Slip Op. 06–83

ABITIBI-CONSOLIDATED INC. AND ITS AFFILIATES ABITIBI-CONSOLIDATED COMPANY OF CANADA, PRODUITS FORESTIERS PETITS PARIS INC., PRODUITS FORESTIERS LA TUQUE INC., PRODUITS FORESTIERS SAGUENAY INC., SOCIETE EN COMMANDITE OPITCIWAN; *AND* CANFOR CORPORATION AND ITS AFFILIATES CANFOR WOOD PRODUCTS MARKETING LTD., CANADIAN FOREST PRODUCTS, LTD., AND BOIS DAAQUAM INC. (a/k/a DAAQUAM LUMBER INC.), LAKELAND MILLS LTD., AND WINTON GLOBAL LUMBER LTD. (formerly THE PAS LUMBER COMPANY LTD.), Plaintiffs, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06–00048

OPINION

[Motion to dismiss granted.]

Dated: June 1, 2006

Arnold & Porter, LLP (*Michael T. Shor*) for Plaintiff Abitibi-Consolidated Inc. and its affiliates Abitibi-Consolidated Company of Canada, Produits Forestiers Petits Paris Inc., Produits Forestiers La Tuque Inc., Produits Forestiers Saguenay Inc., and Societe en Commandite Opitciwan;

Baker & McKenzie, LLP (*Thomas Peele, Kevin M. O'Brien*, and *Kevin J. Sullivan*) for Plaintiff Canfor Corporation and its affiliates Canfor Wood Products Marketing, Ltd., Canadian Forest Products, Ltd., Bois Daaquam Inc. (a/k/a Daaquam Lumber Inc.), Lakeland Mills Ltd., and Winton Global Lumber Ltd. (formerly the Pas Lumber Company Ltd.);

Steptoe & Johnson, LLP (*W. George Grandison, Mark A. Moran, Matthew Frumin*, and *Daniel J. Calhoun*) for Plaintiff-Intervenors British Columbia Lumber Trade Council, Coast Forest Products Association, and Council of Forest Industries;

Wilmer, Cutler, Pickering, Hale, and Dorr, LLP (Robert C. Cassidy, Jr., John D. Greenwald, Jack A. Levy, and *Tammy J. Horn*) for Plaintiff-Intervenors the Quebec Lumber Manufacturers Association;

Baker & Hostetler, LLP (*Elliot J. Feldman, Bryan J. Brown*, and *John Burke*) for Plaintiff-Intervenors Ontario Forest Industries Association and Ontario Lumber Manufacturers Association;

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Claudia Burke*, Trial Attorney and *Quentin M. Baird*, Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce) for Defendant United States;

Dewey Ballantine, LLP (*Bradford L. Ward* and *David A. Bentley*) for Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee.

Gordon, Judge: In this action, plaintiffs and plaintiff-intervenors challenge the United States Department of Commerce's ("Commerce") respondent selection determinations in the third administrative review of the antidumping duty order covering softwood lumber from Canada. Defendant and defendant-intervenor move, pursuant to USCIT Rule 12(b)(1), to dismiss this action for lack of subject matter jurisdiction. For the following reasons, the motion is granted.

I. Background

The third review currently is proceeding with final results due in September, 2006 (or December, 2006 if extended). It covers imports of the subject merchandise for the period May 1, 2004 through April 30, 2005 and nearly 300 Canadian exporters or producers, including plaintiffs. *Certain Softwood Lumber from Canada*, 70 Fed. Reg. 37,749 (June 30, 2005) (initiation of administrative review).

Given the large number of companies in the third review, Commerce had to address the threshold question of respondent selection. In the first and second reviews, Commerce selected eight of the largest respondents based on volume of exports pursuant to Section 777A(c)(2)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677f–1(c)(2)(B) (2000) (all further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition). In the third review, Commerce changed course and decided to limit the number of respondents using a "probability proportional to size" sampling method pursuant to 19 U.S.C. § 1677f–1(c)(2)(A). Plaintiffs were examined in the first and second reviews, but were not selected for examination under Commerce's newly applied sampling method in the third.

When plaintiffs learned they were not selected, they voluntarily responded to Commerce's third review questionnaires and submitted their sales and cost data well in advance of the deadlines for such submissions, all of which Commerce declined to examine pursuant to 19 U.S.C. § 1677m(a). Rather than await the final results of the review, plaintiffs commenced this challenge to Commerce's respondent selection, seeking a writ of mandamus directing Commerce to accept plaintiffs as voluntary respondents. Alternatively, they seek to preliminarily enjoin the third review pending selection of a statistically valid sample under 19 U.S.C. § 1677f–1(c)(2)(A), or selection of "exporters and producers accounting for the largest volume of the sub-

ject merchandise from the exporting country that can be reasonably examined," as provided for under 19 U.S.C. § 1677f–1(c)(2)(B).

II. Standard of Review

"Plaintiffs carry the burden of demonstrating that jurisdiction exists." *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 422, 795 F. Supp. 428, 432 (1992) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). In deciding a motion to dismiss for lack of subject matter jurisdiction, the court assumes "all factual allegations to be true and draws all reasonable inferences in plaintiff's favor." *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). The court, however, does not similarly credit plaintiff's legal conclusions or arguments. See authorities cited in *Falwell v. City of Lynchburg*, 198 F. Supp. 2d 765, 772 (W.D.Va. 2002).

III. Discussion

A. Jurisdiction under 28 U.S.C. § 1581(c)

Plaintiffs do not assert jurisdiction under 28 U.S.C. § 1581(c) where challenges to Commerce decision-making in antidumping administrative reviews ordinarily lie. That avenue requires a "final determination," 19 U.S.C. § 1516a(a)(2)(B)(iii), and is available when Commerce publishes its final results of the third review in the *Federal Register*. 19 U.S.C. § 1516(a)(2). Although plaintiffs were not selected as mandatory respondents, and Commerce has declined to examine their voluntary responses, plaintiffs may continue to participate in the third review as interested parties. Plaintiffs may submit case briefs commenting on the preliminary results, including Commerce's respondent selection determinations. 19 C.F.R. § 351.309 (2004). No antidumping duty assessment will be made or cash deposit rate determined for any respondent until the final results are issued. Once those are issued, interested parties may challenge them in this Court under 28 U.S.C. § 1581(c) as a reviewable final determination under 19 U.S.C. § 1516a(a)(2)(B)(iii).

Plaintiffs, though, are not waiting for section 1581(c) jurisdiction to attach. They seek immediate relief under 28 U.S.C. § 1581(i), the Court's oft-litigated residual jurisdiction provision.

B. Jurisdiction under 28 U.S.C. § 1581(i)

At first blush, plaintiffs' assertion of section 1581(i) jurisdiction during an ongoing antidumping proceeding appears to collide with the express direction that section 1581(i) does "not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable . . . by the Court of International Trade under section 516A(a) of the Tariff Act of 1930. . . ." 28 U.S.C. § 1581(i). Essentially, the requisites for section 1581(i) jurisdiction are not satis-

fied by a challenge to antidumping determinations that will be "incorporated in or superceded by" the final results of an ongoing administrative review because section 1581(c) is the exclusive method of judicial review. H.R. Rep. No. 96–1235, at 48 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3759–60 ("[I]t is the intent of the Committee that the Court of International Trade not permit section (i), and in particular paragraph (4), to be utilized to circumvent the exclusive method of judicial review of those antidumping and countervailing duty determinations listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a), as provided in that section. . . . The Committee intends that any determination specified in section 516A of the Tariff Act of 1930, or any preliminary administrative action which, in the course of the proceeding, will be, directly or by implication, incorporated in or superceded by any such determination, is reviewable exclusively as provided in section 516A."). These requisites discourage piecemeal review of antidumping determinations. They are problematical for plaintiffs who are challenging preliminary administrative actions regarding respondent selection that will be incorporated in or superceded by the final results of the third review.

Admittedly, there are circumstances in which the Court has exercised its residual jurisdiction "to review certain actions taken by Commerce during the pendency of an [administrative proceeding]." *Macmillan Bloedel Ltd. v. United States*, 16 CIT 331, 331 (1992). *See also, Sacilor, Acieries et Laminoirs De Lorraine v. United States*, 3 CIT 191, 542 F. Supp. 1020 (1982) (exercising section 1581(i) jurisdiction during an antidumping investigation to enjoin the agency from disclosing confidential information); *Dofasco Inc. v. United States*, 28 CIT ___ , 326 F. Supp. 2d 1340, *aff'd*, 390 F.3d 1370 (Fed. Cir. 2004) (exercising section 1581(i) jurisdiction to review timeliness of request for administrative review, which, if untimely, would have precluded the review); H.R. Rep. No. 96–1235, at 48 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3760 ("[S]ubsection (i), and in particular paragraph (4), makes it clear that the court is not prohibited from entertaining a civil action relating to an antidumping or countervailing duty proceeding so long as the action does not involve a challenge to a determination specified in section 516A of the Tariff Act of 1930."). The shorthand rule provides that the Court's residual jurisdiction under section 1581(i) attaches only if a remedy under another section of 1581 is unavailable or "manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

Applying this standard to other interlocutory challenges of ongoing antidumping or countervailing duty proceedings, this Court has declined to exercise section 1581(i) jurisdiction because the remedies under section 1581(c) were available, adequate, and reviewable. *See, e.g., Macmillan Bloedel*, 16 CIT at 332 (dismissing for lack of jurisdiction an interlocutory challenge to initiation of countervailing duty

investigation and noting, "[I]f Macmillan Bloedel will have a meaningful opportunity after the final determination to challenge Commerce's decision denying its exclusion request, then the court must stay its hand at this stage of the proceedings"); *NSK v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1128 (2004) (dismissing for lack of jurisdiction an interlocutory challenge to Commerce's selection of model matching methodology for antidumping administrative review). *Tokyo Kikai Seisakusho, Ltd. v. United States*, 29 CIT ___ , 403 F. Supp. 2d 1287 (2005) (dismissing for lack of jurisdiction an interlocutory challenge to initiation of changed circumstances review that would be reviewable under 28 U.S.C. § 1581(c)).

C. Jurisdiction under § 1581(i) for Administrative Procedure Act Claim

To avoid the problem presented by the above-quoted language from section 1581(i), plaintiffs contend that their specific challenge to Commerce's respondent selection in the pending administrative review is not listed in section 516A, and that the express exclusion in section 1581(i) does not apply to their action. (Motion Hr'g Tr. 69.) Plaintiffs instead assert that their action arises under Section 702 of the Administrative Procedure Act ("APA"), (Pls.' Opp'n to Mot. to Dismiss 20 n.8.), which they have standing to invoke pursuant to 28 U.S.C. § 2631(i) (2000). The plaintiffs in *Tokyo Kikai* shared a similar theory of jurisdiction. As in *Tokyo Kikai*, the APA based action here raises "jurisdictional problems that are insurmountable." 403 F. Supp. 2d at 1292.

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (2000). The APA further provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704 (2000). (This APA provision is mirrored in the court's residual jurisdiction case law, which as noted above prescribes that section 1581(i) supplies jurisdiction only if a remedy under another section of 1581 is unavailable or manifestly inadequate.) Section 704 of the APA also provides that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action," 5 U.S.C. § 704 (2000). Plaintiffs' challenge to Commerce's respondent selection thus implicates questions of ripeness, which Defendant has raised in its motion to dismiss. (Def.'s Mem. in Support of Mot. to Dismiss 12–15.)

1. Ripeness

Ripeness "is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.' " *Nat'l Park Hospitality Ass'n v. U.S. Dep't of Interior*, 538 U.S. 803, 807–08 (2003) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–149 (1967)). The ripeness inquiry evaluates "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality* 538 U.S. at 807 (citing *Abbott Labs.*, 387 U.S. at 148).

Plaintiffs challenge two specific Commerce actions regarding respondent selection in the third review. The first is Commerce's failure to examine plaintiffs' voluntary submissions and to compute an individual dumping margin for each of them. The second concerns Commerce's decision to select a sample of respondents under 19 U.S.C. § 1677f–1(c)(2)(A). Neither decision is ripe for review.

a. Fitness of Issues for Judicial Decision

On the first question, namely the fitness of the issues for judicial decision, the court considers "whether the issue presented is a purely legal one, [and] whether consideration of that issue would benefit from a more concrete setting." *Ciba-Geigy Corp. v. U.S. Envtl. Prot. Agency*, 801 F.2d 430, 435 (D.C. Cir. 1986). As explained below, consideration of Commerce's respondent selection decisions will benefit from a more concrete setting.

(i) Voluntary Respondent Claim

In challenging Commerce's refusal to examine their voluntary submissions, plaintiffs contend that Commerce *must* accept voluntary respondents when the agency limits the number of respondents examined in an administrative review. 19 U.S.C. § 1677m provides in pertinent part:

> (a) Treatment of voluntary responses in countervailing or antidumping duty investigations and reviews
>
> In any investigation . . . or a review . . . in which the administering authority has, under section 1677f–1(c)(2) . . . , limited the number of exporters or producers examined, . . . the administering authority *shall establish* . . . an individual weighted average dumping margin for any exporter or producer not initially selected for individual examination under such sections who submits to the administering au-

> thority the information requested from exporters or producers selected for examination, if--
>
> (1) such information is so submitted by the date specified—
>
> . . . and
>
> (2) the number of exporters or producers who have submitted such information is not so large that individual examination of such exporters or producers would be unduly burdensome and inhibit the timely completion of *the investigation*.

19 U.S.C. § 1677m (emphasis added). As noted earlier, plaintiffs timely submitted their voluntary questionnaire responses. Plaintiffs contend that under the plain meaning of the statute they are entitled to an individual weighted average dumping margin. According to plaintiffs, this action involves a review *and not* an "investigation," and Commerce therefore cannot apply the "unduly burdensome" and "timely completion" factors of subparagraph (a)(2). Plaintiffs further contend that even if Commerce had the authority to decline to examine voluntary respondents in an administrative review based on the factors in subparagraph (a)(2), Commerce failed to make the necessary findings that individual examination of the voluntary responses would in fact be "unduly burdensome and inhibit the timely completion" of the review. 19 U.S.C. § 1677m.

The main thrust of plaintiffs' challenge, though, concentrates on the proper construction of section 1677m. To resolve that issue the court applies the two-step inquiry of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). At this stage of the proceedings, however, Commerce has yet to render a considered response to plaintiffs' arguments, simply notifying plaintiffs in separate one-page letters of Commerce's refusal to examine their voluntary submissions. (App. D24, D25.). The record only shows that Commerce declined to examine plaintiffs' voluntary submissions based on Commerce's belief that it has discretion to do so under the statute. *Id.*

To apply the standard of review properly, the court must know Commerce's considered response to plaintiffs' arguments, which will include Commerce's interpretation of section 1677m, and Commerce's prior practices in dealing with large numbers of respondents. To obtain this information now, the court would have to remand the matter to Commerce and disrupt the administrative proceeding. By waiting for completion of the review, this information will, in all likelihood, manifest itself in the final results through Commerce's response to plaintiffs' case briefs. Exercising jurisdiction at this time would deprive Commerce of the opportunity to provide "an explanation of the basis for its determination that addresses relevant argu-

ments. . . ." 19 U.S.C. § 1677f(i)(3)(A), which in this instance is not helpful or efficient for the court, the interested parties, or the agency.

(ii) Sampling Selection Claim

Commerce announced its "probability proportional to size" sampling method for respondent selection in a detailed memorandum analyzing hundreds of pages of comments from the parties and culminating in a recommendation to the Deputy Assistant Secretary for Import Administration, with which he agreed. (App D.23.) In challenging Commerce's "probability proportional to size" sampling method, plaintiffs allege that the selection of only eight respondents lacked statistical validity and was solely based, impermissibly, on Commerce's purported resource constraints. Commerce divided the review population into two strata—one comprising the 16 largest producers (based on production volume), and one comprising the 283 remaining small producers. Commerce then randomly picked six companies from the large producer stratum and two from the small. The applicable statutory provision, 19 U.S.C. § 1677f–1, provides in pertinent part:

> (b) Selection of averages and samples
>
> *The authority to select averages and statistically valid samples shall rest exclusively with the administering authority.* The administering authority shall, to the greatest extent possible, consult with the exporters and producers regarding the method to be used to select exporters, producers, or types of products under this section.
>
> (c) Determination of dumping margin
>
> (1) General rule
>
> In determining weighted average dumping margins under section 1673b(d), 1673d(c), or 1675(a) of this title, the administering authority shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise.
>
> (2) Exception
>
> If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to--

(A) a sample of exporters, producers, or types of products *that is statistically valid based* on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

19 U.S.C. § 1677f–1 (emphasis added).

Plaintiffs' argument that Commerce's approach is not statistically valid may have merit. Whatever the merits of plaintiffs' claim, however, immediate judicial intervention in the third review is inappropriate because further development of the administrative record will enable more efficient judicial review of Commerce's sampling methodology than at present. The statute vests Commerce with exclusive authority to select a statistically valid sample, a grant of authority bounded by the requirement of statistical validity. The court cannot direct Commerce which sampling approach to use. Instead, the court can only review Commerce's chosen method to determine whether it is statistically valid. To do so, the court must know the measure of statistical validity, which the statute does not define. Commerce, and not the court, needs to wrestle with this issue in the first instance. The court should not entangle itself in this issue before Commerce has had the opportunity to formalize its determination in the final results. In short, the administrative proceeding needs to be completed. That process has begun; it needs to finish.

b. Hardship of Withholding Court Consideration & Adequacy of Remedy under § 1581(c).

The second prong of the ripeness test concentrates on the "the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality*, 538 U.S. at 807 (citing *Abbott Labs.*, 387 U.S. at 178). This hardship prong is reflected in the "manifest inadequacy" requirement of the court's residual jurisdiction case law.

Plaintiffs advance three principal reasons why their remedy under section 1581(c) is manifestly inadequate: (1) their records, documentation, and personnel will degrade in some form or another waiting for a corrective remedy under section 1581(c), subjecting them to a potential adverse facts available finding when it arrives (Compl. ¶ 4.); (2) their businesses have been beset by unnecessary operational uncertainty that can only be cured by immediate action under section 1581(i) (Compl. ¶ 5–6.), and; (3) their pursuit of remedies under section 1581(c) will require that a time-consuming and expensive administrative proceeding essentially has "to be restarted anew" if they prevail. (Compl. ¶ 8.) These hardships, however real and diffi-

cult, do not prevent section 1581(c) from affording plaintiffs an adequate remedy.

(i) Records and Personnel Degradation

Plaintiffs contend that Commerce's respondent selection decisions have deprived them of their statutory rights to their own weighted average dumping margins and duty assessment rates and that it "likely would be early 2008" before that deprivation can be remedied under section 1581(c). At that time, plaintiffs claim they will be exposed to an "increased and high risk" of application of adverse facts available by Commerce because, due to the passage of time, their documentation and records may likely be more difficult or impossible to locate years from now, and plaintiffs' personnel will no longer be employed or recall the precise reasons for their transactions and entries years after the fact. (Compl. ¶ 4.) Assuming this allegation is true, it nevertheless does not render plaintiffs' remedy under section 1581(c) manifestly inadequate.

Plaintiffs' allegation reflects a basic requirement of the antidumping statute—the maintenance of necessary records and documentation to substantiate questionnaire responses during the process of verification. *See* 19 U.S.C. § 1677m(i). It also reflects a potential consequence for failing to do so—Commerce draws an adverse inference from an interested party's failing "to cooperate by not acting to the best of its ability to comply with a request for information." 19 U.S.C. § 1677e(b). A continuing obligation to maintain records and institutional information during subsequent judicial review of the administrative proceeding is an unremarkable condition of the antidumping statute and of litigation generally. That reality, though, does not render the remedy under section 1581(c) manifestly inadequate and establish a basis for section 1581(i) jurisdiction. Instead, plaintiffs know the posture of their case and can evaluate the prospects and relative benefits of pursuing relief under section 1581(c) and take whatever measures they deem necessary to achieve the desired result, including the preservation of documents, records, and personnel.

(ii) Business Uncertainty

Plaintiffs also contend that Commerce's unlawful respondent selection has caused them to suffer an unnecessary competitive disadvantage in the market because key competitors including Tembec, West Fraser, and Weyerhaeuser are mandatory respondents and are able to obtain their own margins of dumping, duty assessment rates, and cash deposit rates, whereas plaintiffs cannot. (Compl. ¶ 5.) Armed with the superior knowledge of their own circumstances, these competitors "can plan their lumber production and sales over the next couple of years," whereas plaintiffs cannot. *Id.* Additionally,

Plaintiff Abitibi alleges that the uncertainty now plaguing its operating decisions is further magnified by its "difficult financial circumstances, following three consecutive years of substantial operating losses." (Compl. ¶ 6.) Plaintiff Abitibi contends that it is now critical to evaluate the profitability and cash flow implications of new sawmill acquisitions or joint ventures to access raw material inputs, which it cannot do given the "high degree of uncertainty regarding Abitibi's future antidumping duty assessment and cash deposit rates." *Id*.

Again, assuming these allegations to be true, they do not render the relief available under section 1581(c) manifestly inadequate. Such uncertainty is an ordinary effect of the antidumping regime, and therefore, the disruptions it entails cannot constitute a basis under which the court bypasses section 1581(c) jurisdiction in favor of section 1581(i). The court cannot sensibly hold otherwise and thereby invite challenges to Commerce's interim determinations that introduce such business uncertainty during an administrative review. The absence of certainty regarding the dumping margins and final assessment of antidumping duties is a characteristic of the retrospective system of administrative reviews designed by Congress. *See D&L Supply Co. v. United States*, 17 CIT 1419, 1422, 841 F. Supp. 1312, 1315 (1993) ("the uncertainty of knowing the final amount of duties due at the time of entry is simply an inherent part of importing merchandise into the United States.").

(iii) Repeating a Time Consuming and Expensive Administrative Proceeding

Plaintiffs contend that if they wait and ultimately prevail in a challenge under section 1581(c), a "time-consuming and expensive administrative proceeding" would essentially have to be started anew. (Compl. ¶ 8.) Assuming that this is indeed the likely result of a court ordered remand under section 1581(c), such inconvenience and expense are inherent in the administrative and judicial review process and cannot therefore constitute manifest inadequacy for what is the normal jurisdictional scheme. *See Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.")). Plaintiffs' situation is no different from any other respondent that disagrees with an approach or methodology Commerce has taken that requires different information and documents from those that would be necessary under an interested party's preferred approach.

IV. CONCLUSION

Commerce's respondent selection determinations are interim in nature, and will be incorporated in or superceded by the final results of the third review. Those final results are reviewable under 19 U.S.C. § 1516a(a)(2)(B)(iii), and therefore 28 U.S.C. § 1581(c) is the exclusive means of judicial review for plaintiffs' claims. Alternatively, Commerce's respondent selection determinations are not ripe for review. In sum, plaintiffs' remedy under 28 U.S.C. § 1581(c) is not manifestly inadequate. Therefore, section 1581(i) jurisdiction is not available for plaintiffs' action. The court does not reach the question of standing raised by defendant-intervenors. Judgment dismissing this action will be entered accordingly.

Slip Op. 06–85

BEFORE: RICHARD K. EATON, JUDGE

ZHEJIANG NATIVE PRODUCE & ANIMAL BY-PRODUCTS IMPORT & EXPORT CORP., ET AL., Plaintiffs, v. UNITED STATES, Defendant.

Court No. 02–00057

ORDER

[Matter remanded to United States Department of Commerce]

Dated: June 6, 2006

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt, LLP (*Adam M. Dambrov, Bruce M. Mitchell,* and *Mark E. Pardo*), for plaintiffs Zhejiang Native Produce & Animal By-Products Import & Export Corp., Kunshan Foreign Trade Co., China (Tushu) Super Food Import & Export Corp., High Hope International Group Jiangsu Foodstuffs Import & Export Corp., National Honey Packers & Dealers Association, Alfred L. Wolff, Inc., C.M. Goettsche & Co., China Products North America, Inc., D.F. International (USA), Inc., Evergreen Coyle Group, Inc., Evergreen Produce, Inc., Pure Sweet Honey Farm, Inc., and Sunland International, Inc.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Reginald T. Blades, Jr.*); *Robert LaFrankie,* Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

Collier Shannon Scott, PLLC (*Michael J. Coursey, John M. Herrmann*), for defendant-intervenors American Honey Producers Association and Sioux Honey Association.

This matter comes before the court pursuant to the decision of the United States Court of Appeals for the Federal Circuit ("CAFC") in *Zhejiang Native Produce & Animal By-Products Import & Export*

Corp. v. United States, 432 F.3d 1363 (Fed. Cir. 2005), and the CAFC mandate of February 21, 2006, reversing and remanding the judgment of this court in *Zhejiang Native Produce & Animal By-Products Import & Export Corp. v. United States*, 28 CIT ___ , slip op. 04–109 (Aug. 26, 2004) (not reported in the Federal Supplement).

In its decision, the CAFC held that substantial evidence did not support the finding of critical circumstances by the United States Department of Commerce ("Commerce") based on an imputation of knowledge to plaintiffs that their honey was being sold, or was likely to be sold, in the United States at less than fair value.

Therefore, in accordance with the CAFC's mandate, it is hereby

ORDERED that this matter is remanded to Commerce for further consideration of its critical circumstances finding, provided that in no event shall Commerce impute to plaintiffs any knowledge prohibited by the CAFC's decision, and it is further

ORDERED that Commerce's remand results are due on September 4, 2006, comments are due on October 4, 2006, and replies to such comments are due on October 16, 2006.

Slip Op. 06–86

MERCK & CO., INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Judge
Court No. 02–00759

OPINION

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

Dated: June 6, 2006

Galvin & Mlawski (*John J. Galvin*) for Plaintiff Merck & Co., Inc.

Peter D. Keisler, Assistant Attorney General; (*Barbara S. Williams*) Attorney in Charge, International Trade Field Office; (*Edward F. Kenny*) Civil Division, Commercial Litigation Branch, United States Department of Justice; *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of counsel, for Defendant United States.

BARZILAY, JUDGE: Plaintiff Merck & Co., Inc. ("Merck"), has brought this action against the United States to contest Customs' denial of its timely-filed protest claim for "substitution unused merchandise duty drawback" on exports of substitute, fungible non-NAFTA origin goods to Canada and Mexico. *See* Pl.'s Mot. Summ. J. 1. Plaintiff asserts that pursuant to the relevant statutes, 19 U.S.C. §§ 1313(j)(2) & (4), 3333(a) (2000), its shipments of the merchandise

in question to Canada and Mexico constitute "exports" and therefore are not subject to NAFTA drawback restrictions; Defendant contends otherwise. Both parties have filed motions for summary judgment. For the reasons given below, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied.

I. Procedural History

A. The Statutory Framework for Duty Drawback

Duty drawback provisions traditionally permit importers to obtain duty refunds upon exportation for articles produced with merchandise imported into the United States, *see* 19 U.S.C. § 1313(a),[1] or produced with substitute merchandise, domestic or imported, of the same kind as the imported merchandise ("substitution drawback"), *see* § 1313(b).[2] In 1980, Congress amended the laws to allow drawback on imported merchandise not used in the United States and exported in the same condition as when it was imported ("unused merchandise drawback"). *See* § 1313(j)(1) (1980).[3] In 1984, an additional

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[1] In relevant part, the statute states that:
"(a) Articles made from imported merchandise
Upon the exportation . . . of articles manufactured or produced in the United States with the use of imported merchandise, . . . the full amount of the duties paid upon the merchandise so used shall be refunded as drawback. . . ."
19 U.S.C. § 1313(a).

[2] In relevant part, the statute states that:
(b) Substitution for drawback purposes
If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles . . . , there shall be allowed upon the exportation . . . of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported . . . articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported, but only if those articles have not been used prior to such exportation . . . .
19 U.S.C. § 1313(b).

[3] The relevant part of the subsection read:
(j) same condition drawback.
(1) If imported merchandise, on which was paid any duty, tax, or fee imposed under Federal law because of its importation–,
(A) is . . . ,
(i) exported in the same condition as when imported . . . ; and
(B) is not used within the United States before such exportation . . . ; then upon such exportation . . . the amount of each such duty, tax, and fee so paid shall be refunded as drawback.
. . . .
19 U.S.C. § 1313(j) (1980).

modification legalized substitution unused merchandise drawback. *See* § 1313(j)(3) (1984).[4]

Passage of the North American Free Trade Agreement Implementation Act ("NAFTAIA"), Pub. L. No. 103–182, 107 Stat. 2060–2164 (1993), codified at 19 U.S.C. §§ 3301–3473 (2000), substantially amended the duty drawback system. Crucially, the NAFTAIA added subsection 1313(j)(4) to the statute and thereby eliminated "substitution unused merchandise drawback" for exports to Mexico and Canada, except for merchandise delineated in § 3333(a)(1)–(8). *See* §§ 1313(j)(2) & (4), 3333(a) (2000). These exceptions were included in the statute to preserve certain manufacturing and specialized duty deferral programs. H.R. Rep. No. 103-361(I), at 39 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2589.

B. The Present Case

On May 25, 1993, Merck imported 35 kilograms of the chemical compound N-(aminosulfonyl)-3-(((2-((diaminomethylene) amino)-4-thiazolyl) methyl) thio) propanimidamide, otherwise known as Famotidine, from its manufacturer Yamanouchi Ireland Co., Ltd., of Dublin, Ireland, at a duty rate of 6.9% *ad valorem*. During July and August 1995, Merck imported duty-free[5] an additional 1,195 kilograms of Famotidine. On July 13 and August 4, 1995, the firm then exported 35 kilograms of Famotidine from the 1995 transactions ("the substitute merchandise") to Mexico and Canada, respectively, hoping to secure a substitution unused merchandise drawback claim based upon the 35 kilograms of Famotidine that it imported in 1993 ("the designated merchandise") pursuant to the NAFTA drawback

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[4] Today the modified text of this subsection falls under paragraph (j)(2). This subsection in relevant part read:

> (3) If there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law because of its importation, any other merchandise (whether imported or domestic) that–
> (A) is fungible with such imported merchandise;
> (B) is . . . exported . . . ;
> (C) before such exportation . . . –
> (i) is not used within the United States, and
> (ii) is in the possession of the party claiming drawback under this paragraph; and
> (D) is in the same condition at the time of exportation . . . as was the imported merchandise at the time of its importation; then upon the exportation . . . of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback. . . .

19 U.S.C. § 1313(j)(3) (1984).

[5] Pursuant to the Uruguay Round Trade Agreement, tariffs on pharmaceutical products were eliminated effective January 1, 1995.

exception in § 3333(a)(2).[6] *See* Pl.'s Mot. Summ. J. 7–8, 13; Def.'s Mot. Summ. J. & Resp. Def.'s Mot. Summ. J. 2–3.

Customs denied Merck's drawback claim, asserting that statute prohibits "substitution unused merchandise drawback" for exports to NAFTA countries and that Merck's claim did not fit into any of the eight exceptions in § 3333(a). Customs liquidated the entries on July 31, 1998. *See* Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 3; Def.'s Statement Material Facts 1. Merck subsequently filed a protest, which Customs denied on June 14, 2002. Customs reasoned that

> the goods exported to Canada and Mexico [were] not the imported goods upon which the drawback claim [was] based, but [were] the substitute goods. The designated imported merchandise, which [was] not exported, [was] the basis for the drawback claim. As it [was] not exported, it [was] not merchandise described in paragraph (2) of section 3333(a) . . . and cannot be the basis for a claim under § 1313(j)(2).

HQ 228781 of June 20, 2002, at *2. Merck then filed the present action in this Court, which has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a).

II. Standard of Review

This Court will grant a party summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986); *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). In its evaluation, "[t]he Court may not resolve or try factual issues." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). To determine whether there exists a genuine issue of material fact, the court must view the proffered evidence "in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent." *Dow Agroscis. LLC v. Crompton Corp.*, No. 2005–1524, Slip. Op. at *4 (Fed. Cir. May 5, 2006) (not reported in F. Supp.)

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[6] The exception reads:

(2) A good exported to a NAFTA country in the same condition as when imported into the United States. For purposes of this paragraph– (A) processes such as testing, cleaning, repacking, or inspecting a good, or preserving it in its same condition, shall not be considered to change the condition of the good, and (B) except for a good referred to in paragraph 12 of section A of Annex 703.2 of the Agreement that is exported to Mexico, if a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title.

19 U.S.C. § 3333(a)(2).

(quoting *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 145 F.3d 1303, 1307 (Fed. Cir.1998)) (quotations omitted). Absent a finding of "disputes over facts that might affect the outcome of the suit under the governing law," summary judgment will be entered for the moving party. *Anderson*, 477 U.S. at 248.

III. Discussion

A. Statutory Interpretation

This case centers on the parties' conflicting interpretations of 19 U.S.C. § 1313(j)(4)(A)[7] when viewed in conjunction with §§ 1313(j)(2) and 3333(a).[8] When undertaking an examination of a

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[7] At the time relevant in this case, § 1313(j)(4)(A) was codified as § 1313(j)(4). Upon the passage of the U.S.-Chile Free Trade Agreement Implementation Act, paragraph (4) became (4)(A). For convenience, this opinion will refer to this paragraph as (4)(A).

[8] Section 1313(j), in relevant part and at all relevant times, provides:

(j) Unused merchandise drawback.

. . .

(2) Subject to paragraph (4), if there is, with respect to imported merchandise on which was paid any duty, tax, or fee imposed under Federal law upon entry or importation, any other merchandise (whether imported or domestic), that–

(A) is commercially interchangeable with such imported merchandise;

(B) is, before the close of the 3-year period beginning on the date of importation of the imported merchandise, either exported or destroyed under customs supervision; and

(C) before such exportation or destruction–

(i) is not used within the United States, and

(ii) is in the possession of, including ownership while in bailment, in leased facilities, in transit to, or in any other manner under the operational control of, the party claiming drawback under this paragraph, if that party–

(I) is the importer of the imported merchandise,

. . . .

then, notwithstanding any other provision of law, upon the exportation or destruction of such other merchandise the amount of each such duty, tax, and fee paid regarding the imported merchandise shall be refunded as drawback under this subsection, but in no case may the total drawback on the imported merchandise, whether available under this paragraph or any other provision of law or any combination thereof, exceed 99 percent of that duty, tax, or fee.

. . . .

(4)(A) Effective upon the entry into force of the North American Free Trade Agreement, the exportation to a NAFTA country, as defined in section 2(4) of the North American Free Trade Agreement Implementation Act [19 U.S.C.A. § 3301(4)], of merchandise that is fungible with and substituted for imported merchandise, other than merchandise described in paragraphs (1) through (8) of section 203(a) of that Act [19 U.S.C.A. § 3333(a)], shall not constitute an exportation for purposes of paragraph (2).

. . . .

19 U.S.C. § 1313(j) (emphasis added). Section 3333 in relevant part reads:

(a) "Good subject to NAFTA drawback" defined

For purposes of this Act and the amendments made by subsection (b) of this section, the term "good subject to NAFTA drawback" means any imported good other than the following:

(1) A good entered under bond for transportation and exportation to a NAFTA country.

(2) A good exported to a NAFTA country in the same condition as when imported into the United States. For purposes of this paragraph–

(A) processes such as testing, cleaning, repacking, or inspecting a good, or preserving it

statute's meaning, a court must first look to "the statutory language itself [as] the best indication of congressional intent." *Alaskan Arctic Gas Pipeline Co. v. United States*, 831 F.2d 1043, 1046 (Fed. Cir. 1987); *see United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991); *United States v. Kung Chen Fur Corp.*, 188 F.2d 577, 583–84 (C.C.P.A. 1951). During this initial textual analysis, "the entire context of the statute must be considered and every effort made to give full force and effect to all language contained therein." *Dart Exp. Corp. v. United States*, 43 C.C.P.A. 64, 74 (1956) (citations omitted) (not reported in F.2d); *see Platt v. Union Pac. R.R. Co.*, 99 U.S. 48,

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in its same condition, shall not be considered to change the condition of the good, and
(B) except for a good referred to in paragraph 12 of section A of Annex 703.2 of the Agreement that is exported to Mexico, if a good described in the first sentence of this paragraph is commingled with fungible goods and exported in the same condition, the origin of the good may be determined on the basis of the inventory methods provided for in the regulations implementing this title.
(3) A good–
(A) that is–
(i) deemed to be exported from the United States,
(ii) used as a material in the production of another good that is deemed to be exported to a NAFTA country, or
(iii) substituted for by a good of the same kind and quality that is used as a material in the production of another good that is deemed to be exported to a NAFTA country, and
(B) that is delivered–
(i) to a duty-free shop,
(ii) for ship's stores or supplies for ships or aircraft, or
(iii) for use in a project undertaken jointly by the United States and a NAFTA country and destined to become the property of the United States.
(4) A good exported to a NAFTA country for which a refund of customs duties is granted by reason of–
(A) the failure of the good to conform to sample or specification, or
(B) the shipment of the good without the consent of the consignee.
(5) A good that qualifies under the rules of origin set out in section 3332 of this title that is–
(A) exported to a NAFTA country,
(B) used as a material in the production of another good that is exported to a NAFTA country, or
(C) substituted for by a good of the same kind and quality that is used as a material in the production of another good that is exported to a NAFTA country.
(6) A good provided for in subheading 1701.11.02 of the HTS that is–
(A) used as a material, or
(B) substituted for by a good of the same kind and quality that is used as a material, in the production of a good provided for in existing Canadian tariff item 1701.99.00 or existing Mexican tariff item 1701.99.01 or 1701.99.99 (relating to refined sugar).
(7) A citrus product that is exported to Canada.
(8) A good used as a material, or substituted for by a good of the same kind and quality that is used as a material, in the production of–
(A) apparel, or
(B) a good provided for in subheading 6307.90.99 (insofar as it relates to furniture moving pads), 5811.00.20, or 5811.00.30 of the HTS, that is exported to Canada and that is subject to Canada's most-favored-nation rate of duty upon importation into Canada.

Where in paragraph (6) a good referred to by an item is described in parentheses following the item, the description is provided for purposes of reference only.

. . . .

19 U.S.C. § 3333.

58–59 (1878) ("Congress is not to be presumed to have used words for no purpose. . . . [N]o words are to be treated as surplusage or as repetition."); *Faus Group, Inc. v. United States*, 28 CIT ___ , ___ , 358 F. Supp. 2d 1244, 1261 (2004).

> [I]f the language of a statute is clear and plain, its obvious meaning must be adopted by the court[ ]; yet, in the presence of ambiguity, the fact that inconsistent or absurd results may flow from one construction and not from another will often lead the court to adopt the latter as the most likely expressing the legislative intent.

Cohn & Rosenberger v. United States, 4 Ct. Cust. 378, 383 (Ct. Cust. App. 1913). "However, if the bare language of the statute fails to provide adequate guidance or if a literal interpretation of the statute would lead to an incongruous result," the court must turn to the statute's administrative and legislative history to glean Congress' purpose in enacting the statute. *Alaskan Arctic Gas Pipeline Co.*, 831 F.2d at 1046; *see Kung Chen Fur Corp.*, 188 F.2d at 583–84.

B. The Language of the Statutes in Question

The court notes that the statutory scheme at issue is inartfully drafted, not least because portions of it lie within the laws governing NAFTA, while other parts are embedded within the statutes on duty drawback. Subsection (j)(2) of § 1313 establishes the legal framework for substitution unused merchandise drawback, subject to the limitations set forth in paragraph (4). Paragraph (4)(A) states that "merchandise that is fungible with and substituted for imported merchandise" exported to NAFTA countries – Mexico and Canada – generally does not qualify for duty drawback. § 1313(j)(4)(A). In other words, subsection (j)(4)(A) precludes "substitution unused merchandise drawback" for merchandise exported to NAFTA countries. This prohibition, though, is subject to the exceptions listed in "paragraphs (1) through (8)" of § 3333(a). *Id.*

However, the parties disagree over whether the dependant clause in paragraph (4)(A) that cross-references the § 3333(a) exceptions ("the dependant clause") modifies the first or second "merchandise" in the sentence. Merck claims that the dependant clause modifies the first "merchandise" in paragraph (A) and therefore exempts "the fungible substitute exports" from the substitution unused merchandise drawback restrictions. Pl.'s Mot. Summ. J. 2. To fall within the substitute unused merchandise drawback exception, then, only *the exports* – and not the designated merchandise upon which one bases a drawback claim – would need to fall within a § 3333(a) exception. Defendant insists that the dependant clause modifies the second "merchandise," the "imported merchandise" upon which a duty drawback claim is based. Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 10-11. This construction would necessitate that *the designated*

merchandise fall under one of the exceptions in § 3333(a) to qualify for substitute unused merchandise drawback.

According to conventional grammatical methods of statutory construction, Plaintiff's argument fails. The last antecedent rule instructs that "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Since the second, "imported merchandise" immediately precedes the dependant clause, Defendant's reading conforms to the rule, and Merck's does not. Further, as Defendant notes, Congress could have moved the dependant clause to create Merck's interpretation unambiguously.

> [T]he drafters would have moved the limiting clause forward . . . to modify the substitute "merchandise" as follows[:]
>
> . . . the exportation to a NAFTA country of merchandise, *other than merchandise described in paragraphs (1) through (8) of section 203(a) of that Act [19 U.S.C.A. § 3333(a)]*, that is fungible with and substituted for imported merchandise shall not constitute an exportation for purposes of paragraph 2 [sic].

Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 13 (third brackets in original).

Nevertheless, both parties separately note, and not without reason, that their opponent's reading of § 1313(j) in conjunction with the § 3333(a) exceptions leads to ambiguous, absurd results and renders impotent portions of the statutory scheme. *See* Pl.'s Mot. Summ. J. 15, 19, 21–28; Def.'s Mot. Summ. J. & Resp. Pl.'s Mot. Summ. J. 14–16; Def.'s Reply 11. Thus, the court must examine the legislative history and administrative regulations, so that it may interpret the statute to give the fullest possible effect and meaning to its language and the intent of Congress. *See Nat'l Lead Co. v. United States*, 252 U.S. 140, 145 (1920); *Cohn & Rosenberger*, 4 Ct. Cust. at 380; *cf. Barnhart*, 540 U.S. at 26 (noting that last antecedent rule "not an absolute and can assuredly be overcome by other indicia of meaning").

B. Legislative History and Congressional Intent

The legislative history for the NAFTAIA affirms that in amending the duty drawback statutes in 1993, Congress intended to "restrict[ ] drawback and duty deferral programs between [NAFTA] Parties . . . . except for those categories of goods specifically enumerated" and that Customs' interpretation of the statutes at issue reflects this intent. H.R. Rep. No. 103–361(I), at 39 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2589. Specifically, the Implementation Act aimed to

> eliminate[ ] . . . "same condition substitution drawback [substitution unused merchandise drawback]" by amending section

> 313(j)(2) of the Tariff Act of 1930 (19 U.S.C. [§] 1313(j)(2)), thereby eliminating the right to a refund on the duties paid on a dutiable good upon shipment to Canada or Mexico of a substitute good, except for goods described in paragraphs one through eight of section 203(a) [19 U.S.C. § 3333(a)].[9]

Id. at 39–40; *see* 139 Cong. Rec. S16092-01, S16098 (daily ed. Nov. 18, 1993) (Statement of The Committee on Finance on S. 1627 The North American Free Trade Agreement Implementation Act (NAFTA)) ("[D]rawback may not be paid on exports to a NAFTA country of merchandise that is fungible with and substituted for imported merchandise. [The NAFTAIA] eliminates 'same condition substitution' drawback on trade among NAFTA Parties."). By abolishing "substitution unused merchandise drawback," Congress desired to "remove the trade distorting provisions of the drawback laws . . . between NAFTA countries . . . . [and] ensure that none ofthe NAFTA countries [became] an 'export platform' for materials produced in other regions of the world." H.R. Rep. No. 103–361(I), at 40; *see id*. As legislative history makes amply clear, Congress undoubtedly sought to eliminate nearly all substitute unused merchandise drawback on exports to Mexico and Canada. Merck cannot reconcile its proposed construction of 19 U.S.C. § 1313(j)(4)(A) with this unambiguous statement of intent.

C. Administrative Regulations

Customs' regulations and Headquarters Rulings are consistent with the statutory construction that it advocates in this case, and the court must therefore treat them with substantial deference. 19 C.F.R. § 181.41 establishes the framework for the agency's application of the duty drawback laws modified by the NAFTAIA. Sections 181.42(d) and 181.44 proceed to implement the NAFTA drawback restrictions, and § 181.45 provides for the 19 U.S.C. § 3333(a) exceptions to the general rule. *See* 19 C.F.R. §§ 181.41, 181.42, 181.44, 181.45; *see also* HQ 228209 of Apr. 12, 2002, at *3–4; HQ 227876 of Aug. 21, 2000, at *2–3; HQ 228421 of May 5, 2000; HQ 227272 of May 1, 1997, at *3 ("[W]ith the exceptions specifically provided for in 19 U.S.C. [§] 3333(a)(1) through (8) . . . , substitution drawback under 19 U.S.C. [§] 1313(j)(2) nolonger exists for shipments to Canada or Mexico of merchandise imported into the United States."). *See*

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[9] With no hint of irony, Plaintiff insists that this paragraph supports its position by implicitly invoking the last antecedent rule and claiming that the clause "except for goods described in paragraphs one through eight of section 203(a)" modifies "substitute good." *See* Pl.'s Mot. Summ. J. 31. This reading would allow for § 3333(a) exemptions as long as the exports, and not the designated merchandise upon which one bases a drawback claim, fall within the statute. Unfortunately for Plaintiff, the last antecedent rule is a cannon of statutory construction and does not apply to legislative history.

generally 58 Fed. Reg. 69,460–01, 69,463 (Dec. 30, 1993) (detailing purpose of NAFTA duty drawback regulations).

Since the court finds that Customs' duty drawback regulations reflect Congress' intent in enacting the NAFTAIA, they "should not be disturbed." *Nat'l Lead Co.*, 252 U.S. at 146; *see Barnhart*, 540 U.S. at 26 ("[W]hen the statute 'is silent or ambiguous' we must defer to a reasonable construction by the agency charged with its implementation.") (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)); *see United States v. Haggar Apparel Co.*, 526 U.S. 380, 392–94 (1999); *see also* 19 U.S.C. § 1500(b) (charging Customs with power to fix rate of duty applicable to imported goods).

IV. Conclusion

Though some literal readings of the statutory scheme regulating duty drawback within the NAFTA area can lead to conflicting or absurd results regardless of how one construes the statutes' ambiguous portions, the interpretation reflected in the relevant regulation promulgated by Customs to interpret the statute (and argued by Defendant's brief) most closely conforms to the Congressional intent outlined in the legislative history. Accordingly, the court finds Defendant's interpretation of 19 U.S.C. § 1313(j)(4)(A) valid and affirms its denial of Merck's duty drawback claim. Defendant's motion for summary judgment is granted, and Merck's motion for summary judgment is denied.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C06/13 3/14/06 Carman, J.	GN Netcom, Inc.	05–00016	8518.40.20 8518.90.80 4.9%	8517.90.38 Free of duty	Agreed statement of facts	New York Telephone headset amplifiers and printed circuit board assembles
C06/14 3/16/06 Carman, J.	Gen. Binding Corp.	04–00030	8472.90.95 1.8% 7326.90.85 2.9% 8214.90.90 1.4¢ each + 3.2%	8441.10.00 Free of duty	Agreed statement of facts	Los Angeles Paper cutters and paper trimmers
C06/15 5/30/06 Aquilino, J.	Church & Dwight Co.	04–00352	3824.90.40 4.6%	3823.19.20 Various rates	Agreed statement of facts	New Orleans San Francisco Palm fatty acid distillate
C06/16 5/30/06 Aquilino, J.	Church & Dwight Co.	05–00077	3824.90.40 4.6%	3823.19.20 Various rates	Agreed statement of facts	New Orleans San Francisco Palm fatty acid distillate
C06/17 5/30/06 Aquilino, J.	MBM Co.	04–00425	7117.19.90 11%	7116.20.05 3.3% 7113.11.50 5%	Agreed statement of facts	Chicago Various styles of jewelry