U.S. Customs and Border Protection

Slip Op. 12–18

RACK ROOM SHOES, SKIZ IMPORTS LLC, and FOREVER 21, INCORPORATED, Plaintiffs, v. UNITED STATES, Defendant.

Before: Donald C. Pogue, Chief Judge
Jane A. Restani, Judge
Judith M. Barzilay, Sr. Judge.
Consol. Court No. 07–00404

[Defendant's motion to dismiss is granted.]

Dated: February 15, 2012

John M. Peterson, *George W. Thompson*, *Maria E. Celis*, *Russell A. Semmel*, and *Richard F. O'Neill*, Neville Peterson LLP, of New York, NY, for the Plaintiff, Rack Room Shoes.

Michael T. Cone, McCullough Ginsberg Montano & Partners LLP, of New York, NY, for the Plaintiff, SKIZ Imports LLC.

Damon V. Pike, The Pike Law Firm P.C., of Decatur, GA, for the Plaintiff, Forever 21, Inc.

Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, of Washington, DC, argued for the Defendant. With him on the briefs were *Tony West*, Assistant Attorney General; *Jeanne E. Davidson*, Director; and *Aimee Lee*, Trial Attorney. Of counsel on the briefs were, *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, and *Leigh Bacon*, Office of the General Counsel, United States Trade Representative.

OPINION

Pogue, Chief Judge:

INTRODUCTION

In this action, Plaintiff Rack Room Shoes and other United States importers assert that certain glove, footwear and apparel tariffs violate the Equal Protection Clause of the Constitution. U.S. Const. amend. XIV, § 1, cl. 2. Specifically, Plaintiffs argue that because the Harmonized Tariff Schedule of the United States ("HTSUS") uses the gender and age of intended users of certain imported products to distinguish between tariff rates, and because those tariff rates are not

equal, the HTSUS therefore unconstitutionally discriminates on the basis of gender and/or age.[1] The government moves to dismiss for failure to state a claim.

Because we conclude that the Plaintiffs' complaints do not plausibly show an invidious governmental intent to discriminate, as further explained below, we grant the government's motion.

We have jurisdiction pursuant to 28 U.S.C. § 1581(i)(1).

BACKGROUND

Specific HTSUS provisions that Plaintiffs challenge were previously addressed in *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1358 (Fed. Cir. 2010) ("*Totes III*"), *cert. denied*, 131 S. Ct. 92 (2010), affirming this court's decision in *Totes-Isotoner Corp. v. United States*, __ CIT __, 569 F. Supp. 2d 1315 (2008) ("*Totes I*"), and the court's denial of Plaintiff's motion for rehearing, *Totes-Isotoner Corp. v. United States*, __ CIT __, 580 F. Supp. 2d 1371 (2008) ("*Totes II*").[2]

In the *Totes* line of cases, we rejected Totes' argument that merely pleading the existence of a gender-based classification in the HTSUS "suffices to establish an inference of unconstitutional discrimination." *Totes II*, 580 F. Supp. 2d at 1378. Accordingly, we dismissed Plaintiff's complaint for failure to state a claim under the pleading standard set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*").[3] *Totes I*, 569 F. Supp. 2d at 1328; *Totes II*, 580 F. Supp. 2d at 1380.

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[1] For example, "[m]en's" leather gloves classified in HTSUS subheading 4203.2930 incur a duty rate of 14 percent ad valorem, whereas gloves for "other persons" are classified under HTSUS subheading 4203.2940 at the lower duty rate of 12.6 percent ad valorem. *See* Harmonized Tariff Schedule of the United States, 19 U.S.C. § 1202.

[2] In *Totes I*, Plaintiff Totes challenged HTSUS headings covering men's and women's leather gloves. Plaintiffs here challenge, again, the same HTSUS rates for leather gloves, in addition to certain HTSUS rates for apparel and footwear. The *Totes* line of cases recognized that the Plaintiff had standing and the Plaintiff's challenge was not barred under the political question doctrine. *Totes III*, 594 F.3d at 1352–53.

[3] In *Twombly*, the Supreme Court ruled that court pleadings require "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. Rather, plausibility is the central tenet of the *Twombly* pleading standard. Following *Twombly*, in *Totes III*, the Court of Appeals held that initial "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . [including] enough factual matter (taken as true) to suggest that [a claim is plausible]." *Totes III*, 594F.3d at 1354 (internal citation omitted).

In the context of discrimination claims, the Supreme Court further explained the pleading requirements, holding that a plaintiff "must plead sufficient factual matter to show that [the government] adopted . . . [the] policies at issue . . . for the purpose of discriminating[.]" *Ashcroft v. Iqbal*, 556 U.S. 662,129 S. Ct. 1937, 1948–49 (2009). Determining whether a claim meets the plausibility standards set forth in *Twombly* and *Iqbal* requires that courts draw on "judicial experience and common sense," when evaluating a plaintiff's claim. *Id.* at 1950.

In affirming, the Court of Appeals held that the HTSUS provisions at issue were not facially discriminatory. *Totes III*, 594 F.3d at 1358; *see also id.* at 1359 (Prost, J., concurring) ("[T]he disputed tariff classification is not facially discriminatory."). HTSUS gender references are to the principal or chief use of products by one sex or another. This is different from the use of a suspect classification that requires people to be treated differently depending on their sex. Thus, the HTSUS gender references do not support an inference that the classifications have a discriminatory purpose. There is nothing "objectively invidious" about the tariff provisions' reference to gender. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993).

The Court of Appeals also extended its analysis to conclude that an allegation of disparate impact in the tariff/tax context is also insufficient to provide a basis for a plausible claim of discriminatory purpose.[4] *Totes III*, 594 F.3d at 1357–58 ("[W]e think that in the area of taxation and tariffs, something more than disparate impact is required to establish a purpose to discriminate for the purposes of pleading an equal protection violation. . . .the mere existence of disparate impact does not establish impermissible discrimination.").[5]

[4] In *Totes I* and *Totes II*, we did not reach the issue of the weight to be attributed to allegations of disparate impact because the Plaintiff had failed to amend its complaint to make such a claim. *Totes I*, 569 F. Supp. 2d at 1328 ("[B]ecause the challenged tariff classifications are, at worst, 'in between' classifications that impose a facially discriminatory tax and classifications that are not facially discriminatory, Plaintiff must at least include an allegation that the challenged tariff classifications distribute the burdens of the tax rate imposed in a way that disadvantages one sex as a whole, or has a disproportionate impact based on sex."). After Totes opted not to amend its pleadings, the court dismissed Totes' complaint.

[5] "[A]n equal protection claim requires alleging either (a) that a law is facially discriminatory against natural persons, or (b) that the law has a disparate impact on natural persons resulting from a discriminatory purpose." *Totes III*, 594 F.3d at 1359 (Prost, J., concurring) (citing *Raytheon v. Hernandez*, 540 U.S. 44, 52–53 (2003); *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 264–65 (1977)).

The Court of Appeals concluded, however, that the mere existence of disparate impact is not a sufficient allegation. Rather, as noted above, such impact must result "from a discriminatory purpose." *Id.* at 1359. Therefore, to proceed on a disparate impact claim, a plaintiff must prove "'[a]n invidious discriminatory purpose [, which] may often be inferred from the totality of the relevant facts,'" but "official action will not be held unconstitutional solely because it results in a [disparate] impact.'" *Id.* at 1356 (quoting *Vill. of Arlington Heights*, 429 U.S. at 264–65; *Washington v. Davis*, 426 U.S. 229, 242 (1976)); *see also Pyke v. Cuomo*, 258 F.3d 107, 110 (2d Cir.2001) ("[A] plaintiff seeking to establish a violation of equal protection by intentional discrimination may proceed in 'several ways,' including by pointing to a law that expressly classifies on the basis of race, a facially neutral law or policy that has been applied in an unlawfully discriminatory manner, or a facially neutral policy that has an adverse effect *and* that was motivated by discriminatory animus." (emphasis added)).

After recognizing that all schemes of taxation necessarily contain some inherent discriminatory impact, the Appeals Court held that "[i]n the area of customs duties, even more than in the area of taxation, it is hazardous to infer discriminatory purpose from discriminatory impact." *Totes III*, 594 F.3d at 1358.

Following the Supreme Court's denial of writ of certiorari in *Totes III*, we allowed the current Plaintiffs to re-file their complaints, consolidating them into three test cases: *Rack Room Shoes v. United States* (07–00404) and its member cases *SKIZ Imports LLC v. United States* (11–00074), and *Forever 21, Inc. v. United States*, (11–00075). Plaintiffs in these test cases assert additional facts which they claim are sufficient to state a claim of governmental intent to discriminate.

DISCUSSION

The precise issue now presented by the government's motion is whether Plaintiffs' Amended Complaints, stripped of their legal conclusions, contain sufficient facts to render plausible a claim of governmental intent to discriminate by way of the tariff rates at issue. *Totes III*, 594 F.3d at 1354–55; *Twombly*, 550 U.S. at 555–56; *Iqbal*, 129 S. Ct. at 1950.[6]

As noted above, the Court of Appeals held that the challenged provisions of the HTSUS are not facially discriminatory. *Totes III*, 594 F.3d at 1358. In addition, in the context of tariffs, an allegation of disparate impact is also insufficient to ground a discrimination claim. *Id.* at 1356.[7] It thus follows that Plaintiffs' allegation in the Amended Complaints that the identified tariff rates are facially discriminatory

Plaintiff Forever 21 urges the court to limit *Totes III* by adopting a presumption that where tariff descriptions plausibly suggest actionable discrimination based on gender or age, it will be inferred that the government intended this discrimination to be invidious. Such an approach, however, is foreclosed by both the majority opinion and the concurrence in *Totes III*, which recognize that the tariff provisions at issue are not facially discriminatory and require some plausible basis for an inference of unlawful discriminatory intent or purpose.

[6] As in the *Totes* line of cases, the government again asserts that this case should be dismissed because the Plaintiffs lack third party standing. Because the Court of Appeals clearly found that Totes had third party standing, *Totes III*, 594 F.3d at 1359 n.2, this issue has already been resolved, and the court need not address it further.

The government also asserts that the court may not hear Plaintiff Skiz's complaint because no agency action has taken place that the court can review. Therefore, Defendant argues, Skiz's claim is not ripe for review.

The court need not decide this issue because Rack Room Shoes' and Forever 21's claims provide a sufficient basis to test the adequacy of all Plaintiffs' pleadings and, as discussed *infra*, those pleadings fail to state a claim.

[7] In *Totes III*, the Court of Appeals reasoned that tariffs constitute a unique area of law, further diminishing the sufficiency of a disparate impact claim. While "[i]n contexts such as jury selection, employment, or fair housing, an allegation of disparate impact may . . . be sufficient to make out a prima facie case of discrimination . . . we think a different approach

and disproportionately affect differently gendered or aged users is also insufficient to render plausible an inference of invidious discrimination.[8]

Therefore, Plaintiffs must now allege sufficient additional facts to make plausible their claim that Congress intended to discriminate between male and female users – or between older and younger users – in the provisions of the HTSUS. *Totes III*, 594 F.3d at 1358. To move forward on their claim, Plaintiffs must sufficiently plead "'[a]n invidious discriminatory purpose[, which] may often be inferred from the totality of the relevant facts;'" however, agency action "will not be held unconstitutional solely because it results in a [disparate] impact." *Id.* at 1356 (internal citation omitted); *see also City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (proof of purposeful discrimination is necessary to an Equal Protection violation).

Plaintiffs concede that discriminatory purpose "implies more than intent as volition or intent as awareness of consequences." Rack Room Shoes Mem. Opp'n. Def.'s Mot. Dismiss at 14, ECF No. 24 ("Rack Room Shoes Response"). Rather, discriminatory purpose in this particular context arises only when Congress selects or reaffirms a particular course of action "because of" and not merely "in spite of," its adverse effects upon an identifiable group. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiffs must show that "the legislature was motivated by discriminatory intent,

is required in the tariff context." *Totes III*, 594 F.3d at 1356 (citations omitted). This distinction, the Court of Appeals explains, exists because (1) Congress is concerned with achieving trade policy objectives rather than focusing on the characteristics of retail goods; and (2) disparate treatment in this case is not necessarily invidious – case law establishes that discrimination is inherent to taxation, and Congress has broad authority to levy taxes, which by the court's reasoning, include import duties. *Id.* at 1356–58.

[8] The Government also argues that Plaintiffs' disparate impact pleading is flawed because Plaintiffs do not allege that tariff rates consistently favor goods associated with one gender or age over another. This is correct. Although Plaintiffs claim that they, as importers, are "disproportionately impacted" by the HTSUS tariff rates at issue, Rack Room Shoes Am. Compl. at ¶ 15,ECF No. 9, there is no factual indication in the Amended Complaints that the tariff classifications result in a discriminatory application of the burdens of the tax to one particular sex or age group. *See Totes I*, 569 F. Supp. 2d at 1328 n.17 ("*Cf. Engquist v. Oregon Dept. of Agriculture*, 553 U.S. 591, 601 (2008) ("Our equal protection jurisprudence has typically been concerned with governmental classifications that 'affect some groups of citizens differently than others.'" (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961))"). Thus any alleged discriminatory impact is far from clear enough as to plausibly indicate a discriminatory purpose. *Cf. Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886) (discriminatory application of regulatory laundry ordinance to Chinese subject, without reason, found sufficient to infer discriminatory intent); *Wengler v. Druggists Mutual Insurance Co.*, 446 U.S. 142, 147–49 (1980) (holding that a statutory provision – denying a widower benefits on his wife's work-related death unless he was either mentally or physically incapacitated or could prove dependence on his wife's earnings but granting a widow death benefits without proof of dependence – discriminated against both men and women, i.e. working women and their male spouses).

rather than by other, lawful action." Rack Room Shoes Response at 11 n.10. Accordingly, we review the additional factual allegations Plaintiffs add to their Amended Complaints to determine whether those allegations support a plausible inference of governmental intent to discriminate based on the relevant tariff provisions' adverse effects upon an identifiable sex or age group.

The Amended Complaints contain two such additional allegations. First, Plaintiffs allege that "Congress intended to discriminate by directing and implementing classifications based on gender when it could have used other non-gender factors to distinguish or to separate merchandise for duty assessment purposes, or could have used non-tariff measures to effectuate governmental purposes other than raising revenue." Rack Room Shoes Am. Compl. at ¶ 31. Plaintiffs argue that because Congress "has at its disposal a virtually infinite number of ways to impose . . . customs duties" and instead chose to differentiate between products by gender or age, it therefore must have intended to discriminate between gender and age groups. Rack Room Shoes Response at 16.

Plaintiffs' assertion, however, adds nothing to the claim, already rejected in *Totes III*, that the use of gender in tariff classifications evidences a discriminatory purpose. Rather, it simply re-asserts Plaintiffs' rejected claim that the tariff classifications at issue are facially discriminatory. Moreover, Plaintiffs' claim that Congress could have used other means is an allegation built only upon the language of the provision, raising nothing in the way of further facts, and indeed nothing in terms of discriminatory intent. As such, these conclusory assertions do not rise to the level of factual plausibility required by *Twombly* and *Iqbal*.

Second, Plaintiffs cite the U.S. Tariff Commission's Tariff Classification Study of 1960[9] for the proposition that certain age and gender distinctions within the HTSUS are of "questionable" economic justification.[10] This commentary on the merits of the distinctions between the proposed tariff rates is, at most, a critique of the precursors to the tariff provisions being challenged here and does not indicate Congres-

[9] Plaintiffs insist that the Tariff Classification Study is "official legislative history" from a prior tariff, but offer nothing other than their conclusory label to support this claim. Forever 21 & SKIZ Resp. Def.'s Mot. Dismiss at 3, ECF No. 27 ("Forever 21 & SKIZ Response"). Indeed, the document submitted appears to be authored by one person, providing his particular version of events.

[10] Specifically, Plaintiffs cite to a passage that states:

> The proposed [TSUS provision] combines all McKay-sewed leather footwear in one tariff provision . . . thereby eliminating present distinctions . . . according to the age and sex of the wearer for which the footwear is designed. These distinctions are often difficult if not impossible to make and their economic justification is questionable.

Forever 21 & SKIZ Response at 3.

sional intent in any manner. *Cf. Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1322 (2011) (finding that reports from three medical professionals and presenting a wide range of occurrences of anosmia constituted more than a mere "handful of anecdotal reports"). Moreover, the fact that these distinctions' original economic justification may have blurred with time does not render their purpose discriminatory. On the contrary, it actually reinforces the premise that such distinctions have a rational historic purpose.

Congressional distinctions do not prove invidious intent. As the Supreme Court has held, "[i]nherent in the power to tax is the power to discriminate in taxation." *Leathers v. Medlock*, 499 U.S. 439, 451 (1991); *see also Washington v. Davis*, 426 U.S. at 248. Indeed, tariffs often exist to protect domestic markets, and, to achieve that end, Congress must use some form of classification when setting tariff rates. *See*, *e.g.*, *J.W. Hampton & Co. v. United States*, 276 U.S. 394, 412–13 (1928).[11] Defendant correctly notes that Plaintiffs' argument "wholly ignores [the] obvious commercial, practical, and trade motivations Congress might have had for distinguishing certain products by age or gender for purposes of setting tariffs. . . ." [quoting *Totes III*]:

> [t]he rates of duty applicable to different product classifications are the result of multilateral international trade negotiations and reflect reciprocal trade concessions and particularized trade preferences. The reasons behind different duty rates vary widely based on country of origin, the type of product, the circumstances under which the product is imported, and the state of the domestic manufacturing industry. . . . Further, differential rates may be the result of the trade concessions made by the United States in return for unrelated trade advantages.

Totes III, 594 F.3d at 1357 (footnotes omitted). Def.'s Mem. in Reply Pls.'Opp'n Def.'s Mot. Dismiss at 25, ECF No. 30. Without more, Congress's exercise of its right to choose delineating factors such as the age or gender of a product's intended user when determining

[11] ("More than a hundred years later, the titles of the Tariff Acts . . . declared the purpose of those acts, among other things, to be that of encouraging the industries of the United States. Whatever we may think of the wisdom of a protection policy, we cannot hold it unconstitutional.")

tariff rates does not raise a suggestion of invidious intent to discriminate.[12]

It therefore follows that Plaintiffs' Amended Complaints have not asserted facts that are specific enough to have some evident connection to potentially unlawful behavior. The absence of such an apparent connection forecloses the conclusion that the Amended Complaints allege more than a "sheer possibility" of invidious discriminatory conduct. It follows that the Amended Complaints are not adequately pleaded so as to "plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1949–50. There simply is nothing in the Amended Complaints that can connect the tariff provisions and congressional action in a way to suggest with plausibility the existence of a governmental intent to discriminate.

CONCLUSION

For the forgoing reasons, this matter is dismissed with prejudice. Judgment will be entered accordingly.

So ordered.

Dated: February 15, 2012
New York, New York

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

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[12] Indeed, historical evidence indicates that Congress intended to protect the domestic market when setting tariffs based on the gender of the intended wearer. For example, with regards to gloves, "by actual or tacit agreement, the importers were given control of the market in ladies gloves, while the men's glove business was left to the domestic producers." Daniel W. Redmond, The Leather Glove Industry in the United States 48(1913) (unpublished Ph.D. dissertation, Columbia University).

It logically follows that the disparate tariffs were set in order to maintain such circumstances, leading one glove importer to conclude that

> The tariff in force . . . has been and is now working satisfactorily. The government obtains from it a large revenue . . . American manufacturers are prospering under it, and importers are able to exist and to supply to the market gloves which can not be made here in the same perfection, beauty, and elegance, or are not made here at all [.]

Tariff Hearings Before the H. Comm. on Ways and Means, 60th Cong. 7141–43 (1909) (statement of Daniel Goldschmidt, Goldschmidt Brothers Co.).

Slip Op. 12–19

HIEP THANH SEAFOOD JOINT STOCK CO., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 09–00270

[Remand results sustained.]

Dated: February 15, 2012

Matthew J. McConkey, *Jeffrey C. Lowe*, *Mayer Brown, LLP*, of Washington, DC, for Plaintiff Hiep Thanh Seafood Joint Stock Co.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, for Defendant United States. With him on the brief were *Tony West*, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice and *David Richardson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Valerie A. Slater, *Jarrod M. Goldfeder*, *Nicole M. D'Avanzo*, *Natalya D. Dobrowolsky Akin, Gump, Strauss, Hauer & Feld, LLP*, of Washington, DC, for Defendant-Intervenors Catfish Farmers of America, America's Catch, Consolidated Catfish Companies, LLC, d/b/a Country Select Fish, Delta Pride Catfish Inc., Harvest Select Catfish Inc., Heartland Catfish Company, Pride of the Pond, Simmons Farm Raised Catfish, Inc., and Southern Pride Catfish Company, LLC.

OPINION

Gordon, Judge:

Introduction

This action involves the third new shipper review conducted by the U.S. Department of Commerce ("Commerce") of the antidumping duty order covering certain frozen fish fillets from the Socialist Republic of Vietnam. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 74 Fed. Reg. 37,188 (Dep't of Commerce July 28, 2009) (amended final results admin. review) ("*Final Results*"); *see also* Issues and Decision Memorandum, A-552–801 (June 15, 2009), *available at* http://ia.ita.doc.gov/frn/summary/VIETNAM/E9–14607–1.pdf (last visited Feb. 15, 2012) ("*Decision Memorandum*"). Before the court are the Final Results of Redetermination (Sept. 30, 2011) ("*2nd Remand Results*"), ECF No. 68, filed by Commerce pursuant to *Hiep Thanh Seafood Joint Stock Co. v. United States*, 35 CIT ___, 781 F. Supp. 2d 1366 (June 23, 2011) ("*Hiep Thanh II*") (order remanding to Commerce). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as

amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006). For the reasons set forth below, the court sustains the *2nd Remand Results*.

Standard of Review

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n ,* 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d. ed. 2011). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2010).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *Dupont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005); *Agro Dutch Indus. v. United States*, 508 F.3d 1024, 1030 (Fed. Cir. 2007). "[S]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001); *see also Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) ("[W]e determine whether Commerce's statutory interpretation is

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

entitled to deference pursuant to *Chevron*.").

Background

This case involves the proper treatment of sales of subject merchandise that respondent/producer Hiep Thanh Seafood Joint Stock Co. ("Hiep Thanh") made to an unaffiliated Mexican customer, and delivered to a U.S port, at which point the Mexican customer took title and then entered the merchandise for U.S. consumption. The issue is whether these sales should be included within Hiep Thanh's margin calculation as part of Hiep Thanh's U.S. sales database, or accounted for elsewhere within the new shipper review. In the *Final Results* Commerce included the sales within Hiep Thanh's U.S. sales database. *Decision Memorandum* at cmt 5. Hiep Thanh then commenced this action, arguing that Commerce erred because Heip Thanh had no knowledge, actual or constructive, that those sales were destined for U.S. customers. *Hiep Thanh Seafood Joint Stock Co. v. United States,* 34 CIT ___, ___, 752 F. Supp. 2d 1330, 1334 (Nov. 5, 2010) ("*Hiep Thanh I*"). The court remanded the matter for further consideration by Commerce because it was unclear from the *Decision Memorandum* whether Commerce (1) applied its standard "knowledge test" to analyze the sales in question, or (2) may have applied a different framework that did not depend on Hiep Thanh's knowledge of the "ultimate destination" of the merchandise, but rather Hiep Thanh's more limited knowledge that the merchandise was destined in some form for the United States (as a shipment) coupled with actual consumption entries that Hiep Thanh may not have known about. *Id*., 34 at ___, 752 F. Supp. 2d at 1335.

In the first remand Commerce provided a more detailed explanation of its decision to include the sales within Hiep Thanh's U.S. sales database. *See* Final Results of Redetermination (Jan. 31, 2011) ("*1st Remand Results*"), ECF No. 53., filed by Commerce pursuant to *Hiep Thanh I*. After reviewing the *1st Remand Results* the court again remanded the action to Commerce. *Hiep Thanh II*, 35 CIT at ___, 781 F. Supp. 2d at 1374. Familiarity with prior administrative and judicial decisions in this action is presumed.

Discussion

In the *2nd Remand Results* Commerce reconsidered its application of its "knowledge test"[2] to determine whether to include the disputed sales within Hiep Thanh's U.S. sales database. Commerce simplified its approach:

[2] A full discussion of the "knowledge test" is provided in *Hiep Thanh II*, 35 CIT at ___, 781 F. Supp. 2d at 1371–74.

> Upon reconsideration on remand, we determine that while the knowledge test is a framework that is of use in identifying the first party in a transaction chain with knowledge of U.S. destination where there are multiple entities involved in such chains prior to importation, the framework is one that does not fit the fact pattern in this case. In this case, prior to importation, there were only two entities involved in the sale of the subject merchandise, Hiep Thanh and the unaffiliated purchaser. As such, the Department determines that the disputed sales are in fact U.S. sales that belong in Hiep Thanh's margin calculation because Hiep Thanh made the sales for exportation to the United States, and they fall squarely within the purview of 19 U.S.C.§1677a(a). Application of the knowledge test is neither necessary nor appropriate in these circumstances.

2nd Remand Results at 4. Commerce further explained:

> Within the context of the facts of this case, the Department interprets "exportation to the United States" to mean any sale to an unaffiliated party in which merchandise is to be delivered to a U.S. destination, regardless of whether any underlying paper work may indicate possible subsequent export to a third country. We believe that if a sale is made for delivery of merchandise to the United States (and record evidence clearly indicates that the disputed sales were made as such), there is a significant potential for it to enter the U.S. market for consumption (as discussed below, the sales in question did, in fact, enter the United States for consumption). If the Department were not to take this approach, it would place certain respondents in a position to exclude U.S. sales from reporting requirements by claiming them as sales to be shipped through the United States when, in reality, the merchandise is entered for consumption and thus enters the commerce of the United States subject to antidumping duties.
>
> While Hiep Thanh may have anticipated that the disputed sales were ultimately to be delivered to Mexico, via the United States, Hiep Thanh stated that these sales were made according to sales terms "X" indicating that the merchandise was delivered to the unaffiliated purchaser, Customer Z, at a U.S. destination, at which point transfer of title took place. Another unaffiliated company, Company Y, acted as the U.S. importer of record. These facts in their totality demonstrate that the merchandise

> was "for exportation to the United States" as the Department reasonably interprets the phrase under section 1677a(a) of the statute.

Id. at 6.

Hiep Thanh, for its part, still maintains that the sales should be excluded from its margin calculation. Hiep Thanh argues that the disputed sales were made to a "Mexican customer, as documented by *all* sales and shipping documents." Hiep Thanh Comments on *2nd Remand Results* at 7 (emphasis in original), ECF No. 73. The issue though is not whether the sales were made to a Mexican customer, but whether they were for "exportation to the United States." 19 U.S.C. § 1677a(a). For Hiep Thanh to prevail (and obtain an order from the court directing Commerce to exclude the sales from Hiep Thanh's margin calculation), the administrative record must lead a reasonable mind to draw one and only one conclusion: the sales were for exportation to Mexico and not the United States. That conclusion, in turn, depends upon inferences to be drawn from the available record evidence—inferences that must compete with direct record evidence and other inferences (having perhaps an equal or better claim) that the disputed sales were for exportation to the United States.

To explain further, Hiep Thanh would like Commerce and the court to infer that sales to a Mexican customer must be Mexican sales for exportation to Mexico. Hiep Thanh, however, did not ship the disputed sales to Mexico. The bills of lading detail shipment to a U.S. port, with no subsequent Mexican destination. *See* Confidential Joint Appendix, Tab P3, Ex. 3, Attachs. B, C, & D, ECF No. 48. As Commerce noted, title transferred in the United States. *2nd Remand Results* at 6. Contrary to Hiep Thanh's post hoc claims that the subject merchandise was supposed to be transported "in-bond" to Mexico, Hiep Thanh Comments on *2nd Remand Results* at 7, Hiep Thanh shipped merchandise covered by an antidumping duty order to a U.S. port without any arrangements for further transportation to Mexico, and without any qualification or limitation against U.S. entry. *See* Confidential Joint Appendix, Tab P3, Ex. 3, Attachs. B, C, & D, ECF No. 48. In short, Hiep Thanh delivered merchandise covered by an antidumping duty order to a U.S. port, where title transferred to a Mexican customer, who was free to, and did, distribute it in both the U.S. and Mexican markets. Such facts make it difficult to accept Hiep Thanh's hoped for inference that the disputed sales (those entered for U.S. consumption) must have been for exportation to

Mexico. A reasonable mind reviewing this administrative record would not have to conclude that the disputed sales were for exportation to Mexico.

A fair criticism of the *2nd Remand Results* is that Commerce's interpretation of the phrase "exportation to the United States" is not as rigorous as the court might prefer. Commerce could have provided some definitional context to the term "exportation" by (1) ascertaining its common or technical meaning, *see generally* NORMAN J. SINGER & J.D. SHAMBIE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION §§ 47:28, 47:29 (7th ed. 2011); or (2) analyzing whether the definition of "exportation" used by U.S. Customs and Border Protection, 19 C.F.R. § 101.1, provides any helpful guidance. Commerce instead chose to define the term through application to the particular facts on the administrative record. *2nd Remand Results* at 6 ("These facts in their totality demonstrate that the merchandise was 'for exportation to the United States' as the Department reasonably interprets the phrase under section 1677a(a) of the statute."). Commerce also, however, did explain why mere delivery to a U.S. port (separate and apart from a subsequent consumption entry), constitutes an "exportation"; otherwise, certain respondents could "exclude U.S. sales from reporting requirements by claiming them as sales to be shipped through the United States when, in reality, the merchandise is entered for consumption and thus enters the commerce of the United States subject to antidumping duties." *Id*.

In its comments on the *2nd Remand Results*, Hiep Thanh chose not to proffer a definition of the term "exportation." Instead, Hiep Thanh argues that "Commerce may not reasonably set aside the knowledge test and may not apply its new rule in this case." Hiep Thanh Comments on *2nd Remand Results* at 2. Although the court understands Hiep Thanh's desire to have Commerce apply a standard (a particular knowledge test) that would produce Hiep Thanh's preferred result (exclusion of the sales), the court cannot ignore the administrative law standards governing this case. "*Chevron* contemplates administrative flexibility in the interpretation of silent or ambiguous statutes," *Fujian Lianfu Forestry Co. v. United States*, 33 CIT ___, ___, 638 F. Supp. 2d 1325, 1357 (2009), and "the statute does not specifically resolve whether individual sales of subject merchandise should be included within a particular respondent's U.S. sales database." *Hiep Thanh II*, 35 CIT at ___, 781 F. Supp. 2d at 1373. Commerce had before it a factual scenario it had not previously confronted. As such, it had to "exercise its gap-filling discretion to derive a reasonable approach to the problem." *Id*.

Hiep Thanh was the first to suggest that this case was "fairly simple." Hiep Thanh Comments on *1st Remand Results* at 1, ECF No. 58. In the *2nd Remand Results* Commerce embraced that simplicity, abandoning the self-imposed complexity of the *1st Remand Results*. Commerce concluded that Hiep Thanh had sold subject merchandise to an "unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a). That conclusion finds reasonable support in the administrative record because, as explained above, Hiep Thanh made a direct shipment to the United States without any arrangements for further transportation to Mexico, and without any qualification or limitation against U.S. entry. Also included in Commerce's determination is a simple but clear policy objective to discourage respondents who deliver subject merchandise directly to the United States from too easily excluding sales from their margin calculations by pleading ignorance of subsequent consumption entries.

Hiep Thanh has not supplied the court with a basis upon which to order Commerce to exclude the disputed sales from Hiep Thanh's database. The statute does not mandate that they be excluded, and the administrative record does not require that a reasonable mind should exclude them either. In sum, Commerce's *2nd Remand Results* are (1) reasonable given the circumstances presented by the whole record (supported by substantial evidence) and (2) in accordance with law. Judgment will be entered accordingly.

Dated: February 15, 2012
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON