Slip Op. 05–105

BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE

HYUNDAI ELECTRONICS INDUSTRIES CO., LTD. and HYUNDAI ELECTRONICS AMERICA, INC., Plaintiffs, v. UNITED STATES, Defendant, and MICRON TECHNOLOGY, INC., Defendant-Intervenor.

PUBLIC VERSION
Cons. Court No. 00–01–00027

[Commerce antidumping duty remand determination sustained in part and remanded in part.]

Dated: August 25, 2005

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OPINION

GOLDBERG, Senior Judge: This case is before the Court following remand to the United States Department of Commerce ("Commerce"). In *Hyundai Electronics Industries Co. v. United States*, 28 CIT ___ , 342 F. Supp. 2d 1141 (2004) ("*Hyundai I*"), familiarity with which is presumed, the Court sustained in part and remanded in part Commerce's determination in the fifth administrative review regarding Dynamic Random Access Memory semiconductors of one megabit or above ("DRAMs") from the Republic of Korea produced by Hyundai Electronics Industries Co., Ltd. and Hyundai Electronics America, Inc. (collectively "Hyundai") and LG Semicon Co., Ltd.

("LG Semicon").[1] *See Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Duty Administrative Review and Determination Not To Revoke the Order in Part*, 64 Fed. Reg. 69694 (Dec. 14, 1999) ("*Final Results*").

In *Hyundai I*, the Court found that Commerce was justified in applying only *partial* adverse facts available ("AFA") against LG Semicon in determining its dumping margin. *See Hyundai I*, 28 CIT at ___, 342 F. Supp. 2d at 1155. The Court concluded that while Commerce was correct in applying AFA against LG Semicon for its German sales to [ ] ("the customer") because LG Semicon knew or should have known that DRAMs sold to the customer were destined for the United States, the use of *total* AFA was not warranted because Commerce erred in using AFA for LG Semicon's Mexican sales to [ ]. *Id.* With respect to Plaintiffs' research and development ("R&D") costs, the Court held that Commerce had not adduced substantial evidence to support its theory of cross-fertilization, which allowed the inclusion of R&D expenditures for non-subject merchandise in calculating the cost of producing the subject merchandise. *See id.* at ___, 342 F. Supp. 2d at 1157. Additionally, the Court found that Commerce had not provided specific evidence demonstrating why Plaintiffs' amortized R&D costs did not reasonably account for their actual R&D costs during the period of review, or how Plaintiffs' currently deferred R&D costs affected production and revenue for the review period. *Id.* at ___, 342 F. Supp. 2d at 1159.[2]

The Court remanded the matter to Commerce with instructions to: (1) recalculate LG Semicon's dumping margin using the data provided by LG Semicon for its Mexican sales, and applying AFA only for LG Semicon's sales to the customer's German subsidiary; (2) provide additional information specifically pointing to theeffect of non-subject merchandise R&D on the R&D for the subject merchandise, or in the alternative, recalculate R&D costs on the most product-specific basis possible; (3) provide specific evidence explaining how Plaintiffs' actual R&D costs for the review period are not reasonably

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

[2] In addition to these holdings relevant to the issues considered here, the Court in *Hyundai I* also found that: (1) Commerce did not violate LG Semicon's right to a fair and honest proceeding; (2) Commerce's calculation of Hyundai's R&D cost allocation ratio was reasonable; (3) Hyundai did not provide sufficient evidence of double counting by Commerce; and (4) Commerce's treatment of Hyundai's interest earned on severance deposits was reasonable. *See Hyundai I*, 28 CIT at ___, ___, ___, ___, 342 F. Supp. 2d at 1149–53, 1159–60, 1160, 1161–62.

accounted for in their amortized R&D costs, or in the alternative, accept Plaintiffs' amortization methodology; and (4) present substantial evidence demonstrating how R&D costs for Plaintiffs' long-term projects affect their current projects for the period of review, or in the alternative, accept Plaintiffs' deferral methodology. *See id.* at ___ , ___ , ___ , ___ , 342 F. Supp. 2d at 1155, 1157, 1159, 1159.

Commerce duly complied with the Court's order. Commerce issued draft *Redetermination Results* (Aug. 12, 2004) ("*Draft Remand Results*") and then, after receiving comments from Plaintiffs and Defendant-Intervenor Micron Technology, Inc. ("Micron"), the *Final Results of Redetermination Pursuant to Court Remand* (Aug. 31, 2004) ("*Remand Results*"). In the *Remand Results*, Commerce recalculated LG Semicon's dumping margin and applied a new rate of 89.10 percent, which Commerce concluded was "the highest non-aberrational margin calculated for any U.S. transaction for LG [Semicon] in the period of review[.]" *Remand Results* at 4. Commerce also complied with the Court's request for more information regarding its theory of cross-fertilization by providing scientific articles, new expert testimony, and the titles of some of Hyundai's development projects. *Id.* at 4–5, 11–14. In addition, although it expressed disagreement with the Court's findings regarding amortization in *Hyundai I*, Commerce stated that it could not provide specific evidence showing how amortization did not reasonably account for Plaintiffs' actual R&D costs incurred during the period of review. *Id.* at 5. Thus, Commerce recalculated Plaintiffs' R&D costs to allow for amortization. *Id.* Finally, Commerce continued to find that Plaintiffs' deferred R&D costs should be expensed in the period incurred because Plaintiffs did not offer any reasonable evidence demonstrating how their deferred costs would have discernible future benefits. *Id.* at 6, 22.

Plaintiffs submitted Comments on the Final Results of Redetermination ("Pls.' Br."), and Micron submitted a Memorandum Addressing the Final Results of Redetermination Pursuant to Court Remand ("Def.-Intvr.'s Br."). Commerce then submitted its Response to Plaintiffs' and Defendant-Intervenor's Comments. Plaintiffs subsequently submitted Response Comments on the Final Results of Redetermination, and Micron submitted a Response Brief Addressing Plaintiffs' Comments.

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

I. *DISCUSSION*

A. Commerce's Decision to Apply a Margin of 89.10 Percent as Partial AFA Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In *Hyundai I*, the Court held that Commerce was justified in applying *partial* AFA to LG Semicon's German sales, but not in applying *total* AFA to LG Semicon's entire U.S. sales database. *See Hyundai I*, 28 CIT at ___ , 342 F. Supp. 2d at 1153–55. With respect to LG Semicon's German sales, the Court sustained Commerce's finding that LG Semicon knew or should have known that the DRAMs it sold to the customer's German subsidiary were destined for the U.S. market, and that its failure to submit these German sales as U.S. sales justified the use of AFA under 19 U.S.C. § 1677e(b). *Id.* at ___ , 342 F. Supp. 2d at 1155. However, with respect to LG Semicon's Mexican sales, the Court found that Commerce did not meet the requisite standard for applying AFA. *Id.* Thus, the Court ordered Commerce to recalculate LG Semicon's dumping margin using AFA only for LG Semicon's sales to the customer's German subsidiary. *Id.*

Commerce complied with the Court's instructions and calculated a new AFA rate of 89.10 percent. *See Remand Results* at 2–4. In choosing this rate, Commerce stated that it selected the highest non-aberrational margin calculated for any of LG Semicon's U.S. transactions during the period of review.[3] *See id.* at 4. Commerce also noted that the 89.10 percent rate fell within "a range of margins for a large portion of LG [Semicon]'s review period transactions that decrease[d] steadily by small amounts." *Id.* Finally, Commerce observed that the new rate was sufficiently adverse to ensure that LG Semicon would not have obtained a more favorable result by failing to cooperate than if it had cooperated fully, and also furthered the statutory purpose underlying the AFA rule to induce respondents to provide Commerce with complete and accurate information in a timely manner. *See id.*

1. The 89.10 Percent Rate Is Non-Aberrational.

Plaintiffs argue that Commerce failed to explain why the 89.10 percent rate is non-aberrational, while the other marginsabove it are aberrational. Pls.' Br. at 3. According to Plaintiffs, Commerce's discretion in applying AFA is not unlimited; rather, Commerce must demonstrate why a particular AFA rate is indicative of a respondent's selling practices and rationally related to its sales. *Id.* Here, Plaintiffs contend, Commerce failed to demonstrate in the Remand

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[3] Calculated rates ranging as high as 223 percent were actually available for LG Semicon on remand. *See Remand Results* at 4.

Results that the 89.10 percent rate is indicative of LG Semicon's sales, andtherefore non-aberrational. *Id.*

The Court disagrees for two reasons. First, the Court finds that the 89.10 percent rate is inherently indicative of LG Semicon's selling practices because it was derived from LG Semicon's "own sales data from the instant review segment." *Remand Results* at 8. When Commerce utilizes a respondent's own sales data, it is afforded broad discretion in the selection of the adverse rate, and this is true even if the selected rate is reflective of only a small proportion of the respondent's sales. *See Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002). Thus, although the 89.10 percent rate chosen by Commerce may be higher than other calculated margins, this fact alone does not render the AFA rate aberrational or unrelated to LG Semicon's sales practices.

Second, the Court finds that Commerce did adequately explain in the *Remand Results* why the 89.10 percent rate is non-aberrational: "[T]he margin selected falls in a range of margins for a large portion of LG [Semicon]'s review period transactions that decrease steadily by small amounts." *Remand Results* at 8. The record evidence clearly shows that the selected 89.10 percent margin is within a grouping of sales whose margins differ by very small amounts (*e.g.*, 89.10 percent, [ ] percent, [ ] percent, and [ ] percent), while several sales margins ([ ]) above 89.10 percent range from [ ] percent to 223 percent and do not form a cluster. *See* Confidential Administrative Record ("Conf. Admin. R.") at Ex. 8 (SAS Margin Program Log and Output dated Aug. 28, 2004) at 54. In contrast to this record evidence supporting Commerce's determination, Plaintiffs did not provide any evidence showing how the 89.10 percent rate is aberrational, or otherwise unreflective of LG Semicon's selling practices. As a result, the Court finds that the 89.10 percent rate selected by Commerce on remand is non-aberrational.

2. The 89.10 Percent Rate Is Not Unduly Punitive.

Plaintiffs also argue that the 89.10 percent rate is unduly punitive and excessive. Pls.' Br. at 3. Plaintiffs assert that this new rate is sixteen times greater than Hyundai's previous dumping margin and almost eighteen times greater than LG Semicon's previous margin. *See id.* at 4. Additionally, Plaintiffs note that while LG Semicon's weighted-average dumping margin was 10.44 percent under total AFA, this margin rose to 15.87 percent upon Commerce's application of only partial AFA toLG Semicon's German sales. *See id.* at 3–4. Concluding that LG Semicon has been made worse off with partial AFA than with total AFA, Plaintiffs argue that Commerce has failed to create an incentive for foreign companies to cooperate in administrative reviews, and that Congress's intention to strike "a balance between deterrence for non-compliance and assuring a reasonable

margin" has not been achieved. *Id.* at 4 (*quoting F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000)).

The Court, however, finds that the 89.10 percent rate selected by Commerce upon remand is neither unduly punitive nor excessive. First, Commerce acts within its discretion and does not "overreach reality" so long as the "selected . . . dumping margin [is] within the range of [the respondent's] actual sales data[.]" *See Ta Chen*, 298 F.3d at 1340. Here, because Commerce selected an AFA rate from a range of margins calculated using LG Semicon's own sales data, Commerce did not abuse its discretion. Moreover, the new rate of 89.10 percent is in fact lower than several ([ ]) other margins Commerce calculated for LG Semicon, and therefore is not excessive.

Second, the 89.10 percent rate is not rendered unduly punitive simply because it is higher than the previous rate calculated using total AFA. As the Court has already noted, new margins ranging as high as 223 percent became available for LG Semicon's sales practices after the Court ordered the recalculation in *Hyundai I*. *See Remand Results* at 4. Since 19 U.S.C. § 1677e(b) does not prohibit Commerce from including suchnew sales in its remand calculations, Commerce was free to select an AFA rate incorporating these new margins, even though that meant assigning a higher rate to LG Semicon under partial AFA than under total AFA.

Finally, the Court rejects Plaintiffs' assertion that Commerce failed to create an incentive to cooperate in administrative reviews, and also failed to strike a balance between deterrence and assuring a reasonable margin. If LG Semicon had correctly reported certain sales it knew or should have known were destined for the United States, Commerce would not have applied AFA at all, and the mere fact that LG Semicon received a higher rate on remand does not diminish its incentive to cooperate more fully in future reviews in an effort to avoid the application of AFA. In addition, the issue of whether Commerce properly balanced deterrence with providing a reasonable margin is inapposite, because the Court has already determined that Commerce did provide LG Semicon with a reasonable margin. The 89.10 percent rate is a non-aberrational rate that was derived from LG Semicon's own sales data. Consequently, the margin was within Commerce's discretion to select and must be considered reasonable. *See Ta Chen*, 298 F.3d at 1339.

Accordingly, Commerce's decision on remand to apply an AFA rate of 89.10 percent is supported by substantial evidence and otherwise in accordance with law.

B. Commerce's Treatment of Plaintiffs' R&D Costs Is Sustained in Part and Reversed and Remanded in Part.

In *Hyundai I*, the Court found that Commerce did not offer substantial evidence in support of its cross-fertilization theory. *Hyundai*

I, 28 CIT at ___ , 342 F. Supp. 2d at 1157. The Court also held that Commerce's decision to reject Plaintiffs' amortization of R&D costs was not supported by substantial evidence. *See id.* at ___ , 342 F. Supp. 2d at 1157–59. In addition, the Court found that Commerce failed to provide specific record evidence showing how deferred R&D costs actually affect production and revenue for the period of review. *Id.* at ___ , 342 F. Supp. 2d at 1159.

On remand, Commerce (1) provided additional factual information in support of its cross-fertilization theory; (2) recalculated Plaintiffs' R&D costs to allow for amortization; and (3) continued to find that Plaintiffs' R&D costs should beexpensed in the period incurred, instead of being deferred. *See Remand Results* at 4–6. Plaintiffs challenge Commerce's findings with respect to cross-fertilization and deferral of R&D expenses, while Micron challenges Commerce's finding with respect to amortization of R&D expenses.

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

In *Hyundai I*, the Court rejected Commerce's suggestion that "intrinsic benefits . . . occur between R&D expenditures on non-subject merchandise and production of subject merchandise," and that "R&D costs for non-subject merchandise [therefore] should be included in the cost of production analyses." *Hyundai I*, 28 CIT at ___ , 342 F. Supp. 2d at 1156. Specifically, the Court found that Commerce failed to offer substantial evidence in support of its cross-fertilization theory because the findings of its expert, Dr. Murzy Jhabvala, were based on a prior antidumping investigation that concerned "different products and different parties" than those at issue in *Hyundai I*. *Id.* at ___ , 342 F. Supp. 2d at 1156–57. Thus, the Court remanded for Commerce "to provide additional information specifically pointing to the effect of non-subject merchandise R&D on the R&D for the subject merchandise, or alternatively, [to] recalculat[e] R&D costs on the most product-specific basis possible for both LG Semicon and Hyundai." *Id.* at ___ , 342 F. Supp. 2d at 1157.

On remand, Commerce complied with the Court's request for additional information by providing three exhibits that were originally submitted for the record of the fifth administrative review by Micron. *See* Def.-Intvr.'s Br. at Ex. 2 (Micron's Submission of Factual Information dated Dec. 18, 1998) at Doc. 1(a) (Memorandum from Dr. Murzy Jhabvala dated Sept. 8, 1997) ("Jhabvala Letter 1"); *id.* at Doc. 1(b) (World Technology Evaluation Center Report on the Korean Electronics Industry dated Oct. 1, 1997) ("WTEC Report"); *id.* at Doc. 2 (Memorandum to the File from Dr. Murzy Jhabvala dated Dec. 18, 1997) ("Jhabvala Letter 2"); *id.* at Doc. 3 (Letter from Eugene Cloud dated Oct. 15, 1997) ("Cloud Letter"); *id.* at Doc. 3(a) (Attachment A Articles dated Sept.-Oct. 1997) ("Attachment A Articles");

id. at Doc. 3(b) (Attachment B Articles dated Oct. 1997) ("Attachment B Articles"). Commerce also presented the names of certain research projects that were conducted by Hyundai in non-memory IC labs but featured the word "DRAM" in their titles. *See Remand Results* at 14.

Plaintiffs maintain that the additional factual information supplied by Commerce suffers from the same deficiencies as the information on which Commerce initially relied – namely, the new evidence does not relate to non-subject merchandise, and it does not specifically address Plaintiffs' operations. Pls.' Br. at 5. Moreover, Plaintiffs contend, simply because the word "DRAM" is in a project does not provide substantial evidence that the R&D actually relates to DRAM development. *Id*. at 7.

The Court agrees that the additional information provided by Commerce on remand does not constitute substantial evidence of cross-fertilization between DRAMs and non-DRAM merchandise with respect to R&D costs in this case. First, as in *Hyundai I*, the new evidence on which Commerce relies does not demonstrate "direct contact or experience with Plaintiffs' practices during this review[,]" but rather concerns "different products and different parties to that of the current review[.]" *Hyundai I*, 28 CIT at ___, 342 F. Supp. 2d at 1157. In fact, Jhabvala Letter 1 is the same document rejected by the Court in *Hyundai I*, while Jhabvala Letter 2 is based on similar research from a prior antidumping investigation that involved different parties and products. *See* Jhabvala Letter 1 at 1–2; Jhabvala Letter 2 at 1–2. Moreover, the WTEC Report referenced by Commerce only refers to Plaintiffs' DRAM market shares, and only mentions DRAM R&D in the context of industry-wide research goals – it does not address Plaintiffs' specific R&D operations or production practices. *See* WTEC Report at 4–9. Finally, the Cloud Letter, Attachment A Articles, and Attachment B Articles all fail to mention Plaintiffs by name, and none demonstrates direct contact with Plaintiffs' R&D practices during the review.[4] *See* Cloud Letter at 1–3; Attachment A Articles at 1–3; Attachment B Articles at 1–14.

Second, Commerce's additional information fails to "specifically point[ ] to the effect of non-subject merchandise R&D on the R&D for the subject merchandise[.]" *Hyundai I*, 28 CIT at ___, 342 F. Supp. 2d at 1157. Both Jhabvala Letter 1 and Jhabvala Letter 2 argue that cross-fertilization occurs within the semiconductor industry, but the evidence and research contained therein deal exclusively with

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[4] The Attachment A Articles fail to mention either Plaintiffs or the subject merchandise, while the Attachment B Articles only discuss how DRAM technology has been applied to Application Specific Integrated Circuits ("ASICs") by other firms. *See* Attachment A Articles at 1–3; Attachment B Articles at 3, 6–7, 9–10. Likewise, the Cloud Letter does not name Plaintiffs once; instead, it was written in response to "letters submitted by Dr. Bruce Wooley on behalf of ISSI and Dr. David Angel on behalf of Samsung." Cloud Letter at 1.

SRAMs rather than the subject merchandise DRAMs. *See* Jhabvala Letter 1 at 1–2; Jhabvala Letter 2 at 1–2. Similarly, the WTEC Report discusses only an industry-wide goal of utilizing DRAM R&D to improve SRAM production; it does not establish that SRAM R&D actually benefits DRAM R&D.[5] *See* WTEC Report at 8–9. Moreover, Mr. Cloud's focus and expertise, like that of Dr. Jhabvala, is on SRAMs rather than DRAMs, and the various technological developments discussed in the Attachment A and B Articles fail to identify any specific effect on R&D for the subject merchandise.[6] *See* Cloud Letter at 1–3; Attachment A Articles at 1–3; Attachment B Articles at 1–14.

Finally, Commerce's apparent reliance on the names of Hyundai's R&D projects is misplaced. According to Commerce, the names of three research projects "[c]learly [show] Hyundai was conducting [memory] research during the POR in its [non-memory] IC Lab[, which] clearly indicate[s] that in the semiconductor industry, there is enough similarity among semiconductor products and process technology objectives, that advances from R&D for one type of semiconductor product can benefit other semiconductor products." *Remand Results* at 14. However, as the Court has previously explained, the simple recitation of R&D project titles does not constitute substantial evidence of cross-fertilization. *Hynix Semiconductor, Inc. v. United States*, 28 CIT ___ , ___ , 295 F. Supp. 2d 1365, 1372 (2003). Thus, the Court holds that Commerce's presentation of the names of Hyundai's R&D projects does not establish that non-subject merchandise R&D benefits subject merchandise R&D.

Accordingly, the Court finds that Commerce failed to provide substantial evidence to support its theory of cross-fertilization. The Court therefore remands this issue to Commerce with instructions to recalculate Plaintiffs' R&D costs on the most product-specific basis possible.

2. Commerce's Decision to Accept Plaintiffs' Amortization of R&D Expenses Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In disapproving Commerce's initial refusal to accept Plaintiffs' amortization of R&D costs, the Court in *Hyundai I* rejected Commerce's finding that "Plaintiffs' practice of 'continually changing' [accounting] methodologies produces 'aberrationally high amounts of R&D

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[5] Furthermore, the WTEC Report does not indicate that Plaintiffs have achieved, or even share, the industry-wide goal of using DRAM technology to increase SRAM capacity. *See* WTEC Report at 8–9.

[6] The Attachment A Articles deal with copper metallization technology and do not mention DRAMs. *See* Attachment A Articles at 1–3. The Attachment B Articles merely note that DRAM technology has been introduced into the design of ASICs. *See* Attachment B Articles at 1–14. There is no specific explanation of how these various advancements directly impact DRAM R&D. *See id.*

expense in some years, and aberrationally low amounts of R&D expense in other years, that do not reasonably reflect [production] costs.' " *Hyundai I*, 28 CIT at ___ , 342 F. Supp. 2d at 1158 (*quoting Final Results*, 64 Fed. Reg. at 69699). The Court stated that "Plaintiffs' previous changes in accounting methodology are not relevant in this case as the Court is concerned with the actions of the parties with respect to their R&D costs only for this period of review." *Id*. The Court also dismissed Commerce's concern that the inadvertent result of the change in accounting practice would allow Plaintiffs to recognize less than one-fifth of the current year's R&D costs. *Id*. (*citing Final Results*, 64 Fed. Reg. at 69699). According to the Court, "in switching from expensing to amortization, a difference in costs will likely occur, as amortization by definition permits the allocation of costs over the market life of the product, while expensing costs during the period incurred necessarily implies a one-time charge." *Id*. Therefore, the Court remanded to Commerce "to provide specific evidence regarding how Plaintiffs' actual R&D costs for this period of review are not reasonably accounted for in its amortized R&D costs." *Id*. at ___ , 342 F. Supp. 2d at 1159.

On remand, Commerce stated:

> We believe that in the *Final Results*, we fully explained, and supported with substantial evidence, our positions regarding the amortization of LG [Semicon]'s and Hyundai's R&D costs. Nevertheless, the Court has found that the information cited by the Department does not constitute substantial evidence supporting this determination. Therefore, although we disagree with the Court's findings, we have recalculated LG [Semicon]'s and Hyundai's R&D costs to allow for amortization.

Remand Results at 5.

Micron urges that, although Commerce conceded it was unable to comply with the Court's request that it provide additional evidence in support of its determination regarding amortization, Commerce actually did point to such evidence in the *Remand Results*.[7] *See* Def.-Intvr.'s Br. at 1. The Court, however, has carefully reviewed Commerce's discussion of the amortization issue in the *Remand Results*, *see Remand Results* at 5, 17–19, and finds that it is noticeably void

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[7] In addition to this argument, the Court notes that Micron's Memorandum Addressing the Final Results of Redetermination Pursuant to Court Remand, which was filed on September 30, 2004, is largely comprised of arguments regarding the alleged incompatibility between the Court's decision in the instant proceeding and the Court's decision in *Micron Technology, Inc. v. United States*, 23 CIT 380 (1999), as well as a section explaining why portions of the Court's reasoning in *Hyundai I* are, in Micron's view, "irrelevant." *See* Def.-Intvr.'s Br. at 10–15, 16. As such, Micron's brief is more akin to a motion for rehearing and reconsideration of the Court's April 16, 2004 decision in *Hyundai I* – something the Court declines to entertain at this late stage. *See* USCIT R. 59(b) ("A motion for a . . . rehearing shall be served and filed not later than 30 days after the entry of the judgment or order.").

of any "*specific evidence* regarding how Plaintiffs' actual R&D costs for this period of review are not reasonably accounted for in its amortized R&D costs[,]" which is what the Court instructed Commerce to provide on remand. *Hyundai I*, 28 CIT at ___ , 342 F. Supp. 2d at 1159 (emphasis added). Moreover, the concerns expressed by Commerce in the *Remand Results* were already considered and rejected by the Court in *Hyundai I*.

Accordingly, the Court sustains Commerce's decision to accept Plaintiffs' amortization of R&D expenses for purposes of calculating the cost of production.

3. Commerce's Rejection of Plaintiffs' Deferral of R&D Expenses Is Not Supported by Substantial Evidence.

In *Hyundai I*, the Court held that Commerce failed to provide specific evidence demonstrating why Plaintiffs' deferred R&D costs should be allocated into the cost of production calculation. *Hyundai I*, 28 CIT at ___ , 342 F. Supp. 2d at 1159. In particular, the Court was unconvinced by Commerce's argument that "the practice of indefinite deferral of R&D costs is inconsistent with the conservatism principle in accounting[,]" since "Plaintiffs point[ed] out that their [deferral] methodology, which is in accordance with Korean GAAP, does follow the principle of conservatism in accounting."[8] *Id*. Thus, after observing that "[o]nly R&D costs that are related to the production and revenue of the subject merchandise for the review period should be included in Commerce's calculations[,]" *see* 19 U.S.C. § 1677b(f)(1)(A), the Court remanded to Commerce toprovide "specific evidence on the record to show that R&D costs that are currently deferred actually affect production and revenue for this review period." *Hyundai I*, 28 CIT at ___ , 342 F. Supp. 2d at 1159.

On remand, Commerce continues to rely upon general accounting principles in support of its determination that R&D expenditures for long-term projects should be included in the current cost of production calculation.[9] *See Remand Results* at 5, 22–23. In addition, Commerce faults Plaintiffs for failing to offer any "reasonable evidence to indicate that their deferred [R&D] costs will benefit future periods." *Id*. at 6.

In response, Plaintiffs claim they did provide substantial evidence demonstrating that "the future benefits of [DRAM] research are both readily discernible and imminent at the time of the expenditures."

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[8] Conservatism in accounting calls for the recognition of expenses when incurred if the probability of associated revenue is remote or uncertain. *Hyundai I*, 28 CIT at ____ , 342 F. Supp. 2d at 1159.

[9] Specifically, Commerce cites to both International Accounting Standard 9 and U.S. GAAP to assert that "R&D should not be deferred because the future economic benefits cannot be quantified and measured with a reasonable degree of certainty." *Remand Results* at 22.

Pls.' Br. at 12 (*citing* Supplement to Hyundai's Appendix of the Administrative Record at CR 42 (Hyundai Cost Verification Exhibit 10 and Report dated June 11, 1999) at Ex. 10(a), 10(c)). Plaintiffs also note that Commerce failed on remand to show even one example of how R&D for long-term projects impacted projects for the current review period. *Id.* at 9. Finally, Plaintiffs contend that Commerce erroneously shifted its burden of providing additional information on remand to Plaintiffs. *Id.*

The Court agrees that Commerce failed to provide specific evidence in the *Remand Results* showing how Plaintiffs' "R&D costs that are currently deferred *actually affect* production and revenue for this review period." *Hyundai I*, 28 CIT at ___ , 342 F. Supp. 2d at 1159 (emphasis added). By continuing to cite to general accounting principles on remand, Commerce is merely attempting to resurrect its previous argument, which the Court already rejected in *Hyundai I*, that the future benefits of deferred R&D costs are unquantifiable.[10] The general accounting principles on which Commerce relies do not directly address any of Plaintiffs' expenditures for long-term R&D projects, and they do not explain how such R&D costs might affect revenue and production for the current review period, which is what the Court ordered Commerce to consider on remand. Moreover, since it was the burden of Commerce – not Plaintiffs – to provide additional information on remand, Commerce's assertion that Plaintiffs failed to offer "reasonable evidence" in defense of R&D deferral improperly shifts the burden of providing additional information to Plaintiffs. *See Remand Results* at 6.

Accordingly, because Commerce entirely failed to comply with the Court's instructions in *Hyundai I* to provide specific evidence showing how deferred R&D costs actually affect production and revenue for the current review period, the Court remands to Commerce with instructions to accept Plaintiffs' deferral methodology in calculating R&D expenses for the cost of production.

C. Commerce Properly Decided to Correct an Error in the Calculation of Hyundai's Entered Value.

After Commerce issued the *Draft Remand Results*, Micron raised a challenge to Commerce's calculation of Hyundai's total entered value. *See* Conf. Admin. R. at Ex. 2 (Micron's Comments on the Draft Final Results of Redetermination dated Aug. 18, 2004) at 11–13. According to Micron, the margin program used by Commerce to calcu-

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[10] In *Hyundai I*, Commerce claimed that Plaintiffs' practice of indefinite deferral of R&D costs was inconsistent with the conservatism principle in accounting because the probability of associated revenue was remote or uncertain. *Hyundai I*, 28 CIT at ____ , 342 F. Supp. 2d at 1159. In the *Remand Results*, Commerce again "conclude[s] that R&D should not be deferred because the future economic benefits cannot be quantified and measured with a reasonable degree of certainty." *Remand Results* at 22.

late Hyundai's entered value improperly multiplied quantity and value variables that were stated in inconsistent units of measure, which led to an erroneously low importer-specific assessment rate. *See id.* at 12. In response, Plaintiffs agreed with Micron that Commerce should address the miscalculation issue, but Plaintiffs further argued that Hyundai's entered value should also include *all* of the sales made by Hyundai Electronics America, Inc. ("HEA") – not just the sales that HEA resold to U.S. customers. *See* Conf. Admin. R. at Ex. 3 (Hynix's Rebuttal to Micron's Comments on the Draft Final Results of Redetermination dated Aug. 23, 2004) at 7–8 ("Pls.' Draft Reply Br."). In the *Remand Results*, Commerce made the programming changes suggested by Micron, but did not address the issue raised by Plaintiffs. *Remand Results* at 32.

Plaintiffs now contend that Commerce and Micron were time barred from revisiting the calculation methodology for Hyundai's entered value. Pls.' Br. at 15. In addition, Plaintiffs argue that Commerce's change to the entered value calculation did not involve correcting "a mere clerical error." *Id.* at 16. Finally, Plaintiffs assert that if Commerce is permitted to change its calculation of the entered value at all, then it should include all of HEA's sales transactions in the calculation. *Id.* at 17–19.

1. Commerce Properly Corrected the Ministerial Error in the Calculation of Hyundai's Entered Value Identified by Micron.

With respect to Plaintiffs' first issue, the Court finds that although Plaintiffs allege Commerce and Micron were time barred from recalculating Hyundai's entered value, in reality it is Plaintiffs who are barred from objecting to the recalculated entered value, because Plaintiffs have reversed their agency position on appeal. After Commerce released the *Draft Remand Results*, Plaintiffs did not object to Micron's argument regarding the improper multiplication of the entered value, and in fact "*agree[d]* that the Department should address this issue." Pls.' Draft Reply Br. at 7 (emphasis added). On appeal, Plaintiffs now contend that Commerce and Micron were time barred from addressing the miscalculation at all. *See* Pls.' Br. at 15.

The Court has repeatedly held that "a party may not reverse the position it took before the agency and raise contrary arguments on appeal" because this "den[ies Commerce] the opportunity to review plaintiffs' arguments" and "deprive[s] the other parties of their right to respond to plaintiffs' position." *Calabrian Corp. v. United States Int'l Trade Comm'n*, 16 CIT 342, 347, 794 F. Supp. 377, 383 (1992). Plaintiffs have clearly reversed their agency position on appeal; therefore, the Court will not entertain Plaintiffs' new objection to the calculation of Hyundai's entered value.

Moreover, even if Plaintiffs were not barred from reversing their agency position on appeal, their objection to Hyundai's recalculated

entered value would nonetheless fail on the merits. First, Commerce "may, with or without a party's request, correct errors that it reasonably regards as ministerial in final determinations." *Shandong Huarong Gen. Corp. v. United States*, 25 CIT 834, 848, 159 F. Supp. 2d 714, 727 (2001) (*quoting Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1103, 901 F. Supp. 353, 361 (1995)), *aff'd sub nom. Shandong Huarong Gen. Group Corp. v. United States*, Appeal No. 02–1095 (Fed. Cir. Jan. 10, 2003). Here, because the calculation of Hyundai's entered value involved multiplying quantity and value variables that were stated in inconsistent units of measure, the calculation was clearly an "error in addition, subtraction, or other arithmetic function," and Commerce therefore correctly regarded the miscalculation as a ministerial error. *See* 19 C.F.R. § 351.224(f) (defining "ministerial error").

Second, the Court itself has a responsibility to "exercise its discretion to prevent knowingly affirming a determination with errors." *Torrington Co. v. United States*, 21 CIT 1079, 1082 (1997); *see also Fed.-Mogul Corp. v. United States*, 18 CIT 1168, 1172, 872 F. Supp. 1011, 1014 (1994). At various stages of this review, all parties have agreed that the *Draft Remand Results* contained a miscalculation of Hyundai's entered value. *See Remand Results* at 31–32; Pls.' Draft Reply Br. at 7. Therefore, the Court would be "knowingly affirming a determination with errors" if it did not sustain the correction made by Commerce in the *Remand Results*. *Torrington*, 21 CIT at 1082.

Accordingly, Commerce's recalculation of Hyundai's entered value in the *Remand Results* is sustained.

2. Commerce Properly Refused to Address Plaintiffs' Challenge to the Calculation Methodology for Hyundai's Entered Value.

The Court also affirms Commerce's decision not to address Plaintiffs' argument concerning the inclusion of all HEA's sales in Hyundai's entered value. "While Commerce is required to allow respondents to correct clerical errors discovered late in the administrative process, clerical errors are distinguished from substantive errors and do not encompass methodological modifications." *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT ___ , ___ , 353 F. Supp. 2d 1294, 1304 (2004). Clerical, or ministerial, errors are defined as "error[s] in addition, subtraction, or other arithmetic function, clerical error[s] resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 C.F.R. § 351.224(f); *see also Maui Pineapple Co. v. United States*, 27 CIT ___ , ___ , 264 F. Supp. 2d 1244, 1261 (2003) (*quoting Certain Fresh Cut Flowers From Colombia; Final Results of Antidumping Duty Administrative Reviews*, 61 Fed. Reg. 42833 (Aug. 19, 1996)).

Although Plaintiffs claim that Commerce made an incorrect entered value calculation, Commerce's decision to use only HEA's U.S. sales in calculating Hyundai's entered value was not an "error in addition, subtraction, or other arithmetic function," did not involve "inaccurate copying [or] duplication," and was not an "unintentional error." 19 C.F.R. § 351.224(f). Rather, the decision to exclude HEA's non-U.S. sales involved many issues of methodology and fact,[11] and Commerce intentionally rejected Plaintiffs' alternative methodology because "the record does not appear to contain the data necessary to support Hyundai's claim." *Remand Results* at 33. Thus, unlike the miscalculation identified by Micron, Plaintiffs' challenge does not involve a clerical error, and Commerce therefore properly refused to address this issue in the *Remand Results.*

II. *CONCLUSION*

For the aforementioned reasons, the *Remand Results* are sustained in part and reversed and remanded in part. A separate order will be issued accordingly.

Slip Op. 05–106

HYNIX SEMICONDUCTOR INC., HYNIX SEMICONDUCTOR AMERICA INC., Plaintiffs, v. UNITED STATES, Defendant, and INFINEON TECHNOLOGIES, NORTH AMERICA CORP. and MICRON TECHNOLOGY, INC., Defendant-Intervenors.

Before: Richard W. Goldberg, Senior Judge

Court No. 03–00651

[Commerce's final affirmative countervailing duty determination remanded for further consideration and explanation of financial contribution analysis.]

Dated: August 26, 2005

Willkie, Farr & Gallagher, LLP (*Daniel Lewis Porter* and *James Philip Durling*) for Plaintiffs Hynix Semiconductor Inc. and Hynix Semiconductor America Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Alessandris*) for Defendant United States.

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[11] These issues included (1) the extent of HEA's transshipped sales to third countries; (2) whether Customs could distinguish between entries destined for the United States and those destined for third countries; and (3) whether transshipped entries should have been included in the assessment rate calculation. *See* Pls.' Br. at 17–19; Def.-Intvr.'s Br. at 17–19.

King & Spalding, LLP (*Gilbert Bruce Kaplan* and *Cris R. Revaz*) for Defendant-Intervenor Micron Technology, Inc.

Collier, Shannon, Scott, PLLC (*Kathleen W. Cannon*) for Defendant-Intervenor Infineon Technologies North America Corp.

OPINION

Goldberg, Senior Judge: In this action, Plaintiffs Hynix Semiconductor Inc. and Hynix Semiconductor America Inc. (together, **"Hynix"**) challenge the final affirmative determination of the United States Department of Commerce (**"Commerce"**) in the countervailing duty proceedings involving dynamic random access memory semiconductors (**"DRAMS"**) from the Republic of Korea (**"Korea"**). *See Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37122 (Dep't Commerce June 23, 2003) (final determination), *as amended by* 68 Fed. Reg. 44290 (Dep't Commerce July 28, 2003) (amended final determination) (together, the "***Final Determination***"); *see also Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 47546 (Dep't Commerce Aug. 11, 2003) (notice of countervailing duty order).[1] Pursuant to USCIT Rule 56.2, Hynix moves for judgment on the agency record. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c).

I. BACKGROUND

A. Precipitating Events

Hynix is a Korean DRAMS producer with a history of poor financial performance dating from the late 1990s. *See* Appendix to Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Administrative Record (**"Def.'s App."**), App. 4 (Memorandum from Deputy Assistant Secretary to Assistant Secretary dated March 31, 2003) at 3–5 (analyzing Hynix's financial records from 1997 to 2002). In response to its deteriorating performance, Hynix underwent financial restructuring from approximately December 2000 to October 2001. Defendant's Memorandum in Opposition to Plaintiffs' Motion for Judgment on the Agency Record (**"Def.'s Br."**) at 8–9. During this ten-month period, four events formed the major part of the restructuring: (1) execution of a

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[1] The *Final Determination* was also challenged by the Korean government before the World Trade Organization (the **"WTO"**). *See WTO Dispute Settlement Proceeding Regarding Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, 69 Fed. Reg. 34413 (USTR June 21, 2004) (notice and request for comment) (providing notice of Korean government request to establish WTO dispute settlement panel concerning DRAMS countervailing duty investigation). The result of these WTO proceedings has no bearing on the Court's review of Commerce's regulations and practices at issue in this case. *See* 19 U.S.C. § 3533(g) (1999) (describing statutory scheme which must be observed in order to change otherwise valid agency policy to conform to WTO ruling).

ten-bank syndicated loan to Hynix (December 2000); (2) enrollment of Hynix in the Korean government's 'Fast Track' program which allowed repackaging and refinancing of rapidly maturing bonds (January 2001); (3) execution of a seventeen-bank debt restructuring package in favor of Hynix contingent on a successful international equity offering by Hynix (May 2001); and (4) execution of a seventeen-bank debt and debt-to-equity restructuring package in favor of Hynix (October 2001). *Id.* at 8–12; Plaintiffs' Memorandum In Support of Its Rule 56.2 Motion for Judgment on the Agency Record (**"Pls.' Br."**) at 11–13. These events necessarily involved the participation of Hynix's multiple creditors, which formed a creditors council including at least seventeen specialized government entities, majority government-owned financial institutions, and private financial institutions. Def.'s Br. at 10; Pls.' Br. at 11–13. Among these creditors was Citibank, a non-Korean financial institution. Def.'s Br. at 12. Together with its affiliate Solomon Smith Barney (**"SSB"**), Citibank also served as a paid financial adviser to Hynix during its restructuring. *Id.* at 6.

B. Commerce's Investigation

On November 1, 2002, Defendant-Intervenor Micron Technology, Inc. (**"Micron"**), a domestic DRAMS producer, filed a petition with Commerce and the United States International Trade Commission (the **"ITC"**) alleging that Hynix[2] had received financial assistance from the Korean government during its restructuring which had resulted in an adverse impact on the DRAMS industry in the United States (the **"U.S."**). Def.'s Br. at 3. Commerce initiated a countervailing duty investigation shortly thereafter. *Random Access Memory Semiconductors from the Republic of Korea*, 67 Fed. Reg. 70927 (Dep't Commerce Nov. 27, 2002) (initiation of countervailing duty investigation). In connection with the preliminary phase of the investigation, Commerce issued questionnaires to the Korean government and Hynix and received responses and comments. Def.'s Br. at 3–4. On April 7, 2003, Commerce issued an affirmative preliminary countervailing duty determination. *Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 16766 (Dep't Commerce Apr. 7, 2003) (preliminary determination).

Commerce then commenced its final countervailing duty investigation, which included additional questionnaires and a two-week visit to Korea to conduct on-site verification of questionnaire re-

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[2] Because the petition generally alleged that Korean manufacturers, producers, or exporters of DRAMS were receiving countervailable subsidies, Commerce's investigation also included Samsung Electronics Industries Co., Ltd. (**"Samsung"**), another major Korean DRAMS producer/exporter. Ultimately finding that Samsung received *de minimis* subsidies, Commerce made a negative countervailing duty determination as to Samsung. *Final Determination* at 37124. Commerce's conclusions related to Samsung are not at issue in this case and Samsung is therefore not discussed.

sponses. Def.'s Br. at 4. While in Korea, Commerce met with Hynix employees, Korean government officials, several of Hynix's creditors, and a number of unnamed Korean financial experts. Pls.' Br. at 2–3. Following verification, Commerce received case and rebuttal briefs from all parties and held a hearing on June 6, 2003. Def.'s Br. at 4–5.

C. Commerce's *Final Determination*

As a result of its investigation, on June 23, 2003, Commerce issued the *Final Determination* and a supplemental decision memorandum incorporated therein. *See* Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea, Inv. No. C–580–851, (Dep't Commerce June 16, 2003), *available at* http://ia.ita.doc.gov/frn/summary/korea-south/03-15793-1.pdf (**"Decision Memo"**). In its *Final Determination*, Commerce concluded that Hynix had been the recipient of substantial indirect subsidies during its ten-month restructuring, which Commerce viewed to be a clandestine subsidy program orchestrated by the Korean government. Decision Memo at 20–21. According to Commerce, these subsidies came about when the Korean government caused or coerced financial institutions to participate in Hynix's restructuring by making preferential loans and debt-to-equity swaps. *Id.*

To reach this conclusion, Commerce invoked its authority to countervail benefit-conferring financial contributions made by private parties pursuant to government direction, as described in 19 U.S.C. § 1677(5)(B)(iii).[3] *Id.* at 21. Commerce interpreted this statute to mean that, "if a government affirmatively causes or gives responsibility to a private entity or group of private entities to carry out what might otherwise be a governmental subsidy function[,]" a financial contribution would exist which, if benefit-conferring, would constitute a countervailable subsidy. *Id.* at 47.

To determine if Hynix's restructuring involved financial contributions of the type described in 19 U.S.C. § 1677(5)(B)(iii), Commerce employed a two-part methodology: (1) Commerce examined "whether the [Korean government] had in place during the relevant period a *governmental policy* to support Hynix" and (2) Commerce considered "whether evidence on the record establishe[d] a *pattern of practices* on the part of the [Korean government] to act upon that policy to entrust or direct lending decisions" as part of Hynix's restructuring. *Id.*

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[3] This statute provides, in pertinent part:

> A subsidy is described in this paragraph in the case in which an authority . . .
>
> (iii) makes a payment to a funding mechanism to provide a financial contribution, or *entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments, to a person and a benefit is thereby conferred.*

19 U.S.C. § 1677(5)(B) (1999) (emphasis added).

at 49 (emphasis added). On the basis of the evidence derived from this methodology, Commerce found that substantial evidence supported the conclusion that, with the exception of Citibank, Hynix's creditors were subject to a program of government direction during Hynix's restructuring and, as a result of this direction, had made financial contributions to Hynix. *Id.* at 49. Emphasizing a ten-month subsidy "program" theory, Commerce found that "the [Korean government's] role was essential at each stage in directly supporting the restructuring process through its own actions and by directing, facilitating, and guiding the actions taken by creditor banks." *Id.* at 49. Accordingly, Commerce concluded that the Korean government had entrusted or directed Hynix's creditors to provide Hynix with loans and debt-to-equity swaps which constituted potentially countervailable financial contributions. *Id.* at 62. Further, Commerce concluded that by providing these financial contributions, Hynix's creditors had effectively performed a "governmental subsidy function[.]" *Id.* at 47.

Commerce next considered whether these financial contributions had conferred a benefit to Hynix, thus rendering them countervailable under 19 U.S.C. § 1677(5)(B)(iii). *Id.* at 6–11, 90–92. To make this determination, Commerce attempted to compare the financial contributions under investigation to commercial benchmarks, *i.e.*, similar loans or equity infusions made by independent actors to Hynix under market conditions. *Id.* However, Commerce determined that no commercial benchmarks were available, eliminating from consideration loans and equity infusions made by the independent Citibank because of its involvement in Hynix's restructuring and the financial contributions under investigation. *Id.* Accordingly, Commerce analyzed Hynix to determine if the company was otherwise creditworthy or equityworthy during its restructuring, despite the lack of commercial benchmarks to this effect. *Id.* at 11, 91–92. Commerce determined that Hynix was neither. *Id.* As a result, Commerce concluded that Hynix would not have been able to attract loans or equity investment from reasonable commercial sources during its restructuring and, therefore, the financial contributions which Hynix received from its government-directed creditors conferred a countervailable benefit. *Id.*

II. STANDARD OF REVIEW

The Court must sustain the *Final Determination* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1999).

Concerning the substantial evidence requirement, the U.S. Supreme Court has defined this term to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" taking into account the record as a whole. *Pierce v. Underwood*,

487 U.S. 552, 565 (1988) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It "requires more than a mere scintilla" but is satisfied by "something less than the weight of the evidence. . . ." *Luoyang Bearing Factory v. United States*, 27 CIT ___ , ___ , 288 F. Supp. 2d 1369, 1370 (2003) (citations omitted). In conducting its review, it is insufficient for the Court to find "that the evidence supporting [Commerce's] decision is substantial when considered by itself. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 17 CIT 146, 149, 818 F. Supp. 348, 353 (1993) (citation omitted). However, the Court "may not reweigh the evidence or substitute its own judgment for that of [Commerce]." *Acciai Speciali Terni S.p.A. v. United States*, 28 CIT ___ , ___ n.14, 350 F. Supp. 2d 1254, 1267 n.14 (2004) (citation omitted). Instead, the Court's function is to ascertain "whether there is evidence which could reasonably lead to [Commerce]'s conclusion." *PPG Indus. v. United States*, 978 F.2d 1232, 1237 (Fed. Cir. 1992) (citations omitted). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* (citations omitted).

Concerning the accordance with law requirement, the Court applies two-part *Chevron* analysis to its review of Commerce's statutory interpretations in the context of a countervailing duty determination. *Allegheny Ludlum Corp. v. United States*, 367 F.3d 1339, 1343 (Fed. Cir. 2004) (*citing Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). First, the Court determines "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842. "If the statute is silent or ambiguous with respect to the specific issue," however, the Court second considers "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. If so, the Court must defer to the agency's reasonable statutory interpretation. *Id.* at 844.

Further, "[t]he deference granted to the agency's interpretation of the statutes it administers extends to the methodology it applies to fulfill its statutory mandate." *GMN Georg Muller Nurnberg AG v. United States*, 15 CIT 174, 178, 763 F. Supp. 607, 611 (1991) (*citing Chevron*, 467 U.S. at 844–45; *Amer. Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986); *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984); *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404, 636 F. Supp. 961, 966 (1986), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987)).

III. DISCUSSION

A. Summary of Analysis

This case involves an alleged program of indirect subsidies of the type described in 19 U.S.C. § 1677(5)(B)(iii). That section of the countervailing duty statute[4] sets forth a three-prong test to prove the existence of a countervailable subsidy: Commerce must prove 1) the making of a *financial contribution* by a private entity to another private entity pursuant to government entrustment or direction, 2) the exercise of a *government subsidy function* in the provision of that financial contribution, and 3) the existence of a *benefit* from that financial contribution to its recipient. The proper interpretation and application of the 'entrusts or directs' language of 19 U.S.C. § 1677(5)(B)(iii) – which establishes the existence of a financial contribution[5] -is the central issue in this case and a matter of first impression for the Court.

For the reasons that follow, the Court concludes that Commerce's interpretation of the 'entrusts or directs' language in this case is in accordance with law. Congressional intent, Commerce's past practice, and this Court's jurisprudence clearly support Commerce's decision to interpret the 'entrusts or directs' language broadly so as to include a single program of financial contributions involving multiple financial institutions directed by a foreign government. Under 19 U.S.C. § 1677(5)(B)(iii), Commerce may lawfully analyze countervailable financial contributions on a program basis rather than engage in a micro-analysis of each transaction making up the alleged program. Further, Commerce's chosen methodology for proving such a program is sound. While a finding by Commerce of a program of entrusted or directed financial contributions must be supported by substantial evidence, 19 U.S.C. § 1677(5)(B)(iii) does not require Commerce to produce conclusive evidence of entrustment or direction of each entity involved in each transaction making up an alleged program. Rather, Commerce may lawfully support a finding of entrustment or direction with direct and circumstantial evidence drawn from across the alleged program (but not necessarily including conclusive evidence for each party or each transaction in the alleged program), so long as the cumulated evidence and the reasonable inferences drawn therefrom sufficiently connect all the

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[4] References to the countervailing duty statute are to the Tariff Act of 1930, as amended by, *inter alia*, the Uruguay Round Agreements Act, 19 U.S.C. §§ 1671 *et seq*.

[5] It is uncontested that, if proven to be entrusted or directed by the Korean government, the loans and debt-to-equity swaps made by Hynix's creditors would constitute financial contributions for purposes of 19 U.S.C. § 1677(5)(B)(iii). *See* 19 U.S.C. § 1677(5)(D) (1999) (defining "financial contribution" to include "the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees").

implicated parties and transactions to the alleged program of government entrustment or direction.

Nonetheless, the Court is compelled to remand the *Final Determination* because of errors in Commerce's application of its methodology in this case. While Commerce may allege a program of government entrustment or direction under 19 U.S.C. § 1677(5)(B)(iii), Commerce must consider counterevidence indicating that the transactions making up that alleged program were formulated by an independent commercial actor (not a government) and motivated by commercial considerations. Here, Commerce neglected to explain the influential role of Citibank/SSB and the aberrational presence of commercial contingencies in Hynix's restructuring as part of its financial contribution analysis. These serious errors require remand of the portion of the *Final Determination* concerning Commerce's financial contribution analysis for further consideration and explanation before the Court may undertake its substantial evidence review. Because the Court is remanding on the threshold issue of the existence of potentially countervailable financial contributions, the Court does not yet reach the parties' arguments concerning other aspects of the *Final Determination* (*i.e.*, Commerce's governmental subsidy function analysis and benefit analysis). The Court's conclusions are discussed more fully below.

B. Commerce's Statutory Interpretation and Methodology Are In Accordance with Law

As an initial matter, Hynix generally objects to Commerce's decision to frame the parties and transactions at issue in this case as participating in a single "program" of entrustment or direction. Pls.' Br. at 16. Hynix contends that this generalized program theory and associated evidentiary approach obscure the more specific inquiry required by the 'entrusts or directs' language of 19 U.S.C. § 1677(5)(B)(iii) and is contrary to law. *Id.* at 15–17; Plaintiffs' Reply to Defendant's and Defendant-Intervenor's Memorandum In Opposition to Plaintiffs' Rule 56.2 Motion for Judgment on the Agency Record (**"Pls.' Reply"**) at 1–5, 7.

The Court understands Hynix's objection to include two separate arguments: (1) an appropriate interpretation of the statutory language does not permit Commerce to pursue a program theory of entrusted or directed financial contributions and (2) regardless of whether a program theory is permissible, Commerce's methodology must include an analysis of each investigated party and transaction separately and produce evidence of entrustment or direction on that basis. For the reasons that follow, the Court rejects Hynix's arguments and upholds both Commerce's statutory interpretation and methodology.

1. Commerce's Statutory Interpretation of the 'Entrusts or Directs' Language To Include a Single Program of Government-Directed Financial Contributions Involving Multiple Financial Institutions and Multiple Transactions Is In Accordance with Law

Hynix argues that Commerce erred by framing each transaction made by each financial institution at issue as a single government-directed program of financial contributions. Pls.' Br. at 16. Instead, Hynix contends that 19 U.S.C. § 1677(5)(B)(iii) establishes a standard whereby Commerce must separately analyze each alleged financial contribution. *Id.*

The Court finds that, under *Chevron* analysis, Commerce's decision to interpret the 'entrusts or directs' language to include a multi-stage, multi-actor program of financial contributions is reasonable. As an initial matter, the Court notes that the countervailing duty statute does not define 'entrusts or directs' or provide examples of practices, transactions, or events that would constitute an entrusted or directed financial contribution. Turning to the relevant legislative history, Congress expressly acknowledged that this phrase would be subject to interpretation. The Uruguay Round Agreements Act Statement of Administrative Action (the **"SAA"**)[6] states:

> [T]he term 'financial contribution' includes situations where the government entrusts or directs a private body to provide the subsidy. (It is the Administration's view that the term 'private body' is not necessarily limited to a single entity, but can include a group of entities or persons.). . . . [T]he Administration intends that the 'entrusts or directs' standard shall be interpreted broadly. The Administration plans to continue its policy of not permitting the indirect provision of a subsidy to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry. . . .
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> . . . .
>
> In cases where the government acts through a private party . . . the Administration intends that the law continue to be administered on a case-by-case basis. . . .

SAA, H.R. Doc. No. 103–465, at 925–26 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4239–40, 1994 WL 761793. In light of the SAA, the Court finds that the 'entrusts or directs' language presents precisely the type of ambiguity which an administrative agency, like

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[6] Congress has mandated that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements Act] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d) (1999).

Commerce, is given deference under *Chevron* step one to reasonably interpret. *See Floral Trade Council v. United States*, 23 CIT 20, 24, 41 F. Supp. 2d 319, 324 (1999) (noting that Court will defer to Commerce's reasonable interpretation under *Chevron* where Congress's intended definition of a term is not ascertainable through statutory construction).

Proceeding to *Chevron* step two, the Court first notes that, in conformity with the SAA, Commerce has committed itself to interpreting the 'entrusts or directs' language on a case-by-case basis. Commerce eschewed the opportunity to articulate a fixed definition of this phrase when it promulgated its countervailing duty regulations after the passage of the Uruguay Round Agreements Act. *See Countervailing Duties*, 63 Fed. Reg. 65348, 65349 (Dep't Commerce Nov. 25, 1998) (final rule) (explaining that the phrase "could encompass a broad range of meanings" and indicating that it would not be "appropriate to develop a precise definition of the phrase for purposes of these regulations"). When interpreting the phrase in this case, Commerce alleged that entrusted or directed financial contributions could manifest as a series of loans and equity infusions made by multiple financial institutions pursuant to a single government program of direction. In its Decision Memo, Commerce explained why it considered this programmatic formulation to be more appropriate than analyzing each constituent element of the alleged program:

> It is clear from the [statutory language] defining "subsidy" that a subsidy is a program by a government or directed by a government. There is no sense in the statute that individual events of a subsidy program need to be evaluated outside of the overall context of the subsidy program. Rather, a subsidy program can include multiple elements and multiple actors, brought together for an overarching governmental objective.

Decision Memo at 48 n.11.[7]

The question for the Court is whether this interpretation of the statute is based upon a "permissible" construction. *Chevron*, 467

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[7] Further, Commerce's use of a programmatic approach is consistent with its administration of other aspects of the countervailing duty statute. For example, in *Live Swine from Canada*, Commerce explained that:

> Neither the countervailing duty statute nor regulations mandate a specific standard to be used when determining whether a program under review should be treated as a single program or several programs. Under these circumstances, the Department has discretion and must base its determination on a reasonable interpretation of the facts on the record.

Live Swine from Canada, 61 Fed. Reg. 52408, 52412 (Dep't Commerce Oct. 7, 1996) (final results of administrative review). *See also Structural Steel Beams From the Republic of Korea*, 65 Fed. Reg. 41051 (Dep't Commerce July 3, 2000) (final determination) (assessing different types of loans together).

U.S. at 843. The Court concludes that it is. Through the SAA, Congress has directed Commerce to interpret the countervailing duty statute broadly so as to close any loopholes which might enable governments to provide indirect subsidies. As noted by Congress, the specific manner in which governments have acted through private entities to provide subsidies has varied widely in the past. SAA, H.R. Doc. No. 103–465, at 926, 1994 U.S.C.C.A.N. at 4239. This creativity can be expected to continue. It is possible that governments increasingly sophisticated in countervailing duty law may choose to obscure their actions by pursuing complex, multi-stage subsidy programs. If so, such programs may very well be best analyzed as a whole, rather than reviewed on a constituent basis. *Cf. United States v. Patten*, 226 U.S. 525, 544 (1913) (noting that "the character and effect of a conspiracy is not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole") (citations omitted). Loopholes would be opened – and the countervailing duty statute narrowed - if the 'entrusts or directs' language were read to require Commerce to separately analyze each element of an alleged program like the one at issue. Where (as here) the same company, the same financial institutions, and the same governmental authorities are all allegedly involved in the pursuit of the same general goal over a period as short as ten months, it is reasonable for Commerce to view individual transactions by these entities as one large program and attempt to build a countervailing duty case on that basis. Adopting the restrictive interpretation advocated by Hynix would flaunt Congress' desire for a broad interpretation and significantly limit Commerce's valuable case-by-case discretion.

In addition, Commerce's interpretation conforms with its past practice in the context of indirect subsidies, as this term was used in an earlier version of the countervailing duty statute.[8] In *AK Steel v. United States*, 192 F.3d 1367 (Fed. Cir. 1999), *aff'g in part, rev'g in part British Steel P.L.C. v. United States*, 20 CIT 1141, 941 F. Supp. 119 (1996), the U.S. Court of Appeals for the Federal Circuit (the **"Federal Circuit"**) reviewed this Court's consideration of an alleged indirect subsidy program by the Korean government to provide its domestic steel industry with preferential access to medium- and long-term credit from government and commercial financial institu-

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[8] Although the Uruguay Round Agreements Act first introduced the 'entrusts or directs' language into the countervailing duty statute, the concept of indirect subsidies is not new. *See* 19 U.S.C. § 1671(a) (1988) (authorizing imposition of duty where "a country . . . is providing, *directly or indirectly*, a subsidy") (emphasis added). According to the SAA, "[i]t is the Administration's view that [the 'entrusts or directs' language] encompass[es] indirect subsidy practices like those which Commerce has countervailed in the past, and that these types of indirect subsidies will continue to be countervailable. . . ." SAA, H.R. Doc. No. 103–465, at 926, 1994 U.S.C.C.A.N. at 4239–40 (*citing, inter alia, Certain Softwood Lumber Products from Canada*, 57 Fed. Reg. 22570 (Dep't Commerce May 28, 1992) (final determination); *Leather from Argentina*, 55 Fed. Reg. 40212 (Oct. 2, 1990) (final determination and duty order).

tions. *AK Steel*, 192 F.3d at 1369. In the determination at issue in *AK Steel*, Commerce found that the Korean government's control of lending institutions constituted a program which resulted in preferential access to loans by the Korean steel industry and the receipt of countervailable benefits. *Id.* at 1372–73. Neither this Court, nor the Federal Circuit on appeal, required Commerce to compartmentalize or separately consider *each* loan provided by *each* financial institution to *each* steel producer within the alleged program. Instead, as here, both courts implicitly accepted Commerce's indirect subsidy program theory and reviewed Commerce's determination on that basis. *E.g.*, *id.* at 1374–75.

Accordingly, the Court upholds Commerce's reasonable interpretation of the 'entrusts or directs' language of 19 U.S.C. § 1677(5)(B)(iii). *See Serampore Indus. Pvt., Ltd. v. U.S. Dep't of Commerce, Int'l Trade Admin.*, 11 CIT 866, 873, 675 F. Supp. 1354, 1360 (1987) (upholding Commerce's interpretation of term used in countervailing duty statute where supported by legislative history and sufficiently reasonable).

2. Commerce's Methodology for Proving the Existence of a Program of Government-Entrusted or Directed Financial Contributions Is In Accordance with Law

Even if Commerce is statutorily permitted to allege entrustment or direction on a program basis, Hynix notes that Commerce must utilize a permissible methodology to prove the existence of such a program. Pls.' Br. at 7. Hynix argues that Commerce employed a faulty, "results-oriented" methodology to prove the alleged program of entrusted or directed financial contributions in this case. *Id.* Hynix objects to Commerce's decision to prove the existence of the alleged program by presenting 'government policy' and 'pattern of practices' evidence drawn from across the alleged program but not including specific evidence of entrustment or direction of each party or each transaction in the alleged program. *Id.* at 6. Where an alleged program involves multiple private entities and transactions, Hynix contends that Commerce must provide "a showing of actual and specific entrustment or direction" of each private entity for each transaction. *Id.* at 16. Without this detailed "bank-by-bank" or "event-by-event" inquiry, Hynix contends that Commerce's more generalized 'government policy' and 'pattern of practices' methodology enabled Commerce to "blur the details and to bootstrap its alleged evidence across the lengthy period investigated, and across the numerous banks considered."[9] *Id.* at 15.

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[9] The Court recognizes that Hynix's arguments concerning Commerce's methodology are nearly identical to its arguments concerning Commerce's statutory interpretation. The Court has chosen to address them separately to make clear Commerce's authority under the countervailing duty statute and Commerce's evidentiary obligations with regard to its cho-

The Court concludes that Commerce's methodology for proving the alleged government-directed program of financial contributions involving multiple financial institutions and multiple transactions was reasonable. Central to the Court's holding is its understanding of Commerce's methodology in light of the evidentiary challenges posed by 19 U.S.C. § 1677(5)(B)(iii). This statute empowers Commerce to countervail benefit-conferring financial contributions made by private parties pursuant to government entrustment or direction – financial contributions which, by their furtive nature, are likely to be difficult to discern and even harder to prove by the requisite substantial evidence. Such evidence may be direct or circumstantial; indeed, given the nature of these financial contributions, it is probable that Commerce will rely heavily on circumstantial evidence to meet the substantial evidence standard in many cases. In appropriate circumstances, Commerce may permissibly use circumstantial evidence to prove, in whole or in part, the existence of entrusted or directed financial contributions under 19 U.S.C. § 1677(5)(B)(iii). *See AK Steel*, 192 F.3d at 1373–76 (discussing use of circumstantial evidence in indirect subsidy context); *cf. Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960) (finding that, for purposes of establishing jury question, "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence") (citation and footnote omitted).

Of course, Commerce must fairly weigh each piece of circumstantial evidence it invokes in support of a finding of government entrustment or direction. *See Fuji Photo Film Co. v. Jazz Photo Corp.*, 394 F.3d 1368, 1374 (Fed. Cir. 2005) (noting that, in trial context, fact finder "has the responsibility to weigh the [circumstantial] evidence . . . in deciding the inferential reach of such circumstantial evidence") (citation omitted). Circumstantial evidence is subject to inference, but not every piece of circumstantial evidence will support an inference of government entrustment or direction. However, when viewed together, several such inferences, drawn from multiple sources of corroborating evidence, could support a finding of entrustment or direction. *Cf. Akron Polymer Container Corp. v. Exxel Container*, 148 F.3d 1380, 1384 (Fed. Cir. 1998) (noting that, in patent context, an offense involving deception is "in the main proven by inferences drawn from facts, with the collection of inferences permitting a confident judgment that deceit has occurred"). This is particularly true when direct evidence further supports these inferences.

This reasoning applies with equal force to proving a single entrusted or directed financial contribution or an entire program of such financial contributions. *Cf. Theatre Enter., Inc. v. Paramount*

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sen methodology. Further, although equal deference is owed to Commerce's statutory interpretation and choice of implementing methodology, *see Chevron*, 467 U.S. at 844–45, the Court's review of these agency actions requires two distinct inquiries.

Film Distrib. Corp., 346 U.S. 537, 541–42 (1954) (finding that, in antitrust context, conspiracy may be inferred from evidence of parallel behavior when combined with inferences from other facts and circumstances). Under certain circumstances, record evidence and the inferences drawn therefrom could very well indicate that a foreign government is pursuing an elaborate program of subsidization, rather than a one-off subsidy. Commerce need not support such a conclusion with conclusive evidence incriminating every aspect of the alleged program, for a reasonable person could be satisfied as to the existence of the program with a lesser but highly persuasive evidentiary showing. *See Consol. Edison*, 305 U.S. at 229 (finding that substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). This lesser evidentiary showing would likely rely on inferential connections between the various parties and transactions comprising the alleged program. So long as these inferences were reasonable, even Commerce's lesser evidentiary showing could permit a confident judgment that a clandestine program of entrusted or directed financial contributions had been carried out.

Commerce's methodology appears to be grounded in this sound reasoning. While the evidentiary support for Commerce's determination consisted of some direct evidence, the vast majority of evidence was circumstantial. Commerce chose to present this evidence in two parts. First, Commerce sought to prove that the Korean government had a 'governmental policy' to subsidize Hynix by introducing evidence indicating that the Korean government had a *motive* to subsidize. Second, Commerce attempted to identify a 'pattern of practices' showing that the Korean government acted on this motive as part of a program to manipulate private entities.[10] The practices identified by Commerce varied but it appears to the Court that they may broadly be categorized as including evidence of: (1) the Korean government's *propensity* to subsidize companies like Hynix; (2) the Korean government's *proclivity* for influencing or coercing the actions of financial institutions to achieve its policy goals; (3) the Korean government's *opportunity* or *capacity* to specifically influence or coerce the financial institutions involved in Hynix's restructuring; and (4) *direct commands* by the Korean government to some of these institutions. With the exception of this last category (which relies on direct evidence), proof of motive, propensity, proclivity, opportunity, and capacity is derived by inference from circumstantial evidence. Individually, each of these inferences would be insufficient to estab-

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[10] This 'pattern of practices' inquiry appears to be similar to the "causal nexus" between government action and benefits allegedly bestowed by private entities which Commerce was required to establish in order to prove an indirect subsidy under the previous version of the countervailing duty statute. *See AK Steel*, 192 F.3d at 1376.

lish the existence of a program of entrustment or direction;[11] but, together, this collection of inferences could permit such a conclusion under 19 U.S.C. § 1677(5)(B)(iii), particularly when buttressed by corroborating direct evidence. As such, the Court finds Commerce's methodology to be reasonable.

This conclusion by the Court is once again supported by the Federal Circuit's reasoning in *AK Steel*. As here, the *AK Steel* court did not require Commerce to provide, as a matter of law, conclusive evidence implicating each party and each step in the alleged program of indirect subsidies. Rather, the Federal Circuit accepted Commerce's more generalized methodology, which relied heavily on inferences drawn from circumstantial evidence to connect the various elements of the alleged indirect subsidy program. *AK Steel*, 192 F.3d at 1374–75. However, the Federal Circuit took issue with the substantiality of the evidence proffered by Commerce within that approach. *Id*. Ultimately reversing in part this Court's decision to uphold Commerce's determination, the Federal Circuit held that Commerce had failed to produce sufficient direct or circumstantial evidence to support its finding of an indirect subsidy program by substantial evidence. *Id*. at 1376.

In so holding, the Federal Circuit reinforced the common sense principle that the quantum and quality of evidence required to satisfy the substantial evidence standard varies from case to case. *Accord Astra Pharm. Prod., Inc. v. Occupational Safety & Health Review Comm.*, 681 F.2d 69, 74 (1st Cir. 1982) (noting that "what constitutes substantial evidence varies with the circumstances"). More or richer evidence may be required to support, by substantial evidence, allegations of a complex, large-scale subsidy program encompassing multiple commercial actors, multiple government authorities, multiple phases, multiple transactions, multiple months, *etc.* Of course, an affirmative countervailing duty determination supported by evidence of the depth and breadth implicated by Hynix's suggested methodology would more easily pass this judicial review.[12] But, depending on its quality, scope, and degree of incrimination, a lesser quantum of evidence (and the inferences drawn fairly therefrom) may also suffice to connect ostensibly disparate parties and transactions to a single, interrelated program of government en-

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[11] This Court has also found that "evidence of motive and opportunity alone" are insufficient to prove improper government action under a different aspect of the countervailing duty statute. *Al Tech Specialty Steel Corp. v. United States*, 28 CIT ____, ____, Slip Op. 04–114 at 19 (Sept. 8, 2004).

[12] In the Court's view, Hynix's proposed methodology – implicating every actor and every major decision involved in an alleged complex subsidy program – would likely require Commerce to produce evidence more closely approximating overwhelming evidence. Such a showing would far exceed the requirements of the substantial evidence standard in most cases. *See Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1996) (noting that substantial evidence is "something less than the weight of the evidence") (citations omitted).

trustment or direction. When this lesser quantum of evidence is sufficient may sometimes be a difficult determination for the Court to make, but "[t]here are no talismanic words that can avoid the process of judgment." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951).

Accordingly, the Court declines to burden Commerce with the unnecessarily stringent approach suggested by Hynix and upholds Commerce's reasonable methodology. *See, e.g.*, *Federal-Mogul Corp. v. United States*, 18 CIT 785, 807–08, 862 F. Supp. 384, 405 (1994) (noting that "[Commerce] is given discretion in its choice of methodology as long as the chosen methodology is reasonable") (citation omitted); *Coal. for the Pres. of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 113 n.40, 44 F. Supp. 2d 229, 252 n.40 (1999) ("The [Uruguay Round Agreements Act] and SAA are silent as to how Commerce should make a finding of knowledge of material injury. Therefore, Commerce is afforded reasonable discretion in formulating a methodology.") (citation omitted).

C. Commerce's *Final Determination* Requires Additional Explanation Before the Court May Undertake Substantial Evidence Review

Even if Commerce's statutory interpretation and methodology are legally permissible, Hynix argues that the facts of this case do not support Commerce's program theory. Pls.' Br. at 3. Hynix contends that Commerce ignored key parts of the record evidence and seriously distorted others in favor of its program theory. *Id.* at 11–25. Hynix asserts that, when the counterevidence is considered and the evidence invoked by Commerce is viewed properly, Commerce lacked sufficient evidentiary support for its finding of entrusted or directed financial contributions, in violation of the substantial evidence standard. *Id.* at 25–29.

The Court understands Hynix's objection to include two principal arguments: (1) Commerce failed to consider counterevidence indicating that an independent third party (not the Korean government) orchestrated Hynix's restructuring, which was motivated by commercial considerations and (2) the evidence in support of Commerce's theory was insufficient to establish a program of entrustment or direction under the substantial evidence standard. For the reasons that follow, the Court remands the *Final Determination* to Commerce to more fully address Hynix's first argument and reserves judgment on Hynix's second argument until after remand.

1. Commerce Failed to Adequately Address Counterevidence of Entrustment or Direction, Requiring Remand of the Final Determination *for Additional Explanation*

Hynix argues that Commerce failed to address counterevidence indicating that Hynix's restructuring was in fact organized by inde-

pendent Citibank/SSB and driven by commercial considerations. Pls.' Br. at 11–16. Hynix argues that record evidence proves that three of the four major phases of Hynix's restructuring were actually orchestrated by Citibank/SSB: (1) Citibank arranged a ten-bank syndicated loan for Hynix in December 2000; (2) Citibank and SSB designed Hynix's May 2001 debt restructuring package, modeling it on an informal Corporate Restructuring Agreement suggested by the International Monetary Fund and making it conditional on a successful international equity offering; and (3) SSB orchestrated Hynix's October 2001 debt restructuring package, which provided creditors with multiple courses of action including debt liquidation. *Id*. at 11–13. Since Citibank/SSB arranged most aspects of Hynix's restructuring and included market-based contingencies with no guaranteed outcome, Hynix contends that the ten-month subsidy program simply could not have existed as alleged. *Id*. at 11. In Hynix's view, Commerce erred by failing to consider this alternative theory and supporting evidence in the *Final Determination*. *Id*.

The Court finds that Commerce erred by failing to adequately address, in its financial contribution analysis, counterevidence indicating that Hynix's restructuring was organized by Citibank/SSB and conditioned on uncertain market events. The portion of the *Final Determination* explaining Commerce's finding of a program of entrusted or directed financial contributions contains only three footnotes referencing Citibank/SSB's involvement. Decision Memo at 49 n.12, 57 n.24, 59 n.26. These somewhat disjointed footnotes do not squarely address Hynix's argument related to Citibank/SSB. Rather, Commerce appears to have viewed this argument as an impermissible request to conflate benefit analysis with financial contribution analysis under the countervailing duty statute. *See id*.; Def.'s Br. at 18, 32. Similarly, Commerce dismissed Hynix's related argument concerning the anomalous presence of commercial contingencies in Hynix's restructuring, generally finding it unsurprising that the private parties in a government-entrusted or directed program would be able to set the commercial terms of their involvement. Decision Memo at 48, 61; Def.'s Br. at 18, 32.

Commerce misunderstands the true import of Hynix's arguments. Hynix has essentially advanced an alternative theory of the case – one where an independent commercial actor (not the Korean government) orchestrated the financial contributions under investigation and made at least some of them contingent on uncertain market events (*e.g.*, the international equity offering). If true, this alternative theory could reasonably explain the concerted actions of Hynix's creditors. This theory could also perhaps better explain the complexity of Hynix's restructuring, which featured commercial contingencies and options whose *uncertain outcome* are indeed very surprising

in the context of alleged government control. Hynix has produced evidence rendering this alternative theory at least colorable. *See, e.g.*, Pls.' App., App. 1 (Hynix's Questionnaire Response dated Jan. 27, 2003); *id.*, App. 10 (Hynix Supplemental Questionnaire Response dated Mar. 4, 2003); *id.*, App. 17 (Citibank Affidavit dated Mar. 20, 2003); *id.*, App. 7 (Hynix's Verification Report dated May 15, 2003); *id.*, App. 18 (Citibank Affidavit dated May 22, 2003).

Failure to consider this alternative theory and supporting evidence constituted clear error by Commerce. *See* 19 U.S.C. § 1677f(i)(3)(A) (1999) (obligating Commerce to consider relevant arguments made by interested parties). Commerce may disagree with Hynix's alternative theory and disbelieve the evidence supporting it, but Commerce must explain this decision. *See, e.g., Allegheny Ludlum Corp. v. United States*, 29 CIT ___, ___, 358 F. Supp. 2d 1334, 1344 (2005) (noting that an "agency must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations") (citation omitted); *Granges Metallverken AB v. United States*, 13 CIT 471, 478, 716 F. Supp. 17, 24 (1989) (noting that "it is an abuse of discretion for an agency to fail to consider an issue properly raised by the record evidence") (citation omitted). Because Commerce failed to provide this explanation as part of its financial contribution analysis,[13] the Court remands this issue to Commerce.

On remand,[14] Commerce must address Hynix's argument by thoroughly explaining, if it is able: (1) why Commerce disregarded or disbelieved the record evidence indicating that Citibank/SSB – not the Korean government -orchestrated Hynix's restructuring; and (2) why Hynix's restructuring featured commercially-based contingencies and options with no guaranteed outcome if Hynix's restructuring was indeed the product of government entrustment or direction and not market forces.

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[13] The Court acknowledges that the *Final Determination* rightly included a lengthy discussion of Citibank/SSB as part of Commerce's benefit analysis. *See* Decision Memo at 7–11, 90–92. However, this discussion fails to meet the Court's requirements. First, to the extent that this discussion addressed some of the evidence cited herein, it did so for the limited purpose of determining whether Citibank's involvement in Hynix's restructuring was covered by an implicit Korean government guarantee. *Id.* at 8. At no point in this discussion did Commerce address Hynix's contention that Citibank organized the activities of the other investigated financial institutions. Further, this discussion did not address the uncertain nature of the commercial contingencies featured in Hynix's restructuring. Finally, this discussion formed part of Commerce's benefit analysis, which necessarily assumed the very issue in dispute (*i.e.*, that the Korean government entrusted or directed the investigated financial contributions).

[14] With regard to the remand results, the Court admonishes Commerce to refrain from making oblique references to record evidence and instead assist the review process by providing direct citations to documents within the voluminous administrative record.

2. The Court Defers Consideration of Hynix's Argument that the Final Determination *Lacked Sufficient Evidentiary Support to Establish Entrustment or Direction under the Substantial Evidence Standard*

Finally, Hynix argues that Commerce mischaracterized and exaggerated much of the record evidence supporting its subsidy program theory. Pls.' Br. at 6. To explain this position, Hynix's brief provides a lengthy discussion of the specific pieces of evidence allegedly misinterpreted by Commerce. *Id.* at 11–25. In Hynix's view, Commerce's mistreatment of this evidence allowed Commerce to impermissibly "blur a series of separate financial transactions into one single restructuring, even though there were sharp breaks between some transactions and different banks made different decisions at each stage." *Id.* at 5. Hynix contends that a "serious analysis of the underlying facts" reveals the evidentiary shortcomings of the *Final Determination* and, thus, Commerce's failure to satisfy the substantial evidence standard. Pls.' Reply at 5.

The Court finds that, while Hynix has raised fair questions concerning Commerce's interpretation of the record evidence, these questions are best resolved after receipt of the ordered remand results. In the Court's view, the Citibank/SSB counterargument is so critical to this case that it "has direct and material bearing on the proper resolution of the various issues presented" concerning the substantiality of the evidence supporting Commerce's program theory. *Usinor v. United States*, 26 CIT 767, 784 (2002). Without a reasoned explanation of Citibank/SSB's role in Hynix's restructuring and the alleged financial contributions at issue, "the accuracy and legitimacy of the [agency]'s findings and conclusions [are called] squarely into question." *Id.* Due to the importance of the Citibank/SSB counterargument, the Court finds itself unable at this time to engage in a substantive review of the evidence supporting Commerce's finding of government entrustment or direction. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (noting that "if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation").

Accordingly, the Court reserves judgment on Hynix's second argument concerning the substantiality of evidence in support of Commerce's finding of entrusted or directed financial contributions until after receipt of the remand results. *See, e.g.*, *Luoyang Bearing Corp. v. United States*, 28 CIT ___, ___, 347 F. Supp. 2d 1326, 1359 (2004) (declining to address party argument until receipt of remand results on related issue); *Chefline Corp. v. United States*, 25 CIT 1129, 1130, 170 F. Supp. 2d 1320, 1324 (2001) (deferring review of

portion of agency determination until receipt of remand results on related issue).

IV. CONCLUSION

For the foregoing reasons, the Court remands the *Final Determination*. Because the Court is remanding to Commerce for further consideration of its threshold finding of potentially countervailable financial contributions, the Court does not yet reach the parties' arguments concerning other aspects of the *Final Determination* (*i.e.*, Commerce's governmental subsidy function analysis and benefit analysis). A separate order will be issued accordingly.

Slip Op. 05–107

UNITED STATES, Plaintiff, v. PAN PACIFIC TEXTILE GROUP, INC., AVIAT SPORTIF, INC., BUDGET TRANSPORT, INC., PRIME INTERNATIONAL AGENCY, BILLION SALES, EVER POWER CORP., AMERICAN CONTRACTORS INDEMNITY COMPANY, and THOMAS MAN CHUNG TAO, and STEPHEN SHEN YU JUANG, Defendants.

Before: Richard W. Goldberg, Senior Judge
Court No. 01–01022

[Plaintiff's motion for partial summary judgment granted in part and denied in part; defendants' motion for partial summary judgment denied. Defendants liable for duties unpaid as a result of agent's fraudulent customs violations. Additional briefing required to determine amount of duty liability. Trial ordered on issue of defendants' liability for civil penalty.]

Dated: August 26, 2005

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Patricia M. McCarthy* and *Michael D. Panzera*); *Annmarie R. Highsmith*, Senior Attorney, Office of Associate Chief Counsel, U.S. Customs and Border Protection, U.S. Department of Homeland Security, for plaintiff.

John Weber for defendants Thomas Man Chung Tao, Pan Pacific Textile Group, Inc., and Aviat Sportif, Inc.

OPINION

Goldberg, Senior Judge: This case involves an action by plaintiff the United States (specifically, the United States Customs Service[1]

[1] The United States Customs Service is now U.S. Customs and Border Protection per the Homeland Security Act of 2002, 6 U.S.C. § 542 (2005), and the Reorganization Plan Modifi-

("**Customs**")) against defendants Pan Pacific Textile Group, Inc. ("**Pan Pacific**"), Aviat Sportif, Inc. ("**Aviat Sportif**"), Budget Transport, Inc., Prime International Agency, Billion Sales, Ever Power Corp., American Contractors Indemnity Company ("**ACIC**"),[2] Thomas Man Chung Tao ("**Tao**"), and Stephen Yu Juang ("**Juang**"),[3] regarding 68 unlawful entries of track suits imported from the People's Republic of China ("**China**") into the United States. Customs moves for partial summary judgment against Tao, Pan Pacific, and Aviat Sportif (collectively, "**defendants**") pursuant to USCIT Rule 56, seeking the recovery of (1) unpaid duties under 19 U.S.C. § 1592(d) based on alternativetheories of fraud, gross negligence, or negligence and (2) a civil penalty under 19 U.S.C. § 1592(b) based on alternative theories of gross negligence or negligence. Defendants also move for partial summary judgment pursuant to USCIT Rule 56, contending that Customs cannot prove scienter for purposes of establishing liability for a civil penalty under a fraud theory. The Court has consolidated these motions for purposes of this opinion.

I. BACKGROUND

In accordance with USCIT Rule 56(d), the Court begins with a recitation of the relevant facts which appear to be without substantial controversy. During the events at issue in this case, Tao was an importer dealing almost exclusively in tracksuits manufactured in China. PPFUF ¶ 2. To do business in the United States, Tao acted through two companies, Pan Pacific and Aviat Sportif, which were owned and controlled by Tao. PPFUF ¶ 2. In 1993, Tao and his companies engaged the freight forwarding services of Juang, who operated several companies providing cargo transportation between the United States and China. PPFUF ¶ 12. Later that same year, Juang proposed to expand the scope of the services he provided to Tao. PPFUF ¶ 12. Juang offered to provide both freight forwarding and customs clearance services on Tao's shipments, although he was not a licensed customs broker.[4] PPFUF ¶ 12. Tao accepted Juang's offer, and signed a power of attorney allowing Juang to conduct customs entry transactions on behalf of Tao and his companies. PPFUF ¶ 14. Tao (or one of his companies) remained the importer of record for ap-

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cation for the Department of Homeland Security, H.R. Doc. 108–32, at 4 (2003).

[2] ACIC entered into a settlement agreement whereby Customs dismissed its claims against ACIC in exchange for payment of $201,000. Plaintiff's Motion for Partial Summary Judgment ("**Pl.'s Mot.**") at 10. As such, ACIC is no longer at issue in this case.

[3] Juang was the owner of Prime International Agency, Budget Transport, Inc., Ever Power Corp., and Billion Sales. Plaintiff's Proposed Findings of Uncontroverted Fact ("**PPFUF**") ¶¶ 3–4. The Court entered default judgment against these parties on June 15, 2004. Pl.'s Mot. at 9. As such, they are no longer at issue in this case.

[4] It is a violation of Customs' regulations for a broker to transact customs business without a license. 19 C.F.R. § 111.4 (2005).

proximately one year after Juang began performing customs clearance services. PPFUF ¶ 15.

Upon acquiring these new customs clearance responsibilities, Juang began submitting entry documents to Customs that misdescribed the tracksuits as plastic bags and wooden patio furniture – classifications which carried lesser duty rates[5] and were not subject to quota restrictions.[6] PPFUF ¶¶ 17, 19. He also undervalued the merchandise to further reduce the duties assessed by Customs. PPFUF ¶¶ 17, 19. Juang profited from this scheme by continuing to charge Tao according to the proper duty rate. PPFUF ¶ 20. To support his charges to Tao, Juang supplemented his invoices with accurate entry documents that were never in fact submitted to Customs. PPFUF ¶ 21.

In 1994, Juang approached Tao with an alternate business arrangement (the "**flat fee scheme**"). PPFUF ¶ 29. Juang claimed that Tao had been "paying too much duty" and proposed that Tao pay a flat fee per shipping container that would include all of the costs of shipment, including both freight forwarding and customs duties. PPFUF ¶ 29. Further, Juang claimed that Tao would no longer need to separately purchase quota visas. PPFUF ¶ 31. Juang suggested that he could instead accomplish this task through a personal connection and include it in his package of services to Tao. PPFUF ¶ 32. As part of this arrangement, Juang proposed that he would become the importer of record, although Tao would continue to ultimately receive the goods. PPFUF ¶ 31. For all of his services under the flat fee scheme, Juang offered to charge a fee that was less than the duties Tao would have otherwise paid. PPFUF ¶ 29.

Before accepting Juang's proposal, Tao questioned how Juang could make a profit while offering such a reduced flat fee. PPFUF ¶ 33. Tao consulted with Myron Rosenbach ("**Rosenbach**"), an acquaintance experienced in importing from Asia into the United States, seeking an explanation. Memorandum in Support of Defendants Pan Pacific Textile Group Inc., Aviat Sportif Inc., and Thomas Man Chung Tao's Motion for Summary Judgment Pursuant to Rule 56 of the Court of International Trade ("**Defs.' Mot.**") at 8. Rosenbach indicated that it was possible for an importer to reduce duties owed by calculating the duty based on production cost rather than invoice value, and he provided Tao with a copy of a letter from a Customs attorney that supported this theory. Defs.' Mot., Ex. C

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[5] See e.g., HTSUS 3923.21.0090 (1996) (setting 3% tariff for plastic bags); HTSUS 9401.79.0025 (1996) (setting 2.4% tariff for outdoor household furniture sets with metal frames); HTSUS 6211.33.30 (1996) (setting 16.8% tariff for sets of men and boys' tracksuits of man-made fibers).

[6] For the duration of defendants' relationship with Juang, Chinese textiles were subject to quotas and required quota visas for entry into the United States. See, e.g., Agreement Between the United States and China Concerning Trade in Textile and Apparel Products, U.S.-China, June 8, 1995, Temp. State Dep't No. 95–148, 1995 WL 539718.

(Deposition of Myron Rosenbach) ("**Rosenbach Dep.**") at 133–35. This letter had been sent to Rosenbach as a general update on customs law, and was not intended for Tao, or written with any knowledge of his situation. Rosenbach Dep. at 135–36. Two days after this conversation, Tao agreed to the flat fee arrangement, including the designation of Juang as the importer of record. PPFUF ¶ 37. Although Tao stated that he assumed that duties would be calculated based on production costs, Tao never provided these costs to Juang. Pl.'s Mot., App. E (Deposition of Thomas Man-Chung Tao) at 255, 276.

After Tao agreed to the flat fee arrangement, Juang continued to enter Tao's tracksuits as plastic bags and patio furniture, although he stopped providing Tao with falsified entry documents as support for his invoices. PPFUF ¶ 47. Tao stated that he thought it was not necessary for him to maintain copies of his entry records, since he was no longer the importer of record. PPFUF ¶ 41. Tao also told his supplier, Singmay Industrial, Ltd., that it should no longer purchase quota visas, indicating that Juang would take care of this under the new flat fee scheme. PPFUF ¶ 43. Tao stated that, while he perceived a shift in responsibilities once Juang became the importer of record, he still considered himself to be the owner of the merchandise. PPFUF ¶ 41. To that end, Tao's companies continued to place the orders for the merchandise, and received the goods directly from Juang's companies after they cleared customs. PPFUF ¶ 41. Tao's company, Pan Pacific, also remained the ultimate consignee. PPFUF ¶ 41.

On or about November 26, 1996, Customs Special Agents began investigating Juang, initially for suspected involvement in the smuggling of Chinese medicine. Pl.'s Mot. at 7. On February 26, 1997, Customs searched the premises occupied by Juang's companies. Pl.'s Mot., App. A (Declaration of David J. Peters) ¶ 5. Records uncovered during the search revealed that, from late 1993 to early 1997, Juang entered tracksuits for Tao, Pan Pacific, and Aviat Sportif. Pl.'s Mot., App. B (Declaration of Marcia A. Brown) ("**Brown Decl.**") ¶ 9. Investigators then searched the premises of Pan Pacific and Aviat Sportif and concluded from the records recovered that Tao's payments to Juang were below the duties that would have been assessed based on the value stated on the commercial invoices. Brown Decl. ¶ 13. They also discovered that quota visas had not been obtained and associated charges had not been paid. Brown Decl. ¶ 12. As a result of these discoveries, Tao and Juang were criminally prosecuted for conspiracy to smuggle merchandise into the United States. Pl.'s Mot. at 8. Tao was acquitted, *United States v. Tao*, CR–98–571–RAP (C.D. Ca. 1999), while Juang pled guilty, agreeing to pay $1.4 million in restitution, United States v. Juang, 98–CR–96–ALL (C.D. Ca. 2001).

On November 21, 2001, Customs filed the instant civil action pursuant to 19 U.S.C. § 1592. Defs.' Mot., Ex. D (Complaint) ("**Compl**.") ¶ 1. In its complaint, Customs sought unpaid duties and a civil penalty for 68 entries of merchandise, including 34 that were at issue in the criminal trial. Compl. ¶¶ 1, 15; Pl.'s Mot. at 9. These entries were made between September 21, 1995 and January 20, 1997, under the flat fee scheme.[7] PPFUF ¶ 1. Customs set the total domestic value of these goods at $26,051,129, and claimed that $2,034,159.80 in duties remained unpaid.[8] Compl. ¶¶ 22, 28. In its complaint, Customs sought the recovery of both unpaid duties and a civil penalty under the three alternative theories of liability recognized by 19 U.S.C. § 1592 (*i.e.*, fraud, gross negligence, or negligence). Compl. ¶¶ 28, 31, 34, 37, 40, 43, 44. Under a theory of fraud liability, Customs sought the full amount of unpaid duties, as well as a $26,051,129 civil penalty. Compl. ¶¶ 28, 37. Alternatively, Customs sought $241,351 in unpaid duties[9] and a $956,406 civil penalty under a gross negligence theory or a $482,703 civil penalty under a negligence theory. Compl. ¶¶ 31, 34, 38, 40.

On October 31, 2002, defendants moved for summary judgment on four separate grounds, all of which were denied by this Court. *United States v. Pan Pac. Textile Group, Inc.*, 27 CIT ___, 276 F. Supp. 2d 1316 (2003). The instant motions for partial summary judgment on different grounds followed. The Court has jurisdiction over this action pursuant to 19 U.S.C. § 1582.

II. STANDARD OF REVIEW

"[S]ummary judgment is proper 'if the pleadings [and the discovery materials] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (*quoting* Fed. R. Civ. P. 56(c)).[10] However, "summary judgment will not lie if

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[7] Customs did not seek unpaid duties or a civil penalty for the fraudulent entries made by Juang prior to the flat fee scheme. Reply to Defendants' Opposition to Motion for Partial Summary Judgment at 12.

[8] Defendants dispute both the valuation of the merchandise and the calculation of duties owed. Defendants' Response to Plaintiff's Rule 56(h) Statement ("**Defs.' Resp. to PPFUF"**) ¶ 59.

[9] Customs sought a lesser amount of duties under the theories of gross negligence and negligence because the applicable statute of limitations limited recovery of duties from grossly negligent or negligent violations to only those violations committed within five years of the action. 19 U.S.C. § 1621(1) (2005). Invoking an exception to this statute of limitations for cases of fraud, Customs sought additional duties for violations occurring within five years of the discovery of the fraud. 19 U.S.C. § 1621(1) (2005).

[10] "When the Court's rules are materially the same as the [Federal Rules of Civil Procedure ("**FRCP**")], the Court has found it appropriate to consider decisions and commentary on the FRCP in interpreting its own rules." *Former Employees of Tyco Elec. v. United States Dep't of Labor*, 27 CIT ___, ___, 259 F. Supp. 2d 1246, 1251 (2003) (citation omitted).

the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, all reasonable inferences should be drawn in favor of the nonmoving party. *See United States v. Neman*, 16 CIT 97, 98, 784 F. Supp. 897, 897–98 (1992).

Even where summary judgment cannot be rendered upon the whole case, partial summary judgment may be granted in some circumstances. *See* USCIT R. 56(d). "Partial summary judgment is appropriate 'when it appears that some aspects of a claim are not genuinely controvertible [and] . . . genuine issues remain regarding the rest of the claim.' " *Ugg Int'l, Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993) (*quoting* Fleming James, Jr. & Geoffrey C. Hazard, Jr., *Civil Procedure* § 5.19, at 273–74 (3d ed. 1985) (footnotes omitted)).

The fact that state of mind is at issue in a case does not preclude summary judgment. *See Liberty Lobby*, 477 U.S. at 256. "[T]here are many instances in the law where the evidence of state of mind is so unequivocal that summary judgment is proper and, indeed, expressly mandated by Rule 56." *Piamba Cortes v. Amer. Airlines, Inc.*, 177 F.3d 1272, 1292 n.14 (11th Cir. 1999) (*quoting In re Air Crash Near Cali*, 985 F. Supp. 1106, 1124 (S.D. Fla. 1997)). Even "[p]otential issues of fact as to . . . state of mind . . . do not prevent summary judgment" where the facts "lead to only one legal conclusion." *Executone Info. Sys. v. United States*, 19 CIT 960, 965, 896 F. Supp. 1235, 1239 (1995), *aff'd*, 96 F.3d 1383 (Fed. Cir. 1996).

III. DISCUSSION

A. DEFENDANTS ARE LIABLE FOR DUTIES UNPAID DUE TO THE FRAUDULENT VIOLATIONS OF 19 U.S.C. § 1592 BY THEIR AGENT

On summary judgment, Customs first seeks recovery from defendants of the unpaid duties associated with the entries at issue in this case. Customs has presented two alternative arguments supporting defendants' liability for duties unpaid due to *fraudulent* violations of 19 U.S.C. § 1592. Customs first argues that Juang was serving as defendants' agent, making defendants liable, as principals, for the duties that remain unpaid as a result of Juang's fraud. Customs' second argument is that Tao himself (and by extension, Tao's companies) committed fraud under the statute. Customs argues that Tao deliberately avoided knowledge of Juang's unlawful activities, which served as constructive knowledge sufficient to make Tao (and Tao's companies) complicit in the fraud. Further, because the statutory scheme also prohibits violations of 19 U.S.C. § 1592 due to gross

negligence or negligence, Customs has presented alternative arguments supporting defendants' liability for unpaid duties under these lesser theories of liability as well.

For the reasons that follow, the Court finds defendants liable for unpaid duties on the entries at issue in this case. The Court concludes that, as a matter of law, a principal may be held liable under the fraud provisions of 19 U.S.C. § 1592 for a customs violation committed by an agent acting within its proper scope of authority, regardless of whether the principal authorized the agent's specific unlawful conduct constituting the customs violation. Because the uncontroverted facts in this case clearly demonstrate that Juang committed customs violations in the performance of his duties as defendants' agent, defendants are liable as principals for duties unpaid as a result of Juang's fraud.[11]

1. Juang's Actions Constituted a Fraudulent Violation of 19 U.S.C. § 1592(a)

As a threshold matter, in order for liability for unpaid duties to accrue under 19 U.S.C. § 1592(d), a violation of 19 U.S.C. § 1592(a) must have been committed through either fraud,gross negligence, or negligence. A fraudulent violation under 19 U.S.C. § 1592(a) is committed directly[12] when four key elements are present: first, the party against whom liability is sought must belong to the class of "persons" subject to liability under the statute; second, that party must enter, introduce, or attempt to enter or introduce merchandise into the United States by means of false documents or acts; third, such documents or acts must also be material; and fourth, the material, false documents or acts must be transmitted or performed fraudulently.[13] 19 U.S.C. § 1592(a)(1)(A)(i) (1999). All four elements are easily met in this case.

First, Juang, as importer of record, was clearly a "person" within the meaning of 19 U.S.C. § 1592(a) and, as such, may be held liable for a violation of that statute. This Court has repeatedly held that an importer of record belongs to the class of "persons" subject to liability under 19 U.S.C. § 1592(a) and against whom a claim may be brought for suspect entries. *See, e.g., United States v. F.H. Fenderson, Inc.*, 11 CIT 199, 658 F. Supp. 894 (1987). It is uncon-

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[11] As such, for purposes of the analysis of liability for unpaid duties, the Court need not reach Customs' second argument regarding defendants' complicity in fraud through deliberate ignorance. Similarly, the Court need not reach Customs' arguments concerning gross negligence and negligence, as duties owed under these lesser theories of liability are subsumed by those owed under fraud.

[12] The statute also prohibits the aiding and abetting of customs violations. 19 U.S.C. § 1592(a)(1)(B) (1999).

[13] An alleged violation involving a material omission need not satisfy the second requirement concerning falsity. 19 U.S.C. § 1592(a)(1)(A)(ii) (1999).

tested that Juang was the importer of record for the shipments at issue and he is therefore a "person" subject to liability under the statute.[14]

Next, the facts also show that Juang submitted documents to Customs containing information that was both false and material within the meaning of 19 U.S.C. § 1592(a). Juang submitted entry documents to Customs which identified Tao's merchandise as plastic bags or wooden patio furniture. There is no doubt that these identifications were false, as all parties acknowledge that the shipments contained tracksuits. Further, these false statements were also material. The definition of "material" under 19 U.S.C. § 1592 is provided by 19 C.F.R. pt. 171 app. B(B):

> A document, statement, act, or omission is material if it has the natural tendency to influence or is capable of influencing agency action including, but not limited to a Customs action regarding: (1) Determination of the classification, appraisement, or admissibility of merchandise (e.g., whether merchandise is prohibited or restricted); (2) determination of an importer's liability for duty . . .

19 C.F.R. pt. 171 app. B(B)(1)–(2) (2005). In the instant case, Juang's actions satisfy this definition on multiple counts. The documents submitted to Customs contained false statements which affected Customs' determination of the classification, appraisement, and admissibility of the merchandise, as well as the calculation of the duty. Juang's entry documents falsely led Customs to believe that the tracksuits being imported fell under the classifications associated with plastic bags or wooden patio furniture. These erroneous classifications consequently affected Customs' determination of admissibility as well. While the actual merchandise was subject to quota, the classifications indicated were not, enabling Juang to avoid the quota. Since no quota visas were obtained, Customs was falsely led to believe that the shipments were admissible. Juang further misled Customs by providing a false appraisement of the value of the merchandise, declaring a value lower than the actual value of the goods. Further, since the duty rate on plastic bags and wooden patio furniture was less than that for tracksuits at the time of the shipments at issue, Juang's misstatements resulted in an inaccurate determination of duty liability. Collectively, these deceptions caused Customs to assess significantly lower duties on the merchandise entered by Juang. Thus, Juang's actions satisfied each of the alternative tests

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[14] There is also support for the proposition that anyone in a position to satisfy the other elements of a 19 U.S.C. § 1592(a) violation is a "person" within the meaning of the statute, regardless of any other legal status they might hold. *See United States v. Golden Ship Trading*, 22 CIT 950, 953 (1998) ("One who violates the statute is always liable whether or not the importer of record.").

for "materiality" under Customs' regulation. *See also United States v. Rockwell Int'l Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (holding that the determination of the materiality of a false statement is properly made based on its impact on Customs' determination of the correct duty).

Finally, it is clear that Juang fraudulently submitted the material, false entry documents to Customs. Customs' regulations deem a violation of 19 U.S.C. § 1592 to be fraudulent when "a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, *i.e.*, was done voluntarily and intentionally, as established by clear and convincing evidence." 19 C.F.R. pt. 171 app. B(C)(3) (2005). In the instant case, Juang has admitted to knowingly submitting false statements to Customs. Pl.'s Mot., App. F (Deposition of Stephen Juang) ("**Juang Dep.**") at 41–43. Further, defendants, in their own submissions to the Court, have acknowledged that Juang committed fraud through his customs transactions. Defs.' Mot. at 9. It is thus firmly established by uncontroverted facts that Juang committed fraud, and in so doing, violated 19 U.S.C. § 1592(a). These violations created liability for unpaid duties under 19 U.S.C. § 1592(d).

2. Juang Was Defendants' Agent

In order for any liability for Juang's actions to transfer to defendants under agency principles, it must be shown that Juang was defendants' agent. In the instant case, the uncontroverted facts firmly establish that defendants engaged Juang as their agent. Agency is defined as "the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." Restatement (Second) of Agency § 1(1) (1958) (the "**Restatement of Agency**"). It is undisputed that Tao engaged Juang to perform customs entry services on behalf of defendants, and that Juang consented to this arrangement. Tao formalized the agency relationship by signing a power of attorney, a document specifically designed to create an agency relationship. *See, e.g.*, Black's Law Dictionary 1191 (7th ed. 1999) (defining "power of attorney" as "[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor"). Further, Tao hired Juang to perform the role of a customs broker on behalf of defendants, a role that courts have recognized as that of an agent. *See United States v. Fed. Ins. Co.*, 805 F.2d 1012, 1013 (Fed. Cir. 1986); *United States v. Yip*, 930 F.2d 142, 144 (2d Cir. 1991). The responsibilities delegated by Tao and accepted by Juang clearly constituted the basis of an agency relationship between Juang and defendants.

The fact that Juang became the importer of record did not alter the nature of his agency relationship with defendants. Several cases, before this Court and others, have confirmed that the importer of

record may also be an agent in the context of the customs transactions he or she is performing. *See, e.g., Corrigan v. United States*, 35 C.C.P.A. 10, 17–18 (C.C.P.A. 1947) ("While . . . a customs broker may make entry . . . in his own name, . . . he does so as the agent of the owner.") (citations omitted); *Trans-Border Customs Servs. v. United States*, 18 CIT 22, 23, 843 F. Supp. 1482, 1483 (1994) ("Trans-Border is the importer of record and the customs broker acting as agent. . . ."), *aff'd*, 76 F.3d 354 (Fed. Cir. 1996); *Detroit Zoological Soc'y v. United States*, 10 CIT 133, 140, 630 F. Supp. 1350, 1358 (1986) ("Plaintiff seems to acknowledge in its complaint that the importer of record here is an 'agent' of plaintiff-consignee. . . ."); *Hammerstein v. United States*, 27 Cust. Ct. 147, 150 (1951) (identifying the plaintiff as an "agent" and the "importer of record"); *Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 51 F. Supp. 2d 457, 473 (S.D.N.Y. 1999) ("Hansa technically was 'importer of record' acting on behalf of the actual importer, Duferco USA.").

In the instant case, it is clear that Juang continued to function as an agent for defendants, even after Juang became the importer of record. Defendants placed the orders for merchandise prior to importation, and received the goods directly from Juang's companies after they cleared Customs. Further, Tao intended to retain ownership of the merchandise throughout this process and, to that end, Pan Pacific remained the ultimate consignee. There can be no reasonable doubt that Juang was handling the goods on defendants' behalf, regardless of how he may have deviated from the proper performance of his duties. Despite the transfer of importer of record status, Juang remained defendants' agent during the flat fee scheme.

3. Defendants Are Liable for the Customs Violations Committed by their Agent Within the Scope of that Agent's Authority

It is well established under the agency principle of imputation that defendants, as principals, may be held liable by a third party for the authorized acts of Juang, as their agent. *See* Restatement of Agency § 140 ("The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that: (a) the agent was authorized; [or] (b) apparently authorized. . . ."). An agent is authorized if he acts "in accordance with the principal's manifestations of consent to him." Restatement of Agency § 7. In the instant case, Tao unambiguously consented to Juang filing entry documents on defendants' behalf when he retained Juang's customs clearance services and signed a power of attorney. Thus, liability for Juang's customs transactions may be extended to defendants.

It is irrelevant whether or not defendants authorized the specific unlawful conduct which constituted the violation of 19 U.S.C. § 1592(a). In *Gleason v. Seaboard A. L. R. Co.*, 278 U.S. 349 (1929),

the United States Supreme Court (the "**Supreme Court**") noted that "few doctrines of the law are more firmly established or more in harmony with accepted notions of social policy than that of the liability of the principal without fault of his own." *Id.*, 278 U.S. at 356 (citations omitted); *see also* Restatement of Agency § 216 ("A master or other principal may be liable to another whose interests have been invaded by the tortious conduct of a servant or other agent, although the principal does not personally violate a duty to such other or authorize the conduct of the agent causing the invasion."). Even if Juang had ignored instructions from defendants to the contrary, defendants may still be held liable for Juang's unlawful actions, since those actions were within the scope of the duties that Juang had been authorized to perform. *See Hoover v. Wise*, 91 U.S. 308, 311 (1876) ("[T]he principal is . . . liable in a civil suit if the [agent's] fraud be committed in the transaction of the very business in which the agent was appointed to act.") (citations omitted). It is clear that misrepresentations, including fraud, fall within the category of unlawful acts contemplated under these principles of agency liability. *See, e.g.*, Restatement of Agency § 261 ("A principal who puts a[n] . . . agent in a position which enables the agent, while apparently acting within his authority, to commit a fraud upon third persons is subject to liability to such third persons for the fraud."). Even if Juang was acting entirely for his own purposes, defendants remain liable. In the *Gleason* case, the Supreme Court noted with regard to agency liability that "there would seem to be no more reason for creating an exception . . . because of the agent's secret purpose to benefit himself . . . than in any other case where his default is actuated by negligence or sinister motives." *Gleason*, 278 U.S. at 357; *see also* Restatement of Agency § 262 ("A person who otherwise would be liable to another for the misrepresentations of one apparently acting for him is not relieved from liability by the fact that the . . . agent acts entirely for his own purposes. . . .").

Nevertheless, defendants claim that they cannot be found liable due to the "adverse interest exception" to this principle of agency liability. This exception absolves a principal of liability "when an agent abandons his principal's interests and acts entirely for his or another's purposes." *In Re Crazy Eddie Sec. Litig.*, 802 F. Supp. 804, 817 (E.D.N.Y. 1992) (citation omitted). The exception does not apply, however, when "the unfaithful agent's . . . conduct, while motivated by improper self-serving reasons, also benefit [sic] the . . . principal." *In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002, 1005 n.2 (S.D.N.Y. 1993) (citation omitted). In the instant case, defendants do not qualify for the exception, since they benefitted from Juang's fraud. The flat rate that Juang charged for the shipments at issue was a reduction relative to the duties defendants would have paid. In addition, under the flat fee scheme, defendants no longer purchased quota visas for shipments to the United States. Defendants

argue that these savings could also have been obtained through legitimate means,[15] but this is irrelevant. The savings Juang achieved through his fraud were passed on to defendants. The reception of this benefit forecloses use of the adverse interest exception, regardless of any alternate explanation of the benefit which hypothetically might exist. Since defendants do not satisfy the exception's most basic requirements, the Court does not further consider its applicability to this case.

To be sure, the instant case appears to be the first time this Court has applied agency liability to customs violations in precisely this manner,[16] but the agency principles employed herein are firmly established. For example, *Gleason* demonstrates a closely analogous application of these principles by the Supreme Court. *Gleason* involved a fraudulent scheme by an employee of a railroad company to defraud a cotton merchant. *Gleason*, 278 U.S. at 352–53. Unbeknownst to the railroad company, the employee submitted a fraudulent invoice and bill of lading to the merchant's bank in order to receive payment for a fictitious shipment of cotton. *Id.* Despite the railroad company's ignorance of the scheme and the fact that it was performed solely for the employee's own benefit, the Supreme Court held the railroad company liable for the losses resulting from the fraud. *Id.* at 357. Although the instant case deals instead with customs violations, the theory of defendants' liability is essentially the same as the railroad company's: a principal is liable for a fraud made possible by the responsibilities delegated to an agent, even if the agent acts independently in motive and execution.

4. Sound Public Policy Supports Application of Agency Principles to Fraudulent Violations of 19 U.S.C. § 1592

Assigning liability to defendants for Juang's fraudulent violations of 19 U.S.C. § 1592 is also supported by sound public policy. The policy underlying the agency principle of imputation, at the most basic level, is "to protect innocent third parties or . . . to prevent principals from benefitting at the expense of innocent third parties." *Bankers Life Ins. Co. of Neb. v. Scurlock Oil Co.*, 447 F.2d 997, 1005 (5th

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[15] Defendants claim that court holdings, including *Synergy Sport Int'l v. United States*, 17 CIT 18 (1993) and *Nissho Iwai Am. Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992), indicate that duties can properly be derived from production value, producing a significant savings when compared to similar calculations using invoice value. Defs.' Resp. to PPFUF ¶¶ 36, 38. Defendants contend that this alternative method could produce similar savings to those received under the flat fee scheme. Defs.' Opp'n at 11.

[16] The novelty of this case is probably due to the unusual nature of the business arrangement under the flat fee scheme. In most customs transactions involving a broker, the principal remains the importer of record and, as such, is made explicitly liable by Customs' regulations. *See* 19 C.F.R. § 111.29(b)(1) ("If you are the importer of record, payment to the broker will not relieve you of liability for Customs charges (duties, taxes, or other debts owed Customs) in the event the charges are not paid by the broker.").

Cir. 1971). In this vein, the United States Court of Appeals for the Federal Circuit has previously indicated that, rather than force the government (as third party) to bear the loss resulting from unpaid duties, it is preferable to extend liability for unpaid duties to an innocent party who is nonetheless "traditionally liable" for such payment. *United States v. Blum*, 858 F.2d 1566, 1570 (Fed. Cir. 1988).[17] As such, extending liability to defendants in this case achieves the public policy goals underlying both traditional agency principles and the *Blum* court's reasoning.

Further, the Court's holding in this case serves an additional public policy interest by creating proper incentives for importers in the future. If the Court were to allow defendants to immunize themselves from liability for customs violations by hiring a customs broker and transferring importer of record status, the Court would effectively create an incentive for bad behavior. Allowing such protection for importers would discourage care on their part in selecting their agents, and would thus provide more opportunity for dishonest middlemen such as Juang. Moreover, if importers could lower their costs through unlawful customs transactions without incurring any liability, they would be encouraged to seek brokers willing to commit fraud on their behalf (this case demonstrates that it is possible for both parties to benefit from such an arrangement). In the Court's view, the likely effect of denying liability in this case would be an increase in fraudulent customs transactions. Therefore, the Court concludes that extending liability to defendants for duties unpaid as a result of Juang's fraud is not only well supported by law, but also sound public policy. *See TIE Commc'n, Inc. v. United States*, 18 CIT 358, 366 (1994) (weighing public policy concerns to arrive at disposition in customs case).

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Accordingly, the Court concludes that defendants are liable for the duties unpaid as a result of Juang's fraudulent violations of 19 U.S.C. § 1592.

B. SUMMARY JUDGMENT CANNOT BE GRANTED ON THE ISSUE OF LIABILITY FOR A CIVIL PENALTY UNDER 19 U.S.C. § 1592

On summary judgment, Customs makes two alternative claims for the assignment of liability to defendants for a civil penalty under 19

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[17] To be clear, Customs does not argue (the Court believes rightly) that this case satisfies the requirements of *Blum*, which permits the assignment of liability for unpaid duties under 19 U.S.C. § 1592 to any party "traditionally liable for such duties[.]" *Blum*, 858 F.2d at 1570. The unusual business arrangement under the flat fee scheme, involving transfer of importer of record status, appears to preclude direct application of *Blum* to this case. *See* Customs Directive 4400–09 (Feb. 6, 1989) (indicating that demands for unpaid duties under 19 U.S.C. § 1592 are traditionally made only to violators, importers of record, and sureties).

U.S.C. § 1592. Customs first argues that a civil penalty is warranted because defendants were complicit in the false entry of the merchandise at issue through gross negligence, in violation of 19 U.S.C. § 1592(a).[18] In the alternative, Customs argues that, at a minimum, defendants' role in the flat fee scheme constituted a negligent violation of 19 U.S.C. § 1592(a) deserving of a civil penalty.[19,20] Under either theory, Customs requests that the Court assign liability to defendants for a penalty in accordance with 19 U.S.C. § 1592.[21]

Defendants, in turn, request summary judgment on Count 1 of the complaint, in which Customs seeks a civil penalty based on allegations that defendants were complicit in the false entry of the merchandise at issue through fraud.[22] Defendants claim that Customs has failed to provide any evidence of scienter on the part of defendants, and thus cannot support its claim for a penalty based on fraud under 19 U.S.C. § 1592(c). Defendants request that the Court deny such a penalty on summary judgment.

For the reasons that follow, the Court concludes that it is unable to grant summary judgment for either party on the issue of a civil penalty under any theory of defendants' liability. Although the Court finds that defendants are at least *eligible* for the assignment of liability for a civil penalty under 19 U.S.C. § 1592, defendants' direct culpability in the flat feescheme (and thus degree of liability) is a contested factual question which, in the Court's view, is more appropriate for resolution at trial.

1. Defendants Are Eligible for the Assessment of a Civil Penalty Under 19 U.S.C. § 1592

Like liability for unpaid duties, liability for a civil penalty accrues under 19 U.S.C. § 1592 when a violation of 19 U.S.C. § 1592(a) is committed through either fraud, grossnegligence, or negligence. 19 U.S.C. § 1592(c). The Court applies the same four-part test derived

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[18] Customs' regulations provide that gross negligence is the "actual knowledge of or wanton disregard for the relevant facts . . . with indifference to or disregard for the offender's obligations under the statute." 19 C.F.R. pt. 171, app. B(C)(2) (2005).

[19] Customs' regulations provide that "a violation is negligent if it results from failure to exercise reasonable care and competence. . . ." 19 C.F.R. pt. 171, app. B(C)(1) (2005).

[20] In its complaint, Customs claimed that defendants committed fraudulent violations of 19 U.S.C. § 1592(a) for the purpose of recovering both unpaid duties and a civil penalty. However, on summary judgment, Customs does not request that penalty liability be assigned to defendants under a fraud theory.

[21] The penalty amount differs under each theory of liability. *See* 19 U.S.C. § 1592(c)(1999).

[22] As indicated *supra*, at III.A, Customs' regulations provide that a violation of 19 U.S.C. § 1592 is fraudulent "if a material false statement, omission, or act in connection with the transaction was committed (or omitted) knowingly, *i.e.*, was done voluntarily and intentionally, as established by clear and convincing evidence." 19 C.F.R. pt. 171, app. B(C)(3) (2005).

from 19 U.S.C. § 1592(a) to determine whether such a violation has been committed for purposes of affixing liability for both unpaid duties and a civil penalty.[23] Here, it is already firmly established that information submitted on behalf of defendants to Customs was both false and material. *See supra*, at III.A.1. Thus, for a customs violation to exist and penalty liability to thereby accrue to defendants, it need only be determined that: (1) defendants belong to the class of "persons" subject to liability under 19 U.S.C. § 1592 and (2) defendants' conduct in connection with the false, material submissions to Customs constituted fraud, gross negligence, or negligence.[24]

As an initial matter, it is clear that defendants are "persons" subject to liability within the meaning of 19 U.S.C. § 1592(a), *i.e.*, they are at least *eligible* for the assessment of a civil penalty under the statute. This Court has previously held that "neither the statute nor the regulations limit liability for customs penalties to the 'importer of record.' " *United States v. KAB Trade Co.*, 21 CIT 297, 300 (1997); *see also United States v. Action Prods. Int'l, Inc.*, 25 CIT 139, 142 (2001) ("Defendant's contention that it cannot be held liable for a violation of 19 U.S.C. § 1592 because it is not the importer of record is supported by neither the statute nor case law."). Indeed, the current language of the statute is intended "to encompass all of the potential violators listed in the prior version [of the statute]." *Action Prods.*, 25 CIT at 142 (citing H.R. Rep. No. 95–621, at 12 (1977)). "This list included 'any consignor, seller, owner, importer, consignee, agent or other person or persons.' " *Id. (citing United States v. Appendagez, Inc.*, 5 CIT 74, 80, 560 F. Supp. 50, 55 (1983) (*citing* 19 U.S.C. § 1592 (1976))). Since the uncontroverted facts establish that, at all relevant times, Tao, Pan Pacific, and/or Aviat Sportif served as ultimate consignee (and likely also owner and importer) of the suspect entries, defendants are "persons" under 19 U.S.C. § 1592 who may be assessed a civil penalty if shown to have violated the statute through fraud, gross negligence, or negligence.

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[23] Although the same test is applied, a claim for recovery of unpaid duties is independent of (and analyzed separately from) a claim for assessment of a civil penalty. Under 19 U.S.C. § 1592, a defendant may be required to restore unpaid duties to the government without payment of a penalty; likewise, a defendant may be required to pay a penalty for a customs violation not resulting in unpaid duties to the government. *See, e.g., Blum*, 858 F.2d at 1569; *United States v. Snuggles, Inc.*, 20 CIT 1057, 1060, 937 F.Supp. 923, 926 (1996); *United States v. Gordon*, 10 CIT 292, 297, 634 F. Supp. 409, 415 (1986).

[24] These two parts of the statutory test remain open at this stage of analysis because Customs does not seek (the Court believes rightly) a civil penalty under a fraud theory on summary judgment. The Court is precluded from considering an extension of the agency principles discussed *supra*, at III.A, to satisfy the statutory requirements for the assignment of penalty liability under 19 U.S.C. § 1592 because this remedy was not requested by Customs.

2. Disputes of Material Fact Regarding Defendants' Direct Culpability Preclude Establishing Defendants' Liability for a Civil Penalty on Summary Judgment

Although defendants are eligible as a matter of law for the assessment of a civil penalty under 19 U.S.C. § 1592, defendants' direct culpability (and thus degree of liability under a fraud, gross negligence, or negligence theory) is a contested question of fact inappropriate for summary judgment in this case.

Turning first to the fraud theory of penalty liability, the relevant facts are sufficiently disputed to prevent the Court from granting partial summary judgment in favor of defendants. Defendants urge the Court that they are entitled to judgment as a matter of law concerning their penalty liability for fraud because, in their view, Customs has failed to produce any direct evidence of defendants' knowledge of the customs violations committed under the flat fee scheme. Rather, defendants argue that the uncontroverted direct evidence demonstrates their absolute lack of knowledge. In support of this position, defendants note that Tao has consistently denied any knowledge of the customs violations committed under the flat fee scheme. Defs.' Mot. at 2, 7–8. Defendants also point to statements by Juang and his employee, Chien Kuo Chen, indicating that they did not disclose the customs violations to defendants. *See* Juang Dep. at 45; Deposition of Chien Kuo Chen, dated March 17, 2004 at 43–44. Finally, defendants claim that they have introduced evidence indicating that there were rational explanations for why defendants did not suspect criminality in connection with the flat fee scheme. *See* Rosenbach Dep. at 185–91.

While this evidence does weigh in defendants' favor, it is insufficient to warrant summary judgment for defendants on the Court No. 01–01022 Page 31 issue of penalty liability for fraudulent customs violations. In order to prove fraud under 19 U.S.C. § 1592, Customs must establish by "clear and convincing evidence" that defendants "knowingly" committed a customs violation or an act in connection therewith. 19 C.F.R. pt. 171 app. B(C)(3) (2005). To satisfy this standard, Customs need not present *direct* evidence of defendants' knowing participation in the customs violations. Rather, courts have repeatedly found that, in the fraud context, the clear and convincing evidence standard may be satisfied by circumstantial evidence. *See, e.g., Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 375 F.3d 1341, 1360 (Fed. Cir. 2004) (finding fraud on the basis of "clear and convincing circumstantial evidence"). The rationale for this rule is clear: "[i]t is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence." *Thompson v. Bowie*, 71 U.S. 463, 473 (1866); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1982) (noting that "the proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence"). In this light, when all reasonable inferences are

drawn in favor of Customs, there is sufficient circumstantial evidence for a reasonable trier of fact to infer defendants' knowing participation in the customs violations at issue. This evidence includes (but is not limited to): the unusual nature of the flat fee scheme (including the reduction in costs and the lack of quota visas); Tao's decision not to directly inquire into the mechanics of the scheme with Juang; and changes in defendants' own business practices (including accepting invoices without supporting documentation and ceasing to keep proper records). Admittedly, this evidence is fairly countered by the evidence proffered by defendants; but, this only demonstrates the existence of a dispute concerning the material fact of defendants' knowledge of the customs violations. Such a dispute is more appropriately resolved at trial where, for example, the credibility of defendants' various witnesses may be tested. *Leggett & Platt, Inc. v. Hickory Springs Mfg. Co.*, 285 F.3d 1353, 1362 (Fed. Cir. 2002) (finding that "summary judgment is inappropriate where . . . a case may ultimately turn on the credibility of witnesses) (*citing Liberty Lobby*, 477 U.S. at 255).

Preservation of the issue of penalty liability for fraudulent customs violations leaves the Court equally unable to determine, on summary judgment, defendants' liability under the alternate theories of gross negligence and negligence urged by Customs. Turning to the plain language of the statute, it is clear that the three alternative theories of liability recognized by 19 U.S.C. § 1592 are mutually exclusive. *See* 19 U.S.C. § 1592(a)(1) (1999) (indicating that a violation may occur "by fraud, gross negligence *or* negligence") (emphasis added). Congress' use of the word "or" indicates that a choice must be made among the three theories; for purposes of determining penalty liability under 19 U.S.C. § 1592, a person who commits a customs violation may not have more than one *mens rea* at the time of commission.[25] *United States v. Complex Mach. Works Co.*, 23 CIT 942, 950 n.14, 83 F. Supp. 2d 1307, 1315 n.14 (1999) (recognizing alternative nature of levels of culpability under 19 U.S.C. § 1592).

The Court will not attempt to issue judgment as a matter of law on either of the lesser theories of liability while fraud remains a possible outcome. Such an order at this stage of the proceedings would only add confusion later if a judgment imposing greater liability were made at trial. Instead, it is well within the discretion of this Court to make a threshold determination of eligibility for penalty liability under 19 U.S.C. § 1592 while reserving the issue of actual

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[25] However, when liability for unpaid duties and a civil penalty are both sought in connection with the same customs violation, the Court notes that the end result of these separate liability analyses may be the attribution of two different states of mind to a single person, such as where the agency principle of imputed mens rea is used to establish only one category of liability. See Blum, 858 F.2d at 1570 (recognizing that a party may be "innocent" for purposes of penalty liability but not liability for unpaid duties).

culpability for trial. *See United States v. Almany*, 22 CIT 490, 493 (1998) (holding defendant generally liable for violation of 19 U.S.C. § 1592 and reserving issue of state of mind for later determination).

* * *

Accordingly, defendants' and Customs' motions for partial summary judgment on the issue of penalty liability are both denied and the issue of defendants' liability for a civil penalty is reserved for trial.

IV. CONCLUSION

For the foregoing reasons, the Court grants Customs' motion for partial summary judgment on the issue of defendants' liability for unpaid duties, in an amount to be determined following briefing by both parties. In addition, the Court denies both parties' motions for partial summary judgment on the issue of defendants' liability for a civil penalty, reserving this issue for trial. A separate order will be issued accordingly.

Slip Op. 05–108

SIDERCA S.A.I.C., *ET AL.*, Plaintiffs, v. UNITED STATES, Defendant, and NEWPORT STEEL CORPORATION; MAVERICK TUBE CORPORATION; LONE STAR STEEL COMPANY, INCORPORATED; KOPPEL STEEL CORPORATION; IPSCO TUBULARS, INCORPORATED; GRANT PRIDECO, INC.; UNITED STATES STEEL CORPRATION, Defendant-Intervenors.

Before: Pogue, Judge

Consol. Court No. 01–00692

[ITC's remand determination sustained.]

Dated: August 26, 2005

White & Case, LLP (*David P. Houlihan, Gregory J. Spak, Richard J. Burke, Lyle B. Vander Schaaf,* and *Joanna M. Ritcey-Donohue*) for the plaintiff.

James M. Lyons, Acting General Counsel, *Andrea C. Casson,* Acting Assistant General Counsel for Litigation, U.S. International Trade Commission, (*Peter L. Sultan*) for the defendant.

Schagrin Associates (*Roger B. Schagrin*) for defendant-intervenors Newport Steel Corporation, Maverick Tube Corporation,Lone Star Steel Company, Koppel Steel Corporation, IPSCO Tubulars,Incorporated, and Grant-Prideco, Incorporated.

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer, John J. Mangan, James C. Hecht,* and *Stephen P. Vaughn*) for defendant-intervenor United States Steel Corporation.

OPINION

Pogue, Judge: Plaintiffs, Siderca S.A.I.C. ("Siderca"), Dalmine S.p.A. ("Dalmine"), and NKK Tubes challenge the remand determination of Defendant, the U.S. International Trade Commission ("the ITC"), in the sunset review of antidumping orders on oil country tubular goods ("OCTG") from Argentina, Italy, Japan, Korea, and Mexico. Plaintiffs allege that aspects of the ITC's determination are not in accordance with law and unsupported by substantial record evidence.

BACKGROUND

In August of 1995, following the ITC's finding that U.S. producers of OCTG were being materially injured by competition from dumped imports, *see Oil Country Tubular Goods from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, USITC Pub. 2911, Inv. Nos. 701–TA–363 and 364 (Final) and 731–TA–711–717 (Final), P.R. List 1, Doc. No. 116 at I–3 (Aug. 1995) ("*Original Determ.*"), the United States Department of Commerce imposed antidumping orders on OCTG from Argentina, Italy, Japan, Korea, and Mexico. *See Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 41,055 (Dep't Commerce Aug. 11, 1995) (antidumping duty order); *Oil Country Tubular Goods from Italy*, 60 Fed. Reg. 41,057 (Dep't Commerce Aug. 11, 1995) (antidumping duty order); *Oil Country Tubular Goods from Japan*, 60 Fed. Reg. 41,058 (Dep't Commerce Aug. 11, 1995) (antidumping duty order); *Oil Country Tubular Goods from Korea*, 60 Fed. Reg. 41,057 (Dep't Commerce Aug. 11, 1995) (antidumping duty order); *Oil Country Tubular Goods from Mexico*, 60 Fed. Reg. 41,056 (Dep't Commerce Aug. 11, 1995) (antidumping duty order). Five years later, pursuant to 19 U.S.C. § 1675(c) (2000), the ITC instituted a sunset review to determine whether revocation of the antidumping orders would likely lead to the recurrence of material injury to U.S. OCTG producers within a reasonably foreseeable period of time. *See* 19 U.S.C. § 1675a(a)(1)[1]; *Seamless Pipe from Argentina, Brazil, Germany, and Italy and Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, 65 Fed. Reg. 63,889 (ITC Oct. 25, 2000) (notice of Commission determinations to conduct full five-year reviews concerning the countervailing duty order and antidumping duty orders on seamless pipe from Argentina, Brazil, Ger-

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[1] Title 19 U.S.C. § 1675a(a)(1) states, in part:

(1) In general.

In a [sunset review], the Commission shall determine whether revocation of an order, or termination of a suspended investigation, would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. The Commission shall consider the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked or the suspended investigation is terminated.

many, and Italy and the countervailing duty order and antidumping duty orders on oil country tubular goods from Argentina, Italy, Japan, Korea, and Mexico) ("*Review Notice*"). The ITC cumulated the volume and effect of imported OCTG from the five reviewed countries; the ITC then found that, in the event of revocation of the antidumping order, these cumulated imports would likely cause recurrence of material injury to U.S. OCTG producers within a reasonably foreseeable time. *See Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico*, Inv. No. 701–TA–364 (Review) and 731–TA–711 and 713–716 (Review), C.R. List 2, Doc. No. 91 at 1, 24 (June 29, 2001) ("*Commission's Views*").

Plaintiffs, subject producers of OCTG,[2] challenged the ITC's determinations before the Court, arguing that the ITC's interpretation of the word "likely" in its governing statute was not in accordance with law, and that there was not substantial evidence to support many of ITC's substantive findings.

The court remanded the ITC's determination so that the agency could explain how it understood and applied the statutory term "likely" in making its determination. The ITC affirmed on remand its finding that recurrence of material injury to the domestic industry would be likely in the event of revocation of the antidumping order. After remand, plaintiffs again challenge the agency's interpretation of the word "likely", as well as the quantum of evidence supporting the agency's substantive findings.

STANDARD OF REVIEW

The Court reviews the ITC's determinations in sunset reviews to ascertain whether they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* 19 U.S.C. § 1516a(a)(2)(B)(iii).

DISCUSSION

The court first evaluates the challenge to the ITC's interpretation of the word "likely"; it then goes on to discuss whether substantial evidence supports the agency's substantive findings.

1. *The "Likely" Standard*

The word "likely" has a place of high importance in the statute governing sunset reviews. *See* 19 U.S.C. § 1675a. Indeed, that term is the fulcrum upon which most of the decisions that the agency is required to make in a sunset review turn. For example, the ITC

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[2] Siderca is an Argentine producer of OCTG. Dalmine is an Italian producer. NKK Tubes is a Japanese producer. *Commission's Views*, C.R. List 2, Doc. No. 91 at 3.

must determine whether material injury is "likely" to continue or recur. *See* 19 U.S.C. § 1675a(a)(1).

Various opinions of the Court have held that the term "likely" should be interpreted to mean "probable," or, put another way, "more likely than not." *See, e.g., AG der Dillinger Hüttenwerke v. United States*, 26 CIT 1091, 1100–1101, 1101 n.14 (2002) (explaining that in a countervailing duty sunset review, to satisfy a "likely" standard, a thing must be shown to be "probable," or "more likely than not"); *Usinor Industeel, S.A. v United States*, 26 CIT 467, 474–75 (2002) ("*Usinor I*"), *Usinor Industeel, S.A. v United States*, 26 CIT 1402, 1403–04 (2002), affirmed at 112 Fed. Appx. 59 (Fed. Cir. 2004) (rejecting argument that "likely" means something between "possible" and "probable"). In light of previous cases dealing with contemporaneous reviews finding that the ITC may have employed the wrong standard, contemporaneous statements by the ITC arguing for or advancing a "possible," rather than a "probable" standard, and the lack of discussion of the issue in the determination itself, the court directed the agency on remand to indicate what standard it had actually used, and if the standard used was incorrect, to revisit its determinations accordingly. *See* Order Remanding Court No. 01–692 to the ITC (April 5, 2005).

In its remand determination, the ITC states "[i]n our original views in these reviews we applied a 'likely' standard that is consistent with how the Court has defined that term in *Siderca, S.A.I.C. v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1223, 1243 (2004) as well as in prior opinions addressing this issue." Response of the Commission to Remand Order at 2, Attach. to Letter from Peter L. Sultan, Counsel for Defendant, to the Hon. Donald C. Pogue, Re: *Siderca, S.A.I.C., et. al. v. United States, Consol. Ct. No. 01–692* (June 6, 2005). The court will accept this statement as an assertion that the evidence amassed and cited by the agency is such as to meet or surpass the burden under the "probable" standard. Therefore, at this juncture, the only way in which the agency's statement can be measured is by the sum of record evidence that supports the agency's determinations here. *See Siderca, S.A.I.C. v. United States*, 29 CIT ___ , Slip Op. 05–64 at 5–6 (June 9, 2005).

2. *Substantial evidence*

Plaintiffs challenge whether the evidence compiled by the ITC is sufficient to support its conclusions on a number of issues. First, plaintiffs challenge the ITC's determination to cumulate imports from Argentina, Italy, Japan, Korea, and Mexico. Second, plaintiffs challenge the evidence supporting the agency's determination that, taken together, (1) the likely volume of subject imports, (2) the likely price effects of subject imports, and (3) the likely impact of subject imports, are such as to lead to a recurrence of material injury to do-

mestic manufacturers of OCTG within a reasonably foreseeable time. The court addresses the two issues in turn.

A. *Cumulation*

In a sunset review proceeding, the ITC may cumulate subject imports from all countries with respect to which [sunset reviews] were initiated on the same day, if certain other elements are satisfied. *See* 19 U.S.C. § 1675a(a)(7). First, the ITC must determine whether the imports from each country would be likely to have no discernible impact on the U.S. market. *See id.* Second, the ITC must find that the imports it seeks to cumulate would likely compete with each other and with the domestic product. *See id.* Here, there is no question that sunset reviews for OCTG from Argentina, Italy, Japan, Korea, and Mexico were initiated on the same day. *See Review Notice*, 65 Fed. Reg. at 63,889. However, plaintiffs challenge whether certain of these countries' imports would have a discernible adverse impact and moreover whether they would likely compete with each other and with the domestic product.

I. Discernible adverse impact

Regarding discernible adverse impact, plaintiffs argue that Italy's imports comprised only a very small percentage of the imports to the U.S. market in the original investigation. Pls.' Initial Br.: Mem. Pts. & Auths. Supp. Pls.' Mot. J. Agency Rec. 36 ("Pls.' Mot."). Moreover, plaintiffs argue that Arvedi, one of the Italian producers investigated in the original proceedings, has since ceased to manufacture OCTG, that the record shows that the demand for OCTG in Italy is increasing, such that Dalmine, the remaining Italian producer (and a plaintiff here) would have little motivation to export to the U.S. in the event that the order is revoked, and that, at any rate, Dalmine is operating nearly at capacity. *Id.* (citing Pre-Hearing Brief of Dalmine SpA from Italy, Attach. to Letter from David P. Houlihan to the Hon. Donna R. Koehnke, Secretary, ITC, Re: *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico, Inv. Nos. 701–TA–364 and 731–TA–711, 731–TA–713–716 (Reviews)*, C.R. List 2, Doc. No. 38 at 1 (April 27, 2001) ("Dalmine Pre-Hearing Br."). Plaintiffs characterize the ITC's determination that Italy's imports would likely have a discernible adverse impact as based solely on the finding that Dalmine maintains an active channel of distribution in the United States. *See id.* at 36–37.

The ITC's determination evidences that Italy's imports during the period of the original investigation accounted for only a tiny portion of apparent U.S. consumption of OCTG. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 17. However, the ITC argues that its determination regarding Italy is based on more than its finding that Italy maintains an active channel of distribution in the U.S. *See* Def.'s Opp'n Pls.' Mot. J. Agency Rec. 19–20 ("Def.'s Opp'n"). The de-

termination states that "[p]roducers in each of the subject countries continue to produce and export . . . volumes of the subject casing and tubing." *Commission's Views*, C.R. List 2, Doc. No. 91 at 18. The determination also states that the subject producers can "produce other tubular products on the same machinery used to produce the subject merchandise and can shift production between the subject merchandise and other products." *Id.*[3] Further, the determination appears to state that prevailing conditions of competition in the U.S. market, specifically the importance of price considerations among U.S. buyers of OCTG, would give subject producers an incentive to import. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 18, 18 n.57 (citing *Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico, Staff Report* to the Commission on Investigations Nos. 701–TA–364 (Review) and 731–TA–707–711 and 713–716 (Review), Attach. to Mem. from Lynn Featherstone, Director, Office of Investigations, to the Commission, Re: *Investigations Nos. 701–TA–364 (Review) and 731–TA–711 and 713–716 (Review): Oil Country Tubular Goods from Italy Argentina, Italy, Japan, Korea, and Mexico – Staff Report* (May 31, 2001), C.R. List 2, Doc. No. 87 at Page II–27 ("*Staff Report*")).

In addition, the determination appears to answer the plaintiffs' objections. First, it relies only on data from Dalmine, rather than data from Arvedi, the Italian producer that ceased production. Indeed, as Arvedi did not participate in this review, see *Commission's Views*, C.R. List 2, Doc. No. 91 at 3–4, there is no information from Arvedi upon which the Commission could have relied. Second, while the plaintiffs cite Dalmine's own contention that demand for OCTG in its home market is high and increasing, Dalmine Pre-Hearing Br., C.R. List 2, Doc. No. 38 at 1, the record evidence shows that Dalmine has actually sold less and less OCTG internally each year. *See Staff Report*, C.R. List 2, Doc. No 87 at Table IV–6). Exports, on the other hand, comprise the majority of its sales. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 35, 35 n.136 (citing *Staff Report*, C.R. List 2, Doc. No 87 at Table IV–6). Finally, although Dalmine may be operating at near capacity in its production of OCTG, the ease with which OCTG producers can switch other lines over to the manufacture of OCTG means that high capacity utilization on OCTG does not necessarily result in an insurmountable cap on OCTG produc-

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[3] At first glance, it appears that neither this statement nor the one preceding it are supported by citation to the record. Such failure of citation might present a serious problem, but similar statements are made by the ITC elsewhere in the determination, and appear in conjunction with appropriate record citations. *See Commission's Views*, C.R. List 2 Doc. 91 at 27, 27 nn.100–101 & 30, 30 nn.111, 113–115 & 31, 31 nn.116–117 & 35, 35 n. 136. While the court feels that the ITC must endeavor to be more thorough with its citations in future determinations, it appears that, considered in light of these other record citations, the ITC has not made any conclusory statements here.

tion. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 27 n.100, n.101 & 29 n.112.

Accordingly, it appears that while Italy's imports to the U.S. have historically been small, Italy maintains the ability to export product to the U.S. in an amount that would be discernible. Moreover, Italy is actually dependent on exports for the majority of its OCTG sales. Finally, given the importance of price considerations to U.S. purchasers of OCTG, Italy may have an incentive to export OCTG to the U.S. in the event of revocation. This evidence appears to the court to satisfy the standard that "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted).

ii. Likely competition

However, the plaintiffs here also challenge the ITC's determination that subject imports would likely compete with each other and with the domestic product. In deciding whether subject imports would be likely to compete with each other and the domestic product in the event of revocation, the ITC traditionally considers four subfactors: (1) the degree of fungibility between the imports from different countries and the domestic like product, (2) the existence of common or similar channels of distribution for imports and the domestic like product, (3) the presence of sales or offers to sell in the same geographical markets, and (4) whether the imports are simultaneously present in the market. *See, e.g., Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989) (citation omitted). The plaintiffs here challenge the ITC's determination with regard to all four subfactors, which the court will discuss in turn.

1. Fungibility

With regard to the degree of fungibility between the subject imports and the domestic like product, the plaintiffs make two arguments. First, they note that the subject producers specialize in either seamless or welded OCTG. Pls.' Mot. 38.[4] The plaintiffs argue that the record reveals only limited fungibility between seamless and welded products, and that the price data on the record reveals that seamless products command a premium over welded products. *Id.* at 38–39. Plaintiffs argue that wherever cheaper welded pipe could be used in an application, the consumer would only purchase welded pipe, and that, accordingly, even though seamless pipe might techni-

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[4] Plaintiffs allege that OCTG producers focus on either welded or seamless product. Pls.' Mot. 38. They further allege that they, as well as the Mexican producer TAMSA, produce only seamless product. *See id.* The Korean producers, on the other hand, make only welded OCTG, as well as the remaining Argentine and Mexican producers. *See id.*

Domestic production of OCTG is evenly divided between welded and seamless production. *See Staff Report*, C.R. List 2, Doc. No 87 at Table I–3.

cally be substitutable, the consumer would not perceive it as such. *See id.* at 39. Second, the plaintiffs argue that Japan specializes in the production of niche products that are not available from other producers. *Id.*

The ITC's determination addresses both arguments. First, the ITC notes that the original investigation found that welded and seamless products compete in certain applications. *Commission's Views,* C.R. List 2, Doc. No. 91 at 19. The determination does not, however, address the question of whether price differentials between seamless and welded pipe suggest that purchasers would not substitute welded pipe for seamless. In its opposition to plaintiff's motion, the ITC contends that the plaintiffs' argument on this point is misplaced, because the majority of purchasers indicated that foreign and domestic OCTG are "always" interchangeable, thus making clear that the price differential does not impact perceptions of fungibility. Def.'s Opp'n 16; *Commission's Views*, C.R. List 2, Doc. No. 91 at 20, 20 n.66. Moreover, the ITC argues that the record evidence cited by plaintiff either does not provide meaningful comparisons regarding price differentials or demonstrates that such differentials are not particularly great. Def.'s Opp'n 15, 15 n.6 (citing *Staff Report*, C.R. List 2, Doc. No. 87 at Tables V–1 and V–2).

Second, the ITC, in its determination, addressed the contention that Japanese OCTG was not fungible with other OCTG because Japan produced high-quality "niche" products. The ITC noted that in its original determination, it found that, while Japan did produce certain unique product lines that had no competition from either domestic or other foreign companies, the majority of Japan's exports were of products that did have foreign and domestic analogues. *Commission's Views*, C.R. List 2, Doc. No. 91 at 19 n.60 (citing *Original Determ.*, P.R. List 1, Doc. No. 116 at I–23). The ITC also found that the majority of purchaser responses in both the original determination and the reviews indicated that Japanese OCTG remained relatively fungible with the domestic like product and with other subject imports. *See Commission's Views*, C.R. List 2, Doc No. 91 at 19 n.61, 21, 21 n.71.[5]

Regarding plaintiffs' argument on the fungibility of welded and seamless OCTG, the record regarding actual price differentials is sparse. The ITC asked purchasers and importers of OCTG whether subject and domestic OCTG were interchangeable: the majority of responses indicate that they were, but did not indicate whether the respondents were basing their answers on technical substitutability

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[5] The determination also states that "industry witness testimony" supported its fungibility determination with respect to Japan. *Commission's Views*, C.R. List 2, Doc. No. 91 at 21. It appears, however, that the *Staff Report's* discussion of this is taken entirely from producer and importer questionnaire responses. *See Staff Report*, C.R. List 2, Doc. No. 87 at II–29.

or commercial substitutability. *See Staff Report*, C.R. List 2, Doc. No. 87 at Pages II–27 through II–29. However, domestic industry provided to the ITC a table that shows average prices for welded and seamless casing and tubing over a period of a year. *Staff Report*, C.R. List 2, Doc. No 87 at Table V–16. During that time, seamless tubing in general commanded a premium over welded tubing ranging from $29 per short ton to $115 per short ton. *Id.* Seamless casing commanded a premium over welded casing ranging from $32 per short ton to $57 per short ton. *Id.* Consistent with plaintiffs' arguments here, the ITC's staff itself noted that the consistent difference in pricing must reflect some differences in end uses between seamless and welded OCTG. *Id.* at Page II–10 n.32. Nonetheless, the ITC staff indicated that the moderate nature of the premium could indicate that a large part of the U.S. OCTG market still experienced competition between welded and seamless OCTG, as was found in the original investigation. *Id.*; *see also Original Determ.*, P.R. List 1, Doc. No. 116 at I–23.

Thus, while it appears clear that seamless goods command a premium over welded goods, it is not certain, on this record, what this price difference means in actual practice. As the ITC staff indicated, the "moderate nature" of the difference could indicate that competition was present, or it could not. The information that would enable the court to discern whether the price difference actually makes welded and seamless product nonfungible is simply not contained in the record. Normally, such a lack of evidence on an important issue would result in a remand. However, in this case, the court believes that the arguments on this issue are moot with regard to at least one of the plaintiffs. With regard to the remaining two, the court believes this issue has either been waived, or to the extent it was not waived, results in a *de minimis* harm, and is consequently moot.

With regard to Plaintiff Siderca, the court notes that cumulation is not a producer-by-producer analysis. Rather, the statute calls for the ITC to determine whether the production of entire countries should be grouped together. *See* 19 U.S.C. § 1675a(a)(7). Of the countries involved in these reviews, only Korea specializes in the manufacture of welded products. *See* Revision to the *Staff Report*, Attach. to Mem. from Lynn Featherstone, Director, Office of Investigations, to the Commission; Re: *Investigations Nos. 701–TA–364 (Review) and 731–TA–711 and 713–716 (Review): Oil Country Tubular Goods from Argentina, Italy, Japan, Korea, and Mexico – Revisions to Staff Report* (June 6, 2001), C.R. List 2, Doc. No. 76 at Table C–9 ("*Staff Revision*"); *Staff Report*, CR List 2, Doc. No. 87 at Tables C–10 through C–13. Mexico and Argentina have mixed production of welded and seamless goods. *See Staff Revision* at Table C–9, Staff Report at Table C–13. Japan and Italy engage only in seamless manufacture. *See Staff Report*, CR List 2, Doc. No. 87 at Tables C–10 & C–11. U.S.

production is nearly evenly split between the manufacture of welded and seamless products. *See Staff Report*, C.R. List 2, Doc. No. 87 at Table I–3.

It follows that any argument that plaintiff Siderca might have regarding cumulation of its imports here appears to have no effect. The nation of Argentina, which is the proper subject of the cumulation analysis, engages in both seamless and welded manufacture and accordingly can compete as regards both types of products. With regard to plaintiff Siderca, therefore, the issue is moot. Unlike Siderca, however, plaintiffs Dalmine and NKK Tubes are based in countries that engage solely in seamless manufacture. Nevertheless, their arguments against cumulation must also be rejected.

With regard to plaintiffs Dalmine and NKK Tubes, the court first notes that Dalmine and NKK Tubes will inevitably find their countries' production cumulated with at least some welded production. The fungibility analysis looks at whether goods, considered on a nation-by-nation basis, are interchangeable enough to support an inference of a "reasonable overlap of competition." *Wieland Werke*, 13 CIT 561 at 563, 718 F. Supp. at 52. Even if plaintiffs are completely correct in viewing seamless and welded product as nonfungible, to the extent that countries involved in these reviews (i.e., Mexico and Argentina) produce both seamless and welded OCTG in considerable quantities, their production would have a "reasonable overlap of competition" with that of seamless-producing nations like Japan and Italy. Accordingly, regardless of whether price comparisons between the Korean welded product and seamless production indicate that the Korean product is less competitive, plaintiffs' nations' seamless production would be cumulated with that of nations producing welded OCTG. In addition, two other considerations undermine the plaintiffs' claim.

First, the "likely overlap of competition" analysis undertaken here is very much like the analysis the ITC undertakes in determining what the "domestic like product" for a particular investigation will be. Compare *Wieland Werke*, 13 CIT at 563, 718 F. Supp. at 52 with *Timken Co. v. United States*, 20 CIT 76, 80, 913 F. Supp. 580, 584 (1996). Particularly, both determinations require a fungibility analysis. In the original investigations, the ITC determined that drill pipe should be considered a separate product from other OCTG, but did not find that welded and seamless OCTG should be considered separate like products. *See Staff Report*, C.R. Doc. No. 87 at Page I–25. In responding to the notice of initiation in these reviews, the plaintiffs took no position with respect to this like product determination, while reserving their right to comment at a later time. *See id.* at n.16. However, they do not object to it anywhere in their briefs, or call attention to any objections lodged during the investigation.

It is true that evidence of fungibility sufficient to underpin a like product analysis may not be sufficient to underpin other analyses,

such as the likely competition or injury analyses. *See BIC Corp. v. United States*, 21 CIT 448, 455–56, 964 F. Supp. 391, 399–400 (1997); *Acciai Speciali Terni, S.p.A. v. United States*, 19 CIT 1051, 1063–64 (1995). However, in this case, it appears to the court that the plaintiffs complain of a harm that should have been addressed at the like product stage. While plaintiffs complain that seamless and welded goods would not compete because of price differentials, because the like product analysis has traditionally been concerned with price, *Timken*, 20 CIT at 80, 913 F. Supp. at 584, plaintiffs' fungibility argument is not necessarily dependent on the unique context of the likely competition analysis. Moreover, if the plaintiff is correct that seamless and welded goods are simply not commercially fungible, discussion of this issue at the like product stage would have made sense and permitted appropriate investigation and judicial review of the issue. Because plaintiffs failed to raise their argument regarding fungibility when it was most appropriate to do so, the argument is in some sense, waived.

Second, even if the plaintiffs' contentions regarding the fungibility of seamless and welded OCTG are taken as true, the injury they complain of is so small as to be *de minimis*, and therefore moot. The rule of *de minimis* is a general rule of legal construction and forms part of the background against which all statutes are construed. *Wis. Dep't of Revenue v. William Wrigley, Jr. Co.* 505 U.S. 214, 231 (1992). However, the rule is applied only where it is consonant with the intent of the framers of the law. *Id.*; *Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 903 (Fed. Cir. 1999); *Ciba-Geigy Corp. v. United States*, 25 CIT 1252, 1269, 178 F. Supp. 2d 1336, 1352 (2001); *Former Employees of Barry Callebaut v. Herman*, 25 CIT 1226, 1233–34, 177 F. Supp. 2d 1304, 1311 (2001), *rev'd on other grounds* at *Former Employees of Barry Callebaut v. Chao*, 357 F.3d 1377 (Fed. Cir. 2004). The text of the statute clearly allows cumulation where imports are "likely to compete" with one another. 19 U.S.C. § 1675a(a)(7). Accordingly, the question the court must answer is whether the application of the *de minimis* rule in this context is consonant with determining whether imports are "likely to compete." Given that all countries in the review but Korea produce seamless product, plaintiffs NKK Tubes and Dalmine can only reasonably complain that their countries' production was improperly cumulated with Korea's welded production. In 2000, Korea had an OCTG production capacity of less than 3% of NKK Tubes',[6] Mexico's, Argentina's, and Italy's combined capacity. Compare *Staff Report*, C.R. List 2, Doc. No. 87 at

[6] NKK Tubes was the only Japanese producer to respond to the ITC's inquiries. *Staff Report*, C.R. List 2, Doc. No. 87 at Page II–13. U.S. producers estimated that the non-responding Japanese producers had a potential to supply another 3.5 million short tons of seamless OCTG. *Id.*

Table IV–9[7] with Foreign Producers'/Exporters' Questionnaires, CR List 2, Docs. Nos. 105, 109, 113 & 114 at Questions II–6 and II–16. Accordingly, even if, as plaintiffs allege, welded and seamless OCTG are commercially nonfungible, Korea's production is so comparatively small as to be *de minimis*. Again, because Mexico and Argentina produce both kinds of OCTG, Dalmine and NKK Tubes will inevitably find their countries' production cumulated with at least some welded production. *See* Foreign Producers'/Exporters' Questionnaires, CR List 2, Docs. Nos. 104 & 107 at Questions II–6 and II–16.

Given the plaintiffs' posture, the answer to the question posed to the court must be that the application of the *de minimis* rule here does no violence to the cumulation statute. The harm suffered by the plaintiffs due to their countries' cumulation with other countries stems from the increase in volume, price effects, and impact that results therefrom. In this case, however, Korea's production capacity is simply overwhelmed by that of the other producers, to whom plaintiffs' fungibility argument does not apply. Were plaintiffs Korean producers, the harm they would have to allege here as a result of the ITC's fungibility finding would no longer be *de minimis*, but as it stands plaintiffs cannot assert that such a magnitude of harm would redound to them.

Finally, with regard to plaintiffs' argument that Japan furnishes only niche products and therefore does not compete with either other foreign or with domestic OCTG, the ITC's record clearly shows that such niche products did not account for more than twenty percent of Japanese exports during the original period of investigation. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 19, 19 n. 60. Thus, while some portion of the Japanese export product is unlikely to compete with subject or domestic merchandise, a significant portion of Japanese production would compete in the U.S. market with similar goods of either foreign or domestic manufacture. Moreover, producer, purchaser, and importer responses generally reported that Japanese OCTG was fungible with the other OCTG covered in this review and with domestic product. *Id.* at 20. As only a "reasonable overlap" of competition is statutorily required, *see, e.g.*, *Wieland Werke*, 13 CIT at 563, 718 F. Supp. at 52, the court agrees with the ITC that while there maybe some Japanese specialty products that have no analogues in the market, the majority of Japanese production would compete, and would be fungible with the other products in this review.

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[7] It should be noted, however, that the ITC relied, during its likely volume discussion, on Korea's unused capacity to make all pipe and tube products, which in 2000 was significant. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 32.

2. Channels of distribution

Plaintiffs also take issue with the ITC's determination regarding whether or not subject imports are likely to compete in the same channels of distribution with one another and with domestic product. Pls.' Mot. 37. As in the original determination, the ITC found that virtually all OCTG in the U.S. is sold to distributors, who then sell to end users. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 21. Plaintiffs argue, however, that as members of the Tenaris Group,[8] they focus on direct sales to end users, and their products would therefore not move in the distributor market that accounts for the majority of OCTG purchases in the U.S. Pls.' Mot. 37.

The ITC dealt with this claim in its determination. Citing the TAMSA post-hearing brief, the ITC argues that national market dynamics affect the distribution channels employed by the Tenaris Group. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 21–22, 22 n.73. To the extent that Tenaris members have sold product in the U.S. during the period of the antidumping order, they have used distributors in a substantial portion of their U.S. sales. *Id.* Moreover, the distributor market remains the primary method by which OCTG is sold in the U.S., and U.S. distributors currently purchase substantial volumes of OCTG from subject country producers. *See id.* at 22.

It seems to the court that plaintiffs' argument rests entirely on what they would "prefer" to do. However, their past and present behavior in the U.S. market shows they have no real aversion to selling to distributors. Moreover, sales to end-users are not currently a favored method of distribution in the United States. While it is not unlikely, in the event of revocation of the antidumping order, that plaintiffs would begin to cultivate end-users clients, there is no reason to believe that they would not also avail themselves of the existing distributor market.

3. The same geographical markets

Plaintiffs' challenge to the ITC's determination regarding whether subject merchandise and domestic goods will compete in the same geographic markets is directed mainly at whether the correct standard of "likely" was used. *See* Pls.' Mot. 17. As the court has already decided to treat the likeliness question in such a way as to be governed by substantial evidence review, however, the court will here resolve the issue as one of whether evidence amassed by the ITC regarding geographical markets is sufficient to support a finding of

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[8] The Tenaris Group is a global alliance of pipe and tube manufacturers. *See Commission's Views*, CR List 2, Doc. No. 91 at 32–33. The responding subject producers in this investigation that belong to the group are Siderca (Argentina), Dalmine (Italy), TAMSA (Mexico), and NKK (Japan). *Id.* at 28. The Tenaris companies operate as a unit, submitting a single bid for contracts to supply OCTG and related services. *Id.* at 28.

"likely" competition. Plaintiffs argue that the ITC rested entirely on its findings in the original determination to hold that subject and domestic merchandise would likely compete in the same geographic markets in the event of revocation of the antidumping order. *Id*. Plaintiffs argue that the original reviews, at best, show that it is "possible" that the subject and domestic merchandise would compete in the same markets, and that, in order to show a "likelihood" of such competition, new and affirmative evidence would have to be provided. *Id*.

Plaintiffs appear to mistake the standard that is used to determine cumulation. Evaluating the four factors of fungibility, channels of distribution, geographic markets, and simultaneous presence, the ITC must determine whether or not it is "likely" that the subject and domestic merchandise will compete *inter se.* There is no requirement that the ITC find that all four subfactors are independently supported by a "likeliness" determination. *See, e.g., Wieland Werke, AG v. United States*, 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989) (citation omitted).

At any rate, the ITC's determination clearly relies on more than just information from the original determination. The ITC found that most large distributors of OCTG are located in Texas and that most distributors sell nationwide. *Commission's Views*, C.R. List 2, Doc. No. 91 at 23. Importers similarly reported selling nationwide. *Id*. Given that the market appears to be "nationwide," it is difficult to see how plaintiffs can argue that subject imports and domestic merchandise would not compete in the same geographic market. Indeed, plaintiffs do not argue that there is any other geographic market or submarket that is relevant. *See* Pls.' Mot. 17. Accordingly, the evidence compiled here is sufficient to support a determination that foreign and domestic OCTG would compete in the same geographical market.

4. Simultaneous competition

Plaintiffs also challenge the fourth subfactor in the ITC's analysis, which deals with whether subject imports and the domestic product would compete simultaneously in the market. In particular, plaintiffs state that the ITC fails to discuss a time-frame for when shipments to the United States would occur. *See* Pls.' Reply Br. 5. Plaintiffs do not point to record evidence suggesting that OCTG is somehow a seasonal good. *Id.* Nor do they challenge the ITC's statement that "[n]othing in the record of these reviews suggests that if the orders are revoked subject imports and the domestic like product would not be simultaneously present in the domestic market." *Id*.; *Commission's Views,* C.R. List 2, Doc. No. 91 at 23. The ITC rather found that the original determinations showed that each of the subject countries imported product each year of the original investigations. *Commission's Views*, C.R. List 2, Doc. No. 91 at 23. The propo-

sition to be supported here is that steel products are not seasonal goods such that domestic and foreign producers would sell the goods at mutually exclusive time periods. It appears to the Court that the original determination provides such evidence as would enable a reasonable mind to find that the proposition is supported.

Having arrived at the end of the cumulation analysis, it appears that both the ITC's determinations regarding discernible adverse impact and likely competition are supported by substantial evidence on the record. Accordingly, the court finds that the ITC's overall cumulation determination is supported by substantial evidence.

B. *Likely Recurrence of Material Injury*

Having found that the ITC's cumulation decision is supported by substantial evidence on the record, the Court will discuss the ITC's finding that revocation of the antidumping orders is likely to lead to a continuation or recurrence of material injury to the domestic OCTG industry within a reasonably foreseeable period of time. To make an affirmative finding that material injury is likely to recur, the ITC is statutorily required to evaluate three factors and determine that these factors support a finding that revocation would lead to material injury in a "reasonably foreseeable" period of time. *See* 19 U.S.C. § 1675a(a)(1). These three factors are (i) the likely volume of subject imports, (ii) the likely price effects of subject imports, and (iii) the likely impact of subject imports. *Id.* Plaintiffs challenge the ITC's findings on all three factors; the Court discusses each factor in turn.

i. Likely volume

The first factor concerns the likely volume of subject imports in the event of revocation. *See* 19 U.S.C. § 1675a(a)(2)(A)–(D). In concluding that that imports would likely be significant in the event of revocation of the antidumping order, the ITC relied primarily on data showing the growing U.S. market share of subject imports, the subject producers' available production capacity, and their capacity to shift production away from other products and toward OCTG manufacture. *Commission's Views*, C.R. List 2, Doc. No. 91 at 29–32. The ITC also relied on the Tenaris Group's global sales focus, the high value of OCTG products relative to other pipe and tube products, and the high prices available in the U.S. market, relative to the global OCTG market. *Id.* at 32–33. Finally, the ITC relied on the effects of U.S. and foreign antidumping orders, and its finding that the reviewed countries are focused on export markets. *Id.* at 33–35.

Plaintiffs do not challenge the ITC's findings that the cumulated subject producers have significant available capacity, or that the U.S. market has attractive pricing compared to the global market. Rather, plaintiffs make three arguments to the effect that, despite the subject producers' production capacity and the economic attrac-

tions of the U.S. market, the subject producers will not export in any great quantity. First, plaintiffs argue that the record evidence demonstrates that the Tenaris Group's focus on long-term contracts would prevent it from re-entering the U.S. market in any significant way. Pls.' Mot. 27. Second, plaintiffs challenge whether evidence showing that OCTG is a high-value good relative to other products is sufficient to demonstrate an incentive for subject producers to ship a significant volume of goods. *Id.* at 28. Third, plaintiffs challenge the relevance of U.S. antidumping orders on OCTG and related products. *Id.* at 30.

First, regarding the alleged "export-focus" of the subject producers, the ITC recognized the Tenaris Group as the dominant OCTG supplier in every world market except the United States. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 32. Many of Tenaris' foreign customers also operate in the United States. *Id.* at 33. The ITC concluded, accordingly, that in the event of revocation of the antidumping order, the Tenaris Group would have a "strong incentive" to enter the U.S. market, because (a) the U.S. represents the last available unclaimed market for the Group and (b) because the Group already have established business relationships with customers operating in the U.S. market. *Id.* at 33.

The plaintiffs allege that the record shows that Tenaris Group members have long-term commitments to supply OCTG to customers outside the United States. Pls.' Mot. 27. Plaintiffs claim that because of the high capacity utilization among group members, any significant increase in exports to the U.S. market would require that the Tenaris Group break these commitments. *Id.* at 28. Plaintiffs argue that Tenaris Group members would not be willing to go so far merely in order to take advantage of the U.S. market.

The ITC's position appears to be that the U.S. market is attractive enough to justify breaking such commitments. The U.S. represents the last market in which Tenaris has not achieved dominance; moreover, it is the largest market for OCTG in the world. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 32, 33. U.S. prices for OCTG run between twenty and forty percent aboveTenaris' worldwide prices. *See id.* at 33 n.128. Given the Group's already established business relationships with U.S. customers, significant entry into the U.S. market could reasonably be seen as enhancing the Group's long-term contracts. *Id.* at 33, 33 n.124. Finally, the plaintiffs' argument does not detract from the ITC's finding that non-Tenaris Group producers, such as the majority of Japanese producers, have substantial capacity available for export to the U.S. *See id.* at 31–32.

The court holds, therefore, that the ITC has provided sufficient explanation for the conclusion that the Tenaris Group's long-term commitments and/or end-user focus do not stand in the way of significant imports. Even if high capacity utilization prohibits the Tenaris Group members from making more OCTG to fulfill U.S. market de-

mands, the size of the market, the prices available, and the established presence of Tenaris customers, all provide a significant economic incentive. The ITC did not ignore the argument that end-user focus and high capacity utilization would serve to limit Tenaris group exports. Rather, it explained exactly why it found the claim regarding such a limit not to be compelling.

Second, plaintiffs challenge whether evidence showing that OCTG is a high-value good relative to other products is sufficient to demonstrate an incentive for subject producers to ship a significant volume of goods. Pls.' Mot. 28. Plaintiffs claim that the ITC does not discuss how the high-value of OCTG explains away the subject producers' high capacity utilization, long-term contracts, and other long-standing commitments to customers. *Id.* at 28–29. Moreover, plaintiffs argue that because the Tenaris Group provides full-service supply arrangements for end-users, the price of an individual product is of lesser importance. *Id.* at 29.

The ITC's determination states that OCTG generates very high profit margins relative to other pipe and tube products. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 33. Moreover, the ITC states that, because various pipe and tube products are all produced on the same machinery, subject producers can shift production away from other pipe and tube products and toward OCTG with relative ease. *Id.* at 30, 30 n.112. It appears that this brief ITC argument on the value of OCTG and product-shifting is meant to respond to the issue of the subject producers' high capacity utilization by identifying a way in which exports could be increased. *Id.* at 33.

The court has already held that the ITC's discussion of the relatively high prices in the U.S. market, the size of the market, and the presence of Tenaris customers in the market provide a significant rebuttal to the question of capacity restraints and long-term contracts. The ITC's point regarding OCTG's value and product-shifting merely reinforces the finding that some of the subject producers' large production capacity could profitably be redirected toward the U.S. market.

Third, plaintiffs challenge the relevance of U.S. antidumping orders on OCTG and related products to the "likely volume" analysis. Pls.' Mot. 30. The ITC found that Argentine, Japanese, and Mexican producers are subject to antidumping orders on standard, line and pressure pipe, a pipe product produced in the same production facilities as OCTG. *Commission's Views*, C.R. List 2, Doc. No. 91 at 34. The ITC also found that Korean producers were subject to U.S. import quotas and antidumping orders on similar pipe products, as well as a Canadian antidumping order on casing. *Id.* at 34–35.

The ITC is statutorily required to take into account "the existence of barriers to the importation of such merchandise into countries other than the United States." 19 U.S.C. § 1675a(a)(2)(C). Plaintiff complains that the ITC impermissibly considered U.S. barriers as

well as foreign barriers. Pls.' Mot. 30. However, while § 1675a(a) requires the ITC to look at certain factors, such as barriers to the importation of merchandise in other countries, it makes clear that those factors are non-exclusive, and that the ITC must consider "all relevant economic factors." 19 U.S.C. § 1675a(a). Presumably, these may include the existence of barriers to the importation into the U.S. of pipe products so similar to OCTG that they are actually made on the same production lines. Because barriers to the importation of products similar to subject merchandise may encourage product-shifting toward OCTG, and thus, more OCTG in the U.S. market, the existence of U.S. barriers to import of similar products is clearly economically relevant.

Accordingly, the evidence provided by the ITC is sufficient to support the conclusion that there would likely be a significant volume of imports into the U.S. upon revocation of the orders, owing to non-Tenaris Group subject producers' available capacity, and the economic incentives that Tenaris Group members have to enter the last market in which they do not have dominance, in which prices are high, and where they already have established customers.

ii. Likely price effects

Having discussed the ITC's treatment of the likely volume factor in its material injury determination, the Court will consider the second factor: likely price effects of subject imports in the event of revocation. *See* 19 U.S.C. § 1675a(a)(1). The ITC is statutorily required to consider two subfactors in evaluating the likely price effects. These are (1) whether there is likely to be significant underselling by the subject imports as compared with the domestic like product and (2) whether the subject imports are likely to enter the United States at prices that would have a significant depressing or suppressing effect on the price of domestic like products. *See* 19 U.S.C. § 1675a(a)(3). In its determination, the ITC noted that both factors were found satisfied in the original investigations. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 35–36.

In the sunset review, the ITC found that, to the extent that direct selling comparisons can be made, subject OCTG generally undersold the domestic like product during the period under review. *Id*. at 36. The ITC also found that subject imports are highly substitutable for domestic product and that price is a very important factor in OCTG purchasing decisions. *Id*. Accordingly, the ITC found that, in the event of revocation of the antidumping order, the subject producers would likely seek to compete in the U.S. market based on price. *Id*. at 37. Furthermore, the ITC found that such competition would likely have significant depressing or suppressing effects on the prices of the domestic like product. *Id*.

Plaintiffs challenge the ITC's determination by arguing that the record evidence shows that domestic prices had risen in 2000. Pls.' Mot. 31.[9] Indeed, the record demonstrates that, generally speaking, domestic prices fell in 1999 and rose in 2000, although they did not recover to 1998 levels. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 36, 36 n.141. Plaintiffs' argument, however, does not appear to be on point. Even if prices did increase somewhat during 2000, this does not undermine the ITC's conclusion that the subject producers would seek to compete on the basis of price, and that their underselling would have price suppressing or depressing effects. Rather, the plaintiffs merely observe that the price to be undermined is somewhat higher than it was previously.

Plaintiffs further argue that plaintiff Siderca's assigned dumping margin of 1.36% demonstrates that in the event of revocation, underselling by plaintiffs would not be particularly great. Pls.' Reply Br. 8. However, it remains that this does not address the price effects of plaintiffs NKK Tubes and Dalmine, both of which have significantly higher margins. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 16 n.51. Nor does it take into account that plaintiff Siderca's imports have been cumulated with those of Italy, Korea, Japan, and Mexico. Accordingly, plaintiffs have not pointed to any important factor that the ITC ignored in making its price effects determination.

The ITC's determination demonstrates that the behavior of the producers reviewed here caused price effects in the past, that their goods are substitutable for domestic goods, and that they are likely to compete on the basis of price. The ITC has thus provided "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted).

ii. Likely impact

The third factor that the ITC is required to investigate concerns the likely impact of subject imports in the event of revocation. *See* 19 U.S.C. § 1675a(a)(2)(A)–(D). The original determinations demonstrated that the subject producers' imports led to a decline in domestic producers' market share, poor operating performance, and low capacity utilization. *See Commission's Views*, C.R. List 2, Doc. No. 91 at 37. The original investigation also determined that subject producers' imports had led to price suppression. *See id.* at 38.

However, the determination at issue here found that the domestic industry had markedly recovered. As the ITC stated, "we do not find

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[9] Plaintiff also argues that the record demonstrates that prices would continue to rise despite the revocation of the orders, but provides no citations. Pls.' Mot. 31.

the industry to be currently vulnerable." *Id.* at 39. Nonetheless, the ITC found that while currently healthy, the sheer volume of subject imports that would be likely in the event of price revocation, along with their cumulated price effects, would be enough to likely cause a recurrence of material injury even to this now recovered industry. *Id.* at 39–40.

Plaintiffs take issue with this finding, given the current state of the U.S. industry. Pls.' Mot. 32–34. Plaintiffs point to strong performance indicators for domestic producers, as well as statements by officials of domestic companies forecasting continued strong demand for OCTG. *Id.* at 34–35.

As the ITC itself admitted, the domestic OCTG industry is currently healthy. *Commission's Views*, C.R. List 2, Doc. No. 91 at 38–39. There appears to be some indication that demand will remain strong. *Id.* at 39. Yet the original determinations found that even in a time of increasing demand, the domestic producers quickly lost market share to the subject producers. *Id.* at 39. Moreover, the sheer volume of subject producers' production capacity, coupled with their apparently low prices, support the conclusion that even a healthy industry could be materially injured were the order here revoked.

The court notes that in applying the substantial evidence standard, it is not allowed to re-decide the question before the agency. Rather, it must only decide whether the agency has provided evidence that would be adequate to "a reasonable mind." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (citations omitted). Reasonable minds may differ, but a determination does not fail for lack of substantial evidence on that account.

Accordingly, the court holds that the ITC has provided substantial evidence to ground its finding that the probable or "likely" impact of subject imports would be significant, enough so as to support a finding that material injury would likely recur.

CONCLUSION

The Court affirms the ITC's use of the term "likely" as applied throughout its remand determination. The Court affirms the agency's findings on cumulation of the subject imports. The court also affirms the ITC's determination regarding the likely volume, price effects, and impact of subject imports in the event of revocation of the antidumping orders on SLP from Argentina, Italy, Japan, Korea, and Mexico. Judgment will be entered accordingly.

Slip Op. 05–109

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

ELKEM METALS COMPANY and GLOBE METALLURGICAL INC., Plaintiffs, v. UNITED STATES, Defendant, and RIMA INDUSTRIAL S/A, Defendant-Intervenor.

Court No. 02–00232

JUDGMENT

In *Elkem Metals Co. v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1270 (2004), the Court remanded this matter to the United States Department of Commerce ("Commerce") with instructions to include the value added tax ("VAT"), paid by Rima Industrial S/A ("Rima") upon certain production inputs, in the recalculation of constructed value ("CV") and make all necessary adjustments to the antidumping duty margin. *See id.* at ___ , 350 F. Supp. 2d at 1276. On March 16, 2005, Commerce filed its *Final Results of Redetermination Pursuant to Court Remand* ("*Remand Results*"). For its *Remand Results*, Commerce recalculated Rima's CV to include the VAT paid by Rima on material inputs as supported by record evidence. Accordingly, Commerce recalculated Rima's antidumping duty margin to reflect the inclusion of the VAT Rima paid. *See Remand Results*. Rima's recalculated antidumping duty margin for the period July 1, 1999, through June 30, 2000, was 0.48 percent. *See id.*

This Court, having received and reviewed Commerce's *Remand Results*, comments of Plaintiffs, and comments of Defendant-Intervenors, holds that Commerce duly complied with the Court's remand order and it is hereby

ORDERED that Commerce's *Remand Results* are reasonable, supported by substantial evidence, and otherwise in accordance with law; and it is further

ORDERED that the *Remand Results* filed by Commerce on March 16, 2005, are affirmed in their entirety; and it is further

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

Slip Op. 05–110

International Labor Rights Fund, Global Exchange, and Fair Trade Federation, Plaintiffs, v. United States, Defendant, and Chocolate Manufacturers Association, Defendant-Intervenor.

Court No. 04–00543
Before: Judith M. Barzilay, Judge

[Defendant's Motion to Dismiss granted.]

Decided: August 29, 2005

Terrence Collingsworth (*Derek Joseph Baxter*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, (*Stephen C. Tosini*), Trial Attorney, U.S. Department of Justice, Commercial Litigation Branch, Civil Division, for Defendant.

Collier, Shannon, Scott, PLLC, (*Paul C. Rosenthal*), *Jennifer E. McCadney, Michael R. Kershow*, for Defendant-Intervenor.

OPINION

BARZILAY, JUDGE:

Plaintiffs International Labor Rights Fund ("ILRF"), Global Exchange ("GX"), and Fair Trade Federation ("FTF") (collectively "plaintiffs"), all non-governmental organizations working in the field of labor rights, filed suit under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701, *et seq.* Plaintiffs are seeking declaratory and injunctive relief against George Bush, President of the United States, the Secretary of Homeland Security, the Commissioner of Customs and Border Protection (formerly the Commissioner of Customs), the Assistant Secretary of Homeland Security for the Bureau of Immigration and Customs Enforcement (BICE), and the United States Department of Homeland Security (DHS) (collectively, "defendants") for their failure and refusal to 1) investigate, as required by 19 C.F.R. § 12.42, credible allegations that cocoa imported to the United States from Cote d'Ivoire[1] is produced by forced child labor; 2) require cocoa importers to show that their imports are not the product of forced child labor; and 3) prohibit the importation of merchandise that is shown to be the product of forced child labor as required by 19 U.S.C. § 1307 (1997), commonly known as section 307 of the Tariff Act of 1930.

Defendants responded with a motion to dismiss Plaintiffs' complaint pursuant to USCIT R. 12(b)(1), claiming that all three lack standing to bring such claims before the court, that the complaint

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[1] Formerly known as the Ivory Coast. *See* CIA World Factbook, at http://www.cia.gov/cia/publications/factbook/geos/iv.html

was untimely filed, and that the President cannot be a named defendant. The parties have agreed to dismiss the President from this action.

Background

Section 307 of the Tariff Act[2] and its accompanying regulations prohibit the importation of goods derived from forced labor when certain domestic economic preconditions have been met. The regulations provide for "[a]ny person outside the Customs Service who has reason to believe that merchandise produced [by forced or indentured child labor] is being, or is likely to be, imported into the United States" to "communicate his belief to any port director or the Commissioner of Customs" and in doing so, to also provide "detailed information as to the production and consumption of the particular class of merchandise in the United States and the names and addresses of domestic producers likely to be interested in the matter." 19 C.F.R. §12.42. Upon receipt of any such communication, the Commissioner of Customs is required to undertake an investigation that is warranted by the circumstances of the particular case. *Id.* Pursuant to these regulations, plaintiffs submitted a petition regarding the use of child labor in the cocoa industry of Cote d'Ivoire. This original petition, submitted on May 30, 2002, requested that Customs investigate allegations of child labor pursuant to the implementing regulations, but did not include information regarding production of cocoa in the United States or the names and addresses of interested domestic producers – apparently because no significant domestic cocoa production industry exists in this country. If Customs' investigation were to reveal the use of forced labor on any of the cocoa plantations or farms in Cote d'Ivoire, plaintiffs argue, then defendants would be required to determine whether the cocoa and

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[2] Section 307 states:
Convict made goods; importation prohibited

All goods, wares, articles, and merchandise mined, produced or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. The provisions of this section relating to goods, wares, articles, and merchandise mined, produced, or manufactured by forced labor or/and indentured labor, shall take effect on January 1, 1932; but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.

"Forced labor", as herein used, shall mean all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily. For purposes of this section, the term "forced labor or/and indentured labor" includes forced or indentured child labor. 19 U.S.C. § 1307 (2002).

any products derived from the illegal cocoa were imported to the United States. *Id.* Plaintiffs took action under these statutory and regulatory directives because they claim conditions in Cote d'Ivoire warranted an investigation by Customs of forced child labor in the cocoa production industry.

Plaintiff ILRF is a Washington, D.C.-based advocacy organization dedicated to improving global labor standards. *Compl.* at ¶¶ 15, 19. ILRF achieves its goal of promoting the enforcement of labor rights internationally through public education and mobilization, litigation, legislation and other collaborative efforts with labor, government and other business entities. *Id.* at ¶ 15. Plaintiff GX is a San Francisco-based human rights advocacy organization with over twelve thousand dues-paying members and forty thousand associated members. *Compl.* at ¶ 19. GX is dedicated to "promoting environmental, political and social justice globally." *Id.* at ¶ 19. In addition, GX operates four retail stores, as well as an internet-based sales operations, which sell "fair trade" cocoa, which is produced without the use of forced child labor. Plaintiff FTF is a Washington, D.C.-based association of "fair trade" wholesalers, retailers, and producers, whose members are committed to providing living wages and better employment opportunities to disadvantaged farmers and artisans worldwide. *Id.* FTF further claims that its "purpose is to promote the production and consumption of fair trade goods . . . and to represent the interests of producers, wholesalers, retailers, and importers of . . . Fair Trade Certified cocoa." *Id* at ¶¶ 15, 19.

In a letter dated June 13, 2002, Customs accepted ILRF's petition. Customs' letter communicated that it was pleased with plaintiffs' offer to provide further information, and invited plaintiffs and an independent investigator to meet with Customs officials to discuss the submitted evidence. This meeting apparently took place in July, 2002, although it is unclear what came of it. *See Def's Reply Memo in Support of its Mot. to Dismiss* ("*Def's Mot.*"), at 3. On June 30, 2002, a group of organizations, including GX, sent then-Secretary of the Treasury Paul O'Neil a letter outlining the widespread use of child slavery in Cote d' Ivoire's cocoa industry. This letter concluded by asking for "strict and immediate enforcement of the law as embodied under Section 307 of the Tariff Act of 1930." In effect, the letter sent to Secretary O'Neil reintroduced plaintiffs' ultimate goal of invoking section 307 to prohibit the importation of products made with forced child labor.

Almost a year passed without any further discussion. Having no indication that Customs in fact initiated an investigation or had taken any steps to do so, an ILRF researcher traveled to Cote d'Ivoire to update its factual record. Plaintiff ILRF states that it confirmed the continued existence of forced child labor in the Ivorian cocoa industry and sent another letter to the Commissioner of Customs and Border Security on May 15, 2003, urging him to act on

ILRF's original petition. Then, on June 30, 2003, with both GX and FTF participating in the petitioning process, plaintiffs sent a letter to Customs asking that the law and regulations be enforced with respect to this matter. Again receiving no response, Plaintiffs ILRF and GX filed suit in July 2003, in the District Court for the District of Columbia, seeking to compel Customs to enforce section 307 and the accompanying regulations. In August, 2003, the District Court dismissed the case on jurisdictional grounds. Plaintiffs then filed the present action in the Court of International Trade in October of 2004, seeking once again to compel Customs to undertake its ostensibly required investigation. Plaintiffs claimed they have confirmed the use of forced child labor in Cote d'Ivoire's cocoa industry, and request that the court issue an order, *inter alia*, directing Customs to (1) investigate allegations of forced child labor in Cote d'Ivoire, and (2) upon identifying forced child labor in any imports of cocoa from Cote d'Ivoire, issue an order prohibiting entry of such merchandise into the United States.

Discussion

Defendant moves to dismiss on two separate grounds: that plaintiffs' action is untimely and that plaintiffs lack standing. The court will discuss the dispositive issue of standing.

This court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(3), (4), which grants the court exclusive jurisdiction to review matters arising out of laws providing for embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of health and safety, and provides for enforcement with respect to such matters.

I. Standing

Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and persuasion as to the existence of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). The question of standing involves the determination of whether a particular litigant is entitled to invoke the jurisdiction of the federal court in order to decide the merits of a dispute or of particular issues. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Where the standing of a litigant is placed in issue the court must undertake a two-step analysis, which involves both the constitutional limitations and the prudential limitations that circumscribe standing. *Id*. As a threshold matter, the court must insure that the litigant satisfies the case or controversy requirements of Article III of the Constitution. *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976). Once the court determines that the litigant satisfies the constitutional aspects, it must consider whether any prudential limitations restrain the court from exercising its judicial power. *Gladstone, Realtors v. Village of*

Bellwood, 441 U.S. 91 (1979). In determining standing, the court must undertake a careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. *Allen v. Wright*, 468 U.S. 737, 752 (1984).[3]

A. Constitutional Standing

The principal limitation imposed by Article III is that a litigant seeking to invoke the court's authority must show that he personally has suffered some actual or threatened injury as a result of the allegedly illegal conduct of the defendant. *Gladstone*, 441 U.S. at 98. Article III also requires the litigants to establish that there is a causal connection between the litigant's injury and the defendant's conduct, and that this injury is likely to be redressed should the court grant the relief requested. *Allen*, 468 U.S. at 751.

In the instant case, plaintiffs allege injuries to their organizational and programmatic interests. These alleged injuries stem from the defendant's failure to investigate the presence of forced child labor in Cote d'Ivoire's cocoa industry. As part of their complaint, plaintiffs claim that their reporting and monitoring requirements, and their interests in proposing legislation and policy initiatives were adversely affected. In effect, plaintiffs seek informational standing, claiming that defendant's failure to conduct its required investigation left them without information vital to their organizational purposes. Despite defendant's inaction, however, plaintiffs fail to satisfy the Article III minima of redressable injury-in-fact necessary to establish constitutional standing.

Plaintiffs rely on the regulations promulgated pursuant to section 307 to support their claim of injury-in-fact. These requirements, found in Customs' own regulations, state the following:

> Upon the receipt by the commissioner of Customs of any communication submitted pursuant to paragraph (a) or (b) of this section [alleging forced labor] and found to comply with the requirements of the pertinent paragraph, the Commissioner will cause such investigation to be made as appears to be warranted by the circumstances of the case and the Commissioner or his designated representative will consider any representations offered by foreign interests, importers, domestic producers, or other interested persons.

19 C.F.R. § 12.24 (2004). Thus, plaintiffs argue, because Customs failed to initiate an investigation into child slavery practices in Cote

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[3] As mentioned above, defendant brought its challenge pursuant to USCIT R. 12(b)(1). USCIT Rule 12 provides for dismissal on the basis of a lack of subject matter jurisdiction, and also on the closely analogous motion to dismiss for failure to state a claim upon which relief can be granted. USCIT R. 12(b)(5).

d'Ivoire, they themselves were forced to expend resources to obtain this information in order to fulfill their organizational objectives.

Where a statute explicitly denies relief on the undisputed facts presented in a case, however, a party's claim cannot lie under the regulations promulgated pursuant to the statute. *See Alexander v. Sandoval*, 532 U.S. 275, 285–286 (2001) (citing *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 173, (1994) (a "private plaintiff may not bring a [suit based on a regulation] against a defendant for acts not prohibited by the text of [the statute]")). Section 307 of the Tariff Act states that:

> [a]ll goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor and/or forced labor and/or indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited, and the Secretary of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. . . . *but in no case shall such provisions be applicable to goods, wares, articles, or merchandise so mined, produced, or manufactured which are not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.*

19 U.S.C. § 1307 (emphasis added). This domestic consumptive demand exception provided for in the latter half of the provision is crucial given the facts of this case. The parties agree that no domestic cocoa production industry exists in the United States sufficient to meet domestic consumptive demand.[4] In such instances, the statute expressly prohibits application of *any* of the provisions found within it. As a result, the regulations promulgated pursuant to the statute, which merely direct how Customs will implement the directives of the statute, can neither be invoked nor relied upon by plaintiffs in this case. Therefore, any injury relying on 19 C.F.R. § 12.24 cannot be redressed by this court where the consumptive demand exception applies. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (holding that where prayed-for recourse to interagency rule would not redress injury claimed by plaintiffs, burden of proof regarding standing could not be met). In other words, because of the undisputed facts regarding the lack of any significant domestic production of cocoa, section 307 essentially renders itself moot under these facts.

In the first and seminal case brought pursuant to section 307, *McKinney, et. al. v. United States Dep't of the Treasury, et. al.*, 799

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[4] At oral argument, counsel for defendant-intervenor Chocolate Manufacturers Association, clarified that there are "minuscule" amounts of cocoa grown in the United States, namely in Hawaii. Nevertheless, all parties agree that the United States' considerable demand for cocoa cannot be satisfied without imports.

F.2d 1544 (Fed. Cir. 1986), this Court and the Federal Circuit considered the constitutional and prudential standing of a group of plaintiffs which included human rights non-governmental organizations who were situated similarly to the plaintiffs in this case. In *McKinney*, plaintiffs sought to exclude from entry into the United States various products mined, produced or manufactured in the Soviet Union, allegedly by convict, forced, or indentured labor. While both this Court and the Federal Circuit ultimately held that the plaintiffs all lacked standing, the Federal Circuit stated in dicta that the case law appeared to support the argument that informational injury – similar to that alleged in the present case – was sufficient to satisfy the injury requirement of Article III. The Federal Circuit then went on to find that the *McKinney* plaintiffs were not within the zone of interest of section 307 – an issue this court does not reach in the present case.[5]

Plaintiffs argue that two amendments to section 307, which were enacted after *McKinney* was decided by the Federal Circuit, lessen the effect of the domestic consumption exception. Plaintiffs refer to the Sanders and Harkin amendments, named for Representative Bernie Sanders and Senator Tom Harkin, respectively. *See* Pub. L. No. 105–61, § 634, 111 Stat. 1272, 1316 (Oct. 10, 1997); Pub. L. No. 106–200, § 411 (May 18, 2000). Plaintiffs cite extensively to the legislative history of these two amendments in support of the proposition that they represented a bipartisan effort directing Customs to protect children working in indentured and forced labor overseas.[6] As defendant correctly argues, however, neither amendment as passed addressed, modified, or repealed the consumptive demand exception to section 307. The Sanders Amendment modified the Treasury, Postal Service and General Government Appropriations Act for Fiscal Year 1998, as well as subsequent appropriations bills, in order to ensure that government funds will not be used for the importation

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[5] In *McKinney*, there was ostensibly a domestic industry that could satisfy domestic consumption demands for the various goods at issue in that case. Because in the instant case, however, plaintiffs and defendants agree that there is no domestic cocoa production industry, there is no doubt as to the applicability of the domestic consumption exception. Thus, this court need not reach the prudential standing inquiry that was determinative in *McKinney*. 9 CIT 315, 614 F. Supp. 1226, 1239, 1240–41 (1985); 799 F.2d at 1557.

[6] The court notes that the record in this case included ample evidence that Customs took this direction seriously. It issued several advisories to importers on the issue of forced child labor and spent considerable agency resources on educational efforts which included strong warnings against the importation of products produced by means of such forced labor. One such publication stated "[a]busive child labor is one of the most serious worker and human rights issues facing the world trading community." U.S. Customs Service Advisory on International Child Labor Enforcement, at 5. Because of this record, the court attempted to broker a settlement between these parties reminding them of how much agreement there seemed to be on the core issue – the need to eliminate abusive child labor. Regrettably, the government defendants were unwilling to consider any suggestions toward settlement, representing to the court at the conference held in chambers on August 1, 2005 that agency priorities had changed after September, 11, 2001.

of forced or indentured child labor, as determined by section 307. Specifically, the Sanders Amendment provides the following.

> None of the funds made available in this Act for the United States Customs Service may be used to allow the importation into the United States of any good, ware, article or merchandise mined, produced, or manufactured by forced or indentured child labor, as determined pursuant to Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307).

Pub. L. No. 105–61, § 634, 111 Stat. 1272, 1316 (Oct. 10, 1997). The Harkin Amendment clarified that references to "forced labor" and "child labor" in section 307 include "forced or indentured child labor." Unfortunately for plaintiffs, however, neither Amendment altered the fact that section 307 subordinates human rights concerns to the availability of the goods at issue by means of domestic production.[7]

Plaintiffs also argue that Customs has not uniformly applied the domestic consumption exception in other section 307 cases, and that imports from other countries which are not derived from forced labor should be considered as substitutes for domestic production in cases such as this. Plaintiffs first cite to Customs' action regarding the detention of bidi cigarettes from India, which were found to be produced by indentured child labor, even though there was no domestic production of bidi cigarettes. *Pl's Memo in Opp to Def's Mot. to Dismiss*, at 31, n.29 (citing Sen. Rep. 106–500, 2000 WL 1517014 (June 2000)). As defendant correctly responds, however, Customs found a reasonable substitute produced domestically in sufficient quantities to satisfy domestic demand. *Def's Reply in Support of Mot. to Dismiss*, at 14 (citing *China Diesel Imports, Inc. v. United States*, 18 CIT 515, 870 F. Supp. at 351, n.8 (1994) ("merchandise need not be identical or even nearly so, but merely a substitute that would generally be acceptable to the purchaser")). In the case at hand, no reasonable domestic substitute has been identified.

Lastly, plaintiffs argue that voluntary non-domestic production of cocoa is available, and should be counted towards the consumptive demand requirement. This argument is also unavailing. The statutory language is clear in that it requires goods which are "mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States" in order for the exception not to apply. 19 U.S.C. §1307. For the court to read the availability of imports into this clear language would be an impermissible expansion of the statutory text.

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[7] As defendant points out, efforts to excise the domestic production exception from the text of the statute have repeatedly proven unsuccessful. *See, e.g.*, S.1684, 145 Cong. Rec. S11879 (Oct. 4, 1999), *available at* 1999 WL 785710; Amendment No. 2371; 145 Cong. Rec. S13431, S13449 (Oct. 28, 1999), *available at* 1999 WL 979384; Amendment No. 2502; Cong. Rec. S13693, S13716 (Nov. 2, 1999), *available at* 1999 WL 992619.

Because plaintiffs have not established a redressable injury-in-fact, they cannot satisfy the requirements of Article III standing. Thus, the court need discuss neither prudential standing nor the timeliness of the instant action. Accordingly, it is hereby

ORDERED that this action is dismissed for lack of standing.

Slip. Op. 05–111

TAO VAN TRINH, Plaintiff, v. **UNITED STATES SECRETARY OF AGRICULTURE**, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 04–00632

[Remand final determination to the Secretary for reconsideration of plaintiff's TAA eligibility.]

Dated: August 29, 2005

Barnes, Richardson & Colburn (*Lawrence M. Friedman, Louisa Vassileva Carney*, and *Nikolay A. Ouzounov*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); *Jeffrey Kahn*, of counsel, Office of General Counsel, Department of Agriculture, for the defendant.

OPINION

Restani, Chief Judge: This matter is before the court on the plaintiff Tao Van Trinh's ("Trinh") motion for judgment on the agency record pursuant to United States Court of International Trade Rule 56.1. At issue is the United States Secretary of Agriculture's ("Secretary," "Agriculture," or "Department") determination denying Trinh's application for Trade Adjustment Assistance ("TAA").

Trinh alleges that the Secretary's determination was not based on a "legally complete set of facts," Pl.'s Br. at 2, i.e., it did not include Trinh's amended tax return after he had discovered an inaccuracy in his original 2002 Individual Income Tax Return. Thus, Trinh asserts that the Secretary's final determination denying his application for TAA was unwarranted by the facts and, as a result, could not have been made in accordance with law or supported by substantial evidence. Accordingly, Trinh asks the court to grant his motion for judgment on the agency record or, in the alternative, to remand this determination, for "good cause" shown, to the Secretary for reconsideration of his eligibility for TAA cash benefits.

The Secretary of Agriculture claims that Trinh is not eligible for TAA cash benefits because he failed to meet all the statutory criteria

for TAA eligibility—particularly that Trinh failed to file verifiable documentation, within the specified regulatory time frame, demonstrating a decline in net fishing income from 2001 to 2002. The Secretary further maintains that due to this documentation failure, Agriculture's determination was supported by substantial evidence on the record and otherwise in accordance with law, and consequently, the Secretary asks the court to deny Trinh's motion for judgment on the agency record, affirm Agriculture's determination, and enter judgment for the defendant, dismissing this case. The court remands.

FACTUAL & PROCEDURAL BACKGROUND

Trinh, a shrimp boat operator, resides in Palacios, Texas. On December 11, 2003, subsequent to the November 19, 2003 FAS certification of Texas shrimp producers' eligibility for TAA benefits,[1] Trinh submitted a TAA application for individual producers through the Department's local Matagorda County Farm Service Agency ("FSA") Office. *Application For Trade Adjustment Assistance (TAA) for Individual Producers*, Pl.'s App. 8 [hereinafter *TAA Application*].

On the same date, pursuant to TAA Application requirements,[2] Trinh also submitted his 2001 and 2002 tax returns, a farm operating plan, *see Farm Operating Plan for Payment Eligibility Review for an Individual*, Pl.'s App. 9 [hereinafter *Farm Operating Plan*], and an HELC and WC certification. *See Highly Erodible Land Conservation (HELC) & Wetland Conservation (WC) Certification*, Pl.'s App. 10. Trinh satisfied the TAA requirement of proof of technical assistance by receiving training and technical assistance on January 27,

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[1] On October 21, 2003, the Texas Shrimp Association, Arkansas, Texas, filed a petition with Agriculture's Foreign Agricultural Service ("FAS") seeking certification for TAA benefit eligibility on behalf of Texas shrimp producers. *See Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 65,239 (Dep't Agric. Nov. 19, 2003) (notice). After conducting an investigation, the FAS Administrator "determined that increased imports of farmed shrimp contributed importantly to a decline in the landed prices of shrimp in Texas by 27.8 percent during January 2002 through December 2002, when compared with the previous 5-year average." *Id.*; *see also* 19 U.S.C. § 2401a (Supp. II 2002) (setting group eligibility requirements for TAA certification). The notice also stated that shrimp producers in Texas were eligible to apply for program benefits, and that those shrimpers certified as eligible for TAA benefits "may apply to the Farm Service Agency for benefits through February 9, 2004." *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. at 65,239.

[2] As part of FSA's TAA application, the applicant is required to (1) produce verifiable documentation of production of the commodity and the amount, (2) provide supporting documentation verifying that net fish income declined from the latest year in which no adjustment assistance payment was received, (3) provide supporting documentation, if requested, that adjusted gross income is in accordance with other Department regulations, and (4) provide proof that the applicant received technical assistance from the Cooperative State Research, Education, and Extension Service of the United States Department of Agriculture ("CSREES") or ("Extension Service"). *See TAA Application* at Pl.'s App. 8; *see also* 7 C.F.R. § 1580.102. Additionally, the TAA application states, "all required documentation [must be submitted] on or before September 30 of the current fiscal year [2003]." *TAA Application* at Pl.'s App. 8.

2004, in Palacios, Texas. *See Trade Adjustment Assistance — Technical Assistance Certification Form*, Pl.'s App. 11; *TAA Application*, Pl.'s App. 8.[3]

Trinh next received a letter from the Matagorda County FSA Committee, dated April 28, 2004, stating that it had determined, based on a review of his previously submitted farm operating plan, that Trinh was "one 'person' for payment limitation purposes, separate and distinct from any entity or any other individual." *Letter from USDA Matagorda County FSA Office to Trinh* (Apr. 28, 2004), Pl.'s App. 12. Approximately four months later, Trinh received a letter dated August 16, 2004, again from the Matagorda County FSA Committee, denying his application for TAA benefits and stating that "[t]he Income Taxes [he] provided did not support the certification requirement to be eligible for TAA payment." *Letter from USDA Matagorda County FSA Office to Trinh* (Aug. 16, 2004), Pl.'s App. 13 [hereinafter *FSA Determination*] (requiring net fishing income for 2002 to have been less than 2001 net fishing income). While the FSA's letter stated that the issue "is not appealable," it also advised Trinh that he could seek review of the appealability determination by writing to the National Appeals Division ("NAD") Director within thirty calendar days of the letter's date,[4] explaining why he thought the issue was appealable. *Id.*

Trinh timely submitted a letter to NAD, dated August 14, 2004, but postmarked September 15, 2004, requesting an appeal. *Letter to NAD* (postmarked Sept. 15, 2004), Pl.'s App. 14; *see also NAD Timeliness Worksheet* (Sept. 20, 2004), Pl.'s App. 15 (showing timely postmark of appealability/appeal request). Although his letter to NAD is somewhat confusing, Trinh explained that, "[d]ue to low shrimp price[s]" for 2002, his 2002 income *was* less than his 2001 income, despite "work[ing] more and bring[ing] in more poundage." *Letter from Trinh to NAD* (dated Aug. 14, 2004), Pl.'s App. 16. Because of these factors, Trinh stated that he "still ha[d] less income" in 2002, despite any contrary indication from his tax returns, and tried to ex-

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[3] The *TAA Application* shows that Trinh supplied the documentation requested in Items 9A–9D of Part C. *See id.* In particular, Item 9B asks: "Has the producer provided supporting documentation verifying that the net farm or net fish income declined from the latest year in which no adjustment assistance payment was received?" *Id.* The question clearly designates that section as being for "County Office Use Only," and shows the "yes" box checked with a date of December 11, 2003, indicating that someone in the Matagorda County FSA Office looked over Trinh's application at filing and thought he had provided all the necessary information. *Id.*

[4] As the FSA letter was dated August 16, 2004, Trinh's letter would need to be postmarked by September 15, 2004 in order to be in accordance with NAD appeal procedures. *See* National Appeals Division, 7 C.F.R. Part 11.

plain that "bigger repairs on the boat in 2001 . . . is why [his] net imcome [sic] for 2002 is higher than 2001, but only by 58.00."[5] *Id.*

In response to his NAD appeal letter, Trinh received a response letter from NAD, dated September 30, 2004, stating that "[t]he Agency decision is appealable because it is adverse to you as an individual participant." *Letter from USDA NAD Office to Trinh* (Sept. 30, 2004), at 1, Pl.'s App. 17[6] (citing 7 C.F.R. § 1580.505[7] for authorization to obtain reconsideration and review of determinations made in accordance with appeal regulations at 7 C.F.R. § 780.7(e), which "provides that nothing in this part prohibits a participant from filing an appeal . . . with NAD in accordance with the NAD regulations").[8] Accordingly, Trinh received a letter from NAD, dated October 6, 2004, constituting a notice of appeal and request for the agency record and assigning a Hearing Officer to the appeal. *USDA Notice of Appeal & Req. for Agency R.* (Oct. 6, 2004), at 1, Pl.'s App. 18 (stating that Trinh "may submit additional information . . . by October 25, 2004" (nearly a month after the September 30 regulatory deadline)). Additionally, in a letter from NAD dated October 26, 2004, Trinh received notice that a prehearing conference had been scheduled, pursuant to 7 C.F.R. § 11.8. *USDA Notice of Prehearing Conference* (Oct. 26, 2004), at 1, Pl.'s App. 19.

A few days later, however, Trinh received a letter from NAD, dated October 28, 2004 (two days after the date of NAD's previous letter that had specified the prehearing conference information), informing him that his "NAD appeal is moot and any further NAD processing of [his] appeal should cease." *Letter from USDA NAD Office to Trinh* (Oct. 28, 2004), at 1, Pl.'s App. 20 [hereinafter *NAD Determination*].

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[5] Trinh's 2002 tax return showed a net profit from commercial fishing of $10,588, *Profit/Loss*, Pl.'s App. 1, and an adjusted gross income of $9,842, *Form 1040 (2002)*, Pl.'s App. 2. His 2001 tax return showed a net profit of $10,530 and an adjusted gross income of $9,786. *Form 1040 (2001)*, Pl.'s App. 5. According to his tax returns, therefore, Trinh's 2002 net profit from commercial fishing was $58 greater than his 2001 net profit; whereas his 2002 adjusted gross income was $56 greater.

[6] Noting that Trinh has "a right to a NAD hearing within 45 days after the NAD regional office receives its copy of this ruling." *Id.* at 2.

[7] The 7 C.F.R. § 1580.505 regulation allowing a reconsideration and review of FSA determinations by NAD was amended on October 14, 2004, became effective on November 1, 2004, and now provides for appeal of final determinations of TAA benefits applications directly to the United States Court of International Trade. *See Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 63,317, 63,317–18 (Dep't. Agric. Nov. 1, 2004) (final rule; technical amendments) (explaining that although the prior regulation [under which Trinh initially appealed] had specified that the FSA administrative appeal process should be used to resolve TAA application disputes, this had led to confusion: TAA applicants thought they could appeal to NAD; but because appeals from NAD go to the United States District Courts, this was not intended: the Trade Act, 19 U.S.C. § 2395, grants jurisdiction over TAA claims exclusively to the Court of International Trade).

[8] 7 C.F.R. § 780.7(e) was subsequently amended by 70 Fed. Reg. 43,262 (Consolidated Farm Service Agency July 27, 2005) (interim final rule). *See* 7 C.F.R. § 11.6 (providing NAD regulations governing appealability).

Furthermore, according to the letter, the NAD appeal was moot because the Department's Texas State FSA Office informed NAD that it was "withdrawing [the Matagorda County] FSA's adverse decision." *Id.* The letter did not, however, specify the reason for the withdrawal of the adverse decision, the consequences the withdrawal would have on his appeal, or the Department's next steps.[9] It merely advised Trinh that if he did not want the NAD appeal to be dismissed, he could write to the NAD-appointed Hearing Officer within five days and tell him why the case should not be dismissed.[10] *See NAD Determination*, Pl.'s App. 20.

On November 23, 2004, Agriculture's Foreign Agricultural Service ("FAS") denied Trinh's application for TAA benefits. *See Letter from USDA FAS Office to Trinh* (Nov. 23, 2004), at 1, Pl.'s App. 21. According to the letter, "[t]he Farm Service Agency (FSA)[11] has withdrawn its initial disapproval of [Trinh's] application and referred it to the FAS for a *final determination* of [his] eligibility." *Id.* (emphasis added). The letter also stated that "FAS reviewed the information that [Trinh] provided in [his] application" and "disapproved" him for the 2002 Texas shrimp TAA cash benefit because his "net fishing income for 2002 did not decline from 2001, the pre-adjustment year." *Id.* Moreover, the letter stated that it was the "final FAS disapproval of [Trinh's] application" and that "FAS will disregard any appeal . . . already made to FSA or to the [NAD] because FAS makes the final decision regarding [Trinh's] application." *Id.* The letter also advised Trinh that he could request judicial review of the final, negative FAS determination by contacting the United States Court of International Trade within sixty days. *Id.*

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[9] Nor does it appear, at least from the evidence before the court, that either the Texas State FSA Office or the Matagorda County FSA Office provided any explanation to Trinh of the reason for the withdrawal of the adverse decision, or of the likely effect this would have on his TAA application. Based on a review of Agriculture's Appeals regulations, it appears the withdrawal was due to the November 1, 2004 change in Agriculture's appeals process for review of final determinations, even though these procedures did not become effective until four days after the date of the NAD letter. *See supra* note 7. But this information was not communicated to Trinh and would have only been available to him via the Federal Register.

[10] While there is no evidence that Trinh wrote to NAD arguing why it should not dismiss his appeal, it appears that even had he done so, it likely would have been to little avail. Also, while this regulatory change altered the appeal process, granting the court jurisdiction after a final determination by the Department, *see* 7 C.F.R. § 1580.505; *supra* note 7, it did not specify the administrative appeal procedure. Given the Texas State FSA's withdrawal of the County FSA's initial determination, FAS's subsequent, final FAS determination, therefore, constitutes both an initial and final negative determination, with no further appeal available at the administrative level—this, despite NAD's prior conclusion that Trinh had "a right" to an appellate administrative hearing. *See supra* note 6.

[11] Although the FAS letter does not specify, its reference to the FSA and to the FSA's withdrawal of its initial disapproval, presumably refers to the Texas State FSA Office's withdrawal, mentioned in the NAD letter dated October 28, 2004. *See NAD Determination*, Pl.'s App. 20.

On December 6, 2004, Trinh filed an Amended Individual Income Tax Return for 2002, "because he discovered additional boat repair receipts which had been inadvertently left off his 2002 Tax Return." Pl.'s Br. at 6. *Compare Profit/Loss*, Pl.'s App. 1 (listing $2,369 for repairs and maintenance in original 2002 Schedule C (Form 1040)), *with Form 1040X: Amended U.S. Individual Income Tax Return* and *Schedule C (Form 1040) 2002: Profit or Loss From Business – Amended*, Pl.'s App. 22 [hereinafter *Amended 2002 Tax Return*] (listing $2,607 for repairs and maintenance in both the "Form 1040X, Part II: Explanation of Changes to Income, Deductions, and Credits," and on the amended 2002 Schedule C (Form 1040)). Thus, relative to the 2001 amounts, the amended 2002 values represent an adjusted gross income decline of $165, versus the prior increase of $56.

The next day, on December 7, 2004, Trinh filed a request with the court seeking judicial review of Agriculture's FAS adverse determination. *Letter from Trinh to United States Ct. Int'l Trade* (dated Dec. 7, 2004), Pl.'s App. 23. In this letter, Trinh stated that because Agriculture's ruling was premised on his previously submitted, incorrect federal tax returns, which showed that "the net income from [his] 2001 federal tax return seemed to be greater than [his] 2002 net income," it "was based on inadequate or incorrect information." *Id.* Additionally, he informed the court that he had discovered additional repair receipts that had been inadvertently left off his original 2002 return, and enclosed these amended 2002 tax forms. The Clerk of the Court accepted Trinh's letter as fulfilling, in principle, the requirements of the summons and complaint for commencement of a civil action to review a final determination of TAA eligibility, and in a letter dated December 21, 2004, acknowledged receipt of Trinh's request for review and the court's acceptance of the action. Additionally, the Clerk served copies of the documents comprising the summons and complaint upon the United States Departments of Agriculture and Justice. On March 17, 2005, the court granted Trinh's application to proceed *informa pauperis* and appointed counsel to represent Mr. Trinh in this action. On June 6, 2005, Trinh filed this motion for judgment on the agency record; on June 30, 2005, the Government responded in opposition to Trinh's motion; and on July 18, 2005, Trinh replied to the Government's response.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 2395(c) (2000).[12] The court, in reviewing a challenge to one of Agriculture's determinations regarding eligibility for trade adjustment assistance, will uphold the challenged determination if the factual findings are

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[12] "The Court of International Trade shall have jurisdiction to affirm the action of the . . . Secretary of Agriculture . . . or to set such action aside, in whole or in part." *Id.*

supported by substantial evidence on the record and its legal determinations are otherwise in accordance with law. 19 U.S.C. § 2395(b); *see also Former Employees of Shaw Pipe, Inc. v. United States Sec'y of Labor*, 21 CIT 1282, 1284–85, 988 F. Supp. 588, 590 (1997) (holding that substantial evidence is "more than a 'mere scintilla,' but sufficient evidence to reasonably support a conclusion") (internal quotations and citation omitted). The court, however, may also remand the case and order the Secretary to further investigate for "good cause shown." 19 U.S.C. § 2395(b).

DISCUSSION

I. Agriculture's Determination Denying Trinh TAA Benefits Is Unsupported By Substantial Evidence And Not In Accordance With Law

There is no dispute before the court regarding whether Trinh satisfied the statutory requirements enumerated in 19 U.S.C. § 2401e(a)(1)(A)–(B), (D)[13] or the regulatory requirements listed in 7 C.F.R. § 1580.301(b), (e)(1)–(3), (5).[14] The only issue before the court, regarding Trinh's TAA application, is whether he satisfied the requirement that his net fishing income in 2002 was to have been less than it was in 2001. *See* 19 U.S.C. § 2401e(a)(1)(C); 7 C.F.R. § 1580.301(e)(4).

The Government argues that because Trinh "never submitted documentation demonstrating a decline in income to USDA," he "did not satisfy the statutory or regulatory requirements necessary in or-

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[13] For agricultural commodity producers to qualify for TAA benefits, § 2401e(a) enumerates several conditions that must be met. *See* 19 U.S.C. § 2401e(a)(1). In pertinent part, it states that "[p]ayment of a[n] adjustment assistance . . . shall be made to an adversely affected agricultural commodity producer covered by a certification . . . who files an application for such assistance within 90 days after the date on which the Secretary [of Agriculture] makes a determination and issues a certification of eligibility under section 293 [19 U.S.C. § 2401b]." *Id.* § 2401e(a)(1). In addition to this timeliness requirement, the statute requires the producer to (A) submit sufficient information to establish the amount of the commodity covered by the application, (B) certify that it has not received cash benefits under any other provision of the title, (C) establish that net farm (or fish income) for the most recent year is less than the net income for the latest year in which no adjustment assistance was received, and (D) certify that it has met with an Extension Service employee. *Id.* § 2401e(a)(1)(A)–(D) (These statutory requirements are incorporated within Part C of the TAA Application for Individual Producers as Items 9A through 9D. *See TAA Application*, Pl.'s App. 8).

[14] Agriculture has adopted various regulations that implement these statutory eligibility requirements. *See* 7 C.F.R. § 1580.301(b) (implementing the statutory timeliness requirement and allowing an eligible producer to qualify for TAA benefits "by submitting to FSA a designated application form at any time after the certification date but not later than 90 days after the certification date"); 7 C.F.R. § 1580.301(e) (implementing the statutory certification requirements, such as receipt of technical assistance from the Extension Service and certification of a decline in net fishing income relative to the producer's pre-adjustment year). Additionally, § 1580.303 of Agriculture's regulations specify that "[a]pplicants shall satisfy by September 30 all certifications of § 1580.301(e) to qualify for adjustment assistance payments." 7 C.F.R. § 1580.303(a).

der to receive cash benefits pursuant to 19 U.S.C. § 2401e." Def.'s Resp. Br. at 10. In essence, its contention is that (1) both 19 U.S.C. § 2401e(a)(1)(C) and 7 C.F.R. § 1580.301(e)(4) require Trinh's net fishing income to have been less in 2002 than in 2001; (2) that pursuant to 7 C.F.R. § 1580.303(a), Trinh must have provided certification of this decline by September 30, 2004 to qualify for TAA benefits; (3) because his original 2001 and 2002 tax returns show an increase in net income of $58, he did not demonstrate that he qualified for benefits; and (4) although his amended 2002 tax return does show a drop in net income of $180, it was never submitted to Agriculture, and even had it been, it should not be considered because the 2002 amended tax return was not filed until December 6, 2004, "after the USDA made its final determination finding him ineligible for TAA cash benefits," and well after the regulatory deadline of September 30, 2004. Def.'s Resp. Br. at 11.

Trinh disagrees. He argues that the Secretary's initial negative determination, through the Matagorda County FSA Office, was based on his 2001 and original 2002 tax returns, and that his September 15, 2004 appeals letter to NAD "constitutes an attempt to explain on the administrative record [his] belief that he is entitled to TAA benefits as he had suffered a noticeable decline in income although his Tax Return indicated that his 2002 income exceeded his 2001 income by $58.00." Pl.'s Br. at 8. Furthermore, Trinh argues that although NAD ruled that his case was appealable, the appeal never occurred, due to the Texas State FSA's withdrawal of its adverse decision; consequently, the Secretary's subsequent final disapproval, via the FAS, on the same grounds as FSA's initial denial, was based "only on the facts available at the time of the initial administrative determination," which included the "inadvertent omission of repair receipts," and "not . . . on the full and accurate facts" represented by his amended 2002 tax return. *Id*.

In reviewing the Department's TAA provisions, the Government argues that the court must give substantial deference to Agriculture's methodology. It denies Trinh's claim that "the Secretary based his decision . . . on facts that were incomplete and inaccurate at the time of initial determination," Pl.'s Br. at 10, and argues there was no way Agriculture abused its discretion because evidence of the amended tax return was not in the administrative record at the time the agency made its final determination—it "did not even exist at the time of the agency's determination." Def.'s Resp. Br. at 12. Moreover, because TAA funds are appropriated on a fiscal year basis, the "September 30 deadline is necessary to obligate the funds properly." *Id*. at 13. "Without the deadline, the amount of distributions made by USDA could never be final, and there would never be an end to the processing of TAA distributions." *Id*.

A. TAA's Remedial Purpose, *Ex Parte* Process, And Requirement To Conduct Investigations With Utmost Respect For Worker Interests

This is a case of first impression. While the court has decided many cases involving petitions for TAA benefits, given the relative newness of the Trade Adjustment Assistance for Farmers Program (the enabling statutory provisions were passed on August 6, 2002, and only became effective 180 days later, on February 2, 2003), there is little case law directly addressing Agriculture's TAA program or the statutory and regulatory provisions at issue here. As an extension of the original TAA program (enacted as part of the Trade Act of 1974), the TAA for Farmers Program, however, has the same purpose: "to provide adequate procedures to safeguard American . . . labor against unfair or injurious import competition, and to assist industries, firm [sic], workers, and communities to adjust to changes in international trade flows." Trade Act of 1974, Pub. L. No. 93–618, 88 Stat. 1978 (1975) (codified as amended at 19 U.S.C. § 2102(4) (2000)); *see also Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 50,048, 50,049 (Dep't Agric. Aug. 20, 2003) (final rule) ("The purpose of TAA is to assist producers to adjust to imports by providing technical assistance to all and cash payments to those facing economic hardship.").

Because of this shared congressional intent, the statute governing the TAA for Farmers Program should be construed in a manner similar to the manner in which the court has construed other TAA statutes. *See Former Employees of Elec. Data Sys. Corp. v. United States Sec'y of Labor*, 350 F. Supp. 2d 1282, 1291–92 (Ct. Int'l Trade 2004) ("When construing a statute, the duty of the court 'is to give effect to the intent of Congress.' ") (quoting *Flora v. United States*, 357 U.S. 63, 65 (1958)). In interpreting the original TAA legislation, the court has stated, "it is evident that the law is and was intended to be remedial in nature . . . in the sense of providing assistance to displaced workers." *Former Employees of Champion Aviation Prods. v. Herman*, No. 98–02–00299, Slip Op. 99–48 at 6 (Ct. Int'l Trade June 4, 1999). Furthermore, as remedial legislation, "[t]he trade adjustment assistance [TAA] statutes . . . are to be construed broadly to effectuate their intended purpose." *Former Employees of Elec. Data Sys.*, 350 F. Supp. 2d at 1290 (quotations and citations omitted); *see also Former Employees of Champion Aviation Prods.*, 23 CIT at 352 ("When interpreting remedial legislation, the court is to construe it broadly to effectuate its purpose."); *Gardner v. Brown*, 5 F.3d 1456, 1463 (Fed. Cir. 1993) (describing World War Veterans' Act as remedial legislation that "should be construed broadly to the benefit of the veteran" (citation omitted)).

The court has also held that "any rigidity in implementation of the [TAA] statute would undermine the remedial nature of the Act," *Former Employees of Elec. Data Sys.*, 350 F. Supp. 2d at 1290, and

"because of the *ex parte* nature of the [TAA] certification process, and the remedial purpose of the trade adjustment assistance program, [the Department] is obliged to conduct [its] investigation with the *utmost regard for the interests of the petitioning workers*," *Former Employees of Oxford Auto. UAW Local 2088 v. United States Dep't of Labor*, No. 01–00453, Slip Op. 03–129 at 14 (Ct. Int'l Trade Oct. 2, 2003) (second alteration in original) (emphasis added) (quoting *Stidham v. Dep't of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987) (citation omitted)).[15]

Given congressional and departmental statements that the statute is remedial, the court's intention to construe such remedial statutes broadly to effectuate their intended purpose, the threshold requirement of a reasonable inquiry, the *ex parte* nature of the certification process, and the duty owed to a *pro se* applicant, the salient question is whether Agriculture conducted its investigation with the utmost regard for Trinh's interests. With little case law addressing the requisite investigatory standard directly applicable to Agriculture cases, it is instructive to look at the standards established in TAA case law involving the Labor Department. As these cases typically affect larger corporations with several different facilities and address whether there was a shift in production due to foreign imports, they can be complicated and are highly fact dependent; thus, they are not completely analogous to the instant case, which involves a self-employed shrimper. Analysis of this case law, nonetheless, is instructive here.

B. Agriculture Did Not Meet The Reasonable Inquiry Threshold

Thus, as the court has previously stated, "[w]hile [the Department] 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 Texas v. United States Sec'y of Labor*, No. 03–00625, Slip Op 04–106 at 15 (Ct. Int'l Trade Aug. 20, 2004) (emphasis added) (quoting *Former Employees of Chevron Prods. Co v. United States Sec'y of Labor*, 245 F. Supp. 2d 1312, 1318 (Ct. Int'l Trade 2002) (quotation omitted)). Moreover, the court must sustain the Secretary's factual determinations, under the substantial evidence standard, only "so long as they are reasonable and sup-

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[15] *See also Former Employees of Pittsburgh Logistics Sys., Inc. v. United States Sec'y of Labor*, No. 02–00387, Slip Op. 03–21 at 8 n.6 (Ct. Int'l Trade Feb. 28, 2003) (likening the court's duty towards a *pro se* TAA petitioner to the duty owed by an administrative law judge to a *pro se* social security benefits claimant: to "scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts") (quotations and citation omitted).

ported by the record as a whole." *See Hyundai Elecs. Co., Ltd. v. United States*, 23 CIT 302, 306, 53 F. Supp. 2d 1334, 1338 (1999).

In reviewing the "record as a whole," and Agriculture's determination denying Trinh's application for TAA benefits, the court must look 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) ("The Court decides an adjustment assistance [TAA] case based on the administrative record before it.").[16] Nonetheless, "the Court cannot uphold a determination based upon manifest inaccuracy or incompleteness of record when relevant to a determination of fact." *Former Employees of Pittsburgh Logistics Sys.*, Slip Op. 03–21 at 20. Therefore, pursuant to the court's Rule 56.1, a party may contest an administrative determination by showing "how the determination may be unwarranted by the facts to the extent that the agency may or may not have considered facts which, as a matter of law, should or should not have been properly considered." U.S. Ct. Int'l Trade R. 56.1(c)(1)(B).

If the court determines the Department did not meet this threshold requirement of reasonable inquiry, "the court, for good cause shown,[17] may remand the case to [the appropriate Secretary, *viz*, Agriculture,] to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings." 19 U.S.C. § 2395(b). "Good cause [to remand] exists if the Secretary's chosen methodology is so marred that his finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Galey & Lord Indus. v. Chao*, 219 F. Supp. 2d 1283, 1286 (Ct. Int'l Trade 2002) (internal quotations and citations omitted); *see also* 19 U.S.C. § 2395(b).

Thus, while the Government is correct that the Department's methodology is entitled to substantial deference, this is only if its investigation passes the "reasonable inquiry" threshold, and if its fac-

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[16] *But cf. Ammex, Inc. v. United States*, 23 CIT 549, 551–54, 62 F. Supp. 2d 1148, 1153–55 (1999) (discussing United States Court of International Trade Rule 72(a), "Documents Furnished in All Other Actions Based Upon the Agency Record," (now Rule 73.3, pursuant to the renumbering of the Rules) as not conclusively defining the contents of the administrative record, unlike Rule 71, "Documents in an Action Described in 28 U.S.C. § 1581 (c) [countervailing duty and antidumping duty proceedings, under 19 U.S.C. § 1516a] or (f) [civil actions involving application for an order directing the administering authority or the International Trade Commission to make confidential information available under 19 U.S.C. § 1677f(c)(2)]," (renumbered as Rule 73.2)). This action, which involves neither countervailing duty or antidumping duty proceedings, nor limited disclosure of proprietary information under protective order, falls under Rule 73.3 (old Rule 72(a)), "Documents Furnished in All Other Actions Based Upon the Agency Record."

[17] Although the court must view the record before it, and "good cause" is not an independent standard allowing consideration of extra-record evidence to prove the record's inadequacy, "*[d]e novo* evidence may serve to highlight the inadequacy, once [the inadequacy] has been established." *Former Employees of Pittsburgh Logistics Sys.*, Slip Op. 03–21 at 8, n.6.

tual determinations are supported by the "record as a whole." In this case, the Department failed to meet the threshold of reasonable inquiry because it did not investigate beyond Trinh's application, failing to consider the conflicting information in his tax return and the county FSA's notations on his application, and ignoring his relevant and timely submission seeking appeal and providing notice of these discrepancies. Moreover, in stressing Trinh's failure to meet the regulatory deadline, despite the nearly *de minimis* nature of his original disqualification ($56), Agriculture disregarded the statute's remedial purpose (and its own regulations, which, by allowing waiver of non-statutory deadlines, *see* 7 C.F.R. § 1580.501(d), emphasize TAA's remedial nature). And lastly, by not appreciating how its own inaction and unexplained change in administrative appellate procedures might have led to Trinh's failure to meet the regulatory deadline, Agriculture did not fulfill its duty to act in the utmost regard for Trinh's interests.

In prior TAA cases, the court has held that Labor investigations, which have disregarded potential factual inconsistencies, or which have relied on nothing more than the TAA application, have not met the reasonable inquiry threshold necessary to constitute the requisite substantial evidence upon which a determination can be affirmed. Similarly, in Trinh's case, despite potential factual inconsistencies in the application, Agriculture's final determination relied on nothing more than the original TAA application, with no evidence of any investigatory effort to substantiate the discrepancies, or of any further follow-up with Trinh regarding his application.

For example, in *Former Employees of Pittsburgh Logistics Sys.*, Labor determined that an increase in steel imports was found to have "contributed importantly to the decline in sales or production and to the total or partial separation of workers," and certified LTV Steel employees for TAA benefits. Slip Op. 03–21 at 2. The plaintiffs, former employees at a separate firm, Pittsburgh Logistics Systems ("PLS"), worked on-site at LTV's facilities, and were also terminated. *Id.* at 2–3. The former PLS employees applied for TAA certification, claiming they, too, were terminated due to LTV's discontinuance of production. *Id.* In denying their certification, Labor stated that the plaintiffs were "service workers," engaged in "warehousing and distribution services," but not in production of an article, as required by the Trade Act. *Id.* at 3–4. In remanding back to Labor, the court found the investigation inadequate, stating:

> [T]he petitioners were not contacted for further input at all . . . [and while t]hat may satisfy compliance with procedural due process, and it may well be that in a straight-forward case an investigator is justified in determining that *further* contact with petitioners is unnecessary to establishing all the relevant facts . . . that does not relieve the administrator of having the

> 'utmost regard' towards petitioners, *especially those unrepresented by counsel*, when undertaking fact-finding.

Id. at 15–16 (emphasis added) (citation omitted). As with Agriculture's investigation into Trinh's application, Labor merely relied on the plaintiffs' original application and justified its decision on the "strict time constraints within which [Labor] must complete its numerous investigations." *Id.* at 6 (citation omitted). In *Former Employees of Alcatel Telecomm. Cable v. Herman*, the court stated, "the Department relied on nothing more than the [TAA] questionnaire in making its determination . . . [and] did nothing to verify the accuracy of . . . responses to the questions in the [questionnaire]." 24 CIT 655, 662, 664 (2000) (finding Labor's investigation inadequate because the "Department did not conduct a field investigation, confer on the telephone or in writing with employees or other sources regarding the veracity of . . . claims").

Similarly, in *Former Employees of Sun Apparel*, laid-off garment workers challenged Labor's determination that they were not eligible for TAA benefits because they did not meet the statutory criteria. Slip Op. 04–106 at 2. The petition filed by the firm's HR manager on behalf of the former employees indicated that the workers produced jeans but that the job losses were not due to a shift in production to a foreign country. *Id.* at 3–4. In concluding that Labor's determinations were not supported by substantial evidence on the record and that good cause existed to remand for further investigation, the court stated, in part, that the "agency's negative determination wholly ignored the allegations made in the workers' . . . accompanying letters." *Id.* at 8. Furthermore, in discussing Labor's investigation after the employees' repeated requests for reconsideration, which comprised two e-mails to the employer's HR manager asking four questions, the court noted: "[t]hese e-mail exchanges constituted the full extent of Labor's investigation into the workers' claims." *Id.* at 10–11. Additionally, the court noted:

> Due to Labor's disregard of its statutory duty [citing 19 U.S.C. § 2271(a)(3), requiring Labor to promptly publish notice in the Federal Register that it has received a petition and initiated an investigation], the displaced workers' claims were ignored for over three months while the agency completed its investigation into [another petition the employer had filed on the workers' behalf] and issued its negative determination. The entire investigation consisted of two communications with only one individual. . . . Such a limited investigation fails to provide substantial evidence upon which Labor could base its determination. . . .

Id. at 16–17. "[T]he inconsistency between the statements of the [workers] and the statements of the company official alone would have necessitated further agency investigation of the precise nature

of the [employees'] work." *Id.* at 20 (alteration in original) (quoting *Former Employees of Chevron Prods Co.*, 245 F. Supp. 2d at 1325).

Trinh's case is somewhat similar to these, in which the court found Labor's investigations inadequate and held that the Department did not act with utmost regard for the workers' interests. As in *Former Employees of Pittsburgh Logistics Sys.*, here there were no notes or other indication of any investigation into the veracity of Trinh's September 15 letter, which tried to explain that, despite the information in his tax returns, he did meet the statutory and regulatory criteria because his net income had declined. And as with *Former Employees of Sun Apparel*, Agriculture's final determination "wholly ignored" the claims Trinh made in his "accompanying letter." Indeed, Agriculture's final determination specifically noted that it had relied solely on the information Trinh had provided in his initial application. In terms of the sufficiency of contact regarding an investigation, in *Sun Apparel*, the court held that Labor's two emails to Sun Apparel's HR manager were inadequate. In Agriculture's investigation of Trinh's case, there was no contact with Trinh, apart from his submission of documents. It is true that Labor's investigation in *Sun Apparel*, which concerned whether there was a shift in production to a foreign country, and in *Alcatel Telecomm.*, which involved two separate petitions that were filed, were more complicated; nonetheless given the remedial nature of the statute and the heightened duty owed to *pro se* applicants, once Trinh alerted the agency to a possible discrepancy, Agriculture should have continued its investigation.

Specifically, Agriculture should have been prompted to further action by Trinh's appeal letter, given the discrepancy between Trinh's originally filed tax returns and the Matagorda County FSA Office's notations on his *TAA Application*, indicating that Trinh had provided supporting documentation to meet all statutory and regulatory requirements. *See TAA Application*, Pl.'s App. 8; *supra* note 3. Consequently, in view of the duty to act with the utmost regard for Trinh's interests, these circumstances, together with the timely appeal letter, should have at least suggested that other supporting documentation was missing or lost from the record, and prompted the Department to further investigatory action, given that the statute does not mandate what information is required to establish a decline in net fishing income, *see* 19 U.S.C. § 2401e(a)(1)(c) ("The producer's net farm income (as determined by the Secretary). . . ."), and that Agriculture's regulations do not specify that only tax returns will suffice, *see* 7 C.F.R. § 1580.301(e)(6).[18] Agriculture's inaction

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[18] "To comply with certifications in paragraph (e)(4) of this section [which includes certification of a decline in net fishing income], an applicant shall provide either . . . (i) Supporting documentation from a certified public accountant or attorney, or (ii) Relevant documentation and other supporting financial data, such as financial statements, balance sheets,

simply demonstrates that it did not meet the reasonable inquiry threshold.

C. Trinh's Failure To Fully Support His Application Is Not Fatal To His Claim

This case is also different from an ordinary failure to timely supply sufficient supporting information, because of the confusing changes in procedures. After receiving notification of the County FSA's initial determination, Trinh timely responded, asking for an appeal from NAD. After NAD's acceptance of the appeal, it provided notice that Trinh could submit additional information to the NAD-appointed Hearing Officer by October 25, 2004. *See USDA Notice of Appeal & Req. for Agency R.*, Pl.'s App. 18. Although this was the first notice Trinh received that he could supplement the record, this was already past the regulatory deadline, because of the Department's delay in processing Trinh's application. That notwithstanding, Trinh's second communication from NAD, after its prehearing conference notice, was its October 28, 2004 letter stating that his NAD appeal was moot because the Texas State FSA had withdrawn its adverse decision. Yet there was no information describing what this meant or the Department's next steps. Trinh had no further communication until November 23, 2004, when FAS issued its final determination, expressly stating that any appeal made to NAD would be disregarded. Thus, any supplemental information that Trinh might have tried to enter into the record would have been disregarded. After the Texas State FSA withdrew its initial determination, the FAS determination essentially represented the Department starting over. But as a final determination, with review limited only to the court, FAS's negative determination was an initial and final administrative determination, with no possible administrative appeal. Unlike the former Alcatel Telecommunications Cable employees, Trinh had no opportunity to submit information in connection with a request for administrative reconsideration of the Secretary's denial. Trinh had properly appealed, pursuant to the Department's policies, but the Department changed its policies and merely withdrew his appeal. This process, changed midstream for Trinh's application and, unaccompanied by explanation, does not represent action conducted with the utmost regard for Trinh's interest.

Trinh should not be penalized for confusion surrounding the changed appellate procedures. The Government's focus on the regulatory deadline, moreover, contravenes the remedial purpose of the statute. Granted, a deadline is needed to finalize the processing of

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and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency." 7 C.F.R. § 1580.301(e)(6).

TAA distributions, especially given the limited appropriations for each fiscal year and statutory requirement that cash benefits be prorated whenever claims exceed the allocated $90 million. *See* 19 U.S.C. § 2401g (authorizing appropriations "not to exceed $90,000,000 for each of the fiscal years[19] 2003 through 2007" and requiring "proportionate reduction" when claims exceed the authorized appropriation amount). But this regulatory deadline should not override the statute's purpose and was merely intended to help further the goal of providing rapid relief.

When it initially promulgated its final rule implementing the new TAA for Farmers Program, Agriculture explained that "TAA is intended to provide rapid relief to producers," but that due to the limited funding and need to prorate, "[w]aiting until the close of the fiscal year [i.e., until September 30] to prorate is inconsistent with providing rapid relief." *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. at 50,049. "The rule therefore seeks middle ground between the intent of the legislation, on the one hand, and the requirement to prorate payments, on the other, by creating a window for filing petitions." *Id.* (requiring petitions for certification to be submitted to FAS from August 15 through January 31;[20] petitions received after that date will be returned to sender); *see also* 7 C.F.R. § 1580.303(g) (stating that if FAS "determines in September that program funds may be insufficient to meet the requirements for [TAA] payments . . . during the coming fiscal year, FSA may delay making [TAA] payments in order to prorate amounts owed producers").

Therefore, the regulatory deadline is intended to help encourage producers to submit their information in a timely fashion and allow Agriculture to process payments before the end of the fiscal year. It should not be used to deny payments to a producer who acted in a timely fashion and provided notice that discrepancies existed, especially when Agriculture failed to fully investigate and withdrew any opportunity for an administrative appeal. Moreover, the Government's reliance on the September 30 deadline ignores Agriculture's own regulations, which evince an appreciation of the statute's remedial purpose. For example, 7 C.F.R. § 1580.501(d) states, "[t]he Administrator may authorize the FSA county committees to waive or modify non-statutory application deadlines or other program requirements in cases where lateness or failure to meet such other requirements by applicants does not adversely affect the operation of

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[19] The Government's fiscal year is not based on a calendar year; instead, it begins on October 1 and runs until September 30 of the following year.

[20] The Texas Shrimp Association filed its petition for certification of TAA eligibility on behalf of Texas shrimp producers on October 21, 2003, within the required filing window.

the program." Yet, even given this, and knowing that Trinh had marginal and disputed ineligibility, that a change in the appeals process likely impacted the evaluation of Trinh's September 15 letter, and that the Department's lack of contact hindered Trinh from submitting additional information showing a decline in net income, the Government simply states "Trinh has never submitted documentation demonstrating a decline in income to USDA. However, as a member of the certified producer group, he was eligible for and received technical assistance at no cost to himself." Def.'s Resp. Br. at 10.

The Government does not acknowledge that the lack of complete evidence to support Trinh's claims is partly due to the Government's failure to inform Trinh regarding the process. As a *pro se* applicant, if he did not know additional information could be submitted (if it could be) after the NAD appeal was mooted, and he was told an adverse decision was withdrawn, why would Trinh file an amended tax return or any other information? What end would it serve? Interestingly, however, after FAS's final determination, dated November 23, 2004, which did explain that he could seek review before the court, Trinh filed an amended tax return on December 6, 2004. It is uncertain when Trinh actually received the November 23 letter, but, at most, thirteen days passed between FAS's letter and his amended tax return filing. Thus, while it is unclear when Trinh discovered the additional boat repair receipts, it is possible he was aware of them by the time he wrote the timely September 15 letter. If so, had Agriculture provided clear directives, he may have been able to supplement the record before the regulatory deadline. At the very least, it is possible that he could have supplemented the record in a timely fashion had Agriculture informed him about the true state of his claim and what was lacking in his evidence submissions.

II. Remand Is Justified

Judicial review of an administrative action is based upon the administrative record before it. *See* 28 U.S.C. § 2640(c). The Secretary's conclusions are conclusive, if they are supported by substantial evidence; if not "the court, for good cause shown, may remand the case to such Secretary to take further evidence." 19 U.S.C. § 2395(b); *see also Former Employees of Oxford Auto.*, Slip Op. 03–129 at 2–3. "Good cause [to remand] exists if the Secretary's chosen methodology is so marred that his finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Galey & Lord Indus.*, 219 F. Supp. 2d at 1286 (quotations omitted) (alteration in original).

Agriculture did not conduct its investigation with the utmost regard for Trinh's interest. The Government's brief, in fact, simply ig-

nores the entire aborted NAD appellate process and the confusing messages sent to Trinh, skipping directly from Trinh's letter dated August 14, 2004, requesting an appeal of the initial Matagorda County FSA's determination, to the final determination issued by FAS on November 23, 2004, denying his eligibility for TAA benefits.

TAA benefits are part of remedial legislation, and should be construed broadly for the benefit of the worker. In considering each application, an agency must "provide a reasoned analysis and substantial evidence to support any determination." *Former Employees of Pittsburgh Logistics Sys.*, Slip Op. 03–21 at 12. Because Agriculture has failed to do so here, its investigatory conclusion is not entitled to deference. *See id.* at 10 ("An inadequate investigation is not entitled to deference."); *see also Former Employees of Hawkins Oil & Gas, Inc. v. United States Sec'y of Labor*, 17 CIT 126, 130, 814 F. Supp. 1111, 1115 (1993) (declaring that "no deference is due to determinations based on inadequate investigations") (citations omitted). "The developed record must evince substantial evidence to confirm or refute relevant issues encountered during the course of the investigation, and if an investigation does not pass a threshold of reasonable inquiry, the record is unsupported by substantial evidence." *Former Employees of Pittsburgh Logistics Sys.*, Slip Op. 03–21 at 7.

CONCLUSION

For the foregoing reasons, this matter is REMANDED to the Department of Agriculture to reconsider Trinh's eligibility for TAA benefits. On remand, the Secretary must reopen the record and consider Trinh's amended tax return as well as any other evidence of reduction in income that Trinh might submit. Furthermore, the Secretary's investigation must be conducted with the utmost respect for Trinh's interests, and must meet the reasonable inquiry threshold. Remand results shall be reported by October 3, 2005. Objections thereto are due by October 17, 2005. Rebuttal comments are due by October 31, 2005.

SO ORDERED.

Slip Op. 05–112

ROBERT ROOD, Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Court No. 05–00303

[Defendant's motion to dismiss for failure to state a claim upon which relief may be granted is denied.]

Dated: August 29, 2005

Robert Rood, Pro se.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *David S. Silverbrand*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Jeffrey Kahn*, Of Counsel, Office of the General Counsel, U.S. Department of Agriculture, for Defendant.

OPINION & ORDER

CARMAN, Judge. Plaintiff Robert Rood challenges Defendant United States Secretary of Agriculture's ("USDA" or "Defendant") denial of certification for trade adjustment assistance ("TAA") benefits pursuant to 19 U.S.C.A. § 2401e (West Supp. 2005). Defendant moves to dismiss this case for failure to state a claim upon which relief may be granted under USCIT Rule 12(b)(5). For the following reasons, Defendant's motion to dismiss is denied. This Court has jurisdiction over this matter under 19 U.S.C.A. § 2395(c) (West Supp. 2005).[1]

STANDARD OF REVIEW

Upon review of a motion to dismiss for failure to state a claim, "any factual allegations in the complaint are assumed to be true and all inferences are drawn in favor of the plaintiff." *Amoco Oil Co. v.*

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[1] 19 U.S.C. § 2395 was amended, effective 180 days after August 6, 2002, to provide the Court of International Trade with jurisdiction over trade adjustment assistance matters brought by agricultural commodity producers. Trade Act of 2002, Pub. L. No. 107–210, § 142, 116 Stat. 933, 953. In pertinent part, 19 U.S.C.A. § 2395, states:

> [A]n agricultural commodity producer (as defined in section 2401(2) of this title) aggrieved by a determination of the Secretary of Agriculture under section 2401b of this title . . . may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade for review of such determination.
>
> . . .
>
> The Court of International Trade shall have jurisdiction to affirm the action of . . . the Secretary of Agriculture, as the case may be, or to set such action aside, in whole or in part.

19 U.S.C.A. § 2395.

United States, 234 F. 3d 1374, 1376 (Fed. Cir. 2000). It is well-established that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957). A complaint need not set forth detailed facts but rather only " 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 47; *see also* USCIT R. 8(a)(2) ("A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."). In reviewing the sufficiency of a claim, "consideration is limited to the facts stated on the face of the complaint, documents appended to the complaint, and documents incorporated in the complaint by reference." *Fabrene, Inc. v. United States*, 17 CIT 911, 913 (1993).

DISCUSSION

Plaintiff filed a complaint challenging the USDA's denial of certification for TAA cash benefits. The USDA determined that Plaintiff did not qualify for TAA cash benefits because Plaintiff's "2002 net fishing income did not decline from the latest year in which no adjustment assistance payment was received (2001)" as required by 19 U.S.C.A. § 2401e(a)(1)(C) (West Supp. 2005).[2] (Agency Record ("A.R.") at 16; Attach. to Compl.) Defendant explained:

> In 2001, the tax return Mr. Rood submitted to the IRS reported a net loss from commercial fishing of $2,723 on Line 31 of Schedule C. [A.R.] at 9. In 2002, the tax return Mr. Rood submitted to the IRS reported a net profit from commercial fishing of $2,096 on Line 31 of Schedule C. [A.R.] at 8.

Def.'s Mot. to Dismiss for Failure to State a Claim upon Which Relief May Be Granted ("Def's Mot.") at 4. This Court notes, however, that the 2002 Schedule C that Defendant references appears to represent Plaintiff's wife's aerobic business profit, not Plaintiff's fishing business loss. (A.R. at 8.) As attachments to his Complaint, Plaintiff included his 2002 Schedule C for his fishing business. Line 31 of Plaintiff's 2002 Schedule C reflects a net loss from commercial fishing of $16,763. (Attach. to Compl.) This document is notably not a part of

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[2] Payment of adjustment assistance shall be made to an adversely affected agricultural commodity producer covered by certification if certain statutory conditions are met. The requirement at issue is:

> The producer's net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this part.

19 U.S.C.A. § 2401e(a)(1)(C).

the agency record which was compiled and submitted by the USDA.

Although recognizing that Plaintiff – *pro se* litigant – did not respond to Defendant's motion to dismiss, this Court makes its motion to dismiss determination on the sufficiency of Plaintiff's Complaint. This Court acknowledges the axiom that the "Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley*, 355 U.S. at 48. Therefore, upon review of the Complaint and attached documents, this Court finds it does not appear beyond doubt that Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Assuming the Complaint's factual allegations to be true and drawing all inferences in Plaintiff's favor, this Court finds that Plaintiff has sufficiently alleged a cause of action and denies Defendant's motion to dismiss. For the aforementioned reasons, it is hereby

ORDERED that Defendant's motion to dismiss for failure to state a claim upon which relief may be granted is denied; and it is further

ORDERED that Defendant file an answer no later than September 30, 2005.

Slip Op. 05–113

UGINE & ALZ BELGIUM, N.V.; ARCELOR STAINLESS USA, LLC; and ARCELOR TRADING USA, LLC, Plaintiffs, v. UNITED STATES, Defendant.

Court No. 05–00444

[Plaintiffs' renewed motion to enjoin Department of Commerce liquidation instructions to Bureau of Customs denied.]

Dated: August 29, 2005

Shearman & Sterling LLP (*Robert S. LaRussa*, *Stephen J. Marzen* and *Ryan A.T. Trapani*) for the plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Ada Loo* and *Arthur Sidney*) and Bureau of Customs and Border Protection, U.S. Department of Homeland Security (*Christopher Chen*), of counsel, for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: The court was constrained to conclude in slip opinion 05–97, 29 CIT ___ , ___ F.Supp.2d ___ (Aug. 17,

2005), familiarity with which is presumed, that it could not grant plaintiffs' application for a preliminary injunction in this action, enjoining certain liquidation instructions that have been issued to the Bureau of Customs and Border Protection, U.S. Department of Homeland Security by the International Trade Administration, U.S. Department of Commerce[1] in conjunction with its *Notice of Amended Final Determinations: Stainless Steel Plate in Coils from Belgium and South Africa; and Notice of Countervailing Duty Orders: Stainless Steel Plate in Coils from Belgium, Italy and South Africa*, 64 Fed.Reg. 25,288 (May 11, 1999), and its *Antidumping Duty Orders; Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, the Republic of Korea, South Africa, and Taiwan*, 64 Fed.Reg. 27,756 (May 21, 1999). That slip opinion, page 19, afforded the plaintiffs an opportunity before entry of an order denying that injunctive relief to "inform the court and opposing counsel . . . as to how they propose to proceed from now on in this matter" and continued in effect the temporary restraining order entered on July 27, 2005 until the close of business on August 24, 2005.

I

The plaintiffs have responded by filing the following papers: Motion for Clarification and Reconsideration; Memorandum in Support of Plaintiffs' Motion for Clarification and Reconsideration or, in the Alternative, for an Injunction Pending Appeal[2]; Order of Reconsideration[3]; and Renewed Temporary Restraining Order[4]. Obviously,

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[1] Referred to hereinafter as "ITA".

[2] Referred to hereinafter as "Plaintiffs' Memorandum".

[3] As submitted, this proposed form of order would vacate slip opinion 05–97.

[4] The plaintiffs have also filed an Additional Statement of Defendant Consenting to Extension of the Temporary Restraining Order and Injunction Pending Appeal wherein they represent that counsel for the defendant responded by *e-mail* to these filings, giving the consent indicated, albeit conditioned upon the reported caveat that

> the Government strongly agrees with the Court's denial of plaintiffs' request for a preliminary injunction, and urges plaintiffs to withdraw their meritless complaint[.]

Subsequent to this filing, the court received defendant's Partial Consent Motion for Extension of Time, which affirmed plaintiffs' foregoing representations as well as their consent to that motion of the defendant,

> conditioned upon the temporary restraining order remaining in place for the duration of the Court's consideration and disposition of the motion for reconsideration.

The plaintiffs further represent that counsel for the intervenor-defendants did not have any position on the requested extension of the temporary restraining order. *See* Plaintiffs' Memorandum, p. 5 n. 1.

"However salutary the concerns for orderly proceeding (and even accommodation) are" [Slip Op. 05–97, p. 12], the effect of that restraining order is the same as that of the requested preliminary injunction, which, as discussed in slip opinion 05–97 and again hereinabove, cannot be granted. Hence, that order of July 27, 2005, must be, and it hereby is, vacated (as of the close of business on August 24, 2005).

these amount to a plea for a return to the beginning — rather than any procedure for expedited joinder of issue and trial of this action for equitable relief on the merits.

A

The gravamen of that relief for which the plaintiffs pray, whether preliminary or permanent, is essentially the same. *Compare* Plaintiffs' Complaint, para. 29(a) *with* Plaintiffs' [Proposed] Preliminary Injunction, 2nd decretal para. (filed July 22, 2005). But a preliminary injunction is extraordinary relief, while a permanent injunction is not — because, by the moment of the latter's entry, a full and complete record of all the underlying facts and circumstances has been developed and adjudicated. Ergo, the standards the courts have set for grant of the former (in the absence of such a record) are strict — and have not been satisfied by the plaintiffs herein. There is no evidence yet on the record to explain, for example, how the first-named, Belgian plaintiff herein could have for years (1) processed (or had processed) ["pickled and annealed"[5]] the subject merchandise in Belgium;(2) packaged and shipped that product from that land to this country; (3) certified those goods upon entry via its affiliated corporate U.S. agents, the Arcelor plaintiffs, as products of Belgium subjectto the above-cited ITA countervailing- and antidumping-duty orders; (4) advanced without protest all of the duties contemplated bythose orders covering Belgium; (5) not challenged Belgium as the country of origin during successive ITA administrative (or possible court) reviews of those entries; and (6) still now plead after myriad such entries that those deeds were all the result of "mistake"[6], one counsel now contend is actionable as a matter of U.S. law because the merchandise is not really from or of Belgium.

There is no evidence yet on the record to determine whether or not the entries allegedly encompassed by this action are, as the intervenor-defendants posit, deemed liquidated as a matter of law — and therefore now beyond the reach of any belated claim for equitable relief. *See* Slip Op. 05–97, p. 11, quoting from Intervenor-Defendants' Response to Plaintiffs' Motion for Preliminary Injunction, pp. 1–2. Indeed, this stance of the petitioners-cum-intervenor-defendants had been taken first before the ITA[7], citing for support the recent decision in *Int'l Trading Co. v. United States*, 412 F.3d 1303 (Fed.Cir. 2005), to the effect that any entry that is not liquidated within six months after notice of removal of the suspension of liquidation is deemed liquidated by operation of law at the rate the

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[5] Plaintiffs' Complaint, paras. 1–3.

[6] *See id.*, paras. 10, 14, 15.

[7] *See* Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Exhibit 9, pp. 6–7.

product was entered. The plaintiffs have yet to offer any response with regard to this potentially-dispositive issue, not on the facts, not on the law, not in their instant motion for reconsideration.

Their motion does seek clarification of the court's jurisdiction. It states that, if this court

> determines that it has jurisdiction over the subject matter of this action and can therefore reach the merits of Arcelor's preliminary injunction motion, then Arcelor respectfully moves the Court to reconsider whether [it] has established a substantial likelihood of success on the merits.[8]

But it is not imperative that this court conclusively determine jurisdiction over an action as a predicate to ruling on the merits of such threshold equitable relief. In *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 413 F.3d 1344, 1348 (Fed.Cir. 2005), reversing a Court of International Trade grant of a preliminary injunction, for example, the court of appeals nevertheless found "no abuse of discretion in the trial court's decision to delay consideration of the government's motion to dismiss [for lack of subject-matter jurisdiction] until briefing was completed." On the other hand, the Federal Circuit

> disagree[d] . . . that the jurisdictional arguments could be [completely] ignored in ruling on the Association's preliminary injunction motion. The question of jurisdiction closely affects the Association's likelihood of success on its motion for a preliminary injunction. Failing to consider it was legal error.

Suffice it simply to repeat now that this court has indeed considered plaintiffs' claim of jurisdiction, including its reliance on *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed.Cir. 1983)[9], but that it does not enhance their application for a preliminary injunction.

B

Plaintiffs' instant motion for reconsideration is stated as made pursuant to USCIT Rules 59 (New Trials; Rehearings; Amendment of Judgments) and 62(c)(Injunction Pending Appeal). With regard to the first rule, this court recently pointed out, yet again, [*Agro Dutch Industries Ltd. v. United States*, 29 CIT ___ , Slip Op. 05–28, pp. 5–6

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[8] Plaintiffs' Memorandum, p. 3. They also express the view that, whether or not they would suffer irreparable harm from denial of the preliminary injunction determines if the court must dismiss this action for lack of subject-matter jurisdiction or may reach the merits of their application for that injunction. *See id*. at 2–3.

[9] *Compare* Memorandum in Support of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, p. 5 *with* Slip Op. 05–97, p. 8. *Cf.* Plaintiffs' Memorandum, p. 5.

(Feb. 28, 2005), *appeal docketed*, No. 05–1288 (Fed.Cir. March 22, 2005)] that it considers a motion for reconsideration to be "a means to correct a miscarriage of justice". *Starkey Laboratories, Inc. v. United States*, 24 CIT 504, 510, 110 F.Supp.2d 945, 950 (2000), quoting *Nat'l Corn Growers Ass'n v. Baker*, 9 CIT 571, 585, 623 F.Supp. 1262, 1274 (1985). *Compare Bomont Industries v. United States*, 13 CIT 708, 711, 720 F.Supp. 186, 188 (1989) ("a rehearing is a 'method of rectifying a significant flaw in the conduct o[f] the original proceeding'"), quoting *RSI (India) Pvt., Ltd. v. United States*, 12 CIT 594, 595, 688 F.Supp. 646, 647 (1988), quoting the "exceptional circumstances for granting a motion for rehearing" set forth in *North American Foreign Trading Corp. v. United States*, 9 CIT 80, 607 F.Supp. 1471 (1985), *aff'd*, 783 F.2d 1031 (Fed.Cir. 1986), and in *W.J. Byrnes & Co. v. United States*, 68 Cust.Ct. 358, C.R.D. 72–5 (1972). *Cf.* USCIT Rule 61:

> No error . . . or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Or, stated another way, the

> purpose of a petition for rehearing [ ] under the Rules . . . is to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result.

NLRB v. Brown & Root, Inc., 206 F.2d 73, 74 (8th Cir. 1953). *See also Exxon Chemical Patents, Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1479 (Fed.Cir.), *cert. denied*, 525 U.S. 877 (1998); *New York v. Sokol*, No. 94 Civ. 7392 (HB), 1996 WL 428381, at *4 (S.D.N.Y. July 31, 1996), *aff'd sub nom. In re Sokol*, 108 F.3d 1370 (2d Cir. 1997); *In re Anderson*, 308 B.R. 25, 27 (8th Cir. BAP 2004).

Plaintiffs' motion at bar fails to show any miscarriage of justice. It does correctly state, on the other hand, that "the standard for granting a preliminary injunction is the same as the standard for granting an injunction pending appeal". Plaintiffs' Memorandum, p. 5. But this, of course, means that, since the plaintiffs have failed to carry their burden of persuasion for grant of a preliminary injunction in this action in the Court of International Trade, they also are not entitled to that kind of extraordinary relief pending appeal to another court on the very same grounds.

II

The plaintiffs make clear their intent to attempt to proceed in the absence of expedited joinder of issue and trial of this action on the merits. And since this court is unable to continue in effect the extraordinary relief that was the temporary restraining order or to grant a preliminary injunction either herein or pending appeal, this memorandum, which incorporates by reference the court's slip opinion 05–97, shall serve as the order denying that relief, as prayed for initially, and via plaintiffs' instant motion for clarification and reconsideration or, in the alternative, for an injunction pending appeal.

So ordered.

Slip Op. 05–115

AUTOALLIANCE INTERNATIONAL, INC. Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Court No. 01–01070

[Defendant's Motion to Sever and Dismiss Count II of Plaintiff's [Amended] Complaint is granted.]

Dated: August 30, 2005

Baker & Hostetler, LLP (*Shelby F. Mitchell and Elizabeth A. Scully*), Washington, D.C., for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, U.S. Department of Justice; *Saul Davis* and *Aimee Lee*, Civil Division, Commercial Litigation Branch, U.S. Department of Justice, for Defendant.

OPINION

Carman, Judge: Pursuant to United States Court of International Trade ("CIT") Rule 12(b)[1], Defendant, the United States, moves to sever and dismiss Count II of Plaintiff's Amended Complaint for lack of subject matter jurisdiction. (Def.'s Mot. to Sever and Dismiss Count II of Pl.'s Compl. ("Def.'s Mot.") at 1.) Plaintiff asserts that this Court has jurisdiction over Count II of its Amended Complaint pursuant to 28 U.S.C. § 1581(i). Defendant claims the Court lacks jurisdiction over Plaintiff's claim because, among other reasons, 1) Plaintiff had adequate remedy under 28 U.S.C. § 1581(a), but Plaintiff failed to timely file its claim and 2) Plaintiff

[1] Defendant also cited CIT Rules 5 and 7 in its motion. However, the substantive rule controlling this matter is CIT Rule 12(b).

failed to follow procedural prerequisites of 28 U.S.C. § 1581(i). This Court finds that it does not have jurisdiction over Plaintiff's Amended Complaint and severs and dismisses Count II of Plaintiff's Amended Complaint.

BACKGROUND

The case before this Court already has a long procedural history and the Court has yet to reach the substance of the matter. The facts of this case were discussed in *AutoAlliance Int'l, Inc. v. United States* ("AAI1"), 26 CIT 1316, 240 F. Supp. 2d 1315 (2002). In 1991, Plaintiff, AutoAlliance International, Inc. ("Plaintiff" or "AAI"), imported several shipments of welding machines and related equipment. *Id.* at 1316. The United States Customs Service ("Customs")[2] liquidated the entries in August 1995, classifying each imported item separately and applying a value advance for "design and development" costs. *Id.* at 1316–17.

AAI protested Customs' liquidation of its importations of welding machines and related equipment on two separate grounds: classification and valuation, specifically the imposition of the value advance.[3] *Id.* at 1317. Customs issued its decision on AAI's protest in a Headquarters ruling. HQ 960755 (Aug. 15, 2000). In the ruling, Customs partially granted AAI's protest with regard to classification and denied it in full with regard to valuation. *AAI1*, 26 CIT at 1317. Customs reliquidated AAI's entries in October 2000. *Id.* at 1318. The reliquidation affected the classification of some imported items but left their valuation unchanged, including the imposition of the value advance that AAI challenged in its protest. *Id.* In January 2001, AAI protested the reliquidation of the entries, again challenging the classification and valuation of the imported items. *Id.* Although filed within the requisite ninety-day (90) period after reliquidation, in June 2001, Customs denied – as untimely filed – the protest concerning the reliquidated entries. *Id.* On December 6, 2001, AAI filed a summons and complaint in this Court to dispute the denial of the protest concerning the reliquidated entries. *Id.* The summons was filed within one hundred eighty (180) days of the denial of the protest concerning the reliquidated entries but nearly fourteen (14) months after Customs denied the protest of the original entries, in which Customs denied AAI's protest concerning the value advance. *Id.*

Plaintiff's Complaint asserted two causes of action: one related to the value advance and the other related to the tariff classification of

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[2] The United States Customs Service is now part of the Department of Homeland Security and is known as the Bureau of Customs and Border Protection.

[3] The Court notes that multiple protests were filed in this case. (Pl.'s Am. Compl. at 6.) The number and filing dates are not in dispute. (Pl.'s Am. Compl. at 10.) For simplicity, the Court refers to the subject protests collectively as "protest."

AAI's imported items. In *AAI1*, this Court severed and dismissed the value advance claim for lack of subject matter jurisdiction but held subject matter jurisdiction for part of the classification claim. *AAI1*, 26 CIT at 1329. This Court severed and dismissed AAI's value advance claim because Plaintiff did not file a summons with this Court concerning the value advance within the statutorily-established period of one hundred eighty (180) days following the mailing of notice denying its protest. *Id*. at 1325; 28 U.S.C. § 2636(a)(1) (2000)[4]. The case was stayed pending Plaintiff's appeal of this Court's decision concerning its subject matter jurisdiction over the value advance claim. The Court of Appeals for the Federal Circuit ("Federal Circuit") upheld this Court's severance and dismissal of the valuation claim from Plaintiff's case. *AutoAlliance Int'l, Inc. v. United States*, 357 F.3d 1290 (Fed. Cir. 2004) ("AAI2").[5]

On May 28, 2004, Plaintiff filed its Amended Complaint, which again contained two counts. Count I of Plaintiff's Amended Complaint in substance remains unchanged and relates to the classification of certain imported equipment used in the assembly of automobiles. (Pl.'s Am. Compl. at 14.) Count I is not currently at issue. Count II of Plaintiff's Amended Complaint relates to the value advance imposed by Customs and the agency's procedural and administrative handling thereof. AAI claims that this Court has jurisdiction over Count II based upon 28 U.S.C. § 1581(i) ("§ 1581(i)").[6]

When Defendant failed to timely answer or otherwise plead to Plaintiff's Amended Complaint, Plaintiff moved for and was granted by this Court's Clerk of Court entry of default against Defendant. This Court set aside the entry of default. *AutoAlliance Int'l, Inc. v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1244 (CIT 2004). Defendant then filed its Motion to Sever and Dismiss Count II of Plain-

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[4] 28 U.S.C. § 2636(a) states in relevant part that

A civil action contesting the denial, in whole or in part, of a protest under section 515 of the Tariff Act of 1930 is barred unless commenced in accordance with the rules of the Court of International Trade –

(1) within one hundred and eighty days after the date of mailing of notice of denial of a protest under section 515(a) of such Act. . . .

[5] The CAFC's decision in *AAI2* is not relevant to the matter now before this Court.

[6] 28 U.S.C. § 1581(i) (2000) states in relevant part that

In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) 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—

* * *

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

* * *

(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.

* * *

tiff's [Amended] Complaint, which motion is currently before this Court.

The specific contentions of the parties in support of their positions are discussed below.

PARTIES' CONTENTIONS

I. *Plaintiff's Contentions*

Plaintiff argues that it has standing and has adequately pleaded a timely cause of action in Count II of its Amended Complaint pursuant to the Administrative Procedure Act ("APA"). (Pl.'s Opp'n to Def.'s Mot. to Sever & Dismiss Count II of Pl.'s Compl. ("Pl.'s Opp'n") at 2–5.) In support thereof, Plaintiff notes that Customs failed to produce documents requested pursuant to the Freedom of Information Act ("FOIA"), never had a rational basis for applying the value advance, and failed to conduct further administrative review of the denied 2001 protest as required by Customs regulation. (Pl.'s Opp'n at 3–4.) Plaintiff submits that Customs' actions were "arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the law" and are the type of wrongs the APA is designed to redress. (Pl.'s Opp'n at 4.)[7]

Plaintiff filed Plaintiff's Supplemental Memorandum of Law in Further Support of Its Opposition to Defendant's Motion to Sever and Dismiss Count II of Plaintiff's Complaint ("Supplemental Memo"), in which Plaintiff reasserted the viability of its APA claim based upon this Court's opinion in *Int'l Custom Prod. v. United States*, Slip Op. 05–71, 2005 Ct. Int'l Trade LEXIS 74 (CIT June 15, 2005). In the Supplemental Memo, Plaintiff adds the claim that it asserted its APA claim as soon as practicable. (Pl.'s Supplemental Mem. of Law in Further Supp. of Its Opp'n to Def.'s Mot. to Sever & Dismiss Count II of Pl.'s Compl. at 2.)

Plaintiff further asserts that the Court has jurisdiction to hear Count II of its Amended Complaint pursuant to 28 U.S.C. § 1581(i)(4). (Pl.'s Opp'n at 5–7.) AAI claims that § 1581(i) confers jurisdiction on this Court because "AAI's claim does not contest the denial of a protest, but concerns Customs' administrative actions and failure to follow its procedures and regulations when assessing a duty and thereafter handling AAI's protest." (Pl.'s Opp'n at 5.) According to AAI, its "claim addresses the fundamental principle that Customs should be required to follow its governing procedures and regulations and cannot act arbitrarily and capriciously." (Pl.'s Opp'n at 5.) Plaintiff argues that § 1581(i) jurisdiction is proper when a party challenges an agency's failure to follow its procedures and

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[7] Because the Court does not have jurisdiction over Plaintiff's claim, it does not reach the issue of whether Plaintiff stated a justiciable cause of action under the APA.

regulations. (Pl.'s Opp'n at 6 (*citing Jilin Henghe Pharm. Co. v. United States*, 342 F. Supp. 2d 1301 (CIT 2004)).)

II. *Defendant's Contentions*

Defendant argues that this Court is precluded from reviewing any aspect of Customs denial of a protest when the civil action is not commenced timely. (Def.'s Mot. at 3–4 (*citing* 28 U.S.C. § 2636(a) ("§ 2636(a)"); 19 U.S.C. § 1514(a)[8] ("§ 1514(a)")).) Defendant points out that the Federal Circuit stated that § 2636(a) must be strictly construed because it is a waiver of sovereign immunity. (Def.'s Mot. at 4 (*quoting AAI2*, 357 F.3d at 1293.) According to Defendant, Congress " 'barred' any civil action contesting the denial of a protest, unless the civil action was commenced within 180 days 'after the date of mailing of notice of denial of a protest under section 1515(a) . . . or within 180 days after the date of denial of a protest by operation of law' . . . ." (Def.'s Mot. at 4 (internal citations omitted).)

Defendant points out that Congress intended that liquidations become final and conclusive unless the complaining party meets two prerequisites: (1) the party files a timely protest; and (2) the party files a timely summons to the CIT. (Def.'s Mot. at 7.) Defendant quotes the following language from the legislative history of § 1514 in support of its contention:

> Section 514 of the Tariff Act of 1930 [19 U.S.C. § 1514(a)] is also amended to provide that administrative decisions set forth in section 514(a) shall be final and conclusive on all persons, including the United States and any officer thereof, unless a protest is filed in accordance with this section *and, in the event that such a protest is denied in whole or in part, unless a civil action contesting such denial is commenced in the United States Customs Court*[9] *in accordance with sections 2631 and 2632 of title 28 of the United States Code.*

(Def.'s Mot. at 7 (*quoting* H.R. Rep. No. 91–1067, at 26 (1970)) (emphasis in Defendant's brief; footnote added).) Defendant also notes that reliquidation does not subject an entry to a protest of any issue involved in the reliquidation. (Def.'s Mot. at 5.) Defendant asserts that protest of a reliquidated entry is limited only to those issues involved in the reliquidation. (Def.'s Mot. at 6.)

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[8] Customs decisions, "*including the legality of all orders and findings* entering into the same, as to – (1) the appraised value of merchandise . . . shall be final and conclusive . . . unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade [within one hundred eighty (180) days after the date of mailing of notice of denial of a protest]. . . ." 19 U.S.C. § 1514(a) (emphasis added).

[9] The Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727 (1980), expanded the Customs Court's jurisdiction and renamed the Customs Court as the United States Court of International Trade.

Defendant further argues "that § 1581(i) cannot be used as a basis for jurisdiction in this Court over an action that could have been timely brought" under another jurisdictional provision. (Def.'s Mot. at 8.) Defendant claims that § 1581(i) is a residual jurisdictional provision "that can only be used when [28 U.S.C.] § 1581(a)[10] and the protest procedure cannot be used, or that procedure is manifestly inadequate." (Def.'s Mot. at 8 (footnote added).) In addition, Defendant asserts that § 1581(i) cannot be used to circumvent the limitations and requirements of § 1581(a) and the protest procedure. (Def.'s Mot. at 8.)

Defendant also notes that Count II of Plaintiff's Amended Complaint does not set forth "any new ground in support" of its challenge to Customs' denial of the reliquidated entries as required by 28 U.S.C. § 2638.[11] (Def.'s Mot. at 9.) As such, Defendant suggests that Count II of Plaintiff's Amended Complaint does not state a cognizable claim.

In its reply brief, Defendant argues that the decisions in AAI1 and AAI2 should control in this case because the allegations of Count II of Plaintiff's Amended Complaint and the prayer for relief "are materially identical." (Def.'s Reply to Pl.'s Opp'n to Def.'s Mot. to Sever & Dismiss Count II of Pl.'s Compl. & All Claims & Allegations Relating in Any Fashion to Pl.'s Claim or Contention That the Value Advance Imposed by U.S. Customs & Border Protection Was Not Valid ("Def.'s Reply") at 4.) Defendant further notes that Plaintiff failed to prove that the remedy that would have been available to it under § 1581(a) was manifestly inadequate. (Def.'s Reply at 5.) In addition, Defendant points out that "Plaintiff would have been able to assert **all** of its claims and contentions under [the protest/§ 1581(a)] procedure had it timely filed the civil action contesting the denial of the value claim at the administrative level. Plaintiff's failure to timely file a civil action does not render the procedure inadequate, let alone manifestly inadequate." (Def.'s Reply at 6 n.6.)

Defendant further argues that this Court lacks jurisdiction pursuant to § 1581(i) over Count II of Plaintiff's Amended Complaint because Plaintiff failed to commence its civil action under § 1581(i) by the concurrent filing of a summons and complaint as required by 28

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[10] 28 U.S.C. § 1581(a) (2000) grants the CIT "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930."

[11] 28 U.S.C. § 2638 (2000) states as follows:

> In any civil action under section 515 of the Tariff Act of 1930 in which the denial, in whole or in part, of a protest is a precondition to the commencement of a civil action in the Court of International Trade, the court, by rule, may consider any new ground in support of the civil action if such new ground—
>
> (1) applies to the same merchandise that was the subject of the protest; and
> (2) is related to the same administrative decision listed in section 514 of the Tariff Act of 1930 that was contested in the protest.

U.S.C. § 2632(a).[12] (Def.'s Reply at 8.) According to Defendant, Plaintiff's failure to concurrently file a summons and complaint "must result in dismissal of a § 1581(i) action for lack of jurisdiction." (Def.'s Reply at. 9 (*citing Wash. Int'l Ins. Co. v. United States*, 25 CIT 207, 138 F. Supp. 2d 1314 (2001); *Brecoflex Co., L.L.C. v. United States*, 23 CIT 84, 44 F. Supp. 2d 225 (1999)).)

Defendant also submits that "the APA does not provide an independent jurisdictional basis for review of an agency decision, where there are specific statutory provisions that delineate the jurisdiction, and limitations present in the waiver of sovereign immunity." (Def.'s Reply at 10 (*citing Christopher Vill., L.P. v. United States*, 360 F.3d 1319 (Fed. Cir. 2004)).) Defendant asserts that the APA does not provide means for relief "where the party could have originally sued for the relief its seeks, but failed to do so." (Def.'s Reply at 12.) According to Defendant, Plaintiff would have had adequate relief under § 1581(a) had it timely filed a summons after the partial denial of its 2001 protest. (Def.'s Reply at 12.) Defendant, therefore, challenges Plaintiff's APA claim because this Court – Defendant alleges – lacks subject matter jurisdiction. (Def.'s Reply at 12–13.)

STANDARD OF REVIEW

The party seeking to invoke this Court's jurisdiction has the burden of establishing such jurisdiction. *Old Republic Ins. Co. v. United States*, 14 CIT 377, 379, 741 F. Supp. 1570 (1990), (*citing McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993). In this case, Plaintiff bears the burden of establishing jurisdiction.

When reviewing a motion to dismiss pursuant to USCIT Rule 12(b)(1), the court must determine whether the moving party is attacking the sufficiency of the jurisdictional pleadings or the factual basis for the court's jurisdiction. *Power-One, Inc. v. United States*, 23 CIT 959, 962 n.9, 83 F. Supp. 2d 1300 (1999). If a motion to dismiss refutes or contradicts the plaintiff's jurisdictional allegations, the court treats the motion as questioning the factual basis for the court's subject matter jurisdiction. *Cedars-Sinai*, 11 F.3d at 1583; *see also Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558–59 (9th Cir. 1987) (*quoting* 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1363, at 653–54 (1969)). "In such a case, the allegations in the complaint are not controlling, and only uncontroverted factual allegations are accepted as true for purposes of the motion." *Cedars-Sinai*, 11 F.3d at 1583 (internal citations omitted); *see also Power-One*, 23 CIT at 962 n.9. All other facts

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[12] 28 U.S.C. §2632(a) (2000) states that with limited exception "a civil action in the Court of International Trade shall be commenced by filing *concurrently* with the clerk of the court a summons and complaint. . . ." (Emphasis added.)

underlying the jurisdictional claims are in dispute and are subject to fact-finding by this Court. *Cedars-Sinai*, 11 F.3d at 1584; *Power-One*, 23 CIT at 962 n.9. Thus, a court may review evidence outside the pleadings to determine facts necessary to rule on the jurisdictional issue. *Cedars-Sinai*, 11 F.3d at 1584.

If the Rule 12(b)(1) motion to dismiss involves factual issues that relate to the merits of the plaintiff's case, the court should review the motion as it would a motion for summary judgment. *Trentacosta*, 813 F.2d at 1558. The court construes a motion to dismiss based upon the sufficiency of the jurisdictional pleadings in the light most favorable to the pleader. *Cedars-Sinai*, 11 F.3d at 1583; *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds by Davis v. Scherer*, 468 U.S. 183 (1984); *Power-One*, 23 CIT at 962 n.9. When reviewing such a motion, "the moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Trentacosta*, 813 F.2d at 1558 (quotation and citation omitted). The moving party will prevail on a motion to dismiss if the nonmoving party failed to sufficiently allege an essential element of its case for which the nonmoving party has the burden of proof. *Id.* To over come its burden, the nonmoving party cannot rest on its allegations and must present extraneous evidence to support its jurisdictional claims. *Id.*

If after a review of the pleadings and extrinsic evidence, any doubt remains whether this Court has jurisdiction to hear this action, the Court will refrain from granting Defendant's motion to dismiss. *See Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989) (*citing Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (stating that a complaint should only be dismissed if the plaintiff cannot prove any set of facts that would entitle the plaintiff to relief)).

In the present case, Defendant's Rule 12(b)(1) motion to dismiss challenges the basis of AAI's allegations of jurisdiction. Specifically, Defendant is questioning AAI's assertion that this action is properly before this Court. Accordingly, only the uncontroverted facts will be accepted as true. Based upon such uncontroverted facts and the reasoning that follows, this Court finds that it does not have jurisdiction to hear Count II of Plaintiff's Amended Complaint. Accordingly, Count II of Plaintiff's Amended Complaint is dismissed with prejudice.

DISCUSSION

The court must always determine its jurisdiction over matters before it, even if the parties agree to such. *Brecoflex*, 23 CIT at 86. To that end, the plaintiff must demonstrate that the court has jurisdiction, and the court reviews the matter to determine whether the plaintiff met its burden. *See id.*

I. *Plaintiff Failed to Satisfy the Procedural Prerequisites to Gain § 1581(i) Jurisdiction.*

In federal courts, subject matter jurisdiction is established when the suit is filed, which subsequent events cannot alter. *Wash. Int'l Ins. Co. v. United States*, 25 CIT 207, 218, 138 F. Supp. 2d 1314 (2001). "[T]his rule is primarily intended to prevent the manipulation of federal jurisdiction, promote judicial efficiency, and constrain the use of strategic behavior by litigants." *Id.* In customs litigation, the jurisdiction of this Court is determined when the summons is filed. *Id.* In order to properly bring a suit under § 1581(i) of this Court's jurisdiction, the plaintiff must file the summons and complaint concurrently. 28 U.S.C. § 2632(a). In adherence to the statutory mandate of § 2632(a), this Court adopted Rule 3(a):

> A civil action is commenced by filing with the clerk of the court:
>
> (1) A summons in an action described in 28 U.S.C. § 1581(a) or (b);
>
> (2) A summons, and within 30 days thereafter a complaint, in an action described in 28 U.S.C. § 1581(c) to contest a determination listed in section 516A(a)(2) or (3) of the Tariff Act of 1930 or;
>
> (3) *A summons and complaint in all other actions.*

USCIT R. 3(a) (emphasis added).

This Court has previously addressed the issue of the procedural requirement to concurrently file the summons and complaint in a § 1581(i) case. *See Brecoflex*, 23 CIT at 84. In *Brecoflex*, the plaintiff filed a petition with the International Trade Administration ("ITA") alleging that a foreign manufacturer was illegally circumventing an existing antidumping duty order. The ITA concluded that the plaintiff had no standing to request a circumvention inquiry. *Id.* Thereafter, the plaintiff filed a timely summons with this Court. *Id.* The summons predicated the court's jurisdiction on 28 U.S.C. § 1581(c)[13] ("§ 1581(c)"). *Id.* at 85. Thirty (30) days after filing the summons, the plaintiff filed a complaint. *Id.* at 84. The complaint alleged that the court's jurisdiction was proper under either § 1581(c) or, alternatively, § 1581(i). *Id.* at 85. The court concluded "that jurisdiction over this kind of action can only be predicated upon 28 U.S.C. § 1581(i) since all of the preceding subsections (a to h) of 1581 are 'manifestly inadequate'." *Id.* at 87 (*citing Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). In dismissing the case, the court stated that the action was only properly commenced

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[13] 28 U.S.C. § 1581(c) (2000) 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."

through the concurrent filing of a summons and complaint. *Id.* The court reasoned that – because the plaintiff could have filed a concurrent summons and complaint but chose not to do so – the "court as a matter of law did not become properly possessed of subject-matter jurisdiction." *Id.*

This Court addressed a similar situation in *Washington International*, 25 CIT at 207. In that case, the plaintiff initiated its case in 1992 by filing a summons with the CIT. *Wash. Int'l*, 25 CIT at 212. Two years later the plaintiff filed its complaint, which contained three counts and claimed that the court had jurisdiction over all counts under § 1581(a) or, alternatively, under § 1581(i). *Id.* at 212–13. The court determined that Counts II and III of the plaintiff's complaint could not be brought under § 1581(a) because the plaintiff failed to file a protest concerning the subject entries and, therefore, failed to meet a procedural prerequisite for § 1581(a) jurisdiction. Nevertheless, Count I was allowed to proceed under § 1581(a). *Id.* at 219. In granting the government's motion to dismiss Counts II and III of the plaintiff's complaint, the court stated that "it is extremely difficult for a party to join claims raised under 28 U.S.C. § 1581(a) and 28 U.S.C. § 1581(i) in a single action and, as such, these divergent claims are typically raised in separate lawsuits." *Id.* at 220. The court further noted that if a plaintiff does wish to join § 1581(a) and § 1581(i) issues in a single case, the plaintiff must comply with the procedural requirements of both types of cases. *Id.* "Failure to do so will preclude the Court from exercising jurisdiction over what otherwise would be a legitimate legal claim." *Id.*

The case currently before this Court is – in all relevant respects – similar to *Brecoflex* and *Washington International*. On December 6, 2001, Plaintiff filed a summons and complaint. Plaintiff filed its Amended Complaint on May 28, 2004, more than two years after the summons was filed. Although Plaintiff concurrently filed its original complaint and summons, the original complaint did not attach § 1581(i) subject matter jurisdiction to Plaintiff's claims. Plaintiff's failure to plead § 1581(i) as a possible jurisdictional ground now precludes this Court from jurisdiction over Plaintiff's claim. Nothing in the intervening period between the original Complaint and the Amended Complaint changes the fact that Plaintiff had the opportunity to file a concurrent summons and complaint in December 2001 alleging that this Court had subject matter jurisdiction over Plaintiff's claims pursuant § 1581(a) and § 1581(i). Plaintiff's failure to file a concurrent summons and complaint that alleged § 1581(i) jurisdiction is sufficient to divest this Court of subject matter jurisdiction over Count II of Plaintiff's Amended Complaint. Accordingly, Defendant's Motion to Sever is granted.

II. *Even Had Plaintiff Fulfilled the Procedural Prerequisites to Obtain § 1581(i) Jurisdiction Over Count II of Its Amended Complaint, This Court Would Nevertheless Fail to Have Subject Matter Jurisdiction.*

The procedural deficiency of Plaintiff's failure to file a concurrent summons and complaint is sufficient to preclude subject matter jurisdiction in this Court over Count II of Plaintiff's Amended Complaint. For the reasons that follow, this Court also finds that it would lack subject matter jurisdiction even if Plaintiff had fulfilled the concurrent filing procedural prerequisite of § 1581(i).

A. *The APA is not an independent grant of subject matter jurisdiction.*

The APA entitles "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to judicial review of the agency action. 5 U.S.C. § 702 (2000). While the APA establishes a cause of action for an aggrieved party's claims, it does not create an independent basis of subject matter jurisdiction for this Court to hear the claims. *Kidco, Inc. v. United States*, 4 CIT 103, 104 (1982); *Cherry Lane Fashion Group, Inc. v. United States*, 13 CIT 291, 296, 712 F. Supp. 190 (1989), *aff'd*, 897 F.2d 539 (Fed. Cir. 1990). Plaintiff's assertion that this Court has jurisdiction over this matter pursuant to 5 U.S.C. § 702 (Am. Compl. at 1) is simply incorrect.

Federal courts have limited jurisdiction. *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 358 (Fed. Cir. 1992). In order for this Court to have jurisdiction over Plaintiff's claims, "the government must have waived sovereign immunity to suit." *Christopher Vill.*, 360 F.3d at 1327. The APA provides for judicial review of claims to " 'set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 5 U.S.C. § 706(2)(A) (2004), when the suit calls for 'relief other than money damages,' *id.* § 702, but only if 'there is *no other adequate remedy*,' *id.* § 704 (emphasis added)." *Christopher Vill.*, 360 F.3d at 1327. Accordingly, the APA restricts the government's waiver of sovereign immunity to those circumstances in which "no other adequate remedy" exists. *Id.*

Plaintiff cannot rest on its allegations and must present extraneous evidence to support its jurisdictional claims. *Trentacosta*, 813 F.2d at 1558. However, Plaintiff did not allege and otherwise failed to establish that "no other adequate remedy" was available to redress Plaintiff's claim as required by 5 U.S.C. § 704. Therefore, the jurisdictional basis for Plaintiff's APA claim under 5 U.S.C. § 702 also must fail.

B. *Plaintiff failed to establish that other jurisdictional provisions of § 1581 were "manifestly inadequate."*

Plaintiff also claims this Court has subject matter jurisdiction over Count II of its Amended Complaint pursuant to 28 U.S.C. § 1581(i). Congress defined the jurisdiction of the Court of International Trade in 28 U.S.C. § 1581 (2000). "Subsections (a)–(h) [of 28 U.S.C. § 1581] delineate particular laws over which the Court of International Trade may assert jurisdiction." *Norcal/Crosetti*, 963 F.2d at 358 (citation omitted). "Subsection § 1581(i) is a 'catch-all' provision, allowing the [CIT] to take jurisdiction over designated causes of action founded on other provisions of law." *Id.* at 359. However, the jurisdiction of this Court pursuant to § 1581(i) is strictly limited. The provision is not intended to create new causes of action; it only confers subject matter jurisdiction on the court. Customs Courts Act of 1980, Pub. L. No. 96–417, § 1581(i), 1980 U.S.C.C.A.N. 3759 (codified at 28 U.S.C. § 1581(i)).

Section 1581(i) "grants the court residual jurisdiction of any civil action arising out of the enforcement or administration of the customs laws." *Thyssen Steel Co. v. United States*, 13 CIT 323, 328, 712 F. Supp. 202 (1989) (quotation and citation omitted). Normally, "[w]here a litigant has access to the court by traditional means, such as under § 1581(a), it *must* avail itself of that avenue of approach and comply with all relevant prerequisites." *Id.* (emphasis added). A litigant "cannot circumvent the prerequisites [of another jurisdictional subsection] by invoking jurisdiction under § 1581(i), *unless* the remedy provided under another subsection of § 1581 would be *manifestly inadequate*. . . ." *Id.* (quotation and citations omitted) (emphasis added). The party asserting § 1581(i) jurisdiction has the burden of demonstrating the manifest inadequacy of the remedies available in subsections (a) through (h). *Id.*

1. Plaintiff had recourse under § 1581(a) for its claim.

Section 1581(a) grants the CIT "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part." This jurisdiction is not limited to consideration merely of the agency's legal conclusion in denying the protest. In hearing a § 1581(a) case, the court may also consider the procedures Customs followed in administering its protest decision. *See Am. Air Parcel Forwarding Co., Ltd v. United States*, 718 F.2d 1546, 1551 (Fed. Cir. 1983) ("[T]he issue of violation of a regulation can be raised in a protest and subsequent civil action.")[14]; *Miller & Co.*, 824 F.2d at 964,

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[14] American Air Parcel was a Hong Kong-based company that shipped made-to-measure clothing to the United States. At the urging of American Air Parcel, Customs issued an internal advice ruling that valued the imported clothing on the basis of the manufacturers' transactions rather than the much higher resale price to the U.S. customer. One year later,

("Under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a, the procedural correctness of a countervailing duty determination, as well as the merits, are subject to judicial review."). The government correctly points out that "Plaintiff would have been able to assert **all** of its claims and contentions under [the § 1581(a)] procedure had it timely filed the civil action contesting the denial of the value claim at the administrative level." (Def.'s Reply at 6 n.6.) *See* 19 U.S.C. § 1514(a)[15]; 28 U.S.C. § 2638.[16]

This Court has no reason to believe nor has Plaintiff alleged that it would have been unable to discover the facts upon which it bases its APA claim had it timely filed a § 1581(a) suit concerning the denial of its protest related to the value advance. In fact, Plaintiff may have uncovered those facts more quickly during the discovery allowed in a § 1581(a) proceeding. It is clear, too, that § 28 U.S.C. § 2638 permits this Court to consider any new grounds, such as the APA claim, during the course of litigation. Plaintiff would also have had the opportunity to amend its complaint – had it been timely filed – to allege a newly discovered cause of action. *See* USCIT R. 15(a).

Because Plaintiff had an adequate remedy available under § 1581(a), Plaintiff must demonstrate why that remedy was "manifestly inadequate" in order to obtain jurisdiction under § 1581(i). As explained below, Plaintiff failed to demonstrate why the § 1581(a) proceeding is *now* manifestly inadequate. Therefore, Count II of Plaintiff's Amended Complaint must be dismissed.

2. Section 1581(a) is not manifestly inadequate.

In the matter before the Court, Plaintiff made no attempt to establish the manifest inadequacy of the other subsections of § 1581, which may have enabled it to properly invoke § 1581(i) jurisdiction. Instead, Plaintiff attempted to analogize its situation to a case recently before this court in which the court found jurisdiction under § 1581(i) on grounds other than manifest inadequacy. (Pl.'s Opp'n at 6.) Plaintiff's attempt is unconvincing. Indeed, the only case relied upon by Plaintiff in support of its position – *Jilin Henghe Pharm. Co. v. United States* – was vacated and remanded by the appellate court.

Customs revoked the internal advice upon which American Air Parcel had relied and retroactively assessed duty on unliquidated entries at the higher U.S. customer price. The importer sought to challenge the retroactivity of the ruling revocation before the Court of International Trade. After Customs liquidated entries pursuant to the ruling revocation and after the time to file protests therefor had expired, the plaintiffs brought their case under 28 U.S.C. §§ 1581(h) and (i). The Court of International Trade dismissed the plaintiffs' case for lack of jurisdiction. *Am. Air Parcel Forwarding Co., Ltd., v. United States*, 5 CIT 8, 557 F. Supp. 605 (1983). The Court of Appeals affirmed, stating that "the traditional avenue of approach to the court under 28 U.S.C. § 1581(a) was not intended to be so easily circumvented, whereby it would become merely a matter of election by the litigant." *Am. Air Parcel*, 718 F.2d at 1550.

[15] *See supra* note 8.

[16] *See supra* note 11.

342 F. Supp. 2d at 1301, *vacated & remanded*, 123 Fed. Appx. 402 (Fed. Cir. 2005).[17] Therefore, this Court need not – in fact cannot – consider the case persuasive, let alone precedential.

Plaintiff cannot correct its own error of having failed to file a timely summons to challenge Customs' denial of its protest related to the value advance claim by invoking the residual jurisdiction of this Court. Any harm inflicted upon Plaintiff was of its own making and not the result of inadequate availability of administrative or judicial remedy under the normal § 1581(a) procedure. *See Royal Bus. Mach., Inc. v. United States*, 69 CCPA 61, 669 F. 2d 692 (1982).

In *Royal Business Machines*, the plaintiff sought to challenge the inclusion of products it imported in the scope of a final antidumping duty order issued by the Department of Commerce ("Commerce"). The plaintiff participated in the antidumping duty review and put forth its argument that its imported product should not be covered by the scope of the review or order. Commerce rejected the plaintiff's argument and included its imported product within the scope of the final order even though the plaintiff's product was classified differently than the other products within the scope of the final order. After the final order was published, the plaintiff sought administrative redress. Upon exhausting its efforts at administrative remedy, the plaintiff filed suit in the Court of International Trade more than six (6) months after the final antidumping duty order was published. The plaintiff alleged standing and jurisdiction based upon 5 U.S.C. § 702, 28 U.S.C. § 1581(i), 28 U.S.C. § 2631(i), and 28 U.S.C. § 1585. The court dismissed the plaintiff's complaint for lack of subject matter jurisdiction because the plaintiff failed to file its suit within thirty (30) days after publication of the final antidumping duty order as required by 19 U.S.C. § 1516a. The Court of Customs and Patent Appeals[18] ("CCPA") affirmed the Court of International Trade's decision. The CCPA stated that any action to challenge the inclusion of the plaintiff's product within the scope of "the antidumping duty order had to be brought within thirty days after date of publication of the order in the Federal Register. This not having been done, we hold that [the plaintiff's] action was properly dismissed." *Royal Bus. Mach.*, 669 F.2d at 702.

Similarly, although Plaintiff attempted further administrative recourse of its valuation claim prior to commencing litigation, Plaintiff

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[17] Even if *Jilin* were still good law, this Court would not be persuaded by Plaintiff's argument. In *Jilin*, the court found that *no other* subsection of § 1581 provided subject matter jurisdiction over the plaintiff's claim (a challenge to liquidation instructions issued by the Department of Commerce to Customs). 342 F. Supp. 2d at 1306. Therefore, the court found that subject matter jurisdiction over plaintiff's claim was proper under § 1581(i). *Id.* at 1306–07. In the present matter, Plaintiff had recourse under § 1581(a); thus, resort to § 1581(i) is unnecessary and inappropriate.

[18] The Court of Customs and Patent Appeals was the predecessor to the Court of Appeals for the Federal Circuit.

was under a statutory obligation to file its suit before this Court within one hundred eighty (180) days from the denial of its protest. 19 U.S.C. § 1514(a); 28 U.S.C. § 2636(a)(1). Plaintiff failed to do so. As in *Royal Business Machines*, this Court cannot retain subject matter jurisdiction over Plaintiff's value advance claim. Accordingly, Count II of Plaintiff's Amended Complaint is dismissed.

CONCLUSION

Upon consideration of Defendant's Motion to Sever and Dismiss Count II of Plaintiff's [Amended] Complaint, Plaintiff's Opposition to Defendant's Motion to Sever and Dismiss Count II of Plaintiff's [Amended] Complaint, and Defendant's Reply to Plaintiff's Opposition, and for the reasons stated herein, this Court grants Defendant's Motion to Sever and Dismiss Count II of Plaintiff's [Amended] Complaint. Accordingly, Count II of Plaintiff's Amended Complaint is dismissed with prejudice. Further, Plaintiff shall be required to file by September 1, 2005, an amended complaint removing Count II of its Amended Complaint and all factual allegations related thereto.