Decisions of the United States Court of International Trade

Slip Op. 07–128

KOYO SEIKO CO., LTD. et al., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION et al., Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No. 05–00560

PUBLIC VERSION

[Plaintiffs' Motions for Judgment Upon the Agency Record are DENIED, and the Government's determination is AFFIRMED]

Dated: August 23, 2007

Sidley Austin LLP (*Neil R. Ellis*) for Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A.

Hogan & Hartson LLP (*Craig Anderson Lewis*, *T. Clark Weymouth* and *Shubha Sastry*) for Plaintiff Nankai Seiko Co., Ltd.

Baker & McKenzie LLP (*Kevin M. O'Brien* and *Kevin J. Sullivan*) for Plaintiffs Nippon Pillow Block Co. Ltd. and FYH Bearing Units USA Inc.

Crowell & Moring LLP (*Matthew Philip Jaffe*, *Robert A. Lipstein*, *Alexander H. Schaefer* and *Sobia Haque*) for Plaintiffs NSK Corporation, NSK Ltd., and NSK Precision America, Inc.

Baker & McKenzie LLP, (*Donald J. Unger*, *Diane A. MacDonald*, *Louisa Vassileva Carney* and *Paul E. Amberg*) for Plaintiffs American NTN Bearing Manufacturing Corp., NTN Bearing Corporation of America, NTN Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); and *David W. Richardson*, *Mykhaylo Gryzlov*, *Hardeep Josan*, *Kemba Eneas* and *Jennifer J. Johnson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant United States.

Stewart and Stewart (*Terence P. Stewart* and *Geert M. De Prest*) for Defendant-Intervenor Timken US Corporation.

OPINION

Wallach, Judge:

I
INTRODUCTION

Plaintiffs Koyo Seiko, Co., Ltd., and Koyo Corporation of U.S.A. (collectively "Koyo"); Nippon Pillow Block Co. Ltd. and FYH Bearing

Units USA, Inc. (collectively "NPB"); Nankai Seiko Co., Ltd. ("SMT"); NSK Ltd., NSK Corp., and NSK Precision America, Inc. (collectively "NSK"); and NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft Inc., and NTN-BCA Corp. (collectively "NTN") challenge the United States Department of Commerce's ("Commerce" or "the Department") findings in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711 (September 16, 2005) ("*Final Results*") covering the period of review May 1, 2003, through April 30, 2004. This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Because Commerce acted within its discretion, its determinations are sustained.

II
BACKGROUND

Commerce published in the Federal Register on September 16, 2005, the Final Results of its review of ball bearings and parts thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom, covering the period of review from May 1, 2003 through April 30, 2004. *Final Results*, 70 Fed. Reg. at 54,711. The scope of this order covers ball bearings (other than tapered roller bearings) and parts thereof, and housed or mounted ball bearings united and parts thereof. *Id.* at 54,711–72. This is the fifteenth review. The Department calculated weighted-average dumping margin for ball bearings to be 12.78% for Koyo, 7.15% for SMT and 5.93% for NTN. Id. at 54,713. Commerce issued amended final results for NSK at 8.25% and NPB at 15.51% . *Notice of Amended Final Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof from Japan*, 70 Fed. Reg. 61,252 (October 21, 2005); *Notice of Correction to Amended Final Results of Antidumping Duty Administrative Review: Ball Bearings and Parts Thereof from Japan*, 70 Fed. Reg. 69,316 (November 15, 2005).

In the fifteenth review, Commerce revised the model-match methodology that it used in the preceding fourteen reviews to determine what sales in the home market are to be compared to sales made in the United States.[1] *See* Memorandum from Barbara E. Tillman, Acting Deputy Assistant Sec'y for Import Admin., U.S. Dep't of Commerce to Ronald K. Lorentzen, Acting Assistant Sec'y for Import Admin., U.S. Dep't of Commerce ("Issues and Decision Memo") (September 16, 2005) at 19, Gen. R. Doc. 123. In previous reviews, Commerce determined similarity by using a family averaging methodol-

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[1] Commerce must select similar merchandise in the home market for comparison with merchandise that is sold in the United States when there is no identical merchandise available to use. 19 U.S.C. § 1677(16). Similarity, according to the statute, is based upon the physical characteristics of the merchandise being compared. *Id*.

ogy that compared merchandise using eight different criteria. *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,692 (July 11, 1991).

During the fourteenth administrative review, Timken US Corporation ("Timken") suggested that Commerce modify its method of identifying similar models. *Antifriction Bearings and Parts Thereof from France, Germany Italy Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews, Rescission of Administrative Reviews in Part, and Determination to Resolve Order in Part*, 69 Fed. Reg. 55,574 (September 15, 2004). Commerce received comments on the proposal from respondents and issued a memorandum addressing the question of whether a change should be implemented and, if so, when the change should be effective. Memorandum from Jeffrey A. May, Deputy Assistant Sec'y for Import Admin., to James J Jochum, Assistant Sec'y for Import Admin.: Ball Bearings (and Parts Thereof) from France, Germany, Italy, Japan, Singapore, and the United Kingdom—Model Match Methodology, Amended P.R. Doc. 2 (December 3, 2003) ("Model Match Memo"); Letter from Laurie Parkhill to All Interested Parties, Gen. R. Doc. 1, (December 4, 2003). In the Model Match Memo, Commerce determined that a change in methodology was warranted, but declined to implement a new methodology at that time due to a lack of sufficient data and time to make the changes. Model Match Memo at 5–8. Upon initiation of the Fifteenth Review, Commerce solicited comments from all interested parties and then informed the parties of its new methodology.[2] *Revised Model Match Methodology*, Gen. R. Doc. 33 (July 7, 2004) ("*Revised Model Match*"). Parties Koyo, NPB, NTN, Timken, NSK, and SMT challenged the outcome of varying aspects of the Fifteenth Review in Court Numbers 05–00560, 05–00565, 05–00566, 05–00572, 05–00573, and 05–00574.[3] On January

[2] Under the new methodology, Commerce continues to use the eight characteristics used in the previous fourteen administrative reviews, but require that only four of the criteria (load direction, bearing design, number of rows of rolling elements, and precision rating) match exactly, whereas the family averaging methodology required a match in all 8 categories. *Revised Model Match* at 6–8. If a match in one of those four criteria was not found, Commerce would then resort to constructed value for the normal value. *Id.*

[3] In their briefs, Plaintiffs Koyo abandon their claims in counts two and four of their complaint and Plaintiffs NSK abandon their claims in counts one and four of their complaint. Memorandum of Points and Authorities in Support of Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record ("Koyo's Brief") at 6; Memorandum of Points and Authorities in Support of NSK's Motion for Judgment on the Agency Record ("NSK's Brief") at 1.

23, 2006 these numbers were consolidated under Court Number 05–00560. Oral argument was held on January 24, 2007.

III
STANDARD OF REVIEW

This court will sustain an agency's findings, conclusions, or determinations 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); *see Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1368 (Fed. Cir. 1999). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938)). Courts have deemed substantial evidence to be something less than the "weight of the evidence;" the possibility of drawing two inconsistent conclusions from presented evidence will not necessarily prevent an agency's finding from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966) (citing *Labor Board v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106, 62 S. Ct. 960, 86 L. Ed. 1305 (1942); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18, 21 (5th Cir. 1960)).

When evaluating Commerce's statutory interpretation the court uses a two step analysis, first examining whether Congress has "directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If this is the case, courts then must "give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43; *see Household Credit Servs. v. Pfennig*, 541 U.S. 232, 239 124 S. Ct. 1741, 158 L. Ed. 2d 450 (2004). If instead Congress has left a "gap" for Commerce to fill, the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843–44. Additionally, in matters of statutory construction this court will show "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 13 L. Ed. 2d 616 (1965). The construction need not be the only reasonable one or even the same result this court would have reached had it arisen in a judicial proceeding in order to be sufficient to sustain an agency's interpretation. *Id.* (citing *Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 153, 67 S. Ct. 245, 91 L. Ed. 136 (1946)).

IV
DISCUSSION

A
Commerce's New Model Match Methodology is Supported by Substantial Record Evidence and is in Accordance with Law

1
Commerce was Reasonable in Concluding that Compelling Reasons Existed to Change the Model-Match Methodology

Plaintiffs argue that Commerce did not demonstrate a compelling reason to revise its model match methodology. Memorandum of Points and Authorities in Support of Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record ("Koyo's Brief") at 11–16; Plaintiff Nankai Seiko, Co., Ltd.'s Memorandum of Points and Authorities in Support of Rule 56.2 Motion for Judgment Upon the Agency Record ("SMT's Brief") at 13;[4] Memorandum of Points and Authorities in Support of the Motion for Judgment Upon the Agency Record Submitted by Plaintiffs Nippon Pillow Block Co., Ltd. and FYH Bearing Units USA, Inc. ("NPB's Brief") at 8–16; Memorandum of Points and Authorities in Support of NSK's Motion for Judgment on the Agency Record ("NSK's Brief") at 11–16; Rule 56.2 Motion and Memorandum for Judgment on the Agency Record Submitted on Behalf of Plaintiffs NTN Corporation, NTN Bearing Corporation of America, American NTN Bearing Manufacturing Corporation, NTN Driveshaft, Inc., and NTN-BCA Corporation ("NTN's Brief") at 13–17. According to Koyo, NPB, NSK, and NTN, Commerce only assumes that the matches generated under the revised methodology will create more accurate matches, but provides no record evidence of this. Koyo's Brief at 17; NPB's Brief at 13; NSK's Brief at 13. NSK argues that achieving more price-to-price comparisons does not necessarily equate with a more accurate dumping margin. NSK's Brief at 15. Additionally, it says, the increased complexity of the revised method "results in more selective use of reported sales data, more erratic matches of U.S. and home market sales, and a built-in bias for higher margins," which, according to Koyo, reduce the representativeness and accuracy of dumping margins. Koyo's Brief at 24. Koyo, NPB, and NTN also claim that Commerce's justification of technological advances allowing the new methodology is misplaced because there is no evidence that the family averaging methodology was adopted because of perceived technical limitations; rather the stated

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[4] SMT does not address the compelling reason issue in its memorandum in support of its Motion, but concurs with the views of the other Plaintiffs and incorporates their arguments by reference into its brief.

purpose of the methodology was to take into account the "salient characteristics of the AFB market." Koyo at 25 (quoting *Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order; In the matter of A–27–801, A–428–801, A–475–801, A–588–804, A–485–801, A–559–801, A–401–801, A–549–801, A–412–801; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, 58 Fed. Reg. 39,729, 39,763 (July 26, 1993)); NPB at 12; NTN at 11. NTN further argues that the family method lends stability and predictability, and thus should be retained. NTN's Brief at 17–18.

Defendant counters that it has the discretion to develop a methodology that will determine what is "like" or "similar" merchandise under the controlling statute, 19 U.S.C. § 1677.[5] Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Brief") at 36. Further, Commerce argues that according to the court, it may alter its methodology as long as the new methodology is reasonable, citing *Hangzhou Spring Washer Co., Ltd. v. United States*, 387 F. Supp. 2d 1236, 1246 (CIT 2005), and offers three reasons as to why its determination that there were compelling reasons to revise the methodology is supported by substantial evidence. *Id.* at 38–39. First, Defendant contends that the revised methodology is a more accurate reflection of the intent of 19 U.S.C. § 1677(16)(B) because it compares "foreign like products to the single most similar model," which more accurately implements the statute by "including those models that 'are like subject merchandise in component material(s) and in the purposes for which used.' " *Id.* at 39 (quoting 19 U.S.C. § 1677(16)(B)(ii)). Second, the revised methodology's use of the single most similar model satisfies the statutory preference for price-to-price comparisons. *Id.* Third, technological advancements now allow Commerce to implement a more accurate methodology. *Id.*

Foreign like products are addressed in 19 U.S.C. § 1677(16), which reads, in pertinent part,

> (B) Merchandise—
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> (i) produced in the same country and by the same person as the subject merchandise,
>
> (ii) like that merchandise in component material or materials and in the purposes for which used, and

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[5] Arguments of Defendant-Intervenor Timken in its Response Brief follow those of Defendant United States unless otherwise noted. *See* Response of Timken US Corporation to the Rule 56.2 Motions of Koyo Seiko Co., Ltd., et al., Nankai Seiko Co., Ltd. (SMT), et al., Nippon Pillow Block Co., Ltd. (NPB), et al., NSK Corp. et al., and NTN Corporation, et al. ("Timken's Brief").

(iii) approximately equal in commercial value to that merchandise.

19 U.S.C § 1677(16)(B). In determining what is "like" merchandise, Commerce is given broad discretionary power to create a methodology that best achieves the statutory goal. *Torrington Co. v. United States*, 68 F.3d 1347, 1351 (Fed. Cir. 1995). Commerce created the family averaging methodology pursuant to this discretion, and its decision that there are compelling reasons to revise that methodology must have a reasonable basis to be upheld. *Hangzhou Spring Washer Co.*, 387 F. Supp. 2d at 1246.

According to *Timken Co. v. United States*, 10 CIT 86, 96–97, 630 F. Supp. 1327 (1986), the preference of the statute is to compare foreign like products to a single most similar model from the U.S. There the court determined:

> if values can be found only for items of "similar" merchandise, the value of the item *most* similar to that under appraisement should be adopted. Moreover, an interpretation of the statute requiring selection of the most similar merchandise is most likely to ensure that the ITA "makes the fair value comparison on a fair basis — comparing apples with apples."

Timken, 10 CIT at 96–97 (quoting *Smith-Corona Group v. United States*, 713 F.2d 1568, 1578 (Fed. Cir. 1983)). Thus, as Defendant argues, the single most similar method most recently adopted by Commerce more accurately implements the statutory preference of selecting the most similar merchandise to compare than the family method, which used an averaging technique to create the comparison. Under the new methodology Commerce is able to capture slight differences in models that will potentially be more similar than those matching exactly on the eight basic characteristics the family method uses but which contain significant differences in other areas. Issues and Decision Memo at 24.

In addition, selection of the single most similar methodology also allows for a greater number of reasonable price-to-price comparisons, as is the statutory preference. *See* 19 U.S.C. § 1677b(a)(1)(A) ("The normal value of the subject merchandise shall be the price described in subparagraph (B). . . ."). Plaintiffs are incorrect in their assertion that there is no such preference. *See* Uruguay Round Agreement Act Statement of Administrative Action ("SAA"), H.R. Doc. No. 103–316 at 820 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4161 ("[T]he preferred method for identifying and measuring dumping is to compare home market sales of the foreign like product to export sales to the United States."). Under the family methodology Commerce used constructed value for two-thirds of all models lacking contemporaneous sales of the identical model, whereas under the new methodology price-to-price comparisons rose from thirty to seventy percent. Memorandum from Barbara E. Tillman, Acting

Deputy Assistant Sec'y for Import Admin., Dep't Commerce, to Joseph A. Spetrini, Acting Assistant Sec'y for Import Admin., Dep't Commerce, at 6–7, 14 (May 6, 2005).

Finally, the recent technological advances cited by Commerce act as the means to the end of achieving more accurate margins, making the timing of the revision all the more reasonable. During Oral Argument, counsel for Defendant, citing *Hangzhou Spring Washer Co.*, 387 F. Supp. 2d at 1236, commented that the changes made to the methodology meet the reasonableness standard applied to Commerce by the courts because the change lightens the administrative burden and continues to meet the statutory preference of maximizing price to price comparisons. This assessment is an accurate reflection of the Government's burden, which has been adequately addressed by Commerce's explanation of its decision.

As Defendant-Intervenor Timken aptly notes, prior restraints no longer apply, and Commerce can now use a method that increases accuracy by enhancing data collection and control and addressing prior flaws, and that is more consistent with statutory preference. *See* Timken's Brief at 18. This constitutes a compelling reason to change the methodology. In light of these considerations, substantial evidence exists to show that Commerce was reasonable in determining that there were compelling reasons to revise its methodology, and thus the new methodology is sustained.

2

Commerce Provided Adequate Notice of the Change, and it was Properly Applied to this Review

Plaintiffs argue that they were not given sufficient notice of the change in methodology and thus the application was unlawfully retroactive. Koyo's Brief at 31; NSK's Brief at 19; NPB's Brief at 16; NTN's Brief at 18–20. NSK argues that because the methodology was not defined until May 2005, NSK was unable to price its U.S. sales at or above normal value. NSK's Brief at 19. According to NSK, the family averaging methodology carried the weight of law due to its status as a longstanding agency practice, and all changes had to be made prospectively, even when Commerce had the discretion to revise the method. NSK's Brief at 21. NSK points to an increase in its dumping margin in this review that is over three times greater than that in the thirteenth and fourteenth reviews to show that it did, in fact, rely upon the family methodology, and asserts that this is also due to the fact that the sales activity associated with the fifteenth review period took place before the change was made. NSK's Brief at 23.

Similarly, NPB argues that it detrimentally relied on the Department's use of the family averaging methodology; the retroactive change precluded it from amending its pricing activities to account for the new methodology, thereby minimizing the number of sales at or above normal value. NPB's Brief at 16–17. NPB also notes that there is no evidence on the record of any significant error in the implementation or administration of the family method. *Id.* at 18.

Koyo adds that it was impossible for it or any other respondent to eliminate dumping margins by any of the Department's accepted methods when Commerce retroactively applies the methodology to sales that have already occurred. Koyo's Brief at 33. This, it says, results in an inflation in the dumping margins, but fails to address the remedial goal of antidumping margins. *Id.* at 32–33.

Defendant argues that the notice given to the parties was sufficient. Defendant's Brief at 47. It notes that Commerce is permitted to change its methodology as long as notice and opportunity to comment are given before the final determination. *Id.* at 48 (citing 19 U.S.C. § 1677m(g)). As Commerce afforded the parties an opportunity to comment before the final determination, Defendant claims that it satisfied its statutory obligation. *Id.* Defendant further argues that it gave sufficient notice with regard to the "cap" for the sum of the deviations and precision grade. *Id.* at 49. It notes that though parties were not given notice before the preliminary results of review, they were given notice that the issues were under consideration and were also invited to submit comments. *Id.* (citing Letter from Mark Ross to All Interested Parties, Invitation for Comment on Precision Grade, Gen. R. Doc. 23 (June 22, 2004); Letter from Jeffrey A. May, Deputy Assistant Sec'y for Import Admin. to James J. Jochum, Assistant Sec'y for Import Admin., Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Model Matching Methodology, Gen R. Doc. 42 (September 2, 2004); Letter from Mark Ross to All Interested Parties, Invitation for Comment on Cap on Product Specification Deviation, Gen. R. Doc. 57 (October 29, 2004)). According to Commerce, the increase in similar matches and matches to most similar models "compels this change." *Id.*

Additionally, Defendant argues that changes in methodology "permissibly involve retroactive effect to the extent that this change affected entries made during the period of review subject to Commerce's final determination." *Id.* at 50. To apply them only to future entries would, according to Defendant, "stymie Commerce's ability to change its own practices." *Id.* Commerce believes that a limitation to prospective application would directly contravene the statute. *Id.*

In order to change its methodology, Commerce must provide the affected parties with notice and the opportunity to comment before the final determination is made. 19 U.S.C. § 1677m(g); *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388–89, 795 F. Supp. 417 (1992) (finding that principles of fairness can prevent Commerce from changing its methodology without adequate notice). In this case, Commerce revised its methodology only after providing the parties with notice and meaningful opportunity to comment on the change, even extending the period for further commentary. Letter from Laurie Parkhill, Director, Dep't of Commerce, to All Interested Parties (December 4, 2003), Gen. R. Doc. 1. Though Plaintiffs argue that the change was unfair because Commerce failed to notify them before the end of the review period, Commerce was only obligated to notify them before the final determination. 19 U.S.C. § 1677m(g); *see Shikoku Chems. Corp.*, 16 CIT at 388–89. Commerce did this, and therefore the notice given to the parties was adequate.

Plaintiffs' contention that the application of the methodology was unlawfully retroactive is similarly flawed. Changes in methodology, like all other antidumping review determinations, permissibly involve retroactive effect. 19 U.S.C. § 1675(a)(2); *see Am. Permac, Inc. v. United States*, 10 CIT 535, 539, 642 F. Supp. 1187 (1986) ("19 U.S.C. § 1675(a)(2) expressly calls for the retrospective application of antidumping review determinations"). Applying these changes prospectively would hinder Commerce's ability change its own practices and directly undermine the statutory preference for retrospective application of antidumping review determinations. 19 U.S.C. § 1675(a)(2).

Additionally, Plaintiff NSK makes the argument that the preexisting methodology qualifies as a "longstanding practice." Because longstanding practices by Commerce carry the weight of law, NSK concludes the practice can only be substituted prospectively. NSK's Brief at 20–21; NSK's Reply at 9. Timken counters in its response that this argument should be rejected because Commerce has applied different methodologies in different cases, and so there is no longstanding practice. Timken's Brief at 21–22. In its reply, NSK argues that "Timken does not clarify why an agency cannot have different longstanding practices in different cases, and it does not cite any cases supporting its position." NSK's Reply at 10.

According to case law, "Commerce is required to follow prior 'precedent' only if it represents a settled rule applied consistently over time." *Bethlehem Steel Corp. v. United States*, 25 CIT 895, 914 n.37, 159 F. Supp. 2d 730 (2001). While there is "no explicit explanation . . . of what is required to establish a prior norm . . . [t]he word 'norm' connotes consistency over time." *Coalition for Fair Atl. Salmon Trade v. United States*, 24 CIT 263, 266, 101 F. Supp. 2d 821 (2000) (citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808, 93 S. Ct. 2367, 37 L. Ed. 2d 350 (1973) (using "settled rule" in relation to prior norm); *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 997–98, 834 F. Supp. 413 (1999) (using "traditional methodology" and "normal practice" in relation to prior norm)). As consistency is required to achieve the status of longstanding practice, and the existence of two opposing practices in this case show an inconsistency in Commerce's behavior, there is therefore no longstanding practice to consider.[6]

3

The Resulting Similar Matches are Supported by Substantial Record Evidence and are in Accordance with Law

Plaintiffs Koyo and NBP each argue through specific examples that the Department's new methodology led to the comparison of dissimilar bearing products. Koyo's Brief at 27; NPB's Brief at 18. Plaintiffs argue that the Department "ignored key physical characteristics necessary to differentiate different bearings and to identify foreign like products for comparison," thus erroneously comparing certain specialty bearings with unrelated or standard bearings. NPB's Brief at 18; *see* Koyo's Brief at 28–29. NPB contends that the eight physical characteristics[7] used in the single most similar model method are not enough to select foreign like products; it argues that Commerce must also consider additional criteria such as "type of seals, balls, and the ring width." NBP's Brief at 19–20. NPB provides several examples, such as comparing high temperature bearings and dust proof bearings to standard models. *Id.* at 21. It attempted to raise these arguments to Commerce, but they were rejected. *Id.* at 23.

Koyo begins its examples of mismatches with Match 3 from Exhibit D of its case brief, where the methodology resulted in a dumping margin based on a customized U.S. bearing used in the [certain application] compared to the Japanese price of a bearing used in [a different application]. Koyo's Brief at 27–28. The U.S. model was custom designed with [certain physical characteristics] while the Japanese model was not. *Id.* at 28. Its other examples have similar distinctions.[8] According to Koyo, there are "virtually no similarities between the physical characteristics or commercial uses" of these products. *Id.* Koyo argues that the introduction of matches such as

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[6] Plaintiffs also argue that their expectation that Commerce would continue to use the same methodology caused them to detrimentally rely on the practice. *See, e.g.*, NPB's Brief at 16–17 (citing *Shikoku*, 16 CIT at 388–89). Detrimental reliance is one element of the longstanding practice argument addressed above. As this case fails to meet the standard of a longstanding practice, the Plaintiffs' reliance is not enough to require a prospective application of the change.

[7] (1) bearing load, load direction, number of rows, and precision grade match exactly; (2) from those models, the four physical characteristics of width, inner diameter, outer diameter, width and load rating match with a total sum of the deviations in physical characteristics not greater than 40 percent. Issues and Decision Memo at 19.

[8] Match 7 from Koyo's Exhibit D compared sales of a U.S. model used in [a certain application] with a home market bearing used in a [a different application]. *Id.* Match 8 compared a U.S. model used in [a certain application], to a Japanese model used in [a different application]. *Id.*

these is evidence that the new methodology has actually decreased the accuracy of Commerce's antidumping calculation. *Id.* at 29.

Defendant counters that the statute does not require the level of substitutability or similarity urged by Plaintiffs; home market models need not be technically substitutable, purchased by the same customers, or given the same end use as the U.S. model. Defendant's Brief at 52 (citing *Koyo Seiko Ltd. v. United States*, 66 F.3d 1204, 1210 (Fed. Cir. 1995)). Plaintiffs' focus on specific examples ignores that all of the products meet the basic eight similar matching characteristics, which are the same as the characteristics used in the family averaging methodology. *Id.* at 52–53.

Defendant also contends that while Koyo points out examples of specifically mismatched merchandise, it does not assert whether a better match exists for those examples. *Id.* at 55. Additionally, according to Commerce, Plaintiffs fail to establish the need for additional criteria beyond the eight basic criteria used by Commerce for fifteen years. *Id.* at 56. First, the addition of design sub-types within the "bearing design" criterion is wholly unlike adding new criteria beyond the basic eight, according to Defendant. *Id.* Second, Defendant notes that Koyo stated that no additional criteria should be added when Commerce solicited comments on the development of a new model match methodology, and NPB submitted no comments on the matter. *Id.* at 57 (citing Letter from Sidley Austin Brown & Wood LLP to Donald L. Evans, Sec'y of Commerce, Koyo's Comments on Model-Methodology, Gen. R. 12, at 18.) Finally, Defendant asserts in response to NPB's argument that it improperly rejected new factual information that "the *proprietary* cost data upon which it sought to rely was not submitted upon the record of the fifteenth administrative review," and thus, as it was not on the record, was properly rejected. *Id.* at 59.

> Under the Antidumping statute, similar merchandise, or "foreign like products," are:
>
> (i) produced in the same country and by the same person as the subject merchandise,
> (ii) like that merchandise in component material or materials and in the purposes for which used, and
> (iii) approximately equal in commercial value to that merchandise.

19 U.S.C. § 1677(16)(B)(i)–(iii).[9] According to the Court of Appeals for the Federal Circuit, "for purposes of calculating antidumping duties, it is not necessary " 'to ensure that home market models are technically substitutable, purchased by the same type of customers,

[9] The first criterion is not at issue here.

or applied to the same end use as the U.S. model. . . . Matching 'such or similar' home-market merchandise with certain U.S. merchandise is all that the statute requires.' " *Koyo Seiko*, 66 F.3d at 1210 (Fed. Cir. 1995) (quoting *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof From Japan, Final Results of Antidumping Duty Administration Review*, 56 Fed. Reg. 41,511 (August 21, 1991)).

In this case, Commerce's matches achieve the level of similarity required by the statute. First, Commerce goes beyond its general matching methodology, requiring that matches meet the eight basic similar matching characteristics[10] along with a stricter forty percent sum of the deviations cap of allowable differences between inner and outer diameter, width, and load rating imposed for the bearings methodology. Issues and Decision Memo at 19. In addition, any differences are accounted for by a difference in merchandise ("DIFMER") adjustment. Plaintiffs fail to provide an example of better matches for those they identify as mismatched, and additionally fail to recognize that the statute does not require Commerce to find identical or substitutable matches, but rather "similar" ones. With the forty percent sum of the deviations test and the twenty percent DIFMER adjustment, Defendant asserts "if there were any sales of a home-market product with more similar physical characteristics to the United States sales in question, Commerce would have used them." Defendant's Brief at 55. Plaintiffs do not identify any such sales, and Commerce has fulfilled its duty under the statute to sustain its findings of similar matches.

4
Commerce's Ordering of Criteria for the Most Similar Home Market Sale is Supported by Substantial Record Evidence and is in Accordance with Law

Plaintiff SMT argues that Commerce's decision to use level of trade and contemporaneity to choose between equally similar models rather than differences in variable cost of manufacture is not supported by substantial evidence. SMT's Brief at 15. First, SMT contends that Commerce failed to articulate a reason for changing its tie-breaker methodology, and alleges that is grounds in and of itself to remand to the agency for further explanation. *Id.* (citing *Hontex Enterprises, Inc. v. United States*, 248 F. Supp. 2d 1323, 1344 (CIT 2003) (finding that the court could not uphold Commerce's interpretation of the antidumping statute without knowing what factors led to the decision)). SMT then argues that Commerce's use of level of trade and contemporaneity instead of cost differences was not in accordance with agency practice and yielded distortions in the margin

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[10] These eight basic critera are the same used in the prior family average methodology that Plaintiffs argue should be reinstated.

calculation as it was applied to SMT. *Id.* at 17. According to SMT, Commerce relied on incorrect statutory provisions[11] to conclude that normal value should be based on prices at the same level of trade and violated its established practice of using DIFMER as the tie-breaker for identifying similar merchandise. *Id.* at 18, 22. This misapplication of the tie-breaker, SMT says, seriously distorted its product comparisons, resulting in matches of U.S. market sales to home market sales with higher cost difference percentages than would have occurred if DIFMER had been used, and the court therefore should remand to Commerce to re-conduct the model match methodology using DIFMER as its primary means of selecting among equally similar models. *Id.* at 27–30. SMT adds that Commerce's definition of "contemporaneous" is an unreasonable interpretation of the governing statute, and it should be only selecting sales that, if not occurring in the same period of time, then as close to the same period of time as possible. *Id.* at 32.

Defendant counters that there is no legal basis for requiring Commerce to apply a smallest DIFMER test in identifying sales of similar merchandise. Defendant's Brief at 60. Additionally, Defendant argues that SMT fails to establish that Commerce's identification of sales of similar merchandise is distortive. *Id.* at 65. "[I]t is not necessary, as SMT argues, to narrow further the pool of similar sales based upon the smallest difference in cost because all of the sales in the pool of similar sales have *already* passed the smallest sum-of-the-deviations test for the eight similar model-match characteristics, the 40 percent sum-of-the-deviations test *and* the 20 percent DIFMER test." *Id.* at 66. Commerce adds that applying the smallest DIFMER test would result in a narrow finding, contravening one of the purposes of the revision: to generate more matches. *Id.*

Defendant also contends that it did provide a reasonable explanation for its methodology, but denies SMT's assertion that using the smallest DIFMER is a longstanding practice. According to Defendant, though Commerce applied a smallest DIFMER test in several instances, "in none of these determinations did Commerce articulate a policy in this regard or establish a set hierarchy for analysis." *Id.* at 67. The modification, it says, was made to reflect the data sampling situation, and is consistent with 19 C.F.R. § 351.414(e)(2). *Id.* at 70.

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[11] "Commerce recites section 773(a)(1)(B)(i) of the Act, 19 U.S.C. § 1677b(a)(1)(B)(i), for the proposition that normal value shall be based on prices 'to the extent practicable, at the same level of trade,' and section 773(a)(1)(A) of the Act, 19 U.S.C. § 1677b(a)(1)(A), for the proposition that normal value shall be based on prices 'at a time reasonably corresponding to the time' of the U.S. sale. . . . However, [these citations] are irrelevant to the selection between *product models*. Sections 773(a)(1)(A) and (B) relate to the *characteristics of the sales transactions*, not to the physical characteristics or market value of the products themselves." *Id.* at 18.

The controlling statute here is 19 U.S.C. § 1677(16)(B), which provides the statutory definition of similar merchandise. Nowhere in the statute or accompanying regulations is there a requirement that Commerce follow a specific hierarchy when determining what is "similar" for purposes of comparison; rather Commerce is left with broad discretion to develop its own methodology for this, *Torrington Co. v. United States*, 19 CIT 403, 414, 881 F. Supp. 622 (1995). Though Commerce has in the past applied a DIFMER test before applying a level of trade and contemporaneity test, it is nowhere required that it do so. *See CEMEX, S.A. v. United States*, 133 F.3d 897, 899–900 (Fed. Cir. 1998) (applying a DIFMER test first).

As Commerce explains, requiring that it apply the smallest DIFMER test first will result in a narrow finding of home market sales that works against the purpose of the methodology's revision. The additional narrowing is simply not needed as all of the matches SMT protests had the smallest sum of deviations for the eight basic characteristics, passed the forty percent sum of deviations test, and passed the twenty percent DIFMER test. Those that resulted in higher DIFMERs than other less contemporaneous sales likewise had higher DIFMER adjustments to normal value, thus taking into account any distortions. The hierarchy Commerce has chosen therefore is a reasonable interpretation of the statutory requirements, is in accordance with law, and should be sustained.

5

Commerce's rejection of NTN's request to differentiate its bearings was proper

Plaintiff NTN argues that Commerce improperly rejected NTN's proposed design types, leading to unreasonable matches between substantially different designs. NTN's Brief at 21. This decision, according to NTN, ignores record evidence that shows significant differences in the design types and led to Commerce matching physically and functionally different products. *Id.* at 22. Additionally, NTN says that though Commerce determined that NTN did not provide adequate justification to use its reported bearing designs, NTN provided the agency with "numerous examples of the unreasonable matches that resulted from the use of Commerce's rather than NTN's design types." *Id.* at 24. NTN also argues that it relied on the longstanding use by Commerce of its design types. *Id.* at 27.

Defendant counters that NTN fails to establish that the differences it identifies are so severe that the DIFMER adjustment cannot account for them. Defendant's Brief at 75. In addition, Defendant says that NTN does not dispute that it failed to provide the necessary information and explanation as to why Commerce should adopt the design type designations it identifies. *Id.* at 77. According to Defendant, the examples provided by NTN give only differences in physical characteristics, which alone is insufficient to justify the addition of different design types. *Id.* Defendant also argues that Commerce's action in accepting two additional design types NTN previously reported was not inconsistent with this decision because in this review NTN has not provided any justification for accepting its suggested design types. *Id.* at 78. Finally, Defendant adds that implementation would be impractical in this review because of NTN's failure to alert or provide justification to Commerce of its proposed subtypes in its questionnaire response. *Id.* at 79.

As above, the controlling statute is 19 U.S.C. § 1677(16)(B), and Commerce has the discretion to develop its own methodology for determining what constitutes "like" or "similar" merchandise. *Torrington*, 19 CIT at 414. Bearing design is one of the eight basic characteristics that Commerce has chosen to rely upon when choosing among similar merchandise for comparison. Issues and Decision Memo, at 19.

In its supplemental questionnaire, Commerce specifically requested a detailed explanation of why it should use different bearing design types than those set forth in the original questionnaire. NTN Supplemental Questionnaire, Pub. Doc. 217/11487, question 15 (March 14, 2005). In its Issues and Decision Memorandum, Commerce explained that it could not justify using all of the design types proposed by NTN because "NTN did not provide a detailed analysis of its bearing-design types and did not explain the differences among its various designations." Issues and Decision Memo, at 57. Additionally, NTN failed to report its bearings based on the original basic design types as Commerce requested, and instead reported bearings on the basis of its own suggested design types. When Commerce questioned NTN, its explanation for the suggested design types did not include an explanation as to why the differences could not be accounted for with a DIFMER adjustment. NTN Supplemental Questionnaire at 10. As each of Commerce's determinations to accept additional design types must be based on substantial record evidence *in that particular review*, 19 U.S.C § 1516a(b)(1)(B)(i),[12] Commerce was reasonable in rejecting these design types even if it had accepted them as sufficiently justified in the past.

For the reasons stated above in Section A, Subsections 1–5, Commerce's decision to change its model match methodology in this review and the resulting new methodology are supported by substantial record evidence and are in accordance with law.

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[12] (1) Remedy. The court shall hold unlawful any determination, finding, or conclusion found . . .

> (B)(i) in an action brought under paragraph (2) of subsection (a), to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . .

B
Commerce's rejection of NTN's Proposed Adjustments to its Indirect Selling Expenses is Supported by Substantial Record Evidence

In its initial questionnaire, Commerce requested that NTN provide a description of all of its selling expenses in the United States, including indirect selling expenses. Memorandum from Donald J. Unger, Barnes Richardson & Colburn to Donald L. Evans, Sec'y of Commerce, (January 13, 2005) ("NTN's Section C Questionnaire"), at C–37, C–41. In its response NTN provided a sum to exclude from [certain selling expenses] and sought to exclude from indirect selling expenses [certain management expenses]. *Id.* at Exch. C–11. In a supplemental questionnaire, Commerce requested that NTN justify these proposed adjustments. Memorandum from Donald J. Unger, Barnes, Richardson & Colburn to Carlos M. Guiterrez, Sec'y of Commerce (March 14, 2005) ("NTN's Second Supplemental Questionnaire Response") C.R. Doc. 73. In its *Preliminary Results*, Commerce rejected NTN's proposed adjustment for [certain selling expenses], but accepted its methodology for allocation of [certain management expenses]. *Antifriction Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 25,539 (May 13, 2005) ("*Preliminary Results*"). Then, in the *Final Results*, while Commerce maintained its rejection of [certain selling expenses] it also denied the adjustment for [certain management expenses]. Issues and Decision Memo, cmt. 23, 24.

NTN argues that Commerce's recalculation of NTN's indirect selling expenses should not be upheld because Commerce did not exclude expenses that, according to NTN, were related exclusively to non-subject merchandise. NTN's Brief at 27. Though Commerce asserted that NTN did not explain its calculation of warehousing expenses related to the sale of [a related company's] products, NTN contends that it twice explained that these expenses were solely related to non-subject merchandise, and [the related company] does not produce any merchandise that is subject to the antidumping duty order at issue in this case. *Id.* at 28. On the subject of [certain management expenses], NTN argues that Commerce's allocation, based entirely on annual sales, "is not appropriate because these expenses are not incurred on sales value, and do not vary with the amount of sales at each company." *Id.* at 31.

Defendant counters that NTN failed to adequately justify its lump sum adjustments for [certain selling expenses] because it did not explain its calculations despite repeated requests by Commerce to do so, and thus they were properly rejected. Defendant's Brief at 98–101. According to Defendant, a general description of the nature of the expenses is insufficient without an explanation of how the amount to be deducted was calculated by NTN. *Id.* at 102. When addressing [certain management expenses], Defendant notes that Commerce denied NTN's proposed adjustment in the *Final Results* because the allocation methodology "did not rationally reflect a division between subject and non-subject merchandise." *Id.* at 104. NTN, Commerce says, did not satisfy its burden of showing that its allocation method is reasonable and without distortion because it did not track the time spent by [the manager] between each company, rendering its allocation arbitrary and "not calculated upon as specific a basis as is feasible." *Id.* at 107. Defendant also asserts that Commerce's decision to reject NTN's adjustments comports with its past practice and its reasoning was adequately explained. *Id.* at 108, 109.

Though Commerce will allow suggestions for allocation methodologies that differ from its own general practice, the burden is on the requesting party to establish that its alternative is reasonable and will not create distortions. 19 C.F.R. § 351.401(b)(1) ("In making adjustments to export price, constructed export price . . . [t]he interested party that is in possession of the relevant information has the burden of establishing to the satisfaction of the Secretary the amount and nature of a particular adjustment"). Pursuant to 19 C.F.R. § 351.401(g)(2):

> Any party seeking to report an expense or a price adjustment on an allocated basis must demonstrate to the Secretary's satisfaction that the allocation is calculated on as specific a basis as is feasible, and must explain why the allocation methodology used does not cause inaccuracies or distortions.

Thus, "[i]f Commerce is not satisfied, then it has the discretion to reject the allocations and adjustments sought by the interested party." *NTN Corp. v. United States*, 306 F. Supp. 2d 1319, 1328 (CIT 2004); *see* 19 C.F.R. § 351.401(g)(1) (stating that the agency must be "satisfied that the allocation method used does not cause inaccuracies or distortions.").

In the case of [certain selling expenses], NTN did not provide an explanation or even answer the specific inquiries made by Commerce into the reasoning behind its calculations.[13] NTN Supplemental Questionnaire Response at 24–26 (NTN's Brief, Appendix 10). As the record contains no explanation of the basis for NTN's calculation, NTN did not meet its burden of establishing that the allocation is reasonable. Commerce therefore was within its discretion to determine that there was insufficient support for the proposed adjustments, and to reject NTN's allocations.

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[13] Commerce asked NTN: "Who does NBCA pay for the expenses that you excluded from G&A?" to which NTN never responded. NTN Supplemental Questionnaire Response at 26, Q 128.

For the [certain management expenses], Commerce was similarly within its discretion when it chose to reject NTN's proposal. NTN did not satisfy its burden of showing that its allocation method did not cause inaccuracies or distortions. As Defendant notes, NTN did not track the time [a certain manager] spent at each company. This renders Commerce's determination that it produced unreasonable inaccuracies or distortions within the discretion given Commerce by the regulation.

C

Commerce's Determination to Deduct Certain Additional Benefits Expenses from the Constructed Export Price ("CEP") is Supported by Substantial Record Evidence and is in Accordance with Law

Plaintiff NSK argues that its Japanese worker expenses have no connection with its economic activities in the United States. NSK's Brief at 24. According to NSK, though the base salary for workers is related to activity in the United States, the additional benefits in question are not. *Id.* at 25. As [a company] pays the employees' base salaries, NSK included the base salary expense in its calculation, but not the additional benefits paid by [a company]. *Id.* at 24–25.

Defendant counters that Commerce's determination to deduct additional benefits from the CEP was in accordance with law because the expenses incurred by NSK were in association with, and as compensation for, its employees engaged in activity in the United States. Defendant's Brief at 83. According to Defendant, NSK is mistaken when it contends that the additional benefit expenses are not associated with economic activity in the United States because the additional benefits are provided to NSK's employees in Japan. *Id.* at 84. Defendant also says that "for purposes of calculating CEP, there is no difference between the 'additional benefits' and the salary expenses that NSK acknowledged Commerce properly deducted from CEP." *Id.* Finally, Defendant asserts that NSK's argument that [a company] paid the additional benefits expenses is irrelevant, as the regulation provides that CEP will be adjusted for economic activity in the United States no matter when or where it is paid. *Id.* at 85.

> Pursuant to 19 U.S.C. § 1677a(b), constructed export price is defined as: the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter, to a purchaser not affiliated with the producer or exporter, as adjusted under subsections (c) and (d).

When calculating dumping margins, Commerce will construct a U.S. price for goods that is equivalent to the export price of the home country by deducting certain kinds of expenses from the CEP.[14] Commerce promulgated the rule in 19 C.F.R. § 351.402(b), which reads:

> (b) Additional adjustments to constructed export price. In establishing constructed export price under section 772(d) of the Act, the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid. The Secretary will not make an adjustment for any expense that is related solely to the sale to an affiliated importer in the United States, although the Secretary may make an adjustment to normal value for such expenses under section 773(a)(6)(C)(iii) of the Act.

This statutory interpretation by Commerce has been upheld by the court in *Timken v. United States*, 22 CIT 621, 625, 16 F. Supp 2d 1102 (1998).

As Defendant points out, the fact that the benefits were provided to NSK's Japanese employees in Japan or that the benefits were paid by a different company than that which paid their base salary is not enough to remove the benefits from being considered part of "economic activity occurring in the United States." Defendant's Brief at 84. These employees were compensated with additional benefits specifically because they provided services to NSK Corp. that related to its United States sales. Issues and Decision Memo at 55. In light of this, as Defendant notes in its response brief, when calculating CEP there is no difference between these additional benefits and the base salary that NSK has admitted Commerce properly deducted from the CEP. Defendant's Brief at 84; *see* 19 C.F.R. § 351.402(b) ("the Secretary will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser, no matter where or when paid"). Finally, NSK's assertion that the base salary and the additional benefits were paid by separate entities is not sufficient to prevent their deduction from the CEP. According to the explanation provided in the final rule, "no matter where or when paid," 19 C.F.R. § 351.402(b) is meant to include expenses associated with activities occurring in the

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[14] 19 U.S.C. § 1677a(d) provides that, as additional adjustments, CEP may be reduced by:

> (1) the amount of any of the following expenses generally incurred by or for the account of the producer or exporter, or the affiliated seller in the United States, in selling the subject merchandise (or subject merchandise to which value has been added)—
> (A) commissions for selling the subject merchandise in the United States;
> (B) expenses that result from, and bear a direct relationship to, the sale, such as credit expenses, guarantees and warranties;
> (C) any selling expenses that the seller pays on behalf of the purchaser; and
> (D) any selling expenses not deducted under subparagraph (A), (B), or (C).

United States even when "the foreign parent of the affiliated United States importer pays those expenses." *Antidumping Duties: Final Rule*, 62 Fed. Reg. 27,296, 27,351 (May 19, 1997). Thus, as the additional benefits in question were related to economic activity occurring in the United States, Commerce's deduction of those expenses in its calculation of the CEP is supported by substantial record evidence and is in accordance with law.

D
Commerce's Zeroing is Supported by Substantial Evidence and is in Accordance with Law

Plaintiffs Koyo, NTN, and NPB each argue that Commerce's practice of "zeroing"[15] negative dumping margins is a violation of U.S. international obligations or contrary to U.S. law.

See Koyo's Brief at 33; NPB's Brief at 25;[16] NTN's Brief at 33. Koyo and NTN note that the antidumping statute, 19 U.S.C. § 1677b(a) requires that "[i]n determining under this subtitle whether subject merchandise is being, or is likely to be, sold at less than fair value, a fair comparison shall be made between the export price or constructed export price and normal value." Koyo's Brief at 34 (quoting 19 U.S.C. § 1677b(a)); *see also* NTN's Brief at 36. They go on to argue that Commerce's zeroing practice is not compatible with the requirement of a "fair comparison" as set out by the statute. Koyo's Brief at 35 (citing SAA at 656; Panel Report, *United States–European Communities-Antidumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R (March 1, 2001) ("*Bed Linen*"); Panel Report, *United States–United States-Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R (December 15, 2003) ("Corrosion-Resistant Steel"); Panel Report, *United States–United States-Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R (August 11, 2004) ("*Softwood Lumber*").); NTN's Brief at 36–37. Both Plaintiffs also argue that as the WTO considers the U.S. practice of zeroing to be a violation of the AD Agreement, the United States is not meeting its international obligations if this practice continues. Koyo's Brief at 35–37, NTN's Brief at 38.

Defendant counters that the arguments Plaintiffs present have been addressed and rejected in previous Federal Circuit opinions. Defendant's Brief at 113, 115 (citing *Corus Staal BV v. United States*, 395 F.3d 1343 (Fed. Cir. 2005); *Timken Co. v. United States*, 354 F.3d 1334 (Fed. Cir. 2004)). Additionally, Defendant argues that the Uru-

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[15] "Zeroing" is the practice of assigning the value of zero to negative margin transactions in the calculation of the weighted average margin.

[16] In its brief, NPB notes the controlling case law and this court's obligation to follow precedent due to the principle of *stare decisis*, but raises the argument here in order to preserve its rights to reargue the issue should there be an appeal. NPB's Brief at 26.

guay Round Agreements Act ("URAA") makes it clear that the WTO panel and Appellate Body Reports are not able to "change U.S. law or order such a change." *Id.* at 115 (quoting *Corus Staal*, 395 F.3d at 1348). Additionally, Defendant notes that reliance on *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 188, 2 L. Ed. 208 (1804) construction is misplaced, as it ignores the principle that a non-self executing agreement is not domestically binding without Congressional implementation. *Id.* at 119 (citing *Defenders of Wildlife v. Hogarth*, 330 F.3d 1358, 1362 (Fed. Cir. 2003).

The Court of Appeals for the Federal Circuit has examined the practice in question and addressed the arguments Plaintiffs are making in two separate cases, and each time has found that Commerce's actions are lawful and supported by the language of 19 U.S.C. § 1677. *Corus Staal*, 395 F.3d at 1346; *Timken*, 354 F.3d at 1342–45. As Defendant-Intervenor points out, "[t]he issue continues to be whether Commerce, when calculating the weighted average dumping margin, lawfully treated sales where the export price exceeded normal value as sales without a dumping margin (a zero dumping margin) rather than sales with a 'negative' margin." Timken's Brief at 37–38. Plaintiffs thus essentially ignore the obligation of this court to follow precedent as required by *stare decisis*. *See Beacon Oil Co. v. O'Leary*, 71 F.3d 391, 395 (Fed. Cir. 1995). Without evidence that new circumstances are present or that the agency has acted in a way that requires a different level of deference, there is no need for this court to revisit the practice of zeroing at this time. *See Paul Muller Indus. v. United States*, 435 F. Supp. 2d 1241, 1245 (CIT 2006) (holding that zeroing is a legitimate practice as raised in the fourteenth review); *NSK Ltd. v. United States*, 416 F. Supp. 2d 1334, 1338 (CIT 2006) (sustaining zeroing in the thirteenth review). As Defendant-Intervenor further points out, Plaintiffs' various assertions at best constitute new arguments only, and new arguments do not avoid the weight of precedent. Timken's Brief at 38; *see In re Penn Central Transp. Co.*, 553 F.2d 12, 15 (3d Cir. 1977) (finding that advancing a new point is not enough to overcome precedent on an issue).

Further, Plaintiffs' arguments that Commerce's practice violates the international obligations of the United States are not persuasive to this court. The Federal Circuit has affirmed zeroing, and until an action by Congress adopts the decisions of the WTO as part of the domestic statutory scheme there is no reason to overturn it. *Corus Staal*, 395 F.3d at 1347; *Timken*, 354 F.3d at 1338. No such statutory scheme has been adopted regarding the practice, so there is no reason to reexamine the issue at this time.

E
Commerce's Determination Not to Treat Koyo and its Affiliate as a Single Entity was Proper

1
Background to Timken's Collapsing Claim

Commerce sends initial questionnaires to respondents regarding the producers' corporate structure and affiliations, among other issues. In its initial questionnaires to Koyo, Commerce sent several questions regarding Koyo's affiliation with another producer of subject merchandise. In its response, Koyo stated that it was affiliated with one producer and it did buy a significant amount of the affiliate's production. *Koyo Section A Questionnaire Response*, P.R. Doc. 96 at A–16 to A–17 (October 13, 2004). Koyo also conceded that the affiliate's production facilities produce similar or identical merchandise to its own, but asserted that the companies operate independently and that it cannot direct the operations of the affiliate. *Koyo Rebuttal Brief*, P.R. Doc. 308 at 5, fr. 11 (June 27, 2005). Commerce accepted this response and made no further inquiry into the relationship, and Timken's comments on Koyo's responses did not reference the issue. *See Petitioner's Comments on Koyo Questionnaire Response*, P.R. Doc. 130 (December 7, 2004).

Following Commerce's Preliminary Results Timken contested the treatment of Koyo and its affiliate and argued that they should be treated as a single entity, or "collapsed." *Petitioner Case Brief*, P.R. Doc. 301. In the Final Results, Commerce concluded that the available record evidence[17] did not support collapsing the two entities, and rejected Timken's request. Issues and Decision Memo, at 46–47.

2
Parties' Arguments

Plaintiff Timken argues that Commerce's decision that no significant potential for the manipulation of price or production existed between Koyo and its affiliate is contrary to the Department's practice. Timken US Corporation's Memorandum in Support of its Rule 56.2 Motion for Judgment on the Agency Record ("Timken's Motion") at 10. Timken points to Koyo's disclosure that the affiliated supplier was [in a certain relationship with Koyo], that Koyo purchased [a certain portion of its] affiliates' output, and that for the reported sales, the affiliated producer was [the supplier of a certain portion]

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[17] Commerce added that Timken could have questioned the relationship of the affiliates at an earlier stage in the review if it suspected that their business operations were intertwined, in which case the Department could have obtained more detailed information on the subject. Instead, because Timken waited to express its concern so late in the review, Commerce could only use the evidence available on the record to decide. Issues and Decision Memo at 46–47.

to assert that "intertwined operations" did exist. *Id.* at 11. According to Timken, Commerce's reliance on Koyo's assertions failed to provide factual explanation, reference objective evidence, or address contrary evidence in the record. *Id.* (citing Issues and Decision Memo at 47).

Timken also argues that Commerce's finding that the companies operated independently because Koyo owns less than a majority of the stock "amounts to a non sequitur." Timken's Motion at 13. According to Timken, both the statute, 19 U.S.C. § 1677(33), and Commerce's regulations make it clear that control can exist in the absence of ownership. *Id.* at 14–15 (citing 19 C.F.R. § 351.102(b)). Additionally, Timken contends that Commerce's determination that the companies did not share personnel is unsupported because, though the employees that work for Koyo do not also work for the affiliate, because Koyo receives merchandise produced by the affiliated suppliers and they therefore [have a certain relationship]. *Id.* at 15.

Defendant counters that the record evidence supports Commerce's determination not to collapse the two entries.[18] Defendant's Brief at 90. The record establishes that Koyo owned less than a majority of stock, only shares officers that are "non-stationed auditors" for the affiliate, and does not share employees, production facilities, sales information or production, or sales or pricing decisions. *Id.* at 90–91. Commerce also noted that "given the fact that Timken did not dispute Koyo's representations until it filed its case brief, it was too late for Commerce to obtain more detailed information regarding the relationship," and by the record evidence available concluded that the collapsing was not warranted. *Id.* at 91 (citing Issues and Decisions Memo at 46–47); *see* Koyo's Response at 7 ("the Department properly exercised its discretion and found that Timken raised the issue of collapsing Koyo with one of its affiliated suppliers far too late in the administrative review process for the Department to give that issue the timely consideration that it would require."). Thus, Defendant argues, Commerce appropriately based its decision on the record evidence available. Defendant's Brief at 92.

Timken contends that Commerce's assertion that its collapsing issues was raised at too late a stage in the review is incorrect. Timken's Motion at 15. Though Timken concedes that Commerce could have obtained more detailed information on the relationship of Koyo and its affiliate, Timken contends that this should not prevent Commerce from taking action and measuring the full amount of dumping in order to prevent manipulation. *Id.* at 15–16.

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[18] Defendant-Intervenor Koyo's arguments in its Response Brief mirror the arguments of Defendant unless otherwise noted. *See* Memorandum of Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. in Response to Timken U.S. Corporation's Motion for Judgment on the Agency Record ("Koyo's Response") at 6–17.

3
Analysis of Collapsing Claim

Commerce has promulgated regulations that determine which affiliated parties will be collapsed into a single entity for the purpose of calculating dumping margins in order to avoid the potential manipulation of price or production to circumvent antidumping duties.[19] Thus, Commerce will treat affiliated producers as a single entity if they have "facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities," and " there is a significant potential for the manipulation of price or production." 19 C.F.R. § 351.401(f). When determining whether there is "significant potential for manipulation," Commerce considers three factors: (1) the level of common ownership, (2) to what extent managerial employees or board members of one firm sit on the board of directors of an affiliated firm, and (3) whether the operations are intertwined through shared sales information, production and pricing decision-making, or significant transactions. *Id.* These factors are considered by Commerce in light of the totality of the circumstances; no one factor is dispositive in determining whether to collapse the producers. *See, e.g.*, *Light Walled Rectangular Pipe and Tube from Turkey: Notice of Final Determination of Sales at Less Than Fair Value*, 69 Fed. Reg. 53,675 cmt. 10 (September 2, 2004). Additionally, Commerce looks for "relatively unusual situations, where the type and degree of relationship is so significant that [it finds] there is a strong possibility of price manipulation." *Nihon Cement Co. v. United States*, 17 CIT 400, 426–27 (1993) (quoting *Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany*, 54 Fed. Reg. 18,992, 19,089 (May 3, 1989)).

In this case, the evidence on the record supports Commerce's determination not to collapse Koyo and its affiliate into a single entity. According to the record, Koyo (1) owns less than a majority of the af-

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[19] 19 C.F.R. § 351.401(f) reads, in pertinent part:

(f) Treatment of affiliated producers in antidumping proceedings. (1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retooling of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

(2) Significant potential for manipulation. In identifying a significant potential for the manipulation of price or production, the factors the Secretary may consider include:

(i) The level of common ownership;

(ii) The extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and

(iii) Whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

filiate's stock,[20] (2) the shared officers are merely "non-stationed" auditors for the affiliate, and (3) the companies did not share employees, production facilities, sales information or production, or sales pricing decisions. Koyo Section A Questionnaire Response, P.R. Doc. 96, at A–16 to A–18. The arguments presented by Timken do not undermine Commerce's determination based on these facts and assessed with the totality of the circumstances surrounding the case. At best, Timken presents an alternative way to interpret the evidence, and, as the court has noted before, the possibility of drawing two inconsistent conclusions from the record evidence is not enough to render Commerce's decision unsupported by substantial evidence. *See Consolo*, 383 U.S. at 619–20. Thus, Commerce appropriately based its determination on the record evidence available to it at the time of the review, and properly declined to collapse Koyo and its affiliate for the purpose of calculating a dumping margin.

V
CONCLUSION

For the above stated reasons, Commerce's determination in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711 (September 16, 2005) is AFFIRMED.

KOYO SEIKO CO., LTD. et al., Plaintiffs, v. UNITED STATES, Defendant, and TIMKEN US CORPORATION et al., Defendant-Intervenors.

Before: WALLACH, Judge
Consol. Court No. 05–00560

ORDER AND JUDGMENT

This case having come before the court upon the Motion of Plaintiffs Koyo Seiko Co., Ltd. and Koyo Corporation of U.S.A. for Judgment on the Agency Record; Motion for Judgment Upon the Agency Record Submitted by Plaintiffs Nippon Pillow Block Co. Ltd. and FYH Bearing Units USA, Inc.; Plaintiff Nankai Seiko, Co., Ltd.'s Rule 56.2 Motion for Judgment Upon the Agency Record; Motion for Judgment on the Agency Record submitted on behalf of Plaintiffs NSK Ltd., NSK Corp., and NSK Precision America, Inc.; Rule 56.2

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[20] This fact is particularly significant as Koyo explained that, "as a minority shareholder, Koyo has no legal right under Japanese law to compel its affiliate to provide Koyo with its sales and cost data." Issues and Decision Memo, cmt. 6.

Motion for Judgment on the Agency Record Submitted on Behalf of NTN Corp., NTN Bearing Corp. of America, American NTN Bearing Manufacturing Corp., NTN Driveshaft Inc., and NTN-BCA Corp.; and Timken US Corporation's Rule 56.2 Motion for Judgment on the Agency Record (collectively, "Plaintiffs' Motions"); the court having reviewed all papers and pleadings on file herein, having heard oral argument by each party, and after due deliberation, having reached a decision herein; it is hereby

ORDERED ADJUDGED AND DECREED that Plaintiffs' Motions are DENIED; and it is further

ORDERED ADJUDGED AND DECREED that the decision of the U.S. Department of Commerce ("Commerce") in *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711 (September 16, 2005), as amended by *Notice of Amended Final Results of Antidumping Duty Administrative Reviews: Ball Bearings and Parts Thereof from Japan*, 70 Fed. Reg. 61,252 (October 21, 2005) and *Notice of Correction to Amended Final Results of Antidumping Duty Administrative Review: Ball Bearings and Parts Thereof from Japan*, 70 Fed. Reg. 69,316 (November 15, 2005), is hereby AFFIRMED; and it is further

ORDERED that all parties shall review the court's Opinion in this matter and notify the court in writing on or before Friday, September 7, 2007, whether any information contained in the Opinion is confidential, identify any such information, and request its deletion from the public version of the Opinion to be issued thereafter. The parties shall suggest alternative language for any portions they wish deleted. If a party determines that no information needs to be deleted, that party shall so notify the court in writing on or before September 7, 2007.

SLIP OP. 07–145

UGINE AND ALZ BELGIUM, N.V., ARCELOR STAINLESS USA, LLC, and ARCELOR TRADING USA, LLC, *Plaintiffs*, v. UNITED STATES, *Defendant*, and ALLEGHENY LUDLUM CORPORATION, AK STEEL CORPORATION, UNITED AUTO WORKERS LOCAL 3303, UNITED STEELWORKERS OF AMERICA, AFL-CIO/CLC, NORTH AMERICAN STAINLESS and ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, *Defendants-Intervenor.*

BEFORE: JUDGE GREGORY W. CARMAN
Court No.: 05–00444

Date: October 1, 2007

[Plaintiffs' motion for Oral Argument is DENIED; Plaintiffs' motion for judgment upon the agency record is GRANTED and the matter is REMANDED to the Department of Commerce with instructions to issue revised liquidation instructions consistent with this Opinion; and Defendant's motion to dismiss is DENIED. A separate Order will issue.]

Shearman & Sterling LLP, (*Ryan A. T. Trapani* and *Robert S. LaRussa*) for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director; and *Michael D. Panzera*, Trial Attorney, Civil Division, U.S. Department of Justice, Commercial Litigation Branch; *Jennifer I. Johnson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Kelly Drye Collier Shannon (*R. Alan Luberda*; *David A. Hartquist*; and *Adam H. Gordon*) for Defendants-Intervenor.

OPINION

CARMAN, JUDGE: This matter is before this Court on motion for judgment upon the agency record and on motion to dismiss. Plaintiffs, Ugine & ALZ Belgium, N.V., Arcelor Stainless USA, LLC, and Arcelor Trading USA, LLC's (together "Plaintiffs"), move pursuant to 1 USCIT R. 56.1 to challenge certain final liquidation instructions[1] issued by the International Trade Administration of the U.S. Department of Commerce ("Government" or "Commerce" or "Defendant") on

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[1] The relevant liquidation and cash deposit instructions issued by Commerce are: July 1, 2005 Antidumping Duty ("ADD") Liquidation Instructions, Message No. 5182203; July 8, 2005 Countervailing Duty ("CVD") Cash Deposit Instructions, Message No. 5189205; July 8, 2005 CVD Liquidation Instructions, Message No. 5189204; July 18, 2005 ADD Liquidation Instructions, Message No. 5199201. (*See* Pls.' Mem. in Supp. of its R. 56.1 Mot. for J. Upon the Agency R. ("Pl. Br.") 1.) Plaintiffs specifically challenge the liquidation instructions for July 8, 2005 CVD, Message No. 5189204 and July 18, 2005 ADD, Message No. 5199201 (collectively, "POR 1 Liquidation Instructions"). (*See* Pls.' Reply Br. & Resp. to Def.'s Mot. to Dismiss ("Pl. Reply Br.") 15 n.17.) Plaintiffs also challenge the July 1, 2005 ADD Liquidation Instructions, Message No. 5182203 to the extent it "implicitly instruct[s] Customs to treat entries of German merchandise entered prior to May 1, 2002 as Belgian." (*Id.*)

the grounds that they are arbitrary, capricious or otherwise not in accordance with law. Commerce moves to dismiss Plaintiffs' Complaint, pursuant to USCIT R. 12(b)(1), arguing that this Court lacks subject matter jurisdiction under 28 U.S.C. § 1581(i). Alternatively, assuming jurisdiction is proper, Commerce opposes Plaintiffs' motion for judgment upon the agency record. The domestic industry, petitioners of the initial antidumping duty ("ADD") and countervailing duty ("CVD") orders, participate in this action as Defendants-Intervenor and support Defendant's motions.

As discussed below, this Court denies Defendant's motion in its entirety and finds that Commerce's liquidation instructions are indeed arbitrary, capricious or otherwise not in accordance with law. This Court therefore grants Plaintiffs' motion and remands this matter to Commerce to issue revised liquidation instructions consistent with this Opinion. A separate Order of the Court will issue.

PROCEDURAL HISTORY

On December 14, 2004, Commerce published the final results of the fourth administrative review of the antidumping order on certain stainless steel plate in coils ("SSPC") from Belgium. *SSPC from Belgium*, 69 Fed. Reg. 74,495 (Dep't Commerce Dec. 14, 2004) (final results of ADD administrative review) [hereinafter "*Final Results*"]. Among other things decided in the *Final Results*, Commerce determined, following a country-of-origin review, that certain SSPC that had been hot-rolled in Germany and not further cold-rolled in Belgium fell outside the scope of the ADD order for Belgian SSPC because SSPC that had been produced according to those specifications was of German origin.[2]

Subsequently, on February 22, 2005 Commerce issued draft liquidation and cash deposit instructions and solicited comments therein. (*See* Letter from Maria MacKay to All Interested Parties (Feb. 22, 2005), Conf. R. Doc. 4.) Plaintiffs argued that Commerce amend the liquidation instructions to reflect that "all entries of SSPC . . . hot rolled in Germany and not further cold rolled in Belgium [are] outside the scope" of the ADD and CVD orders "and, therefore, should be liquidated [duty] free." (Letter from Robert S. LaRussa, Counsel to U&A Belgium, to Hon. Carlos M. Gutierrez, Secretary of Commerce, 3 (Feb. 24, 2005), Pub. R. Doc. 8.)

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[2] Commerce explained in great detail the reasons for its decision to grant Plaintiffs' requested country-of-origin application in a memorandum. (Issues & Decision Mem. for the Final Results of the Fourth Admin. Review of the ADD Order on SSPC from Belgium, 10 (Dec. 14, 2004), Pub. R. Doc. 7 [hereinafter "Issues & Decision Mem."].)

In May and June 2005 Commerce staff held several *ex parte* meetings with Plaintiffs and Defendants-Intervenor, concerning the language of the proposed liquidation instructions and whether Commerce should apply its country-of-origin determination retroactively to cover Plaintiffs' unliquidated entries from prior administrative reviews.

On July 1, 2005, Commerce released a memorandum decision ruling, *inter alia*, that the country-of-origin determination, previously published in the *Final Results*, *supra*, would be applied only to "entries covered by the fourth review and future entries, *i.e.*, to entries made on or after May 1, 2002." (*See* Customs Instructions for the Final Results of the Fourth Administrative Review of the ADD Order on SSPC from Belgium, 5 (Jul. 1, 2005), Pub. R. Doc. 19 [hereinafter "Liquidation Instr. Mem."].) Commerce then proceeded to issue additional liquidation and cash deposit instructions, which also rejected Plaintiffs' position that the country-of-origin determination from the *Final Results* should be applied retroactively. *See* note 1, *supra*.

Plaintiffs timely filed suit challenging Commerce's liquidation instructions and asked the court to enjoin liquidation of the entries at issue, pending the outcome of this action. The court denied Plaintiffs' request for a preliminary injunction. Ugine & ALZ Belgium v. United States, 29 CIT ___ , 391 F. Supp 2d 1284 (2005). The U.S. Court of Appeals for the Federal Circuit ("CAFC") reversed and instructed the court to enjoin liquidation of Plaintiffs' entries. *Ugine & ALZ Belgium. v. United States*, 452 F.3d 1289 (Fed. Cir. 2006). The court thereafter issued an Order of Preliminary Injunction. (*See* Order of Preliminary Injunction, Ct. R. Doc. 44.)

FACTUAL BACKGROUND

Plaintiffs are importers of SSPC. (Compl. ¶¶ 1-3; *Ugine & ALZ Belgium*, 452 F.3d at 1290). Following multiple investigations concerning importations of SSPC from numerous countries, Commerce published an affirmative CVD order and an affirmative ADD order covering, *inter alia*, Belgian SSPC. *SSPC from Belgium, Italy & South Africa*, 64 Fed. Reg. 25,288 (Dep't Commerce May 11, 1999) (notice of CVD orders); *Certain SSPC from Belgium, Canada, Italy, the Republic of Korea, South Africa, & Taiwan*, 64 Fed. Reg. 27,756 (Dep't Commerce May 21, 1999) (notice of ADD orders).

I. First Administrative Review

In July 2000, Commerce initiated the first administrative review of the ADD and CVD orders for Belgian SSPC for the period of review ("POR") November 4, 1998 through April 30, 2000. *Initiation of ADD & CVD Administrative Reviews & Requests for Revocations in Part*, 66 Fed. Reg. 41,942 (Dep't Commerce July 7, 2000). Because, Plaintiffs ceased cooperation with Commerce during this first administrative review, Commerce assigned Plaintiffs an ADD margin based on adverse facts available. *SSPC from Belgium*, 66 Fed. Reg. 56,272, 56,273 (Dep't Commerce Nov. 7, 2001) (final results of ADD administrative review). Plaintiffs did not appeal the final results of the first administrative review, however, Defendants-Intervenor (the domestic industry) did. *See Allegheny Ludlum Corp. v. United States*, 27 CIT 1461, 1461 (2003) (appealing Commerce's calculation of the total adverse facts available rate during the first administrative review).

In August 2001, Commerce issued its final determination in the first CVD administrative review. *SSPC*, 66 Fed. Reg. 45,007 (Dep't Commerce Aug. 27, 2001) (final results of CVD administrative review). Plaintiffs appealed this final determination. *ALZ N.V. v. United States*, 27 CIT 1265, 283 F. Supp. 2d 1302 (2003). In December 2001, the court preliminarily enjoined liquidation of entries that were subject to the CVD administrative review. (*See* Def.'s Mot. to Dismiss & Resp. to Mot. for J. upon the Agency R. 4–5 ("Def. Br.").) Accordingly, liquidation was suspended for Plaintiffs' entries that were simultaneously subject to both the CVD order and the ADD order. (*Id.*; *see also* Suspension of Liquidation Instructions, Message No. 3351206 (Dep't Commerce Dec. 17, 2003); Suspension of Liquidations Instructions, Message No. 3357201 (Dep't Commerce Dec. 23, 2003).

In July 2003, the court remanded the matter to Commerce. *See ALZ N.V.*, 27 CIT at 1286, 283 F. Supp. 2d at 1320. Almost a year later, in April 2004, the court sustained Commerce's determination regarding the first CVD administrative review. *ALZ N.V. v. United States*, 28 CIT 541, 541 (2004).[3] Commerce thereafter published amended final results. *Stainless Steel Plate Coils from Belgium*, 70 Fed. Reg. 18,374 (Dep't Commerce Apr. 11, 2005) (notice of amended final results of CVD administrative review).

As a result of the litigation stemming from the first administrative review, which had not been fully resolved until April 2005, there remained perhaps dozens of unliquidated entries still under suspension. For Plaintiffs, this fortunate circumstance forms the backdrop to this lawsuit. Before Commerce could issue liquidation instructions for these entries, following publication of the amended final results for the CVD administrative review, Plaintiffs brought the instant lawsuit, including an application to enjoin liquidation of these first POR entries.

[3] Commerce filed an appeal, which was subsequently dismissed by stipulation of the parties. *ALZ N.V. v. United States*, 114 Fed. Appx. 401 (Fed. Cir. 2004).

II. The Fourth Administrative Review[4]

The fourth administrative review was initiated by request from both Plaintiffs and Defendants-Intervenor. *Initiation of ADD & CVD Administrative Reviews & Request for Revocation in Part*, 68 Fed. Reg. 39,055 (Dep't Commerce July 1, 2003). Plaintiffs had undergone an organizational change ("U&A Belgium" was created following Ugine, S.A.'s purchase of ALZ, N.V.) due to a merger and had also switched counsel during this period. *See SSPC from Belgium*, 69 Fed. Reg. 32,501, 32,503 (Dep't Commerce June 10, 2004) (preliminary results of ADD administrative review) [hereinafter "*Preliminary Results*"].

It was during this, the fourth administrative review, that Plaintiffs petitioned Commerce "about determining [whether] German-origin SSPC is outside the scope of the administrative review of Belgian SSPC." (Letter from Robert LaRussa, Esq. to Hon. Donald L. Evans (Apr. 21, 2004), Pub. R. Doc. 1 [hereinafter "April 2004 Letter"]; Letter from Robert LaRussa, Esq. to Hon. Donald L. Evans, including presentation slides (Apr. 21, 2004), Pub. R. Doc. 2 [hereinafter "April 2004 Handouts"].)

According to Plaintiffs, since the imposition of the ADD and CVD orders on SSPC from Belgium in 1999, they had been continuously importing "SSPC that was hot rolled in Germany and not further cold rolled in Belgium." (Pl. Br. 2; Compl. ¶ 9.) Though acknowledging that "[i]mporters are responsible for designating a country of origin when their goods arrive in the United States," Plaintiffs apparently erred in their country-of-origin designations with respect to some entries of SSPC. (*See* Pl. Br. 2 (*citing* 19 C.F.R. § 141.86(a)(10) (2007)); Compl. ¶ 10 ("Although the SSPC was not further cold rolled in Belgium, it was pickled, annealed, packaged, and shipped from Belgium. Accordingly, at the time of entry, [Plaintiffs] mistakenly declared the country of origin for the merchandise to be Belgium rather than Germany.").) Citing Commerce and Customs practice, Plaintiffs argued that the country-of-origin designation should have been marked as Germany and not Belgium. (April 2004 Letter,

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[4] The second administrative review for the ADD order on SSPC, covered the POR from May 1, 2000 through April 30, 2001, was initiated in June 2001 and completed in October 2002. *See Stainless Steel Plate in Coils from Belgium*, 67 Fed. Reg. 64,352 (Dep't Commerce Oct. 18, 2002) (final results of antidumping duty administrative review). No appeal was filed, *see* Defs.-Intervenor's Resp. Br. (Defs.-Intervenor's Resp. Br. ("Defs.-Int. Br.") 5), and all entries within the purview of this administrative review were either liquidated or deemed liquidated as of April 13, 2003. (Def. Br. 6.)

The third administrative review for the ADD order on SSPC covered the POR from May 1, 2001 to April 30, 2002. This review was rescinded following Plaintiffs' timely withdrawal of its request for review. *See Stainless Steel Plate in Coils from Belgium*, 67 Fed. Reg. 64,868 (Dep't Commerce Oct. 22, 2002) (notice of recision of ADD and CVD order for the period May 1, 2001 through April 30, 2002). No appeal was filed, *see* Defs.-Inter. Br. 6, and all entries within the purview of this administrative review were either liquidated or deemed liquidated as of April 23, 2003. (Def. Br. 7.)

supra, at 2; Pl. Br. 2.) Plaintiffs' error originated in their initial designation of certain imports of SSPC as Belgian where they had been "finished and packaged" in Belgium. (Pl. Br. 3; Compl. ¶¶ 9–13.) This mistake in country-of-origin designation was the result of an apparent confusion regarding the locus of the SSPC's "substantial transformation."[5]

Plaintiffs erroneaouly assumed that their minor processing[6] of the SSPC (i.e., the "finishing and packaging") altered the SSPC's essential character so that it became a product of another country—Belgium. Allegedly, Plaintiffs' new counsel recognized that this assumption was contrary to Commerce's decisions and thus raised the issue with Commerce sometime around April 2004, during the fourth administrative review. (See April 2004 Letter, supra; April 2004 Handouts, supra.) As a result of this error, Plaintiffs had mistakenly "made cash deposits of antidumping and countervailing duties as if [their] merchandise was Belgian" starting in 1999 through the POR for the fourth administrative review of the ADD order (*i.e.*, May 1, 2002 through April 30, 2003). (Pl. Br. 3.)

Upon realization of their mistake, Plaintiffs filed letters with Customs in order to correct the country-of-origin designation and seek a

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[5] "Substantial transformation" is a technical and legal term that "generally refers to a degree of processing or manufacturing resulting in a new and different article. Through that transformation, the new article becomes a product of the country in which it was processed or manufactured." *Cold-Rolled Steel from Argentina*, 58 Fed. Reg. 37,062, 37,065 (Dep't Commerce Jul. 9, 1993) (final determination of sales at less than fair value); *see also E.I. Dupont De Nemours & Co. v. United States*, 22 CIT 370, 374, 8 F. Supp. 2d 854, 858 (1998) ("[W]hether the processes performed on merchandise in a country are of such significance as to require that the resulting merchandise be considered the product of the country in which the transformation occurred.").

As referenced in this Opinion, "substantial transformation" refers to the doctrine as adopted by the Commerce Department as distinguished from Customs' own doctrine. While the "Department may consider the decisions of Customs, it is not obligated to follow, nor is it bound by, the classification determinations of Customs. . . ." *Wirth Ltd. v. United States*, 22 CIT 285, 289, 5 F. Supp. 2d 968, 973 (1998) ("Commerce, not Customs, has authority to clarify the scope of AD/CVD orders and findings.") (internal quotation and citation omitted); *see E.I. Dupont De Nemours & Co.*, 22 CIT at 373, 8 F. Supp. 2d at 858 ("Commerce's decision to use the 'substantial transformation' test to determine the nationality of the subject merchandise is a permissible application of the [Antidumping] statute."); *Certain Steel Products from Mexico*, 57 Fed. Reg. 57,813, 57,821 (Dep't Commerce Dec. 7, 1992) (preliminary affirmative CVD determinations and alignment of final CVD determinations with final ADD determinations) (With respect to Commerce's authority to clarify the scope of an ADD or CVD order, Commerce has "held in past cases that its rulings on country of origin supersede those of Customs").

[6] The minor processing that was at issue in this matter during the fourth administrative review was "pickling" and "annealing." These finishing processes have been determined by Commerce to be minor processes that do not rise to the level of a "substantial transformation" and thus do not alter the country-of-origin designation. *See Issues & Decision Mem.*, *supra* note 2, at 10, Pub. R. Doc. 7; *see also Proposed Agreement Concerning Trade in Certain Steel Products from the Russian Federation*, 64 Fed. Reg. 9891, 9893 (Dep't Commerce Feb. 26, 1999) (defining pickling and annealing as "minor processing" that "do[ ] not result in a substantial transformation or a change in the country of origin of the product that is processed").

refund of the deposits. (Pl. Br. 3.) Plaintiffs also petitioned Commerce, to be included as part of the fourth administrative review, for a ruling on whether "German-origin SSPC is outside the scope of the administrative review of Belgian SSPC." (April 2004 Letter, *supra*, at 2; *see also* Return Copy of Protest to Customs, Port of Portland (Apr. 19, 2004), Appendix to Pl. Br., Ex. 20.)

Commerce then granted Plaintiffs' request for a ruling on whether SSPC hot-rolled in Germany and not further cold-rolled in Belgium was within the scope of the ADD order for Belgium. Shortly thereafter, Commerce published its preliminary results and determined, *inter alia*, that "the[ ] sales of merchandise that [were] hot-rolled in Germany and returned to Belgium for pickling and annealing and shipment, are appropriately classified as merchandise of German origin" and thus *outside the scope* of the order for Belgian SSPC. *See Preliminary Results*, *supra*, at 32,504 (emphasis added).

The Final Results affirmed Commerce's preliminary determination on the issue of country-of-origin:

> [B]ecause hot rolling constitutes substantial transformation, the country of origin of [Plaintiffs'] merchandise which is hot-rolled in Germany, and not further cold-rolled in Belgium, is Germany. Therefore, this merchandise is not subject to the order on SSPC from Belgium and not reviewable in the instant proceeding.

(*Issues & Decision Mem.*, *supra* note 2, at 14.) Commerce's *Final Results* were published in the Federal Register, which incorporated by reference the detailed *Issues & Decision Memorandum*. *See Final Results*, 69 Fed. Reg. at 74,497.

III. *The Liquidation Instructions*

Some 70 days later, on February 22, 2005, Commerce solicited comments from both Plaintiffs and Defendants-Intervenor regarding its anticipated draft liquidation and cash deposit instructions. (*See* Letter from Maria MacKay to Interested Parties (Feb. 22, 2005), Conf. R. Doc. 4.) Plaintiffs' submission drew attention to the proposed language and noted that the instructions "currently state that [German SSPC] . . . is 'no longer subject to suspension of liquidation based on the Department's decision in the final results of this review.' This language addresses only the issue of 'suspension' but does not instruct [Customs] *how* to liquidate suspended entries of . . . [German SSPC]." (Letter from Robert S. LaRussa, Counsel to U&A Belgium, to Hon. Carlos M. Gutierrez, Secretary of Commerce, 2 (Feb. 24, 2005), Pub. R. Doc. 8 (emphasis added).) Plaintiffs then suggested revised language to "properly address" how Customs should treat the unliquidated entries of German SSPC:

> 3. Imports of stainless steel plate in coil hot rolled in Germany and not further cold rolled in Belgium are not subject to the an-

> tidumping duty order on stainless steel plate in coil from Belgium. Entries of this merchandise should be liquidated without regard to antidumping duties.

(*Id.*) With respect to the CVD order on stainless steel plate in coil from Belgium, Plaintiffs requested that Commerce "instruct [Customs] that all entries of SSPC that [are] hot rolled in Germany and not further cold rolled in Belgium [are] *outside the scope* of the countervailing duty order and, therefore, should be liquidated free of countervailing duties." (*Id.* at 3 (emphasis added).)

Beginning almost three months later Commerce held several *ex parte* meetings with the parties concerning the draft liquidation instructions and the effect of the scope determination. (*See* Memorandum to File, By Toni Page, Int'l Compliance Analyst Regarding May 23, 2005 Meeting (May 25, 2005), Pub. R. Doc. 9.) Plaintiffs argued to Commerce that "the Department should instruct Customs to liquidate all unliquidated entries, from the fourth administrative review period and from *previous review periods*, of SSPC hot rolled in Germany and not further cold rolled in Belgium without regard to antidumping duties." (*See* Memorandum to File Regarding June 16, 2005 Meeting, at 1 (June 23, 2005), Pub. R. Doc. 12 (emphasis supplied).

On July 1, 2005, Commerce issued final ADD liquidation instructions. (ADD Liquidation Instructions for SSPC from Belgium Produced by Ugine & ALZ, N.V. Belgium, Message No. 5182203 ¶ 3 (July 1, 2005), Appx. to Pl. Br., Ex. 1.) Commerce explained that it had rejected Plaintiffs' arguments because "[d]uring the fourth administrative review, neither the [Defendants-Intervenor] nor [Plaintiffs]" raised the issue of "the effect of the country of origin decision on unliquidated entries from prior closed reviews." (Liquidation Instr. Mem., *supra*, at 7.) As a result Commerce's country-of-origin determination would be limited to "entries covered by the fourth review and to future entries, *i.e.*, to entries made on or after May 1, 2002." (*Id.* at 5.)

A week later, on July 8, 2005, Commerce issued ancillary instructions pertaining to: (1) unliquidated SSPC entries entered during the first POR and subject to the CVD order, and (2) cash deposits for future entries subject to the CVD order. (*See* CVD Cash Deposit Instructions for SSPC from Belgium, Message No. 5189205 (Jul. 8, 2005), Appx. to Pl. Br., Ex. 2.) The CVD cash deposit instructions were also to be applied prospectively: "effective 05/01/2002 . . . entries of SSPC hot rolled in Germany and not further cold rolled in Belgium are not subject to the suspension of liquidation and do not require cash deposits of estimated countervailing duties." (*Id.*) The CVD liquidation instructions for certain SSPC entered during the first POR provided that "[e]ntries of SSPC hot rolled in Germany and not further cold rolled in Belgium [i.e., German SSPC] should be liquidated at the countervailing duty rate specified in these [Customs] instructions [covering Belgian SSPC].” (CVD Liquidation Instructions, Message No. 5189204 ¶ 7 (Jul. 8, 2005), Appx. to Pl. Br., Ex. 3.)

On July 18, 2005, Commerce issued an additional set of ADD liquidation instructions. (ADD Liquidation Instructions, Message No. 5199201 (Jul. 18, 2005), Appx. to Pl. Br., Ex. 4.) Also covering dates within the first POR, these ADD liquidation instructions similarly provided for liquidation German SSPC entries at the rate determined for Belgian SSPC. (*See id.* at ¶ 5 (“Entries of SSPC hot rolled in Germany and not further cold rolled in Belgium [i.e., German SSPC] should be liquidated at the antidumping duty rate specified [for Belgian SSPC].”).) Plaintiffs brought suit challenging Commerce’s liquidation instructions, which instruct Commerce to liquidate Plaintiffs’ POR 1 entries with both antidumping and countervailing duties in place.

DISCUSSION

I. Motion to Dismiss for Lack of Subject Matter Jurisdiction

The threshold issue presented here is whether this Court possesses jurisdiction to address the merits of Plaintiffs’ action. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 577 (1999); *Steel Co. v. Citizens For A Better Env’t*, 523 U.S. 83, 94-95 (1998). When deciding either a motion to dismiss based on a lack of subject matter jurisdiction or failure to state a claim, the Court will assume all undisputed factual allegations in the complaint as true and will draw all reasonable inferences in the plaintiff’s favor. *Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995). Notwithstanding this rule, the Federal Circuit has instructed that the “ ‘mere recitation of a basis for jurisdiction . . . cannot be controlling . . . [and therefore] we look to the true nature of the action in the district court in determining jurisdiction of the appeal.’ ” *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (*quoting Williams v. Sec’y of Navy*, 787 F.2d 552, 557 (Fed. Cir.1986)).

Plaintiffs claim this Court possesses subject matter jurisdiction under 28 U.S.C. § 1581(i), specifically citing subparagraphs (i)(2) and (i)(4), which grant this court exclusive jurisdiction of any civil action commenced against the United States that arises out of any law of the United States providing for “tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue” and the “administration of enforcement with respect to” such matters, respectively.[7] 28 U.S.C. § 1581(i)(2) & (4) (2000).

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[7] The Court notes that section 1581(i) is the residual jurisdiction provision, and therefore

Defendant contends that this Court lacks jurisdiction because Plaintiffs have failed to demonstrate that: (i) section 1581(c) was unavailable; and (ii) that there was a facial or operative inconsistency between the liquidation instructions and the *Final Results*. (Def. Br. 17–21.) Defendants-Intervenor press a different argument that Plaintiffs could have appealed Commerce's implementation of the country-of-origin determination following completion of the fourth administrative review under section 1581(c) or raised this issue during any of the previous three administrative reviews. (Defs.-Inter. Br. 10–14.) Defendants-Intervenor secondarily argue that Plaintiffs have failed to exhaust their administrative remedies as to the retroactive application of the country-of-origin determination and, therefore, pursuant to 28 U.S.C. § 2637(d) (2000), this appeal must be dismissed. (*Id.* at 15–19.)

Commerce maintains that Plaintiffs should have raised this issue by bringing suit under section 1581(c) following Commerce's publication of the *Final Results*. Commerce argues that Plaintiffs challenge the substantive decision not to apply the country-of-origin determination to unliquidated entries from prior, closed administrative reviews; a decision which, Commerce says, was made during the fourth administrative review. Further, Commerce and Defendants-Intervenor maintain that the decision to only apply the country-of-origin determination prospectively was clear to Plaintiffs. They quote limiting language present in both the Preliminary Results and the Issues & Decision Memorandum, *supra*, of the *Final Results* to show that Plaintiffs knew or should have known that Commerce had decided not to apply the country-of-origin determination to the POR 1 entries. (*See* Def. Br. 22 (*quoting Issues & Decision Mem.*, *supra*, at 14 ("SSPC hot rolled in Germany is not subject to the order of SSPC from Belgium and not reviewable *in the instant proceeding*.")); Defs.-Inter. Br. 12 (*citing Preliminary Results*, *supra*.).) Consequently, Defendants-Intervenor argues that if Plaintiffs took issue with this application, they had available to them the opportunity to initiate suit within thirty days of the publication of the *Final Results*. (Defs.-Interv. Br. 12 (*citing* 19 U.S.C. § 1516a(a)(2) (2000)).)

Plaintiffs respond that, at the close of the fourth administrative review, it was not clear how Commerce intended to treat Plaintiffs' POR 1 entries. Plaintiffs further argue that Commerce's determination—that German SSPC falls outside the scope of the ADD and CVD orders for Belgium—is one of general application, and is not limited to the specific circumstances of the fourth administrative review. (*Id.*) As a result, Plaintiffs assert that the liquidation instruc-

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may be invoked only when another subsection of section 1581 is unavailable or the remedy provided by another subsection is "manifestly inadequate." *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1557 (Fed. Cir.1988); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir.1987).

tions, which do not apply the country-of-origin determination to Plaintiffs' POR 1 entries, are inconsistent with the *Final Results*.

Looking to "the true nature of the action" here, *Norsk Hydro*, 472 F.3d at 1355, this Court finds that Plaintiffs' claim is a bona fide challenge to Commerce's liquidation instructions and not to the *Final Results* themselves. "[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," properly raised under section 1581(i). *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1305 (Fed. Cir. 2004) (*quoting Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003)). Notwithstanding Defendant's and Defendants-Intervenor's arguments of failure to exhaust, the actual question of whether Commerce's ruling would affect unliquidated entries under suspension from prior administrative reviews did not blossom into an issue until *after* the close of the fourth administrative review, commencing with the publication of Commerce's draft liquidation instructions. Moreover, as Plaintiffs argue, there was no administrative issue to challenge following Commerce's publication of the Final Results because Plaintiffs prevailed on the issue of country-of-origin designation for their merchandise.[8]

First, Commerce did not address in the *Final Results* the issue of whether the country-of-origin determination would be applied retroactively to Plaintiffs' unliquidated POR 1 entries. In fact, based on the record, it appears that Commerce itself had not fully contemplated (much less made clear to the parties) whether it intended to apply the determination to the unliquidated entries from prior administrative reviews. The parties did not brief the issue during the fourth administrative review, and Commerce accepted briefs and conducted *ex parte* meetings on the issue after publishing the draft liquidation instructions. The submissions and meetings that occurred after publication of the *Final Results* are palpable evidence of Commerce's uncertainty on the issue of whether it would apply the country-of-origin determination to Plaintiffs' POR 1 entries. Because Commerce had not made a final determination on the issue when it published the *Final Results*, Plaintiffs could not have challenged this determination under to section 1581(c). Indeed, a section 1581(c) suit would likely have been dismissed as unripe.

Defendant cites Am. Signature, Inc. v. United States, 31 CIT ___ , ___ , 477 F. Supp. 2d 1281, 1289 (2007), for the proposition that Plaintiffs are barred from bringing this action under section

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[8] Plaintiffs cite *Mathias v. WorldCom Tech., Inc.*, for the general proposition that "a party may not appeal from a favorable judgment simply to obtain review of findings it deems erroneous." *Mathias v. WorldCom Tech., Inc.*, 535 U.S. 682, 684 (2002). Plaintiffs reason that since they won below, there was no issue that merited an appeal under section 1581(c). (*See* Pl. Br. 9–11.)

1581(i) where section 1581(c) was available to them. (*See* Def. Reply Br. 4–6.) The court in American Signature, distinguishing its facts from those in *Shinyei*, 355 F.3d at 1302 n.2, found that it lacked jurisdiction because the "true nature" of the plaintiff's claim was a challenge to Commerce's refusal to apply the new cash deposit rates retroactively, a determination made in the amended final results of that case. Am. Signature, 477 F. Supp. 2d at 1289 (*citing Norsk Hydro Canada, Inc.*, 472 F.3d at 1354–55). This Court is not persuaded that American Signature's holding is applicable to the facts surrounding the instant case. Here, Plaintiffs challenge the liquidation instructions on the ground that they do not comport with Commerce's determination that Plaintiffs' imports of SSPC from Germany are not subject to the ADDs order on SSPC from Belgium. Unlike American Signature, Plaintiffs are in fact challenging the liquidation instructions insofar as they "deviate from . . . [the] Final Determination." *Id.* at 1289.[9]

Defendants-Intervenor propose an additional argument. They reason that Plaintiffs are foreclosed from challenging Commerce's rejection of retroactive application of the *Final Results* to unliquidated entries of German SSPC suspended from earlier administrative reviews, because Plaintiffs should have raised this issue earlier, during any of the previous administrative reviews. In other words, Defendants-Intervenor argue that Plaintiffs failed to exhaust their administrative remedies. (*See* Defs.-Inter. Br. 10-14; 29-32) This argument is essentially a restatement of their final point wherein, citing 28 U.S.C. § 2637(d), they argue that this appeal must be dismissed for failure to exhaust their administrative remedies. (*See* Defs.-Inter. Br. 15–19; 31–32.) The Court rejects this argument on several grounds.

First, Plaintiffs had pursued their administrative remedies by requesting a country-of-origin determination during the fourth administrative review. The issue concerning whether SSPC that was hot-rolled in Germany and not further cold-rolled in Belgium first arose *during* the fourth administrative review and therefore it was appropriately made part of the administrative review. Plaintiffs can not be expected to raise a challenge on an issue before it ripens or is revealed as an issue. Further, Plaintiffs had been otherwise engaged in administrative processes of Customs when Commerce issued its erroneous liquidation instructions to sort-out and correct its unliquidated entries of German SSPC that had been erroneously

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[9] Similarly, unlike this Court's decision in *Corus Staal BV v. United States*, where the plaintiffs there were actually challenging the *substance* of the underlying administrative review and not Commerce's liquidation instructions, here Commerce preliminarily released its liquidation instructions explicitly stating, for the first time, that the country-of-origin determination was to be applied only to the fourth administrative review and to future entries only. *See Corus Staal BV v. United States*, 31 CIT ____ , ____ , 493 F. Supp. 2d 1276, 1285 (2007); Draft Customs Instructions (Feb. 22, 2005), Conf. R. Doc. 4.

designated as Belgian SSPC pursuant to the *Final Results*. (*See* Pl. Br. 3; Return Copy of Protest to Customs, Port of Portland (Apr. 19, 2004), Appendix to Pl. Br., Ex. 20.)

Defendants-Intervenor rely on *Sandvik Steel Co.* as support for their exhaustion argument. (Defs.-Inter. Br. 30–32.) The court in *Sandvik Steel Co.* affirmed the dismissal of two cases where the plaintiffs in each failed to exhaust their administrative remedies by timely seeking a scope determination from Commerce. *See Sandvik Steel Co.*, 164 F.3d at 597, 602. However, this case is inapposite to the facts at issue here. Fatally, plaintiffs in *Sandvik Steel Co.*, unlike Plaintiffs here, did not timely seek a scope determination with Commerce but instead filed a protest with Customs *after* the entries *had already been liquidated*. *Id.* at 598. Here, Plaintiffs brought their request for a scope determination during the fourth administrative review and did not wait until liquidation of the entries to raise their challenge. (*See* April 2004 letter.) Moreover, Plaintiffs here do not seek to reach the entries from the prior closed reviews that have been liquidated. Plaintiffs point out that they do not seek to reopen any of the closed administrative review proceedings, but merely seek to have the ruling of the *Final Results* apply to the enjoined *unliquidated* entries from the first administrative review. (*See* Pl. Reply Br. 16 ("[Plaintiffs] do[ ] not ask that any reviews be reopened."); *see also* Pl. Br. 16–17 (explaining that the U.S. trade laws "draw the line of administrative finality for assessment of duties applicable to specific entries at the time of final liquidation, not the closing of any administrative review"). For purposes of the matter before the Court, *Sandvik Steel Co.* does not supply a binding rule.

Accordingly, this Court has jurisdiction to review Plaintiffs' challenges to the liquidation instructions issued by Commerce pursuant to its residual jurisdiction under 28 U.S.C. § 1581(i). *See Shinyei*, 355 F.3d at 1305; *Consol. Bearings Co.*, 348 F.3d at 1007; *J.S. Stone, Inc. v. United States*, 27 CIT 1688, 1697, 297 F. Supp. 2d 1333, 1341 (2003) ("Commerce's characterization would effectively prevent parties from seeking redress from mistakes made in its liquidation instructions to Customs when those instructions are sent after the final determination is published and beyond the time permitted for review under § 1581(c).").

II. Merits—Judgment On the Agency Record

A. *Standard of Review*

For actions governed by section 1581(i), the Court reviews Commerce's actions to determine whether those actions are "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); *see also Mittal Steel Galati, S.A. v. United States*, 31 CIT ___ , ___ , 491 F. Supp. 2d 1273, 1280 n.6 (2007). When reviewing Commerce's interpretations of the antidumping statute for accordance with law, the court applies the two-step process set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984). 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 Co. v. United States*, 354 F.3d 1334, 1341 (Fed. Cir. 2004). 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).

B. *Analysis*

Plaintiffs challenge the liquidation instructions Commerce issued covering Plaintiffs' POR 1 entries. Plaintiffs argue that Commerce did not have the authority to instruct Commerce to liquidate Plaintiffs' POR 1 entries with antidumping and countervailing duties in place. Because Commerce determined in the *Final Results* that Plaintiffs' imports of SSPC were of German origin, and thus not subject to the ADD order on SSPC from Belgium, Plaintiffs argue that Commerce should have instructed Customs to liquidate Plaintiffs' earlier POR 1 entries of SSPC from Germany free of both antidumping and countervailing duties. For the reasons that follow, this Court agrees.

1. Authority to Impose Antidumping and Countervailing Duties

Commerce derives its authority to impose antidumping and countervailing duties from the unfair trade statute, 19 U.S.C. §§ 1671–1677n (2000). The ADD provision provides:

> If . . . [Commerce] determines that a *class or kind* of *foreign merchandise* is being, or is likely to be, sold in the United States at less than its fair value, and [the ITC determines that the industry is material injured] by reason of imports of that merchandise . . . then there shall be imposed upon such merchandise an antidumping duty. . . ."

19 U.S.C. § 1673 (2000) (emphasis added). The CVD provision provides:

> If . . . [Commerce] determines that *the government of a country*[10] . . . is providing . . . a countervailable subsidy with respect to the manufacture, production, or export of *a class or kind* of merchandise imported . . . into the United States . . . then there shall be imposed upon such merchandise a countervailing duty. . . .

19 U.S.C. § 1671 (2000) (emphasis added). Both provisions require Commerce to make a finding of either dumping or subsidizing for a class or kind of merchandise from a particular country. 19 U.S.C. §§ 1671, 1673; *see also E.I. Du Pont de Nemours & Co. v. United States*, 22 CIT 370, 375, 8 F. Supp. 2d 854, 859 (1998) ([A]ntidumping orders apply to merchandise from particular countries, . . . [therefore] determining the country where the unfairly traded merchandise is produced or manufactured is fundamental to the proper administration and enforcement of the antidumping statute.")

Pursuant to these provisions, Commerce publishes ADD and CVD orders that instruct Customs to assess antidumping or countervailing duties on particular imports. 19 U.S.C. §§ 1673e(a)(1) (authority to assess antidumping duties), and 1671e(a)(1) (authority to assess countervailing duties). Commerce's ADD and CVD orders must specify both the class or kind of merchandise and the particular country from which the merchandise originates. *See, e.g.*, *Certain Cold-Rolled Carbon Steel Flat Products from Argentina*, 58 Fed. Reg. 37,062, 37,065 (Dep't Commerce Jul. 9, 1993) (notice of final determination of sales at less than fair value) ("The scope of an antidumping or countervailing duty order is defined by the *type of merchandise* and by the *country of origin* (e.g., widgets from Ruritania).") (emphasis added). "For merchandise to be subject to an order, it must meet both parameters, i.e., product type and country of origin." *Id.*

Conversely, if merchandise does not meet one of the parameters—either class or kind, or country of origin—it is outside the scope of the ADD or CVD order. *Final Determination of Sales at Less Than Fair Value: 3.5" Microdisks and Coated Media Thereof from Japan*, 54 Fed. Reg. 6433, 6435 (Dep't Commerce Feb. 10, 1989) (finished microdisk processed in a particular manner was a product of Canada "for country-of-origin purposes under the antidumping law, and thus is not within the scope of" the investigation on microdisks from Japan) (emphasis added). And if the merchandise is outside the scope of an ADD or CVD order, *i.e.*, not "subject merchandise,"[11] then Com-

[10] "The term 'country' means a foreign country. . . ." 19 U.S.C. § 1677(3).

[11] "The term 'subject merchandise' means the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677 (25) (2000).

merce, per statute and per its own rules, may not impose duties on those goods. *See* 19 U.S.C. §§ 1673e(a)(2), 1671e(a)(2); 19 C.F.R. § 351.211(b)(1) (2007) (Commerce's authority to issue instructions to Customs is limited to "subject merchandise"); *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1098 (Fed. Cir. 2002) ("Congress made no provision for bringing other merchandise within the scope of antidumping and countervailing duty orders that was otherwise outside the language of those orders."); *Corus Staal BV v. United States*, 31 CIT ___ , ___ , Slip Op. 07–140, at *17 (Sep. 19, 2007) ("As a general rule, Commerce cannot impose antidumping duties without a valid determination of dumping") (*citing* 19 U.S.C. §§ 1673 & 1673d(c) and 19 C.F.R. § 351.212). Thus in this context, the language of the ADD or CVD order establishes the extent of Commerce's authority. *Smith Corona Corp. v. United States*, 915 F.2d 683, 685–86 (Fed. Cir. 1990) ("The class or kind of merchandise encompassed by a final antidumping order is determined by [language of] the order. . . . [and] [a]lthough the scope of a final order may be clarified, it cannot be changed in a way contrary to its terms.") (citations omitted).

Here, the ADD and CVD orders at issue cover SSPC from Belgium. Plaintiffs imported SSPC that was hot rolled in Germany and pickled, annealed, packaged in and shipped from Belgium. Commerce determined that the country-of-origin of Plaintiffs' merchandise was Germany, and, therefore, that Plaintiffs' imports were not subject to the ADD and CVD orders on SSPC from Belgium. *See Final Results* and *Issues & Decision Mem., supra*. Nevertheless, Commerce issued liquidation instructions to Customs to liquidate Plaintiffs' POR 1 unliquidated entries of German SSPC as if they were nevertheless subject to the ADD and CVD orders on Belgian SSPC. This Commerce cannot do.

It is true that on questions of scope, Commerce has "broad authority to interpret its own antidumping and [countervailing] duty orders." *INA Walzlager Schaeffler KG v. United States*, 108 F.3d 301, 307 (Fed. Cir.1997). However, once Commerce ruled that the SSPC at issue here was no longer subject to either order (i.e., falling outside the scope of the orders), its authority impose duties over that merchandise evaporated. *Duferco Steel, Inc.*, 296 F.3d at 1097 ("Repeatedly, decisions of this court confirm that although the scope of a final order may be clarified, it can not be changed in a way contrary to its terms. . . . We have also noted Commerce's inability to interpret orders contrary to their terms.") (internal citations and quotes omitted). Accordingly, Commerce's instructions to Customs to liquidate Plaintiffs' POR 1 entries with ADD and CVD duties in place are not in accordance with law.

Furthermore, this Court recognizes the long-standing principle that an administrative agency may not act beyond the bounds of authority conceived and delegated by Congress. *FAG Italia v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("an agency literally has no power to act . . . unless and until Congress confers power upon it") (internal quotation and citation omitted); *see generally Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961) (An agency "is entirely a creature of Congress and the determinative question is not what the [agency] thinks it should do but what Congress has said it can do."). Congress has answered the question of when Commerce may impose antidumping and countervailing duties on imports: only when the merchandise is subject to a valid ADD or CVD order.[12]

To hold that Commerce can instruct Customs to liquidate merchandise that is not within the scope of an ADD or CVD order with antidumping and countervailing duties in place, as Commerce desires, would have this Court sanction an *ultra vires* act. *See Pac Fung Feather Co., Ltd. v. United States*, 19 CIT 1451, 1456, 911 F. Supp. 529, 534 (1995) ("It is properly within the jurisdictional province of the court to declare ultra vires and void, agency action that is beyond the scope of its defined statutory authority."). Instead, this Court holds that Commerce's instructions to Customs to liquidate Plaintiffs' unliquidated POR 1 entries of German SSPC with antidumping and countervailing duties in place are "not in accordance with law," 5 U.S.C. § 706(2)(A), specifically 19 U.S.C. §§ 1671e and 1673e.

2. Principles of Administrative Finality.

Commerce argues that principles of administrative finality prevent the agency from issuing instructions to Customs to liquidate Plaintiffs' POR 1 entries without antidumping or countervailing duties. (*See Liquidation Instr. Mem., supra*, at 4.; Def. Br. 28–34.) Yet, this is not the case. Generally, "administrative finality" as applied to agency decisions refers to "an action where the 'decision-making process has reached a stage where judicial review will not disrupt the orderly process of adjudication.' " *Ind. Steelworkers Union v. United States Sec'y of Labor*, 30 CIT ___ , 2006 WL 3354281, at *9 (Nov. 17, 2006) (*quoting* 5 JACOB A. STEIN, ET AL., ADMINISTRATIVE LAW § 48.03[1] at 41 (2006)). In the trade context, administrative finality attaches when entries are *liquidated*, not when the administrative review closes.[13] Here, Plaintiffs do not seek to disturb any entries that Customs has already liquidated. Because Plaintiffs request only that Commerce instruct Customs to liquidate at the proper rate the

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[12] *But see Corus Staal BV*, 31 CIT ____ , Slip Op. 07–140, at *17 (Commerce may impose antidumping duties where valid determination of dumping was subsequently revoked to comply with a negative World Trade Organization dispute settlement panel finding).

[13] In fact, in some situations, liquidation does not trigger administrative finality. *See Shinyei*, 355 F.3d at 1311 (liquidation of the entries at issue did not divest the court of jurisdiction; reliquidation might be an available remedy under particular facts of the case).

POR 1 entries of German SSPC that have not yet been liquidated, principles of administrative finality do not preclude Plaintiffs' requested relief.

Multiple cases have held that Commerce may apply determinations made in a later-occurring proceeding to previously-entered, but not yet liquidated, entries. *See Wirth Ltd. v. United States*, 22 CIT 285, 301–02, 5 F. Supp. 2d 968, 982 (1998) (sustaining retroactive application of an affirmative scope determination) ("Commerce may apply a scope ruling beginning with the entire period of investigation during which entries of the scope merchandise were first suspended.") (internal brackets and quotations omitted); *Timkin Co. v. United States*, 21 CIT 889, 890–91, 972 F. Supp. 702, 703 (1998) (sustaining Commerce's decision to apply a scope ruling "beginning with the entire period of investigation during which entries of the scope merchandise were first suspended for antidumping purposes"); *Koyo Seiko Co., Ltd. v. United States*, 21 CIT 893, 1997 WL 438843, at *1 (1997) ("Commerce explains that its normal practice is to apply a scope determination beginning with the entire period of investigation during which entries of the scope merchandise were first suspended for antidumping purposes."); *FAG Kugelfischer Georg Schafer KGaA v. United States*, 20 CIT 824, 827–31, 932 F. Supp. 315, 318–20 (1996) (sustaining Commerce's decision to apply an affirmative scope ruling retroactively); *but see Antidumping Duty Order on Cylindrical Roller Bearings and Parts Thereof from Japan,* (A-588-804), *available at* http://ia.ita.doc.gov/remands/98–09–02903.htm (final results of redetermination on remand final scope ruling), *aff'd*, *Torrington Co. v. United States*, 24 CIT 306, 306 (2000). The argument for retroactive application of a determination is particularly powerful where, as here, Commerce determines that the merchandise at issue *was never subject to the ADD or CVD order* under which the importer paid duty deposits.

In addition, Commerce's regulations and practice in the "scope review"[14] context belie Commerce's touted interpretation of administrative finality. If Commerce determines through a scope review that "the product in question is *not* included within the scope of the or-

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[14] A "scope review" is a procedure to determine whether "a particular product is included within the scope of an antidumping or countervailing duty order or a suspended investigation." 19 C.F.R. § 351.22(a) (2007). The parties disagree whether the country-of-origin determination that Commerce undertook in the instant case was, in fact, a scope review. Plaintiffs argue that the country-of-origin determination was a scope review, which would obligate Commerce to apply the results retroactively. Defendant argues that a country-of-origin determination is distinct from a scope review. Because this Court finds that Commerce was required to apply the country-of-origin determination to Plaintiffs' unliquidated POR 1 entries, this Court need not decide whether a country-of-origin determination is a type of scope review. Regardless, the two procedures are analogous in that both clarify whether particular merchandise is subject to an ADD or CVD order, and this Court finds Commerce's scope regulations and practice instructive regarding the concept of administrative finality.

der," Commerce "will order any suspension of liquidation on the product ended, and will instruct the Customs Service to refund *any* cash deposits or release *any* bonds relating to that product." 19 C.F.R § 351.225(l)(2); *accord id*. at § 351.225(l)(3) (emphasis added). Commerce regularly applies negative scope rulings retroactively to all unliquidated entries of the merchandise at issue, regardless of entry date. *See, e.g.*, *Antidumping Scope Ruling on Polyethylene Retail Carrier Bags from the People's Republic of China* (A–570–886), Message No. 6194206 (Jul. 13, 2006) (*available at* http://addcvd.cbp.gov/detail.asp?docID = 6194206 (last visited Sep. 10, 2007)); *Scope Ruling on Pressure Sensitive Tape from Italy* (A–475–059), Message No. 2148113 (May 27, 1992) (*available at* http://addcvd.cbp.gov/detail.asp?docID = 2148113 (last visited Sep. 10, 2007)); *Scope Determination on the Antidumping Duty Order On, Granular Polytetrafluoroethylene from Japan* (A–588–707), Message No. 3282112 (Oct. 9, 1992) (*available at* http://addcvd.cbp.gov/detail.asp?docID = 3282112 (last visited Sep. 10, 2007)); *Stainless Steel Bar from India*, (A–533–810), Message No. 5157204 (Jun. 6, 2005) (*available at* http://addcvd.cbp.gov/detail.asp?docID = 5157204 (last visited Sep. 10, 2007)). The CAFC has confirmed this practice. *See Forest Products N.W., Inc. v. United States*, 453 F.3d 1355, 1358–59 (Fed. Cir. 2006) ("If Commerce concludes that the imported merchandise is not within the scope of the antidumping or countervailing duty order, Commerce will order Customs to refund *any* cash deposits paid by the importer") (citing regulations) (emphasis added).

All of this reveals that principles of administrative finality do not bar Commerce from regularly applying negative scope determinations retroactively to unliquidated entries from previous administrative review periods, which are analogous to Commerce's country-of-origin determination at issue here. "An agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *RHP Bearings*, 288 F.3d at 1347. Commerce's proffered explanation for failing to instruct Customs to liquidating Plaintiffs' POR 1 entries of German SSPC without antidumping and countervailing duties—administrative finality—is undermined by the agency's practice with respect to scope reviews.

Commerce reasons that Plaintiffs' position here is untenable since it would require re-opening prior closed administrative reviews as well as other additional "parades of horror."[15] (*See* Def. Br. 32–34). This Court takes notice, however, and Plaintiffs have repeatedly stated that they "do[ ] not ask that any reviews be re-opened" but merely seek to have the scope review applied to the unliquidated German entries under suspension from the first POR. (*See* Pl. Reply

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[15] *See King Instrument Corp. v. Otari Corp.*, 767 F.2d 853, 857 (Fed. Cir. 1985).

Br. 16-17.) Moreover, this Court neither seeks nor embraces such a position had it been advocated. *See Zenith Radio Corp*, 710 F.2d 806[16]. Because principles of administrative finality do not preclude Plaintiffs' requested relief, this Court remands to Commerce with instructions to issue to Customs instructions to liquidate Plaintiffs' unliquidated entries of German SSPC without antidumping or countervailing duties, and refund the unliquidated deposits collected by Customs.

CONCLUSION

For the foregoing reasons, this Court grants Plaintiffs' motion for judgment on the agency record, denies Defendant's motion in its entirety, and holds that Commerce's liquidation instructions are indeed arbitrary, capricious or otherwise not in accordance with law. A separate Order of the Court will be issued in conjunction and in accordance with this Opinion.

Slip Op. 07–146

SHERRI N. BOYNTON, v. Plaintiff, UNITED STATES, Defendant.

Before: Pogue, Judge
Court No. 06–00095

[Plaintiff's motion for judgment on the record denied. Action **remanded** to the Secretary of the Department of Homeland Securityfor further consideration.]

Decided: October 02, 2007

Law Offices of Robert W. Snyder (*Robert w. Snyder*) for Sherri N.Boynton, Plaintiff.
Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *Aimee Lee*, Civil Division, Dept. Of Justice Commercial Litigation Branch, *Maritza Tamayo-Sarver*, of council, Office of Associate

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[16] Defendants-Intervenor argue that this appeal should be dismissed as to Plaintiffs' previously liquidated entries. Even if Plaintiffs had made such a request, this Court would be unable to furnish a remedy to reliquidate Plaintiffs' liquidated entries from the first three POR without ADD or CVD). See Zenith Radio Corp. v. United States, 710 F.2d 806 (Fed. Cir. 1983) (liquidation of entries covered by an annual review terminates any judicial challenge to the final determination of that review); United States v. Utex Int'l Inc., 857 F.2d 1408, 1409–1410 (Fed. Cir. 1988) ("liquidations are effectively final"); Yancheng Baolong Biochem. Prods. Co. v. United States, 406 F.3d 1377, 1381 (Fed. Cir. 2005) (same); cf. Hylsa, S.A. de C.V. v. United States, 31 CIT ____ , ____ , 469 F. Supp. 2d 1341, 1345–46 (2007). The Court notes that all entries covered by the second and third administrative reviews have been liquidated. Therefore, under the longstanding rule of this Circuit and under the circumstances of this case, this Court cannot disturb any liquidated entries of German SSPC inadvertently designated as Belgian SSPC during the POR for the first, second, and third administrative reviews.

Chief Counsel, U.S. Customs and Border Protection for U.S. Department of Homeland Security, Customs and Border Protection, Defendant

OPINION

Pogue, Judge:

Plaintiff, Sherri N. Boynton, moves for judgment on the administrative record pursuant to USCIT Rule 56.1, asking the court to set aside the decision of the Secretary of the Department of Homeland Security[1] ("the Secretary") revoking her Customs broker's License.[2]

The Court has jurisdiction over this case under Section 641(e) of the Tariff Act of 1930, 19 U.S.C. § 1641(e)(1),[3],[4] and 28 U.S.C. § 1581(g) (granting the Court of International Trade exclusive jurisdiction of any civil action to review the revocation of a Customs broker's License by the Secretary of the Department of Homeland Security ("DHS")). In accordance with 19 U.S.C. § 1641(e)(1) and USCIT Rule 56.1(a), the court will review the decision of the Secretary of DHS on the administrative record, considering any objections raised in that proceeding.[5]

Standard of Review

The factual findings of the Secretary must be based on substantial evidence. 19 U.S.C. § 1641(e)(3). *See also* 5 U.S.C. § 706(2)(E) and *Anderson v. United States*, 16 CIT 324, 324 799 F. Supp. 1198, 1199–1200 (1992). Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclu-

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[1] In this instance, the revocation decision was made by Acting Assistant Secretary of the Department of Homeland Security Elaine Dezenski.

[2] Until January 2003, revocation decisions were made by the Secretary of the Treasury. After the reorganization of the former United States Customs Service revocation decisions are made by the Secretary of Homeland Security. 6 U.S.C. § 203(2004).

[3] Citation is to the 2000 edition of the U.S. Code unless otherwise noted.

[4] 19 U.S.C. § 1641(e)(1) provides: In general. A customs broker, applicant, or other person directly affected may appeal any decision of the Secretary denying or revoking a license or permit under subsection (b) or (c), or revoking or suspending a license or permit or imposing a monetary penalty in lieu thereof under subsection (d)(2)(B), by filing in the Court of International Trade, within 60 days after the issuance of the decision or order, a written petition requesting that the decision or order be modified or set aside in whole or in part. A copy of the petition shall be transmitted promptly by the clerk of the court to the Secretary or his designee. In cases involving revocation or suspension of a license or permit or imposition of a monetary penalty in lieu thereof under subsection (d)(2)(B), after receipt of the petition, the Secretary shall file in court the record upon which the decision or order complained of was entered, as provided in section 2635(d) of title 28, United States Code.

[5] In their briefs, both the government and Boynton sometime simply that this court is to review the recommendation of ALJ Sippel. This is incorrect. Our review is of the decision made by Acting Assistant Secretary Elaine Dezenski for the Department of Homeland Security. We, like Secretary Dezenski, must sometimes look directly at ALJ Sippel's findings and recommendations to determine whether a particular charge is supported by substantial evidence or not, but it is ultimately the decision of the Secretary that we review.

sion." *Fusco v. United States Treasury Dep't*, 12 CIT 835, 838–39, 695 F. Supp. 1189, 1193 (1988) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Less than the weight of the evidence, the possibility of drawing two inconsistent conclusions from the evidence does not prevent the agency's findings from being supported by substantial evidence. *Barnhart v U.S. Treasury Dep't*, 9 CIT 287, 290 613 F. Supp. 370, 373 (1985).

For legal issues, in accordance with 5 U.S.C. § 706(2)(A) the court reviews the Secretary's revocation decision to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". *See also Barnhart*, 9 CIT at 291, 613 F. Supp. at 374 (The court need only "assure itself the decision was rational and based on consideration of relevant factors").

Background

Plaintiff Sherri N. Kaplan, a.k.a. Boynton received her Customs broker's License in 1987. Through July 1, 1998, Plaintiff worked as the qualifying broker for Southwest Customs Service.[6] On July 3, 1998, Boynton wrote to Customs to advise that as of July 1, 1998, she had resigned from Southwest and would no longer be the licensed individual employed by Southwest.[7] On July 7, 1998, Boynton again wrote to Customs to confirm that she had resigned her position at Southwest effective July 1, 1998. She updated her license to use her married name, "Boynton", and stated that she intended to apply for a permit to operate under her married name. She submitted an application to operate under the name "Sherri N. Boynton CB", on July 23, 1998, and informed Customs that all operations would be conducted at 25031 Oak Street, Lomita, CA 90717, declaring that, "[a]ll files will be kept at this location in numerical order . . . each file will contain . . . a copy of my invoice to the customer as their Customs Broker, a copy of the Entry Summary and any other documents directly pertaining to each particular importation." *In re Revocation of Customs Broker License of Sherri N. Boynton*, 9–10 (Feb. 2, 2004, citing Tr. 570.) Boynton reconfirmed her resignation from Southwest on July 27th, 1998.

Shortly thereafter a new license was issued to Sherri N. Boynton under her original license number, allowing her to use the license under her married name. A new Customs broker permit was issued to her authorizing her to conduct business as "Sherri N. Boynton."

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[6] Southwest was assigned filer code "G91" and every entry submitted by Boynton for Southwest was required to begin with "G91." *In re Revocation of Customs Broker License of Sherri N. Boynton*, 9 (Feb. 2, 2004, citing Tr. 2445.

[7] There is some lack of clarity in the record as to whether Boynton took control of some or all of the existing Customs records or files after she left the employment of Southwest. As none of the charges upheld by this court depend on this matter, we do not decide this question.

The business address on the permit was the same as used in her application, 25031 Oak Street, Lomita CA 90717–2207. Boynton was assigned filer code "GE6," requiring every entry she filed, whether for herself or a client, to begin with "GE6."

From the time shortly before she left the employment of Southwest until the initiation of disciplinary actions in August, 2001, numerous problems arose with Boynton's actions as a Customs broker. Customs agents advised her, in writing and in person, about proper procedures and she was placed on national and local sanctions.[8] Eventually, on August 9, 2001, the director of the Los Angeles/Long Beach Port (the "Port Director") requested that license revocation proceedings be instituted against Boynton. The Assistant Commissioner authorized the initiation of preliminary proceedings on September 11, 2001, and a "Notice of Preliminary Proceedings and the Notice to Show Cause and Statement of Charges" was served on Boynton on September 27, 2001. The Port Director requested authorization to institute formal revocation proceedings against Boynton's license on December 20, 2001, and the Assistant Commissioner authorized the proceedings on February 26, 2002.

Revocation proceedings commenced on March 28, 2002, under the direction of the former United States Customs Service, now the United States Customs and Border Protection, a part of the Department of Homeland Security. Customs' Notice to Show Cause and Statement of Charges ("Notice") issued on March 28, 2002 was reissued on November 5, 2002 without modification to the charges. A formal hearing was conducted at Long Beach, California by Administrative Law Judge ("ALJ") Sippel, from November 4 until November 7, 2002, in accordance with the Administrative Procedures Acts ("APA"), 5 U.S.C. § 554 et seq., and the Customs Rules of Practice, 19 C.F.R. § 111.62 et seq. ALJ Sippel issued a recommendation of license revocation on February 2, 2004. This recommendation was reviewed by the Secretary, and a decision revoking Boynton's license was issued on January 23, 2006. Boynton filed a timely appeal of the Secretary's decision on March 20, 2006. It is the revocation decision issued by the Secretary that we review here.

Discussion

In her decision revoking Boynton's license, The Secretary stated, "[b]ased on the record in this case, and in concurrence with the ALJ's

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[8] National sanctions are imposed on a Customs broker when her operation has two defaulted payments of any kind within a 12 month period. A broker on national sanctions does not have the privilege of having ten days to file entry summaries and to pay estimated duties and must submit all documents and duties before the release of goods. National sanctions affect a broker or importer in every port. Local sanctions have effect only in a local port and are instituted by local port directors for failure to file documents or pay duties in a timely fashion or for defaulting on certain payments.

recommended determination, I sustain [Custom's] proposed revocation of Ms. Boynton's License." Memorandum for Commissioner Robert C. Bonner from Acting Assistant Secretary Elaine Dezenski re revocation of Customs Broker License - Sherri N. Boynton. At the same time, the Secretary's decision did not hold any particular charge or set of charges against Boynton to be independently sufficient for the revocation of her license.

Customs regulations allows for revocation of a customs broker's license if, "[t]he broker has violated any provision of any law enforced by Customs or the rules or regulations issued under any provision of any law enforced by Customs." 19 C.F.R. § 111.53(c). *See also*, 19 U.S.C. § 1641(d)(1)(C). However, Customs' policy has generally been to issue progressive penalties and to reserve revocation of a broker's license only for "egregious" violations.[9] An "egregious" violation is a "flagrant act or omission that shows gross irresponsibility beyond that of a nonrepetitive [sic] clerical mistake or a good-faith oversight." Customs Directive Number 099 3530–007 Section 5(B),[10] available at http://www.cbp.gov/linkhandler/cgov/toolbox/legal/directives/3530–007.ctt/3530_007.doc. Thus, under Customs policy, if Boynton has committed "egregious" violations of Customs rules, then revocation of her license is warranted. However, because the Secretary based her opinion not on a particular enumerated violation or sub-set of violations, but rather on the record as a whole, the court is unable to affirm the Secretary's decision unless it upholds each of her findings. We therefore must review each of the charges set out against Boynton under the "substantial evidence" test. Because the court may not substitute its judgment as to the appropriate penalty for Boynton, *Barnhart*, 9 CIT at 291, 613 F. Supp. at 374, if any

[9] "The Customs response to a broker violation depends upon whether it is egregious (flagrant) or, like most broker violations, nonegregious. For nonegregious violations, Customs will first attempt to work with the broker through communication and education to improve the broker's overall performance. . . . If a broker's performance remains unsatisfactory despite counseling and warning letters, progressive punitive action should then be taken. Except for egregious violations, the sequence of Customs actions to compel compliance by a broker should generally be:

- communication about a particular deficiency
- a warning letter
- a penalty
- a larger penalty and a warning about suspension
- suspension/revocation of the license"

Customs Directive Number 099 3530–007 Section 5(A), available at http://www.cbp.gov/linkhandler/cgov/toolbox/legal/directives/3530–007.ctt/3530_007.doc

[10] Examples of "egregious" violations given in Customs Directive Number 099 3530–007 include, "[t]he continued employment of a felon after Customs has denied the broker permission for such employment, the continued filing of entries by a broker after the broker is notified that his or her permit has been revoked, and the intentional misuse of clients' funds." Customs Directive Number 099 3530–007 Section 5(B). As none of the charges against Boynton fit directly into the enumerated examples, it is not immediately clear if they are "egregious" violations or not.

charges remain after our review, the case must be remanded to the Secretary for further consideration. The Secretary may then decide what penalty is appropriate in light of any surviving charges.

The Government objects to this approach, noting that Boynton, in her brief, did not challenge one charge taken as proven by the Secretary: charge 5, operating under a name other than that on her broker's license without permission from or notice to Customs.[11] The government's position is that, pursuant to 19 C.F.R. § 111.53(c),[12] the Secretary could have based her decision on this one uncontested charge and that, given this, remand is not appropriate or necessary. The government is not correct. If the court were to follow the government's argument it would be substituting the court's judgment for that of the agency. Because the Secretary did not state that this charge alone would be sufficient to ground a revocation of Boynton's license, we will not make that decision for her now and, as noted, we must review each of the charges against Boynton under the "substantial evidence" test. If we do not find all of the charges accepted by the Secretary to be supported by substantial evidence, we must remand to the Secretary to determine a consequence in accordance with the remaining charges, if any. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) ("[t]he grounds upon which an administrative order must be judged are those upon which the record discloses the action was based.")

Discussion of Charges

Charge I alleges a violation of 19 C.F.R. § 111.2(a)(2)(ii)(1), requiring that all brokers maintain a power of attorney for any employee who signs documents pertaining to Customs business on the behalf of the licensed broker. While the broker need not file the power of attorney for her employee with the port director, she must provide proof of its existence if requested to do so by Customs. Here it is alleged that Boynton did not have a properly executed power of attorney for her employee, Mr. Jay Lee, and that nonetheless she had him conduct Customs business on her behalf from September 4, 1998 until July 22, 1999.

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[11] This charge was challenged by Boynton in her original complaint to this court. She did not there, however, offer any evidence against the charge but merely (and implausibly) blamed the problem on using an old computer program. In her brief she did not challenge this charge, skipping from charge 4 to charge 6.

[12] 19 C.F.R. § 111.53:

The appropriate Customs officer may initiate proceedings for the suspension, for a specific period of time, or revocation of the license or permit of any broker for any of the following reasons:

. . .

(c) The broker has violated any provision of any law enforced by Customs or the rules or regulations issued under any provision of any law enforced by Customs.

ALJ Sippel found, and the Secretary accepted, that this charge had been proven by a preponderance of the evidence. While Boynton claimed that a proper power of attorney had existed for Mr. Lee since September 4, 1998, it is not disputed that she was unable to produce the power of attorney for customs agents when requested to do so. Because the regulation in question requires that the needed power of attorney be produced to Customs on demand, and because Boynton was not able to do so, she was in violation of the regulation. This charge, then, is found to be supported by substantial evidence.

Charge II deals with the proper recording of transactions. 19 C.F.R. § 111.21(a) states, in relevant part, that, "[e]ach brokermust keep current in a correct, orderly, and itemized manner records of account reflecting all his financial transactions as a broker. He must keep and maintain on file copies of all his correspondence and other records relating to his customs business." Customs presented evidence that Boynton failed to maintain and produce for inspection required records and that she failed to provide an explanation for her inability to produce the documents. This charge involves, in particular, thirteen entries - nine of which were failures to file entry summaries[13] and four of which were failures to pay the required duties. While Boynton is correct to note that eventually all entries were made and duties paid, the government is correct that under this regulation timeliness is required and that Boynton has not shown any justification for her late filing or her inability to produce the relevant documents when requested to do so by Customs. While the seriousness of this violation may be considered by the Secretary, in light of the eventual filing by Boynton of all needed paperwork and duties, the charge as stated is supported by substantial evidence and so must be upheld.

Charge III deals with the standard of diligence in correspondence and payments required of a Customs broker. Customs brokers, as fiduciaries, are held to a higher standard of care than are ordinary businessmen. Customs Directive 099 3530–007 Section 4. *See also Kazangian v. Brady*, 16 CIT 140, 141 (1992). The standard of diligence in correspondence and payment required of a Customs broker is set out in the relevant parts of 19 C.F.R. § 111.29:

> (a) *Due diligence by broker*. Each broker must exercise due diligence in making financial settlements, in answering correspondence, and in preparing or assisting in the preparation and filing of records relating to any customs business matter handled by him as a broker. Payment of duty, tax, or other debt or obli-

[13] An entry summary, filed on form CF 7501, is the Customs document required to be filed with estimated duties no later than ten days after release by Customs of the merchandise in question. It provides an itemized listing of the essential information about the imported merchandise for Customs.

> gation owing to the Government for which the broker is responsible, or for which the broker has received payment from a client, must be made to the Government on or before the date that payment is due. Payments received by a broker from a client after the due date must be transmitted to the Government within 5 working days from receipt by the broker. Each broker must provide a written statement to a client accounting for funds received for the client from the Government, or received from a client where nopayment to the Government has been made, or received from a client in excess of the Governmental or other charges properly payable as part of the client's customs business, within 60 calendar days of receipt. No written statement is required if there is actual payment of the funds by a broker.

19 C.F.R. § 111.29(a).

Charge III consists of eleven specifications, each of which is alleged to instance an example of Boynton's failure to meet the standard of diligence required of a customs broker. As each of the specifications is independent, each must be considered to ascertain if it is supported by substantial evidence.[14]

Specification 1 dates back to the time when Boynton was still employed by Southwest Customs Services. One element of the due diligence owed by Customs brokers is to respond to all Customs correspondence that relates to questions about the timely payment of duties, filing of financial statements, and accounting for checks for funds. While Boynton was the qualifying broker for Southwest, it received nineteen debit vouchers[15] from Customs as a result of insufficient funds for duty payments. The Customs Port Director of the Los Angeles/Long Beach Seaport wrote to Boynton on June 8, 1998, while she was still employed at Southwest, to remind her of her due diligence obligations in making financial settlements and instructed her to respond to Customs within 30 days of the receipt of the letter, in writing, indicating the steps she intended to take to ensure prompt payment of duties and to explain the defaulted payments and her failure to properly supervise the brokerage activities. Boynton did not respond to the Port Director's letter within 30 days. On July 30, 1998 a memorandum was faxed to Boynton concerning her failure to reply. Boynton did reply to this message on the 30th of

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[14] Conceivably, ALJ Sippel and the Secretary could have treated this as one discrete charge with the various specifications being treated merely as evidence for the over-all charge. However, because both ALJ Sippel and the Secretary dealt with each specification in the manner of an individual charge, we shall do so as well.

[15] Debit vouchers are bank notices sent to Customs concerning defaulted checks or defaulted Automated Clearing House ("ACH") payments. Debit vouchers are issued by the bank to the National Finance Center ("NFC"). Upon receipt of a debit voucher, NFC issues a debit voucher bill to the payor of the check, or the owner of the ACH account. What actions must be taken when a debit voucher is issued depends on the type and cause of the voucher.

July, 1998, but ALJ Sippel reasonably did not find these explanations to be adequate as to the causes of the problems, as Boynton merely noted that she was no longer at Southwest and gestured towards problems with the IRS at Southwest and the Asian financial crisis. None of these explanations were taken as sufficient and, of course, could not explain why Boynton was late in replying to the Port Director's original letter. This charge, then, is supported by substantial evidence and must be upheld.

Charge III Specification 2 relates to the time shortly after Boynton started working under her own name after having left Southwest. Shortly after she started working under her own name, Boynton received four debit notices from Customs due to late payments. Boynton was apparently on national sanctions at the time and so did not qualify for the ten-day privilege in filing payments. However, ALJ Sippel held that Boynton, at this time, had reason to believe that she was no longer on national sanctions and that, given this, she was not unreasonable to believe that she qualified for the ten-day privilege. Additionally, some importers were late in forwarding funds to her. Boynton, at this time, relied on her own interpretation of Customs Bulletin 88[16] on how to deal with late payments by importers. Boynton had not yet, apparently, received instruction by Customs on the correct interpretation of Bulletin 88. ALJ Sippel did not find, therefore, that these actions indicated a failure to exercise due diligence by Boynton and the Secretary did not introduce any additional evidence on this point. Neither has the government, in its brief, introduced any new evidence here. However, ALJ Sippel, oddly enough, extended his findings with a matter not directly relevant to this specification - Boynton's use of a trade name in her business without approval by Customs, and her unreliable testimony on this point. Even assuming, however, that ALJ Sippel was completely correct in his analysis of Boynton's testimony, at this point it is hard to see how that finding is directly relevant to the matter at issue in this specification. Even though reliability of testimony is almost always relevant, the lack of reliable testimony cannot by itself be substantial evidence for this specification. Because, apparently, no other evidence was introduced, and because ALJ Sippel himself held that there was reason to accept Boynton's account on this issue, this specification of Charge III is not supported by substantial evidence and the Secretary's decision on this specification must be overruled.

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[16] Customs Bulletin 88–30 deals with what a Customs broker must do if she does not receive funds in a timely manner from importers. It holds that a Customs broker must submit entry summary documentation even where the broker has not been paid the duties, thereby making the importer liable under its bond for liquidated damages. However, if the broker "knows" that she will be receiving payment from the importer, she is not to use this procedure. Obviously there is room for interpretation on this matter, but Customs eventually gave Boynton specific instruction on the proper interpretation.

Charge III Specification 3 was found not to be substantiated by the Secretary. Accordingly, we need not consider it here.

Charge III Specification 4 involves failure to forward duties to Customs in a timely manner. In particular, Customs analyzed Boynton's entries from September 4, 1998 to March 14, 2000, disclosing 312 late payments. Boynton does not contest that the payments were made late but does insist that 125 were only a few days late and that there was no conversion of funds. The latter matter, however, is not directly at issue in this charge as here the issue is merely the timeliness, or lack thereof, of duties being forwarded to Customs. Because Boynton does not question the lateness of forwarding of duties, and this is in itself evidence supporting that determination, the charge is therefore supported by substantial evidence and must be upheld.

Charge III Specification 5 involves a failure to pay on ten out of twenty-two late-filed entries for importer KOS America, Inc. ("KOS"). Here ALJ Sippel held that Customs had not introduced evidence sufficient to show that this failure to pay was due to a failure to exercise due diligence by Boynton. Although some evidence pointed to her, other evidence pointed to either KOS, who had the ultimate obligation to make sure payment was made, or alternatively to the freight forwarder General Forwarding, Inc., employed as an agent by KOS. The Secretary disagreed with ALJ Sippel here, arguing that by failing to use Customs Bulletin 88 procedures, Boynton had failed to exercise due diligence. It is clear that Boynton did not here properly use Bulletin 88 procedures and that this was a problem. However, the specification in question does not charge her with failure to use Bulletin 88 procedures in this instance but rather with failure to make payments. Because substantial evidence does not support the charge that this failure to make payments was Boynton's fault or responsibility, this failure in itself cannot constitute a lack of due diligence, even if Boynton also did not do something else that she ought to have. Therefore, this specification is not supported by substantial evidence, and the decision by the Secretary on this point is overruled.

Charge III Specification 6 deals with eight additional cases of late or non-paid duties not included in the above specifications dating back to the time when Boynton was the qualified broker for Southwest. Customs presented evidence that Boynton's failure to exercise due diligence in these cases lead to liquidated damages being assessed against the importers and a surety, International Bond & Marine. Boynton claimed that this was not her fault as she had left the employment of Southwest; however, as she had been the qualified broker at the time of the transactions, she retained responsibility for the non-paid duties. This charge is therefore supported by substantial evidence and must be upheld.

Charge III Specification 7 deals with monies totaling $119,496.72 paid to Boynton by importer National Media Corporation ("NMC") but not forwarded to Customs. Substantial evidence supports the charge that Boynton received monies paid by NMC to pay duties but that these monies were not forwarded to Customs, resulting in liquidated damages being assessed against NMC. Boynton claimed not to have had a power of attorney to file claims for NMC but she concedes that she did have power of attorney for the company E4L, a subsidiary of NMC. Boynton also claimed that the whole matter was due to a clerical mistake with customs at Los Angeles International Airport ("LAX"). No evidence was introduced, however, to support this claim, while Customs provided substantial evidence that the funds forwarded to Boynton by NMC were not paid to Customs. This specification, then, is supported by substantial evidence and must be upheld.

Charge III Specification 8 relates to an instance where Customs instructed Boynton on procedures to resolve 14 entries and overdue payments. Boynton followed these procedures in the large majority of the cases but not all. The record thereafter is unclear, with Boynton claiming, and ALJ Sippel holding, that payment for one entry of the 14 was made two weeks late and the Secretary insisting that 3 of the 14 entries were paid late. Neither Boynton nor the government in their briefs identify further clarifying evidence. The dispute in question is not, as such, whether some number of entries were paid late, but rather whether Boynton's actions here constituted a failure of due diligence. Given that the record is unclear and given that, either way, Boynton paid the large majority of the entries on time and eventually paid all entries within two weeks, the court here agrees with ALJ Sippel that this specification is not substantiated and holds that the decision of the Secretary in this instance is not supported by substantial evidence.

Charge III Specification 9 deals with a particular late payment made by Boynton. In this instance, Boynton failed, for several months after she received funds, to remit duties received via a freight forwarder for a client. In the meantime, Boynton told the client that the funds had been forwarded. The exact cause of the late payment is not, from the evidence, completely clear. However, it is clear that Boynton was responsible for taking proper measures here and did not. This charge is therefore supported by substantial evidence and must be upheld.

Charge III Specification 10 deals with an instance where Boynton filed an entry late and with the wrong sum of money. The entry was late but not so late that penalties were assessed on the importer in this case. ALJ Sippel held that the problem with the sum for the payment was apparently a simple clerical error and that, given these facts, this was not an instance of a failure to exercise due diligence. The Secretary disagreed here with ALJ Sippel, insisting that this instance must be viewed in the light of the other charges against Boynton and that this indicates a pattern of violations. This is not correct. Either this particular instance in itself indicates a failure to exercise due diligence or it does not. That Boynton may have failed to exercise due diligence in other cases does not make this such a case. The Secretary also here seeks to rely on the “presumption of regularity” granted to government action, arguing that we must assume Customs to have considered all available evidence. Such a presumption cannot substitute for the factual findings called for by statute and the regulations. *See, e.g., Truong v. United States Sec'y of Agr.*, 484 F. Supp. 2d 1324, 1329. It was not ALJ Sippel who attempted to re-weigh the evidence in this specification but rather the Secretary. This specification is not supported by substantial evidence and cannot be upheld.

Charge III Specification 11 deals with fifteen importers being placed on local sanctions due to Boynton's failure to submit duty payments in a timely fashion, requiring the importers to file live entries and make payment of duties by cashiers check, money orders, or cash. Boynton contends that these late payments were not her fault but rather stemmed from the use by these importers of a freight forwarder who in turn made late payments. The record does not provide conclusive evidence as to this matter. However, Customs regulations do make provisions for such cases via the use of Bulletin 88 procedures, which define the broker's responsibilities. See *supra* note 16. By the time that these instances arose, Boynton had been instructed by Customs in the correct Bulletin 88 procedures on numerous occasions. Because she did not properly follow Bulletin 88 procedures in these cases, she must be held responsible for the results. Substantial evidence, then, supports the charge of a failure to exercise due diligence in this instance.

Charge IV Specification 1[17] relates to the requirement that a Customs broker keep Customs informed of her actual business address at all times. 19 C.F.R. § 111.30(a) states, in relevant part, “(a) *Change of address*. When a broker changes his business address, he must immediately give written notice of his new address to each director of a port that is affected by the change of address.” It is agreed by all parties that, when she applied to work under her own name, Boynton listed 25031 Oak Street, Lomita CA 90717 as her correct business address and that she at no time gave written notice of a change of address to Customs or the relevant port director. Customs contends, however, that soon after she started working under her own name, Boynton began conducting business at an unauthorized address, 9100 Sepulveda Blvd., Suite 102A, Los Angeles, CA 90045. Customs contends, and both ALJ Sippel and the Secretary held, that

[17] Specification 2 of Charge IV was held to be unsubstantiated by ALJ Sippel and accepted as such by the Secretary and so needs not be discussed here.

Boynton had conducted significant business at the Sepulveda Blvd. address without notifying Customs. (This action was, in turn, apparently connected with the use of the unauthorized name "SCS" dealt with in the fifth charge and discussed below.)

Boynton counters that, firstly, she did not do significant business at the Sepulveda Blvd. address, but rather merely used it to store and sort out files. Alternatively, she argues, Customs had constructive notice of her change of address because she listed this address on filings sent to Customs, and Customs came to this address to interview her former employee, Mr. Jay Lee.

Customs' charge, and the Secretary's decision, is here supported by substantial evidence. Boynton had business cards for herself and for Jay Lee printed listing the Sepulveda address and she, at her own admission, listed the address in Customs filings. Mr. Lee worked from this address and importers sent information to it. Boynton was told by Customs in a letter dated June 28, 2000, to stop using the address, but she continued to do so. Her argument that Customs had constructive notice of a change of address cannot serve here as this merely shows that she was, in fact, using this address without giving the actual written notice required by the regulations. This charge, then, must be upheld.

Charge V deals with the use of the unauthorized name "SCS" and various versions of this (e.g., "Special Consulting Services," "Sherri's Customs Services," etc.) by Boynton. 19 C.F.R. § 111.30(c) states:

> *Change in name.* A broker who changes his name, or who proposes to operate under a trade or fictitious name in one or more States within the district in which he has been granted a permit and is authorized by State law to do so, must submit to the Office of Field Operations, U.S. Customs Service, Washington, D.C. 20029, evidence of his authority to use that name. The name must not be used until the approval of Headquarters has been received. In the case of a trade or fictitious name, the broker must affix his own name in conjunction with each signature of the trade or fictitious name when signing customs documents.

Boynton has not challenged Customs' claim that, at the time she was issued a license to work on her own on September 4, 1998, the correct name of the brokerage was "Sherri N. Boynton." Specification 1 of Charge V deals with Boynton's use of the "SCS" acronym and related extensions while Specification 2 deals with Boynton's use of Southwest's filer code, G91, along with both the name "Southwest" and the name "SCS", after her resignation from Southwest during July of 1998. Customs has provided substantial evidence to support these charges, and they are not contested by Boynton in her brief to the court.[18] Therefore, the findings of the Secretary that Boynton violated section 111.30(c) must be upheld.

Charge VI deals with the use of a problematic power of attorney by Boynton and her employee, Jay Lee. 19 C.F.R. § 111.32 states, in relevant part, "[a] broker must not file or procure or assist in the filing of any claim, or of any document, affidavit, or other papers, known by such broker to be false." Here Customs charged, and the Secretary found, that Boynton submitted a false power of attorney to Customs for the company Circuit Systems. Although there was no showing of intentional fraud or forgery on Boynton's part, the power of attorney in question contained such significant "red flags" that both ALJ Sippel and the Secretary held it appropriate to attribute "knowledge" of the falsity of the power of attorney to Boynton.[19]

Boynton, in her reply, points to ALJ Sippel's conclusion that there was no significant evidence of fraud or forgery on her part. This is, of course, an important fact, but not one that goes to the heart of the charge at issue here. Rather, to rebut the charge, Boynton would have to show either that the power of attorney in question was, despite the evidence otherwise, in fact a true document or else show that knowledge of the falsity of the document could not properly be attributed to her. She has not presented any such evidence. Because the finding of the Secretary is supported by substantial evidence, this charge must be upheld.

Charge VII was held to be not substantiated by both ALJ Sippel and the Secretary and so does not need to be reviewed.

Charge VIII pertains to Boynton's failure to file timely entries. The relevant regulation, 19 C.F.R. § 142.15, states in pertinent part:

> If the entry summary documentation is not filed timely, the port director shall make an immediate demand for liquidated damages in the entire amount of the bond in the case of a single entry bond. When the transaction has been charged against a continuous bond, the demand shall be for the amount that would have been demanded if the merchandise had been released under a single entry bond.

Between September 1998 and March 14, 2000, Boynton filed a total of 322 late entry summaries. These entry summaries were an aver-

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[18] As noted, in her initial complaint Boynton did contest these charges. She did not at that point cite any significant evidence that would have brought the Secretary's decision into question, and in her brief to the court she does not contest this charge, moving from Charge IV to Charge VI without addressing this issue, apparently conceding the charge.

[19] For example, the power of attorney in question contained multiple fonts, misidentified Circuit Systems as a corporation rather than as a limited partnership, contained a false signature from Mr. John Broyles as well as mis-identified him as the company president rather than his correct title of "production/quality manager" and misspelled his name.

age of 20 days late, with one entry being as much as 264 days late.[20] As a result of Boynton's tardiness in filing these entries, importers were assessed liquidated damages, and the government estimated its losses to be $579,385. Boynton contends that these late filings were all due to late payments to her of duties by importers. This is, perhaps, possible, but does not relieve Boynton of responsibility because, in such cases, she would be obligated to follow procedures set out in Customs Bulletins 88 and 93. Boynton was informed of these procedures in writing on May 7, 1999 and December 30, 1999, as well as telephonically on May 7, 1999, June 15, 1999, October 15, 1999, and October 25, 1999. Boynton was additionally provided with copies of Treasury Decision 89–49 and Public Bulletins 88 and 93, documents containing procedures on what to do in such situations. Boynton claims that these procedures are inherently confusing, but it is unclear how this, even if true, would negate her responsibility here, which is clear. The charge is supported by substantial evidence and must be upheld.

Charge IX is a somewhat general charge of a "failure to supervise." 19 C.F.R. § 111.28(a) states, in pertinent part:

> (a) *General*. Every individual broker operating as asole proprietor and every licensed member of a partnership that is a broker and every licensed officer of an association or corporation that is a broker must exercise responsible supervision and control . . . over the transaction of the customs business of the sole proprietorship, partnership, association, or corporation.

This is a "catch all" charge holding Boynton responsible for the actions of her employees and for all brokerage business conducted in her name that resulted in violations of Customs regulations. Customs incorporated by reference in this charge charges I–VIII. Insofar as this can be considered a distinct charge, and insofar as the various charges and specifications of charges hereby incorporated have been upheld as supported by substantial evidence, this charge is also supported by substantial evidence.

Conclusion

The Secretary has reasonably found that Boynton violated several Customs rules and regulations, often on multiple occasions. The Secretary's findings of violations of Customs rules and regulations are supported by substantial evidence, and must be upheld, in Charges I, II, IV, V, VI, VIII, IX, and for Specifications 1, 4, 6, 7, 9, and 11 of Charge III. However, not all of the Secretary's findings are supported by substantial evidence. Specifications 2, 5, and 8 of Charge

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[20] These are, apparently, the same late entries discussed in Charge III Specification 4. The legal issue here, however, is distinct.

II,[21] as well as Charge VII are not supported by substantial evidence and so must be overturned. The Secretary based her decision to revoke Boynton's license "on the record", without specifying which charges, jointly or alone, would be sufficient to warrant a revocation of Boynton's license, the most serious penalty Customs may impose here. Because, after our review, "the record" is no longer the same as that on which the Secretary based her decision as to an appropriate penalty, it is necessary for us to remand the case to the Secretary to consider what penalty is appropriate given the charges that remain after our review.

Remand results are ordered by November 1, 2007. Plaintiff may file any objections to the remand results by November 23, 2007. Any reply should be by December 14, 2007. It is so ORDERED.

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[21] Recall that the Secretary agreed that Specification 3 of Charge III was not substantiated.