Slip Op. 10–93

PSC VSMPO AVISMA CORPORATION and VSMPA TIRUS, U.S., INC., Plaintiff, v. UNITED STATES, Defendant, and U.S. MAGNESIUM LLC, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 08–00321
Public Version

[The court remands the U.S. Department of Commerce's redetermination.]

Dated: August 17, 2010

Arent Fox LLP (*John M. Gurley*, *Mark P. Lunn* and *Diana Dimitriuc Quaia*) for Plaintiffs PSC VSMPO-AVISMA Corporation and VSMPO-Tirus, US Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David S. Silverbrand*, Trial Attorney) for Defendant United States; *Daniel J. Calhoun*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

King & Spalding, LLP (*Stephen A. Jones* and *Jeffery B. Denning*) for Defendant-Intervenor US Magnesium LLC.

OPINION

Barzilay, Judge:

I.
Introduction

This case concerns a challenge to the U.S. Department of Commerce's ("the Department" or "Commerce") determination in an antidumping administrative review covering pure and alloyed magnesium metal from the Russian Federation. Plaintiffs PSC VSMPO Avisma Corporation ("Avisma") and VSMPA Tirus, U.S., Inc., (collectively, "Plaintiffs") and Defendant-Intervenor U.S. Magnesium, LLC ("USM"), challenge Commerce's method for calculating the value of chlorine gas when determining the normal value for the subject merchandise in *Results of Redetermination Pursuant to Remand*, A-421–819 (Dep't Commerce Mar. 30, 2010) ("*Redetermination Results* ").[1] Because the court finds that the Department's method for calculating the value for chlorine gas is not supported in the record

[1] The subject merchandise in this case is pure and alloyed magnesium. Because chlorine gas and raw magnesium emerge as co-products in the carnallite refinement stage, Commerce must determine the value of chlorine gas in order to determine the value of raw magnesium and thus the subject merchandise.

and does not comport with the statute, the court remands the proceedings to Commerce for further consideration.

II. Background & Procedural History.

A. The Industrial Processes at Issue

A thorough understanding of this case demands familiarity with the industrial processes at issue.[2] Avisma is the world's largest producer of titanium. Pls. Br. App. Tab 3 Ex. 5 at 2; Pls. Br. App. Tab 5 at 11. Its production facility operates in two principal stages. In the carnallite[3] refinement stage, enriched carnallite undergoes dehydration and electrolysis to produce raw magnesium and chlorine gas. Pls. Br. App. Tab 8 Ex. 1.A at 1. Avisma processes [[much]] of the resulting raw magnesium to create the subject merchandise and uses the [[rest]] later in the titanium production chain, as described below. Pls. Reply Br. App. Tab 18 at 3. Avisma uses the chlorine gas in three ways:[[Much]] goes toward the ilmenite catalyzation process, while [[some]] recycles into the carnallite refinement process, and [[some]] goes on to produce calcium chloride, a de-icer. Pls. Reply Br. App. Tab 18 at 3. Therefore, only a portion of the chlorine gas goes into the production of the subject merchandise as described more completely below.

In the next stage of production, which does not result in subject merchandise, chlorine gas[4] reacts as a catalyst with ilmenite ore to separate titanium from titanium oxide, resulting intitanium tetrachloride. Pls. Br. App. Tab 8 Ex. 1.A at 1. Avisma then uses raw magnesium and technical-quality magnesium[5] to separate the chlorine from the titanium tetrachloride, producingtitanium sponge and magnesium chloride. Pls. Br. App. Tab 8 Ex. 1.A at 1. Avisma refines the titanium sponge to create salable products, including titanium ingots, billets, and slabs. Pls. Br. App. Tab 3 Ex. 5 ("*2006 Avisma Annual Report* ") at 2. It subjects the magnesium chloride to electrolysis, splitting it into chlorine gas which feeds back into the ilmenite catalyzation process and technical-quality magnesium. Pls.

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[2] For a visual representation of the industrial process, *see infra* p. 4.

[3] Carnallite is "a mineral . . . consisting of a hydrous potassium-magnesium chloride." *Webster's Third New International Dictionary* 340 (2002).

[4] The mineral ilmenite is "a compound of iron, titanium, and oxygen." *Webster's Third New International Dictionary* 1127 (2002).

[5] Unlike raw magnesium, technical-quality magnesium, due to impurities, cannot become subject merchandise. *Redetermination Results* at 6–7. However, in this production step, these two components are interchangable.

Br. App. Tab 8 Ex. 1.A at 1. Avisma recycles the technical-quality magnesium into the titanium tetrachloride separation process. Pls. Br. App. Tab 8 Ex. 1.A at 1.

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B. Procedural History

In 2007, Avisma and USM requested a review of an antidumping order covering imports of pure and alloyed magnesium from the Russian Federation for the period from April 1, 2006 to March 31,

2007. *See Notice of Antidumping Duty Order: Magnesium Metal from the Russian Federation*, 70 Fed. Reg. 19,930, 19,930 (Dep't Commerce Apr. 15, 2005). On May 30, 2007, Commerce commenced the review, *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 72 Fed. Reg. 29,968, 29,968 (Dep't Commerce May 30, 2007), and nearly a year later published its preliminary results. *Magnesium Metal from the Russian Federation: Preliminary Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 24,541 (Dep't Commerce May 5, 2008). At this point Avisma and USM submitted briefs proposing, *inter alia*, changes to the Department's methodology for determining the value of chlorine gas. Commerce rejected a portion of Avisma's brief because it contained new factual information: an affidavit from accounting expert Professor George Foster ("Foster Affidavit"). *See* Pls. Br. App. Tabs 8–11.

On September 10, 2008, Commerce issued the final results of the subject administrative review. *Magnesium Metal from the Russian Federation: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 52,642 (Dep't Commerce Sept. 10, 2008) ("*Final Results* "). To determine the normal value of the subject merchandise,[6] the Department employed a method of constructing a value for chlorine gas which severed Avisma's production process at the point where raw magnesium and chlorine gas emerge from the carnallite refinement process. Pls. Br. App. Tab 14 ("*Final Results Issues and Decision Memorandum*") at 10. Commerce then constructed the value of Avisma's chlorine gas by taking a bulk quantity market value of liquid chlorine and adjusting it for transportation costs between facilities and for the estimated cost of converting the liquid chlorine to chlorine gas. *Final Results Issues and Decision Memorandum* at 18–19. The Department then allocated this cost among the co-products of the carnallite refinement process. *Id.* at 10. Commerce justified this methodology by claiming that because the Department perceived a clear split-off point at the carnallite refinement process, it was reasonable to ignore the parts of Avisma's operation subsequent to that process and to treat raw magnesium as one of Avisma's primary products. *Id*. at 14; *see also Redetermination Results* at 6. The Department additionally claimed, without explanation, that deter-

[6] In the antidumping context, the normal value of the subject merchandise is the price of that merchandise as sold for consumption in the exporting country at a time reasonably corresponding to that of the sale of the merchandise in the United States. 19 U.S.C. § 1677b(a)(1)(A)-(B)(i). Correspondingly, the antidumping duty margin is the amount by which the normal value of the subject merchandise exceeds its export price or constructed export price. *Id.* § 1673.

mining the value of chlorine gas by taking into account Avisma's entire operation would result in a value for chlorine gas too high relative to the value that Avisma obtains from it. *Final Results Issues and Decision Memorandum* at 14; *see also Redetermination Results* at 5. Because the normal value of the subject merchandise necessarily bears an inversely proportional relationship to the value of chlorine gas, its co-product in the carnallite refinement process, an "unreasonably" high value for chlorine gas would result in an unreasonably low normal value for the subject merchandise. *See Redetermination Results* at 13. A lower normal value for the subject merchandise, in turn, would lead to a lower antidumping duty rate.

Plaintiffs and USM filed suit in this Court to contest the *Final Results*. Avisma claimed, *inter alia*, that Commerce employed an erroneous method to allocate joint costs between raw magnesium and chlorine gas, and that Commerce inappropriately rejected the portions of its case brief containing the Foster Affidavit. *PSC VSMPO Avisma Corp. v. United States*, Slip Op. 09120, 2009 Ct. Int'l Trade LEXIS 127, at *5 (Oct. 20, 2009). USM also contested the Department's method for allocating joint costs between raw magnesium and chlorine gas. *Id*. In its decision, the court instructed Commerce to admit the Foster Affidavit to the record, citing concerns over the determination's accuracy given that the case presents an issue of first impression, and remanded the proceedings so that the Department could consider the affidavit's arguments. *Id*. at *22.

On March 30, 2010, Commerce issued its remand results, which left the methodology for constructing the value for chlorine gas unchanged. *Redetermination Results* at 4. Avisma again contests the Department's chlorine gas valuation methodology, arguing that the methodology inappropriately truncates the production process at Avisma's facilities and thereby ignores the intertwined nature of Avisma's operations. Pls. Br. 2–7. USM supports the *Redetermination Results* "in large part," but disagrees with the Department's method of constructing the value for chlorine gas. Def.-Int. Resp. 2.

III. Standard of Review

Because of the "complex" and "technical" nature of the Department's determinations, Commerce's expertise in determining these matters entitles it to great deference. *Fujitsu Gen., Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). The court must sustain Commerce's determination so long as the determination is supported by "substantial evidence on the record" and is "otherwise in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

"Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Novosteel SA v. United States*, 25 CIT 2, 6, 128 F. Supp. 2d 720, 725 (2001) (quotation marks & citation omitted). This evidence must consist of "more than a scintilla" but need not constitute a preponderance. *Id*. at 6, 128 F. Supp. 2d at 725 (citation omitted). To determine whether the Department supports its determination with substantial evidence, the court must take into account the entire record, including anything that detracts from the weight of the evidence that Commerce employs to make its determination. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Commerce must supply a "satisfactory explanation" for its determination, including a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks & citation omitted). The court may not supply a "reasoned basis" for the Department's decision that Commerce itself did not give. *Id*. Even if it is possible to draw two inconsistent conclusions from the evidence on record, it does not mean that Commerce did not support its findings with substantial evidence. *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).

To determine whether Commerce's findings are in accordance with law, the court applies the two-part test articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*. 467 U.S. 837, 842–43 (1984). The court first must determine whether Congress has spoken directly to the issue in question; if so, the court must ensure that the Department's methods comport with "the unambiguously expressed intent of Congress." *Id*. at 843 (footnote omitted). If Congress is silent on the issue, the court must determine whether the methods that the Department employed to reach its conclusion are "based on a permissible construction of the statute." *Id.* (footnote omitted). The court must defer to Commerce's interpretation of the statute so long as it is reasonable and "may not substitute its own construction of a statutory provision for a reasonable interpretation made by" Commerce. *Id*. at 844.

IV. Discussion

How to value co-products in an antidumping case where the manufacturer in question produces one product the subject merchandise simultaneously with a second product that serves as a catalyst in the production of a third product is an issue of first impression for the Court. When Commerce uses a constructed value as the normal value

of the subject merchandise, Congress instructs the Department to take into account "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise . . . *in the ordinary course of business*." 19 U.S.C. § 1677b(e)(1) (emphasis added). The "ordinary course of business" means "[t]he transaction of business according to the common usages and customs of . . . the particular individual whose acts are under consideration." *Black's Law Dictionary* 1098 (6th ed. 1990); *see also Black's Law Dictionary* 404, 1209 (9th ed. 2009).[7] From a thorough examination of the record, the court finds that the Department's chosen chlorine gas valuation methodology in the *Redetermination Results* fails to take into account Avisma's ordinary course of business and, therefore, does not accord with law.

Avisma is primarily a producer of titanium sponge, and its business structure reflects this focus. Pls. Br. App. Tab 2 at 3 ("VSMPO-AVISMA is a titanium manufacturer and AVISMA's Berezniki facility supports that production."); *2006 Avisma Annual Report* 8. To that end, Avisma strives to produce raw magnesium and chlorine gas only in the quantities necessary to enable its overarching titanium operation. Pls. Br. App. Tab 2 at 6. The subject merchandise, pure and alloyed magnesium, is an ancillary product of the overall production process. Pls. Br. App. Tab 5 at 8; *see also* Pls. Br. App. Tab 2 at 6.

The subservient nature of magnesium production to titanium production becomes apparent from an examination of Avisma's finances. Titanium products account for 78 percent of Avisma's sales revenue, while only four percent comes from the subject merchandise. *2006 Avisma Annual Report* 8, 10, 17. This figure puts subject merchandise on par with ferrotitanium, aluminum and its alloys, and "other goods and services" in terms of Avisma's sales revenue, demonstrating its comparatively minor role. *2006 Avisma Annual Report* 10. In addition, the *2006 Avisma Annual Report* reveals that Avisma allocated 29% of its investments that year toward improvements in titanium sponge production, with only three percent going toward "other primary production areas." *2006 Avisma Annual Report* 22; *see also 2006 Avisma Annual Report* 23 (noting that "major modernization project in magnesium processing" geared toward increasing titanium sponge production). From a financial standpoint, Avisma's ordinary course of business places titanium in a preeminent position. Claiming that it is reasonable to treat magnesium as a primary product of Avisma, Commerce disregards the vast majority of Avisma's financial activity.

[7] The statute itself does not define "ordinary course of business." It does define "ordinary course of trade." The court notes that the phrases have different meanings and that "trade" connotes commercial transactions such as sales between individual entities. *See, e.g., NTN Corp. v. United States*, 28 CIT 108, 139, 306 F. Supp. 2d 1319, 1346–47 (2004).

Compare Final Results Issues and Decision Memorandum at 14 (truncating production process at carnallite refinement stage), *with* § 1677b(e)(1) (directing Commerce to take into account entity's ordinary course of business when using constructed value as normal value).

Avisma's treatment of its raw magnesium production capabilities following its 2005 merger with titanium producer VSMPO underscores the subsidiary nature of the subject merchandise production in Avisma's ordinary course of business. Pls. Br. App. Tab 5 at 3. Even prior to the merger, Avisma planned to gradually reduce its raw magnesium output to the level minimally sufficient to produce the chlorine gas necessary for its titanium output projections. Pls. Br. App. Tab 5 at 3 ("It was understood that this merger would shift AVISMA's production focus *more* squarely into the production of . . . titanium sponge." (emphasis added)), 6–7. To achieve this goal, Avisma planned and carried out a gradual reduction in raw magnesium output [[ ]].[8] Pls. Br. App. Tab 5 at 5–6. Over the course of the following three years, raw magnesium output and therefore the output of its co-product chlorine gas dropped [[significantly]]. From the second quarter of 2006 to the first quarter of 2007 alone, raw magnesium output fell from [[many]] metric tons to [[fewer]] metric tons. Pls. Br. App. Tab 6 Ex. 2SD-2. By the end of 2006, raw magnesium production fell to the level minimally sufficient to produce Avisma's desired amount of chlorine gas. Pls. Br. App. Tab 2 at 4–5 ("[P]roduction of magnesium was limited to the amount unavoidable under the existing technology and because of supply issues."). Commerce's chlorine gas valuation methodology effectively disregards the ample record evidence that shows that Avisma's raw magnesium production is completely subservient to titanium production. Pls. Br. App. Tab 2 at 5.

Avisma's attempts to increase technical-quality magnesium production are further indicative of its desire to avoid production of subject

[8] Avisma found it economically expedient to reduce raw magnesium production gradually rather than immediately because it would provide "an opportunity to minimize its electrolysis operations while avoiding any layoffs by increasing its titanium production." Pls. Br. App. Tab 5 at 3. An immediate cessation of magnesium production would have subjected Avisma to disposal costs and workforce downsizing:

> Once a decision has [sic] been made to [[restrain]] [raw] magnesium production above a certain level (that need [sic] to produce chlorine), there were logical economic reasons for switching somewhat gradually in reducing production of magnesium. Generally, each electrolytic cell is budgeted to serve for [[many]] months between capital repairs. These are expensive repairs . . . and an abrupt stoppage would have resulted in [[undesirable consequences]]. This would have been in addition to the loss of whatever material was loaded in the cells at the time of the stoppage.

Pls. Br. App. Tab 5 at 7–8. A 2006 mine collapse at Avisma's carnallite supplier caused Avisma to cut magnesium production more rapidly than originally intended. Pls. Br. App. Tab 5 at 6.

merchandise to the extent possible. *See* Pls. Br. App. Tab 5 at 4. During the period of review, Avisma made steps toward increasing its output of technical-quality magnesium specifically to use in the titanium tetrachloride separation process so that Avisma could limit further its output of raw magnesium, and thus subject merchandise, to the amount necessary for Avisma to obtain chlorine gas in the quantities that it needs to make titanium. Pls. Br. App. Tab 5 at 4. The record evidence shows that subject merchandise production clearly does not lie at the heart of Avisma's business plans or operations; rather, it is an incidental product of Avisma's titanium production. Treating subject merchandise otherwise does not reflect the costs incurred in Avisma's ordinary course of business as the statute requires. § 1677b(e)(1).

Despite the financial and operational cohesiveness of Avisma's titanium operations, the Department nevertheless belittles the integrated nature of Avisma's facility to justify its severing of Avisma's production process in its chlorine gas valuation methodology. For example, the Department claims that the quantities of materials that travel between segments of the production process are too small to warrant considering the facility an integrated whole. *Redetermination Results* at 8. The Department claims that it is therefore reasonable to truncate its consideration of the production process at the carnallite refinement stage and calculate the value for chlorine gas considering only the outputs of that stage. In reality, however, the record shows that the production process depends entirely on the movement of materials between stages. Avisma primarily uses the chlorine gas produced from carnallite in the ilmenite catalyzation process. Pls.Reply Br. App. Tab 18 at 3. The raw magnesium produced jointly with chlorine gas not only becomes subject merchandise, but also plays a fundamental role in the titanium tetrachloride separation process. Pls. Br. App. Tab 5 at 4. In addition, Avisma takes the chlorine gas that it recovers along with technical-quality magnesium following the titanium tetrachloride separation process and recycles it into the ilmenite catalyzation process. Pls. Br. App. Tab 2 at 5–6. Although the raw magnesium and chlorine gas produced at the carnallite refinement stage serve crucial purposes throughout the chain of production, Commerce insists on employing a methodology that turns a blind eye to this undeniable fact.

The 2006 mine collapse suffered by Avisma's carnallite supplier further highlights the interdependent nature of Avisma's operations. Pls. Br. App. Tab 5 at 5; *see also 2006 Avisma Annual Report* 33. After the accident, Avisma could not procure carnallite and, therefore, was unable to produce the raw magnesium and chlorine gas needed to run

its operations. Pls. Br. App. Tab 5 at 5. This threat of a production collapse forced Avisma to purchase outside chlorine to continue its production of titanium. Pls. Br. App. Tab 5 at 5. Commerce characterizes Avisma's production facility as a series of discrete, independently-operating processes, but the events following the mine accident demonstrate that the processes cannot operate independently. The lack of carnallite threatened to halt not only the carnallite refinement process, but all of Avisma's production.[9]

The court finds nothing in the record to legitimize Commerce's characterization of Avisma's production process. *Cf. Thai Pineapple Pub. Co.*, 187 F.3d at 1365 ("Even if it is possible to draw two inconsistent conclusions from evidence contained in the record, this does not mean that Commerce's findings are not supported by substantial evidence."). Commerce claims that its method for valuing chlorine gas more closely comports with "economic reality" than other methods. *Redetermination Results* at 12. But Commerce may not substitute its own definition of "economic reality" for the standard which Congress has mandated. In other words, Commerce must calculate the value of the subject merchandise, including "the cost of materials and fabrication or other processing of any kind employed in producing the merchandise," by taking into account Avisma's ordinary course of business. § 1677b(e)(1). The Department cannot take into account Avisma's ordinary course of business while basing its methodology to calculate the cost of chlorine gas in its overall determination of the normal value of the subject merchandise on a misapprehension of the company's production process. Because Commerce has failed to take into account Avisma's ordinary course of business in calculating the value for chlorine gas, its methodology does not accord with law. *See id.* ; *Chevron U.S.A., Inc.,* 467 U.S. at 842–43.

V. Conclusion

For the foregoing reasons, it is

ORDERED that Commerce's *Redetermination Results* are **REMANDED** to the Department for further proceedings; it is further

[9] Additionally, the Department's justification for truncation is internally inconsistent. The Department severs the carnallite refinement process from the rest of the titanium production while claiming that the goal of its chlorine gas valuation methodology is to arrive at a price that accurately reflects the benefit Avisma obtains from chlorine gas. *Final Results Issues and Decision Memorandum* at 14–15. But Avisma obtains value from chlorine gas precisely as a means to produce titanium. The only other product that Avisma produces with chlorine gas is calcium chloride de-icer, which it sells at a loss as a way of disposing of excess chlorine gas. Pls. Br. App. Tab 5 at 6 n.3 ("This is a process of transforming excess chlorine into [[de-icer]] (i.e., a marketable, albeit inexpensive, product . . . .)"). Were it not for titanium production, Avisma would have no need for chlorine gas at all.

ORDERED that Commerce recalculate the value for chlorine gas in its determination of the normal value of the subject merchandise, taking into account Avisma's ordinary course of business by focusing on Avisma's entire production process, including the stages of production encompassing and following ilmenite catalyzation; and it is further

ORDERED that Commerce shall have until November 9, 2010 to file its remand results with the Court. Plaintiffs and Defendant-Intervenor shall file comments, if any, with the Court no later than December 7, 2010.

Dated: August 17, 2010
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 10–95

ESSAR STEEL LIMITED, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Court No. 09–00197
Public Version

[The court grants in part and denies in part Plaintiff's Motion for Judgment Upon the Agency Record and remands the case to the U.S. Department of Commerce for further proceedings.]

Dated: August 19, 2010

Arent Fox LLP (*Mark P. Lunn*, *Kay C. Georgi* and *Diana Dimitriuc Quaia*) for Plaintiff Essar Steel Limited.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David D'Alessandris*) for Defendant United States; *Deborah R. King*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

Skadden Arps Slate Meagher & Flom, LLP (*Robert E. Lighthizer*, *Jeffrey D. Gerrish* and *Nathaniel B. Bolin*) for Defendant-Intervenor United States Steel Corporation.

OPINION

Barzilay, Judge:

I.
Introduction

Plantiff Essar Steel Limited ("Essar") contests the final results of the sixth administrative review of the countervailing duty order on certain hot-rolled carbon steel flat products from India. *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, 74

Fed. Reg. 20,923 (Dep't Commerce May 6, 2009) ("*Final Results* "). Specifically, Essar alleges that in calculating the net countervailable subsidy rate for the period of review, the U.S. Department of Commerce (the "Department" or "Commerce") erred by: (1) using incorrect benchmarks when determining the adequacy of remuneration received by the government-owned National Mineral Development Corporation ("NMDC") for Essar's purchases of iron ore lumps and fines;[1] (2) improperlyfinding that the 2005 Special Economic Zone Act ("2005 SEZ Act") administered by the Government of India constituted a countervailable subsidy received during the period of review; (3) resorting to adverse facts available ("AFA") when calculating the benefit conferred to Essar under the Export Promotion Capital Goods Scheme ("EPCGS"), the Captive Port Facilities Program of the State Government of Gujarat ("Gujarat Captive Port Facilities Program"), and the Industrial Policy of the Government of Chhattisgarh ("Chhattisgarh Industrial Policy"); and (4) applying uncorroborated and punitive AFA rates in its benefit calculation under the Chhattisgarh Industrial Policy. Essar Br. 6–7. For the reasons explained below, the court affirms the Department's findings on the first three issues and remands the fourth issue to the agency for further proceedings.

II. Background

On January 28, 2008, the Department initiated an administrative review of the countervailing duty order on certain hot-rolled carbon steel flat products from India for the period of review spanning January 1, 2007 to December 31, 2007. *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 Fed. Reg. 4829, 4830 (Dep't Commerce Jan. 28, 2008). The Department subsequently issued initial questionnaires to Essar and to the Government of India, requesting information regarding possible subsidies provided to Essar during the period of review. J.A.149–304. Essar responded to the initial questionnaire on May 12, 2008 and continued to respond to all supplemental questionnaires through November 2008. J.A. 317–546, 557–766, 774–800, 938–1020, 1027–1284, 1293–1323. Following several extensions, the Government of India also responded to the initial and supplemental questionnaires, but ultimately failed to provide usable information regarding several subsidy programs, including the 2005 SEZ Act, Chhattisgarh's Industrial Policy, and Gujarat's Captive Port Facilities Program. J.A. 305–16.

[1] The Government of India holds 98% of NMDC's shares, thereby making NMDC a government authority. *Issues and Decision Memorandum: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, C-533–821 (Dep't Commerce Apr. 29, 2009), Pub. Doc. 105 at 46. Essar does not dispute that fact in this case.

Commerce published the preliminary results of its administrative review on December 30, 2008, finding a net countervailable subsidy rate of 21.95% *ad valorem*. *Certain Hot-Rolled Carbon Steel Flat Products from India: Notice of Preliminary Results and Partial Rescission of Countervailing Duty Administrative Review*, 73 Fed. Reg. 79,791, 79,802 (Dep't Commerce Dec. 30, 2008). Commerce found that during the period of review Essar benefitted from the NMDC's provision of iron ore lumps and fines at less than adequate remuneration, from subsidies received under the 2005 SEZ Act, and from the EPCGS. *Id.* at 79,797–98. Commerce also found that, among other subsidy programs, Essar did not benefit during the period of review from Chattisgarh's Industrial Policy or from Gujarat's Captive Port Facilities Program. *Id.* at 79,801.

Following a notice and comment period, Commerce published the final results of its administrative review, wherein it calculated a net countervailable subsidy rate of 76.88% *ad valorem*. *Final Results*, 74 Fed. Reg. at 20,924. The increased subsidy rate reflected calculation changes made between the preliminary and final results, as well as the addition of previously unaccounted for countervailable benefits that Commerce found Essar received under Chhattisgarh's Industrial Policy and Gujarat's Captive Port Facilities Program. *See generally Issues and Decision Memorandum: Final Results and Partial Rescission of Countervailing Duty Administrative Review*, C-533–821 (Dep't Commerce Apr. 29, 2009), Pub. Doc. 105 ("*Issues and Decision Memorandum* ").

In measuring the adequacy of the remuneration received by NMDC, Commerce applied the three-tiered benchmark hierarchy set forth in its regulations and determined that Essar received a countervailable benefit of 16.14% *ad valorem* from NMDC's sales of iron ore lumps and fines. *Id.* at 16; *see* 19 C.F.R. § 351.511(a)(2)(i)-(iii). [2] With respect to Essar's purchases of iron ore lumps, Commerce compared the NMDC price to a market-determined price that Essar paid when purchasing the same product from a Brazilian supplier during the period of review. *Id.* at 15. In accordance with § 351.11(a)(2)(iv),

[2] The regulation provides, in pertinent part:

(i) In general. The Secretary will normally seek to measure the adequacy of remuneration by comparing the government price to a market-determined price for the good or service resulting from actual transactions in the country in question. Such a price could include prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions. In choosing such transactions or sales, the Secretary will consider product similarity; quantities sold, imported, or auctioned; and other factors affecting comparability.

Commerce adjusted the benchmark to reflect the ocean and inland freight, import duties, and other import fees payable that would apply if Essar imported the product. *Id.* at 15–16. With respect to Essar's purchases of iron ore fines, Commerce did not find any appropriate actual home market transactions. *Id.* at 15. Therefore, it resorted to the second benchmark and compared the NMDC to an adjusted world market price inclusive of ocean freight, import duties, and other import fees payable. *Id.* at 15–16. For purposes of the review, Commerce set the world market price at the 2007 fines price of iron ore from Hamersley, Australia, as listed in the *Tex Report*.[3] *Id.* at 15.

With regard to the purported subsidies that Essar received under the 2005 SEZ Act, Commerce found that the Government of India failed to act to the best of its ability in providing the requested program information and resorted to AFA. *Id.* at 16–17. Accordingly, Commerce determined that the Government of India provided a financial contribution contingent on export performance to Essar within the meaning of 19 U.S.C. §§ 1677(5)(D)[4] and 1677(5A)(B).[5] *Issues and Decision Memorandum* at 12. Commerce further found that during the period of review, Essar benefitted from the subsidy program because the company's Steel-Mod V SEZ unit became eligible for duty free import of goods and for exemptions from excise duties and the National Service Tax. *Id.* at 17–19. In calculating the

(ii) Actual market-determined price unavailable. If there is no usable market-determined price with which to make the comparison under paragraph (a)(2)(i) of this section, the Secretary will seek to measure the adequacy of remuneration by comparing the government price to a world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question. Where there is more than one commercially available world market price, the Secretary will average such prices to the extent practicable, making due allowance for factors affecting comparability.

...

(iv) Use of delivered prices. In measuring adequate remuneration under paragraph (a)(2)(i) or (a)(2)(ii) of this section, the Secretary will adjust the comparison price to reflect the price that a firm actually paid or would pay if it imported the product. This adjustment will include delivery charges and import duties.

§ 351.511(a)(2)(i)-(iv).

[3] The *Tex Report* is a daily Japanese publication that reports on world-wide price negotiations for high-grade iron ore. *Issues and Decision Memorandum* at 15.

[4] Section 1677 defines a financial contribution as:

(i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,

(ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,

(iii) providing goods or services, other than general infrastructure, or

(iv) purchasing goods. § 1677(5)(D)(i)-(iv).

[5] In order to be countervailable, a subsidy must be specific within the meaning of § 1677(5A). Export subsidies, defined as "a subsidy that is, in law or in fact, contingent upon export performance," satisfy the specificity requirement. § 1677(5A)(B).

countervailable benefit conferred, the Department divided Essar's total benefit amounts by Essar's total export sales and arrived at a subsidy rate of 4.3% *ad valorem*. *Id.*

The Department also resorted to partial AFA when evaluating the benefit conferred on Essar by the EPCGS. *Id.* at 12–14. Under the EPCGS, eligible producers import capital equipment at a reduced duty provided that they meet an export obligation equal to eight times the duty saved within an eight year period. *Id.* at 12. When the producer fails to meet its export obligation, it must repay all or part of the duty reduction. *Id.* Commerce found that Essar received two types of benefits from the program. First, with respect to Essar's outstanding export obligations, Commerce treated the unpaid duties as an interest-free loan and calculated a benefit in the amount of the interest Essar would have paid had it borrowed the amount of the duty reduction at the time of importation. *Id.* at 12–13. Second, Commerce treated the import duty savings on fulfilled export obligations as grants received in the year that the Government of India waived the outstanding duty obligation. *Id.* at 13.

To calculate the amount of both benefits conferred, Commerce requested information from Essar regarding EPCGS licenses for which it had yet to fulfill its export obligations, as well as those for which it already had fulfilled its export obligations. *Id*. at 7–8. In Essar's initial questionnaire response, the company provided information about its outstanding obligations, but failed to provide the same information for certain fulfilled licenses. *Id.* Commerce sought the missing information in its First and Fourth Supplemental Questionnaires, but determined that Essar did not respond to the best of its ability and applied AFA when calculating the second countervailable benefit. *Id.* at 8. The Department then added both benefit calculations together and reached a net countervailable subsidy rate of 1.22% *ad valorem*. *Id.* at 14.

Commerce also determined that Essar received a countervailable benefit under Gujarat's Captive Port Facilities Program in the form of subsidized wharfage fees. *Id.* at 21–22. Because the Government of India did not produce usable information regarding the program, Commerce determined that the Government of India failed to act to the best of its ability and resorted to AFA. *Id.* at 6–8, 21–22. On that basis, Commerce found that the port facilities program provided a specific financial contribution to Essar pursuant to §§ 1677(5)(D)(ii) and 1677(5A). *Id.* at 21. In determining the benefit conferred by the program during the period of review, Commerce treated the wharfage fees that Essar paid to the Gujarat Maritime Board as an indirect tax.

Id. at 22. As such, Commerce calculated the benefit by comparing the cost actually paid by Essar to record information regarding wharfage fees paid by other firms operating in the area. *Id.* Ultimately, Commerce arrived at a net subsidy rate of 0.04% *ad valorem*. *Id.*

Finally, using AFA, Commerce found that Essar benefitted during the period of review from nine programs administered by the State Government of Chhattisgarh. [6]*Id.* at 6–7. The Department determined that Essar did not act to the best of its ability in reporting the existence of an iron ore beneficiation plant in the State of Chhattisgarh, despite having been asked about the plant in the initial and supplemental questionnaires. *Id.* In selecting the AFA rates, Commerce reported that it looked to the highest above *de minimis* subsidy rates calculated in prior segments of the proceeding for programs similar to the nine subprograms included in Chhattisgarh's Industrial Policy. *Id.* at 22–26. For the four subprograms providing grants, Commerce used a net subsidy rate calculated for what it described as a similar grant program during the period of investigation. *Id.* at 23. For the four subprograms providing indirect tax benefits, the Department used a rate calculated for what it also described as a similar indirect tax program during the second administrative review. *Id.* For the remaining subprogram involving the provision of goods for less than adequate remuneration, Commerce used a subsidy rate calculated for what it described as a similar program from the fourth administrative review. *Id.* The Department set the total net countervailable subsidy rate at 54.68% *ad valorem*. *Id.* at 24–26.

III. Subject Matter Jurisdiction & Standard of Review

Pursuant to 28 U.S.C. § 1581(c), a civil action commenced under 19 U.S.C. § 1516a falls within the Court's exclusive jurisdiction. The Court must hold as unlawful any Commerce determination "unsupported by substantial evidence on the record, or otherwise not in accordance with law." § 1516a(b)(1)(B)(i).

Substantial evidence on the record requires "less than a preponderance, but more than a scintilla." *Novosteel SA v. United States*, 25 CIT 2, 6, 128 F. Supp. 2d 720, 725 (2001) (quotation marks & citation omitted), *aff'd*, 284 F.3d 1261 (Fed. Cir. 2002). To satisfy the substantial evidence threshold, Commerce must support its conclusions with such relevant evidence as "a reasonable mind might accept as adequate to support a conclusion" in light of the entire record, including

[6] As discussed *infra*, this finding stands in stark contrast to the Department's recent finding in the 2006 administrative review that "Essar did not use the Chhattisgarh Industrial Policy . . . and therefore did not receive a benefit under this program." *Final Results of Determination Pursuant to Court Remand*, C-533–821 (Dep't Commerce July 15, 2010) at 5 (citation omitted); *accord id.* at 6, 22–23.

"whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984) (quotation marks & footnote omitted). As long as Commerce adequately supports its reasonable conclusion, it is immaterial if the record lends itself equally to another, inconsistent conclusion. *See Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).

The court conducts a two-step analysis to determine whether Commerce's interpretation of the countervailing duty statute comports with law. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984). As an initial step, the court must examine "whether Congress has directly spoken to the precise question at issue," and "[i]f the intent of Congress is clear," then the court must give effect to that "unambiguously expressed intent." *Id.* (footnote omitted). When a statute remains "silent or ambiguous with respect to the specific issue," however, the court will look to whether Commerce bases its interpretation on a reasonable construction of the statute in light of the legislature's intent. *See id.* at 843 (footnote omitted); *see also Usinor Sacilor v. United States*, 19 CIT 711, 716, 893 F. Supp. 1112, 1120–21 (1995) (noting that Commerce's interpretation will prevail "[a]s long as the agency's methodology and procedures are [a] reasonable means of effectuating the statutory purpose, and there is substantial evidence on the record supporting the agency's conclusions. . . ." (quotation marks & citation omitted)).

IV. Discussion

A. The Department's Calculation of the Benefit Conferred to Essar by NMDC's Provision of Iron Ore Lumps and Fines

1. The Statutory Framework for the Calculation of a Subsidy

The countervailing duty regime aims to levy additional duties on certain imports entering the United States in order "to offset the unfair competitive advantages" enjoyed by foreign producers subsidized by their respective governments. *Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1117 (Fed. Cir. 1998) (footnote omitted). To constitute a countervailable subsidy, a foreign governmental entity must provide a financial contribution to a specific industry, and a respondent must benefit from that contribution. *See* § 1677(5)(A)-(E), (5A). One way by which governments provide subsidies is through the provision of goods and services to a particular industry at less than adequate remuneration. § 1677(5)(D)(iii), (E)(iv).

Commerce measures the adequacy of remuneration by comparing the price paid by a particular respondent to an adjusted benchmark figure representative of the market price for the good at issue. § 1677(5)(E). Commerce arrives at an appropriate benchmark by following a three-tiered hierarchy set forth in its regulations. § 351.511(a)(2)(i)-(iii). The first, and preferred, benchmark relies on a market-determined price "resulting from actual transactions in the country in question," such as "prices stemming from actual transactions between private parties, actual imports, or, in certain circumstances, actual sales from competitively run government auctions." § 351.511(a)(2)(i). If no such information exists, Commerce resorts to a second benchmark consisting of the world market price for the good "where it is reasonable to conclude that such price would be available to the purchasers in the country in question." § 351.511(a)(2)(ii). Finally, when no data supports the use of either of the first two benchmarks, the Department will look to whether the government price is "consistent with market principles." § 351.511(a)(2)(iii). If the Department utilizes a tier one or tier two benchmark for comparison purposes, it must adjust the selected price "to reflect the price that a firm actually paid or would pay if it imported the product," inclusive of, for example, "delivery charges and import duties." § 351.511(a)(2)(iv). Ultimately, where the chosen market price, adjusted in accordance with Department regulations, differs from the price paid by the respondent by more than a *de minimis* margin, Commerce will find that a countervailable subsidy exists.

2. The Department's Selection of Benchmark Prices for Iron Ore Lumps and Fines

In the *Final Results*, Commerce determined that Essar received a countervailable benefit of 16.14% *ad valorem* from NMDC's sales of iron ore lumps and fines. *Issues and Decision Memorandum* at 16. With respect to Essar's purchases of iron ore lumps, Commerce used as a tier one benchmark the price that Essar paid to a non-affiliated Brazilian supplier during the period of review. *Id.* at 15. Unable to find a similar tier one benchmark for Essar's purchases of iron ore fines, Commerce resorted to a tier two benchmark, a world market price based on the 2007 fines prices from Hamersley, Australia. *Id.*

Essar does not deny that the NMDC provided high-grade iron ore to producers in the Indian steel industry during the period of review, but takes exception with the Department's determination that Essar purchased the iron ore lumps and fines for less than adequate remuneration. Specifically, Essar avers first that Commerce erred in using the prices that Essar paid to a Brazilian supplier for iron ore lumps during the period of review as a tier one benchmark when there

existed another, more appropriate market price available. Essar Br. 21 22. Second, Essar maintains that Commerce inexplicably resorted to a second tier benchmark when measuring the adequacy of remuneration received by NMDC for its provision of iron ore fines, notwithstanding the existence of a usable tier one benchmark. Essar Br. 12–18. Finally, Essar alleges that the chosen benchmarks for iron ore lumps and fines do not reflect a comparable price due to physical differences and other dissimilar conditions of sale. Essar Br. 18–22. Instead of the benchmarks utilized in the *Final Results*, Essar would have Commerce use as the benchmark for iron ore lumps and fines the prices reported in the *Tex Report* for NMDC's iron ore sales to Japanese buyers, which would prove that Essar purchased the iron ore for full consideration. Essar Br. 16–18. Essar contends, in the alternative, that even if Commerce chose appropriate benchmarks for its less than adequate remuneration analysis, it nonetheless unreasonably distorted those benchmarks by adding freight costs. Essar Br. 22–24. To remedy this deficiency, Essar requests that the court remand the *Final Results* with instructions to revise the benchmarks to reflect the same delivery terms as Essar's purchases from NMDC. Essar Br. 22.

Commerce supported its selection of benchmarks for both iron ore lumps and fines with substantial evidence. With respect to the lumps benchmark, Commerce acted in accordance with § 351.511(a)(2)(i) when it used the preferred benchmark for its price comparison– "a market-determined price resulting from actual transactions in the country in question." *Issues and Decision Memorandum* at 15. Specifically, Commerce selected prices that Essar itself submitted reflecting purchases of iron ore lumps from an unaffiliated Brazilian company. *Id.* Although Essar finds the prices offered by the NMDC to Japanese buyers more probative than the Brazilian prices, Essar fails to demonstrate how those prices represent "actual sales from competitively run government auctions," a prerequisite to the use of a government price as a tier one benchmark. § 351.511(a)(2)(i). To constitute an actual sale from a competitively run government auction, the Department has stated that the government must sell "a significant portion of the goods . . . through competitive bid procedures that are open to everyone, that protect confidentiality, and that are based solely on price." *Countervailing Duties*, 63 Fed. Reg. 65,348, 65,377 (Dep't Commerce Nov. 25, 1998); *see also U.S. Steel Corp. v. United States*, Slip Op. 09–152, 2009 WL 5125921, at *6 (CIT Dec. 30, 2009). Nothing on the record demonstrates that the NMDC prices resulted from such competitive bid procedures. To the contrary, the record suggests that NMDC representatives visited Japan to conduct

private negotiations with five Japanese steel producers, and set the iron ore prices on the basis of those closed negotiations. J.A. 530.

Similarly, Commerce did not err when it used a world market price from Hamersley, Australia as its benchmark for iron ore fines. As outlined above, Commerce appropriately determined that the prices Japanese buyers paid to the NMDC for iron ore fines did not reflect a "market determined price" resulting from actual transactions in India. *Issues and Decision Memorandum* at 50–51. As there existed no usable first tier benchmarks, Commerce resorted to the next tier in its hierarchy and searched for world market prices on the record. *Id.* When using a tier two benchmark, Commerce must average all commercially available world market prices to arrive at the benchmark figure. § 351.511(a)(2)(ii). However, because the NMDC prices to Japanese buyers do not constitute market determined prices resulting from government run competitive bidding, Commerce also did not err by excluding the NMDC prices from its benchmark calculation for iron ore fines and by including only the 2007 Hamersley price. *Id.* ; *see also U.S. Steel Corp.*, 2010 WL 5125921, at *7.

Finally, the Department did not act contrary to law when it regarded Brazilian iron ore lumps and Australian iron ore fines as comparable to those sold by the NMDC. *See* § 351.511(a)(2)(i)-(ii) (requiring that Commerce consider comparability when selecting appropriate benchmarks). With respect to the benchmark for iron ore fines, Essar maintains that because the Hamersley fines are of blast furnace lump grade ("BF grade"), a type that Essar does not use when manufacturing subject merchandise, it is inappropriate to compare the two prices. Essar Br. 18–19. Essar confounds what may be incompatible with what is so dissimilar that it cannot serve as a fair price comparison. The regulation requires product comparability, but does not mandate that the products be identical. § 351.511(a)(2)(ii). In its calculations, the Department considered differences in iron content between the Hamersley and NMDC iron ore fines, and adjusted the benchmark price accordingly to reconcile those differences. *Issues and Decision Memorandum* at 53–54. With regard to Essar's assertions about the incompatibility of BF grade fines with Essar's production process, Commerce found that the differences, if they existed at all, were not so profound as to render the two products incomparable. *Id.* at 54. As an initial matter, the Department explained that Essar failed to provide any evidence that the Hamersley fines are actually BF grade. *Id.* ("[W]e find there is no information in the *Tex Report* to substantiate Essar's claim that the fines from Hamersley are strictly BF-grade lump."). Even if Essar succeeded in demonstrating that Hamersley fine prices represent only prices for BF grade

fines, the company still provided no explanation as to why the BF grade is so dissimilar that it cannot be fairly compared to the fines provided by the NMDC. To the contrary, record evidence suggests that Essar potentially used BF grade material when manufacturing subject merchandise during the period of review. J.A. 969–70.

Essar also argues that the benchmark iron ore lumps and fines are not comparable to those sold by NMDC because, in addition to the physical differences, the conditions of sale differ greatly. Essar Br. 19–21. Specifically, Essar maintains that because its iron ore contract with the NMDC is quoted on an ex-mines basis, and because the Hamersley price reflects free on board load port (Australia) prices, a comparison of the two yields a distorted picture of the overall price differential. Essar Br. 19–21. The court finds this argument unavailing because both the relevant statute and Commerce's regulations require that the agency adjust the benchmark prices to include freight and import charges. § 1677(5)(E); § 351.511(a)(2)(iv).

Given that Commerce uses delivered prices when measuring the adequacy of remuneration, Essar's remaining argument that Commerce unreasonably distorted its benchmarks by adding freight costs is similarly without merit. Pursuant to § 351.11(a)(2)(iv), Commerce must adjust its first and second tier benchmarks to "reflect the price that a firm actually paid or would pay if it imported the product." The importation of products necessarily entails payment of certain "delivery charges and import duties" that would not apply when procured domestically. *See id.* Following its regulations, Commerce adjusted its benchmarks accordingly by adding certain freight charges, import duties, and other import fees payable to its lumps and fines benchmarks. *Issues and Decision Memorandum* at 15–16.[7]

In sum, Commerce supported its selection of benchmark prices for iron ore lumps and fines with substantial evidence. Moreover, Commerce did not err by refusing to adjust those prices to place them on the same delivery terms as Essar's domestic purchases of iron ore lumps and fines from the NMDC.

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[7] Essar acknowledges that the Department's regulations call for the use of delivered prices, but nonetheless asks that the court decline to uphold the agency determination below because it resulted in an absurd outcome. Essar Br. 23–24. As support for this proposition, Essar cites *Viraj Group, Ltd. v. United States*, 25 CIT 1017, 1022, 162 F. Supp. 2d 656, 662 (2001) ("Mere compliance with regulations cannot trump what appears to be an absurd result."), *rev'd*, 343 F.3d 1371 (Fed. Cir. 2003)). However, Essar fails to mention that the Federal Circuit reversed that case on the very issue for which Essar cites it. *Viraj Group, Ltd.*, 343 F.3d at 1377 (noting that it "disagree[d] with the Court of International Trade's view that concern over the accuracy of the dumping margin determination compels Commerce to ignore" a statutory mandate). Instead, the court expressly noted that "accuracy concerns cannot trump a specific statutory provision." *Id.* at 1378 (citation omitted).

B. Commerce's Determination That Essar Benefitted During the Period of Review from the 2005 Special Economic Zone Act

Commerce also appropriately found that Essar benefitted from the 2005 SEZ Act during the period of review. The SEZ Act, administered by the Government of India, "provides for the establishment, development and management of SEZs for the promotion of exports." *Id.* at 16. The Department repeatedly requested information on the program from the Government of India, but the requests went largely unanswered. *Id.* at 16–17. As a result, Commerce determined that the Government of India did not act to the best of its ability in complying with the agency's requests in the administrative review. *Id.* at 17. [8] Consistent with Department practice, the agency found as AFA that participation in the SEZ program was specific within the meaning of § 1677(5A)(B) because it hinged on export performance and that it provided a financial contribution as defined by § 1677(5)(D). *Issues and Decision Memorandum* at 16. Record evidence demonstrates that Essar's SEZ unit became eligible for certain duty exemptions during the period of review, and Commerce consequently determined that Essar benefitted from the programs administered under the 2005 SEZ Act. *Id.* at 17.

Essar concedes that its plant became eligible as of January 31, 2007 for SEZ benefits, but maintains that it produced and exported all relevant subject merchandise that entered the United States during the period of review prior to that date. Essar Br. 25. Essar also notes that agency regulation requires that if a foreign government ties receipt of a subsidy to a particular product, the subsidy will be attributed only to that product. Essar Br. 25 (citing 19 C.F.R. § 351.525(b)(5)). Therefore, Essar argues that it did not receive a countervailable subsidy for its production of hot-rolled steel during the period of review because the subsidies it received under the 2005 SEZ Act are only attributable to exports after January 31, 2007. Essar Br. 25.

As an initial matter, Essar mischaracterizes how Commerce attributes subsidies under § 351.525. Although Essar produced and exported all relevant subject merchandise before it became eligible for benefits under the 2005 SEZ Act, it also reported receiving certain SEZ benefits during the period of review. *Issues and Decision Memo-*

[8] When Commerce makes such a finding, it may employ an inference "adverse to the interests" of the non-cooperative respondent in choosing among the facts otherwise available to fill a record deficiency caused by that party's failure to provide necessary information. 19 U.S.C. § 1677e(b).

randum at 17–19; *see also* J.A. 1295–1312. Further, despite Essar's assertions to the contrary, nothing on the record suggests that Essar's receipt of those benefits was contingent on the shipment of specific exports. *Issues and Decision Memorandum* at 39. Commerce will attribute an export subsidy to all "products exported by a firm" unless the record shows that the respondent government tied receipt of that subsidy to a particular product. § 351.525(b)(5)(i). Consequently, Commerce did not err when it attributed the benefits that Essar reported under the 2005 SEZ Act to the company's total exports during the period of review. It is of no import that Essar's exports of subject merchandise never actually benefitted from the SEZ subsidies because, as this court previously noted, "[a]s long as the subject merchandise could be produced, it is immaterial whether and how such subject merchandise is actually produced." *MTZ Polyfilms, Ltd. v. United States*, 33 CIT __, __, 659 F. Supp. 2d 1303, 1314 (2009).

Essar's remaining argument that it does not produce any subject merchandise in the SEZ area, so that merchandise could not benefit from the subsidies provided under the 2005 SEZ Act, also is without merit. Essar Br. 25. First, Essar failed to exhaust administrative remedies with regard to this claim. Congress requires that litigants exhaust administrative remedies "where appropriate," 28 U.S.C. § 2637(d), in part so that the Court does not usurp the subject agency's powers by setting aside a "determination upon a ground not theretofore presented and deprive[] the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Unemployment Comp. Comm'n of Territory of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (footnote omitted). Exhaustion is almost always appropriate in the countervailing duty context "because it allows the agency to apply its expertise, rectify administrative mistakes, and compile a record adequate for judicial review." *Carpenter Tech. Corp. v. United States*, 30 CIT 1373, 1374–75, 452 F. Supp. 2d 1344, 1346 (2006). Moreover, even if Essar had advanced the argument at the agency level, record evidence demonstrates that the subject merchandise did benefit from the SEZ subsidies. Specifically, Essar manufactured Hot Briquetted Iron/Direct Reduced Iron, an input used in the production of subject merchandise, in the SEZ facilities at issue during the period of review. J.A. 328, 332–34. Therefore, Commerce did not err in finding that the 2005 SEZ Act constituted a countervailing subsidy received during the period of review.

C. The Department's Decision to Resort to AFA When Calculating the Countervailable Benefit Received Pursuant to Certain Government Programs

1. Statutory Framework for Determinations on the Basis of AFA

When conducting a countervailing duty administrative review, Commerce seeks program information from the foreign government allegedly subsidizing the production of the subject merchandise and from the respondent companies purportedly benefitting from those subsidies. If the Department finds the information provided in response to its questionnaires deficient, it shall "promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion" of the review. 19 U.S.C. § 1677m(d). At that point, the respondent company or foreign government may choose to remedy the deficiency, but if it fails to do so within a reasonable time, Commerce must resort to facts otherwise available on the record to make its determination. § 1677e(a). Moreover, if Commerce also finds that a respondent did not act "to the best of its ability to comply" with the Department's requests, it may "use an inference that is adverse" to the interests of the parties in choosing among those facts otherwise available. § 1677e(b).

Typically, foreign governments are in the best position to provide information regarding the administration of their alleged subsidy programs, including eligible recipients. The respondent companies, on the other hand, will have information pertaining to the existence and amount of the benefit conferred on them by the program. Because the Department seeks different information from each respondent, the Department's AFA analysis varies depending on which party has provided a deficient response. Where the foreign government fails to act to the best of its ability, Commerce will usually find that the government has provided a financial contribution to a specific industry. *Issues and Decision Memorandum* at 4–5 (citing *Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 71 Fed. Reg. 11,397, 11,399 (Dep't Commerce Mar. 7, 2006)). Under that scenario, the agency then attempts to use information provided by the individual respondent companies regarding the benefit, if any, conferred by the particular program. *See id.* at 5. If the companies similarly fail to act to the best of their ability in complying

with Commerce's requests, Commerce will find that the noncompliant companies both used and benefitted from the subsidy program during the period of review. *See, e.g.*, *id.* at 7. To arrive at an appropriate rate, the Department may rely on secondary information derived from the petition, the original investigation, or from other administrative reviews. § 1677e(b). However, when Commerce uses such secondary information, it must "to the extent practicable, corroborate that information from independent sources that are reasonably at their disposal." § 1677e(c).

In *Nippon Steel Corp. v. United States*, the Federal Circuit provided the following guidelines for the judicial review of an agency's decision to resort to AFA:

> To conclude that an importer has not cooperated to the best of its ability and to draw an adverse inference under section 1677e(b), Commerce need only make two showings. First, it must make an objective showing that a reasonable and responsible importer would have known that the requested information was required to be kept and maintained under the applicable statutes, rules, and regulations. Second, Commerce must then make a subjective showing that the respondent under investigation not only has failed to promptly produce the requested information, but further that the failure to fully respond is the result of the respondent's lack of cooperation . . . .

337 F.3d 1373, 1382–83 (Fed. Cir. 2003) (citation omitted).

2. Export Promotion Capital Goods Scheme

The EPCGS provides permanent customs duty reductions to eligible producers who meet a corresponding export obligation within an allotted time period. *Issues and Decision Memorandum* at 12. Commerce determined that Essar received two types of benefits from the program, in the form of interest free loans and grants. *Id.* at 12–14. In calculating the benefit conferred on Essar by the grants, Commerce sought information from Essar regarding those EPCGS for which Essar had fulfilled its export obligations during the period of review. *Id.* at 13. Despite providing Essar with three opportunities to furnish the necessary information, Essar failed to do so. *Id.* at 7–8. Accordingly, Commerce found that Essar did not act to the best of its ability in cooperating with its requests and resorted to partial AFA to complete the record. *Id.* at 8.

Essar contends that the Department erred by applying partial AFA to Essar's benefit calculation under the EPCGS. Essar Br. 25–26. Specifically, Essar maintains that the Department never informed it

of the exact nature of its record deficiency and, as a result, Essar did not receive its statutorily mandated opportunity to remedy that deficiency. Essar Br. 25–26. Second, Essar notes that even if Commerce sought the requested information, resort to AFA was inappropriate because the missing information would not have figured into the benefit calculation. Essar Reply Br. 15. For reasons stated below, both of these arguments fail.

Essar correctly asserts that Commerce must ensure that respondents are "fully aware of what information the Department [seeks] and the form in which it [seeks] the data," and that failure to do so "can render the decision 'unsupported by substantial evidence and otherwise contrary to law.'" *SKF USA Inc. v. United States*, 29 CIT 969, 978, 391 F. Supp. 2d 1327, 1335–36 (2005) (quoting *Usinor Sacilor v. United States*, 19 CIT 711, 745, 893 F. Supp. 1112, 1141–42 (1995), *aff'd in part and rev'd in part*, 215 F.3d 1350 (Fed. Cir. 1999)). Essar is also correct that respondents have the right to remedy a record deficiency. § 1677m(d). However, it wrongly claims that Commerce failed to satisfy those statutory obligations in this case.

Commerce provided Essar with three separate opportunities to supply information regarding its usage of the EPCGS. In its initial questionnaire, Commerce requested information pertaining to "EPCGS duty exemptions received during the [period of review] and the preceding 14 years for which [Essar] has fulfilled its export obligations." J.A. 238. Essar failed to supply this documentation. J.A. 319–23, 940–44, 952–59. The Department sought the same information again in a supplemental questionnaire, but Essar withheld documentation for certain licenses because, for those licenses, "there were no imports and all goods would be procured from suppliers within India." J.A. 560, 1030. Commerce tried a third time to obtain the outstanding information, even specifying the license numbers for which it lacked the requisite information and offering Essar the opportunity to explain how it used an EPCGS duty license to procure a duty-free domestic good. J.A. 772, 1290. In response to that request, it appears that Essar provided limited information for only one of the requested licenses. J.A. 797–98, 1317–18. In light of this background, a "reasonable and responsible importer would have known" what information Commerce sought, and the refusal to provide that information is attributable only to Essar's "failing to put forth its maximum efforts to . . . obtain the requested information from its records." *Nippon Steel Corp*., 337 F.3d at 1382–83. Therefore, the Department properly resorted to AFA to fill the gaps in the administrative record caused by Essar's failure to act to the best of its ability.

Essar also mistakenly contends that it appropriately withheld the requested documentation because the remaining EPCGS licenses reflected domestic purchases that could not benefit from the import duty exemption. Essar Reply Br. 15. With this argument, Essar ignores that Commerce, and not Essar, is charged with conducting administrative reviews and weighing all evidence in its calculation of a countervailing duty margin. *See Ansaldo Componenti, S.p.A. v. United States*, 10 CIT 28, 37, 628 F. Supp. 198, 205 (1986) ("It is Commerce, not the respondent, that determines what information is to be provided for an administrative review."); *see also* 19 U.S.C. § 1675(a)(1)(A). Regardless of whether Essar deemed the license information relevant, it nonetheless should have produced it the event that Commerce reached a different conclusion. Moreover, Commerce even provided Essar with the opportunity to explain why the information was not relevant to the benefit calculation, and Essar declined to offer such an explanation. J.A. 772, 1290. Given that Essar failed to place anything on the record demonstrating unequivocally that it did not benefit from the subject licenses, Commerce did not err by applying AFA and assuming a benefit for the outstanding licenses. *See Wash. Int'l Ins. Co. v. United States*, Slip Op. 09–78, 2009 WL 2460824, at *5 (CIT July 29, 2009) ("[W]hen the evidence surrounding an interested party's claim is inconclusive, Commerce may find that the party has not met its burden of proof and resort to facts available.").

3. The Gujarat Captive Port Facilities Program

Commerce also found, on the basis of partial AFA, that Essar benefitted during the period of review from subsidized wharfage fees provided under Gujarat's Captive Port Facilities Program. *Issues and Decision Memorandum* at 21–22. In reviewing the countervailability of that program, Commerce sought information from the Government of India regarding the program's administration and participants. *Id.* at 5; J.A. 192–93. The Government of India failed to supply the requested information, so Commerce found as AFA that the program provided a specific financial contribution under § 1677(5)(D) and § 1677(5A), respectively. *Issues and Decision Memorandum* at 5. Specifically, Commerce treated the subsidized wharfage fees offered under Gujarat's Captive Port Facilities Program as an indirect tax benefit. *Id.* at 22. In evaluating whether Essar received such a benefit during the period of review, Commerce looked to the difference between the wharfage fees that Essar paid under the Captive Port Facilities Program and what it would have paid absent the program.

Id. (citing 19 C.F.R. § 351.510(a)(1) ("[A] benefit exists to the extent that the taxes or import charges paid by a firm as a result of the program are less than the taxes the firm would have paid in the absence of the program.")).

Essar incorrectly believes that Commerce unlawfully resorted to AFA against Essar when calculating its benefit under Gujarat's program. Essar Br. 33–39. Commerce applied AFA against only the Government of India, with the result that Commerce found that the EPCGS provided a financial contribution to a specific industry. *Issues and Decision Memorandum* at 21. With respect to the benefit received, on the other hand, Commerce had no government-provided information on the program, such as wharfage fee rates charged to program participants and to non-participants. It, therefore, resorted to facts otherwise available on the record to derive the necessary information. *Id.* at 21–22. The record, as provided by Essar, shows that while Essar paid sixty rupees per metric ton in wharfage fees, other companies operating on Gujarat's jetties paid seventy rupees per metric ton during the period of review. *Id.* ; *see also* J.A. 1236, 1276. In view of this record evidence, Commerce did not err by calculating a benefit for Essar in the amount of a ten rupees per metric ton discount on wharfage fees.

Essar also takes exception to Commerce's apparent rejection of record information demonstrating that Essar paid undiscounted wharfage fees in connection with the operation of its captive jetty in the State of Gujarat. Essar Reply Br. 15. Essar did provide documentation from 2000 suggesting that, at some point, it may have paid full wharfage fees to the State of Gujarat. J.A. 1034–36, 1213–15. However, Essar also supplied documentation from 2003 indicating that it received a ten rupees per metric ton discount on wharfage fees. J.A. 1236, 1276. Commerce evidently found that the more recent documentation provided a more accurate account of the actual wharfage fees that Essar and others paid during the period of review. The court will uphold a determination supported with substantial evidence even if two inconsistent conclusions may be drawn from evidence on the record. *See Thai Pineapple Pub. Co.*, 187 F.3d at 1365. Since the court finds that Commerce adequately supported its benefit calculation, Commerce did not err in assessing a 0.04% countervailable subsidy rate against Essar under Gujarat's Captive Port Facilities Program.

4. Chhattisgarh Industrial Policy

Commerce also employed AFA when examining the benefit supposedly conferred on Essar by the nine subprograms composing Chhat-

tisgarh's Industrial Policy. As with other subsidy programs, Commerce found as AFA that Chhattisgarh's Industrial Policy provided a specific financial contribution to Essar during the period of review. *Issues and Decision Memorandum* at 22. Commerce additionally determined that Essar failed to respond to the best of its ability to the Department's program questions and found as AFA that Essar used and benefitted from the nine subprograms during the period of review. *Id.* at 6–7. These findings ultimately led Commerce to set the total net countervailable subsidy rate for the Chhattisgarh Industrial Policy programs at 54.68% *ad valorem*. *Id.* at 24–26.

However, Commerce's determination in the sixth administrative review that Essar did not benefit from the Chhattisgarh Industrial Policy, and the Department's concurring admissions during oral argument, cast grave doubt upon the present findings. *See Final Results of Redetermination Pursuant to Court Remand*, C-533–821 (Dep't Commerce July 15, 2010) ("*Sixth Administrative Review Redetermination* ") at 5–6, 22–23; Oral Argument at 8:11–13:00; *see also* Letter from J. Barzilay to Parties (July 20, 2010) (on file with Court). Specifically, Commerce found that evidence on the record, a letter provided by the State Government of Chhattisgarh, "indicates that the [State Government of Chhattisgarh] made a determination that Essar's beneficiation plant is not eligible for the *2004–2009* [Chhattisgarh Industrial Policy] program." *Sixth Administrative Review Determination* at 22 (emphasis added); *see id.* at 23 (citing Admin. R. Confidential Doc. 1129 Ex. 4). Moreover, Commerce found that this evidence "*covering the 2004–2009 period* " rendered moot Defendant-Intervenor's claim in that review that Essar's eligibility may change over time. *Id.* at 23 (citing Admin. R. Confidential Doc. 1993 Ex. 9) (emphasis added). These conclusions strongly impugn, if not outright refute, the Department's determination that Essar benefitted from the Chhattisgarh Industrial Policy during the present period of review.

Although Commerce argues that it now need not consider this evidence because it arose in a different administrative review, *see* Def.'s Resp. to Court Order1–2, Aug. 9, 2010 (citing *Home Prods. Int'l, Inc. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1192, 1199 (2009)), in this specific circumstance the court disagrees. The Federal Circuit has held that "deference is not owed to a determination that is based on data that the agency [knows to be] incorrect. The law does not require, nor would it make sense to require, reliance on data which might lead to an erroneous result." *Borlem S.A.-Impreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990); *accord Anshan Iron & Steel Co. v. United States*, 28 CIT 1728, 1737, 358 F.

Supp. 2d 1236, 1243 (2004); *see also Win-Tex Prods., Inc. v. United States*, 17 CIT 786, 789, 829 F. Supp. 1349, 1352 (1993) ("[I]ndisputable facts like the agency's own prior determinations may be judicially noticed by the court . . . ."). Commerce previously recognized the validity of evidence supplied by the State Government of Chhattisgarh that Essar is not eligible to participate in the Chhattisgarh Industrial Program from 2004 to 2009. *Sixth Administrative Review Determination* at 23. It may not now ignore this evidence and claim that Essar benefitted from the program in 2007. *See Anshan Iron & Steel Co.*, 28 CIT at 1734 & n.3, 358 F. Supp. 2d at 1241 & n.3; *see also id.* at 1736, 358 F. Supp. 2d at 1243 ("Evidence cannot be substantial if Commerce is aware that the conclusion it supports is false.") (citation omitted).

When the court cannot arrive at "'the correct decision on the basis of the evidence in any civil action," it may order "such further administrative or adjudicative procedures as [it] considers necessary.'" *Borlem S.A.-Impreedimentos Industriais*, 913 F.3d at 937 n.4 (quoting 28 U.S.C. § 2643(b)); *see also Anshan Iron & Steel Co.*, 28 CIT at 1737, 358 F. Supp. 2d at 1243 (ordering Commerce to reopen administrative record and consider financial statement from prior review to remedy incorrect, contradictory determination currently before court). The court therefore orders Commerce to reopen and enter Essar's Feb. Remand QR Ex. 4 and Essar's Apr. 14 QR Ex. 9 into the administrative record so that on remand the agency may fully consider their bearings on Essar's participation in the Chhattisgarh Industrial Program.

V. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Plaintiff Essar's Motion for Judgment Upon the Agency Record is **GRANTED** in part and **DENIED** in part, and that this case is **REMANDED** to Commerce for further proceedings. Specifically, it is hereby

ORDERED that the Department's calculation of the benchmark prices for iron ore lumps and fines used in its less than adequate remuneration analysis for Essar's purchases from the NMDC is **AFFIRMED** ; it is further

ORDERED that Commerce's finding that the 2005 SEZ Act constituted a countervailing subsidy from which Essar benefitted during the period of review is **AFFIRMED** ; it is further

ORDERED that the Department's decision to apply AFA to Essar with respect to the EPCGS is **AFFIRMED** ; it is further

ORDERED that the Department's decision to apply neutral facts available to Essar with respect to Gujarat's Maritime Policy is **AFFIRMED** ; it is further

ORDERED that the Department reopen the administrative record and admit Admin. R. Confidential Docs. 1129 Ex. 4 and 1193 Ex. 9, and consider these documents in its reassessment of whether Essar benefitted from Chhattisgarh's Industrial Policy; and it is further

ORDERED that Commerce shall file its remand results no later than October 14, 2010, and that the parties shall file any responses to the remand results by November 4, 2010.

Dated: August 19, 2010
New York, New York

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, JUDGE

Slip Op. 10–96

SIOUX HONEY ASSOCIATION, ADEE HONEY FARMS, MONTEREY MUSHROOMS, INC., THE GARLIC COMPANY, and BEAUCOUP CRAWFISH, INC., dba RICELAND CRAWFISH, INC., individually and on behalf of all others similarly situated, Plaintiffs, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 09–00141

[Dismissing all remaining claims in the action]

Dated: August 27, 2010

Kelley Drye & Warren LLP (*Paul C. Rosenthal*, *Donna L. Wilson*, *Kathleen W. Cannon*, *Michael J. Coursey*, and *Richard D. Milone*), counsel for plaintiffs Sioux Honey Association, Adee Honey Farms, The Garlic Company, and Monterey Mushrooms, Inc. and co-counsel for plaintiff Beaucoup Crawfish, Inc., dba Riceland Crawfish, Inc.

Adduci, Mastriani & Schaumberg, LLP (*Will E. Leonard* and *John C. Steinberger*), co-counsel for plaintiff Beaucoup Crawfish, Inc., dba Riceland Crawfish, Inc.

Tony West, Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Michael J. Dierberg* and *L. Misha Preheim*); *Andrew G. Jones* and *Albert T. Kundrat*, Office of Assistant Chief Counsel (Indianapolis), United States Customs and Border Protection, of counsel; *Jonathan Zielinski*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for defendant United States.

OPINION

Stanceu, Judge:

I.
Introduction

Plaintiffs Sioux Honey Association, Adee Honey Farms, Monterey Mushrooms, Inc., The Garlic Company, and Beaucoup Crawfish, Inc.,

dba Riceland Crawfish, Inc. (collectively, "plaintiffs") brought this action against the United States and against a large number of private parties ("Surety Defendants") engaged in the business of issuing customs bonds. Compl. ¶¶ 1–2. Plaintiffs, domestic producers of honey, mushrooms, garlic, or crawfish, alleged numerous statutory and regulatory violations by the United States Department of Commerce ("Commerce") and United States Customs and Border Protection ("Customs") affecting antidumping duty ("AD") collections on products in numerous new shipper reviews ("NSRs") that Commerce conducted under the antidumping laws. *Id.* ¶¶ 1–5. Plaintiffs assert rights on their own behalf and seek to represent the interests of a class of other, similarly-situated domestic producers. *Id.* ¶¶ 2, 77. Common to many of their claims are allegations that various government actions, or failures to act, denied them remedial benefits due them under the antidumping laws and prevented them from obtaining the full amount of distributions to which they are entitled under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), 19 U.S.C. § 1675c (repealed 2006). Compl. ¶ 5.

Ruling on various motions, the court dismissed the Surety Defendants, having concluded that each claim brought solely against the Surety Defendants and each claim brought jointly against the Surety Defendants and the United States must be dismissed, either for lack of standing or for failure to state a claim upon which relief can be granted. *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 34 CIT __, __, 700 F. Supp. 2d 1330, 1351–52 (2010) ("*Sioux Honey I* "). The court now dismisses all remaining claims in this action.

I. *Background*

The background of this litigation is presented in the court's opinion and order in *Sioux Honey I*, 34 CIT at __, 700 F. Supp. 2d at 1335–38, and is summarized briefly herein.

A. Customs Bonding for Merchandise Subject to New Shipper Reviews

Upon request, Commerce conducts reviews to establish individual weighted-average dumping margins for foreign exporters or producers of merchandise subject to an antidumping duty order who did not export subject merchandise during the period of the investigation and are not affiliated with a producer or exporter who did so. 19 U.S.C. § 1675(a)(2)(B) (2006). From January 1, 1995, the effective date of legislation establishing the new shipper review procedures, to April 1, 2006 (a period of time to which plaintiffs refer as the "NSR Bond Period," Compl. ¶ 4), the antidumping law permitted these "new

shippers" to post bonds with Customs in lieu of cash deposits to serve, during the time required to conduct the review, as security for future payment of antidumping duties. *See* 19 U.S.C. § 1675(a)(2)(B)(iii) (suspended by the Pension Protection Act of 2006, Pub. L. No. 109–280, § 1632(a), 120 Stat. 780, 1165 (2006)). At the center of this action are numerous customs importation bonds ("new shipper bonds") obtained from sureties by importers of Chinese-origin products subject to antidumping duty orders and new shipper reviews during the NSR Bond Period. *See id.* § 1623 (authorizing the collection of bonds for protection of the revenue and compliance with laws enforced by Customs); 19 C.F.R. § 113.62 (2009) (setting forth regulations and conditions for basic importation and entry bonds). Plaintiffs estimate that the new shipper bonds at issue in this case number in the hundreds and have "an estimated combined face value of several hundred million dollars." Compl. ¶ 2. Their claims against the United States involve new shipper reviews conducted under twenty antidumping orders on imports from China (the "China NSR Orders"). *Id.* ¶ 4. Plaintiffs' complaint states that the vast majority of the new shipper bonds were issued on imports subject to four antidumping orders on imports from China (the "Four Orders"), which pertained to fresh garlic, preserved mushrooms, freshwater crawfish tail meat, and pure honey. *Id.*

B. Rights of Domestic Producers to Distributions under the CDSOA

The CDSOA directed Customs to deposit collected antidumping (and countervailing) duties into special accounts, to segregate those duties according to the relevant antidumping (or countervailing) duty order, and to distribute, on an annual basis, a ratable share of duties collected for a particular unfairly-traded product to domestic producers who qualified as affected domestic producers ("ADPs") under the CDSOA, as reimbursement for incurred qualifying expenditures. 19 U.S.C. § 1675c(e) (repealed 2006); 19 C.F.R. § 159.61 (2009). In the 2006 repeal of the CDSOA, Congress provided for the continued distribution of duties "on entries of goods made and filed before October 1, 2007." Deficit Reduction Act of 2005, Pub. L. No. 109–171, § 7601(b), 120 Stat. 4, 154 (2006).

Plaintiffs seek to represent not only their own interests but also the interests of a proposed class of similarly-situated ADPs and parties who seek ADP status in litigation now pending before the courts, in which the would-be ADPs challenge as unconstitutional CDSOA pro-

visions limiting ADP status to those parties who expressed support for an antidumping or countervailing duty petition.[1] Compl. ¶ 77.

C. Judicial Proceedings

In *Sioux Honey I*, decided on March 26, 2010, the court dismissed all claims brought against the Surety Defendants in this action, whether brought jointly against the Surety Defendants and the United States or brought solely against the Surety Defendants. *Sioux Honey I*, 34 CIT at __, 700 F. Supp. 2d at 1351. The court thus dismissed all claims expressed in Counts One through Six of the complaint. *Id.* The court reserved decision on the motion of the United States to dismiss with respect to the remaining claims in the complaint (Counts Seven through Fifteen), which are addressed in this Opinion. *Id.* ; United States' Mot. to Dismiss Pls.' Compl. for Lack of Jurisdiction & for Failure to State a Claim upon which Relief May Be Granted ("Mot. to Dismiss").

D. Plaintiffs' Remaining Claims Against the United States

In their remaining claims against the United States, plaintiffs allege that Customs denied them due process by not allowing them to participate in the adjudications of administrative protests by the sureties. Compl. ¶¶ 150–163 (Count Seven). Commerce, they allege, failed in some instances to issue to Customs required instructions to liquidate entries subject to new shipper reviews under the China NSR Orders. *Id.* ¶¶ 164–173 (Count Eight). They claim that Customs unlawfully failed to liquidate some entries within six months of receiving liquidation instructions from Commerce and thereby allowed the entries to be deemed liquidated, thus denying plaintiffs the remedial benefits of the antidumping duty orders and reducing the amount of CDSOA distributions ("offsets") available to plaintiffs as ADPs. *Id.* ¶¶ 174–183 (Count Nine). They claim, further, that Customs failed to distribute some collected antidumping duties as required by the CDSOA or distributed some duties it should have withheld from distribution, *id.* ¶¶ 184–190 (Count Ten), and failed to issue demands to sureties to recover duties under the new shipper

[1] In seeking to represent a class consisting of other affected domestic producers ("ADPs") under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), 19 U.S.C. § 1675c (repealed 2006), plaintiffs define their proposed class as follows:

> [a]ny person or entity that (1) is an affected domestic producer ("ADP") under the . . . CDSOA . . . , under any antidumping order on imports from the People's Republic of China under which one or more new shipper administrative reviews were conducted between January 1, 1995 and August 18, 2006; or (2) would be an ADP under any such order if the CDSOA's requirement that to qualify as an ADP, a domestic interested party must havesupported the relevant petition to impose [antidumping] duties, is stricken from the CDSOA as unconstitutional.

Compl. ¶ 77.

bonds, *id.* ¶¶ 191–197 (Count Eleven). Based on a theory that the statutory power to compromise antidumping duties was transferred from Customs to Commerce in 1980, plaintiffs claim that Customs, in some instances, compromised antidumping duties owed in new shipper reviews although lacking legal authority to do so. *Id.* ¶¶ 198–205 (Count Twelve). They claim that Customs wrote off certain antidumping duties, contrary to various statutes and regulations. *Id.* ¶¶ 206–215 (Count Thirteen). Plaintiffs claim that actions by Customs to cancel bonds and charges against bonds were unlawful because Customs failed to publish, as required by law, guidelines on its exercise of bond cancellation authority. *Id.* ¶¶ 216–225 (Count Fourteen). Finally, plaintiffs allege that Customs failed to notify the Department of Justice of the need to file collection actions against the sureties on certain new shipper bonds and thereby violated a provision in the Customs regulations. *Id.* ¶¶ 226–235 (Count Fifteen). On these various claims, plaintiffs seek relief that, *inter alia*, would declare various challenged governmental actions to be contrary to law, set aside those various actions as contrary to law, order Customs and Commerce to cease certain practices, and order Customs to take various affirmative actions involving claims on the bonds. *Id.* ¶¶ 163, 173, 183, 190, 197, 205, 215, 225, 235.

III. Discussion

In deciding a USCIT Rule 12(b)(1) motion to dismiss that does not challenge the factual basis for the complainant's allegations, and when deciding a USCIT Rule 12(b)(5) motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations to be true and draws all reasonable inferences in a plaintiff's favor. *See Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995) (setting forth the standard for determining subject matter jurisdiction); *Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1583–84 & n.13 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (setting forth the standard under which the court evaluates a motion for failure to state a claim upon which relief can be granted).

As required by USCIT Rule 8(a)(2), a complaint shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." USCIT Rule 8(a)(2). Rule 8(a)(2) requires "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). Although a complaint need not contain detailed factual allegations, the "[f]actual allegations

must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted).

A. Claim of Denial of Due Process for Lack of Opportunity to Participate in Adjudications of Administrative Protests Brought by the Surety Defendants (Count Seven)

In Count Seven, plaintiffs claim that Customs, contrary to the Due Process Clause of the Constitution, did not allow them to participate in the agency's adjudications of administrative protests that the Surety Defendants filed with Customs and that arose out of demands by Customs for performance under the new shipper bonds. Compl. ¶¶ 150–163. They allege a deprivation of property interests they claim to possess as intended third-party beneficiaries under the bonds, stating that "[f]or each new shipper bond, each Plaintiff and Class member that is an intended third-party beneficiary of that bond possesses significant and valuable contract rights thereunder . . . ." *Id.* ¶ 152. The complaint posits that each plaintiff has property rights under the new shipper bonds that include, but are not limited to, "the right to its share of all payments for which the Surety Defendant that issued the bond is liable, and the right to sue such defendant for its wrongful refusal to perform under the bond." *Id.*

Plaintiffs' complaint acknowledges that "[u]nder current law governing Customs' protest procedures (19 U.S.C. § 1515) and Customs' implementing regulations of that law (19 C.F.R. Part 174), only the protesting importer and its bond surety are allowed to participate in Customs' adjudication of protests." *Id.* ¶ 155. In their acknowledgment, plaintiffs apparently intended to refer to 19 U.S.C. § 1514(c)(2), under which they do not qualify as parties who may protest a customs decision. *See* 19 U.S.C. § 1514(c)(2) (2006). Plaintiffs maintain that

> [t]he exclusion of Plaintiffs and Class members from this adjudicatory process constitutes a governmental deprivation of their protected property interests in such bonds without sufficient prior notice and without a prior opportunity to be heard by Customs on the potential taking, and as such is unlawful under the Due Process Clause.

Compl. ¶ 155. They seek declaratory relief to that effect and injunctive relief compelling Customs to allow them to participate in all proceedings that could affect their "protected property rights under new shipper bonds issued under the China NSR Orders." *Id.* ¶ 163.

To withstand a motion to dismiss, the claim in Count Seven must satisfy the three elements of a constitutional due process "takings"

claim: (1) the claimant must be deprived of a protected property interest; (2) the deprivation must be due to some government action; and (3) the deprivation must be without due process. *See Cospito v. Heckler*, 742 F.2d 72, 80 (3d Cir. 1984). With respect to the first element, the court previously determined that plaintiffs are not intended third-party beneficiaries under the contracts underlying the new shipper bonds. *Sioux Honey I*, 34 CIT at __, 700 F. Supp. 2d at 1346–48. The court concluded "that neither the new shipper provisions in the antidumping law, the CDSOA provisions, 19 U.S.C. § 1623, nor 19 C.F.R. § 113.62 makes plaintiffs intended third-party beneficiaries of the customs bonds that they seek to place at issue in this case." *Id.* at __, 700 F. Supp. 2d at 1348. Thus, Count Seven fails for lack of standing because plaintiffs lack the protected property interests on which they base their deprivation claim. There has been no demonstrated "injury in fact an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). Moreover, plaintiffs fail to state in Count Seven that they are bringing a constitutional challenge to 19 U.S.C. § 1514(c)(2) or any related statutory provisions, even though acknowledging that the governing statute does not authorize Customs to allow them to participate in protest proceedings. The claim in Count Seven must be dismissed under USCIT Rule 12(b)(1).

B. Claims that Commerce Failed to Issue Liquidation Instructions to Customs (Count Eight)

In Count Eight, plaintiffs allege that Commerce failed in three situations to issue to Customs required instructions for liquidation of entries subject to new shipper reviews conducted under the China NSR Orders. Compl. ¶¶ 164–173. First, plaintiffs allege that "for each of the China NSR Orders, Commerce has failed to issue such liquidation instructions for certain entries of imports subject to that order despite having received no request to include the imports' exporter in the relevant upcoming administrative review." *Id.* ¶ 166. Second, plaintiffs allege that "Commerce has failed to issue such instructions for certain entries of imports subject to one or more of the China NSR Orders, despite having issued an unappealed assessment rate in the final results of an administrative review for the exporter of those imports." *Id*. ¶ 167. Third, plaintiffs allege that "Commerce has failed to issue such instructions for certain entries of imports subject to one or more of the China NSR Orders despite the lifting of this Court's injunction against the liquidation of those entries." *Id.* ¶ 168.

Plaintiffs claim the alleged failures to issue liquidation instructions injured them "by depriving them of, and unreasonably delaying," the remedial benefits under the antidumping laws of the new shipper review orders, and CDSOA distributions of duties collected under those orders, both of which they claim they otherwise would have received. *Id.* ¶ 171. Plaintiffs state that, for imports from an unreviewed exporter, Commerce is required to instruct Customs to liquidate entries at the duty deposit rate. *Id.* ¶ 166 (citing 19 C.F.R. § 351.212(c)). Referring to Commerce's "15-day" rule, plaintiffs state, with respect to exporters with their own deposit rates, "Commerce's practice is to issue the appropriate liquidation instructions to Customs within 15 days of Commerce's determination of that exporter's non-participation in the relevant administrative review." *Id.* They state, with respect to exporters subject to the countrywide rate for a non-market economy country, that "Commerce's practice is to issue the appropriate liquidation instructions to Customs within 15 days of Commerce's issuance of the final results for the relevant administrative review."[2] *Id.*

Whether or not Commerce issues liquidation instructions following publication of the final results of an administrative review, entries not liquidated by Customs during the six-month period following publication of final results ordinarily will be subject to "deemed liquidation" at the rate declared at the time of entry pursuant to Section 504(d) of the Tariff Act of 1930. *See* 19 U.S.C. § 1504(d) (2006). Section 504(d) directs Customs, unless liquidation is extended, to liquidate an entry within six months of receiving notice from Commerce, another agency, or a court that a suspension of liquidation required by statute or court order is removed.[3] *Id.* If Customs fails to fulfill this statutory duty, the entry is subject to deemed liquidation under Section 504(d), *i.e.*, the entry is "treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of

[2] The United States Department of Commerce's ("Commerce") subsequent practice was to issue liquidation instructions fifteen days after publication of the final results of an administrative review. *See SKF USA Inc. v. United States*, 33 CIT __, __, 675 F. Supp. 2d 1264, 1281 (2009). Commerce's rationale for both the original and modified fifteen-day rule was the avoidance of deemed liquidations under Section 504(d) of the Tariff Act of 1930 (19 U.S.C. § 1504(d) (2006)). *Id.* at __, 675 F. Supp. 2d at 1284.

[3] The statute provides in pertinent part that:

> when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry . . . within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record.

19 U.S.C. § 1504(d).

record." *Id.* The six-month period established by Section 504(d) begins to run on the date of publication of final results of an administrative review. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1274 (Fed. Cir. 2002).

Plaintiffs admit that "the fact that some entries under the Four Orders were deemed liquidated would not be adverse to Plaintiffs as to the assessment rate ultimately applied to those entries," explaining that "[t]his is because that rate will be no lower than the rate Commerce calculated in an administrative review . . . ." Pls.' Opp'n to Defs.' Mots. to Dismiss 30. Plaintiffs further admit that the antidumping duty deposit rate "that applied to all entries from exporters undergoing NSRs under the Four Orders during the Four Orders Period was the countrywide rate for that order, which ranged from 183.80 percent to 376.67 percent." *Id.* at 29; *see* Compl. ¶¶ 51–52. Plaintiffs also admit that "[a]ny exporter that is eligible for a NSR under an AD order on imports from China is subject to that order's countrywide rate until it obtains its own deposit rate." Compl. ¶ 54. In the same paragraph, they also admit that "[i]f that exporter requests a NSR, and Commerce initiates such a review, the exporter will remain subject to the countrywide rate for deposits on entries made during the pendency of that review, which can last up to 18 months." *Id.* (citations omitted).

Plaintiffs' statements, when considered on the whole and in the context of § 1504(d), do not allow the court to conclude that the entries of concern to plaintiffs, if deemed liquidated according to § 1504(d) due to the failure of Commerce to issue liquidation instructions and the resulting inability of Customs to effect liquidation during the six-month periods following publication, would have caused plaintiffs the injury alleged in Count Eight. Plaintiffs admit that deemed liquidation of entries subject to one of the Four Orders would not injure them as to the assessment rate. *See* Pls.' Opp'n to Defs.' Mots. to Dismiss 30. Although they do not make the same admission with respect to the other sixteen China NSR Orders, they rely only on the Four Orders for their general claim of standing: the complaint alleges that each plaintiff "is a domestic producer of goods that directly compete with imports subject to one of the Four Orders," that each qualifies as a domestic interested party under one of the Four Orders, and each is, for purposes of the CDSOA, an ADP under one of the Four Orders. Compl. ¶ 5. Thus, the facts plaintiffs have alleged do not allow the court to conclude that the claimed injury resulted from deemed liquidations under any of the other sixteen China NSR Orders. Although they seek to represent the interests of a class consist-

ing of domestic producers of goods competing with imports under the other China NSR Orders who are ADPs (and parties seeking to qualify as ADPs) under those other orders, *see* Compl. ¶ 77, they cannot represent the interests of a class of plaintiffs on the claims in Count Eight, where, as here, they lack standing on their own to bring those claims. *See O'Shea v. Littleton*, 414 U.S. 488, 493–95 (1974). The court concludes that Count Eight fails for lack of a demonstrated "injury in fact an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560–61 (citations omitted).

C. Claim that Customs Failed to Liquidate Entries (Count Nine)

Plaintiffs claim in Count Nine that "Customs has failed to liquidate one or more entries under each of the China NSR Orders notwithstanding Commerce's issuance of instructions to Customs to liquidate those entries." Compl. ¶ 177. Plaintiffs allege that "one or more entries under each of the China NSR Orders has become deemed liquidated due to Customs' failure to liquidate those entries within six months of being instructed by Commerce to do so" and that

> for one or more of such entries, the assessment rates calculated by Commerce, and which would have been applied to determine the amount of final assessed AD duties owed on such entries had Customs timely liquidated them, were higher than the deposit rates that were used to determine the amount of assessed duties.

Id. ¶ 178. Thus, unlike Count Eight, Count Nine specifically alleges, with respect to the claim therein, that the assessment rate, on at least one occasion, exceeded the deposit rate. Concerning the claimed injury, plaintiffs allege that

> Customs' failure to liquidate such entries has directly injured Plaintiffs and Class members by depriving them of, and/or unreasonably delaying, (1) the remedial benefits of the China NSR Orders intended by the AD law; and (2) CDSOA distributions under the China NSR Orders, both of which they would have received had Customs timely liquidated those entries as instructed by Commerce.

Id. ¶ 181. But their admission that deemed liquidations of entries subject to the Four Orders would not be adverse to them as to the assessment rate, Pls.' Opp'n to Defs.' Mots. to Dismiss 30, precludes a finding that the deemed liquidations to which they object in Count

Nine caused them an injury in fact. Here also, the named plaintiffs may not represent a class of plaintiffs on the claim for which they cannot themselves establish standing to sue. *See O'Shea*, 414 U.S. at 493–95.

Even were the court to allow plaintiffs to proceed to represent the interests of the proposed class, the claim in Count Nine still would not be one on which plaintiffs could obtain relief. Their claim in Count Nine is grounded in the aforementioned Section 504(d). *Id.* ¶ 176 (citing 19 U.S.C. § 1504(d)). Plaintiffs seeks three forms of relief for the harm they allege they incurred. First, they request that the court declare unlawful "Customs' failure to liquidate entries under the China NSR Orders that Commerce has instructed Customs to liquidate." *Id.* ¶ 183. Second, they would have the court "set aside" the failures to liquidate entries. *Id.* Third, they urge the court to "compel and order Customs to cease unlawfully withholding, and unreasonably delaying, the liquidation of entries of imports subject to the China NSR Orders that Commerce has instructed Customs to liquidate." *Id.*

The first form of relief plaintiffs seek, that the court declare unlawful past failures of Customs to liquidate entries within the six-month period of § 1504(d), is meaningless. The statute, on its face, requires Customs to liquidate an entry within the six-month period established by § 1504(d). Thus, all deemed liquidations under § 1504(d) result from an unlawful governmental failure to effect the liquidation that the statute directs, either because Customs failed to follow appropriate instructions or because Commerce failed to issue instructions by which Customs could act. Therefore, any past failures to liquidate entries are defined as contrary to law by the statute itself.

The intended meaning of the second form of relief sought, that the court "set aside" Customs' failure to liquidate entries, is not clear to the court. A failure to liquidate an entry within the time required by § 1504(d) is an inaction, not an action, to which the consequence of deemed liquidation attaches. As such, a failure to liquidate an entry timely according to § 1504(d) would appear to be something that cannot be "set aside" or otherwise undone. If, by seeking such relief, plaintiffs would have the court set aside the *consequences* of the alleged failures to liquidate, *i.e.*, the deemed liquidations, then the relief sought is beyond the power of the court to provide. Any failures to liquidate entries during the respective six-month periods that occurred would have resulted, by operation of the statute, in deemed liquidations that are final according to Section 514 of the Tariff Act of 1930, 19 U.S.C. § 1514. The court is aware of no authority under which it could invalidate such deemed liquidations in the circum-

stances of this case, and plaintiffs cite to none. Deemed liquidations, as a general matter, are final and conclusive absent a timely protest by a party authorized to file such a protest. *See Int'l Trading Co.*, 281 F.3d at 1276–77; *Shinyei Corp. of Am. v. United States*, 524 F.3d 1274, 1276 (Fed. Cir. 2008).[4]

The third form of relief that plaintiffs seek is directed to future failures to perform timely liquidations as required by § 1504(d). Compl. ¶ 183. Plaintiffs' demand for this form of relief for the proposed class would require the court to consider the factors relevant to the grant or denial of a permanent injunction. The court would consider whether the members of the proposed class are incurring irreparable harm that would be prevented by the injunctive relief being sought, whether the remedy at law is inadequate, whether the balance of the hardships favors the plaintiffs, and whether the granting of the injunctive relief is in the public interest. *Ebay Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 391 (2006).

The existence of irreparable harm is a question of fact ordinarily adjudicated at a hearing or trial. In this case, plaintiffs could prove no set of facts that would entitle the members of their proposed class to the permanent injunction sought on the claim in Count Nine. For purposes of ruling on that claim, the court assumes, *arguendo*, that members of the proposed class are being irreparably harmed by past and current failures of Customs to liquidate entries timely according to § 1504(d) and would be harmed by similar failures occurring in the future. But plaintiffs cannot demonstrate that the demanded relief would prevent future harm to the class. Plaintiffs, understandably, do not allege that Customs intentionally allowed deemed liquidation of entries to occur. It must be presumed that any deemed liquidations occurring in the future will result from inadvertence on the part of government officials faced with voluminous entries to administer.[5] Plaintiffs essentially are seeking a permanent injunction under which Customs would be ordered, permanently, to perform its task under § 1504(d) flawlessly, thereby allowing no deemed liquidations

[4] A circumstance in which the Court of Appeals for the Federal Circuit has recognized the power of the Court of International Trade to order reliquidation of entries despite the finality of 19 U.S.C. § 1514 a challenge by an importer to erroneous liquidation instructions issued by the United States Department of Commerce is readily distinguished from the circumstance presented by the claim in Count Nine. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1299–1304, 1312 (Fed. Cir. 2004). The claim in Count Nine alleges harm to domestic parties, not importers, that was caused by deemed liquidations resulting from alleged error by Customs, not by Commerce. Compl. ¶¶ 176–178, 181.

[5] In this respect, the claim in Count Nine differs from the claim in Count Eight, which also seeks permanent injunctive relief, Compl. ¶ 173, but involves a smaller number of administrative actions, *i.e.*, the required issuance by Commerce of timely liquidation instructions.

of entries under the new shipper orders. Because deemed liquidations may not reasonably be presumed to be intentional rather than accidental occurrences, the court cannot conclude that a permanent injunction would prevent them. Moreover, the court is not aware of authority allowing it to reverse the effect of any deemed liquidations that might occur despite such an injunction. For these reasons, the "irreparable harm" factor would not favor the grant of a permanent injunction on the facts plaintiffs allege in Count Nine.

Even were the court free to grant injunctive relief despite plaintiffs' failure to show irreparable harm that would be prevented by the relief sought, the court would conclude that of the remaining three factors, only the inadequacy of a remedy at law could be satisfied. Because deemed liquidation under § 1504(d) may result in importers' paying less in duties than would have occurred had Customs fulfilled its obligation under § 1504(d) (as plaintiffs allege in Count Nine to have happened), and because the court, in the circumstances of this case, would appear to lack the power to set aside a deemed liquidation, the court may presume that the members of the proposed class would not have an adequate remedy at law. The remaining two factors, however, would not favor a grant of injunctive relief.

An injunction that permanently subjects Customs officials to possible contempt of court for the offense of inadvertently allowing entries to liquidate according to § 1504(d), needless to say, would impose a hardship on those officials. The hardship on plaintiffs from the denial of injunctive relief is not comparable because the injunction would be of little value. As discussed above, the court is aware of no authority under which it could reverse the effects of any deemed liquidations that occur. The hardship the class of plaintiffs would suffer from the denial of the injunction is the loss of any potential deterrent to noncompliance, the effectiveness of which is a matter of speculation. In contrast, the hardship Customs officials would incur from the prospect of contempt is real. The court concludes that the balance of hardships does not favor the grant of a permanent injunction.

Nor can it be concluded that the permanent injunction plaintiffs seek on behalf of the class would be in the public interest. In enacting § 1504(d), Congress was concerned that delays by Customs in liquidating entries following the removal of a suspension of liquidation would deprive the process of needed certainty. *See* S. Rep. No. 95–778, at 32 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2243 ("The provisions adopted by the committee would increase certainty in the customs process for importers, surety companies, and other third parties with a potential liability relating to a customs transaction.").

Enactment of the provision is an implicit acknowledgment by Congress that Customs officials, faced with voluminous entries, inadvertently would fail at times to meet the six-month time deadline set forth in the statute. The deemed liquidation provision in § 1504(d) addresses the prospect of such inadvertent failures by causing the liquidations to occur by operation of law. In compelling Customs officials to avoid any deemed liquidations of the entries in question, such an injunction unrealistically would demand perfection on the part of Customs officials in performing timely liquidations under § 1504(d). In enacting the provision, Congress understood that such perfection might be unattainable. The injunction being sought would go beyond the remedy Congress intended, *i.e.*, deemed liquidation, and permanently would attach to inadvertent noncompliance the harsh consequence of potential contempt of court.

In summary, plaintiffs' claim in Count Nine fails for lack of standing because they did not themselves incur the injury on which they seek to represent the interests of a class. Even were they able to establish standing, they could prove no set of facts qualifying them for the permanent injunction they demand on behalf of the class members, and the two other forms of relief they seek on behalf of the class are unavailable.

D. Claims that Customs Failed to Distribute or Withhold Antidumping Duties (Count Ten)

In Count Ten, plaintiffs claim "[o]n information and belief" that "during FY 2001 through FY 2008, Customs failed to distribute, or to withhold from distribution pending the resolution of the CDSOA Support Challenge Lawsuits, certain AD duties that were assessed and collected on imports subject to the China NSR Orders entered prior to October 1, 2007." Compl. ¶ 186. Their claim is that in so doing Customs failed to comply with the CDSOA. *Id.* ¶ 185. As a remedy, plaintiffs request that the court, pursuant to 5 U.S.C. § 706(2)(A) through (D), "hold unlawful and set aside Customs' failure to distribute, or to withhold from distribution pending the resolution of the CDSOA Support Challenge Lawsuits, AD duties assessed and collected under the China NSR Orders," and that the court, pursuant to 5 U.S.C. § 706(1) and 28 U.S.C. § 2643(c)(1), "compel and order Customs to cease unlawfully withholding, and unreasonably delaying, distribution of such duties, and to forthwith distribute all such duties in compliance with the CDSOA." *Id.* ¶ 190.

The claim in Count Ten does not meet the minimum requirements set forth by the Supreme Court in *Bell Atlantic*, under which the "[f]actual allegations must be enough to raise a right to relief above

the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl.*, 550 U.S. at 555 (citations omitted). The claim, therefore, must be dismissed according to USCIT Rule 12(b)(5).

The claim is defective, first, in alluding to two possible, and opposite, situations: a failure by Customs to distribute collected antidumping duties under the CDSOA, and a failure of Customs to withhold antidumping duties from distribution. Because the complaint uses the word "or," the stated claim, read literally, is that Customs either failed to distribute antidumping duties, or did distribute antidumping duties when it should not have done so. Count Ten fails to state that either of these situations definitely occurred. A claim that requires such extensive speculation on the part of the court must be dismissed.

Even were the Count Ten claim amended to state definitely that Customs should have distributed some antidumping duties instead of withholding them but also should have withheld some antidumping duties instead of distributing them, it still would not suffice under *Bell Atlantic*. An allegation made "on information and belief" that Customs failed to distribute some collected antidumping duties under the CDSOA still would be too vague to make out a claim on which relief can be granted. In support of this bare allegation, plaintiffs plead no facts whatsoever. Although advancing a claim "on information and belief," the claim does not identify what information forms the basis for a belief that a violation of the CDSOA occurred. There is nothing in Count Ten to indicate what occurred, or when it occurred, that resulted in duties that were collected on the China new shipper orders but that were not distributed under the CDSOA as required by law. Even though plaintiffs seek a broad remedy including injunctive relief, they give no indication of whether they are alleging an isolated incident or a widespread practice. In the complete absence of pleaded facts, the court is left to speculate as to what may have occurred to give rise to such a claim.

Similarly, Count Ten does not actually claim "on information and belief" that Customs has failed to withhold from distribution certain antidumping duties pending the resolution of lawsuits brought by parties who claimed they should have been granted status as affected domestic producers under the CDSOA (referred to by plaintiffs as the "CDSOA Support Challenge Lawsuits").[6] *See* Compl. ¶¶ 184–190. Had such a claim been made, it would fare no better. Whatever facts

[6] Plaintiffs allege that they are ADPs under the CDSOA and do not allege that they are parties who may gain status as affected domestic producers as a result of ongoing litigation. Compl. ¶ 5. However, they state that each member of the class they seek to represent "either is or may be an ADP under the CDSOA." *Id.*

could have given rise to a belief that Customs failed to withhold some duties from distribution, and did so contrary to law, are not revealed.[7]

E. Claim that Customs Failed to Demand Performance under the Bonds (Count Eleven)

Plaintiffs state as follows in Count Eleven: "On information and belief, Customs, on one or more occasions, has failed to issue a demand that a Surety Defendant perform under one or more new shipper bonds issued in connection with a NSR conducted under a China NSR Order despite Customs' claim for such performance having accrued." Compl. ¶ 193. Plaintiffs claim they are injured because the alleged failure or failures to make a demand or demands on the bond or bonds deprived them of, and unreasonably delayed, the remedial benefits of the antidumping law and their CDSOA distributions. *Id.* ¶ 195. They seek a remedy under which the court would "hold unlawful and set aside each failure by Customs to issue a demand for a Surety Defendant's performance under a new shipper bond issued in connection with a NSR conducted under a China NSR Order where Customs' claim for such performance has accrued." *Id.* ¶ 197. They also seek an injunction under which Customs would be ordered "to cease unlawfully withholding and unreasonably delaying" issuance of such demands on sureties. *Id.*

Count Eleven does not state a claim upon which relief against the United States can be granted. It fails to allege facts sufficient "to raise a right to relief above the speculative level." *Bell Atl.*, 550 U.S. at 555. The facts alleged amount to nothing more than an opaque allegation that there has been at least one instance in which a claim against a surety for unpaid antidumping duties in a China new shipper review has accrued and Customs has yet to make a demand on the surety for payment. Plaintiffs allege no specific facts in support of their claim in Count Eleven, which as a result rests almost entirely on speculation. Plaintiffs ground their demand for relief on their assertions that "Customs is required to issue such a demand once its claim against a

[7] Plaintiffs fail to cite to any requirement that Customs withhold duties from distribution due to the litigation in question. In *Southern Shrimp Alliance v. United States*, 33 CIT __, __, 617 F. Supp. 2d 1334, 1347 (2009), the Court of International Trade held that Customs did not exceed its discretion in withholding duties for the possible future benefit of plaintiffs in the lawsuits brought by parties who claimed they should have been granted status as affected domestic producers under the CDSOA (referred to by plaintiffs as the "CDSOA Support Challenge Lawsuits"), but the court did not hold that Customs was *required* to do so. Some of the litigation to which Count Ten alludes is now resolved. *SKF USA, Inc. v. U.S.Customs & Border Prot.*, 583 F.3d 1340 (Fed. Cir. 2009). Other litigation continues. *See, e.g., PS Chez Sidney, L.L.C, v. U.S. Int'l Trade Comm'n* , 32 CIT __, 558 F. Supp. 2d 1370 (2008), *appeal docketed*, Nos. 2008–1526, 1527 (Fed. Cir. Aug. 20, 2008).

surety has accrued" and that "Customs' obligation to issue such a demand constitutes a ministerial duty that is not committed to agency discretion by law." *Id.* ¶ 192. Although stating that "Customs is required to issue such a demand once its claim against a surety has accrued," *id.*, plaintiffs cite no authority (and the court is aware of none) under which Customs is required to make the demand *immediately* upon accrual of the claim. The court is provided no alleged facts upon which it could be concluded that Customs has exceeded its discretion with respect to the timing of its issuances of demands upon sureties. Moreover, the claim lacks even an allegation that were Customs to make the contemplated demand or demands now (if indeed it has not already done so since the filing of the complaint), the demand or demands would be barred as untimely. Upon assuming the truth of all factual allegations in Count Eleven, the court is unable to conclude that the right to relief is beyond speculation. The court, therefore, must dismiss the claim in Count Eleven according to USCIT Rule 12(b)(5).

F. Claim that Customs Unlawfully Compromised Antidumping Duties (Count Twelve)

In Count Twelve, plaintiffs claim that Customs, without legal authority, compromised some antidumping duties owed as a result of new shipper reviews. Compl. ¶¶ 198–205. Plaintiffs state that "Customs' authority under 19 U.S.C. § 1617 to compromise assessed [antidumping and countervailing] duties was transferred to Commerce in 1980." *Id.* ¶ 200 (citing Reorganization Plan No. 3 of 1979, § 5(a)(1)(C), (G), 44 Fed. Reg. 69,273, 69,275 (1979) (effective as of Jan. 2, 1980 under Exec. Order No. 12,188, 45 Fed. Reg. 989,993 (1980)) ("Reorganization Plan")). Plaintiffs further assert that "[s]ince then, Customs has not been authorized to compromise any claim of the United States for assessed AD duties, and any such compromise by Customs for AD duties assessed under the China NSR Orders would be unlawful." *Id.* As relief, plaintiffs demand that the court "hold unlawful and set aside Customs' compromise of AD duties assessed under the China NSR Orders" and enjoin Customs from unlawfully compromising such duties in the future. *Id.* ¶ 205.

Section 617 of the Tariff Act of 1930 provides generally that the Secretary of the Treasury is authorized to compromise claims "arising under the customs laws." 19 U.S.C. § 1617 (2006). In 1980, Congress, in subparagraph (C) of § 5(a)(1) of the Reorganization Plan transferred from the Department of the Treasury to the Secretary of Commerce "all functions" pursuant to the antidumping and countervailing duty laws, with certain exceptions. Reorganization Plan, § 5(a)(1),

44 Fed. Reg. at 69,274. Two of the exceptions in subparagraph (C) are that "the Customs Service . . . shall accept such deposits, bonds, or other security as deemed appropriate by the [Commerce] Secretary" and that it "shall assess and collect such duties as may be directed by the [Commerce] Secretary." *Id.* § 5(a)(1)(C), 44 Fed. Reg. at 69,275. In subparagraph (G) of § 5(a)(1) of the Reorganization Plan, Congress transferred to the Commerce Secretary all functions of the Treasury Department pursuant to Section 617 of the Tariff Act, but it did so with the qualification, "with respect to the functions transferred by subparagraph (C) of this paragraph." *Id.* § 5(a)(1)(G), 44 Fed. Reg. at 69,275.

In moving to dismiss, defendant takes issue with plaintiffs' construction of the Reorganization Plan, arguing that subparagraph (G) and the subparagraph (C) exceptions are properly construed to mean that Customs retained discretion to compromise claims for antidumping duties. Mot. to Dismiss 35–36. According to defendant's argument, subparagraph (G) transfers only authority to compromise claims "with respect to matters for which Commerce was given authority by virtue of section 5(a)(1)(C), such as determining whether to issue an antidumping order and the rate of duties determined in an administrative review," *id*., and that "Customs retains substantial authority with respect to matters following the issuance of a final determination by Commerce and the issuance of liquidation instructions." *Id.* at 36. Defendant contends, further, that "[p]articularly with respect to the issues that SHA is most concerned about in this suit payment by sureties upon a bond Customs has broad discretion," relying on *Hartford Fire Insurance Co. v. United States*, 544 F.3d 1289, 1294 (Fed. Cir. 2008), and *United States v. Hanover Insurance Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996). Mot. to Dismiss 36.

Plaintiffs have the better argument. Subparagraph (G) of the Reorganization Plan transfers to Commerce all functions pursuant to Section 617, *i.e.*, all functions pertaining to the cancellation of claims, "with respect to the functions transferred by subparagraph (C)." Reorganization Plan, § 5(a)(1)(G), 44 Fed. Reg. at 69,275. The functions transferred by subparagraph (C) included the functions of determining what antidumping duties are to be assessed and collected and determining what "deposits, bonds, or other security" are appropriate to secure payment of antidumping duties. *Id.* § 5(a)(1)(C), 44 Fed. Reg. at 69,275. Under the exception in subparagraph (C), Customs is to assess and collect antidumping duties as directed by the Commerce Secretary and accept the security that the Commerce Secretary

deems appropriate. *Id.* The language of subparagraph (C) under which Customs is to "assess and collect" antidumping duties does not connote retention of authority to compromise claims for those duties. *Id.* Defendant's construction of the exceptions in subparagraph (C) is overly broad in presuming retention in Customs of a specific function, the compromising of claims for antidumping duties, that the plain language of the Reorganization Plan neither requires nor implies. The function of assessing and collecting antidumping duties are distinct from the function of compromising claims for those duties. An established canon of construction is that exceptions to general principles are to be construed narrowly. *See Comm'r v. Clark*, 489 U.S. 726, 739 (1989); 2A Norman J. Singer, Sutherland on Statutes and Statutory Construction § 47:11, at 331 (7th ed. 2007) ("Where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions."). Thus, the better construction of the Reorganization Plan is that Customs may not act on its own to compromise antidumping duties and may do so only with the direction or participation of the Secretary of Commerce. Defendant's reliance on *Hartford Fire Insurance Co.*, 544 F.3d at 1294, and *Hanover Insurance Co.*, 82 F.3d at 1054, is misplaced. Neither case holds that Customs, under the Reorganization Plan, retained authority to compromise claims for antidumping duties.

Although rejecting defendant's construction of the Reorganization Plan, the court still is unable to conclude that relief can be granted on the claim plaintiffs assert in Count Twelve, in which plaintiffs allege as follows:

> Based on the limited Customs data available to Plaintiffs, Customs has not publicly accounted for all AD duties assessed under the China NSR Orders during FY 2001 through FY 2008 as having been either collected or not collected by that agency. On information and belief, some if not all of the AD duties assessed under the China NSR Orders during FY 2001 through FY 2008 for which Customs has not accounted are assessed AD duties that Customs has unlawfully compromised in violation of 19 U.S.C. § 1617. On information and belief, at least some of such compromised AD duties were secured by new shipper bonds, and were compromised by Customs through a legal process that excluded the Plaintiffs and Class members that are intended third-party beneficiaries of such bonds.

Compl. ¶ 201. To the extent plaintiffs base their claim on their alleged status as intended third-party beneficiaries on the new shipper bonds, they lack standing because they do not qualify as intended third-party beneficiaries. *Sioux Honey I*, 34 CIT at __, 700 F. Supp. 2d at 1348.

To the extent that the claim can be construed to be based on something other than plaintiffs' purported beneficiary status, the claim still fails, as plaintiffs fail to allege facts according to which the injury they claim to have incurred resulted from the conduct to which they object, *i.e.*, the compromising of antidumping duties without the direction or participation of Commerce. In Count Eleven, the only relevant factual allegations in the complaint are that "Customs has not publicly accounted for" the assessed antidumping duties, and that some, if not all, of the unaccounted-for duties were "unlawfully compromised" by Customs. Compl. ¶ 201. The complaint adds that

> [a]s a result of Customs' unlawful compromise of AD duties . . . Customs is unable to collect such duties, and has directly injured Plaintiffs and Class members by depriving them of (1) the remedial benefits of the China NSR Orders intended by the AD law; [and] (2) their constitutionally protected property interest in assessed AD duties under the China NSR Orders as ADPs and Contingent ADPs under those orders.

Id. ¶ 203. Although the complaint does not so state explicitly, the court infers from Count Twelve, considered as a whole, that plaintiffs allege that the compromising was contrary to law because it occurred without Commerce's direction or participation. Other than the untenable contention that the duties were compromised by Customs through a process that was unlawful because it excluded plaintiffs and class members, whom plaintiffs erroneously identify as intended third-party beneficiaries of the bonds, nothing in Count Twelve enables the court to infer an additional reason why plaintiffs consider the alleged compromising unlawful.

Plaintiffs could be injured by the loss of remedial benefits of antidumping duty orders and CDSOA distributions only if duties were *not* collected that *would have been* collected *but for* the alleged unlawful conduct. But absent from Count Twelve is an allegation that any government official compromised antidumping duties that could have been, and should have been, collected to safeguard the public fisc. The allegation that "Customs has not publicly accounted for all AD duties assessed under the China NSR Orders during FY 2001 through FY 2008 as having been either collected or not collected by that agency,"

id. ¶ 201, does not suffice because it fails to allege "but for" causation. Although plaintiffs allege an injury in fact, the action complained of compromising of antidumping duties by the wrong government agency in itself cannot be the cause of the injury plaintiffs allege they incurred. The allegation that Customs is "unable" to collect certain antidumping duties "[a]s a result of Customs' unlawful compromise of AD duties," *id.* ¶ 203, is circular: Customs is unable to collect *any* duties once a claim for such duties is "compromised," whether Commerce authorized the compromising or not. The generalized allegations in Count Twelve, when assumed to be true, impermissibly leave to the court the task of speculating as to whether plaintiffs could qualify for some form of relief.[8] *See Bell Atl.*, 550 U.S. at 555. Count Twelve, therefore, must be dismissed according to USCIT Rule 12(b)(5).

G. Claims that Customs Wrote Off Uncollected Antidumping Duties (Count Thirteen)

In Count Thirteen, plaintiffs allege on information and belief that "Customs has written off as uncollectible, or intends to write off as uncollectible, uncollected AD duties assessed under the China NSR Orders," Compl. ¶ 207, and that in so doing, Customs has violated and will violate various statutes and regulations. *Id.* ¶¶ 208–210. As a threshold matter, the claim is defective in failing to allege that an agency action actually has occurred. A mere intention to act unlawfully to write off duties as uncollectible, absent extraordinary circumstances calling for emergency equitable relief (not alleged here), is not agency action ripe for judicial review. *See U.S. Ass'n of Imps. of Textiles & Apparel v. U.S. Dep't of Commerce*, 413 F. 3d 1344, 1349–50 (Fed. Cir. 2005).

Even if the court were to construe Count Thirteen to challenge an agency action that has occurred or is so imminent that judicial review may obtain, Count Thirteen would fail to state a valid claim in alleging that "Customs did not and will not meet the requirements and conditions of 31 U.S.C. § 3711(a)(1) with regard to any or all of the AD duties assessed but not collected under the China NSR Orders that Customs has written off, or intends to write off, as uncollectible." Compl. ¶ 208. The statutory provision on which plaintiffs rely provides in pertinent part that the head of an executive agency "shall try to collect a claim of the United States Government for money or property arising out of the activities of . . . the agency." 31 U.S.C. §

[8] It is unclear how the court, in response to the demand for relief, could "hold unlawful and *set aside* Customs' compromise of AD duties assessed under the China NSR Orders." Compl. ¶ 205 (emphasis added). At least some of the duties alleged to be unlawfully compromised would need to be collected from importers who are not parties to this action.

3711(a)(1) (2006). Plaintiffs cite no facts which, if presumed to be true, would allow the court to conclude that Customs has violated or is about to violate 31 U.S.C. § 3711(a)(1). The provision on which plaintiffs rely does not prohibit an agency from determining that a claim for duties is uncollectible. In alleging merely that Customs either has, or is about to, write off uncollected duties, plaintiffs have done nothing beyond identifying the statute and alleging that Customs, in some unspecified way, has violated the statute or is about to do so. Thus, were this claim ripe for review, it still would be dismissed as speculative. *See Bell Atl.*, 550 U.S. at 555.

Second, plaintiffs claim that "Customs did not and will not meet the requirements and conditions of 31 C.F.R. § 901.1(a) with regard to some or all AD duties that were assessed but not collected under the China NSR Orders, and which Customs has written off, or intends to write off, as uncollectible." Compl. ¶ 209. Plaintiffs rely on language in the Federal Claims Collection Standards, under which "[f]ederal agencies shall aggressively collect all debts . . . " arising out of their activities or referred to them for collection, and under which "[c]ollection activities shall be undertaken promptly with follow-up action taken as necessary." 31 C.F.R. § 901.1(a) (2009); *see* Compl. ¶ 209. Here also, plaintiffs fail to allege facts from which the court could conclude that Customs has violated, or is about to violate, § 901.1(a). The regulations cannot plausibly be construed to require the impossible collection of an uncollectible debt and essentially all that plaintiffs allege is that Customs is writing off debt as uncollectible or is about to do so.

Plaintiffs allege a violation of Section 631(a) of the Tariff Act of 1930, which directs the Treasury Secretary to "enter into contracts and incur obligations with one or more persons for collection services to recover indebtedness arising under the customs laws" and conditions the obligation with the words "but only after the Customs Service has exhausted all administrative efforts, including all claims against applicable surety bonds, to collect the indebtedness."[9] 19 U.S.C. § 1631(a) (2006). The only pertinent "fact" alleged in support of this claim is "[o]n information and belief, Customs did not and will not meet the requirements and conditions of 19 U.S.C. § 1631(a) with regard to some or all AD duties that were assessed but not collected

[9] The provision reads in full as follows:

> Notwithstanding any other provision of law, the Secretary, under such terms and conditions as the Secretary considers appropriate, shall enter into contracts and incur obligations with one or more persons for collection services to recover indebtedness arising under the customs laws and owed the United States Government, but only after the Customs Service has exhausted all administrative efforts, including all claims against applicable surety bonds, to collect the indebtedness.

19 U.S.C. § 1631(a) (2006).

under the China NSR Orders and that Customs has written off, or intends to write off, as uncollectible." Compl. ¶ 210. This vague allegation fails to identify what Customs did or did not do (or is about to do) in violation of 19 U.S.C. § 1631(a).

Finally, plaintiffs allege "[o]n information and belief" that "in writing off as uncollectible AD duties assessed under the China NSR Orders, Customs has failed to meet other statutory and regulatory obligations required of that agency before it may write off such AD duties." Compl. ¶ 211. This claim is devoid of any specific factual allegation and legal basis.

Due to the lack of ripeness, Count Thirteen must be dismissed under USCIT Rule 12(b)(1). Were the claims therein construed to contest a final government action, they still would offer insufficient factual allegations to state a claim upon which relief can be granted. *See Bell Atl.*, 550 U.S. at 555.

H. Claim that Customs Unlawfully Canceled, or Intends to Cancel, New Shipper Bonds or Charges Thereunder (Count Fourteen)

In Count Fourteen, plaintiffs direct their claim to the alleged failure of Customs to publish guidelines on the exercise of authority to cancel customs bonds and charges thereunder, as required by Section 623(c) of the Tariff Act of 1930, 19 U.S.C. § 1623(c) (2006), and the Freedom of Information Act, 5 U.S.C. § 552(a)(1)(C)-(D) (2006). Compl. ¶¶ 216–225. Plaintiffs state in Count Fourteen that the lack of such published guidelines renders unlawful a cancellation of a new shipper bond or a charge under such bond. *Id.* ¶ 219.

Because Count Fourteen relies upon the Administrative Procedure Act ("APA") for a cause of action, Compl. ¶ 222 (citing 5 U.S.C. § 706(2)(A)-(D)), the court first must construe Count Fourteen to ascertain the agency action being challenged. *See Motions Systems Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006). The court observes, first, that nothing in Count Fourteen indicates that plaintiffs are challenging a failure by Customs to issue guidelines.[10] Instead, the claim challenges as unlawful cancellations of bonds or charges effected in the absence of such guidelines. *See* Compl. ¶¶ 219–220, 222. The court's construction of the claim is consistent with the nature of the relief plaintiffs seek. Rather than relief directing Customs to issue

[10] Construing the claim as a challenge to the failure to issue guidelines would raise questions of standing, as plaintiffs do not claim to be principals or sureties on customs bonds and are not intended third-party beneficiaries on the customs bonds that are the subject of many of the claims in their case. *See* Compl. ¶¶ 6–8; *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 34 CIT __, __, 700 F. Supp. 2d 1330, 1348–49 (2010) ("*Sioux Honey I* ").

guidelines, plaintiffs request that the court "hold unlawful and set aside Customs' cancellation of any new shipper bond, or any charge to such bond" and "compel and order Customs to cease and refrain from unlawfully canceling any new shipper bond, or any charge to such bond." *Id.* ¶ 225.

Despite basing their claim on unlawful cancellation of bonds and charges, plaintiffs, paradoxically, fail to allege any specific instance in which Customs actually *has* canceled a new shipper bond or charge against a new shipper bond. Plaintiffs only state "[o]n information and belief" that "Customs has cancelled, *or intends to cancel*, one or more new shipper bonds, or charges to such bonds, that secure the payment of assessed AD duties on imports subject to the China NSR Orders." *Id.* ¶ 221 (emphasis added). Similarly, plaintiffs contend that "Customs' actual *or intended* cancellation of any new shipper bond, or any charge to such bond, violates *or would violate* Section 1623(c) and Section 552(a)(1)(C) and (D), and constitutes, or *would constitute*, final agency action . . . ." *Id.* ¶ 222 (emphasis added). Thus, if Customs has not effected one of the cancellations to which plaintiffs refer a possibility left open by their pleading the agency action on which plaintiffs base their claim has yet to occur. Moreover, there is no allegation in Count Fourteen of imminent irreparable harm that will result to plaintiffs from an agency action that is about to be taken. Upon assuming plaintiffs' factual allegations to be true, the court cannot conclude that the stated claim is ripe for judicial review. *See U.S. Ass'n of Imps.*, 413 F.3d at 1349–50. Therefore, the claim in Count Fourteen must be dismissed according to USCIT Rule 12(b)(1).

Even were the court able to construe the claim in Count Fourteen to allege irreparable harm from an imminent agency action, it still would be required to dismiss this claim under USCIT Rule 12(b)(5). Plaintiffs are incorrect in concluding that 19 U.S.C. § 1623(c) and the Freedom of Information Act would invalidate a cancellation of a new shipper bond or a charge under such bond for lack of the published guidelines. *See* Compl. ¶ 219.

Section 623(c) of the Tariff Act of 1930 authorizes the Treasury Secretary to cancel a bond or a charge against a bond, in the event of breach of a bond condition, "upon the payment of such lesser amount or penalty or upon such other terms and conditions as he may deem sufficient." 19 U.S.C. § 1623(c). The statute further provides that "[i]n order to assure uniform, reasonable, and equitable decisions, the Secretary of the Treasury shall publish guidelines establishing standards for setting the terms and conditions for cancellation of bonds or

charges thereunder." *Id.* Plaintiffs allege that Customs has failed to publish the guidelines that § 1623(c) expressly requires. Compl. ¶ 217.

The provision requiring Customs to publish guidelines for cancellation of bonds or charges was added to Section 623(c) in 1988 by the Omnibus Trade and Competitiveness Act. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1904, 102 Stat. 1107, 1313 (1988). Nothing in the amending statute indicates that Congress intended to condition on the issuance of the required guidelines the exercise of the long-standing authority to cancel bonds or charges. Nor is there an indication of such an intent in the legislative history of the 1988 amendment. *See id.* ; H.R. Rep. No. 100–576 (Conf. Rep.), *as reprinted in* 1988 U.S.C.C.A.N. 1547. The court concludes that plaintiffs have based their claim on an invalid construction of Section 623(c).

In Count Fourteen, plaintiffs claim that the cancellations of bonds and charges against bonds were unlawful because Customs failed to satisfy the requirement in the Freedom of Information Act that an agency publish in the Federal Register, for the guidance of the public, its rules of procedure and substantive rules of general applicability.[11] Compl. ¶ 218. Plaintiffs impliedly allege that Customs has adopted such procedures. *Id.* ("Customs has failed to meet these requirements for the procedures it has adopted for exercising its authority to cancel customs bonds under Section 1623(c)."). Here also, the assumed existence of such unpublished procedures is not a basis on which any bond or charge cancellations could be held to be invalid. Although the Freedom of Information Act, 5 U.S.C. § 552(a)(1)(C) and (D), requires an agency to publish its rules of procedure and its generally-applicable substantive rules and statements of general policy, nothing in the Freedom of Information Act states or suggests the conclusion plaintiffs would have the court draw: that bond or charge cancellations grounded in the statutory authority of 19 U.S.C. § 1623 are invalid due to the agency's failure to publish guidelines.

Therefore, the court concludes that plaintiffs' claim in Count Fourteen must be dismissed pursuant to USCIT Rule 12(b)(1) for lack of ripeness. *See U.S. Ass'n of Imps.*, 413 F.3d at 1349–50. And, in the alternative, even were the court able to construe the claim in Count Fourteen to allege irreparable harm from an imminent agency action,

[11] Plaintiffs also allude in Count Fourteen to a claim that Customs, by cancelling new shipper bonds or charges thereunder that pertain to antidumping duties, has acted contrary to law because, according to plaintiffs, antidumping duties "can only be compromised by Commerce under 19 U.S.C. § 1617." Compl. ¶ 220. This reference in Count Fourteen reiterates a claim made in Count Twelve, which is dismissed for failure to state a claim upon which relief can be granted, as discussed previously in this Opinion.

it still would be required to dismiss this claim under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted.

I. Claim that Customs Failed to Provide Prosecution Notices (Count Fifteen)

Plaintiffs' claim in Count Fifteen involves alleged failures by Customs to provide notices to the Department of Justice for collection of unsatisfied demands on sureties. Compl. ¶¶ 226–235. Plaintiffs base their claim on a provision of the Customs regulations, 19 C.F.R. § 113.52,[12] which requires Customs, in the event a customs bond "is unsatisfied upon the expiration of 90 days after liability has accrued under the bond," to report the matter "to the Department of Justice for prosecution unless measures have been taken to file an application for relief or protest . . . or to satisfactorily settle the matter." 19 C.F.R. § 113.52 (2009); *see* Compl. ¶¶ 230–231, 233–235. As relief, plaintiffs seek, *inter alia*, an order compelling Customs to provide the Justice Department with overdue notices and to provide timely notices henceforth. Compl. ¶ 235.

Upon crediting all facts alleged in Count Fifteen, the court is unable to conclude that plaintiffs have established beyond the speculative level their right to relief on their claim. Plaintiffs allege "[o]n information and belief" that "Customs has failed to provide Justice with Section 11[3].52 Notices for its claims under one or more new shipper bonds that secure the payment of assessed AD duties on imports subject to one of the China NSR Orders." *Id.* ¶ 233. They also allege "[o]n information and belief" that "Customs has issued one or more demands to the Surety Defendants for performance under new shipper bonds that are final as to those defendants." *Id.* ¶ 228. Count Fifteen adds that Hartford[13] (certain of the dismissed defendants in *Sioux Honey I*, 34 CIT at __, 700 F. Supp. 2d at 1352) has admitted that demands for performance under customs bonds are final as to it. Compl. ¶ 228. Stating that the Justice Department is unable to bring a lawsuit for collection of duties from a surety absent the notice from Customs, *id.* ¶ 231, plaintiffs allege that "[b]ased on Plaintiffs' review of this Court's docket, Justice, to date, has not filed any collections lawsuit against any Surety Defendant for performance under a new shipper bond." *Id.* ¶ 232.

[12] The complaint does not cite this provision but erroneously cites to 19 C.F.R. § 114.52, a nonexistent provision. Compl. ¶¶ 230–231, 233–235.

[13] The "Hartford defendants" include Hartford Fire Insurance Company, Hartford Accident and Indemnity Company, Hartford Casualty Insurance Company, Hartford Insurance Company of Illinois, Hartford Insurance Company of the Midwest, and Hartford Insurance Company of the Southeast. The Hartford Defs.' Mot. to Dismiss the Compl. 1 n.1 ("Hartford Mot."); *see Sioux Honey I*, 34 CIT at __, 700 F. Supp. 2d at 1352.

The regulation on which plaintiffs rely does not impose a rigid requirement that Customs refer to the Justice Department for collection any demand on a surety for payment of duties that is unsatisfied upon the expiration of 90 days after liability has accrued under the bond. Customs is directed by the regulation to make the referral "unless measures have been taken . . . to satisfactorily settle the matter." 19 C.F.R. § 113.52. Plaintiffs' claim does not address the measure of discretion that the regulation permits government officials with respect to satisfactory settlement. There is no allegation in Count Fifteen of any specific instance in which there has been neither a referral by Customs nor measures taken to "satisfactorily" settle the liability.

And, although referring to the statute of limitations for collection actions, Compl. ¶ 231 (citing the six-year general statute of limitations in 28 U.S.C. § 2415(a) (2006)), Count Fifteen does not allege, either in general or with respect to any specific demand on a surety, that the Justice Department is now unable to file a collection action because Customs neglected to make a timely referral of a collectible claim against a surety on a new shipper bond. *See id.* ¶¶ 226–235. Moreover, any such allegation would appear to be precluded by the six-year statute of limitations applying to an action by the United States to collect on an unsatisfied demand on a surety. Under 28 U.S.C. § 2415(a), any failure of Customs to make a referral for prosecution that occurred within the two years prior to the initiation of this action (as required by the statute of limitations in 28 U.S.C. § 2636(i) (2006) for actions brought under 28 U.S.C. § 1581(i)) could not yet have resulted in a time-barred collection action.

The alleged fact that the Justice Department has not filed collection lawsuits against sureties on new shipper bonds, if presumed true, does not establish that Customs has acted contrary to 19 C.F.R. § 113.52. For example, it is conceivable that, subsequent to referral, circumstances caused Justice Department officials to decide not to initiate a collection action. Count Fifteen does not claim that the Justice Department impermissibly failed to initiate collection lawsuits; moreover, any such claim, in attempting to challenge the exercise of enforcement discretion, would be beyond judicial review. *See Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

Because the factual allegations offered to support the claim in Count Fifteen do not suffice to allow the court to conclude that the prospect of relief is anything but a matter of speculation, Count Fifteen must be dismissed as required by USCIT Rule 12(b)(5) and *Bell Atlantic*, 550 U.S. at 555.

J. Motion for Jurisdictional Discovery, Other Pending Motions, and Entry of Judgment

Plaintiffs filed on March 18, 2010 a motion, opposed by defendant, to take discovery in the form of interrogatories seeking information in support of subject matter jurisdiction for their claims against the United States. Pls.' Mot. for Jurisdictional Discovery. On April 13, 2010, plaintiffs moved for oral argument on this motion, Pls.' Mot. for Oral Argument Regarding Pls.' Mot. for Jurisdictional Discovery, and on April 14, 2010 moved for oral argument on defendant's motion to dismiss. Pls.' Mot. for Oral Argument Regarding the Gov't's Mot. to Dismiss. On April 29, 2010, plaintiffs moved for leave to file a reply to defendant's response to plaintiffs' motion for jurisdictional discovery. Pls.' Mot. for Leave to File a Reply to the Gov't's Resp. to Pls.' Mot. for Jurisdictional Discovery & Mot. for Oral Argument Concerning Request for Jurisdictional Discovery. The court will grant the motion for leave to file the reply for purposes of ruling on the motion to allow discovery and, because the court is denying the motion to allow discovery and granting defendant's motion to dismiss, will deny as moot plaintiffs' motions for oral arguments.

In their motion to take discovery and thereby obtain answers to their interrogatories, plaintiffs maintain that their allegations "are more than sufficient to establish this Court's jurisdiction over Plaintiffs' claims brought under the Administrative Procedure[ ] Act," Pls.' Mot. for Jurisdictional Discovery 1, but add that "to the extent the Court determines that more detailed allegations and/or supporting evidence is required, Plaintiffs move this Court for leave to take discovery relating to subject matter jurisdiction." *Id.* at 2. Plaintiffs indicate that their motion to take discovery is, at least in part, in response to defendant's argument that plaintiffs may not obtain judicial review because they fail to identify specific instances in which the government has acted, or failed to act, contrary to law. *Id.* ("The crux of the Government's argument is that in order to establish subject matter jurisdiction, Plaintiffs must allege, on an entry-by-entry and/or bond-by-bond basis, each specific instance in which the Government has acted or failed to act in the manner alleged in the Complaint."). Plaintiffs argue that "the information necessary to identify such instances is in the Government's sole control." *Id.* The court concludes, after considering plaintiffs' motion for discovery in the individual contexts of the nine remaining counts in this litigation, that the motion should be denied.

The court observes, first, that plaintiffs include interrogatories directed to Counts Eight, Nine, Twelve, Thirteen, and Fourteen even though the contemplated discovery could not benefit plaintiffs with

respect to the claims in those counts.[14] *See* Pls.' Interrogatories to the Gov't Relating to Jurisdiction ("Pls.' Interrogatories"). The claim in Count Seven, that Customs must allow them to participate in protest proceedings as a matter of due process, fails for a reason lack of the property interests on which plaintiffs base their due process claim outside the scope of the intended discovery. For Counts Eight and Nine, plaintiffs, due to their own admissions, cannot demonstrate an injury in fact and, therefore, lack standing to maintain the claims therein, either on their own behalf or on behalf of the members of their proposed class. For Count Twelve, plaintiffs' interrogatories seek information on individual entries "for which Customs has wholly or partially cancelled or compromised under 19 U.S.C. § 1617 that Entry's Amounts Assessed and/or Post-Liquidation Interest," Pls.' Interrogatories 7, including the dates of each action, the amounts compromised, the amounts paid in lieu of the full amounts assessed, and whether the collected amounts were distributed under CDSOA. *Id.* at 7–8. The claim in Count Twelve fails, however, for two reasons that would not be addressed by the information sought in the interrogatories. Those two reasons are that plaintiffs are not intended third-party beneficiaries on the new shipper bonds and that the action plaintiffs challenge the compromising of claims without the direction or participation of the Commerce Department has no causal relationship to the injury they allege. Count Thirteen fails for lack of ripeness, but even were discoverable facts to overcome this deficiency, plaintiffs could qualify for no relief because they erroneously conclude that the writing off of antidumping duties is contrary to various statutes and regulations that do not place a blanket prohibition on the writing off of obligations owed the United States. Count Fourteen also fails for lack of ripeness, and even were discoverable facts to allow a ripe claim that Customs has canceled a new shipper bond or charge, that claim still would be invalid because plaintiffs err in concluding that the absence of published guidelines by Customs would invalidate such a cancellation. In summary, the discovery plaintiffs want to conduct will be of no benefit with respect to the claims in Counts Seven, Eight, Nine, Twelve, Thirteen, and Fourteen.

The court's dismissals of the remaining three counts in the complaint, Counts Ten, Eleven, and Fifteen, result in part from plaintiffs' failures to make specific factual allegations of unlawful government actions. As to each, the court concludes that plaintiffs' motion to conduct jurisdictional discovery should not be granted. Taken together, these three counts pursue a theory that CDSOA distributions

[14] Plaintiffs do not address directly in their interrogatories the claim in Count Seven. *See* Pls.' Interrogatories to the Gov't Relating to Jurisdiction ("Pls.' Interrogatories").

received by plaintiffs would have been greater but for either the failure by Customs to distribute collected duties or the distribution by Customs of duties it should not have distributed (Count Ten), the failure of Customs to make one or more demands on a surety or sureties for antidumping duties secured by a new shipper's bond (Count Eleven), and the failure of Customs to report to the Department of Justice instances in which a surety's liability under a customs bond is unsatisfied 90 days after liability has accrued, "unless measures have been taken to file an application for relief or protest . . . or to satisfactorily settle the matter," 19 C.F.R. § 113.52 (Count Fifteen).

In Count Ten, plaintiffs fail to state that any action or inaction definitely occurred and allege only that Customs either failed to distribute collected duties it should have distributed or distributed duties it should not have distributed. *See* Compl. ¶¶ 184–190. With respect to Count Ten, plaintiffs seek detailed, entry-specific information from Customs on the amounts of antidumping duties assessed, collected, and distributed on all entries of merchandise subject to one of the Four Orders that qualify for distribution under CDSOA. Pls.' Interrogatories 7–8. The court declines to allow this broad, and burdensome, discovery in support of Count Ten, which states no definite claim, alleges no specific facts, and requires a degree of speculation that the Supreme Court considered unacceptable in *Bell Atlantic*, 550 U.S. at 555.

Plaintiffs seek to support their claim in Count Eleven by obtaining entry-specific information concerning various bonds and the issuing sureties, including information on whether, when, and in what amounts demands were made on the bonds and on the sureties' responses to the demands. Pls.' Interrogatories 8–9. Count Eleven, however, alleges no specific facts and makes only the bare allegation that Customs, "on one or more occasions, has failed to issue a demand that a Surety Defendant perform under one or more new shipper bonds." Compl. ¶ 193. The claim lacks even an allegation that the demand or demands that did not occur are now untimely. Plaintiffs have failed to allege facts that would suffice even as a threshold to justify the extensive jurisdictional discovery they propose.

In support of Count Fifteen, plaintiffs seek detailed information on every bonded entry subject to a new shipper review under one of the Four Orders for which payment of duty was ever delinquent, including date of issuance of any notice under 19 C.F.R. § 113.52, information on protests related to the entry that were filed by the principal or surety, and information on settlement measures. Pls.' Interrogatories 10. The scope of information sought for Count Fifteen is overly broad and unjustified by the claim stated in that count, which is deficient in

failing to recognize the degree of discretion imparted by 19 C.F.R. § 113.52 and the effect of the six-year statute of limitations applying to collection actions.

In summary, the claims in Counts Ten, Eleven, and Fifteen rest on only vague factual allegations which, if assumed to be true, do not establish a right to relief beyond the speculative level. They must be dismissed now for failure to satisfy the pleading standard the Supreme Court set forth in *Bell Atlantic*, 550 U.S. at 555. The high degree of speculation called for by these claims makes questionable plaintiffs' implied premise that burdensome discovery should be allowed because it might lead to claims upon which this litigation could proceed.

Certain publicly available information relied on by plaintiffs for their discovery motion provides an additional reason why the motion to allow discovery should not be granted. This information indicates that facts are not likely to be uncovered that will overcome the deficiencies in Counts Ten, Eleven, and Fifteen. Specifically, in opposing the government's motion to dismiss and in seeking permission to conduct jurisdictional discovery, plaintiffs submit various materials addressing under-collection of antidumping duties under the Four Orders, including two declarations of one of their attorneys, Mr. Michael J. Coursey. Pls.' Opp'n to Defs.' Mots. to Dismiss, Attach. A; Pls.' Mot. for Jurisdictional Discovery, Attach. B. Plaintiffs summarize these materials generally as signifying that "[a]ccording to its own documents, the Government failed to collect almost $900 million in AD duties assessed under the Four Orders during the past seven years, and in fact collected less than 7 percent of the total AD duties assessed during this period." Pls.' Reply to the Gov't's Resp. to Pls.' Mot. for Jurisdictional Discovery & Mot. for Oral Argument Concerning Request for Jurisdictional Discovery 1. Both of the declarations of Mr. Coursey cite, and rely in part on, a 2008 report of the U.S. Government Accountability Office ("GAO"). *See* Pls.' Opp'n to Defs.' Mots. to Dismiss, Attach. A; Pls.' Mot. for Jurisdictional Discovery, Attach. B; U.S. General Accounting Office, Report to Congressional Requesters, Antidumping & Countervailing Duties: Congress & Agencies Should Take Additional Steps to Reduce Substantial Shortfalls in Duty Collection, GAO-08–391, at 20–22 (Mar. 2008), http://www.gao.gov/new.items/d08391.pdf (last visited Aug. 25, 2010) ("2008 GAO Report"). The GAO concluded that more than $613 million in assessed antidumping duties went uncollected from Fiscal Years 2001 through 2007, that 84% of that amount resulted from uncollected antidumping duties on entries of Chinese-origin goods subject to one of the Four Orders, and that an estimated 40% of that

amount involved entries of merchandise from exporters who had new shipper status. 2008 GAO Report 13–14. The report found that more than one-third of the uncollected duties were owed by only four importers and that 63% of the uncollected duties were owed by only 20 importers. *Id.* at 16.

The GAO identified four key factors for the uncollected antidumping duties: (1) the retrospective component of the antidumping and countervailing duty system, which creates the risk of uncollected duties because assessed duties can exceed cash deposits and bond amounts, *id.* at 20–24; (2) new shipper reviews, which previously permitted bonding instead of cash deposits and also pose a risk by allowing a new shipper to obtain a low deposit rate going forward that is based on a few unrepresentative transactions or even a single transaction, *id.* at 24–26; (3) the standard bond formula Customs uses, which according to the GAO "provides little protection of AD/CV duty revenue because it sets bond amounts at a low level," *id.* at 20; and (4) the lack of background or financial checks on importers, *id.* at 28–29. The individual amounts owed by the 20 importers who together owed, as of September 2007, 63% of the total of more than $613 million in uncollected antidumping duties ranged from a high of $122 million to a low of $7 million. *Id.* at 15–16. The insufficiency of the bonding was revealed as a huge factor in the uncollectibility of the duties, as the reported bonding covered only a minuscule percentage (less than one percent) of the duties owed by those 20 importers. *See id*. at 16. Of the 20 importers, 11 importers had a bond of $50,000 (the minimum allowed by Customs for any continuous bond, *see Monetary Guidelines for Setting Bond Amounts*, Directive 99–3510–004 (July 23, 1991), http://www.cbp.gov/linkhandler/cgov/trade/legal/directives/3510–004.ctt/3510004.txt (last visited Aug. 25, 2010) ("*Bond Directive*")), two had bonds of $60,000, and the highest bond of the group, $700,000, belonged to the importer who owed the most antidumping duties, $122 million. 2008 GAO Report 16. A 2003 report of the U.S. Treasury Department's Inspector General on CDSOA implementation, cited to and relied upon by plaintiffs, also identified bond sufficiency as a problem. Pls.' Opp'n to Defs.' Mots. to Dismiss, Attach. A, Ex. 1, at 5. A July 2007 U.S. Treasury Department report, "Duty Collection Problems FY 20032006," upon which plaintiffs also rely, is definitive on the cause of under-collection of retrospectively assessed duties:

> Of the $939.3 million in antidumping and countervailing duties that were retrospectively assessed in fiscal years 2003–2006, 55

> percent ($512.9 million) remains uncollected. *The reason CBP is less successful collecting duties billed after entry is that they are not fully secured by bonds or cash deposits.*

Id., Attach. A, Ex. 3, at 3 (emphasis added). The GAO also concluded that the extent of uncollected AD/CV duties is affected by unresolved legal protests, which account for about 43% of the value of uncollected AD/CV duties. 2008 GAO Report 3, 17.

The GAO noted that according to the Office of Chief Counsel of Customs, which is responsible for referring unsatisfied duty claims to the Department of Justice for collection, nearly $290 million of the $350 million of unpaid antidumping and countervailing duties that are in the collection process have slim prospects of collection, *id.* at 3, 13, "because many of the importers involved have disappeared, have no assets, or have declared bankruptcy," *id.* at 4. Customs told the GAO that prospects are particularly unfavorable for collecting supplemental duties from foreign importers, which unpaid duties present high costs of collection that may exceed any amount actually collected. *Id.* at 29. The report also states that "[t]he Office of Chief Counsel reports that it is currently working with Justice to collect over $80 million in outstanding AD/CV duties from two sureties that are undergoing insolvency proceedings." *Id.* at 18.

The GAO identified deemed liquidations that occurred from October 2004 through June 2007 at a frequency of approximately one percent on 3.1 million entries subject to antidumping duties. *Id.* at 33. The GAO found that "[t]he potential revenue lost or gained on entries deemed liquidated appears minimal," that the vast majority of the total of 37,000 deemed liquidations during that period appeared to cause no gain or loss of revenue, that 507 of them cost the government $106,000 in lost revenue, and that 171 of them should have resulted in approximately $1.5 million in refunds to importers. *Id.* at 34.

In summary, the outcome of the discovery plaintiffs seek to conduct could not cure the defects in the claims in Counts Seven, Eight, Nine, Twelve, Thirteen, and Fourteen of the complaint. It is unlikely to cure the defects in the claims in Counts Ten, Eleven, and Fifteen, for which any possible benefit would not justify the burdensome discovery plaintiffs propose. For these reasons, the court concludes that the discovery motion should be denied.

Having concluded that all counts in the complaint must be dismissed, the court further concludes that judgment dismissing the action should be entered at this time. Plaintiffs have given no indication of an intention to amend their complaint, even though they have had ample time to do so; it has been nearly one year since the

United States filed its motion to dismiss on September 4, 2009. *See* Mot. to Dismiss. A court is not required to provide, sua sponte, the opportunity to amend a complaint, particularly in the absence of any intention by a plaintiff to do so. *See Demings v. Nationwide Life Ins. Co.*, 593 F.3d 486, 492 (2010) (6th Cir. 2010) (stating that "it is not incumbent upon a district court to craft a litigant's complaint, especially when it is dealing with sophisticated parties" and citing *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1042 (6th Cir. 1991) ("[A] district court does not abuse its discretion in failing to grant a party leave to amend where such leave is not sought.")); *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) ("A district court is not required to grant a plaintiff leave to amend his complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court."); *Royal Business Group, Inc. v. Realist, Inc.*, 933 F.2d 1056, 1066 (1st Cir. 1991) (declining plaintiffs' request to amend the complaint and explaining that before the district court, "plaintiffs had the option of filing an amended complaint at any time during the eleven-month period that the motion to dismiss was pending but chose not to exercise that option" (citations omitted)).

Because plaintiffs have not chosen to amend their complaint and instead propose to conduct discovery in the event the court finds insufficient the claims in the complaint as drafted, the court need not consider the question of whether an amended complaint would be futile. Even so, there is reason to conclude that the contemplated discovery would not lead to information supporting claims upon which relief could be granted. The court can appreciate that under-collection of duties on entries subject to any of the Four Orders has reduced substantially the antidumping duties available for distribution to plaintiffs under the CDSOA. Nevertheless, the apparent causes of the under-collection, according to findings by the GAO and other sources upon which plaintiffs rely in seeking discovery, are not those upon which plaintiffs base the theory upon which they are suing the government. The causes of the under-collection as found by the GAO and others *i.e.*, missing or insolvent importers of record, grossly insufficient bonding (including bonding in new shipper reviews), the potential for low cash deposit rates resulting from new shipper reviews conducted on a small number of transactions, and some duty collection actions delayed by protests would not be remediable through judicial review on any theory on which plaintiffs could bring an action under the APA and 28 U.S.C. § 1581(i).

IV. Conclusion

For the reasons stated above, all claims brought against the United States in Counts Seven through Fifteen of the complaint must be dismissed. Because the discovery plaintiffs seek would produce no benefit that would justify the broad scope, and potential burden, of that discovery, plaintiffs' discovery motion will be denied. Judgment will be entered dismissing this action.

Dated: August 27, 2010
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU JUDGE

Slip Op. 10–97

MITTAL STEEL POINT LISAS LIMITED, Plaintiff, v. UNITED STATES, Defendant.

Thomas J. Aquilino, Jr., Senior Judge
Court No. 02–00756

The court having entered a judgment of dismissal of this action pursuant to slip opinion 05–37, 29 CIT 329, 366 F.Supp.2d 1300 (2005); and the plaintiff having prosecuted an appeal therefrom; and the U.S. Court of Appeals for the Federal Circuit ("CAFC") having decided *sub nom. Caribbean Ispat Ltd. v. United States*, 450 F.3d 1336 (2006), to vacate that judgment of dismissal and remand this matter; and this court in slip opinion 06–151, 30 CIT 1519 (2006), having read the mandate of the CAFC to require remand to the U.S. International Trade Commission ("ITC") to

> "make a specific causation determination and in that connection . . . directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago's] imports without any beneficial effect on domestic producers",

quoting 450 F.3d at 1341, quoting *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1375 (Fed.Cir. 2006); and this court having entered an order of remand *in haec verba* ; and the ITC in compliance with that order having determined that an industry in the United States is not materially injured or threatened with material injury by reason of imports of certain wire rod from Trinidad and Tobago that are sold in the United States at less than fair value; and this court having affirmed that determination *sub nom*. *Mittal Steel Point Lisas Ltd. v. United States*, 31 CIT 1041, 495 F.Supp.2d 1374

(2007), and entered an amended final judgment of affirmance; and the intervenor-defendants having appealed therefrom and induced the CAFC to opine, among other things, *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 877 (Fed.Cir. 2008), that it does

> not regard the decision in *Bratsk* as requiring the Commission to presume that producers of non-subject goods would have replaced the subject goods if the subject goods had been removed from the market. Although we stated there, and reaffirm here, that the Commission has the responsibility to consider the causal relation between the subject imports and the injury to the domestic industry, that responsibility does not translate into a presumption of replacement without benefit to the domestic industry[;]

and the CAFC having determined to vacate this court's amended final judgment, notwithstanding the ITC's "scrupulous attention to the terms of this court's remand instructions", 542 F.3d at 879, and remand the matter yet again "for further consideration of the material injury issue in light of [it]s opinion" and also "for further proceedings with respect to the threat of material injury", *id.*; and this court pursuant to the mandate of the CAFC having in slip opinion 10–32, 34 CIT ___ (March 29, 2010), remanded to the ITC to attempt to comply with the CAFC's reasoning, as set forth in its foregoing, more recent opinion, and to report to this court any results of this mandated remand; and the defendant in compliance with the court's latest order of remand having on June 25, 2010 filed the Views of the Commission now to the effect that

> an industry in the United States is materially injured by reason of imports of wire rod from Trinidad andTobago that are sold in the United States at less than fair value [;]

and all parties having been afforded an opportunity to comment on said Views; and no party having interposed an objection thereto; Now therefore, after due deliberation, it is

ORDERED, ADJUDGED and DECREED that the view of certain members of the ITC filed herein on June 25, 2010 that an industry in the United States is materially injured by reason of imports of wire rod from Trinidad and Tobago that are sold in the United States at less than fair value be, it hereby is, affirmed; and it is further

ORDERED, ADJUDGED and DECREED that this action again be, and it hereby is, finally dismissed.

Dated: August 30, 2010

/s/ Thomas J. Aquilino, Jr.
SENIOR JUDGE

Slip Op. 10–98

HORIZON LINES, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 05–00435

[After trial, expenses incurred by plaintiff for ship's lay-up found not to be dutiable "expenses of repairs" under 19 U.S.C. § 1466(a). Upon appropriate submission, judgment in Customs valuation action will be entered for plaintiff. Defendant's motion in limine is denied. Plaintiff's trial exhibits 2, 3, 6, 11, and 21 are admitted as evidence.]

Dated: August 31, 2010

Williams Mullen (*Evelyn M. Suarez*, *Dean A. Barclay*, *Julia F. Thompson*, and *George H. Bowles*); *Horizon Lines, LLC* (*Robert Zuckerman*), of counsel, for the plaintiff.

Tony West, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Edward F. Kenny* and *Jason M. Kenner*); *Michael Heydrich*, Office of the Assistant Chief Counsel, U.S. Customs and Border Protection, of counsel, for the defendant.

OPINION

Restani, Chief Judge:

Introduction

Plaintiff Horizon Lines, LLC ("Horizon") challenges U.S. Customs and Border Protection's ("Customs") partial denial of a protest against certain duties required for repairs made to a vessel ("the Crusader") under 19 U.S.C. § 1466. Defendant United States ("the Government") moved for summary judgment, and its motion was granted in part and denied in part. *Horizon Lines, LLC v. United States*, 31 CIT 1853 (2007) ("*Horizon I* "). Subsequently, the parties filed a series of stipulations that resolved the remaining issues of material fact, Joint Stipulation of Facts, Apr. 17, 2008; Stipulations, Sept. 15, 2008, and the court entered partial judgment for Horizon, *Horizon Lines, LLC v. United States*, Slip Op. 08–109, 2008 Ct. Intl. Trade LEXIS 108 (CIT Oct. 15, 2008). Horizon appealed and the United States Court of Appeals for the Federal Circuit reversed the aspect of the court's grant of summary judgment that held the repairs caused the lay-up and remanded. *Horizon Lines, LLC v. United States*, 341 F. App'x 629 (Fed. Cir. 2009) ("*Horizon II* ").

During trial, Horizon introduced evidence supporting a new business explanation for the Crusader's lay-up. The Government objected on the ground that such evidence was "a wholesale change and there's no ability for the [G]overnment to go in and restart this whole discovery process . . . ." Trial Tr. 10:17 20, Feb. 22, 2010. At that time, the court allowed Horizon's witnesses to testify regarding its new position, but invited the Government to renew its objection at a later date. *Id.* at 18:16 19:13. In response to the standing objection, the court held admission of Horizon's trial exhibits 2, 3, 6, 11, and 21 in abeyance pending the outcome of the Government's future motion. The Government now renews its objection in the form of a motion in limine. For the reasons stated below, the court denies the Government's motion and admits trial exhibits 2, 3, 6, 11, and 21 into evidence.

Background

The facts of this case have been well documented in previous opinions. *See Horizon II*, 341 F. App'x at 629 31; *Horizon I*, 31 CIT at 1853 55. The court presumes familiarity with these decisions, but briefly summarizes the relevant undisputed facts.

The Crusader, a U.S.-flag vessel operated by Horizon primarily for trade in the Caribbean, was required to undergo American Bureau of Shipping ("ABS") inspections by September 25, 2001, or cease operating commercially after that date. *See* Uncontested Facts ¶¶ 3 4, *available at* Pretrial Order Joint Schedule C; Pl.'s Ex. 84, at J67; Pl.'s Ex. 85, at J120; Trial Tr. 253:10 13, Feb. 23, 2010. Under the ABS guidelines, however, this deadline would be suspended if the vessel were placed in lay-up. *Horizon I*, 31 CIT at 1854 On September 7, 2001, the Crusader went into lay-up at Karimun Sembawang Shipyard ("KSS") in Indonesia. *Id.* The Crusader remained in lay-up at KSS until November 28, 2001, when it was towed to Jurong Shipyard ("Jurong") in Singapore. *Id.* While at Jurong, the Crusader was placed in dry-dock and underwent inspections and certain repairs, satisfying the ABS requirements. Def.'s Ex. S, at 3 4.

On January 7, 2002, the Crusader departed Singapore for the United States and arrived on January 25, 2002. Uncontested Facts ¶ 15; Pl.'s Ex. 77, at J57. At that time, Horizon was required to notify Customs of all foreign repairs conducted on the Crusader because such repairs were dutiable at a rate of 50 percent ad valorem pursuant to 19 U.S.C. § 1466. *See* 19 U.S.C. § 1466(a). In August 2002, Customs concluded that Horizon owed $ 810,295.99 in duties, which included the cost of the lay-up at KSS, and liquidated the repair entry. Pl.'s Ex. 86, at J78 80. Horizon protested this determination in

November 2002, insisting that the Crusader's lay-up was not a cost of repair. Pl.'s Ex. 80, at J82 92. In December 2004, Customs granted the protest in part and denied it in part, reducing the duties to $534,636.14. Pl.'s Ex. 81, at J107; Def.'s Ex. Q, at 3.

In July 2005, Horizon commenced this action, challenging Custom's partial denial of the protest and seeking a refund of all excess duties paid. Horizon maintained that its decision to lay-up the Crusader was based, in the main, on a seasonal decline in the Puerto Rico trade and, in any case, was entirely separate from the later repairs conducted at Jurong. *See Horizon II*, F. App'x at 631. The Government moved for summary judgment, and the court granted the motion in part and denied it in part, holding that the lay-up at KSS was a cost of repair because Horizon failed to present evidence that the KSS lay-up was not caused, at least in part, by the dry-dock at the nearby Jurong Shipyard. *Horizon I*, 31 CIT at 1853, 1857, 1875 76. The Federal Circuit, however, reversed this decision, reasoning that Horizon's evidence suggested that the Crusader was laid-up at KSS because of a variety of reasons, including seasonal considerations and the company's contractual obligation to transport empty containers to Hong Kong. *Horizon II*, 341 F. App'x at 633. The Federal Circuit, therefore, remanded this case for "further proceedings." *Id.* at 634.

In February 2010, the court held a trial *de novo*. During the time between its successful appeal before the Federal Circuit and the commencement of the trial *de novo* before the Court of International Trade, Horizon uncovered evidence indicating that its prior position that the Crusader was laid-up because of a seasonal decline in the Caribbean trade was incorrect. Pl.'s Opp'n Def.'s Renewed Mot. *In Limine* 11 12. Rather, new evidence suggested that the Crusader was laid-up because Horizon decided to alter its Midweek Express Service in the Pacific Trade Lane ("MWX service"), which resulted in the elimination of the Crusader's new route. Horizon's Post-Trial Br. 6 12. Before Horizon presented this evidence at trial, however, the Government objected and asked the court to exclude any testimony relating to this theory on the grounds that it was a complete reversal of Horizon's earlier position. Trial Tr. 9:2 10:24, Feb. 22, 2010. Although the court decided to proceed with the trial and provisionally allow the evidence, it also informed the Government that it would allow a later challenge on the basis of discovery violation, judicial estoppel, or law of the case, as appropriate. *Id.* at 18:15 19:13. The Government now moves in limine and asks the court to estop Horizon from advancing its new position that the discontinuation of the company's MWX service was the reason for the Crusader's lay-up at KSS. The Government does not rely on any discovery violations by Horizon.

Jurisdiction and Standard of Review

This Court has jurisdiction pursuant to 28 U.S.C. § 1581(a). As a trial court, it decides issues of fact *de novo*. *See* 28 U.S.C. § 2640(a)(1). Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (internal quotation marks and citation omitted).

Motion In Limine

The Government claims that Horizon should be judicially estopped from changing its position at this stage of the litigation because the new position is inconsistent with its original position as recognized by the Federal Circuit, and if such change were allowed, Horizon would gain an unfair advantage. Def.'s Mot. in Limine 4 7. The court disagrees.

Generally, if a litigant "assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). "This rule, known as judicial estoppel, . . . prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire*, 532 U.S. at 749 (internal quotation marks and citation omitted). Although "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle," the Supreme Court provided that "several factors typically inform the decision whether to apply the doctrine in a particular case . . . ." *Id.* at 750 (internal quotation marks and citation omitted). The Federal Circuit summarized these factors as:

> (1) whether the party's later position [is] clearly inconsistent with its earlier position; (2) whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Trustees in Bankr. of N. Am. Rubber Thread Co. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010) (internal quotation marks and citation omitted). The court will examine each of these factors.

First, the court considers whether Horizon's positions are inconsistent. Horizon argues that its position is consistent because it has maintained the same legal argument throughout this litigation. Pl.'s Opp'n Def.'s Renewed Mot. *In Limine* 2 4. For the purposes of judicial estoppel, however, courts may consider legal and factual positions separately. *See Trustees in Bankr.*, 593 F.3d at 1355. Until recently, Horizon claimed that the Crusader was laidup at KSS largely because of a seasonal decline in the Puerto Rico trade. *See Horizon II*, 341 F. App'x at 633; *Horizon I*, 31 CIT at 1857. Now, Horizon advances a theory that the lay-up occurred because of its discontinuation of the MWX Pacific trade service, a fact not asserted before appeal. Horizon's Post-Trial. Br. 3. It is clear, therefore, that Horizon's prior and current factual assertions are inconsistent, regardless of whether its legal arguments remain unchanged.[1] This factor weighs in favor of applying the doctrine of judicial estoppel.

Next, the court addresses whether Horizon "succeeded in persuading a court to accept [its] earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Trustees in Bankr.*, 593 F.3d at 1354 (internal quotation marks and citation omitted). The Government argues that this factor weighs in favor of judicial estoppel because "Horizon was successful in persuading both this Court, and the CAFC to adopt its prior position." Def.'s Mot. in Limine 5. Although the Federal Circuit has stated that "the important portion of the second *New Hampshire* factor seems to be whether the party was successful in getting a court to adopt its earlier position, not whether the party misled the courts," *Trustees in Bankr.*, 593 F.3d at 1355, case law illustrates that the doctrine of judicial estoppel "is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts," *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 365 (3rd Cir. 1996). The inconsistency is not total, but it is not insignificant. *See supra* note 1. Nonetheless, there is no evidence of any intent to mislead on Horizon's part. While it obviously was of the belief that the expensive

[1] While arguing the general factual proposition that the lay-up was due to lack of need for the Crusader, Horizon presented what turned out to be incorrect underlying facts before both this court and the Federal Circuit, and the court considered those alleged facts. As the court observed during trial, there "might be a reason to impose some sanctions . . . if proceedings were multiplied or needlessly complicated or delayed because someone had documents that they should have presented." Trial Tr. 12:23 13:3, Feb. 22, 2010. Thus far, there has been no motion to impose sanctions, but the court, sua sponte, will not award costs to Horizon, the prevailing party, as it is responsible for likely unnecessary proceedings causing the Government and the courts time and expense.

lay-up at KSS was not due to the repairs at nearby Jurong, it simply did not get to the bottom of the matter during its initial efforts to get the relevant causal information from its various components. In this case, if Horizon were precluded from submitting evidence in support of its MWX service theory, the court would essentially force it to maintain a position that everyone now acknowledges is incorrect, based on a technicality. It is difficult to conceive how this result would "protect the judiciary, as an institution, from the perversion of judicial machinery." *See Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982). Thus, given the strange and unique facts of this case, party intent is more important than it might have been in other cases.[2] *See Wang Labs., Inc. v. Applied Computer Scis., Inc*, 958 F.2d 355, 358 (Fed. Cir. 1992) (stating that the doctrine of judicial estoppel is available under First Circuit law "when intentional self-contradiction is being used" (internal quotation marks and citation omitted)). The second factor, therefore, weighs in favor of not applying the doctrine of judicial estoppel, because there is no reason to believe that Horizon submits its new version of the facts for any reason other than to correct its earlier inadvertently false statements. The court concludes that had Horizon known the facts, it would have revealed them and relied on them.

Finally, the court examines whether the allowance of Horizon's new position provides Horizon with an unfair advantage or causes the Government an unfair detriment. The Government argues that Horizon received an unfair advantage because the Government was "unable to properly prepare for trial on this issue, and [its] ability to present a full defense at trial was irreparably curtailed."[3] Def.'s Mot. in Limine 7. The Government, however, admitted at trial that it failed to request additional time to investigate further the new assertions and furthermore, fully participated in and initiated part of the

[2] In *Trustees in Bankruptcy*, the plaintiff successfully persuaded the United States Department of Commerce that a certain duty order revocation was effective on October 1, 2003, despite the foreign industries' request of a much earlier date. 593 F.3d at 1349. A year later, the plaintiff asked Commerce to reconsider its decision and to adopt the foreign industries' originally proposed date because it "changed its mind about the proper effective date." *Id.* The plaintiff in *Trustees in Bankruptcy*, therefore, changed positions merely because it was more advantageous to do so. *See id.* By contrast, Horizon is attempting to correct its earlier position, based on new factual information.

[3] The Government additionally claims that "[h]ad Horizon informed the CAFC of its erroneous position, for which it had an obligation to know and inform the Court, this case would have been affirmed and the trial would not have occurred." Def.'s Mot. in Limine 6. It is difficult to put the genie back in the bottle. Therefore, the court cannot say with any certainty if this is true. It appears that Horizon knew that its original factual assertion was incorrect in major part only when it discovered new evidence. What the Federal Circuit would have done if asked to remand the matter because of new evidence is unclear.

supplemental discovery that led to Horizon's new position.[4] *See* Trial Tr. 222:23 223:15, Feb. 23, 2010. In addition, considering the mounting testimonial and consistent documentary evidence in support of Horizon's new position, it is difficult to imagine how further discovery would yield new evidence to aid the Government in proving that the Crusader was laid-up because of its impending repairs at Jurong. Moreover, the Government has not spelled out the nature of such discovery. Thus, unfairness is not demonstrated. The third factor, therefore, weighs in favor of not applying the doctrine of judicial estoppel.

In sum, had plaintiff presented a more credible version of the facts in opposition to the Government's motion for summary judgment, it is likely that there would have been a trial before the appeal, and two courts would not have had to engage in largely unnecessary acts. Nonetheless, the court has been directed to have a trial *de novo*, which would be meaningless if plaintiff were limited to its abandoned pre-appeal version of the facts. Further, the court finds plaintiff did not act in bad faith, but uncovered new evidence in trial preparation and in agreed-upon supplemental discovery. A large sum of money is at issue and, at this point, granting the motion in limine seemingly would result in pure windfall to Defendant. Finally, the court's duty is to resolve disputed facts while an action remains open. The Government's motion is denied. The testimony of plaintiff's witnesses and trial exhibits 2, 3, 6, 11, and 21 are admitted as evidence.

Facts

At trial, Horizon presented two witnesses, Peter Strohla and Joseph Breglia, to testify as to the circumstances surrounding the decision to lay-up the Crusader at KSS in September 2001.[5] The Gov-

[4] After *Horizon II*, both parties consented to additional discovery in a joint status report, filed with the court in October 2009. Joint Status Report, Oct. 26, 2009. During the supplemental discovery period, Horizon served the Government with a set of supplemental interrogatory responses and documents that indicated, for that first time, that the Crusader's lay-up at KSS was motivated by the cancellation of its "mid-week Hawaii service." *See* Pl.'s Opp'n to Def.'s Renewed Mot. *In Limine* Ex. 4, at 2 3. Five days later, the Government expanded the scope of the supplemental discovery by serving a notice to depose further certain Horizon witnesses regarding this new information. *See id.* Ex. 5. These depositions basically made clear the facts that were presented at trial.

[5] Strohla is currently employed by Horizon as the director of a group called the edge team, a process improvement group. Trial Tr. at 26:21 27:2, Feb. 22, 2010. At the time of the lay-up, he was a manager of vessel network operations. *Id.* at 27:9 15. Breglia is currently employed by Horizon as a vice president and general manager of its Ocean Transportation Services. *Id.* at 75:14 16; 76:2 3. In 2001, he was a senior port engineer. *Id.* at 76:1 11.

ernment did not present evidence undermining their testimony and the court credits it as follows.[6]

In 2001, Horizon had sixteen ships, fifteen of which were deployed in three trade lanes.[7] Trial Tr. 36:15 25, Feb. 22, 2010. These trade lanes, which consisted of various services that ran between certain designated locations, were called Alaska, Puerto Rico, and Pacific. *Id.* at 35:17 20. The Pacific Trade Lane involved the coordination of five ships, traveling in different circles at different frequencies, resulting in "a carousel" that guaranteed a vessel's availability in a certain location on the same day every week. *Id.* at 38:9 20, 39:3 5. Relevant to this litigation, Horizon's Pacific Trade Lane included the TP1 service, the CHX service, and the MWX service. *See id.* at 38:22 25.

In 2001, Horizon developed a plan that would enable it to dry-dock[8] two ships, the Crusader and the Reliance, in Asia without an interruption of service. *Id.* at 39:19 24. At that time, the Crusader was deployed in the Puerto Rico Trade Lane, *see id.* at 40:23 24, and the Reliance was deployed in the Pacific Trade Lane's CHX service, *id.* at 46:20 23. The plan required another ship to replace the Crusader in the Puerto Rico Trade Lane, allowing Horizon to transport some cargo, i.e., empty containers, through the Panama Canal to Asia and dry-dock at Jurong Shipyard sometime in July and August 2001, for thirty-five days.[9] *Id.* at 39:13 20, 45:2 15, 78:22 25. The Crusader would then come out of dry-dock and replace the Reliance in the Pacific Trade Lane's TP1 service, allowing the Reliance to dry-dock for repairs. *Id.* at 39:22 40:2, 58:19 22. The Crusader would cover the TP1 service until it crossed paths with the ship covering the MWX service, at which point the two vessels would switch and the Crusader would stay in the MWX service. *Id.* at 40:10 14, 42:3 20.

This plan changed, however, when Horizon decided to discontinue its MWX service, thus eliminating the commercial necessity of an additional vessel. *Id.* at 47:19 22, 48:6 13, 60:22 25; *see* Pl.'s Exs. 2, 6, 11. Due to this development, Horizon altered its original plan and decided to dry-dock the Reliance first, letting it take the Crusader's scheduled place at Jurong Shipyard. Trial Tr. 79:13 20, Feb. 22, 2010.

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[6] The court notes that Joseph Walla, Horizon's supervisory port engineer, also testified at trial. Trial Tr. 197:17, Feb. 23, 2010. In 2001, Walla was employed by Horizon as a port engineer. *Id.* at 197:19. Walla's testimony is not relevant to the court's findings of fact.

[7] Horizon's sixteenth ship served as a spare used to replace a deployed ship if it needed to be removed from service. Trial Tr. 36:22 25, Feb. 22, 2010.

[8] A dry-dock involves a series of surveys, which include an inspection of the bottom of a ship and an inspection of all sea valves. *Id.* at 85:15 18.

[9] The movement of empty containers to the Pacific does not cut one way or the other. It is not useful to move a ship in an empty condition whether the move is to effectuate a repair or to move to a new cargo service. Thus, that Horizon sought out some cargo to move as it repositioned its vessel is ultimately unimportant.

Instead of repairing the Crusader by its deadline, Horizon obtained a thirty day extension from ABS, moving the repair deadline from August to September 25, 2001. *Id.* at 81:8 12. This would allow the Crusader to cover the TP1 service until the Reliance came out of dry-dock, at which time the Crusader would be placed into lay-up. *Id.* at 81:11 23; *see* Pl.'s Ex. 3. In accordance with Horizon's new plan, the Crusader completed its TP1 service voyage on September 5, 2001, and on September 7, 2001, the Crusader was placed into lay-up at KSS, despite the possibility, which existed at the time of planning in June, of placing the Crusader in dry-dock almost immediately after its final TP1 voyage.[10] *Id.* at 80:4 16, 96:24 25, 148:19 21; *see* Def.'s Ex. D.

After the terrorist attacks on September 11, 2001, Horizon considered altering its plan yet again because it anticipated an urgent need for the Crusader. Trial Tr. 97:6 22, Feb. 22, 2010. Horizon sought dry-dock availability as soon as possible and received several offers from various shipyards with the capacity to accommodate the Crusader in September, October, and November 2001. *Id.* at 97:21 22, 98:4 100:2; *see* Def.'s Ex. K. Specifically, Jurong offered to begin repairs on the Crusader in October with dry-dock accommodations available the first week of November, Trial Tr. 98:10 12, Feb. 22, 2010; Def.'s Ex. N, and KSS offered availability as early as September 26 or 28, 2001, Trial Tr. 101:5 10, 106:18 107: 3, Feb. 22, 2010; *see* Def.'s Ex. L. The expected need for the Crusader, however, never materialized, and therefore, Horizon decided to leave it in lay-up at KSS. Trial Tr. 107:4 12, 185:7 15, Feb. 22, 2010. On November 28, 2001, the Crusader was towed from KSS to Jurong, was placed in dry-dock, and underwent the required surveys and repairs. *See id.* at 132:6 10.

At trial, Horizon also provided expert testimony, which the court credits, that it could have sought and probably would have received an additional three-month extension from ABS for the Crusader if it had use for the vessel.[11] Trial Tr. 253:10 13, 254:15 21, 257:10 14, Feb. 23, 2010.

Discussion

The Government contends that a portion of expenses associated with the Crusader's lay-up at KSS were dutiable as "expenses of

[10] The Government contends that Horizon's case fails because there is no evidence about the details of the cessation of the MWX service. *See* Def.'s Post-Trial Mem. Law 24 30. Neither party apparently thought this evidence was necessary. The court will not speculate that some non-existent evidence might undermine the testimony of Horizon's witnesses indicating that the Crusader was slated for the MWX service and that such service was discontinued.

[11] Horizon's expert on ABS procedures, James Dolan, is currently the president of Martin, Ardenway, VanHellin & Dolan, a marine consultant company. Trial Tr. 234:15 25, Feb. 23, 2010. Dolan previously worked for ABS for twenty-six years. *Id.* at 235:9 19.

repairs" under 19 U.S.C. § 1466(a). Specifically, the Government argues that it "proved at trial that the KSS lay-up of the CRUSADER in 2001 was, in part, necessitated by the unavailability of Jurong Shipyard, Horizon's preferred repair contractor, and therefore the lay up enabled or furthered the repair project as a whole."[12] Def.'s Post-Trial Mem. Law 6. The Government contends that the lay-up expenses, therefore, are "dual purpose expenses which furthered both dutiable repair work and the non-dutiable operations which took place at Jurong Shipyard." *Id.* at 5. The court disagrees.

Pursuant to 19 U.S.C. § 1466(a), "expenses of repairs made in a foreign country upon a vessel documented under the laws of the United States to engage in the foreign or coasting trade . . . shall . . . be liable to entry and the payment of an ad valorem duty of 50 per centum of the cost thereof . . . ." 19 U.S.C. § 1466(a). The Federal Circuit has interpreted "'expenses of repairs' as covering all expenses (not specifically excepted in the statute) which, but for dutiable repair work, would not have been incurred." *Texaco Marine Servs., Inc. v. United States*, 44 F.3d 1539, 1544 (Fed. Cir. 1994). Additionally, "[i]n the context of dual-purpose expenses," which are expenses necessitated by both dutiable and non-dutiable work, 19 U.S.C. § 1466(a) "impose[s] the duty on only that portion of the expense that is fairly attributable to the dutiable repairs." *SL Serv., Inc. v. United States*, 357 F.3d 1358, 1362 (Fed. Cir. 2004).

The Government's legal argument is based on its understanding that the trial evidence demonstrates that the Crusader's lay-up at KSS was caused by or was fairly attributable to Jurong's inability to dry-dock the Crusader until November 2001. *See* Def.'s Post-Trial Mem. Law 7. Not only does the possibility of an additional three-month ABS extension, as testified to by Dolan, indicate that Horizon could have continued to operate the Crusader commercially until Jurong was able to accommodate the ship in November 2001, but the various offers to dry-dock the Crusader in September and October 2001 also demonstrate that Horizon could have satisfied the ABS requirements much sooner than it ultimately did.[13] Thus, the evidence indicates Horizon could have continued its commercial operation of the Crusader if it so desired. The court, therefore, finds that

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[12] The preference for repair at Jurong was likely one motive for moving the Crusader to the Pacific. Nonetheless, the extensive lay-up in the Pacific, which eventually occurred, is attributable to service changes and lack of commercial use for the vessel once it was in the Pacific.

[13] The Government emphasizes Horizon's preference for the Jurong Shipyard. Assuming that a short amount of the lay-up time is attributable to this preference, it is only incidental and not a significant cause of the lay-up. *See Horizon II*, 341 F. App'x at 634 (providing that "[t]he mere coordination of *Crusader* 's lay-up and repairs does not mean one furthers the other").

Horizon's decision to lay-up the Crusader was based on its lack of a commercial use for the vessel after September 5, 2001. The court also finds that the Crusader's lay-up at KSS was independent of the later repairs performed at Jurong Shipyard. Without a causal link between the repair and the lay-up, case law makes clear that the lay-up at KSS is not an expense of repair. *See Texaco*, 44 F.3d at 1544 (providing that "'expenses of repairs' does not cover expenses that would have been incurred even without the occurrence of dutiable repair work"). The expenses incurred by Horizon for the Crusader's lay-up at KSS, therefore, are not dutiable "expenses of repairs" under 19 U.S.C. § 1466(a).

Conclusion

Judgment will be entered for the plaintiff in this Customs valuation action. After consultation with Defendant, Plaintiff will prepare an appropriate judgment, to be submitted to the court within twenty days hereof.

Dated: This 31st day of August, 2010.
New York, New York.

/s/ Jane A. Restani
JANE A. RESTANI CHIEF JUDGE