U.S. Customs and Border Protection

Slip Op. 10–66

DELL PRODUCTS LP, Plaintiff, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Court No. 06–00306

[Upon classification of secondary batteries, judgment for the defendant.]

Dated: June 10, 2010

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*David M. Murphy, Ned H. Marshak* and *Joseph M. Spraragen*) for Plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); *Beth C. Brotman*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

Goldberg, Senior Judge:

This matter comes before the Court on Plaintiff Dell Products LP's ("Dell" or "Plaintiff") Motion for Summary Judgment and Defendant United States' ("Defendant" or "Government") Cross-Motion for Summary Judgment. Dell contends that the subject batteries should be classified as "automatic data processing machines" under heading 8471 of the Harmonized Tariff Schedule of the United States ("HTSUS")[1], duty-free, the same classification as the notebook computers with which the batteries were packaged.[2] The Government maintains that United States Customs & Border Protection ("Customs") properly classified the subject secondary batteries as "other storage batteries" under heading 8507, HTSUS, at the scheduled duty rate of

[1] All citations to the HTSUS herein are to the 2002 edition. The pertinent text remains unchanged.

[2] "Automatic data processing machines and units thereof . . .: Portable automatic data processing machines, weighing not more than 10 kg, consisting of at least a central processing unit, a keyboard and a display." Subheading 8471.30.00, HTSUS.

3.4% *ad valorem*.[3] *See* HQ 967364 (Dec. 23, 2004).

As discussed below, Customs properly classified the subject batteries as "other storage batteries" under heading 8507, HTSUS. Accordingly, Dell's motion for summary judgment is denied, and the Government's cross-motion is granted.

I. STATEMENT OF THE FACTS

At issue are Dell secondary batteries manufactured for use with Dell notebook computers. The batteries can only be used with specific Dell computer models and are compatible with multiple computer models. The secondary battery is an additional power source that enables longer unplugged operation of the notebook computer than would be possible with the primary battery included with, and encased in, the computer. The primary and secondary battery cannot be used simultaneously by the same computer.

The batteries at issue were initially "admitted"[4] into a Foreign Trade Zone ("FTZ") as non-privileged foreign ("NPF") merchandise.[5] The Dell notebook computers were first imported into the United States and entered for consumption[6] under subheading 8471.30.00, HTSUS, as "portable digital automatic data processing machines," then later were admitted into the FTZ in "domestic status."[7]

Through websites and other means, Dell offered retail customers the option of purchasing a notebook computer, including a primary battery and power adapter, with or without other merchandise. This other merchandise option included the subject secondary batteries.

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[3] "Electric storage batteries, including separators, thereof [sic], whether or not rectangular, (including square); parts thereof: Other storage batteries: Other." Subheading 8507.80.80, HTSUS.

[4] The Foreign Trade Zone Resource Center Customs Manual Glossary of Foreign-Trade Zone Terminology defines "Admission" as "[t]he physical arrival of goods into a zone in a specified zone status . . . . The word 'admission' is used instead of 'entry' to avoid confusion with Customs entry processes . . . ." Foreign-Trade-Zone Customs Manual, 200, *available at* http://www.foreign-trade-zone.com/customs_manual.htm (lastvisited June 9, 2010) ("FTZ Manual").

[5] "Non-Privileged [sic] Foreign Status" is defined by the FTZ Manual as "[s]tatus of zone merchandise not previously cleared by Customs which is appraised in the condition of the merchandise at the time it enters the Customs territory upon exiting the zone . . . . While in the zone, NPF status merchandise can be manipulated or manufactured into another commercial item with a different tariff classification. NPF status allows zone users to pay duty at the rate of the finished product produced in the zone." FTZ Manual at 203.

[6] "Entry" is defined by the FTZ Manual as "[n]otification to Customs of the arrival of imported goods in the Customs territory of the U.S. Merchandise withdrawn from a zone for consumption in the U.S. is entered when it is removed from the zone. Goods brought into a zone are admitted." FTZ Manual at 201.

[7] "Domestic Status" is defined as "status of zone merchandise grown, produced or manufactured in the U.S. on which all internal revenue taxes have been paid or the status of zone merchandise previously imported on which all applicable duties and internal revenue taxes have been paid." FTZ Manual at 201.

Dell then filled the individual orders by packaging the items ordered by each customer in the FTZ. Dell placed a box containing a notebook computer that already encased a primary battery, into a larger box, along with operational manuals, a power adapter, and any additional items, such as a secondary battery, that the customer opted to purchase. The price that a customer paid consisted of the cost of the notebook computer, which included the primary battery and power cord, plus the cost of any optional items ordered. Dell customers could also purchase secondary batteries independent from a Dell computer. This action consists of Dell secondary batteries purchased and packaged together with notebook computers.

Both parties agree that the subject batteries entered into the commerce of the United States when they were withdrawn from the FTZ and delivered to Dell's U.S. customers and are to be classified based on their condition at this time. Upon entry, Dell classified the secondary batteries with the Dell notebook computers as "automatic data processing machines" under subheading 8471.30.00, HTSUS, duty-free. Customs disagreed and, upon liquidation, classified the subject batteries as "other storage batteries" under subheading 8507.80.80, HTSUS, at the duty rate of 3.4% *ad valorem*. Customs classified the computer, primary battery, and power cord together under subheading 8471.30.00, HTSUS. Dell then filed this action challenging Customs' classification of the subject batteries.

II. JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (2006). Summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the movant is entitled to judgment as a matter of law." USCIT R. 56(c). Because the nature of the merchandise at issue is not in question, there are no disputed material facts in this case. The propriety of summary judgment, therefore, turns on the proper construction of the HTSUS. *See E.T. Horn Co. v. United States*, 27 CIT 328, 331 (2003) (*quoting Clarendon Marketing, Inc. v. United States*, 144 F.3d 1464, 1466 (Fed. Cir. 1998)).

The Court employs a two-step process in analyzing a Customs classification. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). "[F]irst, [it] construe[s] the relevant classification headings; and second, [it] determine[s] under which of the properly construed tariff terms the merchandise at issue falls." *Id.*; *see also Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997). The proper scope and meaning of a tariff classification term is a question of law; whether the subject merchandise falls within a particular tariff term as properly construed is a question of

fact. *Franklin v. United States*, 289 F.3d 753, 757 (Fed. Cir. 2002). Where the nature of the merchandise is undisputed, as in this case, "'the classification issue collapses entirely into a question of law,' and the court reviews Customs' classification decision *de novo*." *Id.* (*quoting Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006)).[8]

A Customs classification ruling receives deference proportional to its "power to persuade" under the principles of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).[9] *See United States v. Mead Corp.*, 533 U.S. 218, 234–35 (2001); *Mead Corp. v. United States*, 283 F.3d 1342, 1345–46 (Fed. Cir. 2002) (citations omitted). Customs' "relative expertise in administering the tariff statute often lends further persuasiveness to a classification ruling, entitling the ruling to a greater measure of deference." *Mead Corp. v. United States*, 283 F.3d at 1346.

Nevertheless, Customs' classifications are not controlling by reason of their authority and this Court "has an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005). In determining whether imported merchandise has been properly classified by Customs, this Court must consider whether Customs' classification was correct, "both independently, and in comparison with the importer's alternative." *ABB Power Transmission v. United States*, 19 CIT 1044, 1046, 896 F. Supp. 1279, 1281 (1995) (*quoting Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984)).

III. DISCUSSION

At issue in the present case is the correct tariff classification of Dell secondary batteries when withdrawn from an FTZ in packages with Dell notebook computers and entered for consumption into the United States.

When interpreting a tariff classification, this Court looks first to the General Rules of Interpretation ("GRIs") governing the classification

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[8] Customs' decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1) (2006). However, where "a question of law is before the Court on a motion for summary judgment, the statutory presumption of correctness is irrelevant." *Blakley Corp. v. United States*, 22 CIT 635, 639, 15 F. Supp. 2d 865, 869 (1998) (*citing Universal Elecs., Inc.* 112 F.3d at 492)).

[9] "*Skidmore* deference" refers to the following: "The weight of [a Customs judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore v. Swift & Co.*, 323 U.S. at 140.

of imported goods in the HTSUS. *Home Depot U.S.A., Inc. v. United States*, 491 F.3d 1334, 1336 (Fed. Cir. 2007).[10] This Court begins its analysis with GRI 1. *See Conair Corp. v. United States*, 29 CIT 888, 891 (2005). GRI 1 states “for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes . . . .” GRI 1, HTSUS.

If a tariff term is not clearly defined in either the HTSUS or its legislative history, it may be construed according to its common meaning. *W.Y. Moberly, Inc. v. United States*, 924 F.2d 232, 235 (Fed. Cir. 1991). In order to determine the common meaning of a tariff term, the court may rely on its own understanding of the term, as well as consult dictionaries, lexicons, the testimony in the record, and other reliable sources of information. *Ciba-Geigy Corp. v. United States*, 25 CIT 1252, 1259, 1265, 178 F. Supp. 2d 1336, 1343, 1349 (2001). If the proper classification cannot be determined by reference to GRI 1, this Court must consider the succeeding GRIs in numerical order. *Conair Corp.*, 29 CIT at 891.

Although not binding, the Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) are the official interpretation of the HTSUS set forth by the World Customs Organization and offer guidance in interpreting the HTSUS provisions. *Id.*; *see also Bauer Nike Hockey USA, Inc. v. United States*, 393 F.3d 1246, 1250 (Fed. Cir. 2004) (explaining that “[courts] may look to the Explanatory Notes accompanying a tariff subheading as a persuasive, but not binding, interpretative guide”).[11]

Dell asserts that the subject batteries were properly classifiable, together with the Dell notebook computers with which they were packaged, under heading 8471, HTSUS, based on two alternative legal theories. First, Dell argues that the secondary batteries are “functional units” of the notebook computers, pursuant to GRI 1. In the alternative, Dell asserts that the batteries should be classified as a component of a “retail set” under GRI 3(b). Customs responds that the Dell secondary batteries are neither “functional units” nor “retail set” components, as these terms are used for tariff purposes, and that the batteries must be classified separately from the notebook computers. This court examines Dell’s “functional unit” and “retail set” arguments in turn.

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[10] The HTSUS consists of the General Notes, the GRIs, the Additional U.S. Rules of Interpretation, and Sections I to XXII of the HTSUS (including Chapters 1 to 99, together with all Section Notes and Chapter Notes, article provisions, and tariff and other treatment accorded thereto), as well as the Chemical Appendix. *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007).

[11] All citations to the ENs herein are to the 2002 edition. The pertinent text remains unchanged.

A. Whether the subject batteries qualify as "functional units"

To determine the correct classification of the subject batteries, this Court will first consider GRI 1. *See Conair* Corp., 29 CIT at 891. Dell relies primarily on Section XVI, Section Note 4, HTSUS ("Section Note 4, HTSUS") which states in relevant part: "[w]here a machine . . . consists of individual components . . . intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or Chapter 85, then the whole falls to be classified in the heading appropriate to that function."[12] Section Note 4, HTSUS. The ENs explain that:

> For the purpose of this Note, the expression "intended to contribute together to a clearly defined function" covers only machines and combinations of machines *essential* to the performance of the function specific to the functional unit as a whole, and thus excludes machines or appliances fulfilling auxiliary functions and which do not contribute to the function of the whole.

ENs, Section XVI, (VII) Functional Units, Section Note 4, HTSUS ("ENs, Section Note 4, HTSUS") (emphasis added).

Dell claims that the subject secondary battery contributes to the notebook computer's clearly defined function covered by heading 8471, HTSUS, which is to automatically process data. *See* Heading 8471, HTSUS. According to Dell, the secondary battery is essential for the intended use of the notebook computer for purchasers for whom plugged-in computing will not be available for extended periods of time, and therefore, the batteries are "functional units" pursuant to GRI 1.

The parties agree that the "clearly defined function" of the notebook computer is "automatic data processing," as evidenced by the fact that the computers are classifiable in the tariff provision for "automatic data processing machines." *See* Subheading 8471.30.00, HTSUS. An important benefit of a notebook computer is its portable computing function. The Government does not dispute that components that permit the choice between plugged-in computing (a power cord) and stand-alone computing (a battery) are essential to the function specific to the notebook computer, portable computing.

Dell's argument fails because the secondary batteries are not *essential* to the performance of the function specific to the notebook

[12] Both Chapter 84 and Chapter 85 (and, thus, both heading 8471 and heading 8507) are within Section XVI of the HTSUS.

computer. *See* ENs, Section Note 4, HTSUS. The portable computing function is completely served by the combination of the primary battery encased in the computer and the power adapter. This court is not convinced that extended unplugged computing, beyond the capabilities of the primary battery, is essential to the performance of the computer's specific function as a notebook computer. Because the notebook computers are "whole" and can perform the portable computing function before being packaged with a secondary battery, the batteries at issue are not "essential" to the computer's portable computing function. *See* Section Note 4, HTSUS; ENs, Section Note 4, HTSUS.

Moreover, none of the examples in the ENs to Section Note 4 suggest that secondary power sources are classifiable as functional units. *See* ENs, Section Note 4, HTSUS. The ENs list examples of functional units within the meaning of Section Note 4. Dell points out two examples in particular: "[w]elding equipment consisting of the welding head or tongs, with a transformer, generator or rectifier to supply the current" and "[r]adar apparatus with the associated power packs, amplifiers, etc." ENs, Section Note 4, HTSUS. However, in these examples, it is the article's *primary* power source that is the component classified under the heading appropriate to the function of the machine. Similarly, in this case, Customs classified the primary battery and power cord, along with the notebook computer, under heading 8471, HTSUS. In contrast, the batteries at issue do not serve as a primary power source. The secondary batteries cannot be used at the same time as the primary battery and are not the type of component covered by Section Note 4, which, *together*, contribute to a clearly defined function *essential* to the performance of the notebook computer as a whole. Section Note 4, HTSUS; ENs, Section Note 4, HTSUS.

Ultimately, Dell's position requires an unduly narrow "clearly defined function" of the notebook computer of extended unplugged automatic data processing that ignores the fact that the computer can fully perform the function of portable computing without the subject secondary battery. *See* Section Note 4, HTSUS. Additionally, the ENs as well as previous Customs rulings do not suggest that secondary power sources are classified as "functional units" for tariff purposes.[13]

[13] Dell refers to NY 872117 (Mar. 13, 1991) where Customs held that a notebook computer, imported with a detachable power cord, two Ni-Cad batteries, and an AC/DC adapter, were classifiable together under heading 8471. Although Dell stresses that the notebook computer in that ruling similarly contained two batteries, it is unclear whether or not the computer required both batteries to function nor is there any indication that one of the two Ni-Cad batteries was an optional purchase. *See id.* None of the other cases cited by Dell suggest that Customs classifies secondary power sources serving the same function as aprimary power source as a "functional unit."

Thus, the subject secondary batteries are not "functional units" and are not classifiable under heading 8471, HTSUS pursuant to GRI 1 and Section Note 4 because they are not essential to the portable computing function of the notebook computer.

B. Whether the secondary batteries qualify as a component of a "retail set"

In the alternative, Dell proposes that the subject batteries are classifiable under heading 8471, HTSUS, pursuant to GRI 3(b) as components of "retail sets." GRI 3(b) provides that "goods put up in sets for retail sale" shall be classified in the HTSUS heading applicable to the material or component which imparts the "essential character" to the set, in this case, the notebook computer. GRI 3(b), HTSUS. The ENs to GRI 3(b) provide that:

> (X) For purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles, which are, *prima facie*, classifiable in different headings. . . .;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

ENs, GRI 3(b), HTSUS. The parties do not dispute that the notebook computers and the secondary batteries are *prima facie* classifiable in different headings. Consequently, there is no dispute regarding Criterion (a) of the ENs to GRI 3(b). Therefore, this court must consider whether the subject batteries satisfy Criteria (b) and (c).

i. Whether the packages containing the secondary batteries consisted of products "put up together to meet a particular need or carry out a specific activity."

Under Criterion (b), goods put up in sets for retail sale consist of products or articles "put up together to meet a particular need or carry out a specific activity." ENs, GRI 3(b), (X)(b), HTSUS ("Criterion (b)").

The parties dispute whether the subject batteries meet a "particular need" or "specific activity" under Criterion (b). Dell argues that the "particular need" or "specific activity" met by the inclusion of the second battery is longer, unplugged operation of the computer than would be possible with only the primary battery. Alternatively, Dell argues that even if the secondary battery is characterized as being merely a redundant or replacement part, it should still be considered

part of the retail set because the secondary battery nevertheless enhances the fulfillment of the particular need of unplugged computing. The Government responds by arguing that there is only one "particular need" satisfied by a notebook computer/battery combination — the ability to portably compute — and that this is fully met by the computer, the power cord, and the primary battery which are prepackaged together. According to the Government, the inclusion of the secondary battery exceeds the reasonably intended purpose of the notebook, which was already satisfied by the inclusion of the primary battery and power cord.

The plain language of Criterion (b) supports Dell's position that the inclusion of the secondary battery with the notebook computer meets a "particular need" or carries out a "specific activity." Even though the Government argues that the reasonably intended purpose of the computer is already met; Criterion (b) does not require a retail set component to satisfy a different need than those met by other components. Criterion (b) only requires that the component satisfies a "particular" need. *See* Criterion (b). Furthermore, the Government does not dispute Dell's argument that a component of a "retail set" need not be essential to the use of the primary article for its intended purpose. *See, e.g.*, HQ 078445 (Apr. 18, 1989) (ruling that a camera and multiple lenses were components of a retail set). Here, the secondary battery exists as a supplemental component that meets the particular need of prolonged unplugged computing by extending the time a computer can function without a power adapter.

In addition, the ENs do not require that all components of a retail set can be used simultaneously or that replacements parts are *de jure* excluded from consideration as components of retail sets. Thus, the subject batteries are not precluded from classification as a component of a retail set even if the need they fulfill is considered redundant with the need fulfilled by the primary battery. Dell's position that the secondary battery meets a "particular need" or carries out a "specific activity," thus, appears to be sustainable. There are, however, further considerations in order to satisfy Criterion (b).

Under Criterion (b), the subject merchandise must be *put up together* with the other components of the set in order to meet a particular need or carry out a specific activity. The dictionary definition of "put up" includes "to offer for public sale." *Webster's Third New International Dictionary of the English Language Unabridged* 1851 (Philip Babcock Grove, Ph. D. ed., Merriam-Webster Inc., Publishers

2002) (1961) ("*Webster's Dictionary*").[14] As Customs notes in HQ 967364, "put up" also is defined as to "construct" or "erect" and to "display" or "show." HQ 967364 (Dec. 23, 2004); *see also Webster's Dictionary* at 1851. Criterion (b) in the ENs is meant to assist in interpreting GRI 3(b) which refers to goods "put up in sets *for retail sale*." GRI 3(b), HTSUS (emphasis added). It is therefore reasonable to interpret "put up," in the context of Criterion (b) and GRI 3 (b), to mean offered together for retail sale or displayed or shown together for retail sale.

The subject batteries are not offered or displayed *together* for retail sale with the computer — the computer is offered together with a power cord and primary battery, and the secondary batteries are offered individually. The subject batteries are simply one of many optional, complementary items that may be purchased at the same time as a notebook computer.[15] Although Dell may offer, or even suggest additional items to a customer, it does not necessarily follow that the items selected by a customer are "put up together." GRI 3(b), HTSUS.[16]

Therefore, while the language of Criterion (b) supports Dell's position that the inclusion of the secondary battery with the notebook computer meets a "particular need" or carries out a "specific activity;" the subject batteries nevertheless fail to satisfy Criterion (b) because they were not "put up together" with other components of the retail set, as the terms are used for tariff purposes. *See* GRI 3(b), HTSUS; Criterion (b). Dell fails to show that the computer, with a power cord and a primary battery encased, and the secondary battery were put up together to meet the particular need or carry out the specific activity of extended unplugged computing.

[14] The Government also argues for this definition of "put up" in its interpretation of EN Criterion (c) to GRI 3(b).

[15] *See* HQ 964209 (Sept. 14, 2001) (determining that Dell speakers fail to meet Criterion (b) "because the components are not 'put up together.' Each grouping is made to order so that no identifiable specific activity is met for all groupings . . .Therefore, the speakers may not be considered part of a 'set' pursuant to GRI 3(b)."

[16] Dell points out rulings where multiple identical goods or replacement parts used with the same primary good were together classified as a "set." *See, e.g.*, NY N027960 (June 5, 2008) (extra erasers and extra lead packaged together for resale with the primary good, propelling pencils, in a plastic box); NY G83666 (Nov. 17, 2000) (yo-yo and replacement yo-yo string packaged and classified together); HQ 085487 (Sept. 27, 1989) (athletic shoes and three pairs of shoe lacings in the same packing container). However, in these rulings, each specific collection of goods was offered and sold together as a single, fixed unit.

ii. Whether the packages containing the secondary batteries are "put up in a manner suitable for sale directly to users without repacking."

Based in part on similar reasoning, the secondary batteries fail to satisfy Criterion (c) which describes a retail set as goods "put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards)." ENs, GRI 3(b), (X)(c), HTSUS ("Criterion (c)").

Dell's position focuses on the fact that the subject batteries were "put up" or "packaged" with the notebook computer in the FTZ before entering into the commerce of the United States and delivered to retail customers. Dell argues that merchandise does not need to be packaged together before offered for sale in order to satisfy Criterion (c), noting that Customs has consistently classified goods as GRI 3(b) retail sets without inquiring into the sequence of ordering and packaging. True, the chronology of packaging the secondary battery and the computer together after a customer places an order does not in itself negate classification as a GRI 3(b) retail set. However, Dell's argument overlooks other relevant requirements for merchandise exiting a FTZ to comprise a GRI 3(b) retail set.

Even if the phrase "put up," as used in Criterion (c), is defined as "placed in a container or receptacle," as Dell contends, Criterion (c) must be read in reference to GRI 3(b) since the purpose of the ENs is to aid in the interpretation of the GRIs. *See Webster's Dictionary* at 1851. As previously discussed, GRI 3(b) refers to "goods put up in sets for retail sale." GRI 3(b), HTSUS. The language of GRI 3(b) indicates that there is an identifiable collection of goods comprising a set that is put up for the purpose of a potential retail sale. *See id.* The requirement that a set be "put up" or "placed in a container," in a manner suitable for sale without repacking does not nullify the language of GRI 3(b) which indicates that there is an express set of goods comprising a set prior to the potential retail sale. *See* Criterion (c).

In this case, the batteries at issue were never put up for sale as part of a fixed grouping of goods by Dell or its suppliers — they were simply offered for sale individually. A customer could purchase one or more secondary batteries, along with various other supplemental items, when simultaneously purchasing a notebook computer. Dell then packaged the additional optional items into a shipping box that already contained the notebook computer, a primary battery, and a power cord. Despite the fact that the subject batteries were packaged together with notebook computers, the shipments to Dell's customers were never put up by Dell as sets prior to a potential retail sale. *See* GRI 3(b), HTSUS.

Dell's position would permit goods packaged together to be classified a "set" for tariff purposes even if the grouping of goods was not fixed when offered for sale. This result would nullify the language of GRI 3(b) which anticipates a set as a defined unit that is offered for sale to retail consumers. Here, the contents of a customized order are determined by an individual customer; Dell did not designate which merchandise constituted a set for retail sale.

This is not to suggest that simply marketing or offering items together inherently creates a "retail set" for tariff purposes. Rather, this court is stating that a consumer's customized order of individual, complementary items, (i.e. items that were never put up together as a pre-determined combination), is not transformed into a GRI 3(b) "retail set" upon entry merely by virtue of being ordered at the same time and subsequently packaged together in an FTZ.

Furthermore, it is not clear that the subject batteries satisfy the Criterion (c) requirement that the collection of goods, in its condition as shipped, is "suitable for retail sale without repacking." *See* Criterion (c). One definition of "suitable" is "adapted to a use or purpose." *See Webster's Dictionary* at 2286. The purpose here is a potential retail sale. *See* Criterion (c). Criterion (c) therefore describes a set of goods that is put up in a manner that would allow for retail sale without repacking.

Dell acknowledges that other optional items simultaneously ordered by a customer may leave the FTZ in the same package as the computer and subject battery. Thus, the collections of goods in each package vary according to each customer's specifications. The customization of each order undermines the conclusion that each package, when it exits the FTZ, is "suitable for retail sale without repacking." *See* Criterion (c).

Accordingly, the subject secondary batteries are neither classifiable as part of a GRI 3(b) retail set nor as a functional unit of the notebook computer pursuant to GRI 1. Classifying the subject batteries separately from the computer also is consistent with previous Customs rulings classifying secondary or redundant power sources separately from the primary article entered for consumption. *See, e.g.*, NY N052216 (Apr. 2, 2009) (classifying a heating vest, a removable battery, and a power charger with a cord together under the subheading for the heating vest, the article imparting the essential character, while optional spare batteries and chargers purchased simultaneously were classified separately under subheading 8507.80.80, HTSUS, as "electric storage batteries: other"); NY L857508 (Oct. 6, 2005) (classifying an additional battery under subheading 8507.80.80, HTSUS, as "electric storage batteries," separate from the classification of

the other four components in a RAID500-RK (Redundant Array of Independent Disks) subsystem); NY J89374 (Oct. 8, 2003) (classifying a cordless drill, the battery housed in its base, and other drill components together as a GRI 3(b) set under the subheading for the drill while the extra rechargeable battery imported in the same retail packaging as the drill was classified separately under subheading 8507.30.8010, HTSUS as "other electric storage batteries").[17]

IV. CONCLUSION

For the foregoing reasons, the Court upholds Customs' classification of the subject merchandise under subheading 8507.80.80, HTSUS. Plaintiff's motion for summary judgment is denied and Defendant's cross-motion is granted.

Dated: June 10, 2010
New York, New York

/s/ Richard W. Goldberg
RICHARD W. GOLDBERG
SENIOR JUDGE

Slip Op. 10–67

PACIFIC NORTHWEST EQUIPMENT, INC., Plaintiff, v. THE UNITED STATES OF AMERICA, Defendant.

Before: Gregory W. Carman, Judge
Court No. 07–00184

[*Plaintiff's motion for summary judgment is granted, Defendant's cross-motion for summary judgment is denied.*]

Dated: June 15, 2010

Joel R. Junker & Associates (*Joel R. Junker*), for Plaintiff.

Tony West, Assistant Attorney General, *Barbara S. Williams*, Attorney-in-Charge, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Justin R. Miller, Edward F. Kenny, Jason M. Kenner*); and *Beth C. Brotman*, of counsel, Office of Assistant to Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, Department of Homeland Security, for Defendant.

[17] Dell errs in arguing that this final Customs ruling, NY J89374 (Oct. 8, 2003), has no precedence because at issue was a radio charger kit, not the extra battery. Customs' ruling that the radio kit was not classifiable as part of the set did not preclude Customs from ruling that other components, such as the power cord and the primary battery, were part of a set with the drill.

OPINION

CARMAN, JUDGE:

This case requires the Court to determine the appropriate tariff classification for what appears to be, at first glance, a contradiction in terms: "platform containers." Pacific Northwest Equipment ("Plaintiff" or "PNW Equipment") challenges the denial of six protests by Customs and Border Protection ("CBP") relating to the classification of 98 entries of Plaintiff's imported product. For the reasons set forth below, the Court finds that Plaintiff's product is properly classifiable under heading 8609, HTSUS,[1] as "Containers (including containers for the transport of fluids) specially designed and equipped for carriage by one or more modes of transport." Summary judgment is therefore granted for Plaintiff.

Background

Plaintiff refers to its merchandise as "platform containers," which it defines as "special-purpose shipping container[s]" without "doors, walls, or a roof," and which are "designed for use in intermodal transportation, typically by road, rail, and ocean transport." (Mem. of P&A in Supp. of Pl.'s Mot. For Summ. J. ("Pl.'s MSJ") 1.) Defendant agrees that the subject merchandise is "used to secure cargo during transport on vessels, trucks, and railroad cars," but assiduously avoids referring to the subject merchandise as any sort of container, preferring to use the term "platform," in isolation. (Mem. In Opp'n. to Pl.'s Mot. for Summ. J. and in Supp. of Def.'s Cross-Mot. for Summ. J. ("Def.'s MSJ") 1, *see also* Def.'s Resp. To Pl.'s Stmt. Of Undisputed Material Facts ("Def.'s Resp. Facts") ¶¶ 1, 2, 3, 4, 7.)[2] Defendant's objection to the nomenclature is a reflection of its position that the imported merchandise is not classifiable under the tariff subheading for containers, but rather as an article of iron or steel under subhead-

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[1] Heading 8609, HTSUS (2005) reads:

8609.00.00	Containers (including containers for the transport of fluids) specially designed and equipped for carriage by one or more modes of transport

This language remained unchanged in the 2006 edition of the HTSUS.

[2] On June 15, 2010, the court accepted Plaintiff's amended statement of undisputed material facts and the amended counter statement of the United States on consent of the parties. The amendments are immaterial to the disposition of the case.

ing 7326.90.8587.[3] The Court's adoption of Plaintiff's terminology throughout this opinion is an effect, and not a cause, of the Court's determination that Plaintiff's product is appropriately classified under heading 8609.

PNW Equipment imported platform containers from Korea into the United States between March 2005 and February 2006. (Complaint ("Compl.") Sch. A, Def.'s MSJ 1.) Prior to importation, in January 2005, Plaintiff received a CBP Form 29 Notice of Action. The form indicated the position of CBP's National Import Specialists in New York that platform containers should be classified according to their constituent material—steel—under heading 7326, and not under heading 8609, because they "do not have a measurable internal volume, and are simply platforms." (Pl.'s MSJ 2.) In February 2005, at the behest of Plaintiff, CBP requested an internal advice memorandum from CBP Headquarters regarding the appropriate classification of Plaintiff's merchandise. (Compl. ¶ 11, Answer ("Ans.") ¶ 11; HQ 967571 (Aug. 16, 2006), Pl.'s Ex. O.) By the time the requested internal advice memorandum arrived in August 2006, CBP had already liquidated 68 of the 98 entries contested in this lawsuit under heading 7326; the remaining 30 entries were liquidated in December 2006. (Compl. ¶ 12, Sch. A, Ans. ¶ 12.) Plaintiff filed protests with CBP which were denied on December 11, 2006 and May 15, 2007. (Compl ¶ 4–5, Ans. ¶ 4–5.) After paying the duties owed pursuant to 28 U.S.C. § 2637(a), Plaintiff commenced this lawsuit with the filing of a summons on June 1, 2007. (Summons, Dkt. 1.) This Court has jurisdiction under 28 U.S.C. § 1581(a).

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[3] The relevant portion of Chapter 73, HTSUS (2005) reads:

7326	Other articles of iron or steel:
	...
7326.90	Other
	...
	Other
	...
	Other
	...
7326.90.85	Other
	...
7326.90.8587	Other

This language remained unchanged in the 2006 edition of the HTSUS.

Standard of Review

Summary judgment is appropriate when "there is no genuine issue as to any material fact" and the Court determines that the movant is "entitled to judgment as a matter of law." USCIT R. 56(c). The Court of International Trade reviews CBP protest decisions "upon the basis of the record made before the court," which is to say, *de novo*. 28 U.S.C. § 2640(a)(1); *See also Park B. Smith v. United States*, 347 F.3d 922, 924 (Fed. Cir. 2003). Ultimately, in a tariff classification case, "the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (emphasis in original).

When there is a dispute over classification, the court first undertakes the legal question to "construe the relevant classification headings" and then undertakes the factual question to "determine under which of the properly construed tariff terms the merchandise at issue falls." *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998). When "the nature of the merchandise is undisputed, . . . the classification issue collapses entirely into a question of law." *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006) (citations omitted).

Discussion

A. *According to the Ordinary Definition of "Container," Platform Containers are Appropriately Classified in Heading 8609*

Defendant argues that heading 8609 is not the appropriate tariff classification for platform containers only on the grounds that platform containers are not containers, as that term is ordinarily used. (Def.'s MSJ 7–24.) That is to say, Defendant does not offer any argument that the platform containers at issue in this case are not "specially designed and equipped for carriage by one or more modes of transport." 8609.00.00, HTSUS. Accordingly, the Court finds that this case hinges entirely on the meaning of the term "container," and whether that term includes the platform containers imported by PNW Equipment in this case.

When a term is not defined in the HTSUS, its meaning "is presumed to be the same as its common or dictionary meaning." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988) (quotation and citation omitted); *see also E.M. Chems. v. United States*, 920 F.2d 910, 913 (Fed Cir. 1990) ("tariff terms are to be construed in accordance with their common and popular meaning, in

the absence of a contrary legislative intent.”). The common meaning of a term used in commerce is presumed to be the same as its commercial meaning. *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). The Court may determine the common meaning of a term by relying upon its “own understanding, dictionaries and other reliable sources.” *Boen Hardwood Flooring, Inc. v. United States*, 357 F.3d 1262, 1264 (Fed. Cir. 2004) (*quoting Medline Indus., Inc. v. United States*, 62 F.3d 1407, 1409 (Fed. Cir. 1995.))

The dictionary definition of the term “container” is expansive enough to include platform containers. A container is simply “one that contains,” and to contain means “to keep within limits: hold back or hold down.” *Webster’s Third New International Dictionary* 490–91 (1986). It is evident that a platform container is used to keep various objects within limits, by holding down such objects during intermodal transport. The dictionary definition of container identifies as exemplars, “a receptacle (as a box or jar) or formed or flexible covering for the packing or shipment of articles, goods, or commodities,” and “a portable usu[ally] metal compartment in which freight is placed for convenience of movement esp[ecially] on railroad container cars.” *Id.* at 491. However, these exemplars do not require a “container” to be anything more than simply “one that contains.” *Cf. E.M. Chemicals*, 920 F.2d at 913 (stating that “[t]he terms ‘indicator panels’ or ‘signalling devices’ simply denote objects that ‘indicate’ or ‘signal,’” and rejecting a limitation of the broadest meaning of these terms absent a showing of Congressional intent to do so.) Accordingly, the Court holds that the appropriate tariff classification of platform containers is HTSUS subheading 8609.00.00, “Containers (including containers for the transport of fluids) specially designed and equipped for carriage by one or more modes of transport.”

The Court rejects Defendant’s proffered definition of the term “container,” because it elevates the term’s connotation over its denotation. Cobbling together various definitions and exemplars, Defendant proposes that a container is “a receptacle into which goods can be held and contained within physical limits.” (Def.’s MSJ 10.) A word’s connotation is “something implied or suggested by [that] word,” while its denotation is its “meaning,” especially the “direct specific meaning as distinct from additional suggestion.” *See Webster’s Third New International Dictionary* 481, 692. While the term “container” is frequently used to connote an enclosed compartment in ordinary parlance, the dictionary definition of a container is not so restrictive.

Similarly, Defendant would also have the Court assign unduly restrictive meaning to prepositions such as “in” and “within.” Defen-

dant claims that platform containers "cannot hold anything *within* their limits," because they "have no walls (sides), overhead (top), or doors (ends)." (Def.'s MSJ at 10 (emphasis added).) This assertion restricts the meaning of the preposition "within," and ignores many uses it can bear; an enclosed three dimensional space is not a prerequisite for the appropriate use of the term. For example, soccer players stay "within" the boundaries of the field, and as such are "contained" by the field, no matter that the field is essentially planar. Or, more abstractly, an ideology may be said to "contain within" it a particular belief. To suggest that only enclosed compartments are capable of "containing within" is plainly inaccurate.

B. *Platform Containers are Consistent With Explanatory Note 86.09*

While the dictionary meaning of the term "container" makes clear that platform containers should be classified in heading 8609, the Explanatory Note ("EN") for this heading further confirms this result. "[A] court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994). In its entirety, the Explanatory Note reads:

> **86.09 — Containers (including containers for the transport of fluids) specially designed and equipped for carriage by one or more modes of transport.**
>
> These containers (including lift vans) are packing receptacles specially designed and equipped for carriage by one or more modes of transport (e.g., road, rail, water or air). They are equipped with fittings (hooks, rings, castors, supports, etc.) to facilitate handling and securing on the transporting vehicle, aircraft or vessel. They are thus suitable for the "door-to-door" transport of goods without intermediate repacking and, being of robust construction, are intended to be used repeatedly.
>
> The more usual type, which may be of wood or metal, consists of a large box equipped with doors, or with removable sides.
>
> The principal types of container include:
>
> (1) Furniture removal containers
>
> (2) Insulated containers for perishable foods or goods

(3) Containers (generally cylindrical) for the transport of liquids or gases. These containers fall in this heading **only** if they incorporate a support enabling them to be fitted to any type of transporting vehicle or vessel; otherwise they are classified according to their constituent material.

(4) Open containers for bulk transport of coal, ores, paving blocks, bricks, tiles, etc. These often have hinged bottoms or sides to facilitate unloading.

(5) Special types for particular goods, especially for fragile goods such as glassware, ceramics, etc., or for live animals.

Containers usually vary in size from 4 to 145m^3 capacity. Certain types are however smaller, but their capacity is not normally less than 1 m^3.

The heading **excludes**:

(a) Cases, crates, etc., which though designed for the "door-to-door" transport of goods are not specially constructed as described above to be secured to the transporting vehicle, aircraft or vessel; these are classified according to their constituent material.

(b) Road-rail trailers (intended mainly for use as road trailers, but so designed that they may be transported on special railway wagons fitted with guide rails) (**heading 87.16)**.

Explanatory Note 86.09 (4th edition 2007) (emphases in original).

Defendant's arguments that EN 86.09 is exclusive of platform containers are unpersuasive. First, Defendant claims this EN requires containers to have a "measurable . . . cubic capacity," which, according to Defendant, refers to "the amount of volume which a container encloses[, and] is determined by multiplying length times width times depth." (Def.'s MSJ at 12–13.) Relying on this definition of cubic capacity, Defendant maintains that platform containers "do not, and cannot ever, have any cubic carrying capacity," because they lack "walls (sides), overhead (top), [and] doors (ends)." (*Id.* at 13.) However, contrary to Defendant's assertions, EN 86.09 contains no explicit requirement that containers have a "measurable cubic capacity." *See EN 86.09*.

Even assuming that the description of the typical *magnitude* of container capacity in EN 86.09 creates an implicit requirement of measurable cubic capacity, Defendant does not make a convincing case that platform containers lack this feature. Once again, Defendant's positioned is undermined by proffering too narrow a definition of the relevant terminology. As a shipping device useful for the trans-

portation of three-dimensional objects, platform containers *necessarily* have a measurable capacity, which could be stated in cubic meters, cubic inches or any other form of cubic measurement. That is to say, even if not easily calculable through elementary arithmetic formulas (such as length times width times height), a platform container's capacity is limited, whether by safety regulation, space available on the transporting vehicle, or the laws of physics.[4] Moreover, containers in the form of a "large box" with doors or sides, which *do* lend themselves to the type of volume calculation described by Defendant, are characterized in this EN only as "the more usual type," leaving ample space within this EN for a container without sides or doors. *See id.*

Finally, Defendant's belief that the term "receptacle" in EN 86.09 excludes platform containers is similarly misguided. Receptacle, meaning "one that receives and contains something," is synonymous with container, and does not necessarily signify an enclosed compartment in the way Defendant advocates. *Compare Webster's Third New International Dictionary* 1894, *with* (Def.'s MSJ at 13) (asserting without dictionary citation that "receptacles by definition have sides, walls, or other physical features to enclose cargo.")

C. *All of Defendant's Other Arguments are Unpersuasive*

The Court finds that the internal advice memorandum issued to the area port director at the request of PNW Equipment lacks any power to persuade, and accordingly does not warrant deference. A classification ruling's power to persuade "depends on the thoroughness evident in the classification ruling, the validity of its reasoning, its consistency with earlier and later pronouncements, the formality attendant the particular ruling, and all those factors that give it power to persuade." *Mead Corp. v. United States*, 283 F.3d 1342, 1346 (Fed. Cir. 2002) (*citing United States v. Mead Corp.*, 533 U.S. 218, 219–20 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).)

HQ 967571 is facially unpersuasive because in it, CBP relies on the mistaken notion that the essential feature of containers classifiable under heading 8609 is "some kind of sides or door." *See* HQ 967571 at 4 (asserting that "some kind of wall" is necessary for a shipping device to be classified in heading 8609, and finding that because platform containers have "no walls or doors," they "cannot be considered to hold a measurable volume."). As explained above, this is simply not true. While it may be easier to calculate the maximum carrying capacity of a box-like container using simple arithmetic formulas, a

[4] This is supported by the testimony of two of Plaintiff's witnesses who stated that platform containers are considered to have a "measurable volume capacity." (Pl.'s MSJ 24.)

platform container also necessarily has a measurable carrying capacity. Moreover, the dictionary definition of container does not require that it have sides, walls, or doors, and EN 86.09 does not demand that containers be so constituted. To the contrary, according to heading 8609, the only essential feature of containers classifiable thereunder is being "specially designed and equipped for carriage by one or more modes of transport," which is undisputed in this action. *See* 8609.00.00, HTSUS; *see also EN 86.09* (specifying that whether "cases and crates" or "containers for the shipment of liquids and gasses," are here classifiable depends on whether they have been specially designed for intermodal transport).

Additionally, the Court finds that the definition of container found in the Customs Convention on Containers, Dec. 6, 1975, T.I.A.S. No. 12,085, 988 U.N.T.S. 43 ("CCC") (cited by Defendant), includes language that is absent from the HTSUS and EN 86.09, reinforcing the Court's conclusion in this case. As used in the CCC, the term "container" means "an article of transport equipment . . . (i) **fully or partially enclosed to constitute a compartment** intended for containing goods." (Def.'s MSJ 14 (*quoting* 1994 Edition of CCC) (emphasis added by Defendant).) While this phrase is found in other international treaties, such as the Customs Convention on the International Road Transport of Goods under Cover of TIR Carnets, Mar. 20, 1978, KAV 2251, 1079 U.N.T.S. 89, the Court finds that the absence of those eight words—"fully or partially enclosed to constitute a compartment"—in both HTSUS heading 8609 and EN 86.09 is both conspicuous and consequential. In fact, the definition of container in the Convention on Safe Containers, Sep. 6, 1977, 29 U.S.T. 3707, 1064 U.N.T.S. 3 ("CSC"), cited by Plaintiff, which does not include the requirement of an enclosed compartment, has more in common with EN 86.09 than does the definition in the CCC.[5]

By virtue of General Rule of Interpretation ("GRI") 1 and the pertinent section notes, because platform containers are classifiable under heading 8609, they are not classifiable under heading 7326. GRI

5

CSC, Art. II, ¶ 1 (cited by Plaintiff):	CCC, Art. 1(c) (cited by Defendant):
"Container" means an article of transport equipment: (a) of a permanent character and accordingly strong enough to be suitable for repeated use; (b) specially designed to facilitate the transport of goods, by one or more modes of transport, without intermediate reloading;	(c) the term "container" shall mean an article of transport equipment (lift-van, movable tank or other similar structure): (i) fully or partially enclosed to constitute a compartment intended for containing goods; (ii) of a permanent character and accordingly strong enough to be suitable for repeated use;

1 of the HTSUS states that "classification shall be determined according to the terms of the headings and any relative section or chapter notes." GRI 1, HTSUS. According to HTSUS Section Note 1(g) of Section XV, that section "does not cover . . . articles of Section XVII." In other words, if a good is properly classifiable unter Section XVII, it may not be classified in Section XV by virtue of this section note. Therefore, because heading 8609 is located within section XVII, and because heading 7326 is located within section XV, the analysis of the appropriate tariff classification for platform containers is resolved through the application of GRI 1, and does not require resorting to any subsequent GRI.

Conclusion

For the foregoing reasons, the Court holds that platform containers are properly classifiable under subheading 8609.00.00, HTSUS. Plaintiff's motion for summary judgment is therefore granted and Defendant's cross-motion for summary judgment is denied. Judgment will enter accordingly.

Dated: June 15, 2010
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN

(c) designed to be secured and/or readily handled, having corner fittings for these purposes; (d) of a size such that the area enclosed by the four outer bottom corners is either: (i) at least 14 sq. m. (150 sq. ft.) or (ii) at least 7 sq. m. (75 sq. ft.) if it is fitted with top corner fittings; the term "container" includes neither vehicles nor packaging; however, containers when carried on chassis are included.	(iii) specially designed to facilitate the carriage of goods, by one or more modes of transport, without intermediate reloading; (iv) designed for ready handling, particularly when being transferred from one mode of transport to another; (v) designed to be easy to fill and to empty; and (vi) having an internal volume of one cubic metre or more; the term "container" shall include the accessories and equipment of the container, appropriate for the type concerned, provided that such accessories and equipment are carried with the container. The term "container" shall not include vehicles, accessories or spare parts of vehicles, or packaging. Demountable bodies, are to be treated as containers[.]

Slip Op. 10–68

SAHAVIRIYA STEEL INDUSTRIES PUBLIC COMPANY LIMITED, PLAINTIFF, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Nicholas Tsoucalas, Senior Judge
Court No. 09–00229
PUBLIC VERSION

Held: Plaintiff's Motion for Judgment On the Agency Record is denied. Judgment is entered for Defendant, United States. Case is dismissed.

Dated: June 15, 2010

Hughes Hubbard & Reed LLP, (*Kenneth J. Pierce, Robert L. LaFrankie, Victor S. Mroczka*) for Sahaviriya Steel Industries Public Company Limited, Plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael D. Panzera* and *Jane C. Dempsey*); *Aaron P. Kleiner*, Office of Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for the United States, Defendant.

Skadden, Arps, Slate, Meagher & Flom LLP, (*Jeffrey D. Gerrish Robert E. Lighthizer*, and *Nathaniel B. Bolin*) for United States Steel Corporation, Defendant-Intervenor.

OPINION

TSOUCALAS, Senior Judge:

This matter is before the Court on a Motion for Judgment On the Agency Record brought by Plaintiff, Sahaviriya Steel Industries ("SSI"), pursuant to Rule 56.2 of the Rules of the United States Court of International Trade ("USCIT").

Plaintiff challenges certain aspects of the U.S. Department of Commerce's ("Commerce's" or "Department's") final results with respect to the changed circumstances review of the antidumping duty order in *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement in the Antidumping Duty Order*, 74 Fed. Reg. 22,885 (May 15, 2009) Public Rec. Doc. No. 1180 ("*Final Results*").[1] Plaintiff contends that the Department lacks the authority to conduct a changed circumstances review for the purpose of reinstating a "previously revoked" antidumping duty order. Mem. in Supp. of Pl.'s Mot. for J. On the Agency R. ("Pl.'s Brief") at 2. Plaintiff further contests

[1] Hereinafter all documents in the public record will be designated "PR," and all documents in the confidential record designated "CR."

the Department's date of sale methodology and argues that Commerce acted unlawfully when it changed its previous practice of relying on the contract date as the date of sale for its margin calculations. *See id.* at 3.

Jurisdiction

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2) (2006) and 28 U.S.C. § 1581(c) (2006).

Standard of Review

When reviewing the final results in an antidumping changed circumstances review "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). There must be a "rational connection between the facts found and the choice made" in an agency determination if it is to be characterized as supported by substantial evidence and otherwise in accordance with law. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). The Court "must affirm a Commission determination if it is reasonable and supported by the record as a whole, even if some evidence detracts from the Commission's conclusion." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (internal citation and quotation marks omitted).

When the Court examines the lawfulness of Commerce's statutory interpretations and regulations, it must employ the two-pronged test established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). First, the Court must examine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, the agency and the Court must comply with the clear intent of Congress. *See id.* at 842–43. If it has not, the question for the Court is "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Background

On November 29, 2001, Commerce issued an antidumping duty order on certain hot-rolled carbon steel flat products from Thailand. *See Antidumping Duty Order: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 59,562 (Nov. 29, 2001). The order was based on separate findings by Commerce and the U.S. International Trade Commission ("ITC" or "Commission") that cer-

tain hot-rolled steel from Thailand had been sold in the United States at less than fair value and contributed to the material injury suffered by the domestic hot-rolled steel industry. *See id.* at 59,563. SSI was among the Thai producers of subject merchandise included in the antidumping duty order. *See id.*

Following its issue, Commerce conducted a series of administrative reviews of the order in which it determined that SSI had not sold hot-rolled steel at less than normal value. *See Certain Hot-Rolled Carbon Steel Flat Products From Thailand: Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 69 Fed. Reg. 19,388 (Apr. 13, 2004); *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Rescission of Antidumping Duty Administrative Review*, 69 Fed. Reg. 18,349 (Apr. 7, 2004) (this second administrative review was rescinded when the parties requesting the review withdrew their requests); *Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Final Results of Antidumping Duty Administrative Review, Partial Revocation of Antidumping Duty Order and Partial Rescission of Antidumping Duty Administrative Review* ("*Final Results of Third Administrative Review*"), 71 Fed. Reg. 28,659 (May 17, 2006). In November 2004, as part of its request to conduct the third administrative review, SSI sought partial revocation of the order with respect to its sales pursuant to 19 C.F.R. § 351.222 (2004). In support of its request, SSI agreed "to immediate reinstatement of the order, so long as any Thai exporter or producer is subject to it, should the Department determine that SSI, subsequent to the requested revocation, sold the subject merchandise at less than fair value." Request For Changed Circumstances Review On Behalf Of United States Steel Corp. (Nov. 8, 2006), Ex. 1 at 3 (PR 721).

Upon completion of the third administrative review, Commerce revoked the antidumping duty order for SSI's exports of hot-rolled steel.[2]*See Final Results of Third Administrative Review*, 71 Fed. Reg. 28,661. Commerce's decision was based on its determination that SSI had sold the subject merchandise at not less than normal value for a period of three consecutive years. Despite partial revocation of the antidumping order with respect to SSI, the order itself remained in effect as to other Thai producers and exporters. *See Certain Hot-Rolled Carbon Steel Flat Products from India, Indonesia, the People's Republic of China, Taiwan, Thailand, and Ukraine: Continuation of Antidumping Duty and Countervailing Duty Orders*, 72 Fed. Reg. 73,316 (Dec. 27, 2007).

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[2] This revocation was made effective November 1, 2004. *See* Memorandum to File Regarding Effective Date of Revocation for SSI (May 23, 2006).

On November 8, 2006, United States Steel Corporation ("U.S. Steel") filed with Commerce an allegation claiming SSI had resumed sales of hot-rolled steel products at less than normal value subsequent to its removal from the original antidumping order. Invoking 19 C.F.R. § 351.216(b),[3] U.S. Steel requested that Commerce initiate a changed circumstances review to reinstate the order with regard to SSI's exports of subject merchandise to the United States. Accordingly, Commerce conducted an analysis of the information it received from U.S. Steel to determine the sufficiency of its allegations. On March 28, 2008, the Department, relying on its authority under 19 U.S.C. § 1675(b)(1), initiated the underlying changed circumstances review to determine whether SSI had sold hot-rolled steel at less than normal value during the period in question,[4] and whether it should therefore be reinstated in the original antidumping duty order. *See Initiation of Antidumping Duty Changed Circumstances Review: Certain Hot-Rolled Carbon Steel Flat Products from Thailand* ("*Notice of Initiation*"), 73 Fed. Reg. 18,766 (Apr. 7, 2008).

On October 7, 2008, SSI commenced an action with this Court seeking injunctive relief to prevent the Department from continuing with its changed circumstances review. Attempting to invoke the Court's jurisdiction under 28 U.S.C. § 1581(i), SSI challenged the Department's initiation of the changed circumstances review for the purpose of reinstating a previously revoked antidumping duty order, as unlawful and *ultra vires*. *See Sahaviriya Steel Indus. Co., Ltd. v. United States*, 33 CIT ___, 601 F. Supp. 2d 1355 (2009) ("*SSI I*"). The Court granted Commerce's motion to dismiss based on the lack of subject matter jurisdiction and because SSI's claims were not yet ripe. *See id.*

On May 15, 2009, the Department published the *Final Results* of its changed circumstances review in which it determined that SSI had resumed dumping of hot-rolled steel products, and reinstated Plaintiff under the antidumping duty order still in effect. A dumping margin of 9.04 percent *ad valorem* was calculated for all entries of subject merchandise produced by SSI. *See Final Results*, 74 Fed. Reg. at 22,886.

Plaintiff commenced this action on June 11, 2009, seeking judicial review of Commerce's *Final Results* in the changed circumstances review ("CCR" or "changed circumstances review"). Specifically, Plaintiff contests the legality of the Department's initiation of a changed circumstances review for the purpose of reinstating a previ-

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[3] 19 C.F.R. § 351.216(b) allows an interested party to request a changed circumstances review of an antidumping duty order.

[4] The period of review is July 1, 2006, through June 30, 2007.

ously revoked antidumping duty order, and the methodologies employed by Commerce to determine the dumping margin and cash deposit rate. *See* Compl. ¶ 24.

Discussion

1. *Commerce's Use of a CCR for Reinstatement of a Partially Revoked Antidumping Duty Order*

A. Plaintiff's Arguments

The gravamen of Plaintiff's argument is that Commerce lacks the statutory authority to support its initiation and conduct of a changed circumstances review for the purpose of reinstating a partially revoked antidumping duty order. *See* Pl.'s Brief at 15. According to SSI, there are only two statutory provisions which affect the manner in which a changed circumstances review is conducted. The first, section 1675(b),[5] expressly limits the Department's authority to review three types of agency decisions, none of which is a previous determination to revoke an antidumping duty order. *See id.* Plaintiff argues that, as it relates to this litigation, section 1675(b) only allows Commerce to conduct a changed circumstances review of "a final affirmative determination that resulted in an antidumping duty order" provided there are changed circumstances sufficient to warrant such a review. 19 U.S.C. § 1675(b)(1)(A); *see also* Pl.'s Brief at 15–16. As SSI explains it, there are only two final affirmative determinations that result in an antidumping duty order; a final dumping determination made by Commerce in a less-than-fair value investigation; and a final injury determination made by the ITC. *See* Pl.'s Brief at 16. No where does the statute suggest a unilateral authority to review a determination of revocation as proffered by Commerce. *See id.* Thus, SSI concludes, because the underlying changed circumstances review does not involve a review of any of the authorized determinations listed in section 1675(b), Commerce exceeded its statutory authority. *See id.* at 17.

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[5] The relevant portions of 19 U.S.C. § 1675(b) state: Reviews based on changed circumstances

(1) In general

Whenever the administering authority or the Commission receives information concerning, or a request from an interested party for a review of—

> (A) a final affirmative determination that resulted in an antidumping duty order under this subtitle . . . ,
> (B) a suspension agreement accepted under section 1671c or 1673c of this title, or
> (C) a final affirmative determination resulting from an investigation continued pursuant to section 1671c(g) or 1673c(g) of this title,

which shows changed circumstances sufficient to warrant a review of such determination . . ., the administering authority . . . shall conduct a review of the determination[.]

Plaintiff further argues that, as presently constructed, the statute is an unambiguous declaration by Congress limiting Commerce's authority to conduct a changed circumstances review to those instances where revocation of an existing order is contemplated. *See id.* Plaintiff points to the text of the statute as evidence "that Congress did not intend to authorize the Department to reinstate an order with respect to merchandise covered by a revocation." Pl.'s Brief at 15. Therefore, any deference afforded the agency under *Chevron*, is mooted as the Court "must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. In addition, SSI cites to portions of the legislative history purporting to show that Congress never intended to endow Commerce with the authority to conduct a changed circumstances review for the purpose of reinstating a previously revoked antidumping duty order. *See* Pl.'s Brief at 19. Plaintiff draws this conclusion based upon Congress' failure to specifically provide for the reinstatement of an antidumping duty order notwithstanding the numerous opportunities it had to do so. *See id.* at 18–19.

Plaintiff looks to section 1675(d)(1) as the only other provision in the statute that affects the conduct of a changed circumstances review.[6] According to SSI, the omission of any reference to "reinstatement" in the statutory text is evidence of the legislature's intent to limit Commerce's use of a changed circumstances review solely for revocation purposes, not reinstatement. *See id.* at 20. In light of this unequivocal statement by Congress, the argument goes, any inquiry under *Chevron* should end at the first prong analysis.[7] *See id.* Moreover, Plaintiff claims, when Commerce revokes an antidumping duty order in whole, the order ceases to exist and cannot later be reinstated. *See id.* Therefore, because section 1675(d) does not distinguish between partial and total revocation, the effect is the same for both procedures. Under partial revocation, the part of the order that was revoked ceases to exist, and the Department may not reinstate the

[6] Section 1675(d)(1) states in part that:

> The administering authority may revoke, in whole or in part, . . . an antidumping duty order . . . after review under subsection (a) [administrative review] or (b) [changed circumstances review] of this section.

[7] As directed by the Supreme Court, a reviewing court must first consider "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* a 843.

order over merchandise covered by that revocation. *See id.* To further illustrate this point, SSI references the Department's own regulations which define the term "revocation" as the end of an antidumping proceeding.[8] *See id.* at 21.

Next, Plaintiff challenges the Department's assertion that its reinstatement regulation, 19 C.F.R. § 351.222(b) and (e), is a reasonable exercise of its statutory authority to revoke and later reinstate an antidumping duty order. *See id.* SSI takes particular issue with Commerce's rationale that reinstatement is the "natural corollary" to revocation, and explains that the Department's regulations cannot provide the agency with a level of authority not contemplated by the statute. *See id.* at 22. For example, the regulation's requirement that a respondent agree in writing to immediate reinstatement if the Department later concludes that the exporter or producer has resumed dumping subsequent to revocation, cannot confer upon Commerce the legal authority it lacks under the statute. *See id.* Moreover, claims Plaintiff, even if the Court were to afford the Department's actions deference under *Chevron*, they would still fail because *Chevron* only defers to the agency in its interpretation of statutes, "not in creating statutory authority where none exists." *Id.* at 23 (emphasis omitted).

Plaintiff relies on this Court's decision in *Asahi Chemical Indus. Co. Ltd., v. United States*, 13 CIT 987, 727 F. Supp. 625 (1989), as further evidence that section 1675(b) precludes Commerce from reinstating an order against merchandise that was previously revoked. *See id.* at 23–24. The Court in *Asahi* examined the Department's reinstatement regulation in effect at the time, 19 C.F.R. § 353.54(e) (1988), and whether its requirement that a party agree to immediate suspension of liquidation and reinstatement of the antidumping duty order was enforceable.[9] SSI interprets the Court's holding in *Asahi* as standing for the proposition that revocation of the antidumping order renders the order moot with respect to the merchandise covered by the previous revocation. *See id.* at 24. Therefore, "once the Department makes a revocation determination, 'the antidumping duty order

[8] The relevant portion of 19 C.F.R. § 351.222(a) reads as follows:

> Revocation of orders; termination of suspended investigations.

(a) Introduction. "Revocation" is a term of art that refers to the end of an antidumping or countervailing proceeding in which an order has been issued. in which an order has been issued.

[9] Commerce's previous regulation read in pertinent part:

> Before the Secretary may tentatively revoke a Finding or an Order . . . the parties who are subject to the revocation . . . must agree in writing to an immediate suspension of liquidation and reinstatement of the Finding or Order . . . if circumstances develop which indicate that the merchandise thereafter imported into the United States is being sold at less than fair value. 19 C.F.R. § 353.54(e).

ceases to be operative and may not be reinstated.'" *Id.* (quoting *Asahi*, 13 CIT at 990, 727 F. Supp. 625, 628). Plaintiff maintains that the Department's current regulation, 19 C.F.R. § 351.222(b)(2)(i)(B), is "substantively no different from the regulation at issue in *Asahi*," *id.*, and contains the same defects identified by the Court in that case,[10] *see id.* at 25–26. Namely, the regulation abrogates the statutory requirement of affirmative dumping and injury determinations necessary to impose duties, and fails to address the interrelationship between reinstatement and the existing statutory framework for imposing duties. *See id.* Therefore, Plaintiff concludes, the Court's holding in *Asahi* is equally applicable here, and eliminates the Department's legal authority to reinstate the order over SSI. *See id.* at 27.

B. Defendant's Arguments

Defendant counters that, under the doctrine of collateral estoppel, SSI is precluded from making the argument that Commerce lacks the authority to conduct a CCR for purposes of reinstating an antidumping duty order. *See* Def.'s Resp. to Pl.'s Mot. for J. Upon the Agency R. ("Def.'s Brief") at 8. According to Commerce, the Court in *SSI I*, "specifically ruled upon the merits and settled the issue as a matter of law." *Id.* As a result, the doctrine of issue preclusion applies and relitigation of this matter cannot proceed.

Defendant further opines that, even assuming collateral estoppel does not apply, Commerce's reinstatement efforts derive from and are consonant with its statutory authority. *See id.* at 9. This, says Defendant, was the holding of the Court in *SSI I*, which also affirmed the agency's promulgation of 19 C.F.R. § 351.222(b)(2)(i), giving effect to the agency's authority to reinstate. *See id.* The Department acknowledges that section 1675(b)(1) does not expressly authorize a changed circumstances review for reinstatement, nevertheless, it is Commerce's position that there is "binding precedent" for such an expan-

[10] Commerce's current reinstatement regulation provides in part:

In determining whether to revoke an antidumping duty order in part, the Secretary will consider:

> (A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;
> (B) Whether, for any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value; and
> (C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

19 C.F.R. § 351.222(b)(2)(i).

sive view of this section of the statute. *Id.* at 12. Commerce relies on the Federal Circuit's holding in *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352 (Fed. Cir. 2008) for the proposition that "Commerce's authority to conduct changed circumstances reviews under section 1675(b) is not limited to the circumstances described in the statute, and . . . encompasses a determination to reinstate an antidumping duty order." *Id.*

As evidence that the Department's actions in this review are consistent with its past practice, Defendant offers two proceedings in which, after conducting a changed circumstances review, Commerce reinstated a company under a partially revoked antidumping duty order. *See id.* at 13–14; *see also Sebacic Acid from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order*, ("*Sebacic Acid*") 70 Fed. Reg. 16,218 (Mar. 30, 2005); *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order*, ("*PET Film*") 73 Fed. Reg. 18,259 (Apr. 3, 2008).

With regard to section 1675(d)(1), Defendant, once again, concedes that the statute "is silent with respect to Commerce's exercise of its revocation power." Def.'s Brief at 15. However, the Department maintains that its "authority to reinstate an exporter or producer in the antidumping order derives from its authority to revoke the antidumping order in part as to that particular exporter or producer." *Id.* Because section 1675(d)(1) provides for revocation "in whole or in part," the argument goes, Commerce is entitled to resolve the ambiguity created by the statute's failure to define this term. *Id.* (*quoting* 19 U.S.C. § 1675(d)(1)). Towards this end, Commerce promulgated 19 C.F.R. § 351.222 in order to administer the procedure for withdrawing partial revocation "by means of reinstating companies in an order that remains in effect for other producers or exporters." *Id.* As the Department further explains, it "interpreted the authority to partially revoke the antidumping duty order with respect to a particular company it finds to be no longer dumping to include the authority to impose a condition that the partial revocation may be withdrawn." *Id.* at 16 (*quoting Initiation of Antidumping Duty Changed Circumstances Review: Certain Hot-Rolled Carbon Steel Flat Products from Thailand*, 73 Fed. Reg. 18,770 (Apr. 7, 2008)). Similar to its previous argument, Commerce construes the Court's holding in *SSI I* as affirming this grant of authority. *See id.* at 18. Having already determined that its actions regarding reinstatement are statutorily based,

Commerce dismisses as meritless, Plaintiff's claim that the certification signed by SSI cannot confer upon Commerce any authority beyond that provided by law. *See id.* at 19. As to the absence of any distinction between partial and total revocation of an order in the language of section 1675(d)(1), Defendant argues that the presence of the term "'in whole or in part' expressly contemplates two types of revocation: total revocation and partial revocation." *Id.* at 21. Thus, because partial revocation assumes the continued operation of the antidumping duty order, at least with respect to other producers or exporters, Commerce has not relinquished jurisdiction over this still functional order. *See id.* Therefore, Defendant concludes, there is "no need to undertake a new investigation because the order remain[s] in effect." *Id.*

Insofar as the Plaintiff relies on this Court's decision in *Asahi*, Defendant argues two points of error. First, based upon the Court's ruling in *SSI I*, "the question as to whether *Asahi* has any bearing upon whether Commerce acted *ultra vires* has [already] been decided in favor of the United States." *Id.* at 22. Second, even assuming *Asahi* were relevant, Commerce's current reinstatement regulation has since been substantively amended, curing each of the defects identified by the court in that case.[11] *See id.* Consequently, the Department offers an interpretation of *Asahi* that does not invalidate the agency's authority to order reinstatement.

C. Analysis

As a threshold matter, Defendant invokes the well-established principle of collateral estoppel in claiming that Plaintiff is precluded from relitigating matters already decided against them in *SSI I*, specifically whether Commerce lacks the authority for reinstatement pursuant to sections 1675(b) and (d). Under the doctrine of collateral estoppel, or issue preclusion, a litigant who has litigated an issue in a full and fair proceeding is estopped from relitigating the same issue in a subsequent proceeding. *See Thomas v. Gen. Servs. Admin.*, 794 F.2d 661, 664 (Fed. Cir. 1986). Four conditions must be satisfied before a party can seek to apply collateral estoppel; (1) the issue or fact previously adjudicated is identical with the one now presented; (2) the issue or fact was actually litigated in the prior case; (3)

[11] The Asahi court identified three specific concerns with Commerce's prior reinstatement regulation; 1) the regulation did not specify the circumstances under which Commerce was to consider reinstatement; 2) the regulation did not specify the type of investigation necessary for reinstatement; and 3) the regulation failed to address the interrelationship between reinstatement and the existing statutory framework. *See Asahi*, 13 CIT at 991, 727 F. Supp. 625, 628.

resolution of the issue or fact was essential to a final judgment in the first action; and (4) the party against whom preclusion is applied had a full and fair opportunity to litigate the particular issue or fact. *See id.*

In addressing the first and second prongs of the *Thomas* test, the Court finds that the legal issue presented here is not identical to the issue actually litigated in S*SI I*. While it is true that Plaintiff, in *SSI I*, urged review of the agency's reinstatement authority, it did so under the premise of an *ultra vires* rationale. The Court was careful to make the distinction between a claim of *ultra vires* agency conduct, and one that merely amounted to a "mistake of law." *SSI I*, 33 CIT at ___, 601 F. Supp. 2d 1355, 1367. As the Court noted:

> An *ultra vires* claim cannot be construed to allege that Commerce promulgated its reinstatement regulation based on an erroneous interpretation of the statute, but rather that Commerce acted outside the scope of its authority, and was without any legal basis to make that interpretation at all. Plaintiff's effort at recasting its *ultra vires* argument, merely amounts to a claim that Commerce committed a "mistake of law" in promulgating the reinstatement regulation, not that the Department acted "completely outside [its] governmental authority."

Id. (*quoting State of Alaska v. Babbitt*, 67 F.3d 864, 867 (9th Cir. 1995)). The Court ultimately concluded that:

> [S]hould Commerce decide to reinstate the partially revoked antidumping duty order as to SSI, Plaintiff will have the opportunity to bring an action challenging those results. In such an action, SSI is entitled to contest "any factual findings or legal conclusions upon which the determination is based," 19 U.S.C. § 1516a(a)(2)(A), including the statutory and regulatory bases for the Department's initiation of the changed circumstances review.

Id. at 1369. Hence, the issue, in *SSI I*, of whether or not Commerce was empowered to engage in the challenged course of conduct in the first place is different from the issue of whether Commerce's reinstatement of a partially revoked antidumping duty order was an errant application of the statute. Therefore, Plaintiff's claim is not barred by the doctrine of collateral estoppel.

At its core, this case revolves around the issue of whether Commerce has the authority, under 19 U.S.C. § 1675(b) and (d), to initiate a changed circumstances review for purposes of reinstating a previously revoked antidumping duty order. Plaintiff argues that the au-

thority granted by Congress under section 1675(b) and (d) is exclusive to the explicit textual content of these provisions. In other words, because the statute did not expressly provide for reinstatement via a changed circumstances review or through any other mechanism for that matter, Congress' grant of authority is restricted to review of only those specific types of final determinations listed therein (i.e., under section 1675(b)(1)), and is otherwise intended only to allow the Department to *revoke* existing orders (i.e., under section 1675(d)), not reinstate them. Moreover, Plaintiff asserts, Congress has directly spoken to the issue, therefore, *Chevron* deference does not apply. The Court disagrees. In determining whether an agency's interpretation and application of a statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron*. *Chevron*, 467 U.S. at 837. The first *Chevron* step is to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. Employing traditional tools of statutory construction, the Court looks first to the text of the statute. *See Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998). Because the "statute's text is Congress' final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* at 882. If, however, the statute's text does not explicitly address the question at issue, the Court must seek to determine whether Congress had an intent on the matter. *See id.* Only if after this investigation the Court is still at a loss as to what Congress intended does the second prong of *Chevron* apply.

A review of 19 U.S.C. § 1675(b)(1) does not support the suggestion that Congress intended to circumscribe the changed circumstances review process to only those determinations listed therein. Neither the language of the statute nor the legislative history expressly prohibit Commerce from using a CCR for reinstatement purposes. As Defendant points out, this Court has recognized the Department's use of a CCR for purposes other than those listed in the statute. *See* Def.'s Brief at 12. Plaintiff attempts to distinguish the cases offered by Commerce as inapposite for purposes of comparison to the facts at bar. Specifically, SSI criticizes the Department's application of the Court's holding in *Mittal Canada, Inc. v. United States*, 30 CIT 1565, 1572 n.7, 461 F. Supp. 2d 1325, 1332 n.7 (2006). In *Mittal Canada*, the Court recognized as "broad" Commerce's discretion as to the range of matters subject to a changed circumstances review. *Id.* SSI claims

that *Mittal Canada*, and the cases cited within *Mittal Canada*,[12] are distinguishable on the grounds that each of the underlying CCR proceedings implicated an order that was in place on the relevant party. *See* Pl.'s Reply Brief at 7–8. In this way, only the particular application of each order was being considered by Commerce.

This line of reasoning, however, misses the point. These cases are not offered as justification for reinstatement *per se*, but rather establish a judicial recognition of Commerce's authority to conduct changed circumstances reviews for purposes other than those described in section 1675(b)(1). The existence, or lack thereof, of an antidumping duty order on the affected party does nothing to detract from the argument that the scope of section 1675(b)(1) is not so constrained. The lack of certainty as to whether Congress has directly spoken to this precise issue, compels an examination of whether the Department's interpretation is based on a permissible construction of the statute. In other words, the Court must proceed to the second step of the *Chevron* analysis.

Under the second step of *Chevron*, "[a]ny reasonable construction of the statute is a permissible construction." *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004) (*quoting Torrington v. United States*, 82 F.3d 1039, 1044 (Fed. Cir. 1996)). With this as a guide, the courts have accorded particular deference to Commerce in antidumping determinations. *See id.* Here, the wording of section 1675(d) is instructive. The statute expressly contemplates the revocation "in whole or in part" of an antidumping duty order or "finding." 19 U.S.C. § 1675(d). Both parties agree that there was only a partial revocation with respect to the merchandise produced and exported by SSI, and that the order remained in effect as to other producers of

[12] Plaintiff's comments with regard to the Court's characterization, in *SSI I*, of *Jia Farn Mfg. Co., Ltd. v. United States*, 17 CIT 187, 817 F. Supp. 969 (1993) deserve some mention in that *Jia* also serves as one of the seven cases cited within the *Mittal Canada* opinion. *See* Pl.'s Reply Brief at 8 n.2. In *SSI I*, under its discussion of the jurisdictional issue, the Court represented the holding of *Jia* as one which affirmed Commerce's authority, under section 1675, to reinstate an antidumping duty order. *See SSI I*, 33 CIT ___, 601 F. Supp. 2d 1355, 1368 n.13. SSI accurately points out that the respondent in *Jia* was excluded from the original antidumping duty order during the less than fair value investigation. As a result, the question of reinstatement was never before the court. However, the *Jia* court did examine, and eventually sustained, the agency's authority to place an exporter or producer under an antidumping duty order from which it had been previously excluded. Therefore, while Commerce was not conducting the CCR for purposes of r*einstatement*, it was contemplating *instatement* of the respondent under an order already in place as to other companies. Regardless, Plaintiff's objection to the Court's interpretation of the *Jia* decision is misplaced. In *SSI I*, the Court was adducing evidence with regard to jurisdiction, not reinstatement. In fact, the Court in *SSI I* specifically declined to review Commerce's reinstatement regulation under the guise of a jurisdictional claim. *See SSI I*, 33 CIT ___, 601 F. Supp. 2d 1355, 1368.

hot-rolled steel from Thailand. While this fact, in and of itself, negates Plaintiff's claim that section 1675(d)(1) does not distinguish between total and partial revocation, it also underscores what Commerce actually did in this case. The removal of SSI from the duties imposed by the order did not serve as a revocation of the order itself, but rather a revocation of the finding that SSI was dumping and therefore liable under the strictures of the order. In this way, Commerce's reinstatement of SSI to the order from which it was removed is not a reinstatement of the antidumping duty order, but a reinstatement of the finding that SSI was dumping.[13] Hence, the argument Plaintiff advances that upon revocation an "order ceases to exist and cannot later be 'reinstated'" is without merit. Pl.'s Brief at 20. The antidumping duty order is still in effect as to hot-rolled steel from Thailand. The fact that the order remains effective as to other Thai producers defeats Plaintiff's argument of the need for a new investigation. Both the less than fair value determination by Commerce and the injury determination by the ITC continue to support application of antidumping duties on the subject merchandise. Thus, all Commerce has done is to reconsider its determination as to whether or not SSI has acted in a manner consistent with its original exclusion from the order. *See Jia*, 17 CIT at 192, 817 F. Supp. 969, 973 ("[T]he exclusion of a firm from the order applies only when the firm acts in the same capacity as it was [when] excluded from the order").

Because the statute does not define "in whole or in part," Commerce filled this statutory gap by promulgating regulations to govern the procedures for partial revocation of an order or finding. The mechanism by which Commerce chose to accomplish this is 19 C.F.R. § 351.222. Commerce explains that the rationale underlying this procedure is to ensure that injurious dumping is remedied, especially under circumstances, such as those present here, where a party removed from an antidumping order subsequently resumes dumping. Without such procedures, it is conceivable that a respondent company could evade penalty by curbing its dumping activity for the requisite period of time in order to seek removal from the order and after having done so, return to making sales at below normal value. The reasonableness of this concern is embodied in the fact that SSI willingly entered into an agreement allowing its reinstatement under the order. Although SSI now claims that it only agreed to reinstatement pursuant to a new investigation, this claim is inconsistent with Plaintiff's acquiescence to "immediate reinstatement of the order, so long

[13] While it is true that Commerce characterizes its initial removal of SSI from the order as a partial revocation, the moniker Commerce attaches does not detract from the legal authority it derives from section 1675(d)(1).

as any Thai producer is subject to it." Request For Changed Circumstances Review On Behalf Of United States Steel Corp. (Nov. 8, 2006), Ex. 1 at 3 (PR 721). Plaintiff fails to explain why, if reinstatement could only be effected through a new investigation, the company agreed to predicate reinstatement on the condition that the order remain in effect. The Court interprets Plaintiff's acceptance of the terms of the reinstatement agreement as its accedence to the reasonableness of the practice.

Plaintiff's reliance on the Court's decision in *Asahi* is similarly flawed. The Court's principal objection to the regulation at issue in *Asahi* was the degree to which the provision's ambiguity made any standard for reinstatement conjectural. *See Asahi*, 13 CIT at 991, 727 F. Supp. 625, 628. Specifically, 19 C.F.R. § 353.54(e) did not; (1) describe the circumstances under which Commerce would consider reinstatement; (2) specify the type of investigation necessary for reinstatement; or (3) speak to the inter-relationship between reinstatement and the existing statutory framework. *See id.* Under the terms of 19 C.F.R. § 353.54, it was theoretically possible for Commerce to impose antidumping duties without the benefit of an extant antidumping duty order. This, the *Asahi* court found, was impermissible. Commerce has since amended its reinstatement regulations with the most significant change coming in the form of the conditional requirement that reinstatement be considered only if an exporter or producer is still subject to the order. With this change, Commerce has addressed two of the concerns evoked in *Asahi*. Namely, the circumstances under which reinstatement can proceed are now elucidated, as is the inter-relationship between reinstatement and the existing statutory framework. The stipulation requiring an order to remain in effect as to other exporters or producers before reinstatement can be contemplated speaks to the necessity of two affirmative findings; a finding of dumping by Commerce and a separate finding of material injury by the ITC. It also serves as notice to those seeking partial revocation of the conditions precedent necessary for reinstatement.

In light of the above, the Court finds that Commerce's rationale and interpretation of section 1675(b) and (d) are reasonable within the *Chevron* framework, supported by substantial evidence on the record and otherwise in accordance with law.

2. *Commerce's Use of Invoice Date Rather Than Contract Date as U.S. Date of Sale*

A. Plaintiffs' Arguments

SSI complains that Commerce acted arbitrarily when it changed its U.S. date of sale methodology. Rather than relying on the contract date, as was done in previous segments of this proceeding, Commerce instead used invoice date in the date of sale analysis. *See* Pl.'s Brief at 28–29. SSI alleges that had the Department adhered to its longstanding practice of relying on respondent's contract date, SSI would have no antidumping duty margin. *See id.* at 28. Hence, Commerce would have been precluded from reinstating the order as to SSI. Acknowledging the regulatory preference for use of invoice date as the date of sale, Plaintiff points out that this same regulation provides for use of a date other than invoice date, if the Secretary is satisfied that a different date better reflects the date on which the material terms of sale are established.[14] *See id.* at 29. Because SSI's contract dates better reflect the date on which the material terms of its U.S. sales were established, Commerce erred by not relying on those reported dates as it had done in the four previous segments of this proceeding. *See id.*

Plaintiff avers that date of sale issues are typically resolved by examining the significance of any changes to the material terms of sale involved. *See id.* In other words, the Department should have examined whether or not the material terms of sale underwent any meaningful changes between the contract date and date of invoice, before it deviated from using contract date as the U.S. date of sale. SSI identifies *Notice of Final Results of Antidumping Duty Administrative Review and Final Partial Rescission: Certain Cut-to-Length Carbon Steel Plate from Romania*, 72 Fed. Reg. 6,522 (Feb. 12, 2007) ("*Steel Plate from Romania*") as an instance in which the Department has previously concluded that the use of invoice date is not appropriate when there are only minor changes in quantity between an order acknowledgment and invoice.

SSI references another administrative decision by Commerce, in which the agency declared that "a change in aggregate quantity does

[14] 19 C.F.R. § 351.401(i) provides:

> Date of sale. In identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

not, in and of itself, necessarily constitute a meaningful change to the material terms of sale." Final Results of Redetermination Pursuant to Second Remand, *Nakornthai Strip Mill Public Co. Ltd. v. United States*, Court No. 07–00180, p.3 (Feb. 9, 2009); *see also* Pl.'s Brief at 30. Therefore, because Plaintiff's U.S. sales process has remained the same throughout, resulting in only minor changes in the aggregate quantity shipped, and Commerce has relied on contract date as the date of sale in all previous segments of this proceeding, the Department's decision to change from contract date to invoice date is unsupported by substantial evidence. *See id.* at 30–33.

Lastly, it is SSI's position that "important policy reasons" exist as to why contract date is the appropriate U.S. date of sale in the underlying changed circumstances review. *Id.* at 34. To begin with, Plaintiff maintains that it has complied with all requests and cooperated fully in every segment of this proceeding, and acted consistent with established Department precedent. *See id.* Additionally, "the recording of final contract date is consistent with the Department's position as to what is considered a 'meaningful' change in material terms." *Id.* For instance, the changes in shipment quantity under SSI's contract sales were not "meaningful in relation to the total quantity of U.S. sales." *Id.* at 33. Therefore, if, despite this, invoice date continues to be the U.S. sale date, "contract terms will never be considered set" and Commerce's date of sale regulation will become "meaningless." *Id.* at 34.

B. Defendant's Arguments

Commerce defends its use of invoice date as U.S. date of sale, as a proper exercise of the regulatory presumption reflected in 19 C.F.R. § 351.401(i). *See* Def.'s Brief at 28–29. The regulation's use of the term "normally" establishes invoice date as the presumptive date of sale. 19 C.F.R. § 351.401(i). According to Commerce, this presumption may be overcome if satisfactory evidence is presented establishing the material terms of sale on some other date. *See id.* at 29. In the underlying changed circumstances review, Commerce alleges that the material contract terms were not set until invoice date because the difference between the quantity ordered and the quantity shipped exceeded the aggregate quantity tolerance level allowed by the contract, thereby constituting changes to the material terms of sale, i.e., price, quantity, delivery, and payment. As to Plaintiff's insistence that Commerce should have used contract date as the U.S. date of sale because this was the agency's practice in all previous segments of this proceeding, Commerce argues that the agency's "date of sale deter-

mination is based upon the facts presented by each review." *Id.* Therefore, even if SSI's U.S. sales process has remained unchanged from previous reviews, Commerce's date of sale determination is predicated on the unique facts of this case, not those from earlier determinations. *See id.*

With respect to whether the material terms of sale underwent changes sufficient enough to warrant a deviation from contract date as U.S. date of sale, Defendant points to what it considers "[s]ubstantial record evidence [which] demonstrates . . . that SSI had multiple contracts, representing multiple sales, to multiple customers, with final shipment quantities outside of the quantity tolerance specified in the final contract terms."[15] *Id.* at 34. According to Commerce, these changes in delivery terms represent a "substantial variation[] in material terms between the contract date and the invoice date." *Id.* at 36. Therefore, Commerce's methodology is consistent with the principle that "a party fails to rebut the presumption that date of invoice shall be used where there is a substantial variation between the quantity shipped and the tolerance level specified in a contract." *Id.* at 38. In this way, the previous administrative proceedings to which Plaintiff refers are factually distinguishable from the circumstances of the present case. *See id.* at 37.

As a final point, Commerce rejects as irrelevant Plaintiff's contention that the instant case presents important policy considerations. Plaintiff's cooperation, says Commerce, has not been called into question, therefore any such policy considerations are extraneous to the issue of the agency's determination that Plaintiff failed to establish the requisite grounds for use of a date other than invoice date. *See id.* at 40.

C. Analysis

The antidumping statute on its face does not specify the manner in which Commerce is to determine the date of sale methodology. The legislative history, however, provides some insight into what Congress intended. As the Statement of Administrative Action accompanying the statute explains, the date of sale is the "date when the material terms of sale are established." Uruguay Round Agreements Act, Statement of Administrative Action ("SAA"), H.R. 5110 (H.R. Doc. No. 103–316), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4153. Hence, Congress has "expressed its intent that, for antidumping purposes, the date of sale be flexible so as to accurately reflect the true date on

[15] Of the [[ ]] total contracts, [[ ]] were found to have exceeded the specified "Delivery Allowance" of [[ ]] provided for in each contract. *See* Def.'s Brief at 34.

which the material elements of sale were established." *Allied Tube and Conduit Corp. v. United States*, 24 CIT 1357, 1370, 127 F. Supp. 2d 207, 219 (2000). Towards this end, Commerce has promulgated regulations which provide that invoice date is the presumptive date of sale, but with an express caveat for situations where another date better reflects the date on which the material terms of sale were established. *See* 19 C.F.R. § 351.401(i). Thus, Commerce's date of sale regulation provides for a "rebuttable presumption" that invoice date will normally be identified as the date of sale.[16] *See Nucor Corp. v. United States*, 33 CIT ___, 612 F. Supp. 2d 1264, 1304 (2009). Consequently, unless the party seeking to establish a date of sale other than the invoice date produces sufficient evidence to overcome this presumption, Commerce will use invoice date as the date of sale. This presumption notwithstanding, Commerce does not possess the unfettered discretion to apply invoice date as the date of sale with no regard for the record evidence in a given case. *See id.* Flexibility is the cornerstone of Commerce's date of sale analysis, and the invoice date presumption is merely a "starting point" in the determination of which date better reflects the date on which the material terms of sale were established. *Id.* at 1307.

In its interpretation of material terms of sale, the Department's practice has evolved to include price, quantity, delivery terms and payment terms. *See SeAH Steel Corp. v. United States*, 25 CIT 133, 134 (2001); *Nakornthai Strip Mill Public Co. v. United States*, 33 CIT ___, 614 F. Supp. 2d 1323, 1334 (2009) ("*Nakornthai III*"). More recently, however, Commerce has interpreted material terms of sale to include the specification of an aggregate quantity tolerance level because the aggregate quantity tolerance level may be viewed as specifying the amount or quantity of the merchandise to be shipped. *See Nakornthai Strip Mill Public Co. v. United States*, 32 CIT ___, 558 F. Supp. 2d 1319, 1327 (2008) ("*Nakornthai I*").

In choosing a date of sale, Commerce weighs the evidence presented and determines the significance of any changes to the terms of sale involved. From the beginning of this changed circumstances review, SSI has argued that any changes made to the contract were minimal and therefore not meaningful in relation to the total quantity of U.S.

[16] As support for its presumptive use of invoice date, Commerce explained that: "in many industries, even though a buyer and seller may initially agree on the terms of a sale, those terms remain negotiable and are not finally established until the sale is invoiced. Thus, the date on which the buyer and seller appear to agree on the terms of a sale is not necessarily the date on which the terms of sale actually are established." *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,349 (*Final Rule*) (May 19, 1997).

sales. In support of this contention, SSI looks to *Steel Plate from Romania* where Commerce chose to use order acknowledgment date (contract date) as the date of sale even though one sale fell outside of the quantity tolerance limits set in the contracts. *See* 72 Fed. Reg. 6,522 and accompanying Issues and Decision Memorandum at cmt. 1, p.7. According to SSI, the circumstances in *Steel Plate from Romania* are essentially the same as those present here, in that the material terms of sale did not undergo any meaningful changes subsequent to the final contract date. The Court disagrees. Although both cases involve sales exceeding the aggregate quantity tolerance level specified in the contracts, *Steel Plate from Romania* implicated only a single sale within a single contract. *See id.* at cmt. 1, p.5. Conversely, the instant review involves multiple changes exceeding the contract tolerances of multiple contracts, representing multiple sales to multiple customers. *See* Memorandum to File from John K. Drury, Analysis Memorandum for the Final Results of Changed Circumstances Review of Certain Hot-Rolled Carbon Steel Flat Products from Thailand: Sahaviriya Steel Industries Public Co., Ltd. ("SSI"), dated May 7, 2009, at p.6 (CR 1178) ("Analysis Memorandum"). Of the [[ ]] contracts examined, the Department found that the quantity tolerance level was exceeded in [[ ]], accounting for almost [[ ]] of SSI's contracts.[17] *See id.* These changes affected contracts representing [[ ]] of SSI's customer base in the U.S. *See id.* The significance of these changes stand in stark contrast to the lone sale alluded to in *Steel Plate from Romania*. Despite Plaintiff's assertions to the contrary, it cannot be gainsaid that changes to the material terms of sale occurred after execution of the final sales contract.[18] The Court,

[17] For contract [[ ]], the final quantity delivered was [[ ]] than agreed to in the final contract, exceeding the quantity tolerance level of [[ ]]. Contract [[ ]] delivered a final quantity that was [[ ]] than agreed to in the final contract, exceeding the quantity tolerance level of [[ ]]. Contract [[ ]] delivered a final quantity that was [[ ]] than agreed to in the final contract, also exceeding the quantity tolerance level of [[ ]]. *See* Analysis Memorandum, at p.6 (CR 1178).

[18] SSI reported as the final contract date, the date of final addendum, if an addendum was applicable.

In addition, SSI submitted affidavits from all [[ ]] of its U.S. customers attesting to the fact that "while there might be minor variations to non-material terms in the normal course of business, once the Sales Contract is signed, [customer] understands there can thereafter be no changes to the material terms of sale without an amendment to the contract separately and later agreed to by [customer] and SSI." Response to the Department's Sept. 18, 2008 Third Supplemental Questionnaire Regarding Sections A, B, And C, Ex. S3C–3, ¶ 7 (CR 1031); *see also* Letter from Sahaviriya Steel Industries to the Department of Commerce, dated Aug. 25, 2008, (CR 1021). While these declarations may establish how the contracting parties intended to proceed, they are not an accurate reflection of their course of conduct.

therefore, finds *Steel Plate from Romania* to be inapposite for purposes of the instant matter. Neither is the second of the two agency decisions on which Plaintiff relies instructive here. In *Nakornthai*, Commerce reasoned that "a change in aggregate quantity shipped is not, on its own, significant and does not, by itself, materially affect the date that the terms of contract were essentially established."[19] Final Results of Redetermination Pursuant to Second Remand, *Nakornthai Strip Mill Public Co. Ltd. v. United States*, Court No. 07–00180, p.3 (Feb. 9, 2009). This determination was made in the context of changes to the range of quantities purchased for each item within the contract — i.e., the "per item tolerance level." *Nakornthai III*, 33 CIT ___, 614 F. Supp. 2d 1323, 1326 n.3. As a result, the changes in that case remained within the total aggregate tolerance level provided for by the contract not, as is the case here, outside the total quantity tolerance level specified in the [[ ]] contracts in question. Indeed, Commerce has previously recognized that within tolerance differences do not constitute changes to the material terms of sale. *See* Notice of *Final Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 49,622 (Sept. 28, 2001) and accompanying Issues and Decision Memorandum, at cmt. 9 ("With respect to these quantity changes that occurred within such delivery tolerances, we agree . . . that any differences between the quantity ordered and the quantity shipped which fall within the tolerance specified by the entire contract do not constitute changes in the material terms of sale.").

Equally unconvincing is Plaintiff's argument that the changes in quantity tolerance levels are not meaningful in relation to the total quantity of U.S. sales because they represent only [[ ]] of all quantities ordered in the final contracts. As U.S. Steel correctly points out, this is not the relevant measure of whether a quantity change is meaningful. *See* Mem. in Opp'n to Plaintiff's Mot. for J. On the Agency R. ("Def.-Intervenor's Brief") at 32. Plaintiff's position would render meaningless the quantity tolerance levels negotiated by the contracting parties. Under this theory, SSI could conceivably exceed the quantity tolerance level of virtually every contract, meriting a 100% non-compliance rate, yet if the impact of these changes on the aggregate quantity and value of all U.S. sales was minor, contract date would still be appropriate for the date of sale analysis. Thus, SSI could effectively evade the mutually agreed upon terms of its contracts and thwart the agency's efforts to calculate a dumping

[19] As Commerce correctly points out, SSI cites to the Department's Final Results of Redetermination Pursuant to Second Remand. This has been superceded by the Court's decision in *Nakornthai III*, 33 CIT ___, 614 F. Supp. 2d 1323.

margin as accurately as possible. This, the Court finds, is simply untenable and cannot be understood as an accurate reflection of when the material terms of sale were established by the parties.

In sum, Plaintiff's assertion that Commerce inappropriately used invoice date as the date of sale holds no merit. The evidence necessary to compel rejection of the regulatory presumption in favor of invoice date as the date of sale is conspicuously absent. Furthermore, Commerce's decision to use the invoice date underscores the contracts' lack of finality stemming from sudden changes to the aggregate quantity shipped by Plaintiff, which significantly altered the material terms of sale. It is instances such as this that motivated Congress to grant Commerce the flexibility to choose the date of sale that best reflects the final date on which the material terms of sale were established. Thus, Commerce's decision to proceed with the invoice date as the benchmark for its antidumping determination, despite having applied the contract date in previous reviews, is in accordance with the agency's consistent practice of determining the date of sale based upon the facts specific to each review. Accordingly, the Court finds, as supported by substantial evidence and otherwise in accordance with law, Commerce's date of sale methodology.

The Court takes note of SSI's assertion that there are important policy considerations which support the use of contract date as the appropriate date of sale. Because this argument is not grounded in any legal authority or supported by relevant record evidence, the Court does not specifically address this claim.

Conclusion

For the reasons set forth above, the Motion for Judgment on the Agency Record filed by Sahaviriya Steel Industries is denied. Judgment shall be entered accordingly.

Dated: June 15, 2010
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 10–69

AMANDA FOODS (VIETNAM) LTD., et al., Plaintiffs, –v– UNITED STATES, Defendant, – and – AD HOC SHRIMP TRADE ACTION COMMITTEE, Defendant-Intervenor.

Before: Pogue, Judge
Consol. Court No. 08–00301

[Remand to Department of Commerce for further consideration ofappropriate separate rates for non-individually investigatedrespondents]

Dated: June 17, 2010

Mayer Brown LLP (*Matthew J. McConkey* and *Jeffery C. Lowe*) for Plaintiff Amanda Foods (Vietnam) Ltd.

Thompson Hine LLP (*Matthew R. Nicely* and *Christopher M. Rassi*) and *Winston & Strawn LLP* (*William H. Barringer* and *Valerie S. Ellis*) for Consolidated Plaintiffs Ca Mau Seafood Joint Stock Company; Cadovimex Seafood Import-Export and Processing Joint-Stock Company; Cafatex Fishery Joint Stock Corporation; Can Tho Agricultural and Animal Products Import Export Company; Coastal Fisheries Development Corporation; C.P. Vietnam Livestock Co.,Ltd.; Cuulong Seaproducts Company; Danang Seaproducts Import Export Corporation; Investment Commerce Fisheries Corporation; Minh Hai Export Frozen Seafood Processing Joint-Stock Company; Minh Hai Joint-Stock Seafoods Processing Company; Ngoc Sinh Private Enterprise; Nha Trang Fisheries Joint Stock Company; NhaTrang Seaproduct Company; Phu Cuong Seafood Processing & Import-Export Co., Ltd.; Sao Ta Foods Joint Stock Company; Soc Trang Aquatic Products and General Import-Export Company; Thuan PhuocSeafoods and Trading Corporation; UTXI Aquatic Products Processing Company; Viet Foods Co., Ltd.; Kim Anh Co., Ltd.; Phuong Nam Co., Ltd.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*), and, of counsel, *Jonathan M. Zielinski*, Senior Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce, for Defendant United States.

Picard Kentz & Rowe LLP (*Andrew W. Kentz* and *Nathaniel M. Rickard*) for Defendant-Intervenor Ad Hoc Shrimp Trade Action Committee.

OPINION AND ORDER

Pogue, Judge:

This consolidated action is again before the court following the initial remand of the final results of the second administrative review of the antidumping duty order covering frozen warmwater shrimp from the Socialist Republic of Vietnam.[1] Plaintiffs are cooperative

[1] *See Amanda Foods (Vietnam) Ltd. v. United States*, __ CIT__, 647 F. Supp. 2d 1368, 1374–75, 1379—82 (2009) ("*Amanda I*") (remanding *Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam*, 73 Fed. Reg. 52,273 (Dep't Commerce Sept. 9,2008) (final results and final partial rescission of antidumping duty administrative review) ("*Final Results*")).

non-investigated respondents in the administrative review who have established their entitlement to a separate rate. In the review, the United States Department of Commerce ("Commerce" or "the Department") determined Plaintiffs' dumping margins to be equal to the nonzero rates assigned to Plaintiffs in the investigation underlying this order, rather than to the weighted average of margins calculated for the individually-investigated respondents. All individually investigated respondents' margins were zero or *de minimis*. In *Amanda I*, the court remanded Commerce's decision, directing the Department to assign to Plaintiffs the weighted average of the mandatory respondents' rates, or to provide justification, based on substantial evidence on the record, for using another rate.[2] *Amanda I*, __ CIT at __, 647 F. Supp. 2d at 1382.

As explained more fully below, by imputing to cooperative respondents the behavior of uncooperative respondents, Commerce has failed to comply with the court's remand order in *Amanda I*. The Department has again failed to provide a rational connection between the facts found and the rates applied. Accordingly, the court again remands to Commerce the question of appropriate antidumping duty rates for Plaintiffs.

Background

A. *Amanda I*

Commerce's choice of assessment rate for cooperative non-investigated respondents in the second review of this antidumping duty order is fully chronicled in the court's opinion in *Amanda I*, 647 F. Supp. 2d at 1374–75. Briefly:

> [R]ather than averaging the two mandatory respondents' [zero and *de minimis*] rates and using the resulting average for the separate rate companies, Commerce assigned to the separate rate companies the most recentrate that each had received in a prior proceeding. Specifically, the Department applied the rate that the separate rate companies had received in the original investigation, based on sales made prior to the imposition of the dumping order . . . .

[2] While some of the court's conclusions are summarized in the Background section of this opinion, familiarity with the court's decision in *Amanda I* is presumed. All other issues originally raised by Plaintiffs in this consolidated action have been dismissed pursuant to stipulation between the parties. (*See* Stipulation of Partial Dismissal [Dkt. No. 83]; Order of Dismissal [Dkt. No. 84].)

Id. at 1374 (citing *Final Results*, 73 Fed. Reg. at 52,275–76).[3]

In *Amanda I*, the court noted that "[t]he sole reasoning that the Department provided for this decision was that thirty-five companies received margins based on [adverse facts available ("AFA")] and that 'the circumstances of this review are similar to those of the preceding review.'" *Id.* at 1381 (quoting *Final Results*, 73 Fed. Reg. at 52,275 and citing Issues & Decision Mem., A-552–802, 2d AR 02/01/06–01/31/07 (Sept. 2, 2008), Admin. R. Pub. Doc. 231 ("*I & D Mem.*")).

The court found this analysis insufficient, concluding that "there is no basis in the [antidumping] statute for penalizing cooperative uninvestigated respondents due solely to the presence of non-cooperative uninvestigated respondents who receive a margin based on AFA," *id.* (citing *Yantai Oriental Juice Co. v. United States*, 27 CIT 477, 487 (2003)), and that "nowhere in the record [did] Commerce provide sufficient reasoning linking the evidence to its conclusion that margins . . . established during the period of investigation, prior to the imposition of the antidumping duty order, are 'based on the best available information and establish[ ] [the relevant] antidumping margins as accurately as possible,'" *id.* at 1382 (quoting *Shakeproof Assembly Components, Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001)).[4]

B. *Remand Results*

In its remand redetermination, the Department continues to defend as reasonable its decision "to assign the margin of 4.57 percent, the margin calculated for cooperative separate rate respondents in the underlying investigation, to the separate rate respondents in the instant review with no history of a calculated margin," Final Results

[3] Separate rate companies that were individually examined in the first administrative review of this antidumping duty order were assigned the rate they received in the first review. *Final Results*, 73 Fed. Reg. at 52,275–76. However, none of the rates assigned based on rates from the first review are at issue in this case. *See supra* note 2.

[4] While the Court of Appeals for the Federal Circuit has noted that the requirement that Commerce use the "best available information" may not always be helpful and unambiguous, *see Dorbest Ltd. v. United States*, Nos. 2009–1257, 2009–1266, 2010 WL1931677, at *7 (Fed. Cir. May 14, 2010), and that this requirement may not be used to demand of Commerce more than isexpressly required by more specific relevant provisions of the antidumping statute, *see id.* at *8, it remains the case that, to be supported by substantial evidence, Commerce's determinations must be supported by a rational link to information which may be used to help approximate respondents' actual pricing behavior, and that Commerce does not have discretion to select dumping margins "with no relationship to the respondent's actual dumping margin." *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000).

of Redetermination Pursuant to Court Remand (Mar. 3, 2010) ("*Remand Results*") at 13, as well as its decision to assign to Minh Hai Joint-Stock Seafoods Processing Company a margin of 4.30 percent, the rate received by this company in the original investigation, based on its own data. *See id.* at 4, 22.

The Department argues that Section 735(c)(5) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1673d(c)(5)(2006)[5] (the "all-others rate" provision for investigations) — the statutory provision upon which the Department usually relies in establishing dumping margins for cooperative respondents not selected for individual examination in an administrative review[6] – "articulates a preference that the Department avoid zero, *de minimis* rates or rates based entirely on facts available" when it determines the appropriate dumping margins for cooperative uninvestigated respondents. *Id.* at 14. Further, Commerce contends that the existence in the record of "evidence of dumped sales in the prior [period of review ("POR")] and instant POR," *id.* at 15, renders reasonable the agency's choice of dumping margins for Plaintiffs, *see id.* at 15–18, because "selecting rates from prior segments . . . reasonably reflects the existence of dumping under the order[.]" *Id.* at 18.

The Department points to four particulars in the record as evidence supporting the dumping margins assigned to Plaintiffs for the POR in question — the fact that two mandatory respondents received rates based on AFA in the first review; transaction-specific above-*de minimis* dumping margins for at least one mandatory respondent in the second review; the existence of uncooperative respondents in the second review; and the fact that some of the subject merchandise entered during the POR came from producers/exporters who were assessed cash deposit rates based on AFA but who nevertheless did not request to be reviewed. *Id.* at 16–18.

Plaintiffs contend that the Department has failed to comply with the court's order in *Amanda I* because the margins assigned are not supported by substantial evidence on the record. (*See generally* Comments on Final Results of Redetermination Pursuant to Ct. Remand on Behalf of [Pls.] ("Pls.' Comments").) Specifically, Plaintiffs argue that Commerce continues to offer as evidence the imputation of dumping to Plaintiffs based on the presence of uncooperative respondents in the first and second reviews, despite the court's holding in

[5] Further citation to the Tariff Act of 1930, as amended, isto Title 19 of the U.S. Code, 2006 edition.

[6] *See, e.g.*, *Longkou Haimeng Mach. Co. v. United States*, __CIT __, 581 F. Supp. 2d 1344, 1359 (2008) (discussing and upholding this practice as in accordance with the statutory scheme).

Amanda I that this fact alone cannot constitute substantial evidence supporting the reasonableness of margins assigned to cooperative Plaintiffs. (*See* Pls.' Comments at 2–4, 6–8.) With regard to Commerce's reliance on transaction-specific dumping margins found for one of the mandatory respondents, Plaintiffs argue that "Commerce cannot have it both ways; it cannot assign an overall *de minimis* margin to mandatory respondents, yet use individual comparisons from those respondents' margin calculations to justify application of an above-*de minimis* margin to non-mandatory respondents." (*Id.* at 5.)

Standard of Review

"The court will sustain the Department's determination upon remand if it complies with the court's remand order, is supported by substantial evidence on the record, and is otherwise in accordance with law." *Jinan Yipin Corp. v. United States*, __ CIT __, 637 F. Supp. 2d 1183, 1185 (2009) (citing 19 U.S.C. § 1516a(b)(1)(B)(i)).

"Substantial evidence" is "such evidence as a reasonable mind might accept to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (quotation marks and citations omitted). "The specific determination [the court] make[s] is whether the evidence and reasonable inferences from the record support [Commerce's] finding." *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Technical, Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1520 (Fed. Cir. 1993) (internal quotation marks and citation omitted). That is, "[a] factual finding is supported by substantial evidence when the factfinder could rationally draw support for the finding from the relevant record evidence." *Penrod Drilling Co. v. Johnson*, 905 F.2d 84, 87 (5th Cir. 1990). Further, to be supported by substantial evidence, agency findings must be "reached by reasoned decision-making, including . . . a reasoned explanation supported by a stated connection between the facts found and the choice made." *Elec. Consumers Res. Council v. Fed. Energy Regulatory Comm'n*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)) (quotation marks and additional citations omitted).

Discussion

The court first considers the legal premise for Commerce's remand decision, concluding that the agency's statutory construction is not

reasonable and therefore not entitled to *Chevron* deference.[7] The court then examines the evidentiary bases for the Department's remand decision, concluding that the dumping margins assigned to Plaintiffs on remand are not supported by substantial evidence.

A. *Commerce's Statutory Construction on Remand is Not Entitled to Deference.*

No statutory or regulatory provision directly addresses the methodology to be employed when calculating a dumping margin for companies not selected for individual investigation where Commerce limits its examination in an administrative review. Instead, as noted above, Commerce generally relies on the "all others rate" provision governing investigations under the antidumping statute, 19 U.S.C. § 1673d(c)(5). *Remand Results* at 14 ("Generally we have looked to [19 U.S.C. § 1673d(c)(5)], which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not examine individually in an administrative review."). *See also Final Results*, 73 Fed. Reg. at 52,274 (characterizing the Department's practice in this regard in language mirroring that found in 19 U.S.C. § 1673d(c)(5)); *I & D Mem.* at 18–19 (relying on 19 U.S.C. § 1673d(c)(5) and its accompanying provision in the Statement of Administrative Action to justify choice of separate rate in this case); *Longkou*, __ CIT __, 581 F. Supp. 2d at 1359 (discussing and upholding this practice as in accordance with the statutory scheme).

When Commerce interpreted this all-others rate provision in its remand determination, it concluded that the provision generally disfavors the use of zero and *de minimis* margins in calculating dumping margins for cooperative uninvestigated companies. *Remand Results* at 26. Commerce then relied on this interpretation in deciding not to

[7] To the extent that Commerce's determination depends upon a particular construction of its statutory authority, the court first looks to whether "Congress has directly spoken to the precise question at issue," *Chevron, U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984), using traditional tools of statutory construction. *Id.* at 843 n.9; *see also Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citation omitted)). "[I]f the text answers the question, that is the end of the matter." *Timex*, 157 F.3d at 882 (citations omitted). If, after using traditional tools of statutory construction, the court cannot conclude that the statute itself answers the question at issue, then Commerce's statutory interpretation is entitled to deference so long as it is reasonable. *See United States v. Mead Corp.*, 533 U.S. 218, 229(2001); *Chevron*, 467 U.S. at 843; *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) ("[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*."); *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994) ("In a situation where Congress has not provided clear guidance on an issue, *Chevron* requires us to defer to the agency's interpretation of its own statute as long as that interpretation is reasonable.").

base the dumping margins assigned to Plaintiffs on the zero and *de minimis* margins found for all individually investigated respondents in the second review. *Id.* ("It is because of the statute's clear preference to avoid using *de minimis* /zero and AFA rates in the [all-others rate] average that we have not used any of these rates in assigning a rate to the non-examined companies.").[8]

In reviewing a decision which the agency seeks to justify as compelled or preferred by a particular statutory provision, the court first looks to the text of the statute, to determine whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. *See also Timex*, 157 F.3d at 882.

The statutory provision at issue, Section 1673d(c)(5), provides a general rule and an exception:

(A) General rule

> For purposes of this subsection and section 1673b(d) of this title, the estimated all-others rateshall be an amount equal to the weighted average of the estimated weighted average dumping margins established for exporters and producers individually investigated, excluding any zero and *de minimis* margins, and any margins determined entirely under section 1677e of this title.

(B) Exception

> If the estimated weighted average dumping margins established for all exporters and producers individually investigated are zero or *de minimis* margins, or are determined entirely under section 1677e of this title, [Commerce] may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated, including averag-

[8] *See also Remand Results* at 14–15 (arguing that 19 U.S.C.§ 1673d(c)(5) "articulates a preference that the Department avoidzero, *de minimis* rates or rates based entirely on facts available when it determines the all others rate," and explaining that "the Department [therefore] consistently seeks to avoid the use oftotal facts available, zero and *de minimis* margins in determining non-selected rates in administrative reviews, in order to implement this statutory preference"); *id.* at 22–23 ("[T]he statute clearly disfavors the use of *de minimis* or zero margins in the calculation of the 'all-others' average rate in an investigation. . . . As we . . . calculated only zero and *de minimis* rates for the individually examined respondents . . ., we considered the statutory preference to avoid the use of these rates in the average. . . . Therefore, taking guidance from [19 U.S.C. § 1673d(c)(5)] addressing circumstances where the Department calculates zero or *de minimis* rates, . . . rather than using these disfavored rates, we looked to another reasonable method to assign rates to non-individually examined respondents."); (Def.'s Resp. to Pls.' Remand Comments ("Def.'s Resp.") at 5 ("Commerce explained that 19 U.S.C. § 1673d(c)(5), to which Commerce refers for guidance regarding how to assign rates to separate rate companies, expresses a preference for not relying upon rates that are zero, *de minimis*, or based entirely upon facts available. . . . [T]his statutory preference . . . supports Commerce's methodology.")).

ing the estimated weighted average dumping margins determined for the exporters and producers individually investigated.

19 U.S.C. § 1673d(c)(5)(A) & (B).

By its plain terms, this statutory provision's intended application is to administrative proceedings covered under Sections 1673b and 1673d of Title 19 — that is, to preliminary and final determinations in investigations of sales at less than fair value underlying the imposition of an antidumping duty order. Therefore, the court cannot conclude that "Congress has directly spoken [in this provision or elsewhere in the antidumping statute] to the precise question at issue," *Chevron*, 467 U.S. at 842 — i.e., the court cannot conclude that Congress has directly addressed the issue of whether Commerce must avoid using zero or *de minimis* dumping margins, to the extent that other rates are available, when calculating dumping margins for cooperative non-individually investigated companies in an administrative review. Accordingly, the court must determine whether Commerce's statutory interpretation is reasonable and therefore entitled to deference. *See id.* at 843–44. As explained below, the court concludes that it is not.

Commerce interprets Section 1673d(c)(5) to provide a general congressional preference, applicable both in investigations and administrative reviews, that Commerce avoid using zero or *de minimis* margins to the extent possible when assigning dumping margins to cooperative uninvestigated respondents. *See Remand Results* at 26.[9] However, subsection 1673d(c)(5)(B) provides an exception to the preference, expressed in subsection 1673d(c)(5)(A), for excluding zero and *de minimis* margins from the all-others rate calculation. Subsection (B) provides, *inter alia*, that where, as here, all mandatory respondents receive zero or *de minimis* dumping margins, the rule expressed in (A) does not apply. Subsection (B) then states that, in such cases, averaging the mandatory respondents' zero and *de minimis* dumping margins may serve as a reasonable method of establishing the all-others rate. 19 U.S.C. § 1673d(c)(5)(B).[10]

Thus, while Commerce is correct that the statute disfavors including zero and *de minimis* margins in the all-others rate calculation

[9] *See also supra* note 8.

[10] The court notes the Department's characterization that "the statute contemplates that [Commerce] may use an average of the zero, *de minimis* and rates based entirely on facts available" to arrive at an all-others rate in this case pursuant to 19 U.S.C. § 1673d(c)(5)(B). *Remand Results* at 15. However, despite the presence of a rate based on AFA assigned to the Vietnam-wide entity in the second review, *Final Results*, 73 Fed. Reg. at 52,275, the statute states only that "dumping margins determined for the exporters and producers *individually investigated*" may be averaged to arrive at the all-others rate. 19 U.S.C. § 1673d(c)(5)(B) (emphasis added). Because the margins for all *individually investigated*

when positive non-FA-based rates for individually investigated respondents are available, 19 U.S.C. § 1673d(c)(5)(A),[11] it is an impermissible construction of this provision to extend its disfavor to situations where, as here, "the estimated weighted average dumping margins established for *all* exporters and producers individually investigated are zero or *de minimis* margins," 19 U.S.C. § 1673d(c)(5)(B) (emphasis added). This extension is impermissible because the statute explicitly provides an exemption from the preference against using zero or *de minimis* margins in calculating the all-others rate for the situation at issue here. *Id.*

Simply put, when a statutory provision specifically lists "averaging the [zero and *de minimis*] estimated weighted average dumping margins determined for the exporters and producers individually investigated" as the sole provided example of "a reasonable method to establish the estimated all-others rate" when all mandatory respondents' margins are zero or *de minimis*, 19 U.S.C. § 1673d(c)(5)(B), it is impermissible to interpret this provision as expressing a preference against the use of such methodology in such situations. This must particularly be the case when the "authoritative expression by the United States concerning the interpretation and application of . . . this Act"[12] expressly states that the allegedly disfavored methodology is in fact "[t]he expected method in such cases." SAA, 1994

exporters/producers in the instant review were zero or *de minimis*, those portions of the statute which deal with situations where some or all individually investigated companies receive rates based entirely on facts available are not applicable here. The court will therefore refer only to those portions of the statute that deal with zero or *de minimis* margins for mandatory respondents.

[11] *See Longkou*, __ CIT __, 581 F. Supp. 2d at 1360 (upholding different treatment of mandatory respondents' zero/*de minimis* and above-*de minimis* margins for purposes of calculating the all-others rate pursuant to 19 U.S.C. § 1673d(c)(5)(A) as an "inherent and accepted part" of the statutory scheme). The Department relies on *Longkou* to support its argument that a statutory preference against the use of zero/*de minimis* margins in calculating the all-others rate supports the reasonableness of Commerce's choice of separate rate in this case. *Remand Results* at 22–23. However, because in *Longkou* the Department relied on, and the court construed, subsection (A) of section 1673d(c)(5), rather than subsection (B), the issue presented in *Longkou* and the holding of that case cannot support the reasonableness of the Department's reliance on subsection (B) — which creates an exception to the rule expressed in subsection (A) — in the case at bar. *See Longkou*, __ CIT at __, 581 F. Supp. 2d at 1360.

[12] 19 U.S.C. § 3512(d) (referring to the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 (1994), reprinted in 1994 U.S.C.A.A.N. 4040 ("SAA")).

U.S.C.A.A.N. at 4201.[13] In addition, Commerce's interpretation effectively renders the exception a nullity. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (citation omitted)).

Accordingly, Commerce's reliance upon an interpretation of the statute which reads the preference expressed in subsection 1673d(c)(5)(A) into the exception to that subsection found in subsection 1673(c)(5)(B), *see Remand Results* at 22–23, is unreasonable and therefore not entitled to deference. *See Chevron* , 467 U.S. at 845. While section 1673d(c)(5)(A) expresses a preference for avoiding zero and *de minimis* margins when calculating the all-others rate for cooperative uninvestigated respondents, subsection (B) exempts from this preference situations where, as here, all individually investigated respondents receive zero/ *de minimis* rates.

Contrary to Commerce's argument, therefore, Section 1673d(c)(5) does not support Commerce's methodology for establishing Plaintiffs' dumping margins. As the court held in *Amanda I*, "as a legal matter, Commerce may choose to include or to exclude the mandatory respondents' zero or *de minimis* margins in calculating a separate rate," 647 F. Supp. 2d at 1380, as long as the methodology used and the rates

[13] The Department recognizes that subsection 1673d(c)(5)(B) explicitly lists averaging the mandatory respondents' margins as an example of a reasonable methodology for establishing the all-others rate when all individually-investigated respondents receive zero or *de minimis* margins. *See Remand Results* at 14–15. However, the Department argues that this language applies only to investigations, not administrative reviews. *Id*.

Commerce offers two grounds in attempting to distinguish the circumstances of the instant administrative review from those of an initial investigation. First, the agency argues that subsection (B) is intended to apply only to circumstances where the "expected method" under that subsection would be to average zero/*de minimis* rates with rates based on AFA, and never solely to average zero and *de minimis* rates. *See Id.* at 15. Second, Commerce argues that averaging the margins calculated for all individually investigated companies as the all-others rate is the "expected method" only for investigations, where no other potential rates, such as rates from prior segments, would be available. *See id.*

Commerce's first argument in this regard is based on an erroneous interpretation of the law. *See supra* note 9. Because the provision's "expected method" is to average only the rates calculated for individually investigated companies, nothing prevents the "expected method" of subsection (B) from resulting in the averaging of zero and *de minimis* rates found for individually investigated companies in an underlying investigation, such as in situations where some uncooperative*non* -investigated companies receive rates based on AFA. Hence nothing necessarily distinguishes the circumstances of this review from the kinds of circumstances to which subsection (B) was intended to apply. With regard to Commerce's second argument, as the court explained in *Amanda I*, and reiterates below, the availability of rates from prior segments does not in itself suffice to support the reasonableness of applying such rates to pricing behavior in subsequent periods of review, and therefore does not necessarily bear on the reasonableness of using section (B)'s expected method in a particular segment.

chosen are reasonable, *see id.* at 1379. By categorically excluding the mandatory respondents' zero and *de minimis* margins in calculating the separate rate, the methodology used on remand was unreasonable. A further remand is therefore required.

Moreover, even were Commerce's exclusion of the mandatory respondents' margins from the separate rate calculation not categorical, the court could not accept as reasonable, based on the record here, the dumping margins assigned to Plaintiffs in this review. It is to the consideration of that issue that the court now turns.

B. *Commerce's choice of dumping margins assigned to Plaintiffs is not supported by substantial evidence in the record.*

Because the record for this review does not contain substantial evidence sufficient to establish a reasonable link between the rates assigned to Plaintiffs and Plaintiffs' pricing behavior during the POR, Commerce's decision in this regard is in any case not reasonable, especially in light of the overriding statutory purpose of accuracy in the calculation of dumping margins. *See, e.g.*, *Parkdale*, 475 F.3d at 1380 (Commerce must calculate dumping margins "as accurately as possible"); *De Cecco*, 216 F.3d at 1032 (Commerce does not have discretion to select dumping margins "with no relationship to the respondent's actual dumping margin"); *U.S. Steel Corp. v. United States*, Slip. Op. 10–28, 2010 WL 1347689, at *19 (CIT Mar. 19, 2010) ("It is well-established that Commerce is required to calculate antidumping duty margins as accurately as possible in each segment of a proceeding." (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990))).

The Department points to four areas in the record as evidence in support of the dumping margins assigned to Plaintiffs in this review:

1) the existence of a 25.76 percent rate, based on AFA, for two mandatory respondents in the first review, as "evidence that dumping has occurred since the investigation of the underlying order," *Remand Results* at 16 ("Ground 1");

2) the fact that "[a]t least one of the respondents individually investigated had transaction-specific margins that were higher than the 4.57 percent rate," *id.* ("Ground 2");

3) the fact that "[o]f the 63 exporters covered by the review, 35 exporters did not submit quantity and value questionnaire responses at the beginning stages of the proceeding, despite confirmed receipt of each attempt [to solicit such response]," *id.* at 16—17, as evidence of continued dumping during the POR, at a rate presumed to be at least equal to 25.76 percent, the AFA rate assigned to unresponsive exporters ("Ground 3"); and

4) the fact that "entry data obtained from U.S. Customs and Border Protection [] shows that exporters from the Vietnam-wide entity entered subject merchandise during the POR for which a cash deposit was paid at the rate of 25.76 percent," *id.* at 17–18, as evidence "that the cash deposit rate is reflective of the level of actual dumping by these exporters during the POR," because "reviews were not requested by some of these exporters," *id.* at 18 ("Ground 4").

The court now turns to consider these evidentiary claims.

1. Grounds 1, 3 & 4 — Uncooperative Respondents

Grounds 1, 3 and 4, offered as evidence in support of the dumping margins assigned to Plaintiffs in this review, are all based on evidence of the existence of uncooperative respondents in the first and/or second reviews: Ground 1 refers to the presence of uncooperative respondents in the first review;[14]Ground 3 refers to the presence of uncooperative respondents in the second review; and Ground 4 refers to the presence of uncooperative respondents in the first review who did not request to be reviewed in the second review.[15]

As the court stated in *Amanda I*, however, "the Department's reference to the existence of . . . non-cooperating companies . . . fails to justify its choice of dumping margin for the cooperative uninvestigated respondents," 647 F. Supp. 2d at 1381, and "does not provide a basis for the Department's use of results from a prior determination with respect to the cooperating companies in the present case." *Id.* at 1382.

All fully cooperative individually investigated respondents in both the first and second reviews received zero or *de minimis* rates.[16] Accordingly, when Commerce says that it has "evidence of dumped sales in the prior POR and instant POR," *Remand Results* at 15, it is referring to the *presumption* of dumping with regard to the uncooperative respondents in the first and second reviews.[17]

[14] *Remand Results* at 16 ("[The Department] determined to apply AFA to two mandatory respondents. As these companies refused to provide the Department with necessary information, the Department was required to resort to facts available, and applied an adverse inference, determining their dumping margins to be 25.76 percent." (citation omitted)).

[15] *See Remand Results* at 16 (explaining that the 25.76 percent rate was assigned to uncooperative respondents in the first review).

[16] *Final Results*, 73 Fed. Reg. at 52,275; *Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam*, 72 Fed. Reg. 52,052, 52,054 (Dep't Commerce Sept. 12, 2007) (final results of the first antidumping duty administrative review and first new shipper review).

[17] When respondents fail to cooperate, Commerce presumes the existence of a positive dumping margin for such companies in order to encourage the submission of accurate information with regard to their pricing behavior during the POR. *Rhone Poulenc*, 899 F.2d at 1190–91.

But the presumption that uncooperative respondents engaged in dumping during the POR is just that — a presumption. Because Commerce does not actually possess accurate information with respect to such companies' pricing behavior during the POR, the agency may presume that margins from prior segments constitute "the most probative evidence of current margins because, if it were not so, the [affected respondent], knowing of the rule, would have produced *current* information showing the margin to be less." *Rhone Poulenc*, 899 F.2d at 1190 (emphasis in original).[18]

In the case at bar, however, Commerce, by limiting its examination pursuant to 19 U.S.C. § 1677f-1(c)(2)(B), has expressly refused to accept current information from the cooperative non-investigated separate rate companies. It follows that the presumption that margins established in the underlying investigation are most probative of current dumping margins cannot be justified on the ground that it encourages the submission of more accurate information.[19] A presumption used to encourage some companies to submit more accurate information may not reasonably be transposed onto companies which are expressly prevented from submitting more accurate information.[20] *See Rhone Poulenc*, 899 F.2d at 1191 (when agency presumes margins from prior segments to be the best information regarding current margins for uncooperative respondents, "since the presump-

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[18] *See also, e.g.*, *Gallant Ocean (Thailand) Co. v. United States*, No. 2009–1282, 2010 WL 1508198 (Fed. Cir. Apr. 16, 2010) ("An AFA rate must be 'a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase inteded as a deterrent to non-compliance.' The purpose of the AFA rate 'is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.'" (emphasis omitted) (quoting *De Cecco*, 216 F.3d at 1032)).

[19] *See also SKF USA Inc. v. United States*, __ CIT __,675 F. Supp. 2d 1264, 1276 (2009) ("Although 19 U.S.C. § 1677e(b) does not expressly state that Commerce may not adversely affect a party to a proceeding based upon another interested party's failure to cooperate, a construction permitting such an absurd result makes a mockery of any notion of fairness. In the specific context of the antidumping laws, a party that did not fail to meet its obligation to cooperate, as imposed by § 1677e(b), is entitled by § 1675(a) and related provisions of the antidumping law to have its margin determined accurately and according to the relevant information on the record of the administrative review."); *id.* at 1277 (admonishing Commerce for creating a situation where a party may obtain "a margin or deposit rate[] that is less favorable than that which would have resulted if it had cooperated fully, even though Commerce never found that the party did not cooperate fully as required by § 1677e(b)" (internal quotation marks and citation omitted)).

[20] While Commerce argues that, because it "did not attribute AFA rates to the non-individually examined respondents," *Remand Results* at 22, its separate rate determination is not tantamount to penalizing cooperative respondents for the non-cooperation of others, *id.*, in actuality the Department's treatment of the remaining Plaintiffs — essentially assigning a margin equivalent to the highest prior margin available – appears to the court to be no different from how it normally treats willfully non cooperative companies. *See, e.g.*, *Rhone Poulenc*, 899 F.2d at 1190—91.

tion is rebuttable, it achieves th[e] [] goal [of encouraging cooperation] without sacrificing the basic purpose of the statute: determining current margins as accurately as possible”).

Moreover, a rebuttable presumption with respect to the margins for some companies may not by itself serve as substantial evidence supporting the accuracy of margins assigned to wholly unrelated companies. *See, e.g.*, *Routen v. West*, 142 F.3d 1434, 1439 (Fed. Cir. 1998) (“This court has never treated a presumption as any form of evidence.” (citing *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1037 (Fed. Cir. 1992) (“[A] presumption compels the production of [a] minimum quantum of evidence from the party against whom it operates, nothing more. In sum, a presumption is not evidence.” (citations omitted)); *Del Vecchio v. Bowers*, 296 U.S. 280, 286 (1935) (a presumption “cannot acquire the attribute of evidence in the claimant’s favor”); *N.Y. Life Ins. Co. v. Gamer*, 303 U.S. 161, 171 (1938) (“[A] presumption is not evidence and may not be given weight as evidence.”))). *See also Wilner v. United States*, 24 F.3d 1397, 1411 (Fed. Cir. 1994) (“Presumptions merely impose ‘*on the party against whom [they are] directed* the burden of going forward with evidence to rebut or meet the presumption . . . .’” (emphasis added) (quoting Fed. R. Evid. 301)).

Because Commerce’s Grounds 1, 3 and 4 are all based exclusively on presumptions applicable only to the parties against whom they are made, these grounds cannot constitute substantial evidence to support Commerce’s choice of dumping margins for Plaintiffs in the second review.

2. Ground 2 — Transaction-Specific Margins

Second, with regard to transaction-specific, above-*de minimis* margins found in the course of investigating the mandatory respondents, suffice it to say that, if the presence of these transaction-specific margins failed to justify assigning an overall above-*de minimis* rate for the companies whose data they embody,[21] then they certainly cannot serve to do so for the remaining cooperative companies.

[21] The court notes that the dumping margins for the individually investigated respondents in this review were 0.00 and 0.01 percent. *Final Results*, 73 Fed. Reg. at 52,275. Thus whatever transaction-specific dumping may have been engaged in by the individually investigated respondents, Commerce seeks to have this data justify the imposition of 4.30 or 4.57 percent dumping margins for Plaintiffs for the entire POR, notwithstanding the fact that these transaction-specific margins were evidently not significant enough to raise the overall dumping margins of the companies whose actual data they represent above the barest of possible minimums.

Conclusion

For all of the foregoing reasons, the court concludes that Commerce's argument that "selecting rates from prior segments to apply to the nonselected companies in this review implements the statute's preference to avoid zero/*de minimis* and facts available margins," *Remand Results* at 18, is based on an unreasonable interpretation of the statute, and that the agency's finding that doing so "reasonably reflects the existence of dumping under the order [by Plaintiffs during the POR]," *id.*, is not supported by substantial evidence on the record. Accordingly, the 4.57 percent and 4.30 percent rates assigned to Plaintiffs are unsupported.

On remand, therefore, Commerce must employ a reasonable method, which may "includ[e] averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated," 19 U.S.C. § 1673d(c)(5)(B). Further, Commerce must assign to Plaintiffs dumping margins for the second POR which are reasonable considering the evidence on the record as a whole; to do so, Commerce may reopen the evidentiary record if need be.[22]

Therefore, this matter is remanded to the agency for further consideration in accordance with this opinion. *See* 19 U.S.C. § 1516a(c)(3). Commerce shall have until ninety (90) days from the date of this Order and Opinion to complete and file its remand redetermination. Plaintiffs shall have until thirty (30) days from that filing to file comments. Defendant and Defendant-Intervenors shall have until fifteen (15) days after Plaintiffs' comments are filed to file any reply.

It is **SO ORDERED**

Dated: June 17, 2010
New York, N.Y.

/s/ Donald C. Pogue
DONALD C. POGUE, JUDGE

[22] To the extent that the Department finds that the record does not currently contain sufficient evidence to support the reasonable accuracy of dumping margins for Plaintiffs during the POR, the court notes that neither Petitioner nor the Plaintiffs object to reopening the evidentiary record. *I & D Mem.* at 16–17 ("If the Department elects not to use the mandatory respondents' calculated rates to assign a separate rate, the [separate rate] Respondents [] argue that the only alternative option is for the Department to reopen the record and allow the [separate rate] Respondents to supplement the record with company-specific, count-size information as a reliable source for calculating the separate-rate margin based on the average unit value ("AUV") to estimate U.S. price."); *id.* at 17 ("Petitioner would not be averse to reopening the record for the Department to determine the separate-rate margin based on count-size specific AUV's reported by [separate rate] Respondents.").

Slip Op. 10–70

UNITED STATES, Plaintiff, v. UPS CUSTOMHOUSE BROKERAGE, INC., Defendant.

Before: Gregory W. Carman, Judge
Court No. 04–00650

[*Plaintiff's Motion for Reconsideration of the Court's January 28, 2010 Judgment is DENIED.*]

Dated: June 17, 2010

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (*Jessica R. Toplin*, *Courtney S. McNamara*); *Edward Greenwald*, of counsel, Department of Homeland Security, U.S. Customs and Border Protection; for Plaintiff.

Akin Gump Strauss Hauer & Feld LLP (*Terence J. Lynam*, *Lars-Erik A. Hjelm*, *Natalya Daria Dobrowolsky*, *Lisa-Marie W. Ross*, *Thomas James McCarthy*), for Defendant.

OPINION & ORDER

CARMAN, JUDGE:

The United States has moved under USCIT Rule 59 for reconsideration of the Court's January 28, 2010 Opinion and Order and the accompanying Judgment for Defendant, *United States v. UPS Customhouse Brokerage, Inc.*, 34 CIT ___, 686 F. Supp. 2d 1337 (Jan. 28, 2010) ("Post-Appeal Decision"). The challenged decision followed a decision of the Court of Appeals for the Federal Circuit ("CAFC"), *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376 (Fed. Cir. 2009) ("CAFC Decision"), which partially vacated and partially remanded this Court's earlier Judgment for Plaintiff following a bench trial, *United States v. UPS Customhouse Brokerage, Inc.*, 32 CIT ___, 558 F. Supp. 2d 1331 (2008) ("Post-Trial Decision"). Familiarity with these prior opinions is assumed.

Parties' Contentions

I. *The United States*

Plaintiff asserts errors as follows, which it claims require reconsideration:

A. Argument 1: A New Controlling Legal Standard Required Remand or Reopening Trial

This argument consists of two propositions: that (a) the CAFC Decision announced a new controlling legal standard regarding the

correct interpretation of 19 C.F.R. § 111.1 (“§ 111.1”), and (b) that this Court erred by not providing Plaintiff a chance to satisfy that new legal standard by either taking further trial evidence from Plaintiff, or by remanding for administrative proceedings consistent with the new standard. (Pl.’s Mot. for Reconsideration, Doc. No. 126 (“Motion”) at 4–7.)

B. Argument 2: The Court Improperly Construed Customs Regulations

The government claims that the Court exceeded its proper role in the Post Appeal Decision when it interpreted various Customs regulations without the benefit of agency interpretation or briefing, and compounded this error by incorrectly concluding that Plaintiff could not prove its case absent evidence that the Fines, Penalties, and Forfeitures Officer (“FP&F Officer”) Bert Webster personally considered all ten § 111.1 factors. (*Id.* at 7–9.)

C. Argument 3: Customs’ Error Was Harmless and Correctable at Trial *De Novo* Absent Proof of Substantial Prejudice

This argument stems from Argument 1 — that the CAFC Decision merely announced the correct new legal standard governing the interpretation of § 111.1. According to the United States, this Court erred in holding Customs’ prior misinterpretation of the regulation to be a procedural irregularity that nullified the agency’s penalty action against Defendant UPS Customhouse Brokerage, Inc. (“UPS”). (Motion at 9–10.) Plaintiff argues (without conceding) that if the agency’s failure to consider all of the § 111.1 factors was procedural, that error was harmless, and that the Court should therefore reopen the trial, take new evidence, and consider the § 111.1 factors *de novo* on the augmented trial record and in light of the “new” legal standard. (*Id.* at 10–11; Pl.’s Reply in Supp. of Its Mot. for Reconsideration, Doc. No. 128 (“Reply”) at 6–9) (both citing *Empire Energy Mgmt. Sys. v. United States*, 362 F.3d 1343 (Fed. Cir. 2004)).) Plaintiff also argues that evidence of substantial prejudice is required to set aside, due to procedural noncompliance, an agency action, but that UPS presented no such evidence. (Motion at 12 (*citing Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *Dixon Ticonderoga Co. v. United States*, 468 F.3d 1353, 1357 (Fed. Cir. 2006); *PAM, S.p.A. v. United States*, 463 F.3d 1345, 1349 (Fed. Cir. 2006); Reply at 3, 8–9.)

II. *UPS*

A. Argument 1

UPS claims that Plaintiff's Argument 1 improperly reiterates points already raised and rejected in the Post-Appeal Decision. (Brief of UPS Customhouse Brokerage, Inc. in Opp'n to Pl.'s Mot. for Reconsideration, Doc. No. 127 ("Def.'s Opp.") at 4–5.) UPS attacks the idea that the CAFC Decision's interpretation of § 111.1 is "new" with citations to two Customs Headquarters Rulings that long ago reached the same conclusion about § 111.1 as the CAFC Decision. (*Id.* at 5 (*citing* HQ 225010 (July 21, 1994), 1994 U.S. Custom HQ LEXIS 1645, at *7 *and* HQ 115005 (May 2, 2000), 2000 U.S. Custom HQ LEXIS 906, at *5).)

B. Argument 2

On Argument 2, UPS notes that Plaintiff only contests the Court's method, not the conclusions of its regulatory analysis; and, regardless of the FP&F Officer's proper role, Plaintiff failed to present evidence that anyone considered all of the § 111.1 factors. (*Id.* at 8–9.)

C. Argument 3

On Argument 3, UPS contends that Plaintiff's error was procedural since 19 U.S.C. § 1641(d)(2)(A) requires consideration of the § 111.1 factors and, as the CAFC Decision stated, "Customs did not consider all ten factors listed in 19 C.F.R. § 111.1." (*Id.* at 10 (*quoting* CAFC Decision, 575 F.3d at 1383).) UPS argues that the precise nature of Plaintiff's error is irrelevant in any case, since "neither Customs nor the government presented evidence . . . that the agency considered all of the section 111.1 factors." (*Id.*) As to substantial prejudice, UPS states that prejudice "is what this entire case is about," and that UPS has argued all along that proper consideration of all ten § 111.1 factors would show UPS not to be liable. (*Id.* at 11.)

Standard of Review

Although the Court's rules do not explicitly provide for a motion for "reconsideration," such motions are ordinarily accepted and analyzed under USCIT R. 59. *See, e.g.*, *Peerless Clothing Intern., Inc. v. United States*, 33 CIT ___, 637 F. Supp. 2d 1253, 1255–1256 (2009). The granting of a motion for reconsideration is within the sound discretion of the Court. *See Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *Canadian Wheat Board v. United States*, 33 CIT ___, 637 F. Supp. 2d 1329, 1333 (2009). "The major grounds justifying a grant of a motion to reconsider a judgment are an

intervening change in the controlling law, the availability of new evidence, the need to correct a clear factual or legal error, or the need to prevent manifest injustice." *Almond Bros. Lumber Co. v. United States*, 34 CIT ___, 2010 WL 1409656 at *4 (2010) (*citing NSK Corp. v. United States*, 32 CIT ___, 593 F. Supp. 2d 1355, 1361 (2008) and USCIT R. 59(a)(2).) A motion for reconsideration is thus a mechanism to correct a significant flaw in the original judgment, but is not a mechanism to "allow a losing party the chance to repeat arguments or to relitigate issues previously before the court." *Peerless Clothing*, 637 F. Supp. 2d at 1256 (citations omitted).

Discussion

Plaintiff's claim in Argument 1 simply reiterates arguments already elaborated in prior briefs to the Court and rejected in the Post-Appeal Decision. Plaintiff's claim in Argument 2 that the Court erred by interpreting Customs regulations and basing its holding on the role of the FP&F Officer does not merit reconsideration because the Court's analysis of the FP&F Officer's role was not essential to the Post-Appeal Decision. Argument 2 is therefore irrelevant to the core reasoning upon which the Court issued its judgment. Plaintiff's claim in Argument 3 that the Court should have found Custom's administrative error in applying § 111.1 to be harmless, and refused to enter judgment for Defendant absent a showing of substantial prejudice, is based on citations to inapposite case law. Argument 3 also ignores the fact that the Post-Appeal Decision was entirely driven by a careful analysis and application of the specific directives of the CAFC Decision issued in *this particular case*. Plaintiff's motion for reconsideration is therefore denied.

I. *Argument 1: Plaintiff Attempts to Relitigate Issues Already Decided*

Plaintiff's contentions in Argument 1 are identical to arguments Plaintiff already made in briefing to the Court before the Court issued the Post-Appeal Decision, and are therefore rejected as improper attempts to relitigate under the guise of a motion for reconsideration.

A. The Court Already Rejected the Argument that the CAFC Decision Announced a Surprising New Interpretation of § 111.1

The Court has already considered and squarely rejected Plaintiff's main contention—that the CAFC Decision constituted a new legal standard controlling § 111.1, which Plaintiff could not have anticipated before trial. Post-Appeal Decision, 686 F. Supp. 2d 1337, 1355 ("The Court also rejects Plaintiff's contention that the Court of Ap-

peals' opinion constituted a change in the law regarding 19 C.F.R. § 111.1 and should excuse Plaintiff's failure to prove its case at trial.") The Court's reasoning on this issue has already been set forth at length, based upon detailed consideration of the record of proceedings from summary judgment through opening statements at trial. *Id.* at 1355–1356. It is also true, as UPS points out, that the CAFC Decision is consistent with Customs Headquarters Rulings issued long before the trial, undercutting Plaintiff's claim that it could not have anticipated the CAFC Decision's interpretation of § 111.1. *See* HQ 225010 (July 21, 1994), 1994 U.S. Custom HQ LEXIS 1645, at *7; HQ 115005 (May 2, 2000), 2000 U.S. Custom HQ LEXIS 906, at *5.

B. The Court Already Rejected Plaintiff's Request for Evidentiary Proceedings or Remand to Satisfy the "New" Interpretation of § 111.1

The second part of Argument 1 is that the Court erred in refusing to take further evidence from Supervisory Import Specialist and Trade Enforcement Coordinator Lydia Goldsmith relating to the alleged "new" legal standard governing § 111.1. Plaintiff's contention is that it has never had a chance to present evidence satisfying the correct legal standard, and that the Court wrongly foreclosed Plaintiff from presenting its evidence on the assumption that the CAFC Decision made a factual finding that Customs did not consider each § 111.1 factor. Plaintiff argues that it must be given a chance to prove its case because the CAFC Decision did not foreclose the issue by engaging in "improper appellate fact-finding." (Motion at 9–10.)

The Court has already rejected in detail and at length Plaintiff's contention that it had no opportunity to present evidence satisfying the correct legal standard. Post-Appeal Decision, 686 F. Supp. 2d at 1352–66. For example, the Court noted the many occasions before trial on which the parties debated, and the Court explicitly left open, the question of the correct interpretation and application of § 111.1, ultimately concluding that

> Plaintiff knew well in advance of trial that the success of its case could depend upon establishing evidence to satisfy either of the two potential outcomes on the applicability of the § 111.1 factors [i.e. whether or not demonstrating each factor was mandatory]. No flaw in the trial prevented Plaintiff from doing then what it seeks to do now: putting on a witness to testify regarding the consideration given to the ten factors of § 111.1.

Id. at 1354.

Plaintiff conjures an overblown nightmare scenario to support its insistence that it was entitled to rely upon the interpretation of § 111.1 that was rejected in the CAFC Decision: "the Court has ruled that the Government was required to present multiple cases-in-chief to satisfy all possible interpretations of the agency's own regulations, no matter how unreasonable those interpretations may have been." (Motion at 5.) This is not at all accurate. The debate between the parties here was specific and related to one central issue: whether Customs was required to consider all ten § 111.1 factors. The Post-Appeal Decision only indicated that Plaintiff had no excuse for failing to present evidence—which it now claims to have had all along, and offers through one of the witnesses it called at trial—regarding those ten factors. Post-Appeal Decision, 686 F. Supp. 2d at 1356.

Plaintiff contends that the Post-Appeal Decision ruled that Plaintiff must adduce proof going to interpretations "no matter how unreasonable." But the CAFC Decision ultimately determined that the government's preferred interpretation—that the § 111.1 phrase "will consider" should not be read as mandatory—was the unreasonable interpretation. *See* 575 F.3d 1376, 1382. This Court only upheld that interpretation after trial on the mistaken belief that it was required to do so by principles of deference to agency interpretation. *See* Post-Trial Decision, 558 F. Supp. 2d 1331, 1353.

The second part of Argument 1 also ignores that a finding of fact based on the trial record has already been made on the issue of whether Customs considered all of the § 111.1 factors—by *this Court*. The Post-Appeal Decision stated the finding "that Plaintiff did not establish at trial that the appropriate Customs officer considered the § 111.1 factors when deciding whether to impose penalties upon UPS." 686 F. Supp. 2d at 1351—52. Although this finding was based primarily on the absence of relevant testimony from the FP&F Officer,[1] the Court also considered Plaintiff's proposal to present further testimony from Ms. Goldsmith. After examining the trial transcript in detail, the Court found that any testimony Ms. Goldsmith offered at new proceedings for the purpose of proving that Customs considered all of the § 111.1 factors simply could not be consistent with her prior sworn statements. *Id.* at 1357–58. The Court is certainly not obliged to accept proffered testimony that would be inconsistent with prior sworn statements given to the Court by the same witness. The need for further proceedings was consequently foreclosed because

[1] Plaintiff contends that the Court improperly construed the FP&F Officer's role, which the Court addresses below.

this Court was able to make sufficient factual findings on the trial record before it, and not by relying on any alleged "appellate fact-finding" in the CAFC Decision.

Plaintiff asked, in the alternative, for remand "to allow [Customs] to apply the newly announced standard at the administrative level in the first instance." (Reply at 9.) The Court already considered extensive case law in addressing Plaintiff's alternative request for remand—which was argued even more forcefully by UPS in briefing prior to the Post-Appeal Decision—and squarely rejected that relief. Post-Appeal Decision, 686 F. Supp. 2d at 1358–1366.

II. *Argument 2: The Post-Appeal Decision Did Not Hinge on Improper Construal of Regulations Regarding the FP&F Officer's Role*

The government misreads the Post-Appeal Decision when it argues that the Court committed manifest error by relying on interpretations of Customs regulations without agency input and improperly determining that evidence was required that the FP&F Officer, Bert Webster, personally considered all of the § 111.1 factors.

The Court did not base its interpretation of the role of the FP&F Officer solely upon regulatory analysis. The Court also reached its conclusions based on a close examination of the testimony of Ms. Goldsmith regarding the FP&F Officer's role. Post-Appeal Decision, 686 F. Supp. 2d at 1356–57 (finding that Ms. Goldsmith's testimony established that the FP&F Officer was the relevant decision-maker in the penalty procedure). The Court's finding was, in this regard, based on the Court's role as the finder of fact, and not only on the statute and the regulations interpreting that statute.

The Court does not believe that it acted incorrectly in examining the statutory and regulatory scheme, or that it was mistaken as to the correct role of the FP&F Officer in penalty proceedings. Even if the Court erred in either of these ways, however, the outcome of the case would remain the same. As the post-trial finder of fact, the Court has found that Plaintiff, without adequate excuse, failed to prove at trial that Customs (by its FP&F Officer, Supervisory Import Specialist and Trade Enforcement Coordinator, or *any other* officer, for that matter) considered all ten § 111.1 factors, and thus failed to demonstrate that it was entitled to recover penalties against UPS.

III. *Argument 3: Customs' Procedural Error Was Not Harmless, Customs Failed to Correct It at Trial De Novo, and Substantial Prejudice Need Not Be Shown*

Plaintiff contends in Argument 3 that the Court should have held Custom's failure to consider all ten § 111.1 factors to be harmless

error, and as a consequence should have taken further testimony in order to fulfill its obligation to make findings of fact regarding whether the ten § 111.1 factors were satisfied. Plaintiff contends that entering judgment for the Defendant was inappropriate in this context because Defendant did not prove substantial prejudice resulting from error.

The Court cannot do what Plaintiff urges. This Court's Post-Trial Decision initially embraced a harmless error analysis, but the CAFC Decision, reversing-in-part, *rejected that very approach*. Plaintiff cites inapposite case law from the CAFC and urges the Court to follow those cases, ignoring the specific directives *regarding this case* given to this Court in the CAFC Decision. Finally, Plaintiff urges a substantial prejudice analysis that is neither required nor consistent with the CAFC's mandate. Argument 3 therefore establishes no basis for reconsideration.

A. Errors Regarding § 111.1 Were Dispositive, Not Harmless

Plaintiff contends that Customs committed no error in applying § 111.1, but even if it did, the error could not determine the outcome of the trial. Plaintiff cites *Empire Energy Mgmt. Sys., Inc. v. Roche*, 362 F.3d 1343 (Fed. Cir. 2004) ("*Empire Energy*") for the proposition that procedural failures in administrative proceedings, where they can be corrected in a later *de novo* court proceeding, are non-fatal. (Motion at 10; Reply at 5, 7.) According to Plaintiff, the Court must undertake its own analysis of whether the § 111.1 factors were met. (Motion at 10 ("[e]rrors at the agency level do not absolve the trial court of its responsibility to apply the facts found at trial to the proper legal standard and determine whether the Government can carry its burden"); Reply at 5 ("[t]he Court itself is to apply the 10 factors in section 111.1 *de novo*, based upon the judicial record.").)

Empire Energy is inapposite. *Empire Energy* reviewed a contract to construct a power facility for the military, which the military administratively terminated; the plaintiff appealed in part on the basis that "the contracting officer did not conduct an analysis or form a subjective belief that the conditions for default termination were satisfied." *Empire Energy*, 362 F.3d at 1356. The CAFC rejected this argument, indicating that court review of the termination decision was an objective inquiry to decide whether termination "was reasonable given the events that occurred before the termination decision was made," and emphasized that the subjective beliefs of the contracting officer were not relevant. *Id.* at 1357–58. The CAFC upheld the termination in *Empire Energy* because the finding of the administrative appeals board was supported by facts showing that the plaintiff did not make

reasonable progress in performing under the contract (which was not the basis of the officer's termination decision). An objective review of the facts supported the officer's decision even where that review did not support the officer's subjective reason for reaching that decision. *Id.* at 1358.

Empire Energy thus bears no direct relevance to the case at hand, in which both this Court and the CAFC have been obliged to examine the 19 U.S.C. § 1641(d)(2)(A) procedure for imposing monetary penalties upon customs brokers, and associated regulation 19 C.F.R. § 111.1, which lists ten specific factors that Customs "will consider" when imposing such monetary penalties. The relevance of the subjective beliefs of the Customs decision maker are not at issue here, and neither is the termination of military contracts.

Plaintiff, nonetheless, urges the Court to extend *Empire Energy* to this case, arguing that *Empire Energy* stands for the proposition that "it does not matter what [FP&F Officer] Bert Webster did or did not do because UPS is protected by the *de novo* standard of review in this Court." (Reply at 7–8.) Extending *Empire Energy* in such a manner, and treating the § 111.1 failure in this case as harmless, might be possible—had the CAFC not specifically rejected such an approach in the CAFC Decision, as already detailed in the Post-Appeal Decision and further discussed below.

The analysis advocated by Plaintiff is, in fact, essentially a paraphrase of the approach adopted by this Court in its initial Post-Trial Decision. The Post-Trial Decision, although couching its discussion in the language of deference to Customs' interpretation of § 111.1, held that Customs' failure to consider all ten factors did not preclude recovery and directly analyzed what the Court saw as the relevant § 111.1 factors on the basis of the trial record. *See* 558 F. Supp. 2d 1331, 1352–54 (finding on the trial record that, despite (a) UPS's very low rejection rate and (b) UPS training programs in response to Customs warnings (two relevant § 111.1 factors), UPS failed to exercise responsible supervision and control). It need not be emphasized that, when the CAFC reversed-in-part on this very issue, the CAFC was fully aware of *Empire Energy*. Had the CAFC determined that the failure of Customs to consider each § 111.1 factor was irrelevant, and that this Court was to make its own findings on the § 111.1 factors *de novo*, the CAFC would not have reversed this Court's decision and judgment on those issues.

In issuing the Post-Appeal Decision and Judgment, concluding that the failure of the United States to prove that Customs considered each § 111.1 factor was fatal to recovery, this Court closely examined and hewed to the specific language of the CAFC Decision. For ex-

ample, the Post-Appeal Decision quoted the CAFC Decision at length and examined the precise nature of the errors identified there—committed by both Customs and by this Court. 686 F. Supp. 2d at 1345–1350. The CAFC Decision reversedin-part this Court's judgment specifically on the basis that "the Court of International Trade erred in upholding [Customs'] determination that UPS did not exercise responsible supervision and control in violation of 19 U.S.C. § 1641." 575 F.3d at 1378. The CAFC further specified that it vacated the "portion of the Court of International Trade's judgment" which upheld the penalties, since "Customs did not consider all ten factors listed in 19 C.F.R. § 111.1," which meant that Customs' "determination that UPS violated 19 U.S.C. § 1641 was improper." *Id.* at 1383. Thus, the Court concluded, *based on the specific language of the CAFC Decision*, that the Court's own consideration of the § 111.1 factors did not cure the error, and that the Court could not uphold Custom's penalty decision unless Plaintiff could prove that Customs had *itself* considered the ten § 111.1 factors. The factors going into this rationale are explained in depth in the Post-Appeal Decision and will not be repeated here.

B. Substantial Prejudice to Defendant Not Required Here

Plaintiff's final claim is that Customs' failure to consider all of the § 111.1 factors was, if error at all, a "procedural" error, and that the penalty action thus cannot be set aside absent a showing that UPS was substantially prejudiced by the error. (Motion at 12 (*citing, inter alia, Intercargo Insurance Co. v. United States*, 83 F.3d 391, 395 (Fed. Cir. 1996).)

The first response to this argument is, again, that Plaintiff's desired result conflicts with the language of the CAFC Decision. The CAFC Decision reversed-in-part the judgment of this Court specifically on the grounds that "the Court of International Trade erred in upholding [Customs'] determination that UPS did not exercise responsible supervision and control" since "Customs did not consider all ten factors listed in 19 C.F.R. § 111.1," and therefore Customs' "determination that UPS violated 19 U.S.C. § 1641 was improper." 575 F.3d at 1378, 1383. Had the CAFC intended that Customs' error should be characterized as a harmless procedural shortcoming, remediable only on a showing of substantial prejudice, the CAFC would have applied its own precedent (cited by Plaintiff) regarding such errors. The CAFC did not do so, however.

An examination of the cases cited by Plaintiff suggests why. All of the cases cited by Plaintiff involved notice or service requirements. Violation of "timing requirements" that were "merely procedural

aids" was judged harmless. *Dixon*, 468 F.3d at 1355 n.1. Failure to comply with a service regulation did not require "[r]ecission of a completed administrative review" absent substantial prejudice. *PAM*, 463 F.3d at 1346. A minor defect in extension notices was harmless. *Intercargo*, 83 F.3d at 394–397. And an agency was permitted to relax regulatory requirements intended to assist agency decision-making, not protect individual litigants, in an urgent situation. *American Farm Lines*, 397 U.S. at 538–39.[2]

The regulation here, § 111.1, in contrast to the regulations at issue in the above-cited cases, is not a notice or service requirement. It is also not a regulation benefitting the agency, "relaxed" in this case for reasons of urgency. Section 111.1, to the contrary, cuts to the core of Customs' penalty case against UPS by partially defining the manner in which Customs may decide whether UPS is liable. The government cites no precedent that violation of such a regulation is presumptively harmless absent a showing of substantial prejudice; the Court will instead continue to follow the only precedent relevant to the decision of *this* case: the CAFC Decision, *United States v. UPS Customhouse Brokerage, Inc.*, 575 F.3d 1376 (2009).

Conclusion

The Court has not committed "multiple and manifest errors" as alleged by Plaintiff (Motion at 1)—but would do so if it were to ignore the language of the CAFC Decision and grant this motion. The Court rejects Plaintiff's arguments because they (1) have already been presented to, and rejected by, this Court; (2) are inapplicable to the extent that they misread the basis for the Court's decision; and (3) urge the Court to ignore the specific directives of the CAFC regarding *this particular case*.

For the above reasons, it is hereby **ORDERED** that Plaintiff's Motion for Reconsideration is denied.

Dated: June 17, 2010
New York, New York

/s/Gregory W. Carman
GREGORY W. CARMAN

[2] It is also notable that none of the cases cited by Plaintiff involved a trial court's finding that the plaintiff failed to prove its case being set aside by an appeals court on the basis that the defendant did not show "substantial prejudice" from that failure. Simply stating the idea reveals its absurdity.