Decisions of the United States Court of International Trade

(Slip Op 03–44)

UNITED STATES, PLAINTIFF *v.* CARNATION CREATIONS, INC., JAMES PENG, A/K/A WEN CHIN PENG, A/K/A WEN C. CHEN, ANGELA CHEN A/K/A SHU-MEI CHEN, AND E&T FASHION, INC., DEFENDANT

Court No. 00–07–00329

(Dated April 23, 2003)

ORDER AND JUDGMENT

WALLACH, *Judge:* Upon consideration of the parties' Joint Stipulation For the Entry of Judgment ("Parties' Stipulation"), the Court having reviewed the papers and pleadings on file herein, and after due deliberation, it is hereby

ORDERED, ADJUDGED and DECREED that judgment be and hereby is entered in favor of the United States and against Defendants E&T Fashion, Inc., Angela Chen a/k/a Shu-Mei Chen, and James Peng a/k/a Wen Chin Peng a/k/a Wen C. Chen, jointly and severally, in the amount of $128,756, inclusive of interest; and it is further

ORDERED that each party shall bear its own costs, expenses, and attorney fees.

(Slip Op. 03–45)

THE TIMKEN CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND NSK LTD., NSK CORP., NTN BEARING CORP. OF AMERICA, NTN BOWER CORP., AMERICAN NTN BEARING MANUFACTURING CORP., NTN CORP., KOYO SEIKO CO., LTD., AND KOYO CORP. OF U.S.A., DEFENDANT-INTERVENORS

Court No. 00–08–00386

Plaintiff, The Timken Company ("Timken"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States International Trade Commission's ("ITC" or "Commission") final determination in *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom,* 65 Fed. Reg. 39,925 (June 22, 2000), in which the ITC found that revocation of the antidumping finding (ITC Inv. No. AA–1921–143) and order (ITC Inv. No. 731–TA–343) on tapered roller bearings ("TRBs") from Japan "would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." Specifically, Timken contends, *inter alia,* that the ITC failed to: (1) incorporate the information and findings drawn by the ITC in its prior material injury determinations; (2) properly assess the importance of Japanese investment in the domestic industry; (3) consider the likely effect of revocation on the entire domestic industry; (4) adequately investigate the TRB capacity utilization rates of Japanese producers; (5) properly assess the likelihood of price underselling before revoking the order; (6) support its finding with respect to the domestic industry's vulnerability or the likelihood of continued material injury upon revocation of the order; and (7) consider the relevant economic factors in the sunset review within the context of the business cycle. The complete views of the ITC were published in *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Final Determination"),* Invs. Nos. AA–1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (Review), USITC Pub. 3309 (June 2000).

Held: Timken's motion for judgment on the agency record is granted in part and denied in part. Case remanded to the ITC for further explanation and investigation consistent with this opinion.

[Timken's 56.2 motion is granted in part and denied in part. Case remanded.]

(Dated April 24, 2003)

Stewart and Stewart (Terence P. Stewart, William A. Fennell and *Amy S. Dwyer)* for The Timkem Company, plaintiff.

Lyn M. Schlitt, General Counsel, Office of the General Counsel, United States International Trade Commission *(Marc A. Bernstein* and *Mary Jane Alves),* for the United States, defendant.

Crowell & Moring LLP (Robert A. Lipstein, Matthew P. Jaffe, Grace W. Lawson) for NSK Ltd. and NSK Corporation, defendant-intervenors.

Barnes, Richardson & Colburn (Donald J. Unger, Kazumune V. Kano and *Wm. Randolph Rucker)* for NTN Bearing Corporation of America, NTN Bower Corporation, American NTN Bearing Manufacturing Corporation and NTN Corporation, defendant-intervenors.

Sidley Austin Brown & Wood LLP (Neil R. Ellis and *Maria T. DiGiulian)* for Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A., defendant-intervenors.

OPINION

TSOUCALAS, *Senior Judge:* Plaintiff, The Timken Company ("Timken"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of the United States International Trade Commission's ("ITC" or "Commission") final determination in

Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom, 65 Fed. Reg. 39,925 (June 22, 2000), in which the ITC found that revocation of the antidumping finding (ITC Inv. No. AA–1921–143) and order (ITC Inv. No. 731–TA–343) on tapered roller bearings ("TRBs") from Japan "would not be likely to lead to continuation or recurrence of material injury to an industry in the United States within a reasonably foreseeable time." Specifically, Timken contends, *inter alia,* that the ITC failed to: (1) incorporate the information and findings drawn by the ITC in its prior material injury determinations; (2) properly assess the importance of Japanese investment in the domestic industry; (3) consider the likely effect of revocation on the entire domestic industry; (4) adequately investigate the TRBs capacity utilization rates of Japanese producers; (5) properly assess the likelihood of price underselling before revoking the order; (6) support its finding with respect to the domestic industry's vulnerability or the likelihood of continued material injury upon revocation of the order; and (7) consider the relevant economic factors in the sunset review within the context of the business cycle. The complete views of the ITC were published in *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom ("Final Determination"),* Invs. Nos. AA–1921–143, 731–TA–341, 731–TA–343–345, 731–TA–391–397, and 731–TA–399 (Review), USITC Pub. 3309 (June 2000).[1]

BACKGROUND

On January 23, 1975, the ITC determined that a domestic industry was likely to be injured as a result of Japanese TRBs imported into the United States that were likely to be sold at less than fair value ("LTFV"). *See Tapered Roller Bearings and Certain Components Thereof From Japan,* Inv. No. AA–1921–143, USITC Pub. 714 at 2 (Jan. 1975). A dumping finding was published in the Federal Register, *see* 41 Fed. Reg. 34,975 (Aug. 18, 1976), and on August 10, 1981, the United States Department of Commerce ("Commerce") specified that the order was to be limited to TRBs, four inches or less in outside diameter and components thereof, and excluded unfinished components. *See Clarification of Scope of Antidumping Finding of Tapered Roller Bearings and Certain Components Thereof From Japan,* 46 Fed. Reg. 40,550 (Aug. 10, 1981). The ITC made a further material injury determination with respect to TRBs not subject to the 1976 finding and, accordingly, Commerce published an antidumping duty order on TRBs from Japan on October 6, 1987.[2]

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[1] During the issuance of this determination, the Commission was comprised of Chairman Koplan, Vice Chairman Okun and Commissioners Bragg, Miller, Hillman and Askey. Vice Chairman Okun, however, did not participate in the review. *See Final Determination*, USITC Pub. 3309 at 1. The ITC's *Final Determination* is readily accessible on the internet at http://www.usitc.gov/wais/reports/arc/w3309.htm. Pagination throughout this opinion is matched to the official internet publication.

[2] The 1987 Order covered TRBs defined under the Tariff Schedules of the United States ("TSUS") "item numbers 680.30 and 680.39; flange, take-up cartridge, and hanger units incorporating [TRBs], * * * classified under TSUS item number 681.10; and tapered roller housings (except pillow blocks) incorporating tapered rollers, with or without spindles, whether or not for automotive use, and * * * classified under TSUS item 692.32 * * *." *Antidumping Duty Order,* 52 Fed. Reg. at 37,352.

See Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan ("Antidumping Duty Order"), 52 Fed. Reg. 37,352 (October 6, 1987).

On April 1, 1999, the Commission issued notice of its five-year ("sunset") reviews concerning antidumping duty orders on certain bearings, including TRBs from Japan, to determine whether revocation of the orders would be likely to lead to continuation or recurrence of material injury. *See Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom,* 64 Fed. Reg. 15,783 (April 1, 1999). On July 2, 1999, the Commission determined that it would conduct full reviews.[3] *See Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom,* 64 Fed. Reg. 38,471 (July 16, 1999). Notice regarding scheduling and a public hearing was published on August 27, 1999, *see Certain Bearings from China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom,* 64 Fed. Reg. 46,949–50 (August 27, 1999), and the hearing, allowing all interested parties to comment, was held on March 21, 2000. *See Final Determination,* USITC Pub. 3309 at 2.

The Commission made a final determination regarding the effect of revoking the antidumping duty order on TRBs from Japan in June 2000, and concluded that lifting the order would not likely lead to continuation or recurrence of material injury to any domestic industry within the reasonably foreseeable future.[4] Timken advances several challenges to the Commission's negative determination, and contends that the finding was unsupported by substantial evidence or otherwise contrary to law because of its reliance on, *inter alia,* illogical reasoning, incomplete record evidence and incorrect conclusions regarding price underselling. *See* Mem. P. & A. Supp. Timken's Mot. J. Agency R. ("Timken's Mem.") at 55. The ITC and defendant-intervenors, NSK Ltd. and NSK Corporation ("NSK"), NTN Bearing Corporation of America, NTN Bower Corporation, American NTN Bearing Manufacturing Corporation and NTN Corporation ("NTN"), and Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. ("Koyo"), oppose Timken's claims.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2000) and 28 U.S.C. § 1581(c) (2000).

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[3] In a five-year review, the ITC may conduct a full review, which includes a public hearing, issuance of questionnaires and other procedures, or an expedited review not encompassing such procedures. *See* 19 C.F.R. §§ 207.60(b)–(c) & 207.62(c)–(d) (1999).

[4] Commissioner Miller issued a separate and dissenting opinion. *See generally Final Determination,* USITC Pub. 3309, Separate and Dissenting Views of Commissioner Marcia E. Miller at 83. The remaining three commissioners (Askey, Bragg and Hillman) and Chairman Koplan voted in favor of revocation. Commissioner Bragg clarified her negative determination via footnotes added to the ITC's opinion and expounded separate views in another opinion regarding cumulation (which is not at issue in the case at bar). *See Final Determination,* USITC Pub. 3309 at 45 n.310. Commissioner Askey also issued a separate opinion regarding her negative determination. *See generally Final Determination,* USITC Pub. 3309, Concurring and Dissenting Views of Commissioner Thelma J. Askey ("Askey's Views") at 1.

STANDARD OF REVIEW

The Court will uphold the Commission's final determination in a full five-year sunset review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States,* 24 CIT 385, 389–90, 104 F. Supp. 2d 110, 115–16 (2000)(detailing the Court's standard of review for agency determinations). "'Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Matsushita Elec. Indus. Co. v. United States,* 750 F.2d 927, 933 (Fed. Cir. 1984)(quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)). "[T]he possibility of drawing two inconsistent conclusions from the [same] evidence does not" preclude the Court from holding that the agency finding is supported by substantial evidence. *Consolo v. Federal Mar. Comm'n,* 383 U.S. 607, 620 (1966). An agency determination will not be "overturned merely because the plaintiff 'is able to produce evidence * * * in support of its own contentions and in opposition to the evidence supporting the agency's determination.'" *Torrington Co. v. United States,* 14 CIT 507, 514, 745 F. Supp. 718, 723 (1990)(internal citation omitted), *aff'd,* 938 F.2d 1276 (Fed. Cir. 1991).

DISCUSSION

I. Statutory Background

In a five-year review, the ITC determines whether revocation of an antidumping duty order would likely "lead to continuation or recurrence of dumping * * * [and] material injury." 19 U.S.C. § 1675(c)(1) (1994). The Statement of Administrative Action ("SAA")[5] clarifies that the standard applied to determine whether it is "likely" that material injury will continue or recur is different from the standards applied in material injury or threat of material injury determinations. *See* H.R. Doc. No. 103–465, at 883 (1994), *reprinted in* 1994 U.S.C.C.A.N. at 4209. Specifically, "under the likelihood standard, the Commission will engage in a counter-factual analysis: it must decide the likely impact in the reasonably foreseeable future * * * [due to] revocation" of an antidumping order. H.R. Doc. No. 103–465, at 883–84, *reprinted in* 1994 U.S.C.C.A.N. at 4209.

In its 19 U.S.C. § 1675a(a)(1) determination, the Commission continuously considers "the likely volume, price effect, and impact of imports of the subject merchandise on the industry if the order is revoked * * *."

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[5] The SAA represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. No. 103–316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.; see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress * * * shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.")

19 U.S.C. § 1675a(a)(1) (1994). Title 19 of the United States Code also states that the Commission shall consider:

> (A) its prior injury determinations, including the volume, price effect, and impact of imports of the subject merchandise on the industry before the order was issued * * *,
> (B) whether any improvement in the state of the industry is related to the order * * *,
> (C) whether the industry is vulnerable to material injury if the order is revoked * * *, and
> (D) in an antidumping proceeding under [19 U.S.C. § 1675(c)] * * *, the findings of the administering authority regarding duty absorption under [19 U.S.C. § 1675(a)(4)] * * *.

19 U.S.C. § 1675a(a)(1)(A)–(D) (1994). Guidance regarding the basis for the Commission's determination is also provided in 19 U.S.C. § 1675a(a)(5) (1994). In pertinent part, the statute reads that:

> [t]he presence or absence of any factor which the Commission is required to consider under [19 U.S.C. § 1675a] shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked * * *. In making that determination, the Commission shall consider that the effects of revocation * * * may not be imminent, but may manifest themselves only over a longer period of time.

19 U.S.C. § 1675a(a)(5). The SAA adds that although the Commission must consider all factors listed in 19 U.S.C. § 1675a(a)(1)(A)–(D), "no one factor is necessarily dispositive." H.R. Doc. No. 103–465, at 886, *reprinted in* 1994 U.S.C.C.A.N. at 4211.

II. Commission Findings

In the case at bar, the ITC voted 4 to 1 that revoking the antidumping duty order on TRBs from Japan would not likely lead to continuation or recurrence of material injury to any domestic industry within a reasonably foreseeable time. To determine whether TRBs from Japan compete with each other and with domestic like products, the ITC generally considers four factors, which include:

> (1) the degree of fungibility between the imports from different countries and between imports and the domestic like product, including consideration of specific costumer requirements and other quality related questions; (2) the presence of sales or offers to sell in the same geographical markets of imports from different countries and the domestic like product; (3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and (4) whether the imports are simultaneously present in the market.

Final Determination, USITC Pub. 3309 at 17 n.112 (referencing *Wieland Werke, AG v. United States,* 13 CIT 561, 563, 718 F. Supp. 50, 52 (1989) (stating the factors considered by the ITC in a prior final determination)). However, since sunset reviews are prospective in nature,

the ITC also considers additional "significant conditions of competition that are likely to prevail if the orders [on TRBs from Japan] are revoked." *Final Determination,* USITC Pub. 3309 at 18.

A. Likely Volume of Subject Imports

In the ITC's *Final Determination,* the Commission found that TRBs from Japan have significantly decreased since the imposition of the 1987 Order, and attributed the decrease mainly to the expansion of Japanese producers' facilities within the United States. *See Final Determination,* USITC Pub. 3309 at 31. According to the ITC, this substantial investment in domestic TRB production facilities indicates that foreign producers are "committed to their U.S. operations and import to complement, rather than displace, their U.S. production." *Id.* The *Final Determination* indicates that a review of the record does not lead the Commission to the conclusion that Japanese producers will alter their focus on strengthening their U.S. facilities in the reasonably foreseeable future. *See id*. Instead, the data representing almost all TRB production in Japan indicates that Japan has "extremely high" capacity utilization rates. *See id.* Moreover, since "machinery and equipment needed for TRB production are highly specialized and generally dedicated to TRBs, there is little potential that Japanese producers would shift production in Japan from other types of bearings to TRBs."[6] *Id.* at 31–32. Finally, since Japanese TRB producers inventory-to-shipment ratios were low and Japanese TRB producers were not predominantly "export-oriented," the ITC determined that Japan was not likely to increase the volume of its TRB imports to the United States if the 1987 Order were revoked. *See id.* 31–32.[7]

B. Likely Price Effects of Subject Imports

In 1975, the ITC determined that TRBs, four inches and under, from Japan were sold in the United States for LTFV, and that the "LTFV margins were a material factor in the margins of underselling by the Japanese producers." *Final Determination,* USITC Pub. 3309 at 32. Later, in 1987, the ITC found that "the value of cumulated subject imports was increasing at a time of decreasing shipments by domestic producers[,] and that underselling by cumulated subject imports at a time of declining U.S. prices was fairly consistent." *Id.*

The *Final Determination* at issue in the case at bar, however, was predicated on pricing data that shows "infrequent underselling by Japa-

[6] Commissioner Bragg adds in a footnote that specific Japanese TRB producers, which have established a physical presence in the United States, will probably not engage in export behavior that will harm the monetary interests of their United States facilities. However, Commissioner Bragg notes that this rationalization of production within a family of affiliated companies, in and of itself, does not indicate the likely behavior of Japanese imports as a whole in the event of revocation. *See Final Determination,* USITC Pub. 3309 at 31 n.204.

[7] Commissioner Askey cumulated the volume of subject imports from China and Japan and concluded a significant increase in subject imports (that is, TRBs from China and Japan) is unlikely in the event of revocation of the antidumping orders. *See Final Determination,* USITC Pub. 3309, Askey's Views at 10. Commissioner Askey based her views on the record, which indicates, *inter alia,* that: (1) little available, unused capacity in Japan (or alternatively, existence of high capacity utilization rates); (2) Japanese and Chinese TRB producers ship the majority of their TRBs to their home markets; (3) lack of incentive for Japanese to alter their shipping habits; (4) the domestic industry does not have sufficient capacity to fully serve the United States market; and (5) subject imports lost market share after issuance of the 1987 Order that was later gained by non-subject imports. *See id*. at 10–12.

nese TRB imports * * * for the lower volume sales. The more significant pricing data, for high-volume sales, show consistent *overselling* by Japanese imports, at significant margins of overselling." *Id.* (emphasis added). Accordingly, the ITC concluded that revocation of the antidumping order is unlikely to lead to any significant underselling, and that "subject imports from Japan would not be likely to depress or suppress U.S. prices to any significant degree. In particular, with high capacity utilization and commitments to third-country markets, the Japanese producers do not have an incentive to price aggressively to gain additional U.S. market share." *Id.* at 33.[8]

C. Likely Impact of Subject Imports

In 1975, the ITC acknowledged a deterioration in the domestic TRB industry, and made an affirmative material injury determination due to the market penetration of the TRB industry by Japanese producers and underselling of Japanese imports. *See Final Determination,* USITC Pub. 3309 at 33. In the *Final Determination,* the ITC found an improvement in the domestic TRB industry since the 1987 Order and concluded that the United States industry is not currently vulnerable. The Commission found that:

> [t]he TRB market is expanding; apparent consumption increased by 7.3 percent from 1997 to 1998 and was up about 1.6 percent in interim 1999 compared to interim 1998. The industry is highly concentrated and profitable. The domestic industry's market share has increased to the level held during the original 1987 investigation as capacity and capacity utilization increased substantially. Because of the absence of significant likely volume and price effects, [the Commission found] that revocation of the antidumping finding and order on TRB imports from Japan would not be likely to impact significantly the domestic industry's output, sales, market share, profits, or return on investment.

Id. at 33 (footnote in original omitted).

III. Analysis

A. Original Investigation

1. Contentions of the Parties

Timken argues that the *Final Determination* is unsupported by substantial evidence and otherwise not in accordance with law because, *inter alia,* the ITC failed to consider the information obtained and conclusions drawn by the Commission in prior injury determinations. *See* Timken's Mem. at 75–92. According to Timken, 19 U.S.C. § 1675a(a)(1)(A) clearly instructs the Commission to consider findings from the original investigation "as a source of highly probative evidence." *Id.* at 76. In its moving brief, Timken points to the record supporting the original 1976 Finding and 1987 Order (collectively "original

[8] Commissioner Askey generally agreed with the ITC majority views, and adds that domestic prices are likely to rise in the foreseeable future, given expectations of increased demand, high capacity utilization levels of the United States TRB industry and the domestic markets' inability to meet such rising demand. *See Final Determination,* USITC Pub. 3309, Askey's Views at 10–18.

investigations") and explains that dumping by Japanese TRB producers caused the original deterioration of the domestic TRB market. *See id.* at 21–24. According to Timken, "Japanese TRB producers continue to be formidable competitors in the U.S. market[,]" *id.* at 24, and since TRBs are "fully interchangeable" commodities, regardless of place of production, the competition between TRB markets is primarily price-based. *See id.* at 25–26. Timken speculates that any revocation of orders currently in place will likely lead to the recurrence of material injury, and references Commerce's prior revocation of an order on TRBs imported by NTN to prove that subsequent dumping of TRBs in the United States was a result of such revocation. *See id.* at 22.

Timken also states that continued dumping, despite the 1987 Order, "has reduced industry revenues to such a degree that Timken * * * has been unable to earn its cost of capital[9] for almost the past twenty years. Timken has lost [a substantial amount] in operating profits from 1996 to * * * [1999] due to lost volume and prices reduced to meet competition from dumped imports." *Id.* at 39–40. According to Timken, adequate explanations were not provided for the inconsistent conclusions drawn by the ITC in its *Final Determination,* when compared to those drawn in the 1987 determination, regarding volume, including: (1) increased investment in U.S. facilities; (2) high capacity utilization rates; (3) low inventory-to-shipment ratios; (4) product shifting; and (5) market orientation. *See id.* at 78–92. Timken contends that such lack of consistency and explanation renders the Commission's determination arbitrary. Generally, Timken argues that revocation of the order will lead to an increase in dumped Japanese imports of the subject merchandise and the ultimate depression of domestic TRB prices within two years. *See id.* at 45.

The ITC argues that Timken "fundamentally misconstrues" the Commission's statutory requirements regarding five-year reviews. *See* Mem. Def. ITC Opp. Pl.'s Rule 56.2 Mot. J. Agency R. ("ITC's Mem.) at 24–26. The ITC contends that 19 U.S.C. § 1675a(a) "directs the Commission to consider *a broad range of factors[, in addition to the original investigations,]* to determine whether revocation of an order would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." *Id.* at 24 (emphasis added). Accordingly, the ITC considers Timken's arguments, that the *Final Determination* is not supported by substantial evidence or in accordance with law, unpersuasive because they hinge on one isolated factor, namely, the original determination. *See id.* at 24–28. Furthermore, the ITC considers the original determination not dispositive because "[t]here are fundamental differences between the Commission's examination of the likelihood of continuation or recurrence of material injury in five-year reviews and its examination of material injury or threat of material injury by reason of subject imports in original antidumping duty investigations." *Id.* at

[9] Timken defines cost of capital as "the minimum rate of return demanded by shareholders and lenders." *See* Timken's Mem. at 37.

26. Specifically, since the Commission's analysis in five-year reviews is counter-factual and prospective, and because the United States Code does not explicitly instruct the Commission to distinguish its original investigation findings, the ITC is merely obligated to "take into account" its prior injury determination, and consider such a finding "just one of many factors" in its determination. *See id.* at 26–28.

The ITC also denies Timken's contention that it completely disregarded the results of its original determination. "Timken [improperly] []characterizes the Commission's volume findings in the original investigation * * * [since] the Commission cumulated subject imports from Japan with subject imports from" five other countries. *Id.* at 29 (citation omitted). According to the ITC, this distinction is of particular importance because Timken attempts to compare volume data specific to Japan from the original investigation with volume data on Japan from the sunset review. *See id.* at 30. The ITC views this practice as "comparing apples to oranges," and considers the 1986 Japan-specific volume data discussed by the Commission in the five-year review as not being the basis for the original affirmative determination. *See id.* Furthermore, the ITC argues that the data discussed by Timken in its moving brief was not even relied on in the original determination, and that no statutory requirement exists mandating the Commission to consider findings never made in the original investigation. *See id.* at 31.

NTN, Koyo and NSK generally agree with the Commission that the *Final Determination* is supported by substantial evidence and in accordance with law. Koyo adds that Timken "ignores the fact that Congress has set forth a variety of factors the Commission must take into account [in a sunset review], only one of which is the original determination." Mem. Koyo Resp. Timken's Mot. J. Agency R. ("Koyo's Mem.") at 23. Moreover, Koyo argues that since the original investigation, significant changes have occurred in the TRB industry that were considered by the Commission in the *Final Determination*. *See id.* at 23–24.

2. Analysis

Duty absorption findings regarding TRBs from Japan were made in the 1995–96 and 1997–98 administrative reviews of the subject imports. *See* App. Mem. NSK Opp'n Timken's Rule 56.2 Mot. J. Agency R. app. 2, at TRB-I–7. The United States Code directs the ITC to conduct a sunset review five years after the publication of an antidumping duty order or prior sunset review. *See* 19 U.S.C. § 1675(c)(1) (1994). In a sunset review, the ITC determines "whether revocation of an order * * * would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time." 19 U.S.C. § 1675a(a)(1). Such a determination takes into account the likely volume, price effect and impact of the subject imports if the order were revoked. *See id.* The ITC is also directed to consider various additional factors when making its determination, including: (1) prior injury determinations; (2) any improvement in the subject industry relating to the issuance of an antidumping duty order; and (3) the subject industry's vulnerability to

material injury if the order is revoked. *See id.; see also* H.R. Conf. Rep. No. 98–1156, at 9, 17b (1984), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5291–300 (determination of threat requires careful review of current, identifiable trends in the subject industry); *American Permac, Inc. v. United States,* 831 F.2d 269, 273–74 (1987); *Matsushita,* 750 F.2d at 932.

Although Timken is correct in asserting that the antidumping statute directs the Commission to take into account its prior injury determination in a sunset review, findings from the original investigations are by no means dispositive. *See* H.R. Doc. No. 103–465, at 886, *reprinted in* 1994 U.S.C.C.A.N. 4210–11 (stating that in a sunset review, no one factor is dispositive); *see also* 19 U.S.C. § 1675a(a)(5) (stating that the *presence or absence of any one factor shall not necessarily give decisive guidance with respect to the Commission's sunset review determination).* The parties to this action do not dispute that the Commission is required to consider its prior injury determination in its sunset review. The SAA clarifies the importance of taking into account the periods of review prior to the issuance of an antidumping finding or order. *See* H.R. Doc. No. 103–465, at 884, *reprinted in* 1994 U.S.C.C.A.N. 4209. According to the SAA, "[i]f the Commission finds that pre-order * * * conditions are likely to recur, it is reasonable to conclude that there is likelihood of continuation or recurrence of injury." *Id.* However, neither the statute nor its legislative history directs the ITC to distinguish every factor of its original investigation findings from those made in a sunset review determination.

The ITC did not disregard findings from its original investigations, but rather cited to such findings in the administrative record at issue in this case. *See Final Determination,* USITC Pub. 3309 at 31–33. The Commission discussed its negative determination in terms of the likely volume, price effects and impact of subject imports while incorporating and distinguishing various aspects of the original investigation, where appropriate. *See id.* For example, the Commission explained, *inter alia,* that: (1) subject imports from Japan have decreased since the 1987 Order; (2) Japanese investment in domestic TRB producing facilities has steadily increased in the last 25 years; and (3) there has been a general improvement in the domestic TRB industry since the 1987 investigation. *See id.*

In its moving brief, Timken isolates factor after factor from the original investigation and argues that the ITC drew an incorrect conclusion with regard to such factors in its sunset review determination. However, in its analysis, Timken fails to account for changes of conditions of competition that occurred between the time the order was imposed and the five-year review, such as significant increases in Japanese investment to domestic TRB producing affiliates. *Compare* Timken's Mem. at 75–92, *with Final Determination,* USITC Pub. 3309 at 24–26, 38 (stating that the Commission's analysis is based on current conditions of competition. Accordingly, Timken did not consider "whether injury is imminent, given the status quo." H.R. Doc. No. 103–465, at 883, *reprinted in*

1994 U.S.C.C.A.N. 4209. Timken's arguments regarding the original investigation actually concern how the Commission is to weigh the findings from the original investigations in its sunset review determination. It is well established that it is the agency's function to weigh the evidence and, therefore, this Court cannot substitute conclusions that are reasonable and supported by substantial evidence drawn by the Commission after review of the record, with those presented by Timken. *See Torrington Co. v. United States,* 16 CIT 220, 226, 790 F. Supp. 1161, 1169 (1992), *aff'd mem.,* 991 F.2d 809 (Fed. Cir. 1993); *see also Coalition for Preservation of Am. Brake Drum & Rotor Aftermarket Mfrs. v. United States,* 22 CIT 520, 529–30, 15 F. Supp. 2d 918, 927 (1998). Therefore, the Court rejects the conclusions drawn by Timken regarding the Commission's failure to consider findings from the original investigation in its sunset review determination.

B. Japanese Investment in U.S. Facilities

1. Contentions of the Parties

In its moving brief, Timken contends that the Commission made an illogical determination that Japanese producers are committed to their domestic TRB facilities and unlikely "to alter their current focus on U.S. TRB production in the reasonably foreseeable future." *Final Determination,* USITC Pub. 3309 at 31; *see* Timken's Mem. at 57–75. Timken begins its argument by presenting a syllogism, which it claims the Commission's *Final Determination* was based, and finds error in the syllogism's conclusion that Japanese producers will not increase imports to undercut the rest of the United States industry in order to protect their domestic interests.[10] *See id.* Timken also argues that capital investments in foreign-owned, domestic facilities and presence in the domestic TRB market "did nothing to deter [Japanese producers] from dumping [TRBs into the United States market] prior to the [1976 and 1987] orders, increasing imports, or from continuing dumping after the orders were put in place." App. Administrative R. Docs. Cited Timken's Mem. Supp. Mot. J. Agency R. app. 7, at 21 n.60. Timken adds that domestic investment has not been a relevant factor in making the Commission's negative determination, with exception to one review distinguished by Timken.[11] *See* Timken's Mem. at 65. Timken further points to a prior investigation where the ITC issued an affirmative determination when 30 percent of domestic production was "foreign-owned." *See id.* at 65 (citation omitted). In addition, Timken identifies

[10] The Court does not agree that the syllogism presented by Timken accurately reflects the reasoning of the agency. The data considered by the ITC when making its final determination is much too voluminous and complicated to be reduced to a simple syllogism composed of only three premises. Accordingly, the Court rejects this argument. However, the Court notes Timken's observation that not all Japanese TRB producers have increased investments in domestic facilities.

[11] In this review, the Commission found it reasonable to infer that one company, which dominated the domestic industry and was owned by a Japanese parent company that was also parent company to the competing foreign producer, was not threatened with material injury by foreign imports from the same foreign producer. *See* Timken's Mem. at 65 (citing *12-Volt Motorcycle Batteries From Taiwan,* Inv. No. 731–TA–238 (Final), USITC Pub. 2213 (Aug. 1989); *see also 12-Volt Motorcycle Batteries From Taiwan,* 54 Fed. Reg. 35,089 (Aug. 23, 1989). Timken distinguishes this investigation by stating that Timken, an independent producer, and not Japanese manufacturers, was the "dominant U.S. producer." *See* Timken's Mem. at 65 n.244 (quoting *Final Determination,* USITC Pub. 3309 at 28.

three reviews, two that were issued after the determination before this Court, which admit that foreign investment in the domestic market does not conclusively show injury to be unlikely. *See* Timken's Mem. at 67 (referring to *Certain Carbon Steel Products From Australia, Belgium, Brazil, Canada, Finland, France, Germany, Japan, Korea, Mexico, the Netherlands, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom,* USITC Pub. 3364 (Nov. 2000); *Gray Portland Cement and Cement Clinker From Japan, Mexico, and Venezuela,* USITC Pub. 3361 (Oct. 2000)). Generally, Timken characterizes the Commission's finding in the *Final Determination* as inconsistent with other sunset reviews because the ITC did not weigh several relevant factors in the same manner in each review. *See* Timken's Mem. at 66–75. In addition, Timken argues that the Commission's "commitment" finding did not account for the impact of revocation on the entire domestic industry, but only considered the prospective effects on NTN and Koyo's U.S. affiliates. *See id.* at 58–59.

The ITC rejects Timken's arguments regarding Japanese TRB producers' substantial investment in their U.S. facilities because they ignore "an important distinction between the original investigations and the more recent period examined during the five-year review." ITC's Mem. at 32. This distinction deals with the change in volume of TRBs supplied to the United States through Japanese producers and their U.S. affiliates from the original investigation and the recent sunset review. *See id.* (referencing various confidential data). This data led to the Commission's conclusion that Japanese commitment to domestic facilities would continue and would likely limit the volume of subject imports from Japan in the reasonably foreseeable future. *See id.* at 32–33.

> [T]he Commission found that Japanese producers substantially increased their investment in U.S. production facilities since the original investigations. The record demonstrated that NTN Bearing Corporation of America began production in the United States in 1975 and increased TRB production at various facilities throughout the United States in 1988, 1990, 1992, 1994, 1998, and 1999. * * * NTN increased capital expenditures in its U.S. bearings production facilities from * * * 1990 to * * * 1999. * * * Koyo [substantially] increased its investments in U.S. facilities from * * * 1986 to * * * 1998. * * * The record also supported the Commission's finding that the operation of the U.S. facilities reflected, at least in part, a trend by large multinational bearings manufacturers to localize production facilities in response to customers' needs and to allocate production more efficiently.

Id. at 33 (citation and footnote omitted). Japanese producers characterized their increased investments in U.S. production facilities as a "larger global strategy to localize production" and meet demand. *Id.* at 33 n.25. The Commission, therefore, concluded that Japanese producers lacked

incentive to increase imports of subject merchandise in the event of revocation

> because increased volumes of TRBs from Japan would adversely affect their U.S. affiliates' volumes or prices. * * * [The ITC explained that b]ecause of the industry's high fixed costs, production facilities operate[] at high capacity utilization rates in order to maximize return on investment, and TRB facilities could not generally be used to make other types of bearings without expensive retooling. * * * Moreover, a substantial proportion of TRBs were consumed by large [original equipment manufacturer ("OEM")] customers, particularly in the automotive and construction sectors, and the record indicated that OEMs often required certification of facilities, a cumbersome process, and they were not likely to change suppliers merely on the basis of price.

Id. at 34.

Responding to Timken's contentions regarding the Commission's inconsistent analyses in numerous antidumping investigations, the ITC argues that changing conditions in competition often warrants different outcomes in each investigation. *See id.* at 35. Furthermore, unlike a five-year review, the Commission examines historical data in an original investigation to determine whether the industry is currently materially injured or under the threat of material injury. *See id.* at 36–37. In other words, the Commission's analysis is based on "current conditions and extrapolations of current conditions." *Id.* at 38. The ITC points out that the SAA mandates the Commission to engage in a "counter-factual analysis" that is prospective in nature when conducting a five-year review. *See id.* at 37 (citation omitted). Accordingly, the ITC argues that it properly examined the likely volume of subject imports by determining whether Japanese producers are discouraged from increasing their imports in order to avoid injuring their domestic affiliates. *See id.* at 37–38. The ITC considered the record evidence to weigh in the favor of the conclusion that Japanese TRB producers will not risk harm to their domestic investments in several five-year reviews. *See id.* at 38–41.[12]

NTN, Koyo and NSK generally support the arguments espoused by the ITC. NTN adds that the Commission's determination regarding Japanese producers' commitment to their domestic facilities "was one of many factors used to determine the likely effect of revocation of the antidumping order on the entire U.S. TRB industry. This is evidenced by the ITC's discussion with respect to the conditions of competition in the TRB industry," in addition to the likely volume, price effects and impact of subject imports. Resp. NTN to Timken's Jan. 30, 2001 Br. Supp. Mot. J. Agency R. ("NTN's Resp.") at 13. NTN further asserts that the ITC is not mandated to discuss every piece of record evidence it considered in

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[12] The ITC explains that in the sunset reviews of *Color Picture Tubes From Canada, Japan, Korea and Singapore,* Inv. Nos. 731–TA–367–370 (Review), USITC Pub. 3291 (Apr. 2000), *Brass Sheet and Strip from Brazil, Canada, France, Germany, Italy, Japan, Korea, the Netherlands, and Sweden,* Inv. Nos. 731–TA–311–317 & 379–380 (Review), USITC Pub. 3290 (Apr. 2000), and final determination of *12-Volt Motorcycle Batteries From Taiwan,* USITC Pub. 2213, the Commission considered the relationship of foreign producers with their domestic affiliates in determining that an increase in the volume of subject imports by such foreign producers would be unlikely. See ITC's Mem. at 39–40.

support of the final determination, and that the Commission reviewed the record on a whole and explained its determination adequately. *See id.* at 18 (citing *Acciai Speciali Terni S.p.A. v. United States,* 24 CIT 1064, 1080–81, 118 F. Supp. 2d 1298, 1313 (2000)).

2. Analysis

Timken argues that since Japanese investment in the domestic industry was not a relevant factor in the Commission's original determination or in over sixty prior antidumping cases, the ITC's current determination that U.S. investment will preclude injury or threat of material injury in the foreseeable future, is illogical, unsupported by substantial evidence and otherwise contrary to law.[13] *See* Timken's Mem. at 55–74. The Court agrees with Timken that it is anomalous to consider foreign investment in the domestic industry as a relevant factor in the determination under review, while failing to consider the same factor in the original investigation. It is important to note, however, that the ITC's final determination was not dependent on one single factor, namely, foreign investment in the domestic industry, but rather considered various other conditions. *See Final Determination,* USITC Pub. 3309 at 21–34 (discussing, *inter alia,* the general increase in demand for TRBs, increases in domestic shipments of TRBs in the United States and abroad, and high capacity utilization rates). Moreover, the SAA explains that the standard applied to determine whether it is "likely" that material injury will continue or recur, applicable in sunset reviews, is different from the standards applied in material injury or threat of material injury determinations, applicable in original investigations. *See* H.R. Doc. 103–465, at 883, *reprinted in* 1994 U.S.C.C.A.N. at 4209. In a five-year review, the Commission "engage[s] in a counter-factual analysis" to determine the likely impact of revocation "in the reasonably foreseeable future of an important change in the status-quo * * *." *Id.* Similar to other reviews discussed by Timken, the Commission weighed all of the evidence before it and reasonably concluded that Japanese producers presently lack incentive to increase imports of subject merchandise in the reasonably foreseeable future

> because increased volumes of TRBs from Japan would adversely affect their U.S. affiliates' volumes or prices. * * * [The ITC explained that b]ecause of the industry's high fixed costs, production facilities operate[] at high capacity utilization rates in order to maximize return on investment, and TRB facilities could not generally be used to make other types of bearings without expensive retooling. * * * Moreover, a substantial proportion of TRBs were consumed by large OEM customers, particularly in the automotive and construc-

[13] Commissioner Bragg did not rely on this finding in her analysis, but still concluded that revocation of the order will not be likely to lead to continuation or recurrence of material injury in the reasonably foreseeable future. *See Final Determination,* USITC Pub. 3309 at 31 n.204. Specifically,

> Commissioner Bragg acknowledge[d] that an individual Japanese TRB producer with an established physical presence in the United States is unlikely to engage in export behavior to the detriment of its affiliated U.S. production operations. * * * [H]owever, such rationalization * * * in and of itself, says nothing about the likely behavior of Japanese imports as a whole in the event of revocation, nor does it provide an indication of the likely impact of Japanese imports on unaffiliated producers (whether U.S. or foreign-owned) within the domestic industry.

Id. This finding did not preclude Commissioner Bragg from concluding that revocation of the order would not be likely to lead to the continuation or recurrence of material injury in the reasonably foreseeable future.

> tion sectors, and the record indicated that OEMs often required certification of facilities, a cumbersome process, and they were not likely to change suppliers merely on the basis of price.

ITC's Mem. at 34 (citation to administrative record omitted).

Legislative intent makes clear that "a reviewing court is not barred from setting aside [an agency] decision when it cannot conscientiously find that the evidence supporting that decision is substantial, *when viewed in the light that the record in its entirety furnishes,* including the body of evidence opposed to the [agency's] view." *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951) (emphasis added); *see e.g., Gerald Metals, Inc. v. United States,* 132 F.3d 716, 720 (Fed. Cir. 1997) (clarifying the standard of review for ITC determinations). Therefore, it was reasonable for the Commission to review the entire administrative record and consider foreign investment in the domestic industry as a factor in its five-year review. However, Timken is correct in its assertion that the *Final Determination* does not adequately explain why an increase in Japanese imports of the subject merchandise would not injure the remaining United States industry; that is, TRB producers other than those owned by Japanese companies. Since 19 U.S.C. § 1675a(a)(4) explicitly directs the Commission to evaluate "the likely impact of imports of the subject merchandise on the [domestic] industry," the Court remands the *Final Determination* for further explanation.

C. Utilization Rates

1. Contentions of the Parties

Timken also argues that the ITC failed to investigate the issue of capacity utilization ratios by not inquiring as to "how Japanese TRB producers had reported their capacit[ies]," Timken's Mem. at 94, and not investigating questionable reporting methods of Japanese TRB producers. *See id.* 94–95. Timken asserts that "[c]apacity utilization ratios are based on a plant's total production of a particular product[, in this case TRBs,] divided by [the plant's] total capacity to produce th[is] product. * * * [Such] 'capacity' can vary depending on" numerous factors. *Id.* at 97. Although the ITC's 1987 questionnaire (used to collect data for the original investigation on TRBs from Japan) requested TRB producers to give detailed information regarding such various factors that effect capacity utilization ratios, Timken states that the Commission did not request any such information in the sunset review, despite Timken's repeated warnings to the ITC of the importance of gathering such information. *See id.* at 98–100.

Timken also asserts that the ITC never requested Japanese TRB producers to explain their methods of reporting capacity data nor mandated such producers to explain inherent inconsistencies between the information supplied to the Commission and other associations. *See id.* at 97–109.

The ITC supports its finding that Japanese producers had extremely high capacity utilization rates during the five-year period of review, which, according to the Commission, was based on data supplied by a

representative portion of the Japanese TRB production. According to the ITC, the Commission "used the same definition of 'average production capacity' that it typically includes in questionnaires it sends to the domestic and foreign producers in five-year reviews and original investigations." ITC's Mem. at 41. The ITC rejects Timken's argument regarding the amount of information that the Commission is required to collect in a five-year review, and states that "Timken cites no authority in support of the proposition that a Commission investigation is inadequate unless the Commission decides to seek every piece of information a party requests." *Id.* at 42. Instead, the ITC contends that the size and scope of a TRB investigation made it impractical "for the Commission to collect every piece of information in the degree of detail requested by [Timken]." *Id.* at 43. The ITC also considered the additional information supplied by Timken to be of minimal "probative value."[14] *See id.* at 43–44.

NTN, Koyo and NSK generally support the arguments presented by the ITC. NTN adds that "Timken ma[d]e[a] broad assumption that a production increase based on unused capacity would lead to increased exports to the U.S." NTN's Resp. at 35. Moreover, Koyo argues that Timken's argument regarding capacity utilization ratios focuses on only one of many reasons the Commission found that the volume of imports from Japan was not likely to increase significantly after revocation, "and ignores the substantial changes in the U.S. industry and worldwide competition since th[e] original determinations." Koyo's Resp. at 32.

2. Analysis

"[T]he question of whether the ITC conduc[ted] a thorough * * * investigation begins with the substantial evidence test, and the question of whether, in light of the record evidence as a whole, 'it would have been possible * * *'" for the Commission to have reasonably reached its final determination. *Acciai Speciali,* 24 CIT at 1074, 118 F. Supp. 2d at 1307 (citing *Allentown Mack Sales & Serv., Inc. v. NLRB.,* 522 U.S. 359, 366–67 (1998)). According to the ITC, the size and scope of the sunset review made it impractical for the Commission to collect "every piece" of information in connection with the investigation. *See* ITC's Mem. at 43. The Court recognizes that the size and scope of TRB investigations may be enormous, but notes that *Mitsubishi Elec. Corp. v. United States,* 12 CIT 1025, 1058, 700 F. Supp. 538, 564 (1988), *aff'd,* 898 F.2d 1577 (Fed. Cir. 1990), clarified that where the "ITC actively precludes itself from receiving relevant data or [m]akes no effort to seek relevant [contrary] data * * * then such actions will be found to be contrary to law."

The ITC explains that its finding regarding Japanese producers' high capacity utilization rates was derived from questionnaire responses from five TRB producers that were representative of almost all subject

[14] The ITC contends that "[t]he reporting basis for capacity utilization was not defined in [Timken's] secondary [data,] and Timken expected the Commission to assume that the reporting basis was the same as that described in a glossary also provided by Timken that was dated several years earlier." ITC's Mem. at 44. Since Timken's additional information consisted of this and other inconsistencies, the ITC determined that it is reasonable to reject such data and rely only on the information collected by Japanese producers during the five-year review. *See id.* at 44.

merchandise production in Japan. *See* ITC's Mem. at 41. The ITC further points out that it rejected secondary information presented by Timken because the reporting basis used in such data was undefined. *See id.* at 44. With this impetus, it is logical to find that the Commission erred by not inquiring into the basis used by Japanese TRB producers to report their capacity. Such a distinction is particularly important since the Court is not aware of any standard industry measure of capacity to produce TRBs. Accordingly, the Court remands the *Final Determination* to the ITC for further investigation.

D. The ITC's Vulnerability Finding and Other Volume, Price and Subject Import Findings

1. Contentions of the Parties

Timken argues that the Commission's findings regarding vulnerability of the domestic market and the likely continuation of material injury in the event of revocation are unsupported by substantial evidence. *See* Timken's Mem. at 121. Although Timken admits that the domestic TRB industry has improved since 1987, future vulnerability must be assessed "in light of the type of industry and its current conditions." *Id.* at 124. Timken asserts that the Commission failed to consider information pertaining to the domestic industry's return on investments and ability to raise capital as a result of Japanese producers' continued dumping when making its vulnerability finding. *See id.* at 132. Timken, therefore, asks this Court to remand the Commission's *Final Determination* in order for the ITC to explain its reasoning with respect to the domestic market's vulnerability after revocation, and justify the rejection of Timken's arguments, proposed during the sunset review, with respect to continuation of material injury.

Timken also argues that in the sunset review, the Commission relied on Japanese pricing data covering only a fraction of Japanese imports. *See id.* at 114. Such data, therefore, led the Commission to incorrect conclusions regarding price factors such as underselling, and ultimately to an erroneous negative determination. *See id.* at 115–18.

The ITC argues that its conclusion that the volume of imported TRBs from Japan was not likely to significantly increase is supported by substantial evidence. The ITC states that its conclusion was based on findings relating to Japanese producers' orientation to home and third-country markets and low inventory to shipment ratios, and considered the level of difficulty and expense to Japanese producers who engage in product shifting. *See* ITC's Mem. at 45. According to the ITC, its findings were based on record evidence, which indicated that:

> [(1)] commitments to existing customers and OEM requirements of certification * * * would likely limit Japanese producers' ability to transfer shipments between markets in the reasonably foreseeable future[; * * * (2)] there were no known import barriers to Japanese TRB shipments to third countr[y markets; * * * (3)] Japanese inventory-to-shipment ratios were low[; * * * and (4)] shifting pro-

> duction from one type of bearing to another was difficult and expensive.

Id. at 47. Contrary to Timken's contention, the ITC also asserts it properly considered the likely volume effects of TRB imports from Japan with respect to the entire domestic industry. *See id.* at 48.

In its final determination, the Commission also reviewed data collected in the sunset review showing pervasive overselling of the domestic like product by subject imports from Japan. Along with this information, the Commission considered findings from the original investigation and those of Commerce relating to duty absorption and concluded that TRBs from Japan were not likely to significantly undersell the domestic like product. *See id.* at 50. This finding flowed from the Commission's conclusion that subject import volume was not likely to significantly increase since high capacity utilization and commitments to third-country markets act as disincentives to Japanese producers who price aggressively to gain U.S. market share. *See id.*

The ITC also disagrees with Timken regarding the weight that is to be placed on evidence presented by parties to the Commission, and asserts that "it is the agency's task to weigh the evidence of record and reach a conclusion based on the facts found." *Id.* at 52 (citations omitted). Therefore, the Commission argues that it reasonably placed "less probative weight" on data presented by Timken regarding Japanese underselling because such information did not necessarily involve sales of TRBs imported from Japan, as opposed to TRBs produced by Japanese domestic affiliates, and the record indicated that TRB prices in third-country markets versus the domestic market were "mixed." *See id.*

Generally, the ITC asserts that record evidence regarding volume, price and subject imports supports the finding that the domestic industry was not vulnerable (or alternatively, in a "weakened state"). *See id.* at 58–60. According to the Commission, a small increase in the volume of subject imports from Japan would not likely suppress or depress domestic prices. *See id.* at 59. The ITC also asserts that the Commission "properly took into consideration the likely effects of revocation on the entire domestic industry, [and] not merely the likely effects of revocation on Timken." *Id.* at 61.

The ITC responds to Timken's contentions regarding the pricing data relied upon in the sunset review by admitting "that the pricing data represented a small sample of subject imports from Japan[, but argues that * * *] the thoroughness of the Commission's investigation" was not compromised. *Id.* at 53. However, the ITC contends that Timken has not adequately demonstrated that the pricing data collected by the Commission was unrepresentative of the subject imports. *See id.* at 54.

The ITC also notes that no specific findings regarding the business cycle were made in the original determination, and multiple attempts to collect related business cycle data from the domestic industry during the five-year review were unfruitful. *See id.* at 59–60. According to the ITC, Timken never made any reference to the length of the United States

TRB industry's business cycle during the five-year review, and is ultimately precluded from raising the issue pursuant to the doctrine of exhaustion of administrative remedies. *See id.* at 59 n.52.

NTN, Koyo and NSK generally argue that the ITC's findings are reasonable, supported by substantial evidence and in accordance with law, and urge the Court to dismiss Timken's contentions as unpersuasive and without merit.

2. Analysis

In five-year reviews, the antidumping statute directs Commerce to revoke "an antidumping duty order or finding, * * * unless * * * the Commission makes a determination that material injury would be likely to continue or recur as described in [19 U.S.C. § 1675a(a)] * * *." 19 U.S.C. § 1675(d)(2) (1994). To determine whether revocation is likely to lead to the continuation or recurrence of material injury, 19 U.S.C. § 1675a(a)(1)(B) and (C) instructs the Commission to consider the current state of the domestic industry. Moreover, 19 U.S.C. § 1675a(a)(4) (1994) provides a list of relevant economic factors that the Commission is to consider in determining the likely impact of imports after revocation. The list includes, but is not limited to:

> (A) likely declines in output, sales, market share, profits, productivity, return on investments, and utilization of capacity,
> (B) likely negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, and
> (C) likely negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the domestic like product.

19 U.S.C. § 1675a(a)(4). The statute also clarifies that "[t]he Commission shall evaluate all relevant economic factors * * * *within the context of the business cycle* and the conditions of competition that are distinctive to the affected industry." *Id.* (emphasis added).

> The presence or absence of any factor which the Commission is required to consider under [19 U.S.C. § 1675a(a)] shall not necessarily give decisive guidance with respect to the Commission's determination of whether material injury is likely to continue or recur within a reasonably foreseeable time if the order is revoked * * *. In making that determination, the Commission shall consider that the effects of revocation * * * may not be imminent, but may manifest themselves only over a longer period of time.

19 U.S.C. § 1675a(a)(5).

In making its final determination, the Commission found that TRBs from Japan have significantly decreased since the imposition of the 1987 Order. *See Final Determination,* USITC Pub. 3309 at 31. This was, in large part, a result of substantial investment in domestic TRB production facilities by Japanese producers. *See id.* The *Final Determination* also states that the data representing almost all TRB production in Japan indicates that Japan has "extremely high" capacity utilization rates. *See id.* Moreover, since "machinery and equipment needed for

TRB production are highly specialized and generally dedicated to TRBs, there is little potential that Japanese producers would shift production in Japan from other types of bearings to TRBs." *Id.* at 31–32. Another factor that the ITC considered in its determination was Japanese TRB producers' inventory-to-shipment ratios. Since they were low and Japanese TRB producers were not predominantly "export-oriented," the ITC determined that Japan was not likely to increase the volume of its TRB imports to the United States if the 1987 Order were revoked. *See id.*

The Commission also considered the likely price effects of subject imports in event of revocation. According to the *Final Determination,* the evidence showed "infrequent underselling by Japanese TRB imports * * * for the lower volume sales." *Id.* at 32. Accordingly, the ITC concluded that revocation of the antidumping order is unlikely to lead to any significant underselling, and that "subject imports from Japan would not be likely to depress or suppress U.S. prices to any significant degree. In particular, with high capacity utilization and commitments to third-country markets, the Japanese producers do not have an incentive to price aggressively to gain additional U.S. market share." *Id.* at 33.

Finally, the Commission considered the likely impact of subject imports in event of revocation. The ITC found an improvement in the domestic TRB industry since the 1987 Order and concluded that the United States industry is not currently vulnerable. The Commission found that:

> [t]he TRB market is expanding; apparent consumption increased by 7.3 percent from 1997 to 1998 and was up about 1.6 percent in interim 1999 compared to interim 1998. The industry is highly concentrated and profitable. The domestic industry's market share has increased to the level held during the original 1987 investigation as capacity and capacity utilization increased substantially. Because of the absence of significant likely volume and price effects, [the Commission found] that revocation of the antidumping finding and order on TRB imports from Japan would not be likely to impact significantly the domestic industry's output, sales, market share, profits, or return on investment.

Id. at 33 (footnote omitted).

The Court rejects those arguments raised by Timken regarding findings pertaining to the domestic TRB industry's vulnerability. The Commission's conclusions, in this regard, were supported by substantial evidence and in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *see also NTN Bearing,* 24 CIT at 389–90, 104 F. Supp. 2d at 115–16 (detailing the Court's standard of review for agency determinations). Although the Court agrees with Timken that it is anomalous for the Commission to rely on Japanese pricing data covering a small fraction of Japanese imports, Timken has not convinced the Court that such data was indeed unrepresentative. *See Kern-Liebers USA, Inc. v. United States,* 19 CIT 87, 114–15 (1995) (stating that plaintiff failed to demonstrate that pricing data collected by the Commission was unrepresenta-

tive, even if based on a relatively small sample size). However, the Commission's findings must consider all relevant economic factors *"within the context of the business cycle* and the conditions of competition that are distinctive to the affected industry." 19 U.S.C. § 1675a(a)(4) (emphasis added). The purpose of the business cycle requirement is to allow the Commission to consider whether different trends in the business cycle mask harm caused by unfair trading practices. *See* S. Rep. No. 100–71, 100th Cong., 1st Sess. 115–30 (1987); *Chr. Bjelland Seafoods A/S v. United States,* 16 CIT 945, 955–56 (1992) (citations omitted).

The ITC argues that Timken is precluded from raising the business cycle issue pursuant to the doctrine of exhaustion of administrative remedies. *See* ITC's Mem. at 59 n.52. The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before raising these claims to the Court. *See Unemployment Compensation Comm'n of Alaska v. Aragon,* 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action"). There is, however, no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. *See Alhambra Foundry Co. v. United States,* 12 CIT 343, 346–47, 685 F. Supp. 1252, 1255–56 (1988). Section 2637(d) of Title 28 directs that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." By its use of the phrase "where appropriate," Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies. *See Cemex, S.A. v. United States,* 133 F.3d 897, 905 (Fed. Cir. 1998). Therefore, because of "judicial discretion in not requiring litigants to exhaust administrative remedies," the Court is authorized to determine proper exceptions to the doctrine of exhaustion. *Alhambra Foundry,* 12 CIT at 347, 685 F. Supp. at 1256 (citing *Timken Co. v. United States,* 10 CIT 86, 93, 630 F. Supp. 1327, 1334 (1986), *rev'd in part on other grounds, Koyo Seiko Co. v. United States,* 20 F.3d 1156 (Fed. Cir. 1994)).

The Court exercises its discretion to obviate exhaustion where: (1) requiring it would be futile, *see Rhone Poulenc, S.A. v. United States,* 7 CIT 133, 135, 583 F. Supp. 607, 610 (1984) (in those cases when "it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation"), or would be "inequitable and an insistence of a useless formality" as in the case where "there is no relief which plaintiff may be granted at the administrative level," *United States Cane Sugar Refiners' Ass'n v. Block,* 3 CIT 196, 201, 544 F. Supp. 883, 887 (1982); (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions, *see Timken,* 10 CIT at 93, 630 F. Supp. at 1334; (3) the question is one of

law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question, *see id.; R.R. Yardmasters of Am. v. Harris,* 721 F.2d 1332, 1337–39 (D.C. Cir. 1983); and (4) the plaintiff had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. *See Philipp Bros., Inc. v. United States,* 10 CIT 76, 79–80, 630 F. Supp. 1317, 1321 (1986).

During the sunset review, the Commission requested information concerning the business cycle. *See* Reply Br. Supp. Timken's Mot. J. Agency R. at 82; *Certain Bearings From China, France, Germany, Hungary, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom,* 64 Fed. Reg. at 15,786. It is obvious, then, that the Commission was on notice of the business cycle requirement and Timken had no reason to suspect that the Commission would disregard its statutory mandate. *See* 19 U.S.C. § 1675a(a)(4); *see also Philipp Bros.,* 10 CIT at 79–80, 630 F. Supp. at 1321. The purpose behind the doctrine of exhaustion is to prevent courts from premature involvement in administrative proceedings, and to protect agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49 (1967); *see also Public Citizen Health Research Group v. Comm'r, FDA,* 740 F.2d 21, 29 (D.C. Cir. 1984) (pointing out that the "exhaustion doctrine * * * serv[es] four primary purposes: [(1)] it ensures that persons do not flout [legally] established administrative processes * * *; [(2)] it protects the autonomy of agency decision-making; [(3)] it aids judicial review by permitting factual development [of issues relevant to the dispute]; and [(4)] it serves judicial economy by avoiding [repetitious] administrative and judicial fact-finding * * *" and by resolving sole claims without judicial intervention. (Citation omitted)). Therefore, the Court holds that not only did Timken sufficiently preserve the issue for consideration by this Court, but that the exhaustion doctrine is inapplicable to the question of whether the Commission should have considered relevant factors in the context of the business cycle. Accordingly, the Court remands the ITC's *Final Determination* for further explanation of the Commission's findings in the context of the appropriate business cycle.

The Court has considered additional arguments raised by Timken regarding other volume, price and impact on subject import findings arrived at by the Commission, and finds that they are without merit.

CONCLUSION

The Court remands the *Final Determination* to the ITC to: (a) explain the likely impact of TRB imports from Japan on the entire United States TRB industry; (b) further investigate and explain the basis that Japanese TRB producers used to report their capacity to produce TRBs to the Commission; and (c) further explain the Commission's findings in the context of the TRB business cycle.

(Slip Op. 03–46)

ESSEX MANUFACTURING, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 01–00024

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

(Decided April 29, 2003)

Neville Peterson LLP (John M. Peterson and *Maria E. Celis),* for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Jack S. Rockafellow); Sheryl A. French,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, Of Counsel; for Defendant.

OPINION

RIDGWAY, *Judge:* This action challenging a Notice to Redeliver merchandise is the final chapter in a saga that highlights the risks and dangers that attend the many opportunities inherent in doing business in today's global economy. It is a saga of (in the words of Defendant) "an importation gone wrong," in which (in the words of Plaintiff) "a secret, and still mysterious, documentation arrangement" between customs officials at home and abroad plays a central role; a saga set against a backdrop of international intrigue and events a half world away, revolving around a transaction tainted with the whiff of double-dealing, fraud, forgery and corruption, and yet spiced with exposure to the unique customs and traditions of another culture—in this case, the acclaimed hospitality of Mongolia, where guests are entertained with yak hunting and toasted with *airag,* the intoxicating national beverage made of fermented mares' milk. *See* Memorandum of Points and Authorities in Opposition to Defendant's Cross-Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Reply Brief") at 3; Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Brief") at 1; Transcript of Oral Argument (Oct. 17, 2002) ("Tr.") at 67–68 (alluding to the experiences of Plaintiff's representatives in the company of Mongolian Customs officials).

Although the setting of this dispute may seem picturesque, the legal issues presented could not be more practical: The timeliness and sufficiency of a Notice to Redeliver challenging the country of origin of a shipment of jackets imported into the United States by plaintiff Essex Manufacturing, Inc. ("Essex"). At the time of entry, the merchandise was represented as made in Mongolia, and thus exempt from textile quotas or other import restrictions. The jackets were conditionally released to Essex by the U.S. Customs Service ("Customs").[1] But Customs soon

[1] The Customs Service is now known as the Bureau of Customs and Border Protection of the newly-established U.S. Department of Homeland Security. *See* H.R. Doc. 108–32, at 4 (2003).

learned that the Mongolian Certificate of Origin submitted for the goods could not be verified, and—indeed—appeared to be fraudulent. Customs demanded redelivery of the goods; but, unbeknownst to Customs, the merchandise had already been shipped to Essex's customer, and was therefore no longer available for redelivery. After struggling in vain for several months in an attempt to establish the validity of the Certificate of Origin and resolve Customs' concerns, Essex filed a protest disputing the Notice to Redeliver.[2]

In this action, Essex challenges Customs' decision denying Essex's protest. Jurisdiction lies under 28 U.S.C. § 1581(a) (2000). Denials of protests are subject to *de novo* review. 19 U.S.C. § 2640(a)(1) (2000). Now pending before the Court are the parties' cross-motions for summary judgment. For the reasons set forth below, Plaintiff's Motion for Summary Judgment is denied, and Defendant's Cross-Motion is granted.

I. BACKGROUND

Although the conclusion below actually turns on a handful of relatively straightforward facts, a more complete narrative of the history of the parties' dealings sheds light on their many nuanced arguments.

On July 31, 2000, Essex entered a shipment of more than 43,500 ladies' 100% nylon packaway jackets into the United States through the Port of Los Angeles. The entry documents initially filed with Customs did not include a Form A Certificate of Origin. However, the Multiple Country Declaration which was submitted indicated that the jackets were produced in Mongolia by processes of "cutting, sewing, buttoning, ironing, [and] packing," using 100% nylon material which had originated in China. *See* Plaintiff's Statement of Material Facts As To Which No Genuine Issue Exists ("Pl.'s Statement of Facts") ¶¶ 1–2, Exh. A; Defendant's Response to Plaintiff's Statement of Material Facts ("Def.'s Response to Pl.'s Statement of Facts") ¶¶ 1–2; Defendant's Statement of Undisputed Material Facts ("Def.'s Statement of Facts") ¶ 12; Plaintiff's Response to Defendant's Statement of Material Facts ("Pl.'s Response to Def.'s Statement of Facts") ¶ 12.

Other documents included with the entry papers—the Entry Summary, the Invoice, the Packing List, and the Combined Transport Bill of Lading—also identified Mongolia as the merchandise's country of origin. But the Multiple Country Declaration was signed by a shipping clerk at a company in Hong Kong (a special administrative region of China); the Invoice was signed on behalf of and on the letterhead of the same Hong Kong company; and the Packing List was on the company's letterhead as well. No company with a Mongolian address was identified

[2] Under Customs regulations, a failure to comply with a demand for redelivery results in the assessment of liquidated damages. The parties to this action differ as to the extent of Essex's exposure. Pointing to 19 C.F.R. § 113.62(*l*), Essex has asserted that, if the demand for redelivery is sustained, it is liable for liquidated damages equal to three times the value of the merchandise at issue. *See* Tr. at 27. But, in an April 21, 2003 teleconference with the Court, the Government advised that Essex's exposure is actually limited to the value of the merchandise (which is, admittedly, nevertheless a substantial sum). *See* 19 C.F.R. § 141.113(b) (2000). *See also* 59 Fed. Reg. 61,798 (Dec. 2, 1994) (explaining, *inter alia*, the rationale for limiting liquidated damages to value of merchandise, rather than imposing treble damages as suggested in proposed rule).

as the manufacturer of the jackets. Similarly, the Combined Transport Bill of Lading indicated, *inter alia*, that the place of receipt and the port of loading for the jackets was a city in China, and that the port of discharge was Long Beach, California; but it did not identify any place in Mongolia where the shipment was said to have originated. *See* Def.'s Statement of Facts ¶¶ 7–10; Pl.'s Response to Def.'s Statement of Facts ¶¶ 7–10; Declaration of Bernice J. Conley ("Conley Decl."), Exh. 1.

At the time, the types of nylon jackets here at issue were not subject to textile quotas or other import restrictions if they were assembled in Mongolia. But quota restraints did apply to such merchandise of Chinese origin, providing an incentive to transship Chinese goods through Mongolia and submit false documents claiming that the goods were of Mongolian origin. *See* Pl.'s Statement of Facts ¶¶ 1–2; Def.'s Response to Pl.'s Statement of Facts ¶¶ 1–2; Def.'s Statement of Facts ¶ 5; Pl.'s Response to Def.'s Statement of Facts ¶ 5. While an importer may be faultless in such situations, its suppliers may not.[3]

To combat fraud, Mongolian Customs requires that all exports of apparel from that country be covered by a Certificate of Origin, which is issued by the Mongolian Chamber of Commerce and Industry ("MCCI"), and then registered and cleared by Mongolian Customs prior to exportation. Given the ease with which a wide variety of official-looking forms can be generated from any home computer, it would be a relatively simple matter for an unscrupulous overseas supplier to generate a Certificate of Origin and other business forms to give the appearance of Mongolian origin. To guard against such counterfeiting, Mongolian Customs inserts secret marks in the Certificates of Origin that are properly registered and cleared. Those secret marks—the location of which is changed from time to time—enable customs officials in Mongolia and the U.S. to identify false Certificates, protecting a wide range of business and public interests.[4] Pursuant to a standing arrangement with authorities in that country, U.S. Customs now relies on Certificates of Origin as the primary and most reliable means of verifying the country of origin of textiles purporting to be from Mongolia. *See* Conley Decl. ¶¶ 8–9; Declaration of Susan Thomas ("Thomas Decl.") ¶¶ 5–6; Def.'s Statement of Facts ¶ 11; Pl.'s Response to Def.'s Statement of Facts ¶ 11.

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[3] Although it cites no record evidence on point, Essex vigorously disputes any implication of an incentive to transship in this case. Essex not only maintains that the goods at issue were of Mongolian origin, but also asserts that—at the time the merchandise was exported—the Chinese textile quota limit for nylon jackets had not yet filled. Thus, Essex concludes, "there would presumably have been no impediment to securing permission to ship such garments from China to the United States." Pl.'s Reply Brief at 3 n.1.

In contrast, evidence proffered by the Government indicates that "[a]t the time of importation, * * * quota restraints * * * were essentially filled, which provided an incentive to transship and submit false origin documents." Conley Decl. ¶ 7.

[4] For example, Mongolia wants to protect and encourage its own domestic industries; and Mongolian producers and importers of Mongolian textiles alike would be at a competitive disadvantage if they had to compete with exporters who transshipped their goods through Mongolia while claiming Mongolia as the country of origin. *See generally* Memorandum in Support of Defendant's Reply to Plaintiff's Opposition to Defendant's Cross-Motion for Summary Judgment ("Def.'s Reply Brief") at 7.

Immediately after Essex filed the entry papers on July 31, 2000, Customs released the goods here at issue.[5] Essex then moved the merchandise to a warehouse, and inspected it. *See* Pl.'s Statement of Facts ¶ 3; Def.'s Response to Pl.'s Statement of Facts ¶ 3; Def.'s Statement of Facts ¶ 2; Pl.'s Response to Def.'s Statement of Facts ¶ 2.

In the course of a routine "post entry" review of the entry papers conducted on August 16, 2000, Customs realized that the documents that Essex had submitted did not include a Mongolian Certificate of Origin. Customs therefore phoned Essex's broker. In that conversation:

> Customs advised Essex that there was no Certificate of Origin with the entry papers, that Customs was requesting one, and that a redelivery notice (Customs Form CF 4647) was being issued. Essex was also advised that the importer should hold the shipment pending receipt and verification of the Certificate of Origin from Mongolia.

Def.'s Statement of Facts ¶¶ 3–4, 14. *See also* Pl.'s Response to Def.'s Statement of Facts ¶¶ 3–4, 14.

That same day—August 16, 2000—Customs issued to Essex a Customs Form 4647 Notice to Mark and/or Notice to Redeliver (the "Initial Notice to Redeliver" or "Initial Notice"). In the space on the form provided for "Statute(s)/Regulation(s) Violated" (Block 9), Customs did not cite a particular statute or regulation, but instead checked the box marked "Other, Namely" and inserted the words "Certificate of origin for Mongolia." Elsewhere on the form, in the space reserved for "Remarks/Instructions/Other Action Required of Importer" (Block 15), Customs wrote: "Please submit the original Mongolian Certificate of Origin and a sample of Jacket s/no. 217W. If you are unable to obtain the Certificate of Origin, please redeliver the merchandise into Customs Custody within 30 days." *See* Pl.'s Statement of Facts ¶ 4, Exh. B; Def.'s Response to Pl.'s Statement of Facts ¶ 4.

On August 22, 2000, in response to the Initial Notice to Redeliver, Essex (through its broker) faxed to Customs a document which appeared to be a Mongolian Certificate of Origin. The document was numbered No. MN US 1917 A0002400, and represented that the merchandise at issue had been consigned from Mongol Jindu Garment Co., Ltd., Bayangol District, Ulaanbaatar, Mongolia, and had been produced in Mongolia. The form was purportedly certified by the Mongolian Chamber of Commerce and Industry, and stamped by Mongolian Customs. On the fax coversheet, Essex's broker wrote: "As per our phone conversation find the Mongolian Certif. of Origin for you to verify. * * * If this shipment is OK will you please let me know by phone so that Essex can ship it

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[5] Customs' release of the goods was inadvertent. Essex's broker apparently misrouted the entry papers to Customs' inspection unit, instead of the import specialist team. If the entry papers had been routed to the import specialist team in first place, Customs would not have released the goods. *See* Def.'s Statement of Facts ¶ 2; Pl.'s Response to Def.'s Statement of Facts ¶ 2.

In any event, as discussed in section III.A below, even goods that have been physically released from Customs' custody are generally deemed to have been *conditionally* released and are therefore subject to recall ("redelivery") for some period of time thereafter, known as the "conditional release period."

to Walmart [sic]." In fact, however, the goods had already been shipped.[6] *See* Pl.'s Statement of Facts ¶¶ 6–7, Exhs. C, D; Def.'s Response to Pl.'s Statement of Facts ¶¶ 6–7; Def.'s Statement of Facts ¶¶ 16–17; Pl.'s Response to Def.'s Statement of Facts ¶¶ 16–17.

On August 22, 2000, counsel for Essex spoke with Customs, confirming the agency's receipt of the Certificate of Origin and the sample jacket. In a letter to Customs the following day, Essex's counsel stated his understanding that—in light of the submission of the Certificate of Origin and the sample—"the company is not, as of this time, under an obligation to redeliver the merchandise to Customs custody." *See* Pl.'s Statement of Facts ¶ 8, Exh. E; Def.'s Response to Pl.'s Statement of Facts ¶ 8; Def.'s Statement of Facts ¶ 19; Pl.'s Response to Def.'s Statement of Facts ¶ 19.

In response to Essex's letter of August 23, 2000, a Customs official left a phone message for Essex's counsel on August 29, advising that "although physical redelivery was not required at that time, [Essex] should continue to hold the merchandise pending Headquarters verification of the Certificate of Origin, because the Certificate of Origin submitted was 'unusual' and required verification between the two governments." Def.'s Statement of Facts ¶ 28. *Compare* Pl.'s Statement of Facts ¶ 8 (asserting that Customs never responded to Essex's August 23, 2000 letter) *with* Pl.'s Response to Def.'s Statement of Facts ¶ 28 (acknowledging Customs' August 29, 2000 phone message).

Meanwhile, Customs had been taking steps to ascertain the authenticity of the Certificate of Origin. Because the Certificate lacked the secret marks then being used by Mongolian officials to identify legitimate Certificates of Origin from that country, Customs Headquarters faxed the Certificate to the U.S. Customs Attaché office in Beijing, China for verification. *See* Def.'s Statement of Facts ¶¶ 25–26; Pl.'s Response to Def.'s Statement of Facts ¶¶ 25–26.

On September 22, 2000, Customs Headquarters received a two-page fax from Mongolian Customs concerning the results of its investigation. Mongolian Customs reported that "No records are found that 'Mongol Jindu' company cleared 43506 pieces of goods for export with the certificate of origin MNUS 1917—A0002400." Mongolian Customs also reported on the results of its investigations of two other unrelated Certificates of Origin, authenticating both. *See* Thomas Decl. ¶ 9, Exhs. B, C; Def.'s Statement of Facts ¶ 29; Pl.'s Response to Def.'s Statement of Facts ¶ 29.

Based on the information supplied by the Mongolian authorities, Customs determined that the Certificate of Origin provided by Essex was not valid. Customs concluded that, by submitting an invalid Certificate, Essex had misrepresented the country of origin of the merchandise at issue, so that the merchandise was not entitled to admission into U.S.

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[6] It is not entirely clear precisely when Essex shipped the merchandise to Wal-Mart. However, Essex's counsel represented in the course of oral argument that the shipment date was probably August 16 or 17, 2000. Tr. at 66. *See also* Tr. at 26, 61.

commerce and should be redelivered into Customs' custody. *See* Def.'s Statement of Facts ¶ 31; Pl.'s Response to Def.'s Statement of Facts ¶ 31.

On September 25, 2000, Custom issued a second Customs Form 4647 Notice to Mark and/or Notice to Deliver (the "Amended Notice to Redeliver" or "Amended Notice"), which indicated in Block 10 that it was "*(Amended 9/25/00)*." Like the Initial Notice to Redeliver, Block 9 of the Amended Notice did not specify a particular statute or regulation violated. Instead, "Other, Namely" was again checked, with the same notation: "Certificate of origin for Mongolia." Block 14 ("Action Required of Importer") instructed Essex that the "Merchandise must be redelivered to Customs within 30 days from the date of this notice or other time specified," and Block 15 further explained:

> Merchandise must be redelivered into Customs Custody. Per Mongolian Customs letter dated 9/22/00, "No records are found that 'Mongol Jindu' company cleared 43506 pieces of goods for export with the certificate of origin MNUS 1917 A0002400.["]

Pl.'s Statement of Facts ¶ 9, Exh. F. *See also* Def.'s Response to Pl.'s Statement of Facts ¶ 9; Def.'s Statement of Facts ¶¶ 32–33; Pl.'s Response to Def.'s Statement of Facts ¶¶ 32–33.

The weeks and months that followed were punctuated with frequent communications between Essex's representatives and Customs, as Essex sought to resolve Customs' concerns. Essex even dispatched representatives from its Hong Kong office to Ulaanbataar, and charged them with verifying the validity of the Certificate of Origin. The Essex personnel spent several weeks attempting to navigate the local bureaucracy, working with the Mongolian authorities and getting a "crash course" in the finer points of business entertaining "Mongolian style." *See* Pl.'s Statement of Facts ¶¶ 12–13; Def.'s Response to Pl.'s Statement of Facts ¶¶ 12–13; Affirmation [of Maria E. Celis] in Opposition to Defendant's Cross-Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment ("Celis Aff.") ¶ 10; Tr. at 23, 37, 67–70.

In the meantime, in phone conversations with Essex's counsel, Customs reiterated that the Certificate of Origin was invalid and that redelivery of the merchandise was required. Essex's counsel asserted that there must have been a mistake, and several times requested extensions of the deadline for redelivery, to try to clear things up with the Mongolian government. *See* Def.'s Statement of Facts ¶ 35; Pl.'s Response to Def.'s Statement of Facts ¶ 35.

Specifically, in phone conversations on October 16 and 17, 2000, Essex's counsel discussed the bases for the demand for redelivery with a Customs official, who confirmed that Customs Headquarters had verified that the Certificate of Origin was not authentic. By letter dated October 17, 2000, Essex's counsel provided Customs with certain documents related to the imported merchandise (*i.e.*, a bill of lading, a packing list, and an invoice), as evidence that the goods were of Mongolian origin. Noting that "ample time still remains on the special conditional release period for textile and apparel articles," Essex's counsel

asked Customs to submit the Certificate of Origin for reverification and to withhold action on the Notice to Redeliver until the reverification process was complete. *See* Def.'s Statement of Facts ¶¶ 37–39; Pl.'s Response to Def.'s Statement of Facts ¶¶ 37–39; Celis Aff., Exh. B.

Honoring Essex's request, Customs forwarded the Certificate of Origin to the Customs Attaché in Beijing for reverification. By letter to Customs dated October 25, 2000, Essex's counsel confirmed that Customs had granted a 15-day extension of the original (October 25, 2000) deadline for redelivery. Appended to that October 25 letter was one of the fruits of the labors of Essex's emissaries to Ulaanbataar: a letter dated October 24, 2000, and captioned "Re: Form A No. MN US1917 A0002400," on what appears to be the letterhead of the Mongolian Chamber of Commerce and Industry—the entity which issues Mongolian Certificates of Origin. The MCCI letter was addressed "To Whom It May Concern," and purported to "certify that the above form [the Certificate of Origin specified in the caption] is legitimate and issued by our authorities." However, there was no copy of the Certificate of Origin attached to the MCCI letter. Moreover, the MCCI letter did not identify Mongol Jindu (or any other entity) as the company to which the Certificate of Origin had been issued; nor did it identify or quantify the goods which were the subject of the Certificate. *See* Celis Aff., Exh. C; Def.'s Statement of Facts ¶¶ 41–43; Pl.'s Response to Def.'s Statement of Facts ¶¶ 41–43; Pl.'s Statement of Facts ¶ 12, Exh. G; Def.'s Response to Pl.'s Statement of Facts ¶ 12.

On October 26, 2000, Customs again spoke with counsel for Essex, and extended the deadline for redelivery to November 25, 2000, or until Customs Headquarters completed reverification of the authenticity of the Certificate of Origin. The following day, Customs received confirmation from Mongolian Customs and the MCCI—through the Customs Attaché in Beijing and the U.S. Embassy in Mongolia—that the Certificate of Origin was false. The Mongolian government confirmed that Mongol Jindu did not export the merchandise at issue, and advised that, in fact, Mongol Jindu had made only two exports, totaling 25,000 pieces. The Mongolian government also detailed its suspicions that the Certificate of Origin presented by Essex had been previously lost, stolen or forged. That same day—October 27, 2000—a Customs official informed Essex by phone that, because the reverification had been completed and the Certificate had again been found invalid, redelivery of the merchandise was required on or before November 25, 2000. *See* Def.'s Statement of Facts ¶¶ 44–46, 48; Pl.'s Response to Def.'s Statement of Facts ¶¶ 44–46, 48. *See also* n.24, *infra*.

In a November 17, 2000 call to Customs Headquarters, counsel for Essex notified Customs that Essex had received a letter from the Mongolian Customs Administration, authenticating the Certificate of Origin. However, due to concerns about the potential for fraud, U.S. Customs and Mongolian authorities have agreed—as a matter of policy—that all communications concerning the authenticity of Mongolian Certificates

of Origin must be exclusively between government offices. Customs Headquarters therefore advised Essex's counsel that any such letter from Mongolian Customs would have to be delivered government-to-government, through official diplomatic channels. *See* Def.'s Statement of Facts ¶¶ 49–50; Pl.'s Response to Def.'s Statement of Facts ¶¶ 49–50.

Essex's counsel again contacted Customs Headquarters on November 20, 2000, and was informed that the letter from Mongolian Customs had not been received. The next day, Essex's counsel called Headquarters once more. Customs again reiterated that all communication must be government-to-government, and informed counsel that any letter transmitted through counsel would have to be verified for authenticity. *See* Def.'s Statement of Facts ¶¶ 51–54; Pl.'s Response to Def.'s Statement of Facts ¶¶ 51–54.

On or about November 22, 2000, Essex wrote to Customs authorities in California, stating that it had obtained a letter of verification from Mongolian Customs, and asking that Customs withhold enforcement of the demand for redelivery pending Customs' "imminent receipt" of the Mongolian Customs letter through normal diplomatic channels. The letter obtained by Essex—on what appeared to be Mongolian Customs' letterhead, dated November 14, 2000 and addressed to a U.S. Customs official—purported to certify the validity of the Certificate of Origin. However, Customs never received the November 14, 2000 letter through official channels. *See* Pl.'s Statement of Facts ¶ 13, Exh. H; Def.'s Response to Pl.'s Statement of Facts ¶ 13; Def.'s Statement of Facts ¶¶ 55–57; Pl.'s Response to Def.'s Statement of Facts ¶¶ 55–57.

On November 23, 2000, Customs Headquarters received a one-page fax consisting of a fax coversheet (dated "23.11.00") seemingly transmitted by the Embassy of Mongolia in Washington, D.C., addressed to U.S. Customs and "cc'd" to counsel for Essex. The message on the coversheet stated, in part, that it was confirming "the authenticity of [the] certificate of origin" at issue. It also named the Mongol Jindu factory, and referred to the export of 43,605 garments to the United States. The message on the coversheet concluded with a statement that "[t]his confirmation is based on letter by Mongolian Customs on November 14, 2000." *See* Def.'s Statement of Facts ¶¶ 58, 61; Pl.'s Response to Def.'s Statement of Facts ¶¶ 58, 61; Thomas Decl., Exh. H.

However, there was no letter dated November 14, 2000 attached to the fax coversheet. Nor was there any indication how the Mongolian Embassy had become involved, or whether the Embassy was in possession of the November 14, 2000 letter and, if so, why. Further, the number shown for Customs on the fax coversheet was a phone number, not a fax number; thus, a fax sent to that number could not have gone through. Moreover, the Mongolian Embassy later confirmed that the Embassy in fact did not send the fax. *See* Def.'s Statement of Facts ¶¶ 59, 60, 62; Pl.'s Response to Def.'s Statement of Facts ¶¶ 59, 60, 62.

Essex contacted Customs Headquarters again on November 29, 2000, inquiring whether Customs' position had changed. Essex was advised

that Mongolian authorities had twice confirmed that the Certificate of Origin was not authentic, and that Customs would not seek verification a third time. *See* Def.'s Statement of Facts ¶ 63; Pl.'s Response to Def.'s Statement of Facts ¶ 63.

Because the merchandise had not been redelivered, Customs contacted Essex on December 7, 2000. Essex, in turn, advised that it had contacted Customs Headquarters concerning reverification. In the course of conversation, Essex's counsel advised Customs for the first time that the merchandise was no longer available for redelivery. *See* Def.'s Statement of Facts ¶ 64; Pl.'s Response to Def.'s Statement of Facts ¶ 64.

A week later, on December 14, 2000, Customs Headquarters received a fax from the U.S. Embassy in Mongolia, attaching a translation of a letter from Mongolian Customs. The letter from Mongolian Customs disavowed writing any letter to U.S. Customs dated November 14, 2000, and reiterated that Mongol Jindu had not exported merchandise under the Certificate of Origin in question. In the same letter, Mongolian Customs also responded to U.S. Customs' inquiries concerning the authenticity of two other Certificates of Origin in unrelated matters, advising that one Certificate was authentic and the other was not. *See* Def.'s Statement of Facts ¶ 65; Pl.'s Response to Def.'s Statement of Facts ¶ 65.

On December 20, 2000, Essex filed the protest which underlies this action, challenging the Amended Notice to Redeliver. Customs denied the protest on January 9, 2001, on the strength of the verifications conducted by the Mongolian government, which confirmed that the Certificate of Origin submitted by Essex was not valid. *See* Def.'s Statement of Facts ¶ 66; Pl.'s Response to Def.'s Statement of Facts ¶ 66; Conley Decl., Exh. 21. This action followed.

II. Standard of Review

Summary judgment is a favored procedural device "to secure the just, speedy and inexpensive determination of [an] action." *Celotex Corp. v. Catrett,* 477 U.S. 317, 327 (1986) (*quoting* Fed. R .Civ. P. 1); *Sweats Fashions, Inc. v. Pannill Knitting Co.,* 833 F.2d 1560, 1562 (Fed. Cir. 1987). Nevertheless, under USCIT Rule 56(c), summary judgment is appropriate only when "there is no genuine issue as to any material fact and * * * the moving party is entitled to * * * judgment as a matter of law." *See generally Celotex,* 477 U.S. at 322–23; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247–48 (1986); *Int'l Trading Co. v. United States,* 24 CIT 596, 599, 110 F. Supp. 2d 977, 981 (2000), *aff'd*, 281 F.3d 1268 (Fed. Cir. 2002). Summary judgment thus will not lie if a dispute about a material fact is "genuine," *i.e.*, if the evidence is such that a reasonable fact-finder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby,* 477 U.S. at 248.

It is also true, however, that there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a fact-finder to return a verdict for that party. *Id*. at 249 (citations omitted). In this respect, the standards for summary judgment and directed verdict mirror

one another. *Id.* at 250, 251–52. In short, "[t]he mere existence of a scintilla of evidence" is insufficient to defeat summary judgment. *Id.* at 252. If the nonmoving party's evidence is "merely colorable," or is "not significantly probative," summary judgment may be granted. *Id*. at 249–50 (citations omitted).

As both parties here note, there is no genuine dispute as to any material fact in this case; and, as discussed in greater detail below, the sole remaining issues are questions of law—specifically, the timeliness, and the legal sufficiency, of Customs' Amended Notice to Redeliver. *See generally* Pl.'s Brief at 9; Pl.'s Reply Brief at 6–7; Def.'s Brief at 11–12. Accordingly, the matter is ripe for summary judgment.

III. ANALYSIS

As a preliminary matter, Essex contends that the Amended Notice to Redeliver was untimely, and is therefore "illegal, null and void." *See* Pl.'s Brief at 1, 9, 20–22; Pl.'s Reply Brief at 3, 7–8, 20. But Essex's principal argument is that the Amended Notice is legally defective because it assertedly does not identify a violation of "any law or regulation governing admission of merchandise into the United States, nor [does] it assert any other legally cognizable basis for redelivery."[7] *See* Pl.'s Brief at 1, 9, 10–20; Pl.'s Reply Brief at 1–3, 7–20. Essex's arguments are addressed in turn below.

A. TIMELINESS OF AMENDED NOTICE TO REDELIVER

Under Customs regulations, imported goods generally are subject to recall by Customs within 30 days following their release, under a 30-day "conditional release" period established in 19 C.F.R. § 113.62(d). However, under another regulation—19 C.F.R. § 141.113(b)—textiles and

[7] Essex has recast the "adequacy of notice" issue numerous times over the course of this litigation. A number of its alternative formulations are quite expansive, and could be read to raise other, more substantive issues. *See*, *e.g.*, Pl.'s Brief at 15 (asserting that "[t]he question presented * * * is whether the [Amended] Notice to Redeliver was issued upon a legally proper basis and upon legally required procedures"); Tr. at 3 (asserting that the issue is whether the [Amended] Notice to Redeliver "exclude[d] [Essex's] goods from the United States on legitimate grounds"), 7–8 (asserting that "the question is * * * would any alleged irregularities in the Mongolian Certificate of Origin be a sufficient ground for the exclusion of [Essex's] merchandise? Would it violate a law or regulation?"), 114 (asserting that the issue is "whether [the Amended Notice to Redeliver] is [a] valid decision, based on valid grounds"), 149 (framing issue as "whether that Government * * * decision [demanding redelivery] is legitimate"), 164–65 (asserting that "what matters * * * is really the country of origin of the product. Was the country of origin of the product correctly stated as Mongolia?").

Significantly, the issue in this case is *not* the correctness of Customs' decision in issuing the Amended Notice to Redeliver. Thus, whether or not Customs correctly determined that the Certificate of Origin misrepresented the imported merchandise's country of origin, and whether or not the merchandise was in fact of Mongolian origin, are not at issue here. *See* Pl.'s Brief at 16 (notice need not "prove the sufficiency of the reason claimed"); Def.'s Brief at 2, 24; Def.'s Reply Brief at 1–2; Tr. at 76–77, 100, 140. Nor is the issue the reasonableness of Customs' heavy reliance on Mongolian Certificates of Origin, or whether Customs was receptive in this case to other evidence as proof of country of origin. *See* Tr. at 86–87, 99–100. *See also* n.25, *infra*. Various other issues raised in Essex's papers are similarly off-point.

When pressed at oral argument (*see*, *e.g.*, Tr. at 147, 175–77), counsel for both parties agreed that the narrow issue presented here is the formal adequacy of the Amended Notice to Redeliver. *See, e.g.,* Tr. at 77 (counsel for Essex states that "[T]he issue before the Court is the adequacy of the Redelivery Notice"), 78 (counsel for Government frames issue as "[w]hether the notice was legally adequate * * * [and] did it direct the Plaintiff's attention to the country of origin not being validly represented"), 115 (counsel for Essex indicates that issue is "the adequacy of the notice. Did the notice adequately tell [Essex] that the Government had determined [it] had violated a specific law, or a specific regulation?"), 140 (counsel for Essex acknowledges that limited issue is whether a reasonable importer would have been on notice of Customs' country of origin concerns), 176–78 (counsel for Essex acknowledges that narrow issue of adequacy of notice—"whether the Government * * * stated adequately the reasons for the action it took"—is the only jurisdictionally-preserved point). *See generally* Def.'s Brief at 1 (identifying issue as "whether Essex had reasonable notice under the surrounding circumstances of Customs' reason for demanding redeliver"), 9 (framing issue as "[u]nder the surrounding circumstances, was * * * [the] Notice to Redeliver legally sufficient because it put a reasonable importer on notice that Customs' demand for redelivery originated from a determination that the * * * Certificate of Origin * * * misrepresented the country of origin * * * ?"); Def.'s Reply Brief at 1–2 (essentially the same).

textile products are subject to a special extended conditional release period of 180 days for the purpose of investigating country of origin:

> *For purposes of determining whether the country of origin of textiles and textile products * * * has been accurately represented to Customs, the release from Customs custody of any such textile or textile product shall be deemed conditional during the 180-day period following the date of release.* If the port director finds during the conditional release period that a textile or textile product is not entitled to admission into the commerce of the United States because the country of origin of the textile or textile product was not accurately represented to Customs, he shall promptly demand its return * * *.

19 C.F.R. § 141.113(b) (2000) (emphases added).[8]

Essex contends that the applicable conditional release period in this case was 30 days, not 180 days. According to Essex, the 180-day period set forth in 19 C.F.R. § 141.113(b) applies only if Customs first affirmatively "*makes a determination* that the [textile goods'] country of origin declared by the importer is incorrect." Pl.'s Reply Brief at 7.[9] Arguing that Customs in this case failed to properly challenge the asserted country of origin within 30 days of July 31, 2000 (the date of the merchandise's release from Customs' custody), Essex concludes that the Amended Notice to Redeliver was untimely. *See generally* Pl.'s Brief at 20–22; Pl.'s Reply Brief at 7–8, 10, 20.

Essex's timeliness argument is premised on a fundamental misreading of § 141.113(b). By its terms, that regulation applies to all imported textiles and textile products, and automatically extends the applicable conditional release period to 180 days for purposes of country of origin determinations. Essex has pointed to nothing which suggests that Customs must take any action to trigger the applicability of the 180-day period; certainly nothing on the face of the regulation suggests that any such action is required.

Essex's reliance on *United States v. So's USA Co.,* 23 CIT 605, 611 (1999), is misplaced. Essex cites that case as authority for the proposition that "a notice, regulatory or otherwise, is essential to the establishment or extension of a conditional release period"; that the period ends once the importer responds as requested by Customs in the notice; and that a demand for redelivery is invalid if made more than 30 days after the end of the conditional release period. Pl.'s Brief at 21–22. But, as the Government notes, *So's USA* involved face cream, not textiles; and, as the court in that case observed, "there was no finite regulatory conditional release period established" for the entry there at issue. Def.'s Brief at 27 (*quoting* 23 CIT at 610).

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[8] For purposes other than country of origin issues, even textiles and textile products are subject only to the 30-day conditional release period established in 19 C.F.R. § 113.62(d). *See* 59 Fed. Reg. 61,798 (Dec. 2, 1994) (noting that extended 180-day conditional release period is not applicable "to issues of classification, valuation or other issues of admissibility not related to a transshipment violation").

[9] *See also* Pl.'s Reply Brief at 10 (asserting that "a mere 'inquiry' concerning country of origin is not sufficient to trigger the 180-day extended conditional release period"), 15 (asserting that the 180-day extended conditional release period "is triggered only when the port director * * * makes a finding concerning * * * country or origin, and determines that the good is not admissible into the United States"); Tr. at 48 (Essex's counsel argues that "in order to invoke the hundred and eighty day period, the Port Director of Customs needs to make a specific finding.").

In this case, the situation is quite different. In this case, the "finite regulatory conditional release period" was reflected in the regulations themselves. Anytime textiles or textile products are imported, § 141.113(b) comes into force. Thus, for purposes of reviewing country of origin, the merchandise in this case was automatically subject to the special 180-day conditional release period under § 141.113(b)—*not* the general 30-day conditional release period under § 113.62(d); and Essex was given "deemed" notice of the 180-day conditional release period, as a matter of law.[10]

Indeed, quite apart from its *deemed* notice, Essex's dealings with Customs evidence its *actual, objective* awareness of the applicability and operation of the 180-day period. In an October 17, 2000 letter to U.S. Customs, Essex's counsel acknowledged that "ample time" then still remained on "the special conditional release period for textile and apparel articles." *See* Celis Aff., Exh. B. The phrase "special conditional release period" can only be a reference to 19 C.F.R. § 141.113(b).

Here, the 180-day conditional release period established in § 141.113(b) began on July 31, 2000 (the day the goods were entered and then released). Customs therefore had until January 27, 2001 to determine whether Essex had accurately represented the country of origin, and whether the merchandise at issue should be admitted into U.S. commerce—and another 30 days after that to issue a Notice to Redeliver. *See* 19 C.F.R. § 113.62(d) (demand for redelivery must be made no later than 30 days after end of conditional release period).[11] Thus, both Notices to Redeliver—the first, issued on August 16, 2000, and the second (the Amended Notice to Redeliver), issued on September 25, 2000—were is-

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[10] This conclusion, based on the plain language of 19 C.F.R. § 141.113(b), is reinforced by the history of that regulation. As the Government notes, the reading urged by Essex would severely restrict the time available to Customs to verify the country of origin of textile products. It was precisely because of the problems inherent in completing such verifications within 30 days that the regulations were amended (effective 1995) to provide for the 180-day conditional release period that now governs the issue of the country of origin of imports of textiles and textile products. *See* Def.'s Brief at 20–21 (*citing*, *inter alia*, T.D. 94–95, 28 Cust. B. & Dec. No. 50 (Oct. 24, 1994)). *See also* 59 Fed. Reg. 61,798 (Dec. 2, 1994) (notice of promulgation of final rule, detailing rationale for amending Customs regulations to establish special extended 180-day conditional release period for entries of textiles and textile products, for sole purpose of facilitating determination of whether country of origin has been accurately represented) (reprinting T.D. 94–95).

Customs has consistently interpreted 19 C.F.R. § 141.113(b), together with 19 C.F.R. § 12.130(g), in the same way in which those regulations were applied in the case at bar. *See*, *e.g.*, HQ 962748 (Apr. 24, 2000); HQ 959871 (May 10, 1999). As the Government observes, such prior rulings are entitled to *Skidmore* deference. *See* Def.'s Brief at 22–23 (*citing United States v. Mead Corp.,* 533 U.S. 218 (2001); *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944)).

[11] *See also* 59 Fed. Reg. 61,798 (Dec. 2, 1994) (noting that amendment of regulations to establish 180-day conditional release period "will permit Customs to issue Notices of Redelivery to importers of textiles and textile products *within 30 days after the end of the [180-day] conditional release period* if investigation or information reveals [that country of origin has been misrepresented].") (emphasis added); Def.'s Brief at 20 n.10 (noting that "a demand for redelivery of textile products under § 113.62 presumably could be made within the 30-day period following the 180-day 'deemed' conditional release period specified by § 141.113(b)"), 26 (noting that § 113.62(d) provides that a redelivery demand may be made "30 days after the end of the conditional release period"; thus, "[s]ince the release of a textile product is deemed conditional for 180 days pursuant to § 141.113(b), Customs' demand for redelivery is timely where made within 30 days following January 27, 2001.").

sued well within the prescribed regulatory time frame.[12] In short, there can be no claim that the Amended Notice to Redeliver was untimely.[13]

B. LEGAL SUFFICIENCY OF AMENDED NOTICE TO REDELIVER

Essex's case on the adequacy of notice fares no better than its case on timeliness. Customs here sought redelivery under 19 C.F.R. § 141.113(b),[14] based on its determination that the Certificate of Origin submitted by Essex misrepresented the country of origin of the merchandise at issue. *See* Def.'s Brief at 11, 19–22, 26; Conley Decl. ¶¶ 21, 35, 40, 43. Essex acknowledges that Customs was entitled to require redelivery if it determined that the country of origin was not accurately rep-

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[12] Essex variously claims that, with its submission of a sample and the Certificate of Origin, Customs' Initial Notice to Redeliver was "canceled," or "rescinded," or "withdrawn." *See*, *e.g.*, Pl.'s Response to Def.'s Statement of Facts ¶¶ 14, 24; Celis Aff. ¶ 5; Pl.'s Brief at 4–5, 22. The Government takes strong exception to that claim. *See*, *e.g.*, Def.'s Statement of Facts ¶¶ 20 n.3, 21–23, 28; Def.'s Response to Pl.'s Statement of Facts ¶¶ 5, 8; Conley Decl. ¶¶ 16, 18–19, 38; Def.'s Brief at 3–4; Def.'s Reply Brief at 9–10.

Although it is somewhat unclear, it appears that Essex's claim is a defensive maneuver, premised on the assumption that the applicable conditional release period was 30 days, and that the Amended Notice was therefore untimely. Essex's claim of "cancellation" is thus apparently intended to foreclose any potential argument that the Initial Notice extended the conditional release period. *See* Pl.'s Brief at 22. However, the entire construct hinges on Essex's assertion that the conditional release period is governed by § 113.62(d). As discussed above, the applicable conditional release period is in fact the 180-day period set forth in § 141.113(b), not the 30-day period set forth in § 113.62(d). Essex's "cancellation" argument thus seems to be irrelevant.

The Government suggests that Essex may be hinting at a more far-reaching argument—specifically, that Essex may be asserting that, whatever the duration of the conditional release period, Customs granted an unconditional release of the goods when Essex supplied the sample and the Certificate of Origin. *See generally* Def.'s Reply Brief at 9. However, Essex's counsel has disclaimed any such theory. *See* Tr. at 60 (counsel for Essex disavowing any suggestion that the August 22, 2000 phone conversation resulted in an unconditional release). *See also* Pl.'s Brief at 5 (asserting that purpose of August 22, 2000 phone call to Customs was to "confirm[] that the requested certificate and sample had been provided, and that Essex was no longer under an obligation to redeliver the goods"); Tr. at 26 (counsel for Essex asserts only that, after providing sample and Certificate of Origin, Essex was "no longer under an obligation to re-deliver under that first notice"), 61 (counsel for Essex explains, "[W]hat I wanted to confirm with [Customs] was, 'Okay, we've given you the certificate and the sample. This means we don't have to re-deliver these goods thirty days from August 16th.' And [the representative of Customs] said, 'That's right.' That's all I wanted to know, at that time.").

Indeed, as the Government observes, it would be ludicrous to claim that Essex's submission of a (then unverified) Certificate of Origin and sample forever barred Customs from demanding redelivery. *See* Def.'s Brief at 3–4; Def.'s Reply Brief at 9–10.

[13] It is worth noting that, although Essex has here argued strenuously that the merchandise at issue was subject to a conditional release period of 30 days rather than 180 days, Essex was no more able to redeliver the merchandise at 30 days than it was at 180 days. As Essex has candidly admitted, the goods were shipped to Wal-Mart in mid-August 2000—only a little more than two weeks after the conditional release period began to run on July 31, 2001. Tr. at 66. *See also* Tr. at 26, 61.

[14] As discussed in section III.A immediately above, Essex asserts that this case is governed by 19 C.F.R. § 113.62(d), not § 141.113(b). *See*, *e.g.*, Pl.'s Brief at 20–22; Pl.'s Reply Brief at 20. Interestingly, scrutiny of the evidentiary record reveals that none of the parties' many communications prior to Essex's protest mentioned either regulation (although counsel for *Essex* alluded to *§ 141.113(b)* in its October 17, 2000 letter). In any event, it seems self-evident that the Government's word as to the regulatory basis for its own actions should be accepted at face value (at least absent any circumstances, not present here, which might cast doubt on the Government's statements).

Moreover, on its face, § 141.113(b) is more clearly relevant. Under § 113.62(d), Customs is authorized to require the redelivery of merchandise which has been conditionally released from its custody, if the merchandise:

> (1) Fails to comply with the laws or regulations governing admission into the United States;
> (2) Must be examined, inspected or appraised * * *; or
> (3) Must be marked with the country of origin * * *.

19 C.F.R. § 113.62(d) (2000). Thus, while § 141.113(b) ("'Textiles and textile products") deals specifically and exclusively with the recall of textiles and textile products, § 113.62(d) ("Agreement to Redeliver Merchandise") is a general regulation concerning the redelivery of goods under the basic importation and entry bond conditions.

In any event, the parties' positions on the applicability of § 141.113(b) *versus* § 113.62(d) appear to be largely driven by their implications for the duration of the applicable conditional release period—180 days under § 141.113(b) *versus* 30 days under § 113.62(d). *See generally* Pl.'s Brief at 20–22; Pl.'s Reply Brief at 20; Def.'s Brief at 26–28; Def.'s Reply Brief at 8. The parties' arguments on the applicability of one regulation or the other therefore relate primarily to (and have greater significance for) the issue of the timeliness of notice (an issue resolved in section III.A, above), and have relatively little, if any, direct bearing on the issue here—the adequacy of notice.

Finally, it is noteworthy that, notwithstanding certain seemingly unequivocal assertions, the Government has not entirely divorced its case from § 113.62(d). For example, in arguing the timeliness issue, the Government's briefs emphasize the interplay of §§ 141.113(b) and 113.62(d) (which, read together, provide for a 180-day "conditional release" period for the investigation of country of origin claims, with any demand for redelivery to be made within "30 days after the end of [that] conditional release period"). *See* Def.'s Brief at 20 n.10, 26 (*quoting* 19 C.F.R. § 113.62(d) (2000)). It thus seems clear that the two regulations are not mutually exclusive, but instead actually complement one another, and should be read *in pari materia*.

resented. Pl.'s Brief at 11. But Essex maintains that the Amended Notice to Redeliver failed to adequately apprise Essex of the bases for Customs' demand, and was therefore legally defective.[15] *See generally* Pl.'s Brief at 10–19; Pl.'s Reply Brief at 9–20.

To be sure, the Amended Notice to Redeliver was not a model of clarity. However, perfection is not the governing legal standard. As the Government observed in its opening brief, "[w]hile many variants of wording could have been used by Customs, some perhaps better than others, the issue is not what wording is *ideal*, but what wording is *legally sufficient* to put a *reasonable importer* on notice." Def.'s Brief at 15 (emphases added). As the Supreme Court has held, due process in a situation such as this requires simply "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (citations omitted).[16] Thus, Essex here was entitled to notice sufficient, under all the circumstances, to apprise a reasonable importer of the basis for Customs' redelivery demand.

Measured against that standard, the Amended Notice to Redeliver clearly passes muster. Based on the content of the Amended Notice itself, and particularly in light of the context surrounding that Notice, a reasonable importer would have had adequate notice of the basis for Customs' demand.

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[15] In connection with its "adequacy of notice" claim, Essex's briefs advance a number of other arguments which bear, at best, a tangential relationship to the matters properly at issue in this action.

Essex charges, for example, that Customs in this case failed to adhere to its own "wellpublicized procedure for verifying country of origin statements * * *, [Textile Book Transmittal] *TBT–98–018,* a published directive entitled *Guidelines for Entry Document Review to Substantiate Country of Origin for Textiles and Textile Products" (see* Pl.'s Reply Brief at 2, Exh. A; *see also id.* at 11–12, 18; Tr. at 28, 30, 132–33, 137), and that no law, regulation or directive requires the submission of a Certificate of Origin in a case such as this. Essex argues that it therefore follows that "irregularities" in the Certificate of Origin at issue cannot lawfully serve as the basis for a demand for redelivery. *See* Pl.'s Brief at 4 n.3, 13, 19–20; Pl.'s Reply Brief at 2, 7, 14, 16–19; Tr. at 6–8.

However, the premise of Essex's argument is wrong. Where, as here, Customs "is unable to determine the country of origin of an article from the information set forth in the declaration," Customs is entitled to require further documentation, and the importer "*shall* submit such additional documentation as requested." 19 C.F.R. § 12.130(g) (2000) (emphasis added). Customs officials thus were clearly within their rights in requiring Essex to submit further documentation to establish the country of origin of the merchandise at issue.

Indeed, TBT 98–018 amplifies § 12.130(g), by identifying the types of documents that Customs may wish to seek, which "include, *but are not limited to*, records relative to the raw materials, cutting, production, subcontract, outprocessing, *export*, and letter of credit-proof of payment." Pl.'s Reply Brief, Exh. A (emphases added). A Mongolian Certificate of Origin—issued by the Mongolian Chamber of Commerce and Industry, and registered and cleared by Mongolian Customs—is plainly an "export" document, and thus falls squarely within the documents contemplated by TBT 98–018. But, even if it did not, the very language of TBT 98–018—"include, but are not limited to"—makes it clear that the list of documents in TBT 98–018 is not exclusive.

Customs' right to require the submission of additional documentation to substantiate country of origin claims disposes of another Essex argument—specifically, Essex's claim that the rulemaking requirements of the Administrative Procedures Act barred Customs from requiring Essex to submit a Certificate of Origin. *See* Pl.'s Reply Brief at 17–18. Nothing requires Customs to promulgate a regulation devoted specifically to the subject of Mongolian Certificates of Origin. As discussed immediately above, rulemaking has already provided Customs with the necessary authority, under 19 C.F.R. § 12.130(g).

[16] Contrary to Essex's claim, the adequacy of notice is not to be judged based solely on the four corners of the document. *Cf.* Pl.'s Brief at 9 (arguing that "[t]he sole issue to be determined * * * is whether the * * * Notice to Redeliver is *facially* adequate") (emphasis added); Tr. at 124–25 (Essex's counsel asserts that "you have to judge the adequacy of the notice [on] the four corners of the notice," and that "the notice has to stand on its own."). Instead, as *Mullane* notes, the determination should be made in the context of "all the circumstances" of the particular case at hand. *See Mullane,* 339 U.S. at 314. *See generally* Def.'s Brief at 17–18 (discussing cases where adequacy of notice was determined based on consideration of information and circumstances in addition to the content of the official notice document).

It is equally clear that the adequacy of notice is to be measured against an objective standard (except, of course, where actual notice is proven). Thus, neither party here disputes that the relevant standard is that of the "reasonable importer." *See*, *e.g.*, Pl.'s Reply Brief at 14, 15 (referring to, respectively, "[a] reasonable importer" and "a reasonable importer"); Def.'s Brief at 9, 11 (referring, in both instances, to "a reasonable importer").

1. THE CONTENT OF THE AMENDED NOTICE TO REDELIVER

In a phrase, Essex claims that the Amended Notice to Redeliver "[f]ailed to [s]tate the [r]easons for the [e]xclusion of [its] [g]oods." Pl.'s Brief at 10. Essex argues that an importer "cannot be required to guess" at the basis for Customs' actions. Pl.'s Reply Brief at 8. True enough. But, in this case, there was no need to guess. A reasonable importer giving a fair reading to the Amended Notice—together with the Certificate of Origin and other entry papers filed by the importer—could not fail to grasp the basic thrust of Customs' concern: the merchandise's country of origin, and the potential for a transshipment violation.

On its face, the Amended Notice refers to, and thus incorporates, the entry documents, which (as Essex obviously knew) pertain to textiles said to have been manufactured in Mongolia. In Block 9 of the Amended Notice, captioned "Statutes/Regulation(s) Violated," the box "Other, Namely" was checked and the words "Certificate of origin for Mongolia" were typed in.[17] In Block 14, "Action Required of Importer," another box was checked, with a notation that the subject goods were to be redelivered to Customs within 30 days. Finally, in Block 15, "Remarks/Instructions/Other Action Required of Importer," Customs noted: "Merchandise must be redelivered into Customs Custody. Per Mongolian Customs letter dated 9/22/00, 'No records are found that "Mongol Jindu" company cleared 43506 pieces of goods for export with the certificate of origin MNUS 1917 A0002400.[']"

Reading the Amended Notice (which indicated that Mongolian Customs could not verify the clearance for export of the goods in question under the Certificate of Origin submitted by Essex) in conjunction with the Certificate of Origin that Essex itself submitted (which appeared to indicate, by Mongolian Customs' stamps and other markings, that Mongol Jindu *had* cleared the goods with Mongolian Customs), it is apparent that U.S. Customs demanded redelivery because—according to Mongolian Customs—the goods in question in fact were never registered or cleared for export by the Mongolian authorities;[18] hence, the Certificate

[17] Essex repeatedly complains that "no applicable regulations or statutes are cited" in the Amended Notice to Redeliver. *See*, *e.g.*, Pl.'s Brief at 18. Specifically, Essex criticizes the Notice for failing to make "reference to the laws or regulations which prescribe the determination of country of origin for textile and apparel articles (19 U.S.C. Section 3592; 19 C.F.R. Section 102.21), * * * [or] to * * * TBT 98–018." Pl.'s Reply Brief at 1–2, 15. According to Essex, if Customs had invoked those authorities, "then Essex might have been adequately apprised" of the basis for the demand for redelivery. Pl.'s Reply Brief at 11–12. *See also id.* at 19–20.

Clearly, it would have been far preferable had the Amended Notice to Redeliver cited a specific law or regulation. But the issue presented is not whether Customs could have done better, but—rather—whether Customs did enough. Essex concedes, as it must, that Customs is not required to quote "chapter and verse" of the law or regulation allegedly violated. *See* Tr. at 12, 14–15 (counsel concedes that a narrative explanation of violation would satisfy constitutional requirements for notice). As discussed above, due process required only notice reasonably calculated, under all the circumstances, to apprise Essex of the basis for Customs' action.

[18] Essex attacks the U.S.-Mongolian arrangement concerning Certificates of Origin, asserting that it is unclear whether the arrangement is consistent with U.S. laws and regulations governing the determination of the country of origin of textile and apparel products. *See*, *e.g.*, Pl.'s Reply Brief at 2, 7–8, 10–11, 13, 18.

As the Government notes, however, nothing in the relevant statutes and regulations appears to bar or otherwise conflict with the U.S.–Mongolian arrangement. *See* Def.'s Reply Brief at 7–8. Certainly Essex has pointed to nothing. Indeed, as the Government observes, the arrangement relates not to the substantive rules of country of origin determinations but, rather, to the mechanics of how country of origin claims are to be verified. *See* Def.'s Reply Brief at 5–6; *see also id.* at 6 n.4 (emphasizing that the U.S.-Mongolia arrangement bears "only on the accuracy of claims that goods were wholly manufactured in Mongolia, and has nothing whatsoever to do with altering the principles for determining the country of origin"). Thus, "[i]f anything, the arrangement with Mongolia compliments [sic] [U.S. law], by preventing fraud." Def.'s Reply Brief at 7–8. *See also* n.4, *supra*.

(continued)

of Origin was invalid, and misrepresented the country of origin of the merchandise at issue. As the Government put it, "since the word 'origin' *is* included on the notice, i.e., 'Certificate of Origin,' *and* the reason given for redelivery is, in effect, that the Mongolian government could not verify the certificate because no such goods were cleared for export by Mongolian Customs, the only reasonable conclusion from this information, one that both [Essex and Customs] understood, is that misrepresentation of the *country of origin* was at issue."[19] Def.'s Reply Br. at 3.

Essex implies that it was misled by Customs' focus on the Certificate of Origin, and argues that "an issue concerning *country of origin* is distinct from an issue regarding [a *Certificate of Origin].*" Pl.'s Reply Brief at 15 (emphasis added). But that argument is strained, and artificially dissociates the matter (*i.e.*, the Certificate of Origin) from its function (*i.e.*, documenting the country of origin of imports).[20] As the Government queried: "What, in the mind of a reasonable importer, would the Certificate of Origin be for, if not to confirm country of origin * * * ?" Defendant's Brief at 16. Although he was repeatedly pressed in oral argument, counsel for Essex was at a loss to answer that question. *See*, *e.g.*, Tr. at 29, 43 (counsel was asked "[W]hy would [Customs] be concerned about the authenticity of the certificate [of origin] if they weren't concerned about the underlying [fact of the country of origin]?", 117 (coun-

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In any event, and more to the point, like a number of Essex's other arguments, the gravamen of this argument—the validity of the U.S.-Mongolian arrangement—is irrelevant to the instant case, which concerns only the timeliness and adequacy of Customs' notice to Essex.

[19] As discussed in note 14 above, Essex has maintained that redelivery in this case was demanded under 19 C.F.R. § 113.62(d), rather than § 141.113(b) (the regulation on which the Government relies). For purposes of analyzing the adequacy of notice, it makes little difference.

As noted above, under § 113.62(d), redelivery can be required for three reasons: (1) because the merchandise does not comply with "the laws or regulations governing admission into the United States"; (2) because Customs needs to examine, inspect or appraise the merchandise; or (3) because the merchandise must be marked with the country of origin. 19 C.F.R. § 113.62(d) (2000). Essex has never asserted that it believed that Customs' demand for redelivery was based on an issue of examination or marking. Indeed, Essex has expressly disavowed such a belief. *See* Pl.'s Brief at 12 (emphasizing that the Amended Notice "did not allege any need to examine, inspect or appraise the imported jackets * * *. [n]or did Customs allege any defect in the country of origin marking"); Pl.'s Reply Brief at 10 (essentially the same).

By definition, if—as Essex asserts it believed—Customs' demand for redelivery was governed by § 113.62(d), and if—as Essex concedes—Essex knew that the demand for redelivery was not based on an issue of examination or marking, the demand could only have been based on a finding of a violation of "the laws or regulations governing admission into the United States." 19 C.F.R. § 113.62(d) (2000). And, as explained immediately above, the very face of the Amended Notice to Redeliver would lead any reasonable importer, under the circumstances presented here, to conclude that the violation at issue concerned the merchandise's country of origin.

[20] The Government is justifiably skeptical of Essex's claims that it believed Customs' concern to be nothing more than a minor issue of "documentation." *See* Tr. at 130 (counsel for Essex states that he "understood that [Customs'] problem was a documentation requirement").

As the Government notes, it strains credulity to contend that an importer would devote so much time and energy over a matter of several months to a matter that they believed to be "legally meaningless." *See* Tr. at 90 (counsel for Government argues that Essex "can't be saying that this was legally meaningless * * * [T]hey were just doing all this stuff for two months, sending people over [to Mongolia], and * * * it was legally meaningless."), 152–53 (counsel for Government notes that he "just can't believe that two months' worth of discussions following this issuance of the [Amended Notice], just was over some meaningless document. Everyone knew what was going on here."). *See also* Tr. at 29, 30, 138 (counsel for Essex was asked whether Essex thought Customs wanted valid Certificate of Origin "just * * * for their files," whether Customs was "just going through some formal process," whether Customs' interest in valid Certificate of Origin was "just an empty formality," and whether Customs "just wanted to check a little box on some form that said, 'Yep, we've got [a valid Certificate of Origin.]' ").

sel was asked "What else could you possibly have thought this [concern with the certificate of origin] meant?").[21]

In short, on the face of the document alone, the Amended Notice to Redeliver constituted sufficient notice to a reasonable importer.[22]

2. THE CONTEXT OF THE AMENDED NOTICE TO REDELIVER

In addition to the content of the Amended Notice, the context surrounding its issuance also would have alerted a reasonable importer that the Certificate of Origin submitted to Customs misrepresented the country of origin.

Instructive here is *Lord & Taylor v. United States,* 26 CCPA 151 (1938), involving a challenge to the sufficiency of notice of a Tariff Commission investigation of "infants' wear." The plaintiff in that case claimed that the agency's use of the term "infants' wear" failed to alert it that the investigation would also address clothing for children between two and six years of age. The court held that notice, if sufficient "to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led"; thus, when "a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." 26 CCPA at 156–57 (citations omitted).

Assuming—for the sake of argument—that the Amended Notice, standing alone, was not sufficient to apprise a reasonable importer of the basis for the demand for redelivery, it nevertheless was certainly (in the parlance of *Lord & Taylor)* sufficient "to excite attention and put the [importer] on his guard and call for inquiry." Yet Essex never inquired as to the basis for Customs' action; Essex never sought any sort of clarifica-

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[21] In its opening brief, the Government asserts that "nowhere * * * does Essex allege that it was misled by Customs into thinking that the Notice of Redelivery was issued for *another* reason (a reason *other* than that the country of origin had been misrepresented)." *See* Def.'s Brief at 15. But, in its opening brief, Essex claims that "Customs repeatedly stated that the origin of the shipment has not been questioned." *See* Pl.'s Brief at 8.

At first blush, the difficulty of reconciling the quoted statements might appear to raise at least the spectre of a dispute of fact. However, neither party's assertion is supported by a reference to the evidentiary record. Thus, both statements may be dismissed as unsupported argument. Moreover, even if the assertions were considered to raise a dispute of fact, neither party has argued that this—or any other difference—constitutes a *genuine* dispute of *material* fact sufficient to defeat summary judgment. (To the contrary, both parties have affirmatively argued that the case is ripe for summary judgment. *See* Pl.'s Brief at 9; Def.'s Brief at 11–12; Pl.'s Reply Brief at 6–7.) In any event, the record is devoid of evidence on this point sufficient to enable Essex to survive a directed verdict. Accordingly, under the standards articulated by the Supreme Court and discussed in section II above, a trial would be pointless, and summary judgment is appropriate. *See Anderson v. Liberty Lobby,* 477 U.S. at 249–52.

[22] As the Government notes, it could also prevail in this action based on a theory of "mistake of law." *See generally* Def.'s Brief at 18–19. A mistake of law occurs where "the facts are known but their legal consequences are not known, or are believed to be different than they really are." *Prosegur, Inc. v. United States,* 25 CIT ____, ____, 140 F. Supp. 2d 1370, 1377 (2001) (citation omitted). *See also Executone Info. Sys. v. United States,* 96 F.3d 1383, 1386 (Fed. Cir. 1996).

Applying that theory to the facts of this case, it is clear that—by the time the Amended Form 4647 Notice to Redeliver issued—Essex realized that Customs had rejected the Certificate of Origin as invalid. In addition, Essex knew that the Amended Notice made no further mention of a sample (which is sometimes requested for examination for requisite marking of merchandise). Essex is properly chargeable with knowledge of the legal effects of those facts.

The only statute or regulation which refers to both Form 4647 and the word "origin" in the context of textiles (other than the correct marking of them) is 19 C.F.R. § 141.113(b)—the regulation establishing an extended conditional release period of 180 days for the sole purpose of verifying the accuracy of *country of origin* claims. Essex is thus chargeable with knowledge of the basis for Customs' demand for redelivery in this case.

tion.[23] In these circumstances, because Essex clearly had "sufficient information [from the Amended Notice] to lead [it]" to the basis for the demand for redelivery, Essex must "be deemed conversant" of the basis for the demand for redelivery. *See Lord & Taylor, supra*.

Indeed, in at least one communication with Essex's counsel, Customs *expressly* made the connection between the validity of the *Certificate* of Origin and the agency's underlying concern—*country* of origin. According to Essex's counsel, in a November 6, 2000 phone call, a Customs representative explained "that if the [Certificate of Origin] is false, then Customs becomes increasingly critical of *other* documents produced by the importer *for country of origin purposes*." Celis Aff. ¶ 13 (emphases added). That conversation should have left no room for doubt in the mind of a reasonable importer as to the basis for the demand for redelivery.

Essex's conduct and its correspondence with Customs indicate that it was in fact aware that the demand for redelivery concerned the country of origin of the merchandise at issue, and the absence of a Mongolian Customs' record of exportation. Not only did Essex understand the nature of the problem; it struggled in vain for several months to "cure" it, by submitting documents purportedly from Mongolian authorities in an effort to substantiate the validity of the Certificate of Origin, and even dispatching representatives of the company to Ulaanbaatar.[24] *See* Def.'s Brief at 16, 18; Celis Aff. ¶¶ 10, 11, 14; *id*., Exhs. C, D.

Also very telling are the discussions that Essex initiated with Customs, exploring the possibility of submitting merchandise production records (such as invoices for raw materials, cutting tickets, sewing

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[23] In its briefs, Essex has sought to portray itself as utterly baffled by Customs' demand—"completely in the dark." *See*, *e.g.*, Pl.'s Brief at 13. But that picture is at odds with Essex's course of conduct, and the communications between the parties. Conspicuously absent from the evidentiary record is any correspondence from Essex or its counsel questioning or seeking to clarify the basis for the demand for redelivery. *See*, *e.g.*, Def.'s Brief at 15. As the Government has observed, Essex showed no signs whatsoever of being perplexed. *See* Def.'s Reply Brief at 3.

Although he was repeatedly challenged in oral argument, counsel for Essex was at a loss to explain what Essex or its counsel (or any reasonable importer) might have believed to be the basis for the Amended Notice to Redeliver, if it was not country of origin concerns. *See*, *e.g.*, Tr. at 16–17 (counsel was asked "What is it that you thought the problem was? How were you or Essex misled?"), 19–20 (counsel was asked "What did you think was [Customs'] problem?"), 29–30 (counsel was asked "What did you think [Customs'] problem was?"), 116 (counsel was asked "What could you possibly have thought that [language in the Amended Notice to Redeliver] meant, other than that [Customs] had a problem with country of origin?"), 117–19 (counsel was asked "[W]hat could a reasonable importer have possibly thought?"), 121 (counsel was asked "What possibly could this [Amended Notice] otherwise have meant?"), 123 (counsel was asked "[I]f you didn't understand, if that wasn't adequate notice, * * * if you were confused, what did you think that it was? * * * What was the problem?"), 134 (counsel was asked "[I]f you didn't understand, or if a reasonable importer would have not understood from this [Amended Notice] that the problem was country of origin, what would a reasonable importer have believed to be the problem?"), 141 (counsel was asked "[W]hat did you believe to be the reason that [Customs was] requiring redelivery?").

[24] Essex seeks to strike from the record as hearsay an exhibit attached to two declarations submitted by the Government. *See* Pl.'s Reply Brief at 21–22. The exhibit in question is an e-mail message sent to the U.S. Customs Attaché in Beijing by an official at the U.S. Embassy in Mongolia. The message recounts an exchange between that official and a Mongolian official in which the Mongolian official advised that the Certificate of Origin which Essex eventually presented to U.S. Customs had been previously issued in Mongolia to a company other than Mongol Jindu and had then been reported missing under suspicious circumstances. *See* Thomas Decl. ¶ 13, Exh. F; Conley Decl. ¶ 41, Exh. 16.

Essex contends that the Government proffered the e-mail message "to prove the truth of the matter asserted, namely that the certificate of origin from Mongolia is false." Pl.'s Reply Brief at 22. To the contrary, the Government states that the message was submitted "not for the truth of the matters asserted, but to show what information was communicated to Customs officials and hence by those officials to plaintiff, in showing, *inter alia*, that Customs did not act arbitrarily or capriciously." Def.'s Reply Brief at 11. Because the e-mail message was not submitted to establish the truth of the matter asserted, it is not hearsay. Essex's request to strike the evidence is therefore denied.

Indeed, whether or not the Certificate of Origin is in fact false is irrelevant to this action. That fact would go only to the correctness of Customs' determination that Essex misrepresented the country of origin of the merchandise—an issue that is distinct from the question of the timeliness and adequacy of notice, which are the issues presented here.

sheets, time cards, salary payment records, and shipping records).[25] Because an importer submits production records as proof of country of origin, Essex's discussion of such records in this case is probative of whether a reasonable importer in its shoes would have appreciated the significance of Customs' challenge to the validity of its Certificate of Origin. *See generally* Def.'s Brief at 16–17; Def.'s Reply Brief at 4 (noting that Essex has characterized as "production records" certain documents submitted with its October 17, 2000 letter, and posing the question "Why would plaintiff volunteer what it considered as production records absent an understanding that the country of origin * * * was at issue?"). Essex's discussions with Customs concerning production records thus evidence its "state of mind"—its understanding of the relationship between, on the one hand, Customs' interest in authenticating the Certificate of Origin and, on the other, the basis for Customs' demand for redelivery (*i.e.*, the agency's determination that the Certificate of Origin was invalid and that Essex had misrepresented the country of origin).

But most telling of all is the October 17, 2000 letter from Essex's counsel to U.S. Customs (discussed in section III.A, above)—the proverbial "smoking gun" in this case. In that letter, Essex's counsel requested that Customs seek reverification of the Certificate of Origin. In addition, Essex's counsel asked that Customs defer any further action on the Notice to Redeliver pending a response from Mongolian authorities, observing that "ample time" then still remained on "the special conditional release period for textile and apparel articles." Celis Aff., Exh. B. The phrase "special conditional release period" can only be a reference to 19 C.F.R. § 141.113(b)—the regulation establishing an extended conditional release period for the sole purpose of verifying the accuracy of *country of origin* claims. *See* 59 Fed. Reg. 61,798 (Dec. 2, 1994). Essex's letter thus unequivocally evidences its awareness of the nature of Customs' underlying concern—the country of origin of the merchandise at issue.[26]

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[25] Essex asserts that, despite its "repeated offers," Customs never accorded it the opportunity to submit production records in lieu of a valid certificate of origin. Pl.'s Reply Brief at 12. In contrast, Customs maintains that it raised the matter, but Essex chose not to provide the records. *See* Thomas Decl. ¶¶ 14, 19; Conley Decl. ¶ 39. Whether or not production records were in fact ever offered to Customs is not material here. As discussed above, what *is* material, and highly probative, is that (by its own admission) Essex discussed providing such records to Customs—because the records would be relevant only to establishing country of origin. In short, Essex's admission that it considered the possibility of submitting production records belies its claim that it did not know the true nature of Customs' concern.

As an aside, it is also worth noting that the evidentiary record does not bear out Essex's claim that it made "repeated offers" which Customs rebuffed. The Government vehemently denies Essex's version of the facts on this point. *See, e.g.*, Def.'s Brief at 16–17, 24. And the only record evidence that even arguably lends support to Essex's assertions is the relatively conclusory statement in counsel's affirmation that "no opportunity was given for submission of documents verifying the country of origin * * *. Plaintiff even provided documents showing country of origin [referring to the several documents included in the October 17, 2000 letter] * * *, which were eventually disregarded and dismissed by Customs." Celis Aff. ¶ 19. Conspicuously absent from the record is any contemporaneous correspondence from Essex to Customs offering true "production records." *See* Tr. at 71–74, 86, 89, 112. *See also* Tr. at 94–95 (Government counsel notes that documents provided with October 17, 2000 letter were "not even a drop in the bucket"), 108–09 (Government counsel notes that, unlike documents supplied by Essex to date, true production records would be difficult to forge).

[26] The October 17, 2000 letter is the "smoking gun" not only on the issue of the adequacy of the Amended Notice to Redeliver, but on the issue of its timeliness as well. Just as the letter's reference to "the special conditional release period" evidences Essex's awareness of Customs' concern with country of origin, so too it reflects Essex's awareness of the applicability of 19 C.F.R. § 141.113(b) and the 180-day conditional release period set forth there. *See* section III.A, *supra*.

In sum, particularly when considered in the context of surrounding circumstances, the Amended Notice to Redeliver was sufficient to put a reasonable importer on notice of the basis for Customs' action in this case. Indeed, the Amended Notice was not only *objectively* sufficient; it was *subjectively* sufficient as well. Essex's course of conduct, and its communications with Customs, reveal that Essex in fact knew exactly what the problem was.

Yet this is no ringing endorsement of the Amended Notice. To hold that it was constitutionally adequate is to damn with faint praise indeed. It would have been a simple matter to cite the relevant regulations on the face of the notice. One hopes that this case is an aberration, and not the norm, and that Customs will exercise greater care in the future. The international trade community has the right to expect more from the Government.

IV. Conclusion

At bottom, Essex candidly concedes that—in lieu of filing a protest to press "a technical argument directed only at knocking out this particular [r]edelivery [n]otice"—it would have readily honored Customs' demand for redelivery, if the merchandise at issue had still been in its custody. *See* Tr. at 36, 46, 61, 65–66. But, Essex asserts, given the seasonal nature of the apparel market, it is impracticable to hold inventory for six or seven months. *See* Tr. at 51–54. Essex maintains that it has done everything in its power to be responsive to Customs' concerns. *See* Pl.'s Brief at 18–19; Tr. at 23, 37. Essex therefore concludes that, under the circumstances, it is unreasonable to subject it to a claim for liquidated damages running into the hundreds of thousands of dollars. *See* Tr. at 27, 36, 46, 149.

Yet even Essex admits that something in the underlying transaction was amiss. *See* Tr. at 135. Essex may indeed be the unwitting victim of deceit perpetrated by others somewhere "upstream" in the supply chain. But, in promulgating the applicable regulation (19 C.F.R. §141.113(b)), Customs explicitly recognized that the commercial realities of the textile and apparel industries would mean that many importers would be forced to pay liquidated damages because the subject goods would no longer be available for redelivery. Even more to the point, Customs foresaw that some innocent importers who had acted with reasonable care would nevertheless be held liable. As Customs noted at the time, no finding of culpability is required under the regulation. It is a strict liability, "no fault" provision. *See* 59 Fed. Reg. 61,798 (Dec. 2, 1994). Actual innocence is thus no defense.

For all the reasons set forth above, Customs properly denied Essex's protest, concluding that the Amended Notice to Redeliver was both timely and legally sufficient. Plaintiff's Motion for Summary Judgment is therefore denied, and Defendant's Cross-Motion is granted.

Judgment will enter accordingly.