(Slip Op. 01–149)

STEEL AUTHORITY OF INDIA, LTD., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., IPSCO STEEL INC., DEFENDANT-INTERVENORS

Court No. 00–03–00099

(Dated December 17, 2001)

JUDGMENT

POGUE, *Judge:* This Court having received and reviewed the United States Department of Commerce, International Trade Administration's ("Commerce") *Final Results of Redetermination Pursuant to Court Remand* ("Remand Results"), *Steel Authority of India, Ltd. v. United States,* slip op. 01–60 (CIT May 22, 2001) and Commerce having complied with the Court's remand, and no responses to the Remand Results having been submitted by the parties, it is hereby

ORDERED that the Remand Results filed by Commerce are affirmed in their entirety.

(Slip Op. 01–150)

FORMER EMPLOYEES OF AST RESEARCH, INC., PLAINTIFFS *v.* U.S. DEPARTMENT OF LABOR, DEFENDANT

Court No. 00–10–00481

Former Employees of AST Research, Inc. ("Plaintiffs") brought action seeking judicial review of United States Department of Labor's ("Labor") denial of petition for Trade Adjustment Assistance benefits. United States ("Government"), on behalf of Labor, moved to dismiss complaint for lack of subject matter jurisdiction pursuant to USCIT R. 12(b)(1). Defendant alleged Plaintiffs had not commenced action within sixty-day statutory filing period under 28 U.S.C. § 2636(d). Plaintiffs argued filing was timely because: (1) Labor waived sixty-day filing period by its "acts and omissions"; and (2) submission of papers to Member of Congress was "functional equivalent of a court filing." United States Court of International Trade, Eaton, J., held: (1) Labor did not waive filing period by alleged "acts and omissions" and, moreover, Plaintiffs received both constructive notice of determination, and actual notice of determination, time limits, and procedure for seeking judicial review; and (2) submission of documents to Member of Congress was not sufficient to commence action in United States Court of International Trade.

[Defendant's motion to dismiss for lack of subject matter jurisdiction granted; action dismissed.]

(Decided December 20, 2001)

Cameron & Hornbostel LLP (Alexander W. Sierck), for Plaintiffs.

Robert D. McCallum, Jr., Assistant Attorney General of the United States; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Velta A. Melnbrencis*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Delfa Castillo),* for Defendant.

OPINION

EATON, *Judge:* Plaintiffs seek judicial review of the United States Department of Labor's ("Labor") determination that they were ineligible for Trade Adjustment Assistance ("TAA") benefits under the Trade Act of 1974, *as amended,* 19 U.S.C. §§ 2271–2322 (1994). The United States ("Government"), on behalf of Labor, moves, pursuant to USCIT R. 12(b)(1), to dismiss the complaint for lack of subject matter jurisdiction. For the reasons set forth below, the court grants the Government's motion.

BACKGROUND

Plaintiffs are former employees of AST Research, Inc. ("AST") who, prior to their separation from that company, serviced warranty claims for desktop computers. Proceeding *pro se,* Plaintiffs petitioned for TAA benefits on April 10, 2000. (R. at 1.) After an investigation, Labor determined that Plaintiffs were ineligible for benefits because they did not produce an "article" within the meaning of 19 U.S.C. § 2272.[1] *See Notice*

[1] A group of workers is eligible to receive TAA benefits where Labor determines:

(1) that a significant number or proportion of the workers * * * have become totally or partially separated * * *,
(2) that sales or production, or both * * * have decreased absolutely, and
(3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm * * * contributed importantly to such total or partial separation * * *.

19 U.S.C. § 2272(a) (1994).

of Determination Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, 65 Fed. Reg. 34,732, 34,733 (May 31, 2000). On June 1, 2000, Plaintiffs petitioned for administrative reconsideration of Labor's decision. (R. at 31.) On July 10, 2000, Labor sent all Plaintiffs letters stating that their request for reconsideration had been dismissed, and that they had 60 days from the publication of the notice of determination in the Federal Register to petition for judicial review. *(See* Compl., letter from Beale to Williams of 7/10/00 ("Beale Letter")). Notice of Labor's determination was subsequently published in the Federal Register on July 20, 2000. *See AST Research, Inc., Fort Worth, Texas; Dismissal of Application for Recons.,* 65 Fed. Reg. 45,108 (July 20, 2000) *("Notice of Dismissal").* Thereafter, on August 25, 2000, Plaintiffs wrote their Member of Congress asking for help in obtaining benefits. *(See* Compl., letter from Williams et al. to Lewis of 8/25/00.) Finally, on September 28, 2000, the Clerk of this court received a copy of the documents previously sent to Plaintiffs' Member of Congress. (Compl., letter from Thornton to Williams of 01/23/01.) The Clerk, pursuant to USCIT R. 3(a)(3),[2] deemed these documents to be a summons and complaint sufficient to commence this action on September 28, 2000. *(Id.* ("The Office of the Clerk has reviewed your correspondence and has accepted it as fulfilling in principle the requirements of the summons and complaint for commencement of a civil action to review a final determination regarding certification of eligibility for trade adjustment assistance.").)

STANDARD OF REVIEW

Because they seek to invoke the court's jurisdiction, Plaintiffs have the burden of proving its existence by a preponderance of the evidence. *See McNutt v. Gen. Motors Acceptance Corp.,* 298 U.S. 178, 189 (1936); *Reynolds v. Army and Air Force Exch. Serv.,* 846 F.2d 746, 748 (Fed. Cir. 1988).

DISCUSSION

In support of its motion, the Government asserts that Plaintiffs commenced this action beyond the sixty-day statutory time period within which an aggrieved party may file suit to contest a final determination with respect to the eligibility of workers for TAA benefits. *(See* Def.'s Mot. Dismiss at 2–3.) For their part, Plaintiffs claim that the court has jurisdiction over this matter because the sixty-day statutory time period for commencing an action under 28 U.S.C. § 1581(d)(1) was waived by the Government's "acts and omissions" *(see* Pls.' Resp. to Def.'s Reply in Supp. Mot. Dismiss at 1–2) or that Plaintiffs' letter to their Member of

[2] This rule provides that a "civil action is commenced by filing with the clerk of the court: * * * [a] summons and complaint. * * *" USCIT R. 3(a)(3).

Congress was "the functional equivalent of a formal court filing."[3] (Pls.' Resp. to Def.'s Mot. Dismiss at 3.)

The timeliness of actions brought under 28 U.S.C. § 1581(d)(1) is governed by 28 U.S.C. § 2636 (1994). *See Former Employees of ITT v. United States,* 12 CIT 823, 824 (1988); *Former Employees of Badger Coal Co. v. United States,* 10 CIT 693, 694, 649 F. Supp. 818, 819 (1986). The statute provides:

> A civil action contesting a final determination of the Secretary of Labor under [19 U.S.C. § 2273] * * * is barred unless commenced in accordance with the rules of the Court of International Trade within sixty days after the date of notice of such determination.

28 U.S.C. § 2636(d); *see also* 19 U.S.C. § 2395(a) (specifying that an aggrieved party "may, within sixty days after notice of such determination, commence a civil action in the United States Court of International Trade"); 29 C.F.R. § 90.19(a) (2000). A "final determination" includes a negative determination on an application for reconsideration. *See* 29 C.F.R. § 90.18(e) (2000) (stating that such decisions "shall constitute a final determination for purposes of judicial review"); *see also* 29 C.F.R. § 90.19(a) (identifying the variety of final determinations that may be issued by Labor pursuant to the Trade Act of 1974). By statute, Labor is required to publish its final determinations in the Federal Register. *See* 19 U.S.C. § 2273(c). Publication constitutes constructive notice, *see Former Employees of Malapai Res. v. Dole,* 15 CIT 25, 27 (1991), and, in accordance with regulations, begins the running of the sixty-day period. *See* 29 C.F.R. § 90.19(a) (a party "must file for review in the Court of International Trade within sixty (60) days after the notice of determination has been published in the Federal Register."); *See also Malapai,* 15 CIT at 27. *Pro se* plaintiffs are not excepted from the application of this constructive notice rule. *See Kelley v. Sec'y, United States Dep't of Labor,* 812 F.2d 1378, 1380 (Fed. Cir. 1987).

Here, there is no dispute as to the relevant facts: the *Notice of Dismissal* was published in the Federal Register on July 20, 2000; Plaintiffs were sent, on July 10, 2000, and received a copy of Labor's determination; and Plaintiffs' documents were accepted for filing by the Clerk of the Court on September 28, 2000. Thus, (1) Plaintiffs received both constructive notice of Labor's final determination by publication of the *Notice of Dismissal* in the Federal Register and actual notice, by letter, of both the final determination and the method for seeking judicial review, and (2) Plaintiffs' documents were accepted for filing by the Clerk of this court more than 60 days following publication of the *Notice of Dismissal.*

Plaintiffs contend that "the Department of Labor, by its acts and omissions, waived its right to object to plaintiff's allegedly tardy filing

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[3] Plaintiffs also contend that the statutory sixty-day time frame for filing may be subject to estoppel or equitable tolling. While estoppel and equitable tolling are available in TAA cases, *see, e.g., Former Employees of Seimens Info. Communication Network v. Herman,* 24 CIT ____, ____, Slip Op. 00–141, at 8–13 (2000) (discussing TAA and equitable tolling), here it is not necessary for the court to reach these questions as Plaintiffs allege no conduct that could colorably invoke either doctrine.

* * *." (Pls.' Resp. to Def.'s Reply in Supp. Mot. Dismiss at 2.) Plaintiffs do not, however, specify what these "acts and omissions" might be. The only point at which Plaintiffs allude to something akin to acts or omissions is when they ask the court to "order defendant to explain to this Court the reason for its apparent failure to specifically inform before February 4, 2000 each Plaintiff that if AST did not lay them off by that date each would be ineligible" for TAA benefits.[4] (Pls.' Resp. to Def.'s Mot. Dismiss at 4.) Even if the court were to credit Plaintiffs' argument that "defendant could have, and should have, done a better job, earlier in the process, of explaining to plaintiffs the crucial significance of the February 4, 2000 cut-off date for eligibility under the February 4, 1998 * * * ruling" (Pls.' Resp. to Def.'s Mot. Dismiss at 3), it is difficult to see the relevance of this argument to Plaintiffs' failure to commence an action in this court within sixty days of publication of the *Notice of Dismissal.* Plaintiffs make no argument with respect to failure to receive notice of the sixty-day requirement; and indeed it is difficult to see how they might. Not only was the *Notice of Dismissal* published—thereby giving Plaintiffs constructive notice—but Plaintiffs were each sent a copy of the Beale Letter describing the procedure for seeking judicial review—including the sixty-day requirement. That the parties received the Beale Letter, and thus had actual notice of the sixtyday requirement, is evident by its inclusion among the documents sent to the Clerk of the Court commencing this action.

The court is also unconvinced by Plaintiffs' argument that their letter to their Member of Congress should constitute "the functional equivalent of a formal Court filing * * *." It is indeed well established that the briefs of *pro se* litigants are held to a less stringent standard than formal briefs filed by attorneys. *See Hughes v. Rowe,* 449 U.S. 5, 9 (1980); *Haines v. Kerner,* 404 U.S. 519, 520–21 (1972); *see also Hilario v. Sec'y, Dep't of Veterans Affairs,* 937 F.2d 586, 589 (Fed. Cir. 1991) (stating *pro se* litigants "are not required to file artful, legally impeccable submissions in order to proceed on appeal * * *."). Nevertheless, the leniency afforded *pro se* litigants with respect to mere formalities does not extend to circumstances involving jurisdictional requirements. *See Kelley,* 812 F.2d at 1380. *Pro se* litigants are not immune from laws and proper procedures simply on the basis of their *pro se* status. *See, e.g., Constant v. United States,* 929 F.2d 654 (Fed. Cir. 1991) (imposing sanctions against *pro se* appellant for filing frivolous appeal). Thus, just as a letter to a Member of Congress cannot be considered a filing with this court on behalf of a plaintiff represented by counsel, it cannot be considered a proper filing where, as here, Plaintiffs were proceeding *pro se.*

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[4] Plaintiffs' request relates to an earlier finding, not now before the court, in which AST employees—including Plaintiffs—were certified as eligible for TAA benefits in the event they were separated from employment prior to February 4, 2000. *See Notice of Determinations Regarding Eligibility To Apply for Workers Adjustment Assistance and NAFTA Transitional Adjustment Assistance,* 63 Fed. Reg. 12,830 (Mar. 16, 1998); 19 U.S.C. § 2291(a)(1)(B) (1994).

CONCLUSION

Because Plaintiffs have not proved, by a preponderance of the evidence, that the court retains subject matter jurisdiction over the instant action, the court grants the Government's motion to dismiss.

(Slip Op. 01–151)

FOUR SEASONS PRODUCE, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 99–03–00142

Plaintiff importer challenged United States Customs Services' ("Customs") valuation of its fresh Mexican summer asparagus exported to United States on consignment and, therefore, without an actual transaction value. Plaintiff questioned Customs' construction of phrase "at or about the time" found in section 402 of the Trade Act of 1930, *as amended,* 19 U.S.C. § 1401a (1994), when used to assign a value to Plaintiff's merchandise. The United States Court of International Trade, Eaton, J., found Customs' construction of phrase merited respect under holding of *Skidmore v. Swift & Co.* and, thus, valuation was proper.

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

(Decided December 20, 2001)

Givens and Associates, PLLC, (Robin T. Givens), for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General of the United States; *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Amy M. Rubin);* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service *(Yelena Slepak),* of Counsel, for Defendant.

OPINION

EATON, *Judge:* Plaintiff, Four Seasons Produce, Inc. ("Four Seasons"), brought this action to contest the appraisement and valuation[1] of its fresh Mexican summer asparagus ("Plaintiff's merchandise") by the United States Customs Service ("Customs"). Plaintiff challenges Customs' construction of the phrase "at or about the time" found in section 402 of the Trade Act of 1930, *as amended,* 19 U.S.C. § 1401a (1994) ("section 1401a" or "Act"), as it relates to the method Customs used to value Plaintiff's merchandise. The matter is before the court on cross-motions for summary judgment. The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

BACKGROUND

Plaintiff's merchandise was imported through the Port of Hidalgo, Texas, in 1992 and 1993. Because the merchandise was shipped on con-

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[1] "If imported merchandise is dutiable, in whole or in part, at an *ad valorem* rate * * * the dutiable value of that merchandise must be ascertained to permit application of the pertinent duty rate. The process by which Customs determines dutiable value is called 'appraisement.'" 1 *United States Customs and Int'l Trade Guide* § 9.01 (Peter B. Feller ed., 2nd ed. 2001) (citing Customs Valuation, Report of U.S. Tariff Commission to Senate Finance Committee (Mar. 14, 1973)).

signment, it had no actual transaction value (or sales price) from which Customs could calculate a duty. Customs therefore sought to assign a value to Plaintiff's merchandise by giving it the same transaction value as that "of identical merchandise, or of similar merchandise, * * * exported to the United States at or about the time" Plaintiff's merchandise was exported, as provided in section 1401a(c)(1)(B). In doing so, Customs employed the interpretive principles set out in Customs Headquarters' Decision Letter HQ 546217 of April 8, 1998 ("Decision Letter"),[2] to give meaning to the phrase "at or about the time." (Pl.'s Mem. Supp. Mot. S. J., app. A ¶ 4 ("Stipulated Facts").)[3] Plaintiff's merchandise was entered "under subheading 0709.20.90, Harmonized Tariff Schedule of the United States ("HTSUS") as 'Other vegetables, fresh or chilled: Asparagus: Other' * * *" that provided for a duty of 25% *ad valorem*. (Def.'s Mem. Supp. Cross-Mot. S. J. at 1); *see* HTSUS 0709.20.90 (1992), (1993).

Plaintiff argues that its merchandise was improperly valued because Customs' interpretation of the phrase "at or about the time" did not reflect the legislative intent that Customs consider valuations of all merchandise exported to the United States "about" the time of the exportation of Plaintiff's merchandise. The United States ("Government"), on behalf of Customs, argues that Customs' interpretation of this phrase—preferring valuations of merchandise exported to the United States closer to the date Plaintiff's merchandise was exported over those further away—should be accorded deference under the holding in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). For the reasons set forth below, the court finds that, while Customs' interpretation of the phrase "at or about the time," as used in the Act, does not merit *Chevron* deference, it does merit respect under the holding in *Skidmore v. Swift & Co.,* 323 U.S. 134 (1944), and, therefore, Customs properly appraised and valued Plaintiff's merchandise.

STANDARD OF REVIEW

Under USCIT Rule 56, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." USCIT Rule 56(c); *see also Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986); *Govesan Am. Corp. v. United States,* 25 CIT ____, Slip Op. 01–119, 3 (Sept. 28, 2001); *Rollerblade, Inc. v. United States,* 24 CIT ____, 116 F. Supp. 2d 1247, 1250 (2000). As the parties have entered into a stipulation demonstrating that there is no genuine issue as to any material fact, summary judg-

[2] This letter is appended as an exhibit to Defendant's brief in support of its cross-motion for summary judgment. *(See* Def.'s Mem. Supp. Cross-Mot. S. J., Ex. A.)

[3] Plaintiff filed a number of protests relating to fresh Mexican summer asparagus. Although there is some confusion as to whether the Decision Letter relates to the protest that is the subject of this action *(compare* Pl.'s Mem. Supp. Mot. S. J. at 2 n.1, *with* Def.'s Mem. Supp. Cross-Mot. S. J. at 2), the parties agree that the reasoning in the Decision Letter as to the meaning of the phrase "at or about the time" is the same as that used in the appraisement and valuation of Plaintiff's merchandise. *(See* Pl.'s Mem. Supp. S. J. at 2; Def.'s Mem. Supp. Cross-Mot. S. J. at 2.)

ment is appropriate. *See Trans-Atlantic Co. v. United States,* 74 Cust. Ct. 134 (1975).

DISCUSSION

Where, as here, merchandise is entered on consignment and, thus, has no price actually paid or payable at the time of export and, hence, no readily ascertainable actual value, the Act provides for a value to be assigned.[4] Pursuant to 19 U.S.C. § 1500 (1994), Customs fixes the final appraisement of merchandise under 19 U.S.C. § 1401a "by ascertaining or estimating the value thereof * * * by all reasonable ways and means * * *." 19 U.S.C. §1500(a). Subsection 1401a(c) provides for assigning, to consigned merchandise, a value equal to the actual price paid or payable for identical or similar merchandise:

> (1) The transaction value of identical merchandise, or of similar merchandise, is the transaction value * * * of imported merchandise that is * * *
>
> (B) exported to the United States at or about the time that the merchandise being appraised is exported to the United States.
>
> (2) * * *. If in applying this paragraph with respect to any imported merchandise, two or more transaction values * * * are determined, such imported merchandise shall be appraised on the basis of the lower or lowest of such values.

19 U.S.C. § 1401a(c).[5] In an effort to provide a method for implementing this subsection, Customs issued the Decision Letter, which purports to interpret the phrase "at or about the time" as follows:

> The terms "at" or "about," included in the "at or about the time of exportation" language * * * are applied in a hierarchial[6] [sic] fashion, *i.e.,* "at" then "about." In the case of perishable produce such as asparagus, "about" will be construed as meaning * * * seven calendar days * * * before or after the date of exportation of the * * * merchandise being appraised * * *. Transaction values for produce that has been exported on the exact date as the * * * produce being appraised first are considered. If no transaction value is available for produce exported on the exact date as the * * * produce being appraised, transaction values for produce exported on the date closest to the date of export * * * followed by the next closest date * * * and so forth next are considered.

(Decision Letter at 4.) The Decision Letter also provides that "[o]nce a transaction value is found, only the value or values on the date closest (before and after) to the date of exportation will be considered * * *." *(Id.)*

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[4] While Plaintiff's merchandise was imported in 1992–93, and Customs' final valuation occurred in 1998, the applicable statutes and regulations remained identical. *Compare* 19 U.S.C. §§ 1401a, 1500 (1988), *with* 19 U.S.C. §§ 1401a, 1500 (1994); 19 C.F.R. §§ 152.101(b), 152.104, 174 (1992), (1993), *with* 19 C.F.R. §§ 152.101(b), 152.104, 174 (1998).

[5] Customs' regulations provide for sequential application of these values. If possible, merchandise is first valued by the transaction value of identical merchandise and, then, if that value cannot be determined, by the transaction value of similar merchandise. *See generally* 19 C.F.R. § 152.101(b) (1998).

[6] The words "hierarchical" and "hierarchal" are used interchangeably by Customs and Plaintiff.

In accordance with the Decision Letter, and as stipulated by the parties, in valuing Plaintiff's merchandise Customs construed the phrase "at or about the time" using the following interpretive guidelines:

> (1) "at" means on the date of exportation of the merchandise being appraised;
> (2) "about" means seven days before or after that day; and,
> (3) the phrase "at or about the time" is to be read hierarchically, so that "at" values are preferred to "about" values, such that values for days closer to the date of exportation are preferred, and it is only among values of the same day or days before and after the date of exportation equidistant in time to the date of exportation that the lower or lowest value is utilized.

(Stipulated Facts ¶ 4.) Thus, Customs valued Plaintiff's merchandise by using either: (1) the actual transaction value of identical or similar merchandise on the date of exportation to the United States of Plaintiff's merchandise; or, (2) if no exportation to the United States of identical or similar merchandise took place on that date, the actual transaction value of identical or similar merchandise exported to the United States on the date (or dates)[7] closest to the date Plaintiff's merchandise was exported. Once a transaction value was found, Customs looked no further and assigned that value to Plaintiff's merchandise. Had it found more than one transaction value on such date (or dates), Customs would have applied the lower or lowest of those values to Plaintiff's merchandise. *(Id.* ¶ 6.) Plaintiff does not object to Customs' use of the fifteen day period for examining transaction values. (Pl.'s Mem. Opp'n to Def.'s Cross-Mot. S. J. at 8.) Plaintiff does, however, object to Customs' interpretation of section 1401a(c) as to which transaction values Customs selects during that period:

> It is Plaintiff's position that the phrase "at or about [the time of exportation]" should be interpreted so as to give equal value to the words "at" and "about" and that Customs' interpretation which gives a hierarchal preference to the word "at" is contrary to legislative intent. Thus, in determining the "lower or lowest" values applicable to the involved asparagus * * * Customs must consider values of * * * merchandise exported throughout the entire fifteen day period around and on the date of exportation [of Plaintiff's merchandise]

(Pl.'s Mem. Supp. Mot. S. J. at 2) thereby giving Plaintiff the benefit of the lowest transaction value found during that entire period.

Plaintiff contends that its interpretation of "at or about the time" comports with legislative intent. Plaintiff maintains that the "statute plainly contemplates consideration of merchandise values over a range of dates near the time of exportation because it speaks in terms of 'lower or lowest' value 'at or about' the time of exportation." (Pl.'s Mem. Supp. Mot. S. J. at 3.) Plaintiff relies on the "lower or lowest" language as evi-

[7] Exportation to the United States could occur on dates an equal number of days both a week before and a week after exportation of Plaintiff's merchandise for a total period of up to 15 days. *(See* Stipulated Facts ¶ 5.)

dencing "Congressional intent * * * that importers get the benefit of the lowest comparison transaction value" found during the prescribed period. (Pl.'s Mem. Opp'n to Def.'s Cross-Mot. S. J. at 2.)[8] For Plaintiff, "at or about" is a "seemingly disjunctive phrase" that does not permit Customs to prefer the value of merchandise exported to the United States on the same date as Plaintiff's merchandise to the value of merchandise exported on the day before or the day after. (Pl.'s Mem. Supp. Mot. S. J. at 4.) Essentially, Plaintiff would have the court read "at or about" to mean "at and about." The court declines to do so.

There is no indication that Congress intended "or" to be read as "and."[9] *See generally* Statements of Administrative Action accompanying Trade Agreements Act of 1979, at 441–64, *reprinted in* 1979 U.S.C.C.A.N. 665, 704–25. As the Government points out, while "[j]udicial decisions can be found in which 'or' * * * [has] been interpreted in a manner other than common grammatical rules would suggest * * * such interpretations are not the norm and general purpose dictionaries, as well as numerous other judicial decisions define and employ 'or' as a disjunctive * * *." (Def.'s Mem. Supp. Cross-Mot. S. J. at 12); *see, e.g., United States v. Best Foods, Inc.,* 47 C.C.P.A. 163, 167 (1960) (citing *Doughton Seed Co. v. United States,* 24 C.C.P.A. 258 (1936) and giving "or" its plain meaning where, in the context of the statute at issue, a disjunctive construction neither "produce[d] an anomaly [nor was] contrary to the intent of Congress"). Thus, the court concludes that the phrase "at or about" is not ambiguous and that Congress intended it be read as having its plain meaning such that "at" values are preferred to "about" values. Therefore, Congress intended Customs to value merchandise, which does not have a transaction value at the time of exportation to the United States, by using values of identical or similar merchandise exported to the United States on the date the appraised merchandise is exported, without referring to a longer period of values "about" the date of export of such merchandise.

While it is clear that Congress intended a hierarchical distinction as between "at" values and "about" values, it is less clear that Congress intended that a hierarchical distinction be applied to exportation dates solely "about" the time Plaintiff's merchandise was exported. Thus, the following question is posed: in the event that no identical or similar merchandise with an actual value was exported to the United States on the same day Plaintiff's merchandise was exported, should Customs have

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[8] Customs' interpretation of the phrase "lower or lowest"—as it relates to perishable merchandise—comports with the statute. Specifically, Customs' interprets the phrase "lower or lowest" to mean that where it is presented with more than one transaction value on the date (or dates) closest to the date of exportation, it chooses the "lower or lowest" transaction value from among them. *(See* Decision Letter at 4 ("[I]n selecting a transaction value of identical or similar merchandise in accordance with [19 U.S.C. § 1401a(c)], it would be appropriate to consider transaction values for produce that has been exported 'at' the same time as [Plaintiff's merchandise] * * *. If no transaction value is available for produce exported on the exact date as * * * [Plaintiff's merchandise], it would be appropriate to consider the transaction values for produce exported on the date closest to the date of export * * *. In either case, if several transaction values are provided for produce on the exact or closest date of exportation, the lowest would be utilized.").) Thus, exporters receive the most advantageous transaction value from those on the day (or dates) selected, although that value may not be the "lower or lowest" value over the entire fifteen day period.

[9] "Ordinarily, 'terms connected by a disjunctive [are] given separate meanings, unless the context dictates otherwise.'" *Holly Farms Corp. v. Nat'l Labor Relations Bd.,* 517 U.S. 392, 413 (1996) (quoting *Reiter v. Sonotone Corp.,* 442 U.S. 330, 339 (1979)).

looked to all such merchandise exported to the United States during the fifteen day period, or only to merchandise exported on the date closest to the date of exportation of Plaintiff's merchandise? The word "about" is not sufficiently precise to answer this question by itself. Therefore, the language of the Act is ambiguous on this point. To resolve this ambiguity, the Government urges that Customs' interpretation found in the Decision Letter be accorded deference under the United States Supreme Court's holding in *Chevron.* (Def.'s Mem. Supp. Mot. Cross-Mot. S. J. at 5.) This the court declines to do. However, because Customs' interpretation of the phrase "at or about the time" is persuasive the court finds that it merits respect under *Skidmore.*

A. Chevron Deference

The Supreme Court has held that where an agency puts forth an interpretation of a statute that is "silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843; *see also Christensen v. Harris County,* 529 U.S. 576, 586–87 (2000) (citing *Chevron,* 467 U.S. at 842–43) ("In *Chevron,* we held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute."). Following its initial enunciation of the *Chevron* doctrine, the Supreme Court has spoken several times on the subject of the proper measure of deference to be afforded administrative agency decisions. *See, e.g., United States v. Haggar Apparel Co.,* 526 U.S. 380 (1999); *Christensen,* 529 U.S. at 587. In particular, in the recent case of *United States v. Mead Corp.,* 121 S. Ct. 2164 (2001), the Supreme Court held that a Customs classification ruling is not entitled to *Chevron* deference. *See Mead,* 121 S. Ct. at 2175. The Court explained that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead,* 121 S. Ct. at 2171. The Court then held that classification rulings are not entitled to *Chevron* deference because they are not issued in a way so as to carry the force of law and, thus, "are best treated like 'interpretations contained in policy statements, agency materials, and enforcement guidelines.'" *Id.* (citing *Christensen,* 529 U.S. at 587).[10]

Here the Decision Letter exhibits the characteristics of the classification ruling that was the subject of *Mead.* As with classification rulings, Congress has explicitly delegated authority to the Secretary of the Treasury to make rules, respecting valuation, carrying the force of law. *See*

[10] In support of its position that the Decision Letter should be entitled *Chevron* deference, the Government cites *Generra Sportswear Co. v. United States,* 905 F.2d 377 (Fed. Cir. 1990). *(See* Def.'s Mem. Supp. Cross-Mot. S. J. at 5; Def.'s Reply to Pl.'s Opp'n to Def.'s Cross-Mot. S. J. at 4, 5.) Since the decision in *Generra,* however, the Supreme Court has examined the types of issues addressed therein. *See, e.g., Haggar,* 526 U.S. 380, *Christensen,* 529 U.S. 576, *Mead* 121 S. Ct. 2164; *see also Luigi Bormioli Corp. v. United States,* 24 CIT ___, ___, Slip Op. 00–134, 10 (Oct. 19, 2000) ("Because the court concludes that in *Haggar* and *Christensen* the Supreme Court has refined the rule of *Chevron,* it also concludes that *Generra* no longer requires deference to every Customs policy which is not reduced to a regulation, if indeed it ever did so.").

19 U.S.C. §§ 1500(a), 1502(a) (1994), 1624 (1994). In turn, "[t]he Secretary [of the Treasury] * * * has delegated to the Commissioner of Customs the authority to issue generally applicable regulations, subject to the Secretary's approval." *Haggar,* 526 U.S. at 387–88 (citing Treasury Dept. Order No. 165, T.D. 53160 (Dec. 15, 1952)). However, while Customs possesses the necessary authority to make rules carrying the force of law regarding valuation, it is apparent that it did not do so through the Decision Letter.

First, there is no indication that the Decision Letter was subject to a "relatively formal administrative procedure." *Mead,* 121 S. Ct. at 2172 ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force." (citations omitted)). While the Supreme Court in *Mead* cautioned that the lack of notice-and-comment rulemaking or formal adjudication does not preclude the application of *Chevron* deference, *see United States v. Mead,* 121 S. Ct. at 2173, formality is a strong indicator of whether *Chevron* deference is required. *See Christensen,* 529 U.S. at 587 ("[W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.") Here, the Decision Letter was not subject to any formal administrative procedures. While a meeting was held on September 3, 1996, between Plaintiff's counsel and Customs officials during which it appears Plaintiff asserted its arguments as to the interpretation of the Act *(see* Decision Letter at 1), such a meeting, without more, falls short of the procedural formalism needed for *Chevron* deference. *See Mead,* 121 S. Ct. at 2173 ("[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication.").

Second, as with the classification ruling that was examined in *Mead,* the Decision Letter does not bind third parties. *See* 19 C.F.R. § 152.101(d); *cf. Mead,* 121 S. Ct. at 2174 (stating that the "treatment [of classification rulings] by the agency makes it clear that a letter's binding character as a ruling stops short of third parties."). The Decision Letter is from the Acting Director of Customs Headquarters' International Trade Compliance Division to the Port Director in Laredo, Texas, regarding Plaintiff's "Application for Further Review of Protest No. 2304–95–100183." As such, it applies only to Plaintiff's entries.

Finally, the interpretation contained in the Decision Letter cannot claim precedential value. As with a classifications rulings, Congress has provided for "independent review" of valuation rulings. *Mead,* 121 S. Ct. at 2174 ("[A]ny precedential claim of a classification ruling is counterbalanced by the provision for independent review of Customs classifi-

cations by the CIT * * * ; the scheme for CIT review includes a provision that treats classification rulings on par with the Secretary's rulings on *'valuation* * * *.'" (citation omitted, emphasis added)).

Therefore, for the foregoing reasons the Decision Letter was not issued with the force of law and the court declines to afford it *Chevron* deference.

B. Skidmore Respect

While *Mead* held that Customs classifications rulings are not entitled to *Chevron* deference, it also held that they are entitled to a degree of respect proportional to their "power to persuade." *Mead,* 121 S. Ct. at 2172 (quoting *Skidmore,* 323 U.S. at 140); *see also id.* at 2175 (citing *Skidmore* at 139–40) ("To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the 'specialized experience and broader investigations and information' available to the agency * * * and given the value of uniformity in its administrative and judicial understandings of what a national law requires * * *."). The Supreme Court has described *Skidmore* respect:

> [T]he rulings, interpretations and opinions of [an administrative agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Skidmore, 323 U.S. at 140. Thus,

> The weight of [an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. These factors were restated in *Mead:*

> The fair measure of deference to an agency administering its own statute has been understood to vary with the circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position.

Mead, 121 S. Ct. at 2171 (citing *Skidmore,* 323 U.S. at 139–40); *see also Heartland By-Products, Inc. v. United States,* 264 F.3d 1126, 1136 (Fed. Cir. 2001) (declining to disturb Customs' interpretation of a tariff classification term in the context of a revocation ruling letter because of "the deference [Customs' interpretation] is due under *Mead* and *Skidmore.").* Therefore, where Customs has issued a ruling letter, "[s]uch a ruling may surely claim the merit of its writer's thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight." *Id.* at 2176. Here, the court must determine whether the reasoning behind Customs' interpretation of the statute—preferring

"about" values closer in time to the exportation of Plaintiff's merchandise over other "about" values—merits respect under *Skidmore.* The court finds that it does.

First, Customs is in the business of both classifying and valuing merchandise. As with the classification of merchandise, Customs can be said to possess the kind of "experience and informed judgment to which courts and litigants may properly resort for guidance," *Skidmore v. Swift & Co.,* 323 U.S. at 140, and "can bring the benefit of specialized experience to bear on the subtle question[] of" valuation. *Mead,* 121 S. Ct. at 2175.

Second, based on this experience and informed judgment, the Decision Letter contains a thorough and carefully reasoned analysis of the meaning of "at or about the time" as it applies to the valuation of Plaintiff's merchandise. *See Rocknel Fastener, Inc. v. United States,* 267 F.3d 1354, 1357 (Fed. Cir. 2001) (holding *Skidmore* deference is appropriate where Customs' classification decision revealed Customs' thorough analysis).[11] In arriving at its decision to consider the dates closest to the date of exportation, Customs considered that "in the case of perishable produce, such as asparagus, prices may fluctuate seasonally, weekly, or even daily." *(See* Decision Letter at 3; Stipulated Facts ¶ 13.) Thus, Customs concluded that "at or about the time of exportation" "should cover a period of time as close to the date of exportation as possible." *(See* Decision Letter at 3.) Preferring the value of merchandise exported to the United States closest to the date of exportation of Plaintiff's merchandise is a reasonable way to accommodate rapid fluctuation in prices.

Third, Customs' interpretation of the valuation statute was rendered by the Acting Director of Customs Headquarters' International Trade Compliance Division. *(See id.* at 5.) The relative rank of the Customs official preparing the Decision Letter suggests that the Decision Letter was the subject of serious consideration, thus enhancing its "power to persuade." *Mead,* 121 S. Ct. at 2176 (quoting *Skidmore,* 323 U.S. at 140); *see also* 19 C.F.R. § 174.1 (1998) (stating applications for further review are decided by "customs officers on a level higher than the district").

Finally, Customs appears to have given serious consideration to the controversy and to Plaintiff's contentions. On September 3, 1996, Customs officials met with Plaintiff's counsel. *(See* Decision Letter at 1.) From the Decision Letter it is apparent that Plaintiff was given an opportunity to make its arguments. Further, Customs presented a detailed

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[11] In *Rocknel,* the Federal Circuit reviewed Customs' classification of certain fasteners under HTSUS 7318.15.80. At issue were the definitions of and distinctions between the tariff terms "bolt" and "screw." The court concluded that although plaintiff's definition was not unreasonable, Customs' decision merited *Skidmore* respect, adding that "Customs' choice of definitions for the terms is especially reasonable in light of the failure of the party protesting the classification to offer alternative definitions that are *more consistent* with the common meaning and are useful in making classification decisions." *Rocknel,* 267 F.3d at 1361 (emphasis added). Although *Rocknel* was a Customs classification case, the Federal Circuit's reasoning would seem to extend to valuation decisions as well. For, while "common meaning" is a term of art in the classification of imported goods, the theory is the same. Here, while Plaintiff has offered a not unreasonable interpretation of the phrase "at or about," it cannot be said that its interpretation is more consistent with the common meaning of the phrase than that offered by Customs. Thus, while either definition of the phrase "at or about" could plausibly be applied to the facts presented, as the definition urged by Plaintiff is not more consistent with the "common meaning" of the phrase than that adopted by Customs, Customs' meaning is to be favored. *Id.*

analysis of those arguments and the reasons for their rejection, as well as an explanation of its own analysis. *(See id.* at 1–5.)

In light of Customs' specialized experience in valuing exported merchandise, the thoroughness of Customs' reasoning in interpreting the phrase "at or about the time," the rank of the Customs officer who issued the Decision Letter, and Customs' serious consideration of Plaintiff's position as to the meaning of the phrase "at or about the time," the court finds that Customs' interpretation, as it applies to the valuation of Plaintiff's merchandise, is persuasive and, therefore, entitled to respect under the holding of *Skidmore v. Swift & Co.* and, thus, Customs properly valued Plaintiff's merchandise.

CONCLUSION

Because the court finds that Customs properly valued Plaintiff's merchandise, it denies Plaintiff's motion for summary judgment and grants Defendant's cross-motion for summary judgment.