Decisions of the United States
Court of International Trade

Slip-Op. 07–137

FLORIDA CITRUS MUTUAL, A. DUDA & SONS (d/b/a CITRUS BELLE), CITRUS WORLD, INC. AND SOUTHERN GARDENS CITRUS PROCESSING CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and FISCHER S/A AGROINDUSTRIA, CITRUS PRODUCTS, INC., and SUCOCITRICO CUTRALE LTDA, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 06–00114

PUBLIC VERSION

[Plaintiffs' Rule 56.2 Motion for Judgment Upon the Agency Record is DENIED, and the Agency's Determination is AFFIRMED.]

Dated: September 13, 2007

Barnes, Richardson & Colburn, (*Matthew T. McGrath* and *Stephen W. Brophy*) for Plaintiffs Florida Citrus Mutual, A. Duda & Sons, Inc. (d/b/a Citrus Belle), Citrus World, Inc., and Southern Gardens Citrus Processing Corporation (d/b/a Southern Gardens).

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael J. Dierberg*); and *Mildred E. Steward*, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

Kalik Lewin, (*Robert G. Kalik* and *Brenna Steinart Lenchak*) for Defendant-Intervenor Fischer S/A Agroindustria.

Vinson & Elkins L.L.P., (*Christopher Dunn* and *Valerie Ellis*) for Defendant-Intervenors Citrus Products Inc., and Sucocitrico Cutrale Ltda.

OPINION

Wallach, Judge:

I
INTRODUCTION

This case comes before the court on a Rule 56.2 Motion for Judgment Upon the Agency Record submitted by Plaintiffs Florida Citrus

Mutual, A. Duda & Sons, Inc. (d/b/a Citrus Belle), Citrus World, Inc., and Southern Gardens Citrus Processing Corporation (d/b/a Southern Gardens) (collectively "Florida Citrus" or "Plaintiffs"). Plaintiffs contest aspects of the determination of the U.S. Department of Commerce ("Commerce" or "the Department") in *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil*, 71 Fed. Reg. 2,183 (January 13, 2006) ("*Final Determination*"), as amended by, *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Orange Juice from Brazil*, 71 Fed. Reg. 8,841 (February 21, 2006) ("*Amended Final Determination*"). Complaint ¶ 1. Specifically, Plaintiffs contend that Commerce erred in calculating U.S. price when it offset Respondents' duty expenses by duty refunds received under the U.S. duty drawback program. Memorandum in Support of Plaintiffs' Motion for Judgment on the Agency Record ("Plaintiffs' Motion") at 2. Plaintiffs withdrew their challenge to Commerce's methodology for calculating Cutrale's per unit duty expense in their reply. Plaintiffs' Reply to Defendant and Defendant-Intervenors' Responses to Plaintiffs' Motion for Judgment on the Agency Record ("Plaintiffs' Reply") at 15. That issue is therefore not addressed in this opinion.

For the reasons set forth herein, Plaintiffs' Motion is DENIED.

II
BACKGROUND

Plaintiffs are domestic producers of orange juice and petitioners in the underlying investigation resulting in the antidumping order issued as *Antidumping Duty Order: Certain Orange Juice from Brazil*, 71 Fed. Reg. 12,183 (March 9, 2006) ("*AD Order*"). Complaint ¶ 2. On December 27, 2004 Plaintiffs filed an antidumping petition with the Department of Commerce and the U.S. International Trade Commission ("ITC") alleging that sales of frozen concentrated orange juice for further manufacture ("FCOJM") and orange juice not-from-concentrate ("NFC") from Brazil were materially injuring the domestic industry. Letter from Matthew T. McGrath, Barnes/Richardson to Donald L. Evans, Sec'y of Commerce, U.S. Dep't of Commerce (December 27, 2004) ("Petition"), P.R. 1, at 1. On February 11, 2005, Commerce launched an investigation into certain orange juice from Brazil. *Notice of Initiation of Antidumping Duty Investigation: Certain Orange Juice From Brazil*, 70 Fed. Reg. 7,233 (February 11, 2005). Commerce selected Citrosuco Paulista S.A. d/b/a Fischer S/A -Agroindustria ("Fischer"), Sucocitrico Cutrale SA ("Cutrale") and Montecitrus Industria e Comercio Limitada[1] ("Montecitrus"), the

[1] Montecitrus withdrew from the investigation before the date of the preliminary determination and is not party to this case. Issues and Decision Memorandum for the Antidump-

three largest Brazilian orange juice exporters, as mandatory respondents in the investigation. Memorandum from Elizabeth Eastwood, et al., Analysts, AD/CVD Operations, U.S. Dep't of Commerce to Louis Apple, Office Dir., AD/CVD Operations, U.S. Dep't of Commerce (March 14, 2005), P.R. 95, at 1–2. On March 7, 2005, Commerce dispensed the standard antidumping duty questionnaires to the companies subject to the investigation. *See* Letter from Shawn Thompson, Program Manager, AD/CVD Operations to Christopher Dunn, Willkie Farr & Gallagher (March 7, 2005), P.R. 86, at 1–2. In accordance with Section C of the questionnaire, respondents are requested to report the "unit amount of any customs duty paid on the subject merchandise." *Id.* at C–20. In response, Fischer and Cutrale reported their U.S. import duties net of the refunds they received under the U.S. drawback program. Decision Memo at 1. In the course of the investigation Fischer and Cutrale argued the refunds they received under the U.S. duty drawback program should be used to offset U.S. duties paid on subject merchandise during the period of investigation ("POI"). *Id.* cmt. 5 at 29.

Fischer and Cutrale claimed and received drawback refunds under 19 U.S.C. § 1313(b) and § 1313(j)(2) respectively. Drawback is defined as "the refund or remission, in whole or in part, of a customs duty, fee or internal revenue tax which was imposed on imported merchandise under Federal law because of its importation . . . ." 19 C.F.R. § 191.2(i). The U.S. duty drawback program permits importers to claim reimbursement of 99 percent of U.S. duties paid on imports when "commercially interchangeable" merchandise is exported from the United States or destroyed within a 3-year period from the date of importation. 19 C.F.R. § 191.32; *see generally* 19 U.S.C. § 1313. The right of the importer to claim duty drawback vests when merchandise subject to U.S. duties enter the country. 19 C.F.R. § 191. As a practical matter, U.S. Customs and Border Protection ("Customs" or "CBP") receives a deposit of the U.S. duties due from the importer which is later adjusted if the importer exercises its drawback rights in a timely fashion. Decision Memo at 29–31; *see also* Defendant-Intervenor's Memorandum in Response to Plaintiffs' Motion for Judgment on the Agency Record ("Cutrale's Response") at 8–9.

There are several types of drawback under the statute. Section 1313(b), claimed by Fischer, allows "substitution" drawback if an importer performs further manufacturing on the merchandise after importation. 19 U.S.C. § 1313(b); Decision Memo at 29; Defendant-Intervenors' Brief in Opposition to Plaintiffs' Motion for Judgment

---

ing Duty Investigation of Certain Orange Juice from Brazil, from Stephen J. Claeys, Deputy Assistant Sec'y for Import Admin., to David M. Spooner, Assistant Sec'y for Import Admin., U.S. Dep't of Commerce (January 6, 2005) ("Decision Memo") at 1. Consequently the final antidumping duty margin for Montecitrus was based on adverse facts available. *Id.*

Upon the Agency Record ("Fischer's Response") at 2. Any merchandise "of the same kind and quality" as the imported merchandise which is used in the manufacturing or production of articles within the specified time-frame will deem the importer eligible for the refund "upon the exportation or destruction" of the substituted merchandise. 19 C.F.R. § 191.22(a). Cutrale claimed drawback under section 1313(j)(2) which provides for "substitution of unused drawback." Cutrale's Response at 5; 19 U.S.C. § 1313(j)(2). Under this provision, merchandise which is unused and exported, or destroyed, before a 3-year period, and is "commercially interchangeable" with the imported merchandise may be substituted for the imported merchandise and 99% of the duties paid will be refunded to the importer. 19 U.S.C. § 1313(j)(2).

Commerce recognized the proposed offset as an issue of first impression for the Department, and whereas in its preliminary determination it disallowed the adjustment, Commerce reconsidered its position in its *Final Determination* and offset U.S. duties paid by both respondents by U.S. duty refunds received. Decision Memo at 29, 31; *see also Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Critical Circumstances Determination: Certain Orange Juice from Brazil*, 70 Fed. Reg. 49,557 (August 24, 2005) ("*Preliminary Determination*"); *Final Determination*, 71 Fed. Reg. at 2,183. In the Department's resulting analysis it calculated constructed export price for Fischer and Cutrale by adjusting U.S. price net of the refunds received pursuant to 19 U.S.C. § 1677a(c)(2)(A). Section 1677a(c)(2)(A) requires that U.S. price shall be reduced by:

> (A) except as provided in paragraph (1)(C), the amount, if any, included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States. . . .

19 U.S.C. § 1677a(c)(2)(A). An antidumping analysis involves a comparison between export price ("EP") or constructed export price ("CEP") in the United States and normal value in the foreign market. 19 C.F.R. § 351.401(a). Generally under U.S. antidumping laws, EP or CEP is the price at which the goods under investigation are sold, or agreed to be sold, for exportation to the United States to the first unaffiliated purchaser in the United States. 19 U.S.C. § 1677a(a)-(b).[2] Commerce adjusts EP or CEP figures in accordance

---

[2] Under the statute the terms "export price" and "constructed export price" are defined as follows:

> (a) Export price. The term "export price" means the price at which the subject mer-

with the statutory provisions set out in 19 U.S.C. § 1677a(c)-(d) to achieve a fair "apples-to-apples" comparison between U.S. price and foreign market value "at a similar point in the chain of commerce." *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995). In respect to granting the offset, Commerce explained in its Issues and Decision Memorandum that "the question before the Department is how to determine the amount of 'United States import duties' to be deducted," and that the statutory language does not "preclude consideration of refunds of U.S. import duties paid on subject merchandise and to encompass the net duty experience of the respondents, rather than the gross amount of duties paid to [Customs]." Decision Memo at 30. Commerce furthermore, concluded that the deduction for net import duties is consistent with the statutory mandate to reduce U.S. price by movement expenses, and that its interpretation provides a fair comparison to normal value because "it results in the calculation of the ex-factory price[3] for CEP based on the respondents' actual U.S. customs duty cost experience for importations of subject merchandise." *Id.* Accordingly, Commerce concluded that the applicable statute did not pose a bar to granting an offset of U.S. duties against drawback refunds. *Id.*

On February 2, 2006 Plaintiffs filed a ministerial error allegation which asserted that Commerce had erred in calculating dumping margins for Cutrale and Fischer in its *Final Determination*. Letter from Matthew T. McGrath, Barnes, Richardson & Colburn to Carlos Gutierrez, Sec'y of Commerce, Import Admin., U.S. Dep't of Commerce (February 2, 2006), P.R. 399, at 1–2. Commerce published its *Amended Final Determination* on February 21, 2006 in which it corrected various ministerial errors and made adjustments to its original calculations, but rejected Plaintiffs' overarching allegations on the basis that the offset at issue represented a chosen methodology, not an error.[4] *Amended Final Determination*, 71 Fed. Reg. 8,841; Memorandum from Elizabeth Eastwood et al., Sr. Analyst, AD/CVD

---

chandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted under subsection (c).

(b) Constructed export price. The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).

19 U.S.C. § 1677a(a)-(b).

[3] Constructed export price is an approximation of ex-factory price. *See, e.g.*, *Thai Pineapple Canning Indus. v. United States*, 23 CIT. 286, 293 n.12 (1999) ("CEP is intended to be an approximation of ex-factory price and it is used in place of export price when affiliated U.S. sellers, rather than the exporters, make the U.S. sales.").

[4] As noted above, Plaintiffs' have subsequently abandoned their claim that Commerce

Operations, U.S. Dep't of Commerce to Irene Darzenta Tzafolias, Acting Dir., AD/CVD Operations, U.S. Dep't of Commerce (February 8, 2006), P.R. at 402, at 1–6. Commerce published the antidumping duty order on Certain Orange Juice from Brazil on March 9, 2006. *AD Order*, 71 Fed. Reg. at 12,183.

On April 6, 2006, Plaintiffs timely commenced a civil action pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II)-(B)(i). Complaint ¶ 1,3. On May 23, 2006 and June 6, 2006 respectively, the court granted Fischer S/A Agroindustria, and Sucocitrico Cutrale Ltda. and Citrus Products, Inc.'s motions to intervene pursuant to 28 U.S.C. § 2631(j) as interested parties as defined by 19 U.S.C. § 1677(9)(A). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c). *Id.* at ¶ 1. Oral argument was held on July 25, 2007.

III
STANDARD OF REVIEW

When reviewing an agency's final determination this court shall pursuant to statute "hold unlawful any determination, finding, or conclusion . . . unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 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, 59 S. Ct. 206, 83 L. Ed. 126 (1938). Notably, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). Where a case concerns the reasonableness of an agency's statutory or regulatory interpretation, the standard of review is guided by the Supreme Court's decision in *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under *Chevron*, if the statute is silent or ambiguous on the question at issue, the role of the court is to engage in an analysis of whether the agency's interpretation is based on a "permissible construction of the statute." *Id.* at 843. "[A]n agency's construction need not be the *only* reasonable interpretation or even the *most* reasonable interpretation. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another." *Koyo Seiko Co. Ltd., v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994) (citing *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978)).

---

erred in applying its chosen methodology to the calculation of Cutrale's per unit net U.S. duty expense. Plaintiffs' Reply at 15.

IV
DISCUSSION

A
Commerce Appropriately Reduced U.S. Price Net of Refunds the Respondents Received Under the U.S. Duty Drawback Program

Plaintiffs contend that Commerce's decision to offset U.S. duties paid during the period of investigation ("POI") by refunds received under the U.S. duty drawback program in the same period is an "impermissible construction of the statute." Plaintiffs' Motion at 11. Plaintiffs argue that Commerce erred when it offset refunds received under the drawback program because such refunds are "unrelated" to the merchandise for which U.S. price was determined and not "incident to bringing the subject merchandise" to the U.S. *Id.*; *see* 19 U.S.C. § 1677a(c)(2)(A). Plaintiffs also contend that "U.S. import duties" cannot be construed to encompass net duties, and that the statute does not contemplate duty drawback refunds as a legitimate offset to U.S. import duties. Plaintiffs' Motion at 17–19. Finally, Plaintiffs assert that the effect of the offset is to "nullify" the antidumping remedy. *Id.* at 21.

1
Commerce's Offset was Reasonable and in Accordance with Law

Plaintiffs argue that U.S. price is distorted by the inclusion of U.S. duty drawback refunds because the refunds in question are received on exports of unrelated merchandise, resulting in a skew in the antidumping analysis. *Id.* at 12–13. Plaintiffs contend that because an importer receives drawback refunds only upon the exportation of merchandise, the effect of the adjustment is to adjust subject merchandise upward by duties received for the exportation of nonsubject merchandise. *Id.* at 16. Plaintiffs claim that the statutory language which reads that U.S. price must be reduced by "United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States" indicates that "United States import duties" refers exclusively to expenses incurred in the importation of the same merchandise and precludes consideration of refunds received on identical, but unrelated merchandise exported during the POI. *Id.* at 13–14 (quoting 19 U.S.C. § 1677a(c)(2)(A)). Plaintiffs draw the conclusion that Commerce therefore erred when it adjusted for U.S. drawback refunds received during the POI, without consideration of whether the payments were "qualified for by sales of subject merchandise made during the POI." *Id.* at 15.

In turn, Plaintiffs argue that the crux of the court's enquiry should be whether the export transactions that triggered the refunds are directly related to the import sales central to the antidumping investigation. *Id.* at 15, 18. Indeed, Plaintiffs contend the refunds can only be seen as "inchoate, potential future revenues which must still be qualified for" and that granting an offset for such exportations "allows foreign exporter to manipulate the calculated dumping through subsequent and completely independent export transactions that qualify for drawback." *Id.* at 18, 13. Plaintiffs urge that "Commerce is granting respondents an adjustment to U.S. import duties absent any evidence of a benefit to the first 'unaffiliated U.S. customer,' " contrary to statute. Plaintiffs' Reply at 10; *see* 19 U.S.C. § 1677a(a)–(b). In addition, Plaintiffs contend that the refunds do not qualify as U.S. import duties because the refunds occurred after the product was sold in the U.S. and are not reflected in the price of the product, due to the fact that drawback refunds are reimbursements of duties paid on "commercially interchangeable" merchandise subsequently exported from the United States. Plaintiffs' Motion at 14–15. Plaintiffs concede that Commerce under the statute is required to make adjustments to EP or CEP for costs attributable to "United States import duties" but argue that because Commerce is required to measure U.S. price and normal value at a "common point in the stream of commerce" this indicates that the expenses for which U.S. price may be adjusted must have occurred *prior* to the sale of the merchandise in the United States. *Id.* at 14 (citing *Nihon Cement Co. Ltd., v. United States*, 17 CIT 400, 416 (1993)). In the alternative, Plaintiffs suggest that if the refund occurred prior to the sale of the merchandise in the U.S., the refund still cannot be related to the sales for which the adjustment was made because it was received on unrelated merchandise. *Id.* at 15.

Defendant contends that considering the drawback refunds as an offset to U.S. price constituted a reasonable interpretation of the term "United States import duties" under the statute and that the Department, absent explicit Congressional intent to the contrary, is entitled to deference in its interpretation of the statute under the *Chevron* doctrine. Defendant's Response to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Response") at 7. Defendant argues that the statute does not preclude Commerce from granting the offset and that drawback refunds are "incident" to the importation of the merchandise within the meaning of the statute "because the net duties were paid as a result of the importation." *Id.* at 8. Because the statute only requires that U.S. duties at issue be incident to the importation of the merchandise, Defendant contends that Plaintiffs' argument that Commerce requires proof that the duties paid affected U.S. price, or the refund saving achieved by the foreign producers is passed on to the consumer, is misplaced. *Id.*

The primary issue in this case is whether Commerce permissibly construed the term "United States Import duties" to include refunds exporters receive under the U.S. duty drawback program. The term "U.S. import duties" is not defined in the statute and is therefore subject to interpretation by the agency. Commerce has wide latitude in interpreting antidumping statutes and is entitled to deference under *Chevron* when the statutory language is ambiguous or unclear. *See Chevron*, 467 U.S. at 843; *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 5 1983).[5] It is furthermore incumbent on the court to "respect legitimate policy choices made by the agency in interpreting and applying the statute." *Lasko Metal Prods. Inc., v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (citing *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992)).

The purpose of making adjustments to U.S. price is to take into account shipping and handling expenses, duties and taxes which may affect U.S. price and normal value differently. *See, e.g.*, *Ta Chen Stainless Pipe, Ltd. v. United States*, 342 F. Supp. 2d 1191, 1194 (CIT 2004). Section 1677a ensures that U.S. price is reduced by the amount of import expenses incurred by an importer so that a comparison to normal value reflects the value of the merchandise in the home country and in the U.S., absent import or export duties, and results in a fair comparison between the two variables. 19 U.S.C. § 1677a. There is no statutory requirement that expenses for which U.S. price is being adjusted be related to the merchandise at issue, but merely a requirement that Commerce reduce U.S. price by movement costs which are *included* in U.S. price. 19 U.S.C. § 1677a(c)(2)(A); Decision Memo at 24. This court has previously articulated that Commerce must attempt to reconstruct both values at a "common point in the chain of commerce" so as to achieve a fair "apples-to-apples" comparison. *Carlisle Tire & Rubber Co. v. United States*, 9 CIT 520, 622 F. Supp. 1071 (1985) (citing *Smith-Corona Group*, 713 F.2d at 1578; *see also Nihon Cement Co.*, 17 CIT at 416. However, this "point in the chain of commerce" is not fixed, nor is it incumbent on Commerce that the expenses for which it adjusts U.S. price occur exclusively prior to entry of the merchandise into the U.S. In fact, although Commerce had not developed a practice concerning the treatment of refunds under the drawback program, Commerce has traditionally deducted transportation expenses, warranty costs and claims paid on the merchandise as "movement expenses" although these expenses are generally incurred after the date of importation of the merchandise. *See, e.g.*, Cutrale's Response at 2–3. Plaintiffs suggest a reading of the statute in which the statutory language referring to the price of the merchandise would not be inclu-

---

[5] Plaintiff conceded during oral argument that the statutory language in question is ambiguous.

sive of the importers' overall business expenses, and where movement costs "incident" to the importation of goods is constructed so narrowly that it may not reflect the actual duty experience of the importer. Plaintiffs' Motion at 14. It is unclear from Plaintiffs' reasoning how such a reading would achieve a fairer or more accurate comparison between U.S. price and normal value. Indeed, Commerce's decision to offset the drawback refunds is not barred by the statute, but is a policy decision which was made within the statutory scheme and is well within the bounds of the agency's discretion in accordance with *Chevron*.

Furthermore, Plaintiffs' contentions that the refunds at most have an "indirect impact on the seller's cost of doing business in general," and that there was no evidence that "the U.S. drawback funds at issue were in any way included in the price of the U.S. transactions at issue," are unfounded. Plaintiffs' Motion at 13, 15; *see also* Plaintiffs' Reply at 3. In the period between the preliminary determination and the final determination, Commerce requested supplemental information from both respondents and conducted a comprehensive review of the records in which it requested that both respondents account for the link pertaining to the duties paid and the subsequent refunds. *See*, *e.g.*, Fischer's Response at 6–7 (quoting Letter from Shawn Thompson, Program Manager AD/CVD Operations, Dep't of Commerce to Robert Kalik, Kalik Lewin (August 10, 2005)), P.R. 276, at 2; *see also* Letter from Dep't of Commerce to Robert Kalik, Kalik Lewin (August 24, 2005), P.R. 310 (request for verification of information). Respondents submitted thorough responses, which were verified by Commerce, and that subsequently led Commerce to the conclusion that the offset was a legitimate component of U.S. price and therefore could be appropriately adjusted for pursuant to 19 U.S.C. § 1677a(c)(2)(A). Letter from Robert Kalik, Kalik Lewin to Carlos Gutierrez, Sec'y of Commerce, Dep't of Commerce (May 18, 2005). Commerce correctly stated in its Issues and Decision Memorandum that section 1677a(c)(2)(A) only requires that the Department "reduce U.S. price by all movement costs which are 'included' in the starting price" but does not bar Commerce from making that adjustments if those are not reflected in the purchaser's net outlay. Decision Memo at 31. In addition, contrary to Plaintiffs' contentions the statute does not require that the adjustments made to U.S. price in the form of refunds must be passed directly on to the consumer. In fact, when defining the term "price adjustment" in its regulations, Commerce commented that "price adjustments are not expenses, either direct or indirect. Instead, price adjustments include such things as discounts and rebates that do not constitute part of the net price actually paid by a customer." *Antidumping Duties; Countervail-*

ing Duties, 62 Fed. Reg. 27,296, 27,344 (May 19, 1997); *see also* 19 C.F.R. § 351.102.[6]

2

Commerce's Decision to Consider Respondents' Refunds Movement Expenses and Calculate Net Duty Liability was Reasonable and in Accordance with Law

Plaintiffs argue that the only permissible adjustments pursuant to 19 U.S.C. 1677a(c)(2)(A) are related to amounts "incident to bringing the subject merchandise" into the United States and that the "duties imposed by law at the time of importation of the subject merchandise are the only import duties that meet these terms." Plaintiffs' Motion at 17. Plaintiffs contend that some adjustments to U.S. import duties may be made in cases where duties were overpaid and later refunded by CBP, but that the adjustment as relating to drawback refunds is contrary to the statute because drawback refunds are contingent on a subsequent action and therefore does not reflect a cost of bringing merchandise into the country. *Id.* Plaintiffs also contend that the time lag between filing for drawback refunds and receipt of the refunds distorts any cost adjustment during the POI because the refunds relate to importations years prior to the costs for which they are adjusted. *Id.* at 18. Indeed, in Plaintiffs' Reply they contend that even if the court finds the adjustment made by Commerce appropriate, that Commerce erred by adjusting U.S. import duties paid on shipments during the POI by refunds received, also during the POI, but relating to importations and sales that occurred prior to the POI. Plaintiffs' Reply at 12.

Defendant argues that Commerce reasonably concluded that "United States import duties" pursuant to statute may take into account refunds received under the duty drawback program because it more accurately reflects the foreign producer's actual duty experience. Defendant's Response at 8. Defendant contends that Plaintiffs fail to demonstrate that ignoring such funds would lead to a more accurate dumping margin. *Id.* Furthermore, Defendant argues that drawback refunds may be considered movement expenses and while the refunds are dependent on the subsequent exportation of goods, the statute does not bar adjustments for contingent duties or expenses. *Id.* Defendant also contends that Commerce's methodology of permitting refunds received during the POI to be offset by the U.S. duties for which the respondents were liable was reasonable given the time lag between the exportations for which the refunds are claimed and the receipt of the refunds. *Id.*

---

[6] The term "price adjustment" is defined as "any change in the price charged for subject merchandise or the foreign like product, such as discounts, rebates and post-sale price adjustments, that are reflected in the purchaser's net outlay." 19 C.F.R. § 351.102(b).

Commerce acted reasonably and in accordance with law by determining the importers true duty liability in calculating CEP, based on the difference between duties for which the importers are liable and refunds to which they are entitled within the POI. Commerce calculated each respondent's per unit U.S. duty liability net of the drawback refunds received, which resulted in the total net U.S. duties for which the respondent was liable during the POI. Cutrale's Response at 8. This offset reflects Fischer and Cutrale's net duty liability and therefore is an adjustment which is consistent with the language of the statute as pertaining to "United States import duties" as movement expenses incident to brining merchandise into the country. In its analysis, Commerce accounted for the fact that companies have three years in which to file an application for duty drawback refunds and that the time lag invariably will cause discrepancies between duties received during the POI and duties for which the offset is being granted. Decision Memo at 30. Commerce however, concluded that while duties paid on imports and refunds granted on exports may not correspond, "it would be unreasonable to conclude . . . that substitution drawback programs do not impact a company's net duty cost." *Id.* In addition, although Commerce had not previously dealt with the issue of drawback refunds as an offset, it has generally calculated the net cost to the importer less movement expenses such as warehousing and freight costs. In this case there is no reason why Commerce should consider the respondents' gross costs as a basis for its calculation of U.S. price when companies engaged in import and export of merchandise factor in refunds to which it is entitled in its estimation of its overall duty liability and in its price calculation. Any other reading of the statute distorts the accuracy of Commerce's calculation of U.S. price more than were such refunds to be ignored. Plaintiffs' main contention is that the adjustment does not result in a fair comparison of CEP to normal value. Plaintiffs, however, fail to explain how an adjustment of gross duties, as opposed to net duties, would result in a fairer comparison. Under Plaintiffs' scenario, the appropriate calculation would not take into account refunds received by the importer and therefore not represent the real duty experience of the foreign companies.

3

The Intent and Purpose of the Statute is not Undermined by the Inclusion of the Refunds in the Adjustment to U.S. price and does not "Nullify" the Antidumping Remedy

Plaintiffs argue that the offset granted by Commerce is contrary to the statutory language referring to "United States import duties," and to the purpose of the statute, which is to make adjustments to U.S. price that result in a fair comparison between normal value and

U.S. price. Plaintiffs' Motion at 11–12 (citing 19 U.S.C. § 1677b(a)[7]; *Ta Chen*, 342 F. Supp. 2d at 1194. Plaintiffs argue that because the statute requires that Commerce make an upward adjustment to U.S. price based on foreign government rebates or failure to collect duties, the statute would have explicitly stated that U.S. drawback refunds could permissibly be offset as U.S. import duties, had that been the case. 19 U.S.C. § 1677a(c)(1)(B); Plaintiffs' Motion at 18–19. In fact, Plaintiffs argue that Congress' failure to explicitly permit an offset of drawback refunds indicates that the concept was rejected. *Id.* at 19. Plaintiffs argue that permitting the offset acts as a "nullification of the antidumping remedy." Plaintiffs' Motion at 21. Plaintiffs furthermore contend that because Congress in 1988 amended 19 U.S.C. § 1677h to make antidumping and countervailing duties ineligible for refunds as "regular customs duties" under the drawback program, the offset would act to create an unintentional overlap between the antidumping remedy and the drawback program and undermine the purposes of both laws. *Id.* at 20. Plaintiffs contend that under this scheme the domestic industry will suffer because respondents will continue to dump their merchandise and offset the pricing by pre- and post-sale exports of nonsubject merchandise. *Id.* at 20–21. Plaintiffs speculate that respondents may import input products at dumped prices, then re-claim the duties it paid on the input by exporting the finished product, receive drawback refunds, and in turn erase the dumping margin on the import sale. *Id.* at 21.

Defendant argues that the statutory inclusion of foreign refunds in the adjustment to U.S. price does not indicate Congressional intent that Commerce ignore refunds received by importers under the duty drawback program. Defendant's Response at 15. Defendant asserts that Plaintiffs' argument is flawed and that Plaintiffs' reasoning pertaining to the calculation of a hypothetical dumping margin is circular. *Id.* Defendant furthermore, concludes that differing purposes of the antidumping and drawback statutes is irrelevant to the offset in question. *Id.*

The antidumping statute is intended to "protect domestic manufacturing against foreign manufacturers who sell at less than fair market value." *Koyo Seiko Co., Ltd. v. United States*, 20 F.3d 1156, 1159 (Fed. Cir. 1994) (citing *Smith-Corona Group*, 713 F.2d at 1575–76). The purpose of the drawback statute is "to relieve domestic processors and fabricators of imported dutiable merchandise, in competing for export markets, of the disadvantages which the duties on the imported merchandise would otherwise impose on them . . . ." S. Rep.

---

[7] 19 U.S.C. § 1677b(a) provides that:

> In determining under this title whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value.

No. 2165 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3576, 3577 (1994), H. Rep. No. 103–826(I), 103rd Cong., 2nd Sess. 60 (1994). There is no indication that the antidumping remedy is affected by adjusting U.S. price by taking into account refunds received under the drawback program. Furthermore, Congressional intent to include foreign refunds in the statute cannot be equated with an interpretation that it was Congressional intent to exclude domestic refunds. *See* 19 U.S.C. § 1677a(c)(1)(B); *but see* 19 U.S.C. § 1677a(c)(2)(A). The rebate or failure to collect duties under 19 U.S.C. § 1677a(c)(1)(B) cannot be considered an adjustment of net or gross duties and it was therefore incumbent on Congress to make specific reference to such rebates. Furthermore, pursuant to 19 U.S.C. § 1677a(c)(2)(A) Commerce is required to make adjustments to U.S. price irrespective of whether any refunds have been granted. The question is therefore not whether the statute specifically authorizes the deduction of net duties, but whether it prohibits the offset. In fact, pursuant to statute, the drawback refunds in question can only be granted if subject merchandise is imported into the country, and contrary to Plaintiffs' characterization, is not purely contingent on the subsequent exportation of the merchandise. *See* Plaintiffs' Motion at 18; *see also* 19 U.S.C. § 1677a(c)(2)(A). As noted by Fischer, a drawback claim is only successful if the importer "provide[s] to Customs proof that the actual importation has taken place and that all duties on the importation were paid." Fischer's Response at 6. Because the importers pay import duties on a sale by sale basis, each drawback claim is tied to an actual U.S. sale and each refund is related to that sale. The fact that a specific refund does not correspond to the same sale for which the adjustment to U.S. price is made is irrelevant under the statutory scheme. Here, the refunds to which the respondents were entitled were clearly included in U.S. price and therefore correctly adjusted for by Commerce.

As an alternative argument, Plaintiffs suggest that if drawback refunds are considered in the calculation of antidumping duty margins they should be considered as an offset to indirect selling expenses as a potential future revenue stream, because such refunds "have nothing directly to do with the price paid for respondents' merchandise in the U.S. market, but result from the indirect expenses of a company doing business in the U.S. market." Plaintiffs' Motion at 21–22 (citing *Federal Mogul Corp. v. United States*, 18 CIT 785, 862 F. Supp. 384 (1994)); *see also* Plaintiffs' Reply at 14. Because the offset in question concerned refunds that were well within the meaning of the statute and Commerce acted within its discretion to interpret the statute, the court need not reach a conclusion pertaining the characterization of the drawback refunds as indirect selling expenses.

V
CONCLUSION

For the foregoing reasons, Commerce's *Final Determination*, 71 Fed. Reg. 2,183 (January 13, 2006), as amended by *Amended Final Determination*, 71 Fed. Reg. 8,841 (February 21, 2006), as set forth above is affirmed.

FLORIDA CITRUS MUTUAL, A. DUDA & SONS (d/b/a CITRUS BELLE), CITRUS WORLD, INC. AND SOUTHERN GARDENS CITRUS PROCESSING CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and FISCHER S/A AGROINDUSTRIA, CITRUS PRODUCTS, INC., and SUCOCITRICO CUTRALE LTDA, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 06–00114

ORDER AND JUDGMENT

This case having come before the court upon Plaintiffs' Motion for Judgment Upon the Agency Record ("Plaintiffs' Motion") submitted by Florida Citrus Mutual, A. Duda & Sons, Inc. (d/b/a Citrus Belle), Citrus World, Inc., and Southern Gardens Citrus Processing Corporation (d/b/a Southern Gardens); the court having reviewed all papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiffs' Motion is DENIED; and it is further

ORDERED ADJUDGED AND DECREED that the decision of the U.S. Department of Commerce ("Commerce") in *Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances: Certain Orange Juice from Brazil*, 71Fed. Reg. 2,183 (January 13, 2006), as amended by *Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Orange Juice from Brazil*, 71 Fed. Reg. 8,841 (February 21, 2006), is hereby AFFIRMED; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Thursday, September 20, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish deleted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before September 20, 2007.

Slip Op. 07–142

UNITED STATES Plaintiff, v. INN FOODS, INC., Defendant.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS
Court No. 01–01106

Held: Inn Foods' entry into the United States of the merchandise subject to this action constituted fraud in violation of 19 U.S.C. § 1592. Judgment is entered for Plaintiff.

Dated: September 25, 2007

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael S. Dufault* and *David S. Silverbrand*) for Bureau of Customs and Border Protection, for the United States, Plaintiff.

Horton, Whiteley & Cooper (*Robert Scott Whiteley*; *Michael Jon Horton*) for Inn Foods, Inc., Defendant.

OPINION

TSOUCALAS, Senior Judge: The Bureau of Customs and Border Protection of the Department of Homeland Security ("Customs" or "Plaintiff")[1] commenced this action against Inn Foods, Inc. ("Inn Foods" or "Defendant") to recover civil penalties and collect customs duties for fraudulent, grossly negligent or negligent violations of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592 (1988).[2] This case is before this Court on remand from the United States Court of Appeals for the Federal Circuit. *See United States v. Inn Foods* ("*Inn Foods CAFC*"), 383 F.3d 1319 (2004).

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1582 (2000). For the reasons explained below, the Courtfinds in favor of Plaintiff, that Inn Foods' entry into the United States of the merchandise subject to this action constituted a fraudulent violation of § 1592.[3]

BACKGROUND

Inn Foods, a California company established in 1976, is a "source of frozen fruits and vegetables for food services, industrial and pri-

---

[1] The Bureau of Customs and Border Protection was renamed United States Customs and Border Protection, effective March 31, 2007. *See Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection*, 72 Fed. Reg. 20,131 (April 23, 2007).

[2] The subject entries span § 1592 (1988) and § 1592 (1982). The relevant language is identical in all material respects.

[3] Because the Court finds that Defendant has committed a fraudulent violation of § 1592, it does not address the merits ofPlaintiff's alternative gross negligence and negligence claims.

vate label markets."[4] Inn Foods and Seaveg, Ltd., a Cayman Islands corporation, were founded by Jack Randle and Fred Haas as subsidiaries of the same parent company. *See* Trial Transcript ("Tr.") vol. 3, 366–71, Feb. 23, 2007. This case involves the importation of frozen produce into the United States by Inn Foods and Seaveg from six Mexican growers, from a period commencing on or about January 22, 1987 to on or about January 19, 1990. *See* Complaint ("Compl.") ¶ 6.

On December 14, 2001, the United States filed a Complaint against Inn Foods "to enforce a claim for civil penalties, and to collect lawful Customs duties and fees of which the United States was deprived as a result of violations of 19 U.S.C. § 1592(a)."[5] Compl. ¶ 2.

This case is before the Court on remand from *Inn Foods CAFC*, 383 F.3d 1319. A three day bench trial was held February 21 through February 23, 2007. Parties submitted post-trial briefs on March 14, 2007. Pursuant to USCIT Rule 52(a), "[i]n all actions tried upon the facts without a jury . . . , the court shall find the facts specially and state separately its conclusions of law thereon." USCIT R. 52(a).

Inn Foods stipulated, regarding the subject entries, that "[t]he prices declared to Customs for the entries that are the subject of the complaint filed in this matter, which are represented in Plaintiff's Exhibit 1, were undervalued and did not reflect the prices actually paid to the six Mexican growers/packers." Joint Stipulation of Undisputed Material Facts ¶ 1. Inn Foods also stipulated that the "dutiable values, and loss of revenue for each of the entries represented in Plaintiff's Exhibits 1 and 2, are correct." *Id.* at ¶ 2; Exhibit ("Ex.") 1 and 2.[6] The lost duties were stipulated to be in the amount of $624,602.55, plus interest.[7] *See id.*

Since Inn Foods has acknowledged "erroneous compliance" in entering the produce described herein into the United States, the central question for this Court is the level of culpability attributable to Inn Foods (i.e., fraud, gross negligence or negligence) and the penalties to be imposed. *See* Def.'s post-trial Br. ("Def.'s Br.") at i.

DISCUSSION

The Inn Foods contracts with the Mexican growers at the heart of this case are easily summarized. Seaveg, the exclusive broker on

---

[4] http://www.innfoods.com/index.cfm/fuseaction/companies.main/

[5] At the United States' request Inn Foods agreed to four successive two-year waivers of the statute of limitations contained in 19 U.S.C. § 1621 beginning on December 15, 1993. *See Inn Foods CAFC*, 383 F.3d at 1321.

[6] Plaintiff's exhibits are numerically designated while Defendant's are alphabetically designated.

[7] This amount is composed of $618,356.85 in lawful duties and $6,245.70 in merchandise processing fees. *See* Compl. ¶ 18.

most of the agreements, established an initial market price for the merchandise. Seventy percent of the initially set sales price would be paid upon Inn Foods receiving the produce in cold storage in the U.S., with the remaining thirty percent paid within sixty days of entry (subject to certain adjustments).[8] *See* Pl.'s post-trial Br. ("Pl.'s Br.") at 4; Ex. 52–58. The final price, therefore, would not be known until the goods were resold by Inn Foods. *See id.*

Customs claims that the produce that is the subject of this action was "entered, introduced or caused to be entered or introduced, into the United States by means of material and false documents, statements, acts and/or omissions, in that Inn Foods knowingly, intentionally, and fraudulently filed or caused to be filed, and/or aided or abetted Seaveg in the filing of entry documents that contained materially false statements or omissions" in violation of 19 U.S.C. §§ 1481, 1484 and 1592.

Compl. ¶ 11. Inn Foods responds that "its good faith, but erroneous compliance in this case was the result of ordinary negligence borne out of inexperience in Customs matters." Def.'s Br. at i.

At trial the Court heard testimony from ten witnesses. Customs produced eight witnesses who testified, among other things, to factual matters concerning: (i) the import operations of Inn Foods and Seaveg, including the nature of the agreements between Inn Foods and Seaveg and the Mexican growers; and (ii) Customs' investigation of Inn Foods and Customs' factual findings resulting from the investigation.[9] Inn Foods produced two witnesses who testified, among other things, to factual matters concerning the import operations of Inn Food and Seaveg, including the nature of the agreements between Inn Foods and Seaveg and the Mexican growers.[10]

At trial Customs introduced documents relating to its investigation (including (i) the contractual agreements between Inn Foods and Seaveg and the Mexican growers, and (ii) the factura invoices upon which Customs duties were paid along with the corresponding

---

[8] The adjustments include: (1) a four percent packer allowance deducted for Inn Foods; (2) a three percent brokerage fee deducted for Seaveg; (3) deductions for all storage and inspection costs; and (4) a deduction if the eventual sales price was lower than the initial Seaveg-set price or a splitting of profits with the packer if the eventual sales price was higher than the initial Seaveg-set price. *See* Ex. 52–58.

[9] The eight Customs witnesses (and titles during the time in question) produced were Cathy Sauceda, import specialist for Customs (Trial Tr. vol. 1, 25–26, Feb. 21, 2007); Lawrence Krautkremer, Customs investigator (*Id.* at 86); Rosa McLean, regulatory auditor for Customs (Trial Tr. vol. 2, 143, Feb. 22, 2007); Carlos Martinez, auditor for Customs (*Id.* at 170); Elizabeth Olivarez, account manager with Inn Foods (*Id.* at 238); Ronald Maker, chief financial officer for VPS Companies (*Id.* at 297); Irma Villarreal, office manager at B&D Brokers (Trial Tr. vol. 3, 333, Feb. 23, 2007); and Fred Haas, co-owner of VPS and Secretary/Treasurer of Inn Foods (*Id.* at 366–67).

[10] The two Inn Foods witnesses (and titles during the time in question) produced were Louise McNary, Inn Foods' accounting supervisor (Trial Tr. vol. 3, 360, Feb. 23, 2007); and Jack Randle, Chairman of the Board of the VPS companies (*Id.* at 394).

Inn Foods invoices) and the Court admitted such documents into evidence.

The Court finds the documentary evidence introduced by Customs coupled with the testimonial evidence obtained by Customs highly probative.

In accordance with USCIT R. 52(a) and having given due consideration to the testimony of all ten witnesses and numerous exhibits presented at trial and admitted by the Court, the Court enters judgment in favor of Plaintiff pursuant to the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

A. The relationship between Inn Foods and Seaveg

1. Inn Foods and Seaveg, Ltd. ("Seaveg") were founded by Jack Randle and Fred Haas as subsidiaries of the same parent company. *See* Trial Tr. vol. 3, 369–71, Feb. 23, 2007. Inn Foods was founded in the 1970's. *See id.* at 368.

2. Seaveg, a Cayman Islands corporation, was formed as a shell company to facilitate sales to customers who did not want to buy from Inn Foods (i.e., by using a different corporate name that would not necessarily be associated with Inn Foods). *See id.* at 371; Compl. ¶ 4.

3. Inn Foods and Seaveg were located and operated in the same building in Watsonville, California. *See* Ex. 46–49. Inn Foods and Seaveg had the same phone number and the same address. *See* Trial Tr. vol. 1, 65, Feb. 21, 2007.

4. Inn Food and Seaveg had the same principals (Mr. Randle and Mr. Haas) and shared employees. *See* Trial Tr. vol. 2, 243–44, 246, Feb. 22, 2007. Mr. Randle and Mr. Haas were the final authority for all business decisions involving both Inn Foods and Seaveg. *See* Trial Tr. vol. 3, 373, Feb. 23, 2007.

5. Ms. Olivarez, who worked for both Inn Foods and Seaveg, considered Seaveg to be a department of Inn Foods. *See* Trial Tr. vol. 2, 243–44, Feb. 22, 2007.

6. The books of accounting for Inn Foods and Seaveg were organized as if they were for one corporate entity. *See id.* at 173, 228.

7. In the Seaveg sales agreement dated March 30, 1989 with one of the Mexican packers (La Esperanza of Miranda, S.P.R.R.L.) "Seaveg Limited/Inn Foods, Inc." is listed as the entity with whom the agreement is made. Ex. 54

8. Checks for merchandise were issued from Inn Foods regardless of whether Seaveg or Inn Foods was the importer of record. *See* Trial Tr. vol. 1, 65, Feb. 21, 2007; Ex. 73.

9. Mr. Randle and Mr. Haas appointed Lou Colon as President of Seaveg. *See* Trial Tr. vol. 3, 374–75, Feb. 23, 2007. Mr. Colon reported directly to them and did not have any final authority in any decisions involving Seaveg. *See id.* at 375.

10. Mr. Colon initiated import orders for the subject entries by calling the particular Mexican grower and placing an order at a particular price. *See* Trial Tr. vol. 2, 284–85, Feb. 22, 2007.

11. Seaveg filed for Chapter 7 bankruptcy and was dissolved on December 1, 1998, in order to avoid the possible payment of Customs duties and penalties. *See id.* at 306; Trial Tr. vol. 3, 384, Feb. 23, 2007; Compl. ¶ 4.

12. Inn Foods was a participant on some level in all the Seaveg actions described herein.

B. The Sales Agreements

13. Inn Foods and Seaveg entered into sales agreements with six Mexican growers to purchase frozen produce for importation into the United States (the "Sales Agreements"). *See* Ex. 52–58; Trial Tr. vol. 2, 201–04, Feb. 22, 2007. These Sales Agreements contained nearly identical language and structure, and each was signed by either Mr. Haas or Mr. Colon. *See id.*

14. Seaveg was the exclusive broker on most of the Sales Agreements and established the initial market price of the frozen produce. *See* Ex. 52–58.

15. Pursuant to the Sales Agreements, seventy percent of the purchase price would be paid upon Inn Foods' and Seaveg's receipt of the produce at designated cold storage locations in the Unites States. *See* Ex. 52–58. The remaining thirty percent would be paid within sixty days of delivery into storage after certain adjustments were made. *See id.*

16. For each order, the Mexican growers issued an invoice (a "factura"), which then was sent to Inn Foods or Seaveg. *See* Trial Tr. vol. 2, 285–86, Feb. 22, 2007. The factura invoices would contain a specific invoice number and product description. *See id.*

17. The factura invoices submitted to Customs by the Mexican packers did not reflect the price ultimately paid by Inn Foods for the merchandise. Joint Stipulation of Undisputed Material Facts ¶ 1.

18. For each order, Mr. Colon's assistant, Ms. Olivares, would bring the factura invoice to Mr. Colon for him to reprice the invoice (i.e., to adjust the value of the produce higher in line with the Mexican grower's remittance amount). *See* Trial Tr. vol. 2, 251–57, 286, Feb. 22, 2007.

19. Ms. Olivares would then enter the adjusted prices into Inn Foods' accounting system along with the original Mexican invoice number and description of the goods from the factura. *See id.* at 286–87.

20. After Ms. Olivares entry function, Inn Foods would create its own invoice for the specific transaction (retaining the original Mexican invoice number and item description). *See id.* at 287–88. Upon this Inn Foods invoice, Inn Foods would type the calculations of the amount that would be the Mexican grower's remittance. *See id.* at 288.

21. Inn Foods would subsequently send an order confirmation to the Mexican grower with the adjusted price. *See id.* at 287–88.

22. For certain subject entries, the Mexican growers would send B&D their invoices prior to the entry of goods and B&D would forward them on to Inn Foods to inform Inn Foods of the shipment and to allow Inn Foods to check the accuracy of the invoice. *See* Trial Tr. vol. 3, 344–47, Feb. 23, 2007.

23. Inn Foods maintained both the undervalued Mexican growers' invoices and the adjusted Inn Food generated invoices in their accounting files. *See* Ex. 3–40.

24. After each of the subject entries was made and Customs duties paid, Inn Foods' Customs broker, B & D Customhouse Brokers, Inc. ("B&D") would send Inn Foods their broker bill containing an itemization of costs incurred for the particular entries, which included a copy of the undervalued Mexican factura invoice and the Customs duty paid on that factura invoice. *See* Trial Tr. vol. 1, 62, Feb. 21, 2007; Trial Tr. vol. 3, 338–41, Feb. 23, 2007; Ex. 73.

25. Each of the B&D broker bills was reviewed by Inn Foods' accounting supervisor, Ms. McNary, or by the person assisting Ms. McNary with that particular Mexican grower account. Trial Tr. vol. 2, 281–84, Feb. 22, 2007; Trial Tr. vol. 3, 342–43, Feb. 23, 2007.

26. B&D stressed to Mr. Colon on several occasions the importance of ensuring that the actual value being presented to Customs for the subject entries was accurate upon entry. *See* Trial Tr. vol. 3, 344, Feb. 23, 2007.

27. Mr. Colon confirmed to both B&D and to Achilles Customs Broker ("Achilles"), another Inn Foods' customs broker, that the val-

ues presented on the factura invoices were accurate. *See* Trial Tr. vol. 1, 116–19, Feb. 21, 2007.[11]

28. Mr. Colon would sometimes call Achilles regarding questions on particular shipments, and refer to information from the factura invoices. *See* Trial Tr. vol. 1, 118–20, Feb. 21, 2007.

29. One of the Mexican growers – Fruveza – sent a letter to Seaveg specifically demonstrating that their typical factura would undervalue the price of the goods they shipped.[12] *See* Trial Tr. vol. 2, 276–79, Feb. 22, 2007. Ex. 69.

30. On April 17, 1989, B&D directed a letter (the "B&D Letter") to Ms. Sauceda on Inn Foods' behalf stating that the value on shipments of frozen vegetables "entered as of April 10, 1989 is strictly for Customs clearance." The letter also added that "[l]iquidation of said entries is to be withheld until the importer of record, SeaVeg, Ltd. / Inn Foods, Inc., is able to complete the audit of their files and arrive at a true transaction value." Trial Tr. vol. 1, 79–80, Feb. 21, 2007; Trial Tr. vol. 3, 354–57, Feb. 23, 2007; Ex. F.

31. Before the B&D letter neither Inn Foods nor Seaveg ever informed B&D that the final price of the frozen produce would not be determined until after their entry into the United States and that the factura invoices did not contain true transaction values. *See* Trial Tr. vol. 3, 356–57, Feb. 23, 2007.

32. Before April 1989 neither Inn Foods nor Seaveg ever informed Customs that the final price of the frozen produce would not be determined until after their entry into the United States and that the factura invoices did not contain true transaction values. *See* Trial Tr. vol. 1, 62–63, Feb. 21, 2007.

33. Neither Inn Foods nor Seaveg filed updated or amended entry forms that contained updated values of the goods imported. *Id.* at 63.

---

[11] The B&D office manager had explained to Mr. Colon in detail in a phone conversation how Customs' duties were determined. Trial Tr. vol. 1, 116, Feb. 21, 2007. In the conversation with the Achilles Customs Broker where Mr. Colon verified that the prices were correct, Mr. Colon told the Broker that he had been able to obtain the produce at a good price. *Id.* at 118–19.

[12] The Fruveza letter (in Spanish with a handwritten translation by Ms. Olivarez) addressed to Mr. Colon and Ms. Olivarez, lists five Conditions of Sale, and concludes with an example of how a typical shipment of broccoli spears would appear on their factura invoice. The example has two lines: (1) the first line is translated by Ms. Olivarez as "We ship 1500 112/21 Broccoli Spears at 0.50/lb" and (2) the second line is translated by Ms. Olivarez as "My invoice will read 1500 112/21 Spears at 0.28/lb." Ex. 69.

C. Customs' Investigation

34. Cathy Sauceda, a Customs import specialist, processed Inn Foods' and Seaveg's import entries of frozen produce beginning in 1988. *See id.* at 36.

35. In July and October 1988, Ms. Sauceda made formal requests (via Customs Form 28 or "CF 28s") to Inn Foods for documentation of payments for the produce contained in each subject entry. *See id.* at 48–49. Inn Foods never responded to Ms. Sauceda's initial request. *See id.*

36. Ms. Sauceda issued a CF 28 follow-up request for information in February 1989. *See id.* In March 1989, after the third CF 28 was sent, Ms. Sauceda received Inn Foods' response. *See id.* at 50.

37. After receiving Inn Foods' response, Ms. Sauceda discovered that the amount paid by Inn Foods to the Mexican sellers for the subject entries was higher than the corresponding entries on the Mexican factura invoices presented to Customs. *See id.* at 50–51.

38. Ms. Sauceda contacted Inn Foods about the price discrepancies she observed. *See id.* at 56–60. During one such call to Inn Foods, Ms. Sauceda asked Ms. McNary if Inn Foods used another invoice in addition to the Mexican factura and was told by Ms. McNary that the factura invoice was the only invoice. *See id.* at 58. The following day Ms. Sauceda informed Mr. Colon of the false invoice she had seen and informed him of the Prior disclosure statute (i.e., 19 C.F.R. § 162.74). *See id.* at 58–59.

39. Ms. Sauceda spoke with Inn Foods' Customs brokers, B&D and Achilles, and confirmed that they both would provide Seaveg and Inn Foods copies of the factura invoices that were being presented to Customs for the shipments they were importing. *See id.* at 61–62.

40. On April 10, 1989, Ms. Sauceda informed Mr. Colon that she had referred the Inn Foods case for investigation. *See id.* at 60.

41. After receiving Ms. Sauceda's referral in May 1989, Customs Special Agent Larry Krautkremer initiated an investigation of Inn Foods in June 1989. *See id.* at 88–89. Ex. 42d at 1248; 42h at 1275.

42. Inn Foods attempted to make a prior disclosure on July 19, 1989. *See* Trial Tr. vol. 1, 83, Feb. 21, 2007. Inn Foods and Seaveg failed to make this disclosure before Ms. Sauceda informed Mr. Colon of her referral of the case for investigation on April 10, 1989. *See id.* at 60–61, 83.

43. During the period of investigation Seaveg declared bankruptcy. *See* Trial Tr. vol. 3, 384–85, Feb. 23, 2007.

44. The domestic value of the subject produce at issue here was $15,319,513.35. Ex. 2.

II. CONCLUSIONS OF LAW

A. Inn Foods is responsible for all liabilities

Inn Foods argues that "[t]here is no evidence in the record of knowledge or intent on [its part] to fraudulently aid and abet Seaveg in the filing of false entries." Def.'s Br. at 12. This contention misrepresents the facts of the case as to the relationship between Inn Foods and Seaveg. It bears noting here that Inn Foods and Seaveg (i) were owned and controlled by the same people; (ii) had the same phone number and operated from the same building; (iii) utilized the same employees and officers, and utilized them in the same roles; (iv) paid invoices, regardless of which of the two was the importer of record, from Inn Foods' accounts; (v) had intermingled accounting ledgers; (vi) would combine their names in certain of their contracts and (vii) appeared to be the same entity for all intents and purposes to both its own employees and to Customs. Seaveg, a shell corporation, was admittedly created solely to assist Inn Foods, an operating company and its sister subsidiary, to better conduct its business by providing Inn Foods the use of a different company name to facilitate sales without raising the ire of certain customers. *See* Trial Tr. vol. 3, 371, Feb. 23, 2007.

This Court's predecessor stated that "[a] corporation may be an *alter ego* or business conduit of another and its separate corporate existence will not be recognized where it is so organized and controlled and its business conducted in such a manner as to make it merely an agency or instrumentality of the other corporation." *Service Afloat, Inc. v. United States*, 68 Cust.Ct. 225, 232, 337 F.Supp. 458, 464 (1972)(citation omitted); *see also VWP of America, Inc. v. United States*, 21 CIT 1109, 1115, 980 F. Supp. 1280, 1287 (1997) (vacated on other grounds)("The Court will look through the form to find the underlying function. If it is apparent that a subsidiary is merely an alter ego of the parent, the Court will not hesitate to disregard the constructive fiction."). In this case Seaveg is an alter ego, or perhaps more appropriately an alias, of its sister subsidiary Inn Foods. Therefore, the fact that Seaveg and Inn Foods were incorporated as two separate entities does not shield Inn Foods from Customs duties and penalties owed on actions it took partly under the name of Seaveg.

In addition, the Court finds that the Inn Foods corporate entity itself was involved in one way or another (as described *supra*) in the transactions that are at issue in this case. For the foregoing reasons, Inn Foods is responsible for all the Customs duties and penalties owed in the actions described herein.

B. Inn Foods' Conduct was Fraudulent

Customs has alleged that Inn Foods violated 19 U.S.C. § 1592, thereby depriving the United States of a portion of lawful duty through fraud, or in the alternative, gross negligence or negligence. *See* Compl. ¶¶ 23, 26, 29. In actions brought for the recovery of any monetary penalty claimed under this provision, all issues are tried *de novo*, including the amount of the penalty. *See* 28 U.S.C. § 2640(a)(6); 19 U.S.C. § 1592(e)(1).

A violation of 19 U.S.C. § 1592(a)(1) occurs when a person or entity makes a material false statement or omission in connection with the entry of merchandise into the United States and that false statement or omission is the result of fraud, gross negligence, or negligence. *See* 19 U.S.C. §1592(a)(1)(1988). The level of culpability has a direct correlation to the maximum amount of penalty that can be assessed. *See* 19 U.S.C. § 1592(c).

> In pertinent part, 19 U.S.C. § 1592(a)(1) states: Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty thereby, no person, by fraud, gross negligence, or negligence–
>
> (A) may enter, introduce, or attempt to enter orintroduce any merchandise into the commerce of the United States by means of–
>
> (i) any document, written or oral statement,or act which is material and false, or
>
> (ii) any omission which is material . . .

19 U.S.C. § 1592(a)(1).

To prove a fraudulent violation of the statute, the Plaintiff must establish, by clear and convincing evidence, that the Defendant (1) deliberately introduced merchandise into the commerce of the United States by means of material false statements, acts or omissions; and (2) with intent to defraud the revenue or otherwise violate the laws of the United States. *See* 19 U.S.C. §§ 1592(a)(1),(e)(2); *United States v. Thorson Chemical Corp.*, 16 CIT 441, 447, 795 F. Supp. 1190, 1195 (1992)(*citing United States v. Daewoo Int'l (America) Corp.*, 12 CIT 889, 896, 696 F. Supp. 1534, 1541 (1988)).

(i) The statements were material and false.

The Customs regulations define a material statement as one which "has the potential to alter the classification, appraisement, or admissibility of merchandise, or the liability for duty." 19 C.F.R. Pt. 171, App. B(A) (1988). The issue of materiality is for the Court to determine. *See United States v. Hitachi Am., Ltd.*, 21 CIT 373, 386, 964 F. Supp. 344, 360 (1997), *aff'd in part and rev'd in part on other grounds*, 172 F.3d 1319 (Fed. Cir. 1999); *see also United States v.*

Rockwell Int'l Corp., 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (stating that "the measurement of the materiality of the false statement is its potential impact upon Customs determination of the correct duty for the imported merchandise").

As this Court has stated in the past, Section 1592 does not define the term "false," and this Court has not specifically addressed the meaning of the term in the statute; therefore, "false" must be defined according to its common and ordinary meaning. *See United States v. Rockwell Automation Inc.*, 30 CIT ___ , ___ , 462 F. Supp. 2d 1243, 1248 (2006), (*citing Perrin v. United States*, 444 U.S. 37, 42 (1979)).

The materiality and falseness of the factura invoices presented to Customs in this case are not really in question since it is not disputed that (i) the duties Customs received for the subject entries were solely based on these factura invoices[13] and (ii) these factura, which contained valuations of the merchandise that were significantly less than the later created Inn Foods invoices for the same goods, resulted in significantly less duties paid than what was lawfully due. *See* Ex. 63; Trial Tr. vol. 1, 55–56, Feb. 21, 2007. These false invoices, relied on by Customs, prevented Customs from making the proper determination of the value of the merchandise and, therefore, of the lawful duties owed.

The Court finds that Customs has demonstrated the materiality and falsity necessary for fraud through the documentary evidence introduced (including the factura invoices and the corresponding and subsequently created Inn Foods invoices), in combination with the testimonial evidence that explains the accounting and business procedures Inn Foods had in place in support of their double-invoicing system.

(ii) The intent to defraud.

To prove a fraudulent violation of § 1592, the United States must establish by clear and convincing evidence that the importer " 'knowingly' entered goods by means of a material false statement [or omission]." *United States v. Hitachi Am., Ltd.*, 172 F.3d 1319, 1326 (Fed. Cir. 1999); 19 U.S.C. § 1592(a). That is to say, Customs must demonstrate that "the material false statement or act in connection with the transaction was committed (or omitted) knowingly, i.e., was done voluntarily and intentionally." *United States v. Obron Atl. Corp.*, 18 CIT 771, 778, 862 F. Supp 378, 384 (1994) (*citing* 19 C.F.R. Pt. 171, App. B); *United States v. Jac Natori Co., Ltd.*, 17 CIT 348, 352, 821 F. Supp 1514, 1519 (1993). "Intent is a factual determination particularly within the province of the trier of fact." *Allen Organ Co. v. Kimball Int'l, Inc.*, 839 F.2d 1556, 1567 (Fed. Cir. 1988).

---

[13] Which duties were assessed on an 17.5% *ad valorem* duty under the Harmonized Tariff Schedules of the United States and an *ad valorem* merchandise processing fee of .17%. *See* Trial Tr. vol. 3, 343–44, Feb. 23, 2007; Compl. ¶ 17.

It is undisputed that for each shipment of merchandise Inn Foods received two, and sometimes three, copies of the undervalued facturas presented to Customs by the Mexican growers: first, Inn Foods received a copy of the false and undervalued factura invoice directly from the applicable Mexican grower (*see* Trial Tr. vol. 2, 285–86, Feb. 22, 2007); second, B&D would, when available, also send a copy of the factura invoices to alert Inn Foods of the shipment before it crossed the U.S. border (*see* Trial Tr. vol. 3, 344–48, Feb. 23, 2007); lastly, B&D would forward the factura invoices along with their Broker's bill (*see* Trial Tr. vol. 2, 284, Feb. 22, 2007). Inn Foods knew that these false invoices contained, in every instance, undervalued prices for the merchandise, because the Inn Foods' "re-pricing" process entailed creating a subsequent Inn Foods invoice, combining identification information from the factura invoice with the original higher price negotiated for the purchase. There is therefore no question that Inn Foods reviewed both invoices and knew the factura invoices were not matching up with the corresponding Inn Foods invoices.[14]

Furthermore, B&D stressed to Inn Foods several times the importance of ensuring that Customs received the actual value for *ad valorem* merchandise (i.e., all the frozen produce subject herein) and the B&D office manager had explained to Mr. Colon in detail the process through which Customs' duties were determined. *See* Trial Tr. vol. 3, 344, Feb. 23, 2007. Inn Foods' contention in its post-trial brief that as "[a] novice importer, [it] relied on the Mexican exporters and their customs brokers to create the documents used to make declarations and to enter merchandise," rings untrue. Def.'s Br. at 10. Despite Inn Foods' claim of "inexperience in Customs matters," at the time of this action Inn Foods had already been in business for years and the shipments in question were not a one-time occurrence, but spanned approximately three years. Trial Tr. vol. 3, 368, Feb. 23, 2007; Ex. 1. In fact, far from the babe in the woods, it is clear from the totality of the evidence that Inn Foods' intent was to conceal the undervaluation scheme both from Customs and from Inn Foods' own Brokers and to mislead both as to the true value of the goods they were importing.[15]

In summation, as the government has demonstrated, the Defendant's undervaluation scheme is a simple one. Inn Foods and Seaveg entered into sales agreements with Mexican growers to purchase fro-

---

[14] For example, the Broker bill was checked for accuracy by Inn Foods' controller, Ms. McNary (*see* Trial Tr. vol. 2, 316–19, Feb. 22, 2007); and Mr. Colon would sometimes call the Brokers regarding questions on the factura invoices on particular shipments (*see* Trial Tr. vol. 1, 118–20, Feb. 21, 2007).

[15] For example, although Inn Foods now acknowledges the double-invoicing system in place at the time, during the Customs follow-up call from Ms. Sauceda, Ms. McNary told Ms. Sauceda, with what must have been full knowledge of the falsity of the statement, that the factura invoice was the only invoice. Trial Tr. vol. 1, 58–59, Feb. 21, 2007.

zen produce for importation into the United States. *See* Ex. 52–58. Mr. Colon would secure the initial market price for each subject entry from the Mexican growers over the telephone. *See* Trial Tr. vol. 2, 284–85, Feb. 22, 2007. Once this initial, actual, price was established, the Mexican packer would issue an undervalued factura invoice for the purposes of paying less Customs duties. *See* Trial Tr. vol. 2, 285–86, Feb. 22, 2007. These undervalued invoices were later sent to Inn Foods and Inn Foods would create a second, accurately priced, invoice based on product information in the factura. One invoice served to bring the produce into the United States at a reduced cost and thus defrauded Customs of duties, the second to keep accurate accounting records.

It is impossible to escape the conclusion that there was, at the very least, an implicit yet very clear understanding between Inn Foods and the Mexican growers to undervalue the produce that Inn Foods and Seaveg were importing. Therefore, the Court finds that Inn Foods' entry of the subject merchandise into the Unites States by means of false and undervalued invoices was voluntary and intentional. Customs has thus satisfied this element of fraud by proving by clear and convincing evidence that the material false statements presented in the factura invoices were made with the intention of undervaluing the subject entries and thus defrauding Customs of lawfully owed duties.

The Court finds that Inn Foods fraudulently introduced merchandise into the commerce of the United States by means of material and false documents in violation of 19 U.S.C. § 1592(a)(1).

C. Additional points raised by Inn Foods

(i) The lack of profit motive

Inn Foods argues that because there was agreement between it and the Mexican growers "that all duties were ultimately the responsibility of the Mexican producers," Inn Foods "had nothing to gain by this undervaluation of merchandise and the resulting underpayment of duties." Def.'s Br. at 1, 8. Inn Foods concedes that the prices it paid could increase in direct proportion to any increase in duty payments borne by the growers, but dismisses this as a motivation because it claims the resulting impact of an additional $624,000 in duties would have been "statistically negligible, representing less than 3 percent of its gross profits during the relevant years." *Id.* at 8–9. Ignoring the fact that it is not obvious to this Court that three percent of gross profits should be considered a statistically negligible sum, this line of argument is hardly convincing. There are many reasons, including those brought out at trial by the United States, in addition to seeking to avoid an increase in prices, for why Inn Foods

might have chosen to participate in this undervaluation scheme.[16] *See* Trial Tr. vol. 2, 225–27; Feb. 22, 2007.

(ii) The legal duty to state that the entry was provisional

Inn Foods argues that there was no evidence adduced at trial that indicates that "Inn Foods knew or understood the legal effect of post-importation price adjustments to the price actually paid or payable to the grower/packers based on the U.S. resale prices." Def.'s Br. at 8. This argument needlessly confuses the crux of the wrongdoing, which is that Inn Foods knew that (1) the prices on the subject entries were significantly undervalued, (2) these undervaluations caused a commensurate reduction in lawful Customs duties owed and (3) there was no plan or intention to correct these undervaluations. Before the April 17, 1989 B&D letter, Inn Foods had never informed their Broker, B&D, of the provisional nature of their sales agreements with the Mexican growers (*see* Trial Tr. vol. 3, 351–53, Feb. 23, 2007), or that the prices of the entry documents were in any way provisional.[17] *See* Trial Tr. vol. 3, 356–57, Feb. 23, 2007.

Therefore, while Inn Foods correctly states that "there is nothing sinister, per se, about provisional pricing agreements," it is not the provisional pricing agreement here that is at issue, but the underlying undervaluation scheme in which the provisional pricing agreements only play a part. Def.'s Br. at 9.

The provisional pricing agreements at the heart of these transactions are used by Inn Foods as an *ex post facto* rationalization to conceal a relatively straight forward undervaluation scheme. It is telling that Inn Foods has not put forward any evidence that would show that before the Customs investigation they ever planned to address the factura undervaluations. It is also telling that Inn Foods has not put forward any evidence as to how the factura values were calculated, in order to show some connection, for instance, between that initial value and the "prices actually paid for the merchandise after certain post-importation price adjustments were made based on the final U.S. selling prices."[18] Def.'s Br. at 6. As it stands, it is clear that the factura values were determined by roughly halving

---

[16] Moreover, as there is no requirement under 19 U.S.C. § 1592(a)(1) that there be a monetary gain, Inn Foods' statistically negligible sum argument is without merit.

[17] Inn Foods argues in its post-trial brief that had it been "cognizant of an undervaluation scheme . . . it likely would not have prepared numerous written agreements with the Mexican growers evidencing the provisional nature of the prices." Def.'s Br. at 8. The fact that contracts were entered into between Inn Foods and Seaveg and the Mexican growers cannot be read as any evidence of the absence of such an undervaluation scheme, especially considering that the provisional nature of these contracts was kept a secret for so long.

[18] Inn Foods attached a letter to entries submitted on or around April 17, 1989, to alert Customs at entry that the transaction values were provisional. This action was only taken by Inn Foods after they had been informed that Customs had referred their case for investigation.

the true value of the merchandise and that Inn Foods knowingly deprived Customs of duties for years without any intention to alert Customs that it was owed more in such duties or to rectify the undervaluation. As stated earlier, Inn Foods only excuse, that of ignorance and naivete, is belied by the facts.

(iii) Statute of limitations

There is no merit to Inn Foods' revised statute of limitations argument raised in its post-trial brief.

All other arguments raised by Inn Foods are unpersuasive.

D. Assessment of Penalties

Customs seeks $624,602.55 for unpaid duties and merchandise processing fees and civil penalties in the amount of $15,319,513.35 if Inn Foods' conduct is found to be fraudulent; $2,543,800.64 if Inn Foods is found grossly negligent; or $1,271,900.32 if Inn Foods is found negligent; in each case plus interest, costs, and fees.[19] *See* Compl. ¶¶ 24, 27, 30.

For violations of fraud under 19 U.S.C. § 1592(a), the maximum penalty is the domestic value of the merchandise (*see* 19 U.S.C. § 1592(c)(1); *see also* 19 C.F.R. § 162.73(a)(1)), in this case $15,319,513.35. *See supra.* The plain language of the statute only sets maximum penalties and does not establish minimum penalties, nor does it require the Court to begin with the maximum and reduce that amount in light of mitigating factors. *See United States v. Modes, Inc.*, 17 CIT 627, 635, 826 F. Supp. 504, 512 (1993). The Court "possesses the discretion to determine a penalty within the parameters set by the statute." *Modes*, 17 CIT at 636, 826 F. Supp. at 512 (citations omitted).

In *United States v. Complex Machine Works Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1315 (1999)(citation omitted), this Court identified a number of factors to be considered when assessing a penalty:

1. The defendant's good faith effort to comply with the statute,
2. The defendant's degree of culpability,
3. The defendant's history of previous violations,
4. The nature of the public interest in ensuring compliance with the regulations involved,
5. The nature and circumstances of the violation at issue,

---

[19] Pre-judgment interest should be computed from the time of the product liquidation.

6. The gravity of the violation,
7. The defendant's ability to pay,
8. The appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business,
9. That the penalty not otherwise be shocking to the conscience of the Court,
10. The economic benefit gained by the defendant through the violation,
11. The degree of harm to the public,
12. The value of vindicating the agency authority,
13. Whether the party sought to be protected by the statute had been adequately compensated for the harm, and
14. Such other matters as justice may require.

As this Court has noted, and as the United States has pointed out in their post-trial brief, "§1592 is driven primarily by considerations of deterrence rather than compensation." *Complex Machine Works Co.*, 23 CIT at 950, 83 F. Supp. 2d at 1315. Accordingly, the Court takes into account that the conduct in question occurred many years ago and appreciates Inn Foods' argument, uncontradicted by the United States, that it has since the period in question corrected its past practices, and has "unfailingly reported the proper Customs value on its imported merchandise . . . without further incident." Def.'s Br. at 27.

After careful consideration of the *Complex Machine Works* factors, the evidence and the testimony presented at trial, the Court has determined that the penalty imposed upon Inn Foods must be a substantial one, but imposing the maximum penalty under fraud for the sake of deterring Inn Foods from future transgressions would not appear to be necessary. Based on the foregoing analysis, the Court determines that seven million, five hundred thousand dollars ($7,500,000.00) represents a just penalty in this case.

CONCLUSION

In accordance with the foregoing the Court finds that Customs has shown by clear and convincing evidence that Inn Foods' entry into the United States of the merchandise subject to this action constituted fraud in violation of 19 U.S.C. § 1592.

The Court orders that Inn Foods pay $624,602.55 for unpaid duties plus pre-judgment and post-judgment interest, and civil penalties in the amount of $7,500,000.00, plus costs and fees and interest from the date of judgment. Judgment shall enter accordingly.

UNITED STATES, Plaintiff, v. INN FOODS, INC., Defendant.

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS
Court No. 01–01106

JUDGMENT

This case having been heard at trial *de novo* and submitted for decision, and the Court, after due deliberation, having rendered a decision therein; now, in accordance with said decision, it is hereby

ORDERED, ADJUDGED, AND DECREED that a judgment be, and hereby is, entered in favor of Plaintiff, United States, and against Defendant, Inn Foods, Inc. ("Inn Foods") in accordance with the Findings of Fact and Conclusions of Law issued contemporaneously herewith; and it is further

ORDERED, ADJUDGED, AND DECREED that Plaintiff shall recover unpaid duties from Inn Foods in the amount of $624,602.55 plus pre-judgment and post-judgment interest; and it is further

ORDERED, ADJUDGED, AND DECREED that Plaintiff shall recover against Inn Foods an assessed civil penalty in the amount of $7,500,000.00, plus costs and fees and interest from the date of judgment, for fraud in violation of 19 U.S.C. § 1592.

Slip Op 07–143

TECHSNABEXPORT, Plaintiff, v. UNITED STATES, Defendant, and USEC Inc. and United States Enrichment Corporation, Defendant-Intervenors.

BEFORE: Pogue, Judge
Cons. Court No. 06–00228

[Commerce's determination **remanded**]

Decided: September 26, 2007

Pillsbury Winthrop Shaw Pittman LLP (Nancy A. Fischer, Joshua D.Fitzhugh, Christine J. Sohar, Kemba T. Eneas, and Stephan E. Becker) for Plaintiff Ad Hoc Utilities Group.

White & Case, LLP (Adams Lee, Carolyn B. Lamm, Joanna Ritcey-Donohue, Kristina Zissis) for Plaintiff Techsnabexport.

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 (*Stephen Tosini*, Trial Attorney) for Defendant.

Steptoe & Johnson LLP (Eric C. Emerson, Alexandra E. Baj, Evangeline D. Keenan, Richard O. Cunningham, Sohini Chatterjee, Thomas J. Trendl, Wentong Zheng) for Defendant-Intervenors.

OPINION

Pogue, Judge: These consolidated actions, which are part of a long line of uranium cases, arise from a decision made by the Department of Commerce ("Commerce" or "the government") to include sales of uranium enrichment services in an antidumping investigation. Plaintiffs Techsnabexport ("Tenex") and Ad Hoc Utilities Group ("AHUG")[1] (collectively "Plaintiffs") challenge the final results (or "determination") in the second five-year sunset review ("the Review") of the suspended antidumping duty investigation of uranium from Russia. *Uranium from the Russian Federation*, 71 Fed. Reg. 32,517 (Dep't Commerce June 6, 2006)(final results of five-year sunset review of suspended antidumping duty investigation) ("*Final Results*") and the accompanying Issues and Decision Memorandum ("*Decision Mem.*").

Plaintiffs claim that Commerce's inclusion of and reliance upon service transactions for uranium enrichment renders unlawful its findings and conclusions with regard to the products subject to investigation, or scope of the proceeding, the volume of subject imports, the likelihood of dumping, and the magnitude of the margin likely to prevail.

---

[1] AHUG is the Plaintiff in Case no. 06–00229, which has been consolidated with the captioned matter.

Pursuant to USCIT R. 56.2, Plaintiffs move for judgment on the agency record. The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c).[2] For the reasons stated below, Commerce's determination is remanded.

BACKGROUND

Tenex is the Russian executive agent responsible for the export of uranium and uranium enrichment services from Russia.[3] AHUG is a group of utility companies that use enriched uranium.[4] The Plaintiffs participated in Commerce's sunset review proceedings, the results of which are challenged here. Defendant-Intervenor, USEC, Inc., and its wholly-owned subsidiary, United States Enrichment Company (collectively, "USEC") is a domestic provider of enrichment services. USEC also participated in Commerce's sunset review.

Commerce conducts a five-year sunset review of a suspended antidumping duty investigation pursuant to Sections 751 and 752 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675.[5]

---

[2] All references to the United States Code are to the 2000 edition.

[3] Enriched uranium fuel rods are used to generate nuclear power. The enrichment of uranium is a process by which the concentration of U–235, an isotope of uranium, is increased from its naturally occurring concentration. Depending on the increase in the concentration of U–235, the resulting uranium may be considered low-enriched uranium ("LEU") or high-enriched uranium ("HEU"). LEU is appropriate for the production of nuclear energy. HEU is weapons-grade uranium, appropriate for nuclear weapons. For a more complete explanation of the generation of nuclear energy, *see USEC Inc. v. United States*, 27 CIT 489, 491, 259 F. Supp. 2d 1310, 314–16 (2003)("*USEC I*"). *See also, USEC Inc. v. United States*, 27 CIT 1419, 281 F. Supp. 2d 1334 (2003) (*USEC II*), *aff'd in part Eurodif S.A. v. United States*, 411 F.3d 1355(Fed. Cir. 2005)("*Eurodif I*").

[4] In the Review, Commerce treated AHUG as an "industrial user" of subject merchandise, pursuant to 19 C.F.R. § 351.312, and did not recognize AHUG's standing as an "interested party." *Cf. USEC I*, 27 CIT 489, 259 F. Supp. 2d 1310 (2003)(granting interested party standing to AHUG members as possible "toll"producers of subject merchandise), *aff'd in part by Eurodif I*, 411 F.3d 1355 (upholding as reasonable Commerce's determination that domestic utilities were not foreign producers of uranium for purposes of determining industry support of the petition). Commerce's denial of "interested party" status did not reflect any consideration of the nature of the transactions at issue here. Accordingly, Commerce's determination did not reflect "consider[ation of] an important aspect of the problem," *Motor Vehicles Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983), and cannot be sustained. On remand, Commerce will have the opportunity to reconsider its position on this issue. Here, the government has moved to dismiss Case No. 06–229, claiming that AHUG lacks standing to bring its complaint. However, the court need not reach the standing issue as no party challenges Tenex's standing to challenge Commerce's determination.

[5] In relevant part, 19 U.S.C. § 1675(c) provides as follows: 5 years after the date of publication of-

(A) . . . a notice of suspension of an investigation, described in subsection (a)(1) . . . or
(C) a determination under this section to continue an order or suspension agreement,

the administering authority . . . shall conduct a review to determine, in accordance with section 1675a of this title, whether . . . termination of the investigation suspended under section 1671c or 1673c of this title would be likely to lead to continuation or recurrence of dumping. . . .

19 U.S.C. § 1675(c).

The original suspended antidumpting duty investigation reviewed here was initiated in December of 1991, just before the dissolution of the Soviet Union.[6] Commerce continued the investigation against the Soviet republics individually, as newly independent states, and, using best information available data, came to preliminary affirmative dumping determinations with regard to uranium products and services from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan. *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 23,380 (Dep't Commerce June 3, 1992)(preliminary determinations of sales at less than fair value). However, before Commerce issued final results in that original investigation, the investigation was suspended, when the government entered into an agreement restricting the volume of imports to the United States. *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 49,220 (Dep't Commerce Oct. 30, 1992)(suspension of investigations and amendment of preliminary determinations)("*Suspension Agreement*").[7] As noted above, the action at issue here is a challenge

---

Further, 19 U.S.C. § 1675(d) provides, in relevant part, that:

> [T]he administering authority shall . . . terminate a suspended investigation, unless—
> (A) the administering authority makes a determination that dumping . . . would be likely to continue or recur. . . .

19 U.S.C. § 1675(d)(2).

Section 1675a in turn provides, in relevant part that:

> (1) In general
> In a review conducted under section 1675(c) of this title, the administering authority shall determine whether . . . termination of a suspended investigation . . . would be likely to lead to continuation or recurrence of sales of the subject merchandise at less than fair value. The administering authority shall consider—
>
> (A) the weighted average dumping margins determined in the investigation and subsequent reviews, and
>
> (B) the volume of imports of the subject merchandise for the period before and the period after the issuance of the antidumping duty order or acceptance of the suspension agreement.
>
> (2) Consideration of other factors
>
> If good cause is shown, the administering authority shall also consider such other price, cost, market, or economic factors as it deems relevant.
>
> (3) Magnitude of the margin of dumping
>
> The administering authority shall provide to the Commission the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the suspended investigation is terminated.

19 U.S.C. § 1675a(c).

[6] The preliminary determination states the date of dissolution of the Soviet Union as December 25, 1991. *Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine, and Uzbekistan*, 57 Fed. Reg. 23,380 (Dep't Commerce June 3,1992)(preliminary determinations of sales at less than fair value).

[7] Under the Suspension Agreement, uranium products and services are allowed to enter

to the results of the second five-year sunset review of the suspended investigation.

In this matter, both Tenex and AHUG challenge Commerce's scope determination in the Review and its finding of a likelihood of continued or recurring dumping if the Suspension Agreement is terminated, together with other subsidiary findings upon which Commerce's decision is based. Specifically, Plaintiffs challenge Commerce's inclusion of low-enriched uranium (LEU) obtained pursuant to uranium enrichment services contracts both in the scope of the Review and in the "likelihood" determination.[8] In addition, Tenex alleges that if Commerce's decision is interpreted as having made the statutorily required finding of a likelihood of dumping if the investigation were terminated, in accordance with 19 U.S.C. §§ 1675(c) and 1675a(c), then such a determination was neither in accordance with law nor supported by substantial evidence because, *inter alia*, the determination failed to exclude SWU transactions.

Lastly, Tenex challenges as unsupported by substantial evidence Commerce's reliance upon the 115.82% margin set in Commerce's original preliminary determination, and adopted in the Final Results here as the margin likely to prevail in and after the Review. This last challenge, according to Tenex, is based on the alleged "ex-

---

the U.S. when such products and services are bought and sold by USEC, pursuant to the Agreement between the Government of the United States of America and the Government of the Russian Federation Concerning the Disposition of Highly Enriched Uranium Extracted from Nuclear Weapons ("HEU Agreement") and the USEC Privatization Act, 42 U.S.C. § 2297h.

[8] Enrichment services contracts have been examined in *USEC I, USEC II* and *Eurodif I reaff'd* 423 F.3d 1275 (Fed. Cir. 2005)("*Eurodif II*"), *aff'd per curiam* 217 F. App'x 963 (Fed. Cir. 2007). Typically, these contracts are structured so that a utility contracts for the enrichment of a certain amount of converted uranium (called "feedstock"), which it supplies. The enricher provides enriched uranium to the utility, in exchange for a comparable amount of feedstock and payment for the amount of separative work units ("SWU") necessary to enrich the feedstock. Although the enriched uranium is typically not the same uranium as the feed uranium provided for a given transaction, it is contractually treated as such. These contracts or transactions are referred to as "SWU contracts" or "SWU transactions."

Commerce defined "SWU transactions" in *Low Enriched Uranium from Fance, final Results of Redetermination Pursuant to Court Remand, Eurodif S.A. v. United States*, (Dep't of Commerce, June 19, 2006) ("Also excluded from the scope of this order is LEU produced and imported pursuant to a separative work unit ("SWU") transaction. For purposes of this exclusion, a SWU transaction means a transaction in which the parties only contract for the provision of enrichment processing, and the purchasing party is responsible for the provision of natural uranium feedstock to the enricher. At no time, before, during or after enrichment, does the enricher own or hold title to the LEU product delivered under the contract. In order to qualify for the exclusion, the SWU transaction must be performed in accordance with the relevant terms of a written contract for the provision of SWU. Entries pursuant to such SWU transactions must be accompanied by the certification of the end user and enricher." *Available at* http://ia.ita.doc.gov/remands/06–75.pdf)

Pursuant to the HEU Agreement, USEC is the U.S. Executive Agent authorized to sell SWU obtained from Russia on the U.S. market. (USEC also has enrichment facilities of its own in the United States). The SWU Russia sells, through its executive agent, Tenex, is inherent in LEU which Tenex prepared by downblending high enriched, weapons-grade uranium: HEU.

traordinary circumstances" that have occurred since the commencement of the investigation and preliminary determination, such as the decline of the Soviet Union and Russia's emerging status as a market economy country,[9] exacerbated by the fact that in the preliminary determination, Commerce relied upon the "best information available" in making its determination. Tenex argues that Commerce, in conducting its sunset review, should not rely on USSR information but rather should look to Russia-specific information and take into account the changed economy of the country as well. In addition, Tenex challenges the connection between Commerce's finding that prices were likely to be depressed if the Suspension Agreement was lifted and its conclusion that uranium would be sold at less than fair value, noting that there is no necessary, logical connection between prices which may be low and prices which are less than normal value and therefore constitute dumping.

STANDARD OF REVIEW

The court will uphold Commerce's determination unless it is unsupported by substantial evidence on the record, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

It is settled law that LEU processed pursuant to uranium enrichment services transactions is not a "good" or "merchandise" subject to the antidumping duty statute and that such transactions do not constitute a "sale" subject to those statutory provisions. *See* 19 U.S.C. § 1673;[10] *see also, Eurodif I*, 411 F.3d 1355; *Eurodif II*, 423 F.3d 1275. The Federal Circuit's holdings were based primarily on the utilities' retention, in a SWU transaction, of ownership of the uranium. *Eurodif I*, 411 F.3d at 1362 (explaining that "the utility retains title to the quantity of unenriched uranium that is [sic] supplies to the enricher. The utility's title to that uranium is only extinguished upon the receipt of title in the LEU for which it contracted."). The utility thus maintains title to its feed uranium until it receives the enriched uranium, at which time it pays for the SWU necessary to enrich the relevant amount of feed uranium into the LEU it receives. As a result, there is no "transfer of ownership,"

---

[9] Plaintiffs noted that Commerce recognized Russia as a market economy on April 1, 2002. Mem. from Albert Hsu, Senior Economist, to Faryar Shirzad, Assistant Secretary, Import Administration Re: *Inquiry into the Status of the Russian Federation as a Non-Market Economy Country Under the U.S. Antidumping Law* (June 6, 2002) available at http://ia.ita.doc.gov/download/russia-nme-status/russia-nme-decision-final.htm.

[10] That section reads in relevant part: "[i]f . . . the administering authority determines that a class or kind of foreign *merchandise* is being, or is likely to be, *sold* in the United States at less than its fair value . . . then there shall be imposed upon such *merchandise* an antidumping duty . . . ." 19 U.S.C. § 1673 (emphasis added).

as required for a sale, because the utility has ownership of the relevant uranium at all times during the transaction. *Id.* citing *NSK Ltd. v. United States*, 115 F.3d 965 (Fed. Cir. 1997). The court in *Eurodif I* also pointed to the "fundamental purpose" of the transaction, which was "the provision of enrichment services" as opposed to the sale of enriched uranium. *Eurodif I*, 411 F.3d at 1362–63. In *Eurodif II*, the court clarified its earlier holding "by stating expressly that the antidumping duty statute unambiguously applies to the sale of goods and not services" and that "Commerce's characterization of the SWU contracts [as contracts for the sale of goods] . . . would contradict . . . the statute's unambiguous meaning because it is clear that those contracts are contracts for services and not goods." *Eurodif II*, 423 F.3d at 1278.

As a result of these holdings, the Federal Circuit has determined that Commerce's claim that LEU produced as a result of SWU contracts or transactions is subject to antidumping duties is not in accordance with law. *Id.* Together, *Eurodif I* and *Eurodif II* make it clear that contracts for enrichment services are contracts for services, not goods, and that as such, they are not subject to the antidumping laws.[11] *See also Eurodif S.A. v. United States*, Appeal No. 2007–1005–1006 at 4 (Fed. Cir. Sept. 21, 2007)(identifying the "SWU contract exception" established by *Eurodif I* and *Eurodif II*).

In the Review at issue here, Commerce continued to include, within the scope of the investigation, LEU obtained pursuant to enrichment services transactions. Commerce also made a determination that there was a likelihood of continued or recurring dumping, based at least in part on data that included SWU transactions.

Commerce defended its scope position in the Review, in part, by claiming that the *Eurodif* "litigation . . . has not been completed, and [Commerce] is continuing to actively pursue all avenues in the litigation process . . . [t]herefore, this litigation has no effect on the Suspension Agreement or this sunset review," and by asserting that it

---

[11] Although the USEC Privatization Act of 1996 post-dates the original Suspension Agreement at issue here, it seems clear to the court that Congress, in that 1996 Act, intended that future transactions in enriched Russian uranium be limited to transactions structured as SWU transactions. *See* 42 U.S.C. § 2297h–10(b)(3) (permitting only transactions where equivalent amounts of feed uranium are exchanged by the contracting parties, with the result that the "purchase" would be of SWU for any deliveries of enriched uranium on or after January 1, 1997). It is also clear that Congress was intentionally differentiating between sales that included feed uranium, *see, e.g.*, 42 U.S.C. §§ 2297h–10(b)(1), (2)(mandating that prior to December 31, 1996, the U.S. Executive Agent transfer without charge title to the natural uranium component of LEU obtained pursuant to the HEU Agreement to the Secretary of Energy to sell, and that such uranium would be considered of Russian origin) and sales that were only to be for SWU, 42 U.S.C. § 2297h–10(b)(3) (dictating that the equivalent amount of U.S. origin feed uranium transferred by USEC to the Russian executive agent was to be considered Russian in origin), thereby setting up, for sales going forward, the same "legal fiction" defined by the *Eurodif* cases as SWU transactions. As such, it is not clear to the court how Commerce can continue to argue that these transactions can be subject to the antidumping statutes.

would follow its policy not to "evaluate scope issues or revise the scope of a proceeding in the context of a sunset review." *Decision Mem.* at 14–15 (Cmt. 2), citing *Uranium from Russia*, 65 Fed. Reg. 41,439 (Dep't Commerce July 5, 2000)(final results of full sunset review of suspended antidumping duty investigation) and the accompanying Issues & Decision Mem. (Cmt. 1)(noting that a scope determination was currently before Commerce, and that it was "not appropriate to evaluate scope issues or revise the scope language in the course of this sunset proceeding."). Commerce further determined that because the *Eurodif I* and *Eurodif II* decisions covered an investigation with a scope that was limited to LEU, the decisions were not necessarily applicable to the investigation at hand, which covered LEU in addition to other uranium products. *Id.*

Plaintiffs argue that Commerce is bound by *stare decisis* to follow the binding precedent in the *Eurodif* cases by excluding SWU transactions from the scope of the investigation. *See* Pl.'s Mot. J. Agency R., Court No. 06–00228 at 12–14 ("*Tenex Br.*"); *see also* Initial Br. of Ad Hoc Utilities Group in Supp. R. 56.2 Mot. J. Agency R., Court No. 06–00229 at 19–20 ("*AHUG Br.*"). AHUG further argues that Commerce cannot decline to follow precedent based on its "policy" of not reviewing scope determinations during a sunset review, because ignoring controlling law (here, the *Eurodif* cases) is not acting in accordance with law. *AHUG Br. 21–22*, citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). Tenex also argues that Commerce must depart from its policy where, as here, the policy is in conflict with Commerce's obligation to comply with the law. *Tenex Br.* 13–14. Plaintiffs further note that although the scope of the review in this action is broader than that in the *Eurodif* cases, in that it covers uranium other than LEU, the *Eurodif* holdings were not limited to LEU. Rather, the *Eurodif* cases are applicable to all transactions pursuant to SWU contracts, and stand for the proposition that those transactions are not subject to antidumping duty law. *Tenex Br.* at 16; *AHUG Br.* at 21. Thus, Plaintiffs contend—correctly—that the *Eurodif* cases are both controlling and applicable here.

Commerce's inclusion of uranium enrichment services in the scope of the review at issue here also undermines its decision with regard to the likelihood of continued or recurring dumping. During the sunset review, Commerce stated its conclusion that there was a likelihood of continued or recurring dumping of uranium products from the countries of the former Soviet Union on the American market. In making this statement, Commerce relied on uranium enrichment services transactions in addition to the importation of goods, stating that "absent the Suspension Agreement, imports of Russian uranium *and SWU* would likely undercut and depress or suppress U.S. market prices for uranium products." *Decision Mem.* at 8 (Cmt. 1)(emphasis added). Plaintiffs argue that SWU transactions cannot

be included in the determination of recurrence of dumping, as such transactions are not subject to the antidumping laws. *Tenex Br.* at 14–15; *AHUG Br.* at 28–30.

The government has indicated that it does not oppose a remand to exclude from the scope of its review LEU obtained pursuant to uranium enrichment services contracts, and to redetermine the likelihood of future dumping, again excluding from its findings LEU that will be obtained pursuant to enrichment services transactions. *See Restated Mot. to Dismiss No. 06–00229 & Response to Pls.' Mots. for J. Upon the Admin. R.* 14 (consenting to a remand to implement the *Eurodif* cases because "Commerce based its determination upon an analysis of the domestic and world market in uranium in all forms, *including sales of SWU*." (emphasis added))("*Def.'s Br.*").[12]

The government's consent to remand is well-founded because Commerce must abide by the *Eurodif* decisions in both its scope determination and its determination of the likelihood of continued or recurring dumping. The court will therefore remand the matter to Commerce for a determination of the correct scope of the investigation, excluding all sales pursuant to enrichment services transactions, as outlined in the *Eurodif* cases, and a redetermination of the likelihood of continued or recurring dumping without reliance on such transactions.

Plaintiffs also argue that Commerce's reliance on information from the original, preliminary determination in the antidumping investigation renders Commerce's final determination unsupported by substantial evidence because of the extraordinary changes in circumstance since the time of the original determination. *Tenex Br.* 28, citing *Government of Uzbekistan v. United States*, 25 CIT 1084 (2001)(remanding sunset review results to Commerce to gather new data and make new findings of dumping margin, because using best information available was inappropriate given the extraordinary circumstances of the dissolution of the U.S.S.R.). These issues were raised by Tenex during the Review. The government has not responded to this argument.

As noted above, Commerce is charged with making a likelihood determination that is in accordance with law. 19 U.S.C. § 1675(c). It has not done so here, and it therefore must do so on remand. The requirement that Commerce follow the precedent by which it is bound,

---

[12] Citing 19 U.S.C. § 1675(d)(2)("the administering authority shall . . . terminate a suspended investigation, unless . . . [it] makes a determination that dumping . . . would be likely to continue or recur"), Tenex opposes remand, asking that the court instead order Commerce to terminate the investigation. Tenex argues that it is futile to expect Commerce to now engage in the statutorily required analysis. The court notes that Commerce has yet to articulate, in its uranium cases, a coherent interpretation of the statutes that is consistent with its interpretations in other industries or contexts. Nonetheless, as Commerce has consented to remand, the court will not, at this stage, conclude that the futility standard has been met.

articulated in the *Eurodif* cases, will necessitate a reconsideration of relevant economic factors, in accordance with 19 U.S.C. § 1675a(c)(directing Commerce to consider other relevantfactors where the record provides an appropriate, "good cause" basis for it to do so). Therefore, on remand, in reassessing the likelihood of continued dumping, Commerce must necessarily examine economic and political changes that have occurred since the preliminary determination, such as the dissolution of the Union of Soviet Socialist Republics and Russia's change of status to a market economy, and determine whether these changes affect the reevaluation of the likelihood of continued or recurring dumping. *See Government of Uzbekistan v. United States*, 25 CIT 1084, 1088 (2001)("As a threshold matter, Commerce must support its finding of a non-*de minimus* margin before it can embark on a rational § 1675(c) analysis.")

In addition to arguments relating to the *Eurodif* cases and market and political changes in Russia, Tenex challenges Commerce's conclusion that there is a likelihood of continued or recurring dumping as not logically connected to its factual findings. Specifically, Tenex argues that Commerce never found that sales of subject merchandise would be at less than fair value, as required by 19 U.S.C. § 1675a(c).[13] *Tenex Br.* at 20. Rather, Tenex claims that the determination at most finds that there would be greater imports from Russia which would lower U.S. market prices for uranium products, but that lower prices do not necessitate a finding that dumping has occurred. *Tenex Br.* at 20–21, citing *Decision Mem.* at 6–9. Commerce describes this argument by Tenex as being based on "economic factors," and argues that it is barred by the exhaustion doctrine. *Def.'s Br.* at 15–16. However, Tenex is challenging the conclusion drawn by Commerce (the likelihood of continued dumping) as not supported by the actual findings (likelihood of price depression and of some "margin" likely to prevail).[14] Thus, in this argument, Tenex is not merely challenging the specific price data used, or a specific finding made,[15] but rather both the analysis followed and the conclusion drawn. This challenge is in contrast to those in the cases the government cites to support its proposition that the court should here exercise its discretion to "require the exhaustion of administrative remedies," as those cases generally involved the challenge of a specific economic factor,[16] or are otherwise not applicable.[17]

---

[13] *Supra*, n.5.

[14] In addition to finding the price would be driven down, *Decision Mem.* at 8–9 (Cmt. 1), Commerce found a margin of 115.82%, *Decision Mem.* at 21–23 (Cmt. 3), but never connected the two findings.

[15] Although Tenex does challenge the findings on various grounds.

[16] *Zhejiang Machinery Imp. & Exp. v. United States*, Slip–Op.07–15, 473 F. Supp. 2d 1365 (2007)(exporter failed to exhaust its administrative remedies available and therefore could not challenge use of Indian surrogate values for scrap because it did not raise such

In the Review at issue here, Commerce's finding of likelihood of continued or recurring dumping was challenged on various grounds by both Tenex and AHUG. Tenex argued that the inclusion of SWU transactions in its data was unlawful, that Russia's status as a market economy, no longer part of the U.S.S.R., warranted the use of different data, and that changes in the Russian uranium industry and the global market for uranium warranted a broader analysis. In addition, AHUG also argued that Russia's status as a market economy, no longer part of the U.S.S.R., warranted a use of different data. Commerce was thus given the opportunity to develop a record in order to address its ultimate finding that dumping was likely to occur or continue.[18] Tenex claims that those findings, however, simply do not support the conclusion Commerce has drawn. While Tenex disputed these issues in the context of the magnitude of the margin likely to prevail, rather than in the finding of likelihood of recurrence or continuation of dumping, Tenex did challenge the likelihood finding at the administrative level, and properly sought administrative relief from the result it felt was improperly reached by the agency. *See*, Techsnabexport Case Brief in response to *Uranium from the Russian Federation*, 71 Fed. Reg. 16, 560 (Dep't Commerce Apr. 3, 2006)(preliminary results) and accompanying Issues and Decision Mem., P.R. Doc. 38 at 2 (Cmt. 1)("[Commerce's] failure to acknowledge the [Court of Appeals for the Federal Circuit's] *Eurodif* rulings invalidates any of [Commerce's] findings regarding . . . the likelihood of dumping and effect on U.S. market prices . . . ."). As Tenex notes, determining whether dumping is likely to recur is precisely what Commerce was doing during this sunset review. Pl.'s Reply Br. Supp. R. 56.2 Mot. J. Agency R., Court No. 06–00228 at 11 ("[t]he issue is the basic statutory obligation in a sunset review to make a determination of dumping that should be and is crystal clear"). Accordingly, Tenex has not failed to exhaust its administrative remedies with re-

---

issue in underlying administrative proceeding nor include it in the complaint); *Carpenter Technology Corp. v. United States*, 30 CIT ____ , 452 F. Supp. 2d 1344 (2006)(court exercised its discretion to dismiss for a failure to exhaust administrative remedies, noting that plaintiff's failure to challenge Commerce's decision to collapse entities resulted in a lack of administrative record to review in addition to not allowing Commerce to consider plaintiff's arguments in the first instance); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT ____ , 342 F. Supp. 2d 1191 (2004)(plaintiff failed to exhaust administrative remedies by not challenging denial of offset adjustment before Commerce).

[17] *Sharp Corp. v. United States*, 837 F.2d 1058 (Fed. Cir. 1988)(court found it was unnecessary to reach the question of exhaustion); *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 1999)(dismissal was based on lack of jurisdiction under 28 U.S.C. 1581(i) because Plaintiff had failed to exhaust administrative remedies available under other sections, having not participated in challenge before Commerce).

[18] Accordingly, there can be no claim that Commerce did not have the opportunity to develop a record with respect to determining the likelihood of dumping, or to use its expertise. *Cf., e.g., Carpenter Technology Corp. v. United States*, 30 CIT at ____ , 452 F. Supp. 2d at 1346.

gard to its claim that Commerce failed to make a finding regarding future sales, future margins, and the likelihood of continued dumping.

Although the court may, in its discretion, hear this argument, it need not reach the issue today. On remand, Commerce will be reexamining data relating to the likelihood of continued or recurring dumping, and the margin likely to prevail. In that context, it will have the opportunity to further examine whether its findings support its ultimate conclusion.

Conclusion

For the foregoing reasons, the court **remands** Commerce's determination, for re-determination in accordance with this opinion, and **denies** Plaintiffs' Motions for Judgment on the Agency Record.

Remand results are due by November 26. Comments are due by December 17. Reply comments are due by December 27. SO ORDERED.

Slip Op. 07–144

NUCOR CORPORATION, Plaintiff, v. **UNITED STATES**, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 07–00174

[Denying the motions to intervene of right of Stelco Inc., Dofasco Inc., Sorevco Inc., Do Sol Galva Ltd., Mittal Steel USA Inc., and United States Steel Corporation, denying plaintiff's motion for a preliminary injunction, and granting the motion of defendant to dismiss this action for lack of subject matter jurisdiction]

Dated: September 26, 2007

Wiley Rein LLP (*Timothy C. Brightbill* and *Alan H. Price*) for plaintiff Nucor Corporation.

Vinson & Elkins LLP (*Christopher Dunn* and *David T. Hardin*) for proposed plaintiff-intervenor Stelco Inc.

Hunton & Williams LLP (*William Silverman, Douglas J. Heffner,* and *Richard P. Ferrin*) for proposed plaintiff-intervenors Dofasco Inc., Sorevco Inc., and Do Sol Galva Ltd.

Stewart and Stewart (*Terence P. Stewart* and *Eric P. Salonen*) for proposed plaintiff-intervenor Mittal Steel USA Inc.

Skadden, Arps, Slate, Meagher and Flom LLP (*Robert E. Lighthizer, John J. Mangan,* and *Jeffrey D. Gerrish*) for proposed plaintiff-intervenor United States Steel Corporation.

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

OPINION

Stanceu, Judge: Plaintiff Nucor Corporation ("Nucor"), a domestic producer of steel products, initiated this action under 19 U.S.C. § 1516a (2000) to contest a final determination ("Final Results") issued by the International Trade Administration, United States Department of Commerce ("Commerce" or the "Department") in an administrative review of an antidumping duty order on certain corrosion-resistant carbon steel flat products from Canada. *See Certain Corrosion-Resistant Carbon Steel Flat Products from Canada: Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 12,758 (Mar. 19, 2007).

Before the court are motions to intervene as a matter of right on behalf of Stelco Inc. ("Stelco"), Dofasco Inc. ("Dofasco"), Sorevco Inc. ("Sorevco"), Do Sol Galva Ltd. ("Do Sol Galva"), Mittal Steel USA Inc. ("Mittal Steel USA"), and United States Steel Corporation ("U.S. Steel") (collectively "proposed plaintiff-intervenors"). Plaintiff Nucor moves for a preliminary injunction to prevent liquidation by Customs of the entries of certain corrosion-resistant carbon steel flat products ("subject merchandise") from Canada manufactured by producers Stelco, Dofasco, Sorevco, and Do Sol Galva. Defendant United States moves to dismiss this action pursuant to USCIT Rule 12(b)(1) for lack of jurisdiction, alleging that Nucor did not participate as a party in the administrative review that concluded in the issuance of the Final Results and therefore lacks standing.

Because Nucor did not participate in the Department's proceeding culminating in the Final Results to the extent necessary to qualify as a party to that proceeding, the court concludes that Nucor lacked standing to bring a cause of action under 19 U.S.C. § 1516a. Accordingly, the court must deny Nucor's motion for a preliminary injunction. Because intervention could not cure the defect in subject matter jurisdiction caused by Nucor's failure to establish standing to bring its claim, the court also must deny the motions to intervene and grant the motion to dismiss this action.

I. BACKGROUND

Nucor filed a summons on May 21, 2007, a complaint on June 20, 2007, and an amended complaint on June 29, 2007. In the amended complaint, Nucor challenges as contrary to law the Department's rejection of the requests of certain parties for rescission of the administrative review and the resulting continuation of that administrative review. Am. Compl. ¶ 6. Nucor seeks a ruling holding the Final Results to be unsupported by substantial record evidence and otherwise not in accordance with law and an order remanding the Final Results to Commerce for redetermination. *Id.* at 3, REQ. FOR J. AND RELIEF ¶¶ 1–2.

On July 19 and 20, 2007, the six proposed plaintiff-intervenors moved for intervention as a matter of right, all on the side of plaintiff Nucor. *See* 28 U.S.C. § 2631(j)(1)(B) (2000); USCIT R. 24(a). In its motion, Stelco states that it is a Canadian producer and exporter of the subject merchandise and that it fully participated in the administrative review. Mot. to Intervene As A Matter of Right on the Side of Pl. 2 ("Stelco's Mot. to Intervene"). In a joint motion filed July 20, 2007, Dofasco, Sorevco, and Do Sol Galva state that they are Canadian producers of subject merchandise and that they participated as respondents in the administrative review.[1] Partial Consent Mot. to Intervene as of Right as Pl.-Intervenor ¶ 2 ("Dofasco, Sorevco, Do Sol Galva Mot. to Intervene"). In its motion filed the same day, U.S. Steel states that it is a producer of the domestic like product and that it participated in the administrative review.[2] Mot. to Intervene as of Right as Pl.-Intervenor ¶ 2 ("U.S. Steel Mot. to Intervene"). In its motion, also filed July 20, 2007, Mittal Steel USA states that it is a domestic producer of corrosion-resistant steel flat products and that it participated in the administrative review. Partial Consent Mot. of Applicant Pl.-Intervenor Mittal Steel USA Inc. to Intervene as of Right 2 ("Mittal Steel USA Mot. to Intervene"). Defendant United States did not consent to any of the motions to intervene. According to the motions of certain proposed plaintiff-intervenors, defendant refused to consent on the ground that Nucor is not a proper party plaintiff and the court therefore lacks jurisdiction over plaintiff's claim. *See* Stelco's Mot. to Intervene 1; Dofasco, Sorevco, Do Sol Galva Mot. to Intervene ¶ 5; U.S. Steel Mot. to Intervene ¶ 5. On September 7, 2007, defendant submitted, with a motion for leave to file out of time, a response in opposition to the intervention of Mittal Steel USA, alleging that Mittal Steel USA was not a party to the proceeding below and therefore does not qualify for intervention as a matter of right. Def.'s Resp. to Mittal Steel USA's Mot. to Intervene; *see* Mittal Steel USA Mot. to Intervene.

On July 20, 2007, Nucor moved for a preliminary injunction "to enjoin the liquidation of any and all entries of certain corrosion-resistant carbon steel flat products from Canada manufactured by Dofasco Inc., Sorevco Inc., Do Sol Galva Ltd., and Stelco Inc." Mot. for Prelim. Inj. 1. Nucor stated in support of its motion that it had obtained the consent of Stelco, Dofasco, Sorevco, Do Sol Galva, and U.S. Steel to the entry of a preliminary injunction.[3] *Id.* at 2. On August 3, 2007, defendant, alleging that Nucor lacks standing, moved

---

1 Dofasco, Sorevco, and Do Sol Galva are plaintiffs in *Dofasco Inc. v. United States*, Court No. 07–00135, in which is pleaded the same claim that Nucor attempts to assert in this action.

2 On May 29, 2007, U.S. Steel was granted status as a plaintiff-intervenor and as a defendant-intervenor in *Dofasco Inc. v. United States*, Court No. 07–00135.

3 Nucor stated in its motion for a preliminary injunction that it had obtained the consent

to dismiss this action for lack of subject matter jurisdiction and opposed plaintiff's motion for a preliminary injunction. Def.'s Mot. to Dismiss and Opp'n to Pl.'s Mot. for a Prelim. Inj. 1 ("Def.'s Mot. to Dismiss").

II. DISCUSSION

A. Nucor Has Not Established Standing to Contest the Final Results

To contest the Final Results, Nucor must satisfy the requirements of 19 U.S.C. § 1516a(a), on which it relies for its cause of action, and 28 U.S.C. 2631(c), which governs standing in suits brought before the Court of International Trade. *See* Am. Compl. ¶¶ 1, 3. Under 19 U.S.C. § 1516a(a)(2)(A), an action may be commenced by "an interested party who is a party to the proceeding in connection with which the matter arises . . . ." 19 U.S.C. § 1516a(a)(2)(A). In parallel, 28 U.S.C. 2631(c) provides that "[a] civil action contesting a determination listed in [19 U.S.C. § 1516a] may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose." 28 U.S.C. 2631(c).

Nucor alleges in its amended complaint (and defendant does not contest) that Nucor is a manufacturer of the domestic like product and therefore is an "interested party" within the meaning of 19 U.S.C. § 1516a(f)(3) and § 1677(9)(C) (2000). Am. Compl. ¶ 3; see 19 U.S.C. § 1516a(f)(3) (defining "interested party" by reference to 19 U.S.C. § 1677(9)); 19 U.S.C. § 1677(9)(C) (defining "interested party" to include "a manufacturer, producer, or wholesaler in the United States of a domestic like product"). Nucor further alleges that it participated in the administrative review "through actions including entering a notice of appearance, regularly monitoring the status of the proceeding, and reviewing all of the documents that were submitted or issued in the underlying proceeding." Am. Compl. ¶ 3. In further support of its claim of standing, Nucor states that "Plaintiff also participated in discussions (including telephone conferences) with other parties regarding various issues including case strategy, case settlement, and the parties' decisions to withdraw their requests for administrative review, which Plaintiff supported." *Id.* In its opposition to the motion to dismiss, Nucor makes the additional argument that Commerce implicitly recognized its status as a party to the proceeding by making available to Nucor's representatives the business proprietary information of other parties and the Department's preliminary calculations. Pl.'s Resp. to Def.'s Mot. to Dismiss 4–5. Based on the various factual allegations in its amended com-

---

of all proposed plaintiff-intervenors but does not state that it obtained the consent of Mittal Steel USA. Mot. for Prelim. Inj. 2.

plaint, Nucor seeks to invoke the court's subject matter jurisdiction under 28 U.S.C. § 1581(c) (2000), under which the Court of International Trade is granted exclusive jurisdiction of any civil action commenced under 19 U.S.C. § 1516a. *See* 28 U.S.C. 1581(c).

Nucor has failed to allege facts from which the court could consider Nucor to qualify as a "party to the proceeding" in connection with which the matter arose. 19 U.S.C. § 1516a(a)(2); 28 U.S.C. § 2631(c). The court concludes that Nucor's claimed level of participation does not satisfy any reasonable construction of the "party to the proceeding" requirement that Congress imposed as a condition for obtaining judicial review.

Although the term "party to the proceeding" is not defined by statute, the Department's regulations define the term as "any interested party that actively participates, through written submissions of factual information or written argument, in a segment of a proceeding." 19 C.F.R. § 351.102(b) (2006). Nucor acknowledges that it presented no written factual material or written argument to the Department by admitting that "it did not make written submissions as required under 19 C.F.R. § 351.102." Pl.'s Resp. to Def.'s Mot. to Dismiss 5. However, because the court must determine whether the subject matter jurisdiction provided by 28 U.S.C. § 1581(c) attached to Nucor's claim, Nucor's acknowledgment that it did not satisfy the "written submission" requirement of 19 C.F.R. § 351.102 does not fully resolve the standing issue presented by this case.

Nucor's argument for standing does not address the question of whether the definition of "party to the proceeding" in the Department's regulations, which requires active participation through at least one written submission setting forth factual information or argument, could be controlling if applied to resolve a fundamental question of the extent of the court's jurisdiction. Nor does Nucor, although citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), address the question of whether 19 C.F.R. § 351.102 is a reasonable construction of the statutory term that is entitled to the court's deference when applied in this jurisdictional context. *See* Pl.'s Resp. to Def.'s Mot. to Dismiss 4; *Chevron*, 467 U.S. at 843–44; *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001). However, the court perceives no need to reach these questions in this case because the actions Nucor alleges it took during the administrative review are insufficient to establish that Nucor was a party to the administrative review proceeding under any reasonable construction of the term "party to the proceeding" as used in 19 U.S.C. § 1516a(a)(2)(A) and 28 U.S.C. § 2631(c).

From Nucor's pleadings and submissions, the court must conclude that Nucor's entire correspondence with Commerce was limited to what it terms a "notice of appearance" and an application to receive information under an administrative protective order ("APO"). Filing

of each of these documents does not itself constitute meaningful participation in the Department's proceeding; such filings are merely procedural steps that communicate nothing of substance on any matter to be addressed in the administrative review.[4]

Nucor's allegations that it engaged in certain other activities, *i.e.*, that it monitored the status of the proceeding and participated in case strategy sessions and settlement negotiations with other parties to the review, do not remedy the deficiency in Nucor's claim of standing. As important as those activities may have been to Nucor at the time, they were distinct from actual participation in the proceeding that Commerce was conducting.

The statutory scheme indicates that Congress intended to require, as a condition for obtaining judicial review, some level of participation before the agency beyond the steps identified by Nucor.[5] The statutory scheme limits the scope of judicial review of the Department's determinations to the agency record. *See* 19 U.S.C. § 1516a(b); 28 U.S.C. § 2640(b) (2000). Because Nucor's filings were limited to its notice of appearance and a request for access to business proprietary information, the record in the administrative review would not have been materially different had Nucor ignored the proceeding entirely. Additionally, the statutory scheme provides that the court, in reviewing the agency's decision on the record, shall require a party contesting a determination to exhaust administrative remedies where appropriate. *See* 28 U.S.C. § 2637(d). Thus, in the normal instance, with only narrow exceptions, a party challenging any aspect of a final Commerce determination first must have presented its arguments to Commerce for decision during the administrative proceeding.

Congress specified that the party seeking standing to challenge a determination must have been "a party to the proceeding" and not, for example, merely an "interested party," as defined in 19 U.S.C. § 1677(9). Procedural steps such as a notice of appearance and an application to receive business proprietary information under an APO are more in the nature of preparation for participation than participation itself. Were the court to treat them as sufficient to con-

---

[4] Nucor does not indicate in its pleading what it stated in its notice of appearance or under what regulatory provision it filed this notice. The court observes that 19 C.F.R. § 351.103(c) allows interested parties to request to be included on the service list for a segment of a proceeding. *See* 19 C.F.R. § 351.103(c).

[5] Defendant cites certain legislative history of the Trade Agreements Act of 1979, which generally equates party status with participation in the administrative proceeding. Def.'s Mot. to Dismiss 4 (citing S. Rep. No. 96–249, at 249–51 (1979), *reprinted in* 1979 U.S.C. C.A.N. 381, 635–37). However, the parties have not directed the court to pertinent legislative history for guidance on the question of whether Congress, in requiring a plaintiff to have been a party to the administrative proceeding, intended a lower threshold of participation than that required by 19 C.F.R. § 351.102(b). The court's own research has not uncovered any such legislative history.

fer standing, it would so weaken the "party to the proceeding" requirement as to render it practically meaningless.

The court does not find merit in Nucor's argument that Commerce implicitly acknowledged Nucor's party status in granting Nucor's representatives access to business proprietary information and disclosing preliminary calculations. In support of this argument, Nucor points to 19 U.S.C. § 1677f(c)(1)(A) (2000), under which Commerce must "make all business proprietary information presented to, or obtained by it, during a proceeding . . . available to interested parties who are parties to the proceeding under a protective order . . . ." *See* Pl.'s Resp. to Def.'s Mot. to Dismiss 4. Nucor points to 19 C.F.R. § 351.224(b) (2006), under which regulation Commerce is to "disclose to a party to the proceeding calculations performed, if any, in connection with a preliminary determination . . . ." *See id.* The plain language of 19 U.S.C. § 1677f(c)(1)(A) does not preclude Commerce from releasing business proprietary information to a person's qualified representatives under an APO prior to the person's doing all that is required to obtain status as a party to the proceeding. A person's representatives, upon proper application, may qualify to obtain proprietary information under an APO prior to the person's making written submissions of fact or argument. Indeed, it would seem impracticable for Commerce to delay the release of proprietary information until *after* submission of such written fact or argument, which may rely on such information. In this regard, the Department's regulations contain separate definitions for the term "party to the proceeding" and the term "authorized applicant." *See* 19 C.F.R. § 351.102(b) (defining an "authorized applicant" as "an applicant that the Secretary has authorized to receive business proprietary information under an APO under [19 U.S.C. § 1677f(c)(1)]."). For similar reasons, the court is not persuaded by Nucor's argument that Commerce implicitly recognized Nucor's status as a party to the proceeding by disclosing to Nucor its preliminary calculations. Neither the statute, in 19 U.S.C. § 1677f(c)(1), nor the Department's regulations, in 19 C.F.R. § 351.224(b), both of which pertain to the Department's disclosure of preliminary calculations, preclude the release of preliminary calculations to a person who has not yet qualified for status as a party to the proceeding.

In support of its claim of standing, Nucor cites the unpublished opinion of the Court of Appeals for the Federal Circuit in *Laclede Steel Co. v. United States*, No. 96–1029, 1996 U.S. App. LEXIS 16167 (Fed. Cir. 1996), *aff'g* 19 CIT 1076 (1995). Pl.'s Resp. to Def.'s Mot. to Dismiss 2–3. Nucor also cites the opinions of the Court of International Trade in *Specialty Merchandise Corp. v. United States*, 31 CIT ___ , ___ , 477 F. Supp. 2d. 1359, 1361–62 (2007), *Encon Industries, Inc. v. United States*, 18 CIT 867 (1994), and *American Grape Growers v. United States*, 9 CIT 103, 105–06, 604 F. Supp. 1245,

1249 (1985). Pl.'s Resp. to Def.'s Mot. to Dismiss 2. Each of these cases is distinguishable from the instant case.

In *Laclede Steel Co.*, the Court of Appeals for the Federal Circuit affirmed the Court of International Trade's allowing the intervention as a matter of right under 28 U.S.C. § 2631(j)(1)(B) of two Korean steel pipe manufacturers, Union Steel Manufacturing Company, Limited ("Union") and Dongbu Steel Company, Limited ("Dongbu"), in a judicial review of a final Commerce antidumping determination on steel pipe. 1996 U.S. App. LEXIS 16167 at *1, *4. The plaintiff, a petitioner in the investigation, argued on appeal that Union and Dongbu, whose participation in the antidumping investigation consisted of filing entries of appearance before Commerce and submitting factual data on exports during the period of investigation to assist Commerce in the selection of mandatory respondents, never actively participated in the antidumping investigation and therefore did not qualify as "parties to the proceeding" for purposes of intervention. *See id.* at *1–*3. The Court of Appeals for the Federal Circuit disagreed, reasoning that Union and Dongbu each actively participated in the antidumping investigation so as to qualify as a "party to the proceeding" within the meaning of 28 U.S.C. § 2631(j)(1)(B). *Id.* at *4–*6. The Court of Appeals reasoned that in submitting the factual data on exports, Union and Dongbu "corresponded with Commerce requesting exclusion as mandatory respondents, thereby impliedly indicating their willingness to accept an 'all others' rate." *Id.* at *6. This active participation, according to the Court of Appeals, made Commerce aware of Union's and Dongbu's interests in the investigation and constituted steps that Union and Dongbu deemed necessary to further their interests at the administrative level. *Id.* In contrast, Nucor provided Commerce nothing to inform Commerce of any facts or positions relevant to issues in the administrative review.

In *Specialty Merchandise Corp.*, the Court of International Trade recently held that a plaintiff obtained standing to contest a final determination of Commerce by filing a notice of appearance with comments, albeit untimely, informing Commerce that the plaintiff was joining arguments made by other parties in the administrative proceeding. 31 CIT at ___ , 477 F. Supp. 2d. at 1361–62. Here, Nucor's pleadings do not allege that Nucor informed Commerce, either orally or in writing, that Nucor was joining in the advocacy of any argument that any party had made or was making in the administrative review. Nucor argues, nevertheless, that its "active and consistent collaboration with other parties to the administrative review, including its visible participation in the settlement negotiations, demonstrate that Nucor provided notice of its concerns." Pl.'s Resp. to Def.'s Mot. to Dismiss 5. This argument fails to overcome the problem inherent in Nucor's allegation of standing, which is that Nucor fails to plead facts from which the court could conclude that Nucor commu-

nicated with the Department, orally or in writing, on anything of substance during the administrative review.

Encon Industries, Inc. also is unavailing as support for plaintiff's standing argument. *See Encon Industries, Inc.*, 18 CIT 867. In that case, the Court of International Trade declined to assert jurisdiction over the plaintiff's challenge to an amended final less-than-fair-value determination of Commerce because the plaintiff failed to exhaust its administrative remedies. *Id.* at 867–68. The plaintiff, during the investigation, had not challenged the methodology Commerce used in calculating an "all others" rate. *Id.* at 868. Ruling on exhaustion grounds, the Court of International Trade did not reach the issue of whether Encon, which had filed a notice of appearance in the Commerce investigation but did not submit factual information or make oral or written comments, had standing to file suit under 19 U.S.C. § 1516a and 28 U.S.C. §2631(c). *Id.* In *dicta*, however, the Court of International Trade stated that "[t]he court is inclined to view the participation requirement as intending meaningful participation, that is, action which would put Commerce on notice of a party's concerns." *Id.* (citing *Am. Grape Growers*, 9 CIT at 105–06, 604 F. Supp. at 1249).

Nucor quotes language from the opinion *American Grape Growers*. Pl.'s Resp. to Def.'s Mot. to Dismiss 2. In that case, the Court of International Trade stated that

> [o]n the question of participation in the proceeding, the law is satisfied by any form of notification or participation which reasonably conveys the separate status of a party. The participation requirement is obviously intended only to bar action by someone who did not take the opportunity to further its interests on the administrative level.

9 CIT at 105–06, 604 F. Supp. at 1249. At issue in *American Grape Growers* was whether Gibson Wine Co. ("Gibson") had standing before the Court of International Trade to contest a final injury determination that the U.S. International Trade Commission ("ITC") issued in antidumping and countervailing duty investigations of imported table wine from France and Italy. 9 CIT at 103, 105–06, 604 F. Supp. at 1247, 1249. The question of Gibson's standing arose in the context of whether Gibson did anything more than participate in the ITC's administrative proceeding through passive membership in an umbrella organization. *Id.* The Court in *American Grape Growers* concluded that Gibson met the required standards for participation, noting that "[t]he listing of Gibson as a co-petitioner in a post-conference brief is sufficient to satisfy these standards." 9 CIT at 106, 604 F. Supp. at 1249. Because Gibson's level of participation in the ITC proceeding was not closely analogous to Nucor's claimed participation in the administrative review, *American Grape Growers* does not lend guidance to the resolution of the standing question

presented by defendant's motion to dismiss.

In summary, Nucor has failed to allege facts from which the court may conclude that Nucor was a party to the administrative proceeding culminating in the issuance of the Final Results. Nucor, therefore, lacks the standing Congress required of any person seeking judicial review under 19 U.S.C. § 1516a.

B. The Motions for Intervention of Right Must Be Denied

The proposed plaintiff-intervenors timely moved to intervene as a matter of right pursuant to 28 U.S.C. § 2631(j)(1)(B) and USCIT Rule 24(a). *See* USCIT R. 24(a) (providing that a motion is timely if made no later than thirty days after the date of service of the complaint); Stelco's Mot. to Intervene 1, 3; Dofasco, Sorevco, Do Sol Galva Mot. to Intervene ¶¶ 2, 4; U.S. Steel Mot. to Intervene ¶¶ 2, 4; Mittal Steel USA Mot. to Intervene 1–2. The issue presented by the motions to intervene is whether this case may be continued by the proposed plaintiff-intervenors even though Nucor lacked standing to maintain its cause of action. The court concludes that dismissal is required here by application of the fundamental principle that intervention cannot cure a jurisdictional defect in the original suit. *See United States ex rel. Tex. Portland Cement Co. v. McCord*, 233 U.S. 157, 163–64 (1914); *Simmons v. Interstate Commerce Comm'n*, 716 F.2d 40 (D.C. Cir. 1983).

In *Simmons*, the Court of Appeals for the District of Columbia Circuit, upon considering an issue similar to that presented by this case, dismissed for lack of subject matter jurisdiction a cause of action in a judicial proceeding brought under the Hobbs Act, 28 U.S.C. § 2344. 716 F.2d at 41. Plaintiff Simmons initiated the action to obtain review of an order issued by the Interstate Commerce Commission ("ICC") that reduced various regulatory reporting requirements applicable to motor carriers. *Id.* at 41–42. The Court concluded that plaintiff Simmons, who filed his petition for direct review of the ICC order in the Court of Appeals during the sixty-day filing period set forth in the Hobbs Act, lacked standing as a petitioner because he was not a party to the ICC's rulemaking proceeding that was preliminary to the issuance of the contested order. *Id.* Even though the Court of Appeals earlier had granted the unopposed intervention motion under 28 U.S.C. § 2348 of The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, the Court concluded that the intervenor could not maintain the suit in the absence of the plaintiff Simmons. *Id.* at 42, 46. The Court explained that because the intervenor failed to file its own petition or move for intervention during the sixty-day period for initiating a cause of action under the Hobbs Act, it lacked its own independent basis of jurisdiction. *Id.* at 46.

The Court distinguished its holding from that of the Court of Appeals for the Third Circuit in *United States Steel Corp. v. EPA*, 614

F.2d 843, 845 (3d. Cir. 1979), in which an intervenor was permitted to continue a suit after the party who originally provided valid subject matter jurisdiction left the case. *See Simmons*, 716 F.2d at 46. It also distinguished its holding from Courts of Appeals cases in which the intervenor itself provided subject matter jurisdiction. *See id.* (citing *Atkins v. State Bd. of Educ. of N.C.*, 418 F.2d 874, 876 (4th Cir. 1969), *Fuller v. Volk*, 351 F.2d 323, 328 (3d. Cir. 1965), *Magdoff v. Saphin Television & Appliance, Inc.*, 228 F.2d 214, 215 (5th Cir. 1955), and *Hunt Tool Co. v. Moore, Inc.*, 212 F.2d 685, 688 (5th Cir. 1954)).

Nucor filed its summons on May 21, 2007, the last day on which such a filing was timely within the thirty-day period in which a party could have sought judicial review of the Final Results in the Court of International Trade under 19 U.S.C. § 1516a(a)(5). *See* 19 U.S.C. § 1516a(a)(2), (5). The motions to intervene, although timely under USCIT Rule 24, were filed after the time period in which an original plaintiff could have invoked the court's jurisdiction under 28 U.S.C. § 1581(c) to review the Final Results. Because the only party that attempted to invoke the subject matter jurisdiction of the court during that thirty-day period lacked standing to maintain a cause of action, that jurisdiction never attached to Nucor's claim. *See Simmons*, 716 F.2d at 46. The right to intervene presupposes an action duly brought according to the terms of the statute under which the original plaintiff brought its case. *See United States ex rel. Tex. Portland Cement Co.*, 233 U.S. at 163 (stating that "[t]hese rights to intervene and to file a claim, conferred by the statute, presuppose an action duly brought under its terms.").[6]

C. The Motion for an Injunction Against Liquidation Must Be Denied

Nucor moves under 19 U.S.C. § 1516a(c)(2) for a preliminary injunction against liquidation of entries of subject merchandise produced by Stelco, Dofasco, Sorevco, and Do Sol Galva. Mot. for Prelim. Inj. 2 (stating that "Plaintiff moves to enjoin liquidation as a matter of right pursuant to 19 U.S.C. § 1516a(c)(2)."). The court may order

---

[6] In arguing that Nucor's lack of standing requires the court to dismiss this action for lack of jurisdiction, defendant cites *Bhullar v. United States*, 27 CIT 532, 546, 259 F. Supp. 2d 1332, 1344 (2003), *aff'd*, 93 Fed. Appx. 218 (Fed. Cir. 2004). Def.'s Mot. to Dismiss 5–6. Although supporting the general principle that a plaintiff's lack of standing is a jurisdictional defect, *Bhullar* did not involve an issue directly analogous to that presented by the motions to intervene. In *Bhullar*, the plaintiff, a stockholder in a Canadian forest products company, sought review under § 1581(c) or, alternatively, under § 1581(i), of antidumping and countervailing duty determinations on imports of Canadian softwood lumber, claiming that the assessment of duties pursuant to the determinations caused a decrease in the value of plaintiff's stock. *See* 27 CIT 532, 259 F. Supp. 2d 1332. The Court of International Trade held, *inter alia*, that plaintiff lacked standing because plaintiff "shareholder" was not an "interested party" under 19 U.S.C. §§ 1516a(d) and 1677(9). 27 CIT at 546, 259 F. Supp. 2d at 1343–44.

an injunction against liquidation "[i]n the case of a determination described in [19 U.S.C. § 1516a(a)(2)]" only "upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2). The determination contested in this case, the Final Results in an administrative review issued under 19 U.S.C. § 1675 (2000), is within the scope of § 1516a(a)(2) and Nucor, as a domestic producer of the like product, is an "interested party" at least for purposes of 19 U.S.C. § 1677(9)(C). Nucor, however, is unable to satisfy the other requirement of § 1516a(c)(2), which is "a proper showing that the requested relief should be granted under the circumstances." *Id.*

The controlling circumstance is that subject matter jurisdiction did not attach to Nucor's cause of action and, for the reasons discussed previously, the court must dismiss this case despite the motions to intervene. Nucor argues that the court should grant Nucor's motion to enjoin liquidation because it has satisfied the four requirements for a preliminary injunction, *i.e.*, that Nucor will be immediately and irreparably injured, that there is a likelihood of success on the merits, that the public interest would be better served by the relief requested, and that the balance of hardship on all the parties favors movant Nucor. Mot. for Prelim. Inj. 2–3 (citing *U.S. Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1346 (Fed. Cir. 2005) and *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809 (Fed. Cir. 1983)). The court is unable to agree with this argument. Because jurisdiction did not attach to Nucor's cause of action, the court may not order equitable relief that is sought to preserve the status quo by preventing liquidation of the affected entries.

III. CONCLUSION

The court concludes that subject matter jurisdiction does not exist over this action and that defendant's motion to dismiss therefore must be granted. The court will deny the motions to intervene, deny the motion of plaintiff for a preliminary injunction, grant the motion of defendant to dismiss for lack of subject matter jurisdiction, and enter judgment dismissing this action.

NUCOR CORPORATION, Plaintiff, v. **UNITED STATES**, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 07–00174

JUDGMENT

In conformity with the Opinion issued in this case on this day, and in consideration of all papers and proceedings herein, it is hereby

ORDERED that defendant's motion to dismiss this action for lack of subject matter jurisdiction, filed on August 8, 2007, is GRANTED, and it is further

ORDERED that this action be, and hereby is, dismissed.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C07/26 09/14/07 Restani, C.J.	HY Cite Corp.	05-00355	7013.29.20 23.2% (Vesuve mugs) 7013.39.20 23.2% or 7013.39.50 15% (Florine plates) Headquarters Ruling Letter 966945, March. 22, 2005 [Application for Further Review]	7013.29.05 (Vesuve mugs) 12.5% 7013.39.10 (Florine plates) 12.5%	Agreed statement of facts	Milwaukee Plates and mugs
C07/27 9/24/07 Aquilino, S.J.	FP Webkote, Inc.	02-00621	7607.19.30 5.7%	7607.19.60 3%	Agreed statement facts	Chicago Aluminum foil
C07/28 9/24/07 Aquilino, S.J.	H.S. Crocker Co.	02-00804	7607.19.30 5.7%	7607.19.60 3%	Agreed statement facts	Chicago Aluminum foil
C07/29 9/24/07 Aquilino, S.J.	Kraftseal, Inc.	02-00805	7607.19.30 5.7%	7607.19.60 3%	Agreed statement facts	Chicago Aluminum foil
C07/30 9/24/07 Aquilino, S.J.	Kraftseal, Inc.	02-00806	7607.19.30 5.7%	7607.19.60 3%	Agreed statement facts	Chicago Aluminum foil
C07/31 9/24/07 Aquilino, S.J.	H.S. Crocker Co.	02-00807	7607.19.30 5.7%	7607.19.60 3%	Agreed statement facts	Chicago Aluminum foil