Decisions of the United States
Court of International Trade

Slip Op. 07–70

MIGUEL A. DELGADO, Plaintiff, v. UNITED STATES, Defendant.

Before: MUSGRAVE, Judge
Court No. 06–00030

MEMORANDUM OPINION AND ORDER

[Plaintiff alleged inadequate notification of agency decision. The court found that agency action might not be proper because statute provided that a "written determination" was to be "issued" at the conclusion of the administrative process and it was not clear whether the agency had done so. Matter remanded for further proceedings.]

Dated: May 11, 2007

The Mooney Law Firm (*Neil B. Mooney*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney In Charge, International Trade Field Office, Commercial Litigation Branch, United States Department of Justice (*Marcella Powell*); *Ilena Pattie*, Office of the Associate Chief Counsel, United States Customs and Border Protection, of counsel, for the defendant.

By his complaint Miguel A. Delgado ("Delgado") alleges that United States Customs and Border Protection[1] ("Customs" or "CBP") improperly determined that his customhouse brokers license ("License") should be revoked. Delgado raises four main issues in support of his position, arguing that: (1) the Administrative Law Judge ("ALJ") who presided at the administrative hearing ("Hearing") improperly applied the doctrine of *collateral estoppel*; (2) the ALJ's determination that it was proper to revoke Delgado's License because Delgado violated a Customs statute or regulation by making false or misleading statements was in error; (3) the ALJ's determination that it was proper to revoke Delgado's License because Delgado was con-

[1] This agency's name was officially changed effective March 31, 2007. *See* Name Change From the Bureau of Immigration and Customs Enforcement to U.S. Immigration and Customs Enforcement, and the Bureau of Customs and Border Protection to U.S. Customs and Border Protection, 72 Fed. Reg. 20,131 (Dep't Homeland Security, Apr. 17, 2007).

victed of a felony that was based on either: (a) the importation or exportation of merchandise or (b) the conduct of Delgado's customs business was in error; and (4) that the letter informing Delgado that his License was being revoked insufficiently notified him of the facts and reasons underlying Customs's determination.[2]

Background

On September 26, 1989, Delgado was issued customhouse brokers license 11634. Compl. at para. 2. In 1990, Delgado formed a corporation, Lancer International ("Lancer"), which he ran for approximately ten years. Tr. at 161.

Some time prior to May 1997, questions were raised about certain shipments of merchandise handled by Lancer. *See United States v. Delgado*, 321 F.3d 1338, 1341 (11th Cir. 2003) ("*Delgado*"). Specifically, Customs inspectors found that shipments arriving in Port Everglades, Florida that were described as containing "foodstuffs," contained both foodstuffs and liquor. *See* tr. at 116. Because of this seeming irregularity, Customs and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") initiated an investigation. Tr. at 116–17.

On August 24, 2000, at the conclusion of the investigation, Delgado was indicted by a federal grand jury in the Southern District of Florida on twenty-nine felony counts of being a co-conspirator in a scheme to introduce liquor into United States commerce without the payment of excise taxes thereon. *See United States of America v. Deepak Kumar et al.*, Ct. No. 00–0682 (Aug. 24, 2000), R. at 173 (citing 26 U.S.C. §§ 5601(a)(11), (12), 5608(b); 18 U.S.C. §§ 2, 371). In early 2001, Delgado was tried by a jury and convicted of twenty-eight of the twenty-nine counts. *See United States v. Miguel Delgado*, Ct. No. 00–0682, (Sept. 6, 2001), R. at 165 ("Judgment"). At trial it was affirmatively established that Delgado was aware of, and participated in, the conspiracy. Tr. at 252–53; Judgment, Count One, R. at 165 (citing 18 U.S.C. § 371), *Delgado*, 321 F.3d at 1346 ("Contrary to what Delgado claims, the jury had sufficient evidence to find him guilty of the conspiracy."). At no point was Delgado accused, indicted, or convicted of violating any law or regulation enforced by Customs.[3] In September, Delgado was sentenced to twenty-seven months in prison and ordered to pay restitution. Judgment, R. at 168–69, 171. Delgado timely appealed the trial Court's decision. *See Delgado*, 321 F.3d at 1343. After his release, Delgado resumed actively working in the customs field with the knowledge and oversight of the District

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[2] Delgado also requests the award of attorney fees and costs pursuant to the Equal Access to Justice Act. *See* compl. paras. 45–46 (citing 28 U.S.C. § 2412(d)(1)(A)).

[3] This is possibly so because at some point prior to Delgado's indictment Customs dropped out of the investigation. *See* tr. at 117.

Court. Tr. at 215; *see also* Letter from United States District Court / District of Southern Florida / Probation Office of 6/18/04, R. at 113.

On August 28, 2002, the Acting Port Director for the Miami Service Port sent a memo to the Associate Chief Counsel recommending that Delgado's License be revoked. *See* Recommendation for Revocation of Customhouse Broker Miguel A. Delgado's License, R. at 267. The memo stated that "[t]he proposal for revocation of this license (for cause) is under consideration in accordance with 19 CFR 111.53 (b)(1). As per guidelines provided by the Office of Field Operations, your review and recommendation are requested." *Id*.

Some time in late 2002 or early 2003, Delgado filed his "Triennial Status Report" with Customs. *See* R. at 272. In this document, Delgado responded in the affirmative to a question requesting whether he had "engaged in any conduct that could constitute grounds for suspension or revocation under Title 111.53? [sic] (i.e. convicted of a felony)." *Id*.

On February 20, 2003, the Court of Appeals for the 11th Circuit issued its opinion on Delgado's appeal. *See Delgado*, 321 F.3d 1338. The appellate Court affirmed Delgado's conviction on all twenty-eight counts and the trial Court's "decision in all respects." *Id*. at 1349.

Some time in mid-2003, "concerns" were raised about Delgado's continuing active involvement in the customs field. *See* Informed Compliance Contact Sheet ("Contact Sheet") #1 of 3/24/04, R. at 240; Contact Sheet #2 of 3/24/04, *id*. at 241.[4] Contact Sheet #1 memorialized that, "on or about August 2003," an unidentified broker approached Customs and inquired as to why it would "allow a person to operate as a broker after being convicted." R. at 240. The unidentified broker complained that Delgado "was pulling clients he had under his old filer code . . . [and the unidentified broker] wanted to know if Customs was doing anything about this matter." *Id*. Contact Sheet #2 memorialized that, on September 30, 2003, an unidentified broker[5] spoke to a Customs representative "about his and the trade's concern that Miguel Delgado, having been convicted and arrested was still allowed to operate as a broker. [The unidentified broker] was concerned that Customs would allow [a broker] to continue to operate in this type of situation." R. at 241.

On March 9, the Port Director for the Miami Service Port sent Delgado a "Notice and Statement of Charges." *See* R. at 153 ("Statement of Charges"). The Statement of Charges informed Delgado that his License might be revoked pursuant to 19 C.F.R. §§ 111.53(c) &

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[4] It is not clear why these "records" were not filed contemporaneously with the events they purport to describe. Indeed, they were apparently generated several weeks *after* Customs set into motion the process to revoke Delgado's License.

[5] Due to redactions, it is unclear whether the second broker is the same person as the first broker.

111.32 (violating Customs law or regulation by filing false documentation), 19 C.F.R. § 111.53(b) (convicted of a felony either involving importation or exportation of merchandise or "arising out of" customs business), or 19 C.F.R. § 111.53(d) (aiding and abetting violation of Customs law). *Id.* at 153–54.[6] In addition, the Statement of Charges informed Delgado that 5 U.S.C. §§ 554 and 558 "are applicable to formal proceedings," that he could be represented by counsel, and that the Hearing would be held on May 18, 2004. *Id.* at 159, 161; *see also* Order of 3/3/04, R. at 145, 147.

On, May 18, the Hearing was held in Miami. *See generally*, Tr. of Proceedings, Vols. I & II. At the Hearing, the ALJ took testimony from various Customs and ATF officials, and several other people who testified as to Delgado's good character. *See generally* Transcripts.

On December 17, the ALJ issued the recommendation as to the revocation of Delgado's License. *See* Recommended Decision and Order, R. at 18 ("Recommended Decision"). This document recited the various elements relevant to the ALJ's determination. In summary, the ALJ stated that:

> IT IS HELD that by a preponderance of the evidence contained in the record of this hearing supports license revocation as a matter of law.
>
> IT IS RECOMMENDED that the facts warranting revocation be seriously reconsidered in light of the circumstances of Miguel A. Delgado being permitted by a United States District Court to continue in a licensed Customs business, and in further light of the good character testimony . . . , and the fact that there were no violations of the fiduciary duty of accounting owed by Mr. Delgado to customer-importers, and no customer was injured.

Recommended Dec., R. at 34. On May 31, 2004, the Recommended Decision and a certified copy of the Hearing record were sent to the Department of Homeland Security ("DHS"). *See* Certification of Record, R. at 9, 13.

On August 2, 2005, the Acting Director of Cargo and Transportation Policy, Office of Planning and Policy, Border and Transportation Security Directorate ("BTS") sent a memorandum to the Acting Assistant Secretary for Policy and Planning, BTS ("Acting Assistant Secretary"). *See* R. at 3 ("Decision Memorandum"). The Decision Memorandum requested that the Acting Assistant Secretary affirm

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[6] While it is not clear to which year's regulations the Statement of Charges refers, the court notes that the regulations relevant to this discussion were last revised 2000. *See* Rules and Regulations, 65 Fed. Reg. 13,880, 13,898–94 (Dep't Treas. Mar. 15, 2000) (final rule). Since that time, the regulation's language has remained unchanged. *Compare* 19 C.F.R. §§ 111.32, .53–.81 (2000) *with* 19 C.F.R. §§ 111.32, .53–.81 (2007)

revocation of Delgado's License. *See id*. On that same day, the Acting Assistant Secretary sent a letter to the Commissioner of CBP. *See*, R. at 1 ("Action Letter"). In the Action Letter, the Acting Assistant Secretary notified the Commissioner of CBP that BTS was affirming "CBP's revocation of Mr. Delgado's license." R. at 2. The letter requested the Commissioner "ensure that CBP takes the appropriate steps to inform Mr. Delgado of this decision pursuant to 19 CFR 111.74." R. at 2.

On December 3, the Assistant Commissioner of the Office of Field Operations for CBP sent Delgado formal notification that his License was being revoked. *See* compl. ex. A ("Notification Letter"). The Notification Letter stated, in relevant part, that "[y]ou are hereby notified that the U.S. Department of Homeland Security has affirmed U.S. Customs and Border Protection's (CBP) decision to revoke your Customshouse brokers license." *Id*.

Thereafter, on January 27, 2006, Delgado commenced this action.

Jurisdiction and Standard of Review

Customs has the authority to initiate a proceeding to suspend or revoke a customhouse brokers license pursuant to 19 U.S.C. § 1641(d)(2)(B) (2000). This Court has exclusive jurisdiction to review a determination to revoke a customhouse brokers license pursuant to 28 U.S.C. § 1581(g)(2) (2000). *See Shiepe v. United States*, 23 CIT 66, 72, 36 F. Supp. 2d, 402, 408 (1999) (citing 28 U.S.C. § 1581(g)(2) (1988)). The scope of the Court's review of such a proceeding is set out in 28 U.S.C. § 2640(a)(5) (2000), which provides for "Civil actions commenced to review any decision of the Secretary of the Treasury under section [1641], with the exception of decisions under section [1641(d)(2)(B)], which shall be governed by subdivision (d) of this section." The court pauses here.

As originally enacted, "subdivision (d)" read as follows: "In any civil action not specified in this section, the Court of International Trade shall review the matter as provided in section 706 of title 5." 28 U.S.C. § 2640(d) (1976 Supp. V). In other words, the statute directly tied this Court's review of determinations made by the Secretary of Treasury to provisions of Title 5—the Administrative Procedure Act ("APA"). In 1987, 19 U.S.C. § 1641 and 28 U.S.C. § 2640 were greatly revised. First, in section 1641, Congress added language defining the term "customs business." *See* 19 U.S.C. § 1641(a)(2) (1982 Supp. V). Next, Congress outlined the specific types of disciplinary procedures Customs could initiate against customs brokers, including the imposition of monetary penalties (19 U.S.C. § 1641(d)(2)(A)), and the suspension or revocation of licenses (19 U.S.C. § 1641(d)(2)(B)). In addition to these changes, the "scope and standard of review" for this Court's review of matters concerning Customs's disciplinary procedures was revised. *See* 28 U.S.C. § 2640(a)(5) (1982 Supp. V). Specifically, this subdivision was modi-

fied to provide that determinations made by the Agency were to be reviewed on the record made before the Court "with the exception of decisions under section [1641(d)(2)(B)], which shall be governed by subdivision (d) of this section." *Id*. At that time, "subdivision (d)" continued to firmly point to the APA. *See id*.; *see also Shiepe*, 23 CIT at 72, 36 F. Supp. 2d at 408 (citing 28 U.S.C. §§ 2640(a)(5), (d) (1988)).

In 1993, 28 U.S.C. § 2640(a) was again amended. At that time, Congress re-wrote the statute thusly:

> (4) Section 2640 is amended—
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> (A) by redesignating subsection (d) as subsection (e); and
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> (B) by inserting after subsection (c) the following new subsection:
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> "(d) In any civil action commenced to review any order or decision of the Customs Service under section 499(b) of the Tariff Act of 1930, the court shall review the action on the basis of the record before the Customs Service at the time of issuing such decision or order.". [sic]

P.L. 103–182 Sec. 684 (a)(4), 107 Stat. 2219; *see* 28 U.S.C. § 2640(d) (1988 Supp. V). As stated in the legislative history:

> Section 684 amends 28 U.S.C. 2640 to provide that in any civil action commenced to review an order or decision by Customs with respect to the denial, suspension or revocation of the accreditation of a private laboratory, the court shall review the action on the basis of the record before Customs at the time of issuing such decision or order.

North Am. Free Trade Agreement and Implementation Act, 1993 U.S.C.A.A.N. 2552, 2707. In other words, Congress provided a new scope of review for determinations made by the Secretary of Treasury related to the accreditation of private laboratories in "new" subdivision 2640(d), and moved the "residual" APA scope of review to "new" subdivision 2640(e). *See* 28 U.S.C. §§ 2640(d), (e) (1988 Supp. V). No other part of section 2640 was modified—including subdivision (a)(5), which continued to provide that "decisions under section [1641(d)(2)(B)] . . . shall be governed by subdivision (d) of this section." 28 U.S.C. § 2640(a)(5) (1988 Supp. V). The upshot of this Congressional legerdemain is that now, instead of the statute firmly basing this Court's scope of review for actions initiated under 19 U.S.C. 1641(d)(2)(B) on the APA, this Court is directed that the scope of its review is informed by reference to the "denial, suspension or revocation of the accreditations of a private laboratory." *See* 28 U.S.C. § 2640(d), (e) (2006). In revising the statute thusly, Congress has created a patent statutory absurdity. Specifically, the statute now mandates that the scope of this Court's review of a determination to suspend or revoke a customhouse brokers license is to be based on

the record made before Customs in a proceeding to suspend or revoke the accreditation of a private laboratory. This court has stated that, "[w]hen the literal words of a statute create an absurd result, such a literal interpretation must be rejected." *Koyo Corp. of U.S.A. v. United States*, 29 CIT ___, ___, 403 F. Supp. 2d 1305, 1310 (2005) (citing *Holy Trinity Church v. United States*, 143 U.S. 457, 460 (1892)). Here, because a literal reading of the statute creates an absurd result, the court, therefore, rejects the plain meaning of the statute and finds that subdivision (e) sets out the proper scope of review for this action. *see Kenny v. Snow*, 401 F.3d 1359, 1361 (Fed. Cir. 2005) (citing 5 U.S.C. § 706 when reviewing denial of a customhouse brokers license). This being so, the APA provides, in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall— . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . .

5 U.S.C. § 706. Furthermore, when reviewing Customs's determinations to revoke a customhouse brokers license, "[t]he findings of the Secretary as to the facts, if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 1641(e)(3). *See UPS Customhouse Brokerage, Inc. v. United States*, 30 CIT ___, ___, 442 F. Supp. 2d 1290, 1304 (2006). Finally, the Court may not consider arguments that were not raised before the agency, unless reasonable grounds existed for failing to do so. *See* 19 U.S.C. § 1641(e)(2).

While Delgado raises several arguments in support of his case, the court begins its analysis by reviewing whether Customs's administrative procedures were proper. Specifically, the court must address Delgado's claim that the Notification Letter did not sufficiently apprise him of Customs's final decision in this matter.

Discussion

By statute, it is provided, in relevant part, that: "Following the conclusion of the hearing, the hearing officer shall transmit promptly the record of the hearing along with the findings of fact and recommendations to the Secretary for decision. The Secretary will issue a written decision, based solely on the record, setting forth the findings of fact and the reasons for the decision." 19 U.S.C. § 1641(d)(2)(b). Furthermore, regulations provide, in relevant part:

> If the Secretary of the Treasury, in the exercise of his discretion and based solely on the record, issues an order suspending a broker's license or permit for a specified period of time or revoking a broker's license or permit . . . the Assistant Commissioner will promptly provide written notification of the order to the broker. . . .

19 C.F.R. § 111.74. Thus, the process contemplates the following: (1) that the "hearing officer" will, at the conclusion of a hearing, send the record of that hearing and a recommended decision to the Assistant Commissioner; (2) those materials will be reviewed, culminating in the issuance of a written decision that sets out the findings of fact and reasons for the decision; and finally, (3) notice that the customhouse brokers license has been revoked will be sent to a broker. Here, the Record shows the following. First, the ALJ, at the conclusion of the Hearing, submitted the Recommended Decision and record of the proceeding to the DHS Office of General Counsel. *See* Certification of Record, R. at 13. Second, a component of DHS (the BHS) reviewed the record and the Recommended Decision. *See, generally*, Dec. Memo., R. at 3. In the Decision Memorandum, BTS explained that revocation of Delgado's License was warranted and set out the facts and reasoning underlying that determination. *Id.* The Decision Memorandum stated that the Agency took into consideration the good character evidence attested to at the Hearing and explained that revocation was still warranted because "[t]hese facts do not negate the actuality that [Delgado] was convicted on 28 felony counts that involved importation or exportation of liquor, and that arose out of the conduct of his Customs business, and the attendant harm to the public that Congress has found in making such conduct criminal." *Id.* at 5. BTS then sent a letter to the Assistant Secretary. *See* Action Letter, R. at 1. In this document, BTS summarized its determination, stated that it was affirming revocation of Delgado's License, and requested that "CBP takes the appropriate steps to inform Mr. Delgado of this decision pursuant to 19 CFR 111.74." R. at 7. Finally, DHS sent Delgado the Notification Letter. In this letter DHS stated that "[y]ou are hereby notified that the U.S. Department of Homeland Security has affirmed U.S. Customs and Border Protection's (CBP) decision to revoke your Customshouse brokers license." Notification Letter.

Delgado contends that the Notification Letter "fails to address either the factual basis or the reasoning underlying the determination of the Department of Homeland Security and the CBP to revoke Delgado's Customs broker license. Agency action will only be upheld on [the] basis articulated by [the] agency." Mem. in Supp. of Pl.'s Rule 56.1 (a) Mot. for J. on the Agency R. ("Pl.'s Mem.") at 5 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943)). Delgado argues that, here, the Notification Letter was inadequate because he only "received a letter containing one sentence declaring revocation of his Li-

cense without a reason provided, and two sentences mentioning the right to appeal." *Id.* at 5 (citing Notification Letter). Customs argues that 19 C.F.R. § 111.74

> requires only that the Assistant Commissioner notify the broker that the license has been revoked. This is exactly what was stated in the revocation letter that Mr. Delgado received from CBP. Furthermore, Mr. Delgado was always aware of the reasons underlying CBP's decision to revoke his license. Indeed, Mr. Delgado received a Notice and Statement of Charges, which specified the relevant regulatory provisions and factual bases upon which CBP sought to revoke his license.

Def.'s Mem. at 7–8 (citing Statement of Charges, R. at 153). In response, Delgado contends that the Notification Letter

> contains no reason whatsoever for the revocation, and does not address new issues arising at the hearing. It does not explain how violating ATF rules amounts to violations of CBP regulations, does not explain why DHS/CBP ignored Judge Sippel's recommendation to "seriously reconsider" revocation, does not state why a monetary penalty or license suspension was inadequate—it does not explain a thing.

Pl.'s Reply at 6 (Notification Letter). For the following reasons the court allows that the Agency's procedure may not be proper in this respect.

As an initial matter, a review of the Notification Letter shows that it does not, as pointed out by Delgado, contain any factual findings or reasoning that support Customs's determination to revoke Delgado's License. As argued by defendant, however, there is nothing in the regulations that require any such notification to include a full recitation of Customs's reasoning. The question becomes, then, whether Delgado should have been somehow apprised of the underpinnings of Customs's determination. As noted above, by statute Customs must "issue a written decision, based solely on the record, setting forth the findings of fact and the reasons for the decision." 19 U.S.C. § 1641(d)(2)(B). Here, the court understands that Delgado was not issued a document that contained Customs's reasoning (for example, the Action Letter, the Decision Memorandum, or some other "written decision"). The court considers this to be a plausible scenario as the Action Letter and Decision Memorandum appear to be internal agency memoranda, *see* R. at 1, 3, and there is no other document on the Record that could otherwise be construed as being a "written decision" that was issued to Delgado. If Delgado did not receive notice of the facts and reasoning underlying Customs's final determination, the question, then, is whether Customs has fully complied with its statutory mandate, and the court cannot find, at this time, that it has. This is so because, assuming that the Action

Letter and the Decision Memorandum fulfill in principle the functions of the "order" and "written decision," it would seem that Customs must "issue" one or both of these documents (or some other "written decision") to an affected party—and here that was not done. Conversely, if it is Customs's position that the statute does not require it to "issue" a "written decision" to an affected party, it nowhere explains why it was not necessary to do so.[7] Thus, the court must remand this matter so that Customs may explain this process further.

Conclusion

This matter is remanded so that defendant may file a report with the court indicating whether either: (1) pursuant to 19 U.S.C. § 1641(d)(2)(B), Delgado should have been issued a written decision that contained the facts and reasoning for revoking his License; or (2) why the statute does not mandate that Customs issue Delgado such a document. Defendant shall file this report by May 25, 2007. If Customs determines that Delgado should have been issued a written decision, it shall issue one to him by May 25, 2007, and Delgado may file a brief addressing that written decision by June 15, 2007; defendant may file a response to any such brief by June 29, 2007; Delgado may reply to any such response by July 13, 2007. If Customs determines that it need not issue a written determination to Delgado, Delgado may submit a brief addressing that issue by June 15, 2007; defendant may respond to any such brief by June 29, 2007; Delgado may reply to any such response by July 13, 2007. All filings shall not exceed five pages in length.

SO ORDERED

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[7] Fundamental principles of fairness would seem to dictate that a broker *must* be provided with such information. Defendant's position that Delgado was "always aware of the reasons underlying CBP's decision to revoke his license" at the time Delgado initiated this action rings hollow because Customs's determinations after the Hearing were not based solely on the facts that formed the basis of the Statement of Charges. Indeed, Customs's determinations after the Hearing took into account a broader range of issues, including the conspiracy, Delgado's actions after the conspiracy, and the good character testimony attested to at the Hearing.

Slip Op. 07–71

UNITED STATES OF AMERICA, Plaintiff, v. JACKPINE FOREST PRODUCTS LTD., Defendant.

Court No. 06–00009

[Motion to admit foreign attorney on behalf of the defendant denied.]

Dated: May 11, 2007

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Gregg M. Schwind*), for the plaintiff.

Grunfeld, Desiderio, Lebowitz, Silverman & Klestadt LLP (*Ned H. Marshak* and *Joseph M. Spraragen*) for the defendant.

Memorandum & Order

AQUILINO, Senior Judge: Experienced members of the Bar of this Court of International Trade have duly filed a notice of appearance and an answer on behalf of the defendant, which admits that it is a Canadian corporation with offices in British Columbia but denies that it entered, or caused to be entered, into the United States softwood lumber by means of material and false acts, statements and/or omissions in violation of 19 U.S.C. §§ 1401a, 1481, 1484, 1485, and 1592, as alleged in the complaint filed herein by the U.S. government.

Come now those Bar members with an application styled as Consent Motion to Admit Palbinder K. Shergill "for the limited purpose of participating as counsel to defendant in the instant action":

> Palbinder K. Shergill is a highly qualified Canadian lawyer. Ms. Shergill was called to the bar of British Columbia in 1991 and regularly appears before the trial and appellate courts of that province as well as before the Federal Courts of Canada. Defendant is a long-standing client of Ms. Shergill's and wishes to avail itself of her counsel in preparing its defense in this action.

The motion is made pursuant to USCIT Rule 74(c), which governs the admission of foreign attorneys, in part, as follows:

> An attorney, barrister, or advocate who is qualified to practice at the bar of the court of any foreign state which extends a like privilege to members of the bar of this court may be specially admitted for purposes limited to a particular action. . . . In the case of such an applicant, the oath shall not be required and there shall be no fee. Such admission shall be granted only on motion of a member of the bar of this court.

On its face, the linchpin of this provision is reciprocity. The sum and substance of defendant's instant motion is that

> British Columbia meets the standard of a foreign state which "extends a like privilege to members of the bar of this court." Foreign attorneys, such as those who are members of the bar of this Court, may apply to the Law Society of British Columbia to act as "practitioners of foreign law."

But it offers no support for this representation, perhaps due to the reported consent of plaintiff's counsel. Such acquiescence, however, does not make requested relief automatically lawful[1]. Hence, the undersigned has been required to consult *Foreign Legal Consultants in Canada*, a publication of the Federation of Law Societies of Canada (April 2000), page 7 of which sets forth restrictions and limitations on any foreign lawyer in British Columbia or other Canadian jurisdiction. Moreover, the website of the Law Society of British Columbia, itself, states, among other things, that "a practitioner of foreign law is not permitted to appear as counsel on behalf of a client before any British Columbia or federal court or administrative tribunal". http://www.law society.bc.ca/licensing_membership/practitioners_foreign_law.html.

If this actually means what it seems to say, then the reciprocity contemplated by USCIT Rule 74(c), *supra*, does not exist, and defendant's motion to admit Palbinder K. Shergill as its counsel must be, and hereby is, denied.[2]

So ordered.

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[1] The court notes in passing, for example, that, while certain U.S. legislation, *e.g.*, the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94–583, § 1603(a), 90 Stat. 2891, 2892, defines "foreign state" to include an agency or instrumentality of that state, the Customs Courts Act of 1980 does not do so, thereby leaving that term in USCIT Rule 74(c) to traditional interpretation, namely, a political entity that has been formally recognized by the U.S. government as an independent foreign sovereign. *Cf. JP Morgan Chase Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88 (2002); Wright, Miller & Cooper, Federal Practice & Procedure § 3604, p. 391 (1984).

[2] If the court's perception of Canada's approach is off the mark, the defendant may have until May 18, 2007 to provide proof to that effect.

SLIP OP. 07–72

PARKDALE INTERNATIONAL, LTD., RIVERVIEW STEEL CO., LTD., and SAMUEL, SON & CO., LTD., Plaintiffs, and RUSSEL METALS EXPORT, Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge

Court No. 06–00289

[Plaintiffs' and plaintiff-intervenor's motions for preliminary injunctions denied.]

Dated: May 11, 2007

Hunton & Williams, LLP (*Richard P. Ferrin* and *William Silverman*) for the plaintiffs.

Sharretts, Paley, Carter & Blauvelt, PC (Beatrice A. Brickell and *Peter J. Baskin*) for the plaintiff-intervenor.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Mark B. Lehnardt*), of counsel, for the defendant.

OPINION

Restani, Chief Judge: This case is before the court on plaintiffs Parkdale International, Ltd., Riverview Steel Co., Ltd., and Samuel, Son & Co., Ltd.'s, and plaintiff-intervenor Russel Metals Export's (collectively, "plaintiffs") motions for preliminary injunctions to prevent the liquidation of certain entries of goods.[1]

Plaintiffs are importers and exporter-resellers of certain corrosion-resistant carbon steel flat products from Canada that are covered by an antidumping duty order. *See Certain Corrosion-Resistant Carbon Steel Flat Prods. & Certain Cut-to-Length Carbon Steel Plate from Canada*, 58 Fed. Reg. 44,162, 44,162 (Dep't Commerce Aug. 19, 1993) (antidumping duty order). Plaintiffs seek liquidation or reliquidation of entries from a two-year period commencing on August 1, 2003, and ending on July 31, 2005. Plaintiffs claim they are entitled to liquidation at their producer's deposit rate under the "automatic liquidation rule," 19 C.F.R. § 351.212(c)(1),[2] because the en-

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[1] Liquidation is the "final computation or ascertainment of duties . . . accruing upon entry" of the goods. *Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1351 (Fed. Cir. 2006) (quotation omitted).

[2] The regulation at issue reads in relevant part:

> (1) *If the Secretary does not receive a timely request for an administrative review of an order* (*see* paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary, without additional notice, will instruct the Customs Service to:
>
> (i) Assess antidumping duties or countervailing duties, as the case may be, on the

tries at issue were not the subject of periodic administrative review proceedings and, therefore, did not receive specific reseller rates. *See Certain Corrosion-Resistant Carbon Steel Flat Prods. from Canada*, 71 Fed. Reg. 13,582, 13,583 (Dep't Commerce Mar. 16, 2006) (final results of antidumping duty administrative review); *Certain Corrosion-Resistant Carbon Steel Flat Prods. from Canada*, 72 Fed. Reg. 12,758, 12,758 (Dep't Commerce Mar. 19, 2007) (final results of antidumping duty administrative review) (collectively, "*Final Results*"). In such a case, they assert that the automatic liquidation rule of 19 C.F.R. § 351.212(c)(1) should apply, despite a policy published by defendant United States (the "Government"), which provides that a periodic review of entries for any entity in the same chain of sale will result in a combined "all others" rate for any unreviewed reseller. *See Antidumping & Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 68 Fed. Reg. 23,954, 23,954 (Dep't Commerce May 6, 2003) ("*Reseller Policy*").[3]

The Government challenges jurisdiction. It notes that plaintiffs did not participate in the applicable administrative reviews leading to the *Final Results*, which stated, in boilerplate language, that pursuant to the *Reseller Policy* the "all others" rate would apply to unreviewed resellers whose producers were reviewed. *See Certain Hot-Rolled Carbon Steel Flat Prods., Certain Cold-Rolled Carbon Steel Flat Prods., Certain Corrosion-Resistant Carbon Steel Flat Prods. & Certain Cut-to-Length Carbon Steel Plate from Canada*, 58 Fed. Reg. 37,099, 37,103–04 (Dep't Commerce July 9, 1993) (final determinations of sales at less than fair value) (describing all others rate as a combination of the rates of two producers). The Government argues that the fact that the *Reseller Policy* is mentioned in the *Final Results* dictates the conclusion that plaintiffs' claims should be construed as a challenge to the Department of Commerce's ("Commerce") determination under 19 U.S.C. § 1675(a). The Government

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subject merchandise described in § 351.213(e) at rates equal to the cash deposit of, or bond for, estimated antidumping duties or countervailing duties required on that merchandise at the time of entry, or withdrawal from warehouse, for consumption; and

(ii) To continue to collect the cash deposits previously ordered.

(2) *If the Secretary receives a timely request for an administrative review of an order* (*see* paragraph (b)(1), (b)(2), or (b)(3) of § 351.213), the Secretary will instruct the Customs Service to assess antidumping duties or countervailing duties, and to continue to collect cash deposits, on the merchandise *not covered by the request* in accordance with paragraph (c)(1) of this section.

19 C.F.R. § 351.212(c)(1)–(2) (emphasis added).

[3] This policy was adopted after notice was published in the Federal Register, and comments from interested parties were considered. *See Antidumping & Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 63 Fed. Reg. 55,361, 55,362–63 (Dep't Commerce Oct. 15, 1998) (notice and request for comment on policy concerning assessment of antidumping duties); *Antidumping & Countervailing Duty Proceedings: Assessment of Antidumping Duties*, 67 Fed. Reg. 13,599, 13,599 (Dep't Commerce Mar. 25, 2002) (additional comment period).

contends that because a § 1675(a) determination is among those listed in 19 U.S.C. § 1516a, plaintiffs' challenge should have been brought in this Court pursuant to 28 U.S.C. § 1581(c). *See* 19 U.S.C. § 1516a(a)(2)(B)(iii). According to the Government, because 28 U.S.C. § 1581(c) could have been invoked, and was not a manifestly inadequate means to obtain relief, plaintiffs cannot now invoke residual jurisdiction under § 1581(i).[4]

Plaintiffs respond that application of the *Reseller Policy* is a decision separate from the administrative review, despite the fact that it is reflected in boilerplate in a periodic review determination under 19 U.S.C. § 1675(a). According to plaintiffs, application of the *Reseller Policy* is a decision which relates to the liquidation instructions, and can be challenged only under 28 U.S.C. § 1581(i). *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) (holding that a challenge to liquidation instructions falls under § 1581(i) jurisdiction).

In this case, plaintiffs cannot bring suit under § 1581(c) because they did not participate in the review proceeding. *See* 28 U.S.C. § 2631(c) (stating that only a party to the "proceeding in connection with which the matter arose" may bring an action challenging the results of a determination listed in 19 U.S.C. § 1516a). The jurisdictional issue here is whether plaintiffs were required to bring a challenge to the generally applicable *Reseller Policy* in such proceedings, even though they could not have participated as parties with entries to be reviewed without mooting their case.[5] Stated another way, the court must determine whether 28 U.S.C. § 1581(c) provides a mandatory and adequate avenue to relief that precludes suit under the broad residual jurisdiction of § 1581(i). This is a question that has

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[4] 28 U.S.C. § 1581 states in relevant part:

> (c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.
>
> . . . .
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –
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> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
>
> (3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

[5] The parties agree that plaintiffs were not prohibited from filing a case brief before the agency challenging the policy even without participating in a review of their entries. The issue is whether under these conditions they *must* file such a brief to preserve jurisdiction.

confronted the court on many occasions, but the increasingly convoluted analysis required to resolve it may indicate that it is time to consider more deeply the meaning of "manifestly inadequate."

The term "manifestly inadequate," as applied in the context of this Court's jurisdiction, arose out of the concern that 28 U.S.C. § 1581(i) jurisdiction should be avoided when the use of such jurisdiction would completely gut the requirements of other provisions in § 1581. *See United States v. UniRoyal, Inc.*, 69 CCPA 179, 187, 687 F.2d 467, 475 (1982) (Nies, J., concurring) (articulating view that other forms of relief must be "manifestly inadequate" before jurisdiction may be invoked under § 1581(i)). The concern was particularly acute as the plain language of § 1581(i) seemed to allow a party to file suit without following the mandatory exhaustion steps of protest and protest denial in a customs action, the prerequisites for § 1581(a) jurisdiction. *See id.* at 182–83, 687 F.2d at 471; *see also Am. Air Parcel Forwarding Co. v. United States*, 718 F.2d 1546, 1549 (Fed. Cir. 1983). The principle was later applied to unfair trade cases, where challenges to findings of dumping and subsidization and duty rate calculations proceed through a carefully orchestrated administrative process before court challenges under 28 U.S.C. § 1581(c) are allowed. *See, e.g., Miller & Co. v. United States*, 824 F.2d 961, 963–64 (Fed. Cir. 1987). Over the years, the manifestly inadequate standard has been applied numerous times to determine whether § 1581(i) jurisdiction would attach instead of jurisdiction under other provisions of § 1581. The practical result has been a test that, the Government asserts, requires that jurisdiction under the other sections be a virtual impossibility. This is not a proper interpretation of the statute or its judicial gloss.

More recently, the harbor maintenance tax ("HMT") litigation demonstrated that two avenues of § 1581 jurisdiction may exist simultaneously, at least in theory. The Government argued vigorously that HMT "payments" must be protested, but the courts ruled that payment was not a protestable decision and, accordingly, that § 1581(i) jurisdiction applied. *See U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1570 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998). In subsequent cases brought by other parties, the Federal Circuit found that the protest of an HMT refund request denial was possible and that § 1581(a) jurisdiction was available. *See Swisher Int'l, Inc. v. United States*, 205 F.3d 1358, 1369 (Fed. Cir. 2000). These two holdings create a seeming anomaly which allows a party to assert § 1581(i) jurisdiction where § 1581(a) could have been exercised instead.[6]

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[6] In the HMT litigation, the claimants in *U.S. Shoe* asserted § 1581(i) jurisdiction before the Federal Circuit clarified in *Swisher* that they could have invoked an administrative procedure that would have led to a protestable decision. Even if the plaintiffs in *U.S. Shoe* were not aware of the potential administrative remedy, the availability of jurisdiction under

It is time to consider what these two cases, and other recent cases, mean for the court-created "manifestly inadequate" limitation upon the seemingly clear broad statutory grant of jurisdiction in § 1581(i). After reviewing these cases, the court concludes that where the core of a dispute is within § 1581(i), i.e., it relates to a general issue of administration and enforcement policy as to the matters listed in § 1581(i)(1)–(3), § 1581(i) should function according to its terms, unless it is *clear* that another provision of § 1581 applies. *See* H.R. Rep. No. 96–1235, at 48 (1980) *as reprinted in* 1980 U.S.C.C.A.N. 3729, 3760 ("Subsection (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.").

Turning to the circumstances of this case, the court concludes that, even if plaintiffs had filed a case brief contesting application of the *Reseller Policy*, Commerce's determination regarding the issue would not have constituted a 19 U.S.C. § 1675(a) determination which qualifies for jurisdiction under 28 U.S.C. § 1581(c). Section 1581(c) provides for judicial review of specific determinations listed in 19 U.S.C. § 1516a, including periodic reviews under 19 U.S.C. § 1675(a). *See* 19 U.S.C. § 1516a(a)(2)(B)(iii). Those reviews relate specifically to periodic reviews of entries covered by an antidumping or countervailing duty order. As indicated, none of plaintiffs' entries were reviewed.

The mere inclusion of boilerplate language in the *Final Results* that repeats Commerce's standard *Reseller Policy* does not make application of that policy a § 1516a determination any more than accepting an HMT payment was a Customs decision in *U.S. Shoe*. Commerce declared its *Reseller Policy* in 2003, and merely stated its intention to apply that policy in standard liquidation instructions in the *Final Results*. A mere statement declaring Commerce's intention to order Customs to apply a default rate is not a § 1516a determination. *Cf. SKF USA Inc. v. United States*, Slip Op. 07–43, 2007 WL 867308, at *4 (CIT Mar. 23, 2007) (statement in final results that liquidation instructions will be issued within 15 days of publication of results is not § 1516a determination); *Mukand Int'l Ltd. v. United States*, 452 F. Supp. 2d 1329, 1332 (CIT 2006) (same); *see also Consol. Bearings*, 348 F.3d at 1002 ("[A]n action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results."); *Shinyei Corp. of Am. v. United States*, 355 F.3d

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§ 1581(i) has always hinged on whether the plaintiffs could have used a method that would result in § 1581(a) jurisdiction, not whether they actually used it. *See Omni U.S.A., Inc. v. United States*, 840 F.2d 912, 915 (Fed. Cir. 1988) (holding that a legal remedy "is not made inadequate simply because appellant failed to invoke it within the time frame it prescribes").

1297, 1304 (Fed. Cir. 2004) (finding that the issuance of "clean up" liquidation instructions was not a decision specified in 19 U.S.C. § 1516a; therefore, jurisdiction was not available under 28 U.S.C. § 1581(c)). These cases make clear that parties are not required to challenge substantive determinations under § 1581(c), with which they agree, in order to preserve a challenge to instructions governing the liquidation of goods. Instead, parties are to file § 1581(i) suits to challenge liquidation instructions, particularly where they do not reflect Commerce's underlying 19 U.S.C. § 1516a determination. *Accord Canadian Wheat Bd. v. United States*, Slip Op. 07–61, 2007 WL 1219687, at *5–*8 (CIT Apr. 24, 2007) (holding that plaintiffs who prevailed before a NAFTA bi-national panel, rather than this Court, could nevertheless challenge the terms of the resulting notice of revocation under 28 U.S.C. § 1581(i)(4)). The general rule appears to be that liquidation instructions lead to § 1581(i) jurisdiction unless they directly implement a 19 U.S.C. § 1516a determination, such as the final results of an administrative review under § 1675. If they incorrectly implement a § 1675 determination, relief will be granted pursuant to an Administrative Procedures Act ("APA") action brought under 28 U.S.C. § 1581(i). *See Shinye*i, 355 F.3d at 1309.

Here, plaintiffs challenge a general policy that has existed since 2003, which was adopted after a five-year notice and comment period, and which the Government has defended vigorously. While it was not impossible under the law for Commerce to abandon the policy in response to a brief filed by plaintiffs during the relevant administrative reviews, such an outcome would have been extraordinarily unlikely. Further, plaintiffs' entries were not reviewed pursuant to 19 U.S.C. § 1675, and plaintiffs could not have had their entries reviewed and also preserve their claims, which depended on the entries being unreviewed.

Even assuming, arguendo, that Commerce's response to a case brief could have been construed as part of a determination under 19 U.S.C. § 1516a, application of the *Reseller Policy* was not part of the actual § 1675 review of entries and 28 U.S.C. § 1581(c) jurisdiction is at best unclear. Just as it was unclear prior to *Swisher* that there was a protest avenue to jurisdiction in HMT cases and, therefore, § 1581(i) jurisdiction attached, in this case it is unclear that there is a § 1581(c) avenue to relief. Plaintiffs are not required to pursue such a potential remedy. An unclear avenue to jurisdiction is not an adequate jurisdictional remedy. At the heart of this case is a claim challenging a general administrative policy setting general liquidation instructions, not a 19 U.S.C. § 1675 determination upon review of entries.

The Customs Courts Act of 1980 was intended to eliminate jurisdictional disputes so that matters clearly within this Court's subject matter jurisdiction could be decided promptly and without undue expense. *See* H.R. Rep. No. 96–1235, at 20 (1980), *as reprinted in* 1980

U.S.C.C.A.N. 3729, 3731 (stating that the Customs Courts Act was intended to provide a "comprehensive system [that] will ensure greater efficiency in judicial resources and uniformity in the judicial decision making process"). Arguments about whether these cases should be decided pursuant to 28 U.S.C. § 1581(c) or (i) do nothing to fulfill this purpose. Taking a broader and statutorily consistent view of § 1581(i) jurisdiction, as did the courts in *Consolidated Bearings*, 348 F.3d at 1002, *Shinyei*, 355 F.3d at 1309, and *Mukand Int'l, Ltd. v. United States*, No. 2006–1258, 2007 WL 571026, at *3 (Fed. Cir. Feb. 6, 2007) (non-precedential) (holding that a claim for reliquidation of entries found not subject to an antidumping duty order was properly brought under § 1581(i)(4)), better serves the purpose of the statute.[7]

Under this holding, parties who mistakenly assert § 1581(c) jurisdiction will not be prejudiced by their error. There is a two-year statute of limitations under 28 U.S.C. § 2636(i) for § 1581(i) actions, while the statute of limitations for § 1581(c) cases is much shorter. 19 U.S.C. § 1516a(a)(2). Thus, the party who mistakenly files under 28 U.S.C. § 1581(c) can amend to assert § 1581(i) jurisdiction.[8]

The court does not conclude that § 1581(i) actions will allow parties to preempt agency decision-making in antidumping and countervailing duty cases. Under 28 U.S.C. § 2637(d), the court may require administrative exhaustion where appropriate. Following this statute, the court has not hesitated to deny relief when parties have failed to raise issues before the appropriate administrative bodies, if such an action would not be futile. *See, e.g., Carpenter Tech. Corp. v.*

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[7] Neither *International Custom Products, Inc. v. United States*, 467 F.3d 1324 (Fed. Cir. 2006), nor *Norsk Hydro Canada*, 472 F.3d 1347, dictate a different result. *International Custom Products* involved a choice between § 1581(a) or (i) jurisdiction. As indicated, preservation of customs protest procedures is a special concern. *Norsk Hydro Canada* involved a choice between § 1581(a) and (c) jurisdiction, and the court found jurisdiction under (c), while emphasizing the need to determine the essence of the action. *Id.* at 1355. We do not know what the result would have been if the latter case was pursued as an (i) case and the "manifestly inadequate" standard was at issue, as the court was not called upon to make that determination.

[8] To avoid refiling the 28 U.S.C. § 1581(i) action, the summons and complaint for a potential § 1581(c) action should be filed together because 28 U.S.C. § 2632(a) specifies a concurrent summons and complaint for (i) actions. For § 1581(c) actions, 28 U.S.C. §§ 2632(c) and 2637(d) refer to the court's rules on timing of the summons and complaint, but 19 U.S.C. § 1516a(a)(2) governs and allows thirty days after the publication of the results to file a summons and another thirty days for the complaint. The practice comments of the Rules of this Court, however, encourage simultaneous filing of a summons and complaint in a § 1581(c) action. *See* USCIT R. 3 cmt. 2 ("[C]ounsel are encouraged to commence any action described in Section 516A(a)(2) or (3) of the Tariff Act of 1930 and 28 U.S.C. § 1581(c) by the concurrent filing of a summons and complaint. This will serve to expedite the prosecution of the action."). In contrast, in protest denial cases under § 1581(a), a formal complaint may be filed years after the summons, which commences the action, *see DaimlerChrysler Corp. v. United States*, 442 F.3d 1313, 1318 (Fed. Cir. 2006) (summons functions as the initial pleading, rather than the complaint). While there can be as much as a thirty-day gap in § 1581(c) filings, when viewed in the context of the § 1581(a) permissible gap, this may be seen as essentially concurrent.

United States, 464 F. Supp. 2d 1347, 1349–50 (CIT 2006) (dismissing case for failure to exhaust administrative remedies in administrative review of an antidumping action); *Ceramica Regiomontana, S.A. v. United States*, 16 CIT 358, 362 (1992) (dismissing case for failure to exhaust administrative remedies in an administrative review of a countervailing duty action).[9] Here the issue was thoroughly explored through comment on the policy and subsequent agency consideration.

Congress did not intend for parties to guess if their action fits into a § 1581 pigeonhole. Those claims that involve clearly protestable matters, or are at the core of an antidumping or countervailing duty determination, must proceed under § 1581(a) or (c) respectively. Other matters not clearly provided for in § 1581(a)–(h) were intended to fall into § 1581(i) so that no one would be denied an avenue of relief in this general subject matter area. *See* H.R. Rep. 96–1235, at 48; *see also id.*, at 59 ("In any civil action other than the ones in subsections (a)–(c) of this section, the Court of International Trade shall review the matter as provided for in the Administrative Procedures Act, 5 U.S.C. 706."); *id.*, at 52 ("Subsection (i) [of 28 U.S.C. § 2631] is a new provision which states that a civil action other than one specified in subsections (a)–(h) of this section may be commenced by a person adversely affected or aggrieved by a government agency action within the meaning of 5 U.S.C. 702. This subsection is intended to correlate with and complement the broad grant of residual jurisdiction found in proposed section 1581(i)."); 5 U.S.C. § 704 (providing review under the APA for a "final agency action for which there is no other adequate remedy in a court"). This action involves a generally applicable administrative policy, unreviewed entries, and liquidation instructions not dependent on the results of the review. Jurisdiction is appropriate under 28 U.S.C. § 1581(i).

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[9] Similarly, parties will have little or no incentive to abstain from using available administrative remedies to obtain a longer statute of limitations under § 1581(i). Although *Shinyei*, 355 F.3d at 1309, indicates that liquidation will not prevent remedies if a post-liquidation APA challenge to liquidation instructions is successful, that case involved a claim of invalid liquidation contrary to the results of completed litigation under 28 U.S.C. § 1581(c). In most cases, the risk of irremediable liquidation will compel a plaintiff promptly to file suit. In this case, plaintiffs arguably commenced suit before a § 1581(c) case could have commenced and Commerce was willing to delay liquidation instructions to Customs for only two weeks in order to allow the court to consider its jurisdiction. Further, where parties seek a return of funds or lower estimated duty rates, there is additional financial incentive to file suit promptly. Finally, because none of plaintiffs' entries are the subject of the 19 U.S.C. § 1675 reviews that led to the *Final Results*, the proceeding is not delayed or impeded by a separate 28 U.S.C. § 1581(i) action.

Plaintiffs next assert that they would suffer irreparable harm if their entries are liquidated before this action is decided.[10] This is likely so, unless the rule of *Shinyei* is broadly applied,[11] but even were they able to establish irreparable harm, plaintiffs must also demonstrate that there is some chance they would succeed on the merits of this action. *See Torrington Co. v. United States*, 20 CIT 1293, 1295 (1996) ("The decision in *FMC [Corp. v. United States*, 3 F.3d 424 (Fed. Cir. 1993),] makes it clear that showing irreparable harm . . . does not obviate the need to show some likelihood of success on the merits."). Plaintiffs have not shown such a chance.

19 C.F.R. § 351.212(c) is silent as to what constitutes the "request for an administrative review" that eliminates automatic liquidation at the producer's deposit rate. The Government interprets the regulation to mean a request by or about any seller in the non-reviewee's chain of sale. Plaintiffs interpret it to mean a request by or applicable to the reseller at issue.

> The Government describes the purpose of the policy as follows:
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> > [The] *Reseller Policy* addresses an ambiguity in Commerce's regulations regarding the assessment rate for liquidation of a reseller's entries of a producer's merchandise when: (1) the reseller's entries entered under the producer's cash-deposit rate; (2) a review is requested of the producer, but not of the reseller; and (3) the producer did not have knowledge at the time of the sale to the reseller that the merchandise was ultimately destined for the United States.
>
> (Def's Combined Mot. to Dismiss & Resp. to Pls.' Mot. for J. On the Agency R. 22.)

Commerce may in the first instance interpret its own regulation. *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1363 (Fed. Cir. 2005) ("[I]t is well settled that an agency's interpretation of its own regulations is entitled to broad deference from the courts."). Even if the court accorded Commerce's interpretation a lesser degree of deference because it is a change in policy, the *Reseller Policy* is consistent with the regulation in the context of an administrative review. First, because a producer receives a new rate upon review, the cash deposit rate plaintiffs seek no longer has validity. Thus, there seems to be no good reason for the cash deposit rate to be automatically applied. Second, there is no reason that a reseller or its importer should be entitled to choose among the rates it prefers when none is specific to it, and when it may request its

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[10] The preliminary injunction sought would extend through all levels of appeal.

[11] It is unclear under *Shinyei* whether prior liquidation of entries would ever act as a bar to relief in an APA review of liquidation instructions. *See supra* note 9.

own rate. Plaintiffs object to the "all others" rate, but they had a clear, although perhaps expensive, avenue for avoiding it – they could have obtained a reseller-specific rate.[12]

Furthermore, although 19 C.F.R. § 351.212(c) refers to reviews of *an order*, it is sales of particular producers or exporters which are reviewed. *See* 19 C.F.R. § 351.212(c)(2); 19 C.F.R. § 351.213(b). Thus, it is the sales of merchandise made in various steps from the producer that are the subject of the review. As the *Reseller Policy* applies when the producer does not know that the goods are destined for the U.S. market, the *Reseller Policy* focuses on the export sales where the price discrimination may have occurred. Therefore, Commerce's interpretation is reasonable in the context of the entire review process, and the court sees nothing in the *Reseller Policy* that is forbidden by statute or regulation, and no indication that the policy is arbitrary and capricious.

Moreover, as Commerce merely interpreted the ambiguous words "request for an administrative review" in 19 C.F.R. § 351.212(c), formal notice and comment procedures under the APA were not required. *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001) (interpretive rules exempt from APA notice and comment procedures). While the court notes that Commerce might have just as easily published notice of a regulation amendment, as a matter of fairness, there was a long notification period,[13] which allowed for comment. Further, the reseller policy has been ruled not impermissibly retroactive. *Parkdale Int'l v. United States*, 475 F.3d 1375, 1378–79 (Fed. Cir. 2007) (discussing retroactive application of the *Reseller Policy* in a prior administrative review period).[14]

The remainder of the injunctive factors do not weigh in plaintiffs' favor and cannot overcome the fact that their claim, thus far, fails on the merits. *See FMC*, 3 F.3d at 431 (affirming denial of preliminary injunction without discussion of balance of hardships or public interest, concluding that proof of irreparable harm did not "outweigh [plaintiff's] failure to establish a likelihood of success on the merits").

Accordingly, plaintiffs' motion for a preliminary injunction is DENIED.

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[12] The parties also agree a reseller review may be requested as a protective matter, and withdrawn if no one else requests a review in the applicable chain of sale.

[13] *See supra* note 3.

[14] The court does not reach the issue of whether any injunction granted could apply to plaintiff-intervenor's entries. The *res* of an action brought under § 1581(i) is not as specific as that of an action brought under § 1581(c). Thus, defendant's arguments in that regard are problematic.

PARKDALE INTERNATIONAL, LTD., RIVERVIEW STEEL CO., LTD., and SAMUEL, SON & CO., LTD., Plaintiffs, and RUSSEL METALS EXPORT, Plaintiff-Intervenor, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge

Court No. 06–00289

JUDGMENT

This case having been submitted for decision and the court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED that Plaintiffs Parkdale International, Ltd., Riverview Steel Co., Ltd., and Samuel, Son & Co., Ltd.'s motion for a preliminary injunction is denied. Plaintiff-Intervenor Russel Metals Export's motion for a preliminary injunction is also denied.

Slip Op. 07–73

MITTAL STEEL GALATI S.A., FORMERLY KNOWN AS ISPAT SIDEX S.A., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06–00050

[Plaintiff's motion for judgment on the agency record denied; Commerce's administrative review results sustained.]

Dated: May 14, 2007

Arent Fox Kintner Plotkin & Kahn, PLLC (*John M. Gurley*, *Diana Dimitriuc Quaia*) for Plaintiff Mittal Steel Galati S.A., formerly known as Ispat Sidex S.A.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Alessandris*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Arthur D. Sidney*), of counsel, for Defendant United States.

Wiley Rein & Fielding (*Alan H. Price*, *Timothy C. Brightbill*) for Defendant-Intervenor Nucor Corporation.

Schagrin Associates (*Roger B. Schagrin*, *Michael J. Brown*) for Defendant-Intervenor IPSCO Steel Inc.

OPINION

Gordon, Judge: Plaintiff Mittal Steel Galati S.A. challenges two decisions of the U.S. Department of Commerce ("Commerce") during the 2003–2004 administrative review of the antidumping duty order covering certain cut-to-length carbon steel plate from Romania. *See*

Certain Cut-to-Length Carbon Steel Plate from Romania, 71 Fed. Reg. 7,008 (Dep't of Commerce Feb. 10, 2006) (final results and partial rescission) ("*Final Results*"). First, Plaintiff contends that Commerce erred in assigning Plaintiff a total adverse facts available rate of 75.04 percent *ad valorem*. Second, Plaintiff contends that Commerce's policy of issuing liquidation instructions within 15 days of the publication of the final results of an administrative review is *per se* unlawful.

The court has jurisdiction to review Plaintiff's first issue pursuant to Section 516a(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000)[1] and 28 U.S.C. § 1581(c) (2000). The court has jurisdiction to review Plaintiff's second issue under the same jurisdictional provision, or alternatively, under 28 U.S.C. § 1581(i) (2000).

As discussed further below, Plaintiff's total adverse facts available rate of 75.04 percent is supported by substantial evidence and is in accordance with law. Also, Commerce's 15-day liquidation instruction policy is in accordance with law. The court therefore sustains Commerce's *Final Results* and denies Plaintiff's motion for judgment on the agency record.

II. Standard of Review

When reviewing Commerce's administrative review final results under 28 U.S.C. § 1581(c) (2000), the Court of International Trade sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing whether Commerce's actions are unsupported by substantial evidence, the Court assesses whether the agency action is "unreasonable" given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). When reviewing Commerce's actions under 28 U.S.C. § 1581(i), the Court holds unlawful an agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000); 28 U.S.C. § 2640(e) (2000).

III. Discussion

A. Adverse Facts Available Rate

In the preliminary results of the administrative review, Commerce calculated an antidumping duty rate of 48.90 percent *ad valorem* for Plaintiff. *Certain Cut-to-Length Carbon Steel Plate from Romania*,

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[1] Further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition.

70 Fed. Reg. 53,333, 53,338 (Dep't of Commerce Sept. 8, 2005) (preliminary results) ("*Preliminary Results*"). After the *Preliminary Results*, Plaintiff informed Commerce that it discovered a significant quantity of subject merchandise that it failed to report in the administrative review, but Plaintiff did not disclose the quantity or value of the unreported subject merchandise. Shortly after this revelation, Plaintiff abruptly curtailed its participation in the proceeding by foregoing a scheduled cost verification and removing its business proprietary data from the record. *Final Results*, 71 Fed. Reg. at 7,010.

In the *Final Results* Commerce found that Plaintiff had both withheld information and significantly impeded the administrative review, requiring Commerce to use facts otherwise available to complete the review. *Id.* Commerce also found that Plaintiff had failed to cooperate by not acting to the best of its ability to comply with a request for information, justifying application of adverse facts available. *Id.* at 7,011. Plaintiff does not challenge these findings. *See* Pl.'s Mot. J. Agency R. at 10. Plaintiff instead challenges the 75.04 percent rate that Commerce selected and assigned as total adverse facts available. *Id.* at 11.

In a total adverse facts available scenario, Commerce may not be able to calculate an antidumping rate for the uncooperative respondent because the information required for such a calculation (the respondent's sales and cost information for the subject merchandise during the period of review) typically is not available or has not been provided. As a substitute, Commerce relies on the petition, the final determination from the investigation, prior administrative reviews, or other information placed on the record, 19 U.S.C. § 1677e(b), to select a proxy that should be a "reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.lli de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("de Cecco").

Among the rates available to Commerce in the administrative proceeding were the 48.90 percent rate calculated for Plaintiff in the *Preliminary Results* and the 75.04 percent all others rate that was derived from the petition when Romania was a non-market economy.[2] In the *Final Results* Commerce reasoned that any adverse facts available rate for Plaintiff needed to be higher than 48.90 percent. *Issues and Decision Memorandum for Administrative Review of*

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[2] *See Certain Cut-to-Length Carbon Steel Plate from Romania*, 58 Fed. Reg. 37,209 (Dep't of Commerce Jul. 9, 1993) (final determination). Commerce reclassified Romania as a market economy for antidumping and countervailing duty proceedings effective January 1, 2003. *Certain Small Diameter Carbon and Alloy Seamless Standard, Line, and Pressure Pipe from Romania*, 68 Fed. Reg. 12,672, 12,673 (Dep't of Commerce Mar. 17, 2003) (final results).

Certain Cut-to-Length Carbon Steel Plate from Romania, at 15–16, A–485–803, ADR: 08/01/2003—07/31/2004 (Feb. 6, 2006), *available at* http://ia.ita.doc.gov/frn/summary/romania/E6–1880–1.pdf, ("*Decision Memorandum*"). That rate was a cooperative rate—Plaintiff's non-compliance occurred after it was calculated, and Commerce inferred that Plaintiff's actual rate was therefore higher than 48.90 percent. *See Decision Memorandum* at 10–11 ("an adverse inference is warranted"). Commerce also believed that a rate higher than 48.90 percent would serve as a deterrent to Plaintiff's future non-compliance. *See Final Results*, 71 Fed. Reg. at 7011. These conclusions are both reasonable and consistent with the adverse facts available provision of the antidumping statute and the Federal Circuit's guidance in *de Cecco*. The only rate higher than 48.90 percent was the all-others rate of 75.04 percent, which Commerce first corroborated and then assigned to Plaintiff. *Id*.

Plaintiff first contends that the statutory provisions governing non-market economy calculations prohibit the assignment of a non-market economy rate within a subsequent market economy proceeding. *See* Pl.'s Mot. J. Agency R. at 11–16; Pl.'s Reply Br. at 3–4 (citing 19 U.S.C. § 1677b(c)(1)). The court reviews disputed interpretations of the antidumping statute under the framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984). The court first considers whether Congressional intent on the issue is clear, and if not, whether Commerce's interpretation is reasonable. *Id.*; *Dupont Teijin Films USA, LP v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005).

Here, Congressional intent is clear. The express language of the adverse facts available provision authorizes Commerce to rely on information from the petition irrespective of whether that information is from a market or non-market economy proceeding. *See* 19 U.S.C. § 1677e(b). When operating in an adverse facts available situation, Commerce needs access to additional sources of information to complete the administrative review. Plaintiff's proposed interpretation would limit the available pool of information on which Commerce may rely, contrary to the purpose of the adverse facts available provision. Therefore, Commerce may, in a market economy proceeding, assign to a respondent a total adverse facts available rate derived from a prior, non-market economy proceeding. Whether Commerce should commingle a non-market economy rate with a market economy proceeding does not go to the question of whether Commerce acted in accordance with law, but to whether that action is reasonable given the facts and circumstances presented by the administrative record—that is—whether it is supported by substantial evidence.

Plaintiff next argues that Commerce, in practice, eschews adverse facts available rates derived solely from the petition in favor of rates that have been calculated with respondent information, and that

Commerce's administrative precedents preclude it as a matter of law from relying solely on petition information for an adverse facts available rate. Pl.'s Reply Br. at 7–8; Pl.'s Mot. J. Agency R. at 16–17.[3] This is an odd assertion because the statute explicitly authorizes Commerce to rely on petition information in adverse facts available situations. *See* 19 U.S.C. § 1677e(b); *de Cecco*, 216 F.3d at 1032 ("the statute explicitly allows for use of 'the petition' to determine relevant facts when a respondent does not cooperate"). Plaintiff nevertheless suggests that Commerce no longer has that authority, purportedly abandoning it through administrative practice. Pl.'s Reply Br. at 7–8. In actuality, Commerce has not so limited itself. *See, e.g., Stainless Steel Bar from India*, 69 Fed. Reg. 55,409, 55,410 (Dep't of Commerce Sept. 14, 2004) (final results) (using petition rate). A fair reading of the adverse facts available precedents cited by Plaintiff (in which Commerce opted for a rate other than a petition rate) simply demonstrate Commerce exercising its "discretion to choose which sources and facts it will rely on to support an adverse inference when a respondent has been shown to be uncooperative . . . [to] create the proper deterrent to non-cooperation . . . and assure a reasonable margin." *de Cecco*, 216 F.3d at 1032. The more relevant question is not whether Commerce's administrative precedents preclude Commerce as a matter of law from relying on an adverse facts available rate derived solely from petition information—they do not—but the extent to which they inform the reasonableness of Commerce's selection of such a rate.

Standing alone, a 12-year old petition rate from a non-market economy proceeding may not seem to be an appropriate proxy for a market economy dumping margin. In the context of the *Final Results*, however, the assigned rate is a reasonable, if not correct, choice. As already noted, Plaintiff received a cooperative 48.90 percent rate in the *Preliminary Results*. Afterwards, Plaintiff disclosed that it failed to report subject merchandise, declined to participate in a scheduled cost verification, and removed all of its proprietary information from the administrative record. Plaintiff's conduct led Commerce to infer that Plaintiff's actual dumping rate was higher than 48.90 percent. Exactly how much higher is not ascertainable because Plaintiff removed its sales and cost data from the record. Ideally, the proxy rate selected for Plaintiff should be a "reasonably accurate estimate of the respondent's actual rate," (something higher than 48.90 percent), "with some built-in increase intended as a deterrent to non-compliance." *de Cecco*, 216 F.3d at 1032. When viewed in this light, the 75.04 percent rate seems not only reasonable, but a logical and appropriate choice.

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[3] Plaintiff cites *NSK Ltd. v. United States*, 27 CIT 56, 103, 245 F. Supp. 2d 1335, 1373 (2003); *Kompass Food Trading Int'l v. United States*, 24 CIT 678, 684 (2000); and *Shanghai Taoen Int'l Trading Co., Ltd. v. United States*, 29 CIT ____ , 360 F. Supp. 2d 1339 (2005).

The only remaining consideration is the reasonableness of Commerce's corroboration of the rate pursuant to 19 U.S.C. § 1677e(c). The statute's corroboration requirement provides that if Commerce relies upon secondary information, Commerce "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). The statute does not prescribe any methodology for corroborating secondary information, but the Statement of Administrative Action explains that "corroborate" means that Commerce should satisfy itself that any secondary information used has "probative value." *See* Uruguay Round Agreements Act Statement of Administrative Action, H.R. REP. NO. 103–316, vol. 1 at 870 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773, 4199. Commerce assesses the probative value of secondary information by examining the reliability and relevance of the information to be used. *See Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom*, 70 Fed. Reg. 54,711, 54,712–13 (Sept. 16, 2005) (final results).

Plaintiff alleges in its opening brief that Commerce's corroboration efforts were not reasonable because the 75.04 percent rate was calculated in 1992 using a non-market economy methodology, and is therefore outdated, unreliable, aberrational, and irrelevant. *See* Pl.'s Mot. J. Agency R. at 17–28. These arguments are unpersuasive, though, because Plaintiff fails to acknowledge the cooperative 49.80 percent margin that Plaintiff received in the *Preliminary Results*. *See Id.* Indeed, it is not until its reply brief that Plaintiff begins to address the meaning and import of this central fact from the administrative record. See Pl.'s Reply Br. at 5–6, 7, 14.

Contrary to Plaintiff's claims, Commerce's corroboration of the 75.04 percent rate was reasonable. Commerce transferred documentation from the record in the 2002–2003 administrative review which contained both market economy and non-market economy data specific to Plaintiff. *See Total Adverse Facts Available and Corroboration Memorandum for Company Rate for Administrative Review of Certain Cut-to-Length Carbon Steel Plate from Romania*, at 6, A–485–803, ADR: 08/01/2003—07/31/2004 (Feb. 6, 2006) ("*Corroboration Memo*") (Pub. R. 143).[4] In comparing the 75.04 percent rate with Plaintiff's data from the previous administrative review, Commerce found the rate conservative because there were sales exceeding 75.04 percent rate, and there were sales below that rate but within a ten percent range. *Id.* at 7. Commerce reasonably concluded that these rates were "sufficiently approximate to the 75.04 percent, to establish the reliability of the 75.04 percent rate to be used as the adverse facts available rate." *Id.*[5] *See Ta Chen Stainless Steel Pipe,*

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[4] The public version of the administrative record is cited as "Pub. R."

[5] Commerce went further and provided a detailed analysis of its corroboration of the sec-

Inc., v. United States, 298 F.3d 1330, 1339–40 (Fed. Cir. 2002) ("Commerce acts within its discretion so long as the rate chosen has a relationship to the actual sales information available.")

Relying on *Shandong Huarong General Group Corp. v. United States*, 29 CIT ___ , Slip. Op. 05–129 (Sept. 27,, 2005) and *Am. Silicon Techs. v. United States*, 26 CIT 1216, 240 F. Supp. 2d 1306 (2002), Plaintiff argues that Commerce's use of transaction-specific margins in corroborating the 75.04 percent rate was unreasonable. *See* Pl.'s Mot. J. Agency R. at 23–28. Those decisions, though, are factually dissimilar from this case. In *Am. Silicon* the highest transaction-specific margin relied on by Commerce in selecting an adverse facts available rate was 25 percent lower than the rate selected. Likewise, in *Shandong Huarong* not one of the transaction-specific margins relied on by Commerce was as high as the adverse facts available rate selected. Here, on the other hand, Commerce relied on sales margins that exceeded 75.04 percent as well as sales with a calculated margin within a ten percent range of the AFA rate. *Corroboration Memo* at 7.

To the extent the corroboration provision is designed to provide respondents with an incentive to cooperate while avoiding the imposition of punitive, aberrational, or uncorroborated margins, *see de Cecco*, 216 F.3d at 1032, Commerce's corroboration analysis of the 75.04 percent rate satisfied that framework here. In sum, Plaintiff's total adverse facts available rate of 75.04 percent is supported by substantial evidence and is in accordance with law.

B. Liquidation Instruction Policy

Plaintiff also presents a facial challenge to Commerce's policy of issuing liquidation instructions to United States Customs and Border Protection ("Customs") within 15 days of publication of the final results of an administrative review in the Federal Register. See http://ia.ita.doc.gov/download/liquidation-announcement.html (Aug. 9, 2002).

The Court of International Trade's recent decision in *SKF USA Inc. v. United States*, 31 CIT ___ , Slip Op. 07–43 (Mar. 23, 2007) ("*SKF*") requires a brief discussion of jurisdiction before turning to the merits. In *SKF* the court held that 28 U.S.C. § 1581(i) (2000), and not 28 U.S.C. § 1581(c) (2000), is the correct jurisdictional basis for a claim like Plaintiff's because the agency action—issuing liquidation instructions—is technically not part of the final results of the administrative review and therefore not covered by 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2000). *SKF* at 6–8. In this case though, Plaintiff challenged Commerce's liquidation in-

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ondary information concerning export price and normal value. *See* Corroboration Memo at 7–8.

struction policy during the administrative review, and Commerce squarely addressed Plaintiff's claim in the *Decision Memorandum*. One could argue that the matter was therefore included within the *Final Results* of the administrative review and covered by 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c) (2000). *See, e.g., Am. Signature, Inc. v. United States*, 31 CIT ___, 477 F. Supp. 2d 1281 (2007) (holding that section 1581(c) is proper jurisdictional basis to review issue that Commerce addressed in administrative proceeding). The parties do not dispute that section 1581(c) is a proper jurisdictional basis.

However vexing this jurisdictional question may be, it is largely academic in this case because the Court of International Trade ultimately has jurisdiction to hear the claim, whether under section 1581(c) or 1581(i). And although these jurisdictional provisions have different standards of review,[6] Plaintiff's claim is reviewed identically under each; it involves a question of law requiring statutory interpretation and the possible application of *Chevron*, 467 U.S. at 842–45.

Defendant argues somewhat half-heartedly that the matter is nonjusticiable, making general assertions that Plaintiff has "not been injured and no remedy is available," and that Plaintiff's claims are merely "speculative." Def.'s Resp. Mot. J. Agency R. at 21–22. The court disagrees. Plaintiff's facial challenge to the lawfulness of the liquidation instruction policy is appropriate for judicial review. *See SKF* at 9–12.

On the merits, Plaintiff contends that Commerce may not issue liquidation instructions within the combined 60-day period established by section 1516a(a)(2)(A) for commencing an action in the Court of International Trade (30 days to file a summons, and 30 days thereafter to file a complaint). *See* Pl.'s Mot. J. Agency R. at 33–35. Plaintiff argues that if Commerce does, then entries subject to the administrative review could be liquidated before an interested party perfected its cause of action and obtained an injunction against liquidation. *Id.* This would moot one's claim challenging assessed duties for subject entries. *See Mukand Int'l Ltd. v. United States*, 30 CIT ___, ___, 452 F. Supp. 2d 1329, 1333–34 (2006) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983); *Ugine & Alz Belgium v. United States*, 452 F.3d 1289, 1291–92 (Fed. Cir. 2006)).

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[6] For actions governed by section 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii), the court reviews Commerce's determinations under the "substantial evidence" and "in accordance with law" standard. 19 U.S.C. § 1516a(b)(1)(B)(i). For actions governed by section 1581(i), the court reviews Commerce's actions under the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard. 5 U.S.C. § 706(2)(A) (2000); 28 U.S.C. § 2640(e) (2000).

To support its claim, Plaintiff cites *Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT ___, 353 F. Supp. 2d 1294 (2004), which states:

> On its face, then, § 1516a(2)(A) allows a plaintiff to *wait* thirty days before filing its summons, and to *wait* an additional thirty days before filing its complaint. The fact that a party *could* file both its summons and complaint within fifteen days is immaterial. Because Commerce's fifteen-day liquidation policy directly contravenes the time frame established by § 1516a(2)(A) for filing a summons and a complaint, the Court finds that Commerce's new policy is not in accordance with law.

Tianjin, 28 CIT at ___, 353 F. Supp. 2d at 1309 (emphasis in original).

Tianjin, in effect, reads an implied stay of liquidation into section 1516a. In *Mukand* this judge read the applicable statutes differently and concluded that the statutory framework "does not administratively suspend or automatically stay liquidation following the final results of an administrative review while an interested party decides whether or not to commence an action or move for an injunction." *Mukand*, 30 CIT at ___, 452 F. Supp. 2d at 1334. As *Mukand* explained:

> [The statute] provides that the Court of International Trade "*may* enjoin the liquidation of some or all entries . . . covered by a determination of [Commerce] . . . , *upon a request by an interested party* for such relief and a proper showing that the requested relief should be granted under the circumstances." 19 U.S.C. § 1516a(c)(2) (emphasis added). The statute further provides that "[u]nless such liquidation is enjoined by the court," entries "*shall* be liquidated in accordance with the determination of [Commerce] . . . ," 19 U.S.C. § 1516a(c)(1) (emphasis added), which Customs carries out "promptly and, to the greatest extent practicable, within 90 days" after Commerce issues instructions. 19 U.S.C. § 1675(a)(3)(B). Congress therefore placed the responsibility on interested parties to act affirmatively and request an injunction.

Id. (emphasis in original).

Moreover, the antidumping statute expressly authorizes Commerce to issue liquidation instructions following an administrative review, but does not prescribe a schedule or methodology for doing so. *See* 19 U.S.C. § 1675(a)(3)(B). There is therefore a gap in the statute that Congress left for Commerce to fill. *See, e.g., Viraj Group v. United States*, 476 F.3d 1349, 1357–58 (Fed. Cir. 2007) (applying *Chevron*, 467 U.S. at 844). Commerce filled the gap by issuing a policy statement on August 9, 2002, notifying interested parties that Commerce intends to issue liquidation instructions within 15 days of

publication of the final results of review in the Federal Register. For five years Commerce has consistently notified interested parties of the policy in the final results of administrative reviews.

Commerce has a number of factors to consider when issuing liquidation instructions. Instructions need to be transmitted to Customs in a timely manner because entries remaining unliquidated on the six-month anniversary of the Federal Register publication date are deemed liquidated at the rate asserted at the time of entry. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272–73 (Fed. Cir. 2002). Also, because Customs "has a merely ministerial role in liquidating antidumping duties," *Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994), the onus is on Commerce to transmit correct liquidation instructions to Customs.

For now, the court cannot say that Commerce's gap-filling is unreasonable, and accordingly, Plaintiff's facial challenge to the 15-day liquidation instruction policy must fail. That said, the policy is not without its flaws. As Commerce and Customs continue to improve the efficiency and automation of the liquidation process, there exists the possibility Commerce and Customs may "act so quickly," *Int'l Trading*, 281 F.3d at 1273, as to practically foreclose interested parties from obtaining judicial review of subject entries pursuant to 19 U.S.C. § 1516a, and such a foreclosure would render Commerce's policy unreasonable. Just how quickly is too quickly will unfortunately have to be sorted out on a case by case basis. In *Mukand*, for example, the entries were liquidated 75 days after publication of the final results in the Federal Register, and the court ruled as a matter of law that Commerce (and Customs) had not acted too quickly. *Mukand*, 30 CIT at ___ , 452 F. Supp. 2d at 1334.

Admittedly, the policy and its potential threat of rapid liquidation leaves interested parties contemplating suit in the Court of International Trade in a difficult situation. The lack of certainty of when liquidation will occur,[7] coupled with the rule that liquidation moots a challenge to the assessed rates of the subject entries,[8] practically, if not necessarily, requires interested parties to file a protective summons, complaint, and motion for a preliminary injunction against liquidation almost immediately after publication of the final results

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[7] Commerce does not notify interested parties when liquidation instructions are actually issued. They can be issued as soon as the Federal Register notice is published or as late as 15 days thereafter, or sometime beyond the 15-day period if Commerce ignores its policy, *see, e.g.*, *Mukand*, 30 CIT at ____ , 452 F. Supp. 2d at 1332–33. The instructions are communicated electronically to Customs and are not publicly available. Once Customs receives the instructions, Customs is supposed to liquidate "promptly and, to the greatest extent practicable, within 90 days." 19 U.S.C. § 1675(a)(3)(B). The only formal notice interested parties receive regarding liquidation of their entries is the general blurb in the final results that Commerce intends to issue liquidation instructions within 15 days, and the subsequent bulletin notice from Customs once liquidation occurs, 19 C.F.R. § 159.9(a) (2006).

[8] *See Zenith Radio Corp.*, 710 F.2d at 810; *Ugine & Alz Belgium*, 452 F.3d at 1291–92.

in the Federal Register, and also obtain a temporary restraining order ("TRO") against liquidation pending the Court of International Trade's issuance of a preliminary injunction.

Aware of this predicament, the court in *Mukand* proposed a minor augmentation to Commerce's liquidation policy that might prevent judicial review of antidumping administrative reviews from devolving unnecessarily into a TRO-based practice:

> Commerce can issue instructions that direct Customs to liquidate no earlier than (1) the date that is 90 days after the *Federal Register* publication date, and no later than (2) the six-month anniversary of that publication date unless liquidation is enjoined pursuant to court order.

Mukand, 452 F. Supp. 2d at 1334–35. This though remains unsolicited advice. Commerce has the gap-filling discretion (bounded by the requirement of reasonableness), and it is ultimately for Commerce to decide whether a review and possible revision of its liquidation instruction policy would be worthwhile.

IV. Conclusion

The court denies Plaintiff's motion for judgment on the agency record and will enter judgment in favor of Defendant sustaining Commerce's *Final Results*.

MITTAL STEEL GALATI S.A., FORMERLY KNOWN AS ISPAT SIDEX S.A., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 06–00050

JUDGMENT

This case having been submitted for decision, and the court, after due deliberation, having rendered an opinion; now in conformity with this opinion, it is hereby

ORDERED that Plaintiff's motion for judgment on the agency record is denied; and it is further

ORDERED that judgment is entered for Defendant.

SLIP OP. 07–74

HUSTEEL COMPANY, LIMITED and SEAH STEEL CORPORATION, LIMITED, Plaintiffs, v. UNITED STATES, Defendant, and IPSCO TUBULARS, INCORPORATED, LONE STAR STEEL COMPANY, INCORPORATED, and MAVERICK TUBE CORPORATION, Defendants-Intervenor.

Before: Gregory W. Carman, Judge
Court No. 06–00075

[Plaintiffs' Motion for Oral Argument is DENIED; Plaintiffs' Motion for Judgment upon the Agency Record is GRANTED; Commerce's final determination in the administrative review of Oil Country Tubular Goods from Korea is REMANDED.]

Troutman Sanders LLP (*Donald B. Cameron*, *Julie C. Mendoza*, *R. Will Planert*, *Jeffery S. Grimson*, and *Brady W. Mills*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David F. D'Alessandris*), for Defendant.

Schagrin Associates (*Roger B. Schagrin*, *Brian E. McGill*, and *Michael J. Brown*), for Defendants-Intervenor.

OPINION & ORDER

CARMAN, JUDGE: The matter before this Court is Plaintiffs' Husteel Co., Ltd. ("Husteel") and SeAH Steel Corp., Ltd. ("SeAH") Rule 56.2 Motion for Judgment upon the Agency Record ("Motion for Judgment upon the Agency Record"). Plaintiffs challenge the Department of Commerce's ("Commerce") decision to exclude certain of Plaintiffs' sales price data from the calculation of normal value during the ninth administrative review of the antidumping order on Oil Country Tubular Goods ("OCTG") from Korea.[1] Because Commerce's decision to exclude the data is not supported by substantial evidence

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[1] During an administrative review, Commerce is tasked with calculating a respondent's dumping margin for merchandise subject to an antidumping order ("subject merchandise"). A respondent's dumping margin is the "amount by which the normal value exceeds the export price" for the subject merchandise. 19 U.S.C. § 1673 (2000).

The normal value of subject merchandise is the price at which the respondent first sells the merchandise for consumption in the respondent's home market. Where home-market price is not available, Commerce will use the price at which the respondent first sells the merchandise for consumption in a third country, if: (a) the price is "representative;" (b) the sales are of sufficient aggregate quantity or value; and (c) Commerce does not determine that a "particular market situation" in the third country prevents a proper comparison with the export price. 19 U.S.C. § 1677b(a)(1)(B)(ii) (2000). If there are multiple third-country markets with eligible prices, Commerce selects as the comparison market the country with the highest volume of sales of subject merchandise that is most similar to that sold in the United States. 19 C.F.R. § 351.404(e) (2006). If neither home-market nor third-country price is available, Commerce will calculate a constructed value for normal value, based on the *cost* of producing the merchandise. 19 U.S.C. § 1677b(a)(4).

The export price of subject merchandise is "the price at which the subject merchandise is first sold . . . by the producer or exporter of the subject merchandise . . . to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States." 19 U.S.C. § 1677a(a) (2000).

on the record, this Court grants Plaintiffs' Motion for Judgment upon the Agency Record and remands to Commerce the final results in *Oil Country Tubular Goods, Other Than Drill Pipe, from Korea*, 71 Fed. Reg. 13,091 (Dep't Commerce Mar. 14, 2006) (final results of antidumping duty administrative review) ("*Final Results*") for action consistent with this opinion.

PROCEDURAL HISTORY

Plaintiffs participated as foreign respondents in the underlying administrative action giving rise to this case, the ninth administrative review of the antidumping order on Oil Country Tubular Goods ("OCTG") from Korea. In the Final Results of the administrative review, and over Plaintiffs' objections, Commerce excluded from the respective calculations of normal value Plaintiffs' sales of OCTG to Korean trading companies that subsequently exported the merchandise to the People's Republic of China ("China"). Plaintiffs timely sought judicial review of the issue in this Court.

BACKGROUND

A. *Plaintiffs' Sales During the Period of Review*

Plaintiffs are Korean manufacturers of OCTG that is subject to an antidumping duty order. *See Final Results*, 71 Fed. Reg. at 13,091. Each Plaintiff reported to Commerce its sales of OCTG during the period of review, August 1, 2003 through July 31, 2004, in order for Commerce to use those sales to calculate each Plaintiff's normal value. Husteel reported that it did not sell OCTG for consumption in the Korean home market during the period of review. (Resp. of Husteel Co., Ltd. to Section A of the Dep't of Commerce's Antidumping Duty Questionnaire 1 (Jan. 5, 2005) ("Husteel's Section A Resp."), Pub. R. Doc. 25.) SeAH reported that it sold OCTG for consumption in the Korean home market, but that those sales could not be used to calculate SeAH's normal value because they accounted for less than five percent of the volume of the company's sales to the United States. (Resp. of SeAH Steel Corp., Ltd. to Section A of the Dep't of Commerce's Antidumping Duty Questionnaire A–3 (Jan. 5, 2005) ("SeAH's Section A Resp."), Pub. R. Doc. 26.) Because neither Plaintiff reported viable home-market sales on which to base its normal value,[2] Plaintiffs also reported their sales to third countries. Husteel reported that its only third-country market was China. (Husteel's Section A Resp. 3.) SeAH reported third-country sales to Canada, China, and Myanmar, though the reported sales to

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[2] In order for the home market to be considered viable, the quantity (or value) or the merchandise sold for consumption in the home market must account for five percent or more of the aggregate quantity (or value) of the subject merchandise sold to the United States. 19 U.S.C. § 1677b(a)(1)(C)(ii) (2000).

Myanmar fell below the five percent threshold for viability.[3] (SeAH's Section A Resp. A–3.) Each Plaintiff reported that China was its largest third-country market and that the quantity of OCTG it sold exceeded the five percent threshold for China to be considered a viable third-country market for purposes of calculating normal value. (Husteel's Section A Resp. 3; SeAH's Section A Resp. A–3.)

Plaintiffs explained to Commerce that the sales they reported as "Chinese" were actually made to unaffiliated trading companies operating in Korea that resold the merchandise to buyers in China. (Husteel's Section A Resp. 11; SeAH's Section A Resp. A–14.) Plaintiffs reported the sales to Korean trading companies as sales to China, rather than home-market sales, because Plaintiffs knew at the time of sale that the merchandise would be resold to China.[4] However, Plaintiffs reported to Commerce the invoice price between Plaintiffs and the respective Korean trading companies, *not* the invoice price between the Korean trading companies and their Chinese customers. (Br. in Supp. of Pls.' Husteel Co. Ltd. & SeAH Steel Corp. R. 56.2 Mot. for J. upon the Agency R. ("Pls.' Br.") 3–4; *see also* Def.'s Mem. in Opp'n to Pls.' Mot. for J. upon the Agency R. ("Def.'s Mem.") 13 (confirming that "[w]here the producer sells through a reseller with knowledge of the destination, it is the price between the producer and the reseller . . . that is . . . used in the dumping analysis").)

During Commerce's verification of Plaintiffs' data, the agency found no discrepancies between the price data Plaintiffs reported to Commerce for their sales to the Korean trading companies and the documentation relating to those sales. (*See* Verification of Costs & Sales for Husteel Co., Ltd. in the Admin. Rev. of Oil Country Tubular Goods, Other than Drill Pipe, from Korea 13 (Dec. 28, 2005), Pub. R. Doc 95; Verification of Costs and Sales for SeAH Co., Ltd. in the Admin. Rev. of Oil Country Tubular Goods, Other than Drill Pipe, from Korea 8 (Dec. 28, 2005), Pub. R. Doc. 96.)

Plaintiffs also explained to Commerce the sales process they employed with the Korean trading companies. First, a Korean trading company requested a price quote for a specific quantity, specification, and delivery date for OCTG. (Husteel Confid. Verification Exh.

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[3] As with home-market sales, the quantity (or value) or the merchandise sold to the third country must account for five percent or more of the aggregate quantity (or value) of the subject merchandise sold to the United States in order for a third-country market to be considered viable. 19 U.S.C. § 1677b(a)(1)(B)(ii)(II).

[4] Commerce requires that respondents classify sales as to a third country if, when the seller negotiates the sale, the seller knows, or should have known, that the merchandise will be exported to a third country. *See LG Semicon Co., Ltd. v. United States*, 23 CIT 1074, 1075 (1999) (holding that a respondent must report a sale as to the United States rather than as a home-market sale where the respondent knew at the time of sale to a buyer located in the home market that the subject merchandise would be resold to the United States).

21 at 1, 3–4A, Confid. R. Doc 60; SeAH Confid. Verification Exh. 7 at A–B, Confid. R. Doc. 59); *see also* Pls.' Br. 4. Plaintiffs then made an offer to the Korean trading company. If Plaintiffs' offer was accepted by the Korean trading companies, Plaintiffs and the Korean trading companies entered a contract. Plaintiffs delivered the OCTG to the trading company at the Korean port of departure, whereupon the trading company paid for the merchandise. (Husteel Confid. Verification Exh. 21 at 4–4A; SeAH Confid. Verification Exh. 7 at B). Plaintiffs represented to Commerce that they were not involved in negotiating the price at which the trading companies sold the OCTG to the Chinese buyers, and any claims made by the Chinese customers were made to the Korean trading companies, not to Plaintiffs. (Husteel Confid. Verification Exh. 21 at 3–4A; SeAH Confid. Verification Exh. 7 at B).

B. *The Administrative Review*

During the underlying administrative review, Plaintiffs argued that Commerce should use their "Chinese"[5] sales to calculate normal value because the sales satisfy the three statutory requirements set out in 19 U.S.C. § 1677b(a)(1)(B)(ii): (1) the sales are of sufficient quantity; (2) the sales are not subject to a "particular market situation;" and (3) the price for those sales is "representative," because Plaintiffs sold the OCTG in arm's-length, market-economy transactions to unrelated Korean trading companies. (*See, e.g.*, Letter from Kaye Scholer LLP to the Hon. Carlos Gutierrez, Sec'y of Commerce (Jan. 17, 2006), Pub. R. Doc. 100.)

Commerce disagreed with Plaintiffs' assertion that the price of their sales is "representative." Commerce noted that China is classified as a nonmarket economy and that "sales made in [nonmarket economies] are not representative because the prices for such sales are not determined on the basis of market principles." (Issues & Decision Mem. for the Final Results of the Admin. Rev. of the Antidumping Duty Order on OCTG from Korea 8 (Mar. 7, 2006) ("Issues & Decision Mem.").) Commerce explained that

> [nonmarket economy] prices, as a general rule, are not meaningful measures of value because they do not sufficiently reflect market-determined demand conditions or the relative scarcity of the resources used in production. Specifically, the demand and supply elements that individually and collectively make a market-based price system work and, as a consequence, make market-based prices and costs meaningful measures of value,

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[5] As mentioned previously, the sales in question were not actually made to buyers in China. Plaintiffs sold OCTG to unaffiliated Korean trading companies, and the sales price data Plaintiffs reported represented the invoice price between Plaintiffs and the Korean trading companies, which this Court refers to as the "Chinese" sales price.

> are absent in [nonmarket economies.] Moreover, foreign suppliers to [nonmarket economies] are often competing with domestically set prices. Therefore, sales into [a nonmarket economy] may very well not be at prices that reflect the fair value of the merchandise. Therefore, sales prices into [a nonmarket economy] cannot be considered to be "representative," as required by the statute.

(*Id.* (internal citations omitted).)

On that basis, Commerce excluded China from serving as the third-country comparison market to establish Plaintiffs' normal values. Instead, Commerce used Canada as the third-country comparison market on which to base SeAH's normal value. Because Husteel's only reported third-country sales were to China, Commerce calculated the company's normal value on the basis of constructed value.

PARTIES' CONTENTIONS

A. *Plaintiffs' Arguments*

Plaintiffs argue that Commerce should have used Plaintiffs' Chinese sales price data to calculate normal value because China was the third-country market into which Plaintiffs sold the largest volume of subject merchandise that was most similar to that sold in the United States. (Pls.' Br. 13.) Husteel contends that China should be selected because the company "had no other viable third country market." (*Id.* at 14.) SeAH argues that China should be selected because the volume of merchandise sold to China was significantly greater than the volume sold to the other viable third-country market, Canada, and "more importantly, the OCTG sold by SeAH for export to both China and the United States was plain-end pipe, while the OCTG sold to Canada was threaded and coupled and thus not as similar as the exports to China." (*Id.*)

Plaintiffs assert that Commerce's decision to exclude Plaintiffs' Chinese sales is not supported by substantial evidence on the record and is not otherwise in accordance with law because "there is no basis in the law or on the facts of this case [to support] Commerce's determination" that Plaintiffs' sales are not "representative." (Pls.' Br. 15.) First, Plaintiffs point out that the sales in question occurred "between two unaffiliated companies in a market economy country," (*id.* at 17) and complain that "Commerce has not, and could not, point [sic] to any record evidence to support the notion that [Plaintiffs'] OCTG sales are anything but arm's-length prices to a market economy purchaser" (*id.* at 18). Plaintiffs argue that "Commerce does not explain how the prices between two unaffiliated companies in a market economy country are influenced by the fact that the goods are ultimately delivered to China." (*Id.* at 17.)

Second, Plaintiffs argue that in two previous antidumping administrative reviews (not involving Plaintiffs) Commerce "used China as the third-country market for the purpose of determining normal value." (*Id.* at 26.) Moreover, Plaintiffs stress that Commerce regularly uses prices from sales between a seller located in a market economy and a buyer located in a nonmarket economy to calculate normal value:

> Pursuant to . . . Commerce's regulations [19 C.F.R. § 351.408 (c)(1)], there is a *preference* for calculating normal value in [a nonmarket economy] case using prices paid by the [nonmarket economy] producer in a market economy currency to market economy suppliers for the [nonmarket economy producer's factors of production].[6] Thus, contrary to the *Final Results*, Commerce does *not* reject prices from market economy suppliers simply because the purchaser is located in [a nonmarket economy].

(*Id.* at 20 (footnote added).)

B. *Defendant's and Defendants-Intervenor's Arguments*[7]

Defendant (the "Government") contends that Commerce's decision to exclude Plaintiffs' Chinese sales price data is supported by substantial evidence and is otherwise in accordance with law. The Government points out that the term "representative" is not defined in the statute or regulations and argues that Commerce therefore has the latitude to interpret the term in a reasonable manner. (Def.'s Mem. 11.) The Government argues that "sales between actors in market economy countries cannot be compared to sales where one side of the transaction is a nonmarket entity" (*id.*), and it is therefore reasonable for Commerce to find Plaintiffs' sales to be unrepresentative. Defendants-Intervenor add that record evidence demonstrates that Plaintiffs sales were not made at market prices. "The differential in prices between SeAH's Chinese sales and their sales to market economies Canada and the United States supports Commerce's finding that the prices of [P]laintiffs' Chinese sales are not representative of prices between a market-economy buyer and a market-

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[6] In nonmarket cases, antidumping cases where the respondent alleged to be dumping is located in a nonmarket economy, Commerce "determin[es] the normal value of subject merchandise on the basis of the value of the factors of production utilized in producing the merchandise" plus an amount for expenses and profit. 19 U.S.C. § 1677b(c)(1) (2000). Factors of production are the resources used to manufacture a product or service, including labor, raw materials, energy and utilities consumed, and capital costs. *Id.* at (c)(3).

[7] Defendants-Intervenor repeat many of the arguments raised by Defendant. (*See generally* Opp'n of Def.-Intervenors to Pls.' Mem. in Supp. of Their R. 56.2 Mot. for J. on the Agency R.) This Court will therefore only refer to Defendant's arguments except in instances where the arguments of the two parties differ.

economy seller." (Opp'n of Def.-Intervenors to Pls.' Mem. in Supp. of Their R. 56.2 Mot. for J. on the Agency R. ("Defs.-Int.'s Mem.") 17.)

In response to Plaintiffs' argument that the relevant sales in this case were not made to a nonmarket entity, but, rather, to trading companies located in Korea, the Government states that "Commerce properly determined that the involved sales were sales in China because [Plaintiffs] had knowledge of the destination of the merchandise." (Def.'s Mem. 13.) The Government also distinguishes the two instances cited by Plaintiffs where Commerce accepted Chinese sales data to calculate a respondent's normal value. The first instance "was decided pursuant to the pre-[Uruguay Round Agreements Act] statute, which did not contain the requirement that prices be 'representative';" and no party raised the issue of the appropriateness of using Chinese prices as the basis for normal value in the second instance. (*Id.* at 22.)

Further, the Government contends that Commerce does *not* regularly accept price data for sales between market-economy suppliers and nonmarket-economy buyers to calculate normal value. The Government explains that Commerce accepts this data only to value factors of production in nonmarket cases, but not to value the subject merchandise itself, which is what Plaintiffs asked Commerce to do in the instant case. Defendants-Intervenor add that the standard of reliability for the price data differs in the two cases. (Defs.-Int.'s Mem. 2.) In the instant case, the sale price of subject merchandise must be " 'representative,' " whereas when valuing factors of production, the price data need only be the " 'best information available.' " (*Id.*) Defendants-Intervenor conclude that, "[t]here is, accordingly, good reason for Commerce's different treatment of sales" in the two types of cases. (*Id.* at 9.)

Defendants-Intervenor lastly argue that even if this Court determines that the Chinese sales prices are "representative," China would not be the proper third-country comparison market for SeAH. Defendants-Intervenor contend that Commerce should continue to use price data from SeAH's Canadian sales to calculate SeAH's normal value because the merchandise the company sold to Canada was more similar to the U.S. merchandise than that sold to China. (*Id.* at 18–19.)

JURISDICTION

This Court has jurisdiction to review Commerce's final determination in an administrative review of an antidumping duty order pursuant to 28 U.S.C. § 1581(c) (2000).

STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, this Court will "hold unlawful any determination, finding, or conclusion found . . . to be unsup-

ported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2000). Commerce's factual determinations must be supported by substantial evidence on the record, *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 (Fed. Cir. 1984); its interpretations of the antidumping statute must be in accordance with law, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *Timken Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004).

DISCUSSION

A. *Commerce's Interpretation of "Representative" is in Accordance with Law.*

This Court is first charged with determining whether Commerce's interpretation of the statutory term at issue is in accordance with law. Commerce's interpretation of the antidumping statute is reviewed pursuant to the two-step process set forth in *Chevron*. Under the first step, the Court determines "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43; *accord Timken*, 354 F.3d at 1341. If, however, "the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843; *accord Timken*, 354 F.3d at 1342. To determine whether Commerce's statutory interpretation is permissible, the court considers several factors, including "the express terms of the provisions at issue, the objectives of those provisions and of the antidumping scheme as a whole." *Mitsubishi Heavy Indus., Ltd. v. United States*, 22 CIT 541, 545, 15 F. Supp. 2d 807 (1998).

Here, the statutory term at issue is "representative." Commerce may use third-country sales price data to calculate normal value provided–among other criteria–that "such price is representative." 19 U.S.C. § 1677b(a)(1)(B)(ii)(I). The court in *Alloy Piping Products, Inc. v. United States*, 26 CIT 330, 339, 201 F. Supp. 2d 1267 (2002), found that "[n]either the statute, legislative history, nor regulations define 'representative'." The question for this Court, then, is whether Commerce's interpretation is a permissible construction of the statute.

Commerce defined the term "representative" to mean "determined on the basis of market principles."[8] (Issues & Decision Mem. 8.)

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[8] Commerce has not defined "representative" through formal notice-and-comment rulemaking. However, in the underlying administrative review to this action, the agency found "that the sales made in [nonmarket economies] are not representative because the prices for such sales are not determined on the basis of market principles." (Issues & Deci-

Commerce's interpretation appears consistent with the purpose of the of the antidumping statute, which is to calculate dumping margins as accurately as possible. *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). To this end, Commerce ensures that normal value represents the fair value of subject merchandise by requiring that the underlying price of the subject merchandise is "determined on the basis of market principles." (Issues & Decision Mem. 8.) As such, this Court holds that Commerce's interpretation of "representative" is permissible.

B. *Commerce's Determination that Plaintiffs' Chinese Sales Were Not Representative is Not Supported by Substantial Evidence on the Record.*

Commerce's factual determinations must be supported by substantial evidence on the record. 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *accord Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). An agency's determination is not supported by substantial evidence where the agency fails to adequately explain the basis on which the agency made its decision. *Viraj Forgings, Ltd. v. United States*, 28 CIT ___, 350 F. Supp. 2d 1316, 1320 (2004) (agency action unlawful where the agency "failed to provide an adequate basis for its conclusions"); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action arbitrary and capricious[9] where the agency has "entirely failed to consider an important aspect of the problem"); *Elec. Consumers Res. Council v. FERC*, 747 F.2d 1511, 1513 (D.C. Cir. 1984) (agency decisions must be "reached by 'reasoned decisionmaking,' including an examination of the relevant data and a reasoned explanation supported by a stated connection between the facts found and the choices made").

Here, Commerce did not adequately explain its basis for finding that the prices of Plaintiffs' sales to Korean trading companies are not "representative." Commerce's explanation began with the premise that "[nonmarket economy] prices, as a general rule, are not meaningful measures of value because they do not sufficiently reflect

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sion Mem. 8.) Nevertheless, Commerce's interpretation of this statutory term warrants *Chevron* deference. *See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001) ("Even where Commerce has not engaged in notice-and-comment rulemaking, its statutory interpretations articulated in the course of antidumping proceedings draw *Chevron* deference.").

[9] "[S]ubstantial evidence and arbitrary and capricious 'connote[ ] the same substantive standard of review.' " *Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1156, 178 F. Supp. 2d 1305 (2001) (*quoting Bangor Hydro-Elec. Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996) (brackets in original).

market-determined demand conditions or the relative scarcity of the resources used in production." (Issues & Decision Mem. 8.) Commerce then reasoned that "foreign suppliers to [nonmarket economies] . . . often compet[e] with domestically set prices. Therefore, sales into [a nonmarket economy] may very well not be at prices that reflect the fair value of the merchandise." (*Id.*) Commerce excluded Plaintiffs' price data, declaring that "sales prices into [a nonmarket economy] cannot be considered to be 'representative,' as required by the statute." (*Id.*) However, Commerce's determination is missing an adequate explanation of (1) why Plaintiffs' sales should be treated as sales into nonmarket economy; and (2) why Commerce treated Plaintiffs' price data differently than it treats price data for sales from market-economy suppliers to nonmarket-economy buyers in analogous antidumping cases.

1. Commerce did not adequately explain why it found that Plaintiffs' sales should be treated as sales "into a nonmarket economy."

Commerce did not adequately explain why it found that Plaintiffs' sales to unrelated Korean trading companies should be treated as sales into a nonmarket economy. Plaintiffs sold OCTG to trading companies organized under the laws of and operating in Korea. Korea is a market economy. Furthermore, Plaintiffs explained to Commerce that the price data they submitted represents the invoice price between Plaintiffs and the Korean trading companies and Commerce verified the accuracy of these data. It was the Korean trading companies that sold the OCTG to buyers in China. However, the trading companies are unrelated to Plaintiffs, and Commerce did not present a justification to attribute the unrelated trading companies' sales to Plaintiffs.

Commerce made much of the fact that Plaintiffs' sales are properly classified as sales to China. This Court does not take issue with Commerce's requirement that respondents classify sales as to a third country if, at the point the seller negotiates the sale, the seller knows, or should have known, that the merchandise will be exported to that third country. *See LG Semicon Co., Ltd. v. United States*, 23 CIT 1074, 1075 (1999). At the time that Plaintiffs negotiated their sales with the Korean trading companies, they knew that the Korean trading companies would resell the OCTG to customers in China and, therefore, classified their sales to the Korean trading companies as sales to China. Yet, there is a difference between the *classification* of Plaintiffs' transactions and the underlying *factual circumstances* of them.[10]

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[10] Absent factual evidence of Plaintiffs' sales, Commerce might have been justified to fall back on the classification of the sales. However, the substantial evidence standard requires that Commerce look at the whole record, including evidence that reasonably detracts from

Plaintiffs are organized under and operate in Korea, a market economy, and are unrelated to their Korean trading company customers. It is trivial to say that, absent evidence to the contrary, sales negotiated between unrelated parties operating in a market economy are assumed to be at market prices. The only factual distinction from a typical transaction between two unrelated market-economy participants that Commerce pointed to was Plaintiffs' knowledge that the merchandise would be resold to China (and, hence, Plaintiffs' classification of the sales as Chinese). However, Commerce did not explain the significance of Plaintiffs' knowledge that the OCTG they sold to the Korean trading companies was destined for China. Commerce does not offer any explanation of why, or evidence that, the price between Plaintiffs and the trading companies was affected by the country into which the subject merchandise would subsequently be sold. Further, Commerce does not explore why the factual circumstances of Plaintiffs' transactions should be treated any differently than if the Korean trading companies had resold the subject merchandise into a market economy or into a nonmarket economy without Plaintiffs' knowledge.[11] Without a logical or factual link between Plaintiffs' knowledge that the merchandise was to be resold to China and the distorted prices within China, Commerce cannot justify treating Plaintiffs' sales as sales into a nonmarket economy. Because Commerce did not provide a "reasoned explanation supported by a stated connection between the facts found and the choices made," *Elec. Consumers*, 747 F.2d at 1513, this Court finds that Commerce's decision to exclude Plaintiffs' price data is not supported by substantial evidence on the record.

2. Commerce's treatment of Plaintiffs' price data is inconsistent with its usual treatment of sales from market-economy sellers to nonmarket-economy buyers.

Even if Commerce had adequately explained why it treated Plaintiffs' sales to Korean trading companies as sales into a nonmarket economy, Commerce's explanation is unsatisfactory in another re-

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its conclusion, when making a determination. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."). Therefore, because Plaintiffs presented Commerce with persuasive evidence that their sales were made on the basis of market factors, Commerce should have addressed this evidence in its explanation.

[11] There is nothing in the record to support Defendants-Intervenor's contention that Plaintiffs' sales price to the trading companies was unduly influenced by the less-than-market-price Defendants-Intervenor allege that the trading companies received from the Chinese buyers. (Defs.-Int.'s Mem. 17.) Further, Commerce made no findings–*theoretical or empirical*–that the transactions were influenced by Plaintiffs' knowledge that the merchandise was destined for China. An agency decision will be reviewed on the grounds invoked by the agency, *see SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and the courts may not "supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43.

spect. Commerce's treatment of Plaintiffs' price data is inconsistent with its usual treatment of sales from market-economy sellers to nonmarket-economy buyers. In nonmarket cases, Commerce regularly calculates normal value using price data from sales between market-economy sellers and nonmarket-economy buyers. *See* 19 C.F.R. § 351.408(c)(1) (2006). Here, however, Commerce excluded Plaintiffs' price data on the ground that Plaintiffs (located in the market economy of Korea) sold the merchandise to buyers located in China (a nonmarket economy).[12] An agency acts impermissibly when it treats similar situations in a manner that is "internally inconsistent," *NSK, Ltd. v. United States*, 390 F.3d 1352, 1357 (Fed. Cir. 2004), and fails to "reasonably explain[ ] the inconsistency," *id.* at 1358.

Consider a transaction between A, a seller of automobile engines operating in a market economy, and B, an automobile manufacturer located in a nonmarket economy. A sells an automobile engine to B, which B uses to manufacture an automobile. If B is investigated for dumping automobiles, Commerce would calculate normal value for B's automobiles in a different manner than in an ordinary antidumping case, like the instant one, where the respondent is located in a market economy. Instead of using the *price* at which B sells its automobiles, Commerce would calculate normal value by adding together the *costs* of the various factors of production of the automobile. *See* 19 U.S.C. § 1677b(c). Typically, Commerce estimates the costs of the factors of production using the prices of the inputs in a market-economy country similar to the nonmarket-economy country in which the respondent operates. For example, Commerce might use the price of a similar automobile engine in India to estimate the cost of the engine B used to manufacture its automobile.

However, where a respondent purchases an input from a market-economy supplier, Commerce prefers to use the actual price the respondent paid for the input rather than an estimated cost of the input. *See* 19 C.F.R. § 351.408(c)(1). The Court of Appeals for the Federal Circuit has held that where a nonmarket respondent buys an input from a market-economy supplier "accuracy, fairness, and predictability are enhanced by using" the price paid for the input, rather than the estimated cost. *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001). Further, in *Shakeproof*, Commerce stated that the sale between the market-economy supplier and the nonmarket-economy respondent resulted in "an actual price determined by market economy forces" that was "both reliable and accurate." *Id.* at 1380 (quotation and citation omitted). Thus, in the example above,

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[12] As discussed above, Plaintiffs' sales were not made to Chinese buyers. However, for purpose of this discussion, this Court will assume that Plaintiffs sold to Chinese buyers to highlight the inconsistency in Commerce's positions.

Commerce would use the price B paid to A for the automobile engine to calculate the normal value of the automobile.

Yet, in the instant case, Commerce did not allow Plaintiffs to use similar price data to calculate the normal value of OCTG. Commerce excluded the price data for sales by Plaintiffs (located in the market economy of Korea) to buyers located in China (a nonmarket economy). Commerce did so on the ground that sales by Plaintiffs to the Chinese buyers "may very well not be at prices that reflect the true value of the merchandise."[13] (Issues & Decision Mem. 8.) This was merely an assumption on the part of Commerce, as the agency made no findings that the actual prices paid to Plaintiffs did not reflect the fair value of the OCTG.

Applying the reasoning Commerce used in the instant case to the hypothetical outlined above, Commerce would allow B to calculate the normal value of an automobile using the price B paid to A for the automobile engine, but would not allow A to use that same price to calculate the normal value of the engine. Commerce's practice to accept the price in the former instance while denying it in the latter is "internally inconsistent." *See NSK*, 390 F.3d at 1357. Either the price of the sale between A and B is "an actual price determined by market economy forces" that is "both reliable and accurate," *Shakeproof*, 268 F.3d at 1380, as Commerce claims in nonmarket cases, or it is a price "that may very well not . . . reflect the fair value of the merchandise," (Issues & Decision Mem. 8), as Commerce claimed in the instant case. It cannot be both.

The Government purports to explain the inconsistency by stating that in nonmarket cases the price data is used to value only "a *single input* used in the calculation of normal value" whereas in the instant case the price would serve as "the *entire basis* for normal value." (Def.'s Mem. 18.) This is a distinction without a difference. If the price between a market-economy supplier and a nonmarket-economy buyer is a reliable price determined on the basis of market principles, it should make no difference whether Commerce is using that price to calculate only part or all of the normal value. Contrariwise, if the price is distorted by virtue of being sold to a buyer located in a nonmarket economy, Commerce would not be able to use it in either instance. (*See id.* at 20 (Commerce must "disregard market-economy input purchases when there is evidence that the prices for such inputs may be distorted.").) Therefore, the Government's distinction does not explain why Commerce accepts these prices to calculate fac-

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[13] Commerce explained that foreign suppliers to nonmarket economies often compete with domestically set prices. (Issues & Decision Mem. 8.) Because the domestic prices within a nonmarket economy are "not meaningful measures of value" Commerce assumed that the sales between market-economy suppliers and nonmarket-economy buyers would be similarly distorted. (*Id.*)

tors of production in nonmarket cases, but not to establish the price of the subject merchandise in the instant case.

The Government's and Defendants-Intervenor's other attempt to distinguish the two situations is similarly unpersuasive. They contended that in the instant case the price must be "representative," whereas in nonmarket cases the price need only be the "best information available" for Commerce to use it. (Def.'s Mem. 18; Defs.-Int.'s Mem. 8–9.) As discussed above, Commerce has found in the nonmarket case context that prices for sales from market-economy sellers to nonmarket-economy buyers are "determined by market economy forces." *Shakeproof*, 268 F.3d at 1380. In the instant case, Commerce defined "representative" to mean "determined on the basis of market principles." (Issues & Decision Mem. 8.) Therefore, there appears to this Court no reason to treat the price data for sales between a market-economy supplier and nonmarket-economy buyer differently in the two situations. Because Commerce did not sufficiently explain its inconsistent treatment of the price data, its finding that the Plaintiffs' price data are unrepresentative "is arbitrary and impermissible."[14] *NSK*, 390 F.3d at 1358. On remand, Commerce must give a persuasive explanation for the agency's inconsistent treatment of these sales price data.

3. This Court cannot at this point determine whether Commerce should select Canada or China as the third-country comparison market for SeAH.

An ancillary issue raised by the parties cannot be decided at this point. Defendants-Intervenor argue that China would not be the proper third-country comparison market for SeAH even if Commerce found that Plaintiffs' sales to China are "representative." (Defs.-Int.'s Mem. 18.) If there are multiple third-country markets with eligible prices, Commerce selects as the comparison market the country with the highest volume of sales of subject merchandise that is most similar to that sold in the United States. 19 C.F.R. § 351.404(e). Defendants-Intervenor contend that Canada would still be the proper comparison market if SeAH's sales to China were not ex-

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[14] This Court finds that Commerce adequately distinguished the two instances cited by Plaintiffs (Pls.' Br. 26), where Commerce accepted a respondent's Chinese sales price data to calculate the respondent's normal value. The first instance, *OCTG from Argentina*, Commerce explained, was decided prior to the addition to the statute of the requirement that third-country prices be "representative" and, therefore, does not support Plaintiffs' allegation that Commerce has previously found Chinese prices to be "representative." (Issues & Decision Mem. 10); *see also Oil Country Tubular Goods from Argentina*, 60 Fed. Reg. 33,539, 33,540 (Dep't Commerce June 28, 1995) (final determination of sales at less than fair value). In the second instance, *Polyester Staple Fiber from Korea*, Commerce explained that "no party raised the issue" and the Chinese price data was accepted without objection. (Issues & Decision Mem. 10); *see also Certain Polyester Staple Fiber from Korea*, 67 Fed. Reg. 63,616, 63,617 (Dep't Commerce Oct. 15, 2002) (final results of antidumping duty administrative review).

cluded because the merchandise SeAH sold to Canada was more similar to the U.S. merchandise than that sold to China. (Defs.-Int.'s Mem. 19.)

However, it is premature for this Court to decide whether Canada or China should be selected as SeAH's third-country comparison market. First, at this point, Canada is SeAH's only viable third-country market. While this Court finds Commerce's decision to exclude China as a viable third-country market unsupported by substantial evidence, the remand will afford Commerce the opportunity to adequately explain its decision. Secondly, Commerce has not yet made findings on the similarity of the OCTG exported by SeAH to both Canada and China as compared to that sold to the United States. This Court's role is to vet Commerce's determinations, *not* to make them in the first instance. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006). That said, if Commerce determines that the price of Plaintiffs' Chinese sales is "representative," Commerce must determine, pursuant to 19 C.F.R. § 351.404(e), whether Canada or China should be selected as SeAH's third-country comparison market.

CONCLUSION

Because the final determination in *Oil Country Tubular Goods, Other Than Drill Pipe, from Korea: Final Results of Antidumping Duty Administrative Review*, 71 Fed. Reg. 13,091 (Dep't Commerce Mar. 14, 2006), is not supported by substantial evidence on the record, this Court grants Plaintiffs' Husteel Co., Ltd. and SeAH Steel Corp., Ltd. Rule 56.2 Motion for Judgment upon the Agency Record and remands the final determination to the Department of Commerce for further proceedings consistent with this opinion.

Upon consideration of the papers submitted by the parties, and upon due deliberation, it is hereby

ORDERED that Plaintiffs' Motion for Oral Argument is denied; it is further

ORDERED that Plaintiffs' Motion for Judgment on the Agency Record is granted; it is further

ORDERED that this case is remanded to the Department of Commerce ("Commerce") to determine whether the price of Plaintiffs' sales for export to the People's Republic of China ("the price") is "representative" within the meaning of 19 U.S.C. § 1677b(a)(1)(B)(ii)(I) (2000); it is further

ORDERED that if Commerce determines that the price is "representative," Commerce will determine pursuant to 19 C.F.R. § 351.404(e) whether China or Canada should be selected as SeAH Steel Corp., Ltd.'s third-country comparison market; and it is further

ORDERED that if Commerce determines that the price is "representative," Commerce will recalculate Plaintiffs' dumping margins accordingly; it is further

ORDERED that the remand results shall be filed no later than July 12, 2007; it is further

ORDERED that Plaintiffs may file papers with the Court indicating whether they are satisfied or dissatisfied with the remand results no later than August 6, 2007; and it is further

ORDERED that Defendant and Defendants-Intervenor may respond to Plaintiffs' comments no later than August 27, 2007.

SO ORDERED.

SLIP OP. 07–75

BEFORE: THE HONORABLE DELISSA A. RIDGWAY, JUDGE

FORMER EMPLOYEES OF INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 04–00079

JOINT STIPULATION OF DISMISSAL

PLEASE TAKE NOTICE thai plaintiff, pursuant to Rule 41(a)(l)(B) of the Rules of the United States Court of International Trade, having filed a stipulation of dismissal signed by all parties v/ho have appeared in this action and those actions listed on the attached schedule hereby dismisses this action.

Schedule to Stipulation of Dismissal

Court Number(s)	Plaintiffs) Name
04–0007 9	Former Employees of International Business Machines Corporation

Order of Dismissal

This action and those listed on the schedule set forth above, having been voluntarily stipulated for dismissal by all parties having appeared in the action, are dismissed.

Dated: 5-7-07

Slip Op. 07–76

THE RESOURCE CLUB, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 03–00781

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

Dated: May 16, 2007

Follick & Bessich (*John A. Bessich*, *Suzanne Liberti*) for the Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *Barbara S. Williams*, Attorney in Charge, International Trade Field Office; (*Amy M. Rubin*, Trial Attorney), *Su-Jin Yoo*, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of counsel, for the Defendant.

OPINION

Pogue, Judge: Plaintiff, Resource Club, Inc., ("Resource Club") challenges the United States Customs and Border Protection ("Customs") decision to assess, collect and retain duties and fees paid on imported merchandise. Relying on the statutory provision for abandonment of goods, Section 563(b) of the Tariff Act of 1930, 19 U.S.C. § 1563(b),[1] Resource Club contends that Customs improperly denied a refund of duties after Resource Club abandoned the subject merchandise to Customs. Resource Club's claim, stated in its December 4, 2000 protest, followed the September 8, 2000 liquidation of its entries. Plaintiff's Complaint ("*Compl.*") 3. Customs' May 2, 2003, denial of Resource Club's protest is the agency action under review in this case. Before the Court are the parties' cross-motions for summary judgment on Resource Club's claim. For the reasons explained below, Plaintiff's motion for summary judgment is denied and Defendant's cross-motion for summary judgment is granted.

Jurisdiction and Standard of Review

This court's jurisdiction to hear the Plaintiff's challenge lies under 28 U.S.C. § 1581(a)("[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest. . . . "). In an action under § 1581(a), the Court reviews the matter *de novo*. 28 U.S.C. § 2640(a)(1). *See Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456, 951 F.Supp. 241, 246 (1996), *aff'd* 160 F.3d 1357 (Fed. Cir. 1998). Applying a *de novo* standard of review, the court examines the court record to reach the correct conclusion. *Id*.

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[1] All references to the United States Code ("U.S.C.") are to the 2000 edition.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Summary of Facts

The following facts are uncontested. Plantiff Resource Club is the importer of record of 1,683 dozen ladies' jeans, Entry No. 066–1132964–7, Pl.'s Statement of Material Facts Not in Dispute 2 ("*Pl.'s R. 56 Statement*"), and has paid all the related duties and fees associated with this entry. *Id*. Upon importation, on or about September 1999, a Customs national field import specialist detained the shipment pending the verification of authenticity of the shipment's Cambodian visa. *Id*. Resource Club protested this detention of the entry. Following the denial of Resource Club's protest, Customs notified Plaintiff, on May 19, 2000, that the Cambodian visa was not genuine and that the shipment had been seized as being imported contrary to law. Resource Club then petitioned for relief from Customs' seizure. *Id*. at 3.

Although it denied Resource Club's petition for relief, Customs also issued a decision letter, dated September 7, 2000, authorizing remission of the merchandise for "Export Only", upon payment of all storage charges and $14,137.00, representing 10 percent of the foreign dutiable value. *Pl.'s R. 56 Statement* 3. Customs' offer of relief was to expire if Resource Club failed to 2 respond within 30 days. Plaintiff's Exhibit ("*Pl.'s Ex.*") G.[2] On September 8, 2000, the entry was liquidated. *Pl.'s R. 56 Statement* 3.

Resource Club filed a supplemental petition for further relief on November 3, 2000. *Pl.'s R. 56 Statement* 3. On December 4, 2000, Resource Club notified Customs that it was "formally withdrawing its petition and supplemental petition, and abandoning the subject goods to Customs" and provided Customs with an executed "Election of Proceedings form". *Id*.[3] On the same day, Resource Club filed the

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[2] The Government denies the accuracy of Resource Club's representation of the relief granted, adding that the relief was conditioned upon payment of the above stated fine, "payment of all accrued storage charges, the exportation under Customs' supervision of all of the seized merchandise and the execution of a hold harmless agreement." Def.'s Resp. Pl.'s Statement Material Facts as to which there are no Genuine Issues to be Tried 3 ("*Def.'s R. 56 Resp.*"). The court finds this factual dispute immaterial to its resolution of the controversy.

[3] The Government admits that Plaintiff provided an Election of Proceedings form but denies the accuracy of Resource Club's representation of its letter to Customs. The government avers that Resource Club conditioned its withdrawal of the petitions upon the refund of all customs duties and fees. *Def.'s R. 56 Resp.* 2. The court finds this factual dispute immaterial to its resolution of the controversy.

protest at issue in this action, number 1001–00–105159, contesting the assessment, collection, and retention of duties. *Id*. at 1.

Customs proceeded with forfeiture proceedings of the merchandise in February of 2001, and in April, the government contractor, EG&G services, who was the custodian of the goods during the seizure, sold the merchandise for exportation. Def.'s Statement of Additional Material Facts as to which there are no Genuine Issues to be Tried 4 ("*Def.'s Add'l. R. 56 Statement*."). On May 2, 2003, Customs denied Plaintiff's December 4, 2000 protest. *Pl.'s R. 56 Statement* 3. Resource Club contends that Customs improperly denied its protest in light of its abandonment of the subject merchandise pursuant to 19 U.S.C. § 1563(b).

Discussion

A. Statutory and Regulatory Framework

Resource Club argues for a full refund of duties and fees paid, citing 19 U.S.C. § 1563(b), which, in relevant part states:

> [u]nder such regulations as the Secretary of the Treasury may prescribe and subject to any conditions imposed thereby the consignee may at any time within three years from the date of original importation, abandon to the Government any merchandise in bonded warehouse, whereupon any duties on such merchandise may be remitted or refunded as the case may be, but any merchandise so abandoned shall not be less than an entire package and shall be abandoned in the original package without having been repacked while in a bonded warehouse (other than a bonded manipulating warehouse).

19 U.S.C. § 1563(b).[4] Reading 19 U.S.C. § 1563(b) literally, Customs responds that Resource Club's goods were not stored in a "bonded

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[4] Pursuant to this statutory authority, the Secretary of the Treasury promulgated regulations governing the importer's exercise of this allowance. The relevant section, 19 C.F.R. § 158.43(a)–(b) reads:

> Allowance in duties for merchandise entered under bond destroyed under section 557(c), Tariff Act of 1930, as amended (19 U.S.C. 1557(c)), or for merchandise in bonded warehouse abandoned to the Government under section 563(b), Tariff Act of 1930, as amended (19 U.S.C. 1563(b)), shall be subject to the following conditions:
>
> (a) *Application by importer*. The importer shall file an application for abandonment or destruction of merchandise in bond with the port director on Customs From [sic] 3499, with the title modified to read "Application and Permit to Abandon (or Destroy) Goods in Bond." When an application is for permission to destroy, the proposed method of destruction shall be stated in the application and be subject to the approval of the port director.
>
> (b) *Concurrence of warehouse proprietor*. An application to abandon or destroy warehoused merchandise shall not be approved unless concurred in by the warehouse proprietor.

19 C.F.R. § 158.43(a)–(b). All references to the Code of Federal Regulations are to the 2002 edition.

warehouse" and therefore were not eligible for abandonment in the first place. Def.'s Mem. Supp. Cross-Mot. Summ. J. & Opp'n Pl.'s Mot. Summ. J. 5 ("*Def.'s Mem.*").[5] Customs also draws support for its position from the Tariff Act's "Enforcement Provisions". Customs notes that Resource Club's goods were seized as a result of Customs' finding that the entry visa for the importation was counterfeit, pursuant to 19 U.S.C. § 1595a(c)(3);[6] such a finding authorizes Customs to seize and forfeit the merchandise.[7] In addition, Congress charged Customs with storing seized goods, pending their disposition, in accordance with 19 U.S.C. § 1605, which, in relevant part reads:

> [p]ending such disposition, the property shall be stored in such place as, in the customs officer's opinion, is most convenient

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[5] The statute authorizing the Secretary of Treasury to establish such warehouses is 19 U.S.C. § 1555(a), which reads:

> *[d]esignation; preconditions; bonding requirements, supervision*. Subject to subsection (b) of this section, buildings or parts of buildings and other enclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. . . . Before any imported merchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse . . . .
>
> 19 U.S.C. § 1555(a).

[6] This section provides:

> [i]f the importation or entry of the merchandise is subject to quantitative restrictions requiring a visa, permit, license, or other similar document, or stamp from the United States Government or from a foreign government or issuing authority pursuant to a bilateral or multilateral agreement, the merchandise shall be subject to detention in accordance with section 1499 of this title unless the appropriate visa, license, permit, or similar document or stamp is presented to the Customs Service; but if the visa, permit, license, or similar document or stamp which is presented in connection with the importation or entry of the merchandise is counterfeit, the merchandise may be seized and forfeited.

[7] A summary forfeiture administered by Customs has the following effect under 19 U.S.C. § 1609(b):

> Effect. A declaration of forfeiture under this section shall have the same force and effect as a final decree and order of forfeiture in a judicial forfeiture proceeding in a district court of the United States. Title shall be deemed to vest in the United States free and clear of any liens or encumbrances (except for first preferred ship mortgages pursuant to section 961 of Title 46, Appendix, or any corresponding revision, consolidation, and enactment of such subsection in Title 46) from the date of the act for which the forfeiture was incurred. Officials of the various States, insular possessions, territories, and commonwealths of the United States shall, upon application of the appropriate customs officer accompanied by a certified copy of the declaration of forfeiture, remove any recorded liens or encumbrances which apply to such property and issue or reissue the necessary certificates of title, registration certificates, or similar documents to the United States or to any transferee of the United States.
>
> 19 U.S.C. § 1609(b).

> and appropriate with due regard to the expense involved, whether or not the place of storage is within the judicial district or the customs collection district in which the property was seized. . . .

19 U.S.C. § 1605.

Citing the above statutory provisions, Customs claims that it seized Resource Club's goods and stored them as required by law. *Def.'s Mem*. 9–10. Additionally, however, in response to Customs' May 19, 2000 notice which alerted Resource Club that its visa was counterfeit, Resource Club filed a petition for relief from the seizure, pursuant to 19 C.F.R. § 171.1.[8] Customs replied on September 7, 2000, offering relief, and prescribed a limited time of 30 days within which Resource Club was to respond. *Pl.'s Ex.* G. The 30–day deadline is authorized by 19 C.F.R. § 171.22.[9]

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[8] That regulation provides:

(a) *To whom addressed*. Petitions for the remission or mitigation of a fine, penalty, or forfeiture incurred under any law administered by Customs must be addressed to the Fines, Penalties, and Forfeitures Officer designated in the notice of claim.

(b) *Signature*. For commercial violations, the petitionfor remission or mitigation must be signed by the petitioner, his attorney-at-law or a Customs broker. If the petitioner is a corporation, the petition may be signed by an officer or responsible supervisory official of the corporation, or a responsible employee representative of the corporation. Electronic signatures are acceptable. In non-commercial violations, a non-English speaking petitioner or petitioner who has a disability which may impede his ability to file a petition may enlist a family member or other representative to file a petition on his behalf. The deciding Customs officer may, in his or her discretion, require proof of representation before consideration of any petition.

(c) *Form*. The petition for remission or mitigation need not be in any particular form. Customs can require that the petition and any documents submitted in support of the petition be in English or be accompanied by an English translation. The petition must set forth the following:

(1) A description of the propertyinvolved (if a seizure);

(2) The date and place of the violation or seizure;

(3) The facts and circumstances relied upon by the petitioner to justify remission or mitigation; and

(4) If a seizure case, proof of a petitionable interest in the seized property.

(d) *False statement in petition*. A false statement contained in a petition may subject the petitioner to prosecution under the provisions of 18 U.S.C. 1001.

19 C.F.R. § 171.1.

[9] 19 C.F.R. § 171.22 provides:

[a]decision to mitigate a penalty or to remit a forfeiture upon condition that a stated amount is paid will be effective for not more than 60 days from the date of notice to the petitioner of such decision unless the decision itself prescribes a different effective period. If payment of the stated amount or arrangements for such payment are not made, or a supplemental petition is not filed in accordance with regulation, the full penalty or claim for forfeiture will be deemed applicable and will be enforced by promptly referring the matter, after required collection action, if appropriate, to the appropriate Office of the Chief Counsel for preparation for referral to the Department of Justice unless other

It is against this legal framework that Resource Club maintains that Customs unlawfully denied its petition protesting the imposition, collection, and retention of duties and fees.

B. Resource Club's Errors

It is significant that this case arises as a result of Customs' finding that Resource Club presented a counterfeit visa for the entry of the subject merchandise. Resource Club does not contest this finding or challenge the lawfulness of the attendant seizure. However, Resource Club asserts that it exercised its right to abandonment within the three-year period permitted by 19 U.S.C. § 1563(b), and therefore Customs should refund the duties that Resource Club paid upon entry. Considered in light of the legal framework outlined above, Resource Club's argument is unpersuasive.

As noted above, in its reply to Plaintiff's May 9th petition, Customs offered relief and prescribed a time of 30 days within which Resource Club was to respond. *Pl.'s Ex.* G. When Resource Club failed to respond by October 9, 2000, Customs initiated forfeiture proceedings. The next correspondence from Resource Club came in the form of a supplemental petition for relief filed on November 3, 2000, almost 60 days after the September 7th Customs letter. By the plain language of 19 C.F.R. § 171.22, the decision to mitigate the penalty expired after 60 days unless the decision itself described a different effective period. In this case, by the terms of Custom's September 7, 2000 letter, there was a 30–day mitigation period. Once that expired, Customs could lawfully initiate the administrative forfeiture proceedings. These forfeiture proceedings did not involve placing Resource Club's goods in a bonded warehouse; therefore, 19 U.S.C. § 1563(b), by its own terms, did not apply to Resource Club's goods.

Moreover, and apart from the lawfulness of Customs' forfeiture and sale, Resource Club's exercise of the abandonment provision suffers from fatal procedural errors. Plaintiff failed to meet two explicit conditions for abandonment, both stated in Customs' implementing regulations for 19 U.S.C. § 1563(b). Specifically, Resource Club failed to file Customs Form 3499 and failed to produce evidence of the warehouse proprietor's concurrence. 19 C.F.R. § 158.43.

Because the statute's plain language subjects the exercise of abandonment to the Secretary's regulatory discretion, regulations promulgated pursuant to this authority have the force of law and are binding on this Court, unless they are "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (internal citations omitted). Resource Club does not challenge the validity of

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action has been directed by the Commissioner of Customs.

19 C.F.R. § 171.22.

the regulations and no inferences drawn from the record in Resource Club's favor suggest that Plaintiff should be excepted from the regulation's requirements. Therefore, Customs' denial of the Plaintiff's protest is correct as a matter of law.

C. Customs has no obligation to store seized goods in a bondedwarehouse.

Plaintiff also argues that because its goods were in Customs' custody when they were putatively abandoned, the "bonded warehouse" limitation is inapplicable, thereby entitling Resource Club to a full refund of duties and fees. Pl.'s Affirmation Opp'n Def.'s Cross-Mot. Summ. J. 3 ("*Pl.'s Opp'n Mem.*"). The problem with this contention however, is that it ignores the legal status of the goods in question; the goods were seized by Customs due to their importation contrary to 19 U.S.C. § 1595a(c).[10] Specifically, Customs was acting pursuant to its enforcement authority under the Tariff Act, and that authority is independent of the abandonment statute, 19 U.S.C. § 1563(b), which appears in the "Transportation in Bond and Warehousing of Merchandise." Because Congress carefully outlined Customs' enforcement powers in a separate statutory provision, and excluded such powers from other sections, by negative inference, the separate provision for abandonment, which is not included in the statutory provision for seizure, cannot be read to impose additional conditions on the exercise of enforcement authority. *See Hamdan v. Rumsfeld*, ___U.S. ___, 126 S. Ct. 2749, 2765 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute."(citations omitted)). In addition, adopting Plaintiff's position would contradict another fundamental principle of statutory interpretation by rendering superfluous the broad delegation of discretion to a Customs officer in deciding what is a "convenient and appropriate" place to store seized goods under 19 U.S.C. § 1605, excerpted *supra*, p. 8. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' "(quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001))). Therefore, the bonded warehouse provision does not have any bearing on the treatment of goods, stored elsewhere, prior to enforcement proceedings, or to the duties and fees paid upon importation of seized goods.

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[10] *See supra*, note 6.

In *United States v. One Case Paintings*, 99 F. 426 (2d. Cir. 1900), the Court rejected a similar argument from a Plaintiff who wished to obtain a refund of duties by abandoning goods that had been forfeited and sold as a penalty for undervaluation. The Court held:

> "[i]mportation" and "fraudulent undervaluation" are two distinct acts. The doing of the one act makes the importer a debtor to the government for the amount of duties, the doing of the other act makes him lose his goods; but there is nothing in the language of section 32 which can be construed as a remission of the obligation to pay duties in any event.

Id. at 428. Similarly, importation of Resource Club's ladies' jeans and payment of the concomitant duties are distinct from the presentation of a counterfeit visa and the penalties arising therefrom. Nothing in 19 U.S.C. § 1595a(c)(3), the provision allowing for forfeiture of goods associated with a counterfeit visa, suggests either an obligation to store goods in a bonded warehouse or a remission of Resource Club's obligation to pay duties.

The proposition that Customs is not obliged to store seized goods in a bonded warehouse for the benefit of an importer is bolstered by the statutory provision for designating "bonded warehouses" and the legislative purpose such warehouses serve.

Section 1555 of 19 U.S.C. provides in part:

> buildings or parts of buildings and other enclosures *may be designated by the Secretary of the Treasury* as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the appropriate customs officer, or under seizure, or for the manufacture of merchandise in bond, or for the repacking, sorting, or cleaning of imported merchandise. . . . Before any importedmerchandise not finally released from customs custody shall be stored in any such premises, the owner or lessee thereof shall give a bond in such sum and with such sureties as may be approved by the Secretary of the Treasury *to secure the Government against any loss or expense* connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouse.

19 U.S.C. § 1555(a) (emphasis added). It is apparent from this language that bonded warehouses are not intended to protect the importer, as Resource Club suggests,[11] but rather to provide security to the Government. The intent to secure the government and not the

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[11] *See Pl.'s Opp'n Mem*. 3. ("[The requirement that] goods be in a bonded warehouse at the time of abandonment, only applies to situations where the goods are abandoned while in custody and control of the importer. This requirement exists due to the fact that an importer must store imported goods in a bonded warehouse until the goods clear Customs.")

importer is echoed by the very regulation that Plaintiff relies on. Subsection (c)(1) of the abandonment regulation states:

> *Costs*. When *in the opinion of the port director* the abandonment of merchandise under section 563(b), Tariff Act of 1930, as amended (19 U.S.C. 1563(b)), *will involve any expense or cost to the Government*, or if the merchandise is worthless or unsalable, or cannot be sold for a sum sufficient to pay the expenses of sale, such abandonment shall not be permitted unless the importer deposits a sum which in the opinion of the port director will be sufficient to save the Government harmless from any expense or cost resulting from such abandonment.

19 C.F.R. § 158.43(c)(1)(emphasis added).

Considered in light of the permissive language of 19 U.S.C. § 1555, it is well within the Secretary's authority to determine and designate the bonded warehouses that will sufficiently secure the government against loss or expense.

In addition, 19 U.S.C. § 1605 gives Customs broad discretion to store the goods in a site that is "convenient and appropriate" with "due regard" for the expenses involved. The fact that Customs chose an unbonded warehouse to store the seized goods is in no way contrary to law. In other words, Customs is not under any obligation to store the goods in a bonded warehouse during a seizure. Therefore, Resource Club's argument that, "[i]t is patently unfair and unjust to allow Customs to deny the Plaintiff's right of abandonment and duty refund, based on the fact that Customs decided to store the goods in a non-bonded warehouse,"[12] must fail.

While it is not necessary to decide whether there is a statutory "right of abandonment" as the Plaintiff contends, it is certainly not the case that an importer whose goods have been seized for a suspected violation of U.S. Customs law may preserve such a "right" by asserting a governmental obligation to store its goods in a bonded warehouse pending their disposition.

Finally, we note that by holding that an importer is entitled to a refund of all duties and fees, simply by abandoning his goods to Customs after being notified of possible fraud, the Court would create a significant moral hazard. Importers could systematically skirt Customs' entry laws because counterfeit visas and other falsified information would carry no risk of loss or penalties. The law does not require such a result.

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[12] *Pl.'s Opp'n Mem.* at 3.

CONCLUSION

For the foregoing reasons, the court **denies** Plaintiff's motion for summary judgment and **grants** Defendant's cross-motion for summary judgment.

IT IS SO ORDERED.

Slip Op. 07–76

THE RESOURCE CLUB, LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 03–00781

JUDGMENT

Upon consideration of Plaintiff's complaint, the parties' cross-motions for summary judgment, and all other pertinent papers, and after due deliberation, it is hereby

ORDERED that Plaintiff's motion is denied; and further

ORDERED that Defendant's motion be granted; and further

ORDERED that this action is dismissed.

Slip Op 07–77

MARK T. ANDERSON, Plaintiff, v. U.S. SECRETARY OF AGRICULTURE, Defendant.

Before: Gregory W. Carman, Judge
Court No. 05–00267

[Plaintiff's motion for judgment on the agency record is denied. Judgment for Defendant.]

Mark T. Anderson, Plaintiff, *pro se.*

Peter D. Keisler, Assistant Attorney General; *Jeanne Davidson*, Director, U.S. Department of Justice, Civil Division, Commercial Litigation Branch (*Mark T. Pittman*), for Defendant

Jeffrey Kahn, Office of the General Counsel, International Affairs & Commodity Programs Division, U.S. Department of Agriculture, of counsel, for Defendant.

May 16, 2007

OPINION

Carman, Judge: This matter is before this Court on a motion for judgment on the agency record[1] filed by Plaintiff, Mark T. Anderson, and subsequent to a voluntary remand requested by Defendant, the U.S. Secretary of Agriculture ("Defendant" or "USDA"). After considering all the briefs and other papers filed in this matter and for the reasons that follow, this Court holds that the USDA's findings of fact with regard to this matter are supported by substantial evidence on the record and that the USDA's legal conclusions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, the USDA's negative remand determination is affirmed.

BACKGROUND

This Court's prior opinion in this matter, ruling on Defendant's motion to recaption the case, contains a thorough recitation of the facts. *See Anderson v. U.S. Sec'y of Agric.*, 30 CIT ___ , 441 F. Supp. 2d 1379 (2006) ("Anderson I").[2] This opinion includes only those facts relevant to deciding the motion for judgment on the agency record.

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[1] Although this Court gave Mr. Anderson–a pro se plaintiff–latitude in the filing of his court papers, he–unaided by counsel–did an admirable job of prosecuting his claim. Additionally, the Court expresses its gratitude to the government counsel for their willingness to help guide Mr. Anderson through the litigation process.

[2] In *Anderson I*, Defendant asserted that Mr. Anderson was not the correct party plaintiff in this matter. This Court rejected Defendant's claims and held that–based upon the administrative record before it–Mr. Anderson had applied for TAA benefits as an individual and, therefore, was the correct party plaintiff. *Anderson I*, 441 F. Supp. 2d at 1386.

On September 15, 2003, the USDA Foreign Agricultural Service ("FAS") accepted petitions for Trade Adjustment Assistance ("TAA") from groups representing salmon fishermen from Alaska, Washington, and Oregon. *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 53,957 (Dep't Agric. Sept. 15, 2003) (notice of accepted petitions for TAA). On November 6, 2003, the FAS certified the petitions of the Alaska and Washington salmon fisherman. *Trade Adjustment Assistance for Farmers*, 68 Fed. Reg. 62,766 (Dep't Agric. Nov. 6, 2003) (notice of certified petitions for TAA). The latter Federal Register notice advised that "[s]almon fishermen holding permits and licenses in the states of Alaska and Washington are now eligible to apply for [TAA] program benefits." *Id.* The deadline to apply for benefits was January 20, 2004. *Id.*

On January 16, 2004,[3] Plaintiff applied to his local Farm Service Agency ("FSA") for TAA benefits. (Admin. R. at 1.) On April 26, 2004, the FSA sent Plaintiff a "Final Notice" requesting additional documentation in support of Plaintiff's TAA benefits claim. (Admin. R. at 13.) The Final Notice includes a handwritten note that states

> If you are applying under your corp[oration] only[,] then I will need the page from your 1120S tax return[,] which shows the income is from fishing. If you are applying under your name[,] then we will need the schedule C from your 1040 tax return.

(*Id.*) The Administrative Record contains Internal Revenue Service ("IRS") Form 1120S for St. Patrick, Inc.[4] ("St. Patrick") and the Form 1120S Schedule K–1 (Shareholder's Share of Income, Credits, Deductions, etc.) for tax years 2001 and 2002. (Admin. R. at 7–12.)

Thereafter, Plaintiff received a denial letter from the FSA informing him that the FSA disapproved his 2002 application for a TAA cash benefit. (Admin. R. at 23.) The letter states that "[y]ou have been denied a TAA cash benefit because your 2002 net fishing income did not decline from the latest year in which no adjustment assistance payment was received (2001)." (*Id.*) The letter also advised that the denial of TAA cash benefit was appealable to this court.

On March 8, 2005, Plaintiff filed a letter complaint with this court requesting review of the FSA denial of his application for TAA benefits. Defendant filed its Answer on May 31, 2005. On November 30, 2005, Plaintiff filed his letter motion for judgment on the agency record, which motion is now before this Court.

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[3] In fact, Plaintiff's application for TAA (Admin. R. at 1) is dated January 16, 2002. However, it appears that the 2002 date is incorrect. In *Anderson I*, this Court did not realize this error and incorrectly stated that Plaintiff filed his TAA application on January 16, 2002.

[4] St. Patrick, Inc. is a subchapter S corporation operated by Plaintiff. (*See* Admin. R. at 8.)

PARTIES' CONTENTIONS

A. *Plaintiff's Contentions*

Plaintiff reports that the USDA denied his application for TAA benefits because his "net fishing income did not decline in 2002." (R. 56.1 Br. 1 (quotation omitted).) However, Plaintiff posits that the USDA did not correctly interpret the financial documentation[5] he provided in conjunction with his application for TAA benefits. Plaintiff argues that the USDA is obligated to base its TAA benefits determination only on "income from pacific salmon fishing." (*Id.*) Although he admits that his "ordinary income" increased between 2001 and 2002, Plaintiff explains that the increase in his "ordinary income" is the result of the sale of his fishing vessel. (*Id.* at 2.) Plaintiff submits that had he not sold the vessel, he would have suffered a substantial loss in 2002. (*Id.* ("that sale went to cover my loss from declining fishing income).) Plaintiff asserts that it was improper for the USDA to look only to the increase in his ordinary income to determine his eligibility for TAA benefits. Instead, Plaintiff indicates that the more relevant comparison is his gross receipts, which declined more than forty-five percent (45%) between 2001 and 2002. (*Id.*)

In response to the USDA's remand results, Plaintiff explains that he "talked at length about [his] personal [income tax] returns" with a USDA representative. (Letter from Mark T. Anderson to the Court 1 (Feb. 14, 2007) (Ct. R. Doc. 40).) During this conversation, Plaintiff states that he told the USDA representative that he–Plaintiff–"would be happy to send him copies of my personal returns but that they contained no information regarding my net fishing income as that was all reported on the corporate tax return of St. Patrick Inc. which he already had." (*Id.*) Plaintiff reports that the USDA representative informed Plaintiff that the agency was "limited . . . to only using documents that pertained to [Plaintiff] as an individual and therefore [Plaintiff's] corporate returns could not be used." (*Id.*) Plaintiff argues that the record evidence–corporate tax returns, fishing delivery records, and a letter from his accountant–all establish that Plaintiff suffered a net decrease in fishing income between 2001 and 2002. (*Id.*)

In addition, Plaintiff identifies inconsistencies in the vernacular the USDA uses in a single paragraph of its negative remand determination: "net income," "net fishing income," and "net profit or loss." (*Id.* at 2.) Plaintiff asserts that "there are important distinctions to be made between net income which [Plaintiff] believes to be total income and net fishing income which, as simple as it sounds, is income

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[5] The financial documents that Plaintiff references in his submissions are those for the Subchapter S corporation St. Patrick. Due to the sensitive nature of the financial information, this Court refrains from providing specific figures, as such are not relevant to the determination in this case.

derived from fishing." (*Id*.) Plaintiff adds that the USDA has in its possession–but refuses to review–"[a]ll the information necessary to determine net profit or loss, income from sales and total expenses." (*Id*.) Accordingly, Plaintiff requests that this Court remand to the USDA for further review. (*Id*. at 1.)

B. *Defendant's Contentions*

On December 5, 2006, the USDA issued its negative remand determination. As the basis for its negative remand determination, the USDA states that the documentation Plaintiff submitted to substantiate his decline in net fishing income "only pertains to St. Patrick, Inc., which is not the applicant in this case." (Recons. upon Remand of the Application of Mark T. Anderson ("Remand") 2.) The USDA added that

> [b]ecause Mr. Anderson only provided corporate tax returns for St. Patrick Inc., and a letter from his certified public accountant with respect to corporate income, and did not submit any individual tax documentation for himself, the agency does not have any documentation on the basis of which to make the determination whether there had been a decline in Mr. Anderson's individual net fishing income.

(*Id*. at 3.)

JURISDICTION

This Court has jurisdiction over this matter pursuant to 19 U.S.C. § 2395(c) (Supp. III 2003).

STANDARD OF REVIEW

This Court may affirm USDA's action or set it aside, in whole or in part. 19 U.S.C. § 2395(c). In addition, this Court may remand the case to The USDA when good cause is shown. 19 U.S.C. § 2395(b). As explained below, the Court applies a split standard of review to questions of fact and questions of law.

A. *Questions of Fact*

The court must accept the findings of fact made by The USDA as conclusive if they are supported by substantial evidence. 19 U.S.C. § 2395(b). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). "As long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's meth-

odology." *Ceramica Regiomontana, S.A. v. United States*, 10 CIT 399, 404–05, 636 F. Supp. 961 (1986) (*citing Chevron U.S.A. Inc. v Natural Res. Def. Council*, 467 U.S. 837, 843 (1984)), *aff'd*, 810 F.2d 1137 (Fed. Cir. 1987).

B. *Questions of Law*

Because the TAA statute is silent on judicial review of The USDA's decisions on questions of law, the court looks to the Administrative Procedure Act ("APA"). The APA directs the court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (2000). In conducting its review, the court must

> hold unlawful and set aside agency action, findings, and conclusions found to be–
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2)(A)–(F). In reviewing this matter, this Court applies the residual standard of review found in subsection A.[6] *See In re Robert J. Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000) ("courts have recognized that the 'arbitrary, capricious' standard is one of default").

Courts have deemed the "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" standard the most deferential. *Id.* ("this standard is generally considered to be the most deferential of the APA standards of review"). "[T]he 'touchstone' of the 'arbitrary, capricious' standard is rationality." *Id.* (*quoting Hyundai Elecs. Indus. Co., Ltd., v. U.S. Int'l Trade Comm'n*, 899 F.2d 1204, 1209 (Fed. Cir. 1990)). To be sustained, "the agency must ex-

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[6] *See Anderson I*, 441 F. Supp. 2d at 1384–85, for a discussion of the APA's separate standards of review.

amine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotation & citation omitted). Thus, if this Court finds that the USDA provided a cogent explanation for its decision, this Court will affirm that decision. *See id.* at 48.

DISCUSSION

Because the USDA's findings of fact are supported by substantial evidence on the record, and the findings of law were not arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law, this Court affirms the USDA's determination denying Plaintiff's application for TAA benefits.

I. Plaintiff did not provide the USDA with evidence of his individual net loss in fishing income.

To be eligible for TAA benefits, an applicant must establish that his "net farm income (as determined by the Secretary) for the most recent year is less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer." 19 U.S.C. § 2401e(a)(1)(C) (Supp. II 2002). When promulgating the regulations for this statute, the Secretary of Agriculture specified that the statute "applies not only to farmers but also to certain fishermen. In particular, the regulations make statutory benefits available to domestic fishermen whose catch competes directly with imported aquaculture products and who are adversely affected by those imports." *Steen v. United States*, 468 F.3d 1357, 1359 (Fed. Cir. 2006). The regulations require that the applicant for TAA benefits certify that his "net farm or *fishing income* for the most recent tax year was less than that during the producer's pre-adjustment year." 7 C.F. R. § 1580.301(e)(4) (2004) (emphasis added). The regulations in effect when Plaintiff filed his application defined "net fishing income" as the

> net profit or loss, excluding payments under this part, reported on Internal Revenue Service Schedules C or C–EZ (Form 1040) for individuals or taxable income, excluding payments under this part, reported on Form 1120 for corporations during the tax year that most closely corresponds with the marketing year under consideration.

7 C.F. R. § 1580.102 (2004).[7]

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[7] The USDA subsequently amended this definition to omit the reference to Schedule C. Because Plaintiff's application for benefits and the USDA's decision with regard to his application were completed prior to the regulation's revision, this Court will apply the earlier

Plaintiff did not submit any personal income tax records in connection with his application for TAA benefits, although the record indicates that the USDA requested such. (*See* Admin. R. at 13.) Rather, to support his application for TAA benefits, Plaintiff submitted IRS Forms 1120S for St. Patrick for tax years 2001 and 2002. These forms unmistakably demonstrate that St. Patrick's ordinary income increased between 2001 and 2002.

In *Anderson I*, this Court ruled–based on the record before it–that Mr. Anderson was the correct party plaintiff. In response to *Anderson I*, the USDA requested and this Court granted voluntary remand "to conduct a further review and make a redetermination as to whether plaintiff is eligible for TAA cash benefits." (Mot. for Voluntary Remand 2.) During the remand, the USDA reopened the administrative record and requested documentation from Mr. Anderson to substantiate that his net fishing income for 2002, the year for which benefits were applied, was less than his net fishing income for 2001, the pre-adjustment year. (Nonconfidential Supplement to the List of Docs. Constituting the Admin. R. ("Suppl. Admin. R.") at 1.) The USDA advised Plaintiff that "[a]cceptable documentation" to evidence his decline in net fishing income "includes supporting documentation from a certified public accountant or attorney, or relevant documentation and other supporting financial data, such as financial statements, balance sheets, and reports prepared for or provided to the Internal Revenue Service or another U.S. Government agency." (*Id.*) In response to this request, Plaintiff submitted a letter from his accountant explaining Plaintiff's calculation of net fishing income in 2001 and 2002 and income statements from Plaintiff's salmon processor indicating a decline between 2001 and 2002 in Plaintiff's gross income from salmon sales. (*Id.* at 3–8.)

Subsequent to the receipt of Plaintiff's supplemental submission, the USDA again contacted Plaintiff to advise him that the agency was "still unable to make a determination with respect to [his] eligibility." (*Id.* at 11.) In this correspondence, the USDA specifically requested Plaintiff's "*individual* tax returns filed with the Internal Revenue Service for 2001 and 2002, or supporting documentation from your certified public accountant or attorney prepared for or provided to the Internal Revenue Service with respect to your *individual* returns." (*Id.* (emphasis added).) Still, Plaintiff failed to submit the requested documentation within the time frame the USDA allowed. When a USDA representative contacted Plaintiff by telephone concerning the outstanding request, Mr. Anderson indicated that he had already submitted documentation–that for St. Patrick–evidencing his decline in fishing income between 2001 and 2002. (*Id.* at 12; Letter from Mark T. Anderson to the Court 1.) When Plaintiff had failed to submit the requested documentation by November 30,

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version of the regulation. *See Steen*, 468 F.3d at 1359–60.

2006, the USDA sent a final letter to Plaintiff confirming that it had not yet received the requested documents (Suppl. Admin. R. at 12) and later issued the negative remand determination.

The USDA regulation is clear that "net fishing income" is "net profit or loss, excluding payments under this part, reported on Internal Revenue Service Schedules C or C-EZ (Form 1040) for *individuals*." 7 C.F.R. § 1580.102. Although Plaintiff is the sole owner of St. Patrick (*see* Admin. R. at 8, 10), Plaintiff filed his application for TAA benefits as an individual, not on behalf of the corporate entity St. Patrick. Thus, Plaintiff was obligated to provide the USDA with evidence that he suffered an *individual* net loss in fishing income in support of his claim for TAA benefits.

This Court finds that the USDA provided Plaintiff ample opportunity to submit individual tax returns or other documentation to support his *individual* claim for TAA benefits. Having failed to substantiate his individual claim after being given reasonable opportunity to do so, this Court holds that the USDA's findings of fact with regard to this matter are supported by substantial evidence on the record and that the USDA's legal conclusions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Accordingly, this Court affirms the USDA's remand determination denying Plaintiff TAA benefits.

II. Even if Plaintiff could substitute St. Patrick's financial information for his individual claim, the corporate documents do not reflect a net loss in fishing income.

Plaintiff argues that the administrative record, which consists only of financial records for St. Patrick, supports his individual claim for TAA benefits.[8] This Court rejects Plaintiff's argument because St. Patrick's net fishing income–as defined by the USDA–increased between 2001 and 2002.

For corporations, the USDA regulations define "net fishing income" as the "*taxable income*, excluding payments under this part, reported on Form 1120 for corporations during the tax year that most closely corresponds with the marketing year under consideration." 7 C.F.R. § 1580.102 (emphasis added). In fact, St. Patrick's tax returns evidence an increase in ordinary income between 2001 and 2002. While the Court acknowledges Plaintiff's assertion that this increase in income is due to the sale of his fishing boat, the source of the increase is irrelevant.

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[8] For instance, Plaintiff provided the USDA–in his supplemental submission to the agency–a letter from his accountant. Although supported only by figures from St. Patrick's income tax returns, the accountant's letter is couched in terms of Plaintiff's decline in net fishing income between 2001 and 2002. (Suppl. Admin. R. at 4 ("My client, Mark T. Anderson, experienced a decline in his net fishing income from 2001 to 2002;" ". . . Mark incurred a loss from fishing. . . .")

The Court of Appeals for the Federal Circuit recently explained the purpose of limitations on TAA benefits:

> Limiting statutory benefits to affected producers who experience a reduction in their "net farm income" . . . ensures that persons who do not suffer an *overall* loss in their farming (or fishing) income are not eligible for cash benefits under the adjustment assistance program. It is unsurprising that Congress would elect to provide cash benefits only to persons whose *overall* financial well-being has suffered as a result of import competition. . . . Moreover, one of Congress's purposes in enacting the adjustment assistance statute was to enable persons potentially affected by import competition to adjust their production so as to avoid the impact of the competing imported goods. *Because persons whose net income has risen may be said to have successfully adjusted to the competition from imports, there is no reason to suppose that Congress would want them to share in the cash benefits afforded under the statutory program*. . . . Responding to concerns that diversified producers would be disqualified if their net earnings increased due to income from other commodities, the [USDA] explained that such a result was consistent with the purpose of the statute, which was "to assist producers to adjust to imports by providing technical assistance to all and cash payments to those facing economic hardship."

Steen, 468 F.3d at 1362 (citations omitted) (emphasis added). The *Steen* court added that while all members of a certified group merit some type of assistance "only a subset are deserving of monetary benefits." *Id*.

Given that Plaintiff's "overall financial well-being," *id*., did not suffer, during the relevant period (2001 to 2002), this Court must determine that Plaintiff was one of those affected producers who adjusted his "production so as to avoid the impact of the competing imported goods." *Id*. Certainly, it is unfortunate that Plaintiff felt compelled to sell his fishing vessel; however, Plaintiff is not among the affected producers who qualify for monetary benefits.

CONCLUSION

For the reasons stated herein, this Court affirms the USDA's denial of Plaintiff's application for TAA benefits. Judgment will enter accordingly.

Slip Op. 07–77

MARK T. ANDERSON, Plaintiff, v. U.S. SECRETARY OF AGRICULTURE, Defendant.

Before: Gregory W. Carman, Judge
Court No. 05–00267

JUDGMENT

This case having been submitted for decision and this Court, after due deliberation, having rendered a decision herein; it is hereby

ORDERED that judgment is entered for Defendant; and it is further

ORDERED that the United States Department of Agriculture's remand determination in this matter is affirmed.

Slip Op. 07–78

UNITED STATES, Plaintiff, v. UNIVERSAL FRUITS AND VEGETABLES CORPORATION; DAVID PAI, a/k/a SHIN WEI PAI; and JASON PAI, a/k/a CHUNG SHENG PAI, Defendants.

Before: Gregory W. Carman, Judge
Court No. 04–00431

[Defendants' application for fees pursuant to the Equal Access to Justice Act is DENIED for lack of jurisdiction.]

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Alan J. Lo Re*, *David K. Barret*, and *Lisa A. Palombo*), *Sean B. McNamara*, of counsel, for Plaintiff.

Carollyn Jackson, Office of the Chief Counsel, U. S. Customs and Border Protection, Department of Homeland Security, of counsel, for Plaintiff.

Neville Peterson LLP (*John M. Peterson*, *Maria E. Celis*, and *Curtis W. Knauss*) for Defendants.

May 16, 2007

OPINION & ORDER

Carman, Judge: The matter before this Court is Defendants' Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act ("Defendants' EAJA Application"). Defendants, David Pai a/k/a Shin Wei Pai ("David Pai"), individually and as the owner of Universal Fruits and Vegetables Corporation ("Universal Fruits"), and Jason Pai a/k/a Chung Sheng Pai ("Jason Pai"), move for attorney's fees and expenses following this Court's dismissal of the under-

lying suit against them for lack of subject matter jurisdiction. *See United States v. Universal Fruits & Vegetables Corp.*, 30 CIT ___, 433 F. Supp. 2d 1351, 1351 (2006) ("*Universal Fruits V*"). Because this Court lacked jurisdiction to decide the merits of the underlying action, this Court does not possess jurisdiction to award attorney's fees and expenses to Defendants pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A) (2000). Accordingly, this Court denies Defendants' EAJA Application.

BACKGROUND

The history of this case is a complicated one. On November 11, 2000, the Government brought an action against Defendants pursuant to 31 U.S.C. § 3729(a)(7) (2000)[1] in federal district court for the Central District of California, Western Division ("District Court"). The Government alleged that Defendants fraudulently misrepresented the country of origin of four shipments of fresh garlic as the Republic of Korea to avoid antidumping duties assessed on fresh garlic from the People's Republic of China. (Compl. & Demand for Jury Trial ¶ 15.) The District Court granted judgment in favor of the Government and ordered Universal Fruits and David Pai to pay $1,957,237 and Jason Pai to pay $1,952,237.[2] *United States v. Universal Fruits & Vegetables Corp.*, 2001 U.S. Dist. LEXIS 25,815 (C.D. Cal. Dec. 3, 2001) ("*Universal Fruits I*"). Defendants timely appealed the judgment, arguing that the District Court lacked jurisdiction over the case because the United States Court of International Trade ("USCIT") has exclusive jurisdiction of actions involving customs duties, pursuant to 28 U.S.C. § 1582(3) (2000). *United States v. Universal Fruits & Vegetables Corp.*, 362 F.3d 551, 554 (9th Cir. 2004). The United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") reversed the District Court's judgment for lack of subject mat-

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[1] 31 U.S.C. § 3729 is known as the False Claims Act. Section 3729(a)(7), commonly called the "Reverse False Claims Act," provides:

(a) Any person who–

* * *

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person. . . .

[2] "These awards were based on the actual [customs] duties avoided of $644,079, which [were] trebled pursuant to 31 U.S.C. § 3729(a)(7), plus $5,000 in civil penalties for each of the four false statements made to the United States Customs Service, now known as the Bureau of Customs and Border Protection." *United States v. Universal Fruits & Vegetables Corp.*, 29 CIT ____, 387 F. Supp. 2d 1251, 1253 (2005). The District Court's opinion does not explain the $5,000 difference between the judgments against Universal Fruits and David Pai compared to that of Jason Pai. *See Universal Fruits I*, 2001 U.S. Dist. LEXIS at 25,815.

ter jurisdiction and dismissed the case. *Id.* at 558. Upon the Government's request, the Ninth Circuit amended its original decision and remanded the case to the District Court with instructions to transfer the case to the USCIT, pursuant to 28 U.S.C. § 1631 (2000).[3] *United States v. Universal Fruits & Vegetables Corp.*, 370 F.3d 829, 831 (9th Cir. 2004) ("*Universal Fruits III*").

This Court preliminarily accepted jurisdiction of the case. *United States v. Universal Fruits & Vegetables Corp.*, 29 CIT ___, 387 F. Supp. 2d 1251, 1253 (2005). However, upon subsequent examination, this Court dismissed the case for lack of jurisdiction. *Universal Fruits V*, 433 F. Supp. 2d at 1353. This Court reasoned that the USCIT has jurisdiction only over suits filed by the Government to recover *customs duties*, and that in this case the Government sought to recover *penalties and damages*, rather than customs duties.[4] *Id.* at 1355. The Government timely appealed this Court's decision to the Court of Appeals for the Federal Circuit, and the parties later voluntarily dismissed the appeal. *United States v. Universal Fruits & Vegetables Corp.*, 204 Fed. Appx. 881 (Fed. Cir. Oct. 19, 2006). Thereafter, Defendants timely filed an application for attorney's fees and expenses with this Court. (Defs.' EAJA Application.)

DISCUSSION

Pursuant to USCIT Rule 54.1, "[t]he court may award attorney's fees and expenses where authorized by law. Applications must be filed within 30 days after the date of entry by the court of a final judgment." USCIT R. 54.1(a). An application for fees and expenses must "contain a citation to the authority which authorizes an award, and shall indicate the manner in which the prerequisites for an award have been fulfilled." USCIT R. 54.1(b). Here, Defendants cite the EAJA as authority for such an award. The EAJA provides that "a court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any civil action . . . brought by or against the United States in any court *having jurisdiction of that action*. . . ." 28 U.S.C. § 2412(d)(1)(A) (emphasis added).

This Court determined that it lacked jurisdiction over the underlying suit against Defendants. *Universal Fruits V*, 433 F. Supp. 2d at 1353. Regardless of Defendants' arguments regarding the signifi-

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[3] 28 U.S.C. § 1631 provides that "[w]henever a civil action is filed in a court . . . and that court finds that there is a want of jurisdiction, the court shall . . . transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time if was filed or noticed."

[4] The USCIT has jurisdiction to recover penalties in some instances. 28 U.S.C. § 1582(1) provides jurisdiction to the USCIT over suits by the Government "to recover a civil penalty under section 592, 593A, 641(b)(6), 641(d)(2)(A), 704(i)(2), or 734(i)(2) of the Tariff Act of 1930." However, because the Government pleaded as its cause of action the Reverse False Claims Act, not the Tariff Act of 1930, section 1582(1) does not apply.

cance of this Court's determination,[5] it is well-settled by the Court of Appeals for the Federal Circuit that a trial court cannot award fees pursuant to the EAJA unless the court possessed jurisdiction to decide the suit underlying the fee application. *See Hudson v. Principi*, 260 F.3d 1357, 1363 (Fed. Cir. 2001) ("This court and others have established that there cannot be an award of attorney's fees unless the court has jurisdiction of the action."); *Burkhardt v. Gober*, 232 F.3d 1363, 1367 (Fed. Cir. 2000) ("[W]e interpret the EAJA to extend only to fees and other expenses incurred before a court . . . having the power to hear and decide the underlying civil action in which the EAJA applicant incurred those fees and other expenses."); *RAMCOR Servs. Group, Inc. v. United States*, 185 F.3d 1286, 1288 (Fed. Cir. 1999) ("As a predicate to an EAJA award, the awarding court must have had jurisdiction over the civil action in which the applying party prevailed."); *Johns-Manville Corp. v. United States*, 893 F.2d 324, 328 (Fed. Cir. 1989) (The EAJA "authorizes an award of costs only in a court 'having jurisdiction of such action'. . . . Because the [trial court] did not have jurisdiction over the civil actions brought by [the plaintiff] in this case, [the EAJA] is inapplicable and does not empower the [trial court] to award costs."); *Oliveira v. United States*, 827 F.2d 735, 742 (Fed. Cir. 1987) ("The EAJA specifically requires, as a basis for an award of attorney fees and other expenses, that the action be brought before a 'court having jurisdiction.'" (citation omitted)). Having ruled that it did not possess jurisdiction over the subject matter of the Government's case, this Court similarly lacks jurisdiction to award Defendants attorney's fees or expenses pursuant to their EAJA Application.

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[5] Defendants argue that this "Court determined, *on the merits*, that [the Government] was not entitled to recover duties under the [False Claims Act]. The government's claim for duties, therefore, was dismissed not on jurisdictional grounds, but on the merits." (Defs.' Revised Reply Br. Addressed to Application for Atty's Fees under Equal Access to Justice Act ("Defs.' Reply") 5 (emphasis added)). Defendants incorrectly characterize this Court's decision. This Court merely determined that the Government's claim under the Reverse False Claims Act was to recover "civil penalties and damages," *Universal Fruits V*, 433 F. Supp. 2d at 1355, not duties. This Court made *no* determination on the merits of the Government's Reverse False Claims Act claim.

In fact, the only court to decide the merits of this case, the District Court, specifically found for the Government on their Reverse False Claims Act claim. *Universal Fruits I*, 2001 U.S. Dist. LEXIS at 25,815. Of course, the Ninth Circuit reversed the District Court's decision for lack of subject matter jurisdiction and ordered the District Court to transfer the case to this Court, but *did not address the merits* of the District Court's decision. *Universal Fruits III*, 370 F.3d at 831. No court at any point in the complicated history of this case has ruled for Defendants on the merits. The irony of Defendants now claiming to be "prevailing parties" is not lost on this Court.

CONCLUSION

Based on the foregoing, this Court denies Defendants' EAJA Application for lack of jurisdiction. Judgment will enter accordingly.

Slip Op. 07–78

UNITED STATES, Plaintiff, v. UNIVERSAL FRUITS AND VEGETABLES CORPORATION; DAVID PAI, a/k/a SHIN WEI PAI; and JASON PAI, a/k/a CHUNG SHENG PAI, Defendants.

Before: Gregory W. Carman, Judge
Court No. 04–00431

JUDGMENT

Upon consideration of the papers submitted by the parties, and upon due deliberation, it is hereby

ORDERED that Defendants' Application for Fees and Other Expenses Pursuant to the Equal Access to Justice Act is denied for lack of jurisdiction.

The Clerk of the Court is directed to forward copies of this Judgment to counsel for the parties.