Slip Op. 50–49

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

FORMER EMPLOYEES OF COMPUTER SCIENCES CORPORATION, Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 04–00149

Plaintiffs, Former Employees of Computer Sciences Corporation ("Plaintiffs"), move pursuant to USCIT R. 56.1 for judgment upon the agency record or, alternatively, for a remand for further investigation. Plaintiffs challenge the United States Department of Labor's ("Labor") determinations denying them eligibility for trade adjustment assistance benefits under Title II of the Trade Act of 1974, as amended 19 U.S.C. § 2272 (West Supp. 2004) (the "Trade Act"). *See Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance* ("*Negative Determination*"), TA–W–53,209 (Dep't Labor Oct. 24, 2003) Admin. R. 55–56; *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance* ("*Notice of Determination*"), 68 Fed. Reg. 66,877–78 (Dep't Labor Nov. 28, 2003); *Notice of Negative Determination on Reconsideration for Computer Sciences Corporation, Financial Services Group ("FSG"), East Hartford, Connecticut* ("*Negative Reconsideration Determination*"), Admin. R. 78–80 (Dep't Labor Feb. 3, 2004) *published at* 69 Fed. Reg. 8,488 (Dep't Labor Feb. 24, 2004); *Notice of Negative Determination on Reconsideration on Remand for Computer Sciences Corporation, Financial Services Group, East Hartford, Connecticut* ("*Remand Final Negative Determination*"), Supplemental Admin. R. 13–17 (Dep't Labor July 29, 2004) *published at* 69 Fed. Reg. 48,526 (Dep't Labor Aug. 10, 2004).

Labor concluded that the employees did not meet the requirements of the Trade Act, basing its conclusion on its findings of fact that: (1) a significant number of workers in Computer Sciences Corporation's ("CSC") Financial Services Group ("FSG") in East Hartford, Connecticut were not separated; (2) Plaintiffs were not involved in the production of articles and did not complete software on physical media; (3) there has not been a shift in production to India of software components and completed software like or directly competitive with those formerly produced by plaintiffs; (4) there has not been or is likely to be an increase in imports of articles like or directly competitive with those formerly produced by plaintiffs.

Plaintiffs request the Court remand this case to Labor with instructions to certify Plaintiffs as eligible for trade adjustment assistance ("TAA") benefits. Alternatively, Plaintiffs request the Court remand this case to Labor with instructions to further investigate because of inadequacies in Labor's previous investigations.

Held: Plaintiffs' 56.1 motion is granted; case remanded.

Dated: April 14, 2005

Sidley Austin Brown & Wood LLP, (*Neil R. Ellis, Rajib Pal*, and *Sharon H. Yuan*) for plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Delfa Castillo*); of counsel: *Peter Nessen*, Office of the Solicitor, United States Department of Labor, for defendant.

OPINION AND ORDER

TSOUCALAS, Senior Judge: Plaintiffs, Former Employees of Computer Sciences Corporation ("Plaintiffs"), move pursuant to USCIT R. 56.1 for judgment upon the agency record or, alternatively, for a remand for further investigation. Plaintiffs challenge the United States Department of Labor's ("Labor") determinations denying them eligibility for trade adjustment assistance benefits under Title II of the Trade Act of 1974, as amended 19 U.S.C. § 2272 (West Supp. 2004) (the "Trade Act"). *See Negative Determination Regarding Eligibility To Apply for Worker Adjustment Assistance ("Negative Determination")*, TA–W–53,209 (Dep't Labor Oct. 24, 2003) Admin. R. 55–56; *Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance* ("*Notice of Determination*"), 68 Fed. Reg. 66,877–78 (Dep't Labor Nov. 28, 2003); *Notice of Negative Determination on Reconsideration for Computer Sciences Corporation, Financial Services Group ("FSG"), East Hartford, Connecticut* ("*Negative Reconsideration Determination*"), Admin. R. 78–80 (Dep't Labor Feb. 3, 2004) *published at* 69 Fed. Reg. 8,488 (Dep't Labor Feb. 24, 2004); *Notice of Negative Determination on Reconsideration on Remand for Computer Sciences Corporation, Financial Services Group, East Hartford, Connecticut* ("*Remand Final Negative Determination*"), Supplemental Admin. R. 13–17 (Dep't Labor July 29, 2004) *published at* 69 Fed. Reg. 48,526 (Dep't Labor Aug. 10, 2004). Labor concluded that the employees did not meet the requirements of the Trade Act, basing its conclusion on its findings of fact that: (1) a significant number of workers in Computer Sciences Corporation's ("CSC") Financial Services Group ("FSG") in East Hartford, Connecticut were not separated; (2) Plaintiffs were not involved in the production of articles and did not complete software on physical media; (3) there has not been a shift in production to India of software components and completed software like or directly competitive with those formerly produced by plaintiffs; (4) there has not been or is likely to be an increase in imports of articles like or directly competitive with those formerly produced by plaintiffs.

Plaintiffs request the Court remand this case to Labor with instructions to certify Plaintiffs as eligible for trade adjustment assistance ("TAA") benefits. Alternatively, Plaintiffs request the Court remand this case to Labor with instructions to further investigate because of inadequacies in Labor's previous investigations.

BACKGROUND

The Trade Act provides for TAA benefits to workers who have lost their jobs as a result of increased imports or shifts of production out of the United States. *See* 19 U.S.C. § 2272. Such benefits include training, re-employment services and various allowances including income support, job search and relocation allowances.

Plaintiffs are former employees of CSC's financial services group who were separated from their employment as information technology professionals on February 28, 2003 (Monali Patel) and May 30, 2003 (Mark Bain and Deborah Corkindale). *See* Petition for Trade Adjustment Assistance, Sept. 22, 2003, Admin. R. at 2. On September 22, 2003, Plaintiffs petitioned Labor to obtain certification of eligibility for TAA benefits. *See id.* Labor initiated an investigation and determined that Plaintiffs did not produce an article within the meaning of section 222(c)(3) of the Trade Act and, therefore, were not eligible for TAA benefits. *See Negative Determination*, Admin. R. at 55–56. Plaintiffs appealed Labor's determination on November 24, 2003. *See* Mem. P. & A. Supp. Mot. Pls. J. Agency R. ("Pls.' Mem.") at 5. Labor agreed to reconsider its determination and found that the "workers did produce widely marketed software components on CD Rom and tapes, and thus did produce an article within the meaning of the Trade Act." *Negative Reconsideration Determination*, 69 Fed. Reg. at 8,488. Labor, however, again denied Plaintiffs request for certification because "although [CSC] did report that some 'source coding' did shift to India in the relevant period, [CSC] does not import completed software on physical media that is like or directly competitive with that which was produced at the subject facility. Business development, design, testing, and packaging remain in the United States." *Id.*

On March 15, 2004, Plaintiffs sought judicial review and filed a letter with the Court which the Clerk of the Court deemed as the filing of a summons and complaint. *See* Pls.' Mem. at 7. Labor consulted with Plaintiffs and on May 28, 2004, filed a consent motion for voluntary remand indicating that it would further investigate conflicting information in the record. *See* Consent Mot. Voluntary Remand (May 28, 2004). The Court granted this motion on June 2, 2004. Upon remand, Labor reviewed previously submitted information and contacted CSC officials "to determine the process in which software code is fixed onto tangible media, identify which functions were shifted to India, and determine whether the subject worker group meets the statutory criteria for TAA certification." *Remand Final Negative Determination*, 69 Fed. Reg. at 48,526. Labor found that CSC had not shifted any "packaging" functions to India. *See id.* Moreover, Labor found that all "storing" and "copying" of the completed software onto physical media and the delivery of the software continues to take place in the United States. *See id.* CSC reported to Labor that it does not import any completed software which is like or

directly competitive with the completed software produced in East Hartford. *See id.* Accordingly, Labor again denied Plaintiffs' eligibility for TAA benefits. *See id.* Plaintiffs now challenge Labor's determinations denying them certification for eligibility for TAA benefits.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395(c) (2000) and 28 U.S.C. § 1581(d) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Labor's determination of eligibility for trade adjustment assistance, the Court will uphold Labor's determination if it is supported by substantial evidence on the record and is otherwise in accordance with law. *See* 19 U.S.C. § 2395(b) (2000); *Woodrum v. Donovan*, 5 CIT 191, 193, 564 F. Supp. 826, 828 (1983), *aff'd*, *Woodrum v. United States*, 737 F.2d 1575 (Fed. Cir. 1984)). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987); *see also Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Additionally, "the rulings made on the basis of those findings [must] be in accordance with the statute and not be arbitrary and capricious, and for this purpose the law requires a showing of reasoned analysis." *Former Employees of Rohm & Haas Co. v. United States*, 27 CIT ___, ___, 246 F. Supp. 2d 1339, 1346 (2003) (quoting *Int'l Union v. Marshall*, 584 F.2d 390, 396 n.26 (D.C. Cir. 1978)).

Moreover, although "the nature and extent of the investigation are matters resting properly within the sound discretion of [Labor,]" *Former Employees of Galey & Lord Indus. v. Chao*, 26 CIT ___, ___, 219 F. Supp. 2d 1283, 1286 (2002) (quoting *Former Employees of CSX Oil & Gas Corp. v. United States*, 13 CIT 645, 651, 720 F. Supp. 1002, 1008 (1989) (citation omitted)), "[g]ood cause [to remand] exists if [Labor's] chosen methodology is so marred that [Labor's] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Id.* (citations omitted). The Court's review of Labor's determination denying certification of eligibility for TAA benefits is confined to the administrative record before it. *See* 28 U.S.C. § 2640(c) (2000); *see also Int'l Union v. Reich*, 22 CIT 712, 716, 20 F. Supp. 2d 1288, 1292 (1998).

CONTENTIONS OF THE PARTIES

A. Plaintiffs' Contentions

Plaintiffs argue that record evidence does not support Labor's determination that: (1) a significant number of workers in CSC's FSG

in East Hartford, Connecticut, have not become separated; (2) Plaintiffs' were not involved in the production of articles within the meaning of the Trade Act and consequently did not complete software on physical media; (3) there has not been a shift in production by CSC to India of software components and completed software like or directly competitive with those produced by CSC; and (4) there has not been or is likely to be an increase in imports of articles like or directly competitive with those produced by CSC. *See* Pls.' Mem. at 11.

Plaintiffs assert that they were engaged in the production of an article within the meaning of the Trade Act and completed software on physical media. *See id.* at 12. Plaintiffs argue that Labor erred in concluding that software components are services and not articles. *See id.* at 13–14. Plaintiffs assert that "[i]n designing and coding elements of Vantage-One, Plaintiffs created or manufactured a tangible commodity. Plaintiffs created the blueprints for the programs, as well as the source code itself. . . ." *Id.* at 17. The ordinary meanings of the words "tangible" and "services" indicate that software components are tangible and therefore constitute articles not services. *See id.* at 15–16. Plaintiffs maintain that software design and code does not merely constitute a contribution of labor, skill, or advice. *See id.* at 16. Rather, software design and code requires "the creation of a new object that performs specific tasks, no different from the creation of a new machine." *Id.*

Plaintiffs argue that, to effectuate the remedial purpose of TAA benefits, section 222 of the Trade Act "must be interpreted broadly to include shifts in various stages of production of an article." *Id.* at 18. Plaintiffs note that the Trade Act does not define the term "production." *See id.* Based on the common meaning of the term and court precedent, Plaintiffs argue that the term "does not focus only on the end stage of the production of an article . . . but rather on the various stages of production." *Id.* at 19. Accordingly, a shift in production of any single function to India satisfies the requirement of section 222(a)(2)(B)(i) of the Trade Act. *See id.* at 20. Plaintiffs note that "[i]n the software industry, the designer, coder, tester, and packager are all engaged in the production of completed software . . . ." *Id.* Workers who produce software components which are combined and packaged to produce completed software on physical media are therefore engaged in the production of completed software. *See id.* Thus, Labor's investigation improperly focused on whether marketing, storing, packaging and delivery of completed software products had shifted overseas rather than focusing on whether any single function had shifted abroad. *See id.* at 21.

Plaintiffs also argue that software components, even when transmitted electronically, constitute articles because under the Harmonized Tariff Schedule of the United States ("HTSUS") all goods are subject to duty unless they are exempt under a specific provision. *See* Pls.' Mem. at 15. The HTSUS exempts telecommunication trans-

missions from duty, but such an exemption "does not suggest that an item is not a good or an article." *Id.* Plaintiffs maintain that Labor ignored a subsequent ruling by the United States Department of Customs[1] ("Customs") in which it found that software modules, such as source code, are objects of trade and commerce and are consequently considered "merchandise" or "goods." *See id.* at 22. (citing Customs Headquarters Ruling Letter, HQ 114459 (Sept. 17, 1998)). Plaintiffs assert that Labor "must defer to Customs' interpretation of the HTSUS, as Customs is the agency charged by Congress with applying and interpreting the HTSUS." *Id.*

Finally, Plaintiffs contend that Labor merely investigated whether CSC imported completed software and did not investigate whether there has been or is likely to be an increase in imports of software components. *See id.* at 21. Furthermore, record evidence demonstrates that "imports of software components increased relative to domestic production during the years preceding Plaintiffs' separation." *Id.* at 23. Plaintiffs assert that "evidence of a firm shifting its production facilities abroad indicates a likelihood of an increase in imports of like articles even if that firm had not yet begun importing its foreign-produced product." *Id.* at 24. Plaintiffs note that, as of June 2003, CSC has established three centers in India with a workforce of 1,000 employees. *See id.* Consequently, Labor erred in determining that CSC did not shift production of articles like or directly competitive with those formerly produced by Plaintiffs.

B. Labor's Contentions

Labor responds that its determinations are supported by substantial evidence and in accordance with law. *See* Def.'s Resp. Pls.' Mot. J. Upon Admin. R.("Labor's Resp.") at 9–26. Labor contends that Plaintiffs falsely assume that it "has already found that, by writing software code, petitioners were creating a component." *Id.* at 10. Labor asserts that Plaintiffs' assumption is "apparently based upon the erroneous inference that Labor deemed 'coding,' 'design,' 'testing,' and 'delivery' to constitute 'software components.' " *Id.* at 11. Labor argues that "code" is not a software component. *See id.* at 12. Rather, Labor maintains that "coding is only one function or process in the development of a complete 'article.' " *Id.* Labor further argues that whether Plaintiffs produced software components in the United States is not relevant; "[w]hat matters is whether the work transferred to India entailed the creation of an article." *Id.* Labor asserts that, in context, code is only one part or process of the development of a complete article and that the record supports its determination

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

that coding does not constitute the creation of a software component. *See id.* at 12–13.

Labor further contends that the imported code from India is not like or directly competitive with the domestically produced completed software. *See id.* at 13–16. While the domestic product is in final form and on physical media, code from India is not in its final form or onto physical media. *See id.* at 13–22. Labor points out that "CSC informed Labor 'that the subject software is copied from a central computer system onto physical media. When the software is ordered by a customer, *a copy is made* at the subject facility and delivered to the customer.' " *Id.* at 13–14 (citation omitted) (emphasis in original). During its investigation, Labor found that the transfer of software code onto physical media, the packaging and the delivery of the software all take place in the United States. *See id.* at 14. Therefore, Labor determined that all the steps involved in creating CSC's completed software is completed domestically. *See id.*

Labor notes that code from India is electronically transferred from India to East Hartford, where it is stored in a central computer. *See* Labor's Resp. at 14. Consequently, code from India is not tangible because it is fixed onto physical media in the United States. *See id.* Labor argues that, under 20 C.F.R. § 90.2 (2003), an article must be a tangible item. *See id.* at 14–15. Labor claims that code from India is not an article because it is not a tangible item. *See id.* at 15. Labor maintains that its "longstanding practice is to consider 'articles' to be goods that are marketable, fungible, and interchangeable for commercial purposes and that enter into the stream of commerce." *Id.* Here, code from India is not fungible nor is it interchangeable with the completed software produced by CSC domestically. *See id.* Labor also argues that code from India does not constitute an article because the term "code" is not contained in the HTSUS. *See id.* Labor maintains that inclusion in the HTSUS "is a prerequisite for an item to be considered an article." *Id.* at 15–16.

Labor contends that it properly interpreted the statute to require that an article be a tangible item. *See id.* at 16. Labor maintains that "[t]he literal reading of 'article' supports Labor's interpretation that *code*, independent of carrier media, is not an 'article.' " *Id.* at 17 (emphasis in original). Labor asserts that because code from India is transmitted electronically and not on physical media it cannot reasonably be considered a tangible item because software in such form lacks substance. *See id.* at 18. Moreover, if the ordinary meaning of the term "article" does not support Labor's interpretation of the statute, then its interpretation is entitled deference under by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Labor's Resp. at 20–22. Labor maintains that its interpretation of the term "article" is supported by the term's ordinary meaning "as viewed in the context of the statute and legislative his-

tory, and there is no valid justification for interpreting the statutory term, 'article,' to include intangible India-origin code. . . ." *Id.* at 21.

ANALYSIS

The Court finds that Labor's determinations are based on incomplete factual findings and its rulings derived from those findings do not demonstrate a reasoned analysis. *See Former Employees of Rohm & Haas Co*, 27 CIT ___ , ___ , 246 F. Supp. 2d at 1346. Labor is required to certify a group of workers as eligible to apply for TAA benefits if "a significant number or proportion of the workers in such workers' firm, or appropriate subdivision of the firm, have become totally or partially separated [from employment]," and if one of two further sets of conditions are satisfied. 19 U.S.C. § 2272(a). First, such workers may qualify if:

> (i) the sales or production, or both, of such firm or subdivision have decreased absolutely; (ii) imports of articles like or directly competitive with articles produced by such firm or subdivision have increased; and (iii) the increase in imports . . . contributed importantly to such workers' separation or threat of separation and to the decline in the sales or production of such firm or subdivision.

19 U.S.C. § 2272(a)(2)(A). Second, the workers may qualify if there has been a shift in production to a foreign country by the firm or subdivision of articles like or directly competitive with articles produced by the firm or subdivision, and if any of the following conditions are satisfied: (1) the shift in production was to a country which is a party to a free trade agreement with the United States; (2) the shift in production was to a country that is a beneficiary under one of the various trade preference programs; or (3) there had been or is likely to be an increase in imports of articles like or directly competitive with articles produced by the subject firm or subdivision. *See* 19 U.S.C. § 2272(a)(2)(B). Labor concedes that a significant number of workers were separated from their jobs in CSC's FSG during the relevant period, *see* Labor's Resp. at 10, thus satisfying the first requirement of 19 U.S.C. § 2272(a).

As this Court has stated, "[w]hile Labor has 'considerable discretion' in conducting its investigation of TAA claims, 'there exists a threshold requirement of reasonable inquiry. Investigations that fall below this threshold cannot constitute substantial evidence upon which a determination can be affirmed.' " *Former Employees of Sun Apparel of Tex. v. United States*, 28 CIT ___ , ___ , 2004 Ct. Intl. Trade LEXIS 105 *22–23 (Aug. 20, 2004) (internal citations omitted). This Court has noted that "because of the *ex parte* nature of the certification process, and the remedial purpose of the [TAA] program, [Labor] is obliged to conduct [its] investigation with the utmost regard for the interests of the petitioning workers." *Abbott v. Donovan*,

7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (internal quotations and citation omitted). For the reasons stated below, the Court finds that Labor's investigations are inadequate and therefore remands this case for further investigation and redetermination.

Labor's determination that Plaintiffs are not eligible for TAA benefits turns on its determination that the imported code from India is not "like or directly competitive" with the completed software produced by Plaintiffs while employed by CSC. *See Negative Reconsideration Determination*, 69 Fed. Reg. at 8,488; *Remand Final Negative Determination*, 69 Fed. Reg. at 48,526. Labor found Plaintiffs ineligible for TAA benefits because CSC "does not import completed software on physical media that is like or directly competitive with that which was produced at the subject facility." *Negative Reconsideration Determination*, 69 Fed. Reg. at 8,488. Labor contends that "[n]othing in the administrative record . . . supports the inference that 'code,' for example, constitutes a 'software component' or an article." Labor's Resp. at 12. Furthermore, Labor argues that whether Plaintiffs produced a software component is not relevant. *See id.* at 12. Labor notes that "the storing of completed software onto physical media, the copying of the completed software onto physical media, and the delivery of the software continue to take place at the subject facility." *Remand Final Negative Determination*, 69 Fed. Reg at 48,526. Labor insists that the central basis for its determination is whether the code imported from India is an article like or directly competitive with the completed software produced by Plaintiffs. The Court does not agree.

While Labor may be correct that the code from India is not like or directly competitive with the completed software on physical media produced in the United States, it does not follow that the code from India is not like or directly competitive with a function used in producing the completed software in the United States. Labor notes that "coding is only one function or process in the development of a complete 'article.' " Labor's Resp. at 12. Labor, however, asserts that code is not a software component. *See id.* at 12–16. Labor's conclusion is counterintuitive because, if code is a process in the development of completed software, then code must also be considered a component of such software.

Labor also contends that code is not an article. *See* Labor's Resp. at 13–16. Plaintiffs respond that they were engaged in the production of software components which are articles under the Trade Act. *See* Pls.' Mem. at 13–18. Plaintiffs argue that an item does not have to be tangible in order to be an article. *See* Pls.' Reply Def.'s Resp. Pls.' Mot J. Upon Admin. R. at 5. Nonetheless, Plaintiffs contend that code is tangible and therefore an article because it "is something 'capable of being possessed or realized' and not simply the contribution of labor, skill, or advice." *Id.* at 6 (citation omitted). The Court finds that the record supports neither Labor's nor Plaintiffs'

contentions. The Trade Act requires Labor to examine the articles produced by petitioners and compare them to the articles imported from abroad. *See* 19 U.S.C. § 2272(a)(2). Based on the administrative record, Labor has failed to satisfy its obligation to compare the domestic product with the foreign made product. Consequently, the Court finds that Labor's investigation failed to meet the threshold requirement of reasonable inquiry. *See Former Employees of Sun Apparel of Tex.*, 28 CIT at ___ , 2004 Ct. Intl. Trade LEXIS 105 *22–23 (internal citation omitted); *see also Former Employees of Hawkins Oil and Gas, Inc. v. United States*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993) ("[N]o deference is due to determinations based on inadequate investigations."). An inadequate investigation fails to produce a complete record with further findings of fact which may lead to a different conclusion. Here, Labor failed to conduct an adequate investigation and, therefore, the administrative record fails to substantially support Labor's determinations.

CONCLUSION AND ORDER

Whether Plaintiffs produced software components is highly relevant to determining whether Plaintiffs are eligible for TAA benefits. Accordingly, the Court remands this matter to Labor with instructions to investigate whether Plaintiffs produced code and if they did, whether the production of code shifted to India. Without further investigation, it is uncertain whether the code from India is like or directly competitive with the article or component of such article produced by Plaintiffs in the United States. Moreover, the Court finds that Labor's contention that code is not a software component nor an article is not supported by substantial evidence. Upon consideration of Plaintiffs' motion for judgment upon the agency record and Labor's response thereto and the administrative record, it is hereby

ORDERED that Plaintiffs motion for judgment upon the agency record is granted; and it is further

ORDERED that Labor's *Negative Determination*, *Negative Reconsideration Determination* and *Remand Final Negative Determination* are not supported by substantial evidence or in accordance with law; and it is further

ORDERED that this matter is remanded to Labor with instructions to: (1) explain why code, which is used to create completed software, is not a software component; (2) examine whether Plaintiffs were engaged in the production of code; (3) investigate whether there was a shift in production of code to India; (4) investigate whether code imported from India is like or directly competitive with the completed software or any component of software formerly produced by Plaintiffs; and (5) investigate whether there has been or is likely to be an increase in imports of like or directly competitive articles by entities in the United States; and it is further

ORDERED that Labor shall have until June 9, 2005 to complete additional investigation required and file the remand results; and it is further

ORDERED that the parties shall have until June 29, 2005, to submit comments on the remand results; and it is further

ORDERED that rebuttal comments shall be submitted on or before July 19, 2005.

Slip Op. 05–50

SAN VICENTE CAMALU SPR DE RI and EXPO FRESH, LLC, *Plaintiffs*, v. UNITED STATES, *Defendant*.

Court No. 03–00517

[Motions to dismiss for lack of subject matter jurisdiction granted.]

Decided: April 18, 2005

Crowell & Moring LLP (*Matthew P. Jaffe* and *Robert A. Lipstein*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Paul D. Kovac* and *Kent G. Huntington*); *Augusto Guerra*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant U.S. Department of Commerce.

James M. Lyons, General Counsel, U.S. International Trade Commission (*Charles A. St. Charles* and *Michael Diehl*), for Defendant U.S. International Trade Commission.

OPINION

RIDGWAY, Judge:

Plaintiffs in this action – hereinafter collectively referred to as "SVC" – are San Vicente Camalu SPR de RI ("San Vicente"), a Mexican producer and exporter of fresh tomatoes, and Expo Fresh, LLC ("Expo Fresh"), a U.S. importer of the same. SVC here contests certain determinations made in the course of an antidumping investigation by the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("ITC"). Specifically, invoking the court's residual jurisdiction under 28 U.S.C. § 1581(i) (2000),[1] SVC challenges the two agencies' determinations to terminate (or, alternatively, not to reopen) the five year "sunset" review involving fresh tomatoes from Mexico.

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[1] All statutory citations herein are to the 2000 edition of the U.S. Code.

Now before the court are parallel motions to dismiss for lack of subject matter jurisdiction filed on behalf of Commerce and the ITC, and opposed by SVC.[2] As discussed in greater detail below, so-called "(i) jurisdiction" will not lie in this case, because jurisdiction was available under another provision of the statute – specifically, 28 U.S.C. § 1581(c). SVC failed to meet the statutory deadline for filing its appeal under § 1581(c), however. The pending motions are therefore granted, and this action is dismissed.

I. *Background*

The underlying administrative proceedings began some nine years ago, when representatives of the U.S. tomato industry petitioned Commerce and the ITC, alleging that fresh tomatoes from Mexico were being dumped in this country (that is, sold at less than fair value), to the detriment of the domestic industry.[3] Both agencies launched antidumping investigations, and in due course made affirmative preliminary determinations.[4] The investigations were suspended in November 1996, however, when Commerce entered into a suspension agreement with certain Mexican tomato producers and exporters, who agreed to revise their prices.[5] The statute authorizes Commerce to enter into such agreements where, *inter alia*, "exporters of the subject merchandise who account for *substantially all* of the imports of that merchandise" agree to measures that "eliminate completely the injurious effect" of the imports. 19 U.S.C. § 1673c(c) (emphasis added).[6]

Fast forward approximately five years, to October 2001. Commerce and the ITC began their five-year "sunset" review of the sus-

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[2] *See* Defendant's Motion to Dismiss ("DOJ Brief"); Defendant U.S. International Trade Commission's Motion to Dismiss ("ITC Brief"); San Vicente Camalu and Expo Fresh's Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction ("SVC Response Brief"); Reply to Plaintiffs' Opposition to Defendants' Motions to Dismiss for Lack of Jurisdiction ("DOJ Reply Brief"); Defendant United States International Trade Commission's Reply to Plaintiff's Response to Defendants' Motions to Dismiss ("ITC Reply Brief").

[3] *See Fresh Tomatoes from Mexico*, 61 Fed. Reg. 15,968 (ITC April 10, 1996) (initiation of antidumping investigation); *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 18,377 (Dep't Commerce April 25, 1996) (initiation of antidumping investigation).

[4] *See Fresh Tomatoes From Mexico*, Inv. No. 731–TA–747, USITC Pub. 2967 (May 16, 1996) (prelim. affirm. injury determination, finding "reasonable indication" that imports were injuring domestic industry); *Fresh Tomatoes from Mexico*, 61 Fed. Reg. 56,608 (Dep't Commerce Nov. 1, 1996) (prelim. affirm. dumping determination, finding that imports were being, or were likely to be, dumped).

[5] San Vicente was not a party to the 1996 Suspension Agreement. *See Fresh Tomatoes From Mexico*, 61 Fed. Reg. 56,618 (Dep't Commerce Nov. 1, 1996) (suspension of antidumping investigation); *Fresh Tomatoes From Mexico*, 61 Fed. Reg. 58,217 (ITC Nov. 13, 1996) (suspension of antidumping investigation).

[6] For a more detailed discussion of the legislative history, requirements, and actual use of the suspension agreement statute, *see generally Bethlehem Steel Corp. v. United States*, 25 CIT 519, 521–23, 146 F. Supp. 2d 927, 930–32 (2001).

pended antidumping investigations, to determine whether dumping (and material injury to domestic producers) would be likely to continue or resume if the suspended investigation were terminated.[7] But, in late May 2002, while the agencies' sunset reviews were ongoing, Mexican tomato producers and exporters accounting for a large percentage of U.S. imports gave notice of their intent to withdraw from the 1996 Suspension Agreement. Because the suspension agreement no longer covered "substantially all of the imports," Commerce was forced to terminate it, effective July 30, 2002.[8]

The termination of the 1996 Suspension Agreement led perforce to the agencies' termination of their sunset reviews (since, as Commerce noted, "there [was] no longer a suspended investigation for which to perform a sunset review"), and to the resumption of the agencies' antidumping investigations initiated some six years earlier.[9] However, those investigations were soon halted once again, by a new suspension agreement – the 2002 Suspension Agreement.[10]

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[7] *See Notice of Initiation of Five-Year Review*, 66 Fed. Reg. 49,926 (Dep't Commerce Oct. 1, 2001) (initiation of sunset review); *Fresh Tomatoes from Mexico*, 66 Fed. Reg. 49,975 (ITC Oct. 1, 2001) (initiation of sunset review); 19 U.S.C. § 1675(c).

Articles 11.2 and 11.3 of the WTO Antidumping Agreement require that antidumping measures – including suspension agreements, as well as antidumping orders – be reviewed at least every five years, to determine whether the measures should be terminated ("sunsetted"). Where the measure at issue is a suspension agreement, Commerce and the ITC use these "sunset" reviews to analyze whether termination of the suspended investigation "would be likely to lead to continuation or recurrence of dumping . . . and of material injury." 19 U.S.C. § 1675(c)(1). *See generally Committee for Fairly Traded Venezuelan Cement v. United States*, 372 F.2d 1284, 1286–87 (Fed. Cir. 2004).

[8] *See Fresh Tomatoes From Mexico*, 67 Fed. Reg. 50,858 (Dep't Commerce Aug. 6, 2002) (termination of suspension agreement, termination of sunset review, and resumption of antidumping investigation).

If Commerce determines that a suspension agreement has been violated or no longer meets the requirements of the statute, the agreement must be terminated. *See* 19 U.S.C. § 1673c(i); 19 C.F.R. § 351.208–09 (2002).

[9] *See Fresh Tomatoes from Mexico*, 67 Fed. Reg. 43,278 (Dep't Commerce June 27, 2002) (notice of intent to terminate suspension agreement, intent to terminate sunset review, and intent to resume antidumping investigation); *Fresh Tomatoes From Mexico*, 67 Fed. Reg. 50,858 (Dep't Commerce Aug. 6, 2002) (termination of suspension agreement, termination of sunset review, and resumption of antidumping investigation); *Fresh Tomatoes from Mexico*, 67 Fed. Reg. 53,361 (ITC Aug. 15, 2002) (termination of sunset review); *Fresh Tomatoes from Mexico*, 67 Fed. Reg. 56,854 (ITC Sept. 5, 2002) (resumption of antidumping investigation).

[10] *See Fresh Tomatoes from Mexico*, 67 Fed. Reg. 77,044 (Dep't Commerce Dec. 16, 2002) (suspension of antidumping investigation); *Fresh Tomatoes from Mexico*, 67 Fed. Reg. 78,815 (ITC Dec. 26, 2002) (suspension of antidumping investigation).

As with the 1996 Suspension Agreement, San Vicente also is not a party to this more recent suspension agreement. *See San Vicente Camalu SPR de RI v. United States*, No. 02–00811 (CIT filed Dec. 17, 2002), Memorandum of Points and Authorities in Support of San Vicente Camalu's Motion for Judgment on the Agency Record (May 19, 2003) at 7 n.22 (noting that San Vicente is not a member of the associations that signed the 1996 and 2002 Suspension Agreements); Signatory List - Suspension Agreement - Fresh Tomatoes from Mexico (available on Commerce's website).

San Vicente requested that the antidumping investigations be continued, notwithstanding the 2002 Suspension Agreement; but its request was denied.[11] It did not seek to appeal that denial. Next, SVC asked the ITC to "reopen" its sunset review. The ITC denied SVC's request. SVC then set its sights on Commerce, requesting that it reopen its sunset review. That request, too, was denied. Commerce reiterated that it could not "conduct a sunset review of a non-existent suspension agreement."[12]

On July 29, 2003 – approximately one year after the agencies terminated their sunset reviews – SVC commenced this action, challenging those terminations. In the alternative, SVC challenges the agencies' denials of its requests to reopen their sunset reviews. *See* Complaint ¶¶ 25–30 (Count I, challenging Commerce's termination of sunset review), ¶¶ 31–35 (Count II, challenging ITC's termination of sunset review), ¶¶ 36–41 (Count III, challenging Commerce's denial of SVC's request to reopen sunset review), ¶¶ 42–46 (Count IV, challenging ITC's denial of SVC's request to reopen sunset review).

II. *Analysis*

Where a plaintiff's assertion of jurisdiction is challenged by a motion to dismiss pursuant to USCIT Rule 12(b)(1), the plaintiff bears the burden of proving the soundness of its jurisdictional allegations. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991); *Elkem Metals Co. v. United States*, 23 CIT 170, 175, 44 F. Supp. 2d 288, 292 (1999). Here, SVC's claim to jurisdiction under 28 U.S.C.

Indeed, San Vicente is challenging the validity of the 2002 Suspension Agreement, in a companion case pending before the court. *See San Vicente Camalu SPR de RI v. United States*, No. 02–00811 (CIT filed Dec. 17, 2002).

[11] *See* Complaint ¶¶ 11–12. *See also San Vicente Camalu SPR de RI v. United States*, No. 02–00811 (CIT filed Dec. 17, 2002), Memorandum of Points and Authorities in Support of San Vicente Camalu's Motion for Judgment on the Agency Record (May 19, 2003) at App. 15 (Letter from Counsel to San Vicente, dated Jan. 3, 2003, requesting continuation of antidumping investigations under 19 U.S.C. § 1673c(g)), App. 16 (Memorandum from Commerce to All Interested Parties, dated Jan. 3, 2003, denying San Vicente's request because San Vicente did not "account for a significant proportion of exports" as required for that relief under the statute).

The statute provides for the continuation of antidumping investigations notwithstanding the existence of a suspension agreement, where the continuation is requested by exporters accounting for "a significant proportion of exports" to the United States. *See* 19 U.S.C. § 1673c(g). In addition, some domestic parties may request the continuation of an investigation. However, domestic *importers* like Expo Fresh are not entitled to that relief. *See* 19 U.S.C. §§ 1673c(g), 1677(9).

[12] *See* Letter from Counsel to SVC, dated Feb. 10, 2003, requesting that the ITC reopen its sunset review (Pub. Doc. No. 177,383); Letter from the ITC, dated Mar. 24, 2003, denying SVC's request, explaining that "[a]bsent initiation by [Commerce], the [ITC] has no authority to institute the requested five-year review") (Pub. Doc. No. 179,568); Letter from Counsel to SVC, dated May 1, 2003, requesting that Commerce reopen its sunset review (Pub. Doc. No. 1926); Letter from Commerce, dated June 27, 2003, denying SVC's request (Pub. Doc. No. 1961).

§ 1581(i)[13] turns on whether it could have availed itself of jurisdiction under some other provision of § 1581. *See JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000) (*quoting Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992)) (jurisdiction lies under § 1581(i) only where there is no jurisdiction under any other subsection of § 1581, unless the remedy under that other subsection would be "manifestly inadequate").[14] Commerce and the ITC maintain that the court would have had jurisdiction to review the agencies' determinations under § 1581(c),[15] if SVC had filed its challenge within 30 days of their publication.

In a nutshell, SVC's argument is that jurisdiction under § 1581(c) could not lie, because – SVC contends – the contested agency actions did not constitute "final determinations" under the statute, since the agencies never reached the ultimate findings on the merits that are made when a sunset review is completed. In short, SVC reasons:

> Section 1581(c) states that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]." Among the actions that may be commenced pursuant to 19 U.S.C. § 1516a are "final determinations" by the [ITC] or [Commerce] made "under section 1675 of this title."

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[13] Pursuant to 28 U.S.C. § 1581:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under [19 U.S.C. § 1516a(a)] or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and [19 U.S.C. § 1516a(g)].

[14] SVC's claim to jurisdiction under § 1581(i) is predicated entirely on its assertion that jurisdiction did not lie under § 1581(c) – or, for that matter, under any other subsection of § 1581. In particular, SVC has not alleged that a remedy under any other subsection of § 1581 would be "manifestly inadequate." *See* DOJ Brief at 10; ITC Brief at 5–6; ITC Reply Brief at 3, 8–9; SVC Response Brief at 8 (arguing only that jurisdiction under § 1581(c) is unavailable).

[15] Jurisdiction lies under § 1581(c) for "any civil action commenced under [19 U.S.C. § 1516a]." In turn, 19 U.S.C. § 1516a(a)(2)(B)(iii) provides for review of "[a] final determination . . . , by [Commerce] or the [ITC] under section 1675 of this title."

> Subsection (c) of 19 U.S.C. § 1675 addresses five-year reviews, the type of review at issue in this action. Therefore, for jurisdiction to exist in this case under 28 U.S.C. § 1581(c), there must be a "final determination" made pursuant to 19 U.S.C. § 1675(c).

SVC Response Brief at 1–2 (footnotes omitted). Quoting the text of § 1675(c),[16] SVC further contends that there is a "final determination" in a sunset review case only if Commerce makes a finding as to whether "stopping the investigation will likely lead to dumping" and the ITC makes a finding as to whether "stopping the investigation will likely lead to material injury." SVC Response Brief at 2 (first and second alterations in original) (footnote omitted). SVC concludes:

> When Commerce ended its five-year review of the suspended antidumping investigation . . . , it did not "determine . . . whether . . . termination of the investigation suspended . . . would be likely to lead to the continuation or recurrence of dumping." Similarly, when the [ITC] ended its five-year review, it did not "determine . . . whether . . . termination of the investigation suspended . . . would be likely to lead to continuation or recurrence . . . of material injury." Therefore, neither agency made a "final determination" pursuant to 19 U.S.C. § 1675(c). Since 28 U.S.C. § 1581(c) requires such a "final determination" before it vests jurisdiction in the Court, the agency actions challenged by SVC clearly cannot be reviewed under that section.

SVC Response Brief at 2–3 (all but first and fifth alterations in original) (footnotes omitted). However, SVC's strained argument ignores both the unambiguous finality of the agencies' determinations here, and the pertinent precedent.

The determinations by Commerce and the ITC terminating the sunset reviews were clearly the final and definitive actions in those proceedings. There was nothing whatsoever about the determinations that was in any way preliminary, interlocutory, interim, provisional, or temporary. They were *final determinations* terminating the sunset reviews, driven in turn by the termination of the 1996 Suspension Agreement. The statute provides for sunset reviews *only*

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[16] Section 1675(c) requires, in pertinent part, that every five years after notice of a suspension agreement is published:

> [Commerce] and the [ITC] shall conduct a review to determine, in accordance with section 1675a of this title, whether . . . termination of the investigation suspended under section 1671c or 1673c of this title would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

19 U.S.C. § 1675(c).

where an antidumping order or a suspension agreement is in place. And, at the time, neither existed in this case. 19 U.S.C. § 1675(c); DOJ Reply Brief at 2–3; ITC Reply Brief at 3. Moreover, because the agencies' terminations were the final and definitive resolution of the sunset reviews and any issues presented therein, the agencies' determinations on termination were every bit as *final* as determinations on the merits of the ultimate substantive issues under 19 U.S.C. § 1675(c) would have been – and they were every bit as *reviewable* under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), as well.

Even SVC does not contend that the agencies' termination determinations were in any way preliminary in nature. Nor does SVC explain how, had the sunset reviews continued, Commerce and the ITC could have logically and meaningfully completed the sunset review analysis required under § 1675(c), given that the focus of that analysis was the antidumping investigation as it was suspended under the terms of the 1996 Suspension Agreement – a suspension agreement that no longer existed.[17] *See generally* ITC Reply Brief at 4.

SVC's argument is also at odds with relevant judicial precedent. Significantly, SVC cites no case law to support its theory that an agency decision terminating a sunset review does not constitute a "final determination" simply because that determination does not reach ultimate findings on the continuation or recurrence of dumping and material injury. Indeed, existing authority is to the contrary.

For example, in disputes arising out of administrative reviews conducted under 19 U.S.C. § 1675(a), the courts have routinely reviewed cases pursuant to § 1581(c), even though such actions are not specifically identified in the applicable statute. *See, e.g.*, *GSA, S.r.l. v. United States*, 23 CIT 920, 921, 77 F. Supp. 2d 1349, 1350 (1999) (invoking jurisdiction pursuant to 28 U.S.C. § 1581(c) in a challenge to a termination of an antidumping new shipper review); *Windmill Int'l Pte., Ltd. v. United States*, 26 CIT 221, 222, 193 F. Supp. 2d 1303, 1305 (2002) (finding jurisdiction pursuant to 28 U.S.C. § 1581(c) in a challenge to a rescission of an antidumping administrative review). *See generally* DOJ Brief at 8–9; DOJ Reply Brief at 4–5. Just as the termination at issue in *GSA* and the rescission at issue in *Windmill* both constituted "final determinations" under § 1675 that were properly reviewable under § 1581(c), so too the agencies' terminations here at issue constituted "final deter-

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[17] The notion of resuming the sunset review now is, if anything, even more absurd. At the time the sunset review was terminated, the 1996 Suspension Agreement had only been terminated, and the antidumping investigation (once suspended) had been resumed. But those events too have now been affirmatively superseded, by yet another suspension agreement – the 2002 Suspension Agreement – which SVC is challenging in a companion case. *See* n.10, *supra*.

minations" under § 1675 that were properly reviewable under § 1581(c).[18]

Similarly, in *Tupy I*, Commerce's decision not to revoke an antidumping order was held to be a final determination reviewable under 19 U.S.C. § 1516a(a)(2)(B)(iii), even though that decision did not reach the ultimate findings specified in the statute. *Industria Fundicao Tupy v. Brown*, 18 CIT 933, 940–41, 866 F. Supp. 565, 571–72 (1994) ("*Tupy I*"). Indeed, *Tupy II* expressly rejected the argument that jurisdiction did not lie under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) because Commerce's decision not to revoke was not a "determination" specifically listed as an appealable determination under § 1516a. *Industria Fundicao Tupy v. Brown*, 19 CIT 1266, 1269–71, 904 F. Supp. 1398, 1400–02 (1995) ("*Tupy II*"). *See* ITC Reply Brief at 4–5.

SVC points to several cases that suggest that residual jurisdiction under § 1581(i) might lie if " 'the 'legality' of the administrative proceeding is at issue.' " *See* SVC Response Brief at 8–9 (*quoting Ad Hoc Comm. of Florida Producers of Gray Portland Cement v. United States*, 22 CIT 902, 908, 25 F. Supp. 2d 352, 358 (1998)). But those cases are simply inapposite here. In this action, SVC is not challenging the legality of the sunset reviews. Rather, SVC contests the agencies' determinations terminating those reviews because the 1996 Suspension Agreement was no longer in effect. Indeed, for example, in *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 584, 586–88, 717 F. Supp. 847, 850–51 (1989), *aff'd*, 903 F.2d 1555 (Fed. Cir. 1990), and *Carnation Enterprises Pvt. Ltd. v. Dep't of Commerce*, 13 CIT 604, 612, 719 F. Supp. 1084, 1091

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[18] SVC seeks in vain to distinguish *GSA* and *Windmill* from this case, emphasizing that sunset reviews under § 1675(c) are "mandatory," "initiated automatically . . . five years after a date certain," in contrast to the "non-obligatory section 1675(a) reviews considered . . . in *Windmill* and *GSA*." *See* SVC Response Brief at 3 n.7, 5. But SVC's argument is a classic case of "a distinction without a difference." SVC has failed to explain why the means by which administrative proceedings are triggered (*i.e.*, initiated automatically, pursuant to a statute vs. initiated at the request of an interested party) has any bearing on the "finality" of the agency determinations rendered in those proceedings. *See* ITC Reply Brief at 6; DOJ Reply Brief at 4–5.

Equally futile is SVC's attempt to dismiss *GSA* and *Windmill* on the grounds that they do not "address[ ] in detail issues of jurisdiction under 28 U.S.C. § 1581(c)." *See* SVC Response Brief at 5–6. Contrary to SVC's implication, the relative silence in *GSA* and *Windmill* actually speaks volumes about the self-evident nature of jurisdiction in those cases. And even if, as SVC hints, *the parties* in those cases gave little or no thought to jurisdiction, it is "always necessary that *the court* determine its [own] jurisdiction irrespective of what parties aver, or even agree among themselves." *Brecoflex Co. v. United States*, 23 CIT 84, 86, 44 F. Supp. 2d 225, 228 (1999) (emphasis added). *See generally* ITC Reply Brief at 6 n.13.

SVC's reliance on *Jeumont Schneider Transformateurs v. United States*, 18 CIT 647, 650 (1994), is similarly unavailing. SVC cites *Jeumont* for the (seemingly non-controversial) proposition that jurisdiction may lie under § 1581(i) if an action does not contest a "final determination" issued under § 1675. *See* SVC Response Brief at 3 & n.7. But *Jeumont* does not address the definition of a "final determination." Moreover, as discussed above, the agency actions here in fact constituted "final determinations." *Jeumont* is thus irrelevant. *See generally* ITC Reply Brief at 5–6.

(1989) – cases on which SVC relies – the claims of illegality were asserted before the proceedings had reached "final determinations." As a result, in both cases, the court held that § 1516a and § 1581(c) did not apply. *See generally* ITC Reply Brief at 5; DOJ Reply Brief at 5–6.

Certainly the cases that SVC cites do not stand for the proposition that (i) jurisdiction lies whenever a plaintiff (like SVC here) claims that a final determination in a proceeding is contrary to law. The standard of review in *all* cases under § 1516a is whether the agency determination at issue is contrary to law – *i.e.*, "not in accordance with law." *See* 19 U.S.C. §§ 1516a(b)(1)(A), (B)(i), and (B)(ii).

In sum, here, much like *Tupy I*, "pursuant to 19 U.S.C. § 1516a, plaintiffs had 30 days from the . . . publication date[s]" of the agencies' determinations – *i.e.*, 30 days from August 6, 2002 (for Commerce) and from August 15, 2002 (for the ITC) – to initiate an action contesting those determinations. But, by the time SVC's Complaint was filed, those deadlines had long since passed. "Having failed to [initiate any action], plaintiffs may not now resort to the residual jurisdiction of this court." *Tupy I*, 18 CIT at 941, 866 F. Supp. at 572 (*quoted in* ITC Reply Brief at 7).[19]

III. *Conclusion*

For all the reasons set forth above, residual jurisdiction under 28 U.S.C. § 1581(i) will not lie in this case; and SVC failed to timely invoke jurisdiction under 28 U.S.C. § 1581(c). The motions to dismiss

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[19] The jurisdictional basis for Counts III and IV of SVC's Complaint – which challenge the denial of its requests to reopen their sunset reviews – is no less flawed than that for Counts I and II, which challenge the terminations of those reviews.

SVC cannot invoke (i) jurisdiction – after failing to challenge the agencies' August 2002 determinations terminating the sunset reviews within 30 days of those determinations (as required to invoke jurisdiction under § 1516a and § 1581(c)) – simply by requesting that the agencies retract or reconsider their determinations. *See generally* ITC Reply Brief at 8. Section 1581(i) was never intended to create new causes of action. H.R. Rep. No. 96–1235, at 47 (1980). Nor was it intended to supersede more specific jurisdictional provisions. *Koyo Seiko Co. v. United States*, 13 CIT 461, 463, 715 F. Supp. 1097, 1099 (1989). Similarly,

> where Congress has prescribed in great detail a particular track for a claimant to follow, in administrative or judicial proceedings, and particularly where the claim is against the United States . . . , the remedy will be construed as exclusive without a specific statement to that effect. The claimant will not be allowed to sail past carefully constructed limitations simply by invoking other and more general legislation. This is so even when the general legislation might have been construed to cover the case if the specific legislation had not been enacted.

Nat'l Corn Growers Ass'n v. Baker, 840 F.2d 1547, 1558 (Fed. Cir. 1988). SVC thus cannot make an "end run" around § 1581(c) and secure (i) jurisdiction simply by using the procedural mechanism of a request to reopen.

filed on behalf of Commerce and the ITC are therefore granted, and this action is dismissed.

Judgment will enter accordingly.

Slip Op. 05–51

THE PILLSBURY COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 03–00096

[Plaintiff's Motion for Summary Judgment granted; Defendant's Cross-Motion for Summary Judgment denied.]

April 19, 2005

Neville Peterson LLP (*John M. Peterson*, *Maria E. Celis*, *Margaret R. Polito*, and *George W. Thompson*) for *The Pillsbury Company*.

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

Pogue, Judge: Plaintiff, The Pillsbury Company ("Pillsbury"), challenges a decision by the United States Bureau of Customs and Border Protection ("Customs" or "Defendant") classifying certain imports of ice cream. Customs classified Plaintiff's imports under subheading 2105.00.20 of the Harmonized Tariff Schedule of the United States (1999) ("HTSUS") dutiable at a rate of 51.7 cents per kilogram plus 17.5% *ad valorem*. Pillsbury asserts that Customs should have classified these imports under subheading 2105.00.10, HTSUS, and assessed a 20% *ad valorem* duty.

Before the Court are cross-motions for summary judgment. As the parties have agreed to all the essential facts, the issue presented is a pure question of law, rendering this case ripe for summary judgment. *Brother Int'l Corp. v. United States*, 26 CIT 867, 869, 248 F. Supp. 2d 1224, 1226 (2002); USCIT R. 56©). The Court has exclusive jurisdiction over this question pursuant to 19 U.S.C. § 1514 (2000) and 28 U.S.C. § 1581(a). For the reasons set forth below, the Court finds that Customs should have classified the imports in question under subheading 2105.00.10, HTSUS, and therefore grants summary judgment for the Plaintiff.

I. BACKGROUND

A.

As part of the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT"), the member states of the World Trade Organi-

zation ("WTO")[1] agreed to abolish quantitative limitations on imports of agricultural products. WTO Agreement on Agriculture, art. 4(2)[2]; *see also* 7 U.S.C. § 624(f), 7 C.F.R. § 6.20 (2005). Nevertheless, the Uruguay Round did permit member states to adopt tariff rates that are contingent on the volume of imports of a certain product, often referred to as tariff rate quotas ("TRQs"). Under the TRQ regime, the tariff rate is adjusted depending on the volume of imports of a given product into the United States during a certain year. TRQs are a departure from the absolute quota restrictions under the GATT because nations are not allowed to set specific limits on imports – rather, member states are only allowed to increase tariff rates for imports after certain levels of imports have been reached. To take a simplified version of the facts in this case as an example of a TRQ, the United States may agree to allow 5,191,031 liters of ice cream into the United States, at a tariff rate of 20% *ad valorem*, and then, after that quota level has been reached, assess a tariff rate of 51.7 cents per kilogram plus 17.5% *ad valorem* for all subsequent entries.[3] The United States, a member state of the WTO, has adopted many TRQs.

Before the Uruguay Round began, Congress expressed the negotiating objectives of the United States: to develop "(1) more open, equitable, and reciprocal market access; (2) the reduction or elimination of barriers and other trade-distorting policies and practices; and (3) a more effective system of international trading disciplines and procedures." 19 U.S.C. § 2901(a). To this end, Congress granted the President the authority to "enter into trade agreements with foreign countries; and [subject to certain limitations proclaim[4]] — (I) such modification or continuance of any existing duty, (ii) such continu-

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[1] The World Trade Organization (WTO) was created as part of the Uruguay Round and replaced the General Agreement of Tariffs and Trade ("GATT").

[2] The Agreement can be found at: http://www.wto.org/english/docs_e/legal_e/14-ag.pdf (last accessed April 11, 2005).

[3] This is one example of a TRQ. The United States' TRQs can be classified into three general categories: (1) minimum access provisions, (2) maximum access provisions, and (3) licensing provisions. *See* Def.'s Mem. Supp. Cross-Mot. Sum. J. & Opp'n Pl.'s Mot. Sum. J. ("Def.'s Mem.") at 7. Minimum access provisions establish that an aggregate quantity of a classified product "shall not exceed" a certain quantity. *See e.g.*, Chapter 20, Additional Note 4, HTSUS; Chapter 18, Additional U.S. Note 2, HTSUS. Maximum Access provisions provide that the aggregate quantity of a product "shall not exceed" the quantities specified for each state or group of states. *See* Chapter 24, Additional U.S. Note 5, HTSUS. Licensing provisions require import licenses for specified products. See Chapter 4, Additional Note U.S. 19, HTSUS; *see also* David W. Skully, Economics of Tariff-Rate Quota Administration, Technical Bulletin No. 1893, available at *http://www.ers.usda.gov/publications/tb1893/tb1893.pdf* (April 2001) (last accessed April 11, 2005) (setting out categories of administration methods of TRQs in the WTO as "applied tariffs," "first-come, first-served," "licenses on demand," "auctioning," "historical," "state trader producer group," "mixed" and "other or not specified.").

[4] The term "proclaim" means to amend the tariff laws of the United States. *See* 19 U.S.C. § 3004©).

ance of existing duty-free or excise treatment, or (iii) such additional duties; as he determines to be required or appropriate to carry out any such *trade agreement*." 19 U.S.C. § 2902 (emphasis added).

Specifically, with regard to the provisions at issue in this case, during the Uruguay Round negotiations, the United States agreed to certain commitments with regard to the importation of ice cream. This agreement is recorded as "Schedule XX" (a schedule listing the United States' tariff concessions for numerous products). *See* Schedule XX — United States of America, annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 ("Schedule XX"). Pursuant to his authority granted by Congress, i.e., 19 U.S.C. § 2902, President Clinton proclaimed portions of Schedule XX into United States law. *See* Presidential Proclamation 6763 of Dec. 23, 1994, 60 Fed. Reg. 1007, 1131 & 1137 (Jan. 4, 1995). Nearly simultaneously, Congress expressed its support for the United States' commitments under Schedule XX by providing the President specific authority to: (i) proclaim Schedule XX into U.S. law;[5] (ii) proclaim future agreements to reduce duties under the "auspices of the WTO";[6] and (iii) to correct "technical errors in Schedule XX or to make other rectifications to the Schedule."[7] *See* H.R. Rep. No. 103–826, pt. 1, at 28–29 (1994); S. Rep. No. 103–412, at 18 (1994).[8]

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[5] 19 U.S.C. § 3521(a)(1)–(3). Title 19 Section 3521 provides:

(a) In general
In addition to the authority provided by [19 U.S.C. § 2902], the President shall have the authority to proclaim—
(1) such other modification of any duty,
(2) such other staged rate reduction, or
(3) such additional duties,
as the President determines to be necessary or appropriate to carry out Schedule XX.

(b) Other tariff modifications
Subject to the consultation and layover requirements of [19 U.S.C. § 3524], the President may proclaim—
(1) the modification of any duty or staged rate reduction of any duty set forth in Schedule XX if—
(A) the United States agrees to such modification or staged rate reduction in a multilateral negotiation under the auspices of the WTO, and
(B) such modification or staged rate reduction applies to the rate of duty on an article contained in a tariff category that was the subject of reciprocal duty elimination or harmonization negotiations during the Uruguay Round of multilateral trade negotiations, and
(2) such modifications as are necessary to correct technical errors in Schedule XX or to make other rectifications to the Schedule.

[6] 19 U.S.C. § 3521(b)(1)(A).

[7] 19 U.S.C. § 3521(b)(2); *see also* Presidential Proclamation 7011 of June 30, 1997, 62 Fed. Reg. 35,909 at para. 3 (July 2, 1997). Although 19 U.S.C. § 3521 was passed after the President proclaimed Note 5, 19 U.S.C. § 3521 would have required the President to amend Note 5 to conform with Schedule XX if Note 5 had not already conformed to Schedule XX.

[8] Nevertheless, although Note 5 became part of United States law, the exact language of Note 5 was never voted on by the House and the Senate nor presented to the President for his signature. *Cf.* U.S. Const. art 1 sec. 7.

As part of these concerted actions of Congress and the President, the United States adopted a TRQ for ice cream codifying Schedule XX as Note 5 to Chapter 21, HTSUS ("Note 5").[9]

Note 5 provides:

> The aggregate quantity of ice cream entered under subheading 2105.00.10 in any calendar year shall not exceed 5,191,031 liters (articles the product of Mexico shall not be permitted or included in the aforementioned quantitative limitation and no such articles shall be classifiable therein).
>
> Of the quantitative limitations provided for in this note, the countries listed below shall have access to not less than the quantities specified below:

	Quantity (liters)
Belgium	922,315
Denmark	13,059
Jamaica	3,596
Netherlands	104,477
New Zealand	589,312

If ice cream imports fall within these limits (i.e., "in-quota"), Customs classifies the entries under subheading 2105.00.10 and assesses a 20% *ad valorem* duty rate. Subheading 2105.00.10, HTSUS. Alternatively, if the quota level is exhausted (i.e., "over-quota"), Customs classifies the entries under subheading 2105.00.20, HTSUS, and assesses a duty of 51.7 cents per kilogram plus 17.5% *ad valorem*. Subheading 2105.00.20, HTSUS. As is apparent in the language quoted above, Note 5 further provides that enumerated nations, i.e., those specifically mentioned, shall have access to a specified volume of imports regardless of how many liters of ice cream are imported from other nations. Additionally, because the amounts specifically allocated to the enumerated nations total 1,632,759 liters, far less than aggregate level allowable of 5,191,031 liters, the language implies that there exists a "common pool" which may be used by all WTO nations — including the enumerated nations if they have exceeded their minimum access quotas. For imports implicating the "common pool," Customs allocates the quota on a first-come-first-served basis. *See* 19 C.F.R. § 130 *et seq.*

What is unclear from Note 5's language, and what is at issue here, is whether ice cream imported from nations, other than those specifically listed, may qualify under the unused portions of the enumerated nations' allotments at the expiration of the year. To wit,

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[9] Although Customs initially maintained that Schedule XX and 5 conflicted, Customs now maintains that "there is no substantive conflict" between Note 5 and Schedule XX. Def.'s Supp. Mem. Resp. Chambers' Letter Dated Jan. 25, 2005, ("Def.'s Supp. Mem.") at 3.

whereas Note 5 is clear that the enumerated nations' imports may invade the "common pool" if the "common pool" has not been exhausted, the parties in this case disagree as to whether all other nations may invade the enumerated nations' unused allotments.

B.

Plaintiff is an importer of ice cream products. On March 27, 1999, an ice cream factory exploded in Le Mars, Iowa. That factory had been producing Haagen-Dazs ice cream for Pillsbury. Pl.'s Mem. Points and Authorities R. 56 Supp. Mot. Summ. J. at 2 ("Pl.'s Mem."). As a result of the explosion, Pillsbury did not have sufficient production in the United States to meet demand. Consequently, in the spring of 1999, Pillsbury imported ice cream from its Haagen-Dazs factory in France in order to meet its production needs. *Id*.

At first, Customs classified Pillsbury's entries under subheading 2105.00.10, HTSUS. However, commencing in July, 1999, 3,558,272 liters of the "common pool" had been imported and Customs then assessed Pillsbury's imports at the over-quota rate. When the quota year ended on December 31, 1999, the enumerated nations had not used their allotments. In fact, Belgium, Denmark, Jamaica, and New Zealand had shipped no ice cream to the United States during 1999, and the Netherlands had shipped only 82 liters of ice cream. *See* Pl.'s R. 56 Statement Material Facts Not in Dispute at paras. 13, 14; Def.'s Pl.s Stat. Mat. Facts at paras. 13, 14. Consequently, Customs permitted only 3,558,354 liters of ice cream to enter under the lower tariff rate. Given this short-fall, Pillsbury made a timely request to have certain of its over-quota imports reliquidated at the lower tariff rate. Customs did not respond to Pillsbury's request and, after 30 days, the protest was deemed denied. *See* 19 C.F.R. § 174.22(d). Pillsbury timely sought judicial review of Customs' denied protest.

II. STANDARD OF REVIEW

Although the parties disagree over the proper standard of review, this question is squarely addressed by the Supreme Court's decisions in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) and *United States v. Mead*, 533 U.S. 218 (2001). In *Haggar Apparel Co.*, 526 U.S. at 386–89, the Supreme Court held that when Commerce adopts regulations pursuant to notice and comment rule making, the Court should accord those regulations deference pursuant to the Supreme Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("*Chevron* deference"). However, when Customs has not issued a regulation adopted by notice and comment rule making, its interpretation of an ambiguous statute is entitled to deference only commensurate with its

power to persuade ("*Skidmore* deference"). *See Mead*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Customs argues three theories as bases for its claim of entitlement to *Chevron* deference: (1) one of its regulations, 19 C.F.R. § 133.2(c), is at issue, (2) the absence of any regulations supporting Pillbury's position, and (3) the United States Trade Representative's ("USTR") role in proclaiming modifications to the HTSUS. The Court disagrees that any of these theories implicate *Chevron* deference.

First, 19 C.F.R. § 132.2(c) states that the "terms of a Presidential proclamation, Executive order, or legislative enactment establishing a quota, and the regulations implementing the quota, must be strictly complied with." According to Customs, this regulation requires that unless the statute clearly permits the reallocation of unused quotas, then reallocation is forbidden under its regulations.[10] Alternatively, Customs argues that this regulation supports its interpretation of Note 5, and that specifically its determination as to whether Note 5 is ambiguous or unambiguous is entitled to deference. Customs' analysis, however, does not follow established administrative law.

The HTSUS is, of course, a statute. An agency's interpretation of a statute is entitled to deference only after the Court, reviewing the statute *de novo* (commonly referred to as *Chevron* Step I), finds that there is a statutory ambiguity or gap. *Gen. Dynamic Land Sys. v. Cline*, 540 U.S. 581, 600 (2004) ("Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent."), *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002) ("In the context of an unambiguous statute, we need not contemplate deferring to the agency's interpretation."); *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260 (Scalia, J. concurring) (rejecting the majority's characterization that the EEOC's decision be viewed under *Skidmore* rather than *Chevron* deference, but noting that the presumption against extraterritoriality trumps *Chevron*

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[10] This argument entirely begs the question. Customs must strictly comply with Note 5, but with what meaning applied to Note 5? Certainly regulations are the creatures of an agency's own creation, and agency interpretations of their regulations may be entitled to deference. *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997), *Cathedral Candle Co. v. United States ITC*, slip op. 04–1083 (Fed. Cir. March 9, 2005); *but cf. Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003) (Posner, J.) ("Probably there is little left of *Auer*."). But this is true only so long as the "interpretation" is not wholly erroneous. *Auer*, 519 U.S. at 461. Here, the cited regulation in no way leads to the interpretation Customs places on it – it does not mention reallocation or in any way suggest the resolution of this matter. Deferring to Customs' interpretation here would be tantamount to giving deference solely to an agency's litigation position. Moreover, the Court's conclusion is bolstered by the fact that it does not appear that Customs is even entitled to promulgate regulations entitled to deference in this matter. *See infra* at note 19.

deference).[11] In conducting this initial *de novo* review, the Court will look to the plain language of the statute, grammatical, and substantive canons of statutory interpretation, *Barnhart*, 534 U.S. at 452, *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), the statute's legislative history, *Rust v. Sullivan*, 500 U.S. 173, 186 (1991), and all other relevant tools of statutory construction, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), to determine whether Congress has spoken on the question. Whether an agency, by regulation or otherwise, deems a statute to be ambiguous or unambiguous, or should be strictly construed, is immaterial to this inquiry and Customs is not entitled to deference on this question.

Second, Customs contends that the absence of regulations supporting Plaintiff's position substantiates its position, i.e., this absence demonstrates that Customs has not adopted Pillsbury's interpretation.[12] Customs further argues that this "absence" of regulations is entitled to *Chevron* deference.

Again, Customs' analysis is does not follow established jurisprudence. Non-existent regulations are not "promulgated" through notice and comment rule making, *Haggar Apparel Co.*, 526 U.S. at 388, nor are there "any other circumstances reasonably suggesting that Congress ever thought [of Customs] as deserving the deference claimed for them here." *Mead*, 533 U.S. 218, 231. Nor do non-existent regulations offer any explanations of the law or reasoning for their legal conclusions, and consequently, non-existent regulations could not have the "power to persuade," *Id.* at 233.[13] Accordingly, this "absence" of regulations is entitled to no deference.

Customs' third argument has also been rejected by the United States Supreme Court. Despite the fact that USTR and the International Trade Commission ("ITC") have extensive authority to proclaim changes directly to the tariff schedule, Congress did not entrust them with the authority for administering the adopted tariff schedules. *Haggar Apparel Co.*, 526 U.S. at 388–89. Accordingly, it is for the "Customs Service, not for USTR or ITC, to issue regulations entitled to judicial deference in the interpretation of the tariff sched-

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[11] An agency's authority to give meaning to a statute is also only proper where Congress has so delegated that authority to an agency by leaving a statutory gap or ambiguity. The Court must first assure itself that Congress has delegated that task to an agency before any deference to that agency is warranted. Accordingly, this review is conducted *de novo. See Chevron*, 467 U.S. at 843–44.

[12] Customs contends that if Pillsbury were correct, Customs would have a procedure for reallocation. The Court finds this argument curious in the light of 19 C.F.R. § 132.13(a)(1)(i) (establishing a procedure for refunding money paid at the over-quota rate) which could be employed in this case.

[13] Of course, had Customs promulgated regulations, which occupied the interpretative field of this provision, the Court's analysis would be different. But when Customs has issued no regulations directing the enforcement of this provision, *Chevron* deference cannot be warranted.

ules." *Id*. Customs may not ride the coat-tails of USTR and ITC in claiming deference because of other agencies' authority.

Accordingly, Customs is not entitled to *Chevron* deference here. Nor is Customs entitled to *Skidmore* deference. Customs did not issue a Headquarters Letter Ruling and has provided no justification, outside of its briefs, for its actions. Moreover, Customs' only related Letter Ruling contradicts its decision in this case. Headquarter Ruling Letter 962316 (Nov. 5 1998) (recognizing that "minimum access" guarantees do not establish limits on importation). Therefore, no deference will be granted, and the Court will consider the question presented *de novo*.

III. DISCUSSION

The question presented is whether Customs must reallocate the enumerated nations' unused allotments. Consequently, at issue is the proper meaning of Note 5 to Chapter 21:

> The aggregate quantity of ice cream entered under subheading 2105.00.10 in any calendar year shall not exceed 5,191,031 liters (articles the product of Mexico shall not be permitted or included in the aforementioned quantitative limitation and no such articles shall be classifiable therein).
>
> Of the quantitative limitations provided for in this note, the countries listed below shall have access to not less than the quantities specified below:

	Quantity (liters)
Belgium:	922,315
Denmark:	13,059
Jamaica:	3,596
Netherlands:	104,477
New Zealand:	589,312

The issue that gives rise to this dispute centers around the word "access." More specifically, the question centers on what type of "access" is implicated. Customs essentially argues that there is an implied term "exclusive" before the word "access," i.e., that "the countries listed below shall have [exclusive] access to the quantities listed below." Pillsbury disagrees essentially asserting that the implied term is "the right of first" access, i.e., that "the countries listed below shall have [the right of first] access to the quantities listed below." As discussed above, Note 5 implements the United States' international commitments under Schedule XX. *See* discussion on the history of this provision *supra* at 4–6. Read in light of Schedule XX, the meaning of Note 5 is unambiguous. Consequently, the Court answers this question by reference to Schedule XX.

A.

In this case, two interrelated bedrock principles of statutory construction strongly counsel in favor of using Schedule XX as an aid in construing Note 5: the canon of constitutional avoidance and the *Charming Betsy* canon.

As Customs has conceded, the relevant statutory authorizations permitted the President to proclaim modifications to the HTSUS to bring the HTSUS in accord with the United States' international legal obligations stated under Schedule XX. *See* 19 U.S.C. §§ 2902 & 3521. If Note 5 differs from Schedule XX without good cause, the President's actions would have been *ultra vires*, i.e., exceeded his authority, and therefore his actions would have been unlawful as not in accordance with Congressional intent.

This proposition is, in part,[14] driven by the fact that the provisions of the HTSUS are "statutory provisions of law." 19 U.S.C. § 3004(c). Accordingly, any amendments thereto must conform with the strictures of Article I Section 7 of the Constitution so long as the amendments can be considered "law-making".[15] As the Supreme Court found in *Field v. Clark*, certain changes to a statutory scheme are not considered "law-making" when Congress delegates the President the authority to make changes to the law such that: (1) those changes are necessary to accommodate to future contingent (international) developments, and (2) where Congress has specifically instructed the President on how, (3) and when, the law is to be amended, leaving little to the President's discretion. *Field v. Clark*, 143 U.S. at 693–94; *see also Clinton v. City of New York*, 524 U.S. 417, 442–45 (1998); *but cf. Terran v. Secretary of HHS*, 195 F.3d

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[14] The Court notes that even if the HTSUS were a regulation, the President could still only proclaim that which he was instructed to proclaim by Congress. The only difference is the degree of discretion afforded to the President. If the HTSUS were only a regulation, Congress need only enunciate an intelligible principle, *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394, 406–410 (1928); however, given that the HTSUS is statutory law, constitutionally, the President may be accorded only limited discretion. Accordingly, any attempt to read broad discretion into Congress' authorization would be improper. *See* sources cited *infra* at note 15. This is especially true here where Customs may have discretion, through the promulgation of regulations, in the execution of the law proclaimed by the President, *see Haggar Apparel Co.*, 526 U.S. at 388, creating the possibility of two layers of deference.

[15] *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 442 (1998) (invalidating an unlawful delegation of lawmaking power), *Field v. Clark*, 143 U.S. 649, 693 (1898), *Star-Kist Foods, Inc. v. United States*, 47 CCPA 52, 60, 275 F.2d 472, 380 (1959); *see also INS v. Chadha*, 462 U.S. 919, 951 (1983); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); US Const. art. I sec. 7 ("*Every* Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President.").

The Court further notes that even at the apex of the President's inherent authority, the Court would only give effect to an executive agreement by the terms stated in the agreement. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 417 (2003) (refusing to preempt state law on the basis of an executive agreement because the agreement did not contain a preemption clause).

1302, 1313 (Fed. Cir. 1999) (suggesting in dicta that this may extend to domestic issues as well). This principle was reaffirmed in the Supreme Court's decision in *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating an unconstitutional delegation of lawmaking authority).

The Court need not dwell on this issue because Schedule XX, interpreted in light of the plain language of Note 5, contains no ambiguity regarding the issue presented here. *See infra* at § III.c. Therefore, as counseled by the canon of constitutional avoidance, the Court will give effect to that reading of Note 5 which is implicated by Schedule XX. *Clark v. Martinez*, 125 S. Ct. 716, 724 (2005) ("It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."), *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Industrial Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (overturning the Secretary of Labor's interpretation of a statute because a "construction of the statute that avoids this kind of open-ended grant should certainly be favored.") (opinion of Justice Stevens).

This proposition is reinforced by the *Charming Betsy* canon of statutory construction. "For two centuries [courts] have affirmed that the domestic law of the United States recognizes the law of nations." *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2765 (2004). One important way the courts have recognized this principle is through the invocation of the *Charming Betsy* canon of statutory construction. Appropriately named after the Supreme Court's decision in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)), the *Charming Betsy* canon holds that "an act of congress ought never be construed to violate the law of nations, if any other possible construction remains." *Charming Betsy*, 6 U.S. (2 Cranch) at 118. In this case, the United States has accepted obligations to permit specified levels of ice cream into the United States at certain duty levels under Schedule XX. To suggest that there is a conflict between Schedule XX and Note 5 would offend the well settled principle that the abrogation of international agreements by implication is strongly disfavored. *See e.g.*, *Weinberger v. Rossi*, 456 U.S. 25, 35 (1982) ("affirmative congressional expression [is] necessary to evidence an intent to abrogate provisions in 13 international agreements"), *United States v. Lee Yen Tai*, 185 U.S. 213, 221 (1902) ("the purpose by statute to abrogate a treaty or any designated part of a treaty . . . must not be lightly assumed, but must appear clearly and distinctly from the words used in the statute"), *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 237–38 (D.C. Cir. 2003) (neither a treaty nor executive agreement will be deemed abrogated unless Congress clearly expresses its intent). Pursuant to this principle, unless Note 5 explicitly conflicts with the United States' international

obligations, *see e.g.*, *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963), *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889), the Court should endeavor to read Note 5 in harmony with Schedule XX. This conclusion is rendered unavoidable by the fact that Congress specifically expressed its intent that the United States comply with its international legal obligation, rather than clearly expressing an intent to abrogate the United States' international commitment. *See* 19 U.S.C. §§ 2902 & 3521; *see also* 19 U.S.C. § 2901 (expressing the aspiration for reciprocal and fair trade); *cf. Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466, 2479 (2004) (employing Congressional instructions as an interpretative aid).

B.

Schedule XX provides in relevant part:

> There shall be permitted entry an aggregate quantity of ice cream, entered under subheading 2105.00.10 during any calendar year, of not less than the total quantity specified below.
>
> | | *Quantity* (liters) |
> |---|---|
> | 1995 | 3,283,772* |
> | 1996 | 3,760,587* |
> | 1997 | 4,237,402* |
> | 1998 | 4,714,216* |
> | 1999 | 5,191,031* |
> | 2000 and thereafter | 5,667,846* |
>
> * Of the quantitative limitation provided for in this note, an access level is reserved as follows:
>
> | | *Quantity* (liters) |
> |---|---|
> | Belgium | 922,315 |
> | New Zealand | 589,312 |
> | Denmark | 13,059 |
> | Netherlands | 104,477 |
> | Jamaica | 3,596 |
>
> An additional aggregate quanitity of 366,000 liters is reserved for Mexico under this note and additional note 3 to chapter 4 combined.
>
> The quantitative limitation established by this note may be administered through regulations (including licenses and reallocation of the unfilled quotas) issued by the Secretary of Agriculture.

The Court construes international agreements in a manner similar to its interpretation of statutes. "The analysis must begin . . . with the text of the treaty and the context in which the written words are used." *Air France v. Saks*, 470 U.S. 392, 396–97 (1985). Because "treaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words," *Rocca v. Thompson*, 223 U.S. 317, 332 (1912), the courts must "give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties," *Air France*, 470 U.S. at 399. The plain language of Schedule XX demonstrates why Customs' argument must fail.

Schedule XX explicitly provides that "[t]here shall be permitted entry an aggregate quantity of ice cream, entered under subheading 2105.00.10 during [1999], of not less than . . . 5,191,031 [liters]." The unavoidable conclusion that this language requires reallocation is demonstrated by the facts of this case. In 1999, the United States imported no ice cream from Belgium, Denmark, Jamaica, and New Zealand and only imported 82 liters from the Netherlands. Accordingly, (and as Customs administered the matter in this instance) only 3,448,354 liters entered under subheading 2105.00.10, HTSUS. Therefore, Customs did not "permit[ ] entry an aggregate quantity of ice cream . . . of not less than . . . 5,191,031" liters; rather, Customs permitted entry of an aggregate quantity far less than required by Schedule XX to be entered under subheading 2105.00.10, HTSUS. This plain reading of Schedule XX clearly dictates why Customs' interpretation is untenable.[16] *See, e.g., Soc'y for Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 490 (1823) ("Where the language of the parties is clear of all ambiguity, there is no room for construction."); *cf. Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 469 (2005) (" 'there is no canon against using common sense in construing laws as saying what they obviously mean.' ") (quoting *Roschen v. Ward*, 279 U.S. 337, 339 (1929)).

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[16] When pressed at oral argument, Customs averred that this language only requires the United States to permit a certain access level and because the United States made available the opportunity for importation of the requisite aggregate quantity of ice cream, it fulfilled its duty under Schedule XX. However, this argument betrays the plain language of the first clause. *See* Def.'s Mem. Reply Pl.'s Opp. Def.'s Cross-Mot. Summ. J. at 10 ("Schedule XX, to the contrary, indicates that the aggregate quantity of ice cream must be 'not less than the total quantity specified below'. . . . Schedule XX affirmatively sets forth a minimum aggregate amount of ice cream which may be imported from all countries."). Moreover, Customs' argument creates tension with the word "entered." In order for products to be "entered under subheading 2105.00.10," HTSUS, something must occur (i.e., be "entered, or withdrawn from [a] warehouse for consumption, in the customs territory of the United States" pursuant to U.S. Additional Note 19, HTSUS) – not the mere possibility of entry occurring. Even if the Court were to have any doubt, the canon of liberal construction would apply resolving the ambiguity in favor of the Court's reading. *See infra* at 29.

That Schedule XX employs the word "shall" demonstrates that the United States agreed to provide not less than this minimum access level. The word "shall," generally speaking, imposes a requirement. That this is a mandatory requirement is reinforced when the word "shall" is viewed in contraposition to the Section's later use of the word "may," i.e., "the Department of Agriculture may regulate." *Cf. Jama v. Immigration and Customs Enforcement*, 125 S. Ct. 694, 703 (2005). Therefore, the plain text of Schedule XX requires that the United States allow 5,191,031 liters into the United States at the reduced tariff rate regardless of whether the enumerated nations have exhausted their reserved allotments.

Customs departs from this common sense reading even though, in its initial briefs to the Court, it maintained that the plain language of Schedule XX conflicted with its interpretation of Note 5, i.e., that Schedule XX required reallocation but Note 5 did not, and therefore there was a conflict between the two.[17] Customs now advances three arguments as to why reallocation is not required. First, Customs alleges that the term "reserved" signals that the United States is not required to reallocate. Second, it argues that the permission to regulate (including reallocation) suggests that reallocation is not required. Third, it submits a correspondence from the Embassy of New Zealand interpreting such provisions. The Court will address each argument in turn.

1.

First, Customs points to the word "reserved," i.e., "[o]f the quantitative limitation provided for in this note, an access level is *reserved* as follows," claiming that the word "reserved" means that Customs is not required to reallocate unused quotas. Citing *Webster's Third New international Dictionary of the English Language* 1930 (1993), Customs argues that the word "reserved" means "to keep in store for future or special use: hold or keep in reserve . . . to set aside or apart –

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[17] In its initial brief Customs argued: "Pillsbury quotes a WTO document referred to as 'Schedule XX' which indicates that the aggregate quantity of ice cream would be 'not less than the total quantity specified below.' If this language was in Additional U.S. Note 5 to Chapter 21, HTSUS, there would be some merit to Pillsbury's claim. However, the language in Additional U.S. Note 5 is quite different." Def.'s Mem. at 12 n.1; *see also* Def.'s Mem. Reply Pl.'s Opp. Def.'s Cross-Mot. Summ. J. at 10 ("Schedule XX, to the contrary, indicates that the aggregate quantity of ice cream must be 'not less than the total quantity specified below'. . . . Schedule XX affirmatively sets forth a minimum aggregate amount of ice cream which may be imported from all countries.").

Concerned by Customs' representations in its initial brief, the Court requested that the parties submit supplemental briefs on the question of whether Note 5 and Schedule XX conflicted. The Court permitted a month to submit a ten-page response. Customs twice asked for extensions citing the need to conduct "a significant" amount of research. The six page submission by Customs cited a single authority: the Webster's Third New International Dictionary. Customs failed to even address the "not less than" language of Schedule XX in its supplemental submission to the Court.

usu. with *to* or *for* . . . ." Def.'s Supp. Mem. at 5 n.2 (emphasis in original). As this definition indicates, "reserved" means to keep for a "special use." However, when that "special use" has expired, i.e., the time that the enumerated nations may use their allotments has elapsed, the definition of "reserved" is not implicated.

Moreover, Customs' interpretation departs from the cardinal principle that international agreements should be read holistically. *Air France v. Saks*, 470 U.S. 392, 396–97 (1985) ("The analysis must begin . . . with the text of the treaty and the context in which the written words are used"), *cf. Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 466–67 (2005). According to this principle, any meaning ascribed to the word "reserved" should, if possible, be read in harmony with the rest of the Section's scheme. As previously discussed, the plain language requires that the overall aggregate level permitted into the United States be not less than 5,191,031 liters. Customs' reading of "reserved" would needlessly set the two parts of the Section in tension as it would suggest the aggregate level of actual imported ice cream could be less than 5,191,031 liters. This reading of "reserved" would also conflict with the word "aggregate," i.e., "[t]here shall be an *aggregate quantity*" of ice cream admitted into the United States. The word "aggregate" suggests that all actual entries are considered in determining the TRQ rate – not that the enumerated nations' allotments are hermetically sealed from the unenumerated nations' allocations. Customs' interpretation ignores this word in the Section.

Customs' argument is further undercut by another claim it makes: that Customs may reallocate unused quotas so long as it is done by regulation. If the term "reserved" had the meaning Customs ascribed to it, then it could not reallocate unused quotas. That Customs agrees that it may reallocate unused quotas undermines the import Customs places on the word "reserved."[18]

2.

Next Customs argues that Schedule XX grants the Department of Agriculture ("Agriculture") the authority to "administer through regulations (including licenses and reallocation of the unfilled quotas)" the TRQ. Therefore, Defendant argues, Agriculture must promulgate regulations for reallocation if reallocation is to be allowed –

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[18] The Court further notes that when the drafters wanted to make an access level separate from the aggregate level, it stated so explicitly, as Mexico's allotment illustrates. *See* Schedule XX ("An *additional* aggregate quantity of 366,000 liters is reserved for Mexico under this note and additional U.S. note 3 to chapter 4 combined.") (emphasis added). Accordingly, where the drafters intended that an enumerated allotment be insulated from access by other nations it used language quite different from the "an access level is reserved" language at issue here.

because Agriculture has not promulgated regulations, Defendant asserts, no reallocation is permitted.[19]

First, the language on which Customs focuses in no way detracts from, or qualifies, the absolute language of the first clause, i.e., the "shall be permitted" clause. In essence, Customs reads the "administered through regulations" language as stating that the United States "may *only*" reallocate through regulation, thereby defeating the mandate of the first clause if no regulation is promulgated. However, the language admits of no such restriction and the Court will not imply one.[20]

Moreover, contrary to Customs' supposition, the "administered through regulations" language detracts from, rather than supports, its argument. This conclusion is best evidenced when considered in the context of international trade law. *See, e.g., Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) ("words [of the treaty] are to be taken in their ordinary meaning, as understood in the public law of nations, and not in any artificial or special sense impressed upon them by local law "), *The Pizarro*, 15 U.S. (2 Wheat.) 227, 243 (1827)(Story, J.). Generally, under international trade law, nations are always free to grant more liberal trade concessions than those to which they have agreed. *Cf.* Schedule XX ("There shall be permitted entry an aggregate quantity of ice cream . . . of not less than the total specified below."). If a nation so desired, it could eradicate all of its tariffs without violating international law. However, the reverse is not true – if the United States has agreed to a certain tariff rate, it cannot raise that rate without violating its international agreements. This principle sheds light on the meaning of the clause upon which Customs relies. If the United States did not have to reallocate, stipulating that it could reallocate by regulation would be senseless — of course it could reallocate. Rather, the sensible reading is that Schedule XX allows the United States to encumber reallocation through regulations established by Agriculture.[21] Such regulations could, for example, permit Agriculture to provide a procedure for reallocation.[22]

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[19] The Court notes that this language grants Agriculture the authority to establish regulations, not Customs. Therefore, any deference would flow to Agriculture, thereby further undermining Customs' claim for *Chevron* deference. *See Haggar Apparel Co. v. United States*, 526 U.S. at 388.

[20] The Court further notes that this language is standard disclaimer language found in all of the United States' TRQs which allocate quotas to nations (or groups of nations), including maximum access provisions. This broad usage reinforces the Court's reading that this language is not intended to derogate rights created by the operative language used in the other portions of the ice cream TRQ. Rather, this usage suggests that the United States wanted the "administered through regulations" language to recognize its use of regulations in adopting license and reallocation provisions of in-quota imports.

[21] The Court further notes that the word "regulation" means "[t]he act or process of controlling by rule or restriction." *Black's Law Dictionary* 1311 (8th ed. 2004).

[22] As the Supreme Court noted in *Geofroy v. Riggs*, "the treaty power of the United States extends to all proper subjects of negotiation between our government and the gov-

Even if the Court were to have any doubt, the oft-quoted maxim of liberal construction would counsel in favor of reallocation: if " 'a treaty fairly admits two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.' " *United States v. Stuart*, 489 U.S. 353, 368 (1989) (quoting *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150, 163 (1940)). Pursuant to this maxim, the Court should, and does, prefer recognizing that Schedule XX requires reallocation of unused allotments.

3.

Last, Customs points to a letter from the Embassy of New Zealand to the United States International Trade Commission, opposing the reallocation of unused in-quota allotments for beef imports and expressing its opinion that the TRQ for beef "is a minimum access opportunity, not an obligation; the United States is not required to import 656,621 tonnes of beef each year."[23] Letter from Ambassador John Wood, New Zealand, to Chairman, United States International Trade Commission, Re: *Cattle and Beef: Impact of the NAFTA and Uruguay Round Agreements on U.S. Trade* (March 13, 1997), Exhibit B to Def.'s Mem. In its original submissions Customs erroneously cited this authority as bearing on the interpretation of United States' law while, at the same time, arguing that the United States had appropriately departed from its international legal obligations. When the United States has departed from international norms, constructions of U.S. statutes by foreign governments are wholly irrelevant. *Accord Roper v. Simmons*, 125 S. Ct. 1183, 1199–1200 (2005) (looking to international sources to interpret the Eighth Amendment because the Eighth Amendment embraced, rather than conflicted with, international norms). This is especially true given that courts grant only a modicum of deference to Customs regarding its interpretation of U.S. law – why the Court would be swayed by the position of foreign governments on U.S. law is unclear.

Nonetheless, reframing of the issue as an interpretation of Schedule XX does make this submission arguably probative. Courts have

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ernments of other nations[.]" 133 U.S. at 266. Under Customs' proposed construction, why the internal allocation of authority of regulatory power of the United States is addressed when the United States already has the full authority to regulate (and prohibit) is left unexplained. In other words, under Customs' reading, this provision would simply be an attempt by USTR to enlarge Agriculture's authority when the rights of foreign nations were not implicated. Under such a reading, it is hard to see how the language would have been the proper subject of negotiations between our government and foreign governments.

[23] The Court notes that the actual language of the Ambassador's letter appears to address a matter not at issue here, i.e., whether the U.S. may reallocate, and thereby limit, New Zealand's access level if its allotment is not used. The Court's conclusion here in no way abridges New Zealand's, or any of the enumerated nations' rights, under Schedule XX. Customs must keep the enumerated nations' access levels open to those nations until the end of the year, and then only reallocate any unused quota for that year.

long recognized that contract states' post-ratification understanding may be consulted in construing an international agreement. *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 227–28 (1996). Nevertheless, unilateral actions taken by a single foreign state are rarely persuasive especially when those actions violate the letter and spirit of the international agreement. *Cf. In re Kaine*, 55 U.S. (14 How.) 103, 113 (1853) ("What Great Britain has done by its legislation, cannot control our decision; we must abide by our own laws. If theirs are inconvenient, or supposed to violate the spirit of the treaty, it is the duty of our government to complain, and ask that they be reformed."); *Sullivan v. Kidd*, 254 U.S. 433, 442 (1921). Customs has failed to corroborate its proffered interpretation with any minutes of the Uruguay Round negotiations or any other authoritative source. Moreover, this position appears contrary to the prior position of our own government, which required reallocation.[24] *See* Headquarter Ruling Letter 962316 (Nov. 5 1998).[25] Consequently, this submission is unpersuasive.

C.

Given that Schedule XX unambiguously requires reallocation of unused quotas, the Court now considers whether Note 5 is at odds with this interpretation. The Court finds that it is not.

Note 5's most significant departure from Schedule XX is that it frames the issue in the negative rather than the positive. Whereas Schedule XX specifies that the United States "shall permit" certain quota levels, Note 5 states that imports "shall not exceed." The Court does not consider this a meaningful divergence. The only other significant variation is that Note 5 states that enumerated nations

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[24] In fact, in 2000, the United States proposed the following before the WTO:

> **Reallocation:** Many TRQ administrative practices, particularly the use of import licenses, do not permit sufficient reallocation to allow exporters to fill TRQs. The United States proposes that members develop new disciplines on license reallocation, such as requirements that licensees surrender unused licenses if they cannot arrange shipments within specified time periods. Members would reallocate, in a timely fashion, unused licenses to provide sufficient commercially viable opportunities for other importers, including new entrants.

Proposal for Tariff Rate Quota Reform: Submission from the United States, G/AG/NG/W/58 (Nov. 14, 2000) available at *http://docsonline.wto.org/DDFDocuments/t/G/AG/NGW58.doc* (last accessed April 15, 2005). Customs has not submitted any interpretation of the ice cream TRQ, or any other TRQ, by the United States Trade Representative (the Agency charged with negotiating and enforcing other nations' compliance with TRQ's) that may shed light on the TRQ's meaning at issue here.

[25] Customs attempts to discount this Ruling Letter by asserting that there is a slight variance in the wording between Note 5 and the provision at issue in the Ruling Letter. Assuming that Customs is correct in noting that the variance in language does not establish this Ruling Letter as clear precedent, then Customs' citation to the New Zealand Letter must also fail as Customs has failed to prove that the language that gave rise to the letter is identical to the provision in question here.

shall have "access" to certain allotment whereas Schedule XX says the allotments are "reserved" for the enumerated nations. Again this variation is immaterial and, if anything, supports the Court's interpretation because "access" is more permissive than the word "reserved." Certainly, these departures, when read in light of the plain language of Schedule XX, do not render Note 5 ambiguous.

Therefore, upon application of the canon of constitutional avoidance and the *Charming Betsy* canon, the Court incorporates the unambiguous interpretation of Schedule XX into the meaning of Note 5. Consequently, the Court deems that Note 5 requires Customs to reallocate the unused quotas of the enumerated nations.

IV. CONCLUSION

For the foregoing reasons, the Court deems that Note 5 requires Customs to reallocate unused quotas. Accordingly, Plaintiff's motion for summary judgment is granted and Defendant's motion for summary judgment is denied.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C05/6 4/4/05 Carman, J.	A.D. Sutton & Sons	03–00468	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	Los Angeles PVC Bottle bags, etc.
C05/7 4/4/05 Carman, J.	A.D. Sutton & Sons	03–00501	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	Los Angeles PVC Vinyl Diaper Bags
C05/8 4/6/05 Pogue, J.	A.D. Sutton & Sons	99–10–00654	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	New York PVC Cooler Bags, etc.
C05/9 4/12/05 Pogue, J.	Preh Elecs.	03–00052	8537.10.90 3.2%	8471.60.20 Free of duty	Agreed statement of facts	Chicago Keyboards
C05/10 4/12/05 Pogue, J.	Ugine Stainless & Alloys, Inc.	01–00967	7223.00.10 7222.20.00 Various rates	7222.20.00 Various rates	Agreed statement of facts	Philadelphia New York Shaved stainless steel wire rod
C05/11 4/15/05 Ridgway, J.	Pomeroy Collection, Inc.	01–00143	MX7013.99.50 24%	MX9405.50.40 Free of duty	Agreed statement of facts	Laredo Flower pot votives

ABSTRACTED VALUATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*VALUATION*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
V05/1 4/12/05 Pogue, J.	La Perla Fashions, Inc.	03–00439	Transaction value	Invoice price actually paid by LPF to the exporter, Gruppo La Perla, S.p.A. of Italy	Agreed statement of facts	New York Wearing apparel
V05/2 4/13/05 Wallach, J.	Heng Ngai Jewelry, Inc.	98–10–03019	—	Invoice unit price + 24.6%	Agreed statement of facts	Anchorage San Francisco Various styles of jewelry