test Case Summons of Alcan (Court No. 94–09–00539 at 1–4 (Sept. 14, 1994) (on file with Court). Customs imposed the MPF rate required for "goods not originating in the territory of Canada." *See Alcan Aluminum Corp*, 21 CIT at 1238–39, 996 F. Supp. at 1437–38. This rate was imposed because Alcan's merchandise contained a small amount of a non-Canadian additive in addition to Canadian materials. *Id.*

But for this additive, Alcan's merchandise would have been classified as "goods originating in Canada." *Id.* at 1239, 986 F. Supp. at 1438. Alcan argued that the additive should have been disregarded pursuant to the doctrine of *de minimis non curat lex.*, and its imported merchandise classified as "goods originating in Canada" that qualified for the reduced MPF rate under the United States-Canada Free Trade Agreement Implementation Act of 1988. *Id.* at 1240, 986 F. Supp. at 1438–1439. However, the Court of International Trade affirmed Customs' assessment of the higher rate. *Id.* at 1247, 986 F. Supp. at 1444. Thereafter, Alcan appealed the decision of the Court of International Trade to the Federal Circuit, which reversed the Court of International Trade decision. *See Alcan Aluminum Corp. v. United States*, 165 F.3d 898 (Fed. Cir. 1999).

cies not anticipated in the Agreement or unanticipated frustration" of the same. *Id.* at 3. Finally, Alcan protested "Customs' decision to accept [Alcan's] tender[ ]" relating to the pre-1993 entries. *See id.* at 1–2. Despite these objections, Alcan requested that Customs refrain from taking action on the subject protest until after resolution of the test case. *See id.* at 3.

Ruling in that test case, on January 5, 1999, the United States Court of Appeals for the Federal Circuit reversed the decision of the Court of International Trade, and held that the non-Canadian additive in the subject imports was subject to the principle of *de minimis non curat lex*, and that, therefore, the imported merchandise was of Canadian origin. *See Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 905 (Fed. Cir. 1999). Because the parties previously agreed that the decision in this case would control the handling of the pre-1993 entries (*See* Agreement, Ex. C to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1 (May 4, 2004); Amend. to Agreement, Ex. 1 to Pl.'s Supp. Br. Letter (May 3, 2004)), in February, 2000, Customs refunded to Alcan the tendered MPF for those entries.[8] *See* Def.'s Mot. at 2; Compl. of Alcan at paras. 16, 23. However, Plaintiff claims that Customs failed to remit to Alcan the "interest as may be required by law," as outlined in the Agreement. *See* Agreement, Ex. C to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1–2 (May 4, 2004).; Def.'s Mot. at 2; Compl. of Alcan at paras. 17, 23.

In response to Customs' action, on September 11, 2000, Alcan filed a request for accelerated disposition of its February 8, 1995 protest. *See* Compl. of Alcan at para. 18; Letter from F.D. "Rick" Van Arnam, Jr., Barnes, Richardson & Colburn, to Port Dir., Customs, *Re: Protest Number 3801–95–100775, Date Filed: February 8, 1995* (Sept. 11, 2000) and Certified Mail Receipt for Article Sent from Alcan Aluminum Corp. to Port Dir., Customs (Sept. 11, 2000), Ex. B to June 18 Letter. The protest was denied by Customs on September 27, 2000. *See* Compl. of Alcan at para. 19; Protest Form (as marked and stamped by Customs), Protest Package, Ex. 1 Def.'s Supp. Br. Letter (May 4, 2004). On March 23, 2001, Alcan filed its Summons, and thereby commenced this action to recover the interest accrued on the refunded MPF. *See* Summons of Alcan at 2. As noted above, Defendant Customs now moves to dismiss for lack of subject matter jurisdiction.

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[8] There is a discrepancy regarding the actual date in February, 2000, that Customs refunded the MPF. Alcan asserts that Customs refunded the MPF on February 7, 2000. *See* Compl. of Alcan at paras. 16, 23. However, a handwritten notation made by a Customs officer on the Protest Form indicates the money was refunded on February 14, 2000. *See* Protest Form, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). This noted discrepancy has no effect on the Court's decision regarding the Court's jurisdiction.

STANDARD OF REVIEW

Alcan seeks to invoke the Court's jurisdiction under 28 U.S.C. § 1581(a). Compl. of Alcan at para. 1. Accordingly, Alcan has the burden of establishing the basis for the Court's jurisdiction. *See Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345 (Fed. Cir. 1995) (citation omitted). At the same time, "the Court assumes 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.' " *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

DISCUSSION

Customs contends that the Court lacks subject matter jurisdiction under § 1581(a) because Alcan's protest was untimely filed. *See* Def.'s Mot. at 3–4.[9] In response, Alcan asserts that the Court has jurisdiction over this case under 28 U.S.C. § 1581(a), which grants the Court exclusive jurisdiction over "any civil action commenced to contest the denial of a protest [by Customs]. . . ." *See* Compl. of Alcan at para. 1; 28 U.S.C. § 1581(a). However, in order to invoke the Court's jurisdiction under § 1581(a), a civil action must be based on the denial of a valid protest filed in accordance with 19 U.S.C. § 1514. *See Koike Aronson, Inc. v. United States*, 165 F.3d 906, 908–909 (Fed. Cir. 1999). Title 19 U.S.C. § 1514 contains, among other things, the statutory requirements for filing a valid protest. *See* 19 U.S.C. § 1514.

For a protest to be valid within the meaning of Section 1514, an importer must protest a "decision" of Customs, and the protest must be filed within ninety days after the protested decision. *See* 19 U.S.C. § 1514(c)(3).[10] Without such a timely filed protest, the Court lacks jurisdiction. *See Castelazo & Assocs. v. United States*, 126 F.3d

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[9] Alcan argues that Customs cannot challenge the Court's jurisdiction in this action because the Court exercised jurisdiction in the test case. *See* Pl.'s Stat. in Opp'n to Mot. to Dismiss at 1–2 ("Pl.'s Opp'n"). Alcan argues that the instant action was commenced to enforce the Stipulated Judgment in the test case, and thus jurisdiction is proper because of the Court's continuing jurisdiction and power to enforce the same. *See id.* at 3–4. However, the Stipulated Judgment, and the test case itself, involved entries made during 1993. *See* Test Case Summons of Alcan (Court No. 94–09–00539); Schedule A to Stip. J., Ex A. to Pl.'s Opp'n. This action covers pre-1993 entries. *See* Protest Form, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter; Summons of Alcan at 1. Therefore, because this case and the test case cover different entries, this action is not an instrument to enforce the Stipulated Judgment entered in the test case, and thus the Court's jurisdiction to enforce that judgment has no bearing procedurally on the case at bar.

[10] Under section 1514(c)(3), to be valid, a protest must be filed "within ninety days after but not before . . . (A) a notice of liquidation or reliquidation, or . . . (B) the date of the decision as to which protest is made." 19 U.S.C. § 1514(c)(3). In this action, the parties agree that the subject protest does not contest specific liquidations. *See* Def.'s Mot. at 3; February 6 Letter at 1. Therefore, subsection (B) of section 1514(c)(3) is applicable here.

1460, 1461 (Fed. Cir. 1997). Accordingly, the Court will now analyze whether the subject protest conforms to the requirements outlined in Section 1514.

In its protest, Alcan essentially objected to three separate determinations. *See* February 6 Letter at 1–3. It objected to Customs' assessment and its own payment of the MPF, any "unanticipated frustration" of the Agreement, and Customs' acceptance of Alcan's tendered MPF. *Id*. The Court will discuss all three objections in turn.

First, Alcan protested Customs' assessment and its own payment of the MPF.[11] *See id*. at 1. Customs assessed the MPF pursuant to 19 C.F.R. 162.74(h) and demanded the amount of $378,496.53 as payment of the MPF. *See* Compl. of Alcan at para. 5; October 18 Letter, Ex. A to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). This demand would appear to constitute a Customs decision; Customs calculated the owed amount of MPF and actively demanded its payment. *See* Compl. of Alcan at para. 6. Customs made its demand for payment by means of a letter dated October 18, 1994. *See* Compl. of Alcan at para. 5; October 18 Letter, Ex. A to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). Alcan filed its protest on February 8, 1995, one hundred and thirteen days after Customs' October 18, 1994 demand. *See* Protest form (as stamped by Customs), Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004); Compl. of Alcan at para. 12; *see also* Def.'s Mot. at 3. Therefore, because Alcan's protest of Customs' assessment was not filed within ninety days following Customs' demand, the protest of Customs' assessment of the MPF was untimely.

Second, with respect to the "unanticipated frustration" objection, Alcan protested the "possibility of contingencies not anticipated in the Agreement." February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 3 (May 4, 2004). The protest, however, was filed on February 8, 1995. *See* Protest Form (as stamped by Customs), Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004); Compl. of Alcan at para. 12. Assuming that Customs' eventual failure to pay interest as outlined in the Agreement constitutes a "decision," the February 6, 1995 protest is simply untimely. According to 19 U.S.C. § 1514(c)(3), "[a] protest . . . shall be filed with the Customs Service within ninety days after *but not before . . . the date of the decision* as to which protest is made." (emphasis added). 19 U.S.C. § 1514(c)(3). Customs refunded Alcan's tender without interest in February, 2000. *See* Compl. of Alcan at paras. 16, 17. Therefore, even if Customs' nonpayment of interest were categorized an

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[11] Insofar as Alcan protests its own payment of tender, that protest is invalid. Under 19 U.S.C. § 1514(a), only "decisions of the Customs Service" may be the subject of an administrative protest. 19 U.S.C. § 1514(a). While Customs' demand of payment and acceptance thereof may be termed "decisions" of the Customs Service, Alcan's payment of tender cannot. Alcan tendered payment on November 11, 1994.

"unanticipated frustration" of the Agreement, Alcan filed its protest before Customs' nonpayment of interest. Accordingly, the protest as to this determination was untimely. *See* 19 U.S.C. § 1514(c)(3); *see also A.N. Deringer, Inc. v. United States*, 12 CIT 969, 972, 698 F. Supp. 923, 925 (1988)(protest was rendered invalid because it was prematurely filed one day before Customs' decision and also violated the one-protest-per-entry rule).

Third, Alcan protested "Customs' decision to accept . . . [its] tender[ ] . . . [of the MPF]." February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004) at 1–2. This acceptance occurred on November 15, 1994.[12] But the mere passive acceptance of funds does not constitute a Customs decision under *United States Shoe Corp. v. United States*, 114, F.3d 1564 (Fed. Cir. 1997). That case found that Customs' collection of Harbor Maintenance Tax was not protestable, as Customs merely passively accepted the taxes paid pursuant to statute. *Id.* at 1569. Customs was not involved in calculation of the tax; in fact, the burden of calculation and payment was entirely on the taxed party. *Id.* Customs' function of collection involved no independent thought process on its part. *Id.*

The facts here are somewhat different than those in *United States Shoe Corp*. Here, Customs appears to have actively demanded payment of the MPF. *See* October 18 Letter, Ex A. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004).[13] However, as discussed above, the protest of Customs' demand for payment was untimely filed. All that remains, then, is a protest of Customs' passive acceptance of that demanded payment.[14] Because

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[12] Alcan identifies November 17, 1994 as the date upon which Customs accepted its tender. *See* February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter at 1 (May 4, 2004). This date is based on a letter it received from Customs, dated November 17, 1994, which enclosed the receipt for the tender. *See* Letter from William D. Dietzel, District Dir., to Rufus E. Jarman, Barnes, Richardson & Colburn, Ex. B to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004) ("November 17 Letter"). However, the receipt is dated November 15, 1994, which indicates that Customs' acceptance of Alcan's tender occurred on November 15th rather than on November 17th. *See* Receipt, Attach. to November 17 Letter, Ex. B to February 6 Letter, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004).

[13] The Court notes, however, that the amount demanded appears to have been based on calculations provided by Plaintiff to Customs. *See* October 18 Letter, Ex A. to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004).

[14] Another argument could be made: Customs' acceptance of the tender is not passive, and not subject to *United States Shoe Corp.*, because acceptance of the tender was made pursuant not to the October 18 demand, but as part of an active decision to enter into the Agreement. While Customs did not sign the Agreement until December 12, 1994, Plaintiff appears to have submitted a signed copy of the Agreement along with its tender; Customs accepted the money on November 15, 1994. *See* Receipt, Ex. to November 17 Letter, Ex. B to February 6 Letter, Protest Package, Ex. 1 to Def.'s Supp. Br. Letter (May 4, 2004). By accepting the money, it could be argued that Customs accepted the Agreement as well. Indeed, in some of its submissions, Plaintiff appears to be edging towards an argument that its February 6, 1995 protest, by protesting Customs' acceptance of payment, was in fact protesting Customs' entry into the Escrow Agreement. *See*, e.g., Pl.'s Response to Order of Court Dated

such passive acceptance is not a "decision" under the rule stated in *United States Shoe Corp.*, the protest of Customs' acceptance of the tender fails. The Court need not, therefore, decide the question of whether the protest was timely; as the protest objected to no actual Customs "decision," the protest is invalid under 19 U.S.C. § 1514.

CONCLUSION

Because the protest before the Court was invalid, as it untimely objected to Customs' demand for payment and failure to pay interest, and failed to protested a decision of Customs inasmuch as it protested acceptance of payment, the Court grants Defendant's motion to dismiss, and enters judgment for Defendant.

August 10, 2004 at 2 (Aug. 23, 2004). Plaintiff never clearly states this proposition, however, and even to the extent that Plaintiff's protest could be read to properly object to Customs' entry into the Escrow Agreement, it is unclear to the Court that there would be any substantive merit to protesting Customs' entry into a contract that Plaintiff itself entered into freely. Properly, it is not from Customs' entry into the Agreement that Plaintiff's complaint stems; it is from Customs' alleged breaking of the Agreement. Had Plaintiff waited until that occurrence to protest, the Court would have no trouble taking jurisdiction of the case. As it stands, however, Customs' acceptance of tender is so entwined with either the October 18 demand that it cannot count as an independent decision, or, accepting Plaintiff's rather shadowy argument that its protest of acceptance of tender is really a protest of Customs' entry into the Escrow Agreement, would lead the Court to an absurdity - certifying as timely and proper a protest that appears to present no legal claim that could result in an award of Plaintiff's claimed relief.