Slip Op. 07–118

CHANGCHUN PILKINGTON SAFETY GLASS CO., LTD., *ET AL.*, Plaintiffs, v. UNITED STATES, Defendant, and PPG INDUSTRIES, INC., *ET AL.*, Deft.-Ints.

Before: Richard K. Eaton, Judge
Consol. Court No. 02–00312

JUDGMENT

Before the court are the Final Results of Redetermination Pursuant to Court Remand ("Fourth Remand Results") in *Fuyao Glass Industry Group Co. v. United States*, Consol. Court No. 02–00282[1] (Orders of Nov. 2, 2006 & Dec. 19, 2006) ("*Fuyao IV*"); the comments of Shenzhen CSG Autoglass Co., Ltd. ("CSG"), the successor company to plaintiff Benxun Automotive Glass Co., Ltd. ("Benxun"); the comments of plaintiffs Changchun Pilkington Safety Glass Co., Ltd., Guilin Pilkington Safety Glass Co., Ltd. and Wuhan Yaohua Pilkington Safety Glass Co., Ltd. ("Pilkington Plaintiffs"); and the United States' response to CSG's and the Pilkington Plaintiffs' comments.

In *Fuyao IV*, the court remanded this matter to the United States Department of Commerce ("Commerce") for the purpose of devising a reasonable methodology to calculate an antidumping margin for the Pilkington Plaintiffs and Benxun, taking into consideration the zero margins assigned to Fuyao and Xinyi. *See* Order of 12/19/06.

On remand, Commerce identified the control numbers ("CONNUMs")[2] shared by the Pilkington Plaintiffs, Benxun, Fuyao and Xinyi, as reported in their questionnaire responses, and "impute[d]

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[1] On January 8, 2007, the court severed Court Nos. 02–00282 and 02–00321 from the consolidated action, and designated Court No. 03–00312 as the lead case, under which Court No. 02–319 and Court No. 02–00320 were consolidated.

[2] Commerce defined a CONNUM as a products's unique combination of physical characteristics. See Fourth Remand Results at 6.

Fuyao's and Xinyi's CONNUM-specific margins to the matching CONNUMs of [the Pilkington Plaintiffs] and Benxun." Fourth Remand Results at 8. Commerce then weight-averaged those CONNUM-specific margins, which resulted in the *de minimis* antidumping margin of 1.47 percent for the Pilkington Plaintiffs and Benxun. Neither the Pilkington Plaintiffs nor CSG contest the Fourth Remand Results.

In light of the foregoing, and Commerce having duly complied with the court's directive in *Fuyao IV*, it is hereby

ORDERED that the Fourth Remand Results are sustained.

Slip Op. 07–119

ROYAL THAI GOVERNMENT, SAHAVIRIYA STEEL INDUSTRIES PUBLIC COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Before: Richard W. Goldberg,Senior Judge
Consol. Court No. 02–00026

[Commerce's remand results further remanded with instructions]

Date: August 6, 2007

Vinson & Elkins LLP (*Kenneth J. Pierce*, *Robert Edward DeFrancesco*, and *Victor S. Mroczka*) for Plaintiffs the Royal Thai Government and Sahaviriya Steel Industries Public Company Limited.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Claudia Burke* and *David S. Silverbrand*); *Mykhaylo A. Gryzlov*, International Attorney-Advisor, Office of the Chief Counsel for the Import Administration, United States Department of Commerce, for Defendant United States.

Skadden, Arps, Slate, Meagher & Flom LLP (*John J. Mangan*) for Defendant-Intervenor United States Steel Corporation.

OPINION

Goldberg, Senior Judge: This matter is before the Court following a court-ordered remand on July 26, 2006. *See Royal Thai Gov't v. United States*, 30 CIT ___, 441 F. Supp. 2d 1350 (2006) ("*Royal Thai III*").

I. *BACKGROUND*

A. Procedural History of This Case

In December 2000, Commerce initiated an investigation into whether the Thai steel industry received various countervailable subsidies. *See Certain Hot-Rolled Carbon Steel Flat Products from*

Argentina, India, Indonesia, South Africa, and Thailand, 65 Fed. Reg. 77580 (Dep't Commerce Dec. 12, 2000) (notice of initiation of countervailing duty investigation). At the conclusion of this investigation, Commerce determined *inter alia* that the Royal Thai Government ("RTG") provided countervailable subsidies to the Thai steel industry in the form of import duty exemptions under Sections 30 and 36(1) of the Investment Promotion Act of 1977 ("the duty exemption programs"). *See Certain Hot-Rolled Carbon Flat Products from Thailand*, 66 Fed. Reg. 50410 (Dep't Commerce Oct. 3, 2001) (final results of countervailing duty investigation). The duty exemption programs permitted Thai steel manufacturers to import free of duty charges raw materials consumed in production and raw materials incorporated into goods for export. *See* Issues and Decision Memorandum in the Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, C–549–818 (Sept. 21, 2001), Parts II.A.2 & II.A.3, *available at* http://ia.ita.doc.gov/frn/summary/thailand/01–24753–1.txt ("Issues and Decision Mem."). Ultimately Commerce calculated the benefit from the duty exemption programs by using a 1% benchmark rate and found, respectively, 0.58 percent and 0.07 percent countervailable subsidy rates. *See id.*

Two court cases were filed challenging the final results of the investigations. These cases were later consolidated. In one case, Plaintiffs RTG and Sahaviriya Steel Industries Public Company Limited ("SSI") challenged Commerce's decision to countervail the entire amount of the duty exemption programs. Compl. ¶ 12 (Court No. 02–00027). In the other case, domestic party United States Steel Corp. ("U.S. Steel") objected to Commerce's use of the 1% tariff rate as a benchmark to measure the benefit from the duty exemption programs.[1] Compl. ¶ 13 (Court No. 02–00026). Specifically, U.S. Steel argued that the 1% rate was itself a countervailable subsidy and therefore an inappropriate benchmark. *See* U.S. Steel's Mem. Support Mot. J. Agency Record 43–44.

This Court ordered Commerce to reverse its decision to countervail the entire amount of the duty exemptions. *See Royal Thai Gov't v. United States*, 29 CIT ___ , 341 F. Supp. 2d 1315 (2004) ("*Royal Thai I*"). As a result, U.S. Steel's argument relating to the benchmark was moot. *See id.*, 29 CIT at ___ , 341 F. Supp. 2d at 1326. The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") reversed *Royal Thai I*'s holding and upheld Commerce's decision to countervail the entire amount. *See Royal Thai Gov't v. United States*, 436 F.3d 1330, 1337–41 (Fed. Cir. 2006) ("*Royal Thai II*").

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[1] Other domestic parties jointly commenced this case with U.S. Steel, but at this point in the proceedings all other domestic plaintiffs have ceased involvement with the litigation and only U.S. Steel remains.

After *Royal Thai II*, the only thing remaining for this Court to do with respect to the duty exemption programs was to address U.S. Steel's challenge to the 1% benchmark. Commerce initially had found that since a 1% rate would have applied to the steel slab imports, that 1% rate was the correct benchmark to use. *See* Issues and Decision Mem. Parts II.A.2 & II.A.3. The Court remanded that matter back to Commerce, explaining that the countervailing duty laws required Commerce to use a non-countervailable benchmark. *See Royal Thai III*, 30 CIT at ___, 441 F. Supp. 2d at 1364–68. The Court then instructed Commerce to determine whether the 1% rate it had initially used in calculating the benefit of the duty exemptions was itself a countervailable subsidy. *See id.*, 30 CIT at ___, 441 F. Supp. 2d at 1368.

B. Commerce's May 4, 2007 Remand Determination

A component of countervailability analysis is specificity; a subsidy is only countervailable if it is a *specific* subsidy. *See id*. at 1366 (discussing 19 U.S.C. § 1677(5A)(D)'s de facto specificity requirement). A de facto specificity analysis will require Commerce to examine the actual "use" of the subsidy and the "amount" of the subsidy that various industries received.[2] *See* 19 U.S.C. § 1677(5A)(D)(iii) (2000). In order to compare the "use" and "amount" of the 1% rate across various Thai industries, the RTG claimed on remand that the specificity analysis should examine the relative benefits resulting from the 1% rate. The RTG proposed that Commerce calculate the duty savings resulting from the 1% rate by subtracting the duties actually paid on merchandise subject to the 1% rate from what would have been paid otherwise. The RTG proposed further that the "Normal" rates be used to calculate the import duties that would otherwise be due. According to the nomenclature of the Thai tariff system, the "Normal" rates were higher than the "Reduced" rates. *See Verification Report* 3–5. During the period of investigation, steel slab had a 1% "Reduced" rate and a 10% "Normal" rate. *See* RTG's Supp. Quest. Resp. 6.

Commerce rejected the RTG's proffered "relative benefit analysis," insisting that it was inappropriate to use the "Normal" rates as benchmarks in calculating the precise amount of benefits flowing from the 1% rate.[3] *See Results of Redetermination on Remand Pur-*

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[2] A subsidy is specific under 19 U.S.C. § 1677(5A) if it is defacto or de jure specific. No party to this litigation has ever argued that the 1% rate could be de jure specific. Instead, the litigation has focused on whether the 1% rate is de facto specific.

[3] For sake of clarity, it may be helpful to provide some explanation of the two types of benchmarks at issue in this case. First, Commerce must select a benchmark to calculate the economic value of the duty exemption programs. Originally, Commerce had determined the 1% rate was an appropriate benchmark. Second, the RTG sought to have Commerce consider the "Normal" rates as a benchmark to measure the benefits, if any, resulting from the 1% rate itself, which was being examined for countervailability on remand.

suant to Royal Thai Government, et al. v. United States, Slip Op. 04–91 (Ct Int'l Trade July 27, 2004) (May 4, 2007) at 7 & 18–19 ("*Remand Determination*").[4] Commerce explained that the "Normal" rates were unsuitable benchmarks because the "Normal" rates in the Thai tariff system "are not usually applied in assessing duties upon imports under the vast majority of the HTS categories." *Id.* at 18. Commerce explained further that the RTG implemented "Normal" rates as part of Thailand's negotiations with the WTO to fulfill its obligations to cap its import duties at certain agreed-upon levels. *Id.*

The *Remand Determination* reflects Commerce's understanding that the "Normal" rates were generally used as a form of import protection, and were only applied to imports competing with domestic industries specifically targeted for protection. *Id.* at 18–19. According to Commerce, they served merely to memorialize Thailand's GATT and WTO commitments in the Thai HTS and were irrelevant for purposes of the actual assessment of duties for the vast majority of HTS designations receiving the 1% rate. Commerce reasoned that since the "Normal" rates would under no circumstances have been applied, it made no sense to use them as benchmarks.[5]

Instead, Commerce analyzed specificity by measuring the total CIF values[6] of imported merchandise under the various HTS subheadings receiving the 1% rate. Relying on the data culled from the total CIF value analysis, it then made a twofold determination: (1) a group of industries including the steel industry was a predominant user of the 1% rate; and (2) the steel industry itself received a disproportionate amount of the benefits flowing from the 1% rate. *Id.* at 6–8. Since either one of these findings would necessitate a finding of specificity, Commerce then concluded that the 1% rate was a specific subsidy and therefore was not suitable as a benchmark to measure the benefits resulting from the importing duty exemption programs. *Id.* at 30–31. Nowhere in the *Remand Determination* did Commerce present any analysis of why the 1% rate constitutes a subsidy. Finally, Commerce identified without explanation the 10% "Normal" rate as an acceptable benchmark and calculated the "estimated net countervailable subsidy rates under these [duty exemption] programs to be 5.85 percent and 0.91 percent, respectively." *Id.* at 31.

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[4] The reference in the title of the *Remand Determination* to USCIT Slip Opinion 04–91 is incorrect. Commerce's *Remand Determination* responded to the Court's order in USCIT Slip Opinion 06–117.

[5] Commerce also considered alternative benchmarks, but ultimately rejected those as well. *See Remand Det.* 7–8 & 19. The RTG has never suggested that any alternative rates exist or would be appropriate benchmarks. In fact, in its comments to the *Remand Determination*, the RTG states that "[t]here are no such 'alternative' reduced rates as claimed by [Commerce], nor would it be proper for [Commerce] to try to create them." Pls.' Comments Dep't Commerce's Remand Results Pursuant to Slip Op. 06–117 at 8 ("Pls.' Br.").

[6] "CIF value" refers to the total price of an import shipment including (1) cost of the goods, (2) insurance, and (3) freight.

II. *STANDARD OF REVIEW*

The Court must sustain any determination, finding, or conclusion made by Commerce in the *Remand 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).

With respect to the substantial evidence requirement, the U.S. Supreme Court has defined this term to mean "more than a mere scintilla. It means 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); *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

With respect to the in-accordance-with-law requirement, the Court must defer to an agency's reasonable construction of an ambiguous statute. *See 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, 843 (1984)). Further, "the 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) (citations omitted).

The segregation of the two standards of review (supported-by-substantial-evidence and in-accordance-with-law) serves to focus courts' attention on the dual agency function of legal interpretation and factual investigation. Ultimately, the two standards of review are both iterations of the broad requirement that an agency must not act arbitrarily or capriciously. *See Bangor Hydro-Elec. Co. v. Fed. Energy Reg. Comm'n*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996); *accord Fujian Mach. and Equip. Imp. & Exp. Corp. v. United States*, 178 F. Supp. 2d 1305, 1314, 25 CIT 1150, 1156 (2001). An agency acts arbitrarily and capriciously when it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' " *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1984) (*quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

III. *DISCUSSION*

A. Commerce's Treatment of the "Normal" Rates Must Be Internally Consistent

Countervailing duties are imposed on foreign products that are imported, sold, or likely to be sold in the United States, where the foreign government is directly or indirectly subsidizing the manufacture, production, or export of that merchandise. *See* 19 U.S.C. § 1671(a); *Kajaria Iron Castings Pvt. Ltd. v. United States*, 156 F.3d 1163, 1165–66 (Fed. Cir. 1998). The purpose of countervailing duties is to level the playing field in international trade by offsetting the

unfair advantage that a foreign exporter receives through subsidies. *See Kajaria*, 156 F.3d at 1166; *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1117 (Fed. Cir. 1998).

To achieve this purpose, Commerce must approximate the economic value that the foreign subsidy provides. *See Royal Thai III*, 441 F. Supp. 2d at 1365. In order to gauge the economic value of a countervailable import duty exemption, as in this case, Commerce must determine the tariff rate that the enterprise would have paid absent the duty exemption. *Id*. at 1364. It is difficult to measure the benefit conferred by a duty exemption because import tariffs are inherently government constructions, and so there is no "prevailing market rate" for Commerce to use as a benchmark. *Id.* at 1365. Nonetheless, Commerce's analysis must be aimed at ascertaining the economic value of the benefit conferred.

In its *Remand Determination*, Commerce used the 10% "Normal" rate as a benchmark to calculate the countervailable subsidy rate with respect to the duty exemption programs. Earlier in that determination, though, Commerce had determined that looking to "Normal" rates was improper when analyzing the specificity of the allegedly countervailable 1% rate. As noted in Part I.B, Commerce found that the "Normal" rates would not apply in the vast majority of cases. In other words, Commerce has determined that the "Normal" rate is an appropriate benchmark to calculate SSI's countervailable subsidy rate; but at the same time, and under the very same system of financial contribution, Commerce has determined that the "Normal" rates are not appropriate benchmarks to gauge the specificity of the 1% reduced tariff rate.

By using the "Normal" rate for steel slab, but rejecting the "Normal" rates for all other Thai industries, Commerce has created a distinction that requires explanation. *See Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (remanding agency determination where agency's internally inconsistent analysis was never explained). Commerce has provided no reason for treating steel slab imports differently than all other Thai industries receiving the 1% rate. *Remand Det.* 2, 18–19. Steel slab, like the "vast majority" of Thai industries, is not a vulnerable industry to which the "Normal" rate would likely apply. *Verification Report* 5. Nevertheless, Commerce applied the "Normal" rate to steel slab in reliance on the RTG's representation that the "Normal" rate would apply to steel slab in the absence of the 1% rate. *Id.* Without a formal notification from the Thai Ministry of Finance[7], *all* HTS tariff designations would receive the "Normal" rate by default. *See Verification Report* 5; RTG Resp. 21 (*citing* Exs. 9 & 10 in response to Question 4). So all

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[7] The Ministry of Finance could impose tariff rates lower than the "Normal" rates by means of ministerial promulgations, which are known as "MOF Notifications." *See Verification Report* 4.

merchandise – not just steel slab – would revert to their "Normal" rates if their applicable reduced rates were suspended, or if the MOF notification for that rate expired. *Verification Report* 5; RTG Resp. 21 (*citing* Exs. 9 & 10 in response to Question 4). It is thus unclear why Commerce has decided to use steel slab's "Normal" rate to calculate the countervailing duty on SSI, but cannot use the "Normal" tariff rates to calculate the benefit conferred to Thai industries importing other merchandise at the 1% reduced tariff rate.

Commerce must decide whether the "Normal" tariff rates meaningfully relate to the economic value of the subsidy, or whether they are so irrelevant to the actual functioning of the Thai tariff regime that they must be excluded entirely from the benefit analysis. It is clear that the Thai system of import tariffs is complex and technical; it is for Commerce, and not this Court, to make a supported determination regarding the use of the "Normal" rates as benchmarks. *See* 19 U.S.C. §§ 1671d & 1677(1); 19 C.F.R. §§ 351.210 & 351.503(d) (2006). But Commerce may not treat two like situations differently without explanation. *Cf. NSK Ltd. v. United States*, 390 F.3d 1352, 1357–58 (Fed. Cir. 2004) (rejecting as internally inconsistent a Commerce regulation interpreting "the price used to establish export price" in antidumping law); *Husteel Co., Ltd. v. Seah Steel Corp., Ltd.*, 31 CIT ___ , ___ , Slip Op. 07–74 at 18 (May 15, 2007) (applying the *NSK* holding to Commerce's findings in a single antidumping proceeding).

Defendant-intervenor U.S. Steel offers the following explanation for the apparently inconsistent determinations: "At verification, RTG officials specifically stated with respect to slab, and only slab, that if the 1% reduced import duty rate was rescinded, the 'normal' rate of 10% would apply." Def.-Int. U.S. Steel Corp.'s Resp. Pl.'s Comments to Dep't Commerce Remand Det. 7 ("Def.-Int.'s Reply") (*citing Verification Report* 5). The cited *Verification Report* provides in pertinent part that:

> RTG officials explained that slab would have automatically reverted to its "Normal" rate of ten percent if these MOF Notifications had not been issued or had expired, since any "Reduced" rate other than one percent would require action on the part of the MOF to initiate and implement a new MOF Notification.

Verification Report 5. U.S. Steel is only half correct in its summation of this passage. While it is true that the passage can be read to support the proposition that the 10% "Normal" rate would apply to steel slab if the 1% rate were rescinded, Commerce addresses only steel slab in the passage, and never limits that analysis as applying "with respect to slab, and only slab." Def.-Int.'s Reply 7.

In fact, Commerce notes in the same paragraph that "RTG officials explained that an MOF Notification must be issued before a product can receive a 'Reduced' rate." *Verification Report* 5. Since steel slab

was the only industry about which Commerce specifically inquired, Commerce only responded with respect to the steel industry. However, in formulating that response, the RTG was simply applying the general principle that since MOF Notifications alone operate to reduce tariff rates from the "Normal" rates, the "Normal" rate would have been the legally operative rate if no MOF Notification had ever implemented the 1% reduced rate. *See* Pls.' Br. 8–9 ("Indeed, [in the *Verification Report*] the Department verified that if [the] 1% rate was not available, the legally operative rate would be the normal rate clearly set forth in the tariff schedule."). Thus, U.S. Steel correctly asserts that the "Normal" rate would be legally operative for slab, but incorrectly asserts that slab is unique in this regard. Accordingly, the Court remands the issue so that Commerce may reconcile its findings regarding the applicability *vel non* of the "Normal" rates as benchmarks in Commerce's analysis.[8] As it stands, the disparate treatment of the "Normal" rates is arbitrary.

B. Commerce Must Make Further Findings

A reconciliation of the inconsistency discussed in Part III. A will not complete Commerce's calculation of SSI's countervailable subsidy rate. In this section, the Court will endeavor to explain the consequences of Commerce's adoption or rejection of the "Normal" rates as benchmarks, and delineate the additional findings that the Court will require as a result of Commerce's findings.

1. If the "Normal" Rates Are Meaningful Benchmarks, Then Commerce Must Revise Its Specificity Methodology.

If Commerce determines that the "Normal" tariff rates are meaningful benchmarks then it must reverse its methodological decision to use CIF values instead of duty savings as a means of comparing the distribution of the 1% rate across industries. Otherwise, Commerce must explain its reasons for departing from its preferred policy.

As a preliminary matter, the deference due to Commerce's selected methodology is unaffected by the Federal Circuit's previous decision in *Royal Thai II*. In *Royal Thai II*, the court granted Commerce latitude to measure the benefit conferred by a debt restructuring program. *See* 436 F.3d at 1336. The program, created in response to the Asian financial crisis of 1997, sought to identify major corporate debtors and offer a voluntary forum for restructuring negotiations that would bind all creditors. *Royal Thai I*, 29 CIT at ___ , 341 F. Supp. 2d at 1317–18. Commerce determined that the program was non-specific by measuring the distribution of the value of the debts being restructured. *Royal Thai II*, 436 F.3d at 1336. The Federal Cir-

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[8] Commerce itself has offered no explanation for its disparate treatment of the 10% "Normal" rate for steel slab and the "Normal" rates for other imported merchandise.

cuit recognized that more favorable terms would confer greater benefits, but ultimately did not require Commerce to inquire into the specific terms of each loan because acquiring that information was "impracticable." *Id.* Indeed, the RTG did not have access to the terms of the private loans. Pls.' Br. 5.

In contrast, the current controversy is not over the practicability of conducting the proposed alternative analysis. The RTG has already provided the data necessary to analyze the duty savings. *See* RTG Resp., Ex. 9. Rather, the parties disagree over whether the "Normal" tariff rates provide a meaningful benchmark against which the reduced 1% tariff rate may be measured. *Royal Thai II* thus has no bearing on the present matter. The issue is then whether Commerce, having found that the "Normal" rates are appropriate benchmarks for the purposes of calculating the countervailable subsidy rate, is compelled to use the "Normal" rates in its specificity analysis, or if it may continue to use the CIF values as a proxy for its proportional benefit analysis.

It is Commerce's own policy to use the relative level of actual benefits conferred to various industries when conducting a specificity analysis. *See Royal Thai II*, 436 F.3d at 1336 (" '[A]nalysis of whether an enterprise or industry or group thereof is a dominant user of, or has received disproportionate benefits under, a subsidy program should normally focus on the level of benefits provided,' even if sometimes 'it may be impracticable or impossible to determine the relative level of benefits.' " (*quoting Countervailing Duties: Final Rule*, 63 Fed. Reg. 65348, 65359 (Dep't Commerce Nov. 25, 1998) (final rule)). As applied to the present controversy, the policy would require Commerce to measure the actual savings provided by the import tariff reduction, unless acquiring that information is "impracticable."

As explained above, it is not impracticable for Commerce to incorporate the "Normal" rates into its specificity analysis. Having determined that they are appropriate benchmarks to measure the economic value of the reduced tariff rate, Commerce must either follow its preferred policy of conducting a relative benefit analysis, or it must explain its departure from its own precedent. *See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973); *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 29 CIT ___, ___, 412 F. Supp. 2d 1330, 1336 (2005); *Allied Tube & Conduit Corp. v. United States*, 29 CIT ___, ___, 374 F. Supp. 2d 1257, 1262 (2005) ("Commerce must explain why it chose to change its methodology and demonstrate that such change is in accordance with law and supported by substantial evidence.").

To be sure, the Court is mindful that it should not intrude into an agency's methodological prerogative without good reason. However, adopting the "Normal" rates as benchmarks in the specificity analy-

sis will significantly transform the data and the conclusions that it may support. If Commerce measures the benefit conferred on Thai industries by the RTG's "relative benefits analysis," the steel industry's share of the benefit drops considerably. According to that analysis, the steel industry's share of the benefits flowing from the 1% reduced rate drops from 7.64 percent to 2.44 percent. *Remand Det.* 8; Pls.' Br. 8. The Court does not speculate as to whether Commerce will decide to group the steel industry with other industries to find predominant use, or whether Commerce will find disproportionate use despite steel's decreased proportion of benefits received. However, it is clear that such a transformation of the benefit distribution would merit further consideration from Commerce.

2. If the "Normal" Rates Are Not Meaningful Benchmarks, Then Commerce Must Prove That the 1% Reduced Tariff Rate Is a Subsidy.

If Commerce determines that the "Normal" tariff rates are *not* meaningful benchmarks, then it will have rightfully excluded them from its specificity analysis. However, under a finding of specificity alone, Commerce may not, as it has done here, discard the 1% reduced rate as a benchmark. Commerce must prove that the 1% reduced rate is a countervailable subsidy and it must do so without reference to the rejected "Normal" rates.

A subsidy exists when "an authority . . . provides a financial contribution . . . to a person and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B). As noted supra, such a subsidy is countervailable only when it is specific. *See id*. § 1677(5)(A). There are thus three elements of a countervailable subsidy: (1) financial contribution; (2) benefit conferred; and (3) specificity. *See Delverde, SrL v. United States*, 202 F.3d 1360, 1365 (Fed. Cir. 2000); 19 U.S.C. §§ 1677(5)(D) (defining "financial contribution"), 1677(5)(E) (defining "benefit conferred") & 1677(5A) (defining "specificity").

Commerce has not yet made any finding that the 1% tariff rate is a subsidy, nor did this Court in *Royal Thai III* express any opinion as to whether the 1% tariff met the other statutory requirements of a countervailable subsidy.[9] Thus, even if Commerce finds specificity, it will have prematurely rejected the 1% rate as a benchmark if it does so without the requisite finding that it is in fact a subsidy.

The consequence of rejecting the "Normal" rates as benchmarks, however, is that Commerce must then show that the 1% rate confers

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[9] In *Royal Thai III*, the Court included the following qualification to its remand:
> Because the Court's discussion herein is necessarily limited to specificity analysis (i.e., the apparent basis for agency decision-making), the Court expresses no opinion on whether the other statutory criteria for establishing the existence of a countervailable subsidy (including the presence of a financial contribution) have otherwise been met in this case.

441 F. Supp. 2d at 1366 n.16.

a benefit without reference to these now irrelevant "Normal" rates. If the rates are not meaningful benchmarks, such that their use would distort the specificity analysis, then any calculations that result from their use will similarly distort the calculation of SSI's countervailable subsidy. And unless Commerce can demonstrate that the 1% rate constitutes a benefit-conferring financial contribution without reference to the "Normal" tariff rates, it cannot find that the 1% rate is a subsidy. Finally, if Commerce is somehow able to prove that the 1% reduced tariff rate confers a countervailable benefit without reference to the "Normal" rates, and accordingly rejects the 1% rate as a benchmark, Commerce must then find a non-countervailable benchmark that is not the "Normal" rate.

IV. ***CONCLUSIONS***

The Court holds that Commerce's disparate treatment of the "Normal" rates is unsupported and arbitrary. Since the conclusions of the *Remand Determination* depended on that disparate treatment, the matter is remanded to the agency for reconsideration consistent with this opinion. On remand, Commerce must make one of three findings: (1) determine that the "Normal" rates are meaningful benchmarks to determine the economic value of the benefit conferred by any import tariff rate reduction or exemption; (2) determine that the "Normal" rates are *not* meaningful benchmarks to determine the benefit conferred by the tariff rate reductions or exemptions; or (3) distinguish steel slab from other Thai industries that receive the 1% reduced rate, to show that steel slab's "Normal" tariff rate of 10% is a meaningful benchmark to calculate the benefit conferred by the tariff rate reductions or exemptions, but that the other Thai industries' "Normal" rates are not similarly meaningful benchmarks. If Commerce makes the first finding, then it must accordingly adjust its specificity methodology or state its reasons for abandoning its precedent. If Commerce makes the second finding, then Commerce must prove the existence of a subsidy without reference to the "Normal" tariff rates. If, under this second finding, it cannot prove the existence of benefit, then it cannot prove that the reduced rate is a countervailable subsidy, and it must use the 1% tariff rate as a benchmark to calculate the countervailable subsidy that SSI received through its import duty exemption programs. If Commerce makes the third finding, then it must make an affirmative finding that that the 1% tariff rate is a subsidy, and use the 10% rate to calculate SSI's countervailing duty.

ROYAL THAI GOVERNMENT, SAHAVIRIYA STEEL INDUSTRIES PUBLIC COMPANY LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Before: Richard W. Goldberg,Senior Judge
Consol. Court No. 02–00026

ORDER

Upon consideration of the *Results of Redetermination on Remand Pursuant to Royal Thai Government, et al. v. United States, Slip Op. 04–91 (Ct Int'l Trade July 27, 2004)* (May 4,2007) ("*Remand Determination*"), Plaintiffs' Comments on the Remand Results, and the Responses to Plaintiffs' Comments filed by the Defendant and the Defendant-Intervenor, and upon all other papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that the *Remand Determination* is further REMANDED to Commerce; and it is further

ORDERED that on remand Commerce must make one of the following three findings based on substantial evidence:

(1) The "Normal" rates are meaningful benchmarks to determine the economic value of the benefit conferred by any import tariff rate reduction or exemption;
(2) The "Normal" rates are *not* meaningful benchmarks to determine the benefit conferred by the tariff rate reductions or exemptions; or
(3) Steel slab may be distinguished from other Thai industries that receive the 1% reduced rate, such that steel slab's "Normal" tariff rate of 10% is a meaningful benchmark to calculate the benefit conferred by the tariff rate reductions or exemptions, but that the other Thai industries' "Normal" rates are not similarly meaningful benchmarks.

And it is further

ORDERED that Commerce must consider and explain the implications of the aforementioned findings as indicated in Part IV of the Court's August 6, 2007 Slip Op. 07–119.

IT IS SO ORDERED.

Slip Op. 07–120

MITTAL STEEL POINT LISAS LTD., Plaintiff, v. UNITED STATES Defendant, GERDAU AMERISTEEL CORP. AND KEYSTONE CONSOLIDATED INDUSTRIES, INC. Defendant-Intervenors.

BEFORE: Pogue, Judge
Court No. 05–00681

MEMORANDUM OPINION

In *Carbon and Certain Alloy Steel Wire Rod from Trinidad & Tabago*, 70 Fed. Red. 69, 512 (Dep't Commerce Nov. 16, 2005) (notice of final results of antidumping duty administrative review) and its corresponding "Issues and Decisions Memorandum" dated November 16, 2005, the Department of Commerce ("Commerce") calculated a constructed export price ("CEP") for Mittal Steel Point Lisas Ltd.'s ("Mittal's") U.S. sales by, *inter alia*, deducting credit expenses for the time period between shipment from the port in Trinidad & Tobago and the date payment was received. Although this was consistent with Commerce's general practice of using the date of shipment as the date of invoice, rather than the date of shipment, as the date of sale for purposes of calculating credit expenses, it was inconsistent with Commerce's actions in other sections of the administrative review, where Commerce had treated Mittal's later date of sale. Accordingly, the court granted the government's motion for partial voluntary remand in order to address this issue, instructing Commerce to "determine the date on which credit expenses should begin to run, keeping in mind its previous determination in this review that the material terms of sale are not set until Mittal issues an invoice," and permitting Commerce to "reassess its decision regarding inventory carrying costs in light of its reconsideration of credit expenses." *Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT ___, Slip Op. 07–60 at 22, 24 (Apr. 24, 2007).

On remand, Commerce found that because it had used the date of invoice as the date of sale in this review, it was appropriate to calculate credit expenses from the date of invoice, rather than the date of shipment. Commerce further recalculated Mittal's carrying costs to reflect the date of sale occurring on the date of invoice. Mittal submitted comments indicating its agreement with Commerce's determination of credit expenses and subsequent recalculation of CEP, and with Commerce's determination of carrying costs.

This court, having received and reviewed Commerce's Remand Results and Mittal's comments in response thereto,[1] finds that Com-

[1] Defentant-Intervenors filed no comments on the remand results.

merce duly complied with the court's remand order. Therefore, it is hereby

ORDERED that the remand results filed by Commerce on June 21, 2007 are affirmed in their entirety. Judgment will be entered accordingly.

Slip Op. 07–120

MITTAL STEEL POINT LISAS LTD., Plaintiff, v. UNITED STATES Defendant, GERDAU AMERISTEEL CORP. AND KEYSTONE CONSOLIDATED INDUSTRIES, INC. Defendant-Intervenors.

BEFORE: Pogue, Judge
Court No. 05–00681

JUDGMENT

This action having been duly submitted for decision, and this court, after due deliberation, having rendered a decision herein; now, in conformity with that decision, it is hereby

ORDERED that he remand results filed by the Department of Commerce on June 21, 2007 are affirmed in their entirety.

Slip Op. 07–121

THAT'S MY BOAT, INC., Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard K. Eaton, Judge

Court No. 05–00464

[Defendant's motion to dismiss for failure to prosecute pursuant to USCIT Rule 41(b)(3) granted. Case dismissed, without prejudice.]

Dated: August 8, 2007

That's My Boat, Inc., plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, United States Department of Justice; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, United States Department of Justice (*Michael J. Dierberg*); Office of the General Counsel, United States Department of Agriculture (*Jeffrey Kahn*), of counsel, for defendant.

MEMORANDUM OPINION

Eaton, Judge: This matter is before the court on the United States' motion on behalf of defendant the United States Secretary of Agriculture ("defendant" or the "Department") to dismiss for failure to prosecute under USCIT Rule 41(b)(3) plaintiff That's My Boat, Inc.'s challenge to the Department's denial of its application for trade adjustment assistance ("TAA") benefits pursuant to 19 U.S.C. § 2104e (2002). *See* Def.'s Mot. Dismiss 3; *see also* Letter from Ronald Lord, Deputy Dir., Imp. Policies & Program Div., to That's My Boat, Inc. (June 22, 2005); Letter from Bob Massey to United States Court of International Trade (Aug. 3, 2005) ("Massey Letter"). Jurisdiction lies pursuant to 19 U.S.C. § 2395(c) (2002). For the following reasons, defendant's motion to dismiss for failure to prosecute is granted and the case is dismissed, without prejudice.

BACKGROUND

Bob Massey is a shrimp fisherman in the state of Georgia. He owns a corporation named "That's My Boat, Inc.," which has as an asset a shrimp fishing boat. This action was commenced on August 3, 2005, with Bob Massey named as plaintiff, to contest the denial by the Department of his individual application for TAA benefits. *See* Massey Letter; *see also* Letter from Office of the Clerk, Donald C. Kaliebe, Case Management Supervisor, to Mr. Bob Massey (Aug. 15, 2005) ("Letter I") at 1 ("The Office of the Clerk has reviewed your correspondence, and has accepted it as fulfilling in principle the requirements of the summons and complaint for the commencement of a civil action . . . ."). Within two weeks after receiving plaintiff's summons and complaint, the Office of the Clerk sent a letter to Mr. Massey, which reminded him, in the event that he had not yet done so, to pay the $25.00 filing fee and further explained the procedural rules to follow when filing documents with the Court. *See* Letter I at 1–2. In addition, Letter I "strongly suggested that [Mr. Massey] try to obtain legal counsel as soon as possible" and informed Mr. Massey that if unable to obtain counsel, he should contact the Office of the Clerk and request the forms necessary to apply for a court-appointed attorney. *Id.* at 2. This was the first of two such letters mailed to plaintiff. Since his letter of August 3, 2005, plaintiff has taken no action to pursue the case.

In response to plaintiff's complaint, defendant, believing that the proper plaintiff in this case is That's My Boat, Inc., filed two separate motions for extensions of time to file its answer.[1] According to defendant, it filed the motions to provide That's My Boat, Inc. with enough time to find legal representation. *See* Def.'s Mot. Dismiss at 4

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[1] Defendant maintained this position because That's My Boat, Inc., not Bob Massey, was the actual applicant for TAA benefits.

("[W]e sought and received . . . two extensions of time . . . in order to provide sufficient opportunity for That's My Boat to obtain counsel."). The Court granted both motions, the first on October 18, 2005, and the second on January 10, 2006. *See* Order of 10/18/05 (Tsoucalas, J.); Order of 1/10/06 (Wallach, J.).[2] Defendant's purpose was defeated, however, when on October 18, 2005, the Court denied, without opinion, defendant's motion to recaption the case. *See* Order of 10/18/05 (Tsoucalas, J.). On January 18, 2006, defendant filed a motion seeking reconsideration of this Court's prior order denying the motion to recaption the case, dismissal of the action for failure to prosecute or, in the alternative, dismissal of the action for lack of subject matter jurisdiction.

Having received no communication from plaintiff as of February 2006, the Office of the Clerk telephoned Mr. Massey at the number he provided. Because plaintiff did not answer, a message was left on his answering machine recommending that he respond to defendant's motion. Plaintiff did not return the phone call. *See* E-mail from Donald C. Kaliebe, Office of the Clerk, Case Management Supervisor, to Chambers of Richard K. Eaton, Judge (Sept. 22, 2006, 06:17:00 EST). On March 6, 2006, the Office of the Clerk sent another letter to Mr. Massey. *See* Letter from Office of the Clerk, Donald C. Kaliebe, Case Management Supervisor, to Mr. Bob Massey (Mar. 6, 2006) ("Letter II"). This letter stated in the opening paragraph:

> It is strongly suggested that you try to obtain legal counsel as soon as possible. If you are unable to afford counsel and wish the Court to assist you in this, please refer to the enclosed forms, which need to be completed in order to make a Motion for Court Appointed Counsel.

Id. As with Letter I, Letter II failed to induce plaintiff to act on the case.

On January 19, 2007, this Court granted defendant's motion to reconsider and recaption this case with "That's My Boat, Inc." as the plaintiff. *See That's My Boat, Inc. v. U.S. Sec'y of Agric.*, No. 05–00464 (CIT Jan. 19, 2007) (order granting defendant's motion to reconsider and recaption). On that same date, this Court issued an order directing plaintiff "to show cause as to why this case should not be dismissed pursuant to USCIT Rule 41(b)(3) by February 21, 2007." *That's My Boat, Inc. v. U.S. Sec'y of Agric.*, No. 05–00464 (CIT Jan. 19, 2007) (order to show cause). In the nearly six months that have passed since the issuance of the order to show cause, the court has received no communication from either That's My Boat, Inc. or Mr. Massey.

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[2] This case was assigned to the court on March 7, 2006. *See* Order of 3/7/06.

For the following reasons, the court dismisses this action pursuant to USCIT Rule 41(b)(3) for failure to prosecute, without prejudice.

STANDARD OF REVIEW

"It is well settled that dismissal for failure to prosecute is discretionary." *United States v. Rubinstein*, 23 CIT 534, 537, 62 F. Supp. 2d 1139, 1142 (1999); *see also ILWU Local 142 v. Donovan*, 15 CIT 584, 585 (1991) (not reported in the Federal Supplement) (" 'Every court has the inherent power, in the exercise of a sound judicial discretion, to dismiss a cause for want of prosecution. The duty rests upon the plaintiff to use diligence and to expedite his case to a final determination.' ") (alteration omitted) (quoting *United States v. Chas. Kurz Co.*, 55 C.C.P.A. 107, 110, 396 F.2d 1013, 1016 (1968)). "The primary rationale underlying such a dismissal is the failure of a plaintiff to live up to its duty to pursue its case diligently." *A. Hirsh, Inc. v. United States*, 12 CIT 721, 723 (1988) (not reported in the Federal Supplement).

The Court generally refrains from taking such action unless there is evidence of "a clear pattern of delay, contumacious conduct, or failure to comply with orders of the Court." *Id.* (internal quotation marks and citation omitted). Nonetheless, absent justifiable circumstances, the Court may exercise its discretion to dismiss when faced with a plaintiff's substantial delay in prosecuting its case. *See ILWU Local 142*, 15 CIT at 586 (dismissing plaintiff's action, in part, because plaintiff failed to cite an acceptable reason for its delay and further stating that "[u]nder circumstances in which three years have elapsed, the court finds plaintiff consciously decided not to diligently proceed."); *see also Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980) ("In this case the last pleading . . . was filed . . . 22 months before the dismissal. . . . In light of the significant inactivity of the plaintiff, we cannot say the district court abused its discretion in dismissing the complaint.") (emphasis omitted).

DISCUSSION

Defendant seeks the dismissal of this action because of plaintiff's failure to prosecute. According to defendant, That's My Boat, Inc. has been fully aware of the pendency of this action, yet no action has been taken indicating that plaintiff maintains an interest in continuing to litigate this case.

The court finds it appropriate to dismiss plaintiff's action pursuant to USCIT Rule 41(b)(3) for failure to prosecute because plaintiff has failed to prosecute its case diligently. *See* USCIT Rule 41(b)(3) ("Whenever it appears that there is a failure of the plaintiff to prosecute, the court may upon its own initiative after notice, or upon motion of a defendant, order the action or any claim dismissed for lack

of prosecution."). The timeline of events in this case makes clear that plaintiff has made no effort to pursue its action. Mr. Massey's letter was received on August 3, 2005. On August 15, 2005, the Office of the Clerk sent Mr. Massey a letter advising him of the Court's filing procedures and suggesting that he obtain counsel. *See* Letter I. Defendant, on September 19, 2005, filed its first motion for an extension of time to answer plaintiff's complaint. Defendant's second motion to extend its answer time was filed on December 19, 2005. This Court granted these motions, which defendant contends were meant to provide plaintiff with additional time to seek legal representation.

Defendant filed its motion to dismiss for failure to prosecute on January 18, 2006. The motion was served on plaintiff by First-Class Mail. *See* Certificate of Service of David S. Silverbrand (Jan. 18, 2006). The Office of the Clerk tried to contact Mr. Massey by telephone in February 2006, but to no avail. On March 6, 2006, as the response deadline to defendant's motion to dismiss came and went, the Office of the Clerk made one final attempt to urge Mr. Massey to take action by mailing Letter II. No response was received. The court then took the additional step on January 19, 2007, of providing plaintiff with thirty days to show cause as to why its action should not be dismissed, but to date has received no response. Thus, other than the letter serving to commence the action, Mr. Massey, either individually or as president of That's My Boat, Inc., has done nothing further to prosecute this case.

When faced with similar facts, this Court found:

> Since the outset, the plaintiff might have availed herself of the proffered assistance of the clerk's office to obtain legal representation *in forma pauperis* (concerning which, it should be noted, the clerk's office expended considerable time and effort for her benefit since receipt of her [summons and complaint] letter), however she has failed, to date, to respond properly. The Court therefore considers it appropriate to dismiss her case, but without prejudice, for failure to prosecute pursuant to USCIT R. 41(b)(3).

See Burton v. U.S. Sec'y of Agric., 29 CIT ___ , ___ , Slip Op. 05–125 at 3 (Sept. 14, 2005) (not reported in the Federal Supplement); *see also Luu v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , 427 F. Supp. 2d 1362, 1365 (2006); *Ebert v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , 425 F. Supp. 2d 1320 (2006); *Grunert v. U.S. Sec'y of Agric.*, 30 CIT ___ , ___ , Slip Op. 06–37 (Mar. 13, 2006) (not reported in the Federal Supplement); *M/V Cheri H. Inc. v. U.S. Sec'y of Agric.*, 29 CIT ___ , ___ , 400 F. Supp. 2d 1382 (2005). Likewise, the court here finds that Mr. Massey's failure to take any action with respect to the case despite the several efforts undertaken by the Office of the Clerk warrants the dismissal of the action, but without prejudice.

CONCLUSION

Based on the foregoing, the court grants defendant's motion to dismiss for failure to prosecute and dismisses this case, without prejudice. Judgment shall be entered accordingly.

THAT'S MY BOAT, INC., Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard K. Eaton, Judge:

Court No. 05—00464

JUDGMENT

Upon consideration of the papers and proceedings had herein, and in conformity with the court's decision in this matter, it is hereby

ORDERED that defendant's motion to dismiss this action pursuant to USCIT Rule 41(b)(3) is granted; and it is further

ORDERED that this case is dismissed, without prejudice.

SLIP OP. 07–122

PARKDALE INTERNATIONAL, LTD., RIVERVIEW STEEL CO., LTD., and SAMUEL, SON & CO., LTD., Plaintiffs, and RUSSEL METALS EXPORT, Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge

Court No. 06–00289

[Plaintiffs' motion for judgment on the agency record denied, judgment for defendant.]

Dated: August 8, 2007

Hunton & Williams, LLP (*Richard P. Ferrin* and *William Silverman*) for the plaintiffs.

Sharretts, Paley, Carter & Blauvelt, PC (*Beatrice A. Brickell* and *Peter J. Baskin*) for the plaintiff-intervenor.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand* and *Michael D. Panzera*); *Mark B. Lehnardt*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

OPINION

Restani, Chief Judge: Plaintiffs Parkdale International, Ltd., Riverview Steel Co., Ltd., and Samuel, Son & Co., Ltd., and plaintiff-intervenor Russel Metals Export (collectively, "Plaintiffs") are importers and exporter-resellers of certain corrosion-resistant carbon steel flat products from Canada. Since 1993, Plaintiffs' merchandise has been subject to an antidumping duty order. *See Certain Corrosion-Resistant Carbon Steel Flat Prods. & Certain Cut-to-Length Carbon Steel Plate from Canada*, 58 Fed. Reg. 44,162, 44,162 (Dep't Commerce Aug. 19, 1993) (antidumping duty order). Plaintiffs challenge the validity of the United States Department of Commerce's ("Commerce") interpretation of its regulations governing the assessment of antidumping duties on merchandise entered into the United States by resellers who are unaffiliated with a foreign producer. For the reasons stated below, the court finds that it has jurisdiction to adjudicate this dispute, but that Commerce's interpretation is valid.

Background

Under the United States' retrospective system of assessing antidumping duties, Commerce instructs Customs and Border Protection ("Customs") to collect cash deposits of estimated antidumping duties from importers at the time the subject merchandise is entered, instead of immediately assessing duties on entries of subject merchandise. *See* 19 C.F.R. §§ 351.211(b), 351.212(a) (2007). Assessment of antidumping duties occurs after the opportunity for an administrative review of the antidumping duty order.[1] *See* 19 C.F.R. § 351.213. Under 19 U.S.C. § 1675(a) (2000), Commerce publishes a notice of opportunity to request an administrative review in the "anniversary month" in which the relevant antidumping duty order was published. 19 U.S.C. § 1675(a)(1); 19 C.F.R. § 351.102(b). If a request for review is received, Commerce is required to determine "the normal value and export price . . . of each entry of the subject merchandise" and "the dumping margin for each such entry." 19 U.S.C. § 1675(a)(2)(A). After the dumping margins are established, Commerce is required to "publish in the Federal Register the results of such review, together with notice of any duty to be assessed [or] estimated duty to be deposited." *Id.* § 1675(a)(1). Following publication, the final results of an administrative review become "the basis for

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[1] Prior to 1984, Commerce automatically conducted administrative reviews on antidumping duty orders every year. *See* 19 U.S.C. § 1675(a)(1) (1982); 19 C.F.R. § 353.53(a) (1983). Subsequently, Congress passed the Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 611, 98 Stat. 2948, 3031 ("1984 Act"), which made yearly administrative reviews contingent upon a request from an interested party, or at the initiative of the Secretary of Commerce.

the assessment of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties." *Id.* § 1675(a)(2)(C).

Because administrative reviews under § 1675(a) are granted only on request, not all entries of subject merchandise are necessarily subject to the requested review. Congress foresaw this possibility, but elected not to legislate a particular method for assessing duties on entries not covered by an administrative review. *See* H.R. Rep. No. 98–1156, at 181 (1984) (Conf. Rep.), *as reprinted in* 1984 U.S.C.C.A.N. 5220, 5298 (delegating to Commerce the responsibility to promulgate regulations governing automatic assessment of duties on entries for which no request for review was received). To fill this gap in statutory authority, Commerce published regulations, currently codified at 19 C.F.R. § 351.212(c), that govern the automatic assessment of duties on entries for which no review was requested. *See Mittal Can., Inc. v. United States*, 461 F. Supp. 2d 1325, 1329 (CIT 2006). Under those regulations, if no one requests an administrative review of any entity subject to an antidumping duty order, Commerce will instruct Customs to assess antidumping duties at "rates equal to the cash deposit of, or bond for, estimated antidumping duties . . . required on that merchandise at the time of entry." 19 C.F.R. § 351.212(c)(1)(i). If Commerce receives a timely request for a review of an order, it will instruct Customs "to assess antidumping duties . . . and to continue to collect cash deposits, on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section." *Id.* § 351.212(c)(2).

Commerce has a stated policy that "company-specific assessment rates must be based on the sales information of the first company in the commercial chain that knew, at the time the merchandise was sold, that the merchandise was destined for the United States." *Antidumping & Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 63 Fed. Reg. 55,361, 55,362 (Dep't Commerce Oct. 15, 1998) (notice and request for comment on policy concerning assessment of antidumping duties) ("*Reseller Notice*"). By identifying the party that had knowledge of the destination of the subject merchandise, Commerce determines which entity was the "price discriminator" that engaged in the dumping, and hence which company's dumping margin should apply to a given entry. *See Antidumping & Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954, 23,960 (Dep't Commerce May 6, 2003) (notice of policy concerning assessment of antidumping duties) ("*Reseller Policy*"). When conducting an antidumping investigation, Commerce examines the records of responding producers, but rarely examines the sales of resellers such as Plaintiffs. *Reseller Notice*, 63 Fed. Reg. at 55,362. Instead of determining whether a producer had knowledge of the destination of its sales to identified resellers, Commerce assumes that a producer knew the destination

of all of its sales to every reseller it identifies during the initial investigation. *Id.* Because the producer is assumed to be the first company in the commercial chain that knew of the product's destination, cash deposits for antidumping duties on all merchandise sold to identified resellers is initially set at the producer's cash deposit rate. *Id.*

This assumption remains in effect until the time for an administrative review. If no interested party requests a review of a reseller or its producer during the anniversary month of the antidumping duty order pursuant to 19 U.S.C. § 1675(a), Commerce will continue to assume that the producer was aware of the ultimate destination of the goods that it sold to the reseller and assess duties on the reseller's entries at the cash deposit rate placed on the producer under the automatic assessment regulation, 19 C.F.R. § 351.212(c)(1). *Reseller Notice*, 63 Fed. Reg. at 55,363. If a review is requested for a reseller, Commerce will cease to assume that the producer was aware of the reseller's entries, and set a rate specific to the reseller if Commerce determines it was unaffiliated with a producer. *Id.* If someone requests a review of a producer, Commerce will determine whether the producer in question was aware of the ultimate destination of sales to a given reseller. *Id.* If Commerce discovers that the producer was aware of the destination of a sale to a reseller, Commerce will find that the producer set the price of sale into the United States and assess antidumping duties accordingly. *Id.* If, however, Commerce finds that a producer was unaware of the ultimate destination of the sales to a reseller, it can no longer rely on its prior assumption to apply the producer's assessment rate calculated during the administrative review. *Id.*

In such a case, Commerce has at least two options to determine what assessment rate should apply to the unaffiliated reseller that is not covered by the results of the administrative review. First, Commerce could retain the status quo, applying the producer's cash deposit rate used at the time the merchandise was entered. Following this approach, Commerce would retain its initial assumption that, at the time of the investigation (or last review), the producer was aware of the destination of the reseller's merchandise, even though that assumption proved false during the current administrative review. Alternatively, Commerce could reject its initial assumption that the producer was aware of the ultimate destination of the merchandise that it sold to the reseller. Absent that assumption, the reseller would fall into the category of unaffiliated exporters who did not participate in the investigation. The assessment rate for unreviewed parties is the so-called "all others" rate.[2]

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[2] The all others rate is the simple average of the company-specific margins calculated in the original antidumping investigation. *See Reseller Notice*, 63 Fed. Reg. at 55,362.

For most of the time that the antidumping duty order at issue in this case has been in effect, Commerce chose the first option, instructing Customs that "if the exporter is not a firm covered in this review, or the original investigation, but the manufacturer is, the [cash] deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise." *Certain Corrosion-Resistant Carbon Steel Flat Prods. & Certain Cut-to-Length Carbon Steel Plate from Canada*, 62 Fed. Reg. 18,448, 18,468 (Dep't Commerce Apr. 15, 1997) (final results of antidumping duty administrative reviews).[3] As exporter-resellers, Plaintiffs purchase the subject merchandise from Canadian producers and arrange the eventual sale of the goods in U.S. commerce. It is uncontested that Plaintiff resellers are not affiliated with their producers; the producers in question did not have knowledge of the ultimate destination of the merchandise they sold to Plaintiffs. Thus, Plaintiffs' entries have historically been liquidated at the cash deposit rate they paid when the merchandise entered. In 1998, however, Commerce published a notice and request for comment concerning the automatic assessment of antidumping duties aimed at "clarify[ing]" this practice. *Reseller Notice*, 63 Fed. Reg. at 55,361. Under Commerce's proposal, "automatic liquidation at the cash deposit rate required at the time of entry [would] only apply to a reseller if no administrative review has been requested, either of the reseller or of any producer of the merchandise the reseller exported to the United States, and the reseller does not have its own cash deposit rate." *Id.* at 55,362; *see also Mittal*, 461 F. Supp. 2d at 1337 n.10 ("[T]he *Reseller Policy* example presents an exceedingly rare, perhaps anomalous, case where the importer does not request a review but Commerce learns of information prior to liquidation that sheds light on the rate that was in effect at the time of the reseller's entries."). If a review of the reseller's producer was requested, and the producer was not aware of the final destination of the merchandise it sold to that reseller, the reseller's entries would be liquidated at the all others rate, unless there was a rate specific to it. *Reseller Notice*, 63 Fed. Reg. at 55,362. The new interpretation was adopted in 2003. *See Reseller Policy*, 68 Fed. Reg. at 23,954.

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[3] *See also Certain Corrosion-Resistant Carbon Steel Flat Prods. & Certain Cut-to-Length Carbon Steel Plate from Canada*, 63 Fed. Reg. 12,725, 12,744 (Dep't Commerce Mar. 16, 1998) (final results of antidumping duty administrative reviews) ("[I]f the exporter is not a firm covered in this review, a prior review, or the original less than fair value (LTFV) investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise."); *Certain Corrosion-Resistant Carbon Steel Flat Prods. & Certain Cut-to-Length Carbon Steel Plate from Canada*, 66 Fed. Reg. 11,553, 11,555 (Dep't Commerce Feb. 26, 2001) (amended final results of antidumping duty administrative reviews) ("[I]f the exporter is not a firm covered in this review, a previous review, or the original LTFV investigation, but the manufacturer is, the cash deposit rate will be the rate established for the most recent period for the manufacturer of the merchandise.").

In 2006 and 2007, Commerce completed administrative reviews of the antidumping duty order on carbon steel flat products. *See Certain Corrosion-Resistant Carbon Steel Flat Prods. from Canada*, 71 Fed. Reg. 13,582, 13,583 (Dep't Commerce Mar. 16, 2006) (final results of antidumping duty administrative review); *Certain Corrosion-Resistant Carbon Steel Flat Prods. from Canada*, 72 Fed. Reg. 12,758, 12,758 (Dep't Commerce Mar. 19, 2007) (final results of antidumping duty administrative review) (collectively, "*Final Results*"). Reviews were requested for Plaintiffs' producers, but no request was made to review Plaintiff resellers. In the *Final Results*, Commerce stated that it would "instruct [Customs] to liquidate unreviewed entries at the all-others rate if there is no rate for the intermediate company(ies) involved in the transaction." 71 Fed. Reg. at 13,584; *see also* 72 Fed. Reg. at 12,759 ("[W]e will instruct [Customs] to liquidate unreviewed entries at the "All Others" rate if there is no rate for the intermediate company(ies) involved in the transaction."). Because Plaintiffs are unaffiliated resellers, and their producers were subject to the final results of the administrative review, but Plaintiffs were not, and Plaintiffs' entries were consequently ordered to be liquidated at the all others rate.[4] (*See* Pls.' Mem. in Supp. Mot. J. on the Agency R. 2–3.)

Plaintiffs challenge the validity of the *Reseller Policy*, claiming that the "clarification" is irreconcilably inconsistent with § 351.212(c), that it is arbitrary, capricious, and not supported by governing law, and that Commerce failed to comply with the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, in issuing the *Reseller Policy*. (*See* Pls.' Mem. in Supp. Mot. J. on the Agency R. 15–27.)

Jurisdiction and Standard of Review

The court addressed the question of its jurisdiction to hear this case in a prior opinion denying Plaintiffs' motions for preliminary injunctions. *See Parkdale Int'l, Ltd. v. United States*, ___ F. Supp. 2d ___ , Slip Op. 07–72 (CIT May 11, 2007). The court adheres to its conclusion, as further explained below, that jurisdiction is proper under 28 U.S.C. § 1581(i)(4), as an action related to the administration and enforcement of antidumping duty orders.

The Court of International Trade was created by the Customs Courts Act of 1980, Pub. L. No. 96–417, 94 Stat. 1727, which granted the court exclusive jurisdiction over certain matters to provide a

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[4] Plaintiffs' entries made between August 1, 2003, and July 31, 2004, were liquidated prior to commencement of this litigation. The court denied a motion for a preliminary injunction preventing liquidation of the entries made between August 1, 2004, and July 31, 2005, though liquidation is currently enjoined by a separate order of this Court in another case addressing separate issues. *See Parkdale Int'l, Ltd. v. United States*, Court No. 07–166 (CIT May 18, 2007) (temporary restraining order).

"comprehensive system [that] will ensure greater efficiency in judicial resources and uniformity in the judicial decision making process" in the area of international trade. H.R. Rep. No. 96–1235, at 20 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3731. In that Act, Congress set out a number of different areas of jurisdiction, two of which are relevant here. First, 28 U.S.C. § 1581(c) vests the court with authority to review "any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c). To bring suit under § 1581(c), a party must contest a "factual finding[ ] or legal conclusion[ ]" made in a determination listed in 19 U.S.C. § 1516a(a)(2)(B). 19 U.S.C. § 1516a(a)(2)(A). Among these are factual findings or legal conclusions made in a final determination of an administrative review of an existing antidumping duty order conducted pursuant to 19 U.S.C. § 1675. *Id.* § 1516a(a)(2)(B)(iii).

Second, Congress provided this Court with broad residual jurisdiction under 28 U.S.C. § 1581(i) to hear "any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs [or] duties . . . on the importation of merchandise for reasons other than the raising of revenue," as well as cases challenging Commerce's "administration and enforcement with respect to the matters referred to" in the remainder of § 1581. 28 U.S.C. § 1581(i)(2), (4). Congress has emphasized, however, that "the Court of International Trade [should] not permit subsection (i) . . . to be utilized to circumvent the exclusive method of judicial review of those antidumping and countervailing duty determinations listed in [19 U.S.C. § 1516a]." H.R. Rep. No. 96–1235, at 48. Thus, it has been held that § 1581(i) " 'may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.' " *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)) (emphasis removed).

Defendant contends that Plaintiffs had the opportunity to file a case brief challenging the *Reseller Policy* in the *Final Results*, and thus should have filed suit under 28 U.S.C. § 1581(c). (Def.'s Combined Mot. to Dismiss & Resp. to Pls.' Mot. for J. Upon the Agency R. 11–16.) Plaintiffs counter that application of the *Reseller Policy* was a foregone conclusion, and that Commerce's mere invocation of the *Reseller Policy* is not a factual finding or a legal conclusion supporting Commerce's determination in the *Final Results*. (Pls.' Br. on Jurisdiction 2–5.)

In deciding between the appropriate bases for jurisdiction, the " 'mere recitation of a basis for jurisdiction, by either a party or a court, cannot be controlling[;]' " instead, the court " 'look[s] to the true nature of the action . . . in determining jurisdiction.' " *Norsk*

Hydro Can., Inc. v. United States, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (quoting *Williams v. Sec'y of Navy*, 787 F.2d 552, 557 (Fed. Cir. 1986)). In this case, Plaintiffs challenge, on facial grounds, a generally applicable policy regarding the assessment of duties on entries which were not covered by the results of an administrative review under 19 U.S.C. § 1675(a).[5] Plaintiffs do not seek to challenge the factual conclusion that they are unaffiliated resellers, nor do they seek to challenge the legal conclusion that, as unaffiliated resellers, the terms of the *Reseller Policy* apply to them. Indeed, Plaintiffs' entries were excluded from the *Final Results*. Thus, the nature of Plaintiffs' complaint is, by definition, divorced from any final determination regarding entries that were within the scope of the *Final Results*. Commerce's reference to the mere existence of the *Reseller Policy* does not render the *Final Results* a final legal determination with respect to all entries of carbon steel flat products from Canada.

Treating the reference to the *Reseller Policy* in the *Final Results* as a § 1516a determination would create procedural incentives inconsistent with the purpose of the Customs Courts Act and the APA. Plaintiffs' claims arise from the APA, and challenge the statutory basis for, and procedural flaws in the adoption of, the *Reseller Policy*. Because a claim under the APA accrues at the time of "final agency action," 5 U.S.C. § 704, facial challenges to regulations and claims

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[5] A facial challenge is a broad-based attack on a statute or regulation's consistency with existing law. A facially invalid regulation or law therefore cannot be justified under any potential application, and is void. When making a facial challenge to a regulatory policy such as that at issue here, "the challenger must establish that no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Further, when ruling on such a challenge, "the agency's construction of the statute is entitled to great weight." *Melamine Chems., Inc. v. United States*, 732 F.2d 924, 928 (Fed. Cir. 1984).

Defendant argues that Plaintiffs' claims regarding the 2004 to 2005 administrative review are not ripe for adjudication because, at the time Plaintiffs filed suit, the final results of the review had not been issued. (Def.'s Combined Mot. to Dismiss & Resp. to Pls.' Mot. for J. Upon the Agency R. 16.) To determine whether an action is ripe for judicial review, the court must determine: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). Under the first prong, the court must determine "whether the issue 'is purely legal [or] . . . would benefit from a more concrete setting, and whether the agency's action is sufficiently final.' " *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1204 (D.C. Cir. 1998) (quoting *Natural Res. Def. Council, Inc. v. EPA*, 22 F.3d 1125, 1133 (D.C. Cir. 1994)). As the D.C. Circuit recently reaffirmed, a " 'purely legal claim in the context of a facial challenge . . . is presumptively reviewable.' " *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 440 F.3d 459, 464 (D.C. Cir. 2006) (quoting *Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 417 F.3d 1272, 1282 (D.C. Cir. 2005) (internal quotations omitted); *see also Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1335 (Fed. Cir. 2005) (" 'A case is generally ripe if any remaining questions are purely legal ones . . . ' ") (quoting *Monk v. Huston*, 340 F.3d 279, 282 (5th Cir. 2003)). The issues in this case are purely legal, and do not concern any factual determination made in the *Final Results*. In terms of hardship, the court finds that although postponing the action with respect to the 2004 to 2005 entries would work only a minimal hardship, if any, on the parties, it would not benefit the court in any way, as the necessary facts to resolve this case are already definite. Consequently, the court finds that this action is ripe for review.

arising from a failure to comply with APA procedures accrue at the time the rule was published, not when the rule is applied to a plaintiff.[6] *See Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (holding that a facial challenge to regulation accrues when the agency publishes its rule in the Federal Register); *Wind River Mining Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (holding that "[i]f a person wishes to challenge a mere procedural violation in the adoption of a regulation or other agency action, the challenge must be brought within six years of the decision" and that "[s]imilarly, if the person wishes to bring a policy-based facial challenge to the government's decision, that too must be brought within six years of the decision"). A claim raising procedural objections accrues at the time that the rule goes into effect because

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[6] Following the court's request at oral argument, Defendant cited cases suggesting that Plaintiffs' claims could be time-barred under the two-year statute of limitations for § 1581(i) actions provided in 28 U.S.C. § 2636(i). (*See* Def.'s Resp. to Ct.'s Request for Citation.) As noted above, various APA claims, for example, a failure to provide notice and comment, accrue at the time a rule is put into effect, and might have been time-barred in this case. Failure to file suit within the statute of limitations period is an affirmative defense, which must be claimed in a defendant's first responsive pleading. USCIT R. 8(d) ("[A] party shall set forth affirmatively . . . [a] statute of limitations . . . and any other matter constituting an . . . affirmative defense."). Although an exception is made for statutes of limitations that are jurisdictional in nature, courts have not treated the failure to comply with the two-year statute of limitations under 28 U.S.C. § 2636(i) as a jurisdictional issue under § 1581(i). *See Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994). In *Mitsubishi*, the plaintiff filed a suit under § 1581(a) and § 1581(i), challenging automatic liquidation of certain entries at a 94 percent ad valorem rate required under a preliminary antidumping determination, rather than the 13.43 percent rate established in the final results. *Id.* at 975. Although jurisdiction was not available under § 1581(a), the court found that the automatic assessment of antidumping duties "pertain[ed] to the 'administration and enforcement' of laws 'providing for . . . duties' " under § 1581(i). *Id.* at 977 (quoting 28 U.S.C. § 1581(i)). Thus, the court concluded that "the trial court apparently had jurisdiction over this case under section 1581(i)(2), (4)." *Id.* Having concluded that this Court had jurisdiction, however, the Federal Circuit then found that the plaintiff's claim was barred under the two-year statute of limitations in § 2636(i). *Id.* at 978. This conclusion implies that jurisdiction under § 1581(i) may be had despite a party's failure to meet the filing deadline under § 2636(i). As the Supreme Court has recently stated, " '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, the courts and litigants will be duly instructed and will not be left to wrestle with the issue.' " Rockwell Int'l Corp. v. United States, 127 S.Ct. 1397, 1405–06 (2007) (quoting Arbaugh v. Y&H Corp., 546 U.S. 500, 515–16 (2006)); but c.f. Bowles v. Russell, 127 S.Ct. 2360, 2365 (2007) (in the context of habeas corpus, distinguishing Arbaugh). The statute of limitations in question provides that "[a] civil action of which the Court of International Trade has jurisdiction under section 1581 of this title, other than an action specified in subsections (a)–(h) of this section, is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues." 28 U.S.C. § 2636(i). The statute's reference to actions of which the court "has jurisdiction" being barred does not clearly state a Congressional intent to treat this statute of limitations as jurisdictional. Defendant's cited case pertains to the statute of limitations for the Court of Federal Claims, and does not specifically mention the jurisdiction of this Court under 28 U.S.C. § 1581(i), or the statute of limitations provided for such actions in 28 U.S.C. § 2636(i). *See John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006) (discussing statute of limitations for the Court of Federal Claims under 28 U.S.C. § 2501). Defendant failed to timely raise the statute of limitations defense, and therefore the court finds that affirmative defense was waived.

the relevant harm has already been inflicted: an interested party has lost the opportunity to alter the agency's decision through full participation in the regulatory process. *See, e.g.*, *Wind River*, 946 F.2d at 715 (holding that grounds for a cause of action for facial or procedural challenges to a regulation "will usually be apparent to any interested citizen within a six-year period following promulgation of the decision" and because "[t]he government's interest in finality outweighs a late-comer's desire to protest the agency's action as a matter of policy or procedure"); *Thrift Depositors of Am., Inc. v. Office of Thrift Supervision*, 862 F. Supp. 586, 590 (D.D.C. 1994) (stating that a "challenge to an agency's promulgation of an interim final rule without notice and comment is a case or controversy") (citing *Tenn. Gas Pipeline Co. v. Fed. Energy Regulatory Comm'n*, 969 F.2d 1141 (D.C. Cir. 1992)). Furthermore, encouraging parties to file suit as soon as a rule is published preserves the court's ability to remand in time for the agency to correct its errors before the new policy has been given widespread reliance. If the court were to recognize that this claim could, and therefore must, have been raised under § 1581(c), a party might wait years before it opts not to participate in an administrative review. Only then would it obtain an opportunity to file a case brief in an administrative review to challenge the automatic application of the *Reseller Policy* to its admittedly unreviewed entries, and thereby eventually obtain review of the procedural flaws in the adoption of the *Reseller Policy*. Although there may be some cases where a facial or procedural challenge to a regulation should be raised in an administrative review, the nature of Plaintiffs' objections to the *Reseller Policy* suggest that this case does not involve a determination within the meaning of 19 U.S.C. § 1516a. Given the purpose of the Customs Courts Act, to provide a "comprehensive system [that] will ensure greater efficiency in judicial resources and uniformity in the judicial decision making process," H.R. Rep. No. 96–1235, at 20, the court finds that a mandate requiring Plaintiffs to raise this argument in administrative review would favor procedural formality over the swift resolution of cases ripe for adjudication.

The Federal Circuit's holding in *Miller* is not contrary to this outcome. In that case, the Federal Circuit considered whether a party could bring a challenge to a final determination in an administrative review that was issued outside the statutory time limit. 824 F.2d at 962. The plaintiff brought suit under § 1581(i), arguing that Commerce's decision to issue an untimely final determination was a procedural matter concerning the administration and enforcement of the administrative review, not the substance of the review itself. *Id.* at 963–64. The court disagreed, holding that "the procedural correctness of a countervailing duty determination, as well as the merits, are subject to judicial review," and could be reviewed under § 1581(c). *Id.* at 964. *Miller* involved a challenge to Commerce's fail-

ure to comply with procedural rules in a specific administrative review, and the consequent invalidity of the results issued pursuant to that review. In this case, Plaintiffs do not argue that Commerce was incorrect in applying the *Reseller Policy*, nor do they argue that the *Final Results* are inconsistent with Commerce's established assessment policy, as stated in the *Reseller Policy*. Unlike *Miller*, Plaintiffs make no argument concerning Commerce's conduct during the review or authority to issue the *Final Results*.

Nor is this outcome contrary to this Court's decision in *American Signature, Inc. v. United States*, 477 F. Supp. 2d 1281 (CIT 2007), *appeal docketed* No. 2007–1216 (Fed. Cir. Mar. 19, 2007). In that case, the plaintiff filed suit under § 1581(i), seeking an order requiring Commerce to instruct Customs to assess duties on its unreviewed entries at an amended rate that had been corrected for ministerial errors, both retrospectively and prospectively. *Id.* at 1286. Commerce had determined, in a prior administrative review concerning a similarly-situated party, that the proper method of requesting a refund for excess duties was to request an administrative review, and then obtain interest on overpayment of duties based on the results of that review pursuant to 19 U.S.C. § 1673f. The plaintiff failed to request an administrative review to challenge Commerce's practice, instead filing immediately under § 1581(i). The court found that the plaintiff could have brought their claim under § 1581(c), and therefore that jurisdiction was unavailable under § 1581(i). In *American Signature*, however, the plaintiff sought to challenge a legal determination made in the context of an administrative review. Commerce published no separate notice or request for comment regarding this determination. The *Reseller Policy*, in contrast, is a policy announced following notice and comment under the APA, and is separate from any administrative review.

Even assuming that the reference to the *Reseller Policy* constituted a legal conclusion in an administrative review, the court disagrees with Defendant's contention that relief under another subsection of § 1581 must be a virtual impossibility before a party may bring suit under § 1581(i). The Federal Circuit's treatment of jurisdiction in cases arising from the unconstitutionality of the harbor maintenance tax ("HMT") illustrates a somewhat broader view of § 1581(i). In the case of *U.S. Shoe Corp. v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), the court was called upon to consider the constitutionality of the HMT. The plaintiff filed under § 581(i), but the defendant argued that § 1581(i) jurisdiction was unavailable because U.S. Shoe should have protested Customs's collection of the HMT, which, following denial of that protest, would have led to jurisdiction under § 1581(a). *Id.* at 1568. The court of appeals disagreed, finding that Customs's ministerial acceptance of an HMT payment involved no "decision-making process," and therefore was not a decision within the meaning of 19 U.S.C. § 1514. *Id.* at 1569. In the ab-

sence of § 1581(a) jurisdiction, the court held that § 1581(i) jurisdiction was available. *Id.* at 1570–71. Subsequently, in *Swisher International, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000), the Federal Circuit held that "[n]either our decision [in *U.S. Shoe*] nor that of the Supreme Court . . . reached the question of whether section 1581(a) jurisdiction would have been available had a protest been filed and denied following the filing and denial of a refund request." *Id.* at 1364. The court concluded that "*U.S. Shoe* does not preclude our consideration of section 1581(a) jurisdiction in this case where a refund request and protest were, in turn, filed and denied." *Id.* The court thus allowed the suit to proceed under 28 U.S.C. § 1581(a) to challenge the denial of the plaintiff's protest of a denial of a refund of its HMT payments. *Id.* at 1365. Taken together, these two cases suggest that although the plaintiff in *U.S. Shoe* could have obtained jurisdiction under § 1581(a) by filing a refund request and protest with Customs, jurisdiction under § 1581(i) was simultaneously available.

Defendant implies that § 1581(a) jurisdiction was available in *Swisher*, but not in *U.S. Shoe*, because "once the HMT had been declared unconstitutional, a determination by Customs not to grant a refund to the plaintiff, unlike a constitutional challenge to a statute placing Customs in a ministerial role, was a protestable decision." (Def.'s Reply Supp. Mot. to Dismiss 9.) This argument might have merit if the plaintiff's protest in *Swisher* had been denied after the HMT was declared unconstitutional. However, in its complaint, Swisher stated that it filed a refund request on September 28, 1994, and protested the denial of that refund request on November 23, 1994. *See Swisher Int'l v. United States*, No. 95–03–00322, Compl. ¶¶ 12, 16 (CIT Mar. 29, 1995). Customs denied that protest on March 26, 1995. *See Swisher*, 205 F.3d at 1361. This Court did not declare the HMT unconstitutional until almost seven months later, on October 25, 1995, *U.S. Shoe Corp. v. United States*, 19 CIT 1284, 907 F. Supp. 408 (1995), and the Supreme Court did not affirm that finding until March 31, 1998, *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998). Swisher's protest was filed and denied long before the HMT was declared unconstitutional by any court. The court can discern no reason why a refund request was not also an avenue to jurisdiction for the plaintiff in *U.S. Shoe*. Thus, the court finds that the timing of the two cases does not resolve the jurisdictional anomaly presented by the Federal Circuit's treatment of these challenges to the HMT.[7]

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[7] The court notes that the plaintiff in *U.S. Shoe* filed suit in this Court on November 3, 1994, prior to Customs's publication of an interim rule governing protests. *See User Fee Protests*, 59 Fed. Reg. 60,044, 60,044 (Dep't Treasury Nov. 21, 1994) (notice of interim rules). At that time, Customs recognized only a protest of payment procedure, which was invalidated by *U.S. Shoe*. The rule was to provide a protest of the "calculation, collection and demand

The Federal Circuit's reasoning in *Swisher* points to several factors that gave rise to § 1581(i) jurisdiction in *U.S. Shoe*. The Federal Circuit recognized its holding in *Miller* that § 1581(i) is not available when another jurisdictional provision was or could have been used to gain relief, but nevertheless held that its finding in *U.S. Shoe* did "not control subsequent suits asserting similar challenges but in different procedural postures." *Swisher*, 205 F.3d at 1364. Instead, the court explained that its "holding in *Miller* (and other decisions) [was] meant merely to prevent a party from asserting residual (subsection (i)) jurisdiction when jurisdiction under another subsection *would be appropriate*." *Id.* (emphasis added). Parties challenging the HMT could arrive in court via more than one "procedural path," in part because "it appear[ed] that there was much confusion in Customs and among exporters as to the proper procedure for challenging the constitutionality of the HMT." *Id.* at 1364–65. It appears that the *U.S. Shoe* plaintiffs could have filed a refund request and protest, but the Federal Circuit found that "there was not one obvious jurisdictional basis that this court could have required the *U.S. Shoe* plaintiff to use." *Id.* The court finds the reasoning of *Swisher* persuasive here. Like *U.S. Shoe*, there is no single obvious jurisdictional basis that would be most appropriate in these circumstances. Nor is it clear, as a procedural matter, that a challenge to a regulatory policy governing the automatic liquidation of entries not covered by an administrative review must be brought to the attention of an agency in an administrative review.

Defendant argues that application of § 1581(i) jurisdiction would force the court to review similar agency determinations under disparate standards of review. (Def.'s Reply in Supp. Mot. to Dismiss 13–14.) Defendant claims that, under the court's analysis, if Commerce were to find in an administrative review that a reseller was affiliated with its producer, the reseller would be required to challenge that determination in the context of that administrative review. (*Id.* at 13.) A subsequent court challenge to that determination would be brought under § 1581(c), subject to the substantial evidence standard of review. (*Id.*) In contrast, Defendant argues, if Commerce were to determine in an administrative review that a reseller was not affiliated with a producer, that reseller would not be required to bring a challenge in the administrative review. (*Id.* at 14.) Instead, it would immediately file suit under § 1581(i), subject to the arbitrary and capricious standard of review. (*Id.*) Defendant's argument fails to distinguish the type of challenge involved in the

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for payment" of user fees under various statutes, including the HMT. *See User Fee Protests*, 59 Fed. Reg. at 60,044. Recognition of the refund protest procedures by the courts and Customs occurred as a result of *Swisher*. *See id.*, 205 F.3d at 1364–65. Nonetheless, the refund route was declared to have existed, a previously unsettled route to jurisdiction, but not an impossible one. Thus, U.S. Shoe could have filed a refund request and protest prior to Customs's publication of specific guidance on the matter.

above hypothetical and the challenge presented in this case. A reseller's suit seeking to overturn Commerce's finding that it was unaffiliated with a producer would constitute a challenge to a factual determination made in administrative review, which is among the determinations enumerated in 19 U.S.C. § 1516a(a)(2)(B). Unlike Defendant's hypothetical, the challenge in this case is not directed to a factual or legal determination Commerce made in the course of the *Final Results*, but to the consistency of the *Reseller Policy* with Commerce's regulations and the APA.

Accordingly, the court finds that jurisdiction is proper under 28 U.S.C. § 1581(i). In cases brought under § 1581(i), the court is directed to "review the matter as provided in section 706 of title 5." 28 U.S.C. § 2640(e). Section 706 directs the court to "hold unlawful and 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). Typically, agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Discussion

A. The *Reseller Policy* is Not Inconsistent with 19 C.F.R. § 351.212(c).

Plaintiffs argue that the *Reseller Policy* is irreconcilably inconsistent with Commerce's regulation governing the automatic liquidation of antidumping duties, located at 19 C.F.R. § 351.212(c). Under that regulation, "[i]f a review is not requested, duties are assessed at the rate established in the completed review covering the most recent prior period or, if no review has been completed, the cash deposit rate applicable at the time merchandise was entered." *Id.* § 351.212(a). As noted above, the regulation provides that "[i]f the Secretary does not receive a timely request for an administrative review of an order . . . the Secretary, without additional notice, will instruct the Customs Service to . . . [a]ssess antidumping duties or countervailing duties . . . at rates equal to the cash deposit . . . required on that merchandise at the time of entry." *Id.* § 351.212(c)(1). Similarly, if Commerce "receives a timely request for an administrative review of an order," it will instruct "the Customs Service to assess antidumping duties or countervailing duties . . . on the merchandise not covered by the request in accordance with paragraph (c)(1) of this section." *Id.* § 351.212(c)(2).

Plaintiffs contend that when a request for review is made, but a reseller is not named in the request for an administrative review, the reseller's entries must be liquidated at the cash deposit rate required at entry in accordance with § 351.212(c)(1). Plaintiffs' argument relies on the assumption that if no review was requested for the reseller, then none of its entries were "covered by the request" for review of an order. That assumption ignores the situation that the *Reseller Policy* is designed to address. When a review of a producer is requested, Commerce may still be acting under the assumption that the producer is aware of the ultimate destination of its sales to the reseller. Thus, at the time the review was requested, the reseller's entries were covered by the request to review the producer's sales to the United States and to identified resellers. 19 C.F.R. § 351.212(c)(2) applies only to entries that are not covered by the request for the review; it says nothing about entries that were covered by the request for review, but are not within the scope of the final results of the review. The *Reseller Policy* fills this gap in the regulation and is therefore not inherently inconsistent with 19 C.F.R. § 351.212(c).

Plaintiffs argue that the all others rate is often a less accurate reflection of the reseller's actual prices, and therefore a less "proper" rate than the producer's cash deposit rate. (Pls.' Mot. for J. on the Agency R. 16–17.) Accurate or not, requiring Commerce to liquidate an unaffiliated reseller's entries at its producer's cash deposit rate perpetuates Commerce's use of a false assumption. If Commerce had perfect information at the time the cash deposit rate was set, unaffiliated resellers would have posted cash deposits at the all others rate, not at their producers' rates. While, ideally, Commerce would determine whether a producer knew of the destination of its sales to resellers during the initial antidumping investigation, Commerce has chosen to apply its resources elsewhere. To require Commerce to adhere to a producer's cash deposit rate in liquidating entries, even after it discovers that the assumption upon which the use of that rate was based is false, would not result in the rate the reseller should have received, i.e., the "proper rate." *See Mittal*, 461 F. Supp. 2d at 1338 ("[I]t would be strange indeed to prefer assessment at the deposit rate when the producer's administrative review will determine what the appropriate assessment rate is based on the producer's testimony relating to the dispositive factor: i.e., whether the producer knew that the merchandise sold to the reseller was destined for the U.S. market."). Under the *Reseller Policy*, Commerce has chosen to apply the rate the reseller would have been assigned had Commerce initially known that the reseller, rather than the producer, was the first party in the commercial chain to know of the destination of the merchandise. Use of the all others rate most closely adheres to Commerce's policy of setting antidumping duty

rates based on the first entity in the commercial chain that has knowledge of the destination of the subject merchandise. Thus, the all others rate is the "proper" rate.

B. The *Reseller Policy* is not Arbitrary or Capricious

Plaintiffs also contend that the *Reseller Policy* is inconsistent with the purpose of the 1984 Act, and is therefore arbitrary, capricious, and otherwise not in accordance with law. As Plaintiffs note, the 1984 Act was designed to limit the number of administrative reviews in which interested parties expressed little or no interest. H.R. Rep. No. 98–1156, at 181 (Conf. Rep.) (stating that the amendment to 19 U.S.C. § 1675 "is designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority"). Congress chose to effect this policy by requiring interested parties to request reviews during the anniversary month of a given antidumping or countervailing duty order. *See id.*; 19 U.S.C. § 1675(a). Plaintiffs contend that Commerce's former practice, automatically assessing duties at a producer's cash deposit rate for unaffiliated resellers that lack a rate of their own, is more effective than the *Reseller Policy* at reducing the number of requests for administrative reviews. Under the *Reseller Policy*, a reseller is more likely to request a review to protect its interests in the event that Commerce determines that its entries are not covered by the request for a review of its producer. Thus, Plaintiffs argue that Commerce cannot derive authority to issue a policy that will effectively increase the number of administrative reviews from an Act designed to reduce the number of reviews.

Commerce agrees that the number of administrative reviews, vis-a-vis the prior policy, may increase. *See Reseller Notice*, 63 Fed. Reg. at 55,363. Compared to pre-1984 Act practice, however, the *Reseller Policy* will still result in a reduction in the number of reviews. The *Reseller Policy* does not undermine Congress's intent to create a voluntary review system to replace the old system of automatic reviews. Indeed, the legislative history of the 1984 Act indicates that Congress intended to allow Commerce to regulate the area of automatic assessments. *See* H.R. Rep. 98–1156, at 181 (1984) (Conf. Rep.) (stating that Commerce "should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including the elimination of suspension of liquidation, and/or the conversion of cash deposits of estimated duties, previously ordered"). Commerce must balance a number of competing policy concerns in fashioning its assessment regulations. *See Reseller Policy*, 68 Fed. Reg. at 23,957 (discussing concerns that resellers may "margin-shop" and stating that incentives are needed to promote accurate margin calculations). Plaintiffs cite Congress's obvious concern with administrative efficiency in the 1984 Act, but

there is nothing in the 1984 Act to suggest that Congress intended to subordinate all other goals, such as the consistent treatment of similarly situated resellers and the prevention of rate manipulation, to the goal of reducing the number of administrative reviews. Consequently, Commerce did not rely on factors Congress did not intend it to consider, or ignore an important aspect of the problem in issuing the *Reseller Policy*.

Plaintiffs claim that the legislative history of the 1984 Act "expressed Congress' intention" to limit Commerce's discretion in creating automatic liquidation regulations. (Pls.' Mot. for J. on the Agency R. 10.) Specifically, Plaintiffs argue that Congress intended to prevent Commerce from creating an automatic assessment regulation that provides for other than the "elimination of suspension of liquidation, and/or the *conversion of cash deposit[s] of estimated duties, previously ordered*." *Id.* (quoting H.R. Rep. No. 98–1156, at 181 (Conf. Rep.)). Even assuming that this language would require Commerce to fashion automatic liquidation regulations that liquidate only at the rate for "previously ordered" cash deposits, this argument fails for the same reason the *Reseller Policy* is not inconsistent with the existing automatic assessment regulations. The cited legislative history applies only to "entries for which review is not requested." *Id.* The legislative history does not contemplate the treatment of entries which were subject to the request for an administrative review, but are not covered by the final results. Commerce has authority to fill gaps in a legislative scheme it is entrusted to administer, even where Congress has not provided a direct statement delegating rulemaking authority. *See Viraj Group v. United States*, 476 F.3d 1349, 1357 (Fed. Cir. 2007) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984)) (discussing implicit delegation of rulemaking authority).

Plaintiffs also argue that the regulation "fails to consider an important aspect of the problem" by increasing resellers' uncertainty as to whether they should request administrative reviews. (Pls.' Mot. for J. on the Agency R. 23–24.) According to Plaintiffs, prior to the *Reseller Policy*, an unaffiliated reseller knew with certainty that its entries would be liquidated at the rate at which they were entered, absent a request for review of that reseller. Under the new system, by contrast, a reseller that has been assumed to be affiliated with a producer does not know whether its entries will be liquidated at the cash deposit rate until after the close of requests for review. If a request for review is made of a producer, the reseller will not know what its liquidation rate will be until Commerce determines whether the producer knew, or should have known, that sales to the reseller were destined for the United States.

The *Reseller Policy* does increase the uncertainty faced by resellers that have not established their status as affiliated or unaffiliated. Commerce acknowledged this outcome in publishing the *Reseller*

Policy, *see Reseller Notice*, 63 Fed. Reg. at 55,364, but determined that the policy was justified despite that added imposition. So long as a reseller continues to rely on Commerce's initial assumption that it is affiliated with a given producer, that reseller will remain vulnerable to Commerce's determination that its assumption is faulty. In such a case, however, a reseller's position is no worse than it would have been had Commerce investigated the reseller in the original investigation. At worst, the *Reseller Policy* increases resellers' uncertainty about whether they will continue to be eligible for the undeserved benefit of claiming a producer's rate to which they are not entitled. Moreover, if a reseller wishes to avoid the uncertainty that Commerce will review the nature of its relationship with a producer, the reseller may request an administrative review of its own entries, and obtain a cash deposit rate specific to it. If, at the end of the anniversary month, it appears that no request has been made for the producer in question, the reseller may withdraw its request. Plaintiffs are correct that the *Reseller Policy* will force many resellers to expend resources to be more vigilant to request a review if they wish to avoid application of the all others rate. Nevertheless, because the *Reseller Policy* provides incentives for resellers to obtain rates specific to themselves, rather than relying on a potentially faulty assumption by Commerce, the uncertainty introduced by the *Reseller Policy* is not arbitrary or capricious.

C. Plaintiffs' Alleged Procedural Errors Were Harmless

Plaintiffs also argue that the *Reseller Policy* is void because it was not passed in accordance with the procedural requirements of the APA governing the publication of regulations. (Pls.' Mot. for J. on the Agency R. 19–20.) The APA requires agencies to comply with the various procedural requirements when issuing new "substantive" or "legislative" rules. *See* 5 U.S.C. § 553 (2000). These procedural requirements generally include a "notice of proposed rule making . . . published in the Federal Register," and an opportunity for "interested persons" to submit "written data, views, or arguments." *Id.* § 553(b)–(c). An agency is required to consider the comments it receives and publish a final rule together with a "statement of . . . basis and purpose" explaining the rationale for its decision. *Id.* § 553(c). The APA provides an exception, however, from this requirement for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," often called "interpretive rules." *Id.* § 553(b).

Although the *Reseller Policy* purports to be a "clarification" of 19 C.F.R. § 353.212, Plaintiffs argue that it is a legislative rule. In determining whether a rule is "legislative" or "interpretative" in character, the Federal Circuit has held that " 'substantive rules' . . . effect a change in existing law or policy or . . . affect individual rights and obligations," while " '[i]nterpretive rules' . . . clarify or explain exist-

ing law or regulations." *Paralyzed Veterans of Am. v. West*, 138 F.3d 1434, 1436 (Fed. Cir. 1998) (quoting *Orengo Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993)) (other citations omitted). According to the Federal Circuit, " '[a]n interpretive statement simply indicates an agency's reading of a statute or a rule. It does not intend to create new rights or duties, but only reminds affected parties of existing duties.' " *Id.* (quoting *Orengo Caraballo*, 11 F.3d at 1436); *see also Am. Frozen Food Inst., Inc. v. United States*, 18 CIT 565, 573, 855 F. Supp. 388, 396 (1994) ("[S]ubstantive or legislative-type rules are those which relate to and change the standards of conduct, and have force of law."). Thus, if a rule "adopts 'a new position inconsistent with' an existing regulation, or effects 'a substantive change in the regulation,' notice and comment are required." *U.S. Telecom Ass'n v. F.C.C.*, 400 F.3d 29, 35 (D.C. Cir. 2005) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)) (emphasis omitted). This does not mean that an interpretative rule must be devoid of all significance; an interpretive rule may " 'suppl[y] crisper and more detailed lines than the authority being interpreted.' " *Orengo Caraballo*, 11 F.3d at 195 (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). Thus, a clarification may prompt a party to behave differently from how it would have acted in the absence of interpretive guidance.

Turning to the policy at hand, the court finds that the *Reseller Policy* is not a new position inconsistent with the existing regulation at 19 C.F.R. § 351.212(c). As discussed above, the *Reseller Policy* applies to entries that are covered by the request for a review, but are not covered by the final results of the review. It fills a gap in the existing regulatory scheme, but does not alter the way in which § 351.212 governs liquidation of entries which were not covered by a request for review. Similarly, because 19 C.F.R. § 351.212(c) does not address the treatment of entries for which a request was made, but are not included in the final results of an administrative review, the *Reseller Policy* does not effect a "substantive change" in the regulation's provisions.

Plaintiffs' argument would require the court to conclude that Commerce cannot alter its established practice of liquidating unaffiliated resellers' entries at their producers' cash deposit rate without complying with APA procedures, even if the former practice was not adopted in a formal policy statement. Although many cases have required a showing that a prior interpretation was formally adopted by an agency before a subsequent change may be subjected to APA requirements, some cases have suggested that a longstanding practice is sufficient. *Compare Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997) (finding that government was not required to provide notice and comment to change its interpretation of a regulation because it never authoritatively adopted a contrary interpretation) *with Alaska Prof'l Hunters Ass'n v. F.A.A.*, 177 F.3d

1030, 1031 (D.C. Cir. 1999) (finding that interpretation followed for almost thirty years, and affirmed in agency adjudication, constituted an authoritative interpretation that could not be altered without notice and comment rulemaking); *see also Shell Offshore Inc. v. Babbitt*, 238 F.3d 622, 630 (5th Cir. 2001) (finding that a change in "long established and consistent practice that substantially affects the regulated industry" was subject to APA notice and comment requirements). The court notes that, although Commerce has not published a prior interpretation of this rule, it has frequently issued instructions to Customs following administrative reviews reflecting its prior practice. *See supra* p. 6 and note 2. Under the *Reseller Policy*, Commerce recognizes that resellers would face a greater obligation to monitor the requests for review of their producers' entries, and to request reviews of themselves if necessary. *See Reseller Notice*, 63 Fed. Reg. at 55,363. The court need not resolve this question, however, because Plaintiffs have failed to argue that they were harmed in any way by Commerce's failure to follow certain aspects of the APA.[8]

Even assuming that Commerce's longstanding practice constitutes an authoritative interpretation of 19 C.F.R. § 351.212, the rule is not automatically invalid. Judicial review under the APA is conducted with "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706; *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) ("It is well settled that principles of harmless error apply to the review of agency proceedings."). Thus, even if Commerce should have labeled the *Reseller Policy* a regulation, rather than a "clarification," if it complied with all material requirements for the publication of a legislative rule, the policy should not be voided.

As noted, under ordinary circumstances the APA requires an agency to provide notice and an opportunity for interested parties to comment on a proposed regulation. It is required to consider submissions and issue a statement of basis and purpose explaining why it settled on the final legislative rule. In this case, Commerce appears to have taken great pains to comply with these requirements. In 1998, Commerce published a notice in the Federal Register identifying the proposed interpretation and requesting comments. *Reseller Notice*, 63 Fed. Reg. at 55,361. It then extended the comment period for the proposed clarification on November 12, 1998, to allow for rebuttal arguments from interested parties. *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 63 Fed. Reg. 63,288, 63,288 (Dep't Commerce Nov. 12, 1998) (rebuttal period for comments on policy concerning assessment of antidumping duties). The time for comment was extended again in 2002, to provide a last opportunity for comment "[g]iven the passage of

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[8] Thus, the court does not adhere to its prior opinion denying Plaintiffs' requested preliminary injunction, *Parkdale Int'l*, ____ F. Supp. 2d at ____, Slip Op. 7–72, to the extent that it concludes that the *Reseller Policy* is an interpretive rule.

time since the publication of the Proposed Clarification." *Antidumping and Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 67 Fed. Reg. 13,599, 13,599 (Dep't Commerce Mar. 25, 2002) (notice of additional comment period on proposed policy). Publication of the final clarification was accompanied by a detailed discussion and response to the comments and rebuttals submitted by the parties, including comments received after the official end of the original comment period. *See* 68 Fed. Reg. at 23,954 ("[W]e have decided to consider and respond to all comments in order to allow for a thorough analysis of this issue.").

Indeed, Plaintiffs do not attempt to argue that Commerce failed to provide notice of the proposed clarification and an opportunity to comment on it. Instead, Plaintiffs note that a regulation should be labeled a "notice of proposed rulemaking" and listed in the semiannual agenda of regulations in the Federal Register. (Pls.' Combined Resp. to Def.'s Mot. to Dismiss and Reply Br. in Supp. Mot. for J. on the Agency R. 15.) As the Court of Appeals for the District of Columbia Circuit recently noted, "the label, however, is not fatal." *U.S. Telecom Ass'n*, 400 F.3d at 40. In that case, the FCC issued a "declaratory ruling" that altered the extent of telephone companies' obligations to provide consumers with portable telephone numbers. *Id.* at 32–33. The D.C. Circuit found that the declaratory ruling effected a substantive change in policy, and therefore should have been treated as a legislative rule under the APA. *Id.* at 38. Nevertheless, the D.C. Circuit refused to invalidate the rule because the FCC had provided notice and opportunity to comment on the proposed ruling, had explained its reasoning in its final decision, and the plaintiffs had not pointed to any harm flowing from procedural deficiencies in the rulemaking process. *Id.* at 40–42. Failure to label the legislative rule in the semiannual agenda did not prejudice the plaintiffs, and therefore was not grounds to void the FCC's policy. *Id.* at 41.

Similarly, in this case, Plaintiffs have not stated that they were prejudiced in any way by the failure to label the "clarification" as a "proposed rule," and the court will not rule that such a failure will automatically void Commerce's policy. Plaintiffs also argue that in publishing a new legislative rule, an agency is required to state whether the rule complies with various statutes and executive orders, including the Regulatory Flexibility Act, 5 U.S.C. § 602, and Executive Order Number 12,866. (Pls.' Combined Resp. to Def.'s Mot. to Dismiss and Reply Br. in Supp. Mot. for J. on the Agency R. 15.) Plaintiffs expressly stated at oral argument that they have suffered no prejudice as a result of Commerce's failure to state whether the *Reseller Policy* complies with these requirements. (*See* Oral Arg. Tr. 7:15–21, May 30, 2007.) Under these circumstances, any error was admittedly harmless, and cannot serve as a basis to void the *Reseller Policy*.

Conclusion

For the reasons stated above, the court finds that the *Reseller Policy* is not arbitrary, capricious, or otherwise inconsistent with law. Consequently, Plaintiffs' Motion for Judgment on the Agency Record is DENIED. Judgment will issue for the Defendant.

PARKDALE INTERNATIONAL, LTD., RIVERVIEW STEEL CO., LTD., and SAMUEL, SON & CO., LTD., Plaintiffs, and RUSSEL METALS EXPORT, Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge

Court No. 06–00289

JUDGMENT

This case having been submitted for decision and the court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss is DENIED. Plaintiffs' Motion for Judgment on the Agency Record is DENIED. Consequently, judgment is entered in favor of Defendant and all remaining motions are DENIED as moot.