Decisions of the United States Court of International Trade

Slip Op. 06–108

ELKEM METALS CO., APPLIED INDUSTRIAL MATERIALS CORP., AND CC METALS & ALLOYS, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard K. Eaton, Judge

Consol. Court No. 99–00628

MEMORANDUM OPINION AND ORDER

[United States International Trade Commission's Third Remand Results remanded]

Dated: July 21, 2006

DLA Piper Rudnick Gray Cary US, LLP (*William D. Kramer*, *Martin Schaefermeier*, and *Clifford E. Stevens, Jr.*), *Eckert Seamans Cherin & Mellott, LLC* (*Dale Hershey*), and *Howrey Simon Arnold & White, LLP* (*John W. Nields, Jr. and Laura S. Shores*), for plaintiff Elkem Metals Co.

Williams Montgomery & John, Ltd. (*Theodore J. Low*), for plaintiff Applied Industrial Materials Corp.

Arent Fox Kintner Plotkin & Kahn, PLLC (*Eugene J. Meigher*, *Matthew Kanna*, and *George R. Kucik*), for plaintiff CC Metals & Alloys, Inc.

Dangel & Mattchen, LLP (*Edward T. Dangel, III*), for plaintiff-intervenor Globe Metallurgical, Inc.

Lyn M. Schlitt, General Counsel, United States International Trade Commission, *James M. Lyons*, Deputy General Counsel, United States International Trade Commission (*Marc A. Bernstein*), for defendant.

Kaye Scholer, LLP (*Julie C. Mendoza*), for defendant intervenor Ferroatlantica de Venezuela.

Hogan & Hartson, LLP (*Mark S. McConnell*), for defendant-intervenor General Motors Corp.

Greenberg Traurig, LLP (*Philippe M. Bruno*), for defendant-intervenors Associao Brasileira dos Productores de Ferroligas e de Silico Metalico, Companhia Brasileira & Companhia Ferroligas, Nova Era Silicon S/A, Italmagnesio S/A-Industria e Comercio, Rima Industrial S/A, and Companhia Ferroligas Minas Gerais - Minasligas.

Eaton, Judge: This matter is before the court following remand to the United States International Trade Commission ("ITC" or the "Commission") of its negative injury determination contained in Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Invs. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–641 (Final) (Reconsideration) (Second Remand), USITC Pub. 3627 (Sept. 2003) ("Second Remand Determination"). *See Elkem Metals Co. v. United States*, 28 CIT ___ , slip op. 04–49 (May 12, 2004) (not published in the Federal Supplement) ("*Elkem VI*"), *as modified by*, *Elkem Metals Co. v. United States*, 28 CIT ___ , slip op. 04–152 (Dec. 3, 2004) (not published in the Federal Supplement) ("*Elkem VII*"). Pursuant to remand, the Commission has again issued a determination in Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Invs. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–641 (Final) (Reconsideration) (Third Remand), USITC Pub. 3765 (Mar. 2005) ("Third Remand Determination"), and again found that the U.S. ferrosilicon industry was not injured as a result of ferrosilicon imports. Plaintiffs now challenge the results of the Third Remand Determination. The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(ii)(2000). For the reasons set forth below, the court remands the Third Remand Determination to the ITC for further consideration.

BACKGROUND

Familiarity with the facts of this dispute is presumed. For purposes of this opinion, the following history is noted. In *Elkem VI*, the court considered whether an established price-fixing Conspiracy[1] was a significant condition of competition that had affected prices charged by U.S. ferrosilicon producers during: (1) the period preceding the Conspiracy, i.e., the first three quarters of 1989 ("Prior Period"); (2) the period of the Conspiracy itself, i.e., the period from late-1989 through mid-1991 ("Conspiracy Period"); and (3) the period subsequent to the end of the Conspiracy, i.e., the period from mid-1991 to mid-1993 ("Subsequent Period"). *See Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 3 n.1. There, the court "sustain[ed] the ITC's finding that the price-fixing [C]onspiracy did not affect prices during the Prior Period"[2] and remanded, as unsupported by substantial evi-

---

[1] The Conspirators were plaintiffs Elkem Metals Co., American Alloys, Inc., and SKW Metals & Alloys, Inc., the predecessor firm to CC Metals & Alloys, Inc. (collectively, "Conspirators" or "plaintiffs"). *See Elkem Metals Co. v. United States*, 27 CIT ____ , 276 F. Supp. 2d 1296, 1300 (2003) ("*Elkem V*").

[2] The court sustained the finding that the price-fixing Conspiracy was a significant condition of competition that affected prices during the Conspiracy Period, *see Elkem V*, 27 CIT at ____ , 276 F. Supp. 2d at 1313; and, following remand, that the price-fixing Conspiracy was not a significant condition of competition during the Prior Period, *see Elkem VI*, 28 CIT at ____ , slip op. 04–49 at 8. Although the Conspiracy was not a significant condition of competition during the Prior Period, the ITC concluded that "[t]he available pricing data for the Prior Period do not detract from [the negative injury determination], because they show predominant overselling." Second Remand Determination at 17 (footnote omitted).

dence, the Commission's finding that the price-fixing Conspiracy affected prices during the Subsequent Period. *Id.* at 8.

In *Elkem VII*, the court addressed the ITC's motion seeking reconsideration of its holding in *Elkem VI* that substantial evidence did not support the Commission's finding that the price-fixing Conspiracy affected prices during the Subsequent Period. *See Elkem VII*, 28 CIT at ____ , slip op. 04–152 at 3. By its motion, the ITC asserted that the court erred because "[s]everal of the remand instructions . . . appear[ed] to require the Commission to engage in inquiries that do not reflect the requirements of the antidumping and countervailing duty laws." Mot. of Def. ITC for Reconsideration ("Def.'s Mot.") at 5; *see also Elkem VII*, 28 CIT at ____ , slip op. 04–152 at 3–4. The court treated the Commission's motion as one for modification and clarification rather than reconsideration because, while the ITC's arguments did not establish that the court's decision was "manifestly erroneous," they were meritorious in some respects. *See Elkem VII*, 28 CIT at ____ , slip op. 04–152 at 3.

The ITC first objected to the remand instruction from *Elkem VI* that required it to quantify its findings by determining the "true" market price of ferrosilicon.[3] *See Elkem VI*, 28 CIT at ____ , slip op. 04–49 at 19. The need to instruct the ITC to quantify its findings arose after the Commission introduced, in the Second Remand Determination,[4] the notion that prices in the Subsequent Period exceeded the "true market price." *See* Second Remand Determination at 11. The ITC used the construct "true market price" to substantiate its conclusion that the [C]onspiracy affected prices beyond the Conspiracy Period. *Id.* According to the ITC, the antidumping and countervailing duty laws did not require it to determine a "true market price." *See Elkem VII*, 28 CIT at ____ , slip op. 04–152 at 10. The court acknowledged the possibility for the ITC to make findings based on "true market price" that would be supported by substantial evidence without quantifying the actual price itself, but emphasized that, if the ITC wished to continue using the term "true market price," it had to define the term and provide substantial evidence supporting any findings that were based on its use. *Id.* at 13. As a result, the court modified the remand instructions regarding "true market price" as follows:

---

[3] This instruction provided that: "On remand, the ITC shall (1) determine the true market price the ITC referenced in its Second Remand Determination at 10. . . ." *Elkem VI*, 28 CIT at _____ , slip op. 04–49 at 19 (internal quotation marks omitted).

[4] In the Second Remand Determination, the ITC stated that:

> By contrast, if the effects of the [C]onspiracy on prices were limited solely to the Conspiracy Period, one would expect an immediate decline from prices established by a [C]onspiracy, which would be at inflated levels relative to a "true" market price, to prices established by marketplace considerations.

Second Remand Determination at 11.

> Should it continue to rely on the term "true market price," the ITC shall (1) define the term "true market price" it referenced in its Second Remand Determination at 10, and provide substantial evidence supporting any findings it makes regarding price changes that should have occurred in the absence of continued effects from the [C]onspiracy, including any findings based on the use of the term "true market price," but is not required to provide a quantification of that term; (2) account for the factors it relied upon so heavily in its prior determinations, e.g., demand and U.S. apparent consumption; (3) clearly explain how these factors either support or do not support its finding that the [C]onspiracy affected domestic prices in the Subsequent Period; and (4) evaluate the relevant economic factors it finds to exist in the marketplace for the entire Subsequent Period, not merely the first quarter of the Subsequent Period.

Id.

The ITC further asserted that it should not be required on remand to "state with specificity what difference in price it would consider material in the context of this inquiry, and why."[5] *Elkem VI*, 28 CIT at ____ , slip op. 04–49 at 26–27. Rather than reconsidering its instruction, the court clarified that the ITC could, if it so desired, comply with the instruction by substituting the word "significant" for "material" because the court's instructions were designed to show what price differential between the Conspiracy Period and Subsequent Period would be significant enough to demonstrate that the Conspiracy affected prices in the Subsequent Period. *See Elkem VII*, 28 CIT at ____ , slip op. 04–152 at 15.

The Commission next contested the court's instruction that, "[s]hould the ITC hope to establish by substantial evidence that the [C]onspiracy affected prices during the Subsequent Period, a baseline [price] would be useful." *Elkem VI*, 28 CIT at ____ , slip op. 04–49 at 32. The court clarified that its suggestion to include a baseline price was merely "guidance from the court as to the type of evidence that might be useful in order to satisfy the demands of substantial evidence . . . ," and not a remand instruction. *Elkem VII*, 28 CIT at ____ , slip op. 04–152 at 16.

Finally, the ITC asserted that the court's instruction to disaggregate the pricing data for each of the Conspirators is not required by antidumping or countervailing duty laws. *See* Def.'s Mot. at 7.

[5] This instruction resulted from the ITC's finding that there was "no significant shift in the [C]onspirators' pricing patterns with respect to other domestic producers in the period following the Conspiracy Period," and "prices charged by both the [C]onspirators and the domestic industry as a whole during the Subsequent Period were not the result of competitive marketplace conditions." Second Remand Determination at 11, 13.

The court found this contention to have some merit, and therefore amended the remand instruction to read as follows:

> (3) in revisiting its finding that the Conspirators frequently maintained higher prices than their domestic competitors during the Subsequent Period, [the ITC should] consider the data for each of the Conspirators and either (a) disaggregate the pricing data or (b) explain why its method of aggregating the data is reasonable considering the court's discussion of that data, and, in any event, identify sufficient record evidence to support its finding, and explain how that evidence supports its finding.

Elkem VII, 28 CIT at ____ , slip op. 04–152 at 17.

Following the issuance of the court's order modifying the remand instructions, the ITC issued its Third Remand Determination. Rather than directly complying with the court's remand instructions, however, the ITC has instead redirected its efforts toward disproving Elkem's assertion that, "absent evidence to the contrary, the Commission should presume that ferrosilicon prices during the Subsequent Period were established pursuant to marketplace forces because ferrosilicon is a commodity product sold by numerous suppliers pursuant to competitive bidding." Third Remand Determination at 9. Specifically, the Commission states that:

> [W]e have not attempted to make an affirmative showing that the [C]onspiracy affected prices during the Subsequent Period. To comply with the CIT's decision, our finding instead concentrates solely on what the record does *not* show – namely, that prices during the Subsequent Period were established in a different manner, *i.e.*, solely pursuant to marketplace forces, than prices for the Conspiracy Period.

Third Remand Determination at 19 (emphasis in original). In so doing, the ITC abandoned its finding in the Second Remand Determination that, "a significant condition of competition was that the price-fixing [C]onspiracy had effects on prices charged by U.S. ferrosilicon producers during . . . the Subsequent Period." Second Remand Determination at 15.

Now before the court are the ITC's conclusions contained in the Third Remand Determination. Here, the Commission first provides a "modified analysis of subject import volume, price effects, and impact once it stated it was unable on third remand to find that the [C]onspiracy affected prices during the Remand Determination ("Def.'s Comments") at 11; *see also* Third Remand Determination at 22. The ITC found that "the record cannot support any conclusion on how prices were established during that period, including a conclusion that prices were solely the result of marketplace forces." Third Remand Determination at 22. This led the ITC to find, based on what the record did not show, that the likely volume, price effects, and impact of subject imports on the domestic industry were not significant. *Id.* at 24–28.

With regard to the likely volume of subject imports, the ITC found that the 1992 increase in volume that occurred during the Subsequent Period was not significant because:

> [W]hile we have not made a finding that the [C]onspiracy affected prices charged by domestic ferrosilicon producers during the Subsequent Period, we have concluded, based on [Best Information Available ("BIA")], that the record indicates no significant change in pricing patterns between the Conspiracy Period and the Subsequent Period. In light of this, the record cannot support a finding that the pricing data in the record for the Subsequent Period reflect prices determined exclusively pursuant to marketplace conditions. We therefore cannot find the requisite causal link between this increase in the subject imports and the declines in the condition of the domestic industry. . . .

Third Remand Determination at 23. The ITC further stated that:

> The lack of reliable information for the Conspiracy Period, or for the full period of investigation that the Commission would typically examine, impairs our ability to assess the significance of changes, such as those in subject import volume, between the Conspiracy Period and the Subsequent Period.

Id.

In addition, the ITC concluded that the likely price effects of subject imports were not significant:

> Because there is no finding that the domestic industry pricing data for the Subsequent Period reflect prices at market levels, we cannot find this data – or any other pricing data in the record – probative for an analysis of underselling during the period. We consequently lack a sufficient evidentiary basis to conclude that any underselling is significant.

Id. at 25.

The ITC went on to hypothesize, *see* Third Remand Determination at 25, that if the pricing data for the Prior Period and the Subsequent Period *did* reflect competitive marketplace conditions, the

> usable underselling observations from the Prior Period and the Subsequent Period would still account for a minority of all price comparisons during the entire period for which we have consistently-generated pricing data. The significance of this relatively small proportion of underselling is diminished further by the fact that ferrosilicon is a commodity product, for which we would ordinarily expect to see some degree of under-

> selling of the domestically-produced product by products from other sources.

Id. at 25–26.

As a result, the ITC found that the likely impact of subject imports on the domestic industry was not significant:

> Because the 1991 data are not a probative baseline for competitive market conditions, and there is no reliable information in the record concerning what the CIT has acknowledged is a central condition of competition, the record permits us to do no more than observe that domestic industry performance declined concurrently with increases in subject import volume. The record does not permit us to ascertain whether there is a causal link between the subject imports and the industry declines. Absent such a causal link, we are not authorized to make an affirmative determination of material injury by reason of subject imports.

Id. at 27.

The ITC justified its analysis by contending that the court "found in *Elkem V* that the Commission was entitled to use BIA and take adverse inferences in this proceeding because . . . the Conspirators . . . 'significantly impeded' its investigation within the meaning of 19 U.S.C. § 1677e(c)." *Id.* at 7–8; *see also Elkem Metals Co. v. United States*, 27 CIT ___ , 276 F. Supp. 2d 1296, 1305 (2003) ("*Elkem V*"). For the ITC, a "principal justification for the BIA rule is to avoid rewarding the uncooperative and recalcitrant party for its failure to supply requested information." Third Remand Determination at 10 (internal quotation marks omitted). In addition, the ITC failed to comply with the court's instruction to provide an independent evidentiary basis for any conclusion based on BIA because in its view, "absent conducting a separate investigation to obtain the missing data – something the BIA provision is intended to avoid – the Commission will not typically have ready reference to factual material that could provide independent evidentiary corroboration for use of an adverse inference." *Id.* at 21 n.72.

Plaintiffs now challenge the Third Remand Determination on the grounds that the Commission failed to support its findings with substantial evidence. *See* Comments of CC Metals and Alloys, Inc. On The Third Remand Determinations of the ITC ("CCMA Comments") at 3; Elkem Comments on ITC Third Remand Determination ("Elkem Comments") at 9. Plaintiffs further assert that, because the Commission conceded that the record lacks substantial evidence indicating that subject imports had an adverse pricing impact during the Subsequent Period, the "ITC shifted the grounds of decision onto a purportedly 'new' theory . . ." of focusing on an adverse inference, i.e., what the record does *not* show. CCMA Comments at 9; *see also* Elkem Comments at 4. In other words, plaintiffs posit that there is no evidentiary basis for the Commission's adverse inference that the Conspiracy, or some other force, prevented domestic prices from being set by the market in the Subsequent Period.

STANDARD OF REVIEW

When reviewing the ITC's final injury determination in an antidumping or countervailing duty investigation, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence requires more than a mere scintilla, but is satisfied by something less than the weight of the evidence." *Altx, Inc. v. United States*, 370 F.3d 1108, 1116 (Fed. Cir. 2004) (internal citation and quotation marks omitted). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

The court has held in previous opinions that the ITC's "use of BIA . . . is in accordance with law," and that "[plaintiffs] ha[ve] produced nothing to convince the court that the ITC's conclusions with respect to BIA should be limited to the Conspiracy Period." *Elkem VI*, 28 CIT at ____ , slip op. 04–49 at 13. Nevertheless, the court may "hold unlawful the [ITC's] final determination if it is unsupported by substantial evidence on the record or otherwise not in accordance with law." *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000). Accordingly, the court has repeatedly held that "substantial evidence [does] not support the ITC's adverse inference that the price-fixing [C]onspiracy affected prices outside the Conspiracy Period." *Elkem VI*, 28 CIT at ____ , slip op. 04–49 at 5; *see also Elkem VII*, 28 CIT at ____ , slip op. 04–152 at 6. The court stated in *Elkem V* that:

> It does not appear that the ITC had a sound rationale in making the adverse inference that the [C]onspiracy affected prices during the entire Original [Period of Investigation], and not just during the period in which the [C]onspiracy was actually in effect. . . . While the ITC may justifiably conclude that the "failure [to reveal the [C]onspiracy] gives rise to an inference that the evidence is unfavorable to" Plaintiffs, it may not use the in-

> ference to reach a conclusion that appears to be at odds with the known facts, and an attempt to do so on the part of the ITC cannot be said to be supported by substantial evidence on the record.

Elkem V, 27 CIT at ___ , 276 F. Supp. 2d at 1315 (internal citation omitted).

The ITC claims that in the Third Remand Determination, it abandoned its previous conclusion that the Conspiracy affected prices in the Subsequent Period. Even so, the ITC appears to be attempting by way of an adverse inference to reach the same conclusion. That is, if the prices in the Subsequent Period were not set solely by the market, it follows that they must have been affected by the Conspiracy or by some other unstated force. *See* Third Remand Determination at 22 (finding that the "record cannot support any conclusion on how prices were established during [the Subsequent P]eriod, including a conclusion that prices were solely the result of marketplace forces.").

The court has held previously that the "ITC cannot, using [an] adverse inference [ ], invent a price-fixing conspiracy during the period outside the time period during which the [C]conspiracy was and was not found to be in effect. . . ." *Elkem V*, 27 CIT at ___ , 276 F. Supp. 2d at 1315. Each remand since *Elkem V* has instructed the ITC to "set forth the evidentiary basis for the adverse inference that the price-fixing [C]onspiracy affected prices throughout the entire Original [Period of Investigation]." *Id.*, 276 F. Supp. 2d at 1315. Rather than following the court's instruction, the ITC again uses "the approach of comparing pricing patterns during the Conspiracy Period with those during the Subsequent Period . . . ,"[6] to support its conclusion that prices in the Subsequent Period were not set solely by marketplace forces. Third Remand Determination at 9. In doing so, the ITC found no "material changes[7] in pricing patterns between the Conspiracy Period and the Subsequent Period that could be attributed to the [C]onspirators changing the manner in which they established prices." Third Remand Determination at 20. This finding, together with the court's finding that prices during the Conspiracy Period were distorted by the Conspiracy, led the ITC to conclude that

---

[6] The ITC found that "compar[ing] the prices that domestic ferrosilicon producers charged during the latter portion of the Conspiracy Period with the [sic] those charged during the Subsequent Period . . . enable[d it] to examine whether prices for the Subsequent Period solely reflected market forces and represent the prices the producers would have charged during the Subsequent Period. . . ." Second Remand Determination at 10.

[7] The ITC's analysis revealed that the "frequency of underselling by the subject imports was 80 percent . . . for the entire Conspiracy Period and 74 percent during the entire Subsequent Period. . . ." Third Remand Determination at 15. The ITC did not view this six percentage point differential as being significant, particularly because the "difference in underselling frequency between the Conspiracy Period and Subsequent Period is far less than the difference in underselling frequency between either of these periods and the Prior Period." *Id.*

there is no evidence that the prices in the Subsequent Period were not similarly distorted, either by the Conspiracy or some other factor. *Id*.

The first difficulty with this theory is that the ITC's finding of a price distortion during the Conspiracy Period was based on an adverse inference. *See Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 7. In *Elkem VI*, the court found that substantial evidence supported the ITC's adverse inference that the Conspiracy distorted prices during the Conspiracy Period. *Id*. This distortion, however, was never quantified, as the ITC only "compared the prices of imported ferrosilicon and observed that during the Conspiracy Period, imports of ferrosilicon undersold the domestic product more frequently than in the months preceding . . . the [C]onspiracy." *Elkem V*, 27 CIT at ___ , 276 F. Supp. 3d at 1311. Based on this comparison, the "court [found] that the evidence . . . fairly support[ed] [the ITC's] conclusions with respect to the effect of the [C]onspiracy during the Conspiracy Period." *Id*. This comparison could be made because prices during the Prior Period reflected market conditions, as "there is no evidence that the [C]onspiracy affected prices prior to its existence." *Elkem VI*, 28 CIT at ___ , slip op. 04–49 at 15.

Thus, the extent to which prices were affected by the Conspiracy during the Conspiracy Period is unknown. Indeed, plaintiffs have maintained throughout these proceedings that the Conspiracy had no effect on prices. *See Elkem VII*, 28 CIT at ___ , slip op. 04–152 at 8; *see also* CCM Compl. ¶ 56 (Oct. 28, 1999). That being the case, a comparison of prices between the Conspiracy Period and the Subsequent Period demonstrates nothing with respect to how prices were set. As counsel for the ITC noted at oral argument prior to the modification of the remand instructions from *Elkem VI*, there would be a decline in prices following the end of the Conspiracy Period because, "other things being equal," the prices would be solely determined by marketplace forces. *Elkem VII*, 28 CIT at ___ , slip op. 04–152 at 11. That is a valid point, but the ITC has failed to determine if marketplace conditions did remain equal, or changed in some material respect following the Conspiracy Period. In other words, without knowing either the extent of the distortion during the Conspiracy Period or what the market would have determined prices to be during the Subsequent Period, no valid comparison can be made.

This approach is further flawed in that the ITC "lack[s] reliable information for the Conspiracy Period, or for the full period of investigation . . . [which] impairs [its] ability to assess the significance of changes, such as those in subject import volume, between the Conspiracy Period and the Subsequent Period." Third Remand Determination at 23. If the ITC does not know how prices were set in the Conspiracy Period, or how much effect the price-fixing Conspiracy actually had on the prices during the Conspiracy Period, the ITC simply cannot use prices during the Conspiracy Period as a basis of comparison with the Subsequent Period to make a determination. Furthermore, if the ITC does not know what the market conditions were in the Subsequent Period, the ITC cannot know if the prices were indeed set by forces other than the market.

The Commission asserts that compelling it to ignore plaintiffs' misconduct and render a determination in plaintiffs' favor "would subvert a principal justification of the BIA rule, which is to avoid rewarding the uncooperative and recalcitrant party for its failure to supply requested information." Def.'s Comments at 15 (internal quotation marks omitted). Nonetheless, the ITC would substitute a lack of evidence for substantial evidence. It is worth noting that the ITC has cited no case where it has felt itself bound, or required any party to affirmatively demonstrate that prices were set by the market. The court's analysis is "not whether we agree with [the ITC's] conclusions, nor whether we would have come to the same conclusions reviewing the evidence in the first instance, but only whether [the ITC's] determinations were reasonable." *See AK Steel Corp. v. United States*, 192 F.3d 1367, 1371 (Fed. Cir. 1999) (citing *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996)). Here, it is not reasonable for the court to affirm a determination by the ITC when there is no data tending to confirm a central part of its analysis. *See Allegheny Ludlum Corp. v. United States*, 287 F.3d 1365, 1374 (Fed. Cir. 2002) (finding that Commission's price determination was not supported by substantial evidence due to inaccurate data). Indeed, "[n]otwithstanding the tolerance of the substantial evidence requirement for Commission determinations which contain some errors, . . . the statutory language of 19 U.S.C. § 1677(7)(B) . . . [does not] permit[ ] the court to affirm a [determination] which is legally flawed as to each of the three factors the Commission is obliged to consider. . . ." *Id.* at 1376 (emphasis omitted).

Although the ITC is "not required to amass every conceivable shred of relevant data in order to comply with the requirements of the law, the absence of information necessary for a thorough analysis may render a determination unsupported by substantial evidence." *Chung Ling Co., Ltd. v. United States*, 16 CIT 636, 640, 805 F. Supp. 45, 49 (1992) (internal citations and quotation marks omitted). The court, therefore, cannot agree with the ITC's conclusion that, based on the lack of available information, the prices in the Subsequent Period were not solely determined by marketplace forces. The argument in the Third Remand Determination suffers from the same infirmity as the previous arguments. Phrasing the conclusion differently does not alter the result.

CONCLUSION

Based on the foregoing, the court remands the ITC's conclusion that domestic prices in the Subsequent Period were not established solely by the marketplace. On remand, the ITC shall either (1) reopen the record to obtain relevant data of marketplace conditions to support, with substantial evidence, its conclusion that prices in the Subsequent Period were not set by market forces, or (2) find that the price-fixing Conspiracy was not a significant factor in the Subsequent Period and further find that the prices in the Subsequent Period were set by market forces and complete its analysis accordingly.

Remand results are due on October 19, 2006, comments are due on November 18, 2006, and replies to such comments are due on November 29, 2006. Neither comments nor replies to such comments shall exceed thirty pages in length.

Slip Op. 06–109

TEMBEC, INC., Plaintiff, and GOVERNMENT OF CANADA, GOUVERNEMENT DU QUEBEC, GOVERNMENT OF ONTARIO, GOVERNMENT OF ALBERTA, GOVERNMENT OF BRITISH COLUMBIA, CANADIAN LUMBER TRADE ALLIANCE, and ABITIBI-CONSOLIDATED, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE, Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge,
Judith M. Barzilay &
Richard K. Eaton, Judges

Consol. Court No. 05–00028

OPINION

Decided: July 21, 2006

[Defendant's and Defendant-Intervenor's motions to dismiss are denied. Plaintiff's and Plaintiff-Intervenors' cross-motions for summary judgment are granted in part.]

Baker & Hostetler, LLP (*Elliot Jay Feldman*, *Bryan Jay Brown*, *John Burke*, *Robert Lewis LaFrankie*) for Plaintiff Tembec, Inc.

Arnold & Porter, LLP (*Michael Tod Shor*) for Plaintiff-Intervenor Abitibi-Consolidated, Inc.

Steptoe & Johnson, LLP (*Mark Astley Moran*, *Alice Alexandra Kipel*, *Sheldon E. Hochberg*, *Michael Thomas Gershberg*) for Plaintiff-Intervenor Canadian Lumber Trade Alliance Executive Committee.

Arent Fox Kintner Plotkin & Kahn, PLLC (*Matthew J. Clard*, *Keith Richard Marino*) for Plaintiff-Intervenor Gouvernement du Quebec.

Hogan & Hartson, LLP (*Mark S. McConnell*, *Craig Anderson Lewis*, *Harold Deen Kaplan*, *Jonathan Thomas Stoel*) for Plaintiff-Intervenor Government of Ontario.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Spencer Stewart Griffith*, *Bernd G. Janzen*, *Anne K. Cusick*, *Jason Alexander Park*) for Plaintiff-Intervenor Government of British Columbia.

Weil, Gotshal & Manges, LLP (*M. Jean Anderson*, *Amy Tross Dixon*, *Gregory Husisian*, *Jahna Hartwig*, *John Michael Ryan*, *J. Sloane Strickler*); *Wilmer, Cutler, Pickering, Hale & Dorr, LLP* (*Randolph Daniel Moss*) for Plaintiff-Intervenor Government of Canada.

Arnold & Porter, LLP (*Claire Elizabeth Reade*) for Plaintiff-Intervenor Government of Alberta.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Jeanne E. Davidson*), Deputy Director; (*Stephen Carl Tosini*), Commercial Litigation Branch, Civil Division, United States Department of Justice; *Dean Pinkert*, Senior Attorney, Office of the Chief Counsel for Import Administration, Department of Commerce; *Theodore R. Posner*, Associate General Counsel, Office of the United States Trade Representative for Defendant United States.

Dewey Ballantine, LLP (*Kevin M. Dempsey*, *Alan William Wolff*, *Harry Lewis Clark*, *David Adrian Bentley*) for Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee.

Per Curium: The Canadian lumber industry, the Canadian federal government, and several of Canada's provincial governments seek to invalidate the action of the United States Trade Representative ("USTR") ordering implementation of an International Trade Commission ("ITC") determination finding an affirmative threat of material injury arising from imports of Canadian softwood lumber into the United States. Plaintiff Tembec, Inc. ("Tembec"), Plaintiff-Intervenor Canadian Lumber Trade Alliance ("CLTA"), and Plaintiff-Intervenors the Governments of Canada[1] (collectively "Plaintiffs") allege that the United States has illegally continued to enforce antidumping ("AD") and countervailing duty ("CVD") orders following the illegal implementation of an affirmative injury determination issued by the ITC pursuant to section 129 of the Uruguay Round Agreements Act ("URAA").[2] Defendant United States and Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee ("CFLI") (collectively "Defendants") move to dismiss pursuant to USCIT Rules 12(b)(1), for lack of subject matter jurisdiction, and 12(b)(5), for failure to state a claim upon which relief can be granted. *See* Def.'s Mem. Supp. Mot. Dismiss 1 ("Def.'s Mem."); Def.-Intervenor's Mem. Law Supp. Mot. Dismiss 1 ("Def.-Int.'s Mem."). Plaintiffs cross-move for summary judgment. The court grants Plaintiffs' motions in part and finds that the USTR improperly interpreted and applied section 129. The court reserves decision on the remedy to be imposed.

---

[1] In this opinion, the term "Governments of Canada" refers to Plaintiff-Intervenors the Government of Canada and the Governments of Alberta, British Columbia, Ontario, and Quebec.

[2] Uruguay Round Agreements Act, Pub. L. No. 103–465, § 129, 108 Stat. 4809, 4836–39 (1994), codified at 19 U.S.C. § 3538 (2000) ("section 129").

I. Procedural History[3]

Softwood lumber has been a perennial sore-spot in trade relations between the United States and Canada.[4] The U.S. softwood lumber industry has long maintained that Canadian softwood lumber exports are sold at "less than fair value" in the United States and that Canada subsidizes the Canadian softwood lumber industry, injuring the U.S. industry. For five years, litigation over Canadian softwood lumber imports was limited by a 1996 agreement governing the importation of softwood lumber from Canada. *See Canadian Exports of Softwood Lumber*, 61 Fed. Reg. 28,626 (U.S. Trade Rep. June 5, 1996) (notice of agreement; monitoring and enforcement pursuant to sections 301 and 306). That hiatus ended when the agreement expired on March 31, 2001. *See Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 21,328, 21,331 (Dep't Commerce Apr. 30, 2001) (notice of initiation of antidumping duty investigation). Following expiration of the agreement, on April 2, 2001, CFLI and several other U.S. entities filed a petition with U.S. Department of Commerce ("Commerce") and the ITC, alleging that an industry in the United States was materially injured and threatened with material injury by reason of subsidized and less-than-fair-value imports of softwood lumber from Canada.[5] *See Softwood Lumber from*

[3] Due to the complex series of events involved in this case, the court has attached a procedural history in time-line format at Appendix A. Appendix B contains the full text of section 129(a)–(c), codified at 19 U.S.C. § 3538(a)–(c).

[4] CFLI petitioned, unsuccessfully, for countervailing duties on softwood lumber from Canada in 1982. *See Certain Softwood Products from Canada*, 48 Fed. Reg. 24,159, 24,160 (Dep't Commerce May 31, 1983) (final negative countervailing duty determinations). CFLI filed another petition in 1986, which eventually led to a preliminary determination finding that Canadian softwood lumber industry was subsidized. *Certain Softwood Lumber Products from Canada*, 51 Fed. Reg. 37,453 (Dep't Commerce Oct. 22, 1986) (preliminary affirmative countervailing duty determination). Prior to entry of a final determination, Canada and the United States entered into a Memorandum of Understanding settling this dispute. *See Certain Softwood Lumber Products from Canada*, 56 Fed. Reg. 56,055 (Dep't Commerce Oct. 31, 1991) (self-initiation of countervailing duty investigation). In 1991, Commerce initiated an investigation into subsidization of the Canadian softwood lumber industry. *Id.* Though the investigation resulted in a CVD order, that order was overturned by a binational panel convened under the U.S.-Canada Free Trade Agreement ("U.S.-CAFTA"). *See Certain Softwood Lumber Products from Canada*, 59 Fed. Reg. 42,029, 42,029 (Dep't Commerce Aug. 16, 1994) (notice of panel decision, revocation of countervailing duty order and termination of suspension of liquidation). On May 29, 1996, the United States and Canada finalized an agreement governing the importation of softwood lumber into the United States. *Canadian Exports of Softwood Lumber*, 61 Fed. Reg. 28,626 (U.S. Trade Rep. June 5, 1996) (notice of agreement; monitoring and enforcement pursuant to sections 301 and 306). *See generally Canada-U.S. Softwood Lumber Relations, 1982–2005*, *available at*: http://www.dfait-maeci.gc.ca/eicb/softwood/chrono-en.asp (last visited July 20, 2006).

[5] The process of imposing AD or CVD duties begins with an investigation. Commerce may start an investigation on its own initiative, or an investigation may be prompted by a petition from the domestic industry. *See* 19 U.S.C. §§ 1671a(a)–(b), 1673a(a)–(b) (2000).

Commerce and the ITC are authorized to conduct investigations and impose AD and CVD duties on imported goods under Title VII of the Smoot-Hawley Tariff Act of 1930, as amended by the Trade Agreement Act of 1979 ("Title VII"). *See* Tariff Act of 1930, 71 Cong.

Canada, 66 Fed. Reg. 18,508 (Int'l Trade Comm'n Apr. 9, 2001) (institution of countervailing duty and antidumping investigations and scheduling of preliminary phase investigations). The ITC instituted investigations pursuant to that petition on April 9, 2001. *Id*.

On May 16, 2002, the ITC issued a final determination that the domestic industry was threatened with material injury by reason of imports of softwood lumber from Canada. *Softwood Lumber from Canada*, Inv. Nos. 701–TA–414, 731–TA–928 (Final), USITC Pub. 3509 (May 2002) ("May 16, 2002 Determination"). On May 22, 2002, Commerce issued AD and CVD orders on certain softwood lumber products from Canada. *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (Dep't Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and notice of antidumping order); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,070 (Dep't Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order) (collectively "May 22, 2002 Orders"). That day, CLTA and the Ontario Forest Industries Association filed petitions for binational panel review with the U.S. section of the North American Free Trade Agreement ("NAFTA") Secretariat, later followed by petitions from Tembec and the Ontario Lumber Manufacturers Association. *See North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews*, 67 Fed. Reg. 41,955 (Dep't Commerce June 20, 2002) (notice of first request for panel review). While the NAFTA Panel reviewed the ITC's May 16, 2002 Determination, in April 2003, the Canadian government requested the formation of a World Trade Organization ("WTO") panel to review the ITC's May 16, 2002 Determination for consistency with the WTO Antidumping and Subsidies agreements.[6] *See* Pls.' J. Statement of Undisputed Facts ¶12. Thus, the ITC's May 16, 2002 Determination was concurrently subject to review in two separate fora, applying different bodies of law.

The NAFTA Panel issued its decision on September 5, 2003, finding that the ITC's injury determination was not supported by substantial evidence or in accordance with U.S. law. *See In the Matter of Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Panel Decision (Sept. 5, 2003) ("NAFTA First Remand").

Ch. 497, Title VII, § 701 *et seq.*, 46 Stat. 590 (1930) *as amended by* Pub. L. No. 96–39, Title I, § 101, 93 Stat. 144, 151 (1979) (codified as amended in part at 19 U.S.C. §§ 1671, 1673 *et seq.*).

[6] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round 33 I.L.M. 1125 (1994) ("Antidumping Agreement"); Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round 33 I.L.M. 1125 (1994) ("Subsidies Agreement").

The NAFTA Panel therefore remanded to the ITC with instructions to report back within one hundred days. *Id.* at 115. On December 15, 2003, the ITC issued its remand determination, again finding an affirmative threat of injury. *See In the Matter of Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Remand Decision, at 3 (Apr. 19, 2004) ("NAFTA Second Remand"). On April 19, 2004, the NAFTA Panel issued its Second Remand report, finding that the ITC's remand determination was not supported by substantial evidence or in accordance with U.S. law. *Id.* at 51–52. The ITC was given 21 days in which to issue a second remand determination. *Id.* at 53.

Meanwhile, on March 22, 2004, the WTO Panel issued its decision finding that the ITC's affirmative determination was not consistent with the United States' WTO obligations. Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (Mar. 22, 2004) ("WTO Panel report"). On April 26, 2004, the Dispute Settlement Body ("DSB") of the WTO adopted the WTO Panel report. Rather than appeal to the WTO Appellate Body ("AB"), on June 14, 2004, the USTR sent a letter, pursuant to section 129(a)(1) of the URAA, to the ITC requesting an advisory report as to whether the ITC would be able to implement the WTO Panel report in accordance with Title VII of the Trade Act of 1930. *See* Letter from Robert B. Zoellick, USTR, to Deanna T. Okun, Chairman, ITC (June 14, 2004) AR 2. On July 14, 2004, the ITC replied that it would be able to render its determination "not inconsistent" with the WTO Panel report under Title VII. *See* Letter from Stephen Koplan, Chairman, ITC, to Robert B. Zoellick, USTR (July 14, 2004) AR 3. On July 27, 2004, the USTR requested that the ITC issue a determination pursuant to section 129(a)(4) of the URAA. *See* Letter from Robert B. Zoellick, USTR, to Stephen Koplan, Chairman, ITC (July 27, 2004) AR 4. In response, on August 5, 2004, the ITC published notice in the *Federal Register* that it was instituting a section 129(a)(4) proceeding. *See Softwood Lumber from Canada*, 69 Fed. Reg. 47,461 (Int'l Trade Comm'n Aug. 5, 2004) (notice of institution of proceeding).

While the ITC and USTR were determining how to respond to the adverse WTO Panel report, the ITC submitted a revised threat of injury analysis per the NAFTA Panel's Second Remand on June 10, 2004. *See In the Matter of Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Remand Decision, at 2 (Aug. 31, 2004) ("NAFTA Third Remand"). Once again, the ITC remand determination found a threat of material injury. *Id.* On August 31, 2004, the NAFTA Panel returned its third report, finding that the ITC had not corrected inadequacies in its injury analysis, and giving the ITC ten days to issue a new determination. *Id.* at 13. On September 10, 2004, the ITC relented and issued a determination finding no threat of material injury to the domestic industry resulting from imports of softwood lumber from Canada. *See Softwood Lumber from Canada*, Inv. Nos. 701–TA–414, 731–TA–928 (Final) (Third Remand), USITC Pub. 3815, Views on Remand (Sept. 10, 2004) ("Negative Remand Determination"). The NAFTA panel affirmed this determination on October 12, 2004. *See Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 69,584, 69,585 (Dep't Commerce Nov. 30, 2004) (NAFTA panel decision). On October 25, 2004, a "notice of final panel action" was published by the NAFTA Secretariat. *Id*.

On November 24, 2004, the United States requested that an Extraordinary Challenge Committee ("ECC") review the NAFTA Panel's Third Remand.[7] *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 70,235 (Dep't Commerce Dec. 3, 2004) (notice of request for Extraordinary Challenge Committee). On the same day, and despite having issued the Negative Remand Determination, the ITC issued a determination pursuant to section 129(a)(4) finding that the domestic industry was threatened with material injury by reason of imports of softwood lumber. *Softwood Lumber from Canada*, 701–TA–414, 701–TA–928 (Final), Section 129 Determination (Nov. 24, 2004) AR 5 ("Section 129 Determination")[8]; *see also WTO Dispute Settlement Proceeding Regarding Investigation of the International Trade Commission in Softwood Lumber from Canada*, 70 Fed. Reg. 36,687, 36,688 (U.S. Trade Rep. June 24, 2005) (notice and request for comments) (noting date of Section 129 Determination).

Pursuant to the ITC's Negative Remand Determination of September 10, 2004, on November 30, 2004, Commerce published a notice in the *Federal Register*:

> Consistent with the decision of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in *Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990) . . ., the Department of Commerce . . . is notifying the public that the *Third Remand* for antidumping and countervailing duty investigations in *Certain Softwood Lumber Products from Canada* and the Notice of Final Panel action issued by the NAFTA Panel reviewing the ITC's determinations . . . are not "in harmony" with the ITC's original results.

---

[7] NAFTA provides that a Member may seek review of a NAFTA Panel report by an ECC if the involved party alleges gross misconduct or bias by a panel member, a serious departure from fundamental rules of procedure, or that the panel manifestly exceeded its power, authority or jurisdiction. North American Free Trade Agreement, U.S.-Can.-Mex., art. 1904.13, Dec. 17, 1992, 32 I.L.M. 605, 683–84 (1993).

[8] The Section 129 Determination is available at: http://63.173.254.5/fopin.129.pdf (last visited July 20, 2006).

69 Fed. Reg. at 69,584 ("*Timken* notice").[9]

Returning to the WTO track, on December 10, 2004, the USTR instructed Commerce to amend the May 22, 2002 Orders to implement the ITC's section 129(a)(4) determination.[10] *See* Letter from Robert B. Zoellick, USTR, to Donald L. Evans, Sec'y, Dep't Commerce (Dec. 10, 2004) AR 6 ("I request that the Department [of Commerce] effectuate this implementation by amending the antidumping and countervailing duty orders on softwood lumber products from Canada, published on May 22, 2002 . . . to reflect the issuance and implementation of the Commission's Section 129 determination."). Commerce carried out the USTR's instructions on December 20, 2004. *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,916 (Dep't Commerce Dec. 20, 2004) (amendment to antidumping and countervailing duty orders). The United States then informed the WTO Panel that it had complied with the recommendations of the WTO Panel report. On February 15, 2005, Canada requested that the WTO form a panel ("Article 21.5 Panel") to review the measures taken by the ITC to render its determination consistent with the United States' WTO obligations.[11] *See* Request for the Establishment of an Article 21.5 Panel, *United States – Investigation of the*

---

[9] Following an adverse ruling by this Court or a NAFTA panel, publication of a *Timken* notice serves to remove the "presumption of correctness" enjoyed by an agency action. Post-*Timken* notice entries will be liquidated in accordance with the court's or NAFTA panel's determination if such determination is upheld on appeal, or if the time for appeal elapses. *See Timken*, 893 F.2d at 342.

Pursuant to 19 U.S.C. § 1516a(g)(5)(B), the *Timken* notice in this case was to be published within 10 days of the issuance of the NAFTA panel decision, or by November 4, 2004. In fact, publication was not made until November 30, 2004. The notice set forth that "the Department must publish notice of decision . . . which is 'not in harmony' with the Department's results. . . . Publication of this notice fulfills [this] obligation. . . . [T]his notice will serve to suspend liquidation of entries [made] on or after November 4, 2004, i.e., 10 days from the issuance of the Notice of Final Action." 69 Fed. Reg. at 69,584. Thus, the parties have treated November 4, 2004 as the *Timken* notice effective date, as it was the last lawful day that notice of an adverse decision could be published.

[10] The parties and the court use the term "implement" to indicate action taken by Commerce (the "administering authority") to "give domestic legal effect" to a determination by Commerce or the ITC. For example, once the ITC issues a section 129 determination, it has no domestic legal effect until Commerce "implements" the determination. The court understands the act of "giving domestic legal effect" to mean that the determination is used to "support" an AD or CVD order. Thus, if a section 129 determination were partially negative, and the USTR ordered Commerce to implement that determination, Commerce would do so by partially revoking the outstanding AD or CVD order, using the analysis of the section 129 determination to "support" the remainder of the order still in effect. The court will therefore use the term "support" in reference to an AD or CVD order to indicate that the analysis of the determination in question constitutes the legal justification for the imposition of AD or CVD duties.

[11] A WTO panel may be convened to review whether "measures taken to comply" with an adverse WTO report have in fact brought a Member's practices into accordance with the Member's WTO obligations. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments – Results of the Uruguay Round, 33 I.L.M. 1125, 1226 (1994) ("DSU"); *see also infra* p. 41.

Int'l Trade Comm'n in Softwood Lumber from Canada, WT/DS277/8 (Feb. 15, 2005).

Review of the NAFTA Third Remand and the Section 129 Determination continued in separate fora, with mixed results. On August 10, 2005, the ECC unanimously dismissed the United States' challenge to the NAFTA Panel's Third Remand, thus upholding the NAFTA Panel's finding that the May 16, 2002 Determination was inconsistent with U.S. law. *See In the Matter of Certain Softwood Lumber Products from Canada*, ECC–2004–1904–01–USA, Opinion and Order of the ECC (Aug. 10, 2005). The NAFTA Secretariat published a notice of the ECC's decision on August 16, 2005. *North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews*, 70 Fed. Reg. 48,103 (Dep't Commerce Aug. 16, 2005) (notice of decision and completion of Extraordinary Challenge Committee). On November 15, 2005, however, the WTO Article 21.5 Panel found the ITC's Section 129 Determination consistent with the United States' WTO obligations. Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW (Nov. 15, 2005).[12] Commerce therefore continued collecting deposits pursuant to the May 22, 2002 Orders as "amended" to reflect the ITC's Section 129 Determination. At the time Plaintiffs' motions for summary judgment were filed, the total deposits collected pursuant to the May 22, 2002 Orders exceeded four billion U.S. dollars. *See* Pls.' J. Statement of Undisputed Facts ¶ 6; Def.'s Counterstatement of Material Fact ¶ 6.

Plaintiff Tembec filed a summons and complaint in this Court on January 19, 2005, alleging under section 702 of the Administrative Procedure Act ("APA") that the USTR's action ordering Commerce to implement the Section 129 Determination was not in accordance with law. Defendants moved to dismiss this action for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. In response, Plaintiffs filed for summary judgment claiming that the USTR's actions were not in accordance with section 129. To prevail on their claims for summary judgment, Plaintiffs must show that there is no genuine issue of material fact and that

---

[12] The AB has since "reversed" the Article 21.5 Panel's report. *See* Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW (Apr. 13, 2006). The AB reversed the Article 21.5 Panel's findings "on the grounds that the Panel articulated and applied an incorrect standard of review to the Section 129 Determination." *Id.* ¶ 141. The AB did not, however, find sufficient undisputed facts on the record to enable it to "complete the analysis." *Id.* ¶ 160. As a result, the AB "express[ed] no views on the consistency or inconsistency of the Section 129 Determination" with the United States' WTO obligations. *Id.* ¶ 161. The AB consequently found that it was "unable to make a recommendation to the Dispute Settlement Body." *Id.* ¶ 163.

they are entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

II. Subject Matter Jurisdiction

The court begins with a consideration of whether it possesses the authority, both statutory and constitutional, to hear this case. Subject matter jurisdiction constitutes a "threshold matter," and without it, a case must be dismissed without proceeding to the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). "The burden of establishing jurisdiction lies with the party seeking to invoke th[e] Court's jurisdition." *Bhullar v. United States*, 27 CIT, ___, ___, 259 F. Supp. 2d 1332, 1334 (2003) (citing *Old Republic Ins. Co. v. United States*, 14 CIT 377, 379, 741 F. Supp. 1570, 1573 (1990)), *aff'd*, 93 F. App'x 218 (Fed. Cir. Mar. 2, 2004).

This matter involves a number of discrete jurisdictional issues. First, the court must consider certain mandatory limits on its power to hear this case; including Plaintiffs' standing under the Article III 'case and controversy' requirement; Plaintiffs' right to bring suit challenging the USTR's interpretation of section 129; and the statutory authority of this Court to hear such claims under 28 U.S.C. § 1581 (2000). Second, the court must consider certain prudential limits on its authority to hear the case, including Plaintiffs' standing under the "zone of interests" test, as well as the political question doctrine.

A. Mandatory Limitations on Jurisdiction

1. Constitutional Standing

Article III of the U.S. Constitution requires federal courts to adjudicate only "actual Cases and Controversies." *Utah v. Evans*, 536 U.S. 452, 459 (2002) (quotations omitted); U.S. Const. art. III, § 2. To show an actual case or controversy, plaintiffs must "[1] allege personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984) (quotations omitted)).

It is apparent that Plaintiffs have alleged personal injuries fairly traceable to the allegedly unlawful conduct of the USTR. As to the private plaintiffs, which are Canadian producers and exporters of softwood lumber, they have paid, and continue to pay, cash deposits on merchandise that they exported to the United States subject to the May 22, 2002 Orders. Tembec Am. & Supplemental Compl. ¶ 5. Pecuniary injury constitutes injury in fact. *See Elkem Metals Co. v. United States*, 26 CIT 398, 401, 196 F. Supp. 2d 1367, 1371 (2002) ("Probable economic injury suffices to establish standing."). Private plaintiffs assert that these deposits have been collected by virtue of the USTR's illegal action ordering Commerce to implement the Section 129 Determination. *See* Tembec Am. & Supplemental Compl. ¶¶ 5–9, 14–15, 23–25, 27–29, 31–32, 34–36. CLTA brings the same claims against the United States on behalf of its members.[13] *See* CLTA Compl. ¶¶ 4, 7–8, 12, 21–23, 25–27, 29–30, 32–34. Defendants argue that the USTR's action in ordering implementation of the Section 129 Determination was legal, but otherwise have not disputed that the private plaintiffs are lumber producers that have paid cash deposits under the May 22, 2002 Orders.

The Governments of Canada allege injury in the form of damage to their respective economies and lost tax revenue.[14] *See* Can. Gov'ts'

---

[13] CLTA represents the Alberta Forest Products Association, the British Columbia Lumber Trade Council (including its constituent associations, the Council of Forest Industries and the Coast Forest & Lumber Association, and their member companies), the Free Trade Lumber Council (including its constituent association the Canadian Wood Pallet Association and its member companies), the Ontario Forest Industries Association, the Ontario Lumber Manufacturers Association, and the Quebec Lumber Manufacturers Association. *See* CLTA Compl. 1–2 n.1, ¶ 6. Although CLTA has not suffered direct injury, it may obtain "[associational] standing solely as the representative of its members." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1977) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (quotations omitted)).

A party acquires associational standing by showing that "(1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claims asserted nor the relief requested requires the participation of the individual members in the lawsuit." *McKinney v. U.S. Dep't of the Treasury*, 799 F.2d 1544, 1550 n.13 (Fed. Cir. 1986) (quoting *Hunt*, 432 U.S. at 343). CLTA fulfills the first prong of this test because its members represent various Canadian softwood lumber exporters serving the United States market that are subject to the May 22, 2002 Orders. *See* CLTA Compl. ¶ 8. CLTA meets the conditions of the second prong because it "was formed to defend the interests of Canadian softwood lumber producers and exporters in the softwood lumber AD and CVD investigations that began in April 2001" that led to the imposition of the AD and CVD orders. CLTA Compl. ¶ 9. Finally, nothing suggests that CLTA's members need to directly participate in this suit to assert their claims and obtain relief. *See* Pl. CLTA's Mem. Supp. Mot. Summ. J. & Resp. Defs.' Mot. Dismiss 59–61 ("Pl.-CLTA's Mem."); *cf. U.S. Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 202, 544 F. Supp. 883, 887 (1982), *aff'd*, 683 F.2d 399 (C.C.P.A. 1982). Thus, CLTA has the associational standing required to bring this suit.

Relatedly, Defendant argues that this action must be dismissed insofar as Plaintiffs have requested a refund of all cash deposits collected pursuant to the May 22, 2002 Orders, including those collected from entities not represented in this action. Def.'s Mem. 43–44. This argument mischaracterizes the nature of Plaintiffs' suit. The court is called upon to consider the authority of the USTR to order implementation of the Section 129 Determination. If the court finds that the USTR's action was *ultra vires*, the court will invalidate that action. The fact that the ITC's existing Negative Remand Determination may lead to a refund of some or all cash deposits does not change the nature of this inquiry, nor does the fact that persons other than Plaintiffs may incidentally be benefitted by invalidation of the USTR's order render Plaintiffs' claims invalid as an attempt to litigate the rights of third parties.

[14] Because the Governments of Canada have asserted claims bearing on their individual economic losses stemming from the AD and CVD orders, and not based merely on the rights of other plaintiffs, they do not fall within the prudential prohibition on *jus tertii* standing. *See Clinton v. City of New York*, 524 U.S. 417, 433 (1998) ("The Court routinely recognizes probable economic injury resulting from governmental actions that alter competitive conditions as sufficient to satisfy the Article III 'injury-in-fact' requirement. It follows logically that any petitioner who is likely to suffer economic injury as a result of governmental action that changes market conditions satisfies this part of the standing test.") (quoting 3 K. Davis

Mem. Supp. Mot. Summ. J. & Resp. Defs.' Mot. Dismiss 71 ("Pl.-GOC's Mem."). Defendants do not appear to dispute this assertion.[15] The deprivation of tax revenue has been recognized as an injury in fact in other contexts. *See, e.g.*, *Mount Evans Co. v. Madigan*, 14 F.3d 1444, 1451–1452 (10th Cir. 1994) (finding that county had standing to sue based on the loss of revenue sharing and tax revenue stemming from decision by U.S. Forest Service not to rebuild certain park facilities after forest fire). The Governments of Canada also assert that the loss of tax revenue stems directly from economic injury inflicted on softwood lumber companies located within their borders. *See* Pl.-GOC's Mem. 71. This claim is sufficient to show causation. *See Bennett v. Spear*, 510 U.S. 154, 168–69 (1997) (rejecting arguments "equat[ing] injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation"); *see also Singleton v. Wulff*, 428 U.S. 106, 113 (1976); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973).

A favorable judgment from the court would afford relief for these claimed injuries. The court is not asked to review the Section 129 Determination itself for consistency with U.S. law.[16] Rather, the court is asked to review whether the USTR had authority to order implementation of the Section 129 Determination under section 129(a). A victory for Plaintiffs would result in invalidation of the USTR's order to Commerce that resulted in implementation of the Section 129 Determination. Because implementation is necessary to give a determination "domestic legal effect," that is, to support an order, a finding that the USTR improperly ordered implementation of the Section 129 Determination will prevent the use of that determination to support the May 22, 2002 Orders. The parties appear to concede that, absent implementation of the Section 129 Determination, the Negative Remand Determination would control. *See* Def.'s Mem. 40; Def.-Int.'s Mem. 44. Nor do Defendants appear to dispute that, if the Section 129 Determination were not implemented, the deposits collected after issuance of the *Timken* notice would be returned to Plaintiffs. *See* Def.'s Mem. 40; Def.-Int.'s Mem. 46. Thus, all parties agree that a finding that implementation of the Section

---

& R. Pierce, *Administrative Law Treatise* 13–14 (3d ed. 1994) (quotations, brackets & ellipses omitted)); 19 U.S.C. § 1677(9)(B) (2000); Customs Courts Act of 1980, H.R. Rep. No. 96–1235, at 28 (1980) (marking Congressional intent to "enlarge[ ] the class of persons eligible to sue in civil actions in the Court of International Trade to include . . . foreign governments" and thereby implicitly acknowledging that foreign sovereigns possess their own claims).

[15] Defendant-Intervenor has argued that the Governments of Canada lack standing to seek refunds of cash deposits collected, but has made no mention of the economic impact of continued collection of cash deposits under the May 22, 2002 Orders. *See* Def.-Int.'s Resp. Pls.' Mot. Summ. J. & Reply Supp. Mot. Dismiss ("Def.-Int.'s Reply") 46 n. 35.

[16] Before this Court, such an action properly would be brought under 19 U.S.C. § 1516a(a)(2)(B)(vii) (2000) and reviewed pursuant to 28 U.S.C. § 1581(c).

129 Determination was *ultra vires* would result in a refund, pursuant to the Negative Remand Determination, of some or all of the cash deposits collected. The possibility of such a refund, as well as the revocation of the May 22, 2002 Orders, satisfies the "redressability" prong of the standing inquiry.

2. Mootness

Having found that Plaintiffs meet the requirements of standing, the court must also determine whether any intervening events have mooted this case. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) ("The requisite personal interest that must exist at the commencement of the litigation . . . must continue throughout its existence.") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22 (1997) (quotations omitted)). Unless the circumstances fall within certain well-defined exceptions to mootness, a court cannot entertain a case in which "[t]he controversy between the parties has . . . clearly ceased to be 'definite and concrete' and no longer 'touches the legal relations of parties having adverse legal interests.' " *DeFunis v Odegaard*, 416 U.S. 312, 317 (1974) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937) (parentheses omitted)). "The test is whether a present controversy exists as to which effective relief may be granted." *Associacao Dos Industriais de Cordoaria e Redis v. United States*, 17 CIT 754, 759, 828 F. Supp. 978, 984 (1993) ("*Cordoaria*").

Defendant asserts that Plaintiffs' claims, which Defendant characterizes as seeking the enforcement of the ITC's Negative Remand Determination, were mooted by implementation of the Section 129 Determination. Def.'s Mem. 43 ("The section 129 determination provides an independent basis for the antidumping and countervailing duty orders. Accordingly, even if this Court possessed subject matter jurisdiction and plaintiffs' complaints concerning the retroactive effect of revocation pursuant to a NAFTA panel decision were valid, any decision by this Court concerning those issues would be advisory only."); *see also URAA SAA* at 1027 ("[I]mplementation of section 129 determinations may render moot all or some issues in pending litigation in connection with the agency's initial determination.").[17] Defendants' argument assumes the very question the court has been called upon to decide – whether the Section 129 Determination could be implemented following the Negative Remand Determination. Consequently, the case is not moot.

---

[17] Statement of Administrative Action accompanying H.R. Rep. No. 103–826(I), *as reprinted in* 1994 U.S.C.C.A.N. 4040 ("*URAA SAA*").

3. Statutory Jurisdiction

In addition to constitutional authority, the court must also consider whether it has the statutory authority to hear this case. The court will first consider whether a challenge to the USTR's interpretation of section 129 is within the jurisdiction of the Court of International Trade under 28 U.S.C. § 1581(i)(4). The court will then address whether Congress has authorized a private right of action to bring a suit challenging the USTR's interpretation of section 129. Finally, the court will consider whether foreign governments, such as the Governments of Canada, are "persons" entitled to bring suit in this Court under the APA and 28 U.S.C. § 2631 (2000).

a. Jurisdiction Under 28 U.S.C. § 1581(i)

Plaintiffs invoke the court's jurisdiction under 28 U.S.C. § 1581(i).[18] *See* Tembec Am. & Supplemental Compl. ¶ 4; CLTA Compl. ¶ 1; Pl.-GOC Compl. ¶ 3. Congress enacted § 1581(i)(4) to ensure that actions involving the "administration and enforcement" of matters reviewable under other portions of § 1581 did not escape review in this Court. *Cordoaria*, 17 CIT at 757, 828 F. Supp. at 982–83 (Congress intended § 1581(i) "to avoid conflict in jurisdiction with the district courts and to ensure judicial review for various unspecified challenges to enforcement of import laws."). Plaintiffs claim that § 1581(i) applies because this case involves actions taken by the USTR to administer and enforce a determination by the ITC under section 129(a)(4), i.e., a determination subject to review under 28 U.S.C. § 1581(c). Pl.-GOC's Mem. 58 n.35 (arguing that "[t]he Federal Circuit has recognized the distinction between actions challenging a determination reviewable under section 516A of the Tariff Act . . . and actions challenging the administration and enforcement of orders based on such determinations").

---

[18] 28 U.S.C. § 1581(i) provides in part:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section . . . , the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for –

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

. . . .

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection and subsections (a)–(h) of this section.

This subsection shall not confer jurisdiction over an antidumping or countervailing duty determination which is reviewable either by the Court of International Trade under section 516A(a) of the Tariff Act of 1930 [19 U.S.C. § 1516a(a)] or by a binational panel under article 1904 of the North American Free Trade Agreement or the United States-Canada Free-Trade Agreement and section 516A(g) of the Tariff Act of 1930 [19 U.S.C. § 1516a(g)].

28 U.S.C. § 1581(i).

Two arguments are advanced as to why § 1581(i) does not apply in this case. First, Defendant-Intervenor claims that once substantive review of the ITC's May 16, 2002 Determination entered the NAFTA review process, the claim ceased to involve review of the administration and enforcement of a "matter" reviewable under § 1581(c). Def.-Int.'s Reply 43 (arguing that court could not review "the 'matter' of the ITC negative remand determination issued pursuant to the NAFTA panel's order" because "this Court could never have had jurisdiction over the action taken by the ITC on remand").[19] Defendant's argument mischaracterizes the nature of Plaintiffs' claims. Plaintiffs do not challenge the administration and enforcement of the Negative Remand Determination. Instead, it is the administration and enforcement of the Section 129 Determination that is challenged. Section 1581(c) only permits suits based on the review of actions listed in 19 U.S.C. § 1516a, which does not include the USTR's interpretation of section 129. *See Shinyei Corp of Am. v. United States*, 355 F.3d 1297, 1304–05, 1309 (Fed. Cir. 2004) (granting plaintiff § 1581(i)(4) jurisdiction in action challenging administration and enforcement of results of administrative review); *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) ("[A]n action challenging Commerce's liquidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results."). The fact that the Negative Remand Determination may remain in effect if the Section 129 Determination is invalidated does not transform Plaintiffs' challenge to the USTR's interpretation of section 129 into an attempt to enforce a NAFTA report or the Negative Remand Determination.[20]

---

[19] It may also be argued that because the substantive review of the Section 129 Determination was pursued in the NAFTA process, the court lost § 1581(c) jurisdiction to review the substance of the Section 129 Determination. Consequently, it could be claimed that the Section 129 Determination ceased to be a "matter" subject to review under § 1581(a)–(h) or (i)(1)–(3), thus depriving this court of jurisdiction to review the "administration and enforcement" of the Section 129 Determination under § 1581(i)(4). This argument incorrectly defines the "matter" over which this Court has subject matter jurisdiction under § 1581(i). 28 U.S.C. § 1581(c) provides the court with jurisdiction to review "any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]." Those matters over which a civil action may be commenced include "[a] determination by the administering authority or the Commission under section 3538 of [19 U.S.C., i.e. a section 129 determination,] concerning a determination under title VII of the Tariff Act of 1930." 19 U.S.C. § 1516a(a)(2)(B)(vii). Thus, the "matter" for purposes of § 1581(i)(4) is not the civil suit challenging a section 129 determination, but a section 129 determination itself. Because the ITC issued the Section 129 Determination, the court has jurisdiction to review the administration and enforcement of that determination regardless of where the substance of the determination is being reviewed.

[20] Despite Defendant-Intervenor's contentions, *Bhullar v. United States* does not apply to the present case to deny Plaintiffs section 1581(i) jurisdiction. In that case, the court dismissed plaintiff's suit for lack of subject matter jurisdiction because NAFTA panel review had been requested in lieu of review under § 1581(c). *See Bhullar*, 27 CIT at ____, 259 F. Supp. 2d at 1340–41. Thus, § 1581(i) jurisdiction was not available. There is no NAFTA panel review authority for the issue now before the court.

Defendants make a similar argument, claiming that Plaintiffs cannot bring suit under § 1581(i) because they could have received the same remedy in a challenge to the May 22, 2002 Orders under § 1581(c). *See* Def.'s Mem. 39–40; Def.'s Reply Supp. Mot. to Dismiss & Resp. Pls.' Mot. Summ. J. ("Def.'s Reply") 35 ("[P]laintiffs did not . . . respond to our demonstration that they might have received the same *remedy* – revocation of the antidumping and countervailing duty orders and refunds of deposited estimated duties – pursuant to a properly brought 28 U.S.C. § 1581(c) action challenging the ITC's original 2002 determination."). It is true that "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (quoting *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (emphasis removed)). This constraint does not mean, however, that Plaintiffs must forego their right to NAFTA panel review of the substance of the May 16, 2002 Determination in order to seek review of a completely separate action taken to administer and enforce the Section 129 Determination.

The facts in *Consolidated Bearings*, 348 F.3d at 1001, present a similar situation. In that case, an importer challenged under § 1581(i) the wrongful liquidation of its entries at the time-of-entry cash deposit rate, rather than at the rate established by the weighted average of the final results of an administrative review. *Id.* at 1001. The importer brought an action under the APA and § 1581(i), claiming that Commerce improperly administered the results of the administrative review. *Id.* at 1002. The defendant moved to dismiss for lack of subject matter jurisdiction, arguing that the plaintiff could have participated in the administrative review and received the same remedy under § 1581(c). *Id.* Although the importer might have received its sought-after rate had it joined the administrative review, the Federal Circuit nonetheless found § 1581(i) jurisdiction proper. *Id.* The court focused not on the remedies available under § 1581(c) and (i), but on the distinction between the claims available under § 1581(c), a challenge to the substance of the administrative review, and § 1581(i), a challenge to Commerce's failure to comply with past-practice in applying assessed rates. *Id.*

In this case, a challenge to the substance of the ITC's Negative Remand Determination, or the substance of the Section 129 Determination for that matter, involves an entirely separate legal claim than is presented here. Like the plaintiff in *Consolidated Bearings*, Plaintiffs have brought a challenge to the administration and enforcement of a determination, not to the validity of the determination itself. Consequently, the availability of a remedy under § 1581(c) as to the underlying determination does not bar suit under § 1581(i).

b. Private Right of Action

The APA provides a waiver of sovereign immunity allowing persons aggrieved by agency action to file suit for relief other than money damages. Under the APA, courts presume a private right of action is available absent "any indication in the statute that the [agency] decision is committed wholly to the discretion of the agency or that review is otherwise precluded." *Md. Dep't of Human Res. v. Dep't of Health & Human Servs.*, 763 F.2d 1441, 1445 (D.C. Cir. 1985) (quoting *Bell v. New Jersey*, 461 U.S. 773, 778 n.3 (1983)) (quotations omitted); *see* 5 U.S.C. § 701(a). This presumption may be overcome by a clear indication of Congressional intent to the contrary. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 350–51 (1984). Defendants argue that Plaintiffs lack a cause of action for two reasons. First, they argue that Congress has clearly barred private suits to enforce the NAFTA or to challenge agency action taken to implement a NAFTA report. *See* Def.'s Mem. 41; Def.-Int.'s Mem. 18–21. Second, Defendants argue that the terms of the URAA clearly state that no person other than the United States "shall have any cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement." 19 U.S.C. § 3512(c)(1); *see also* Def.-Int.'s Mem. 22–26.

Defendants are correct that Congress has provided that no private party may sue to enforce implementation of a NAFTA panel report. 19 U.S.C. § 1516a(g)(7)(a) ("Any action taken by the administering authority or the Commission under this paragraph shall not be subject to judicial review. . . ."); § 3312(c)(1) ("No person other than the United States . . . shall have any cause of action or defense under . . . the Agreement or by virtue of congressional approval thereof. . . ."); § 3312(c)(2) (providing that no person other than the United States "may challenge, in any action brought under any provision of law, any action or inaction by any department . . . on the ground that such action or inaction is inconsistent with the Agreement. . . ."). These provisions are irrelevant, however, because Plaintiffs' claims do not arise from the NAFTA. Instead, pursuant to the APA, Plaintiffs contest the USTR's interpretation of section 129, which was passed as part of the URAA. The possibility that the court would find the USTR's order to implement the Section 129 Determination unlawful does not transform Plaintiffs' claims into an effort to enforce the NAFTA or a NAFTA report through the courts. Because this suit arises from the APA and section 129, and not from the NAFTA or by virtue of Congress' approval of the NAFTA, the jurisdictional bars of 19 U.S.C. §§ 1516a(g) and 3312(c) do not apply.

Defendants also argue that Plaintiffs' claims are barred as attempts to enforce the terms of the URAA. *See* Def.-Int.'s Mem. 22–26. Specifically, § 3512(c)(1) bars federal courts from entertaining "(A) . . . any cause of action or defense under any of the *Uruguay Round Agreements or by virtue of congressional approval of such an* *agreement*, or (B) . . . any action brought under any provision of law, [to challenge] any action or inaction by any department . . . of the United States . . . on the ground that such action or inaction is inconsistent with *such agreement*." 19 U.S.C. § 3512(c)(1) (emphasis added). Defendants are correct that Plaintiffs' suit stems from section 129 of the URAA; however, Defendants' argument overlooks a crucial distinction – section 129 is domestic legislation that implements, but does not approve, the Uruguay Round Agreements ("URA"). *See* 19 U.S.C. § 2903(a)(1)(B) (distinguishing between trade agreements, such as the URA, legislation implementing an agreement, such as the URAA, and Congressional approval of an agreement).

An exhaustive opinion recently issued by the court delineates the difference between "approval" of an agreement and "enactment" of an agreement's implementation act in the NAFTA context. *See Can. Lumber Trade Alliance v. United States*, 30 CIT ___, ___, 425 F. Supp. 2d 1321, 1361–62 (2006) ("*CLTA*") ("Given that Congress has demonstrated that it knows how to refer to implementing legislation, the court cannot conclude that 'approval of the Agreement' means, or extends to, barring actions under the implementing legislation itself."). The court finds that the reasoning expressed in *CLTA* regarding the NAFTA Implementation Act is directly applicable to the URAA as well. In *CLTA*, the court found that "approval" of the NAFTA was accomplished by only a single section of the NAFTA Implementation Act, while the remainder of that Act does not approve the NAFTA at all. *Id*. at ___, 425 F. Supp. 2d at 1359.

As in the NAFTA Implementation Act, the URAA contains a single provision that "approves" the URA. *Compare* 19 U.S.C. § 3311(a) (approving NAFTA and its accompanying statement of administrative action), *with* 19 U.S.C. § 3511(a) (approving URA and its accompanying statement of administrative action); *see also CLTA*, 30 CIT at ___, 425 F. Supp. 2d at 1362–63 (discussing ratification through "approval" of NAFTA). The court in *CLTA* also found that the nature of the "fast track" trade agreement procedures used to negotiate the NAFTA demonstrated a distinction between "approval" of the agreement negotiated by the President and passage of the implementing legislation by Congress.[21] *CLTA*, 30 CIT at ___, 425 F. Supp. 2d at 1360–61. The URAA was passed via "fast track" authority, and the same distinction between approval and enactment exists in its legislative history. *Compare* North American Free Trade Agreement

---

[21] The court's holding in *CLTA* was as follows. Under fast track authority, Congress was called upon to "approve" only the terms of the NAFTA itself and the NAFTA SAA, which was submitted by the President. *See CLTA* 30 CIT at ____, 425 F. Supp. 2d at 1360–61. The NAFTA Implementation Act was not "approved," but "enacted." *Id*. Thus, specific references to approval of the NAFTA were not directed to the enactment of the implementing legislation. *Id*. The URAA was passed according to similar authority, and similar distinctions between approval and enactment appear in its text and legislative history.

Statement of Administrative Action, H.R. Doc. No. 103–159, at 13–14 (1993) (referring to "[t]he prohibition of a private right of action based on the NAFTA, or on Congressional approval of the agreement *in section 101(a)*") (emphasis added), *with URAA SAA* at 676 (referring to "[t]he prohibition of a private right of action based on the Uruguay Round agreements, or on Congressional approval of those agreements in *section 101(a)*," now codified at § 3511(a)) (emphasis added). Finally, the court in *CLTA* also noted that a broad reading of "approval" would lead to absurd results in the statutory scheme. *CLTA*, 30 CIT at ___, 425 F. Supp. 2d at 1363. For example, in that case, Defendant-Intervenors would have been prevented from raising § 3312(c)(1)(A) as a bar to judicial review, because that provision is part of the implementing legislation, and no person other than the United States "shall have any cause of action *or defense*" by virtue of congressional approval of the NAFTA. *Id.* at ___, 425 F. Supp. 2d at 1358 (quoting 19 U.S.C. § 3312(c)(1)(A)) (emphasis altered). Defendant-Intervenors would face an identical problem under § 3512(c)(1)(A), which contains the same limitation on defenses arising from the "approval" of the URA.

A recent case from the Court of Appeals for the Federal Circuit also impliedly acknowledges the distinction between the "approval" and "implementation" of a treaty. In *Former Employees of Quality Fabricating, Inc. v. U.S. Secretary of Labor*, 448 F.3d 1351 (Fed. Cir. 2006), the court considered this Court's jurisdiction to review claims brought pursuant to a provision of the NAFTA Implementation Act governing trade adjustment assistance. *Id.* at 1352–53. The court noted that "the statutes implementing NAFTA vested the Court of International Trade with considerable jurisdiction over litigation arising under NAFTA." *Id.* at 1355. It also recognized that "19 U.S.C. § 3311 . . . approves the NAFTA with Canada and Mexico, and the SAA proposed to implement the agreement." *Id.* Implied in this statement is the recognition that "approval" of the NAFTA is accomplished by one section of the NAFTA Implementation Act, 19 U.S.C. § 3311, not the implementing legislation as a whole. It follows logically that the remainder of the statute does not "approve" the NAFTA, but rather "implements" it. Similarly, 19 U.S.C. § 3511(a)(1) "approves" the URA, and the remainder of the statute, including section 129, "implements" the URA. Because § 3512(c) bars actions arising from the URA and Congressional *approval* thereof, that section does not bar review of actions brought to challenge the USTR's interpretation of section 129, which was enacted to "implement," not to "approve," the URA.

Furthermore, the structure of the URAA is designed to ensure the participation of all interested parties, including parties such as Plaintiffs. Interested parties are entitled to submit comments on a proposed section 129 determination. 19 U.S.C. § 3538(d). Interested parties are entitled to notice of pending implementation of a section

129 determination. *Id.* § 3538(c)(2). Interested parties are also entitled to bring suit to challenge the substance of an implemented section 129 determination. 19 U.S.C. § 1516a(a)(2)(B)(vii) (declaring "determination by the administering authority or the Commission under section 3538 of this title [Section 129] concerning a determination under subtitle IV of this chapter" reviewable by courts). The court will not infer that, despite Congress' clearly expressed intent to promote the participation of interested foreign parties in the section 129 process, it nevertheless intended to preclude review of whether the USTR's order to implement the results of that process is in accordance with law.

Plaintiffs do not challenge the outcome or adoption of any decision stemming from the URA, NAFTA, or Congressional approval of these agreements. Therefore, Plaintiffs may bring their cause of action challenging the USTR's interpretation of section 129.

c. The Governments of Canada Are Entitled to Bring Suit Under the APA

The Governments of Canada brought their suit pursuant to 28 U.S.C. §§ 1581(i), 2631(i), and the APA. *See* Pl.-GOC's Mem. 64. Defendants argue that the United States has not waived its sovereign immunity with respect to foreign sovereigns' assertion of claims against it under the APA because foreign sovereigns do not qualify as "persons" under the APA. *See* Def.'s Mem. 19–22. Section 702 grants a "*person* suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*" access to federal courts. 5 U.S.C. § 702 (2000) (emphasis added). The APA defines "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2). Defendants believe that the Governments of Canada cannot invoke the APA because traditionally "in common usage, the term 'person' does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it.' " Def.'s Mem. 20 (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989) (quotations, citation & brackets omitted)).

Defendant's cited cases all involve the definition of "person" in the context of 42 U.S.C. § 1983 (2000) and the Due Process Clause of the U.S. Constitution, not the APA, 28 U.S.C. § 1581, or 28 U.S.C. § 2631. *See* Def.'s Mem. 20 (citing *Will*, 491 U.S. at 64; *Breard v. Greene*, 523 U.S. 371, 378 (1998) (per curiam); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 97 (D.C. Cir. 2002)). The definition of "person," however, for purposes of other statutes is not tied to the logic of civil rights legislation. Indeed, the definition of "person" is often defined more broadly than is "person" in the context of § 1983. The Supreme Court has noted that

> there is no hard and fast rule of exclusion. The purpose, the subject matter, the context, the legislative history, and the executive interpretation of the statute are aids to construction which may indicate an intent, by the use of the term, to bring state or nation within the scope of the law.
>
> . . . .
>
> Decision is not to be reached by a strict construction of the words of the Act, nor by the application of artificial canons of construction. On the contrary, we are to read the statutory language in its ordinary and natural sense, and if doubts remain, resolve them in the light, not only of the policy intended to be served by the enactment, but, as well, by all other available aids to construction.

United States v. Cooper Corp., 312 U.S. 600, 604–05 (1941) (footnote omitted), *superseded by statute on other grounds*, 15 U.S.C. § 15a, *as recognized in U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 745 (2004). In the context of other statutes, foreign sovereigns have been found to be "persons." *See, e.g.*, *Pfizer Inc. v. Gov't of India*, 434 U.S. 308, 320 (1978). In *Pfizer*, for example, the Supreme Court found that foreign sovereigns are "persons" entitled to sue under the Sherman and Clayton Acts, 15 U.S.C. §§ 7, 12. The Court noted that the definition of persons provided in the statute included "corporations and associations" formed under domestic and foreign laws. *Id.* at 312 n.9. The Court considered the statute's expansive remedial purpose and found that a foreign sovereign was a "person." *Id.* at 313 ("In light of the law's expansive remedial purpose, the Court has not taken a technical or semantic approach in determining who is a 'person' entitled to sue for treble damages.") (citing *Cooper*, 312 U.S. at 605).

A number of cases have found that the term "person" should be read to include a foreign sovereign for purposes of the APA.[22] In cases litigating Freedom of Information Act requests filed by foreign agencies and sovereigns, courts have generally assumed that such entities are "persons" within the meaning of 5 U.S.C. § 551. *See, e.g.*, *Stone v. Exp.-Imp. Bank of U.S.*, 552 F.2d 132, 136 (5th Cir. 1977); *Neal-Cooper Grain Co. v. Kissinger*, 385 F. Supp. 769, 776 (D.D.C. 1974). The D.C. Circuit has since cited these cases with approval. *Md. Dep't Human Res.*, 763 F.2d at 1445; *but see Doherty v. U.S. Dep't of Justice*, 596 F. Supp. 423, 427–28 (S.D.N.Y. 1984) (disagreeing with *Neal-Cooper* in *dicta*).

---

[22] The Governments of Canada argue that the term "person" in the APA context encompasses foreign sovereigns through the term "public organization." *See* Pl.-GOC's Mem. 67; *see also* 5 U.S.C. §§ 551(2), 701(b)(2).

In addition to the general meaning of "person" under the APA, the court finds that the best indication of whether Congress intended for foreign sovereigns to be considered "persons" for purposes of this case lies in the statutes governing who may sue in the Court of International Trade. 28 U.S.C. § 2631(i) governs which parties may bring suit in this Court under 28 U.S.C. § 1581(i) and provides that "[a]ny civil action of which the Court of International Trade has jurisdiction . . . may be commenced in the court by any *person* adversely affected or aggrieved by the agency action within the meaning of section 702 of title 5." 28 U.S.C. § 2631(i) (emphasis added). Other portions of text from § 2631 illuminate the meaning of "person" within the statute. Subsection 2631(j)(1)(B) states that "only *an interested party* who was a party to the proceedings in connection with which the matter arose may intervene, and such *person* may intervene as a matter of right." 28 U.S.C. § 2631(j)(1)(B) (emphasis added). "Interested party" and "person" in this subsection share the same antecedent, which indicates that "interested party" and "person" have an identical meaning within the statute.

The history of U.S. international trade law supports this conclusion. For the purposes of administrative law and specific administrative procedures, agencies frequently employ "interested party" as a term of art in trade cases, and the laws governing this Court adopt this convention, while using "person" in other contexts. Thus, a "person" for the purposes of 28 U.S.C. § 2631 includes "the government of a country in which such merchandise is produced or manufactured or from which such merchandise is exported." 19 U.S.C. § 1677(9)(B) (providing definitions for terms within Subtitle IV, Countervailing and Antidumping Duties, of Tariff Act of 1930); *see* 28 U.S.C. § 2631(k)(1) (giving term "interested party" in 28 U.S.C. § 2631 definition provided in 29 U.S.C. § 1677); *see also* 19 U.S.C. § 1677(3) (placing "a political subdivision" of foreign country within definition of "foreign country"); *cf. CLTA*, 30 CIT at ____, 425 F. Supp. 2d at 1355 n.32 (noting intent of Congress to allow foreign governments to commence actions in this Court); H.R. Rep. No. 96–1235, at 28 (emphasizing Congressional intent to "enlarge[ ] the class of persons eligible to sue in civil actions in the Court of International Trade to include . . . foreign governments"). This definition indicates that the Governments of Canada have standing to pursue this case. Consequently, the Court has the power to provide relief that may redress the alleged injuries of all Plaintiffs in the suit.

B. Prudential Limitations

1. The Zone of Interests

In addition to demonstrating standing under Article III, Plaintiffs also bear the burden of showing that their "complaint[s] . . . fall within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *See McKinney*, 799 F.2d at 1551 (citations & quotations omitted); *see also Air Courier Conference of Am. v. Postal Workers Union*, 498 U.S. 517, 523–24 (1991). "In the administrative context, [the zone of interests aspect] is derived from the requirement of section 702 of the APA that a plaintiff challenging agency action must be 'adversely affected or aggrieved.' " *Sacilor, Acieries et Laminoirs de Lorraine v. United States*, 815 F.2d 1488, 1491 (Fed. Cir. 1987) (citing 5 U.S.C. § 702). For this test, the court need only determine that the complainant's interest is "*arguably* within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (emphasis added). Specifically, the court must "first discern the interests 'arguably . . . to be protected' by the statutory provision at issue [and] then inquire whether the plaintiff's interests affected by the agency action in question are among them." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 492 (1998) (ellipses in original).

a. The Interests Arguably Protected by the Statutory Provision at Issue

Defendant argues that "[f]oreign governments and producers are . . . outside the 'zone of interest' intended to be protected by section 129" because "section 129 creates only procedures for the Political Branches to consult with each other in order to frame the United States' response to adverse WTO reports." Def.'s Mem. 18 (citing *URAA SAA* at 1022); Def.-Int's Reply 15–17. According to Defendant, only the U.S. Government falls within the applicable "zone of interests" because section 129 establishes a procedure for administrative actions following WTO panel reports to bring U.S. actions into compliance with those rulings. Within this context, Congress provided "for interested party participation *only* for the ITC's proceedings upon the merits, section 129(d), and judicial review *only* for implemented determinations." Def.'s Reply 4; Def.-Int.'s Mem. 28–29. Thus, Defendants invite the court to read narrowly the provisions of 19 U.S.C. § 3538 and find arguable interests only where Congress has specifically provided a statutory right to participate in the administrative process.

Defendants' argument focuses on the procedural rights created by section 129, but misses the proper object of inquiry – the substantive interests to be protected by those procedural rights. *See Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1484 (D.C. Cir. 1994) (finding that prudential standing to challenge agency failure to comply with notice and comment requirements depends on nature of "substantive authority" of agency in question). The Supreme Court instructs the courts to consider "the overall context" of the relevant statutory framework in deciding which interests are arguably protected. *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 401 (1987) (stating that court is "not limited to considering the statute under which respondents sued, but may consider any provision that helps us to understand Congress' overall purposes in the [relevant act]"). Section 129 does indeed impose an obligation on the ITC to allow interested parties to provide comments on a proposed section 129 determination. 19 U.S.C. § 3538(d). It provides a right to be notified once a section 129 determination is implemented. *Id.* § 3538(c)(2). It also provides a right to seek judicial review of a section 129 determination, if it is implemented. 19 U.S.C. § 1516a(a)(2)(B)(vii). The substantive purpose of these procedural rights, however, is to ensure, once the USTR has ordered the ITC to make a determination under section 129, that such determination "is in accord with U.S. safeguards, antidumping, or countervailing duty law." *URAA SAA* at 1023, 1022 (stating that section 129 is "mechanism that permits the agencies concerned . . . to issue a second determination, *where such action is appropriate*, to respond to the recommendations in a WTO panel or Appellate Body report") (emphasis added). The possibility that interested parties will suffer under an unlawful AD or CVD order is the substantive interest that Plaintiffs argue is within the zone of interests protected in section 129.

Thus, section 129 is intended not only to provide the USTR with authority to order new determinations to comply with adverse WTO reports, but also to ensure that those determinations are made in accordance with U.S. law. The procedural interest of participating in the section 129 process cannot be divorced from the substantive interest such participation arguably protects – ensuring that new section 129 determinations are implemented in accordance with U.S. law.[23]

---

[23] Defendants' comparison of this case with *Sacilor* is inapposite. That case involved a challenge to Commerce's steel quota short supply determination under the Steel Import Stabilization Act, Pub. L. No. 98–573, Title VIII, § 801 *et seq.*, 99 Stat. 2948 (1984), which was passed for the express purpose of limiting steel imports from the European Economic Community. 815 F.2d at 1489. Because the statute was designed to protect domestic producers of steel products, the court found that "it would be contrary to the entire purpose of the Act to allow foreign producers to challenge a decision made pursuant to a regulatory scheme designed to protect American steel producers from foreign imports." *Id.* at 1491. The Federal Circuit in *Sacilor* examined the legislative history to conclude that Congress did not "intend[ ] to rely on foreign manufacturers to challenge administrative application of American import laws." *Id.* Section 129 is intended to ensure that implemented section 129 determinations are made in accordance with Title VII, while also complying with the United States' WTO obligations. *See URAA SAA* at 1023. Likewise, Title VII's purpose is not solely to protect domestic industry, but rather to "regulate the level of competition between foreign and domestic producers." *CLTA*, 30 CIT at ____, 425 F. Supp. 2d at 1353; *see also Fed. Mogul Corp. v. United States*, 63 F.3d 1572, 1580 (Fed. Cir. 1995) ("It is well established that antidumping law is not intended to be punitive. Antidumping jurisprudence seeks to be fair, rather than to build bias into the calculation of dumping margins."). *Globe Metallurgical, Inc. v. United States*, 28 CIT ____, ____, 350 F. Supp. 2d 1148, 1157 (2004) ("The goal of the [antidumping] statute is not punitive; the goal is to level the playing field for United States producers of similar goods with producers in [a foreign] country."); *Allied Tube & Conduit Corp. v. United States*, 24 CIT 1357, 1370, 127 F. Supp. 2d 207, 218 (2000)

b. Whether Plaintiffs' Interests Affected by the USTR's Actions Are Among the Interests Protected by Section 129

Private plaintiffs, as producers, exporters, and importers, have an interest in the proper administration of 19 U.S.C. § 3538. First, they are "interested parties" as defined in 19 U.S.C. § 1677(9)(A). As they were and are subject to U.S. antidumping and countervailing duties, they have a protected interest in the proper administration of section 129. *See* 19 U.S.C. § 3538(c)(1), (d). Plaintiffs' interest in not having antidumping and countervailing duties imposed is directly connected to the proper administration of section 129 and, therefore, falls "arguably within the zone of interests to be protected or regulated [by section 129]." *Data Processing*, 397 U.S. at 153.

Likewise, the Canadian Governments' interests are regulated by section 129, as Congress intended foreign governments to be "interested parties" for the purposes of this section. *See* 19 U.S.C. § 1677(9). The Governments of Canada claim that they were aggrieved by Commerce's and the ITC's actions within the meaning of 28 U.S.C. § 2631(i), specifically that Defendants' administrative actions harmed their economies and tax revenues. *See Data Processing*, 397 U.S. at 154 (stating that interest to be protected "at times, may reflect . . . economic values."). The Supreme Court has held that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998). Therefore, the Governments of Canada also meet the zone of interests requirement. *See Clarke*, 479 U.S. at 399–400 (stating that zone of interests test only "denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute" and that "there need be no indication of congressional purpose to benefit the would-be plaintiff"). Thus, the court thus finds no prudential standing restraints that bar Plaintiffs' claims in this matter.

2. Foreign Affairs and the Political Question Doctrine

The court must also consider whether the issue before it is a political question committed the discretion of a coordinate political branch. Courts refer to six factors identified in *Baker v. Carr* to determine whether an issue should be deemed a nonjusticiable "political question." 369 U.S. 186, 217 (1962). These factors are:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judi-

(finding that "fair and equitable" calculation of antidumping duties is "crucial" to purpose of antidumping law).

> cially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Bancoult v. McNamara, 445 F.3d 427, 432 (D.C. Cir. 2006) (quoting *Baker*, 369 U.S. at 217). Any one of these factors may be sufficient to render an inquiry a political question, "but 'unless one of these formulations is inextricable from the case at bar,' we may not dismiss the claims as nonjusticiable under the political question doctrine." *Id.* at 432–33 (quoting *Baker*, 369 U.S. at 217). This case implicates none of these concerns.

First, this is manifestly not a case involving the "textual commitment" of the given subject matter to a coordinate branch of government. The USTR, as part of the Executive Office of the President, undoubtedly has a role in the creation and management of U.S. trade policy. *See Fed. Mogul*, 63 F.3d at 1581 ("Trade policy is an increasingly important aspect of foreign policy, an area in which the executive branch is traditionally accorded considerable deference."). Nevertheless, Congress also possesses some constitutional authority to regulate trade with foreign nations. U.S. Const. art. I, § 8, cl. 3. In the context of section 129, Congress has intentionally instituted a system of checks and balances, requiring the USTR to consult with Congress, *see* 19 U.S.C. § 3538(a)(3) and (5), and giving the ITC, an independent agency, authority to decide whether it may, under Title VII, take steps to comply with an adverse WTO report, *see id.* § 3538(a)(1). *See Fed. Mogul Corp.*, 63 F.3d at 1581–82 (noting ITC's role as check on USTR's ability to implement WTO determinations through section 129 process, thereby dampening influence of "political concerns" on policy). Given this division of constitutional and statutory authority, the court finds that there is no demonstrable textual commitment of the interpretation of section 129 to the political branches.

Moreover, this case clearly presents issues susceptible to judicial analysis and review. The court is called upon to interpret the scope of authority conferred on the USTR by statute. There is no lack of judicially manageable standards to be used in interpreting a delegation of power from Congrress to an executive agency. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–35 (2000) (interpreting authority of FDA to regulate cigarettes under agency's organic statute); *DKT Mem'l Fund, Ltd. v. Agency for Int'l Dev.*, 810 F.2d 1236, 1238 (D.C. Cir. 1987) ("[W]hereas attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs."). As discussed above, this case fundamentally concerns the authority of the USTR under section 129(a) – a question of domestic administrative and trade law that lies within this Court's subject matter jurisdiction.[24]

Consideration of the USTR's authority to order implementation of affirmative section 129(a) determinations does not depend on the court's evaluation of the wisdom of a given implementation. The court is neither called upon to make trade policy, nor to direct the USTR as to whether any section 129 determination should be implemented. Rather, the court is merely asked to determine the bounds of the USTR's authority to order implementation. *Cf. Population Inst. v. McPherson*, 797 F.2d 1062, 1067 (D.C. Cir. 1986) (finding agency's interpretation of statute restricting USAID funding for family planning programs operating in nations where forced abortion or sterilization occurs was justiciable because "the correctness of the [agency's] interpretation of the amendment appeared to be a simple question of statutory construction that a court was competent to examine").

Furthermore, resolution of this case does not present a lack of respect for, or a need for unquestioning adherence to, the views of the executive, or the possibility of embarrassment from multifarious statements from the U.S. Government. In the context of international trade law, courts frequently find agency determinations inconsistent with U.S. law or unsupported by substantial evidence. Indeed, the court is required by statute to invalidate such actions, regardless of the potential for "embarrassment." *See* 19 U.S.C. § 1516a(b)(1) (requiring court to deem certain agency actions unlawful if unsupported by substantial evidence or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Given this obligation, the court also finds that reviewing the scope of authority delegated to the USTR under section 129 would not show a "lack of respect" that would implicate the political question doctrine. Finally, this court has been instructed *not* to exercise unquestioning support for executive agencies in interpreting international trade law. *Fed. Mogul Corp.*, 63 F.3d at 1581 (noting that foreign affairs aspect of trade law does not grant "Commerce . . . unlimited discretion . . . or [allow] courts [to] unthinkingly defer to the Government's view of Congressional enactments"). Consequently, the court

---

[24] Because this case deals with domestic law and not the international obligations of the United States, *Corus Staal BV* does not apply as Defendants contend. *See Corus Staal BV v. U.S. Dep't of Commerce*, 395 F.3d 1343, 1349 (Fed. Cir. 2005) (citing need of courts to grant "substantial deference" to Executive decisions regarding WTO enforcement because of foreign policy implications).

finds that it has the power to hear Plaintiffs' claims and that no prudential concerns limit the court's jurisdiction.

III. Statutory Analysis

Having resolved the question of jurisdiction, the court now turns to the merits of Plaintiffs' claims. The issue before the court is a relatively narrow question of statutory interpretation: whether Congress has granted the USTR authority, pursuant to section 129, to order anything other than the total or partial revocation of an AD, CVD, or safeguards order following a determination by the ITC under section 129(a)(4). For the reasons stated below, the court finds that section 129 cannot be read to imply authority for the USTR to order the implementation of a section 129(a) determination that does not result in at least partial revocation of a related AD, CVD, or safeguards order. Therefore, the court finds that Plaintiffs are entitled to judgment as a matter of law, insofar as the USTR did not have legal authority to order Commerce to "implement" the Section 129 Determination.

A. The WTO Dispute Settlement System

Although the legal question presented to the court for decision is narrow, the legal context necessary to understand that question is somewhat elaborate. For clarity's sake, the court will provide a brief overview of AD and CVD duty orders, and the forms of review to which they are subject.

Commerce and the ITC are authorized to conduct investigations and impose AD and CVD duties on imported goods under Title VII of the Tarriff Act of 1930, as amended. *See* 19 U.S.C. §§ 1671, 1673 *et seq*. These laws, and the regulations implementing them, provide a series of standards to be applied in determining whether, and to what extent, AD and CVD orders may be imposed under U.S. law. Determinations under Title VII may be reviewed by the U.S. courts, or, if the goods in question are of Mexican or Canadian origin, by a NAFTA binational panel. *See* 19 U.S.C. § 1516a(a)(2)(B), (g)(2). Additionally, by virtue of the United States' membership in the WTO and its accession to the Antidumping and Subsidies agreements, the United States has agreed to certain international standards governing the imposition of AD and CVD orders. These obligations are separate from those imposed by U.S. law under Title VII. Thus, the same AD or CVD order may be subject to challenge under either set of obligations. Challenges to an AD or CVD order under the WTO agreements occur through international arbitration under the DSU. Challenges to an AD or CVD order as inconsistent with U.S. law may be brought before this Court, or, where the case involves Canada or Mexico, before a NAFTA binational panel. The binational panel sits in the place of a U.S. court, interpreting U.S. law according to U.S. standards of review. *See* NAFTA art. 1904.2.

Ordinarily, when this Court or a NAFTA panel finds that a given AD or CVD order is inconsistent with U.S. law, the court or NAFTA panel issues a ruling remanding the determination to Commerce or the ITC. Commerce and the ITC are obligated to act on these remands by issuing new determinations "not inconsistent" with the findings of the court or NAFTA panel.[25]

Unlike litigation before the court or a NAFTA panel, WTO Members are not required automatically to comply with the recommendations of a WTO panel or the AB. While compliance is encouraged, the DSU contemplates three different responses to an adverse WTO panel report. *See URAA SAA* at 1008–09. A Member may elect to bring its domestic practices in line with the WTO's recommendations. *Id.* at 1009. Alternatively, Members may substitute a compensatory trade agreement that lowers other barriers to trade while leaving an objectionable practice in place. *Id.* Finally, a Member may choose not to comply with the WTO's recommendation. *Id.* When there is a dispute over a Member's compliance with an adverse report, Article 21.5 of the DSU provides for the formation of an arbitration panel to determine whether a Member has taken measures to comply with a final report. *See* DSU art. 21.5. If the Article 21.5 panel finds that a Member has not taken measures to comply with an adopted WTO report, the panel may authorize a suspension of trade concessions at a value "equivalent to" the nullification of trade benefits caused by the practice in question. *See* DSU art. 22.

Congress fashioned section 129 to allow the United States to take full advantage of its remedial options before the WTO.[26] Rather than require the ITC or Commerce automatically to implement an ad-

---

[25] For NAFTA panel reports, the obligation to issue a new determination is found at 19 U.S.C. § 1516a(g)(7).

[26] Section 129(a), as codified at 19 U.S.C. § 3538(a), provides:

> (1) Advisory report
>
> If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request.
>
> . . . .
>
> (3) Consultations on request for Commission determination
>
> If a majority of the Commissioners issues an affirmative report under paragraph (1), the Trade Representative shall consult with the congressional committees concerning the matter.

verse WTO recommendation, Congress granted the USTR authority to decide whether the United States will undertake to comply with its WTO obligations, and, if so, whether that response will be through agency action. *See URAA SAA* at 1022 ("Section 129 of the implementing bill establishes a procedure by which the Administration may obtain advice it requires to determine its response to an adverse WTO panel or Appellate Body report concerning U.S. obligations under the Agreement on Safeguards, Antidumping, or Subsidies and Countervailing Measures.").

Section 129 describes a step-by-step process to be taken in response to an adverse WTO report. It is divided into two subsections, 129(a), which governs determinations by the ITC, and 129(b), which governs determinations by Commerce. *See* 19 U.S.C. § 3538(a), (b). Under subsection (a), following an adverse recommendation from a WTO panel or the AB concerning an ITC determination, the USTR may request an advisory report from the ITC. *Id*. § 3538(a)(1). The advisory report states whether a majority of the ITC commissioners believe that it is possible for the ITC to take steps to comply with the WTO's recommendation, consistent with Title VII of the Tariff Act of 1930 and Title II of the Trade Act of 1979.[27] *Id*. This advisory report does not provide the ITC's reasoning supporting its conclusion, nor does it state whether a new determination would be affirmative or negative.

---

(4) Commission determination

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. 1202 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

(5) Consultations on implementation of Commission determination

The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

(6) Revocation of order

If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.

19 U.S.C. § 3538(a).

[27] As mentioned, Title VII of the Tariff Act of 1930 governs antidumping and countervailing duties under 19 U.S.C. § 1671 *et seq.* Title II of the Trade Act of 1979 governs safeguards under 19 U.S.C. § 2251 *et seq.*

If the ITC's subsection (a)(1) report finds that action may be taken consistent with Title VII to bring the challenged determination into compliance with the adverse report, the USTR must then consult with designated congressional committees.[28] *Id.* § 3538(a)(3). Following these consultations, the USTR may ask the ITC to issue a determination that would render its action "not inconsistent" with the WTO panel's or AB's recommendation. *Id.* § 3538(a)(4). The ITC must then "decide independently on the steps it will take to render its actions 'not inconsistent with' the panel or Appellate Body findings." *URAA SAA* at 1024. To accomplish this, section 129 allows the ITC to revisit its determinations, reopen the record, and conduct additional analysis. *See URAA SAA* at 1024 (allowing 120 days to "provide the ITC sufficient time to gather additional information if necessary for it to decide on appropriate implementing action"). Interested parties are provided notice and opportunity to comment on the determination. *Id.* § 3538(d). The ITC's new determination must be issued within 120 days after the USTR's request. *Id.* § 3538(a)(4).

After the ITC's report is issued, but before it is implemented, the USTR must again consult with the congressional committees. *Id.* § 3538(a)(5). Finally, subsection (a)(6) provides that "[i]f, by virtue of the [ITC's] determination . . . an antidumping or countervailing duty order with respect to some or all of the imports . . . is no longer supported by an affirmative Commission determination" the USTR may "direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part." *Id.* § 3538(a)(6).

Revocation is effective on the date the USTR directs Commerce to revoke an order pursuant to paragraph (6) of section 129.[29] *Id.* § 3538(c)(1)(A). Commerce must publish notice of implementation of

---

[28] The relevant congressional committees are the House Ways and Means Committee and the Senate Committee on Finance. *URAA SAA* at 1023.

[29] Section 129(c)(1), codified at 19 U.S.C. § 3538(c)(1), provides:

> (c) Effects of determinations; notice of implementation
>
> (1) Effects of determinations
>
> Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. 1677]) that are entered, or withdrawn from warehouse, for consumption on or after –
>
> (A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and
>
> (B) in the case of determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

19 U.S.C. § 3538(c)(1)

any determination made under section 129 with respect to Title VII of the Tariff Act of 1930. *Id.* § 3538(c)(2)(A). Finally, section 129(e) provides for judicial or binational panel review of implemented section 129 determinations. 19 U.S.C. § 1516a(a)(2)(B)(vii); *URAA SAA* at 1026. The section 129 determination also may be subject to review before a WTO panel as a "measure taken to comply" with an adverse WTO report. *See* DSU art. 21.5. If an Article 21.5 panel issues an adverse recommendation in response to a section 129 determination, the process is repeated.

The dispute in this case centers around the meaning of section 129(a)(6) and the powers Congress delegated to the USTR to order implementation of section 129(a) determinations. The parties offer two competing interpretations. Plaintiffs assert that the plain language of section 129(a) gives the USTR only the authority to order Commerce to revoke some or all of an order in response to a section 129(a) determination. Pl.-GOC's Mem. 18; Pl.-CLTA's Mem. 25. Plaintiffs contend further that the purpose and structure of section 129 militate against an interpretation implying additional authority for the USTR to order implementation of "affirmative" section 129(a) determinations.[30] Defendants argue that the authority of the USTR to order Commerce to implement affirmative section 129(a) determinations is necessarily implied in the language and purpose of the statute. Def.'s Mem. 24; Def.-Int.'s Mem. 32.

The court begins with the familiar rules governing statutory interpretation. The court must first decide whether Congress has spoken to the precise question presented, i.e., whether the USTR has the authority to order Commerce to implement an affirmative section 129(a) determination. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1380 (Fed. Cir. 2003) (" 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.' ") (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)). In deciding whether Congress plainly intended to delegate authority to the USTR, "a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context." *Brown & Williamson*, 529 U.S. at 132. This context includes legislative history and canons of statutory construction if the text of the statute is unclear. *See Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed.

---

[30] Because Congress has clearly provided for the USTR to order implementation of a "negative" section 129(a) determination through complete or partial revocation of an outstanding AD or CVD order, the parties and the court have confined their discussion to "affirmative section 129 determinations." The court uses the term "affirmative section 129 determination" to refer to any section 129 determination that cannot be implemented through total or partial revocation of an existing AD, CVD or safeguards order.

Cir. 2000) (employing "the traditional tools of statutory construction," including "the statute's text, structure, and legislative history, and . . . relevant canons of interpretation" before resorting to deference under *Chevron*); *Natural Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1125 (D.C. Cir. 1995) (courts "must first exhaust the traditional tools of statutory construction to determine whether Congress has spoken to the precise question at issue") (quotation omitted). Finally, the court must "interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole," while making allowances for "common sense as to the manner in which Congress is likely to delegate a policy decision of [significant] economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133 (citations & quotations omitted).

B. Section 129(a) Does Not Authorize the USTR to Order Implementation of an Affirmative Section 129(a) Determination

1. The Text of Section 129(a)(6)

As with any case involving statutory interpretation, the court begins with the text of the statute in question. Section 129(a)(6) provides:

> (6) Revocation of order
>
> If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 . . . or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority *to revoke* the antidumping or countervailing duty order in whole or in part.

19 U.S.C. § 3538(a)(6) (emphasis added).

Subsection (a)(6) provides for the revocation of an order that "is no longer supported by an affirmative Commission determination" – the situation that results after the ITC issues a negative determination. Conspicuously absent from the text of section 129(a)(6) is any mention of "implementation" of an affirmative determination that does not withdraw support for an existing order. In other words, the text of subsection (a)(6) permits the USTR to order revocation only where the ITC's section 129 determination withdraws analytical support for some or all of the order in question. *See* 19 U.S.C. § 3538(a)(6) (permitting revocation only "[i]f, by virtue of the Commission's determination under paragraph (4)," an order "is no longer supported by an affirmative Commission determination"). The text of paragraph (6) is silent regarding the opposite situation, where an order remains entirely supported by virtue of the ITC's new analysis under section 129(a)(4). The legislative history also states that "[s]ubsection (a)(6) provides authority for Commerce to revoke an order under Title VII in whole or in part to implement an ITC determination under subsection (a)(4)." *URAA SAA* at 1024. Like the statute, the *URAA SAA* makes no mention of any action other than full or partial revocation that the USTR may order "to implement" the ITC's determination under subsection (a)(4).

Moreover, paragraph (6) is entitled "[r]evocation of order." While a statutory heading is not controlling in the presence of conflicting statutory text, the court is not barred from using the heading as an interpretive guide when the meaning of the text in question is uncertain. *See INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text."); *see also Doe v. GTE Corp.*, 347 F.3d 655, 660 (7th Cir. 2003) (noting that "a statute's caption must yield to its text when the two conflict," but implying this rule does not apply when the question is "*whether* there is a conflict"). Here, use of the term "revocation" in the heading corresponds with the use of the term "revocation" in the text of section 129(a)(6), further indicating that the power delegated to the USTR is confined to ordering "revocation," not "implementation," of a new affirmative determination.

The statutory text of paragraph (6) therefore supports Plaintiffs' contention that Congress did not intend to give the USTR authority to order Commerce to implement an affirmative section 129(a) determination. In a detailed statutory scheme such as this, the absence of authorization militates against implying additional powers not mentioned in the text. *See FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) ("[T]he absence of an express statutory provision cannot be interpreted as giving an agency authority. . . ."); *Ethyl Corp. v. EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("Were courts to *presume* a delegation of power absent an express *withholding* of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.").

2. Comparison with the Parallel Provisions of Section 129(b) and (c)

In determining whether Congress has spoken to the precise question at issue, the court also compares the provisions of section 129(a) with similar provisions in the statute. *See US W. Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000) (where two statutory provisions "were enacted at the same time and form part of the same Act, the duty to harmonize them is particularly acute"). Section

129(b) provides a procedure to implement adverse WTO recommendations concerning determinations by Commerce, rather than by the ITC, in AD, CVD, and safeguards cases. 19 U.S.C. § 3538(b). The procedure established under section 129(b) is similar to that of section 129(a) in many respects. Like subsections (a)(1) and (a)(3), subsection (b)(1) orders the USTR to consult with Commerce and the relevant congressional committees after receiving an adverse recommendation from the WTO. *Id.* § 3538(b)(1). Like subsection (a)(4), subsection (b)(2) requires Commerce to issue a determination "not inconsistent" with the findings of an adverse WTO recommendation following an order from the USTR. *Id.* § 3538(b)(2). Upon issuance of that report, the USTR consults again with Congress under subsection (b)(3), just as in (a)(5). The similarity, however, ends there. While (a)(6) refers only to "revocation of order," (b)(4) expressly grants the USTR authority to "direct the administering authority to *implement*, in whole or in part, the determination made under [subsection (b)(2)]." *Id.* § 3538(b)(4) (emphasis added).

The text of section 129(b) demonstrates two things. First, it shows that Congress was aware of a difference between the relatively broad authority to order "implementation" and comparatively narrow authority to order "revocation" of section 129 determinations. Second, it shows that Congress gave the USTR authority to order Commerce to "implement" section 129(b) determinations, but chose not to use the same language in the context of section 129(a) determinations. Comparison of these two adjacent and simultaneously enacted provisions strongly suggests that Congress' choice of the word "revocation" was not accidental, but was consciously intended to limit the USTR's authority to order implementation under section 129(a) – a limitation that Congress did not provide for in section 129(b). *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended.") (citation & quotation omitted); *Clay v. United States*, 537 U.S. 522, 528 (2003) ("When 'Congress includes particular language in one section of a statute but omits it in another section of the same Act,' we have recognized, 'it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' ") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The reason that Congress used "revocation" in subsection (a)(6), but "implemented" in (b)(4), is tied to the different functions performed by Commerce and the ITC. In antidumping cases, Commerce determines not only whether sales are made at less than fair value, but also how much below fair value those sales actually are. *See* 19 U.S.C. § 1673b(d) (preliminary determinations of estimated weighted dumping margin); *id.* § 1673d(c)(1)(B) (final determination of estimated weighted dumping margin).[31] Commerce will therefore often have to adjust an antidumping or countervailing duty order to reflect changes in a subsidy rate or dumping margin even if its determination under section 129(b) remains affirmative. *See, e.g.*, *Antidumping Measures on Certain Softwood Lumber Products from Canada*, 70 Fed. Reg. 22,636, 22,645 (Dep't Commerce May 2, 2005) (notice of determination under section 129 of the Uruguay Round Agreements Act) (adjusting margins in response to section 129(b) determination); *Stainless Steel Plate in Coils from the Republic of Korea*, 66 Fed. Reg. 45,279, 45,283 (Dep't Commerce Aug. 28, 2001) (notice of amendment of final antidumping duty determinations of sales at less than fair value) (same). Congress gave the USTR authority to order implementation of an affirmative determination by Commerce because a section 129(b) determination might change the margins used in the resulting antidumping or countervailing duty order. By contrast, the ITC issues a "yes-or-no" determination as to whether the domestic industry is subject to injury or a threat of injury. *See* 19 U.S.C. § 1671d(b), (c)(2); § 1673(b), (c)(2). The ITC does not make margin calculations as Commerce does, and an affirmative section 129(a) determination, such as the Section 129 Determination in this case, has no effect on the order it supports. Because ITC determinations do not involve the changes in margins made by section 129(b) determinations, Congress saw no need to give the USTR authority to order implementation of an affirmative section 129(a) determination.

An examination of the legislative history of section 129 supports the conclusion that Congress intended that implementation of an affirmative determination would occur only if it resulted in a change in the order that it supports. Even though the USTR has authority to order implementation of affirmative section 129(b) determinations, the *URAA SAA* is careful to point out that:

> The Trade Representative may decline to request implementation of the second [section 129(b)] determination. This might be the case, for example, if Commerce issued a final affirmative

---

[31] 19 U.S.C. § 1677(35)(A) defines the term dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Subsection (35)(B) defines the term "weighted average dumping margin" as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer."

Commerce performs a similar function with respect to countervailing duties. *See* 19 U.S.C. § 1671b(d) (preliminary determination of subsidy rate); *id.* § 1671d(c)(1)(B) (final determination of subsidy rate). A countervailable subsidy is described in 19 U.S.C. § 1677(5)(B) as one in which an authority provides a financial contribution to a person and a benefit is thereby conferred. The statute defines "financial contribution" as "(i) the direct transfer of funds . . . (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." *Id.* § 1677(5)(D).

> subsidy determination and a WTO panel subsequently finds that Commerce's analysis was not consistent with the Subsidies Agreement. On making a new determination at the Trade Representative's direction, *Commerce could correct the analytical flaw found by the panel without changing the original outcome. In such a case, there would be no need to implement the new determination as a matter of domestic law.*

URAA SAA at 1025 (emphasis added). Thus, it is clear that only those determinations that have a substantive effect on the order that they support require implementation. If a section 129(b) determination has no effect on an order, Congress saw no need for implementation. *Id.* Likewise, Congress knew that an affirmative determination by the ITC, following an adverse WTO proceeding, would have no effect on an existing order, leaving no reason for the USTR to have the power to order implementation of an affirmative section 129(a) determination.

The text of section 129(c) reinforces the dichotomy between "revocation" under section 129(a) and "implementation" under section 129(b). In section 129(c), Congress provided effective dates for section 129 determinations. 19 U.S.C. § 3538(c). Section 129(b) determinations take effect for all entries made after "the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to *implement* that determination." *Id.* § 3538(c)(1)(B) (emphasis added). By contrast, "in the case of a determination by the Commission under subsection (a)(4) of this section," the determination takes effect after "the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to *revoke* an order pursuant to that determination." *Id.* § 3538(c)(1)(A) (emphasis added). Once again, Congress consciously chose to use the term "implement" in reference to a determination from Commerce under section 129(b), but used only the term "revoke" in reference to the determination from the ITC under section 129(a). As discussed, the explanation for this difference lies in the different nature of section 129(a) and 129(b) determinations. Congress made clear in the *URAA SAA* that a determination that has no effect on an order need not be implemented. Because an affirmative section 129(a) determination would have no effect on an order, it does not require domestic implementation. Therefore, Congress did not find it necessary to provide an effective date for an unimplemented determination in section 129(c).[32]

---

[32] Defendant-Intervenor argues that an affirmative section 129(a) determination does not need an express effective date because it has no effect on an underlying order. Def.-Int.'s Reply 28–29. At oral argument, Defendant offered a similar position, stating that the USTR may, in its discretion, order an affirmative determination to be effective "as of the date of the original order." Oral Arg. Tr. 66:17–18, 76:5–21, Apr. 4, 2006. This interpretation is inconsistent with the terms of the statute. Congress expressly provided an effective date for

3. The Purpose of Section 129

Finally, the court must also consider the purpose of the statute in evaluating Congress' intent in fashioning the law. This includes a consideration of whether "common sense" suggests that Congress would have chosen to delegate a significant amount of authority through implication. *See Brown & Williamson*, 529 U.S. at 133; *cf. Whitman v. Am. Trucking Ass'ns. Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes."). As mentioned, the purpose of section 129 is to provide a means "by which the Administration may obtain advice it requires to determine its response to an *adverse* WTO panel or Appellate Body report concerning U.S. obligations under the Agreement on Safeguards, Antidumping, or Subsidies and Countervailing Measures." *URAA SAA* at 1022 (emphasis added). Because section 129 only applies where the United States has lost before the WTO, Congress expected that adoption of WTO recommendations with respect to an ITC determination would result in determinations revoking all or part of an existing order, if implementation were necessary at all. Because such an ITC determination could always be implemented through revocation, Congress saw no need to delegate authority to order implementation of an affirmative section 129(a) determination.

C. The Defendants' Arguments Do Not Show that Congress Intended to Imply Additional Authority for the USTR in Section 129

Although the plain text of section 129(a) does not mention the USTR's authority to order implementation of affirmative section 129(a) determinations, Defendants offer the following arguments, based on portions of statutory text and the purpose of the statute, in favor of their interpretation implying such authority into the terms of section 129. The court addresses each in turn.

1. Use of the Term "Supported" in Section 129(a)(6)

Defendants argue that the presence of the phrase "no longer supported . . . under . . . this subsection" in subsection (a)(6) demonstrates that Congress implied the USTR's power to order implementation of affirmative section 129(a) determinations. Def.-Int.'s Reply

---

affirmative section 129(b) determinations that are implemented. 19 U.S.C. § 3538(c)(1)(B). It is unclear why Congress would provide a prospective effective date for implemented affirmative section 129(b) determinations, but leave the effective date for implemented affirmative section 129(a) determinations subject to the USTR's discretion. The more straightforward explanation is that Congress did not explicitly provide an effective date for implemented affirmative section 129(a) determinations because it did not foresee a need for implementation.

27–28 ("Plaintiffs' interpretation of Section 129(a) makes superfluous the language of subsection (a)(6) that provides that USTR may revoke an order if it 'is no longer supported' by an affirmative Title VII determination or an affirmative Section 129(a)(4) determination, because in order for an affirmative Section 129(a)(4) determination to have effect under domestic law such that it 'supports' an order, it must be implemented.") This argument is based on the following logic. Section 129(a)(6) identifies two ways in which a new section 129(a)(4) determination may lead to revocation: (i) by undermining a determination under Title VII of the Tariff Act of 1930 that supports the existing order; or (ii) *by undermining a determination "under . . . this subsection" that supports the existing order*. *See* 19 U.S.C. § 3538(a)(6). "Under this subsection" refers to a determination under section 129(a)(4), which implies that a prior section 129(a)(4) determination "supported" the order in question. The prior section 129 determination could only have "supported" an order if it were implemented. Thus, argue Defendants, Congress must have intended for the USTR to order implementation of affirmative section 129(a) determinations. Def.'s Mem. 27; Def.-Int.'s Mem. 36.

Defendants' argument makes one critical assumption – that a section 129(a)(4) determination that "supports" an existing order must have been an "affirmative" determination. Defendants fail to consider that the first section 129 determination may result in a *partial revocation* of the original Title VII order. There is no dispute that the USTR has authority to order implementation through a partial revocation. *See* 19 U.S.C. § 3538(a)(6). After the USTR orders implementation of a section 129(a)(4) determination through partial revocation of an existing order, the remaining portion of that order would then be "supported" by the ITC's first section 129(a) determination. A second section 129(a) determination could then result in total or partial revocation of that order, in which case it would also need to be implemented. This explains how an existing order may be "supported" by a section 129(a)(4) determination without it necessarily being "affirmative."[33]

Given the wording of the statute, which discusses only revocation and partial revocation, the court finds that Congress used the phrase "no longer supported . . . under . . . this subsection" to provide for a situation involving an intervening partial revocation of an order, not the implementation of an affirmative section 129(a) determination. Therefore, there is no need to imply additional authority for the

---

[33] This also provides an explanation of why Congress refers to the possibility of NAFTA panel review of a section 129 determination. Foreign parties may choose to challenge a section 129 determination that results in only partial revocation, rather than total revocation, of an AD or CVD order. In such circumstances, a foreign party could exercise its right to challenge an implemented partial negative determination before a NAFTA panel, rather than this Court.

USTR to order implementation of an affirmative section 129(a) determination to account for the phrase "under . . . this subsection" in section 129(a)(6).

2. Use of the Term "Implemented" in Section 129(a)(5)

Defendants raise an argument supporting their interpretation of section 129(a) based on the text of subsection (a)(5). They note that subsection (a)(5) requires the USTR to consult with Congress before an ITC determination under section 129(a)(4) is "implemented." 19 U.S.C. § 3538(a)(5) ("The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented."). Defendants argue that the court must find some purpose for the broader term "implemented" used in section 129(a)(5), beyond the power to "revoke" mentioned in (a)(6).[34] Plaintiffs contend that subsection (a)(5) is merely a "procedural requirement" and that the cross-reference between subsections (a)(6) and (a)(5) suggests that the two be read consistently, not disparately. Pl.-GOC's Mem. 28 n.6.

The fact that Congress used the term "implemented" should be given some meaning, if possible, though the court should not strain to abide by the surplusage canon if it leads to an interpretation inconsistent with the remainder of the statutory scheme. *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (stating that the canon requiring a court to give effect to each word if possible "is sometimes offset by the canon that permits a court to reject words 'as surplusage' if . . . 'repugnant to the rest of the statute' ") (quoting K. Llewellyn, *The Common Law Tradition* 525 (1960)).

It is evident from the statutory text that subsections (a)(5) and (b)(3) were intended to emphasize that regardless of the agency in question, the USTR must consult with Congress before ordering Commerce to take action on a section 129 determination. Congress' attempt to create procedural uniformity does not, however, demonstrate that the powers delegated to the USTR under subsections (a) and (b) must also be uniform in substance. Indeed, Congress' choice of wording in subsections (a), (b) and (c) shows that Congress intended to differentiate the authority delegated to the USTR under section 129(a) and (b). Given Congress' careful use of the term "implemented" and "revoke," a procedural rule limiting when the USTR may exercise its authority to order revocation of an AD or CVD order should not be used to expand the powers listed in section 129(a) beyond what Congress delegated in the first place.

---

[34] Essentially, Defendants suggest that had Congress not intended to grant the USTR authority to order implementation of affirmative section 129(a) determinations, it could have simply written section 129(a)(5) to read: "The Trade Representative shall consult with the congressional committees before ordering revocation of an antidumping or countervailing duty order pursuant to a Commission determination under paragraph (4)."

Furthermore, giving additional meaning to "implemented" in subsection (a)(5) would bring ambiguity into otherwise straightforward statutory text, for all of the reasons indicated. The Supreme Court has cautioned against abandoning a plain reading of a statute for an ambiguous one solely to accommodate an extra word. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) (acknowledging that Court's interpretation of a statute rendered the term "attorney" surplusage, but finding that "[w]here there are two ways to read the text – either attorney is surplusage, in which case the text is plain; or attorney is non-surplusage . . . , in which case the text is ambiguous – applying the rule against surplusage is, absent other indications, inappropriate"). Following the Supreme Court's advice, the court "prefer[s] the plain meaning since that approach respects the words of Congress." *Id.*

3. Whether Failure to Implement Affirmative Section 129(a) Determinations Would Put the United States in Violation of Its WTO Obligations

Defendant-Intervenor argues that Congress must have intended for the USTR to direct implementation of affirmative section 129(a) determinations in order to comply with the Antidumping Agreement's requirement to provide judicial review of all "final determinations and reviews of determinations." Antidumping Agreement art. 13. Section 129(e) only provides for "review by the courts and NAFTA binational panels of new Title VII determinations made by Commerce or the ITC under section 129 *that are implemented*." *URAA SAA* at 1026 (emphasis added). Thus, argues Defendant-Intervenor, implementation of affirmative section 129(a) determinations is necessary to allow the United States to fulfill its WTO obligation to provide domestic judicial review.

This argument fails for two reasons. First, there is no indication that the WTO would construe the definition of "final determination" or "reviews of determinations" under Article 13 to include a section 129 determination. The court will refrain from attempting to divine what gloss the WTO might place on Article 13 in some future report. This is especially so where, as here, neither the AB nor a WTO panel has ruled on the meaning of the Article 13.[35]

Second, and more importantly, Congress clearly has stated that it does not intend to provide judicial review for some affirmative determinations. The *URAA SAA* states that "[s]ection 129 determinations that are not implemented will not be subject to judicial or binational

---

[35] *See* Legal Affairs Division, World Trade Organization, *WTO Analytical Index: Guide to WTO Law and Practice* 759 (2003), *available at* http://www.wto.org/english/res_e/ booksp_e/ analytic_index_e/anti_dumping_e.htm (last visited July 20, 2006) (noting that there is "[n]o jurisprudence or decision of a competent WTO body" regarding Article 13 of the Antidumping Agreement).

panel review, because such determinations will not have any effect under domestic law." *URAA SAA* at 1026. Because Congress has made clear that the USTR need not order implementation of Commerce determinations that merely "correct an analytical flaw . . . without changing the original outcome," *id* at 1025, it is also clear that Congress did not intend for all section 129 determinations to be eligible for judicial review.

Although it is a well-established canon of statutory construction that "[a]bsent express Congressional language to the contrary, statutes should not be interpreted to conflict with international obligations," *Luigi Bormioli Corp. v. United States*, 304 F.3d 1362, 1368 (Fed. Cir. 2002) (quoting *Federal Mogul Corp.*, 63 F.3d at 1581), that principle does not apply here. The court finds that the statements contained in the *URAA SAA*, which are authoritative as to the meaning of the URAA, express a clear intent to deny judicial review to unimplemented determinations, even if that is later held to be inconsistent with Article 13 of the Antidumping Agreement. *See* 19 U.S.C. § 3512(d) ("The statement of administrative action approved by the Congress under section 3511(a) . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding. . . ."). Had Congress intended for the USTR to implement all section 129 determinations in order to comply with Article 13, it would not have invited the USTR to do otherwise in the *URAA SAA*.

Defendant makes a variant of the same argument, suggesting that even if Congress does not always require implementation "as a matter of domestic law," Congress nonetheless did intend to allow implementation of affirmative section 129(a) determinations as a matter of "international law." Def.'s Mem. 33–34. The AB has stated that "[i]n principle, a measure which has been 'taken to comply with the recommendations and rulings' of the [Dispute Settlement Body ("DSB")] will *not* be the same measure as the measure which was the subject of the original dispute. . . . [but will be] the 'measures taken to comply' . . . adopted to *implement* those recommendations and rulings." Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Roucouse to Article 21.5 of the DSU*, ¶ 36, WT/DS70/AB/RW (July 21, 2000) (footnote omitted). Defendant argues that the United States may be found to be in violation of its WTO obligations if the USTR is not given authority to order implementation of an affirmative section 129(a) determination. Def.'s Mem. 32–33.

Defendant buttresses this argument with a negative inference from the legislative history. As noted, the *URAA SAA* provides that in certain circumstances Commerce would not need to "implement" a section 129(b) determination where "Commerce could correct [an] analytical flaw found by the panel without changing the original outcome. In such a case, there would be no need to implement the new determination as a matter of *domestic* law." *URAA SAA* at 1025 (emphasis added). By referring only to domestic law, Defendant argues that Congress must have intended to allow the USTR to implement affirmative section 129(a) determinations "as a matter of *international* law." Def.'s Mem. 33.

As with Defendant-Intervenor's argument under Article 13 of the Antidumping Agreement, Defendant's argument rests on a hypothetical – the WTO may one day impose a requirement on the United States to formally "implement" all section 129 determinations, regardless of their effect on an existing order. In actuality, the WTO has not emphasized the importance of any official sanction given to a section 129 determination. The Article 21.5 panel that considered the ITC's Section 129 Determination in this proceeding focused directly on the ITC's determination. *See* Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW (Nov. 15, 2005). It considered how the ITC "fill[ed] the gaps" identified by the original WTO Panel report by providing "additional explanation and evidence in support of its conclusions." *Id.* at ¶ 7.11. It even went so far as to say that "what is most important for our analysis is the reasoning and explanation of the [ITC] in its section 129 determination." *Id.* at ¶ 7.12. If the WTO were to interpret the Anitdumping Agreement to require the formal "implementation" of all section 129 determinations, Congress might change section 129 or its implementing regulations to conform with this requirement, but such "implementation" might take a different form and would not govern this action in any event. *See* 19 U.S.C. § 3533(g). Additionally, to the extent Defendant's argument rests on an inference that Congress intended to grant a power to order implementation as a matter of "international law" based on an explicit refusal to require implementation as a matter of "domestic law," it is disfavored. *See FAG Italia S.p.A.*, 291 F.3d at 816; *Ethyl Corp.*, 51 F.3d at 1060. In sum, it is not for the court to ascribe to Congress an unstated intent to allow the USTR to order implementation of an affirmative section 129(a) determination based on conjecture regarding future events in the WTO.

4. Changes from Findings of Material Injury to Threat of Material Injury

Defendant asserts that Congress must have intended to grant the USTR the authority to order implementation of affirmative section 129(a) determinations in cases where the ITC's injury determination under section 129 finds only a threat of material injury, following a preliminary determination of present material injury. Oral Arg. Tr. 67:7–19. Where the ITC finds only a threat of material injury in a final determination, Commerce may be required to refund cash deposits collected after issuance of a preliminary affirmative dumping determination from Commerce.[36] 19 U.S.C. §§ 1671e(b)(2), 1673e(b)(2). Without implementation of the ITC's order, Defendant argues, the threat finding would have no domestic legal effect and could not result in a refund required under sections 1671e(b)(2) and 1673e(b)(2).

This argument is subject to two objections. First, Congress has emphasized that relief under section 129 is prospective only. *URAA SAA* at 1026 ("Consistent with the principle that GATT panel recommendations apply only prospectively, subsection 129(c)(1) provides that where determinations by the ITC or Commerce are implemented under subsections (a) or (b), such determinations have prospective effect only."). A refund of cash deposits might be construed as a form of retrospective relief unavailable under section 129. No court has addressed this issue. The court therefore hesitates to decide whether retrospective relief in the form of refunds of cash deposits would be available following issuance of a section 129(a) determination finding a threat of material injury after a prior present injury finding is rejected.

Assuming, *arguendo*, that such a refund would be available, the court finds that the USTR's power to direct revocation of an order under section 129(a)(6) would be sufficient to fulfill this obligation. The USTR has authority to order Commerce to "revoke the antidumping or countervailing duty order in whole *or in part*." 19 U.S.C. § 3538(a)(6) (emphasis added). If a refund of cash deposits is necessary in response to an ITC determination, the USTR could order Commerce to revoke the AD or CVD order insofar as it directed, or led to directions to, Customs to hold deposits collected during the investigation period. In its AD and CVD orders, Commerce often implies, but sometimes explicitly states, that it is ordering collection of deposits consistent with the "general rule" of sections 1671e(b)(1) or 1673e(b)(1). *See, e.g., Glycine from the People's Republic of China*, 60 Fed. Reg. 16,116 (Dep't Commerce Mar. 29, 1995) (antidumping duty order) (finding that section 1673e(b)(1) applies and ordering assessment of duties on all entries made after "the date on which the Department published its preliminary determination notice in the Federal Register"). In response to a change from present injury to

[36] Commerce may keep cash deposits collected after a preliminary affirmative dumping determination under two circumstances. First, it may keep deposits collected if the ITC finds in its final determination that a domestic industry is materially injured by reason of foreign imports. Second, Commerce may keep the cash deposits if the ITC finds a threat of material injury that would have been a present material injury "but for" the suspension of liquidation under 19 U.S.C. §§ 1671b(d)(1) and 1673b(d)(1). If neither of these is the case, then 19 U.S.C. §§ 1671e(b)(2) and 1673e(b)(2) require Commerce to order Customs to release any bond or security, and to refund any cash deposits taken for merchandise entered, or withdrawn from warehouse, for consumption prior to the entry of the ITC's threat determination. *See, e.g., Sulfanilic Acid from India*, 58 Fed. Reg. 12,026, 12,027 (Dep't Commerce Mar. 2, 1993) (countervailing duty order).

threat, Commerce could implement that determination by revoking the portion of the outstanding order requiring retention of cash deposits collected during the investigation period. The fact that Customs usually assumes that it will apply the "general rule" unless instructed otherwise does not mean that this implied order cannot be revoked.

Defendant claims that implementation of the threat of injury finding would be necessary to refund the cash deposits held by Customs, but a refund is precisely what a revocation would accomplish. The court finds that the USTR possesses the authority it requires to comply with sections 1671e(b)(2) and 1673e(b)(2) under the express terms of section 129(a)(6), making it unnecessary to imply an authority for the USTR to direct implementation of affirmative section 129 determinations.

5. Analytical Changes Related to Sunset and Changed Circumstances Reviews

Defendant also argues that affirmative section 129 determinations must be implemented to allow the ITC to comply with its obligations in subsequent proceedings under U.S. law. Oral Arg. Tr. 74:19–75:4. For instance, while a change in the definition of "like product" and the domestic industry in a section 129 determination might not lead to a change in the original antidumping or countervailing duty order, the ITC may have to revisit that determination in a changed circumstances or sunset review under 19 U.S.C. §§ 1675(b) and (c) (2000).[37] *See* 19 U.S.C. § 1675a(a)(1) (the ITC must "take into account . . . its prior injury determinations, including the . . . impact of imports of the subject merchandise on the industry."). Defendant argues that a failure to implement an affirmative section 129(a) determination would prevent the ITC from performing this statutory obligation.

Defendant's argument assumes that a determination must be implemented, i.e., used to support an AD or CVD order, before its analysis may be considered by the ITC. There is nothing in the law suggesting that analysis used in a determination that does not result in a change in a published antidumping order cannot be considered under § 1675a(a)(1). The purpose behind § 1675a(a)(1) is to ensure that the ITC reviews all of the information available to it in a sunset or changed circumstances review, especially information obtained prior to imposition of an AD or CVD order or with respect to

[37] Before determining whether a domestic industry is faced with material injury or a threat of material injury, the ITC must first determine the scope of the "domestic industry" by defining the "like product" under investigation. Having defined the domestic like product, it becomes possible to determine the scope of the domestic industry injured by foreign imports. 19 U.S.C. § 1677(4)(A), (10). Although the ITC must accept Commerce's determination as to the scope of the imported merchandise that is subject to investigation, the ITC determines what domestic products are like the imported product Commerce has identified.

such period. *URAA SAA* at 884 ("This consideration is important, because this period is the most recent time during which imports of subject merchandise competed in the U.S. market free of the discipline of an order or agreement."). Likewise, the provision allowing the ITC to review confidentially submitted information from previous determinations speaks of information gathered during investigations and makes no mention of implemented or unimplemented determinations. *Id.* ("Section 226(a)(1) of the bill amends section 777(b)(1) of the Act [19 U.S.C. § 1677f(b)(1)(A)] to expressly allow proprietary information submitted in connection with an investigation or review to be used by the agency to which the information originally was submitted in a changed circumstances or sunset review . . . involving the same subject merchandise."). There is nothing in the statute suggesting that a section 129 determination must be "implemented" before the ITC may consider a new mode of analysis or review information gathered in a section 129 analysis in complying with section 1675a(a)(1).

D. Tembec's Timing Argument

Tembec argues that the May 22, 2002 Orders ceased to exist, effective November 4, 2004, upon the dismissal of the United States' challenge to the NAFTA panel determination and thus, on December 20, 2004, there was nothing for Commerce to amend. Because the court has reached the conclusion, based on other grounds, that the USTR's order to implement the Section 129 Determination was not authorized by statute, the court does not reach this argument.

V. Conclusion

The court concludes that no question of material fact exists as to its jurisdiction to hear this case, or the right of Plaintiffs to bring their claims under the APA, and that the court has jurisdiction in this matter. Further, the court grants Plaintiffs' motions for summary judgment in part, and holds as follows:

1) section 129 does not grant the USTR authority to order Commerce to implement affirmative section 129(a) determinations;

2) the USTR's order to Commerce to implement the Section 129(a) Determination was *ultra vires* and void; and

3) the May 22, 2002 Orders are not supported by an affirmative finding of injury.

Further proceedings on remedies will be addressed in a separate order.

APPENDIX A

April 2, 2001:	Commerce and the ITC received petitions to initiate AD/CVD investigations. *See Softwood Lumber from Canada*, 66 Fed. Reg. 18,508 (Int'l Trade Comm'n Apr. 9, 2001) (institution of countervailing duty and antidumping investigations and scheduling of preliminary phase investigations).
Aug 17, 2001:	Commerce issued its preliminary determination that countervailable subsidies were being provided to producers of certain softwood lumber products from Canada. *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 43,186 (Dep't Commerce Aug. 17, 2001) (notice of preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final countervailing duty determination with final antidumping duty determination).
Nov. 6, 2001:	Commerce issued its preliminary determination that softwood lumber from Canada was being sold, or was likely to be sold, at less than fair value. *Certain Softwood Lumber Products from Canada*, 66 Fed. Reg. 56,062 (Dep't Commerce Nov. 6, 2001) (notice of preliminary determination of sales at less than fair value and postponement of final determination).
Apr. 2, 2002:	Commerce issued its final affirmative determinations regarding dumping and subsidization. *See Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 (Dep't Commerce Apr. 2, 2002) (notice of final determination of sales at less than fair value); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,545 (Dep't Commerce Apr. 2, 2002) (notice of final affirmative countervailing duty determination and final negative critical circumstances determination).
May 16, 2002:	The ITC published its final affirmative threat of injury determination, which states that United States industry was threatened with material injury by reason of subject imports. *See Softwood*

	Lumber from Canada, Inv. Nos. 701–TA–414, 731–TA–928 (Final), USITC Pub. 3509 (May 2002).
May 22, 2002:	Commerce issued AD and CVD orders. *See Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (Dep't Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and notice of antidumping duty order); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,070 (Dep't Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order).
June 20, 2002:	Canadian parties filed a Request for a NAFTA Panel to review the ITC affirmative threat of injury determination. *See North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews*, 67 Fed. Reg. 41,955 (Dep't Commerce June 20, 2002) (notice of request for panel review).
April 2003:	Canada requested dispute resolution at the WTO, challenging the ITC's affirmative threat determination as inconsistent with the United States' legal obligations under the WTO Antidumping and Subsidies agreements.
Sept. 5, 2003:	The NAFTA panel found the ITC affirmative threat of injury determination not supported by record evidence and remanded it to the ITC. *See In the Matter of Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Panel Decision (Sept. 5, 2003).
Mar. 22, 2004:	The WTO panel found the ITC affirmative threat of injury determination to be in violation of the WTO Antidumping Agreement. *See* Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R (Mar. 22, 2004).
Apr. 19, 2004:	The NAFTA panel found the ITC's revised affirmative threat of injury determination unsupported by record evidence and again

	remanded it to the ITC. *See In the Matter of Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Remand Decision (Apr. 19, 2004).
Apr. 26, 2004:	The WTO Dispute Settlement Body adopted the WTO Panel's March 22, 2004, report.
June 14, 2004:	Pursuant to section 129 (a)(1), the USTR requested that the ITC determine whether it may, consistent with Title VII, take steps to comply with the WTO Panel's adverse report. *See* Letter from Robert B. Zoellick, USTR, to Deanna T. Okun, Chairman, ITC (June 14, 2004) AR 2.
July 14, 2004:	The ITC issued an affirmative advisory report in response to the USTR's inquiry pursuant to section 129(a)(1) as to whether the ITC could comply with the WTO's findings. *See* Letter from Stephen Koplan, Chairman, ITC, to Robert B. Zoellick, USTR (July 14, 2004) AR 3.
July 27, 2004:	Pursuant to section 129(a)(4), the USTR asked the ITC to issue a new determination not inconsistent with the WTO panel's findings. *See* Letter from Robert B. Zoellick, USTR, to Stephen Koplan, Chairman, ITC (July 27, 2004), AR 4.
Aug. 31, 2004:	The NAFTA panel again found the revised ITC affirmative threat of injury determination unsupported by record evidence and directed the ITC to issue a determination consistent with the panel's decision that the record evidence did not support an affirmative finding of a threat of material injury. *See In the Matter of Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Remand Decision (Aug. 31, 2004).
Sept. 10, 2004:	In response to the NAFTA panel, the ITC issued a negative threat of injury determination. *See Certain Softwood Lumber from Canada*, Inv. Nos. 701–TA–414, 731–TA–928 (Final) (Third Remand), USITC Pub. 3815, Views on Remand (Sept. 10, 2004).

Oct. 12, 2004:	The NAFTA panel affirmed the ITC Negative Remand Determination. *See Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 69,584, 69,585 (Dep't Commerce Nov. 30, 2004) (NAFTA panel decision).
Oct. 25, 2004:	The NAFTA Secretariat issued a Notice of Final Panel Action. *See Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 69,584, 69,585 (Dep't Commerce Nov. 30, 2004) (NAFTA panel decision)
Nov. 4, 2004:	The *Timken* Notice issued by Commerce on November 30, 2004, *see infra*, to give legal effect to the ITC's negative injury determination retroactively took effect and suspended liquidation of entries entered on or after November 4, 2004.
Nov. 24, 2004:	The United States filed a request for a NAFTA Extraordinary Challenge Committee to contest the NAFTA panel decisions. *See Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 70,235 (Dep't Commerce Dec. 3, 2004) (notice of request for Extraordinary Challenge Committee).
	In response to the USTR's July 27, 2004, Section 129 request, the ITC issued an affirmative threat of material injury determination. *See Softwood Lumber from Canada,* Inv. Nos. 701–TA–414, 731–TA–928 (Final), Section 129 Determination (Nov. 24, 2004) AR 5.
Nov. 30, 2004:	Commerce issued a *Timken* Notice in the Federal Register to implement retroactively to November 4, 2004, the ITC negative injury determination resulting from the NAFTA panel's Third Remand. *See Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 69,584 (Dep't of Commerce Nov. 30, 2004) (notice of NAFTA Panel decision).
Dec. 10, 2004:	The USTR directed Commerce to "effectuate th[e] implementation [of the affirmative Section 129 Determination] by amending the

antidumping and countervailing duty orders on softwood lumber products from Canada." Letter from Robert B. Zoellick, USTR, to Donald Evans, Sec'y, Dep't Commerce (Dec. 10, 2004), AR 6.

Dec. 20, 2004: Commerce published an "Amendment to Orders" that "affirm[ed] the Commission's original determination that . . . the industry in the United States producing softwood lumber products is threatened with material injury by reason of imports of the subject merchandise from Canada." *Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,916 (Dep't Commerce Dec. 20, 2004) (amendment to antidumping and countervailing duty orders).

Aug. 10, 2005: The NAFTA ECC unanimously dismissed the United States challenge and upheld the NAFTA panel decision affirming the ITC negative remand determination. *See In the Matter of Certain Softwood Lumber Products from Canada*, ECC–2004–1904–01–USA, Opinion and Order of the ECC (Aug. 10, 2005).

Aug. 16, 2005: The NAFTA Secretariat published notice of the ECC decision. *See North American Free-Trade Agreement, Article 1904 NAFTA Panel Reviews*, 70 Fed. Reg. 48,103 (Dep't Commerce Aug. 16, 2005) (notice of decision and completion of Extraordinary Challenge Committee).

Nov. 15, 2005: The Article 21.5 arbitration panel upholds the Section 129 Determination as consistent with the United States' WTO obligations. Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW (Nov. 15, 2005).

APPENDIX B

Section 129(a) and (b), as codified at 19 U.S.C. § 3538(a), provides:

(a) Action by United States International Trade Commission

(1) Advisory report

If a dispute settlement panel finds in an interim report under Article 15 of the Dispute Settlement Understanding, or the Appellate Body finds in a report under Article 17 of that Understanding, that an action by the International Trade Commission in connection with a particular proceeding is not in conformity with the obligations of the United States under the Antidumping Agreement, the Safeguards Agreement, or the Agreement on Subsidies and Countervailing Measures, the Trade Representative may request the Commission to issue an advisory report on whether title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], as the case may be, permits the Commission to take steps in connection with the particular proceeding that would render its action not inconsistent with the findings of the panel or the Appellate Body concerning those obligations. The Trade Representative shall notify the congressional committees of such request.

(2) Time limits for report

The Commission shall transmit its report under paragraph (1) to the Trade Representative –

(A) in the case of an interim report described in paragraph (1), within 30 calendar days after the Trade Representative requests the report; and

(B) in the case of a report of the Appellate Body, within 21 calendar days after the Trade Representative requests the report.

(3) Consultations on request for Commission determination

If a majority of the Commissioners issues an affirmative report under paragraph (1), the Trade representative shall consult with the congressional committees concerning the matter.

(4) Commission determination

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C.1202 et seq.] or title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.], if a majority of the Commissioners issues an affirmative report under paragraph (1), the Commission, upon the written request of the Trade Representative, shall issue a determination in connection with the particular proceeding that would render the Commission's action described in paragraph (1) not inconsistent with the findings of the panel or Appellate Body. The Commission shall issue its determination not later than 120 days after the request from the Trade Representative is made.

(5) Consultations on implementation of Commission determination

The Trade Representative shall consult with the congressional committees before the Commission's determination under paragraph (4) is implemented.

(6) Revocation of order

If, by virtue of the Commission's determination under paragraph (4), an antidumping or countervailing duty order with respect to some or all of the imports that are subject to the action of the Commission described in paragraph (1) is no longer supported by an affirmative Commission determination under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] or this subsection, the Trade Representative may, after consulting with the congressional committees under paragraph (5), direct the administering authority to revoke the antidumping or countervailing duty order in whole or in part.

(b) Action by administering authority

(1) Consultations with administering authority and congressional committees

Promptly after a report by a dispute settlement panel or the Appellate Body is issued that contains findings that an action by the administering authority in a proceeding under title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] is not in conformity with the obligations of the United States under the Antidumping Agreement or the Agreement on Subsidies and Countervailing Measures, the Trade Representative shall consult with the administering authority and the congressional committees on the matter.

(2) Determination by administering authority

Notwithstanding any provision of the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the administering authority shall, within 180 days after receipt of a written request from the Trade Representative, issue a determination in connection with the particular proceeding that would render the administering authority's action described in paragraph (1) not inconsistent with the findings of the panel or the Appellate Body.

(3) Consultations before implementation

Before the administering authority implements any determination under paragraph (2), the Trade Representative shall consult with the administering authority and the congressional committees with respect to such determination.

(4) Implementation of determination

The Trade Representative may, after consulting with the administering authority and the congressional committees under paragraph (3), direct the administering authority to implement, in whole or in part, the determination made under paragraph (2).

(c) Effects of determinations; notice of implementation

(1) Effects of determinations

Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. 1677]) that are entered, or withdrawn from warehouse, for consumption on or after –

(A) in the case of a determination by the Commission under subsection (a)(4) of this section, the date on which the Trade Representative directs the administering authority under subsection (a)(6) of this section to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2) of this section, the date on which the Trade Representative directs the administering authority under subsection (b)(4) of this section to implement that determination.

(2) Notice of implementation

(A) The administering authority shall publish in the Federal Register notice of the implementation of any determination made under this section with respect to title VII of the Tariff Act of 1930 [19 U.S.C. 1671 et seq.].

(B) The Trade Representative shall publish in the Federal Register notice ofthe implementation of any determination made under this section with respect to title II of the Trade Act of 1974 [19 U.S.C. 2251 et seq.].

Slip Op. 06–110

OLYMPIA INDUSTRIAL, INC., Plaintiff, v. UNITED STATES, Defendant, and AMES TRUE TEMPER, Deft.-Intervenor.

Before: Richard K. Eaton, Judge
Court No. 04–00647

OPINION

[United States Department of Commerce's Final Scope Ruling sustained]

Dated: July 24, 2006

Hume & Associates, PC (*Robert T. Hume, Akil Vohra,* and *Jon C. Cooper*), for plaintiff.

Peter D. Keisler, Assistant Attorney General, Civil Division, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United Sates Department of Justice (*Stephen Carl Tosini*), for defendant.

Wiley, Rein & Fielding, LLP (*Charles Owen Verrill, Jr.* and *Timothy C. Brightbill*), for defendant-intervenor.

Eaton, Judge: This matter is before the court on plaintiff Olympia Industrial, Inc.'s ("plaintiff" or "Olympia") motion for judgment upon the agency record pursuant to USCIT Rule 56.2. By its motion, plaintiff challenges the determination of the United States Department of Commerce ("Commerce" or the "Department") that its multi-use tough tool ("MUTT") is included within the scope of the anti-dumping duty orders covering heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC"), specifically the order applicable to axes, adzes and similar hewing tools. *See* Final Scope Ruling–Request by Olympia Industrial, Inc. for a Scope Ruling on the MUTT (ITA Dec. 9, 2004) ("Final Scope Ruling"); *see also* HFHTs, Finished or Unfinished, With or Without Handles From the PRC, 56 Fed. Reg. 6622 (Feb. 19, 1991) ("HFHTs Orders").

Plaintiff seeks a remand of the Final Scope Ruling to allow Commerce to reconsider its findings. *See* Pl.'s Mem. of Pts. Auth. Supp. R. 56.2 Mot. ("Pl.'s Mem.") at 16. Defendant United States ("defendant" or the "Government"), on behalf of Commerce, opposes the motion and requests that the Department's Final Scope Ruling be sustained. *See* Def.'s Response to Pl.'s Mot. ("Def.'s Resp.") at 1. Defendant-intervenor Ames True Temper ("Ames") joins in opposition to plaintiff's motion. *See* Def.-Int.'s Response to Pl.'s Mot. ("Def.-Int.'s Resp.") at 1.

Jurisdiction lies with 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(2)(B)(vi) (2000). Because the MUTT's utility as a tool comes from its steel head with a sharp blade that can be used for cutting and chopping, the court finds that it is a hewing tool similar to an axe or adze and, thus, sustains Commerce's Final Scope Ruling.

BACKGROUND

On March 25, 2003, Commerce published notice that it would conduct an administrative review of merchandise subject to the four antidumping duty orders on HFHTs from the PRC for the period beginning February 1, 2002 and ending January 31, 2003. *See* Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part, 68 Fed. Reg. 14,394, 14,395 (ITA Mar. 25, 2003). On July 10, 2003, Commerce notified Olympia that data concerning scrapers, with or without handles, should be submitted as those tools were subject to the order applicable to axes, adzes, and similar hewing tools ("axes/adzes order"). *See* Scope Ruling Request on Scrapers Submitted on Behalf of Olympia Industrial, Inc. (Oct. 9, 2003) ("Scope Ruling Request") at 3. On October 9, 2003, plaintiff submitted an application to Commerce pursuant to 19 C.F.R. § 351.225(c) (2005),[1] asking the agency to issue a scope ruling finding that the MUTT did not fall within the ambit of the HFHTs Orders. *See id.* at 10. Pursuant to its regulations, Commerce engaged in an initial scope investigation and found that the language of the HFHTs Orders was not dispositive of the scope question. *See* Final Scope Ruling at 2. Thus, on December 2, 2003, in accordance

---

[1] The regulation provides, in pertinent part, that:

> Any interested party may apply for a ruling as to whether a particular product is within the scope of an order or a suspended investigation. The application must be served upon all parties on the scope service list [which includes all persons that have participated in any segment of the proceeding] . . . and must contain the following, to the extent reasonably available to the interested party . . .
>
> (i) A detailed description of the product, including its technical characteristics and uses, and its current U.S. Tariff Classification number;
>
> (ii) A statement of the interested party's position as to whether the product is within the scope of an order or a suspended investigation, including:
>
> (A) A summary of the reasons for this conclusion,
>
> (B) Citations to any applicable statutory authority, and
>
> (C) Any factual information supporting this position, including excerpts from portions of the Secretary's or the Commission's investigation, and relevant prior scope rulings. . . .

19 C.F.R. § 351.225(c).

with 19 C.F.R. § 351.225(e),[2] Commerce initiated a formal scope inquiry. *See id*. To facilitate its investigation, Commerce instructed the parties to submit supplemental filings.

As part of those filings, Commerce instructed Olympia to identify the specific MUTT models that were to be examined. *See* Pl.'s Mem. at 3. Olympia complied, stating that the models to be reviewed were "three MUTT blades (5″x4″ 8″x4″and 9″x7″) without handles and the same MUTT blades with handles identified by eight model numbers . . . 64–386, 64–389, 64–392, 64–393, 64–394, 64– 396, 64–397 and 64–398." *Id*. at 3–4. After analyzing the MUTT based on the additional information obtained in the scope inquiry, Commerce determined that it was subject to the terms of the axes/adzes order because it was reasonable to find the tool to be an axe, adze, or similar hewing tool. *See* Final Scope Ruling at 1.

STANDARD OF REVIEW

When reviewing Commerce's final determination finding a particular type of merchandise to be within the class or kind of merchandise described in an antidumping duty order, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " Id. (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). Finally, the possibility of drawing two opposite, yet equally justified conclusions from the record will not prevent the agency's determination from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

---

[2] Under 19 C.F.R. § 351.225(e):

> If the Secretary finds that the issue of whether a product is included within the scope of an order . . . cannot be determined based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, the Secretary will notify by mail all parties on the Department's scope service list of the initiation of a scope inquiry.

19 C.F.R. § 351.225(e).

DISCUSSION

I. Relevant Law

Commerce's regulations require the agency to engage in a two-step analysis when determining whether particular merchandise is included within the scope of an antidumping duty order.[3] First, upon receiving an application from an interested party,[4] Commerce is directed to conduct an investigation that is limited to the consideration of: (1) the descriptions contained in the petition filed by domestic interested parties seeking the original antidumping order; (2) the initial antidumping investigation; and (3) any relevant determinations issued by the International Trade Commission ("ITC" or the "Commission"). *See* 19 C.F.R. § 351.225(k)(1);[5] *see also* 19 C.F.R. § 351.202(a) ("The Secretary normally initiates antidumping . . . investigations based on petitions filed by a domestic interested party."). Commerce may also consider the Harmonized Tariff Schedule of the United States ("HTSUS") subheading under which the product is imported. The HTSUS subheading for a product, however, is not dispositive of whether that product falls within the scope of an antidumping duty order. *See Smith Corona Corp. v. United States*, 915 F.2d 683, 687 (Fed. Cir. 1990). If Commerce's review of this evidence leads it to conclusively determine that the product is, or is not included within the scope of the order, the Department is then required to issue a final scope ruling. *See* 19 C.F.R. § 351.225(d) ("If the Secretary can determine, based solely upon the application and the descriptions of the merchandise referred to in paragraph (k)(1) of this section, whether a product is included within the scope of an order . . . the Secretary will issue a final ruling. . . .").

Where Commerce finds that the information reviewed in the initial investigation is not dispositive, it then proceeds to notify the

---

[3] Once the product is determined to be within the scope of the order, it is then referred to as subject merchandise. "Subject merchandise" is defined as "the class or kind of merchandise that is within the scope of an investigation, a review, a suspension agreement, an order under this subtitle or section 1303 of this title, or a finding under the Antidumping Act, 1921." 19 U.S.C. § 1677(25).

[4] Section 1677(9)(A) of Title 19 provides, in relevant part, that "[t]he term 'interested party' means . . . a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise. . . ." 19 U.S.C. § 1677(9)(A).

[5] The regulation provides that:

> With respect to those scope determinations that are not covered under paragraphs (g) through (j) of this section, in considering whether a particular product is included within the scope of an order or a suspended investigation, the Secretary will take into account the following:
>
> (1) The descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of the Secretary (including prior scope determinations) and the Commission.

19 C.F.R. § 351.225(k)(1).

parties that it will begin a formal scope inquiry in which it examines the factors commonly referred to as the "*Diversified Products*" criteria in reference to the case where they were first set forth. *See Diversified Prods. Corp. v. United States*, 6 CIT 155, 162, 572 F. Supp. 883, 889 (1983). These factors, which have since been reduced to a regulation, are as follows:

(i) The physical characteristics of the product;
(ii) The expectations of the ultimate purchasers;
(iii) The ultimate use of the product;
(iv) The channels of trade in which the product is sold; and
(v) The manner in which the product is advertised and displayed.

19 C.F.R. § 351.225(k)(2).

The regulation, however, merely provides guidance to the Department during its scope investigation. "The language of the order determines the scope of an antidumping duty order." *Tak Fat Trading Co. v. United States*, 396 F.3d 1378, 1382 (Fed. Cir. 2005). Where the order's scope language does not expressly address the status of a particular product, the order "may be interpreted as including subject merchandise only if [it] contain[s] language that . . . may be reasonably interpreted to include it." *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002). In other words, the language of the order controls Commerce's inquiry. *See id.* at 1097 ("[R]eview of the petition and the [antidumping] investigation may provide valuable guidance as to the interpretation of the final order . . . [b]ut they cannot substitute for language in the order itself."); *see also Vertex Int'l, Inc. v. United States*, 30 CIT ____ , ____ , slip op. 06–10 at 7–8 (Jan. 19, 2006) (not published in the Federal Supplement); *Tianjin Mach. Import & Export Corp. v. United States*, 29 CIT ____ , ____ , 394 F. Supp. 2d 1369, 1373–74 (2005) ("Commerce must consult the final scope language as the primary source in making a scope ruling because Commerce's final determination reflects the decision that has been made as to which merchandise is within the final scope of the investigation and is subject to the order.") (internal quotation marks omitted); *Allegheny Bradford Corp. v. United States*, 28 CIT ____ , ____ , 342 F. Supp. 2d 1172, 1184 (2004) ("The language of an order is the cornerstone of a court's analysis of an order's scope.") (internal quotation marks omitted).

Thus, the court's task is to determine whether Commerce, in the Final Scope Ruling, reasonably interpreted the scope language of the HFHTs Orders to include the MUTT.

II. Results of the Department's Initial Investigation

Following the regulation's procedures, Olympia submitted its application to Commerce asking the agency to issue a final scope ruling that the MUTT was not included within the HFHTs Orders. In its application, Olympia contended that the words in the original order clearly indicated that the MUTT was outside the scope of the order. The scope language provided that:

> The products covered by these investigations are HFHTs comprising the following classes or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg. (3.33 pounds) ("hammers/sledges"); (2) bars over 18 inches in length, track tools and wedges ("bars/wedges"); (3) picks and mattocks ("picks/mattocks"); and (4) axes, adzes and similar hewing tools ("axes/adzes"). . . .
>
> HFHTs are manufactured through a hot forge operation in which steel is sheared to required length, heated to forging temperature and formed to final shape on forging equipment using dies specific to the desired product shape and size. HFHTs are currently provided for under the following *Harmonized Tariff System* (HTS) subheadings: 8205.20.60, 8205.59.30, 8201.30.00, and 8201.40.60. Specifically excluded from these investigations are hammers and sledges with heads 1.5 kg. (3.33 pounds) in weight and under, hoes and rakes, and bars 18 inches in length and under.

HFHTs Orders, 56 Fed. Reg. at 6622–23 (emphasis in original).

For Olympia, the order supported its contention that the MUTT is not included in the scope, primarily because it views the MUTT as a scraper, and the order does not specifically mention scrapers. *See* Scope Ruling Request at 5. Olympia's application further insisted that "[a] scraper is not a tool that is 'similar' to an axe or adze. . . ." *Id*. Moreover, Olympia argued that the MUTT must be excluded from the order because it entered the MUTT under HTSUS subheading 8205.59.5510, which was not listed in the order. In sum, Olympia maintained that, "[i]n the case of scrapers, both the language [of the HFHTs Orders] and the designated HTSUS subcategories are clearly dispositive of the issue, and do *not* include scrapers." *Id*. at 4 (emphasis in original).

Plaintiff's application also provided Commerce with the following description of the MUTT:

> The product in question is a scraper, with or without a handle. Olympia imports the scraper without a handle, but generally sells the scraper with a handle using the trademark MUTT. Olympia sells three (3) types of scrapers with blades that measure 5″x4″, 8″x4″, and 9″x7″.
>
> A scraper is a hand tool used in landscaping with a long wooden handle and chisel-like blade at the end. More specifically, a scraper can be used for cutting roots, for edging, and even for chipping ice on driveways or sidewalks. . . .

> The scrapers imported by Olympia are made of steel and manufactured using a forging process.

Scope Ruling Request at 2 (footnote omitted). According to plaintiff, the merchandise at issue is a forged scraper with a steel head and varying sized sharpened blades.

Along with the descriptions provided by plaintiff's initial application, Commerce also had at its disposal: (1) the language contained in the domestic industry's petition asking the Department and the ITC to provide relief from the claimed injurious effects of HFHTs imports; (2) the original ITC final injury determination; and (3) the applicable HTSUS subheading under which Olympia was entering the MUTT. *See generally* HFHTs, With or Without Handles, From the PRC-Antidumping Petition of Woodings-Verona Tool Works, Inc. (Apr. 4, 1990) (the "Petition"); HFHTs From the PRC, Determination of the Commission in Invs. No. 731–TA–457 (Final), USITC Pub. 2357 (Feb. 1991) ("Final Injury Determination"); HTSUS 8205.59.5510 (2003).

In the Petition, the domestic industry provided the following description:

> The manufacturing process is generally described as a hot forge operation in which fine grain special bar quality steel of the needed metallurgy and cross-sectional dimension is sheared to the required length, heated to forging temperature in a fossil fuel furnace, and formed to final shape on forging equipment using dies specific to the desired product shape and size. If heat treating is required, the formed shape is quenched in a suitable media, such as an oil bath or a water spray, and then tempered to the required hardness. . . .
>
> The merchandise in question is all imports from the PRC currently classified under the following subheadings of the [HTSUS], and before January 1, 1989, under the item numbers of the Tariff Schedules of the United States Annotated ("TSUSA"):
>
> HTSUS 8205.20.60/TSUSA 651.2300
> Hammers and Sledges, with or without their Handles with Heads over 1.5 Kg (3.25 pounds) each
>
> HTSUS 8205.59.30/TSUSA 651.2500
> Crowbars, Track Tools, Wedges of Iron or Steel
>
> HTSUS 8201.30.00/TSUSA 648.5300
> Picks and Mattocks/(as of 1/1/89) Mattocks, Picks, Hoes, and Rakes and Parts Thereof
>
> HTSUS 8201.40.60/TSUSA 648.6700
> Axes, Adzes, etc./(as of 1/1/89) Axes and Hewing Tools Other than Machetes and Parts, Base Metal

> The four classification subheadings listed above provide the scope of this Petition and describe four distinct like product groups (and class or kind of merchandise groups) except that (1) hoes and rakes in HTSUS 8201.30.00 are not heavy forged hand tools and are not subject to investigation, and (2) bars eighteen inches and under in HTSUS 8205.59.30 are not heavy hand tools and are not subject to investigation. . . .

Petition at 2, 11–12.

Commerce also considered the language of HTSUS 8205.59.5510, the heading under which Olympia enters the MUTT.

8205		Handtools (including glass cutters) not elsewhere specified or included; blow torches and similar self-contained torches; vises, clamps and the like, other than accessories for and parts of machine tools; anvils; portable forges; hand-or pedal-operated grinding wheels with frameworks; base metal parts thereof:
8205.59.55		
	10	Other. . . .

HTSUS 8205.59.5510 (2003).

Finally, the product description contained in the ITC Final Injury Determination provided that:

> The HFHTs included in the scope of this investigation consist of the following products, finished or unfinished, with or without handles: (1) hammers, sledges, and mauls (hammers and sledges or 'striking tools'), including drilling hammers and woodsplitting mauls, with heads over 1.5 kilograms (3.3 pounds) each; (2) bars of over 18 inches (45.72 centimeters) in length, track tools, and wedges (bars and wedges or 'bar tools'), including wrecking bars, digging bars, tampers, and steel woodsplitting wedges; (3) picks and mattocks ('digging tools'); and (4) axes, adzes, and similar hewing tools (axes and adzes or 'hewing tools'). . . .
>
> The method used most often in the production of the subject products is forging. This process involves shearing the raw material (fine-grain, special bar- quality steel) to a specific size and heating it in an electric, gas, coal, or oil-fired furnace to a temperature that renders the steel malleable. The raw material is then shaped into the desired form by intermittent blows of forging hammers fitted with impression dies. After forging, numerous steps are undertaken before manufacturing is completed. These steps include trimming excess metal; heat treating to increase strength; and grinding, polishing, and painting to obtain a finished appearance.

Final Injury Determination at 95, 97–98.

After reviewing the above materials in light of the scope language of the HFHTs Orders, Commerce concluded that they failed to establish the status of the MUTT. In particular, Commerce found that, while scrapers are not included in the referenced HTSUS subheadings, such subheadings are "provided for convenience and U.S. Customs Service purposes. The written description [in the final order] remains dispositive." Final Scope Ruling at 12 (internal quotation marks and citation omitted); *see also Novosteel SA v. United States*, 284 F.3d 1261, 1270 (Fed. Cir. 2002) ("[A] reference to an HTSUS number 'is not dispositive' about the scope of an antidumping or countervailing-duty order.") (quoting *Smith Corona Corp.*, 915 F.2d at 687)). Thus, Commerce initiated a scope inquiry and considered the additional factors set forth in § 351.225(k)(2).

III. Scope Inquiry

Following its examination of the *Diversified Products* criteria, Commerce issued its final determination on Olympia's request for a scope ruling on the MUTT. The Department found that: (1) the MUTT was not specifically identified or excluded by the scope of the HFHTs Orders; (2) neither the information contained in the Petition or the ITC's Final Injury Determination provided a definition of "similar hewing tools"; (3) the product descriptions contained in the Petition, the ITC's Final Injury Determination, and the HFHTs Orders could be "reasonably interpreted to include the MUTT in the antidumping duty order on axes/adzes"; and (4) an application of the *Diversified Products* criteria supported the finding that the MUTT is properly included within the scope of the HFHTs Orders. *See* Final Scope Ruling at 13, 20. Olympia challenges several aspects of the Final Scope Ruling.

A. Manufacturing Process

Olympia first contends that the language of the HFHTs Orders cannot reasonably be read to include the MUTT because the roll forge process used to manufacture the MUTT head is distinct from the hot forge process described in the order.

> According to plaintiff:
>
> The [MUTT] is strong and durable, made of steel and manufactured using a forging process. The forging process, unlike the description in the scope of the [Antidumping Duty] orders, is roll forging. A roll forging process is a process where the steel is heated then compressed between two rollers to the specified thickness then cooled. When cooled the MUTT is cut to its finished shape. The MUTT is *not* "formed to final shape on forging equipment using dies specific to the desired product shape and size." While the MUTT is produced in a forging factory, the

> tools needed to make the MUTT are different from those used to make HFHTs.

Supplemental Submission on Scope Ruling Request on the MUTT (A Forged Scraper) Submitted on Behalf of Olympia Industrial, Inc. ("Supplemental Submission") at 4 (emphasis in original) (footnote omitted).

Plaintiff's counsel further pursued this point at oral argument. *See* Tr. of Civ. Cause for Or. Arg. ("Tr.") at 3:2–8:24.

MR. COOPER: This process of roll forging takes the heated steel, puts it through a set of rollers in order to get the proper dimensions for this material. It is then cut to shape, heat annealed, and then punched when necessary for additional holes. . . . So the roll forge process itself more significantly uses completely different equipment than the hot forge process. . . .

THE COURT: Are dies used at all in the production of the MUTT?

MR. COOPER: Yes, Your Honor. The dies are used but it's a completely different kind of die. As opposed to an open die which the metal is forced into it, during the hot forge process this die just guides the metal into a shape that the rollers are pushing it into. . . .

The COURT: Now, explain to [the court] why that's not what is described [in the order].

MR. COOPER: The roll forge process is much [more] low tech. It basically is heated steel which is just coming down on basically a vertical type conveyor. They cut it to form it into a shape. . . . It's simply that the steel ingots are heated, hey are rolled into these conveyor belts and there are dies on either side just to keep basically the width from coming too much.

Tr. at 3:22–25, 4:1,2, 11–16; 5:13–14; 6:23–25; 7:1, 6–9.

The Department insists that, if there are differences between the roll forge and hot forge processes, those differences are negligible and therefore cannot be reasonably understood to exclude the MUTT from the scope of the HFHTs Orders. *See* Final Scope Ruling at 10–11, 16; *see also* Def.'s Resp. at 9–11. Commerce maintains that the critical language in the HFHTs Orders relating to the manufacturing process is that "HFHTs are manufactured through a hot forge operation. . . ." Final Scope Ruling at 11. For Commerce, the words that follow, i.e., "in which steel is sheared to required length, heated to forging temperature and formed to final shape on forging equipment using dies specific to the desired product shape and size," simply explain the general elements of all forging processes. *Id*. In other words, Commerce asserts that the "plain language of . . . [the HFHTs Orders] clearly indicates that the HFHTs covered by these orders are manufactured through a 'hot forge operation.' " *Id*. Thus, the Department understands the "hot forge" language as merely "describ[ing] production processes for HFHTs that are illustrative and not exclusive of variations in the forging process." Final Scope Ruling at 11, 16 ("Since the scope allows for variations in the forging process used to produce subject merchandise, it follows that there will be variations in the equipment used to conduct the hot-forge process.").

The court finds that the differences between the roll forge and hot forge processes do not render unreasonable Commerce's interpretation of the HFHTs Orders' scope language to include the MUTT. *See Duferco*, 296 F.2d at 1089. It is true that the hot forge process contained in the HFHTs Orders describes the steel as being first sheared, then heated, and then formed into shape by dies. In the forging process for the MUTT's heads, on the other hand, the steel is heated first, forced into its proper dimensions by dies, cooled, and then sheared. Both processes are clearly hot forging using dies to shape the metal. Plaintiff's counsel described the roll forge process as using dies to ensure that the MUTT's head is produced to the proper "dimensions," and that the die "guides the metal into a shape." *See* Tr. at 7:10–14. Put another way, the dies used to manufacture the MUTT head are "specific to the desired product shape and size." HFHTs Orders, 56 Fed. Reg. at 6623. The fact that the steel used to create the MUTT head is cut after having been shaped is simply not sufficient to remove the MUTT from the scope of the HFHTs Orders.[6] Thus, the court concludes that, because the variations between the processes are not substantial, Commerce was reasonable in finding that the MUTT is made by a forging process.

B. *Diversified Products Criteria*

1. Physical Characteristics

Having found unconvincing plaintiff's argument concerning the manufacturing processes, the court turns to Commerce's examination of the MUTT using the *Diversified Products* criteria. Commerce undertook this examination in order to determine whether the

---

[6] This situation is dissimilar from that faced by the Court in *Tianjin Machinery Import & Export Corp. v. United States*, 29 CIT ____ , ____ , 394 F. Supp. 2d 1369, 1374 (2005). There, the Court sustained Commerce's finding that tampers manufactured through a *cast* process were not covered by the HFHTs Orders because:

> [T]he scope language in the *HFHT Orders* makes no reference to any hand tool that is not identified as an "HFHT," *i.e.*, as a "forged" hand tool, and does not refer to any production of a hand tool by casting or by any manufacturing process that is distinct from a forging process.

Id., 394 F. Supp. 2d at 1374 (emphasis in original).

MUTT could be reasonably said to be an "axe, adze, or similar hewing tool" as described in the axes/adzes order. Addressing the factors in the order that they appear in the regulation, the first criterion reviewed is the MUTT's physical characteristics. *See* 19 C.F.R. § 351.225(k)(2)(i). For plaintiff, this factor lends substantial support to its assertion that the MUTT is not within the scope of the axes/adzes order.

Olympia states in its Supplemental Submission that the MUTT has a "chisel-like blade" and is typically sold with a long handle. *See* Supplemental Submission at 3. Although acknowledging the presence of this blade, plaintiff asserts that "[t]he physical characteristics of a MUTT are similar to those of forged edgers, forged hoes, and forged shovels," not axes or adzes. *Id.* at 4 (footnotes omitted). For plaintiff:

> An axe or adze head is placed at a 90 degree angle to the shaft of the tool so the ultimate user can swing the implement and obtains the striking power from the swing or arc of the tool. A MUTT head, on the other hand, is not placed at a 90 degree angle, but in a manner that is similar to the bristles of a broom or the head of a rake. The physical structure of the tool is entirely different from an axe or adze. . . .

Pl.'s Mem. at 9.

Olympia also focuses on the difference between the handle attached to the MUTT blade and that which is attached to the axe or adze head.

> Olympia imports the tool without an attached handle, but typically sells the tool with a wooden handle. The blade of the MUTT under review measure 4″x5″, 4″x8″ and 7″x9″ and the wooden shaft comes in five sizes 23″, 30″, 41″, 48″ and 54″. Axes typically do not come with wooden handles with shafts of 41″, 48″ and 54″ because these measurements would make the tool inordinately top heavy not allowing the user to properly swing the axe. The wooden handles [used on the MUTT] are typically longer than an axe or adze. . . .
>
> Additionally, the MUTT can also be purchased with the nylon handle that functions as a firm grip to use for scraping purposes. A similar handle is found on many snow shovels. . . . Axes and adzes typically do not have a nylon grip since it would diminish the utility of the tool. . . .

Id. at 10.[7] Thus, by emphasizing the differences between the MUTT handle and that of an axe or adze, Olympia maintains its position

[7] At oral argument, plaintiff's counsel reiterated for the court the descriptions and arguments set forth in its memorandum supporting its Rule 56.2 motion. *See* Tr. at 16:18–25.

that Commerce was unreasonable in determining that the physical characteristics of the MUTT were similar enough to an axe or an adze to justify its conclusion that the MUTT was subject to the axes/adzes order.

With respect to Olympia's claim that the physical appearance of the MUTT precludes a reading of the HFHTs Orders' scope language to include the MUTT, Commerce focused on the "similar hewing tool" language of the order and found that "[w]hile there will be differences [between hewing tools and axes and adzes], these differences will be minor, such that the other hewing tool can reasonably be called 'similar' to an axe or adze, and still be encompassed by the order." Final Scope Ruling at 16. Put another way, because the axes/adzes order covers axes, adzes, and similar hewing tools, Commerce maintains that it is not enough for plaintiff to point out the characteristics of its product that distinguish it from an axe or adze to exclude the MUTT from the scope of the order. Thus, Commerce argues that for the MUTT to be found to lie outside the scope of the order, it must be demonstrated that the phrase "similar hewing tool" cannot reasonably be read to include the MUTT.

Commerce further asserts as without merit plaintiff's claim that the MUTT most closely resembles a shovel or other form of landscaping or digging tool.

> Olympia . . . states that the MUTT has a chisel like blade, which is used for cutting and chopping applications. Thus, contrary to Olympia's contention, the MUTT is not like a shovel, as shovels are used for digging and excavation. . . . Given the sharpened end and flatness of the MUTT blade, it is more physically similar to that of an axe or adze, rather than a shovel. . . . Olympia's brochure states that the MUTT blade is "resharpenable," thereby indicating that the MUTT is initially sold with a sharpened edge. . . . While there may be some difference in the degree to which the edge is sharp between the MUTT and an axe or adze, we note that the scope contemplates that there will be some differences between an axe or adze and "similar hewing tools."

Final Scope Ruling at 15–16. That is, Commerce found that the MUTT, because of its steel head and sharpened edge, was similar enough to an axe or adze head to reasonably include the MUTT within the scope of the order.

The court agrees with plaintiff that the MUTT indeed has some physical characteristics that are distinct from those of an axe or adze. In particular, the MUTT head, unlike that of an axe or adze, is not attached to its handle at a ninety degree angle and the MUTT handle is considerably longer than that attached to an axe or adze. It is worth noting, however, that an axe head is attached so that the blade is parallel to the handle, while that of an adze is placed perpendicular to its handle. Thus, the position of the head to the handle is not a determinative characteristic. It is also the case that the physical characteristics of the MUTT's head are similar to that of an axe or adze. That is, the MUTT head is made of steel, is "strong and durable," and the blade, which is sharpened at the time of sale, may be re-sharpened. *See* Supplemental Submission at 4 ("The [MUTT] is strong and durable, made of steel and manufactured using a forging process."); *see also* Pl.'s App. to R. 56.2 Mot. ("Pl.'s App.") at App. 3 (describing the MUTT as having a "Rolled Forged, Heat Treated Tempered Head," and "Resharpenable Blade.").

The dictionary defines the word "hew" as meaning "[t]o strike forcibly with a cutting tool. . . ." VII The Oxford English Dictionary 194 (2d ed. 1989); *see also* The American Heritage Dictionary of the English Language 849 (3d ed. 1992) ("To strike or cut. . . ."). It follows, then, that a hewing tool is designed to be capable of performing tasks that involve cutting by striking, i.e., chopping. In order to efficiently and effectively complete such tasks, a hewing tool must have a strong head with a sharpened blade. As indicated by plaintiff's own sales literature, the MUTT has a forged, heat-treated and tempered steel head with a re-sharpenable blade. *See* Pl.'s App. at App. 3. For axes, adzes, and the MUTT, the characteristic that gives them utility as a tool is the head and blade. Therefore, as the MUTT shares with axes and adzes the physical characteristic of a substantial head with a sharpened blade that is attached to a handle, the court finds that Commerce reasonably concluded that the MUTT has the physical characteristics of a hewing tool that is similar to an axe or adze.

2. Expectations of the Ultimate Purchaser

The next factor Commerce considers in a scope inquiry is whether the expectations of the ultimate purchaser of the product are the same as those who purchase products already found to be within the scope of an antidumping duty order. Here, Commerce determined that, while the MUTT has a multitude of uses, the ultimate purchaser of the MUTT can have similar expectations to those of a purchaser who buys an axe or an adze. *See* Final Scope Ruling at 17.

Olympia insists that the ultimate purchasers of the MUTT are not the same as those seeking to buy an axe or an adze. According to plaintiff, because the MUTT is "generally sold in the gardening sections of hardware and do-it-yourself (DIY) stores[,] . . . [t]he customer that purchases a MUTT is one who generally intends to use the MUTT for 'light' work and expects the tool to perform a number of different tasks around the yard." Supplemental Submission at 4–5. Moreover, Olympia suggests that "[t]he type of customer that purchases a HFHT includes professionals that buy the tools for heavy work such as cutting down trees . . . or digging ditches . . . ," rather than someone intending to do more moderate tasks. *Id.* at 5. Thus, Olympia maintains that the MUTT is outside the scope of the

HFHTs Orders because, simply put, a "customer will not purchase a MUTT to cut down a tree or to split wood." *Id.*

Plaintiff further states that:

> [A]n end user of this tool can expect that the MUTT can be used for a variety of activities including: scraping, digging, ice breaking, lot clearance, trenching, shingle removal, tile removal, carpet and floor removal, removing ice from a driveway and paint removal. An axe or adze, however, cannot be used for these additional tasks and an end user would not conceive of using an axe to remov[e] shingles, remov[e] paint, or tak[e] out linoleum.

Pl.'s Mem. at 11. Thus, Olympia's position is that, unlike the consumer who purchases an axe, the MUTT consumer is not buying the tool solely for its ability to cut or chop, but rather expects to use the tool for many purposes including scraping and digging.

Commerce, on the other hand, found that the MUTT's ultimate purchasers and those who buy HFHTs "have very similar expectations," primarily because "the over-riding purpose of the MUTT is to cut and chop." Final Scope Ruling at 17. According to Commerce, "Olympia . . . failed to provide any evidence . . . that a purchaser of the MUTT would obtain this tool with the expectation of using it in a significantly different manner than merchandise covered by the antidumping duty order on axes, adzes, and similar hewing tools." *Id.*

Despite its finding, Commerce concedes that a consumer's expectations for the compared products would not be exactly the same. *See id.* The Department states that, while an axe is limited to activities such as felling trees, chopping and splitting wood, and hewing timber, and an adze is used principally for rough-shaping wood, the MUTT is capable of performing a number of different functions. *See id.; see also* Webster's Third New International Dictionary 153, 32 (1981). Irrespective of this finding, Commerce returns to the line of reasoning it adopted when analyzing the physical characteristics of the MUTT to justify its conclusion that purchasers of the tool can have similar expectations to axe or adze consumers. Specifically, Commerce observes that "the scope anticipated that there [would] be some differences between axes or adzes and other hewing tools because it uses the word 'similar.' " Final Scope Ruling at 17. For Commerce, the word "similar" adequately compensates for any potential differences between the expectations of an axe or adze consumer and those of a MUTT purchaser.

Finally, Commerce found that Olympia failed to produce any evidence supporting its contention that purchasers of the MUTT tended to be "do-it-yourselfers" as distinct from professional contractors or construction personnel. *See id.* According to Commerce, "[g]iven that the vast majority of homeowners have trees and shrubs on their property and a significant percentage of homeowners have fire-places, it is logical to assume that individual homeowners purchase a large percentage of the axes and adzes sold in hardware and DIY stores." *Id*.

The court finds that Commerce reasonably concluded that a person buying the MUTT has, at least, some of the expectations of the purchaser of an axe or adze. Indeed, where a product has a variety of uses, and thus a consumer may expect the product to perform an array of tasks, this Court has stated that:

> The applicable regulation . . . does not provide that the products being compared must have identical uses. Rather, the [Department] is directed to evaluate the *Diversified Products* criteria and determine whether a product is sufficiently similar as merchandise unambiguously within the scope of an order as to conclude the two are merchandise of the same class or kind.

Wirth Ltd. v. United States, 22 CIT 285, 300, 5 F. Supp. 2d 968, 981 (1998) (sustaining Commerce's conclusion that purchasers of profile slab have similar expectations to purchasers of carbon steel plate). In other words, if two products can be used in at least some of their applications for similar, if not identical purposes, Commerce may conclude that purchasers of the products have similar expectations.

First, it is worth noting that while plaintiff claims that the MUTT cannot be used to fell trees or chop or split wood, neither can an adze. Nor can an axe be employed to rough-shape wood in the same manner as an adze. In addition, while an adze cannot effectively be employed by swinging it across the body at a standing object, an axe can. Here, it is undisputed that a purchaser of a MUTT may have similar expectations as a purchaser of an axe or adze. For instance, a purchaser might expect to use the MUTT with its steel head and sharpened blade to cut or chop tree roots or small branches, or for lot clearance. *See* Pl.'s App. at App. 3. Indeed, plaintiff's brochure states the "best" MUTT blade a purchaser might buy if he or she intends to use the MUTT for chopping or cutting. *See* Pl.'s App. at App. 3 ("Original MUTT. Best for chopping and cutting with its 4″ blade.). Because a consumer might reasonably purchase an axe or adze to accomplish the same or similar cutting and chopping tasks, the court finds reasonable Commerce's conclusion that the ultimate expectations of both kinds of purchasers are similar enough to support a reading of the scope language to include the MUTT.

3. The Ultimate Use of the Product

Third among the *Diversified Products* criteria is the ultimate use of the product. Here, Commerce claims that the MUTT is ultimately used to hew, cut, or chop, while Olympia insists that the MUTT is a scraper that is used for light work, such as landscaping and ice removal.

Olympia first takes issue with Commerce's finding that the MUTT is primarily used to cut or chop. For Olympia, in order for Commerce to find that the MUTT is subject to the axes/adzes order, it must be established that the primary use of the tool is the same as an axe, adze, or similar hewing tool. In plaintiff's view, "[i]t is clear that the class referred to in the HFHT Order relating to axes, adzes and other hewing tools has the major function of cutting or chopping. This is not the overriding function of the MUTT." Pl.'s Mem. at 13. In support of this assertion, Olympia states that:

> The MUTT is clearly a scraper whose primary function is to serve as a tool that facilitates the separation of materials attached during construction such as shingles from a roof, tile from a floor, paint from a wall and other similar applications such as removing ice from a driveway. None of the major functions of the MUTT serves to cut or chop, but merely serves as a byproduct of the tool since it has a sharp blade. The MUTT comes with a wooden handle as described before whose length would make it extremely cumbersome to swing as an axe might. . . .
>
> Thus, the evidence on the record clearly points to the conclusion that the ultimate use of Olympia's MUTT is to scrape, not to "hew" as alleged by Commerce.

Id.

Commerce recognized that the MUTT can be used as a scraper, but nonetheless found that even the act of scraping shingles off of a roof required the user to exert force similar to that required to operate a hewing tool. Commerce concluded that:

> Based on our review of the record, it is clear that the ultimate use of Olympia's MUTT is essentially to cut and chop. The scope of one of the classes or kinds of merchandise subject to the *HFHTs Orders* is axes, adzes, and similar hewing tools. . . . [T]he definition of the term "hew" is "to cut with blows of a heavy cutting instrument." *See* Merriam-Webster's Online Dictionary at www.webster.com. This definition demonstrates that a hewing tool is one that is relatively heavy and is designed to employ the weight of the tool to assist in cutting or chopping. Olympia's brochure identifies the first two uses for MUTT as "cutting" and "chopping." Moreover, all of the other uses identified in the brochure, such as scraping, ice breaking, shingle removal, carpet removal, etc., involve applying force to an object through the use of a sharpened blade. Thus, both tools employ the weight of the tool to cut or chop. Therefore, based upon the record evidence, we find that the MUTT is used for cutting tasks that are very similar to the cutting tasks for which axes and adzes are used.

Final Scope Ruling at 18 (emphasis in original).

Commerce also seeks to refute what it perceives to be Olympia's claim that the MUTT may only be included within the ambit of the axes/adzes order if the sole use of the tool was to cut or chop. *See* Def.'s Resp. at 13. As with the expectations of the ultimate purchaser, Commerce argues that it is not required to find that the MUTT may be used only to cut and chop for it to be included within the scope of the axes/adzes order. Rather, Commerce maintains that it need only demonstrate that some of the uses of the MUTT are like those of an axe or adze. *See id.* For Commerce, "Olympia repeatedly described the uses of scrapers to include cutting and chopping, which are akin to the uses of 'similar hewing tools.' " *Id.; see* Scope Ruling Request at 2 ("[The MUTT] can be used for cutting roots . . . and even for chipping ice on driveways or sidewalks."); Supplemental Submission at 4 ("[T]he tool is intended for multiple uses including cutting [and] chopping. . . ."). Therefore, Commerce insists that its finding that the MUTT is a hewing tool similar to an axe or adze is reasonable.

The court finds unconvincing plaintiff's argument that the ultimate use criterion of the *Diversified Products* factors requires the compared products to have identical uses in order for the subject product to be within the scope of an order. This Court has previously held that it is not necessary for Commerce to find that a product is exclusively used for the same purpose as another product subject to an antidumping duty order to justify including that product within the scope of the order. *See Novosteel SA v. United States*, 25 CIT 2, 18, 128 F. Supp. 2d 720, 735 (2001) ("[T]wo products need not be an identical replacement for one another to have similar ultimate uses. . . . The ultimate use criterion does not require a complete overlap of uses to be supported by substantial evidence."). Indeed, the *Novosteel* Court sustained Commerce's finding that "several of the ultimate uses [for profile slabs] are the same as those for other products within the scope of the . . . orders." *See id.*, 128 F. Supp. 2d at 734 (internal citations and quotation marks omitted).

Applying that standard to the facts presented here, the court concludes that Commerce reasonably found that the MUTT has similar ultimate uses as axes and adzes. The MUTT, like the other tools, has a head of steel and a sharpened blade, and is used to cut and chop. According to Olympia's own sales brochure, the first two functions listed for the MUTT are cutting and chopping. *See* Pl.'s App. at App. 3. The first page of the brochure provides the following:

> The MUTT is a multiple use tough tool. One of the most versatile tools in the market and the leader in its class.
>
> In the short time since Village Blacksmith introduced the MUTT, more and more uses for this unique tool have been discovered . . .

- Cutting
- Chopping
- Scraping
- Digging
- Ice Breaking
- Lot Clearance
- Root Removal
- Sod Cutting
- Trenching
- Shingle Removal
- Tile Removal
- Carpet & Floor Removal
- Paint Removal
- Construction Clean-up
- And Many More Applications

Id. The brochure description is surrounded by pictures of the MUTT being used to complete various tasks, including chopping tree roots. *Id*. Thus, as it is clear that the MUTT has ultimate uses that involve cutting and chopping, Commerce was reasonable in concluding that the MUTT has similar ultimate uses to axes and adzes.

4. Channels of Trade in which the Product is Sold

The penultimate factor the Department considers when conducting a formal scope inquiry is whether the product is sold in the same channels of trade as other products that are unequivocally included within the scope of the order.

In the Final Scope Ruling, the Department found unavailing plaintiff's argument that the MUTT was not sold in the same channels of trade as axes and adzes because it was sold in the gardening department of hardware stores. *See* Final Scope Ruling at 19. Commerce observed that:

> There are many types of tools subject to the *HFHTs Orders* that are normally sold in the garden section of hardware and [do it yourself] stores. Picks, mattocks, and axes are frequently considered agricultural tools and, for this reason, are more likely to be found in the garden section of a retail store rather than a tool section.

Id. (emphasis in original).

Aside from insisting that its product is sold in a different part of hardware stores from axes and adzes, plaintiff does not vigorously dispute this point. *See* Pl.'s Mem. at 15. Indeed, Olympia concedes that "the MUTT and subject HFHTs are sold in the same channel[s] of trade." *Id*. (internal quotation marks and footnote omitted); *see also* Supplemental Submission at 5.

Thus, as plaintiff concedes that this factor does not assist its case, the court finds that this criterion adds to the reasonableness of Commerce's interpretation of the HFHTs Orders' scope language to encompass the MUTT.

5. Manner in which the Product is Advertised and Displayed

The final criterion Commerce applies in determining whether a product falls within the scope of an antidumping order is whether the product is advertised and displayed in the same manner as products already deemed to be subject to the order.

Plaintiff again reasserts its claim that the MUTT is not advertised and displayed in the same manner as other heavy forged hand tools because the MUTT is a light-work tool that is sold in the garden section of retail stores. *See* Final Scope Ruling at 19. Olympia also states that it advertises the MUTT to retailers using a separate catalog from that used to sell its other products. *See* Supplemental Submission at 3. In that brochure, however, Olympia states that the MUTT "can be cross-merchandised in many departments for its multiple uses." Pl.'s App. at App. 3.

The court finds plaintiff's argument regarding this factor to be without merit. The record indicates that both the MUTT and other HFHTs are advertised and displayed in the garden section of hardware stores. In addition, plaintiff's own brochure emphasizes that, because of its many uses, the MUTT can be sold in a variety of different retail departments. Thus, the manner in which the MUTT is advertised and displayed is not materially different from that of tools unequivocally within the scope of the axes/adzes order.

CONCLUSION

The court finds that Commerce properly sought guidance from the *Diversified Products* criteria to aid its interpretation of the language of the HFHTs order. In addition, because the MUTT is a forged, steel, durable tool with a sharpened blade that can be used for cutting and chopping, the court finds that Commerce reasonably found that the words of the order included the MUTT as a "similar hewing tool." *See Duferco*, 296 F.3d at 1089. Thus, the court sustains Commerce's Final Scope Ruling and dismisses this case. Judgment shall be entered accordingly.

Slip Op. 06–111

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

RICHARD L. JONES CALEXICO, INC., d/b/a R.L. JONES CUSTOMS HOUSE BROKERS, Plaintiff, v. UNITED STATES, Defendant.

Court No. 04–00315

[Held: Plaintiff's Motion for Summary Judgment granted. Judgment for the Plaintiff entered.]

Dated: July 25, 2006

Betts, Patterson & Mines, P.S. (*Steven W. Block*) for Richard L. Jones Calexico, Inc., d/b/a R.L. Jones Customs House Brokers, Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge; International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Mikki Graves Walser*); of counsel: *Sheryl A. French*, Office of the Assistant Chief Counsel for International Trade Litigation, Bureau of Customs and Border Protection, for United States, Defendant.

OPINION

Tsoucalas, Senior Judge: Plaintiff, Richard L. Jones Calexico, Inc., d/b/a R.L. Jones Customs House Brokers ("Calexico") moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Calexico argues that its claims for direct identification unused merchandise drawback with respect to certain asparagus from various origins should be granted. The Bureau of Customs and Border Protection ("Customs") argues that Calexico's drawback claims were properly denied and seeks an order dismissing the case.

JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581 (2000) and 19 U.S.C. § 1514(a)(6) (2000).

STANDARD OF REVIEW

On a motion for summary judgment, the Court must determine whether there are any genuine issues of fact that are material to the resolution of the action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is genuine if it might affect the outcome of the suit under the governing law. *See id*. Accordingly, the Court may not decide or try factual issues upon a motion for summary judgment. *See Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050 (1988). When genuine issues of material fact are not in dispute, summary judgment is appropriate if a moving party is entitled to judgment as a matter of law. *See* USCIT R. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

DISCUSSION

I. Factual Background

Calexico is a licensed customs broker for Spencer Fruit Company ("Spencer Fruit"), an importer-exporter of asparagus. *See* Pl.'s Statement Material Facts Supp. Pl.'s Mot. Summ. J. ("Calexico's Facts") ¶ 1. In late 1995, Customs approved Spencer Fruit's application for use of summary procedure and accelerated payment for unused drawback. *See* Decl. Earl Roberts Supp. Pl.'s Mot. Summ. J. ("Roberts Decl."), Ex. 1 at 6–7. Customs' approval included both substitution and direct identification drawback. *See* Roberts Decl., Ex. 1 at 6–8. Accelerated payment allows for the payment of estimated drawback before liquidation of the drawback entry. *See* 19 C.F.R. § 191.92(a) (1998). The use of summary procedure waives the "prior notice of intent to export" requirement to claim drawback. *See* 19 C.F.R. § 191.91(a); Roberts Decl., Ex. 1 at 8 ("It is the opinion of [Customs] that 'prior notice of intent to export' is not necessary with the approval of Exporter Summary Procedure.").

Spencer Fruit timely filed to renew its existing privileges for direct identification and substitution drawback by April 5, 1999. *See* Roberts Decl., Ex. 2 at 10–15; Def.'s Mem. Supp. Its Opp'n Pl.'s Mot. Summ. J. ("Customs' Mem.") at 11. On May 26, 2000, Customs initially denied Spencer Fruit's application stating it had not receive evidence of product commercial interchangeability or sample export documentation. *See* Roberts Decl., Ex. 3 at 17; Def.'s Resp. Pl.'s R.56(I) Statement Material Facts Not Dispute ("Customs' Facts") ¶ 5. Customs later approved Spencer Fruit's modified application for substitution drawback on May 15, 2001. *See* Roberts Decl., Ex. 4 at 19.

On January 10, September 14 and May 30, 2000, Calexico, on behalf of Spencer Fruit, submitted the three direct identification unused merchandise drawback claims at issue to Customs.[1] *See* Roberts Decl., Ex. 6 at 25–27. The drawback claims involved merchandise exported between January 4, 1999, and March 23, 2000. *See* Roberts Decl., Ex. 6. Spencer Fruit's original drawback application, filed by Calexico, requested $222,676.79, which Calexico reduced to $166,713.89 in its complaint. *See* Calexico's Facts ¶ 9. Customs denied all three drawback claims on July 31, 2002. *See* Roberts Decl., Ex. 9 at 247–49; Customs' Facts ¶ 23. Customs stated that the reason for denial of drawback was because the "[c]laimant does not have privilege approval for direct identification unused drawback merchandise exported under 19 U.S.C. 1313(j)(1) – (entry type 42)." Roberts Decl., Ex. 9 at 247. Customs' internal

---

[1] Drawback claim entry # 218–2027705–7 was filed on January 10, 2000; claim entry # 218–2038702–1 was filed on May 30, 2000; and claim entry # 218–2041845–3 was filed on September 14, 2000. *See* Roberts Decl., Ex. 6.

computer records dated July 31, 2002, also indicates that entry # 218–2038702–1 was denied because the “claimant does not have privilege approval for direct identification unused drawback merchandise.” Decl. Steven W. Block Supp. Pl.’s Mot. Summ. J. (“Block Decl.”), Ex. 1 at 3. In an informal correspondence by fax thereafter dated August 21, 2002, Customs further stated that drawback entries 218–2027705–7 and 218– 2041845–3 were denied, among other reasons, because “[n]o Waiver of Prior Notice provided for exports after 4/6/99, when old privileges for entry type 42/j(1) expired.” Roberts Decl., Ex. 10 at 252. Customs liquidated the entries without the benefit of drawback on August 16, 2002. *See* Calexico’s Facts ¶ 31; Customs’ Facts ¶ 31. Calexico filed a protest ninety-one days later, which Customs denied as untimely. *See id*. ¶ 32; Customs’ Facts ¶ 32. This action followed.

II. Statutory Background

Under section 1313(j) of Title 19 of the Unites States Code, Customs will fully repay, less one percent, the amount of duties paid upon goods previously imported into the United States and either 1) was not used within the United States or 2) was “commercially interchangeable” with the imported merchandise, before being subsequently exported or destroyed. *See* 19 U.S.C. § 1313(j) (2000). Known as unused merchandise drawback, or simply drawback, it can be obtained as “direct identification” drawback when sought under 19 U.S.C. § 1313(j)(1) because the same imported merchandise is exported or destroyed or as “substitution” drawback under 19 U.S.C. § 1313(j)(2) because the exported merchandise is commercially interchangeable with the imported merchandise. *See* 19 U.S.C. § 1313(j). The exportation date of the underlying merchandise governs the drawback claim because it is the operative date upon which the claim accrues. *See, e.g.*, 19 U.S.C. § 1313(r)(1) (three year window following the date of exportation to file a drawback claim); 19 C.F.R. § 191.31(b) (drawback allowed if exportation occurs within three years after importation).

On April 6, 1998, new regulations formalizing waiver of prior notice to export and accelerated payment of drawback claims (collectively, “drawback privileges” or “privileges”) came into effect. *See* 19 C.F.R. §§ 191.91–191.93 (1998). Under the new 1998 regulations, companies seeking to continue their waiver privileges had one year to apply for continued privileges. *See* 19 C.F.R. §§ 191.91(a)(2) & 191.92(a)(2). Companies that filed within the one year deadline “may continue to operate under its existing waiver of prior notice until Customs approves or denies the application. . .”. 19 C.F.R. §§ 191.91(a)(2) & 191.92(a)(2). If the waiver application is denied, Customs will give the company “written notice, specifying the grounds” of denial “together with what corrective action may be taken. . .”. 19 C.F.R. §§ 191.91(c)(3) & 191.92(e)(4).

If Customs refuses to pay a claim for drawback, a company may protest the decision within ninety days before the liquidated entry without the benefit of drawback becomes final and conclusive upon all parties. *See* 19 U.S.C. § 1514(a)(6). "Notwithstanding a valid protest was not filed," however, Customs may correct a

> (1) clerical error, mistake of fact, or other inadvertence, whether or not resulting from or contained in electronic transmission, not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction . . .

19 U.S.C. § 1520(c)(1).[2] Customs' regulations "essentially [do] no more than paraphrase 19 U.S.C. § 1520(c)(1)," *Chrysler Corp. v. United States*, 24 CIT 75, 80 n.4, 87 F. Supp. 2d 1339, 1345 n.4 (2000), and reiterates that correction pursuant to 19 U.S.C. § 1520(c) may be made in "any entry, liquidation, or other Customs transaction. . .". 19 C.F.R. § 173.4(b) (1998).

III. Contentions of the Parties

A. Calexico's Contentions

Calexico argues that summary judgment is proper because the testimony and record evidence demonstrates that Customs' denial of Spencer Fruit's drawback claims was due to a mistake of fact regarding Spencer Fruit's privileges. *See* Mem. Supp. Pl.'s Mot. Summ. J. ("Calexico's Mem.") at 19. Calexico asserts that Customs denied Spencer Fruit's drawback claims solely because Customs understood that the "claimant does not have privilege approval for direct identification." *See* Calexico's Mem. at 20. Calexico argues, however, that Spencer Fruit had an effective waiver of prior notice for direct identification at the time the underlying merchandise of the drawback claims were exported. *See id.* at 20–21. Furthermore, Spencer Fruit continued to have direct identification privileges until May 26, 2000, when the renewal application was denied. *See id.* Calexico reasons that Customs' denial "could not have been made based upon complete knowledge of the facts because the Customs computer record was incorrect" and the Customs official handling the claims did not have a prior relationship with Spencer Fruit and was not familiar with Spencer Fruit's privilege application file. *See id.* at 21. Accordingly, Calexico reasons that Customs' decision was based on a mis-

---

[2] 19 U.S.C. § 1520(c) was repealed in 2004, *see* 108 P.L. 429 § 2105, 118 Stat. 2434, 2598 (Dec. 3, 2004), but is in effect for all times relevant to this case.

taken belief of Spencer Fruit's privileges and thus relief under 19 U.S.C. § 1520(c) is appropriate. *See id.*

Calexico also argues that Customs' contention that other issues existed with Spencer Fruit's denied claims is without merit. *See* Calexico's Mem. at 21. Calexico asserts that during the relevant period, Customs' only reason for denying Spencer Fruit's claims was the purported lack of privileges for direct identification drawback. *See id.* Moreover, the other reasons Customs cites in support of its denial are not applicable to the majority of Spencer Fruit's claims. *See id.* at 22. At most, Calexico argues that the other reasons are also mistakes of fact or clerical errors committed by Customs and thus, also correctable under 19 U.S.C. § 1520(c). *See* Customs' Mem. at 22. Finally, Calexico asserts that the language in 19 U.S.C. § 1520(c) speaks broadly, encompassing both drawback claims and non-importers. *See* Reply Mem. Further Supp. Pl.'s Mot. Summ. J. ("Calexico's Reply") at 10–12.

B. Customs' Contentions

Customs responds that its denial of Calexico's "section 1520(c) claim was proper." Customs' Mem. at 3. Customs argues that Calexico does not satisfy the statutory requirements to seek relief under 19 U.S.C. § 1520(c). *See id.* at 7. Specifically, Customs asserts that Calexico has not demonstrated how the denied drawback claims are adverse to the importer, Spencer Fruit. *See id.* Furthermore, Customs argues that the "adverse to the importer" language in 19 U.S.C. § 1520(c) is unambiguous because in drawback claims, "any error would be adverse to the drawback claimant or exporter, not an 'importer.' " *Id.* Customs contends, however, that if the Court determines the phrase is ambiguous, then its interpretation of "adverse to the importer" should be entitled to deference. *See id.* at 7. Customs also asserts that the legislative history indicates that 19 U.S.C. § 1520(c) was only intended to benefit importers and not apply to drawback entries. *See id.* at 8.

Customs argues, alternatively, that even if 19 U.S.C. § 1520(c) applies to drawback claims, Calexico has not demonstrated here that the drawback claims were denied because of a mistake of fact. *See* Customs' Mem. at 9. Customs also states that Calexico failed to make any mistake of fact known to Customs within the one year time frame allotted by the statute. *See id.* Customs asserts that Calexico claims that the December, 1995, and April, 1996, letters from Customs' Houston office represent a waiver of prior notice. *See id.* at 10. Therefore, Customs' Los Angeles office handling the drawback claims would have honored the waiver of prior notice had it been aware of the Houston office's actions. *See id.* Customs argues that Calexico's evidence fails to establish that Customs' Los Angeles office "was not aware of the Houston Port's extension of privileges at the time it denied the drawback claims here." *See id.* Customs claims that Calexico never directly confronted it with the Houston privileges letters before the pending motion. *See id.* at 10–11. Rather, Customs argues that its Los Angeles office was aware of and honoring Spencer Fruit's Houston privileges to exportations occurring before April 6, 1999. *See id.* at 11. Customs agrees that it initially denied Spencer Fruit's application for substitution and direct identification drawback privileges in May, 2000. *See id.* Customs also agrees that after resubmissions by Spencer Fruit, it approved the application for substitution drawback privileges only. *See id.* at 12. Customs states that when it denied Spencer Fruit's reapplication in May 2000, it "considered that the waiver of prior notice of intent to export privilege expired as of April 6, 1999." *Id.* Thus, Customs argues that whether or not the privileges expired on April 6 is legally correct, there was no factual mistake made by Customs in denying Spencer Fruit's drawback claims.[3] *Id.* Customs asserts that its Los Angeles office did not err regarding its knowledge of Spencer Fruit's drawback claim, or that if it did err, the error was one of law, not fact. *See id.* Furthermore, Customs argues that Calexico has failed to demonstrate that "Spencer would have been allowed drawback but for the failure to accord the Houston privileges" to the drawback claims filed in Los Angeles. *Id.* at 13.

Finally, Customs argues that even if Calexico can demonstrate a mistake of fact correctable under 19 U.S.C. § 1520(c), it is still not entitled to drawback. *See* Customs' Mem. at 14. Customs contends that it denied Spencer Fruit's drawback claims because multiple errors existed with the claims and not only due to the lack of waiver of prior notice as Calexico suggests. *See id.* at 18–20. Among the errors, Customs argues that Calexico failed to produce the proper documentation to prove exportation, which is reason enough for denying a drawback claim irregardless of whether or not Spencer Fruit had a valid waiver of prior notice. *See id.* at 17–19. Customs stresses that drawback privileges do not grant a "carte blanche guaranteeing that a drawback claim will be allowed. In particular, a claimant must still prove exportation. In this regard, [Calexico's] proof continues to be deficient." *Id.* at 20. Finally, Customs asserts that 19 U.S.C. § 1313(r)(2) does not apply here because the claims were insufficient to satisfy the requirements for substitution. *See id.* at 17.

---

[3] Customs acknowledges that of the three drawback claims at issue, entry claim # 218–2038702–1 did not involve any exportations after April 6, 1999 and entry claim # 218–2027705–7 involved one post-April 6, 1999 exportation. *See* Customs' Mem. at 12. Thus, Customs' rationale that the direct identification privileges does not apply to exports made after April 6, 1999, only applies to drawback entry claim # 218–2041845–3 and a small fraction of the # 218–2027705–7 entry. *See id.*

IV. Customs Improperly Denied Spencer Fruit's Direct Identification Unused Merchandise Drawback Claims

The Court finds that Spencer Fruit's direct identification unused merchandise drawback claims filed by Calexico were improperly denied by Customs.

A. Drawback Claims Are Entries Within the Scope of 19 U.S.C. § 1520(c)

Customs raises the initial argument that 19 U.S.C. § 1520(c) does not apply to drawback. *See* Customs' Mem. at 4. The Court finds that Customs has misinterpreted the statute and that 19 U.S.C. § 1520(c) does apply to drawback claims.

19 U.S.C. § 1520(c) clearly states that Customs may reliquidate "*any* entry, liquidation, or other customs transaction" to correct "a clerical error, mistake of fact, or other inadvertence." 19 U.S.C. § 1520(c)(1) (emphasis added); *see also Computime, Inc. v. United States*, 9 CIT 553, 555, 622 F. Supp. 1083, 1084 (1985) (The statute "is designed to permit Customs to correct mistakes of fact or inadvertence which have caused an error in liquidation."). When the "language of a statute is clear, its plain meaning governs interpretation of the statute." *United States v. Hanover Ins. Co.*, 18 CIT 991, 993, 869 F. Supp. 950, 952 (1994). The plain language of 19 U.S.C. § 1520(c) does not exclude drawback claims from the entries, liquidations or other customs transactions able to be corrected. Rather, the plain language is very expansive in its scope with the use of the word "any" as a modifier. Furthermore, the purpose of 19 U.S.C. § 1520(c) is to be a means "for refunding money erroneously collected suggest[ing] that it should be interpreted *liberally*." *G & R Produce Co., v. United States*, 381 F.3d 1328, 1332 (Fed. Cir. 2004) (emphasis added). Therefore, drawback claims are included within the scope of 19 U.S.C. § 1520(c)(1) because it is "any entry, liquidation, or other customs transaction." 19 U.S.C. § 1520(c)(1); *see also C. Itoh & Co. (America), Inc. v. United States*, 5 CIT 45 (1983) (holding importer untimely sought reliquidation under 19 U.S.C. § 1520(c) in a drawback action).

Furthermore, 19 U.S.C. § 1520(c)(1) does not specify by whom reliquidation may be sought. The statute merely states that the clerical error, mistake of fact or other inadvertence, among other things, must be "adverse to the importer." 19 U.S.C. § 1520(c)(1). Customs argues that Calexico cannot seek remedy under 19 U.S.C. § 1520(c) because Calexico is a customs broker and not the importer, Spencer Fruit. *See* Customs' Mem. at 7. Customs also argues that Calexico has not demonstrated how the denied drawback claims are adverse to Spencer Fruit. *See id*. Again, the plain language of the statute does not state that only importers can seek remedy under 19 U.S.C. § 1520(c)(1), but that the error must be adverse to the importer. *See* 19 U.S.C. § 1520(c)(1). Licensed customs brokers are agents of their importer-exporter customer. *See United States v. Fed. Ins. Co.*, 805 F.2d 1012, 1013 (Fed. Cir. 1986). As such, customs brokers are permitted to file an action involving the refusal to pay a claim for drawback on behalf of their customer and be properly heard before the Court. *See* 28 U.S.C. §§ 1581 & 2631(a). Therefore, Calexico need not be the actual importer when it is acting as an agent of the importer in the present action. Moreover, here, Spencer Fruit is the importer for all and the exporter for much of the underlying merchandise. *See* Calexico's Facts ¶¶ 1 & 12; Customs' Facts ¶ 1; Roberts Decl., Ex. 6. Therefore, even under the narrowest interpretations of 19 U.S.C. § 1520(c)(1), Spencer Fruit as the importer and drawback claimant here is adversely affected by Customs' denial of its three drawback claims.

While Calexico, as Spencer Fruit's customs broker, can seek recourse under 19 U.S.C. § 1520(c) here, Calexico urges the Court to hold an expansive definition of "importer" as used in 19 U.S.C. § 1520(c). *See* Calexico's Reply at 10. The Court notes that in construing an act of Congress, it is "fundamental that a section of a statute should not be read in isolation from the context of the whole Act." *NTN Bearing Corp. of Am. v. United States*, 26 CIT 53, 102–03, 186 F. Supp. 2d 1257, 1303 (2002) (citations omitted). Rather, "each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole. . . ." *Id.* (citing *In re Nantucket, Inc.*, 677 F.2d 95, 98 (C.C.P.A. 1982)). The Tariff Act of 1930, read as a whole, supports the ability of drawback claimants, whether they are also the importer, exporter, destroyer or any intermediate party, *see* 19 U.S.C. § 1313(j), to seek reliquidation under 19 U.S.C. § 1520(c). Under 19 U.S.C. § 1313(j), the exporter has the right to claim drawback but can assign that right to other parties. *See* 19 U.S.C. § 1313(j). With that assignment comes all the rights that were available to the exporter. *See, e.g.*, *Sicom Sys. Ltd. v. Agilent Techs., Inc.*, 427 F.3d 971, 976 (Fed. Cir. 2005) (interpreting statutorily permissible assignment in a patent case). Drawback claimants protesting Customs' refusal to pay drawback can file a protest under 19 U.S.C. § 1514. *See* 19 U.S.C. § 1514(a). 19 U.S.C. § 1520(c), then, clearly states that "[n]otwithstanding a valid protest was not filed," indicating that it is a separate but related recourse to a negative Customs decision. *See generally*, *Chrysler Corp.*, 24 CIT at 84–86 87 F. Supp. 2d at 1348–49. Accordingly, a valid protest recognized under 19 U.S.C. § 1514 includes denied drawback claims, also indicating that notwithstanding whether a valid protest was filed, an error in the denied claim could be correctable under 19 U.S.C. § 1520(c).

B. Customs Denied Spencer Fruit's Drawback Claims Relying On a Mistake of Fact

Again, 19 U.S.C. § 1520(c) allows for reliquidation of an entry to correct either "a clerical error, mistake of fact, or other inadvertence." 19 U.S.C. § 1520(c)(1). "[T]he purpose of section 1520(c)(1) as a means for refunding money erroneously collected suggests that it should be interpreted liberally." *G & R Produce Co.*, 381 F.3d at 1332–33. To obtain reliquidation under 19 U.S.C. § 1520(c)(1), Calexico is required to prove that the error is a clerical error, a mistake of fact or an other inadvertence. *See* 19 U.S.C. § 1520(c)(1). A mistake of fact occurs when either "(1) the facts exist, but are unknown, or (2) the facts do not exist as they are believed to." *G & R Produce Co.*, 381 F.3d at 1331 (citing *Hambro Auto. Corp. v. United States*, 66 C.C.P.A. 113, 119, 603 F.2d 850, 855 (C.C.P.A. 1979)). Also, Calexico must show that the error does not "amount to a misconstruction of the law." *Id.* at 1332. An error in the construction of the law occurs when "the facts are known, but the legal significance of those facts" are not appreciated. *Id.* Finally, a correctable error can be committed by either the drawback claimant or Customs. *See id.*

Here, the Court finds that Customs improperly denied Spencer Fruit's direct identification unused merchandise drawback claims under the mistaken belief that Spencer Fruit did not have direct identification privileges. Customs approved Spencer Fruit for both direct identification and substitution privileges in late 1995. *See* Roberts Decl., Ex. 1. Spencer Fruit continued to have both privileges until they ceased on May 26, 2000, when Customs denied Spencer Fruit's renewal application. *See* 19 C.F.R. § 191.91(a)(2) (A claimant "may continue to operate under its existing [privileges] until Customs approves or denies the application" for continued privileges.); Roberts Decl., Ex. 3. Therefore, when the underlying merchandise of the subject drawback claims was exported, between January 4, 1999, and March 23, 2000, Spencer Fruit had privileges for direct identification drawback in place. *See* Roberts Decl., Ex. 6.

Customs has stated multiple times that it denied the drawback claims because "[c]laimant does not have privilege approval for direct identification unused drawback merchandise exported under 19 U.S.C. 1313(j)(1) – (entry type 42)." Roberts Declaration, Ex. 9 at 247; *see also* Block Decl., Ex. 1; Roberts Decl., Ex. 10. Moreover, Customs employee, Ms. Marilyn Sokolow, who handled Spencer Fruit's drawback claims, stated that she believed that Spencer Fruit only had privileges for substitution and not direct identification drawback. *See* Sokolow Dep., Block Decl., Ex. 3 at 19–20. The fact that Customs was operating under the belief that Spencer Fruit did not have direct identification privileges when the underlying merchandise was exported simply did not exist as Customs believed. Since this mistaken belief is the singular reason given for denying Spencer Fruit's drawback claims, Customs was operating under a mistake of fact. *See G & R Produce Co.*, 381 F.3d at 1331. Customs argues that the Los Angeles port, where the drawback claims were filed, "was not aware of the Houston Port's extension of privileges at the time it denied the drawback claims here." Customs' Mem. at 10. The Houston Port granted the original privileges in 1995. *See* Roberts Decl., Ex. 1. Then under the facts as Customs has argued, it was operating without knowing all the facts when it denied the drawback claims, which is also a mistake of fact. *See G & R Produce Co.*, 381 F.3d at 1331. Customs also asserts that the absence of direct identification privileges is not the only reason for denying the drawback claims. *See* Customs' Mem. at 18. Customs' decision, communicated in a formal notice of denial letter dated July 31, 2002, however, states as the singular reason of denial that the claimant does not have privileges. *See* Roberts Decl., Ex. 9 at 247. The issue before the Court is not to determine whether other lapses with Spencer Fruit's drawback claims existed that may also have merited denial. Rather, the Court is to determine whether Customs, based on the evidence before it at the time, made its decision relying on mistaken facts. Customs had listed multiple reasons for denying drawback claims in other previous communications to Calexico, whether minor or not. *See, e.g.*, Roberts Decl., Ex. 7 at 220. Therefore, the Court is unpersuaded by attempts to now claim that other reasons were included when denying the drawback claims at issue when only one reason was stated. Based on the record evidence, Customs denied Spencer Fruit's drawback claims either without complete knowledge of Spencer Fruit's privileges or understood Spencer Fruit's privileges to be other than what they were, both qualifying as mistakes of fact correctable under 19 U.S.C. § 1520(c)(1). Furthermore, Customs' error is not a mistake of law. A mistake of law "occurs when the facts are known, but the legal significance of those facts is not appreciated." *G & R Produce Co.*, 381 F.3d at 1332. As aforementioned, Customs denied Spencer Fruit's drawback claims believing Spencer Fruit's privileges to be other than what they were or without complete knowledge of the facts. Therefore, Customs' mistake is one of fact, not of law.

CONCLUSION

The Court finds that clerical errors, mistakes of fact or other inadvertencies in drawback claims are correctable under 19 U.S.C. § 1520(c)(1). The Court also finds that Customs denied Spencer Fruit's direct identification unused merchandise drawback claims under a mistaken belief of Spencer Fruit's privileges. Accordingly, the Court concludes that Spencer Fruit's drawback claims should have been granted. The Court is unpersuaded by all other arguments. Calexico's motion for summary judgment is granted. Judgement will be entered accordingly.

SLIP OP. 06–112

CORUS STAAL BV, Plaintiff, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, Defendant-Intervenor

Before: Jane A. Restani, Chief Judge
Court No. 05–00354

OPINION

[Plaintiff's motion for judgment upon the agency record denied.]

Dated: July 25, 2006

Steptoe & Johnson LLP (*Richard O. Cunningham*, *Joel D. Kaufman*, *Alice A. Kipel*, and *Jamie B. Beaber*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Claudia Burke*, Attorney; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Jeanne E. Davidson*), for the defendant.

Skadden, Arps, Slate, Meagher & Flom LLP (*Robert E. Lighthizer*, *John J. Mangan*, and *Ellen J. Schneider*) for defendant-intervenor United States Steel Corporation.

Restani, Chief Judge: This matter is before the court on plaintiff Corus Staal BV's ("Corus") motion for judgment on the agency record pursuant to United States Court of International Trade Rule 56.2. At issue are certain portions of the final results of the second administrative review of an antidumping duty order by the International Trade Administration of the United States Department of Commerce ("Commerce" or "Department") of hot-rolled steel from the Netherlands. *See Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands*, 70 Fed. Reg. 18,366 (Dep't Commerce Apr. 11, 2005) (second admin. rev.) [hereinafter *Final Results*] (covering the period from November 1, 2002 through October 31, 2003).

Corus claims that (1) the agency's use of the "zeroing" methodology is contrary to law, (2) the agency's classification of Corus' "just-in-time" ("JIT") sales to an unaffiliated U.S. customer as constructed export price ("CEP") transactions (rather than export price ("EP") transactions) is contrary to law and unsupported by substantial evidence and (3) the agency's determination that Corus absorbed duties related to sales of the subject merchandise is contrary to law and unsupported by substantial evidence. Corus claims that zeroing, whereby transactions in which the U.S. price exceeds normal value ("NV") – i.e., nondumped sales – are set to zero in calculating Corus' weighted average dumping margin (and concomitant assessment rate and deposit rate), does not properly allow non-dumped sales to offset dumped sales, resulting in a higher margin, assessment rate and deposit rate than the mathematical average of margins for the subject merchandise as a whole.

As to the first issue, notwithstanding the decisions by this court and the Court of Appeals for the Federal Circuit holding that zeroing is permitted, *Timken Co. v. United States*, 354 F.3d 1334, 1342 (Fed. Cir. 2004); *Corus Staal BV v. U.S. Dep't of Commerce* ("*Corus I*"), 259 F. Supp. 2d 1253, 1261 (CIT 2003), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005); *Corus Staal BV v. United States* ("*Corus II*"), 387 F. Supp. 2d 1291, 1297 (CIT 2005), *aff'd*, Slip Op. 05–1600, 2006 U.S. App. LEXIS 15022 (Fed. Cir. June 13, 2006), Corus claims that structural changes to the U.S. antidumping statute, as well as recent decisions by World Trade Organization ("WTO") and North American Free Trade Agreement ("NAFTA") panels, suggest that Commerce's continued use of zeroing is no longer reasonable.

As to the second issue, Corus claims that the agency's classification of Corus' JIT sales to an unaffiliated U.S. customer as CEP transactions (instead of EP transactions) is erroneous because Commerce incorrectly identified the first sale or agreement to sell as Corus' post-importation issuance of the final invoice for the JIT transactions. Under 19 U.S.C. § 1677a(a) and (b) (2000), post-importation sales and agreements to sell are classified as CEP transactions. Corus argues that the first agreement to sell should instead be defined loosely as an agreement between two parties to enter into a binding contract, which Corus claims occurred prior to the date of importation, when Corus entered into a frame agreement with JIT customers in the Netherlands, or alternatively when Corus later issued a pro forma invoice at the time the JIT merchandise was shipped to the United States. Corus therefore contends that the JIT sales fulfill the statutory definition of an EP transaction under § 1677a(a) .

As to the final issue, Corus claims that the agency's determination of duty absorption is contrary to law and unsupported by substantial evidence, asserting that the duty absorption statute, 19 U.S.C. § 1675(a)(4), does not apply when Corus itself, and not a U.S. affiliate, is the importer of record. Additionally, Corus argues that Commerce has in practice turned duty absorption into an unlawful de facto irrebuttable presumption and lacks sufficient evidence to prove duty absorption actually occurred in this case.

In response to plaintiff's motion, both Commerce and United States Steel Corporation ("U.S. Steel"), the defendant-intervenor and petitioner in the original investigation, argue that Corus' motion, with respect to zeroing, should be denied because the final results are in accordance with the law. Commerce, citing decisions by this court and the Federal Circuit, both of which have repeatedly sustained Commerce's methodology, asserts: (1) use of zeroing is "reasonable" because it has been definitively upheld by binding precedent; and (2) the WTO and NAFTA decisions cited by Corus are legally irrelevant, for numerous reasons. U.S. Steel agrees with Commerce that the Department's use of zeroing is proper, and that Corus' reliance on WTO and NAFTA decisions is misplaced, but also asserts that zeroing is not merely in accordance with the law but is actually required by law.

As to the second issue, Commerce argues that the classification of the JIT sales as CEP transactions is supported by substantial evidence and in accordance with the law. In the *Issues and Decision Memorandum*, Commerce concluded that a sale occurs when there is "both a 'transfer of ownership to an unrelated party and consideration,' " which Commerce contends did not occur until Corus' issuance of the final invoice after importation. *Issues and Decision Mem. for the 2002–2003 Administrative Review of Certain Hot-Rolled Carbon Steel Flat Products from the Netherlands; Final Results of Antidumping Duty Administrative Review*, 70 Fed. Reg. 18366 (Dep't Commerce Apr. 4, 2005) (final determ.), at 9 [hereinafter "*Issues and Decision Mem*."] (citing *AK Steel Corp. v. United States*, 226 F.3d 1361, 1371 (Fed. Cir. 2000)). Although Commerce originally did not distinguish a sale from an agreement to sell or respond specifically to Corus' contention that an agreement to sell existed prior to importation, Commerce now contends that an agreement to sell occurs when the importer and purchaser have settled upon the price and quantity terms for the sale. U.S. Steel agrees with Commerce that no sale or agreement to sell occurred prior to importation here because price and quantity were not fixed until the final invoice. Therefore, they argue that under 19 U.S.C. § 1677a(a) and (b), the JIT sales should be classified as CEP transactions.

As to the final issue, Commerce argues that Corus failed to exhaust its administrative remedies by failing to challenge Commerce's preliminary duty absorption determination and therefore ought to be precluded from making the challenge now. Additionally, Commerce contends that even if Corus had exhausted its administrative remedies and may make a valid challenge, the challenge should be rejected because the duty absorption statute applies even when Corus itself, and not a U.S. affiliate, is the importer of record. U.S. Steel agrees with Commerce that there is no closer "affiliate" relationship to an exporter than the exporter itself, and therefore Corus, according to 19 U.S.C. § 1675(a)(4), is subject to the duty absorption determination.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction pursuant to 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2000). In reviewing one of Commerce's administrative determinations made under 19 U.S.C. § 1673d, the court will uphold the challenged determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

DISCUSSION

I. Commerce's Use of Zeroing is Reasonable and in Accordance With Law

Numerous cases before this court and the Federal Circuit have held that "zeroing" is neither required nor prohibited by 19 U.S.C. § 1677(35)(A), (B), in either an investigation, *see, e.g., Corus I*, 259 F. Supp. 2d at 1261, or an administrative review, *see, e.g., Timken*, 354 F.3d at 1341–42; *Corus II*, 387 F. Supp. 2d at 1297. Applying *Chevron*, both this Court and the Federal Circuit defer to Commerce's interpretation as a reasonable interpretation of statutory language. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *Timken*, 354 F.3d at 1342–43. _____

_______ Despite these prior holdings, Corus claims that previous structural changes to the U.S. antidumping statute, as well as recent WTO decisions, suggest that Commerce's continued use of zeroing is no longer reasonable. As this court has previously noted, however, the Federal Circuit has "(1) expressly affirmed the reasonableness of Commerce's use of zeroing in an antidumping administrative review, and . . . (2) conclude[d] that WTO decisions are not binding on the U.S. and cannot trump domestic legislation." *Corus II*, 387 F. Supp. 2d at 1298.

The court has carefully considered all of Corus' arguments and finds no reason to depart from its own prior decisions or those of the Federal Circuit. Further, the court has considered U.S. Steel's argument that zeroing is mandatory under the statute. The court does not reach that argument as this court's prior holdings that Commerce's practice is permissible are sufficient to sustain the determination in this regard.

II. Commerce's Decision to Classify Corus' JIT Transactions as CEP Transactions rather than EP Transactions is Reasonable

In calculating dumping margins, Commerce compares the U.S. Price to the NV of the subject merchandise and imposes antidumping duties if, and to the extent, the former is lower than the latter. *See* 19 U.S.C. § 1673. The U.S. Price is calculated using either the EP or CEP methodology. Adjustments are made in both cases, but if the sale is classified as a CEP sale, additional deductions are made from the sales price to arrive at the U.S. Price.[1] The statute defines EP and CEP as follows:

---

[1] Due to these deductions, the use of CEP is more likely to result in a determination of dumping. Specifically, the deductions include any expenses from the sale of the subject merchandise (e.g., credit expenses), the cost of further manufacture, and the profit allocated to those costs and expenses. *See* 19 U.S.C. § 1677a(d). As the Federal Circuit stated in *AK Steel*, the U.S. Price "is meant to be the sales price of an arm's-length transaction between

> (a) Export Price
> The term "export price" means the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States. . . .
>
> (b) Constructed Export Price
> The term "constructed export price" means the price at which the subject merchandise is first sold (or agreed to be sold) in the United States before or after the date of importation by or for the account of the producer or exporter of such merchandise or by a seller affiliated with the producer or exporter. . . .

19 U.S.C. § 1677a(a)–(b).

The U.S. Price classification issue in this case involves Corus' direct sale of subject merchandise to an unaffiliated U.S. customer. Corus' sales process for its JIT transactions makes use of frame agreements, pro forma invoices, and sales invoices. According to Corus, the frame agreements set forth a general framework outlining the estimated volume and pricing of the customer's likely purchases. Corus' Resp. to Section A of the Department's Antidumping Duty Questionnaire (Feb. 18, 2004) ("Section A Resp.") at A–66. The frame agreements were not signed by the JIT customer, Verification Report of Corus Steel USA (July 13, 2004) ("Verification Report") at 5, and were not binding on either party. Corus' Resp. to the Department's Second Section A Supplemental Questionnaire (May 13, 2004) ("May 13, 2004 Resp.") at 5, P.R. 29. When merchandise was shipped to the United States, Corus issued a pro forma invoice detailing the imported items for U.S. customs purposes. *See* Corus' Resp. to the Department's Second Section C Supplemental Questionnaire (June 24, 2004) ("June 24, 2004 Resp.") at Ex. C–39 (showing that the pro forma invoices bore the legend "INVOICE FOR CUSTOMS PURPOSES").[2]

The merchandise in question was shipped to and stored at a warehouse in the United States to await an order from the U.S. customer. To purchase the merchandise, Corus' U.S. customer issued purchase

---

the foreign producer and an unaffiliated U.S. purchaser." *AK Steel*, 226 F.3d at 1367. The deductions therefore are meant "to prevent foreign producers from competing unfairly in the United States market by inflating the U.S. Price with amounts spent by the U.S. affiliate [or in this case, Corus itself] on marketing and selling the products in the United States." *Id.*

[2] In certain circumstances, the merchandise was shipped, and the pro forma invoice issued, over a year before the date of the applicable frame agreement. A comparison of the June 24, 2004 Resp. at Ex. C–39, with Corus' Resp. to the Department's Section A Supplemental Questionnaire (Apr. 1, 2004) ("Apr. 1, 2004 Resp.") at Ex. A–27 shows that the frame agreement was dated January 10, 2003, and the pro forma invoice was issued and the merchandise shipped to the U.S. in September 2001, nearly eighteen months earlier.

orders. For each purchase order received, Corus performed a price calculation based on both the quantity ordered and the prevalent market situation. Section A Resp. at A–67. Once the price was finalized and agreed upon, Corus issued the sales invoice setting forth the fixed terms of the sale, namely the product sold, quantity, and price, and directed that the merchandise be shipped from the warehouse to the customer. Section A Resp. at A–67. Upon receipt of the merchandise, the customer remitted payment to CSUSA, Corus' U.S. affiliate. Verification Report at 5–6.

The parties do not dispute that where a sale or agreement to sell between a foreign exporter and an unaffiliated U.S. customer occurs after importation in the United States, that CEP methodology is to be used.[3] What is disputed is the point at which a sale or agreement to sell first occurred in order to determine if EP methodology should have been used instead. Corus claims that the agency's classification of Corus' JIT sales to the unaffiliated U.S. customer as CEP transactions is erroneous because Commerce incorrectly identified the first sale or agreement to sell as Corus' post-importation issuance of the final invoice for the JIT transactions. Defining an agreement to sell as a loose agreement between two parties to enter into a binding contract, Corus argues that an agreement to sell occurred when it entered into a frame agreement in the Netherlands with JIT customers, or, alternatively, when Corus later issued a pro forma invoice at the time the JIT merchandise was shipped to the United States. Corus claims that Commerce, in both the investigation and first administrative review of this case, determined that Corus' frame agreements memorialized an agreement to sell and ultimately governed on the question of EP versus CEP. Thus, Corus argues, the frame agreement between Corus and its U.S. JIT customer, which was executed in the Netherlands before importation, is determinative of when an agreement to sell occurred.

Commerce defines a sale or agreement to sell as the point at which the material terms of the agreement, i.e., price and quantity, have been established between the foreign producer/exporter and the customer.[4] In this case, neither the frame agreements nor the pro forma

---

[3] Generally, Commerce applies CEP methodology "when the foreign producer's or exporter's steel is sold to an unaffiliated U.S. buyer by a producer-affiliated company located in the United States." *AK Steel*, 226 F.3d at 1364. Commerce applies EP methodology to a sale "when the foreign producer or exporter sells merchandise directly to an unrelated purchaser located in the United States." *Id.* However, "the statute appears to allow for a sale made by a foreign exporter or producer [directly to an unrelated U.S. purchaser] to be classified as a CEP sale, if such a sale is made 'in the United States.' " *Id.* at 1367 n.5 (quoting 19 U.S.C. § 1677a(a)).

[4] Commerce found that

> [t]here was no sale between Corus and the JIT customer before importation, because there was no agreement on the material terms (i.e. price and quantity) until the final invoice was issued after importation of the subject merchandise. Here, the sale does not

invoices settled these terms. Instead, the frame agreements and pro forma invoices provided estimated prices and quantities or left these terms to be determined at final invoicing. Commerce thus argues that, the final invoices, not the frame agreements, in this case are controlling for the purposes of EP/CEP classification.[5] Commerce distinguishes the frame agreements here from the frame agreements of the original investigation, arguing that, unlike in the case at hand, the frame agreements in the original investigation were determinative because they provided the final written confirmation of the sales agreement and set forth the agreed-upon prices and quantities.[6] *See Notice of Prelim. Determination of Sales at Less Than Fair Value; Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands*, 66 Fed. Reg. 22,146, 22,149 (May 3, 2001) ("Specifically, although Corus Staal initially reaches the agreement with the U.S. customer on the estimated overall volume and pricing of merchandise, CSUSA provides the final written confirmation of the agreement, *setting forth the agreed prices and quantities*, to the U.S. customer.") (emphasis added).

Under *Chevron*, the issue before the court is whether the meaning of the statute is clear from the face of the statute. *Chevron*, 467 U.S. at 842–43. If so, the agency is required to give effect to the express statutory language. Where the statute is silent or ambiguous, the question for the court is whether the agency's answer is a permissible construction of the statute. *Id.*

Here, Commerce's definition of "sold (or agreed to be sold)" comports with a plain reading of the statute, which specifically states that both EP and CEP classifications hinge upon "the *price* at which

---

> take place until the final invoice is issued, when the goods are in the United States."

Issues and Decision Mem. at 10.

[5] As Commerce explained in its *Preliminary Results*,

> Corus Staal argues that the frame agreement is controlling in this case based upon the Department's position in the investigation. However, in this review, Corus Staal has maintained the invoice date "better reflects the time that the material terms of sale become fixed". . . . In Corus Staal's own words, the invoice date is the date used to determine the date of sale as changes often do occur between the frame agreement and the date of invoice. If this is the case, it is hard to argue that the frame agreement is the governing document in determining when a sale is agreed upon or when it is executed.

Certain Hot-Rolled Carbon Steel Flat Products From the Netherlands; Prelim. Results of Antidumping Duty Administrative Review, 69 Fed. Reg. 70,226, 70,229 (Dec. 3, 2004) (internal citations omitted) [hereinafter *Prelim. Results*].

[6] Commerce is free to change its position on frame agreements from the investigation in the previous review because it has fully explained its reasoning for doing so. *See Viraj Forgings, Ltd. v. United States*, 350 F. Supp. 2d 1316, 1324 (CIT 2004) ("Commerce need not 'forever hew' to its prior decisions, but it must explain with specificity the reason for its departure from a prior practice.") (quoting *Viraj Forgings, Ltd. v. United States*, 283 F. Supp. 2d 1335, 1342 (CIT 2003)). In fact, Commerce attempted to revisit this issue after the first review was complete, but the court did not permit it. *See Corus II*, 387 F. Supp. 2d at 1295–96. Whether the facts were different in the first review is unknown because Commerce never explored the concept of agreement to sell. *Id.* at 1296.

the subject merchandise is first sold (or agreed to be sold). . . ." *See* 19 U.S.C. § 1677a(a) and (b) (emphasis added). It follows that the classifications could not realistically hinge upon a price that has not been fixed with some certainty by the time of the sale or agreement to sell. Although the statutes do not specifically define the term "sold (or agreed to be sold)," when a word is undefined in a statute, the agency and the reviewing court normally give the undefined term its ordinary meaning. *AK Steel*, 226 F.3d at 1371 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Based on the plain definition of "sale" stated in *Webster's New International Dictionary* 356 (1932), the Federal Circuit in *NSK Ltd. v. United States* unequivocally defined "sold" to "require both a '*transfer of ownership* to an unrelated party and *consideration*.' " *AK Steel*, 226 F.3d at 1371 (quoting *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997)) (emphasis added). Similarly, we look to the plain meaning of the term "agree," which is defined in *Webster's Ninth New Collegiate Dictionary* 43 (9th ed. 1990) as "(1) admit; concede; (2) to settle by common consent." Therefore, if a foreign producer or exporter has sold or agreed to sell merchandise to an unaffiliated U.S. customer, the two parties must have settled upon the terms of the transfer of ownership and the terms of the consideration for that transfer. In other words, in order for a sale or agreement to sell to have occurred, the parties must have settled upon the price and quantity involved in the transaction with complete or at least near certainty.[7] As there is no real ambiguity about these terms, we

[7] In its Reply Brief, Corus argues that Commerce has defined sale and agreement to sell in exactly the same way, impermissibly reading the "agreed to be sold" requirement out of the statute. Commerce, in its Response Brief, stated that an agreement to sell does not occur until the material terms of the sale are fixed, which Corus argues is the same as the Department's test to determine when a sale takes place for date of sale purposes. Corus claims that Commerce ignores the plain language of the statute in making this interpretation, as well as violates *AK Steel*, which Corus claims held the locus and identity of the seller (and not whether material terms are fixed) to be the controlling factors of distinguishing between EP and CEP sales.

Corus, however, incorrectly assumes that "sale" and "agreement" to sell are being defined identically. While both a sale and an agreement to sell require the establishment of the material terms of sale, other factors may additionally distinguish the two terms. In this particular instance, the time of sale and agreement to sell happen to coincide.

Additionally, Corus is wrong in its characterization of *AK Steel*. *AK Steel* did not say that the locus and identity of the seller are the sole controlling factors for the purpose of EP/CEP classifications; rather, *AK Steel* held that the locus of the transaction at issue (i.e., where the sale takes place, not the location of the company) and whether the foreign producer or exporter and the U.S. importer are affiliated are "two factors dispositive of the choice between the two classifications." *AK Steel*, 226 F.3d at 1369. By emphasizing the material terms of the sale, Commerce seeks to define the terms "sale" and "agreement to sell," a necessary step to determining the first factor in deciding upon EP or CEP status, as noted in *AK Steel*.

are not required to analyze the issue under the second part of the *Chevron* test.

Turning to the application of the law to the facts of this case, Commerce properly applied the definition of "sold (or agreed to be sold)" to the case at hand. As the material terms of the sale or agreement to sell were not fixed until the final invoice, Commerce could properly conclude that the final invoices determined when a sale or agreement to sell first occurred.[8] It follows that the sale or agreement to sell occurred after importation in the United States. Therefore, Commerce correctly classified the JIT transactions as CEP transactions pursuant to 19 U.S.C. § 1677a(a) and (b).

III. Corus Failed to Exhaust its Administrative Remedies as to Commerce's Determination of Duty Absorption

Corus' challenge to Commerce's duty absorption determination is precluded from review because, by failing to challenge Commerce's preliminary duty absorption determination, Corus failed to exhaust its administrative remedies.

Congress expressly directs that this Court "shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). This Court has "generally take[n] a strict view of the need [for parties] to exhaust [their] remedies by raising all arguments" in a timely fashion so that they may be appropriately addressed by the agency. *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792 (1999). In an antidumping case such as this, where "Congress has prescribed a clear, step-by-step process for a claimant to follow, and the failure to do so precludes [the claimant] from obtaining review of that issue in the Court of International Trade." *JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed.Cir. 2000) (citing *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599–600 (Fed. Cir. 1998)). The doctrine of exhaustion serves two basic purposes: to protect administrative agency authority and to promote judicial efficiency. *Ta Chen Stainless Steel Pipe, Ltd., v. United States*, 342 F. Supp. 2d 1191, 1206 (CIT 2004).

It is undisputed that the Commerce Department's *Preliminary Results* included a specific finding that Corus had unlawfully absorbed duties. *See Prelim. Results*, 69 Fed. Reg. at 70,228. It is also undisputed that Corus failed to challenge that finding in the case brief that it filed with the Commerce Department following the issuance of the *Preliminary Results*, and that Corus briefed the issue for the first time only after Commerce issued the *Final Results* in the Rule

---

[8] As Corus stated: "[A]t the time [the frame agreements] are executed, there is no binding final agreement as to price, quantity or even specific products to be shipped. Rather, they provide an operating framework under which the customer and Corus can plan their business operations." May 13, 2004 Resp. at 5.

56.2 Motion now before the Court.[9] Hence, Commerce was not put on timely notice of the company's objection following the issuance of the *Preliminary Results* and could not revisit the duty absorption issue in the *Final Results*. In *Ta Chen*, the court stated:

> The prescribed remedy for challenging Preliminary Results issued by the Commerce Department is to file a case brief with the agency setting forth objections. By regulation, the Department affords interested parties the opportunity to submit such briefs within 30 days after Preliminary Results are published. The regulations specifically require that such briefs "present *all* arguments . . . relevant to the Secretary's . . . final results, including any arguments presented before the date of publication of the . . . preliminary results."

Ta Chen, 342 F. Supp. 2d at 1205 (quoting 19 C.F.R. § 351.309(c)(1)–(2)) (emphasis and omissions in the original).

As in *Ta Chen*, by failing to raise the duty absorption claim immediately after the issuance of the *Preliminary Results*, Corus did not present all arguments relevant to Commerce's *Final Results* and essentially precluded Commerce from the opportunity to make a final determination on the issue. Corus' actions directly contravene the policy behind the exhaustion doctrine. While it might be theoretically possible for Commerce to address the issue later, the agency is under no obligation to do so. *Id.* at 1206 (citing *McKart v. United States*, 395 U.S. 185, 195 (1969)). As in *Ta Chen*, Corus should have addressed the issue in its case brief immediately after Commerce's preliminary determination. By failing to do so, Corus waived its right to bring up the claim later.[10]

---

[9] Corus contends that it raised the duty absorption determination challenge before the *Preliminary Results* were even issued, arguing that the challenge was presented to Commerce in Corus' Resp. to Commerce's Request for Information with Respect to Duty Absorption (Mar. 5, 2004) and that Commerce subsequently responded to the challenge in its *Preliminary Results*. However, this mischaracterizes the nature of Corus' preliminary "challenge," which was not the formal raising of a claim against a duty absorption determination, but merely a response to Commerce's request for information during its duty absorption review, made before any determination as to duty absorption had even been reached.

[10] Even if Corus had exhausted its administrative remedies and was permitted to make a challenge now, the statutory construction challenge likely would be rejected because Commerce's interpretation of "affiliated" to include exporters importing through themselves has been found to be a permissible construction. *See Agro Dutch Indus., Ltd. v. United States*, Slip. Op. 06–40, 2006 WL 785463 at 13 (CIT Mar. 28, 2006). The court stated:

> Commerce's interpretation of subsection 1675(a)(4) appears to be a reasonable, commonsense solution to what Congress attempted to accomplish with its enactment. This conclusion is inherent from the statute's focus-upon duty absorption in the foreign producer or exporter-and therefore even if the meaning of "affiliate" were clear, and resort to legislative history unnecessary, to find that the statute does not address the circumstance of the foreign producer or exporter itself acting as the importer of record would result in an apparent absurdity."

In certain cases, when mandating administrative exhaustion would prove "futile or an insistence on a useless formality," the court has waived the requirement. *Alhambra Foundry Co. v. United States*, 12 CIT 343, 347, 685 F. Supp. 1252, 1256 (1988). The issue raised by Corus in this case, however, fails to meet these criteria.[11]

CONCLUSION

For the foregoing reasons, Corus' Motion for Judgment on the Agency Record is denied, and Commerce's *Final Results* are sustained.

Id. at 14. Thus, this is also not an issue that cries out for court resolution because an obvious error has been committed. "Affiliation" requires definition because issues of control are often unclear. Here, where the "affiliated" parties are the same entity, no definition is needed. There is no question as to how close the relationship is or what level of control is involved. Therefore it is unlikely that plaintiff would prevail, in any case.

[11] Scenarios in which the court waives administrative exhaustion requirements include when: (1) plaintiff raised a new argument that was purely legal and required no further agency involvement; (2) plaintiff did not have timely access to the confidential record; (3) a judicial interpretation intervened since the remand proceeding, changing the agency result; (4) it would have been futile for plaintiff to have raised its argument at the administrative level. *Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991). None of the established exceptions to the doctrine of exhaustion are relevant here. In particular, Corus' claim does not raise a purely legal question. *See Hercules, Inc. v. United States*, 11 CIT 710, 735 (1987) ("[W]here a new claim is asserted outside of the administrative record by a party who participated in the administrative proceeding, and the claim is purely legal and does not add factual data to the record, it is within the Court's discretion to consider the claim."). In order to qualify for the exception, plaintiff must (1) raise a new argument; (b) this argument must be of purely legal nature; (c) the inquiry shall require neither further agency involvement nor additional fact finding or opening up the record; and (d) the inquiry shall neither create undue delay nor cause expenditure of scarce party time and resources. *Consolidated Bearings Co. v. United States*, 25 CIT 546, 587 (2001), *rev'd on other grounds*, 348 F.3d 997 (Fed. Cir. 2003).

In asking the court to vacate Commerce's finding of duty absorption, Corus objects not only to Commerce's statutory construction of 19 U.S.C. § 1675(a)(4), but additionally argues that Commerce lacks sufficient evidence to prove duty absorption by Corus and that Commerce has in practice turned the duty absorption determination into a de facto irrebuttable presumption by virtue of its application in that manner for almost ten years. These allegations require an evidentiary assessment of duty absorption by the court, a factual record of Commerce's past practices and an assessment of Commerce's justifications for those practices. As in *Consolidated Bearings Co.*, 348 F.3d at 1003, "[s]tatutory construction alone is not sufficient to resolve this case." *See Id.* (holding that the case did not present a purely legal question because one of cross-appellant's arguments concerned divergence from past administrative practice). Accordingly, this case does not qualify for the "pure" question of law exception to the exhaustion doctrine. *Cf. Agro Dutch Indus.*, Slip. Op. 06–40, 2006 WL 785463 at 12 (holding that a "pure" question of law exception to the exhaustion doctrine did apply to a 19 U.S.C. § 1675(a)(4) statutory construction claim that was added to a preexisting duty absorption challenge in which all factual arguments had already been raised in plaintiff's administrative case brief).

Slip Op. 06–113

AGRO DUTCH INDUSTRIES, LTD., Plaintiff, v. UNITED STATES, Defendant, and COALITION FOR FAIR MUSHROOM TRADE, Defendant-Intervenor.

Before: MUSGRAVE, Judge
Court No. 04–00493

JUDGMENT

This matter having been submitted for decision, and the Court having duly deliberated and now concluding that the second *Results of Redetermination Pursuant to Remand* dated July 19, 2006, in which the defendant explains that the lines of computer programming described in Slip Op. 06–96 (June 23, 2006) accomplishes both a circumstance-of-sale adjustment for differences in commissions pursuant to 19 C.F.R. § 351.410(b) as well as the 351.410(e) adjustment at issue (*i.e.*, commissions paid in one market but not the other), are reasonable, and upon all other papers and proceedings, now, therefore, in view of the foregoing, it is hereby

ORDERED that judgment be, and it hereby is, rendered in favor of defendant, and it is further

ORDERED that *Certain Preserved Mushrooms From India: Final Results of Antidumping Duty Administrative Review*, 69 Fed. Reg. 51630 (Aug. 20, 2004), *as amended* 69 Fed. Reg. 55405 (Sep. 14, 2004) be, and they hereby are, sustained, and it is further

ORDERED that all issues having been decided, this matter is concluded.

Slip Op. 06–114

DOUG SELIVANOFF, Plaintiff, v. UNITED STATES SEC'Y OF AGRICULTURE, Defendant.

Before: MUSGRAVE, Judge
Court No. 05–00374

[Despite sympathy for the plight of the plaintiff Alaska salmon fisherman, whose income was apparently diminished due to foreign competition, the Court is compelled to accept the remand results of the Department of Agriculture denying the plaintiff's application for trade adjustment assistance benefits, which remand results are sustained.]

Decided: July 25, 2006

Doug Selivanoff, plaintiff *pro se*.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United

States Department of Justice (*David S. Silverbrand*); *Jeffrey Kahn*, Office of the General Counsel, U.S. Department of Agriculture, of counsel, for the defendant.

OPINION AND ORDER

Slip Op. 06–55 (April 18, 2006) remanded Doug Selivanoff's application for trade adjustment assistance cash benefits under 19 U.S.C. § 2401e to the U.S. Department of Agriculture, Foreign Agricultural Service (FAS) for consideration of whether storm damage to Mr. Selivanoff's fishing vessel, reduction of crew, and significant difference in the amount of depreciation, as compared with the pre-adjustment year figures, should be considered extraordinary items and therefore aberrant to a proper determination of Mr. Selivanoff's "net fishing income" for the claim year. *Cf.* 19 U.S.C. § 2401e(a)(1)(C). Mr. Selivanoff did not offer additional new information to FAS upon remand. Rather, he restated his argument that

> it would seem that legally the issue is to use a simple analysis of one line item to determine net income or to use a broader analysis to determine the actual impact of imported salmon on me the Fisherman.
>
> As you well know, life is complex and looking at just one factor would hardly represent a true reality. Judge Musgrave opened the door to expand the determination from a line item to a more accurate perspective of which I have actually lived through. On page 6 of the Judge[']s Opinion and Order there is an appeal by myself for you to look at the bigger picture. "In 2003 we worked harder, caught more fish but made less money than in 2001," multiple factors were at work.
>
> I would have not pursed this action of appealing the previous denial of benefits if I had figured that the original determination of denial was based in fairness and fact. I feel the determination was simplistic and did not represent reality on the fish grounds. I urge you to consider my whole argument and ultimately award me the $10,000.00 and allow the program to work as intended by Congress.

Letter of D. Selivanoff to FAS dated May 12, 2006, Administrative Remand Record 1.

On June 14, 2006, FAS again denied Mr. Selivanoff's application. *Reconsideration Upon Remand of the Application of Doug Selivanoff* (FAS, June 14, 2006) ("*Reconsideration*"). In accordance with the Court's order, the FAS considered whether Mr. Selivanoff's claims involved extraordinary income or expense items:

> In . . . 2003, [Mr. Selivanoff] incurred $6,890 in repairs and maintenance, which he deducted on line 9 on his 2003 income

> tax return. Thus, in a year in which there was not a storm, he still incurred a significant amount, approximately a third, in expenses for repairs and maintenance. We find that a storm causing damage to a fishing vessel necessitating repairs would not meet the criteria as an extraordinary item under the definition. Such expenditures are clearly directly related to a fishing business and can be expected to occur in the foreseeable future.
>
> In his complaint, which the Court quotes, [Mr. Selivanoff stated as follows:] "In 2003 I reduced my crew by one, I increase my workload by 25%. Grub and Insurance cost dropped in 2003 because of the reduction of crew. Increasing my profits but the workload increased." Mr. Selivanoff proferred no evidence of these statements; however, even assuming that this was the case, we find that they would not meet the criteria [of] an extraordinary item under the definition. Adjustments to the size of a boat's crew and resulting savings would be in the norm for a fishing business.
>
> In his complaint, which the Court quotes, [Mr. Selivanoff stated as follows:] "By 2003 my boat had pretty much depreciated out. In 2001 my depreciation was $4,135.00 and in 2003 it was $812." We find that depreciation would not meet the criteria as an extraordinary item under the definition. Depreciation of assets is annual and ordinary in any business.

Id. Cf. Financial Guidelines for Agricultural Producers ("*Guidelines*") (FFSC, Dec. 1997) at 22.

This complies with the Court's order, but as part of its rationale for rejecting Mr. Selivanoff's application, FAS distinguished the *Guidelines* as applicable only to the disposition of capital assets and only with respect to those by farmers. *Reconsideration* at 1–2, referencing *Miller GAAP Guide* (Aspen Law & Bus., Jan 2002) at ch. 41, p. 1. To the extent this requires clarification, FAS's distinguishment overlooks that FFSC considered arguments for and against excluding extraordinary items from net farm income ("NFI"), not merely those related to capital gain or loss, that have support in the accounting community (*see infra*). FFSC ultimately sided with

> [t]hose who argue for calculation of NFI before the inclusion of gains or losses on capital sales [because] *the critical use for the NFI number is to analyze the operating results of the business from "normal operations[ ]" and . . . this number would logically not include one-time capital gains or losses.* Further, since it is so commonly used for analysis purposes, it should be available directly from the earnings statement.

* * *

> It is important to note that to be considered an extraordinary item, the transaction or event must meet both of the criteria. The accounting literature also provides examples and additional guidance in this area. Write-downs of receivables, intangible assets, or inventories and gains or losses from sale or abandonment of property or equipment used in the business are not extraordinary items because they are usual in nature and may be expected to recur. The accounting literature also identifies three specific items that should be reported as extraordinary items even though they may not exactly meet the criteria specified above. The only one of those items applicable to farm statements would be gains or losses from extinguishment of debt.

Guidelines at 22 (italics added). Notwithstanding FAS's distinguishment, the impact of the rationale of the foregoing speaks for itself. *Cf. Miller GAAP Guide: Level A* (CCH 2006) ("*GAAP Guide*"):

> For many years, there were differences of opinion in the accounting profession as to what should be included in net income. Proponents of the *all-inclusive concept* (sometimes called "clean surplus") believed that all items affecting net increases in owners' equity, except dividends and capital transactions, should be included in computing net income. Alternatively, proponents of the *current operating performance concept* (sometimes called "dirty surplus") advocated limiting the determination of net income to normal, recurring items of profit and loss that relate only to the current period and recognizing other items directly in retained earnings. Differences between the two concepts are seen most clearly in the treatment of the following items:
>
> - Unusual or infrequent items
> - Extraordinary items
> - Changes in accounting principles
> - Discounted operations
> - Prior period adjustments
> - Certain items that are required by GAAP to be recognized directly in stockholders' equity rather than in net income
>
> Current GAAP (primarily APB–9, APB30, FAS–16) require the presentation of income in a manner that generally is consistent with the all-inclusive concept. Net income includes all items of revenue, expense, gain, and loss during a reporting period, except for prior period adjustments, dividends, and capital transactions, and a limited number of items that are required to be recognized directly in equity. Examples of items treated in this manner are certain foreign currency adjustments and certain changes in the value of debt and equity investments.

> The FASB first introduced the term "comprehensive income" in its conceptual framework, CON–3 (Elements of Financial Statements), which was replaced subsequently by CON–6 of the same title. According to CON–6, *comprehensive income* is the change in equity of a business enterprise from transactions, other events, and circumstances from nonowner sources during a period. It includes all changes in equity during a period except those resulting from investments by owners and distributions to owners. CON–5 (Recognition and Measurement in Financial Statements of Business Enterprises) concluded that comprehensive income and its components should be reported as part of a full set of financial statements for a period and that earnings (*i.e.* net income) was a more narrow measurement of performance and, therefore, was a part of comprehensive income. FAS–130 (Reporting Comprehensive Income) requires the presentation of comprehensive income and its components in the financial statements.

GAAP Guide at 41.02 (italics in original). Further, to conclude that the rationale of the *Guidelines* is relevant only to land-based agricultural operations is to ignore any similarities between farming and fishing operations, not to mention congressional intent to extend trade adjustment assistance for farmers to fishermen and the fact that benefits for either are conditioned upon loss of income from an "adversely affected agricultural commodity." *See* 19 U.S.C. § 2401e(a)(1).

Previously, the Court drew attention to the fact that the *Guidelines*, and now here the *GAAP Guide*, considers a concept of "net income" (whether defined as net profit or loss or otherwise–*see* 7 C.F.R. § 1580.102) that excludes extraordinary and other items depending upon the perspective sought. *Cf.* Slip Op. 06–55 at 9 ("what is a 'normal' year [of net fishing income]?"). Given the tautology inherent in "net fishing income means net profit or loss,"[1] the Court was unclear as to FAS's perspective on the matter, although it was and is clear that FAS must make a determination in a particular instance with the "utmost regard" for the interests of applicants such as Mr. Selivanoff. *See, e.g., Trinh v. United States Secretary of Agriculture*, 395 F.Supp.2d 1259 (CIT 2005). It was therefore appropriate to remand the matter for reconsideration.

FAS has again reached a negative decision upon reconsideration, and its filing implies its perspective that "net fishing income" is to be equated with the GAAP all-inclusive concept of net income. *Cf. Reconsideration* at 1 ("GAAP requires that net income include extraordinary items") (citation omitted). Whether or not that is in accordance with congressional intent, Mr. Selivanoff has elected not to

---

[1] *See* 7 C.F.R. § 1580.102; *see also* Slip Op. 06–55 at 11.

submit comments thereon to the Court and has therefore failed to argue persuasively or demonstrate that the repairs/maintenance to his boat, the reduction of crew, and/or the difference in depreciation from year to year were not extraordinary items, that FAS's conclusions are unreasonable, or that his net fishing income for the claim year 2003 was less than his net fishing income for the pre-adjustment year figure for 2001. Accordingly, FAS's remand results are conclusive upon this Court. *See* 19 U.S.C. § 2395(b). There may indeed be a "more accurate perspective" of what Mr. Selivanoff actually lived through, but the Court can neither deduce it from the evidence and arguments presented for consideration nor speculate as to its legal impact on FAS's determination, in contravention of section 2395(b).

Judgment will enter accordingly.

Slip Op. 06–115

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

FORMER EMPLOYEES OF GALE GROUP, INC., Plaintiffs, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Court No. 04–00374

JUDGMENT

In *Former Employees of Gale Group, Inc. v. United States Sec'y of Labor* ("*Gale Group*"), 29 CIT ___ , 403 F. Supp. 2d 1299 (2005), the Court affirmed the Department of Labor's ("Labor's") determination denying Former Employees of Gale Group, Inc.'s ("Plaintiffs'") eligibility for certification to receive trade adjustment assistance ("TAA") benefits. *See Gale Group*, 29 CIT at ___ , 403 F. Supp. 2d at 1304. In affirming Labor's negative determination, the Court stated that Labor's factual determination that Plaintiffs performed electronic indexing services and therefore did not produce an article was supported by substantial record evidence. *See id.* at ___ , 403 F. Supp. 2d at 1303.

Plaintiffs then appealed to the Court of Appeals for the Federal Circuit ("CAFC") on January 12, 2006. While on appeal, Labor revised its policy to "acknowledge that . . . there are tangible and intangible articles and to clarify that the production of intangible articles can be distinguished from the provision of services. Software and similar intangible goods that would have been considered articles for the purposes of the Trade Act if embodied in a physical medium will now be considered to be articles regardless of their method of transfer." *Notice of Revised Determination on Remand for Com-*

puter Sciences Corp., Fin. Services Group, East Hartford, Connecticut, TA–W–53,209 (Mar. 24, 2006), *published at* 71 Fed. Reg. 18,355, 18,355 (Apr. 11, 2006).

Labor then moved, without opposition from Plaintiffs, to remand this matter to the Court "for the limited purpose of remanding to [Labor] to make a determination regarding certification for benefits under the Trade Act in accordance with Labor's current policy[,]" which the CAFC granted. *Order* (CAFC June 2, 2006). On June 19, 2006, the Court remanded this matter back to Labor and noted that the Court considered the facts of this case to be distinguishable from *Former Employees of Computer Sciences Corp. v. United States Sec'y of Labor*, 29 CIT ____ , 366 F. Supp. 2d 1365 (2005).

On July 20, 2006, Labor filed its revised determination. *See Notice of Revised Determination on Remand* ("*Revised Determination*"), TA–W–54,434 (July 19, 2006). In its *Revised Determination*, Labor stated that its revised policy acknowledges "that there are tangible and intangible articles. Products that would have been considered an article if embodied in a physical medium will now be considered an article for purposes of the Trade Act even if transmitted or stored electronically." *Revised Determination* at *2. Upon review and in light of its revised policy, Labor determined that Plaintiffs produced "an intangible article (electronic documents) and that, following the shift of production abroad, documents like or directly competitive with those produced at the subject firm were brought back into the United States." *Id.* at *3. Therefore, Labor certified Plaintiffs as eligible to apply for TAA benefits. *See id.* at *3–4. Plaintiffs filed comments on July 25, 2006, concurring with the *Revised Determination*.

The Court, having received and reviewed Labor's *Revised Determination* and comments of Plaintiffs, holds that Labor duly complied with the Court's remand order, and it is hereby

ORDERED that Labor's *Revised Determination* is supported by substantial evidence and otherwise in accordance with law; and it is further

ORDERED that the *Revised Determination* filed by Labor on July 20, 2006, is affirmed in its entirety; and it is further

ORDERED that this case is dismissed.

Slip Op. 06–116

FUJI AMERICA CORPORATION, Plaintiff, v. THE UNITED STATES, Defendant.

Before: MUSGRAVE, Judge
Court No. 03–00126

[Plaintiff challenged classification of merchandise by United States Customs and Border Protection under Harmonized Tariff Schedule of the United States ("HTSUS") heading 8479 as "Machines and mechanical appliances having functions, not specified or included elsewhere in this chapter, parts thereof. . . ." Plaintiff claimed that merchandise identified as a "chip placer" was properly classified under HTSUS heading 8428 as "Other lifting, handling, loading or unloading machinery . . . ," and that merchandise identified as a "feeder" was properly classified under heading 8431 as "parts" of machines of heading 8428. Plaintiff's motion for summary judgment was denied in its entirety. Defendant's cross-motion for summary judgment was granted in part and denied in part as the court found that the chip placers were properly classified under subheading 8479.89 as they did not passively lift and handle electronic components but, rather, played an active and integral role in making printed circuit assemblies and, further, that the feeders were properly classified under subheading 8479.90 as "parts" of those machines.]

Decided: July 26, 2006

Katten Muchin Zavis Rosenman LLP (*Mark S. Zolno*, *Eric R. Rock*, and *David P. Sanders*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Arthur J. Gribbin* and *Bruce N. Stratvert*); Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection (*Sheryl F. French*), of counsel, for the defendant.

OPINION

Before the Court are plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment. Plaintiff challenges the classification of the subject merchandise—certain specialized machinery—by the United States Customs Service ("Customs").[1] By its cross-motion, defendant argues that Customs' classification was correct. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(a) (2000).

Background

The subject merchandise, consisting of machinery identified as "chip placers" and "feeders," was entered into the United States between January 3, 2001, and December 10, 2001. Pl.'s Statement of Material Facts not in Dispute ("Pl.'s Facts"), sec. 1, para. 1; Def.'s

[1] The United States Customs Service has been renamed United States Customs and Border Protection.

Resp. to Pl.'s Statement of Material Facts not in Dispute ("DRPF"), sec. 1, para. 1. Customs determined that all of the subject merchandise was properly classified under heading 8479 of the Harmonized Tariff Schedule of the United States (2001) ("HTSUS"), which provides for "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof . . . ," which would be assessed a duty rate of 2.5 percent *ad valorum*. *Id.* Plaintiff timely protested Customs' classification, arguing that the chip placers were properly classified under HTSUS heading 8428 as "Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics) . . . ," which would enter duty free. *See* Pl.'s Facts, sec. 1, para. 2; DRPF, sec. 1, para. 2. Customs denied the protest, finding that the subject merchandise was properly classified under heading 8479. Plaintiff then timely commenced this action.

Standard of Review

Where there is a dispute as to the classification of merchandise, that issue may be resolved by means of summary judgment. *See Essex Mfg. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–01 at 5 (2006) ("*Essex*") (*citing Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998) ("*Bausch & Lomb*")). In a classification case, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT R. 56(c); *see Essex*, 30 CIT at ___ , Slip Op. 06–01 at 5. "Summary judgment of a classification issue is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Essex*, 30 CIT at ___ , Slip Op. 06–01 at 5 (citing *Bausch & Lomb*, 148 F.3d at 1365; *Rollerblade, Inc. v. United States*, 112 F.3d 481, 483 (Fed. Cir. 1997) ("*Rollerblade*")) (internal quotation marks omitted). "Where jurisdiction is predicated on 28 U.S.C. § 1581(a), Customs' interpretation of an HTSUS tariff term, a question of law, is subject to *de novo* review." *Id.* (*citing* 28 U.S.C. § 2640(a)(1); *E.T. Horn Co. v. United States*, 27 CIT ___ , ___ , Slip Op. 03–20 at 4 (Feb. 27, 2003)). It is incumbent upon the Court "to 'reach the correct decision' in classification cases. . . ." *Rollerblade*, 112 F.3d at 484 (internal quotation marks and citations omitted). Here, the parties agree that there are no material facts in dispute and, accordingly, resolution of this matter by summary judgment is appropriate.

The agreed-upon facts are the following. The subject merchandise consists of two types of machines: "chip placers" and "feeders." *See* Pl.'s Facts, sec. 2, para. 1; DRPR, sec. 2, para. 1. A chip placer is "used in the manufacture/assembly of printed circuit assemblies

(PCAs)."[2] *See* Def.'s Statement of Material Facts as to Which There is No Genuine Issue to Be Tried ("Def.'s Facts"), para. 1; Pl.'s Resp. to Def.'s Statement of Material Facts Not in Dispute ("PRDF"), para. 1 ("Chip placers are but one of several machines used in the multi-step process of manufacturing printed circuit assemblies."). Chip placers are machines that "are used to place various electronic components such as resistors, capacitors and circuits onto blank printed circuit boards ('PCBs'). This process is often referred to as 'populating' the PCBs." Pl.'s Facts, sec. 2, para. 2 (citing Headquarters Ruling Letter ("HRL") 965608 (Sept. 10, 2002)); DRPF, sec. 2, para. 2. A chip placer is a machine that is composed of several discrete units, including a loading system, a component placement system, and a parts inspection system. *See* Pl.'s Facts, sec. 2, para. 3[3]; DRPF, sec. 2, para. 3; Pl.'s Reply to Def.'s Resp. to Pl.'s Statement of Material Facts Not in Dispute ("Pl.'s Reply to DRPF") at 6; Def.'s Facts, para. 3; PRDF, para. 3; *see generally* Fuji Corp. Video of 3/11/02 ("Video")[4]. The loading system receives PCBs from an external conveyor, moves PCBs within the chip placer, and then disgorges populated PCBs onto a second external conveyor. Def.'s Facts, para. 3. PRDF, para. 3; *see also* Video at 9:56:17–:32[5]; *id.* at 10:04:22–:30 (showing external conveyor introducing PCB into chip placer). The placement system consists of "numerous vacuum nozzles and heads, which populate the PCB with great accuracy and speed." Def.'s Facts, para. 3; PRDF, para. 3; *see* Video at 9:56:54–:57:15. The parts recognition system inspects components prior to placement to ensure that the correct component has been selected for placement. *See* Video at 9:57:16–:34.

The feeders at issue consist of two different types of machines: "motor" and "power" feeders. Pl.'s Facts, sec. 2, para. 4; DRPF, sec. 2,

---

[2] The HTSUS defines PCAs as "goods consisting of one or more printed circuits . . . with one or more active elements assembled thereon, with or without passive elements. For the purposes of this note, '*active elements*' means diodes, transistors and similar semiconductor devices . . . and integrated circuits and microassemblies. . . ." Section XVI Additional U.S. Note 1.

[3] *See also* Mem. In Supp. of Pl.'s Mot. for Summ. J. at Ex. 5, Attachs. In these documents, chip placers are stated to have the following system components: "XY-robots, PCB conveyors, part supply stations, placing heads, and part and fiducial inspection cameras." *See* Twin Station Multi-Function SMD Mounter NP–251E/251E–XL Mach. Specifications at 3; Multi-Function SMD Mounter QP–351E–MM Mach. Specifications at 2.

[4] The Video was not filed concurrently with either parties' papers. Because, however, the parties reference the content of the Video (*see, e.g.*, Pl.'s Br. In Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. and Def.'s Cross-Mot. for Summ. J. at 5; Def.'s Reply Br. In Supp. of Mot. for Summ. J. and in Opp'n to Pl.'s Resp. at 2), and Customs reviewed the Video during the protest process (*see* HRL 965608), the Court requested that plaintiff file a copy of it, which plaintiff did. In the Video, Fuji's Applications Engineering Manager gives a detailed explanation of the functions of various machines—with an emphasis on chip placers—and the processes involved in making PCAs.

[5] These numbers refer to the time stamp on the Video. The stamp apparently refers to the date and time the Video was recorded. For clarity, the date and "AM" designations are not reproduced with the citations herein.

para. 4. The feeders are specifically designed to supply various electronic components to chip placers via a variety of different systems. *See*, *e.g.*, Def.'s Facts, para. 9; PRDF, para. 9; *id.* at para. 10. These systems include tape and tray feeders. Def.'s Facts, para. 10; PRDF, para. 10.

Discussion

The parties argue that classification of the subject merchandise can be resolved by application of HTSUS General Rule of Interpretation ("GRI") 1. *See* Mem. In Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem.") at 20; Def.'s Mem. In Supp. of Its Mot. for Summ. J. and in Opp'n to Pl.'s Mot. for Summ. J. ("Def.'s Mem.") at 7 ("The classification of the imported merchandise requires a straightforward application of HTSUS [GRI] 1. . . ."). GRI 1 provides:

> The table of contents, alphabetical index, and titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings do not otherwise require, according to the [other general rules of interpretation]. . . .

GRI 1; *Nidec Corp. v. United States*, 68 F.3d 1333, 1335 (Fed. Cir. 2005) ("*Nidec*") (citing GRI 1). In the case at bar the parties agree that the chip placers are properly classified within HTSUS chapter 84. *See* Pl.'s Mem. at 16; Def.'s Mem. at 7. The parties differ, however, as to which heading within chapter 84 the chip placers and feeders fall.

A

1

The Court first examines the classification of the chip placers. Customs classified the chip placers under HTSUS heading 8479 and, more specifically, subheading 8479.89.9797, which covers "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof: . . . Other machines and mechanical appliances . . . Other: Electromechanical appliances with self-contained motor . . . Other . . . Other . . . Other. . . ." *See* HRL 965608. Customs stated that classification within heading 8479 was proper because the function of the chip placers "is not a function described within the terms of heading 8428, HTSUS." Customs further stated that the Court of International Trade

> upheld the Customs Service position that the scope of Heading 8428 covers a wide range of machinery for mechanical handling

> of materials, goods, people and other items. Citing technical sources, Customs has maintained that Heading 8428, HTSUS, covers material handling equipment[,] which are devices that transport, position and store raw materials and finished goods for industrial and commercial operations.

HRL 965608 (citing *Mitsubishi Int'l Corp. v. United States*, 22 CIT 324, 339, 5 F. Supp. 2d 991, 1005 (1998) ("*Mitsubishi I*"), *aff'd*, 182 F.3d 884 (Fed. Cir. 1999) ("*Mitsubishi II*")). Customs reasoned that classification of the subject merchandise under heading 8479 was proper because

> [t]he chip mounter's function is to manufacture printed circuit assemblies by mounting (sometime[s] referred to as "populating") electronic components onto printed circuit boards. This position was further confirmed upon reviewing the videotape submitted by counsel on behalf of the protestant that demonstrated the chip placers. In the videotape, the machine is described as a high speed assembly machine. The machine's function is to populate the PCB with electronic components. It populates the PCBs by using a conveyor to load and unload a PCB under the vacuum nozzle placing heads. These placing heads retrieve the electronic components from one of the several types of feeders made by the manufacturer. We find that the chip mounters/placers do not meet the terms of Heading 8428, as they do not transport, position and store materials. Therefore, classification under Heading 8428 is precluded. Based upon our holdings in NY 884327 and in NY A88431, we find that the chip mounters/placers are classified in Heading 8479, HTSUS.

Id.

Plaintiff argues that the chip placers should be classified under heading 8428 as "Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics). . . ."[6] Plaintiff contends that this is the proper classification of

---

[6] In further detail, heading 8428 provides for the classification of:

8428.00	Other lifting, handling, loading or unloading machinery (for example, elevators, escalators, conveyors, teleferics): . . .
8428.10	Passenger or freight elevators other than continuous action; skip hoists . . .
8428.20	Pneumatic elevators and conveyors . . .
	Other continuous-action elevators and conveyors, for goods or materials:
8428.31	Specially designed for underground use . . .
8428.32	Other, bucket type . . .
8428.33	Other, belt type . . .
8428.39	Other . . .
8428.40	Escalators and moving walkways . . .

the chip placers due this Court's jurisprudence. *See* Pl.'s Mem. at 24 (citing *Mitsubishi I*, 22 CIT 324, 5 F. Supp. 2d 991). Plaintiff argues that, following *Mitsubishi I*, "[t]he Chip Placers' immediate, primary function is to lift electronic components from the feeder banks by means of the vacuum nozzles and then handle them in order to place them at the appropriate locations on the blank PCB." Pl.'s Mem. at 24–25 (emphasis removed; citing Aff. of Dr. Kevin M. Lynch, ¶ 7). While the Court agrees that *Mitsubishi I* is instructive on this point, the Court does not agree that *Mitsubishi I* supports plaintiff's position. In *Mitsubishi I* the Court was presented with the issue of the proper classification of various machines used in a continuous steel casting process. *See Mitsubishi I*, 22 CIT at 325, 5 F. Supp. 2d at 994. The plaintiff argued that classification of certain of those machines under heading 8428 was not proper because none of them were operated by pulleys, winches or jacking systems and, moreover, the exemplars listed in the heading moved raw materials, whereas the subject merchandise was part of an assembly process. *See id.* at 338–339, 5 F. Supp. 2d at 1005. The defendant countered that heading 8428 covered a "wide range" of machinery, and that the proper question for classification was what constituted the "primary function" of each of the machines. *Id.* at 339, 5 F. Supp. 2d at 1005–06. The Court agreed that it was the "primary function" of a machine that was the determining factor for classification, and proceeded to review each article using that standard. *See id.* at 341, 5 F. Supp. 2d at 1007. The Court first examined several machines, including a "torch approach table," a "torch roller table," a "torch runout table," and a "slab transfer table." *Id.* at 340, 5 F. Supp. 2d at 1006. The Court stated that the "tables are used to convey the solidifying steel during the final forming operations. Each roller table consists of a frame onto which rollers with bearings and drives are mounted and they advance and discharge the slab at a casting speed. . . ." *Id.* The Court found that each of these items were properly classified under heading 8428 because "the primary function of the components at issue is not making steel slabs but lifting and handling materials." *Id.* at 341, 5 F.

8428.50	Mine wagon pushers, locomotive or wagon traversers, wagon tippers and similar railway wagon handling equipment . . .
8428.60	Teleferics, chair lifts, ski draglines; traction mechanisms for funiculars . . .
8428.90.00	Other Machinery . . .
8428.90.00.02	Of a kind used in charging or discharging furnaces . . .
8428.90.00.04	Of a kind used for radioactive materials . . .
8428.90.00.06	Woodland log handling equipment (other than skidders) . . .
	Other:
8428.90.00.10	Industrial robots . . .
8428.90.00.20	Oil and gas field machinery . . .
8428.90.00.30	Sidebooms and pipehandlers . . .
8428.90.00.40	Loaders, underground mine type . . .
8428.90.00.90	Other. . . .

Supp. 2d at 1007; *see Mitsubishi II*, 182 F.3d at 887 (stating "[w]e conclude the classifications were correct. . . ."). The Court next examined a machine called a "deburring table." *Mistubishi I*, 22 CIT at 341, 5 F. Supp. 2d at 1007. The Court, noting that the plaintiff conceded that "the deburring runout table is similar to the [other roller tables]," found that it was properly classified under heading 8428 as a conveyor. *Id.* at 342, 5 F. Supp. 2d at 1008 (bracketing in original). The Court next examined several machines, including a "segment change system," a "ladle turret," a "tundish transfer car," a "ladle-to-tundish shroud changing mechanism," a "tundish lifting beam," a "segment lifting beam," a "mold and first zone lifting beam," and a "segment transfer car." *Id.* at 342, 5 F. Supp. 2d at 1008. The Court found that these machines were all properly classified under heading 8428 because their primary function was to lift and handle various items. The Court reasoned that the ladle turret was properly classified under heading 8428 because its "primary function is lifting or handling materials." *Id.* at 343, 5 F. Supp. 2d at 1009. The Court reasoned that the tundish transfer car and the shroud changing mechanism were properly classified within heading 8428 because "[i]n their condition as imported . . . these components . . . perform lifting and handling functions." *Id.* at 345, 5 F. Supp. 2d at 1010. The Court noted that there was "no evidence that the tundish transfer car or shroud changing mechanism . . . perform additional casting operations . . . without parts added after importation." *Id.* Finally, the Court reasoned that the tundish lifting beam, segment changer system, segment lifting beam, mold and first zone lifting beam, and the segment transfer car were all properly classified under heading 8428 because "these components are described by plaintiff as having functions including aligning, transporting and removing steel slabs by lifting and handling." *Id.* at 347, 5 F. Supp. 2d at 1011.

In the case at bar, plaintiff argues that a chip placer's primary function is "lifting and handling" computer components. The Court does not agree. The main difficulty with this position is that it reduces the overall function of a chip placer to a single process within it. In other words, plaintiff's argument does not take into account a chip placer's entire function within the process of making PCAs. To better understand this point, the Court finds plaintiff's Video—which explains in detail how chip placers function—instructive.[7] According to the Video, a chip placer begins its function in making a PCA by having a PCB moved into the chip placer's internal loading system. Video at 10:04:21–:36. The loading system grasps the PCB, moves it into the chip placer's work area, lifts it into position, and locks it in place. *Id.* at 9:56:24–:31. After being locked in place, the

[7] The Court uses plaintiff's model QP–351E–MM as the basis of its discussion, as the functioning of this model is explained in the Video and plaintiff has included that machine's design specifications with its papers. *See* Pl.'s Mem. at Ex. 5, Attach. 2.

chip placer uses a camera to locate fiducial marks printed on the PCB to determine the PCB's exact position within the work space. *Id.* at :56:34–:44. Using this information, the chip placer calculates an offset that allows accurate placement of components. *Id.* at :56:46–:52. Next, the chip placer selects a placement tool by moving the placement head to a "tooling fixture" where, depending on the size and type of component to be placed, the placement head is fitted with one of several vacuum nozzles or mechanical chucks.[8] *Id.* at :55:35–:56:10. The chip placer then moves the tooled placement head to a feeder station where a variety of components can be selected. *Id.* at :57:07–:15. After making a selection, the chip placer moves the placement head to the parts identification system, which takes a picture of the selected component. *Id.* at :57:16–:26. The chip placer then matches the picture of the selected component with a reference image to determine whether the correct component has been selected. *Id.* at :57:27–:34. After determining that the selected component is the correct component, the chip placer makes a calculation as to where the selected component is to be placed on the PCB. *Id.* at :57:35–:43 The chip placer then moves the placement head to the correct spot over the PCB and places the component on the PCB's surface.[9] *Id.* at :57:45–:48. After the chip placer places the selected component, it repeats the process. *Id.* at :57:50–:52. As the placement process progresses, the chip placer may, depending on the component to be selected, return the placement head to the tooling fixture to change the tooling on the placement head. *Id.* at :57:52–:58:04. In sum, the Video shows that a chip placer does not merely move materials (in this case PCBs and electronic components) from one place to another; instead, a PCB is introduced into a chip placer, the PCB has components placed on it, and the populated PCB exits the chip placer at the end of the process. In direct contrast to machines at issue in *Mitsubishi I*, the chip placers' primary function is not the passive lifting and handling of materials but, rather, an active and integral step in making PCAs. *See Mitsubishi I*, 22 CIT at 341, 5 F. Supp. 2d at 1007 ("[T]he primary function of the [machines] at issue is not making steel slabs but lifting and handling materials."). Therefore, because the chip placers' primary function is not "lifting and handling," they cannot be classified under heading 8428 as "Other lifting, handling, loading or unloading machinery. . . ."

---

[8] The mechanical chucks are vacuum actuated tools that grasp components with a pincer action. *See* Video at 9:55:53–:58.

[9] Components are held in place during the population process by a variety of methods including "solder paste, conductive adhesives, and non-conductive adhesives." Glenn R. Blackwell, P.E., & James K. Hollomon, Jr., *Surface Mount Technology for PC Boards* 96 (2d ed. 2006).

Plaintiff presents several additional arguments in support of its position that chip placers are correctly classified within heading 8428. First, plaintiff takes issue with defendant's position that the chip placers cannot be classified in heading 8428 because they perform an "assembly" function. *See* Pl.'s Mem. at 27 (citing Def.'s Resp. to Pl.'s First Set of Interrogs. and Req. for Prod., ¶ 12). Plaintiff argues that "[t]he jurisprudence of this court and numerous Customs rulings make clear that the appropriate question is not whether a machine 'assembles,' but rather the function it performs in contributing to that assembly." *Id.* at 27. In support of its position plaintiff states that

> The clearest example of this distinction is in the *Mitsubishi* case. . . . In that case, all of the various machines at issue contributed to the assembly (or manufacture) of the steel slabs. The court specifically rejected the suggestion that all of the various machines should simply be classified as parts of a "steel casting machine" simply because they were part of the process whereby steel was cast into slabs. . . . [T]he appropriate inquiry is each machine's immediate, primary function within that process of assembly or production.

Pl.'s Mem. at 27. Again, the Court does not agree that *Mitsubishi I* supports plaintiff's argument. Specifically, in *Mitsubishi I* the plaintiff argued that a prior decision covering similar merchandise was controlling for the classification of the merchandise at issue. *See Mitsubishi I*, 22 CIT 331–332, 5 F. Supp. 2d at 999–1000. The Court disagreed, finding that the prior action was not controlling because the merchandise at issue had been classified under provisions of the Tariff Schedule of the United States ("TSUS") and not the HTSUS, and that the "special language" of the HTSUS dictated a different result. *See id.* at 336, 5 F. Supp. 2d at 1003 (examining GRI additional U.S. note 1(c); TSUS GRI 10(ij); HTSUS section XVI note 2(a)) ("The inclusion of Note 2(a) to Section XVI provides a 'context' which requires this Court to examine whether the components at issue are '[p]arts which are goods included in any of the headings of chapters 84 and 85' and thus whether they should 'be classified in their respective headings.' " (bracketing in original)). On appeal, the Court of Appeals for the Federal Circuit affirmed, stating that "[n]ote 2(a) of Section XVI provides that 'parts which are goods included in any of the headings of chapters 84 and 85 . . . are in all cases to be classified in their respective headings.' This provision is 'special language or context' that renders Rule of Interpretation 1(c) inapplicable to the extent that they conflict." *Mistubishi II*, 182 F.3d at 886 (citing *Clarendon Mktg., Inc. v. United States*, 144 F.3d 1464, 1469 (Fed. Cir. 1998)). Here, the issue is not whether a chip placer is part of a larger assembly process. Instead, the issue has solely to do with the primary function of a chip placer. As previously stated, the classification of the chip placers within heading 8428 is not proper because they are not, as in *Mitsubishi I*, machines that passively lift and handle materials from one place to another within a larger process. *See Mitsubishi I*, 22 CIT at 341, 5 F. Supp. 2d at 1007.

Next, plaintiff argues that the explanatory notes support its position that the chip placers are properly classified under heading 8428. Plaintiff argues that the chip placers "are industrial robots, as that term is used both in the Explanatory Notes and in the robotics industry at large. . . ." Pl.'s Mem. at 29. Therefore, plaintiff reasons, because the chip placers are industrial robots that perform the primary function of lifting and handling, they are excluded from heading 8479. *Id.*; *see* Explanatory Note 84.79(I) ("[T]he heading excludes those industrial robots specifically designed to perform a specific function; these industrial robots are classified in the heading covering their function. . . ."). Again the Court does not agree. The main problem with this argument is that, even were it established that the chip placers are industrial robots (a point with which defendant disagrees), a necessary prerequisite to classifying an article under heading 8428 is that it has as its primary function the passive lifting and handling of material and, as discussed, this simply is not the case with chip placers. *See Mitsubishi I*, 22 CIT at 341, 5 F. Supp. 2d at 1007. Furthermore, were it agreed that the chip placers are industrial robots, this fact alone would not exclude them from classification under heading 8479, as that heading specifically provides for the classification of industrial robots. *See* HTSUS subheading 8479.50 ("Industrial robots, not elsewhere specified or included. . . .").

Finally, plaintiff argues that the Court should not give deference to the ruling letter that addresses the classification of the chip placers. *See* Pl.'s Mem. at 40 (citing HRL 965608). Plaintiff contends that this ruling letter is not entitled to deference because it is "neither thorough nor well-reasoned. [It is] also not consistent with Customs' prior interpretation of Heading 8428." *Id.* Plaintiff reasons that the ruling letter "lack[s] power to persuade" and, therefore, is not to be accorded deference. *Id.* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1934); *United States v. Mead*, 533 U.S. 218, 235 (2001) ("*Mead*")); *see also Rocknel Fastener v. United States*, 267 F.3d 1354, 1357 (Fed. Cir. 2001) ("*Rocknel*") (citing *Mead*, 533 U.S. at 235). As the chip placers are correctly classified under heading 8479 the Court does not address the question of whether the ruling letter has the "power to persuade."[10]

---

[10] The Court notes that were the chip placers not properly classified within heading 8479 plaintiff's argument might have some merit, as an examination of the ruling letter reveals that at least one of its main premises is incorrect. Specifically, the ruling letter, citing *Mitsubishi I*, states that "Customs has maintained that Heading 8428, HTSUS, covers material handling equipment[,] which are devices that transport, position and store raw mate-

For all the foregoing reasons the Court finds that the chip placers cannot be properly classified under HTSUS heading 8428.

2

The Court next turns to the correct classification of the chip placers. As previously noted, GRI 1 provides that for "legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes. . . ." GRI 1; *Nidec*, 68 F.3d at 1335; *see Ciba-Geigy Corp. v. United States*, 22 CIT 1155, 1162–63, 44 F. Supp. 2d 207, 213 (1998) ("GRI 1 instructs that in addition to the plain language of the headings themselves, chapter notes are to be used in fully determining the meaning of tariff headings."), *aff'd*, 223 F.3d 1367, 1372–73 (Fed. Cir. 2000) ("The plain language of Note 1(a), read in conjunction with Note 2(f) of Chapter 29, can only be interpreted to mean that Headings 3203 and 3204 are the only acceptable classifications within Chapter 32 for a 'separate chemically defined compound.' "). Thus, to classify the chip placers, GRI 1 must be read "in conjunction" with the relevant notes for chapter 84. The chapter notes provide that

> A machine which is used for more than one purpose is, for the purposes of classification, to be treated as if its principal purpose were its sole purpose.
>
> Subject to note 2 to this chapter and note 3 to section XVI, a machine the principal purpose of which is not described in any heading or for which no one purpose is the principal purpose is, unless the context otherwise requires, to be classified in heading 8479. . . .

Chapter 84 note 7.[11] Here, the chip placers' primary function is to perform an active and integral role in making PCAs. *See Mitsubishi*

---

rials and finished goods for industrial and commercial operations." *See* HRL 965608 (citing *Mitsubishi I*, 22 CIT at 339, 5 F. Supp. 2d 1005). A review of *Mitsubishi I*, however, shows that this was not, in fact, Customs' "position" in that case. Instead, the cited language is a synthesis of two quotations from the *plaintiff's* brief. *See Mitsubishi I*, 22 CIT at 339 nn.6 & 7, 5 F. Supp. 2d at 1005 nn.6 & 7. Nowhere in *Mitsubishi I* is it indicated that Customs either advocated or adopted these definitions. *See generally id.*

[11] Section XVI note 3 provides:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

Chapter 84 note 2 provides, in relevant part:

> Subject to the operation of note 3 to section XVI, a machine or appliance which answers to a description in one or more of the headings 8401 to 8424 and at the same time to a description in one or more of the headings 8425 to 8480 is to be classified under the appropriate heading of the former group and not the latter. . . .

I, 22 CIT at 341, 5 F. Supp. 2d at 1007. A review of chapter 84 shows that none of the headings describe this primary function and, therefore, pursuant to note 7, the chip placers are properly classified under heading 8479. The fact that the chip placers are to be classified under heading 8479 does not conclude the classification process, however, as there are several subheadings within that heading. *Rollerblade*, 112 F.3d at 484; *see Diachem Indus., Ltd., v. United States*, 22 CIT 889, 893 (1998) (citing *Alcan Aluminium Corp. v. United States*, 21 CIT 1238, 986 F. Supp. 1436, 1443 (1998), *rev'd on other grounds*, 165 F.3d 898 (Fed. Cir. 1999)) ("If the chapter notes and headings are dispostitive, the Court need not engage in the analysis of subordinate rules and other interpretation."). Pursuant the General Rules of Interpretation:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

GRI 6. A review of heading 8479 shows that none of the terms of the subheadings describe the chip placers or their primary function, and, therefore, classification of the subject merchandise under the "other" subheading of 8479.89.9797 is proper.

For all the foregoing reasons, the Court finds that chip placers are not "lifting, handling loading or unloading machinery" that can be classified under heading 8428 but are, rather, "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter . . ." that are properly classified under heading 8479.

B

The Court next turns to the classification of the feeders. Plaintiff argues that the feeders should be classified under heading 8431, which covers "Parts suitable for use solely or principally with the machinery of heading 8425 to 8430. . . ." *See* Pl.'s Mem. at 33. In response, defendant argues that classification of the feeders under heading 8431 is inappropriate "inasmuch as the machine of which these feeders are parts of is not a Heading 8428 machine." Def.'s Mem. at 22. The Court agrees that classification of the feeders within heading 8431 is not appropriate as they are not "parts" of a machine of one of the headings listed therein.

The question then becomes the proper classification of the feeders. Defendant argues that Customs' classification of the feeders under the same subheading as the chip placers—8479.89—was proper. *See*

Def.'s Mem. at 22. The Court does not agree. As a preliminary matter, while the parties differ as to the precise characterization of the feeders (*i.e.*, whether or not they perform an inseparable function of the chip placers, *see* DRPF, sec. 2, para. 8; Pl.'s Reply to DRPF, sec. 2, para. 8), they agree that the feeders are "parts" to be used with the chip placers. *See* Pl.'s Mem. at 33 (citing *Bauerhin Techs. Ltd v. United States*, 110 F.3d 774 (Fed. Cir. 1997)); Def.'s Mem. at 22 (citing section XVI note 2(a)). Thus, to properly classify these "parts," the Court turns to the HTSUS notes for guidance. GRI 1; *Mitsubishi II*, 182 F.3d at 886. The section notes provide, in relevant part:

> [P]arts of machines . . . are to be classified according to the following rules:
>
> > (a) Parts which are goods included in any of the headings of chapters 84 and 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8485, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
> >
> > (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate. . . .

Section XVI note 2. Defendant argues that section note 2(a) is controlling because the feeders are machines that can perform their function independently from the chip placers. *See* Def.'s Facts, para. 14 (citing Def.'s Resp. to Pl.'s Interrogs.; Aff. of David Losche) ("The function of feeding, which is performed by the Feeders[,] is separate from the function of mounting electrical components onto a printed circuit board, which is performed by the Chip Placers."). In contrast, plaintiff argues that section note 2(b) is controlling because the feeders' design and function is inexorably intertwined with that of the chip placers. *See* PRDF, para. 14 ("[A]vers that, the Chip Placers cannot operate without having components in place. The components are supplied to the chip placer by feeders in a manner that allows the Chip Placer to function as designed."). Plaintiff contends that, following Court of Appeals for the Federal Circuit precedent, the feeders should be considered integral "parts" of the chip placers. Pl.'s Br. In Reply to Def.'s Opp'n to Pl.'s Mot. for Summ. J. and Def.'s Cross-Mot. for Summ. J. ("Pl.'s Reply") at 28 (citing *Bauerhin Techs. Ltd. P'ship v. United States*, 110 F.3d 774 (1997) ("*Bauerhin*")). As pointed out by plaintiff, in *Bauerhin* the Court of Appeals for the Federal Circuit stated that "an imported item dedicated solely for use with another article is a 'part' of that article within the meaning of the HTSUS." *Bauerhin*, 110 F.3d at 779 (citing *United States v.*

Pompeo, 43 CCPA 9 (1955)). Here, plaintiff explains that the feeders are "solely" designed to be used with the chip placers because

> the motor feeders and power feeders are specially designed to attach to a Chip Placer and communicate with its programmable controller in order to synchronize operation with the Chip Placer exclusively.
>
> These feeders cannot be sold for use with any other machine, and more importantly, perform no function other than to feed parts to a Chip Placer. The feeders are not general equipment which could be sold independently for use with other machines.

Pl.'s Reply at 29 (citing Suppl. Wischoffer Aff., ¶ 10); *see also* Video at 9:54:58–:55:29; 10:01:24–:02:30; 10:10:14–:16:12 (explaining function of feeders). The Court agrees that the feeders are integral parts of chip placers because they are "an imported item dedicated solely for use with another article. . . ." *Bauerhin*, 110 F.3d at 779. Therefore, as they are "suitable for use solely or principally with a particular kind of machine . . . ," the feeders "are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate." Section XVI note 2(b). Because the feeders cannot be classified under heading 8431 as parts of machines of heading 8428, and as no other heading describes the feeders, they are, thus, properly classified under the same heading as the chip placers—8479. As previously noted, heading 8479 is divided into several subheadings and, therefore, consideration of each is necessary. GRI 6; *see Rollerblade*, 112 F.3d at 484 (stating it is the Court's duty "to 'reach the correct decision in classification cases. . . .' "). An examination of the subheadings of heading 8479 shows that subheading 8479.90 specifically provides for the classification of "parts."[12] A further review of subheading 8479.90 shows that classification of the feeders is not specifically provided for therein and, therefore, they are properly classified under subheading 8479.90.9595 as "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof . . . Parts . . . Other. . . ."[13] The Court, therefore, denies both plaintiff's and defendant's motion for summary judgment as to the classification of the feeders, and finds that they are properly

---

[12] While neither alleged in its complaint nor argued in its papers, plaintiff, by its summons, raises the possibility that the feeders are properly classified under subheading 8479.90. *See* summons. Indeed, plaintiff identified 8479.90 as the proper subheading for classification of the feeders in its entry papers. *See* HRL965394 (Sept. 10, 2002).

[13] Because defendant agrees that the feeders are "parts" of the chip placers, and since subheading 8479.90 specifically provides for the classification of "parts," classification of the feeders under precisely the same subheading as the chip placers—8479.89—is not proper. *See Rollerblade*, 112 F.3d at 484.

classified under HTSUS subheading 8479.90.9595. *Rollerblade*, 112 F.3d at 484.

Conclusion

For all the foregoing reasons, the Court finds that the chip placers are properly classified under HTSUS subheading 8479.89.9797 as "Machines and mechanical appliances having individual functions, not specified or included elsewhere in this chapter; parts thereof . . . Other machines and mechanical appliances . . . Other: Electromechanical appliances with self-contained electric motor . . . Other . . . Other . . . Other . . . ," and that the feeders are properly classified under HTSUS subheading 8479.90.9595 as "parts" of such machines. Judgment shall enter accordingly.

Slip Op. 06–117

ROYAL THAI GOVERNMENT, ET AL., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORP., Defendant-Intervenor.

Before: Richard W. Goldberg,
Senior Judge
Consol. Court No. 02–00026

OPINION

[Motions for reconsideration granted. Commerce's final affirmative countervailing duty determination remanded with instructions.]

Date: July 26, 2006

Willkie Farr & Gallagher LLP (*Kenneth J. Pierce*, *Robert Edward DeFrancesco*, and *Victor S. Mroczka*) for Plaintiffs the Royal Thai Government and Sahaviriya Steel Industries Public Company Limited.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Patricia M. McCarthy*); *Mykhaylo A. Gryzlov*, International Attorney-Advisor, Office of the Chief Counsel for the Import Administration, United States Department of Commerce, for Defendant United States.

Skadden, Arps, Slate, Meagher & Flom LLP (*John J. Mangan*) for Defendant-Intervenor United States Steel Corporation.

Goldberg, Senior Judge: In *Royal Thai Government v. United States*, 436 F.3d 1330 (Fed. Cir. 2006) (**"*Royal Thai II*"**), the United States Court of Appeals for the Federal Circuit (the **"Federal Circuit"**) remanded this case for further proceedings following that court's reversal-in-part of *Royal Thai Government v. United States*, 28 CIT ____ , 341 F. Supp. 2d 1315 (2004) (**"*Royal Thai I*"**), familiarity with which is presumed. Pending before the Court are motions for reconsideration which seek review of two issues previously considered moot as a result of a now overturned holding in *Royal Thai I*. The Court has jurisdiction over this case pursuant to 28 U.S.C. § 1581(c).

I. *BACKGROUND*

In *Royal Thai I*, the Court reviewed the final affirmative countervailing duty determination made by the U.S. Department of Commerce (**"Commerce"**) with respect to certain hot-rolled carbon steel flat products from Thailand (**"subject imports"**). *See Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 50410 (Dep't Commerce Oct. 3, 2001) (final determination) (**"*Final Determination*"**); Issues and Decision Memorandum in the Final Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, C–549–818 (Sept. 21, 2001), *available at* http://ia.ita.doc.gov/frn/summary/thailand/01-24753-1.txt (**"Decision Memo"**).

The Court affirmed Commerce's decision not to countervail a debt restructuring program administered by Plaintiff the Royal Thai Government (**"RTG"**), as well as Commerce's decision not to investigate alleged equity infusions in Plaintiff Sahaviriya Steel Industries Public Company Limited (**"SSI"**) made by RTG. *Royal Thai I*, 28 CIT at ____ , 341 F. Supp. 2d at 1317–23. However, the Court reversed Commerce's decision to countervail the entire amount of duty exemptions, or drawbacks, provided by RTG for SSI's imports of steel slab used as the sole raw material in the manufacture of hot-rolled steel coil for export. *See id.* at ____ , 341 F. Supp. 2d at 1323–26. As a result of this holding, the countervailing duty rate applicable to SSI was rendered *de minimis* and, accordingly, the Court instructed Commerce to find that no countervailable subsidies were provided to SSI. *See id.* at ____ , 341 F. Supp. 2d at 1326–27. Also as a result of this holding, the Court declined to address two additional issues raised by the parties with respect to (1) the sustainability of Commerce's determination that SSI (and its subsidiary, Prachuab Port Company (**"PPC"**)) received a countervailable regional subsidy from RTG through the provision of electricity at less than adequate remuneration and (2) the appropriate benchmark to be used in calculating the alleged countervailable benefit received from the imported steel slab duty exemptions. *See id.* at ____ , 341 F. Supp. 2d at 1326. The Court reasoned that these issues had been rendered moot by the calculation of a *de minimis* countervailing duty rate and the corresponding, legally-compelled finding that no countervailable subsidies were provided to SSI.[1] *Id.*

---

[1] That is, with respect to issue (1), it was unnecessary to review Commerce's decision to countervail the provision of electricity because, even if the provision of electricity was

On appeal, however, the Federal Circuit reversed this Court's holding with respect to RTG's provision of duty exemptions to SSI for steel slab imports. *Royal Thai II*, 436 F.3d at 1339–41. The Federal Circuit instead upheld Commerce's decision to countervail the entire amount of these import duty exemptions received by SSI. *Id.* In light of this reversal, the Federal Circuit remanded the case for this Court to conduct further proceedings consistent with *Royal Thai II*.

Shortly thereafter, on March 20, 2006, Plaintiffs RTG and SSI filed a motion for reconsideration, requesting that the Court reexamine their claim that Commerce erroneously concluded that SSI received a countervailable regional subsidy from RTG through the provision of electricity at less than adequate remuneration. On April 20, 2006, Defendant-Intervenor United States Steel Corporation (**"U.S. Steel"**) filed a second motion for reconsideration, requesting that the Court also reassess its claim that Commerce had selected an incorrect benchmark when calculating the countervailable benefit received by SSI from the steel slab duty exemptions. This case is now properly[2] before the Court upon Plaintiffs' and Defendant-Intervenor's motions, consolidated for purposes of this opinion.

II. *STANDARD OF REVIEW*

With respect to the motions for reconsideration, the Court will not exercise its discretion to disturb a previous decision unless it is "manifestly erroneous." *Former Employees of Quality Fabricating, Inc. v. United States*, 28 CIT ____ , ____ , 353 F. Supp. 2d 1284, 1288 (2004) (quotation marks omitted). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Doe v. New York City Dep't of Social Servs.*, 709 F.2d 782, 789 (2d Cir. 1983) (quotation marks omitted).

With respect to the underlying *Final Determination*, the Court must uphold a determination made by Commerce if it is supported by substantial evidence and otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B)(i) (1999). Concerning the substantial evidence requirement, the U.S. Supreme Court has defined this term to mean "such relevant evidence as a reasonable mind might accept as

---

countervailable, the resulting cumulative countervailing duty rate would still be *de minimis* and thus non-actionable under U.S. countervailing duty law. With respect to issue (2), it was unnecessary to resolve the dispute concerning the appropriate calculation of the benefit received from the imported steel slab duty exemptions, since the Court determined that these exemptions were not countervailable.

[2] As Defendant the United States ("**U.S.**") correctly notes, the Court was initially without jurisdiction to consider Plaintiffs' motion. The motion was filed seven days before the issuance of the Federal Circuit's mandate in this case – the date upon which this Court regained jurisdiction. *See Tronzo v. Biomet, Inc.*, 318 F.3d 1378, 1380 (Fed. Cir. 2003) ("[T]he district court regains jurisdiction when the appellate mandate issues."). The Court now possesses jurisdiction to consider Plaintiffs' motion.

adequate to support a conclusion," taking into account the record as a whole. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (*quoting Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). It requires "more than a mere scintilla" but is satisfied by "something less than the weight of the evidence. . . ." *Luoyang Bearing Factory v. United States*, 27 CIT ____ , ____ , 288 F. Supp. 2d 1369, 1370 (2003).

III. *DISCUSSION*

A. The Motions for Reconsideration Are Well-Founded in Light of the Federal Circuit's Decision in *Royal Thai II*

Plaintiffs' and Defendant-Intervenor's unopposed motions both argue that the Federal Circuit's reversal of a key holding in *Royal Thai I* had the effect of resurrecting two issues in this case which were previously considered moot.

The Court agrees. Because Commerce's decision to countervail the entire amount of the import duty exemptions received by SSI has been sustained by the Federal Circuit, the Court can no longer say with certainty that SSI's countervailing duty rate is *de minimis*. Rather, if sustained, Commerce's decision to countervail RTG's provision of electricity to SSI would result in a combined countervailing duty rate of 2.38 percent. This exceeds the two percent *de minimis* (and thus non-actionable) rate afforded developing countries like Thailand under U.S. countervailing duty law. *See* 19 U.S.C. § 1671b(b)(4)(B) (1999); *Developing and Least-Developed Country Designations under the Countervailing Duty Law*, 63 Fed. Reg. 29945, 29948 (USTR June 2, 1998) (interim final rule). In addition, SSI's countervailing duty rate could be increased even more if, as contended by U.S. Steel, Commerce erred in its calculation of the benefit received by SSI with respect to the steel slab import duty exemptions.

As such, it is clear that, in light of the intervening decision in *Royal Thai II*, it is "manifestly erroneous" to view the issues raised by Plaintiffs and Defendant-Intervenor in their respective motions as moot. *Former Employees of Quality Fabricating*, 28 CIT at ____ , 353 F. Supp. 2d at 1288. The motions for reconsideration are therefore granted and the Court now proceeds to its substantive analysis of these two issues.

B. With Regard to Plaintiffs' Claim, Commerce's Decision to Countervail RTG's Provision of Electricity to SSI Is Supported by Substantial Evidence and in Accordance with Law

During the period of investigation, the provision of electricity to residential and commercial consumers in Thailand was largely controlled by RTG through various government entities. Decision Memo at 11. The National Energy Policy Council developed electricity rate-setting policy, which was then implemented by the National Energy Policy Office (**"NEPO"**). NEPO accomplished its mission through three additional RTG authorities: (1) the Electricity Generating Authority of Thailand (**"EGAT"**), which was responsible for generation and transmission; (2) the Metropolitan Electricity Authority (**"MEA"**), which was responsible for distribution in and around Bangkok; and (3) the Provincial Electricity Authority (**"PEA"**), which was responsible for distribution in the remainder of Thailand. *Id.* PEA's delivery costs were higher than MEA's. *Id.* at 12. Nonetheless, "RTG maintain[ed] a 'uniform national tariff policy' which provide[d] that consumers in the same customer category [paid] the same rate regardless of whether they [were] in MEA's distribution area or PEA's distribution area." *Id.* at 11. In order to implement this uniform tariff policy, EGAT gave a discount to PEA and applied a surcharge to MEA for their respective electricity purchases (the **"internal cross-subsidy"**). *Id.* at 12.

In the *Final Determination*, Commerce concluded that SSI's receipt of electricity from PEA under RTG's uniform tariff policy constituted a countervailable subsidy. *Final Determination*, 66 Fed. Reg. at 50412. To reach this conclusion, Commerce found that the statutory criteria establishing the existence of a countervailable subsidy had been met: (1) a financial contribution was provided by a government entity (19 U.S.C. § 1677(5)(B)(i)); (2) the financial contribution was specific to an enterprise or industry (19 U.S.C. § 1677(5A)(D)); and (3) the financial contribution resulted in a benefit to its recipient (19 U.S.C. § 1677(5)(B)). *See* Decision Memo at 13–16.

Plaintiffs argue that Commerce's determination with respect to each of these criteria was flawed. For the reasons set forth below, the Court upholds this aspect of the *Final Determination*.

1. Commerce Reasonably Determined that RTG's Provision of Electricity to SSI Constituted a Potentially Countervailable Financial Contribution and Not "General Infrastructure"

Plaintiffs initially contend that Commerce erred in finding that RTG's provision of electricity to SSI constituted a potentially countervailable financial contribution. Plaintiffs' Memorandum in Support of Motion for Judgment on the Agency Record (**"Pls.' Br."**) at 21. Instead, Plaintiffs insist that the governmental provision of electricity to SSI properly should have been considered "general infrastructure," and therefore exempt from U.S. countervailing duty law. *Id.* at 22 (*quoting* 19 U.S.C. § 1677(5)(D)(iii)). Plaintiffs advance three arguments in support of this position. First, Plaintiffs argue that Commerce's past practice, authoritative sources, and common sense dictate that the provision of electricity is infrastructure. *Id.* at 22–25. Second, Plaintiffs argue that the record evidence demonstrates that RTG's provision of electricity to SSI was clearly undertaken to benefit the "public welfare," the standard employed by Commerce to identify non-countervailable general infrastructure. *Id.* at 26 (*quoting Countervailing Duties*, 63 Fed. Reg. 65348, 65378 (Dep't Commerce Nov. 25, 1998) (final rule) (**"*CVD Preamble*"**)). Third, Plaintiffs argue that nothing in the *CVD Preamble*, the countervailing duty regulations,[3] or past court cases concerning electricity preclude a finding that the provision of electricity may constitute general infrastructure. *Id.* at 27–30.

The Court finds that Commerce reasonably considered RTG's provision of electricity to SSI to be a potentially countervailable financial contribution and not general infrastructure. "General infrastructure" is a term of art in U.S. countervailing duty law. The relevant statute directs that goods or services which constitute general infrastructure may not be countervailed. *See* 19 U.S.C. § 1677(5)(D)(iii)(1999). Commerce has interpreted this statutory language to encompass "infrastructure that is created for the broad societal welfare of a country, region, state or municipality." 19 C.F.R. § 351.511(d) (2006). Commerce elaborated on this interpretation by noting that "the type of infrastructure *per se* is not dispositive of whether the government provision constitutes 'general infrastructure.' Rather, the key issue is whether the infrastructure is developed for the benefit of society as a whole." *CVD Preamble*, 63 Fed. Reg. at 65378. Commerce refers to this analysis as the "public welfare concept." *Id.* Plaintiffs do not dispute the reasonableness of Commerce's methodological approach to identifying general infrastructure for purposes of 19 U.S.C. § 1677(5)(D)(iii); rather, they contend that Commerce misapplied the public welfare concept to the facts of this case.

However, even assuming *arguendo* that RTG's provision of electricity was necessarily infrastructure (as urged by Plaintiffs), substantial evidence supports Commerce's conclusion that it was not "general infrastructure" under U.S. countervailing duty law. Commerce verified that RTG's uniform tariff policy was intended to serve three purposes: (1) provide electricity to low-income consumers; (2) ensure rural electrification; and (3) promote economic activity outside of the congested Bangkok metropolitan area. Decision Memo at 36–37. Although these three purposes could be fairly characterized as "broad social goals," *id.* at 35, Commerce reasonably found that they nonetheless did not satisfy the public welfare concept. On their face, the purposes underlying the uniform tariff policy did not "benefit society as a whole," *CVD Preamble*, 63 Fed. Reg. at 65378, but instead primarily benefited only a portion of Thai society. While it perhaps could be argued that these purposes, if fulfilled, would have bestowed a residual benefit to the greater Thai society, there was no

---

[3] References to the countervailing duty regulations are to 19 C.F.R. § 351.101 *et seq.*

record evidence supporting such speculation about the attenuated effects of the uniform tariff policy.

In addition, it is noteworthy that the alleged infrastructure at issue here was the electricity itself and "not the physical plant associated with the generation, transmission and distribution of the electricity." Decision Memo at 35. This is an important distinction. Commerce generally views electricity facilities – but not their issue – as constituting general infrastructure. *See Bethlehem Steel Corp. v. United States*, 26 CIT 1003, 1011, 223 F. Supp. 2d 1372, 1379 (2002) (upholding Commerce's finding of no financial contribution from electricity facilities constituting general infrastructure). This is because an electric power facility or distribution grid is used repeatedly by the entire consuming public; in contrast, once used by a single consumer, a kilowatt of electricity is gone forever. Plaintiffs counter that, for each kilowatt of electricity charged by RTG through PEA, SSI paid a pro rata portion of the costs associated with maintaining the electricity facilities. Pls.' Br. at 25. Plaintiffs essentially argue that this overhead charge included in the electricity's price transformed the electricity into general infrastructure. In the Court's view, this factor alone cannot support a finding of general infrastructure. After all, a certain amount of overhead is included in the price of virtually every good or service available to consumers. It is difficult to imagine a government's provision of goods or services which could not be connected to recognized general infrastructure, however marginally, through overhead charges. Because Plaintiffs' position would eviscerate Commerce's public welfare concept and the underlying statutory directive, the Court finds it unpersuasive. Viewed in this light, Commerce's decision to consider RTG's provision of electricity to SSI as non-general infrastructure is reasonable.

Moreover, as noted briefly *supra*, Commerce's decision is consistent with the agency's past practice. Since the passage of the Uruguay Round Agreements Act (**"URAA"**), from which the existing definition of financial contribution derives, Commerce has uniformly viewed the provision of electricity as a financial contribution, subject to specificity and benefit analysis to determine actual countervailability. *See, e.g., Stainless Steel Sheet and Strip in Coils from the Republic of Korea*, 69 Fed. Reg. 2113, 2116 (Dep't Commerce Jan. 14, 2004) (final determination); *Steel Wire Rod from Venezuela*, 62 Fed. Reg. 55014, 55021–22 (Dep't Commerce Oct. 22, 1997) (final determination); *Steel Wire Rod from Trinidad and Tobago*, 62 Fed. Reg. 55003, 55006–07 (Dep't Commerce Oct. 22, 1997) (final determination). This is in keeping with Commerce's pre-URAA practice. *See, e.g., Oil Country Tubular Goods from Argentina*, 62 Fed. Reg. 32307, 32309–11 (Dep't Commerce June 13, 1997) (preliminary determination); *Certain Steel Products from Spain*, 58 Fed. Reg. 37374, 37380–81 (Dep't Commerce July 9, 1993) (final determination); *Fer-*

rosilicon from Venezuela, 58 Fed. Reg. 27539, 27539–40 (Dep't Commerce May 10, 1993) (final determination).[4]

Nonetheless, Plaintiffs argue that nothing in these and other sources necessarily *precludes* a finding of general infrastructure with respect to the provision of electricity. Unfortunately for Plaintiffs, this observation, even if true, is of no moment. Plaintiffs' burden as movant requires more than a showing that their desired alternative to Commerce's determination is theoretically permissible under existing law. Rather, Plaintiffs must demonstrate that Commerce's determination is actively contrary to that law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1999). Plaintiffs have not met that burden here.

Accordingly, the Court upholds Commerce's determination that RTG's provision of electricity to SSI constituted a potentially countervailable financial contribution as in accordance with law and supported by substantial evidence.

2. Commerce Reasonably Determined That RTG's Provision of Electricity Satisfied the Requirements of Regional Specificity

Plaintiffs next contend that Commerce erred in finding that RTG's provision of electricity was specific to SSI as required by 19 U.S.C. § 1677(5)(A) to establish countervailability. Pls.' Br. at 30. In particular, Plaintiffs claim that the requirements of regional specificity, a sub-set of specificity analysis under U.S. countervailing duty law, were not met in this case. *Id*. Plaintiffs argue that RTG's provision of electricity under the uniform tariff policy was plainly not "limited to an enterprise or industry located within a designated geographical region" in Thailand, the statutory standard for a finding of regional specificity. *Id*. at 30–31 (*quoting* 19 U.S.C. § 1677(5A)(D)(iv) (1999)). Rather, Plaintiffs insist that "regional specificity cannot exist" here because the uniform tariff policy ensured that "[i]ndustrial companies in the same customer categories located anywhere in Thailand [paid] the same electricity rates." Pls.' Br. at 31.

The Court finds that Commerce reasonably determined that RTG's provision of electricity satisfied the requirements of regional specificity. Indeed, Plaintiffs' own argument reveals why a finding of regional specificity is justified here. As noted *supra*, Commerce verified (and Plaintiffs do not contest) that the cost of distributing electricity in PEA's distribution area was higher than the cost of distributing

---

[4] It is noteworthy that the Statement of Administrative Action ("**SAA**") accompanying the URAA indicated that the new definition of financial contribution was intended to "encompass the types of subsidy programs generally countervailed by Commerce in the past." SAA, H.R. Doc. No. 103–465, at 927 (1994), *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4240, 1994 WL 761793. Congress has mandated that the SAA "shall be regarded as an authoritative expression by the United States concerning the interpretation and application of . . . [the URAA] in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d) (2005).

electricity in MEA's distribution area. Nonetheless, PEA-serviced companies paid the same electricity rates as their MEA analogs. As a result, PEA-serviced companies had access to something MEA-serviced companies did not: relatively cheaper electricity than RTG's costs otherwise dictated. Access to this relatively cheaper electricity was expressly contingent upon only one factor: a company's regional location within Thailand. As such, it was regionally specific.[5] Plaintiffs are therefore correct that "[i]f one producer subject to an investigation is located within the PEA region and another is in the MEA region, only the one in the PEA region will be countervailed even though both are paying the exact same rate for electricity." Pls.' Br. at 31–32. However, this result is not "absurd," *id.* at 32; to the contrary, it is the logical outcome of regional specificity analysis under the facts of this case.

Accordingly, the Court upholds Commerce's determination that RTG's provision of electricity to SSI satisfies the requirements of regional specificity as in accordance with law and supported by substantial evidence.

3. Commerce Reasonably Determined that RTG's Provision of Electricity to SSI Conferred a Countervailable Benefit in the Amount Calculated in the *Final Determination*

Plaintiffs next contend that Commerce erred both in its finding that RTG's provision of electricity to SSI conferred a countervailable benefit and in its calculation of that benefit. Pls.' Br. at 32–45. In support of this position, Plaintiffs make two principal arguments, discussed separately below.

a. Commerce Reasonably Found that RTG Did Not Receive Adequate Remuneration for Its Provision of Electricity to SSI

First, Plaintiffs argue that Commerce erred in finding that RTG provided electricity to SSI for less than adequate remuneration, as required by 19 C.F.R. § 351.511 to establish receipt of a countervailable benefit. *Id.* at 32. Plaintiffs contend that, to the contrary, record evidence demonstrated that (1) RTG's price-setting philosophy was based on market principles; (2) the electricity rates applicable to SSI and its subsidiary, PPC, were in excess of market-based costs; and (3) PEA made a significant operating profit in 1999. *Id.* at 32–39. Plaintiffs argue that this evidence made clear that RTG did in fact

---

[5] The Court notes that no additional showing of specificity as to SSI is required under U.S. countervailing duty law because "subsidies provided by a central government to particular regions (including a province or a state) are specific regardless of the degree of availability or use within the region." SAA, H.R. Doc. No. 103–465 at 932, 1994 U.S.C.C.A.N. at 4244.

receive adequate remuneration from SSI and, consequently, did not confer a countervailable benefit by the provision of electricity. *Id.*

The Court finds that Commerce reasonably determined that RTG provided electricity to SSI for less than adequate remuneration. Pursuant to 19 U.S.C. § 1677(5)(E)(iv), "less than adequate remuneration" is the standard used by Commerce to measure the amount of countervailable benefit, if any, conferred by a specific financial contribution consisting of goods or services. *See* 19 U.S.C. § 1677(5)(E)(iv) (1999); 19 C.F.R. § 351.511(a)(1) (2006). To determine the adequacy of remuneration of an investigated good or service, Commerce prefers to compare the government price to available country-specific or world market prices. *See* 19 C.F.R. § 351.511(a)(2)(i)–(ii) (2006). However, when such prices are unavailable, Commerce will resort to an assessment of "whether the government price is consistent with market principles." *Id.* § 351.511(a)(2)(iii). This "market principles" analysis is an examination "of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination." *CVD Preamble*, 63 Fed. Reg. at 65378. In this case, Commerce concluded that the nature of Thailand's electricity market necessitated recourse to market principles analysis. *See* Decision Memo at 14. Plaintiffs do not dispute this methodological choice; rather, they contend that Commerce misapplied market principles analysis to the facts of this case.

However, substantial evidence supports Commerce's conclusion that the rate set by RTG for the provision of electricity to SSI was not consistent with market principles. In the *Final Determination*, Commerce conceded Plaintiffs' first argument – that, on its face, pricing under RTG's uniform tariff policy appeared to have been set in accordance with market principles. Decision Memo at 14. This was because RTG (through NEPO) required that the electricity rates underlying the uniform tariff policy be sufficient to cover the marginal costs of EGAT, MEA, and PEA, as well as meet specified financial criteria for each of these entities (i.e., a minimum self-financing ratio, a maximum debt-to-equity ratio, and a minimum debt-service coverage ratio). *Id.* At verification, Commerce asked RTG officials to document that this market-based pricing philosophy had in fact been implemented – i.e., to provide the most recent analysis of whether the electricity rates were sufficient to cover marginal costs and meet the specified financial criteria. *Id.* This was a reasonable request for Commerce to make during verification. *See Bomont Indus. v. United States*, 14 CIT 208, 209, 733 F. Supp. 1507, 1508 (1990) (noting that "verification is like an audit, the purpose of which is to test information provided by a party for accuracy and completeness").[6] Surpris-

---

[6] Indeed, Plaintiffs admit that "these information requests were not necessarily unreasonable." Pls.' Br. at 42.

ingly, RTG officials informed Commerce that copies of this important analysis were not retained. Decision Memo at 14.

Instead, RTG sought to rely on a previously submitted report prepared by PricewaterhouseCoopers (**"PWC"**) which allegedly demonstrated that customers in the same categories as SSI and PPC generated revenues well in excess of marginal costs. *Id.* at 37. Although Commerce considered this report, the agency found that it was not "probative of whether the RTG, through PEA, [received] adequate remuneration for the electricity sold in the region" because "PWC did not examine the issue of what rates PEA should or would charge to any of its customer classes in the absence of [the internal cross-subsidy.]" *Id.* at 38–39. Indeed, Commerce found that RTG expressly required PWC to assume the continuation of the internal cross-subsidy in its review of the electricity rates. *Id.* at 38. In the Court's view, Commerce reasonably discounted the probative value of the PWC report because it assumed the very issue which lies at the heart of the market principles analysis in this case: whether, absent the internal cross-subsidy, PEA was able to cover its marginal costs and meet RTG's own specified financial criteria.[7]

In contrast, Commerce reasonably found highly probative a different report, issued directly by NEPO, which stated that "the financial transfers from the MEA to the PEA are . . . essential so that the financial status of the two utilities would meet the specified criteria." Decision Memo at 39 (*quoting* NEPO report at 23). Like Commerce, the Court views this admission by RTG as supporting the conclusion that, without the internal cross-subsidy, PEA could not have satisfied the market principles ostensibly underlying the uniform tariff policy. *See id.* Plaintiffs attempt to rebut this evidence by noting that PEA's financial reports paint a different picture – that PEA actually turned a profit in 1999 even without the internal cross-subsidy.[8] Pls.' Br. at 38. However, Commerce was not able to determine the accuracy of this financial information at verification due to chronic inconsistencies in the data presented and its late submission.[9] *See* App. to

---

[7] Because of the assumed continuation of the internal cross-subsidy, the PWC report did not distinguish between customers located in the PEA and MEA distribution areas. As a result, PWC's statement (reflected in the NEPO report) that "[customers in SSI and PPC's pricing categories] will generally pay for electricity in excess of the marginal costs" cannot be taken to mean, as Plaintiffs insist, that SSI, PPC, or any other customer in the PEA distribution area necessarily overpaid for the provision of electricity. App. to Pls.' Br., App. 9 (RTG Questionnaire Response dated Feb. 7, 2001), Ex. J–8 at 13. Despite Plaintiffs' assertions to the contrary, the Court finds that the PWC report simply does not allow for this level of analytical precision.

[8] It is noteworthy that Plaintiffs' observation is true only if PEA's financials are adjusted to exclude foreign exchange losses recognized in 1999. Pls.' Br. at 38. Like Commerce, the Court is not fully convinced that such an adjustment is appropriate in evaluating PEA's financial status for purposes of market principles analysis in this case. *See* Decision Memo at 40. Nevertheless, the Court need not resolve this dispute in order to dispose of this issue.

[9] Plaintiffs argue that Commerce should have provided additional time for RTG's non-

Pls.' Br., App. 5 (RTG Verification Report dated Aug. 17, 2001) at 17. Undaunted, Plaintiffs note that Commerce was able to at least verify the fact that PEA was required to pay a large remittance to RTG's Ministry of Finance in 1999, which Plaintiffs contend was a clear demonstration that PEA in fact made a profit for that year. Pls.' Br. at 38. However, the record evidence does not demonstrate that this remittance was at all related to PEA's relative profitability. Although expressly provided the opportunity by Commerce to make this point with respect to profitability during verification, RTG officials "did not elaborate on the reasoning" behind PEA's remittance. App. to Pls.' Br., App. 5 (RTG Verification Report dated Aug. 17, 2001) at 14. As such, this evidence fails to rebut Commerce's conclusion that the internal cross-subsidy was necessary for PEA to meet RTG's specified financial criteria.

Nonetheless, Plaintiffs contend that, even if the internal cross-subsidy was necessary, record evidence demonstrates that this was true only because of the high costs associated with servicing agricultural and rural consumers (i.e., not consumers in SSI and PPC's customer categories). Pls.' Br. at 36 n.129, 37. Plaintiffs argue that the adequacy of remuneration should be judged on the government costs and prices involved in providing electricity to the particular customer categories associated with the investigated companies. *Id.*

Anglophone officials to respond to Commerce's allegedly confusing information requests concerning the electricity authorities' finances. *See* Pls.' Br. at 42. However, the Court finds nothing unusually complicated or confusing about the conduct of verification here. Commerce's verification outline and preliminary determination in this case clearly put Plaintiffs on notice of the importance of the operation of the internal cross-subsidy to Commerce's analysis of the adequacy of remuneration. *See Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 20251, 20259–60 (Dep't Commerce Apr. 20, 2001) (preliminary determination). Even if Plaintiffs were not fully prepared for Commerce's specific information requests, Commerce afforded Plaintiffs multiple opportunities during verification to produce the requested information. Plaintiffs were unable to do so, notwithstanding the fact that this information was very similar to analyses regularly performed by RTG. Under these circumstances, Commerce did not err by refusing to allow Plaintiffs to submit additional financial information after verification. Although Commerce's regulations provide that "factual information requested by the verifying officials from a person normally will be due no later than seven days after the date on which the verification of that person is completed," 19 C.F.R. § 351.301(b)(1) (2006), Commerce is also statutorily mandated to verify all information relied upon in a final determination. *See* 19 U.S.C. § 1677m(i)(1) (1999). Read together, these requirements mean that Commerce may consider information received after verification only when it corroborates, reinforces, explains, or expands on already verified questionnaire responses or other data. The post-verification information offered by Plaintiffs failed to meet this standard, as Commerce was consistently unable to confirm the electricity authorities' finances during verification. Although it was within Commerce's discretion to extend the time limit of verification, *see Fujian Mach. & Equip. Imp. & Exp. Corp. v. United States*, 25 CIT 1150, 1161, 178 F. Supp. 2d 1305, 1319 (2001), Commerce was under no obligation to do so here because the agency had already "give[n] respondents a reasonable opportunity to participate in the review and verification process." *Id.* (quotation marks omitted); *see also Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT _____ , _____ , 353 F. Supp. 2d 1294, 1303–1304 (2004) (noting Commerce's discretion in "forc[ing] parties to submit information within a specified time frame in the interests of fairness and efficiency").

This is a correct statement of the law and Commerce's past practice, *see, e.g.*, *Carbon and Certain Alloy Steel Wire Rod from Trinidad and Tobago*, 67 Fed. Reg. 6001, 6008 (Dep't Commerce Feb. 8, 2002) (preliminary determination); *Steel Wire Rod from Venezuela*, 62 Fed. Reg. at 55021–22; however, Commerce's ability to make such a particularized determination may be limited by the information uncovered during an investigation. As noted *supra*, despite multiple requests, Commerce was not able to verify here the true costs associated with servicing companies like SSI and PPC absent the internal cross-subsidy. Moreover, at verification, Commerce took the extra step of exploring this line of analysis in a non-quantitative manner, asking RTG to simply explain why the uniform tariff policy applied to consumers like SSI and PPC if its purpose was to ensure the provision of electricity to underserved agricultural and rural consumers. RTG officials responded that "the goal was also to promote economic activity outside of the Bangkok area." App. to Pls.' Br., App. 5 (RTG Verification Report dated Aug. 17, 2001) at 15. Based on this telling response and the other factual findings noted *supra*, Commerce concluded that RTG had given social criteria precedence over market principles, resulting in the receipt of less than adequate remuneration from PEA-serviced companies like SSI and PPC.[10] *See* Decision Memo at 38. There is ample evidentiary support for this conclusion and, accordingly, the Court finds no error here by Commerce.[11]

b. Commerce Properly Calculated the Countervailable Benefit Conferred on SSI by RTG's Provision of Electricity

Finally, Plaintiffs argue that Commerce erred in its calculation of the countervailable benefit received as a result of RTG's provision of electricity for less than adequate remuneration. Pls.' Br. at 43. Plaintiffs contend that Commerce should have adjusted the calculation to take into account (1) "the lump-sum adjustment to the [MEA] surcharge and [PEA] deduction that was made after" the period of in-

---

[10] Plaintiffs also argue that Commerce's conclusion that social criteria took precedence over market principles is inconsistent with Commerce's separate finding that RTG's provision of electricity did not constitute general infrastructure for purposes of financial contribution analysis. *See* Pls.' Br. at 34. The Court disagrees. This is not an example of Commerce trying to "have it both ways." *Id*. A government program may well be motivated by social criteria which do not provide the broad societal benefits necessary to constitute general infrastructure under U.S. countervailing duty law. Indeed, the Court imagines that some sort of social objective underlies most programs which give rise to countervailing duties.

[11] Plaintiffs also argue that Commerce's use of adverse facts available to determine that RTG received less than adequate remuneration was unwarranted. *See* Pls.' Br. at 40–43. Because the Court concludes that substantial evidence supported this aspect of Commerce's determination (thereby rendering superfluous the agency's recourse to adverse facts available), the Court need not address this argument by Plaintiffs.

vestigation, Decision Memo at 15, and (2) the resales of electricity by SSI to companies not associated with production of the subject imports during the period of investigation. Pls.' Br. at 43.

The Court finds that Commerce properly denied the adjustments requested by Plaintiffs. First, in determining the net amount of countervailable subsidy received by SSI, Commerce appropriately refused to modify its calculations to take into account the lump-sum adjustment to the internal cross-subsidy retroactively made by RTG. 19 U.S.C. § 1677(6) provides that Commerce may make only certain enumerated deductions from the gross countervailable subsidy amount in order to arrive at the net countervailable subsidy amount. *See* 19 U.S.C. § 1677(6) (1999). Deductions may be made for:

> (A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy,
> (B) any loss in the value of the countervailable subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and
> (C) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received.

Id. § 1677(6)(A)–(C). Plaintiffs' requested adjustment plainly does not fall within any of these categories: RTG made a retroactive adjustment to the internal cross-subsidy for accounting purposes, not to offset or reduce the value of the subsidy in any way. Indeed, as Commerce found, it would be "inappropriate" to consider this retroactive adjustment because, due to its timing, the adjustment clearly "did not affect the actual rates paid" by SSI to RTG during the period of review. Decision Memo at 16. As such, the unadjusted calculation of the net countervailable subsidy is a more accurate reflection of the amount of benefit received by SSI through RTG's provision of electricity and Commerce properly used it.

Second, in calculating the ad valorem subsidy rate for the subject imports, Commerce also properly included in its calculation the subsidized electricity associated with the resales of electricity made by SSI. It is uncontested that SSI did resell some of its subsidized electricity to companies not involved in the production or sale of subject imports during the period of investigation. *Id.* at 41. Plaintiffs argue that the electricity associated with the resales was "tied" to non-subject merchandise and therefore, pursuant to Commerce's regulations, should have been excluded from the calculation of the ad valorem subsidy rate for the subject imports. 19 C.F.R. § 351.525(b)(5) (2006) (requiring Commerce to attribute subsidy tied to the production or sale of a particular product only to that product).

However, Commerce has made clear that, in identifying a tied subsidy, the agency looks to "the stated purpose of the subsidy or the purpose we evince from record evidence *at the time of bestowal*." *CVD Preamble*, 63 Fed. Reg. at 65403 (emphasis added). Here, Commerce found that "*at the point of bestowal*, PEA [did] not direct or require SSI to sell [the electricity] or distribute [the electricity] to any other entities." *Id.* at 32 (emphasis added). Indeed, Commerce found that "SSI [was] the only entity to which PEA [provided] the electricity," *id.*, indicating that there was no way to know of SSI's intended use for the subsidized electricity at the point of bestowal. Although Plaintiffs counter that SSI had in place separate meters calibrated by PEA which showed how much electricity was ultimately resold, *see* Pls.' Br. at 45, there is no indication that this information was available at the time of the bestowal of the subsidized electricity. Commerce has indicated that the agency "will not trace the use of subsidies through a firm's books and records." *CVD Preamble*, 63 Fed. Reg. at 65403. This position is sound not only as a matter of administrative economy, but also because it recognizes that "a subsidy may provide benefits . . . not specifically named in a government program," *id.*, including, for example, improved business relations with other companies.

The Court thus finds that Commerce did not err in determining that RTG provided SSI with an untied subsidy. Based on this finding, Commerce correctly determined that the full amount of subsidized electricity provided by RTG to SSI should be used in the calculation of the ad valorem subsidy rate for the subject imports. *See* 19 C.F.R. § 351.525(b)(3) (2006) (requiring Commerce to attribute untied domestic subsidies "to all products sold by a firm, including products that are exported").

Accordingly, the Court upholds Commerce's determination that RTG's provision of electricity conferred a countervailable benefit to SSI in the amount calculated in the *Final Determination* as supported by substantial evidence and in accordance with law.

C. With Regard to Defendant-Intervenor's Claim, Commerce's Calculation of the Countervailable Benefit Received by SSI As a Result of Import Duty Exemptions Is Not Supported by Substantial Evidence or in Accordance with Law

As noted in *Royal Thai I*, SSI enjoyed import duty exemptions on steel slab which steeply reduced its import tariffs. *See Royal Thai I*, 28 CIT at ___ , 341 F. Supp. 2d at 1326. Commerce found that these exemptions constituted countervailable subsidies.[12] *Id.* To calculate the resulting countervailable benefit received by SSI, Commerce pre-

---

[12] *Royal Thai I* addressed the import duty exemptions received by SSI pursuant to Section 36(1) of Thailand's Investment Promotion Act of 1977 ("**IPA**"); however, the *Final Determination* also identified IPA Section 30 as the source of other countervailable import duty exemptions received by SSI. *See* Decision Memo at 7. The description of Commerce's

liminarily used as a benchmark (or point of comparison) the ten percent ceiling tariff applicable to steel slab imports in Thailand, presuming that the ten percent rate was the tariff SSI would have paid but for the exemptions. *See* Decision Memo at 25. However, in the *Final Determination*, Commerce altered its benefit calculation by using a different tariff rate benchmark identified at verification. *Id.* At verification, Commerce determined that RTG had established a tariff schedule structured to comply with Thailand's obligations under the World Trade Organization and the General Agreement on Tariffs and Trade. App. to Pls.' Br., App. 5 (RTG Verification Report dated Aug. 17, 2001) at 3–4. Under this structure, RTG created a ceiling tariff of ten percent on imports such as steel slab. *Id.* RTG also created a discount tariff rate of one percent usually applied to any imported products and materials which were not also produced domestically. *Id.* at 4. Commerce further determined that, during the period of investigation, the steel slab imported by SSI was not domestically produced in Thailand. *See* Decision Memo at 5. Applying its newfound understanding of Thailand's tariff schedule, Commerce determined that, but for the duty exemptions, SSI would have paid an import duty of one percent on its imports of non-domestically produced steel slab. *Id.* at 7. Therefore, in the *Final Determination*, Commerce used the one percent tariff rate as a benchmark for its calculation of the countervailable benefit received by SSI as a result of the import duty exemptions. *Id.* at 25.

U.S. Steel objects to this calculation. U.S. Steel's Memorandum in Support of Motion for Judgment on the Agency Record at 43–44. U.S. Steel argues that, in calculating the benefit, Commerce used a tariff rate benchmark that itself was a countervailable subsidy, rendering the calculation not in accordance with law. *Id.* Specifically, U.S. Steel contends that Commerce's determination that the one percent tariff rate was non-specific and therefore not a countervailable subsidy is unsupported by substantial evidence. *Id.* In U.S. Steel's view, Commerce must instead recalculate the benefit from SSI's import duty exemptions using the ten percent ceiling tariff rate. *Id.*

The Court first notes that the purpose of benefit analysis under U.S. countervailing duty law is to determine the actual market value of a financial contribution provided to a company by a foreign government subsidy. *See* 19 U.S.C. § 1677(5)(E) (1999). After all, placing a duty on such a company's imports in an amount equal to the countervailable benefit received is intended to counteract any unfair advantage gained by government intervention. *See Kajaria Iron Castings Pvt. Ltd. v. United States*, 156 F.3d 1163, 1166 (Fed. Cir. 1998). It follows logically that, when measuring the benefit derived from countervailable government intervention, it is inappropriate to

---

benefit calculations in this Part, as well as the Court's analysis and remand instructions related thereto, apply equally to both IPA Sections.

use a benchmark that is similarly the product of government intervention. This commonsense principle is reflected in Commerce's regulations[13] and judicial precedent.[14]

However, analyzing the benefit received from import duty exemptions presents unique difficulties. A tariff regime is an inherently governmental construct. In determining the appropriate tariff rate to use in benefit analysis, there is no prevailing market rate available for comparison, only another government-set rate that would be paid absent the countervailable exemption. RTG and SSI appear to argue that Commerce's only obligation is to determine the rate that would be applied but for the exemption, regardless of whether or not this rate itself constitutes a countervailable subsidy. Plaintiffs' Memorandum In Opposition to U.S. Steel's Motion for Judgment on the Agency Record (**"Pls.' Resp. Br."**) at 38, 41. In the Court's view, however, concluding the inquiry at this early stage has the potential to subvert the very purpose of U.S. countervailing duty law: to counteract the unfair effects of foreign government subsidies. That is, if Commerce's analysis stopped at the point suggested by RTG and SSI, a loophole would be created through which a foreign government could manipulate its tariff regime, layering one countervailable tariff rate upon another, and thereby subsidize its domestic industries without concern for retribution.

To prevent such unfairness, Commerce must make certain that any tariff rate used to calculate the benefit received from a countervailable tariff exemption is not itself countervailable. In most cases, this inquiry is summary; however, where, as here, at least two alternative tariff rates appear reasonably available, a quick look does not suffice. Instead, Commerce must affirmatively establish the non-countervailability of the tariff rate selected for use as a benchmark in benefit analysis. As a practical matter (and as Commerce apparently chose to do here[15]), this is likely to be accomplished

---

[13] *See* 19 C.F.R. § 351.503(d) (2006) (assessing benefit conferred by government program offering varying levels of financial contributions by using as benchmarks "financial contributions provided at a non-specific level under the program").

[14] *See, e.g., Hynix Semiconductor Inc. v. United States*, 30 CIT ____ , ____ , 425 F. Supp. 2d 1287, 1308 (2006) (holding that Commerce reasonably rejected as benchmarks private loans with terms affected by government involvement with borrower); *Allegheny Ludlum Corp. v. United States*, 29 CIT ____ , ____ , 358 F. Supp. 2d 1334, 1338 (2005) (noting that presumption of subsidy extinguishment which accompanies sale of government-owned company for fair market value may be rebutted upon showing of distortive government intervention in broader market); *AL Tech Specialty Steel Corp. v. United States*, 28 CIT ____ , Slip Op. 04–114 at 26–27 (Sept. 8, 2004) (noting that, if proven, government manipulation would render a real estate appraisal an unreliable measure of market conditions).

[15] *See* Decision Memo at 7 (the one percent duty "policy appears to be uniformly applied"); *id.* at 25 ("Many products have had their duty rate lowered to one percent, not just slab."); *see also* Defendant's Memorandum in Opposition to U.S. Steel's Motion for Judgment upon the Administrative Record at 43 ("Commerce made clear findings that the one percent rate was 'generally applied' and therefore that it was not specific.").

through specificity analysis. *See Royal Thai I*, 28 CIT at ___ , 341 F. Supp. 2d at 1317–20 (first applying specificity analysis to determine non-countervailability). This is because the specificity test "function[s] as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy." SAA, H.R. Doc. No. 103–465 at 929, 1994 U.S.C.C.A.N. at 4242.[16]

Specificity analysis (which is non-regional in nature) has two aspects. To be non-countervailable, a subsidy must be both non-specific as a matter of law (de jure) and as a matter of fact (de facto). *Id.* at 929–30, 1994 U.S.C.C.A.N. at 4242–43; 19 U.S.C. § 1677(5A)(D) (1999). A subsidy is non-specific as a matter of law if: (1) eligibility is automatic; (2) the conditions for eligibility are strictly followed; (3) the conditions are clearly set forth in a relevant statute or regulation so as to be capable of verification; and (4) the authority providing the subsidy does not expressly limit access to the subsidy to an enterprise or industry. 19 U.S.C. § 1677(5A)(D)(i)–(ii) (1999); *see also AL Tech Specialty Steel Corp. v. United States*, 29 CIT ___ , ___ , 366 F. Supp. 2d 1236, 1238 n.3 (2005). A subsidy is non-specific as a matter of fact if: (1) the actual recipients of the subsidy, whether considered on an enterprise or industry basis, are not limited in number; (2) no one enterprise or industry is a predominant user of the subsidy; (3) no one enterprise or industry receives a disproportionately large amount of the subsidy; or (4) the authority granting the subsidy has not exercised its discretion in a manner indicating that a particular enterprise or industry is favored over others. 19 U.S.C. § 1677(5A)(D)(iii) (1999); *see also AK Steel Corp. v. United States*, 192 F.3d 1367, 1384 (Fed. Cir. 1999). Commerce's regulations require a sequential analysis of these factors. *See* 19 C.F.R. § 351.502(a) (2006).

Applying these principles to this case, Commerce must demonstrate that the one percent tariff rate used to calculate the benefit received by SSI under the duty exemption program is both de jure and de facto non-specific. Turning first to de jure specificity, the Court finds that Commerce reasonably selected the one percent tariff rate.[17] Commerce, upon discovering the two alternative rates, inquired about the nature of the one percent rate. App. to Pls.' Resp.

---

[16] However, as discussed *supra* in Part III.B, there are multiple statutory criteria for establishing the existence of a countervailable subsidy. The absence of any one of these criteria is sufficient to prove non-countervailability and Commerce may freely select from among them in conducting its analysis of potential tariff rate benchmarks. Because the Court's discussion herein is necessarily limited to specificity analysis (i.e., the apparent basis for agency decision-making), the Court expresses no opinion on whether the other statutory criteria for establishing the existence of a countervailable subsidy (including the presence of a financial contribution) have otherwise been met in this case.

[17] Although not specifically discussed in the *Final Determination*, the Court concludes that Commerce relied on record evidence, particularly the RTG Verification Report and ex-

Br., App. 9 (RTG Verification Report dated Aug. 17, 2001) at 3–4. In response to Commerce's questionnaires, RTG provided the Thai tariff schedule as well as a government publication explaining the tariff structure and its implementation (the "***Guide to Thai Taxation***"). *Id.*, App. 25 (RTG Verification Report dated Aug. 17, 2001) at MOF Ex. 1, 3. The tariff schedule showed a normal rate of ten percent and a reduced rate of one percent. *Id.* at MOF Ex. 1. The *Guide to Thai Taxation* explained that the reduced duty rate was applied to all imports which were not also produced domestically. *Id.* at MOF Ex. 3. Based on this verified information, it was clear that the eligibility criteria for the reduced duty rate were set out in a government record (i.e., the *Guide to Thai Taxation*). Decision Memo at 25. Further, based upon RTG's stated procedure for determining the tariff rate, it was also clear that the eligibility criteria were strictly followed and that eligibility was automatic when those criteria were met. *Id.*; App. to Pls.' Resp. Br., App. 9 (RTG Verification Report dated Aug. 17, 2001) at 4, MOF Ex. 6 (noting that slab was eligible for one percent tariff rate solely because it satisfied criteria, while other products were denied rate because they did not). In addition, record evidence showed that the reduction itself was not expressly limited to any particular industry or enterprise because RTG's policy was to apply the rate to all industries. Decision Memo at 25; App. to Pls.' Resp. Br. dated Nov. 6, 2002, App. 9 (RTG Verification Report dated Aug. 17, 2001) at MOF Ex. 1. U.S. Steel does not point to any evidence to the contrary and the Court is aware of no record evidence otherwise suggesting de jure specificity. As such, the record evidence substantially supports the finding that the one percent tariff rate was not de jure specific. *Accord Geneva Steel v. United States*, 20 CIT 7, 47–48, 914 F. Supp. 563, 598 (1996) (sustaining negative finding of de jure specificity based on similar evidence).

However, turning to de facto specificity, the Court is unable to similarly sustain Commerce's selection of the one percent tariff rate. Commerce maintains that, because the one percent tariff rate was applied to several different industries and companies, the one percent tariff rate must be non-specific as a matter of fact. *See* Decision Memo at 7. However, Commerce did not inquire as to the quantity of imports made by each of the industries/companies benefiting from the reduced tariff rate. As noted *supra*, the de facto prong of specificity analysis requires Commerce to determine the actual use of the tariff rate by sequentially analyzing the four applicable statutory criteria. A hypothetical example from this case demonstrates why de facto specificity analysis must look to actual use: while the one percent tariff rate was generally available, it may be that the Thai steel industry was the only industry actually importing significant

hibits related thereto, as demonstrating the absence of de jure specificity. *Accord AK Steel*, 192 F.3d at 1384.

amounts of goods at this reduced rate during the period of investigation. If so, then the trade distorting effects would be exactly the same as if RTG were reducing the tariff rate for only the Thai steel industry or SSI specifically.[18]

In the *Final Determination*, Commerce failed to make any findings with respect to imports at the one percent tariff rate made by industries or companies other than the Thai steel industry. This constituted clear error by Commerce. *See Roses, Inc. v. United States*, 14 CIT 444, 454–55, 743 F. Supp. 870, 879 (1990) (finding flawed application of de facto specificity analysis sufficient basis for remand when error not otherwise harmless). The Court therefore remands this issue for Commerce to conduct a more thorough de facto specificity analysis. On remand, Commerce must demonstrate, if it is able, that the one percent tariff rate was non-specific as a matter of fact – i.e., Commerce must address each of the four statutory criteria enumerated in 19 U.S.C. § 1677(5A)(D)(iii). There are no rigid rules for determining whether a subsidy satisfies these criteria. *See* SAA, H.R. Doc. No. 103–465 at 930, 1994 U.S.C.C.A.N. at 4242 (characterizing specificity analysis as a "rule of reason"). However, Commerce must point to substantial record evidence supporting a finding of non-specificity with respect to each statutory criterion.[19] *See* 19 U.S.C. § 1516a(b)(1)(B)(i) (1999). If Commerce is unable to do so, then Commerce must either: (1) establish the non-countervailability of the one percent tariff rate benchmark through alternative analysis, *see supra* note 16, or (2) revise the *Final Determination* by appropriately identifying and using a different, non-countervailable benchmark for measuring the countervailable benefit received by SSI as a result of import duty exemptions.

IV. *CONCLUSION*

For the foregoing reasons, the Court remands the *Final Determination*. A separate order will be entered accordingly.

---

[18] Further, to end de facto specificity analysis with mere appearances would again serve to create a loophole through which foreign governments could easily subsidize selected industries or companies. A foreign government would only need to make available an ostensibly universal subsidy which is in actuality used by a single favored industry or company. *See Cabot Corp. v. United States*, 9 CIT 489, 495, 620 F. Supp. 722, 730 (1985) (observing that U.S. countervailing duty law is not "concerned with the nominal availability of a governmental program" but with "what aid or advantage has actually been received").

[19] If necessary, Commerce may reopen the administrative record in order to obtain information inadvertently overlooked as a result of applying an erroneous specificity analysis.