Slip Op. 06–10

VERTEX INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Restani, Chief Judge
Court No. 05–00272

[Scope determination on Vertex International, Inc.'s garden carts from the People's Republic of China REMANDED for exclusion of the garden carts.]

Dated: January 19, 2006

Neville Peterson LLP (Curtis W. Knauss, John M. Peterson, and George W. Thompson) for plaintiff.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (Stephen C. Tosini), Carrie Owens, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant.

OPINION

Restani, Chief Judge: Plaintiff Vertex International, Inc. ("Vertex") moves for judgment on the agency record pursuant to USCIT R. 56.2, claiming that the U.S. Department of Commerce ("Commerce") improperly ruled that its "garden carts" were within the scope of an antidumping duty order on hand trucks from the People's Republic of China. See Final Scope Ruling on the Antidumping Duty Order on Hand Trucks from the People's Republic of China, U.S. Dep't of Commerce Internal Memorandum from Wendy J. Frankel to Barbara E. Tillman (Feb. 15, 2005), P.R. Doc. 3, Def's App. Tab 3 [hereinafter Final Scope Ruling].

On December 27, 2004, Vertex requested a ruling from Commerce to determine whether its garden carts fell within the scope of Commerce's antidumping duty order on hand trucks from the People's

Republic from China.[1] See Hand Trucks and Certain Parts Thereof from the People's Republic of China, 69 Fed. Reg. 70,122 (Dep't of Commerce Dec. 2, 2004) (notice of antidumping duty order) [hereinafter Antidumping Duty Order or "Order"]. In an unpublished ruling, Commerce found that the garden carts exhibited all of the essential physical characteristics of hand trucks as outlined by the Antidumping Duty Order and were within the scope of the Order. See Final Scope Ruling, Def.'s App. Tab 3, at 7. Vertex contends that Commerce's Final Scope Ruling is not supported by substantial evidence on the record and is otherwise not in accordance with law. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000).

I. BACKGROUND

A. The Hand Truck Order

On December 2, 2004, Commerce published an antidumping duty order concerning hand trucks from the People's Republic of China. Antidumping Duty Order, 69 Fed. Reg. at 70,122. The Order covers hand trucks "manufactured from any material, whether assembled or unassembled, complete or incomplete, suitable for any use, and certain parts thereof, namely the vertical frame, the handling area and the projecting edges or toe plate, and any combination thereof." Id. It states that the covered product is commonly referred to as a "hand truck, convertible hand truck, appliance hand truck, cylinder hand truck, bag truck, dolly, or hand trolley," and typically imported under three subheadings of the Harmonized Tariff Schedule of the United States ("HTSUS"): 8716.80.50.10; 8716.80.50.90; and 8716.90.50.60.[2] Id.

The Order gives the following description of a hand truck:

> A complete or fully assembled hand truck is a hand-propelled barrow consisting of a vertically disposed frame having a handle or more than one handle at or near the upper section of

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[1] Vertex is an importer based in Watertown, Minnesota, and sells garden and yard products.

[2] The relevant parts of HTSUS subheading 8716 provides:

8716	Trailers and semi-trailers; other vehicles, not mechanically propelled; and parts thereof:
8716.80	Other vehicles:
. . .	
8716.80.50.10	Industrial hand trucks
8716.80.50.90	Other
8716.90	Parts:
. . .	
8716.90.50.60	Other

> the vertical frame; at least two wheels at or near the lower section of the vertical frame; and a horizontal projecting edge or edges, or toe plate, perpendicular or angled to the vertical frame, at or near the lower section of the vertical frame. The projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load.
>
> That the vertical frame can be converted from a vertical setting to a horizontal setting, then operated in that horizontal setting as a platform, is not a basis for exclusion of the hand truck from the scope of this petition. That the vertical frame, handling area, wheels, projecting edges or other parts of the hand truck can be collapsed or folded is not a basis for exclusion of the hand truck from the scope of the petition. That other wheels may be connected to the vertical frame, handling area, projecting edges, or other parts of the hand truck, in addition to the two or more wheels located at or near the lower section of the vertical frame, is not a basis for exclusion of the hand truck from the scope of the petition. Finally, that the hand truck may exhibit physical characteristics in addition to the vertical frame, the handling area, the projecting edges or toe plate, and the two wheels at or near the lower section of the vertical frame, is not a basis for exclusion of the hand truck from the scope of the petition.

Id.

The language as to the scope of the investigation remained the same from the notice of the initiation of investigation through the preliminary and final determination of sales at less than fair value, and the Antidumping Duty Order. See Hand Trucks and Certain Parts Thereof from the People's Republic of China, 68 Fed. Reg. 68,591 (Dep't of Commerce Dec. 9, 2003) (initiation of antidumping duty investigation); Hand Trucks and Certain Parts Thereof from the People's Republic of China, 69 Fed. Reg. 29,509 (Dep't of Commerce May 24, 2004) (preliminary determ. and postponement of final determ.); Hand Trucks and Certain Parts Thereof from the People's Republic of China, 69 Fed. Reg. 60,980 (Dep't of Commerce Oct. 14, 2004) (final determ.); Hand Trucks and Certain Parts Thereof from the People's Republic of China, 69 Fed. Reg. 65,410 (Dep't of Commerce Nov. 12, 2004) (amended final determ.); Antidumping Duty Order, 69 Fed. Reg. at 70,122.

C. Vertex's Arguments

Vertex argues that Commerce's ruling that its garden carts are within the scope of the Order because they exhibited all the physical characteristics of hand trucks is unsupported by substantial evidence. Vertex argues that Commerce should not have ended its scope inquiry at an examination under 19 C.F.R. § 351.225(k)(1) (2005)

but should have conducted an inquiry under the test set forth in Diversified Products Corp. v. United States, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983) (codified in 19 C.F.R. § 351.225(k)(2) (2005)).[3] See Letter from Vertex Int'l, Inc. to Dep't of Commerce, Int'l Trade Admin. (Dec. 27, 2004), P.R. Doc. 1, Def.'s App. Tab 1, at 6 [hereinafter Request for Scope Ruling].

In arguing that an inquiry under § 351.225(k)(1) is not dispositive in this case, Vertex first claims that the language of the Order is ambiguous and does not specifically include or exclude its garden carts. Vertex argues that while the Order covers hand trucks known by other names – "convertible hand truck, appliance hand truck, cylinder hand truck, bag truck, dolly, or hand trolley" – it does not cover products like carts, garden carts, or caddies. (Pl.'s Br. 9–10.)

Additionally, Vertex distinguishes the use of its garden carts from the use of hand trucks. Vertex claims that unlike hand trucks, its garden carts are not used primarily to transport objects but are used primarily for organizing, storing, and holding equipment and supplies. The garden carts' hollow, plastic wheels are also designed for use on grass and soil surfaces, rather than on sidewalks, curbs and other rough surfaces. Vertex claims that the tires on its garden carts would deform or break if the garden carts are used to carry heavy loads or used to move loads over rough or uneven terrains. (Pl.'s Br. 10.)

Vertex also argues that its garden carts do not have all of the same characteristics as hand trucks. While a garden cart has a vertical frame, handle, and two wheels, Vertex contends that the subject cart's "stabilizing plate" is not a projecting edge or toe plate as defined by the Order. (Pl.'s Br. 15–16.) The Order provides that a hand truck has "a horizontal projecting edge or edges, or toe plate, perpendicular or angled to the vertical frame, at or near the lower section of the vertical frame. The projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load." Antidumping Duty Order, 69 Fed. Reg. at 70,122. While the garden cart's "stabilizing plate" is made from steel wire welded into a grid pattern that projects out horizontally from the bottom of the vertical frame, Vertex argues that this stabilizing plate does not "readily 'slide under' a load" as the Order requires. Request for Scope Ruling, Def.'s App. Tab 1, at 6. Additionally, the stabilizing plate does not have a large carrying capacity, and the garden cart itself has no "centrally positioned frame member against which a stabiliz[ing] plate load can be balanced." Id., Def.'s App. Tab 1, at 5.

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[3] 19 C.F.R. § 351.225(k) outlines the procedures that Commerce should follow when interpreting the scope of an antidumping duty order. Id. First, Commerce considers the three factors articulated in 19 C.F.R. § 351.225(k)(1). Id. If such an inquiry is not dispositive, Commerce considers the additional five factors articulated in 19 C.F.R. § 351.225(k)(2). Id.

After arguing that an inquiry under § 351.225(k)(1) is not dispositive, Vertex argues that under a § 351.225(k)(2) inquiry, its garden carts are outside the scope of the Order.[4]

D. Industry Response

On January 19, 2005, the petitioners, Gleason Industrial Products, Inc. and Precision Products, Inc., stated their view that Vertex's garden carts were excluded from the scope of the Order. See Letter from Gleason Indus. Prods., Inc. & Precision Prods., Inc. to Donald L. Evens, Sec'y of Commerce, U.S. Dep't of Commerce (Jan. 18, 2005), P.R. Doc. 2, Def.'s App. Tab 2, at 2. Although the petitioners did not accept Vertex's argument that its garden carts should be excluded based on their intended use in gardening because the Order specifically stated that hand trucks could be "suitable for any use," the petitioners did agree that Vertex's garden carts do not have all of the characteristics of hand trucks as outlined in the Order. The petitioners reasoned that because the projecting plate of the subject garden cart does not "readily 'slide under' a load," Vertex's product is excluded from the scope of the Order. Id. In other words, the petitioner advised Commerce that Vertex's carts are not within the scope of the Order because they are unambiguously excluded by the Order. The court agrees.

II. JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(c). The court will affirm Commerce's scope determination if it is supported by substantial evidence and in accordance with the law. See 19 U.S.C. §§ 1516a(b)(1)(B)(i), 1516a(a)(2)(B)(ii), 1516a(a)(2)(B)(vi) (2000).

III. DISCUSSION

A. Relevant law

In examining whether a particular product is within the scope of an antidumping duty order, Commerce follows the two-step process set forth in 19 C.F.R. § 351.225(k). Under § 351.225(k)(1), Commerce examines "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary [of Commerce] (including prior scope determinations) and the [International Trade] Commission." 19 C.F.R. § 351.225(k)(1). If an examination of the three sources in § 351.225(k)(1) is not dispositive of the scope, Commerce then considers the five factors found in 19 C.F.R. § 351.225(k)(2): "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he

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[4] As this opinion must focus upon Commerce's "interpretation" of the Order, it is unnecessary to examine Vertex's arguments under § 351.225(k)(2) at this juncture.

ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." Id.

Although § 351.225(k) offers the interpretive rules for scope determinations when the description of a product is written in general terms, there are "circumstances in which an order's relevant terms are unambiguous." Allegheny Bradford Corp. v. United States, 342 F. Supp. 2d 1172, 1184 (CIT 2004). In such cases, Commerce may rule based upon the language of the Order itself because "[t]he language of an order is the 'cornerstone' of a court's analysis of an order's scope." Id. (quoting Duferco Steel, Inc. v. United States, 296 F.3d 1087, 1097–98 (Fed. Cir. 2002)). Furthermore, Commerce cannot "make a scope determination that conflicts with an order's terms, nor can it interpret an order in a way that changes the order's scope." Id. (citing Duferco, 296 F.3d at 1087, 1094–95).

B. Commerce's final scope ruling is erroneous

As indicated, in its unpublished final scope ruling, Commerce found that Vertex's garden carts were within the scope of the Antidumping Duty Order. Commerce found that the garden carts were not automatically excluded from the Order even though they were equipped with additional parts not mentioned in the Order and even though they were primarily used for the storage and organization of tools.[5]

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[5] As a preliminary matter, Commerce properly found that the presence of additional features on the garden cart, an upper rack and lower rack, does not exclude it from the scope of the Order. The additional features of the garden cart do not automatically exclude it from the Order because the Order specifically provides that "the hand truck may exhibit physical characteristics *in addition to* the vertical frame, the handling area, the projecting edges or toe plate, and the two wheels at or near the lower section of the vertical frame." *Antidumping Duty Order*, 69 Fed. Reg. at 70,122 (emphasis added).

Commerce also correctly rejected Vertex's argument that the primary use of its garden cart automatically excluded it from the scope of the Order. Commerce noted that the scope of the Order specifically covers hand trucks "suitable for any use." *Id.* Accordingly, the fact that the subject cart can be used for gardening and the storage and organization of gardening tools does not automatically exclude it from the scope of the Order.

Additionally, Vertex fails to argue convincingly that the Order does not cover its garden cart simply because the Order does not refer explicitly to it by its name. First, the scope language is unambiguous in treating the listed names of the articles as examples, not as an exhaustive list. *See Antidumping Duty Order*, 69 Fed. Reg. at 70,122 ("Examples of names commonly used to reference hand trucks are hand truck, convertible hand truck, appliance hand truck, cylinder hand truck, bag truck, dolly, or hand trolley."). Second, the court of appeals has recognized that it is unnecessary to " 'circumscribe the entire universe of articles' that might possibly fall within the order." *Novosteel SA v. United States*, 284 F.3d 1261, 1269 (Fed. Cir. 2002) (citing *Nitta Indus. Corp. v. United States*, 997 F.2d 1459, 1464 (Fed. Cir. 1993)). Rather than state each and every product that is covered by an order, Commerce gives a "description[ ] of [the] subject merchandise [that is] written in general terms." 19 C.F.R. § 351.225(a); *Novosteel*, 284 F.3d at 1269–70. Thus, even though the Order did not specifically refer to a garden cart, the absence of a direct reference does not automatically exclude it from the Order. *See id.*

In making its scope determination, Commerce claimed to have "evaluated Vertex's request in accordance with 19 CFR 351.225(k)(1) and [found] that the descriptions of the product contained in the petition, the initial investigation, the determinations by the Secretary . . . and the ITC are . . . dispositive with respect to Vertex's Cart." Final Scope Ruling, Def.'s App. Tab 3, at 5.[6] The government now argues that the terms of the Order were unambiguous and that further review was unnecessary. A review of Commerce's analysis in its scope ruling shows that although it did review the petition and a prior scope determination as mentioned in the regulation, Commerce based its ruling upon the language of the Order itself. While Commerce may base its ruling on the unambiguous language of an order, see Duferco Steel, 296 F.3d at 1096, here, that unambiguous language excludes rather than includes the garden carts.

In the present case, the Antidumping Duty Order specifically lays out the characteristics of a hand truck as:

> consisting of a vertically disposed frame having a handle or more than one handle at or near the upper section of the vertical frame; at least two wheels at or near the lower section of the vertcal frame; and a horizontal projecting edge or edges, or toe plate, perpendicular or angled to the vertical frame, at or near the lower section of the vertical frame.

Antidumping Duty Order, 69 Fed. Reg. 70,122. In its Final Scope Ruling, Commerce properly identified the four key characteristics of a hand truck – a vertical frame, a handle, at least two wheels, and a projecting edge or toe plate – and it is uncontested that the subject garden cart possesses the first three characteristics of a hand truck. Commerce failed, however, to cite record evidence demonstrating that the garden cart possessed a toe plate as defined by the Order and ignored contrary evidence.

The Order defines "projecting edge or toe plate" according to its function. Specifically, it states that "[t]he projecting edge or edges, or toe plate, slides under a load for purposes of lifting and/or moving the load."[7] Id. Although Commerce specified that a hand truck may be "suitable for any use," the "any use" language is limited by this sentence which requires that a hand truck's toe plate slide under a load to lift or move it. Commerce must give effect to this sentence, which states an essential physical characteristic of the articles included within the scope and specifies the purpose for which the horizontal projecting edge or toe plate must be designed.

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[6] Commerce then found that "it [is] unnecessary to consider the additional factors in 19 CFR 351.225(k)(2)." *Final Scope Ruling*, Def.'s App. Tab 3, at 5.

[7] Commerce included this sentence without variation from the initiation of the investigation through the preliminary and final determination of sales at less than fair value and the final Order.

Having specifically defined "toe plate," Commerce did not properly analyze whether the garden cart's stabilizing plate is a toe plate that slides under a load to lift or move it. The Final Scope Ruling's only consideration of whether the garden cart's "toe plate" falls within the terms of the Order consists of the following statement:

> Although Vertex asserts that the Cart's toe plate is "too thick to slide under a load conveniently," and the Petitioners assert that the toe plate's inability to "slide" under a load implies that the Cart does not fit in the definition of the scope of the Order, neither party provided any record evidence to determine whether the toe plate can or cannot actually "slide" under a load. Therefore, we have determined that the Cart falls within the definition of the scope of the Order because all four scope characteristics are present.

Final Scope Ruling, Def's App. Tab 3, at 7 (footnotes omitted). Despite having given information as to the operation instructions of the garden cart and its dimensions and composition, Commerce incorrectly claimed that neither party provided any evidence as to whether the garden cart slides under a load to lift or move it, and proceeded to find that all of the characteristics of a hand truck were present.[8] Id.

Contrary to Commerce's assertions here, Vertex did offer evidence regarding whether its garden cart slides under a load to lift or move it, and that evidence indicates that Vertex's garden cart cannot do so. First, evidence shows that the garden cart was not designed to, and cannot, slide under a load. In order to slide under a load, a hand truck must be pushed towards a load before the toe plate can slide underneath it. Here, the operation instructions from Vertex warn: "DO NOT PUSH. This product is designed to be PULLED ONLY. Pushing may damage the product **and even cause bodily injury.**" Request for Scope Ruling, Def.'s App. Tab 1, at 2 (emphasis original). This warning indicates that the manufacturer of the subject cart intended for objects to be placed on the stabilizing plate by hand and did not design the plate to slide under a load. Additionally, unlike the projecting edge of a hand truck, which is beveled to facilitate its sliding under a load, the edge of the stabilizing plate is a round steel wire that is not conducive to sliding under a load.[9] Thus, the evidence on the record demonstrates that the garden cart was not designed to, and cannot, slide under a load.

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[8] In the normal course Commerce has the authority to request further information if the uncontradicted evidence of record does not satisfy its concerns. The court also notes that Commerce did not find Vertex's evidence uncredited. It simply ignored it.

[9] The garden cart also has a metal, wire frame that projects out from the top rack of the subject cart and is parallel to the stabilizing plate. This wire frame prevents the cart from sliding under, and carrying, a taller load which would bump against the wire frame.

Second, the garden cart does not lift or move a load like a hand truck.[10] Unlike the garden cart, a hand truck is designed to carry heavy loads. Although the Order does not specify a specific load capacity for hand trucks, the fact that hand trucks need to slide under a load before it can be lifted or moved indicates that hand trucks are designed to carry heavy loads.[11] Here, unlike a hand truck which typically has a solid metal toe plate that can carry heavy loads, the garden cart has a metal wire stabilizing plate that cannot carry heavy loads. In fact, Vertex specifically stated that its garden cart cannot carry a load over 150 pounds. Request for Scope Ruling, Def.'s App. Tab 1, at 2. Moreover, the fact that the garden's cart's wheels may shatter if a heavy load was placed on the cart further suggests that the cart was not designed like a hand truck to carry heavy loads. Request for Scope Ruling, Def.'s App. Tab 1, at 6. Additional evidence indicates that Vertex's garden cart may not be able to lift or move any load at all. The garden cart does not have a central frame member against which a load can be balanced when it is lifted or moved. Request for Scope Ruling, Def.'s App. Tab 1, at 5–6. Even thought a central frame member is not a specific requirement of the Order, the absence of an object against which a load can be balanced prevents the secure lifting or moving of a load. Thus, contrary to Commerce's assertions, the record does contain evidence regarding the garden cart's ability to slide under a load to lift or carry it, and the only relevant evidence in the record indicates that the garden cart does not meet this essential requirement of the Order.

While Commerce may define and clarify the scope of an antidumping duty order, it cannot "interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms." Duferco, 296 F.3d at 1095 (quoting Eckstrom Indus., Inv. v. United States, 254 F.3d 1068, 1072 (Fed.Cir. 2001)) (internal quotation marks omitted). Commerce "interprets" an order contrary to its terms if it finds a product within the scope of the order despite the fact that the product does not exhibit all of the requirements of the order. By finding that Vertex's garden cart is within the scope of the Order without evidence that the garden cart's stabilizing plate can slide under a load to lift or move it, Commerce has impermissibly broadened the scope of the Order to include products that have projecting edges or toe plates that do not slide under a load for carrying purposes.

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[10] In its brief, while the government argues that the garden cart's stabilizing plate can slide under a load, it does not address whether the subject cart can lift or move a load. The "lifting and/or moving" requirement is essential to the Order because it explains why a projecting edge has to slide under a load and it further explains how a hand truck operates.

[11] Commerce's Final Scope Ruling refers to the petition which describes a hand truck's load capacity as "generally not exceeding 1000 pounds." Id., Def.'s App. Tab 3, at 7. Although this description was not found in the Order, it is indicative of the weight that hand trucks are meant to carry.

III. CONCLUSION

For the foregoing reasons, Commerce erred when it did not follow the unambiguous language of the Antidumping Duty Order which required that a product slide under a load to lift or move it. Upon remand Commerce shall issue a determination excluding Vertex's garden carts from the Order.

Slip Op. 06–12

LADY KELLY, INC., Plaintiff, v. UNITED STATES SECRETARY OF AGRICULTURE, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 05–00480

MEMORANDUM OPINION AND ORDER

[Defendant's motion to strike is granted. Plaintiff has ten days to file a response to Defendant's motion to dismiss thatcomplies with USCIT R. 75(b).]

Dated: January 24, 2006

GOLDBERG, Senior Judge: Defendant United States Department of Agriculture moves to strike Plaintiff Lady Kelly, Inc.'s response to Defendant's motion to dismiss. Defendant submits that the Court should strike Plaintiff's response because Plaintiff's response was filed by someone other than the attorney of record for the Plaintiff.

Plaintiff is a corporation engaged in the shrimping business in Georgia. The Foreign Agriculture Service recertified a petition for trade adjustment assistance ("TAA") filed by the Georgia Shrimp Association on behalf of Georgia shrimpers. *See Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 68,303 (Nov. 24, 2004). The effective date of the certification was November 29, 2004. Eligibility for the adjustment assistance disbursed pursuant to 19 U.S.C. § 2401e is conditioned on an "adversely affected agricultural commodity producer" (in this case, the shrimpers) filing a TAA application within ninety days of the date of certification. *See* 19 U.S.C. § 2401e (2005).

Plaintiff filed an application that was received on June 9, 2005, more than 180 days after the date of certification. Defendant denied the application for failure to file within the statutorily prescribed ninety-day window, which expired on February 28, 2005. On August 17, 2005, Plaintiff commenced proceedings in this Court under 28 U.S.C. § 1581(d), contending that the application was in fact mailed

on January 8, 2005, in light of which the Court should equitably toll the ninety-day window.

On October 28, 2005, Plaintiff's counsel R. Michael Patrick filed a motion to appear *pro hac vice* in this matter, which the Court granted on December 12, 2005. In the meantime, on November 4, 2005, Defendant filed a motion to dismiss under USCIT R. 12(b)(5) or, in the alternative, for judgment on the agency record under USCIT R. 56.1. On December 9, 2005, Plaintiff filed, directly and not through counsel, a response to Defendant's motion to dismiss. Such response consisted of a one and one-half page recitation of the Plaintiff's version of the facts, as well as allegations that the TAA program "is unfair and inequitable for the small business owner." Plaintiff's Response to Defendant's Motion to Dismiss ¶ 1. It was signed by Stewart E. Sadler, Plaintiff's sole shareholder, after whose signature the words "pro se" appeared. Four days after the response came due and was filed, the Court granted Mr. Patrick's motion to appear *pro hac vice***, establishing him as the counsel of record in this case.**

On December 21, 2005, Defendant filed a motion to strike Plaintiff's response "because [it] was filed by someone other than the attorney of record . . . ." Defendant's Motion to Strike, and in the Alternative, Reply Brief in Support of Defendant's Motion to Dismiss and Motion for Judgment upon the Administrative Record ("Motion to Strike") at 1. In that same motion, Defendant replied, in the alternative, to Plaintiff's response brief of December 9, 2005. Defendant attached a handwritten note from Mr. Patrick to the Clerk of the U.S. Court of International Trade advising the Court that "my client is now representing himself–pro-se [sic]. I believe the U.S. Constitution allows him to do so." Motion to Strike (Ex. A).

Of course, Mr. Patrick was wrong. Not only does the U.S. Constitution provide no such right, *see* U.S. Const. amend. VI (applying only to "criminal prosecutions"), but federal courts have consistently denied corporations even the opportunity to appear *pro se* in court. The rule is well established that a corporation *must always* appear through counsel. *See* USCIT R. 75(b) ("Except for an individual (not a corporation, partnership, organization or other legal entity) appearing *pro se*, each party and any *amicus curiae* must appear through an attorney authorized to practice before the court."); *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 201–02 (1993) ("It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel."). There exists a "virtually unbroken line of state and federal cases [that] has approved the rule that a corporation can appear in court only by an attorney." *United States v. Neman Bros. & Assoc., Inc.*, 17 CIT 181, 181, 817 F. Supp. 967, 968 (1993) (quoting *In re Holliday's Tax Serv., Inc.*, 417 F. Supp. 182, 183 (E.D.N.Y. 1976),

aff'd sub nom. Holliday's Tax Serv., Inc. v. Hauptman, 614 F.2d 1287 (2d Cir. 1979)).[1]

Thus, Plaintiff's response to Defendant's motion to dismiss must be stricken from the record because a corporation may not appear *pro se*, and must appear in court by an attorney. Plaintiff was in the difficult situation of having retained a counsel that was not admitted *pro hac vice* to appear before the Court in time to file Plaintiff's response. The situation was complicated further when Mr. Patrick communicated informally with the Clerk of the Court that his client intended to do something that an informed attorney would realize is an impossible course of action – i.e., a corporation representing itself *pro se*. As of now, Mr. Patrick is still counsel of record for Plaintiff, and will continue as such until Mr. Patrick submits a motion to withdraw as counsel. His handwritten note to the Clerk of the Court is insufficient to constitute withdrawal, since USCIT R. 75(d) requires that withdrawal be accomplished by court order upon motion from the attorney. As such, at this time only Mr. Patrick may appear before this Court in this matter.

In most cases, striking a plaintiff's response brief would render a defendant's underlying motion to dismiss under USCIT R. 12(b)(5) judgment-ready. *See* USCIT R. 7(d) (providing that a proper response to a dispositive motion, in order to be considered, must be filed within 30 days of the filing of the dispositive motion). Typically, the court would then test the adequacy of the complaint standing alone, without any briefing in support of its claim to rebut the defendant's motion to dismiss. In a case like this, where the lack of timeliness is patent, and dismissal can be avoided only by showing that equitable tolling is appropriate, a plaintiff's failure to present an argument will likely result in dismissal.

Here, however, the Court believes such action unwarranted at this stage. Because the Court is mindful of Plaintiff's difficulties resulting from the Court's delayed response to Mr. Patrick's *pro hac vice* motion, in conjunction with the confusion attending Mr. Patrick's representation of Plaintiff, as well as the lack of legal sophistication of many TAA plaintiffs, the Court prefers to grant Plaintiff an opportunity to respond with a brief that contains arguments the Court may actually entertain. Accordingly, the Court will *sua sponte* grant Plaintiff a ten-day extension of time, from the entering of this order, within which to file, through an attorney, a new response. *Accord*

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[1] *In re Holliday's* permitted a close corporation's sole shareholder to represent himself in a bankruptcy proceeding, noting that "[t]he traditional rule is unnecessarily harsh and unrealistic when applied in bankruptcy to small, closely-held corporations." 417 F. Supp. at 184. That court found authority to modify the general rule in "the inherent power of a court to supervise the proper administration of justice." *Id.* The Supreme Court, however, has criticized the *In re Holliday's* decision and reinforced the unqualified nature of the rule. *See Rowland*, 506 U.S. at 202 n.5.

Neman Bros., 17 CIT at 182, 817 F. Supp. at 968 (granting defendant's motion to strike response and granting sixty-day extension of time to enter an answer).

In accordance with the foregoing, it is hereby

ORDERED that Plaintiff's Response to Defendant's Motion to Dismiss, filed on December 9, 2005, is stricken from the record; and it is further

ORDERED that the portion of Defendant's brief of December 21, 2005 that replies to Plaintiff's stricken response brief, be similarly stricken from the record, and it is further

ORDERED that Plaintiff shall have ten (10) days to file a response, if any, to Defendant's Motion to Dismiss; and it is further

ORDERED that any such response be submitted by Mr. Patrick, unless Mr. Patrick withdraws from the case in accordance with the applicable procedures under USCIT R. 75(d); and it is further

ORDERED that failure to submit either (1) a response or (2) a withdrawal and a subsequent or concurrent motion for an extension of time to respond to Defendant's Motion to Dismiss, will result in the Court ruling on the Motion to Dismiss forthright and upon its own deliberations without benefit of consulting any papers in response to said motion.

SO ORDERED.

Slip Op. 06–13

GUANGDONG CHEMICALS IMPORT & EXPORT CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Restani, Chief Judge
Court No. 05–00023

OPINION

[Results of Department of Commerce Periodic Review on Antidumping Duty Order on Sebacic Acid from the People's Republic of China Remanded.]

Dated: January 25, 2006

Garvey Schubert Barer (*Ronald M. Wisla* and *William E. Perry*) for the plaintiff.

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*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for the defendant.

Restani, Chief Judge: Guangdong Chemicals Import and Export Corporation ("Guangdong") appeals from a ruling by the Department

of Commerce ("Commerce" or "the Department") conducting an administrative review of an antidumping duty order entered against sebacic acid from the People's Republic of China ("China"). *See Sebacic Acid from the People's Republic of China*, 69 Fed. Reg. 75,303 (Dep't Commerce Dec. 16, 2004) (final results of antidumping admin. review). Guangdong alleges that the review should be dismissed for lack of service or remanded for lack of substantial evidence supporting Commerce's calculation of the surrogate value of the input factor sebacic acid and failure to properly credit by-product offsets.

Commerce's failure to properly serve Guangdong was harmless error, but the determination is remanded as to the surrogate value for sebacic acid and by-product credit.

BACKGROUND

The facts of this case may neatly be divided into two parts. The first set of relevant facts relate to the circumstances surrounding Genesis Chemical Corp.'s ("Genesis") failure to serve Guangdong. On July 2, 2003, Commerce published notice of an opportunity to request review of an antidumping duty order entered against exporters of sebacic acid from China. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation*, 68 Fed. Reg. 39,511 (Dep't Commerce July 2, 2003) (opportunity to request administrative review). On July 21, 2003, Genesis submitted a request that Commerce perform an administrative review of sebacic acid from two specific companies, Tianjin Chemical Import and Export Co. and Guangdong. *See* Letter from Greg E. Mitchell, Frost Brown LLC, to the Assistant Sec'y for Imp. Admin, Int'l Trade Admin. (Jul. 21, 2003), P.R. Doc. 2, Pl.'s App. Tab 2. In mid-July, counsel for Genesis contacted an employee of the Department of Commerce to inquire whether the firm was required to serve its client's request for administrative review on parties on the public service list. *See* Memorandum from Michael Strollo, Senior Analyst, Dep't of Commerce to Louis Apple, Office Director, Dep't of Commerce (Aug. 22, 2003), P.R. Doc. 6, Pl.'s App. Tab 4, at 1 [hereinafter *Service Mem.*]. A Commerce employee stated that no service was necessary because no public service list had yet been generated. *Id.* Counsel for Guangdong received an antidumping review questionnaire on August 14, 2003, which was its first notice of the review. *See* Letter from Ronald M. Wisla, Garvey Schubert Barer, to Donald Evans, Sec'y of Dep't of Commerce (Aug. 20, 2003), P.R. Doc. 4, Pl.'s App. Tab 3, at 1–2. On August 20, Guangdong sent Commerce a letter requesting that Commerce decline review because it had not been properly served. *Id.*

Commerce published a notice of initiation on August 22, 2003. *Initiation of Antidumping and Countervailing Duty Reviews and Request for Revocation in Part*, 68 Fed. Reg. 50,750 (Dep't Commerce Aug. 22, 2003). That day, it also entered a memorandum into its files

recognizing that Genesis had failed to serve Guangdong within the regulatory time-frame established by 19 C.F.R. § 351.303(f)(3)(ii) (2005). *See Service Mem.*, Pl.'s App. Tab 4. The memorandum stated that Genesis would be allowed to cure its deficient service by serving the request on or before August 29, 2003. *Id.*, Pl.'s App. Tab 4, at 1–2. Genesis served Guangdong on August 26. Letter from Greg E. Mitchell, Frost Brown Todd LLC, to Assistant Sec'y for Imp. Admin, Int'l Trade Admin. (Aug. 26, 2003), P.R. Doc. 9, Def.'s App. Tab 1.

The second set of facts relate to Commerce's method of calculating a surrogate value for sebacic acid. Guangdong purchases its sebacic acid from a producer named Hengshui Dongfeng Chemical Co. Ltd. ("Hengshui"). *See* Sections C and D Response of Guangdong Chems. Imp. & Exp. Corp. Group (Nov. 4, 2003), P.R. Doc. 21, Pl.'s App. Tab 13, at D-1. Sebacic acid production results in the creation of a co-product, capryl alcohol. *Prelim. Valuation of Factors of Prod.*, Memorandum from Greg Kalbaugh, Dep't of Commerce, to File (Jul. 30, 2004), P.R. Doc. 47, Pl.'s App. Tab 6, at 4 [hereinafter *Prelim. Valuation of Factors of Prod. Mem.*]. In order to calculate Hengshui's production costs for sebacic acid, Commerce allocated production costs between the two products based on their relative sales values in India. *Id.*, Pl.'s App. Tab 6, at 4. Because India does not produce sebacic acid, Commerce relied on import statistics to estimate the value of sebacic acid in India. *Id.*, Pl.'s App. Tab 6, at 1–2. Commerce used statistics from the Indian Department of Commerce's Import/Export Data Bank (the "Indian government statistics"), which lumped sebacic with azelaic acid (a common derivative of sebacic acid) under Indian Harmonized Tariff Schedule ("HTS") subheading 291713. *Id.*, Pl.'s App. Tab 6, at Attach. 4. Guangdong proposed using surrogate value data for sebacic acid maintained by the Indian publication Chemical Weekly (the "Chemical Weekly data"), which was based on a selection of the Indian government data, but was further subdivided and included a specific subheading for sebacic acid (291713.02). *Guangdong Chems. Imp. & Exp. Co. Case Br.* (Sept. 20, 2004), P.R. Doc. 65, Pl.'s App. Tab 8, at 2–3 [hereinafter *Guangdong Case Br.*]. Based on this data, Guangdong argued that the value of sebacic acid in India during the Period of Review ("POR") was $3,551.73 per metric ton. *Id.*, Pl.'s App. Tab 8, at 7. Guangdong corroborated its proposed value with data from U.S. import statistics for sebacic acid, published Indian prices for oxalic acid (asserted to be similar to sebacic acid), and benchmark price data from the publication Chemical Market Reporter. *Id.*, Pl.'s App. Tab 8, at 6–7.

Commerce refused to use the Chemical Weekly data, stating that its authenticity could not be verified, and that the data, which relied on two shipments totaling 1,400 kilograms, did not "represent a sufficiently broad range of import values on which to base the surrogate value for sebacic acid." *See Issues & Decision Mem. for the Anti-dumping Duty Admin. Review of Sebacic Acid from the People's Re-*

public of China (Dec. 10, 2004), P.R. Doc. 80, Pl.'s App. Tab 10, at 7 [hereinafter *Issues & Decision Mem.*]. Recognizing that HTS 291713 was a basket category including both sebacic and azelaic acid, Commerce conducted additional research to determine whether prices for azelaic acid and sebacic acid were similar. *See Comparison of U.S. Int'l Trade Comm'n Dataweb Values for Sebacic Acid & Azelaic Acid Imps. to the U. S.*, Memorandum from Jennifer Moats, Dep't of Commerce, to File (Dec. 10, 2004), P.R. Doc. 79, Pl.'s App. Tab 11, at 1 [hereinafter *Price Comparison Mem.*]. It concluded that the two products were similarly priced, varying only by $0.30 per kilogram over a twenty-three month period during which the price for sebacic acid ranged between $2 and $3 per kilogram. *Id.*, Pl.'s App. Tab 11, at 1. Commerce therefore used the basket category Indian government statistics to determine the surrogate value of sebacic acid, calculating the surrogate value of sebacic acid in India to be $15,826.30 per metric ton. *See Issues & Decision Mem.*, Pl.'s App. Tab 10, at 9 (electing to use Indian government statistics); *see also Prelim. Valuation of Factors of Prod. Mem.*, Pl.'s App. Tab 6, at 4 (using Indian government statistics to arrive at $15,826.30 per-metric-ton value for sebacic acid).

JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction to review Commerce's administration of an antidumping review under 28 U.S.C. § 1581(c) (2000). The Court will uphold an administrative decision 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) (2000).

DISCUSSION

I. Failure To Serve Notice

A. Genesis Did Not Make A Reasonable Attempt to Serve Guangdong Under 19 C.F.R. § 351.303(f)(3)(ii).

A petitioner requesting an administrative review of an antidumping order "must serve a copy of the request by personal service or first class mail on each exporter or producer specified in the request . . . by the end of the anniversary month or within ten days of filing the request for review, whichever is later." 19 C.F.R. § 351.303(f)(3)(ii). A petitioner has the responsibility to serve a specified exporter whether or not that exporter appears on Commerce's service list; however, if the interested party is "unable to locate a particular exporter or producer . . . the Secretary may accept the request for review if the Secretary is satisfied that the party made a reasonable attempt to serve a copy of the request on such person." *Id.*

A Commerce employee advised Genesis that no service was necessary at the time it filed its petition for review because no public service list had yet been generated. Genesis understood this advice to mean that it did not have to serve Guangdong with notice of its request for review despite its obligations under 19 C.F.R. § 351.303(f)(3)(ii). Although the petitioners "misconstrued" Commerce's instruction, Commerce granted Genesis additional time in which to "remedy the procedural deficiency." *Service Mem.*, Pl.'s App. Tab 4, at 1. This was done by letter thirty-six days after Genesis's initial request and four days after the initiation of review.

Genesis's call to Commerce cannot be considered a "reasonable attempt." Reliance on faulty agency advice, or a misinterpretation of agency advice, does not excuse a party from failing to comply with the law. *See Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947) ("[E]veryone is charged with knowledge of the United States Statutes at Large, [and] Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents."); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n.*, 285 F. Supp. 2d 1371, 1378 n.10 (CIT 2003) ("It is well established by both statutes and cases that the publication of an item in the Federal Register constitutes constructive notice of anything within that item."). To say that Genesis's inquiry with Commerce by itself constituted a reasonable attempt at service would imply that Genesis is not charged with knowledge of Commerce's regulations. It is undisputed that Genesis was aware of, and provided Commerce with, Guangdong's location and that Genesis was not prevented in any way from serving Guangdong. Failure to serve cannot be excused by Genesis's failure to read the relevant regulation.

This court has suggested that a party may make a "reasonable attempt" at service by "curing" faulty service after discovering the defect. *See PAM, S.P.A. v. United States*, 395 F. Supp. 2d 1337, 1342–43 (CIT 2005). In that case, the court voided an administrative review for failure to comply with the service requirements of 19 C.F.R. § 351.303(f)(3)(ii). *Id.* at 1344. It distinguished another opinion, *NSK, Ltd. v. United States*, 346 F. Supp. 2d 1312, 1325 (CIT 2004), that refused to void an administrative review for failure to comply with the same regulatory provision. *PAM*, 395 F. Supp. 2d at 1343 n.2. In *NSK*, the petitioner failed to serve notice on a respondent under § 351.303(f)(3)(ii) until after the notice of initiation was published in the Federal Register. 346 F. Supp. 2d at 1323–24. Upon discovering its mistake, the petitioner faxed notice to the respondent. *Id.* at 1324. The court in *PAM* argued that a reasonable attempt at service had been made in *NSK* because "upon discovery of lack of service, petitioner attempted to cure its defective service by facsimile service." *PAM*, 395 F. Supp. 2d at 1343 n.2. Assuming that a party may attempt service by "curing" their default after the time for service has passed, Genesis's service would still not constitute a "rea-

sonable attempt." In *NSK*, the petitioner, apparently of its own accord, realized its own mistake the day after initiation and immediately sought to serve the respondent. *See* Decision Mem., A–100–001 at 94 (Aug. 3, 2002) (ball bearings and parts thereof), *available at* http://ia.ita.doc.gov/frn/summary/2002aug.htm. In this case, Commerce published its notice of initiation while instructing Genesis to cure its mistake.[1] Only after Commerce's prompting did Genesis attempt to "cure" this error.

B. Commerce's Obligation to Abide By Its Own Regulations

Commerce asserts that it was within its discretion to relax its procedural rules regarding service in the interests of justice. No statute requires a petitioner to serve a respondent when it requests an administrative review. Nevertheless, in enforcing the antidumping laws, Commerce has created a regulation obligating a party requesting a review to serve a proposed respondent with notice. Having exercised its discretion to create such a requirement, Commerce is generally required to play by its own rules. *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *Vitarelli v. Seaton*, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part) (recognizing a "judicially evolved rule of administrative law" that "he who takes the procedural sword shall perish with that sword").

The Supreme Court has not held, however, that the courts are required to reverse subsequent agency action on the basis of any procedural misstep, no matter how minute or inconsequential. Thus, judicial review of agency action is conducted with "due account . . . of the rule of prejudicial error." 5 U.S.C. § 706 (2000).[2] If, as is often the case, no law or regulation specifies the consequence of noncompliance with a regulation, the court must determine what remedy, if any, should be imposed. In this endeavor, the court is guided by the Supreme Court's opinion in *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970). First, it must be determined whether the regulation in question was "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion" or if the "agency [was] required by rule to exercise independent discretion [but] has failed to do so." *Id.*

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[1] The court also notes that the terms of the regulation require a reasonable attempt at service to take place before the Secretary accepts a petition for administrative review. *See* 19 C.F.R. § 351.303(f)(3)(ii) (allowing Secretary to accept review "if . . . satisfied that the party *made* a reasonable attempt to serve a copy of the request on such person") (emphasis added). The regulation nowhere provides for the Secretary to accept a petition conditioned on a future attempt to serve.

[2] 19 U.S.C. § 1677c(b) (2000) provides that administrative hearings in antidumping duty reviews are "not subject to the provisions of subchapter II of chapter 5 of title 5, or to section 702 of such title" of the Administrative Procedures Act ("APA"). These provisions do not apply to 5 U.S.C. § 706, which is located in chapter 7 of the APA.

at 538–39; *see also Lopez v. Fed. Aviation Admin.*, 318 F.3d 242, 247 (D.C. Cir. 2003). If the regulation was not so intended, but, for example, was intended to ease the agency's administrative burden, the court considers whether the party challenging agency action has shown that it was substantially prejudiced by the agency's failure to comply with its rules. *See Lopez*, 318 F.3d at 247. If substantial prejudice is shown, the administrative action is reversed, if not, it is affirmed. *See Dixon Ticonderoga Co. v. U.S. Customs & Border Prot.*, 366 F. Supp. 2d 1352, 1357 (CIT 2005).

If the violated regulation was intended to confer important procedural benefits, the result is less clear. Some courts applying the *American Farm Lines* test have automatically reversed agency action. *See Port of Jacksonville Maritime Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708 (11th Cir. 1986); *Alamo Express, Inc. v. United States*, 613 F.2d 96, 97–98 (5th Cir. 1980).

In contrast, the District of Columbia Circuit has found that harmless error should be considered in the context of a regulation providing important procedural safeguards to an employee facing termination by the Federal Aviation Administration ("FAA"). *Lopez*, 318 F.3d at 248. In *Lopez*, the court specifically found that

> the FAA's procedures challenged by Lopez are not primarily intended to provide information to the agency, but are instead aimed at protecting the [employee] from the Administrator's otherwise unlimited discretion. It is uncontested that FAA Orders 8110.37C and 8130.24 provide procedural safeguards that are the only available protection for [employees] whose designation can otherwise be terminated by the FAA for "any reason considered appropriate by the Administrator."

Id. at 247–48 (quoting 49 U.S.C. § 44702(d)(2)). Despite finding that the rules provided procedural benefits for employees, the court nonetheless refused to reverse the FAA's employment decision because Lopez did not show he was "pressed for time in responding to the FAA's view of his performance or that other defenses would have been presented with additional time." *Id.* at 248. He therefore "fail[ed] to show that the FAA's initial oversight was other than harmless." *Id.*

Other courts have dispensed with the inquiry of whether a regulation provides important procedural benefits and have gone straight to the question of prejudice. For example, the court of Appeals for the Ninth Circuit held in the context of a deportation proceeding that a "[v]iolation of a regulation renders a deportation unlawful only if the violation prejudiced interests of the alien which were protected by the regulation." *United States v. Calderon-Medina*, 591 F.2d 529, 531 (9th Cir. 1979).

More recently, the Second Circuit refused to require proof of prejudice in all cases, but found that agency action will be voided auto-

matically for failure to follow its regulations only if it affects "fundamental rights derived from the Constitution or a federal statute." *Waldron v. INS*, 17 F.3d 511, 518 (2d Cir. 1994). In *Waldron*, the court considered two INS regulations, 8 C.F.R. § 242.2(g) (1994), which required an alien to be notified of his right to contact a consular official when taken into custody, and 8 C.F.R. § 3.7, which provided that an Immigration Judge's decision must include a certificate of notice if its opinion must be certified to the Board of Immigration Appeals, if known at the time the opinion was filed. *Id.* at 515–16. The court held that

> we believe that, when there is a regulation which relates to less fundamental, agency-created rights and privileges, the wholesale remand of cases, where no prejudice has been shown to result from the INS's failure to strictly adhere to its regulations, would place an unwarranted and potentially unworkable burden on the agency's adjudication of immigration cases.

Id. at 518; *see also Chong v. INS*, 264 F.3d 378, 390 (3d Cir. 2001) (following *Waldron*).[3]

No case from the Federal Circuit applies the *American Farm Lines* test in the context of a regulation intended to confer important procedural benefits, and it is not clear which approach the appellate court would adopt. *Kemira Fibres Oy v. United States*, 61 F.3d 866 (Fed. Cir. 1995), applied the *American Farm Lines* substantial prejudice test to a Commerce regulation requiring publication of any "notice of intent to revoke [an antidumping duty] order" no later than five anniversary-months after receiving its last request for administrative review. *Id.* at 869 (citing 19 C.F.R. § 353.25(d) (1995)). The court was careful to note that the regulation in question was a "merelyprocedural aid[ ]" to accomplishing the goal of the antidumping laws to provide "notification of domestic parties so that their interest in revocation of an outstanding order may be ascertained and addressed." *Id.* at 875. Because the regulation was "merely procedural" the court required the plaintiff to "establish that it was prejudiced by Commerce's non-compliance with this requirement." *Id.*

Other cases from the Federal Circuit have dispensed with the inquiry into whether a regulation is "merely procedural" and held that "[i]t is well settled that principles of harmless error apply to the review of agency proceedings." *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996). In that case, the Customs Service ("Customs") published regulations requiring a district director, prior to extending the liquidation period for entered goods, promptly to no-

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[3] The Fourth Circuit has reserved the question of when prejudice is presumed after an agency fails to comply with its own regulations in the context of a regulation governing representation of prisoners during a hearing to determine whether medication should be involuntarily administered. *United States v. Morgan*, 193 F.3d 252, 267 (4th Cir. 1999).

tify an importer and its surety "on Customs Form 4333–A . . . that the time has been extended and the reasons for doing so." *Id.* at 393 (quoting 19 C.F.R. § 159.12(b) (1996)). In *Intercargo*, Customs sent a notice to sureties that did not state which of the statutorily authorized reasons for the extension was relied on, and thus "did not satisfy the requirement of the regulation." *Id.* at 394. Applying principles of harmless error, the court first found that neither the regulation, nor the governing statute, provided a consequence for the failure to send proper notice under § 159.12(b). *Id.* at 394–96. The court then determined that the regulation was "amenable to harmless error analysis," noting that "a plaintiff 'should not become immune from the antidumping laws because Commerce missed the deadline.' " *Id.* at 396 (quoting *Kemira Fibres Oy*, 61 F.3d at 873). The court concluded that "[t]he 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." *Id.* at 396 (quoting *Kemira Fibres Oy*, 61 F.3d at 873).

Likewise, in *Belton Industries, Inc. v. United States*, 6 F.3d 756, 761 (Fed. Cir. 1993), the court of appeals found that Commerce "violated 19 C.F.R. § 355.25(d)(4)(ii)" by failing to "send written notice to the appellees . . . despite its prior recognition of them as interested parties." Commerce had instead sent written notice of initiation of a sunset review to the appellees' counsel and a trade association of which the appellees were members. The court declined to void the subsequent agency action, noting that "appellees suffered no prejudice" and that appellees' counsel received actual notice of the proposed action. *Id.* The court ruled that the failure to abide by Commerce's own regulations was "harmless error." *Id.*

Although *Kemira Fibres Oy*, *Intercargo* and *Belton* all upheld agency action, the three cases can be read as standing for different propositions. On one hand, *Kemira* implies (but is not premised on) the stricter approach of the Fifth and Eleventh Circuits, presuming prejudice when an agency fails to follow its regulations that are intended to confer a procedural benefit. On the other hand, *Intercargo* and *Belton* can be seen as similar to the approach of the Ninth and Second Circuits, which do not presume prejudice in all cases where an agency fails to abide by its regulations that are intended to confer procedural benefits. *See Atteberry v. United States*, Slip Op. 03–93, 2003 WL 21748674, at *11 n.40 (CIT Jul. 28, 2003) ("*Intercargo* – and cases that have followed it, such as [*Cummins Engine Co. v. United States*, 23 CIT 1019, 1032, 83 F. Supp. 2d 1366, 1378 (1999)] – can be read to extend *Accardi* and its progeny by requiring 'harmless error' analysis in *every* case involving an agency's violation of its statute or regulations, without regard to the nature and extent of the remedy sought by the complainant.") (citation omitted).

Additionally, this court has grappled with Commerce's failure to abide by this very regulation in two recent opinions. In *NSK*, the court stated that a nine-day delay in notice resulting from a petitioner's failure to properly serve respondent did not invalidate review because "the regulation here was 'not intended to confer important procedural benefits' " and the plaintiff could not demonstrate substantial prejudice. 346 F. Supp. 2d at 1325 (quoting *Taiyuan Heavy Mach. Imp. & Exp. Corp. v. United States*, 23 CIT 701, 703 (1999). The court found that "nine fewer days of preparation time, prior even to receipt of Commerce's questionnaire, does not constitute such substantial prejudice that a remand is required on this issue." *Id.* at 1326.

In another case, this court found that 19 C.F.R. § 351.303(f)(3)(ii) "does indeed confer important procedural benefits upon the individual companies involved in normal antidumping administrative reviews." *PAM*, 395 F. Supp. 2d at 1343.[4] In that case, Commerce allowed a review to proceed although no service occurred before or after the regulatory deadline had passed, unlike *NSK*, where the respondent was eventually served. *Id.* The court in *PAM* voided the administrative review for failure to comply with the regulation's requirements. *Id.* at 1344.

The court believes that the best way to reconcile cases such as *Kemira* with *Belton* and *Intercargo* is to apply the following process. First, the court will consider whether the regulation (or statute it implements) spells out a remedy for failure to comply. Second, if no remedy is stated, the court will consider whether the regulation in question was intended to provide important procedural benefits. Third, if the regulation is not intended to provide important procedural benefits, Commerce's action will be voided only if the plaintiff can show it in fact suffered substantial prejudice.[5] If the regulation is intended to provide important procedural benefits, the court will void the agency action unless the agency demonstrates that the violation was harmless error. *Cf. Wilson v. Comm'r Soc. Sec.*, 378 F.3d 541, 547 (6th Cir. 2004) (stating in dicta that an agency's failure to follow a regulation "creating an important procedural safeguard for claimants for disability benefits" might nonetheless "constitute harmless error").

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[4] As noted above, the *PAM* court distinguished *NSK* on the grounds that Commerce "cured" the defect once it was discovered, leading to a "reasonable attempt" at service within the terms of the regulation. *PAM*, 395 F. Supp. 2d at 1343 n.2. *NSK*'s discussion of *American Farm Lines* was therefore treated as dicta.

[5] *See*, *e.g.*, *Dixon Ticonderoga*, 366 F. Supp. 2d at 1357 (CIT 2005) (voiding agency action for failure to comply with 19 C.F.R. § 159.62(a) (2003), which requires a notice of intent to distribute funds obtained pursuant to antidumping duty orders under the "Byrd Amendment," 19 U.S.C. § 1675c (2000), despite finding that the regulation in question was "merely [a] procedural aid[ ]," because plaintiffs failed to show substantial prejudice).

This approach has the virtue of recognizing Commerce's responsibility to comply with its regulations, especially regulations intended to benefit participants in the administrative process, while avoiding a rigid rule that would mandate reversal based on a court's construction of regulatory intent alone, with little or no reference to the facts of a particular case.[6] This rule also allows the court to follow the *American Farm Lines* test, as applied in cases such as *Kemira*, while heeding the language of the APA, which requires that "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. Applying this test, the court finds that even if it is assumed that § 351.303(f)(3)(ii) was intended to provide an important procedural benefit, failure to provide service until after commencement of the review process in this case constituted only harmless error.

The regulation in question here, 19 C.F.R. § 351.303(f)(3)(ii), does not state consequences for failure to comply. *See NSK*, 346 F. Supp. 2d at 1325. The regulation is intended to confer a procedural benefit – service of notice provisions generally provide predictability in the administrative review process, and time for respondents to prepare a response.[7] *PAM*, 395 F. Supp. 2d at 1343. The notification provision at issue in *Intercargo*, for example, was designed "to increase certainty in the customs process by apprising the importer and its surety of the precise period within which final action would be taken on the liquidation. . . ." 83 F.3d at 396. Similarly, the D.C. Circuit has found that the FAA's failure to comply with a regulation requiring thirty days notice prior to termination of an employment contract was a procedure "aimed at protecting the [employee] from the Administrator's otherwise unlimited discretion." *Lopez*, 318 F.3d at 248. Respondents such as Guangdong rely on service of notice provisions, such as § 351.303(f)(3)(ii), to provide greater regularity in the administrative process and an opportunity to prepare for participation in an investigation before it begins. Thus, Guangdong will not be required to show that it suffered substantial prejudice in order to void the administrative review.

The mere fact that Guangdong is not required to show substantial prejudice does not mean that the court must void agency action that is conceded to have caused no harm at all. While Guangdong need not show "substantial prejudice," Commerce may show that the agency oversight was harmless error. At oral argument, counsel for

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[6] The court needs not decide here how "substantial prejudice" differs from "harmless error." In the circumstances of this case, it is enough to note that, at oral argument, Guangdong in essence conceded that Commerce's failure to comply with § 351.303(f)(3)(ii) did not cause even a *de minimus* injury related to the rights and interests that the regulation protects.

[7] The regulatory history for 351.303(f)(3)(ii) is very limited. The federal register notice proposing the provision states only that "[p]aragraph (f)(3)(ii) is new, and clarifies the requirements for service of requests of review." *Notice of Proposed Rulemaking & Request for Pub. Comments*, 61 Fed. Reg. 7308, 7326 (Dep't Commerce Feb. 27, 1996).

Guangdong stated that it was not prevented in any way from preparing for, or participating in, the administrative review. Guangdong affirmatively stated that it suffered no prejudice, other than the fact that the administrative review took place. The plaintiff in *Intercargo* made a similar argument that "the prejudice flowing from this circumstance [failure to fully comply with a notice regulation] is the ultimate prejudice – the wrongful imposition of customs duty." 83 F.3d at 396. The Federal Circuit disagreed, stating that the loss of a case "is not what is meant by prejudice as used in this context." *Id.* There must instead be some indication that failure to comply with the regulation in some way inhibited Guangdong's presentation of its case. *See id.* at 396 ("Prejudice, as used in this setting, means injury to an interest that the statute, regulation, or rule in question was designed to protect."). Because Guangdong in essence conceded that the failure to serve was harmless error, Commerce has met its burden to show its error was harmless. Guangdong's request that Commerce's administrative review be voided *ab initio* is denied.

II. Commerce's Choice of Data Source Is Not Supported by Substantial Evidence

Commerce is given wide discretion in the selection of data sources for use in administrative review. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 (Fed. Cir. 1999). The role of the court is to determine whether Commerce's choice of data was reasonable. When choosing a data source to estimate the surrogate value of an input, Commerce looks to a number of factors, including: 1) whether the data reflects non-export average values; 2) whether the data is contemporaneous with the period of investigation ("POI"); 3) whether the data is product specific; and 4) whether the data excludes taxes in its price. *Taiyuan*, 23 CIT at 706 (1999) (citing *Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, from the People's Republic of China*, 63 Fed. Reg. 16,758, 16,759 (Dep't Commerce Apr. 6, 1998) (final results of antidumping duty administrative reviews)). Guangdong concedes that the data it proposed and the data used by Commerce are identical with respect to all of these factors except for product specificity.

Because India does not produce sebacic acid domestically, both Commerce and Guangdong relied on statistics of imports of sebacic acid into India to establish its surrogate value. As discussed, Commerce used import statistics based on the six-digit Indian HTS subheading 291713, a basket tariff category that includes both sebacic acid and azelaic acid. *See Issues & Decision Mem.*, Pl.'s App. Tab 10, at 8–9.

Guangdong submitted comments requesting that Commerce adopt data taken from the Indian publication Chemical Weekly based on 1,400 kilograms of sebacic acid imported in two transactions from Germany to India. *See* Letter from Ronald M. Wisla, Garvey

Schubert Barer, to Donald Evans, Sec'y Dep't of Commerce (Sept. 8, 2004) (submission of publically available information for use as surrogate value), P.R. Doc. 62, Pl.'s App. Tab 7, at Attach. 1 [hereinafter *Guangdong Surrogate Value Submission*].

Commerce expressed two reasons for rejecting the Chemical Weekly data. First, Commerce found that the Chemical Weekly data contained insufficient data points and "therefore [did not] represent a sufficiently broad range of import values on which to base the surrogate value for sebacic acid where alternative data are available." *Issues & Decision Mem.*, Pl.'s App. Tab 10, at 7. Second, Commerce could not determine the accuracy of the Chemical Weekly data because it could not tell how the data was culled from the Indian government import statistics. *Id.*

In support of its own data, Commerce only conducted research into the relative prices of azelaic and sebacic acid in the United States to assure that the two products were similarly priced over a twenty-three-month period, determining that "[b]ecause the record does not include any technical information on the more specialized production requirements for azelaic acid and because the attached dataweb query shows that the prices are not consistently higher than those for sebacic acid, we are unable to determine that azelaic acid is a specialty product." *Price Comparison Mem.*, Pl.'s App. Tab 11, at 1. Commerce therefore found that "[t]he prices for azelaic acid and sebacic acid fluctuate with sebacic acid sometimes having the higher price, and, therefore, we do not see a clear pattern that azelaic acid is a higher priced product." *Issues & Decision Mem.*, Pl.'s App. Tab 10, at 8.

Even if the court were to conclude that Commerce produced substantial evidence demonstrating that azelaic and sebacic acid are priced similarly, that would not justify Commerce's decision to abandon a more product-specific data source. Commerce failed to address the data Guangdong used to corroborate its Chemical Weekly submission. Guangdong admitted the small size of its sample but submitted evidence designed to prove that the data were not aberrational. It corroborated its data using an average unit value of $3,061.54 per metric ton for sebacic acid in the United States (excluding data from non-market economies and subsidizing nations), data published in the September 6, 2004 edition of Chemical Market Reporter (listing sebacic acid in drums as $4,187.60 per metric ton), and data from Chemical Weekly for the POI reflecting the price of oxalic acid (asserted to be similar to sebacic acid) in India as $469.66 per metric ton. *Guangdong Surrogate Value Submission*, Pl.'s App. Tab 7, at 2–3.

Neither the *Final Determination* and the attached *Issues and Decision Memorandum* nor Commerce's brief specifically discusses the corroborating evidence Guangdong submitted to support the use of

its product-specific import data, nor does either provide evidence demonstrating that the values were in fact aberrational. Commerce's only objection, besides the small size of the sample, is that it "cannot determine how this categorization was derived from the official Indian government statistics." *Issues & Decision Mem.*, Pl.'s App. Tab 10, at 8–9.

The Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner. . . ." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). "The agency must explain the evidence which is available, and must offer a 'rational connection between the facts found and the choice made.' " *Id.* at 52 (quoting *Burlington Truck Lines, Inc. v. United States*, 317 U.S. 156, 168 (1962)). Although an agency is not required to comment on every submission it receives, a pertinent submission, such as Guangdong's corroborating evidence, should not be ignored. *See Nat'l Ass'n of Mirror Mfrs. v. United States*, 12 CIT 771, 780, 696 F. Supp. 642, 649 (1988) (the agency must discuss "material issues of law or fact"). This is particularly true in a case such as this, where Commerce departs from its generally expressed preference for product-specific data. *See Save Domestic Oil, Inc. v. United States*, 357 F.3d 1278, 1283–84 (Fed. Cir. 2004).

Additionally, Commerce failed to consider or explain why its own sample of 10,100 kilograms of sebacic and azelaic acid was not aberrational compared with the same basket category in other years. "[I]f . . . import statistics are based on a small quantity of imports for the period of investigation, the Commerce practice is to determine if the price for those imports is aberrational." *Shanghai Foreign Trade Enters. Co., Ltd. v. United States*, 318 F. Supp. 2d 1339, 1350 (CIT 2004) (citing *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 23 CIT 479, 485, 59 F. Supp. 2d 1354, 1360 (1999)).

Guangdong identified for Commerce a number of logical inconsistencies in its surrogate value for sebacic acid that should have prompted Commerce to examine its own data. Guangdong argued that Commerce's value of $15,826.30 was over six times the commercial value of the product. *Guangdong Surrogate Value Submission*, Pl.'s App. Tab 7, at 1–2. Additionally, in the 2000–2001 administrative review, *Sebacic Acid from the People's Republic of China*, 67 Fed. Reg. 69,719 (Nov. 19, 2002) (final results of antidumping duty administrative review), Commerce found the same basket category established a surrogate value of $5,388.66 per metric ton. *See* Decision Mem., A–570–825 at 17 (Mar. 23, 2005), *available at* http://ia.ita.doc.gov/frn/summary/2005mar.htm (discussing surrogate value

of sebacic acid used in 2002).[8] Commerce noted Guangdong's objection that the surrogate value was "over six times the commercial value of the subject merchandise," but did not cite evidence explaining the inconsistency. *Issues & Decision Mem.*, Pl.'s App. Tab 10, at 3, 8–9. Nor did Commerce determine the total size of the Indian sebacic acid market to determine if it was commercially and statistically significant. Having failed to consider whether the $15,826.30 figure derived from the basket category was aberrational despite evidence of its wide variation from the value of the same basket category in another year, Commerce failed to present substantial evidence supporting its surrogate value for sebacic acid. *See Timken U.S. Corp. v. United States*, 421 F.3d 1350, 1355 (Fed. Cir. 2005) (agency decision not supported by substantial evidence if the agency " 'entirely failed to consider an important aspect of the problem [or] offered an explanation for its decision that runs counter to the evidence before the agency' ") (quoting *State Farm*, 463 U.S. at 43) (emphasis removed). Accordingly, the court will remand this issue to Commerce for reconsideration.

III. By-Product Credit

Commerce requests that the court remand Commerce's application of the by-product credit. The issue is remanded.

CONCLUSION

Commerce's calculation of the surrogate value of sebacic acid is not supported by substantial evidence and is therefore REMANDED for further consideration consistent with this opinion. Commerce's application of the by-product credit is likewise remanded. Commerce shall reconsider these matters and issue a determination within 45 days after the issuance of this opinion. Guangdong will have 15 days to file objections to Commerce's remand determination. Commerce will have 11 days to file its response.

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[8] The Court also notes that Commerce recently abandoned a surrogate value of $15,826.30 for sebacic acid in the context of another administrative review. Decision Mem., A–570–825 (Mar. 23, 2005), *available at* http://ia.ita.doc.gov/frn/summary/2005mar.htm. Commerce found that "information on the record of this changed circumstances review indicates that the POR average sebacic acid surrogate value in the Indian six-digit category that we used in the preliminary results of this changed circumstances review is significantly higher than the import value of the previous period." *Id.* at 17. Commerce therefore eliminated the highest and lowest value countries (imports from the United States and Germany, respectively) and arrived at a value of $5,459.72 per metric ton, "which was in line with other sebacic acid prices on the record." *Id.*

Slip Op. 06–14

HENRY H. WOOTEN, III Plaintiff, v. UNITED STATES, SECRETARY OF AGRICULTURE, Defendant.

Before: WALLACH, Judge
Court No.: 05–00208

[Plaintiff's Motion to Supplement the Record is Granted]

Dated: January 25, 2006

Miller & Chevalier Chartered, (*Myles S. Getlan*, and *Daniel P. Wendt*) for Plaintiff.
Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director; *Delfa Castillo*, Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; and *Jeffrey Kahn*, Attorney-Advisor, Office of the General Counsel, International Affairs & Commodity Programs Division, U.S. Department of Agriculture, of Counsel, for Defendant.

OPINION

Wallach, Judge:

I
Introduction

This matter comes before the court following Plaintiff's Motion to Supplement the Record ("Plaintiff's Motion") filed on October 14, 2005. Defendant filed its Memorandum in Opposition to Plaintiff's Motion to Supplement the Record ("Defendant's Opposition") on November 4, 2005. For the reasons set forth below, Plaintiff's Motion is granted. This court has jurisdiction pursuant to 19 U.S.C. § 2395 (2004).

II
Background

Plaintiff is challenging the U.S. Department of Agriculture's ("Defendant" or "Agriculture") denial of TAA cash benefits regarding his catfish crop for the year 2002. This Motion to Supplement the Record arises from Plaintiff's challenge to Defendant's original determination of eligibility for TAA benefits.

Upon commencement of this matter, Defendant filed with the court the administrative record of the case. The administrative record was amended and certified on September 1, 2005.

III
Arguments

Plaintiff requests the court's permission to supplement the record on the grounds that Plaintiff was not notified of the deficiency con-

cerning documentation demonstrating that his net farm income was lower in 2002 than in 2001 until his application for TAA benefits was rejected. Plaintiff asserts that if the Defendant had requested this information prior to making its determination, Plaintiff would have provided the documentation voluntarily and the record would have been complete prior to Defendant's denial of benefits. As a result, Plaintiff wishes to supplement the record with Schedules F from his 2001 and 2002 income tax return because (1) the record is inadequate; and (2) Agriculture has not met the threshold requirement of making a reasonable inquiry in making its decision.

Defendant argues that Plaintiff failed to provide documentation certifying that his net farm income for 2002 was less than 2001 in accordance with Agriculture's deadlines and that this information was therefore not considered by Defendant in making its original determination. Defendant further argues that none of the documents attached to Plaintiff's Motion was before the agency when it made its TAA denial decision and therefore should not be considered by the court in this matter.

IV
Applicable Legal Standard

This court has jurisdiction to affirm or remand the actions of the Secretary of Agriculture "in whole or in part." 19 U.S.C. § 2395(c) (2004). The Department of Agriculture's determination regarding certification of eligibility for TAA will be upheld if it is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 2395(b); *Former Employees of Swiss Indus. Abrasives v. United States*, 17 CIT 945, 947, 830 F. Supp. 637, 639 (1993). The scope of review of the agency's actions is limited to the administrative record. *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336, 1342–43. In addition, the Administrative Procedures Act ("APA") provides that agency determinations shall be held invalid if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706 (2004).

V
Discussion
A
Plaintiff's Motion to Supplement the Record is Reasonable and Required Under the Law

Plaintiff argues that he was never notified by Defendant that he had failed to attach Schedules F from his 2001 and 2002 tax returns. Plaintiff's Motion at 4. Plaintiff asserts that the administrative record in this case is deficient because it did not contain his Schedules F and that Agriculture did not make a reasonable inquiry into his eligibility because it failed to notify Plaintiff of this deficiency. *Id.*

at 5. Plaintiff contends that because the most relevant issue in this matter is whether or not Plaintiff's net farm income in 2002 was less than 2001, the absence of Schedules F from the administrative record is critical in the agency's determination. *Id.* Plaintiff also argues that Agriculture's failure to request this critical information does not meet the reasonable inquiry threshold in administrative decisions and therefore its Motion to Supplement the Record should be granted. *Id.* at 5–6 (citing *Trinh v. United States Sec'y of Agriculture*, 395 F. Supp. 2d 1259 (CIT 2005) (quoting *Former Employees of Sun Apparel of Texas v. United States Sec'y of Labor*, Slip Op. 04–106 at 25, 2004 Ct. Int'l Trade LEXIS 105 (CIT Aug. 20, 2004))).

Defendant argues that Plaintiff was required to timely submit documentation verifying that his net farm income was less in 2002 than in 2001 and he failed to provide the Schedules F at the time he certified his application. Defendant's Opposition at 7. Defendant asserts that supplementation of the administrative record is only allowed when there is a " 'reasonable basis' to believe that the agency's record is materially incomplete" which it says is not the case here. *Id.* Defendant further asserts that since Mr. Wooten signed and certified his application, he understood that his approval for benefits was contingent upon Agriculture receiving supporting documentation, and that he failed to contact Agriculture or provide the requisite information in a timely manner resulting in the denial of TAA benefits. *Id.* at 11. Defendant argues that its denial of Mr. Wooten's application was not a result of the administrative record being incomplete, but rather that it was based on Plaintiff's failure to demonstrate that his net farm income declined between 2001 and 2002. *Id.* at 14. Accordingly, Defendant contends that Plaintiff's Motion should be denied as the record is complete and Plaintiff has not demonstrated any need to re-open it. *Id.*

The Department of Agriculture has discretion in conducting its investigations of TAA claims. This discretion, however, is prefaced by the existence of "a threshold requirement of reasonable inquiry" and investigations which fall below this "cannot constitute substantial evidence upon which a determination can be affirmed." *Former Employees of Sun Apparel of Texas v. United States Sec'y of Labor*, Slip Op. 04–106 at 15. In making its determination, the court must sustain Agriculture's decisions as long as it is "reasonable and supported by the record as a whole." *See Hyundai Elecs. Co. Ltd. v. United States*, 23 CIT 302, 206, 53 F. Supp. 2d 1334, 1338 (1999). The record as a whole consists of the administrative record before the court. *See* 28 U.S.C. § 2640(c) (2004). Nevertheless, the court will not and "cannot uphold a determination based upon manifest inaccuracy or incompleteness of record when relevant to a determination of fact." *Former Employees of Pittsburgh Logistics Sys. Inc. v. United States Sec'y of Labor*, 2002 CIT 21, 32–33 (CIT 2003). If the court determines that the Defendant did not meet the threshold re-

quirement of a reasonable inquiry, the court, for good cause shown, may remand the case to Agriculture to take further action. 19 U.S.C. § 2395(b). Good cause exists "if [Agriculture's] chosen methodology is so marred that [its] finding is arbitrary or of such a nature that it could not be based on substantial evidence." *Former Employees of Galey & Lord Indus. v. Chao*, 26 CIT 806, 809, 219 F. Supp. 2d 1283, 1286 (CIT 2002) (citing *Former Employees of Barry Callebaut v. United States*, 177 F. Supp. 2d 1304, 1308 (2001) (citing *Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 469, 715 F. Supp. 378, 381 (1989) (quoting *United Glass & Ceramic Workers of North America, AFL-CIO v. Marshall*, 189 U.S. App. D.C. 240, 584 F. 2d 398, 405 (D.C. Cir. 1978))).

Agriculture in TAA cases bases its determination of eligibility on whether or not the applicant's net farm income declined between two comparable years. In this case, the Plaintiff needed to demonstrate whether his net farm income declined from 2001 to 2002 and to provide proof of this decline, Agriculture needed certified information such as the Plaintiff's tax records. Agriculture failed to examine Plaintiff's complete tax returns including the Schedules F and also failed to notify Plaintiff of the absence of those documents in the record in a timely manner. Plaintiff wishes to have the record complete so that his application may be properly examined and considered. Defendant has failed to meet the threshold of reasonable inquiry by not investigating beyond Mr. Wooten's application, not notifying Mr. Wooten of the absence of critical information, and ignoring his attempts to provide notice of these discrepancies upon appeal. As a result, Agriculture's final TAA determination relied solely on the original TAA application with no evidence of any investigation or analysis to substantiate Plaintiff's claim. Agriculture's inaction demonstrates that it was uninterested in determining the actual facts of this case. That lack of institutional interest did not meet the reasonable inquiry threshold.

V
Conclusion

For the reasons stated above, Plaintiff's Motion is granted.