Decisions of the United States Court of International Trade

Slip Op. 05–41

UNITED STATES, Plaintiff, v. JEAN ROBERTS OF CALIFORNIA, INC., Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 03–00212

[Defendant ordered to show cause why default judgment should not be entered against it for failure to answer Complaint in compliance with Court rules]

Decided: March 30, 2005

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, *Kenneth S. Kessler*, Trial Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Erik Gantzel*, Assistant Chief Counsel, Bureau of Customs and Border Protection, of counsel, for plaintiff.

OPINION AND ORDER

Plaintiff United States commenced this action pursuant to 19 U.S.C. § 1592 (2000) against defendant, Jean Roberts of California, Inc. ("Jean Roberts") to collect a civil penalty for alleged negligence by Jean Roberts in the entry into the United States of knit acrylic/polyester blankets from Mexico. Jean Roberts, a company incorporated in California, is, according to plaintiff, engaged in the business of manufacturing, importing, and distributing comforters, bedspreads, and other textile items.

Default was entered against Jean Roberts for failure to file, through counsel, an answer to the Complaint in compliance with the Rules of this Court. Pending before the court is Plaintiff's Application For Default Judgment ("Plaintiff's Application"). To ensure that Jean Roberts has a full and fair opportunity to retain legal counsel and defend itself in response to the allegations set forth in the Complaint, the court herein orders defendant to show cause why a default judgment should not be entered against it.

I. BACKGROUND

The Complaint alleges essentially that during the period of August 29, 1997 through July 20, 1998, Jean Roberts violated 19 U.S.C. § 1592 in negligently causing thirty-four entries of knit acrylic/polyester blankets to be filed with the U.S. Customs Service ("Customs")[1] at the port of Otay Mesa, California by means of material false statements and/or material omissions. Compl. ¶¶ 3, 6. Plaintiff's principal allegation is that defendant's false, and negligently-made, description of the subject blankets as "woven" rather than "knit" on the entry documentation resulted in defendant's making an improper claim for preferential duty treatment under the North American Free Trade Agreement ("NAFTA") Implementation Act. Compl. ¶¶ 6, 7. Plaintiff further asserts that the false statements and/or omissions occurring as a result of defendant's negligence caused a loss of revenue of $121,187.73, calculated as the difference between the general duty rates and NAFTA preferential duty rates applying to the subject blankets. Compl. ¶¶ 6, 7, 9. This revenue loss, according to the Complaint, entitles the United States to collect a civil penalty in the amount of $242,375.46, which is twice the alleged loss of revenue. Compl. ¶ 12. The maximum penalty for a violation based on negligence under 19 U.S.C. § 1592 is the lesser of the domestic value of the merchandise or "two times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(3)(A).

A. Administrative Penalty Proceeding

As specified in procedures established by 19 U.S.C. § 1592, Customs conducted an administrative penalty proceeding before bringing an action in this court to collect an unpaid civil penalty for alleged negligence by defendant in the entry of merchandise. The administrative proceeding began on November 29, 2000, the date on which Customs issued to Jean Roberts a "Pre-Penalty Notice" pursuant to 19 U.S.C. § 1592(b)(1) stating, *inter alia*, that defendant "failed to exercise reasonable care and competence throughout the importation process of thirty-four consumption entries" filed at the port of Otay Mesa, California from August 29, 1997 through July 20, 1998 containing knit acrylic/polyester blankets. *See Pl.'s Notice of Filing of Supplemental Doc. in Supp. of Pl.'s Application for Default J. in Resp. to the Ct.'s Telephonic Req. ("Pl.'s Supplemental Doc.")* Ex. 1. Like the Complaint in the case at bar, the Pre-Penalty Notice al-

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[1] All relevant documents concerning the entries in this action originally were filed with the U.S. Customs Service. The U.S. Customs Service now is renamed the Bureau of Customs and Border Protection. *See Homeland Security Act of 2002,* Pub. L. 107–296 § 1502, 116 Stat. 2135 (2002); Reorg. Plan for the Dep't of Homeland Security, H.R. Doc. No. 108–32 (2003).

leged that Jean Roberts incorrectly described the subject blankets as "woven" on entry documentation filed with Customs and that because the blankets actually were knit, not woven, Jean Roberts was not eligible for the claimed NAFTA preferential tariff treatment. The Pre-Penalty Notice, citing a revenue loss of $121,508.52 in unpaid duties, notified Jean Roberts that Customs was contemplating issuance of a civil penalty in the amount of $243,017.04, representing twice the alleged loss of revenue.[2]

Defendant did not submit a response to the Pre-Penalty Notice, and on February 26, 2001, Customs issued to Jean Roberts a Notice of Penalty in the amount of $121,508.52. This amount represented one time the loss of revenue, as then calculated by Customs.[3] Customs also made a demand for payment of the $121,508.52 in duties. Customs, on March 9, 2001, issued a demand for payment of duties on defendant's surety, American Contractors Indemnity. *See Pl.'s Application* Ex. A at 3; *Pl.'s Supplemental Application* Ex. 3 at 2. American Contractors Indemnity paid Customs the total amount of duty liability asserted by Customs. Customs continued the proceeding against Jean Roberts in an effort to collect the civil penalty.

Jean Roberts, through counsel, responded to the Penalty Notice on May 14, 2001, petitioning for complete cancellation of the penalty. *See Pl.'s Supplemental Doc.* Ex. 3. As its first argument, Jean Roberts claimed that the Mexican manufacturer of the blankets, Nova Textil Rivera Hermanos y Asociados, S.A. de C.V. ("Novatex"), had been responsible for preparing the import documentation for the imported blankets, a process in which it claimed not to have participated. *See id*. Contending that Novatex acted essentially as an agent of Jean Roberts, defendant argued that Customs should not allege negligence on the part of Jean Roberts unless Customs first found negligence on the part of Novatex. *See id*.

Defendant's second argument for cancellation of the penalty was that Novatex had reasonably relied upon a Customs ruling holding that the subject merchandise qualified for NAFTA preferential tariff treatment. In its petition, Jean Roberts argued that the ruling was issued in response to a ruling request submitted by counsel for its customs broker that erroneously, but in good faith, had informed Customs that the blankets were made of woven fabric. According to defendant, the error stemmed from a mis-communication that occurred when the counsel consulted with a Novatex employee.

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[2] An exhibit to the Complaint contains a worksheet recalculating the loss of revenue to be $121,187.73.

[3] Exhibit A to the Notice of Penalty is internally inconsistent in stating: "Monetary Consequences: . . . A civil, administrative penalty of $121,508.52, an amount equals [*sic*] to two times of the potential loss of revenue." *Pl.'s Supplemental Application* Ex. 2.

In its decision in response to the petition, issued to Jean Roberts on April 19, 2002, Customs declined to mitigate its penalty claim of $121,508.52. The decision allowed Jean Roberts seven days to pay the $121,508.52 penalty and offered additional time if Jean Roberts would execute a two-year waiver of the statute of limitations. Jean Roberts did not pay the penalty, and Customs brought this collection action.

B. Procedural History of the Penalty Collection Action in this Court

The Summons and Complaint commencing this case were served upon Jean Roberts on June 12, 2003. On July 2, 2003, Mr. Marvin Brownstein, President and Chief Executive Officer of Jean Roberts, attempting to appear *pro se* on behalf of Jean Roberts, filed a document entitled Answer to Complaint that included a one sentence, general denial of all allegations of the Complaint. On July 11, 2003, the Office of the Clerk of the Court of International Trade informed Mr. Brownstein that the Answer to Complaint was deemed filed and "advised that [his] corporation must be represented by counsel before [Jean Roberts] can proceed with this matter." *Pl.'s Application* Ex. A at 20 (emphasis omitted). The Clerk's Office further informed Mr. Brownstein that, pursuant to USCIT Rule 75(b), corporations, in order to make a proper appearance, must be represented by licensed counsel admitted to practice before the Court. In a letter dated July 24, 2003, Mr. Brownstein informed the Clerk's Office that he attempted to secure counsel by contacting three attorneys in New York, all of whom required a $10,000 retainer and informed Mr. Brownstein that the defendant should "expect to spend over $50,000 to fight this case." *Id.* at 22. A statement of assets, liabilities and equity, as of March 31, 2003, was attached to the same correspondence, in which Mr. Brownstein claimed financial insolvency and requested a "public defender." *See id.* at 22–30. The Clerk's Office responded to Mr. Brownstein's request by letter dated August 5, 2003 informing him that public defenders are not available to represent corporations in civil matters and reiterating the requirements of USCIT Rule 75(b). *See id.* at 32. In a letter dated August 13, 2003 to which additional financial statements were attached, Mr. Brownstein reasserted that Jean Roberts does not have the financial means to defend the allegations pleaded in the Complaint. *See id.* at 33. The Clerk's Office responded by letter on August 19, 2003, advising defendant that failure to obtain counsel could result in judgment for the United States. *See id.* at 40. The Court has received no further correspondence from defendant.

On December 1, 2003, the United States filed Plaintiff's Request for Entry of Default on the grounds that Jean Roberts repeatedly failed to appear and defend the allegations pleaded in the Complaint. The Office of the Clerk of the Court of International Trade entered default on December 3, 2003 pursuant to USCIT Rule 55(a).[4]

C. Plaintiff's Application for Default Judgment

On February 20, 2004, the United States, pursuant to USCIT Rule 55(b), applied for judgment by default against Jean Roberts for $242,375.46, an amount representing the statutory maximum penalty of two times the loss of revenue alleged by Customs in the Complaint. *See Pl.'s Application* at 19, 25; *see also* 19 U.S.C. § 1592(c)(3)(A). The penalty sought in the default judgment is nearly twice the amount of the penalty claim Customs asserted against Jean Roberts in the administrative proceeding conducted under 19 U.S.C. § 1592.

In its pending application for default judgment, the government argues that "Jean Roberts improperly relied upon the work of a foreign manufacturer to complete its entry documentation" relating to the subject merchandise, and that such reliance constitutes negligence pursuant to 19 U.S.C. § 1592. *Pl.'s Application* at 8. The government also maintains that the refusal of Jean Roberts to retain legal representation prevented plaintiff from "conducting discovery and expeditiously prosecuting the case." *Id.* at 12. Plaintiff further maintains that Jean Roberts willfully violated the Rules of the Court by "failing to comply with the initial disclosure requirements of USCIT Rule 26(a)(1) and other discovery and planning obligations that require the appearance of licensed counsel." *Id.* at 14. According to plaintiff, the negligent conduct of Jean Roberts and defendant's failure to obtain counsel in order to defend the allegations of the Complaint despite repeated warnings from the Clerk of the Court of International Trade justify entry of a default judgment. *See id.* 8–9.

Plaintiff further argues that the application of factors articulated in *United States v. Complex Machine Works Co.*, 23 CIT 942, 949–50, 83 F. Supp. 2d 1307, 1313–14 (1999), to the facts of this case warrants imposing the maximum penalty for negligence, plus post-judgment interest and costs. Plaintiff alleges that these factors include the failure of Jean Roberts to put forth a good faith effort to comply with the customs laws of the United States during the importation of the subject blankets, the public interest in deterring importers in the future from submitting to Customs inaccurate documentation, and the degree of harm Jean Roberts caused to the public by depriving the government of revenue and requiring the government to conduct an "extensive investigation" and commence a civil

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[4] Rule 55(a) states that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as prescribed by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."

prosecution. *See Pl.'s Application* at 21–23. The United States also contends that the court should not consider as a mitigating factor the inability of Jean Roberts to pay the penalty. *See id.* at 24.

II. DISCUSSION

Rule 55(b) of the Rules of this Court provides as follows:

> When the plaintiff's claim against a defendant is for a sum certain or for a sum which can b[y] computation be made certain, the court upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

USCIT R. 55(b). The Rule, however, provides that the court may "conduct such hearings or order such references as it deems necessary and proper." *Id.* The court may do so, under the Rule, "[i]f, in order to enable the court to enter judgment . . . it is necessary . . . to establish the truth of any averment by evidence or to make an investigation of any other matter." *Id.* The court construes Rule 55(b) in conjunction with Rule 55(c), which states that "[f]or good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside as prescribed by [USCIT] Rule 60(b)." USCIT R. 55(c). The court also is cognizant of the "strong policy in favor of decisions on the merits and against resolution of cases through default judgments." 10 *James W. Moore et al.*, *Moore's Federal Practice* § 55.20 (3d ed. 2003).

Within twenty days of the date on which this collection action was commenced, Jean Roberts filed a document entitled Answer to Complaint with the Court. Such document cannot, however, answer to the allegations pleaded against Jean Roberts in the Complaint because it was filed *pro se*.[5] The Rules of the Court require that "each party . . . must appear through an attorney authorized to practice before the court," providing an exception only for "an individual (not a corporation, partnership, organization or other legal entity) appearing *pro se*." USCIT R. 75(b). The Supreme Court, moreover, has stated that "[i]t has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts

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[5] In addition, the general denial that constituted defendant's answer did not meet the substance of the specific allegations in the Complaint. *See* USCIT R. 8(c) ("Denials shall fairly meet the substance of the averments denied.").

only through licensed counsel." *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201–02 (1993) (citations omitted).

At this point, the court cannot reach the conclusion that Jean Roberts willfully violated the Rules of the Court. The court is not satisfied that Jean Roberts does not wish to retain legal counsel or defend itself against the allegations of the Complaint. The court views the defendant's attempt to reply to the pleadings in this action and its communications with the Office of the Clerk of the Court of International Trade on the obtaining of counsel as acts indicative of its desire to defend itself in this action. Accordingly, the court considers it necessary and proper to provide defendant a final opportunity to secure legal counsel, so that defendant may be afforded a full and fair opportunity to defend itself in this action. The court, therefore, will grant to Jean Roberts one final opportunity to be represented by legal counsel eligible to file an appearance with this Court.

III. Conclusion and Order

In view of the requirement set forth by USCIT Rule 75(b), the guidance of the Supreme Court in *Rowland v. California Men's Colony*, 506 U.S. at 201–02, that a corporate defendant may appear in federal court only through licensed counsel, and the general disfavor accorded to default judgments, the court, pursuant to USCIT Rule 55(b), will grant defendant Jean Roberts one final opportunity to obtain legal representation and proceed with a defense in this action. The court is allowing defendant sixty days to obtain counsel and show cause why a default judgment should not be entered against it in this litigation. The court is taking this action to ensure that defendant has a full and fair opportunity to fulfill its desire to respond to the allegations in the Complaint. It is hereby

ORDERED that defendant, through licensed counsel admitted to practice in this Court, and by May 31, 2005, will show cause why a default judgment should not be entered.

Slip Op. 05–42

BEFORE: HONORABLE RICHARD W. GOLDBERG, SENIOR JUDGE

NATIONAL CANDLE ASSOCIATION, Plaintiff, v. UNITED STATES, Defendant, and DONGGUAN FAY CANDLE CO., LTD., TIJID, INC. (d/b/a DIJIT, INC.), and PALM BEACH HOME ACCENTS, INC., Defendant-Intervenors.

Consol. Court No. 03–00172

[Court sustains *Final Results.*]

Dated: March 31, 2005

Barnes & Thornburg (*Randolph J. Stayin*) for Plaintiff National Candle Association.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*); *Arthur D. Sidney*, Of Counsel, Office of Chief Counsel for Import Administration, United States Department of Commerce, for Defendant United States.

White & Case, LLP (*William J. Clinton* and *Adams C. Lee*) for Defendant-Intervenors Dongguan Fay Candle Co., Ltd., TIJID, Inc. (d/b/a DIJIT, Inc.), and Palm Beach Home Accents, Inc.

OPINION

GOLDBERG, Senior Judge: In this action, Plaintiff National Candle Association ("National Candle") challenges the final determination of the United States Department of Commerce ("Commerce") in the third administrative review of the antidumping duty order covering petroleum wax candles in *Petroleum Wax Candles From the People's Republic of China; Final Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 13264 (Mar. 19, 2003) ("*Final Results*"). Defendant-Intervenors Dongguan Fay Candle Co., Ltd., TIJID, Inc. (d/b/a DIJIT, Inc.), and Palm Beach Home Accents, Inc. (collectively "Fay Candle") also challenge certain aspects of the *Final Results*. The *Final Results* covers the period of review from August 1, 2000 through July 31, 2001. Pursuant to USCIT Rule 56.2, both National Candle and Fay Candle move for judgment on the agency record.

For the reasons that follow, the Court sustains the *Final Results*. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c).

I. *STANDARD OF REVIEW*

The Court will sustain the *Final Results* 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). To determine whether Commerce's construction of the statutes is in accordance with law, the Court looks to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The first step of the test set forth in *Chevron* requires the Court to determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. It is only if the Court concludes that "Congress either had no intent on the matter, or that Congress's purpose and intent regarding the matter is ultimately unclear," that the Court will defer to Commerce's construction under step two of *Chevron*. *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). If the statute is ambiguous, then the second step requires the Court to defer to the agency's interpretation so long as it is "a permissible construction of the statute." *Chevron*, 467 U.S. at 842. In addition, "[s]tatutory interpretations articulated by Commerce during its antidumping proceedings are entitled to judicial deference under *Chevron*." *Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1382 (Fed. Cir. 2001) (interpreting *United States v. Mead*, 533 U.S. 218 (2001)). Accordingly, the Court will not substitute "its own construction of a statutory provision for a reasonable interpretation made by [Commerce]." *IPSCO, Inc. v. United States*, 965 F.2d 1056, 1061 (Fed. Cir. 1992).

II. *DISCUSSION*

A. Commerce's Decision to Apply Adverse Facts Available in Determining Fay Candle's Dumping Margin Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

During the submission portion of the review at issue, Commerce provided multiple questionnaires to Fay Candle in an effort to obtain detailed production information. Defendant's Memorandum in Opposition to Plaintiff's Motion for Judgment Upon the Agency Record ("Def.'s Br.") at 8. Prior to conducting verification of the questionnaire responses, Commerce sent a verification agenda to Fay Candle. *See* Verification Outline for 2000–01 Administrative Review of Petroleum Wax Candles from the People's Republic of China (PRC), Appendix of Public Documents in Support of Defendant's Memorandum in Opposition to Motions for Judgment Upon the Agency Record ("Def.'s App.") at Ex. 2 (July 11, 2002). The letter stated that "verification is not intended to be an opportunity for submitting new factual information. New information will be accepted at verification only when (1) the need for that information was not evident previously, (2) the information makes minor corrections to information already on the record, or (3) the information corroborates, supports, or clarifies information already on the record." *Id.* at 2.

On the first day of verification in the People's Republic of China ("PRC"), Fay Candle presented Commerce with what it considered to be a "minor correction" to its questionnaire responses. Letter from Respondents to Secretary of Commerce, Import Administration, Appendix Accompanying Plaintiffs' (Dongguan Fay Candle Co., TIJID, Inc. (d/b/a DIJIT, Inc.) and Palm Beach Home Accents, Inc.) Memorandum of Points and Authorities in Support of Their USCIT R. 56.2 Motion for Judgment Upon an Agency Record ("Def.-Intvrs.' App.") at Ex. 1 at 1 (July 22, 2002). This "minor correction" consisted of one unreported production order out of a total of ninety-six, and resulted in an approximate twenty-five percent increase in total production quantity from that which Fay Candle had originally reported. Memorandum of Points and Authorities in Support of Plaintiffs Dongguan Fay Candle Co., TIJID, Inc. (d/b/a DIJIT, Inc.) and Palm Beach Home Accents, Inc. ("Def.-Intvrs.' Br.") at 5, 7; Commerce PRC Verification Report, Def.-Intvrs.' App. at Ex. 6 at 1 (Aug. 30, 2002) ("Verification Report").

On the fourth and final day of verification, the verification team was instructed to reject the newly submitted information and halt the remainder of the PRC verification. Verification Report at 1–2. Commerce's actions were based on its finding that the correction submitted by Fay Candle was new factual information that was not submitted in accordance with Commerce's verification policy concerning minor corrections. *Id.* Further, Commerce determined that the new production order accounted for a "very large percentage" of Fay Candle's production and thus "was not minor in any sense of the word." Issues and Decision Memorandum for Final Results of Antidumping Duty Administrative Review of Petroleum Wax Candles from the People's Republic of China, Def.'s App. at Ex. 1 at 23 (Mar. 10, 2003) ("Issues and Decision Memo"). In fact, Commerce was concerned that "the fact that respondents did not notice the effect of an omission of such magnitude on their response calls into question the care they took in preparing that response." *Id.*

The following week, however, Commerce informed Fay Candle that it would proceed with the U.S. portion of verification, beginning on August 12, 2002. *See* Memorandum Regarding 2000/2001 Administrative Review on Candles from the People's Republic of China: Telephone Conversation Regarding U.S. Verification, to the File, from Sally C. Gannon, Def.'s App. at Ex. 6 (July 31, 2002). Thereafter, in a letter dated August 9, 2002, Fay Candle notified Commerce of its decision not to proceed with the U.S. verification because it felt there was "no point in proceeding." Letter From Law Firm of Sandler, Travis & Rosenberg to Secretary of Commerce, *id.* at Ex. 7 (Aug. 9, 2002).

Commerce subsequently published the *Final Results*, in which it concluded that adverse inferences were warranted in light of Fay Candle's decision not to proceed with the U.S. verification. *See* 68 Fed. Reg. at 13265. Specifically, Commerce stated that Fay Candle's "refusal to allow the U.S. verification to take place seriously impeded [Commerce's] ability to complete its analysis in this administrative review and leads to [the] conclusion that [Fay Candle] failed to cooperate by not acting to the best of [its] ability in this review." Issues and Decision Memo at 8.

Fay Candle contends that Commerce abused its discretion by failing to consider that Fay Candle's initial misreporting of its total production quantity resulted from a clerical error. Def.-Intvrs.' Br. at 12. Alternatively, Fay Candle asserts that Commerce abused its discretion by waiting until the final day of verification in the PRC to reject the new production data and thereafter terminate the PRC verification. *Id.* at 19–20. By terminating the PRC verification prematurely, Fay Candle points out that Commerce failed to verify important production data, including hours of labor and the quantity of wicks used to produce petroleum wax candles, as required by 19 U.S.C. § 1677b(c)(3). *Id.* at 20. Without this necessary data, Fay Candle claims that application of adverse facts available was "a foregone conclusion," *id.* at 21, and thus it was reasonable for Fay Candle to refuse to proceed with the U.S. verification. *Id.* at 25–26.

The Court disagrees. Pursuant to 19 U.S.C. § 1677e(b), adverse inferences are warranted where "an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce]." In this case, Fay Candle's unilateral decision to cancel the U.S. verification simply cannot be viewed as anything but a failure to cooperate by not acting to the best of its ability to comply with a request for information. Furthermore, by intentionally canceling the U.S. verification, Fay Candle did not "put forth its maximum effort to provide Commerce with full and complete answers to all inquiries in an investigation[,]" as required by the Court of Appeals for the Federal Circuit in *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003).

Fay Candle insists, however, that a party retains the right to cease cooperation in an ongoing review if it believes that the review is not proceeding in its favor. Specifically, Fay Candle suggests that its decision to cancel the U.S. verification "cannot be viewed in isolation of" Commerce's "arbitrary and capricious administration of the [PRC] portion of the verification." Def.-Intvrs.' Br. at 24, 27. This argument is without merit. Even if Commerce did abuse its discretion by terminating the PRC verification, that still does not justify Fay Candle's unilateral decision to cancel the U.S. verification. While Fay Candle may have believed that Commerce inappropriately rejected the new production data and prematurely halted the PRC verification, it should have utilized the proper procedural channels to seek redress for the perceived flaws in Commerce's administration of the review. Specifically, Fay Candle should have proceeded with the review, participated in the U.S. verification, allowed Commerce to issue the *Preliminary Results*, and then argued in its case brief that Commerce abused its discretion by prematurely terminating the PRC verification. *See* 19 C.F.R. § 351.309(c) (setting forth requirements for submitting case briefs to Commerce). To cease cooperation in an ongoing review, as Fay Candle did here, simply is not an acceptable alternative for resolving disagreements. If the Court were to hold otherwise, every party to an administrative review would immediately stop participating the moment Commerce makes an unfavorable finding, and as a result, the record on appeal would be incomplete in every instance, as it is here. The Court cannot condone such an untenable situation.[1]

Accordingly, because Commerce properly concluded that Fay Candle failed to cooperate to the best of its ability, Commerce's decision to apply adverse facts available is supported by substantial evidence and otherwise in accordance with law.

B. Commerce's Decision to Apply a Dumping Margin of 65.02 Percent as Adverse Facts Available Is Supported by Substantial Evidence and Otherwise in Accordance with Law.

In the *Preliminary Results*, Commerce expressed its intention to apply a dumping margin of 95.22 percent as adverse facts available. *Notice of Preliminary Results of Antidumping Administrative Review: Petroleum Wax Candles From the People's Republic of China*, 67 Fed. Reg. 57384, 57385 (Sept. 10, 2002) ("*Preliminary Results*"). This margin was taken from the most recent new shipper review of candles from the PRC and was the only rate calculated in the proceeding based on information supplied by a respondent. *See Petroleum Wax Candles from the People's Republic of China: Notice of Final Results of New Shipper Review*, 67 Fed. Reg. 41395, 41396 (June 18, 2002); Proprietary Information Regarding Adverse Facts Available Rate, Appendix of Confidential Documents in Support of Defendant's Memorandum in Opposition to Motions for Judgment Upon the Agency Record at Ex. 1 (Mar. 10, 2003). The 95.22 percent rate was calculated by taking the weighted-average margin of the only two products sold by the new shipper; the product-specific margins were 65.02 percent and 122.42 percent. *Id.*

In the *Final Results*, however, Commerce determined that, for several reasons, it was inappropriate to apply the weighted-average

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[1] The Court finds it unnecessary to reach the issue of whether the new production data submitted by Fay Candle on the first day of verification in the PRC should have been deemed a "minor correction" resulting from clerical error, since any ruling on this issue would not change the Court's holding that adverse inferences are warranted because of Fay Candle's failure to cooperate to the best of its ability by canceling the U.S. verification.

margin of 95.22 percent as adverse facts available. *See* 68 Fed. Reg. at 13265–66. Instead, Commerce concluded that the product-specific margin of 65.02 percent was a more appropriate reflection of Fay Candle's actual dumping margin. *Id.* at 13266. National Candle challenges this determination.

In selecting adverse facts, Commerce is permitted by statute to rely on information derived from "(1) the petition, (2) a final determination in the investigation . . . , (3) any previous review under section 1675 . . . or determination under section 1675b . . . , or (4) any other information placed on the record." 19 U.S.C. § 1677e(b). "So long as the data is corroborated, Commerce acts within its discretion when choosing which sources and facts it will rely on to support an adverse inference." *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002). Where Commerce selects a previously calculated margin as adverse facts available, such information is corroborated upon a showing that it is "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli De Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032, 1034 (Fed. Cir. 2000).

1. Commerce Properly Rejected the 95.22 Percent Weighted-Average Margin.

National Candle argues that Commerce's preliminary determination to apply a margin of 95.22 percent as adverse facts available was correct because it was an accurate estimate of Fay Candle's actual rate and was not unduly punitive. Motion for Judgment on the Agency Record and Case Brief in Support Thereof ("Pl.'s Br.") at 26. In support of this contention, National Candle draws the Court's attention to the *fourth* administrative review, in which Commerce preliminarily decided to assign a margin of 95.74 percent to Fay Candle as adverse facts available. *Notice of Preliminary Results and Preliminary Partial Rescission of the Antidumping Administrative Review: Petroleum Wax Candles From the People's Republic of China*, 68 Fed. Reg. 53109, 53115 (Sept. 9, 2003). According to National Candle, in light of this subsequent determination by Commerce, the 95.22 percent margin preliminarily assessed by Commerce in the *third* administrative review must be viewed as a reasonably accurate estimate of current industry practice. Pl.'s Br. at 29.

The Court rejects this argument. "[I]t is well established that the record for judicial review should ordinarily not contain material from separate investigations, including records of separate administrative reviews arising out of the same antidumping duty order, as is the case here." *Sanyo Elec. Co. v. United States*, 23 CIT 355, 361, 86 F. Supp. 2d 1232, 1239 (1999) (quotation omitted). This means that "[a]ny information received by Commerce after the particular determination at issue is not part of the reviewable administrative record." *Torrington Co. v. United States*, 16 CIT 76, 77–78, 786 F. Supp. 1027, 1029 (1992). Accordingly, it would be improper for the Court to use the margin preliminarily calculated by Commerce in the fourth administrative review to profess, in hindsight, that the margin preliminarily calculated by Commerce in the third administrative review was reasonable.

National Candle also contends that when a respondent fails to cooperate, Commerce assigns the highest rate from any segment of the proceeding as adverse facts available. Pl.'s Br. at 26. In this case, the highest rate from a prior segment of the proceeding was the 95.22 percent weighted-average margin preliminarily assigned by Commerce. *Id.* at 27. It is clear, however, that Commerce is not *required* to select the highest rate available when applying adverse facts to an uncooperative respondent. *See F.lli De Cecco*, 216 F.3d at 1032; *see also Ferro Union, Inc. v. United States*, 23 CIT 178, 205, 44 F. Supp. 2d 1310, 1335 (1999) ("Commerce cannot assume the highest previous margin applies simply because it is the one most prejudicial to the respondent."). Moreover, although there is a goal of deterrence inherent in § 1677e(b), "Congress tempered deterrent value with the corroboration requirement" so that "punitive, aberrational, or uncorroborated margins" would not be imposed as adverse facts available. *F.lli De Cecco*, 216 F.3d at 1032. In other words, Commerce cannot select "unreasonably high rates with no relationship to the respondent's actual dumping margin." *Id.*

Here, Commerce determined that the weighted-average margin of 95.22 percent was unreasonably high because:

> The 95.22 percent margin was calculated for a new shipper, a trading company, whose single sale, albeit of more than one product, during the new shipper POR was also its first sale ever to the United States. Because of the substantial difference between the two margins calculated in the new shipper review (and weight-averaged into the 95.22 percent margin) and the unusual facts surrounding the new shipper's one sale, the Department has determined that the application of the new shipper's weighted-average margin would be inappropriate. The wide range of the two margins weight averaged together in the new shipper review, given the nature of the new shipper as a start-up with very low sales volumes, and given other unusual proprietary facts surrounding the sale, has led us to find that it is inappropriate to use the higher of these two margins. Moreover, while the rate we have chosen (65.02 percent) is higher than the single PRC-wide rate that has been applied for the past 16 years (54.21 percent) under this order, it is still more inline with the 54.21 percent PRC-wide rate which was also based on facts available. The higher rate we have excluded [122.42 percent] is more than double that previous rate, con-

> firming our conclusion that it is the product of circumstances not germane to this analysis.

Final Results, 68 Fed. Reg. at 13265–66. Moreover, it is not unusual for Commerce to select a rate other than the highest-available rate when applying adverse inferences. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan*, 64 Fed. Reg. 24329, 24369 (May 6, 1999) (re-examining the preliminary determination to use the highest-available margin as adverse facts available and finding instead that the second-highest margin should be used, since the highest margin "was not sufficiently within the mainstream"); *Fresh Cut Flowers From Mexico; Final Results of Antidumping Duty Administrative Review*, 61 Fed. Reg. 6812, 6814 (Feb. 22, 1996) (applying the second-highest margin because the highest-available margin was "unrepresentative" in that it was based on skewed cost-of-production data).

Thus, Commerce acted within its discretion in finding that the 122.42 percent product-specific margin, and in turn the 95.22 percent weighted-average margin, were unreasonably high and an inaccurate estimate of Fay Candle's actual dumping margin. Accordingly, the Court sustains Commerce's rejection of the weighted-average margin.

2. Commerce Did Not Err in Applying the 65.02 Percent Product-Specific Margin.

National Candle contends that Commerce's application of the product-specific margin of 65.02 percent is not supported by substantial evidence and otherwise in accordance with law for three reasons. Pl.'s Br. at 32. First, National Candle suggests that it should have been given an opportunity to comment on Commerce's use of the 65.02 percent rate, since this reflected a change from the 95.22 percent rate assigned in the *Preliminary Results. See id.* at 32–33. Preliminary results, however, "are 'preliminary' precisely because they are subject to change." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995). Thus, Commerce "need not reach the same result" in the final results as it did in the preliminary results since "[t]he purpose of publishing preliminary results is to discover inaccuracies and correct them before coming to a final decision." *Pulton Chain Co. v. United States*, 17 CIT 1136, 1140 (1993). In addition, "there [is] no obligation on the part of [Commerce] to notify the parties beforehand that there [will] be a different [rate] used in the final determination[] than in the preliminary." *Tehnoimportexport v. United States*, 15 CIT 250, 255, 766 F. Supp. 1169, 1175 (1991). As a result, National Candle's first argument is without merit.

Next, National Candle asserts that it was surprised by Commerce's selection of the 65.02 percent margin from the new shipper review, since it was the margin calculated for a type of candle never produced by Fay Candle during the period of review. Pl.'s Br. at 34. National Candle insists that if Commerce is going to apply a product-specific margin as adverse facts available, then it must select a product-specific margin based on the types of products actually produced and sold by the respondent during the period of review. *Id.* National Candle, however, cites no authority to support this contention, and the Court is aware of no statute or regulation requiring Commerce to apply product-specific margins in the manner National Candle advocates. Furthermore, while the new shipper produced only two types of candles and a margin was calculated for each candle, Fay Candle produced and sold many types of candles, none of which was identical to the candles produced by the new shipper. *See* Response of Dongguan Fay Candle Co., Ltd., to Antidumping Questionnaire Section D, Appendix Accompanying Plaintiff's Case Brief Dated October 24, 2003 at Ex. 3 (Jan. 9, 2002). Therefore, there is no product-specific margin from the new shipper review that would precisely mirror the candles produced and sold by Fay Candle in any event.

Finally, National Candle argues that the proprietary facts found by Commerce to be unusual and particular to the new shipper were not unusual at all, and were in fact reflective of "actual conditions in the U.S. candle market." Pl.'s Br. at 34. Again, however, National Candle cites no record evidence in support of its factually intensive argument regarding "actual conditions in the U.S. candle market" and the "significant price competition" that "U.S. candle producers have seen." *Id.* at 34, 36. As such, the Court finds this argument to be unavailing.

Accordingly, Commerce's decision to apply a dumping margin of 65.02 percent as adverse facts available is supported by substantial evidence and otherwise in accordance with law.

III. *CONCLUSION*

For the aforementioned reasons, the Court sustains the *Final Results*. Judgment will be entered accordingly.

Slip Op. 05–43

GEORGETOWN STEEL COMPANY, LLC, GERDAU AMERISTEEL CORP., KEYSTONE CONSOLIDATED INDUSTRIES, INC., and NORTH STAR STEEL TEXAS, INC., Plaintiffs, v. UNITED STATES, Defendant, and SAARSTAHL AG, ISPAT HAMBURGER STAHLWERKE GMBH and ISPAT WALZDRAHT HOCHFELD GMBH, Intervenor-Defendants.

Court No. 02–00739

Memorandum & Order

[Plaintiffs' motion for judgment upon the agency record denied; action dismissed.]

Decided: April 1, 2005

Collier Shannon Scott, PLLC (*Paul C. Rosenthal*, *Kathleen W. Cannon* and *R. Alan Luberda*) for the plaintiffs.

Lyn M. Schlitt, General Counsel, *James M. Lyons*, Deputy General Counsel, *Andrea C. Casson*, U.S. International Trade Commission, for the defendant.

DeKieffer & Horgan (*Marc E. Montalbine*, *Merritt R. Blakeslee* and *Wakako O. Takatori*) for intervenor-defendant Saarstahl AG.

Barnes, Richardson & Colburn (Matthew T. McGrath, *Gunter von Conrad* and *Stephen W. Brophy*) for intervenor-defendants Ispat Hamburger Stahlwerke GmbH and Ispat Walzdraht Hochfeld GmbH.

AQUILINO, Senior Judge: In *Co-Steel Raritan, Inc. v. U.S. Int'l Trade Comm'n*, 26 CIT 1131 (2002), this court affirmed the results of its remand of that part of the (preliminary) determination of the defendant Commission ("ITC") *sub nom*. *Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Egypt, Germany, Indonesia, Mexico, Moldova, South Africa, Trinidad and Tobago, Turkey, Ukraine, and Venezuela*, 66 Fed.Reg. 54,539 (Oct. 29, 2001), which terminated investigations with regard to subject imports from Egypt, South Africa and Venezuela. In response to that order, the *Views of the Commission on Remand* (Aug. 16, 2002) were to the effect that

> imports of wire rod from Egypt, South Africa and Venezuela are not negligible, and that there is a reasonable indication that an industry in the United States is materially injured by reason of imports of wire rod from Egypt, South Africa and Venezuela that are allegedly sold in the United States at less than fair value.

26 CIT at 1131. The commissioners were of the view that an amendment by the International Trade Administration, U.S. Department of Commerce ("ITA") of the scope of its investigation reduced the volume of subject imports from Germany to less than the statutory maximum for negligibility and thereby caused their aggregation with those from Egypt, South Africa and Venezuela in accordance

with 19 U.S.C. §1677(24)(A)(ii). Whereupon Saarstahl AG and Saarsteel Inc., interested parties in the underlying administrative proceedings, moved for leave to intervene as parties defendant on the ground that the

> plaintiffs [we]re . . . attempting to use this litigation regarding the Commission's preliminary determination to influence [it]s final investigation. . . . The Commission's rescission in its remand determination of its earlier negligibility determination with respect to Egypt, South Africa, and Venezuela raises the possibility that the seven-percent exception to the negligibility statute will be triggered. If this occurs, German imports will be rendered non-negligible, notwithstanding that they fall below the three-percent negligibility threshold. Saarstahl respectfully submits that this substantial change in its posture in the Commission's investigations constitutes good cause for its intervention out of time.

Id. at 1133. That untimely motion could not be granted. *See id.* at 1132–34.

Following the filing of the final judgment in *Co-Steel Raritan, supra*, the above-encaptioned action was commenced, with Saarstahl AG and the Ispat firms obtaining early leave to intervene. Plaintiffs' complaint[1] contests the ITC's final determination *sub nom. Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Indonesia, Mexico, Moldova, Trinidad and Tobago, Ukraine,* 67 Fed.Reg. 66,662, 66,663 (Nov. 1, 2002), that imports of such subject merchandise from Germany were negligible and that the investigation as to them therefore be terminated. The views of the Commission majority in support of this determination took note of the court's affirmance of the remand results in *Co-Steel Raritan, supra*, but also of notice(s) of appeal from that final judgment in declining to aggregate those German imports with subject imports from Egypt, South Africa and Venezuela. *See* Plaintiffs' Non-confidential Appendix 1, USITC Pub. 3546, p. 16 and n. 88 (Oct. 2002), to wit:

> . . . As with the antidumping duty investigations, there are no other subject countries with negligible levels of imports with which to aggregate subject imports from Germany in these countervailing duty investigations.
>
> * * *
>
> We interpret 19 U.S.C. § 1516a(c)(3) to provide that the Commission's original published decision remains operative until final court disposition of the matter, which has not yet oc-

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[1] Among other changes pointed out therein is that Co-Steel Raritan, Inc. had become plaintiff Gerdau Ameristeel Corp.

> curred given the filing of an appeal with the Federal Circuit Court of Appeals. In accordance with its customary practice, the Commission has not issued any Federal Register notice with respect to its Remand Views pending final judicial disposition of the matter. Therefore, the Commission's investigations of [Egypt, South Africa and Venezuela] remain terminated. As these investigations are terminated they are not subject to the aggregate negligibility provisions. . . .

In other words, the linchpin of this ITC final determination of teutonic negligibility is the ITA's amendment of the scope of the investigation[2], which, to repeat, was also the crux of the Commission's own prior remand views that were affirmed by the court in *Co-Steel Raritan*, *supra*, yet the defendant decided to disregard that orderly, timely administrative aggregation and judicial affirmance. Indeed, ITC counsel thereafter joined in support[3] of the appeals taken on behalf of intervenor-defendants from Egypt and Venezuela.

That circumstance apparently induced the three-judge panel of the Federal Circuit to consider the jurisdiction of both this and that court. A judge in dissent concluded that the undersigned lacked jurisdiction to opine on the Commission's "affirmative" but "preliminary" remand results.[4] The panel majority held that this court had such authority and that its court had appellate jurisdiction over the resultant final CIT judgment.[5] It thus proceeded to consider the merits thereof and came to conclude that this court

> erred . . . when it remanded the case to the Commission for further consideration in light of Commerce's modification of the scope of the investigation. . . .[6]

Whereas the judge in dissent would have vacated this court's final judgment and dismissed the appeals therefrom for lack of jurisdiction[7], the majority remanded for further proceedings to

> consider the contention in Co-Steel's original motion for judgment on the administrative record that it did not address in *Co-Steel I*. That is the contention that the Commission erred in concluding in the preliminary determination that there was no reasonable indication that wire rod imports from Egypt, South

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[2] *See* Plaintiffs' Nonconfidential Appendix 1, USITC Pub. 3546, p. 1 n. 2 (Oct. 2002).

[3] *See Co-Steel Raritan, Inc. v. Int'l Trade Comm'n*, 357 F.3d 1294, 1297 (Fed.Cir. 2004).

[4] *See id.* at 1317–19.

[5] *See id.* at 1303–09.

[6] *Id.* at 1317.

[7] *See id.* at 1319.

> Africa, and Venezuela would imminently exceed statutory negligibility levels, whether considered individually or collectively.[8]

That matter is *sub judice* before this court.

I

Also to be decided of course herein is what remains of this matter in light of the foregoing background. To date, no party has intimated that the court might not be possessed of subject-matter jurisdiction pursuant to 28 U.S.C. §§ 1581(c), 2631(c), 2636(c). Presuming that it is leads to the question of whether or not plaintiffs' complaint states a claim upon which affirmative relief can be granted. Alas, the court concludes that it does not.

The sum and substance of plaintiffs' motion for judgment upon the agency record is:

> B. The Commission's Determination that Imports of CASWR from Germany Could Not Be Aggregated with Imports of CASWR from Egypt, South Africa and Venezuela to Determine Negligibility Because Those Investigations Had Been Terminated Was Unlawful[.]
>
> * * *
>
> C. The Statutory Negligibility Provision Does Not Permit Refusal to Aggregate Dumped With Subsidized Imports in Assessing Aggregate Import Levels[.]
>
> D. In Assessing Negligibility, the Commission Is Not Precluded from Aggregating Imports from Germany with Imports from Egypt, South Africa and Venezuela Merely Because Final Commerce and Commission Decisions Have Not Yet Been Issued as to Such Imports[.[9]]

In fairness to plaintiffs' counsel, it should be pointed out that this motion was filed before the decision of the court of appeals — and after this court had denied a motion by the defendant to stay this action pending that decision. *See Georgetown Steel Co. v. United States*, 27 CIT ___ , ___ , 259 F.Supp.2d 1344, 1348 (2003)("parties to judgments *nisi prius* are not automatically at liberty to disregard them, in particular when they do not seek appellate relief in their own right"). It must also be recognized, however, that *Co-Steel Raritan*, *supra*, and this action both emanate from the same antidumping and countervailing-duty administrative investigations and have engendered notable "hypothesizing" by the parties, including intervenor-defendant Saarstahl AG. *See*, *e.g.*, *id.*, 27 CIT at ___ , 259

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[8] *Id.* at 1317.

[9] Plaintiffs' Brief, page i. The acronym "CASWR" refers to the subject merchandise.

F.Supp.2d at 1347–48. Indeed, it was the petitioners cum plaintiffs that precipitated those investigations and which decided after their commencement to petition the ITA for an amendment of their scope. And the potential impact of that tactic was well-understood by their counsel, *e.g.*:

> This amendment to the scope of the cases has direct relevance to the Commission's negligibility analysis. As set forth in the domestic industry's submission, Germany was believed to be a significant producer of the excluded tire cord and tire bead products. [ ] Excluding these products from the scope of the cases, therefore, would result in a decline in Germany's subject import share over the 12-month period reviewed. Based on the domestic industry's best information, as set forth on the record of the Commission's case, the scope modification would result in a reduction in imports from Germany to 2.9 percent in the August 2000-July 2001 period. . . . Aggregation of these German imports with imports from Egypt, South Africa, and Venezuela in the August 2000-July 2001 period would result in a 9.27 percent import share, well above the seven percent threshold.[10]

Suffice it to state now that this maneuver has had its day in two courts and also to confirm that this one does not interpret the mandate of the Federal Circuit in the first case as providing a basis for relief for the plaintiffs herein from the predicament, the "extraordinary procedural posture"[11], that they instigated. Ergo, judgment should be entered, denying their motion[12] and dismissing this contingent action.

So ordered.

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[10] Plaintiffs' Brief in Support of Rule 56.2 Motion for Judgment Upon the Agency Record [in Co-Steel Raritan, Inc. v. United States, Court No. 01–00955], pp. 30–31 (Dec. 21, 2001)(citations omitted).

[11] Plaintiffs' Nonconfidential Appendix 1, USITC Pub. 3546, pp. 47, 49 (Oct. 2002)(Additional and Dissenting Views of Commissioner Lynn M. Bragg).

[12] Given the seemingly-intractable lie of this matter, the parties' motions for oral argument can be, and they hereby are, denied.

Slip Op. 05–44

ZOMAX OPTICAL MEDIA, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 00–03–00104

[Plaintiff's motion for summary judgment granted.]

Decided: April 1, 2005

Neville Peterson LLP (*John M. Peterson* and *Curtis W. Knauss*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *John J. Mahon*, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Amy M. Rubin*); *Sheryl A. French*, Office of the Assistant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

In this action, plaintiff Zomax Incorporated (formerly known as Zomax Optical Media, Inc.) challenges the decision of the U.S. Customs Service ("Customs")[1] denying Zomax's protest concerning the tariff classification of certain digital mastering equipment imported by Zomax and used for the manufacturing of CDs and DVDs.

Zomax maintains that Customs improperly classified its merchandise as "[o]ther drawing, marking-out or mathematical calculating instruments" under subheading 9017.20 of the Harmonized Tariff Schedule of the United States ("HTSUS") (1997),[2] assessing duties at a rate of 5.1% *ad valorem*. *See generally* Memorandum in Support of Plaintiff's Motion for Summary Judgment ("Pl.'s Brief"); Plaintiff's Reply to Defendant's Opposition to Summary Judgment ("Pl.'s Reply Brief").[3] Zomax argues that the merchandise is instead properly classified as a "[m]achine[ ] for the manufacturing of video laser discs," under subheading 8479.89.85 of the HTSUS, and thus should be duty-free.

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[1] Effective March 1, 2003, the U.S. Customs Service was renamed the Bureau of Customs and Border Protection of the U.S. Department of Homeland Security. *See Reorganization Plan Modification for the Department of Homeland Security*, H.R. Doc. 108–32 at 4 (2003).

[2] All references are to the 1997 version of the HTSUS.

[3] There is some confusion as to Customs' precise classification. *Compare, e.g.*, Pl.'s Brief at 3 (asserting that merchandise was classified under HTSUS subheading 9017.20, providing for ". . . Other drawing, marking-out or mathematical calculating instruments . . . Other . . . Other") *with* Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Brief") at 2–3 (asserting that merchandise was classified under HTSUS subheading 9017.20.90, providing for "other *parts* of drawing, marking-out or mathematical calculating instruments") (emphasis added). In any event, the discrepancy has no effect on either the substantive classification analysis that follows, or on the result.

Pending before the court is Zomax's motion for summary judgment.[4] The Government opposes the motion, asserting, *inter alia*, that Zomax has failed to meet its burden of proof, and that its proposed classification is impermissible. *See generally* Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Brief") at 3–4.

For the reasons set forth below, the merchandise at issue in this action is properly classified as a "[m]achine[ ] for the manufacturing of video laser discs," under subheading 8479.89.85 of the HTSUS. Zomax's motion for summary judgment is therefore granted.

I. ***Standard of Review***

Customs classification decisions are reviewed through a two-step analysis – first, construing the relevant tariff headings (a question of law); and, second, determining under which of those headings the merchandise at issue is properly classified (a question of fact). *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363 (Fed. Cir. 1998) (*citing Univ. Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997)). Summary judgment is thus appropriate where, as here, "there is no *genuine* dispute as to the underlying factual issue of what exactly the merchandise is." *Bausch & Lomb*, 112 F.3d at 1365 (emphasis added); *see also* USCIT Rule 56(c).

"Mere denials or conclusory statements are not sufficient" to put a material fact into dispute. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390–91 (Fed. Cir. 1987); USCIT Rule 56(e). Indeed, a factual dispute is genuine only "if the evidence is such that the [trier of fact] could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In short, "there is no issue for trial unless there is *sufficient evidence* favoring the non-moving party. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249–50 (emphasis added) (citations omitted). Thus, at the summary judgment stage, the question presented is "whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may *reasonably* be resolved in favor of either party." *Id.* at 250 (emphasis added).

II. ***Background***

A. *The Nature of This Case*

This case is an odd one, for a number of reasons. Most striking is

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[4] Jurisdiction lies under 28 U.S.C. § 1581(a) (1994). Customs classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640.

the peculiar procedural posture.[5] In the typical customs classification case, the court's analysis consists largely of reviewing the competing classifications proposed by the respective parties.[6] But this case is very different.

Here, even the Government does not contend that Customs' classification under subheading 9017.20 is proper. Indeed, the Government not only does not defend that classification, it has expressly disavowed it. *See, e.g.*, Pl.'s Brief at 2, 7, 30–31; Def.'s Brief at 7 n.7; Pl.'s Reply Brief at 1, 6, 10. Yet the Government has declined to proffer any proposed alternative classification. *See, e.g.*, Pl.'s Brief at 8; Def.'s Brief at 7 n.7; Pl.'s Reply Brief at 1, 10.[7]

Further, although the Government takes pains to emphasize that it is "not *formally* cross-moving for summary judgment," it requests that summary judgment be granted *sua sponte* in its favor. Def.'s Brief at 5 (emphasis added), 7. The Government also suggests, in passing, that Zomax's case be dismissed for "fail[ure] to plead or demonstrate a cause of action for which relief may be granted." Def.'s Brief at 7 n.7.; USCIT Rule 12(b)(5).[8]

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[5] Zomax's research revealed no reported cases in the last two decades "in which the government has jettisoned the presumption of correctness, declined to introduce its own evidence, asserted no alternative classification, and yet opposed a plaintiff's dispositive motion." Pl.'s Reply Brief at 7 n.3.

[6] *See, e.g., Toy Biz, Inc. v. United States*, 26 CIT 816, 820–30; 219 F. Supp. 2d 1289, 1293–1303 (2002) (addressing whether "X-Men Projector" action figures should be classified as "dolls" or as "other toys"); *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984) (observing that, ordinarily, it will be difficult for a party to show that a classification is *incorrect* without proposing a better classification).

[7] According to the Government, Customs was "willing to consider alternative classification provisions" for the merchandise at issue, but could not do so without information as to which system components were in each of two entries – information that is, according to the Government, material (so that its absence defeats Zomax's motion for summary judgment), and information that both parties agree Zomax cannot provide. *See* Def.'s Brief at 3–5, 7 n.7; Pl.'s Brief at 28. But the Government's explanation is less than satisfying, and cannot fully excuse Customs' failure to proffer any alternative classification in this forum.

To be sure, the lack of information as to the contents of the two entries could present an impediment to the classification process under certain scenarios – if, for example, the Government prevailed on its argument that the two entries at issue must be classified separately. But the Government also failed to proffer a proposed classification for any scenario where the respective contents of the two entries was irrelevant – for example, a scenario where the two entries are treated as one for classification purposes and are deemed to constitute a complete system, but where the Government prevails on its argument that CDs and DVDs are not video laser discs, and/or its argument that a machine that makes "masters" for VLDs is not a machine that "manufactures" VLDs.

[8] Such a motion will not lie here. In support of its motion to dismiss for failure to state a claim, the Government points to Zomax's discovery responses (which indicate that "Zomax has conceded that it cannot provide the identity and value of the invoiced articles"). *See* Def.'s Brief at 7 n.7. The Government thus relies on information outside the pleadings to support its motion to dismiss.

Where a motion to dismiss for failure to state a claim relies on information outside the pleadings, however, that motion is effectively converted into a motion for summary judgment – and the moving party becomes "obligated to demonstrate, in accordance with the re-

However, to do as the Government urges – either to grant summary judgment *sua sponte* in its favor, or to dismiss the case – would, in effect, grant a judicial *imprimatur* to the classification of the merchandise at issue under an HTSUS provision that even Customs believes is improper. This the court cannot do. *See* 28 U.S.C. § 2643(b) (stating that the Court of International Trade has the duty to find the correct answer by appropriate means); *Jarvis Clark Co.*, 733 F.2d 878 (asserting that "the court's duty is to find the *correct* result, by whatever procedure is best suited to the case at hand").

Finally, the parties agree that no purpose would be served by a trial in this action. *See, e.g.*, Def.'s Brief at 7 (citing Zomax's discovery responses). The matter is thus ripe for disposition.

B. *The History of the Statutory/Regulatory Scheme*

The realities of modern merchandise and modern modes of cargo shipping can pose significant challenges for importers. One such challenge has arisen in situations where merchandise is imported in an unassembled or disassembled state, in multiple containers. Where such merchandise is capable of being transported in one conveyance, the importer will often have the shipment delivered to a carrier in the exporting country as one shipment, under one bill of lading or waybill, with the intention that the merchandise be transported to the U.S. as a single shipment. However, after taking possession of the merchandise, the carrier may divide the shipment into different lots, which may arrive in the U.S. at different times, often days apart. *See generally* Single Entry for Split Shipments, 68 Fed. Reg. 8713, 8714 (Feb. 25, 2003) (Dep't Treasury).

These so-called "split shipments" are a routine occurrence, particularly in the context of air-shipped cargo, due to practical considerations including limited cargo space, the need for proper weight distribution, and the offloading of cargo for safety concerns. But, while split shipments are a straightforward matter of logistics for *carriers*, they often created legal uncertainty and unpredictability for *importers*. *Id*. The confusion stemmed from the interplay of agency regulations concerning the *entry* of goods, and various customs doctrines governing the *classification* of goods, as well as the fact that customs classification decisions are made annually for literally millions of entries at dozens of ports scattered across the country.

For example, as in this case, Customs at some ports invoked the "condition as imported" rule to require the separate classification of shipments that were split by the carrier. In contrast, at other ports

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quirements of [the rule governing summary judgment], that there exists no genuine issue as to any material fact and that [it] is entitled to the entry of a judgment as a matter of law." USCIT Rule 12(b)(5); Wright & Miller, Fed. Prac. & Proc. Civ. § 1366 (3d ed. Supp. 2005).

(such as Los Angeles International Airport ("LAX") and the John F. Kennedy Airport ("JFK") in New York), Customs treated split shipments as a single entry for purposes of classification. The financial repercussions for an importer could be significant where treatment as separate entries resulted in a different classification (and a higher rate of duty) than treatment of the merchandise as a single entry, as the importer had intended.

Sensitive to importers' concerns, Congress resolved the inconsistency and clarified the situation by enacting 19 U.S.C. § 1484(j)(2), providing a framework to help ensure that split shipments are consistently classified as importers intend.[9] In effect, Congress merely provided uniformity to a practice that was already in place in at least two of the busiest airports in the nation.[10] In both of these airports, Customs had already established a system for handling split shipments. To comply with this system, the carrier was required to include each split portion on the cargo manifest. *See* Single Entry for Split Shipments, 68 Fed. Reg. 8717. Thus, Congress' action amounted to a ratification of the agency's ad hoc practice and an express authorization to the agency to consistently treat split shipments in accordance with importers' intentions.

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[9] Congress expressed concern that, "[a]s a result of these shipping conditions, parts of entireties do not arrive together, which *causes classification or entry problems with Customs*." H.R. Rep. No. 106–789 (2000), *reprinted in* 2000 U.S.C.C.A.N. 2102 (emphasis added).

[10] The history of Customs' implementing regulations indicates that the regulations reflect not a new practice, but – rather – an effort to make uniform a practice already in use at some ports:

> *Comment: Under the current systems for handling split shipments employed* at [LAX] and at [JFK] in New York, the carrier is required to include each split portion on the manifest. Hence, it is asserted that the manifest should constitute the advance notification to Customs that the shipment has been split. If the importer does not file a separate entry for each arriving portion, it should be understood that the importer intends to file a single entry for the entire split shipment.
>
> *Customs Response:* Customs disagrees. The advance notice is a statutory requirement which lets Customs know that the importer has elected to file a single entry for all portions of the split shipment. Mere notification that the shipment has been split is not notification by the importer that a single entry will be filed for the shipment.

See Single Entry for Split Shipments, 68 Fed. Reg. 8717 (emphasis added). As the Comment makes clear, and Customs never refutes, there was already a system in place that addressed split shipments.

Similarly, in the process of notice and comments that preceded the regulation that implemented 19 U.S.C. § 1484(j)(2) the following exchange took place with regards to a proposed change in the procedure which required notice to Customs that the shipment has been split:

> *Comment:* The split shipment procedures followed by Customs at [LAX] and at [JFK] are preferable to those reflected in the proposed rule.
>
> *Customs Response:* Customs reviewed the split shipment procedures at these airports. In developing the proposed regulation, Customs included the most operationally feasible features of the procedures for handling split shipments at those locations.

See Single Entry for Split Shipments, 68 Fed. Reg. 8714.

C. *The Facts of This Case*

Zomax purchased the digital video mastering system here at issue in 1997, from Nimbus Technology & Engineering, of the United Kingdom.[11] The system is used to manufacture "master" video laser discs of various formats (including DVDs, CD-roms, CD videos, and Video-CDs, among others), which can be played on suitable players, and which, in turn, are used to produce the discs available in retail and wholesale outlets.[12]

The merchandise at issue was marketed, ordered, purchased, and sold as a single operating unit, at a single price, under a single commercial invoice covering the entire system.[13] For reasons of transportation necessity, the system was shipped from Great Britain to the U.S. in 46 separate cartons. All 46 cartons were tendered to the carrier as a single shipment, under a single air waybill, and were accepted for transport by the carrier on that basis. After accepting the shipment, however, the carrier arbitrarily split the shipment – on its own initiative, and without notice to or consent from Zomax (the importer of record) – shipping the 46 boxes to the U.S. in two lots,[14] which were sent on two different flights on consecutive days. Forty-one of the 46 cartons comprising the system arrived on the first aircraft, with the five remaining cartons delivered the following day. It is impossible to know exactly which components were in each of the two lots.

In accordance with Customs regulations, Zomax's customs broker made entry of the two lots on consecutive days, using the single commercial invoice.[15] The system was subsequently assembled at

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[11] The facts herein are drawn largely from the affidavit submitted by Zomax, together with the documents submitted by the parties.

[12] As Zomax explains, the master disc is topologically inverse to the discs that are molded from the master, and distributed commercially. *See* Pl.'s Brief at 20–21.

[13] Zomax's purchase order (Pl.'s Exh. D) lists the quantity ordered as "1.000" and describes the product as "Equipment – CD Glass Master Equipment," indicating that the order was for a single mastering unit. Similarly, the invoice Nimbus issued to Zomax (Pl.'s Exh. C) lists only the cost of the system as a whole.

[14] A single air waybill (Pl.'s Exh. E) was issued in England by the carrier. That air waybill indicates that, while the 46 cartons containing the entire system were delivered to the carrier as a single shipment, the carrier thereafter decided to split the shipment and send it on separate flights leaving on two consecutive days.

Two airline Carrier's Certificates (Pl.'s Exh. F) confirm that a single shipment of 46 cartons was accepted for carriage under a single air waybill (#0737021741) and was split by the carrier for shipment on two different flights.

[15] A copy of the invoice issued by Nimbus was included with each of the two lots. The copy included with the first lot has a hand-written notation indicating that it is "pt.1" covering "41" cartons, while the copy included with second lot covers "5" cartons and is marked "pt.2." *See* Pl.'s Exh. C.

The broker apportioned the value stated on the invoice between the two lots, based on the number of cartons in each lot. *See* Pl.'s Exh. C; Pl.'s Brief at 11.

Zomax's manufacturing plant, by technicians from Nimbus, over a period of weeks.

Zomax's customs broker entered the system at issue under the provision for "[m]achines for the manufacturing of video laser discs" – subheading 8479.89.85 of the HTSUS, duty-free. Customs initially liquidated the two lots as entered. Three and a half months later, however, Customs reliquidated the two lots under HTSUS subheading 9017.20, which covers "[o]ther drawing, marking-out or mathematical calculating instruments," subject to a duty rate of 5.1%.[16]

Zomax's timely protest was denied, and this action ensued.

III. *Analysis*

The Government opposes Zomax's proposed classification on three basic grounds. The Government first contends that – because the merchandise here at issue was entered as two entries, rather than a single entry – it cannot be classified as a single machine. *See generally* Def.'s Brief at 3, 8–13. Secondly, the Government disputes that the merchandise constitutes a complete system. *See generally* Def.'s Brief at 3, 10, 18–20. Finally, the Government asserts that – even if the two entries are combined for classification, and even if the merchandise constitutes a complete system – the merchandise still cannot be classified as Zomax proposes, because (a) "a DVD (or CD) mastering system is not a machine for the manufacture of video laser discs because DVDs and CDs are not [video laser discs]" (*see generally* Def.'s Brief at 4, 13–17), and because (b) "a machine that makes 'masters' for [video laser discs] is not the same as a machine that manufactures [video laser discs]" (*see generally* Def.'s Brief at 4, 17–18).

As discussed in greater detail below, the Government's arguments are unavailing; and the merchandise at issue is properly classifiable as a "[m]achine[ ] for the manufacturing of video laser discs," HTSUS subheading 8479.89.85, as Zomax has urged.

A. *The "Condition As Imported" Rule*

The Government's threshold – and primary – argument against Zomax's proposed classification is the Government's claim that the two entries cannot be combined for classification because the "condition as imported" rule requires merchandise in separate entries to be classified separately. *See generally* Def.'s Brief at 3, 8–13.

As discussed in section II.B. above, the "condition as imported" rule is nowhere near as ironclad as the Government suggests. Indeed, as II.B.explains, Customs had a practice of combining "split shipments" (such as the entries here at issue) for purposes of classifi-

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[16] *See* n.3, *supra*.

cation in at least two major U.S. ports (LAX and JFK Airports), even before Congress enacted legislation expressly codifying it. That fact alone makes short work of the Government's argument. In short, Customs' practice of combining "split shipments" in at least some ports effectively refutes the Government's claim that the "condition as imported" rule is *inherently* incompatible with Zomax's proposed classification.

The Government also invokes *KMW Johnson, Inc. v. United States*, 13 CIT 1079, 728 F. Supp. 754 (1989). *See* Def.'s Brief at 8–9. However, that case – which dealt with the doctrine of "entireties" – is inapposite. The plaintiff in *KMW* sought to classify as an "entirety" the components of a paper-making machine which were imported in a total of 17 entries through multiple ports over a period spanning two years. According to the plaintiff, "[t]he size, complexity, cost, manufacturing and erection time of the machine rendered it physically impossible and economically unfeasible to import all the components in a single shipment." *KMW*, 13 CIT at 1082, 728 F. Supp. at 755.

What was dispositive in *KMW* was the definition of the doctrine of entireties, which expressly required that the merchandise sought to be classified be imported *in one importation*. *See KMW*, 13 CIT at 1082, 728 F. Supp. at 756 (*quoting* classic definition of doctrine, set forth in *Karoware, Inc. v. United States*, 427 F. Supp. 402, 411 (Cust. Ct. 1976)). However, the case at bar does not involve the doctrine of entireties, which is – in any event – now defunct.[17]

In sum, what the plaintiff in *KMW* sought to do was expressly prohibited by the doctrine of entireties, on which the plaintiff relied. In contrast, the principle that the Government invokes here is the "condition as imported" rule. And, as discussed above, nothing in that rule is inherently incompatible with the classification that Zomax here seeks.

B. *The Completeness of the System*

The Government also argues that – even if the two entries at issue are combined for classification – Zomax has failed to prove that the merchandise constituted a complete (albeit unassembled) system, or in the alternative, that the merchandise had the "essential character" of a complete system. *See generally* Def.'s Brief at 2–4, 8, 10, 13 n.15, 14 n.18, 18–19.

To the contrary, Zomax has submitted the affidavit of the Zomax manager who oversees the department that uses the merchandise here at issue, who attests that it is a "complete digital laser disc mastering system." *See* Pl.'s Exh. B ¶¶ 3–4; *see also* ¶ 5 (describing

[17] The Government concedes that the doctrine of entireties is defunct. *See* Def.'s Brief at 9 (referring to the "extinction" of the doctrine).

merchandise post-assembly as "completed . . . system"). The Government proffers no testimony of its own to refute Zomax's affidavit.

In lieu of supplying any affirmative testimony or other evidence on this point, the Government instead argues that Zomax failed to meet its burden of proof. Specifically, the Government asserts that "at least one crucial component (the UV laser) was not included" in the entries at issue. *See* Def.'s Brief at 10. The Government also points to a "control panel" that Zomax sourced domestically (referred to on Plaintiff's Exhibit G, a videotape of the merchandise at issue, as assembled), and to a "surface analyzer" used in conjunction with the system. *See* Def.'s Brief at 10 n.11.

However, aside from the Government's naked assertion that these items are "crucial" (*see* Def.'s Brief at 10), there is no evidence that the system is (for tariff purposes) incomplete without them. Indeed, what evidence there is suggests otherwise. As explained on the videotape of the actual merchandise (Pl.'s Exh. G), the "UV laser" is a "consumable" – that is, an item that is replaced every six months or so. In other words, the laser is, in essence, a fancy light bulb. To suggest that the laser encoder is incomplete without it is akin to arguing that a lamp is incomplete, for tariff purposes, without a light bulb – a position that even the Government must concede is erroneous.[18]

In any event, even assuming – *arguendo* – that the system were incomplete, it would nevertheless be classifiable as though it were complete, pursuant to GRI 2(a).[19] The Government's challenge to the

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[18] Indeed, as Zomax has observed, a laser printer imported *without the laser* is nevertheless classified as a laser printer. *See* Audiotape of Oral Argument.

Similarly, as to the "control panel" and the "surface analyzer," there is simply nothing in the record to effectively refute Zomax's assertion that the merchandise at issue constituted a complete system. Zomax's inability to pinpoint the "surface analyzer" on the invoice does not mean that the component was not included in one of the two entries. Further, although there may be any number of additional machines or components that *may* be used in the mastering process, the record evidence – *i.e.*, Zomax's sworn testimony, as well as the purchase order and commercial invoice – supports Zomax's claim that the merchandise here constituted a complete system.

[19] The classification of all merchandise is governed by the General Rules of Interpretation ("GRIs"), which provide a framework for classification under the HTSUS. *See, e.g.*, *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001).

Pursuant to GRI 2(a), merchandise that consists of either a complete article entered in an "unassembled" state or an unfinished article that has the "essential character" of the complete article is classified under the same tariff provision as the complete, assembled article.

In cases such as this one, where the imported merchandise is unassembled, the components – when assembled – must result in a substantially complete article. *See, e.g.*, *Authentic Furniture Products, Inc., v. United States*, 343 F. Supp. 1372, 1380 (Cust. Ct. 1972). One critical factor in determining whether merchandise is substantially complete is a comparison between the number of missing parts and the number of included parts. *See Daisy-Heddon, Div. Victor Comptometer Corp. v. United States*, 600 F.2d 799, 803 (C.C.P.A. 1979). Here, it is undisputed here that 46 of – at most – 49 components were included in the two entries at issue. Moreover, as discussed above, the record is devoid of evidence to suggest completeness of the system is lacking in substance.

C. *Classification Under Subheading 8479.89.85*

Finally, the Government argues that, even if the mastering system is classifiable as a single unassembled machine, it is not used to manufacture video laser discs and therefore cannot be classified under HTSUS subheading 8479.89.95, as Zomax proposes. *See generally* Def.'s Brief at 3–4, 13–18.

The Government's argument is two-fold. First, the Government contends that CDs and DVDs are not video laser discs, and therefore machines used in the manufacturing of CDs and DVDs do not fall within the tariff provision. *See generally* Def.'s Brief at 4, 13–17. And, second, the Government argues that – even if CDs and DVDs are video laser discs – "a machine that makes 'masters' for [video laser discs] is not the same as a machine that manufactures [video laser discs]." *See generally* Def.'s Brief at 4, 17–18.

As discussed in section I. above, it is axiomatic that the proper tariff classification of merchandise is determined through a two-step analysis: first, construe the relevant tariff headings; and, second, determine under which tariff heading the merchandise at issue falls. *See, e.g., Universal Elecs., Inc. v. United States*, 112 F.3d 488, 491 (Fed. Cir. 1997).

1. *The Tariff Term "Video Laser Discs"*

In accordance with GRI 1, classification begins with reference to the language of the relevant tariff schedule headings.[20] It is understood that tariff terms are to be construed in accordance with their common and commercial meanings, which, absent contrary evidence, are presumed to be the same. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1379 (Fed. Cir. 1999). In order to determine the common meaning of a tariff term it is proper to consult dictionaries, lexicons, scientific authorities, and other reliable sources. *Lonza Inc. v. United States*, 46 F. 3d 1098, 1106 (Fed. Cir. 1995).

Although "video laser disc" does not appear in any of the sources consulted, the term "laser disc" does. *The Oxford English Dictionary* defines "laser disc" as "a disc on which signals or data are recorded to be reproduced by directing a laser beam on its surface and detecting the light reflected or transmitted by it." *The Oxford English Dictionary* 67 (2d ed. 1989). "Laser disc" is also defined as "OPTICAL DISK; [especially]: one on which programs are recorded for playback on a television set." *Merriam Webster's Collegiate Dictionary* 656

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that any missing components were of such a nature as to render the system other than "substantially complete."

[20] The term "headings" includes the subheadings indented thereunder. General Note 19(f), HTSUS.

(10th ed. 1997). "Optical disc," in turn, is defined as "a disc (such as a CD-ROM) on which data is stored or recorded using light . . . ," *The Oxford English Dictionary* (online ed.) *available at* http://dictionary.oed.com.

Thus, a "laser disc" is an optical disc[21] on which data is both recorded and read using light (*i.e.* a laser beam). The term "video" appearing before "laser discs" indicates that the data stored on the discs consists of images (and possibly sound) meant to be viewed on a television screen or computer display. *See Merriam Webster's Collegiate Dictionary* 1316 (10th ed. 1997) (definition of "video"). This is consistent with the existence of the term "video disc," which is defined as "a disc similar in appearance and use to a phonograph record on which programs have been recorded for playback on a television set; *also*: OPTICAL DISK . . . ." *Merriam Webster's Collegiate Dictionary* 1317 (10th ed. 1997). In other words, a video laser disc is an optical disc with video content; and it is the same thing as a video disc.

2. *Whether CDs and DVDs Are "Video Laser Discs"*

The Government asserts forcefully that CDs and DVDs are not video laser discs. *See* Def.'s Brief at 14. The Government claims that the term "video laser discs" as it appears in subheading 8479.89.85 of the HTSUS refers *only* to discs that are 12 (or sometimes 8) inches in diameter, that are encoded in analog (as opposed to digital) format, and that must be "flipped" when played. *See id.* Thus, the Government appears to argue that the tariff term "video laser discs" refers only to the video discs manufactured from the late 1970s and into the 1990s known by copyrighted brand names such as "LaserDisc" or "Laser Vision." *See id.* at 14–15; Def.'s Exh. 9.

The Government's argument cannot prevail. CDs and DVDs, and the branded discs referred to by the Government are *all*, as the Government concedes, optical discs. *See* Def.'s Brief at 14. This is evident from the common meaning of "compact disc" (*i.e.*, CD), which is, "a small plastic *optical disc* . . .", *Merriam Webster's Collegiate Dictionary* 233 (10th ed. 1997) (emphasis added), and of DVD, which is, "[a] type of compact disc. . . ." *The Oxford English Dictionary* (online ed.) *available at* http://dictionary.oed.com. Moreover, all three types of discs are "video laser discs" or "video discs" – that is, optical discs on which video and other information can be stored for playback on a television or computer screen. Indeed, a relevant encyclopedia entry explains that the "video disk exists in three major forms: the Digital Video Disk (DVD; sometimes called the Digital Versatile Disk); the

[21] "Disc" and "disk" are used interchangeably without the difference in spelling appearing to denote any difference in meaning.

Laser Video disk (sometimes called the Laser Vision disk); and the Video CD." *McGraw-Hill Encyclopedia of Science & Technology* vol. 19, 261(9th ed. 2002).

Thus, the tariff term "video laser discs" plainly encompasses optical discs with video content such as CDs and DVDs, as well as the "LaserDisc" or "Laser Vision" variety of discs favored by the Government.[22] Further, nothing on the face of the tariff term "video laser discs" even remotely suggests that it is limited to discs of a certain size, or to discs with analog (versus digital) content, much less to discs that need to be – in the Government's words – "flipped."

Nevertheless, the Government maintains that Congress did not intend that machines used to manufacture CDs and DVDs would be classified under 8479.85.85. Def.'s Brief at 16. In support of this assertion, the Government points out that numerous bills were proposed to the 106th Congress to amend subheading 8479.89.85 by replacing "video laser disc" with "digital versatile disc." The Government concludes that "if the original drafters had intended for subheading 8479.89.85, HTSUS, to be sufficiently broad to encompass machines for making DVDs or CDs, there would have been no need of these proposed bills." *Id.*

This argument is specious. When there is ambiguity in a tariff term, resort may be had to legislative history to determine the intent of Congress vis-a-vis the tariff term. Here, as discussed above, there is no ambiguity compelling such a course of action. Moreover, assuming *arguendo* that such an ambiguity exists, what legislative history there is, shows that the drafters intended for the tariff provision to include machines that manufacture CDs and DVDs. For example, in connection with one of the proposed amendments a member of the House of Representatives stated: "Under the established legal principle that legislation should be interpreted to take into account advancements in technology, *DVD manufacturing machines should be classified under the same duty free provisions as VLD* [video laser disc] *manufacturing machines. Customs, however, has ruled that DVD manufacturing machine are not classified under the duty provisions for VLDs* . . . [with] *the effect of negating the benefits of the Congress' 1994 legislation on VLDs.* 146 Cong. Rec. E213–02; Def.'s Exh. 11 (emphasis added).

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[22] It is also true that tariff terms are "written for the future as well as the present" and therefore are meant to encompass merchandise not known at the time of their enactment, provided that the subsequent merchandise bears an "essential resemblance" to the articles described by the tariff terms. *See Sears Roebuck and Co. v. United States*, 22 F.3d 1082, 1084 (Fed. Cir. 1994) (quotations omitted) (holding that camcorders manufactured in the 1990s were classifiable under a tariff provision for "television camera" and "tape recorder" enacted in 1962). Assuming, *arguendo*, that CDs and DVDs represent articles that came into existence *after* the enactment of the tariff provision "video laser discs" (although there is no evidence to that effect in the evidentiary record here), CDs and DVDs, as discussed at length above, clearly bear an essential resemblance – in terms of technology, function, and appearance – to the discs encompassed by the provision at the time of its enactment.

Accordingly, the tariff term "video laser discs" encompasses CDs and DVDs with video content.

3. *Whether "Masters" Are Video Laser Discs*

In a last ditch effort, the Government argues that even if the tariff term "video laser discs" encompasses CDs and DVDs, the system here at issue produces *master* discs. The Government maintains that a master disc is not the same thing as the video laser disc itself.[23]

Once again, the Government's argument cannot be sustained. The master discs produced on Zomax's system are indeed optical discs on which video information is recorded in CD and DVD format. *See* Pl.'s Exh. B. And, as Zomax explains, they are playable on an industrial-grade DVD player producing the same output as any other DVD or CD. Pl.'s Reply Brief at 9–10. In fact, the master disc is simply the original recorded disc from which copies are made for commercial distribution. *See The Oxford English Dictionary* (online ed.), *available at* http://dictionary.oed.com (definition of "master disc").

IV. *Conclusion*

For all the reasons set forth above, the digital mastering equipment at issue here is properly classified as a "machine[ ] for the manufacturing of video laser discs" under subheading 8479.89.85 of the HTSUS.[24] Zomax's motion for summary judgment is therefore granted.

Judgment will enter accordingly.

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[24] This disposition obviates the need to reach Zomax's alternative proposed classification. *See* Pl.'s Brief at 28–30; Def.'s Brief at 18–19.

Slip Op. 05–45

Before: Judge Judith M. Barzilay

Sinopec Sichuan Vinylon Works, Plaintiffs, v. United States, Defendant and Celanese Chemicals, Ltd. and E.I. DuPont De Nemours & Co., Defendant-Intervenors.

Court No. 03–00791

[Plaintiffs USCIT R. 56.2 Motion for Judgment upon an Agency Record granted in part and denied in part.]

Decided: April 4, 2005

Gamey Schubert Barer, William E. Perry, Lizabeth R. Levinson, (*Ronald M. Wisla*), *J. Patrick Briscoe* for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen,* Director; (*Jeanne E. Davidson*), Deputy Director; (*Stephen C. Tosini*), Trial Attorney, Department of Justice, Civil Division, Commercial Litigation Branch and *Ada E. Bosque,* Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel for Defendant.

Wilmer Cutler Pickering Hale & Dorr LLP, (*Ronald I. Meltzer*), *Tammy J. Horn*, *Atman M. Trivedi* for Defendant-Intervenors.

OPINION

BARZILAY, JUDGE:

I. INTRODUCTION

Plaintiff Sinopec Sichuan Vinylon Works (“SVW”), a Chinese producer and exporter of polyvinyl alcohol (“PVA”) from the People’s Republic of China (“China”), challenges the final determination of sales at less than fair value and the resulting antidumping duty order issued by the United States Department of Commerce, International Trade Administration (“Commerce” or “the Department” or “the Government”) in *Polyvinyl Alcohol from the People’s Republic of China*, 68 Fed. Reg. 47538 (2003), as amended 68 Fed. Reg. 52183 (2003) (finding PVA to be dumped in the United States by SVW and determining the final dumping margin to be 6.91 percent). Plaintiff contests Commerce’s decisions (1) not to apply the “self-produced” rule to inputs produced by a joint venture; (2) to apply a value-based methodology to allocate costs between acetylene and acetylene tail gas instead of a heat of combustion-based methodology; (3) to use the ceiling price of published Indian natural gas prices as the surrogate value for natural gas rather than an average of published floor and ceiling prices; and finally, (4) Commerce’s decision regarding when and how to apply a by-product credit in its calculation of Plaintiff’s normal value. Commerce has requested remand of its use of the ceiling price for natural gas. For the reasons explained below, Plaintiff’s

USCIT R. 56.2 Motion for Judgment Upon an Agency Record is granted, in part, and the case is remanded to Commerce to reconsider its analysis with regard to issues (l), (3), and (4). Commerce's decision regarding issue (2) is affirmed.

II. BACKGROUND

For non-market economy ("NME") countries, section 773(c) of the Tariff Act of 1930 requires that Commerce calculate normal value using market economy prices to value the factors of production used in the NME country to produce the subject merchandise. 19 U.S.C. § 1677(b) (2003); Antidumping Duty Manual, Ch. 8 at 85. In its normal value calculation, Commerce valued costs of production by utilizing the financial statements of an Indian surrogate, VAM Organic Chemical Ltd. (subsequently, Jubilant Organosys Ltd.) ("Jubilant" or "the surrogate") to value factory overhead, general expenses and profit. *Def.'s Memo in Opp. to Pl.' Mot. for J. Upon the Agency Record* ("*Def.'s Memo*") at 3. Jubilant is a producer of polyvinyl acetate (PVAc), a product comparable to the PVA produced by SVW. The two manufacturers' production processes differ, however, in that SVW polymerizes vinyl acetate monomer ("VAM") into PVAc, and then converts it into PVA, while Jubilant processes ethanol into ethylene to derive VAM, which it then processes into PVAc. *Pl.'s Brief in Support of Mot. for J. on Agency Record ("Pl.'s Brief")* at 3. Jubilant does not follow through to the final stage for the production of PVA, where significant amounts of acetic acid are recovered. *Id.* SVW, on the other hand, does perform this final stage and, therefore, recovers acetic acid in the production of PVA.

On March 20, 2003, Commerce published its preliminary determination, where it reported a *de minimis* dumping margin. *Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Polyvinyl Alcohol from the People's Republic of China*, 68 Fed. Reg. 13674 (March 20, 2003). Commerce's investigations revealed that SVW purchases acetic acid, one of the main inputs, from a joint venture partner within the PRC. *Issues and Decision Memo ("I & D Memo")* at 3. For its preliminary determination, Commerce did not value the costs of producing acetic acid by the joint venture, but instead used a surrogate value from an Indian producer. *Id.* Commerce reasoned that the joint venture was neither a branch nor a division of SVW, and therefore, it was statutorily required to treat acetic acid as purchased from another NME supplier. *I & D Memo* at 3. SVW argued that Commerce should have treated acetic acid as a self-produced input because the joint venture supplier produces acetic acid within SVW's manufacturing site and supplies it directly to SVW through a connected pipe system. *Id.* at 5. Moreover, SVW argued that it owned a substantial minority interest in the joint venture, and that it decided to form this relationship because it would be more cost effective to produce the input than to purchase it. *Id*. To treat the joint venture as an arms-length supplier, SVW contended, would result in an inflated cost of production, since SVW obtains substantial economic benefits from its vertical integration with the joint venture. *Id*. at 5. Commerce rejected SVW's argument, and continued to treat acetic acid as a purchased input in its valuation rather than using SVW's costs of production. *I & D Memo* at 7.

Moreover, Commerce's investigation revealed that during the PVA production process, acetylene and acetylene tail gas are also recovered. *Def.'s Brief* at 4. For its preliminary determination, Commerce allocated the costs for these two products using a heat combustion methodology, as SVW did in its own records. *I & D Memo* at 17. Petitioners argued that tail gas should be treated as a co-product, rather than a by-product, and that SVW allocated more costs to tail gas than it did to acetylene, despite the latter's significantly higher market value. *Def.'s Brief* at 4. For its final determination, Commerce reasoned that "allocation of costs solely on potential heats of combustion when the potential heat is not a factor in the process at hand is not reasonable given the vastly different market values of the joint products at issue," *I & D Memo* at 17, and ultimately used a "value based methodology." *Id*.; *I & D Memo* at 15–18.

In its investigation Commerce also used surrogate values for natural gas, a raw material input in the production of PVA, using values obtained from the Gas Authority of India, Ltd. ("GAIL"). *I & D Memo* at 22. Plaintiff challenged Commerce's use of GAIL's reported ceiling prices, arguing that Commerce should use an average of the reported ceiling and floor prices for natural gas, as opposed to the highest reported price, which the Department used. *Id*. In its final determination, Commerce rejected SVW's argument and continued to use the natural gas prices from the surrogate as it did in the preliminary determination, asserting that the lower prices were "only offered on preferential terms to customers in a particular geographic region." *I & D Memo* at 23.

Finally, during its calculations for the preliminary determination, Commerce utilized surrogate financial ratios for factory overhead, SG&A, and profit to calculate SVW's cost of production. *I & D Memo* at 25. Commerce also determined that the denominator of the financial ratios did not account for the significant quantity of the acetic acid by-product that SVW recovered during the final PVA production stage, and not experienced by the surrogate. *Id*. at 28. Therefore, to account for this discrepancy, Commerce applied the surrogate's financial ratios to SVW's costs prior to making an offset for the recovered by-product, with the goal of equating the base on which the ratios were calculated with that to which they were applied. *I & D Memo* at 25.

SVW suggested that Commerce should apply overhead, SG&A, and profit after granting the by-product credit. Petitioners, on the other hand, urged Commerce to adjust Jubilant's financial statements to account for SVW's higher level of integration, which resulted in differences in costs between the two manufacturers. *Pl.'s Brief* at 4. Commerce found that the differences in material costs were due to differences in the production process, and not to capital intensity or integration. *I & D Memo* at 28. Therefore, it refused to adjust the surrogate values, and instead continued to apply Jubilant's ratios prior to offsetting for SVW's recovery of acetic acid. *Pl.'s Brief* at 5.

Commerce issued its final determination on August 11, 2003, in which it reported an affirmative dumping margin of 7.40 percent. *Polyvinyl Alcohol from the People's Republic of China*, 68 Fed. Reg. 47538 (2003). On September 2, 2003, Commerce published the antidumping duty order with a reduced dumping margin of 6.91 percent, after correcting various clerical errors. *Polyvinyl Alcohol from the People's Republic of China*, 68 Fed.Reg. 52183 (2003). It concluded that PVA from the PRC was being sold at less than fair market value within the meaning of section 733(b) of the Tariff Act of 1930, as amended, 19 U.S.C.§ 1673b(b) (1988). Plaintiff SVW filed a complaint contesting Commerce's findings.

III. DISCUSSION

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2005). In reviewing Commerce's antidumping duty determinations, the court will sustain any determination, finding, or conclusion by Commerce unless it is unsupported by substantial evidence on the record or is otherwise not in accordance with law. *See* 19 U.S.C. § 1516a(b)(l) (2005); *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996). Substantial evidence is "such relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison v. NLRB*, 305 U.S. 197, 229 (1938).

A. Application of the Self-produced Rule to Acetic Acid Inputs

In non-market economy antidumping proceedings, Commerce values respondent's factors of production utilizing the best available information from a market economy. 19 U.S.C. § 1677b(c) (1994). Therefore, Commerce uses surrogate values from market economy manufacturers to value the costs of factors of production when it determines that this constitutes the best information available.

1. Plaintiff's Arguments

Plaintiff argues, as it did during the agency investigation, that Commerce erred in utilizing a single surrogate price for acetic acid because SVW obtains the input from an affiliate, and therefore the self-produced rule applies. Plaintiff indicates that the self-produced rule has been upheld as an appropriate method for determining the most accurate dumping margin possible, even where the producer under investigation purchases from affiliates. To support this claim, SVW cites *CITIC Trading Co., Ltd. v. United States*, where the court upheld the self-produced rule as "reflective of the statute's overriding requirement for accuracy." 27 CIT ___ , Slip Op. 03–23 (March 4, 2003).

Plaintiff contends that, as indicated in its responses to Commerce's questionnaires, it obtains acetic acid from an affiliated manufacturer, of which Plaintiff is a minority owner. Moreover, SVW maintains that it shares a manufacturing site with the affiliated supplier and that the two operations are intertwined at the site. Thus, SVW argues that it enjoys economic benefits from its vertical integration with its supplier, and as such, Commerce's failure to apply the self-produced rule results in an inflated cost of production calculation.

Although Plaintiff concedes to Commerce's determination that the manufacturer is a separate legal entity, it argues that this distinction is not, or should not be, the dispositive factor. Plaintiff argues that Commerce should instead consider operational interdependence, along with Plaintiff's investment and interest in the joint venture. Thus, Plaintiff contends that Commerce failed to adequately explain why corporate organization is the decisive factor in determining whether merchandise is considered self-produced.

Furthermore, SVW claims that Commerce's use of the Indian surrogate value instead of SVW's own factors of production, resulted in an overstatement of SVW's costs. According to SVW, the Indian surrogate produces 20 different by-products, including acetic acid, while SVW produces only 9. Therefore, Plaintiff suggests that Commerce's failure to apply the credit for the costs of production would treat SVW as less integrated than Jubilant, and impute higher capital costs to SVW. Thus, applying Jubilant's overhead figures, as opposed to applying its prices to SVW's reported factors of production, overstates SVW overhead, as the former has higher capital costs. Application of the self-produced rule, SVW alleges, would alleviate this disparity.

2. Defendant's and Defendant-Intervenors' Arguments

Commerce maintains that it is not required to apply the self-produced rule. It argues that there is no legal justification for treating the joint venture's factors of production as those of SVW. Doing so, Commerce suggests, would result in an undervaluation of the input, and consequently an understatement of the normal value, undermining the accuracy of its calculation. Commerce contends that SVW does not incur the operation, maintenance, and depreciation related expenses of its supplier's plant, and that SVW and the joint venture are separate corporate entities. Finally, Commerce argues that to consider acetic acid as self-produced would require it to collapse SVW with the joint venture, while the collapsing factors have not been proven.[1]

Defendant-Intervenors, the domestic producers, argue that Commerce correctly valued SVW's acetic acid input using the Indian surrogate prices and not the factors of production. They contend that SVW does not self-produce the acetic acid because it is purchased from a separate company, which it "neither owns nor controls." *Defendant-Intervenors' Brief* at 9. They further argue that SVW failed to supply sufficient evidence to support its claim that it is vertically integrated with its supplier of acetic acid. According to Defendant-Intervenors, SVW's alleged physical proximity and minority ownership interest in the affiliate are not determinative factors for the application of the self-produced rule.

3. Analysis

It is well-established that section 773 of the Tariff Act of 1930 directs Commerce to base normal value on market economy figures for factors of production that are comparable, to the extent possible, with those of the NME producer. 19 U.S.C. § 1677b(c)(4) (2003). When obtaining data from such market economy-based surrogate producers, Commerce must base the market economy figures on the best available information. 19 U.S.C. § 1677b(c)(1)(B) (2003). While a factors of production methodology is specifically provided for in the statute, Commerce is not restricted to the exclusive use of surrogate values in comparable market economies. *See CITIC Trading Co.*, 27 CIT ___ , Slip Op. 03–23, 47 (citing *Lasko Metal Products, Inc. v. United States*, 16 CIT 1079, 1082, 810 F. Supp. 314, 317 (1992) (quotations omitted)). Thus, Commerce may use evidence of prices paid in the nonmarket economy country to market-economy suppliers in combination with surrogate country information when valuing factors of production. *Lasko*, 810 F. Supp. at 316 (citing *Tianjin Mach. Import & Export Corp. v. United States*, 806 F. Supp. 1008, 1018 (1992)). Additionally, as Plaintiff points out, Commerce has in the past relied on costs of self-produced inputs rather than surrogate values where it could value the materials, energy, and labor employed to manufacture the input. *CITIC Trading Co.*, Slip Op. 03–23 at 47 (citations omitted). At oral argument, the government indicated that the "bright line rule" for determining when an input is considered self-produced is whether control over the affiliated producer can be exercised, but admitted that "a party can rebut this

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[1] Defendant has not provided any support for its claim that in order to consider acetic acid to be self-produced, it would have to collapse SVW and the joint venture. The court notes that under the present facts, the collapsing analysis is not applicable to this case, and without a more complete discussion of this issue than contained in the briefs, the court will not consider it further.

presumption based upon certain factors concerning that party." *Oral Arg. Tr.* at 26. Commerce has failed, however, to sufficiently explain why corporate organization is itself the dispositive factor in deciding whether to treat inputs as self-produced. Although arguing that other factors such as operational integration do not establish organizational control, Commerce has failed to sufficiently explain what organizational control itself has to do with the essential issue of arriving at an accurate cost of production for the NME producer. Therefore, this issue is remanded to Commerce to reconsider its analysis of whether to apply the self-produced rule and, if necessary, to revise its dumping margin calculations in accordance with this opinion. Furthermore, Commerce has failed to respond to Plaintiff's second argument, that because Jubilant is more vertically integrated than SVW, using its cost figures would greatly overstate SVW's overhead. Accordingly, this issue is similarly remanded to Commerce to explain why Jubilant is the appropriate surrogate, assuming the self-produced rule cannot be applied here.

B. Value-Based Methodology Versus Heat of Combustion-Based Methodology

SVW produces acetylene and acetylene tail gas. In its questionnaire responses, SVW allocated the values of acetylene and acetylene tail gas by using their relative heats of combustion. In its verification report, Commerce concluded:

> Company officials explained that acetylene tail gas is recorded as a co-product in its normal books and records and that all production costs are allocated between acetylene and acetylene tail gas in the ordinary course of business. Company officials provided a document from the SVW planning department showing the allocation methodology used. Company officials explained that the current methodology has been in place at SVW since December 1996. Commerce accepted this methodology for the preliminary determination.

Id. Commerce further noted:

> . . . acetylene tail gas is a significant product for SVW because it is used as the feedstock to produce methanol in the Methanol (I) plant, while acetylene is a significant product because it is the feedstock for VAM.

Id. For the final determination, however, Commerce continued to treat acetylene and acetylene tail gas as co-products, but adopted a value-based allocation methodology. Commerce concluded that

> we have determined that it is appropriate to reject SVW's allocation methodology because it does not reasonably reflect the costs associated with the production and sale of PVA, as required by the Act. . . . Accordingly for the final determination,

> we re-allocated SVW's costs between acetylene and acetylene tail gas based on each product's relative market value.

I&D Memo at 18–1 9.

1. Plaintiff's Arguments

Plaintiff contends that Commerce's decision to switch from a heat of combustion-based methodology to a value-based methodology was contrary to law and unsupported by substantial evidence on the record. SVW argues that Commerce's discretion to select a methodology is not without restriction. Instead, it relies upon *Shikoku Chems. Co. v. United States*, 16 CIT 382,795 F. Supp. 417 (1992),for the proposition that Commerce may not alter its methodology where a respondent has detrimentally relied upon a previous methodology developed by Commerce itself and used in prior proceedings. Plaintiff alleges that Commerce, "by its own volition," utilized a heat of combustion methodology during its 1995 anti-dumping investigation against SVW. *Pl.'s Brief* at 14.[2] Moreover, Plaintiff claims that since that time, SVW has adopted that allocation methodology for its own accounting records and in the ordinary course of business. Therefore, SVW claims that it detrimentally relied on Commerce's prior use of such methodology, and therefore, Commerce cannot switch methodologies for its final determination.

In addition, Plaintiff argues Commerce's decision to switch its allocation methodology is contrary to law because the statute requires Commerce to use the producer's records if they "are kept in accordance with generally accepted accounting principles of the exporting country." *Pl.'s Brief* at 19, citing 19 U.S.C. § 1677b(f)(1). According to SVW, it incorporated western-style accounting procedures after the 1995 investigation in order to avoid further dumping charges. *Pl.'s Brief* at 16. Therefore, Plaintiff argues that Commerce should have continued allocating values of acetylene and acetylene tail gas using their relative heats of combustion.

Moreover, Plaintiff contends that the use of the heat of combustion methodology is based on sound accounting and scientific principles, and thus provides an accurate, consistent, predictable and stable measure; while a value-based methodology is not an accurate allocation method for SVW because it "neither purchases nor sells these products." *Pl.'s Brief* at 22. Plaintiff further attests that a value-based methodology would reflect the ever changing prices of the two co-products, which has no effect on SVW's costs.

Finally, Plaintiff challenges the Department's use of surrogate values for acetylene and acetylene tail gas in its calculations. According

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[2] The court was not able to verify this claim by referencing Plaintiff's citation to the record.

to Plaintiff, Commerce was unable to find a surrogate market value for the two co-products, and therefore, it arrived at the value of acetylene tail gas by deducting the Indian surrogate's costs of all factors of producing methanol, except acetylene tail gas. In addition, SVW contends that there was a large discrepancy in the surrogate market value of acetylene provided by Petitioner and the value used in Commerce's calculation in the final determination. Therefore, Plaintiff argues that on remand Commerce should be instructed to recalculate SVW's costs using heat of combustion methodology to allocate values for acetylene and acetylene tail gas.

2. Defendant's and Defendant-Intervenors' Arguments

According to Commerce, it decided to use a value-based methodology in order to account for a significant disparity between the values of acetylene and acetylene tail gas. *Def.'s Brief* at 14. Commerce asserts that it ordinarily calculates costs in accordance with respondent's books and records, if they are maintained according to the exporting country's generally accepted accounting principles ("GAAP") and they reasonably reflect actual costs. *Def.'s Brief* at 14. Commerce states that heat of combustion methodology is not an appropriate value allocation methodology, because SVW does not utilize the products as fuel, and therefore, their "heat generation properties" are irrelevant. *I & D Memo* at 17.

Commerce further argues that the heat of combustion methodology results in a majority of the costs being allocated to acetylene tail gas, while the market value of acetylene is 15 times greater than acetylene tail gas. Commerce contends, therefore, that its use of a different value based methodology is merely the use of more accurate and relevant data, and not a change in methodology as SVW suggests. Finally, Commerce argues that even if the court considers this to be a change in methodology, it should still uphold Commerce's decision, because it adequately explained and supported this decision with substantial evidence on the record.

Defendant-Intervenors additionally argue that although Commerce initially accepted SVW's heat-based methodology in its preliminary determination, it noted that the cost-allocation issue must be revisited before reaching any final decision. *Def. Intervenor's Brief* at 17 (citing *Concurrence Memorandum* at 13). Furthermore, Defendant-Intervenors argue that SVW misplaces its reliance on the final determination of the 1994–1995 investigation because, as Defendant-Intervenors argue, Commerce never considered the cost allocation issue in that investigation. Thus, Defendant-Intervenors argue that *Shikoku* is inapplicable because Commerce did not create or ratify any cost allocation methodology upon which Plaintiff could have relied to its detriment.

3. Analysis

In *Shikoku*, this Court stated that in certain circumstances, principles of fairness prevent Commerce from changing its prior methodology. 795 F. Supp. at 388. Thus, this Court held that the parties have a right to rely on Commerce's consistent approach over successive annual reviews, and that Commerce could not alter its analysis at a "late stage" simply to effectuate a slight improvement. *Id.*

Plaintiff claims that in the 1995 antidumping investigation, Commerce, "on its own volition and without any input from the interested parties, determined that acetylene tail gas and acetylene were co-products and [Commerce] allocated costs between the co-products based upon their relative heats of combustion." *Pl.'s Brief* at 14 (citing *Polyvinyl Alcohol from the People's Republic of China*, 61 Fed. Reg. 14057–14063 (1996). This claim, however, is unsupported by any evidence in the record. SVW further cites to the verification report in support of the fact that Commerce indicated that it was informed by SVW officials that the heat of combustion-based methodology had been in place since December 1996. *Id.* (citing Verification Report at 15–16). While tending to establish how long SVW has employed its allocation methodology and perhaps even establishing contemporaneousness, this information does not indicate any reliance on any of Commerce's instructions – whether explicit or implicit – to apply such methodology. Upon questioning at oral argument, Plaintiff admitted that the Polyvinyl Alcohol decision in the Federal Register in fact does not contain any record evidence of the instructions from Commerce it claims to have relied on in the instant case. *See Oral Arg. Tr.* at 9, 11–12. Rather, Plaintiff indicated that evidence of its reliance interest is located in the preliminary determination in this case, which is unavailing. *Id.* at 9. Furthermore, Plaintiff itself indicated that it had no knowledge of Commerce's decision to treat acetylene and acetylene tail gas as co-products, and that it based its decision to do so not because of Commerce's decision, but because of the change in Chinese accounting procedures to follow western accounting practices, specifically GAAP. *Rebuttal Brief of Sinopec Sichuan Vinylon Works* at 8 (*Appendix to Brief in Support of Pl.'s Mot. for J. on the Agency Record, Tab 7*).

Without any evidence to support its claim that "it was [Commerce] that first applied the heat of combustion allocation methodology upon SVW to the two co-products in the 1995 antidumping investigation," and that "SVW subsequently adopted that methodology in its ordinary course of business so as to minimize potential antidumping duty liability," SVW's reliance on *Shikoku* is misplaced. The court declines to assume, as Plaintiff suggests, that simply because SVW adopted the allocation methodology in 1996, it did so at Commerce's direction.

Furthermore, Commerce has explained that allocating costs solely on the basis of potential heats of combustion, when neither acetylene nor tail gas is used by SVW for its heat-generating properties, is unreasonable given the vastly different market values of the two coproducts. Thus, as Commerce argues, adopting a value-based allocation methodology more accurately reflects SVW's costs. Under its deferential standard of review, this court must affirm Commerce's findings when they are supported by substantial evidence on the record, as has been established here. *See Fujitsu*, 88 F.3d at 1038. Thus, because SVW has failed to direct the court to any record evidence to show that it relied on Commerce's direction in adopting the heat of combustion allocation methodology, and because the court finds that Commerce has articulated a reasonable rationale for adopting a value-based allocation methodology, Commerce's determination to do so is affirmed.

C. Calculation of Surrogate Value for Natural Gas

In calculating the normal value of the production of polyvinyl alcohol, Commerce used a surrogate value for natural gas, a raw material input used in the production process. Commerce preliminarily used surrogate values obtained from the Gas Authority of India, Ltd. ("GAIL"). In the Final Results, Commerce continued to use the GAIL figures, but used only the reported ceiling prices. Plaintiff challenges this action, arguing that Commerce should use an average of the reported ceiling and floor prices for natural gas as a surrogate price in its normal value calculation. Commerce admits that it is unclear whether it analyzed averaging the GAIL prices and requests a voluntarily remand on this issue for further analysis. The court agrees and grants Commerce's request.

D. Application of the By-Product Credit

When calculating normal value in the final determination, Commerce applied Jubilant's financial ratios to SVW's materials, labor and energy expenses before making any offset for SVW's recovery of acetic acid during the final stage of the PVA production process. Commerce determined that Jubilant is a producer of PVAc, a constituent of partially hydrolyzed PVA and the precursor to fully hydrolyzed PVA, but does not produce PVA itself. Thus, PVAc manufactured by Jubilant does not undergo the final step in the process used to produce PVA. During this final stage of PVA production, PVAc is hydrolyzed into PVA, resulting in the release of methyl acetate, from which acetic acid is recovered. This acetic acid can be recycled and used as an offset against production costs, as is done by SVW. Because the PVAc manufactured by Jubilant did not undergo this final production stage, Commerce concluded that the denominator of the financial ratios did not account for these by-products. Therefore, Commerce applied Jubilant's financial ratios to SVW's costs prior to making any offset for the recovery of acetic acid, ostensibly in order to equate the base on which the ratios were calculated with the base to which they were applied.

1. Plaintiff's Arguments

SVW argues that this methodology inflates its costs beyond their actual level, and is therefore inappropriate. SVW argues that Commerce should instead follow its standard practice of applying overhead, SG&A, and profit only after giving full credit to SVW for its recovered acetic acid. Moreover, SVW claims that while Commerce has adjusted overhead in the past, it radically departs from past practice in adjusting SG&A and profit. Because these factors have no relationship to the level of integration in SVW's production process, SVW argues that these amounts should be calculated only after the by-product offset has been made.

Plaintiff bases its argument, that Commerce's decision to apply the by-product credit after applying Jubilant's financial ratios would significantly overstate SVW's costs, on two basic premises. First, Plaintiff argues that evidence on the record indicates that Jubilant's capital costs include capital costs associated with the production of acetic acid in its production facility – a process that Plaintiff itself does not undergo. Therefore, SVW argues, Jubilant's overhead, SG&A and profit ratios used by Commerce include the capital costs, operation and maintenance of an acetic acid production plant, which is not included in SVW's costs. Second, Plaintiff argues that the SG&A profit ratios of Jubilant are overstated as compared to SVW because Jubilant sells more products and by-products, including acetic acid, than SVW.

Plaintiff also claims that Commerce violated generally accepted accounting principles by not applying the credit for recycled acetic acid during the PVA hydrolysis stage in the calculation of its overhead, SG&A and profit. In essence, Plaintiff argues that by refusing to give it a credit for the recycled acetic acid when calculating the overhead, SG&A and profit, Commerce is effectively making SVW's recycled acetic acid a direct cost of manufacturing whereas "it is clearly not 'part of the cost object.' " Instead, Plaintiff argues, the recycled acetic acid should be treated as an asset that is included within inventory.

Moreover, Plaintiff claims that because Commerce refused to consider its purchases of acetic acid from the affiliated joint venture partner as "self-produced" inputs, using surrogate prices for Plaintiff's acetic acid inputs results in the double-counting of those inputs. Thus, although Commerce did provide a by-product credit, SVW argues that deduction of the credit from the calculated normal value, rather than from manufacturing costs, still resulted in inflated SG&A and overhead costs.

2. Defendant's and Defendant-Intervenors' Arguments

Defendant responds that while it found both companies, Jubilant and SVW to be at equivalent levels of vertical integration, it nonetheless found that sufficient differences existed in the production process which, if not accounted for, would result in the understatement of factory overhead, SG&A, and profit. Specifically, Defendant indicated in its decision memorandum that:

> the difference in overhead percentages cited by petitioners appears to be a direct result of a difference in the relative material costs associated with the two processes, not their relative capital intensity or degree of vertical integration.

I&D Memo at 27. Thus, Defendant explained:

> [G]iven the denominator of the overhead ratio does not appear to account for significant by-products generated during the PVA process, we recommend applying Jubilant's overhead ratio to SVW's total material, labor, and energy costs prior to making any offset for the recovery of acetic acid. Because the same principle holds true for Jubilant's SG&A and profit ratios, we further recommend applying these ratios to SVW's costs prior to the offset for acetic acid as well.

Id.

Therefore, the quantities of acetic acid recovered by the two companies are not equivalent and to treat them as if they were would not be appropriate. *Id.* at 28. Commerce further stated that

> because Jubilant does not recover acetic acid in the final stage, the financial ratios calculated using Jubilant's data do not account for the significant acetic acid by-product credit claimed by SVW. In order to fully capture the overhead associated with the production of PVA, therefore, it is necessary to apply these ratios to the same base of costs used in the denominator of the calculation (i.e. materials costs incurred prior to the final production stage, energy, and labor). We disagree with SVW that this issue is one of integration; rather, it is a question of simple mathematics.

Id. Furthermore, Defendant argues that no statute mandates that it apply the by-product credit in the manner Plaintiff proposes – i.e., before determining factory overhead or adding SG&A and profit. Because Commerce found that SVW's proposed methodology would artificially reduce normal value by imputing overhead costs to SVW's recovery of acetic acid despite the fact that Jubilant did not incur overhead costs for the recovery of acetic acid, Commerce declined to follow SVW's methodology.

Defendant-Intervenors' further argue that Jubilant produces more by-products than SVW and therefore has potentially inflated costs relative to SVW. Additionally, Intervenors respond to Plaintiff's argument that SVW has greater costs because it produces more products and by-products than SVW, by arguing that the number of by-products a company produces should not determine whether that company is viewed as a more integrated producer generating larger amounts of overhead. Finally, Intervenors argue that Commerce has been completely consistent in applying its principle that it will contemplate adjustments to SVW's direct cost base to account for important differences in production processes, but will not adjust surrogate financial ratios, because its decision to make adjustments to SVW's cost base was premised on accounting for SVW's recovery of acetic acid.

3. Analysis

The court notes from the outset that the statute and regulations are silent with respect to how Commerce is to account for by-product credits. Commerce's decision, however, must be supported by substantial evidence on the record. *Fujitsu*, 88 F.3d at 1038. In the case at bar, Commerce's calculation properly accounts for SVW's recovery of acetic acid. It does not, however, adequately consider the differing levels of integration and the fact that Jubilant's overhead costs are not representative of SVW's.

Commerce's decision to apply the by-product credit for acetic acid recovery after applying Jubilant's financial ratios to SVW's costs is supported by its finding – a finding that Plaintiff does not disagree with – that "SVW recovers a significant quantity of acetic acid during the final hydrolysis stage, while Jubilant does not hydrolyze PVAc into PVA." During the stage of the production process when Jubilant produces ethylene and before SVW produces acetylene the total cost per pound before recovery of acetic acid for each company is comparable, and therefore, Commerce's decision to compare the two companies at this stage is supported by the record. *See* 19 U.S.C. 1677b(c); *Cf. Yantai Oriental Juice Co. v. United States*, 27 CIT ___ , Slip Op. 03–150 ("Commerce must capture all of the costs of production no matter how characterized"). Applying the by-product credit before applying Jubilant's financial ratios would, as Commerce argues, mischaracterize SVW's cost of production because Jubilant's production process does not include the hydrolysis step where acetic acid is recovered.

Plaintiff argues, however, that because Jubilant produces its own acetic acid and SVW does not, Jubilant is more vertically integrated and therefore incurs greater costs. Thus, Plaintiff argues that by deducting the by-product offset after the application of the financial ratios, overhead, SG&A and profit costs are inflated above what they would be for a company that produces PVA in the way SVW does, thereby substantially overstating SVW's normal value. Because Jubilant produces its own acetic acid and because Jubilant produces more products than SVW, Plaintiff argues that Commerce should apply the by-product credit before applying Jubilant's financial ratios in order to control for these disparities. Plaintiff's approach would misapply the by-product credit.

Commerce applied the by-product credit to account for the fact that SVW recovers and reuses acetic acid in its PVA production process. *See Self-Produced Inputs Memorandum* at 12–14 (*Appendix* tab 10). Thus, the by-product credit corresponds to the amount and value of acetic acid recovered by SVW in its production process, not the cost of Jubilant's upstream production of acetic acid or the costs associated with the other products and by-products produced by SVW. Commerce's decision to apply financial ratios calculated from Jubilant's data to Plaintiff's cost before applying the by-product credit will not be disturbed by the court.

Although Commerce has sufficiently supported its decision to apply the by-product credit after applying Jubilant's financial ratios, it has not sufficiently explained its decision to apply Jubilant's financial ratios without accounting for the greater costs incurred by Jubilant during its production of acetic acid, a process which Commerce has determined SVW does not undergo. As Plaintiff points out, Jubilant's capital costs include capital costs associated with its production of acetic acid in its production facility. Thus, it is likely that Jubilant's overhead is overstated as to Plaintiff's overhead because Jubilant's overhead includes the capital costs associated with its production of acetic acid. Moreover, because Jubilant sells more products and by-products than SVW, it is likely that the SG&A and profit ratios of Jubilant will also be overstated compared to SVW. Although Defendant-Intervenors argue that the number of by-products a company produces is not probative of whether that company should be viewed as a more integrated producer generating larger amounts of overhead, Commerce has failed to respond sufficiently to Plaintiff's arguments and to adequately explain its decision not to account for these potentially significant disparities in its calculations. Therefore, this issue is remanded to Commerce to explain its rationale or to recalculate normal value after making the appropriate adjustments.

IV. CONCLUSION

In conclusion, this matter is remanded to the Department of Commerce for further proceedings consistent with this opinion with regard to application of the "self-produced rule" (issue 1), the use of the ceiling price of published GAIL prices as the surrogate for natural gas (issue 3), and Commerce's decision to apply Jubilant's financial ratios without accounting for disparities in the cost of manufacturing (issue 4). Commerce's use of a value-based methodology to allocate costs between acetylene and acetylene tail gas (issue 2) is affirmed.

Commerce shall have sixty (60) days, until June 6, 2005 to complete and file its review. Plaintiff shall have thirty (30) days from that filing to file comment(s), and any reply by Commerce shall be due twenty (20) days after Plaintiff's comment(s) are filed.

Slip Op. 05-46

Before: Judge Judith M. Barzilay

Dixon Ticonderoga Company, Plaintiff, v. United States Customs and Border Protection and Robert C. Bonner, Defendants.

Court No. 04-00027

[Plaintiff's Motion for Judgment on Agency Record granted.]

Decided: April 4, 2005

Gray Robinson, P.A. (*A. Anthony Giovanoli*), *Guy S. Haggard* for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director, (*David S. Silverbrand*), Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Charles Steuart*, Office of Chief Counsel, United States Customs & Border Protection, of counsel, for Defendant.

OPINION

BARZILAY, JUDGE:

Plaintiff, Dixon Ticonderoga Company ("Dixon"), seeks review of a decision by Defendant, United States Customs and Border Protection of the Department of Homeland Security ("Customs" or "the Government") to deny its application to receive its share of assessed Chinese pencil anti-dumping duties for fiscal year 2003. Customs denied Dixon's application because it was filed late, and Dixon argues that this decision was arbitrary and capricious because Customs itself failed to publish notice of intent to distribute the offset in the Federal Register at least 90 days before the end of Customs' fiscal year, as required by Customs' own regulations. Dixon also argues that Customs' failure to timely publish this notification was substantially prejudicial, and requests that this court either require Customs to reverse its denial of Dixon's application and allow Dixon to receive its share of the disbursement for fiscal year 2003, waive the 2003 application deadline for all U.S. pencil manufacturers, or require Customs to void the distribution process thus far and republish its Notice of Intent so that applications may be resubmitted. Although the court finds that the regulatory deadline set forth in 19 C.F.R. § 159.62(a) constitutes a mere procedural guideline, Dixon's motion is granted because the court finds that Customs' failure to abide by its own notice regulations was substantially prejudicial to Dixon.

Background

This case concerns a distribution pursuant to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), also known as the Byrd Amendment.[1] 19 U.S.C. § 1675c (2005). In 1994, the Pencil Manufacturers Association, of which Dixon is a member, petitioned the United States Department of Commerce ("Commerce") alleging that certain cased pencils from the People's Republic of China were being sold in the United States at less-than-fair value. *See Notice of Final Determination of Sales at Less than Fair Value: Certain Cased Pencils From the People's Republic of China*, 59 Fed. Reg. 55625 (Nov. 8, 1994). After concluding that pencils from China were being sold at less-than-fair value in the United States, Commerce published an antidumping duty order. *See Antidumping Duty Order: Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 66909 (Dec. 28, 1994).

As part of the CDSOA distribution process, Customs is statutorily required to publish a "Notice of Intent to Distribute" at least 30 days before the distribution of a continued dumping and subsidy offset. 19 U.S.C. § 1675c(d)(2) (2003). Furthermore, according to Customs' own regulations, it is required to publish the Notice of Intent to Distribute at least 90 days before the end of the fiscal year. 19 C.F.R. § 159.62(a) (2003). Claimants seeking a share of the distribution then have 60 days from the date of publication of the Notice of Intent to Distribute to file the certifications required to receive an offset distribution. 19 C.F.R. § 159.63(a) (2003). In 2003, Customs published the Notice of Intent to Distribute on July 14 – 78 days prior to the end of the fiscal year and 12 days after the regulatory deadline. Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers, 68 Fed. Reg. 41,597 (July 14, 2003).

On October 23, 2004 – 102 days after Customs' publication of the Notice of Intent to Distribute – Dixon filed its application to receive a portion of the assessed Chinese pencil duties for that fiscal year. Dixon argued to Customs that Customs' own failure to provide notice as required by 19 C.F.R. § 159.62(a) caused it as well as other do-

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[1] The CDSOA provides that assessed duties received from antidumping orders, countervailing duty orders, or findings under the Antidumping Act of 1921 be distributed to "affected domestic producers" for certain qualifying expenditures. 19 U.S.C. § 1675c. This court notes that recently, a WTO Appellate Panel held that the Byrd Amendment is not in conformity with the United States' obligations under the WTO Agreements. WTO Appellate Body, United States Continued Dumping and Subsidy Offset Act of 2000, http://docsonline.wto.org/DDFDocuments/t/WT/DS/234ABR.doc, at 120-21. The validity of the Byrd Amendment is not at issue in this case, and this court applies the law as it stands.

mestic pencil manufacturers to file late. Nonetheless, Customs denied Dixon's application in a letter dated December 16, 2003, stating that because "all certifications were due no later than September 12, 2003," and because Customs received Dixon's certification on October 24, 2003, "more than 60 days after the publication date of the FR Notice, [Customs] must deny [Dixon's] claim for a FY 2003 disbursement under the CDSOA." *Certified Admin. R.* at 3.

Analysis

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i). Thus, the court will set aside any agency action, findings or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A) (2005). Under this standard of review, an administrative action must be upheld if the court finds that the agency "has considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric v. N.R.D.C.*, 462 U.S. 87, 105 (1983).

It is uncontested that Customs failed to timely comply with the regulatory notice requirement of section 159.62(a)[2]. Customs, however, asserts that although it published notice of its intent to distribute late, it retains the authority to reject distribution applications for untimeliness pursuant to 19 C.F.R. § 159.63(a)[3]. Dixon argues that this seeming "double-standard" of treating its own deadline to provide notice to the domestic industry as a "mere guideline" while treating the domestics' deadline to apply for distributions as a "hard and strict rule" constitutes an arbitrary and capricious construction of Customs' own regulations. Dixon further argues that Customs' failure to provide notice of its intent to distribute by the regulatory deadline is a strong signal to the domestic industry that no distribution is forthcoming for that fiscal year, as domestics have no other

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[2] Section 159.62(a) states:

At least 90 days before the end of a fiscal year, Customs will publish in the Federal Register a notice of intention to distribute assessed duties received as the continued dumping and subsidy offset for that fiscal year. The notice will include the list of domestic producers, based upon the list supplied by the USITC (see § 159.61(b)(1)), that would be potentially eligible to receive the distribution.

[3] Section 159.63(a) states:

Requirement and purpose for certification. In order to obtain a distribution of the offset, each affected domestic producer must submit a certification, in triplicate, or electronically as authorized by Customs, to the Assistant Commissioner, Office of Regulations and Rulings, Headquarters, or designee, that must be received within 60 days after the date of publication of the notice in the Federal Register, indicating that the affected domestic producer desires to receive a distribution. The certification must enumerate the qualifying expenditures incurred by the domestic producer since the issuance of an order or finding for which a distribution has not previously been made, and it must demonstrate that the domestic producer is eligible to receive a distribution as an affected domestic producer.

indication that a distribution is forthcoming.[4] Thus, because of its own failure to provide timely notice, according to Dixon, Customs should have waived the deadline for domestic pencil manufacturers, provided notice of a reasonable extension, or simply re-started the process.

Customs responds that it acted reasonably in providing the full 60 days required by section 159.63(a) after the date of publication of notice in the Federal Register of its intent to distribute, and that Dixon was given constructive notice of the intent to distribute by virtue of this publication.

The Supreme Court, in *Brock v. Pierce County*, 476 U.S. 253 (1986), provides direction regarding this issue. The Court in that case considered section 106(b) of the Comprehensive Employment and Training Act ("CETA"), 29 U.S.C. § 816(b) and its implementing regulations. 476 U.S. at 255. The statute and regulations directed the Secretary of Labor to issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint alleging such a misuse. *Id.* at 256. After examining the statutory language and legislative history, the Court held that the Secretary's failure to satisfy the 120-day statutory timing requirement did not necessarily deprive the Secretary of the power to recover misused funds. *Id.* at 266. The Court stated that it "would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Id.* at 260.

Furthermore, the Federal Circuit's opinion in *Kemira Fibres Oy v. United States*, 61 F.3d 866 (Fed. Cir. 1995), is instructive. In that case, the Department of Commerce failed to publish a notice of its intention to revoke a particular finding that had been made under the antidumping laws, in violation of Commerce's own regulations. *Kemira*, 61 F.3d at 868. Considering whether Commerce's failure to comply with the regulatory notice requirement voided its subsequent administrative action, the Court held that the administrative default by Commerce did not compel the court to revoke the antidumping finding where the plaintiff, a foreign importer, could not establish that it was prejudiced by the default. *Id.* at 876. The Court explained that the plaintiff "should not become immune from the an-

[4] The court notes that domestic producers are under notice that Customs may publish its intent to distribute in the Federal Register at any time prior to the 90th day before the end of the fiscal year. 19 C.F.R. § 159.62(a) (2003). Although Customs cites to a number of cases in support of the proposition that publication of an item in the Federal Register constitutes constructive notice of anything within that item, *see, e.g., Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947), the court finds merit in Plaintiff's response that such a position renders theregulation meaningless. Under Defendant's theory, domestic producers would be required to expect notice not prior to the 90th day before the end of the fiscal year, as directed by the regulation, but rather at any given time because constructive notice, even outside the purview of the regulation, would suffice to trigger the 60-day deadline within which certification must be submitted under section 159.63(a).

tidumping laws because Commerce missed the deadline . . . [t]he national interest in the regulation of importation should not fall victim to an oversight by Commerce . . ." *Id.* at 873.

Thus, this court must first determine whether, under the *Brock* standard, Congress intended Customs to lose its authority to administer the CDSOA, having failed to meet its regulatory timing requirements. *Cf. Brock*, 476 U.S. at 266. If the court finds that Congress did not intend Customs to lose its authority, and that the timing requirements are merely procedural guidelines, the court must then inquire into whether Dixon was substantially prejudiced by Customs' failure. *Cf. Kemira*, 61 F.3d at 873.

A. Customs' Authority to Administer the CDSOA

As a general rule, an agency is required to comply with its own regulations. *Kemira*, 61 F.3d at 871 (citation omitted). However, "not every failure of an agency to observe timing requirements voids subsequent agency action." *Id.* (citing *Brock*, 476 U.S. at 260). In *Kemira*, the Federal Circuit noted that "in the context of an agency's failure to comply with statutorily-mandated timing directives, the Supreme court has rejected the argument that non-compliance with a timing requirement renders subsequent agency action voidable." 61 F.3d at 872. The Federal Circuit went on to indicate that this argument "is even less cogent . . . when the relevant statute does not provide a timing requirement, but the requirement is found in the administering agency's implementation regulations." *Id.* at 873. The court is therefore directed to the statute and its history to determine whether Customs' construction of the regulation is a permissible one. *Kemira*, 61 F.3d at 873. (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984); *Asociacion Colombiana de Exportadores de Flores v. United States*, 903 F.2d 1555, 1559 (Fed. Cir. 1990) ("[An agency's] interpretation of its own regulations implementing 'the statutes it administers' is entitled to 'substantial weight.' ") (citation omitted)). The CDSOA instructs Customs to publish a Federal Register notice at least 30 days before a distribution, but does not bind this time limitation to any specific date in either the calendar or fiscal year. Specifically, it provides that:

> [t]he Commissioner shall publish in the Federal Register at least 30 days before the distribution of a continued dumping and subsidy offset, a notice of intention to distribute the offset and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the Commission under paragraph (1). The Commissioner shall request a certification from each potentially eligible affected domestic producer . . .

19 U.S.C. § 1675c(d)(2) (2003). Thus, the statute left up to Customs' determination when during the fiscal year to publish the Federal Register notice, and also when applications for distributions must be received after notice has been provided. Customs further explains that

> there is a window of 90 days between the date Customs receives the certification and the date the monies are distributed during which Customs must review and process the claims. . . . [C]alculating the distribution amounts is a long, detailed, and difficult process. . . . At a certain point there must be a deadline . . . Without the deadline, the amount available for distribution could never be fixed, there would never be an end to the processing of CDSOA distributions. . . .

Def.'s Opp. to Pl.'s Mot. for J. on the Agency Record at 8-9. The statutory language clearly indicates Congress' intention that the domestic industry affected by dumping or subsidies benefit from the trade laws, but is silent regarding timing requirements. Thus, notification for domestic parties of a forthcoming distribution is a paramount concern to the administration of the CDSOA, as is ensuring that applications are received and offsets are disbursed according to a strict time line. The court finds that the timing requirements of section 159.62(a) are merely procedural aids in applying the CDSOA. Furthermore, Customs has articulated a rational connection between the statutory and regulatory framework and its decision to strictly apply section 159.63(a).

B. Substantial Prejudice

Since the requirements at issue are merely procedural aids, in order to prevail Dixon must establish that it was prejudiced by Customs' non-compliance with section 159.62(a). *See Kemira*, 61 F.3d at 875 (citing *American Farm Lines v. Black Ball Freight Serv.* 397 U.S. 532, 539 (1970); *Cornelius v. Nutt*, 472 U.S. 648, 663 (1985); *Belton Indus., Inc. v. United States*, 6 F.3d 756, 761 (Fed. Cir. 1993)) ("Since the requirement at issue is merely procedural, Kemira must establish that it was prejudiced by Commerce's non-compliance with this requirement."). *See also Intercargo Insurance Co. v. United States*, 83 F.3d 391 (1996) ("The public interest in the administration of the importation laws should not 'fall victim' to the failure by the Customs Service to use the requisite language in its extension notices, if the oversight has not had any prejudicial impact on the plaintiff"). Prejudice means "injury to an interest that the statute, regulation, or rule in question was designed to protect." *Id.* (citing *Hernandez-Luis v. INS*, 869 F.2d 496, 498 (9th Cir. 1989); *State of Texas v. Lyng*, 868 F.2d 795, 799-800 (5th Cir. 1989); *United States v. Cerda-Pena*, 799 F.2d 1374, 1377 (9th Cir. 1986); *Aero Mayflower Transit, Inc. v.*

ICC, 228 U.S. App. D.C. 438, 711 F.2d 224, 232 (D.C. Cir. 1983); *Diaz v. Department of the Air Force*, 63 F.3d 1107, 1109 (Fed. Cir. 1995)).

The statute at issue in this case is the CDSOA, which provides for distribution of all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic producers. 19 U.S.C. § 1675c(d)(3) (2003). While Congress has provided no indication that it intended that Customs lose its authority to administer the CDSOA if it misses the regulatory deadline imposed by section 159.62(a), Congress has made it clear that the purpose of the CDSOA is the protection of domestic producers. *See* CONGRESSIONAL FINDINGS ACT, Oct. 28, 2000, P.L. 106-387, § 1(a), 114 Stat. 1549 (enacting into law § 1002 of Title X of H.R. 5426 (114 Stat. 1549A-72), as introduced on Oct. 6, 2000) ("Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized."); WTO DECISION AND THE CDO ACT, 108th Cong. (2003), 149 Cong. Rec. S1064-03 (statement of Mr. Hollings) ("The [CDSOA] ensures that the U.S. companies and their workers can compete against unfair imports from foreign companies who dump their products in the U.S. If a foreign company continues to dump its products in the U.S. after having been found guilty of that practice, the [CDSOA] allows that future penalty tariff payments be made to the companies who are being injured. We would all prefer that companies halt their illegal dumping, but if a foreign competitor chooses to continue the predatory practices, then the tariffs assist the U.S. workers and industry to remain competitive. . . . [T]he money assists theimpacted companies to help them remain competitive, invest in new technologies and keep jobs in the U.S.").[5] Unlike in *Kemira*, where the plaintiff was a foreign importer of fiber and found to be outside the national interest of the timing regulation implicated in that case, the harm to Dixon by Customs' delay in this case is emblematic of the harm done to the domestic industry. *Cf. Kemira*, 61 F.3d at 875-76 ("we strongly deplore Commerce's or any other agency's failure to follow its own regulations . . . [s]uch failure harms those who assume agency compliance . . . [h]owever, such prejudice has not been shown here.").

Dixon is precisely one of the contemplated beneficiaries of the CDSOA. *See* 19 U.S.C. § 1675c(b)(1) . Thus, Dixon's interest in receiving its share of the anti-dumping duties assessed against Chinese pencil manufacturers was clearly injured by Customs' failure to

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[5] The court notes that the legislative history of the CDSOA is not as robust as that of other provisions of the United States Code. *See* 146 CONG. REC. S10732-01 (Oct. 18, 2000) (statement of Sen. Nickels). Such as it is, however, the legislative history strongly supports Plaintiff's claim that the CDSOA was enacted to benefit domestic producers, and that it accomplishes this objective in part by providing for collected duties to be distributed to qualified domestic producers.

give timely notice of its intent to distribute – the only notice that Customs' regulations direct domestic producers to expect. Such failure harms those who assume agency compliance with section 159.62(a) and are prejudiced by non-compliance, particularly because domestic producers receive no other indication of Customs' intent to distribute an offset or the deadline within which to file for a share of the offset. *Kemira*, 61 F.3d at 875-76. Such prejudice has been shown here.

Conclusion

Because Customs' failure to publish timely notice of its intent to distribute the antidumping duty offset substantially prejudiced Dixon, Dixon's motion for judgment on the agency record is granted. Counsel are ordered to confer regarding a remedy and are further ordered to advise the court, 30 days from the date of this opinion, of the proposed remedy.

Abstracted Classification Decisions

DECISION NO./DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY & MERCHANDISE
C05/1 1/12/05 Restani, J.	Pioneer, Elecs., Inc.	03–00578	8528.21.70 5%	8471.60.45 Free of duty	Agreed statement of facts	Los Angeles Plasma Display Monitors
C05/2 1/19/05 Carman, J.	A.D. Sutton & Sons	03–00473	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	New York Bottle bag
C05/3 2/7/05 Tsoucalas, J.	Hilti, Inc.	01–00124	3214.10.00 3.7%	3506.91.00 2.1%	Agreed statement of facts	Houston Tulsa Hilti anchor adhesives