Decisions of the United States
Court of International Trade

Slip Op. 03–119

G&R PRODUCE COMPANY, ET AL., PLAINTIFFS, v. UNITED STATES, DEFENDANT.

Before: WALLACH, Judge

Consol. Court No.: 96–11–02569

[Judgment for Plaintiff.]

Decided: September 15, 2003

Givens and Johnston, PLLC (Robert T. Givens, Scott L. Johnston), for Plaintiffs. David W. Ogden, Assistant Attorney General; John J. Mahon, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, Department of Justice, Amy M. Rubin, Trial Attorney; Beth C. Brotman, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for Defendant.

WALLACH, Judge.

FINDINGS OF FACT & CONCLUSIONS OF LAW

I.
INTRODUCTION

This matter is before the court for decision following a bench trial on February 26, 2003. Plaintiff, G&R Produce Co., with ten other consolidated parties, ("Plaintiffs") challenge the United States Customs Service's[1] ("Customs") refusal to reliquidate certain entries of Persian limes.[2] This consolidated case was brought after Customs

[1] The United States Customs Service is now organized as the Bureau of Customs and Border Protection.

[2] More than 1,400 entries of limes are at issue in this case. Eleven cases were consolidated by order of the Court dated October 26, 2001. The consolidated cases in this action are: G&R Produce Co. v United States, Court No. 96–11–02569; I. Kunick Co. v. United States, Court No. 96–11–02570; Rio Produce Co. v. United States, Court No. 96–11–02571;

refused to stipulate judgment in each individual matter, pursuant to this court's holding in Black & White Vegetable Co. v. United States, 125 F. Supp. 2d 531 (CIT 2000).[3] The court previously opined in G&R Produce I that material facts were in issue as to whether the Customs import specialists were aware of the proper botanical classification of the limes, and the significance of their choice of tariff classification.

In this matter, Plaintiffs claim that Customs was a party to the entry of Persian limes under an incorrect tariff provision for over five years and that Customs misclassified their lime entries because the import specialists were not aware of the correct scientific and botanical facts regarding the limes. According to Plaintiffs, Customs erred in denying both their request to have their Persian Lime entries reliquidated and their subsequent protests. Therefore, Plaintiffs seek the reliquidation of their entries and a full refund of duties paid.

Defendant argues that regardless of whether the parties were mistaken as to the botanical names and varieties of the limes, the Persian limes at issue were misclassified as a result of an error in the construction of the law, specifically, an error in the interpretation of the tariff phrase "limes (*Citrus aurantifolia*)" in subheading 0805.30.40 of the HTSUS and therefore, the Plaintiffs have not met the statutory criteria required for relief.

Pursuant to the following findings of fact and conclusions of law, and in accordance with USCIT R. 52(a), the court enters a final judgment in favor of Plaintiffs and against Defendant.

II.
BACKGROUND

Plaintiffs imported *Citrus latifolia*, commonly known as Persian limes, from Mexico in 1993 and 1994. The imported limes were classified under subheading 0805.30.40 of the Harmonized Tariff Schedule of the United States ("HTSUS"), which encompassed "Citrus Fruit, fresh or dried: Lemons (Citrus limon, Citrus Limonum) and limes (Citrus Aurantifolia): Limes."[4] Different botanical varieties of

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McAllen Fruit & Vegetable, Co. v. United States, Court No. 96–11–02572; Robert Ruiz, Inc. v. United States, Court No. 96–11–02573; London Fruit, Inc. v. United States, Court No. 96–11–02574; GM Sales Co. v. United States, Court No. 96–11–02597; Val-Verde Vegetable Co. v. United States, Court No. 96–11–02608; Frontera Produce, Inc. v. United States, Court No. 96–11–02610; Trevino International, Inc. v. United States, Court No. 96–11–02617; and Limeco, Inc. v. United States, Court No. 97–08–01351.

[3] Familiarity with the court's decisions in Black & White Vegetable Co. v. United States, 125 F. Supp. 2d 531 (CIT 2000) and G&R Produce Co. v. United States, 245 F. Supp. 2d 1304 (CIT 2002) ("G&R Produce I") is presumed.

[4] The Harmonized Tariff Schedule of the United States ("HTSUS") Subheading, 805, provided for:

0805 . . . . Citrus fruit, fresh or dried:

limes were distinguished in the tariff schedule effective January 1, 1989. Limes, *Citrus aurantifolia*, were listed *eo nomine* while other lime varieties, including *Citrus latifolia*, were classified as "other" at a lower duty rate.[5]

On June 30, 1994, Customs posted Administrative Message 94–0661 ("Administrative Message") that gave notice of statistical breakout changes to subheading 0805.90.00. Effective July 1, 1994, a statistical modification and an additional breakout, 0805.90.00.10, which referenced *Citrus latifolia*, *eo nomine*, were added to the HTSUS.[6]

After publication of the Administrative Message, Customs and Plaintiffs discovered that Plaintiffs' lime entries were being classified under the wrong tariff number. Subsequently, Plaintiffs requested that Customs reliquidate its entries. Customs treated Plaintiffs' requests as mistake of fact claims pursuant to 19 U.S.C. § 1520(c)(1) (1994)[7] and decided Plaintiffs had not met the statutory criteria. Therefore, Customs denied Plaintiffs' request for reliquidation and subsequent protests.

III.
JURISDICTION AND STANDARD REVIEW

Jurisdiction of the Court is found under 28 U.S.C. § 1581(a)(1994), which provides for judicial review of denied protests filed in compliance with the provisions of 19 U.S.C. § 1514

0805.30 . . . . Lemons (Citrus limon, Citrus limonum) and limes (Citrus aurantifolia):

0805.30.40 . . . Limes

[5] HTSUS Subheading 0805.90.00, provided for:

0805 . . . . Citrus fruit, fresh or dried:

0805.90.00 . . . . Other, including kumquats, citrons and bergamots

[6] HTSUS Subheading 0805.90.00.10, provided for:

0805. Citrus fruit, fresh or dried:

0805.90.00 Other, including kumquats, citrons and bergamots.

0805.90.00.10 Tahitian limes, Persian limes and other limes of the citrus latifolia variety.

[7] In relevant part, 19 U.S.C. § 1520(c)(1) stated:

Notwithstanding a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry or reconciliation to correct—

(1) a 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.

(1999). Although Customs's decisions are entitled to a presumption of correctness under 28 U.S.C. § 2639(a)(1) (1994), the Court makes its determinations upon the basis of the record made before the Court, rather than that developed by Customs. See United States v. Mead Corp., 533 U.S. 218, 233 n.16, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001). Accordingly, the Court makes the following findings of fact and conclusions of law as a result of the *de novo* trial. See 28 U.S.C. § 2640(a) (1994).

IV.
FINDINGS OF FACT

A. Facts Uncontested by the Parties and Agreed to in the Pretrial Order

1. The merchandise in issue consists of fresh Persian limes imported into the United States from Mexico in 1993 and 1994.

2. The botanical name for the limes in issue is *Citrus latifolia*.

3. Limes of the *Citrus latifolia* variety are a distinct botanical variety from limes of the *Citrus aurantifolia* variety.

4. The phrase *Citrus aurantifolia* refers to a variety of limes, but is not a synonym for the word limes.

5. Plaintiffs' Persian limes were entered under subheading 0805.30.40 of the HTSUS, that referred to "Limes (Citrus Aurantifolia)," *eo nomine*, at a duty rate of 2.2 cents per kilogram during 1993 and 1.9 cents per kilogram during 1994.

6. Customs liquidated the limes under HTSUS subheading 0805.30.40 and imposed duties.

7. Plaintiffs' entries of limes of the *Citrus latifolia* variety should have been entered under HTSUS subheading 0805.90.00, at a duty rate of .9% ad valorem in 1993 and duty free in 1994.

8. Plaintiffs' entries of Persian limes were misclassified upon entry and liquidation.

9. The classification error is manifest from the record.

10. On June 30, 1994, the Committee for Statistical Annotation published statistical modifications, which included a breakout of subheading 0805.90.00, expressly encompassing "Tahitian limes, Persian limes and other limes of the Citrus latifolia variety.

11. Information regarding the statistical breakout was disseminated by the Customs Service through Administrative Message 94–0661.

12. Each of the importers in this consolidated action submitted re-

quests for Customs to reliquidate their entries under subheading 0805.90.00 more than ninety days following liquidation.

13. Customs treated the importers' requests as claims under 19 U.S.C. § 1520(c)(1).

14. Customs denied Plaintiffs' claims for relief under § 1520(c)(1).

15. Plaintiffs filed protests with Customs.

16. All of the protests involved in this consolidated action were filed, and the actions commenced, within the time provided by law.

17. All liquidated duties and fees relating to the imported merchandise were paid.

B. Facts Established at Trial

18. The Court permitted the Defendant to read into the record various excerpts from Plaintiffs' customs brokers depositions; and enter them into evidence.

19. Customs designated Ms. Gonzalez-Castilleja as its agent in response to Plaintiffs' notice of deposition in this case. The Court found the testimony of Ms. Gonzalez-Castilleja, a Customs import specialist with more than fifteen years of experience, highly probative and credible.

20. In December 1991, Customs Team 688, for the port of Laredo, Texas, was formed.

21. Customs Team 688 was responsible for classifying merchandise and entries that fell under the first 24 chapters of the HTSUS, which include citrus fruit and the variety of limes at issue.

22. Ms. Gonzalez-Castilleja was responsible for overseeing Team 688 and insuring that entries of merchandise were accurately classified, and that the team complied with Customs regulations and other Government agency requirements.

23. Ms. Gonzalez-Castilleja has been the Customs Team leader in charge of Team 688 since its formation.

24. In 1993 and 1994 Ms. Gonzalez-Castilleja and Team 688 were responsible for lime entries in for the Laredo service port and the Brownsville, Progresso, Hidalgo, Rio Grande City, and Roma ports of entry.

25. Both Key limes and Persian limes were imported through the Hidalgo port of entry.

26. Ms. Gonzalez-Castilleja and her team received training on bypass procedures and she was familiar with Customs Directive No. 3550–26, entitled Entry Simplification - Bypass Procedure.

27. Ms. Gonzalez-Castilleja placed Persian limes on bypass because she had no issues with their entry and liquidation.

28. Bypass entries are subject to random sampling and review by Customs import specialists.

29. The majority of Plaintiffs' entries were placed on bypass.

30. Ms. Gonzalez-Castilleja and the Customs import specialists knew that the HTSUS referenced *Citrus aurantifolia* under subheading 0805.

31. Ms. Gonzalez-Castilleja did not know that more than one botanical variety of limes existed until after publication of the Administrative Message.

32. Ms. Gonzalez-Castilleja did not know the specific scientific and botanical nomenclature for the Plaintiffs' lime varieties at the time of their entry.

33. Ms. Gonzalez-Castilleja mistakenly believed at the time of Plaintiffs' lime entries that the botanical phrase *Citrus aurantifolia* described all limes.

34. Ms. Gonzalez-Castilleja did not know that the correct botanical name for Plaintiffs' Persian limes was *Citrus latifolia* until after publication of the Administrative Message.

35. The Plaintiffs' customs brokers did not know the taxonomy for lime varieties.

36. Customs' import specialists neither exercised judgment nor made a classification decision based upon the taxonomy or botanical names of the limes.

37. Ms. Gonzalez-Castilleja would have classified the limes differently, prior to publication of the Administrative Message, had she known two distinct varieties of limes existed, and the correct botanical name for each.

38. Once the erroneous classification was discovered, Ms. Gonzalez-Castilleja classified the limes at issue under the correct subheading, 0805.90.00, and removed the entries from bypass. She contacted the responsible Customs Import Specialist to confirm the change in classification. She contacted the Texas Agricultural Extension Service and the University of Florida, horticulture science department to confirm that the botanical variety of Persian limes was *Citrus latifolia*. Additionally, she sent a memo to the trade advising them to include the scientific name/botanical name on their invoices so Customs could distinguish between types of limes.

39. Ms. Gonzalez-Castilleja would have acted to insure that Plaintiffs' Persian limes were accurately classified had she known two sci-

entific names existed prior to mid-1994. She would not have placed Persian lime entries on bypass unless she had verified that they were being entered and liquidated accurately. She would have called all of the customs brokers filing entries of the limes to notify them of a tariff classification change. She would have contacted the responsible Customs Import Specialist to confirm the change in classification.

40. If any of these Findings of Fact shall more properly be Conclusions of Law, they shall be deemed to be so.

V.
CONCLUSIONS OF LAW

1. Following oral argument in G&R Produce I, it was unclear whether the entry documents apprised the Customs import specialists of the proper botanical classification. Thus, the Court denied the parties' motions for summary judgment and stated in its opinion that

> While it may be true the specialists classified the limes under the incorrect tariff provision because it referred to limes *eo nomine*, the court cannot ascertain whether being apprised of the limes' proper botanical classification would have altered the specialists' behavior. Certainly, it is possible, *inter alia*, that if the import specialists were indeed unaware that the limes are of the *citrus latifolia* variety, being apprised of this fact may have alerted them that the reference to *citrus aurantifolia* "was a limitation on the types of limes that were classifiable in that provision" and that their assumption "that the phrase 'citrus aurantifolia' was synonymous with the term 'limes' immediately preceding the parenthetical" was erroneous. In other words, Ms. Gonzalez-Castilleja's statement fails to clarify whether "the facts exist, but [were] unknown" to her and her teammates upon entering the limes. As it stands, this statement can plausibly support the assertion that the Customs import specialists misclassified the limes due to a factual mistake.

G&R Produce I, 245 F. Supp. 2d at 1312.

2. In this instance, Defendant claimed that in order to "prevail on its claim that its imported Persian limes were misclassified because of a factual mistake as to the limes' botanical name, plaintiff had to prove . . . that the relevant parties were actually *unaware* of the correct botanical names for these limes." Defendant's Post-Trial Brief at 21–22 (emphasis added). Defendant's characterization is not what the Court held in G&R Produce I, 245 F. Supp. 2d at 1312. Furthermore, the Court does not require that Plaintiffs prove this assertion.

3. Defendant's claim illustrates one of the classic logic fal-

lacies: *argumentum ad ignorantiam*, an argument from ignorance.[8] This type of fallacy asserts that because something has not been proved true, it is therefore false.[9] The underlying predicate to Defendant's argument is that the parties were aware of the correct botanical name. This proposition may not be logically proven by lack of evidence that the parties were *unaware* of the correct botanical name. Defendant mistakenly assumes that an absence of evidence to support its proposition establishes the proposition. "New knowledge must be derived from some measure of knowledge." Ruggero J. Aldisert, Logic for Lawyers 190–91(3d ed. 1997). The Court cannot make a finding that a party has knowledge based on Defendant's claim. See id.

4. Following G&R Produce I, the remaining issues for the Court's resolution were whether the Customs import specialists were *aware* of the scientific facts and proper botanical classification of the limes; and the significance of their choice of tariff classification. See G&R Produce I, 245 F. Supp. 2d at 1312. This Court has previously held that "[t]axonomical classification is inherently factual; whether an import be fish or fowl, lemon or lime is a question resolved by quantities manifest in its nature." Black &White, 125 F. Supp. 2d at 544; G&R Produce I, 245 F. Supp. 2d at 1311 (CIT 2002). In order to succeed on their mistake of fact claim the Plaintiffs need only demonstrate the correct facts and " 'that *either* the importer or Customs had a mistaken belief as to the correct state of facts,' " that did not amount to an error in the construction of the law. Black & White, 125 F. Supp. 2d at 543 (quoting Chrysler Corp. v. United States, 87 F. Supp. 2d 1339, 1352 (CIT 2000))(emphasis added).

5. The taxonomical classification of an imported item is a question of fact. Plaintiffs' allegation, that their lime entries were misclassified because the parties were not aware of the correct scientific and botanical facts regarding the limes, contemplates the type of error that is remedial under 19 U.S.C. § 1520(c)(1). In general, decisions regarding the tariff treatment of merchandise are "final and conclusive on all persons" unless a protest is filed within ninety days of notice of liquidation. 19 U.S.C. § 1514(a), (c)(2) (1994). Pursuant to 19 U.S.C. § 1514, an importer may protest the classification of merchandise when the importer believes Customs has erred. See Taban Co. v. United States, 21 CIT 230, 237, 960 F. Supp 326, 332 (1997). Section 1520(c)(1) is an exception to the finality of liquidation and

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[8] "Another way that men ordinarily use to drive others and force them to submit to their judgments, and receive their opinion in debate, is to require the adversary to admit what they allege as a proof, or to assign a better. And this I call *argumentum ad ignorantiam*" John Locke, Essay Concerning Human Understanding 686 (Peter H. Nidditch ed., 1975).

[9] "The argument from ignorance is the mistake that is committed when it is argued that a proposition is true simply on the basis that it has not been proved false, or that it is false because it has not been proved true." Irving M. Copi & Carl Cohen, Introduction to Logic 116 (9th ed. 1994).

permits reliquidation of imported merchandise to correct clerical errors, mistakes of fact, or other inadvertences not amounting to an error of law, if brought to Customs attention within one year of liquidation.[10] 19 U.S.C. § 1520(c)(1); 19 C.F.R. § 173.4 (1994). However, section 1520(c)(1) does not provide a remedy for all mistakes, and only offers limited relief to the importer in the situations described in the statute. See PPG Indus., Inc. v. United States, 7 CIT 118, 123 (1984).

6. Defendant claims that Plaintiffs' lime entries were misclassified because the relevant parties determined that these limes were covered by a particular tariff provision and that determination proved to be wrong. Defendant argues that "[e]veryone was aware of the parenthetical phrase '*Citrus aurantifolia*,' but no-one interpreted that phrase as placing a limitation on the immediately preceding term 'limes' according to botanical variety." Defendant's Post-Trial Brief at 4. A determination by the Customs service that merchandise is covered by a certain tariff provision is a conclusion of law. See Cavazos v. United States, 9 CIT 628, 630 (1985). The Court of Appeals for the Federal Circuit, in Executone Info. Sys. v. United States, 96 F.3d 1383 (1996), stated that a typical challenge to a Customs decision exists where "Customs evaluated the merchandise and, based on its construction of the tariff schedule, determined into which of two categories the merchandise must be placed . . . . In such a case, there is no dispute that the only proper course of action would have been to file a timely protest under section 1514." Id. at 1388. The distinction between a mistake of law, and a mistake of fact is that a mistake of fact occurs in instances where either (1) the facts exist, but are unknown, or (2) the facts do not exist as believed. See Hambro Auto. Corp. v. United States, 603 F.2d 850, 855 (CCPA 1979). A mistake of law, however, occurs when "the facts are known, but their legal consequences are not known or are believed to be different than they really are." Id.

7. In cases where the Court has concluded that a party did not know the facts as they really were, and therefore lacked true knowledge of the ultimate character of the merchandise, the Court has found a mistake of fact exists. See Taban Co. v. United States, 21 CIT 230, 240, 960 F. Supp. 326, 334 (1997); Zaki Corp. v. United States, 21 CIT 263, 273, 960 F. Supp 350, 356 (1997). "Section

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[10] The regulation for a correction of an clerical error, mistake of fact, or inadvertence, 19 C.F.R. § 173.4(b) (1994), provides that a

> [c]orrection pursuant to . . . 19 U.S.C. § 1520(c)(1), may be made in any entry, liquidation, or other Customs transaction if the clerical error, mistake of fact, or other inadvertence:
>
> (1) Does not amount to an error in the construction of a law;
>
> (2) Is adverse to the importer; and
>
> (3) Is manifest from the record or established by documentary evidence.

1520(c) requires only that a mistake of fact by *either* party result in the erroneous classification." G&R Produce I, 245 F. Supp. 2d at 1306 (emphasis added).

8. One of the leading cases involving a mistake of fact is C.J. Tower & Sons of Buffalo, Inc. v. United States, 68 Cust. Ct. 17, 336 F. Supp. 1395 (1972). In C.J. Tower, neither Customs nor the importer were aware that the importer's entries constituted emergency war materials, entitled to duty free treatment, until after the liquidation of the importer's entries became final. Id. The Customs Court, predecessor to the Court of International Trade, discussed the legislative history of various bills and hearings held prior to the passage of the Customs Simplification Act of 1953, 67 Stat. 507, 519 § 20 and explained that in the hearings prior to the passage of § 1520 the Government stated that "the correction of errors and mistakes of the importers or *the Customs Service* in customs transactions" should be corrected in order "to do justice to the importing public."[11] Id. at 1399 (quoting hearings on H.R. 5505 before the Senate Committee on Finance, 82nd Cong., 2d Sess., 30 (1952))(emphasis added). The Customs Court ultimately found that mistakes that were not of a physical nature and not readily apparent, but rather required some further knowledge about the merchandise, i.e., its status as duty free war materials were mistakes of fact. Id. at 1400.

9. This Court further distinguished decisional mistakes, a wrong choice between two alternate sets of facts, and ignorant mistakes, where a party is unaware of the correct facts in Universal Coop., Inc. v. United States, 13 CIT 516, 518, 715 F. Supp. 1113, 1114 (1989). In Universal Coop., the plaintiff entered merchandise under a duty-free classification. Id. Based on a laboratory analysis of the merchandise, Customs determined that it was classifiable under a different tariff subsection, which was not duty free. Id. The plaintiff filed a petition for reliquidation under 19 U.S.C. § 1520(c)(1), which was denied. Id. Thereafter, the plaintiff filed a timely protest against Customs refusal to reliquidate, and, after that protest was denied, brought suit. Id. The Plaintiff's action was based on the premise that Customs' determination was a mistake of fact. The Court explained that decisional mistakes had to be challenged by a protest, pursuant to 19 U.S.C. § 1514, while ignorant mistakes could be remedied pursuant to 19 U.S.C. § 1520(c).[12] Id. The Court ultimately held that Cus-

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[11] In these hearings the Government expressed the opinion that it had no interest in retaining duties improperly collected that resulted from a clerical error, mistake of fact, or other inadvertence. C.J. Tower, 336 F. Supp. at 1399 (1972) (discussing hearings on H.R. 5505 before the Senate Committee on Finance, 82nd Cong., 2d Sess., 30 (1952)). Furthermore, the Government acknowledged in the hearings that the inability to make refunds in such cases results in "great dissatisfaction and a feeling of injustice among importers." Id.

[12] Applying this distinction, the Court in *Universal Coop.* stated that:

If there was a mistake here, it was surely of the decisional type. . . [T]he govern-

toms' determination was a decisional, and therefore, was not remedial under section 1520(c). Id. at 1114–15.

10. The necessary predicate to a tariff classification decision is a factual determination of what is being classified. Defendant's characterization that the Plaintiffs' lime entries were misclassified because the relevant parties determined that the limes were covered by a particular tariff provision, and that determination proved to be wrong, misses the mark. While both parties were aware that the HTSUS contained a provision for limes, the testimony at trial indicates that the Customs did not know the correct botanical facts regarding the entries of Persian limes. Specifically, the Customs import specialists did not know that Plaintiffs' limes were not *Citrus aurantifolia*. The testimony showed both parties recognized that immediately following a subheading was a parenthetical containing the phrase "*Citrus aurantifolia*," however, Ms. Gonzalez-Castilleja testified that prior to publication of the administrative message she believed that the phrase *Citrus aurantifolia* described all limes. Ms. Gonzalez-Castilleja also testified that she had not heard of the botanical lime variety *Citrus latifolia* until after the issuance of the Administrative Message. Customs made an initial ignorant or factual mistake as to not only the botanical variety of limes it was classifying but also as to the existence of other taxonomical classifications for lime varieties. Unlike the decisional mistake described in Executone Info. Sys., 96 F.3d at 1388, where Customs construed the tariff schedule and determined into which subheading the merchandise belonged, here, Customs first inaccurately determined the product, and then classified the limes according to that inaccurate knowledge. Thus, Customs made an ignorant factual mistake about the merchandise before the limes were classified.

11. The underlying assumption to Defendant's claim that a mistake of law was made, because no-one interpreted the phrase *Citrus aurantifolia as placing a limitation on the immediately preceding term 'limes' according to botanical variety, see Defendant's Post-Trial Brief at 4, is that both parties knew the correct botanical and scien-*

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ment . . . made a decision that the [merchandise] w[as] less than one inch wide. This created a situation for which the conventional protest method of 19 U.S.C. § 1514 was manifestly designed, i.e., *an importer with a fully informed position regarding its merchandise, confronting an informed, but adverse decision by the government.* One of them may have been mistaken as to the correct state of the facts, *but it was not from total ignorance of a possible alternative state of facts. . . .*

. . .[A]ll relevant positions as to the facts were known prior to the original liquidation and it would have been no hardship, and certainly no impossibility, for plaintiff to have made a timely protest against that liquidation. *If the government was mistaken as to the facts as a result of having chosen incorrectly from a number of known alternatives, then the condition precedent for contesting that decision in court was the making of a timely protest under Section 514*, thus allowing the question to be considered administratively in the most orderly and efficient way.

Universal Coop., 715 F. Supp. at 1114–15 (emphasis added).

tific facts; or that Customs knew that another taxonomical classification for limes, besides Citrus aurantifolia, existed. The testimony at trial showed that Customs did not know the correct factual information that would have allowed the import specialists to make a choice between alternative sets of facts (i.e., a decisional mistake). Customs was neither fully informed nor aware of the correct respective facts that might have informed them of a potential alternative classification. As stated above, while it is true that everyone was aware of the parenthetical phrase *Citrus aurantifolia*, the necessary link that is absent from Customs reasoning is the fact that the Customs import specialists did not know that the Plaintiffs' limes were not *Citrus aurantifolia*. The Customs import specialists did not interpret the botanical phrase in the HTSUS as placing a limitation on the preceding term 'limes' because the parties did not know that another taxonomical classification for limes existed.

12. The Defendant's other claim, that the scientific name for the limes would not have mattered to Customs' classification decision, is contradicted by Ms. Gonzalez-Castilleja testimony. Customs was aware that the parenthetical *Citrus aurantifolia* followed the term limes, but mistakenly believed that Persian limes were *Citrus aurantifolia*. Ms. Gonzalez-Castilleja testified that had she known the correct scientific and botanical facts she would have accurately classified the limes. Accurate knowledge of the merchandise is the first step in any classification decision and Customs' ignorance of the correct facts does not convert its factual mistake into a legal interpretation in this instance. Thus, the Court does not impute a legal interpretation on Customs' when the requisite facts were clearly unknown.

13. Congress provided a liberal mechanism for the correction of clerical errors, mistakes of fact, and other inadvertence through section 1520(c)(1). See ITT Corp. v. United States, 24 F.3d 1384, 1389–90 (Fed. Cir. 1994). Because Customs was not aware of the correct botanical facts regarding the limes, they could not have exercised judgment nor made a classification decision based upon the taxonomy or botanical names of the limes. The Court finds the Customs' import specialists made a mistake of fact when classifying Plaintiffs' lime entries because the import specialists were neither aware of taxonomical facts regarding the limes nor the limes correct scientific or botanical nomenclature. Therefore, Customs mistake of fact as to the correct taxonomy, and botanical and scientific names for the limes, is remedial under § 1520(c).

14. The Defendant alternately claims that because Plaintiffs used the electronic entry system, and the majority of Plaintiffs' entries were on entry summary selectivity bypass, ("bypass") the customs brokers, and not Customs' import specialists, are responsible for

classification errors.[13] See Defendant's Post-Trial Brief at 10, 30–32. Defendant claims that "while we do not dispute that, as a general proposition, 19 U.S.C. § 1520(c)(1) can be used to remedy a clerical error, mistake of fact or other inadvertence by anyone connected with an entry, including a Customs employee, when the claim relates to a bypass entry, the reviewer should only consider the "mistakes" of those who had an ability to affect the entry. . . ." Id. at 30–31. Thus, Defendant asserts that only customs brokers could have made the relevant determination respecting bypass entries.[14]

15. Ms. Gonzalez-Castilleja testimony at trial reflects that the fact that Customs misclassified Persian lime entries. Ms. Gonzalez-Castilleja testified that Customs uses its bypass procedure to manage its workload. In order to place entries on bypass, Customs reviews the entries' tariff classification for accuracy. Ms. Gonzalez-Castilleja stated that she would not have placed entries on bypass if she doubted that she was sufficiently familiar with the facts regarding a specific good. Furthermore, even while entries are on bypass, Customs continued to randomly sample and review entries for accuracy.

16. The Court finds that Customs elected to place entries of limes on bypass for its own convenience and because it believed there were no classification or valuation issues involving those entries at the time she selected them. Although entry documents are provided to Customs by the Plaintiffs' importers, the original decision to place the lime entries on bypass was Customs' own. Because Customs made the initial decision to place the Persian lime entries on bypass and independently verified the entries' classification, Defendant may not now claim that Customs may avoid making a mistake of fact by the use of a workload reducing administrative process.

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[13] Importers and their brokers are responsible for submitting entry summary data to Customs. The Automated Broker Interface ("ABI") is an electronic method that customs brokers may use to transmit the required entry data to Customs. Additionally, Customs tracks imported merchandise through their Automated Computer System ("ACS").

[14] The depositions that Defendant read and entered into evidence at trial reveal that he customs brokers were also unaware of the correct scientific and botanical facts regarding the Plaintiffs' entries of limes. While the brokers knew that more than one type of lime existed, i.e. a Key lime versus an Persian lime, the brokers did not know that more than one taxonomical type of lime existed. The deposition of Jose Guerra indicates that prior he was not aware of the correct botanical name for the Persian limes. Defendant's Exhibit A, Guerra Deposition. The testimony of Jimmy Santos indicates that he believed that *Citrus aurantifolia* was the botanical name for Persian limes. Defendant Exhibit B, Santos Deposition. The deposition of Jose Arevalo indicates he did not know the correct botanical name for Persian limes. Defendant Exhibit C, Arevalo Deposition. Finally, the deposition of Alex Trevino indicates that he was unfamiliar with the scientific and botanical names for the limes at issue. Defendant's Exhibit D, Trevino Deposition.

17. If any of these Conclusions of Law shall more properly be Findings of Fact, they shall be deemed to be so.

Evan J. Wallach, Judge

Dated: September 15, 2003
New York, New York

Slip Op. 03–120

BEFORE: GREGORY W. CARMAN, CHIEF JUDGE

MAUI PINEAPPLE COMPANY, LTD., PLAINTIFF, v. UNITED STATES, DEFENDANT, AND DOLE FOOD COMPANY, INC., DOLE PACKAGED FOODS COMPANY, AND DOLE THAILAND, LTD., DEFENDANT-INTERVENORS.

Court No. 01–01017

[Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order are affirmed and the case is dismissed.]

Dated: September 15, 2003

Collier Shannon Scott, PLLC (*Paul C. Rosenthal, David C. Smith, Jr., Jennifer E. McCadney*), Washington, D.C., for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Brent M. McBurney*, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Glenn R. Butterton*, Senior Attorney, Office of Chief Counsel for Import Administration, United States Department of Commerce, Of Counsel, for Defendant.

Hale and Dorr LLP (*Michael D. Esch, Aimen Mir*), Washington, D.C., for Defendant-Intervenors.

OPINION

CARMAN, CHIEF JUDGE: The Court holds that the Final Results of Redetermination Pursuant to United States Court of International Trade Remand Order ("*Remand Results*") are supported by substantial evidence or otherwise in accordance with law and affirms the *Remand Results*.

On June 16, 2003, this Court entered judgment affirming in part the Department of Commerce's ("Commerce") determination in *Notice of Final Results of Antidumping Duty Administrative Review and Recission* [sic] *of Administrative Review in Part: Canned Pineapple Fruit From Thailand*, 66 Fed. Reg. 52,744 (Oct. 17, 2001), and remanding in part for further proceedings. *Maui Pineapple Co., Ltd.*

v. United States, 254 F. Supp. 2d 1244 (Ct. Int'l Trade 2003). The Court instructed Commerce to 1) consider Maui's arguments as to the interest rate used for Defendant-Intervenor's imputed credit expense and explain how the rate chosen is reflective of Defendant-Intervenor's creditworthiness and usual commercial behavior, and 2) determine whether there is a clerical error in Commerce's final margin program and make any necessary corrections. *Id.* at 1264. The Court gave Commerce until June 16, 2003 to file the remand results, and the parties were given until July 7, 2003 to file responses.

Commerce filed the *Remand Results* on June 16, 2003. In the *Remand Results*, Commerce decided not to use the surrogate interest rate it had used in the original results in light of Plaintiff's arguments and Commerce's own findings. Commerce listed its concerns with the rate previously used and some of the alternative rates considered. Ultimately Commerce decided to use an average commercial paper rate, the Bank of Canada 30-day prime corporate paper rate, as the surrogate interest rate for calculating Defendant-Intervenor's imputed credit expense because it best reflected Defendant-Intervenor's usual commercial behavior and creditworthiness. Commerce also confirmed the clerical error pointed out by Plaintiff and made all requisite corrections, as well as corrections to two other clerical errors directly related to the one found by Plaintiff.

Upon reviewing the *Remand Results* and the record supporting the *Remand Results*, the Court finds that Commerce complied with the Court's remand order and its determination is supported by substantial evidence or otherwise in accordance with law. The parties do not oppose the Court's sustaining the *Remand Results*.

CONCLUSION

The Court finds that Commerce's *Remand Results* are supported by substantial evidence or otherwise in accordance with law. Accordingly, the *Remand Results* are affirmed.

Gregory W. Carman,
Chief Judge

Dated: September ___ , 2003
New York, New York

Slip Op. 03–121

USEC INC. AND UNITED STATES ENRICHMENT CORPORATION, PLAINTIFFS, v. UNITED STATES, DEFENDANT.

Before: Pogue, Wallach, and Eaton, Judges

Court No. 02–00112; and Court Nos. 02–00113, 02–00114 and
Consol. Court Nos. 02–00219; 02– 00221, 02–00227, 02–00229, and 02–00233

[Commerce's remand determination reversed in part and affirmed in part.]

Decided: September 16, 2003

Fried, Frank, Harris, Shriver & Jacobson (David E. Birenbaum, Jay R. Kraemer, Mark Fajfar) for Plaintiffs and Defendant-Intervenors Urenco Limited, Urenco Deutschland GmbH, Urenco Nederland B.V., Urenco (Capenhurst) Ltd., and Urenco, Inc.; Weil, Gotshal & Manges, LLP (Stuart M. Rosen, Gregory Husisian, Jennifer J. Rhodes) for Plaintiffs and Defendant-Intervenors Eurodif S.A., COGEMA, and COGEMA, Inc.

Peter D. Keisler, Assistant Attorney General, David M. Cohen, Director, Stephen C. Tosini, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, David R. Mason, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant United States.

Steptoe & Johnson LLP (Sheldon E. Hochberg, Richard O. Cunningham, Eric C. Emerson) for Defendant-Intervenors and Plaintiffs USEC Inc. and United States Enrichment Corporation.

Shaw Pittman LLP (Stephan E. Becker, Nancy A. Fischer, Sanjay J. Mullick, Joshua D. Fitzhugh) for Plaintiff-Intervenors Ad Hoc Utilities Group.

OPINION

Pogue, Judge: In USEC Inc. v. United States, 27 CIT ___ , 259 F. Supp. 2d 1310 (2003) ("USEC I"),[1] this Court remanded aspects of the final affirmative antidumping and countervailing duty determinations of the Department of Commerce ("the Department" or "Commerce") with regard to low enriched uranium ("low enriched uranium" or "LEU") from France, Germany, the Netherlands, and the United Kingdom.[2] The Court instructed Commerce to evaluate the

[1] Familiarity with the Court's prior opinion is presumed.

[2] The determinations challenged in the original action were Low Enriched Uranium from France, 67 Fed. Reg. 6,680 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination of sales at less than fair value and antidumping duty order); Low Enriched Uranium from France, 66 Fed. Reg. 65,877 (Dep't Commerce Dec. 21, 2001) (notice of final determination of sales at less than fair value) ("LEU from France"); Low Enriched Uranium from France, 67 Fed. Reg. 6689 (Dep't Commerce Feb. 13, 2002) (notice of amended final determination and notice of countervailing duty order); Low Enriched Uranium from France, 66 Fed. Reg. 65,901 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom, 67 Fed. Reg. 6,688 (Dep't Commerce Feb. 13, 2002) (notice of amended final determinations and notice of countervailing duty orders); Low Enriched Uranium from Germany, the Netherlands, and the United Kingdom, 66 Fed. Reg. 65,903

applicability of its tolling regulation, 19 C.F.R. § 351.401(h), to determine whether the intervenors (the "utilities," also the "Ad Hoc Utilities Group" or "AHUG") should be designated as producers of LEU. USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1326. The Court further directed that if Commerce found the tolling regulation applicable, the agency should also (1) reconsider whether application of the regulation affects the determination as to which companies are "producers" for the purpose of the industry support determination, USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1328; and (2) reconsider its application of the countervailing duty laws. USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1329. The Court now reviews the results of the remand as presented in Commerce's Final Remand Determination, USEC Inc. and United States Enrichment Corporation v. United States (June 23, 2003)("Remand Determ."). Jurisdiction lies under 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(i) (2000).

Background

The antidumping and countervailing duty investigations at issue here covered all low enriched uranium. Low enriched uranium is used to produce nuclear fuel rods, which in turn produce electricity in nuclear reactors. See, e.g., USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1314. Uranium enrichment is one of five steps in the production of nuclear fuel.[3] See id.; LEU from France, 66 Fed. Reg. at 65,879. At issue in this proceeding is whether, for purposes of application of the antidumping and countervailing duty statutes, the "separative work unit" contracts entered into by the utilities and the companies that enrich the uranium feedstock (the "enrichers") constitute subcontracting arrangements involving the purchase of services or sales of enriched uranium.

As we more fully explained in USEC I, nuclear utilities employ two types of contracts for procuring LEU from uranium enrichers. See, e.g., USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1314. One is a contract for enriched uranium product ("EUP contract"), in which the utility simply purchases LEU from the enricher. See LEU from France, 66 Fed. Reg. at 65,878, 65,884. In an EUP contract, the price paid for the LEU covers all elements of the LEU's value, including the feed uranium and the effort expended to enrich it. Transcript of

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(Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determinations).

[3] The steps involved in nuclear fuel production are: (1) mining uranium ore; (2) milling and/or refining the ore into uranium concentrate, referred to as natural uranium (U_{308}); (3) converting the natural uranium into uranium hexafluoride (UF_6), or "feed uranium;" (4) enriching uranium hexafluoride to create low enriched uranium; and (5) using the low enriched uranium to fabricate nuclear fuel rods for use in nuclear reactors. USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1314; see also LEU from France, 66 Fed. Reg. at 65,879.

Dep't of Commerce Hearing in the Matter of Low Enriched Uranium from France, Germany, the Netherlands, and the United Kingdom (Oct. 31, 2001), Jt. App. Tab 6–A at 46 ("Hrg. Trans."). As noted in USEC I, all parties to this action agree that sales of enriched uranium product constitute sales of merchandise subject to the antidumping and countervailing duty laws. USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1314.

The second type of contract is called a "separative work unit" or "SWU" contract. A "separative work unit" is a measurement of the amount of energy or effort required to separate a given quantity of feed uranium into LEU and depleted uranium, or uranium "tails," at specified assays. See LEU from France, 66 Fed. Reg. at 65,884. Under a SWU contract, a utility purchases separative work units and delivers a quantity of feed uranium to the enricher. LEU from France, 66 Fed. Reg. at 65,878, 65,884–85.

As discussed in USEC I, because feed uranium is fungible, the specific feed uranium provided by a utility need not be used to produce LEU for that utility. See USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1315 (citing Resp. Br. of USEC, Inc. Opp'n Cogema/Urenco Mot. J. Agency R. at 16–17 & n.21). Enrichers maintain inventories of feed uranium, which is not segregated according to source or ownership, and any uranium held by the enricher may be used to produce LEU for any customer. Id.

Utilities purchase feed uranium from third parties,[4] and prior to delivering the feed uranium to the enricher, the utilities have title, risk of loss, power to alienate or sell, and use and possession of the feed uranium. The utility retains title to feed uranium supplied to the enricher until the enricher delivers the LEU ordered by the utility. In addition, at the time of delivery of the LEU, the enricher recognizes that title to the LEU is also held by the utility. As stated in one of the contracts in the record, "[t]itle to the Feed Material shall remain with [the utility] until the [LEU] Delivery associated with such Feed Material . . . at which time the Feed Material shall be deemed to have been enriched; whereupon [the utility] sha[ll] have title to such [LEU] associated with such Feed Material and title to such Feed Material will be extinguished." Uranium Enrichment Services Contract between [Utility A] and Urenco, Jt. App. Tab 3–F at JA–1364; see also Uranium Toll Enrichment Services Contract between [Utility B] and COGEMA, Inc., Jt. App. Tab 3–A at JA–1210; Uranium Enrichment Services Contract between [Utility C] and COGEMA, Inc., Jt. App. Tab 3–E at JA–1302; Uranium Enrichment Services Contract between [Utility D] and Urenco, Jt. App. Tab 3–G at JA–1399. In USEC I, we described the SWU transactions as follows:

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[4] Nothing in the record suggests that the parties from whom utilities purchase the feed uranium are in any manner related to the enrichers.

> Pursuant to the SWU contracts, risk of loss or damage to the feed uranium, as well as use and possession, pass from the utility to the enricher upon delivery of the feed uranium to the enricher. However, the enricher does not obtain title to the feedstock; rather, actual title is at all times with the utility. Nor does the enricher have the power to sell a utility's feedstock to a third party. Moreover, it appears clear on this record that at the moment when the LEU is delivered to the utility by the enricher, the utility has title to and ownership of the LEU. The feed uranium does not become an asset of the enricher, nor is it ever reflected as such on the enricher's books and records.[5]

USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1315 (internal citations omitted).

In reaching its original affirmative antidumping and countervailing duty determinations, Commerce found that under both LEU and SWU contracts the enrichers were producers of LEU for purposes of the less-than-fair-value determination.[6] The agency concluded that EUP and SWU contracts were "functionally equivalent," in that "the overall arrangement under both types of contracts is, in effect, an arrangement for the purchase and sale of LEU." LEU from France, 66 Fed. Reg. at 65,884–85.

In USEC I, this Court concluded that the circumstances of the SWU transactions at issue resemble those of earlier cases involving "tolling" or "subcontracting" arrangements in which Commerce applied its tolling regulation, 19 C.F.R. § 351.401(h), to determine that the tollee, rather than the toll manufacturer, or subcontractor, was the producer of the subject merchandise. The Court therefore directed Commerce to assess the applicability of the tolling regulation, and thus, the propriety of designating the enrichers as producers of LEU and respondents in the antidumping and countervailing duty investigations. See USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1326, 1331. The Court also directed Commerce to explain why it applied a different definition of the term "producer" in the context of determin-

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[5] See USEC I, 27 CIT at ____ , 259 F. Supp. 2d at 1315–16 n.5 (noting that (1) the foreign enrichers' records, which were verified by Commerce, did not reflect payments for customer-provided uranium, (2) USEC requires utilities to pay the property taxes on customer-provided uranium in USEC's possession, and (3) the record does not indicate that the enrichers treated customer-provided uranium as an asset).

[6] To determine whether merchandise is being sold or is likely to be sold in the United States at less than fair value, Commerce compares the merchandise's normal value, or the price at which the merchandise is first sold for consumption in the exporting country, to the export price or constructed export price, which represents the price of the good when sold in or for export to the United States. See 19 U.S.C. § 1673; 19 U.S.C. § 1677a; 19 U.S.C. § 1677b(a). In making an export price or constructed export price determination, Commerce first must decide which company is the producer or exporter of the merchandise. See 19 U.S.C. § 1677a(a)—(b); Taiwan Semiconductor Mfg. Co. v. United States, 25 CIT ____ , ____ , 143 F. Supp. 2d 958, 966 (2001).

ing industry support than that used in the context of calculating the dumping margin. USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1328.

In its Remand Determination, Commerce concludes once again that the enrichers, rather than the utilities, are the producers of LEU, finding that (1) "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value," (2) the enrichers "are the only companies engaged in the production of LEU," (3) the enrichers "control the production of LEU," and (4) the utilities are "industrial users and consumers of LEU." Remand Determ. at 52. Commerce also explained that the different definitions of the term "producer" are warranted by the purposes underlying the relevant statutory provisions. Id. at 14–15, 22–23, 25.

Standard of Review

This Court will uphold an agency 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. Ownership of the Subject Merchandise

Commerce bases its selection of the enrichers as the producers of LEU primarily on its conclusion that under the terms of the contracts, the enrichers own all of the LEU that they have produced but not yet delivered. See Remand Determ. at 52, 59. Commerce asserts that the enrichers transfer title to and ownership of the LEU to the utilities upon delivery of the LEU. Id. Therefore, Commerce argues, the delivery of the LEU effects a transfer of title and ownership for consideration, which constitutes a sale under NSK Ltd. v. United States, 115 F.3d 965, 973 (Fed. Cir. 1997), and a relevant sale for the purposes of calculating a dumping margin. Id. at 59–60.

As we discussed in USEC I, however, the SWU contracts governing the transactions at issue establish a legal fiction that the very feed uranium delivered by a utility to an enricher is enriched and then returned as LEU to the utility. See USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1321–22; Oral Arg. Trans. at 33–34, 38, 41. The Court concluded that although the enrichers obtain the right to use and possess the feedstock, and assume the risk of loss or damage, there is no evidence that they ever obtain ownership of either the feed uranium or the final enriched product. USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1315, 1323; see also Oral Arg. Trans. at 30–35, 38, 41. Moreover, the contractual provisions addressing the retention of title in the feed uranium and passage of title in the LEU suggest an intention to establish a continuous chain of ownership in the utility while maintaining the enricher's ability to cover its obligations under the contract should it encounter difficulties in producing or providing LEU for a customer. See, e.g, Oral Arg. Trans. at 33–34 (not-

ing that the contractual provisions specifying that a utility obtains title to LEU are necessary because "if title to the product material were not specified clearly in the contract, there could be a question"), 38 ("[The enricher] receives material that it is holding for the account of the Utility customer, to be enriched and returned. And, when it is returned in enriched form, title passes to the enriched product. Title is extinguished in the feed."); Uranium Enrichment Services Contract between Cogema, Inc. and [Utility E], App. to Response of USEC to Dep't of Commerce's Remand Determ. of June 23, 2003, Tab 1 at JA–9003 ("USEC Remand App."); Uranium Enrichment Services Contract between [a utility] and Urenco, USEC Remand App. Tab 2 at JA–9074; see also contracts cited supra pp. 5–6. For example, these provisions enable the utility to claim the amount of feed uranium delivered, or the value thereof, from the enricher in the event that the enricher breached the contract. Such a contractual arrangement, which is apparently beneficial to both parties, is aided by the essential fungibility of the material at issue. Parsing the contractual provisions at issue does not lead to the conclusion that the enricher obtains ownership over the LEU and then sells it to the utility. Rather, the contracts delineate a transaction in which a utility provides raw material to an enricher, pays for the service of processing the material, and obtains the finished product after the manufacturing service has been performed.

Because the enricher does not obtain ownership of the LEU enriched under SWU contracts, the transfer of LEU by the enricher to the utility cannot constitute a sale of merchandise under NSK Ltd. v. United States. See 115 F.3d at 975 (concluding that a sale "requires both a transfer of ownership to an unrelated party and consideration"). Nothing in Commerce's Remand Determination provides any evidentiary or legal basis for a contrary conclusion. Commerce's basic premise in the Remand Determination is that "the enrichers make the only relevant sales that can be used for purposes of establishing U.S. price and normal value." Remand Determ. at 52. This statement, however, begs the question whether these transactions can truly be construed as relevant sales of merchandise. Commerce's duty is to investigate "sales" at less than fair value. The agency's assertion that the enrichers' transactions with the utilities are the only transactions that could be such sales, without more, does not establish that there is an evidentiary or legal basis to conclude that those transactions constitute sales for purposes of our antidumping statutes.

Commerce's subsidiary factual determination is no more well-founded. Commerce asserts that because the utilities only hold title to the feedstock at the time prior to delivery, "[t]he enricher, by contrast, would have rights as to the LEU." Remand Determ. at 58. Commerce, however, cannot and does not provide any evidentiary basis for this supposition; nothing in the record supports a determi-

nation that the enricher has any ownership rights. Accordingly, Commerce's determination is unsupported by substantial evidence and not in accordance with law.

II. Equivalence of EUP and SWU Contracts

In addition to its claim that the enrichers obtain ownership of the LEU, Commerce also bases its conclusions upon the assertion that EUP and SWU contracts are fundamentally equivalent. Commerce states that

> the completed product, LEU, is entering the marketplace through the transactions at issue. Utility customers cannot obtain LEU by purchasing enrichment alone. Rather, in every instance in which the utility customer enters into a SWU transaction, it is obtaining LEU.

Remand Determ. at 61.

Commerce made essentially the same argument in its original determinations when it stated that "the overall arrangement under both [EUP and SWU] contracts is, in effect, an arrangement for the purchase and sale of LEU." LEU from France, 66 Fed. Reg. at 65,884. This Court dismissed that argument in USEC I when we stated that "under any tolling arrangement, the 'overall arrangement' is one for acquisition of a good, usually manufactured by the toller." USEC I, 27 CIT at ___, 259 F. Supp. 2d at 1324. Furthermore, the SWU transaction does not account for the full value of the finished product; rather, it accounts only for the value of the enrichment processing. Cf. Response to Court Remand, Taiwan Semiconductor Mfg. Co. v. United States, Jt. App. Tab 7–A at JA–2604 (Dep't Commerce June 30, 2000) ("Under the Department's practice, the 'relevant sale' must be a sale by the company that owns the merchandise entirely, including all essential components, can dispose of the merchandise at its own discretion, and, thus, controls the pricing of the merchandise and not merely the pricing of certain portions of production. . . . In contrast, a subcontractor's or toller's price does not represent all elements of value. Rather, the subcontractor or toller merely performs one or more segments of the manufacturing process at the direction of another entity. Thus, subcontracted production is distinguishable from other types of production because the subcontractor does not bear at least one element of cost which is essential to production of the subject merchandise.") ("SRAMS Remand Response"). Here, the SWU transaction represents approximately 65 percent of the value of the LEU, and is not equivalent to a sale of the finished product at its full value. See USEC I, 27 CIT at ___, 259 F. Supp. 2d at 1325 (indicating that natural uranium supplies "approximately 35 percent of enriched uranium's total value").

Commerce states in a footnote that "in a meaningful sense, enrichment transactions do reflect the full value of the LEU since the

things of value provided by the utility customer to the enricher (cash and natural uranium) account for the full value of the LEU received by the customer from the enricher." Remand Determ. at 54 n.34. Yet this reasoning could be applied to any subcontracting case, including some of Commerce's earlier tolling cases, in which a tollee provides raw materials to the toll manufacturer and pays for the manufacturing services. For example, in SRAMS from Taiwan, the value of the wafer design and design mask provided by the design house plus the value of the manufacturing processes performed by the toller, considered together, reflect the full value of the finished product. In that case, however, Commerce recognized that the toller was paid only for the actual manufacturing processes, and that "a subcontractor's or toller's price does not represent all elements of value." SRAMS Remand Response, Jt. App. Tab 7–A at JA–2603–04. In Certain Pasta from Italy, Corex provided the materials to the toller and paid the toller for its manufacturing services. 63 Fed. Reg. 53,641, 53,642 (Dep't Commerce Oct. 6, 1998) (preliminary results of new shipper antidumping duty administrative review). The payment to the toller was characterized as a "processing fee," and Commerce determined that Corex, rather than the toller, was the producer of the subject merchandise. Id. Commerce has stated that "[t]ypically, the subcontracting, or tolling, addressed by [the tolling regulation] involves a contractor who owns and provides to the subcontractor a material input and receives from the subcontractor a product that is identifiable as subject merchandise." SRAMS Remand Response, Jt. App. Tab 7–A at JA–2604. Consequently, we find unpersuasive Commerce's argument that the transaction between the tollee and toll manufacturer reflects the full value of the merchandise produced.[7]

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[7] Commerce also cites to Polyvinyl Alcohol from Taiwan for the proposition that "the sale of subject merchandise may occur in two distinct transactions," and "such relevant sales may be combined to derive, and calculate, the price of the subject merchandise." Remand Determ. at 55–56 (citing Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. 32,810, 32,81[3–14] (Dep't Commerce June 16, 1998) (final results of antidumping duty administrative review)). The transactions in Polyvinyl Alcohol from Taiwan to which this comment refers are those between Perry and Chang Chun. Commerce determined that Chang Chun, the toller, was the producer of the subject merchandise and that the other company, Perry, was merely an importer and reseller. See Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. 6,526, 6,527 (Dep't Commerce Feb. 9, 1998) (preliminary results of antidumping duty administrative review). Perry had restructured its contractual arrangement with Chang Chun after Commerce found that Chang Chun was selling subject merchandise at less than fair value. See USEC I, 27 CIT at ____ , 259 F. Supp. 2d at 1320–21 n.11 (citing Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. at 6,527). Under the restructured contract, Perry purchased inputs from an affiliate of Chang Chun and arranged delivery of the inputs to Chang Chun for processing. USEC I, 27 CIT at ____ , 259 F. Supp. 2d at 1321 n.11 (citing Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. at 6,527). As we stated in USEC I, "[t]he crucial finding in Polyvinyl Alcohol from Taiwan was that, under the circumstances, Perry had simply restructured its payments to Chang Chun in an effort to circumvent the antidumping duties." USEC I, 27 CIT at ____ , 259 F. Supp. 2d at 1321 n.11. By contrast, in considering DuPont's relationship with Chang Chun in the same case, Commerce held that DuPont was the producer of the subject merchandise because DuPont manufactured the primary input, shipped it to Tai-

III. The Tolling Regulation, 19 C.F.R. § 351.401(h)

In the Remand Determination, Commerce again concludes that the tolling regulation does not apply in this case to designate the utilities as producers of LEU for purposes of calculating export price or constructed export price. See Remand Determ. at 47, 52. As in its original determinations, Commerce concludes that the enrichers are the producers of LEU. Id. at 45, 52, 56–57.

In explaining its decision, Commerce reasons that the tolling regulation "does not purport to address all aspects of an analysis of tolling arrangements," and that the agency looks at the totality of the circumstances in making its determination. Remand Determ. at 49 (quoting Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. at 32,813). Commerce distinguishes the prior tolling cases cited by the Court in USEC I on the grounds that in each of those cases, the agency "faced a choice of respondents, based upon its analysis of the sales made by two entities — the toller on the one hand, and the tollee on the other." Remand Determ. at 48. Commerce argues that in each of the earlier cases,

> the tollee sold the subject merchandise, as contemplated by the regulation. Second, in nearly all of these cases, and in particular where the Department was required to examine the totality of the circumstances to determine the producer, the tollee engaged in manufacturing or processing operations. In no instance did the Department determine an entity was a producer based solely upon its purchase of an input and the designation of product specifications.

Remand Determ. at 62–63. The agency says that in this case, by contrast, the tollees did not sell the completed merchandise. As the utilities made no sales of the subject merchandise, Commerce claims that they cannot be designated as respondents for the purpose of establishing export price or constructed export price. Therefore, Commerce concludes, "the tolling regulation cannot be applied to the facts and circumstances of this case without defeating the purpose of the regulation and the statutory provisions that the regulation is de-

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wan for processing by Chang Chun according to specifications supplied by DuPont, and exported it from Taiwan back to the United States and to third countries. See USEC I, 27 CIT at ____, 259 F. Supp. 2d at 1320 (citing Polyvinyl Alcohol from Taiwan 63 Fed. Reg. at 6,527).

The instant case is more similar to the contract between DuPont and Chang Chun than to the contract between Perry and Chang Chun. First, in the course of managing the sequential steps in the production of nuclear fuel, the utility purchases uranium feedstock from a third party and pays the enricher to process it into LEU. See, e.g., USEC I, 27 CIT at ____, 259 F. Supp. 2d at 1314–15. Second, the utility does not merely import and resell LEU. Finally, the contractual arrangement here long predates the initiation of unfair trade investigations. See, e.g., Hrg. Trans., Jt. App. Tab 6–A at 43–45; Oral Arg. Trans. at 42. Unlike the contract referred to in the Remand Determination, the SWU contracts here are not simply restructured purchase contracts.

signed to implement." Remand Determ. at 47. Commerce asserts that the tolling regulation does not contemplate the circumstances of this case, and that "the statutory provisions governing the establishment of U.S. price are silent" as to how to calculate U.S. price in such circumstances. Id. at 51; see also id. at 47 ("A fundamental requirement upon which the tolling regulation is premised is that merchandise produced through a tolling operation is sold to a party in the United States. . . . In promulgating the tolling regulation, the Department did not contemplate the situation in which the tollee makes no sales of subject merchandise."). Commerce thus proceeds to evaluate "the totality of the circumstances in order to select the appropriate respondents." Remand Determ. at 50.

It is certainly true that the tolling regulation does not "address all aspects of an analysis of tolling arrangements," Remand Determ. at 49 (quoting Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. at 32,813), and that the agency may look at the totality of the circumstances in making a determination. See, e.g., Stainless Steel Bar from India, 66 Fed. Reg. 13,496, 13,496 (Dep't Commerce Mar. 6, 2001) (preliminary results of new shipper antidumping duty administrative review) ("In determining whether a company that uses a subcontractor in a tolling arrangement is a producer pursuant to 19 C.F.R. [§] 351.401(h), we examine all relevant facts surrounding a tolling agreement."); Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. at 32,813 ("[W]hen determining whether a party is a producer or manufacturer of subject merchandise, we look at the totality of the circumstances presented."). Nonetheless, we find Commerce's continuing attempts to distinguish its earlier tolling cases from the instant case unpersuasive.

In support of its assertions, Commerce relies primarily on SRAMS from Taiwan and Polyvinyl Alcohol from Taiwan, in which the tollees participated in manufacturing or processing operations. See SRAMS Remand Response, Jt. App. Tab 7–A at JA–2603, JA–2605 (finding that the tollee design house engaged in research and development, thereby producing the intellectual property that was "one of the primary determinants of the value of individual products"); Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. at 6,527; Polyvinyl Alcohol from Taiwan, 63 Fed. Reg. at 32,817 (concluding that DuPont was the producer of the subject merchandise, because it manufactured the primary input and shipped it to a toller for further manufacturing).

In a number of other cases, however, it appears that the tollee did not engage in manufacturing or processing operations, and was determined to be a producer based on procurement and continued ownership of inputs or raw materials, payment of processing fees to subcontractors for manufacturing, and overall control of the series of processes (such as purchasing inputs, procuring manufacturing services, and marketing and sales services) involved in creating the final product. In Certain Pasta from Italy, Commerce determined that

Corex was the producer of the subject pasta because Corex "(1) purchase[d] all of the inputs, (2) pa[id] the subcontractor a processing fee, and (3) maintain[ed] ownership at all times of the inputs as well as the final product." See 63 Fed. Reg. at 53,642. Corex also was "solely responsible for the marketing and sales of the product and any freight arrangements." Id. Corex's involvement in the production of the subject merchandise apparently involved not manufacturing or processing, but managing the successive steps in production of the subject merchandise by procuring and maintaining ownership of the material inputs and subcontracting the manufacturing processes. In Certain Forged Stainless Steel Flanges from India, Commerce found respondent Akai the producer of the subject merchandise, even though Akai did not own the machinery used in producing flanges and apparently did not engage in the actual manufacturing processes. 58 Fed. Reg. 68,853, 68,855–56 (Dep't Commerce Dec. 29, 1993) (notice of final determination of sales at less than fair value). Instead, Commerce's conclusion was premised on the following facts:

> Akai purchase[d] and maintain[ed] title (during the entire course of production) to the raw materials used for the production of the vast majority of the flanges, and . . . direct[ed] and control[led] the manufacturing process insofar as it determine[d] the quantity, size, and type of flanges to be produced. . . . Akai control[led] the costs for all elements incorporated in the production of the flanges.

Id. at 68,856. In explaining its conclusion, Commerce stated that "[t]he Department is required to capture all the costs involved in the production of the subject merchandise, and must therefore look to the company that controls the costs of production of the merchandise." Id.; see also Dep't of Commerce Mem. from Joseph A. Spetrini to Troy Cribb, Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Stainless Steel Butt-Weld Pipe Fittings from Italy at 3 (Dec. 27, 2000) (unpublished), at www.ia.ita.doc.gov/frn/index.html (concluding that a company that "perform[ed] all marketing and selling functions," "purchased the raw material," and "maintained ownership of all materials sent . . . for further production" was the producer of subject merchandise, while the two companies that actually performed manufacturing operations were tollers and not producers); Stainless Steel Bar from India, 65 Fed. Reg. 59,173, 59,174 (Dep't Commerce Oct. 4, 2000) (preliminary results of new shipper antidumping duty administrative review) (finding a company the producer of the subject merchandise where it "(1) [p]urchase[d] all of the inputs, (2) pa[id] the subcontractor a processing fee, and (3) maintain[ed] ownership at all times of the inputs as well as the final product").

In other cases, it appears that the tollee did engage in manufacturing or processing operations, but this fact was not crucial to Com-

merce's determination that the tollee was the producer. See, e.g., Dep't of Commerce Mem. from Joseph A. Spetrini to Faryar Shirzad, Issues and Decision Memorandum for the Administrative Review of Certain Stainless Steel Wire Rod from India for the Period of Review ("POR") Covering December 1, 1999 through November 30, 2000 at 5 (May 29, 2002) (unpublished), at www.ia.ita.doc.gov/frn/index.html ("[T]he sub-contractor is not the producer of the wire rod, because the companies of the [tollee] Viraj Group retain ownership of the material and control the sale of the subject merchandise; therefore, [the Viraj companies] are producers of subject merchandise."). As we stated in USEC I, " 'Commerce's construction of "producer," as memorialized in [the regulation], emphasizes three factors: (1) ownership of the subject merchandise; (2) control of the relevant sale . . . ; and (3) control of production of the subject merchandise.' " USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1318 (quoting Taiwan Semiconductor Mfg. Co. v. United States, 25 CIT at ___ , 143 F. Supp. 2d at 966).

In the production of LEU, the utilities manage the successive processes in the production of nuclear fuel, using contractors that perform mining and milling of uranium, conversion of uranium into uranium hexafluoride, enrichment of uranium hexafluoride to obtain LEU, and fabrication of nuclear fuel rods. See, e.g., USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1314, 1322. The utilities manage the entire process of creating nuclear fuel in order to manage costs and assure a steady and reliable supply of fuel. See USEC I, 27 CIT at ___ , 259 F. Supp. 2d at 1316; Oral Arg. Trans. at 47, 53–54. Enrichment is merely one step in this process, and the utilities obtain it by providing a raw material to a subcontractor and paying for the service of enrichment. As discussed in USEC I, the utilities' management of the process of producing nuclear fuel and their relationship with the enrichers under SWU contracts render this case very similar to the tolling arrangements seen in earlier cases. Consequently, the fact that the utilities do not subsequently sell the finished product, but rather consume it in the production of electricity, does not render the tolling regulation inapplicable. Moreover, as noted in section I, supra, nothing in the record provides a basis for determining that the tolling arrangements at issue here constitute sales that may be considered equivalent to the full-value sale of a finished product. Accordingly, Commerce's determination that its tolling regulation is inapplicable to this case is neither supported by substantial evidence nor in accordance with law.

IV. Definitions of "Producer" in the Contexts of Industry Support and the Determination of Export Price or Constructed Export Price

In USEC I, the Court directed Commerce to assess whether the definition of "producer" in the industry support context should differ

from the definition applied in the context of determining export price or constructed export price. See USEC I, 27 CIT at ___, 259 F. Supp. 2d at 1328. In addition, the Court directed that "[i]f Commerce finds that the tolling regulation applies here, the agency must consider whether those entities determined to be 'producers' under the tolling regulation are also 'producers' for purposes of the industry support determination." Id.

In its Remand Determination, Commerce concludes that in order to qualify as the producer of a good for the purposes of industry support, a company must have a "stake" in the domestic industry, which the agency interpreted to mean that a company must be engaged in the "actual production of the domestic like product" in the United States. Remand Determ. at 13 (quoting S. Rep. No. 96–249 at 47 (1979)), 15–16. Commerce reasoned that "[w]hether a company is at risk from unfairly traded imports depends on the nature and extent of its operations in the United States. It stands to reason that a company may be injured by unfairly traded imports where it is in the business of producing the domestic like product." Id. at 14. Commerce further reasoned that the tolling regulation is inapplicable in the industry support context because its application could lead to the inclusion of companies within the domestic industry that would not be adversely affected by unfairly traded imports of merchandise. See Remand Determ. at 16. Commerce claims that such an outcome would defeat the purpose of the unfair trade laws, which exist to aid domestic producers adversely affected by unfair trade. See id. at 16–17; see also Torrington Co. v. United States, 68 F.3d 1347, 1352 (Fed. Cir. 1995) ("The purpose underlying the antidumping laws is to prevent foreign manufacturers from injuring domestic industries by selling their products in the United States at less than 'fair value,' i.e., at prices below the prices the foreign manufacturers charge for the same products in their home markets."); Tung Mung Dev. Co. v. United States, 26 CIT ___, ___, 219 F. Supp. 2d 1333, 1338–39 (2002).

In the context of the less than fair value determination, Commerce maintains that the purpose and intent of the statute warrants application of a different definition of "producer" than is used in the industry support context. Commerce explains that 19 U.S.C. §§ 1677a and 1677b focus on the price of a good, rather than on its manufacture. Remand Determ. at 22–23. Section 1677a refers to the "producer or exporter" of a good in connection with selecting an appropriate respondent and sale price. Id. at 22; 19 U.S.C. § 1677a(a)—(b). Commerce explains that in this context, it may be appropriate to select a toller as the producer when that company, although it may not actually manufacture the good, is responsible for setting the price "at which the merchandise is first sold (or agreed to be sold) before the date of importation." 19 U.S.C. § 1677a(a)—(b); Remand Determ. at 23–24 & n.21.

Absent application of the tolling regulation to the industry support context, Commerce again concludes, as it did in the original determinations, that USEC is the sole domestic producer of LEU. Remand Determ. at 18–20. The agency concludes that for purposes of the industry support determination, the utilities are industrial users and purchasers of LEU, rather than producers, because they do not actually produce LEU in the United States and they do not maintain any manufacturing operations or facilities for the production of LEU. Id. at 19–20 (noting also that the "business interest" of the utilities, "like that of any industrial user, lies in obtaining lower priced LEU in an effort to keep the cost of producing electricity down"). Consequently, as Commerce concludes that USEC is the sole domestic producer of LEU, the agency finds that the petitions had support within the domestic industry as required by 19 U.S.C. § 1673a(c)(4). See id.

In explaining why it applies the tolling regulation in establishing export or constructed export price, but not in the industry support determination, Commerce has articulated reasons that are consistent with the purposes of the two sections of the statute. In accordance with Commerce's reasoning, we acknowledge that in this case, the utilities would benefit from, rather than be injured by, the availability of lower-priced LEU or enrichment services provided by foreign companies. Consequently, the Court finds Commerce's application of different definitions of "producer" in these two contexts is reasonable and therefore in accordance with law. See Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1382 (Fed. Cir. 2001); Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984). As the Court upholds Commerce's reasons for declining to apply the tolling regulation in the industry support context, we also uphold the agency's finding that USEC is the sole member of the domestic industry for the purposes of satisfying the industry support requirement and permitting the investigation to proceed. See 19 U.S.C. §§ 1673a(b)(1), 1673a(c)(4)(A).

V. Applicability of the Countervailing Duty Statute

Title 19 U.S.C. § 1671 provides that Commerce may impose countervailing duties where it determines that a government or public entity within a country is providing a countervailable subsidy[8] "with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States," and imports of that merchandise injure or threaten to injure a domestic industry.[9] In its Remand Determination, as in its original determinations, Commerce concludes

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[8] A "countervailable subsidy" is a "financial contribution" or "any form of income or price support" that confers a benefit. 19 U.S.C. § 1677(5).

[9] 19 U.S.C. § 1671(a) states that

If—

that the countervailing duty provisions are applicable to both EUP purchase contracts and SWU enrichment contracts.

In the Remand Determination, Commerce notes that "the scope of the CVD law is clearer [than the scope of the antidumping law] in that the plain language of the statute provides that the law is applicable where the merchandise is either imported, or sold for importation, into the United States." Remand Determ. at 84. The agency "interpret[s] the CVD law to apply whenever a foreign government provides subsidies with respect to a class or kind of merchandise that is imported into the United States," and states that "[a]ccordingly, we conclude that the law is applicable to all imports of LEU from the respective countries under investigation." Id. at 85.[10]

The language of the countervailing duty provisions states that duties may be imposed where (1) merchandise is imported and (2) a countervailable subsidy has been provided "with respect to the manufacture, production, or export" of that merchandise. 19 U.S.C. § 1671(a)(1). Thus, no sale of the subject merchandise is required for the application of the countervailing duty statute. Moreover, in the

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(1) the administering authority determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) in the case of merchandise imported from a Subsidies Agreement country, the Commission determines that—

(A) an industry in the United States—
(i) is materially injured, or
(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded,

by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation,

then there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net countervailable subsidy.

19 U.S.C. § 1671(a). "Subsidies Agreement country" is defined in 19 U.S.C. § 1671(b) to mean countries that are WTO members or as to which the United States has undertaken certain obligations. In the case of non-Subsidies Agreement countries, no determination of injury or threat of injury to the domestic industry is required. 19 U.S.C. § 1671(c). France, Germany, the Netherlands, and the United Kingdom are Subsidies Agreement countries. See Membership of the World Trade Organization, WTO Doc. No. 95–2450, WT/L/51/Rev.4 (Aug. 18, 1995), at http://docsonline.wto.org; Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1144, 1144 (1994) (providing that multilateral agreements included in Annex 1, which includes the Subsidies Agreement, are binding on all WTO members).

[10] Commerce also states that "based up [its] analysis" that the enrichers "own and hold title to the complete LEU product . . . and transfer ownership and title to the utility customers for consideration . . . these [SWU contract] sales are also relevant for purposes of the CVD law." Remand Determ. at 83–84. As discussed above, we find incorrect Commerce's conclusion that pursuant to the SWU contracts the enrichers own and transfer ownership in the complete LEU. Consequently, contrary to its statement in the Remand Determination, Commerce's conclusion that SWU transactions are sales of subject merchandise cannot lend support to Commerce's countervailing duty finding. See id.

countervailing duty context, the enricher may be considered to "manufacture" or "produce" LEU by performing the processing operations that transform feed uranium into enriched uranium.[11] See, e.g., Oxford English Dictionary at www.oed.com (defining the verbs "produce" as, inter alia, "[t]o bring forth, bring into being or existence. . . . [t]o bring (a thing) into existence from its raw materials or elements, or as the result of a process; to give rise to, bring about, effect, cause, make (an action, condition, etc.) and "manufacture" as, inter alia, "[t]o make (a product, goods, etc.) from, (out) of raw material; to produce (goods) by physical labour, machinery, etc." and "[t]o make up or bring (raw material, ingredients, etc.) into a form suitable for use; to work up as or convert into a specified product") (emphasis supplied).

Consequently, we find Commerce's interpretation that the statutory countervailing duty provisions are applicable to imports of LEU under both EUP purchase contracts and SWU enrichment contracts reasonable.

There remains the question whether purchases of enrichment services for more than adequate remuneration may constitute countervailable subsidies. Title 19 U.S.C. § 1677(5)(E)(iv) provides that a subsidy which confers a benefit exists "in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration." Thus, while the statute explicitly provides a remedy for the provision of subsidies in the form of goods or services, it also explicitly limits purchases that may constitute subsidies to purchases of "goods." 19 U.S.C. § 1677(5)(E)(iv).

As in its original determinations, Commerce concludes in the Remand Determination that the state-owned French electric utility, EdF, purchased a good from and provided a subsidy to the French enricher Eurodif. See Remand Determ. at 86; see also Low Enriched Uranium from France, 66 Fed. Reg. 65,901, 65,902 (Dep't Commerce Dec. 21, 2001) (notice of final affirmative countervailing duty determination); Dep't of Commerce Mem. from Bernard T. Carreau to Faryar Shirzad, Issues and Decision Memorandum: Final Affirmative Countervailing Duty Determination: Low Enriched Uranium from France — Calendar Year 1999 at 3–5 (Dec. 21, 2001) (unpublished), at www.ia.ita.doc.gov/frn/index.html. Commerce first bases

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[11] We concluded in section III, supra, that Commerce's tolling regulation applies in the antidumping context to designate the utilities as "producers" of LEU. That regulation, which is applicable in the context of determining export price or constructed export price in order to assess a dumping margin, does not apply in the countervailing duty context. Consequently, for purposes of the countervailing duty determination, the tolling regulation does not prohibit recognition of a subcontractor or toll manufacturer as a producer of a good. Thus, the tolling regulation does not contradict the conclusion that the enrichers are "producers" of LEU for purposes of a countervailing duty determination.

this conclusion on its finding that SWU transactions constitute sales of LEU, because the enricher obtains ownership of the LEU and transfers ownership to the utility for consideration. See Remand Determ. at 86–87. As discussed above, the Court has found this conclusion incorrect. See supra pp. 11–12.

Commerce also states, however, that even if the SWU transactions do not constitute sales of merchandise, EdF's purchase of enrichment from Eurodif still constitutes a countervailable subsidy. The agency argues that "[f]irst, there is no question that EdF obtains LEU in a series of purchase transactions (i.e., the purchase of natural uranium, the purchase of conversion, and the purchase of enrichment)." Id. at 87. Accordingly, Commerce argues, EdF's "payment of more than adequate remuneration to Eurodif is made in connection with the major step in the process by which EdF is 'purchasing goods.' " Id. Second, Commerce argues that

> the fundamental purpose of the [countervailing duties] provision is to address subsidization of manufacturing operations that produce subject merchandise. In this context, the purchase of manufacturing or processing is a necessary component of the good. As a practical matter, goods include any manufacturing or processing that is necessary to produce the article. Thus, the sale of manufacturing or processing, which is a necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a "service" in this context.

Remand Determ. at 87.

We find Commerce's first argument unpersuasive. We have found that the enrichment transaction here does not constitute a sale of subject merchandise, and the mere fact that enrichment is "purchased" as part of a series of transactions in the nuclear fuel production process simply does not constitute a basis for concluding that the purchase of enrichment processing is tantamount to the purchase of a good. Moreover, it appears from the record that under SWU contracts, Eurodif performs only the enrichment portion of the nuclear fuel production process. Commerce stated in its preliminary countervailing duty determination that "[f]or purposes of this determination, we accept Eurodif's assertion that its operations are no different from those of USEC." Low Enriched Uranium from France, 66 Fed. Reg. 24,325, 24,327 (Dep't Commerce May 14, 2001) (notice of preliminary affirmative countervailing duty determination and alignment with final antidumping duty determination). If, under SWU contracts, Eurodif performs only the uranium enrichment, then EdF must contract with third parties for the other steps in the production of nuclear fuel, including procuring feed uranium and fabricating LEU into nuclear fuel rods. See supra note 3 (listing the five steps in the production of nuclear fuel). The fact that the utility contracts with third parties, rather than with the enricher, to com-

plete four of the five steps in the nuclear fuel production process renders even less plausible the claim that enrichment is merely part of an overall goods transaction between the utility and enricher.

Commerce's second argument posits that operations resulting in or leading to the production of a good do not constitute "services" for the purpose of the countervailing duty statute. Remand Determ. at 87 ("[T]he sale of manufacturing or processing, which is a necessary component of the good, pertains to the purchase of goods, and does not constitute the purchase of a "service" in this context."). The agency bases this conclusion on its understanding that "the fundamental purpose of the [statutory countervailing duties] provision is to address subsidization of manufacturing operations that produce subject merchandise." Id.

The countervailing duty provisions are "intended to offset any unfair competitive advantage enjoyed by foreign manufacturers or exporters over domestic producers as a result of subsidies." S. Rep. No. 103–412, at 88 (1994). To realize this legislative intent, Commerce interprets the countervailing duty statute to reach subsidies that help to defray the costs of manufacturing subject merchandise. Noting that the statute does not define "service," the agency distinguishes manufacturing services, or operations that result in the production of a good, from other types of services which do not result in the production of a good. See Remand Determ. at 87–88 ("The term 'service' is not defined in the statute. Under its ordinary meaning, consistent with the purpose of [19 U.S.C. § 1677(5)(D)], we interpret the term to mean '[t]he sector of the economy that supplies the needs of the consumer but produces no tangible goods, as banking and tourism.' ") (internal citation omitted). Under this interpretation, the agency concludes that even transactions "solely for contract manufacturing" are covered by 19 U.S.C. § 1677(5)(D), because the manufacturing operations lead to the production of a good. Remand Determ. at 88. Essentially, Commerce states that because manufacturing operations are integral to the good produced, subsidization of those operations constitutes subsidization of the good itself. See id. at 89.

Commerce's distinction between manufacturing processes that lead to the production of subject merchandise and other services that do not produce tangible goods is consistent with the language and purpose of the countervailing duty statute. It is consistent with the statute's language because it preserves a real distinction between "goods" and "services." It is consistent with the statute's purpose because subsidization of a process essential to the manufacture of a good lowers the manufacturer's cost of producing that good, which may enable the manufacturer to gain a competitive advantage over an unsubsidized competitor.

In the case of enrichment processing, subsidization would lower an enricher's production costs, enabling the enricher to sell enrichment

processing at lower prices than an unsubsidized enricher. This is the type of "unfair competitive advantage" the statute is intended to counter, and therefore, Commerce's interpretation of the statute is reasonable and in accordance with law. Consequently, we affirm Commerce's determination that purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy.

Conclusion

In summary, we find Commerce's explanation of its industry support determination is in accordance with law, and we sustain this portion of the Remand Determination. We also sustain Commerce's determination that the countervailing duty law may apply to imports of LEU under either LEU purchase contracts or SWU enrichment contracts, as well as the agency's determination that the purchase of enrichment for more than adequate remuneration may constitute a countervailable subsidy. Because this opinion is limited to general issues, see Scheduling Order at 4–5 (Aug. 5, 2002), we do not decide here the question whether the LEU imported from the subject countries benefitted from countervailable subsidies.

We also find Commerce's determinations that LEU and SWU contracts are equivalent and that the antidumping provisions are applicable to SWU transactions are neither supported by substantial evidence nor in accordance with law. Accordingly, with respect to these conclusions, we find that Commerce's Remand Determination is unlawful and we reverse.

The parties are ordered to consult with each other and with the Clerk of the Court and to file a revised scheduling order within sixty days of the date of entry of this opinion.

Donald C. Pogue
Judge

Evan J. Wallach
Judge

Richard K. Eaton
Judge

Dated: September 16, 2003
New York, New York

Slip Op. 03–122

BEFORE: RICHARD W. GOLDBERG, SENIOR JUDGE

RUSS BERRIE & COMPANY, INC., PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 00–00018

[Summary judgment for plaintiff.]

Dated: September 17, 2003

Serko & Simon, LLP (Joel Kenneth Simon) for plaintiff Russ Berrie & Company, Inc.

Peter D. Keisler, Assistant Attorney General, John J. Mahon, Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (Mikki Graves Walser); Office of the Assistant Chief Counsel, International Trade Litigation, United States Bureau of Customs and Border Protection (Beth C. Brotman), Of Counsel, for defendant United States.

OPINION

GOLDBERG, Senior Judge: This matter is before the Court on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment pursuant to USCIT R. 56. It involves the proper classification of earrings and pins portraying motifs associated with Christmas and Halloween. The case requires the Court to interpret the scope of the term "festive articles" as it appears in heading 9505 of the Harmonized Tariff Schedules of the United States ("HTSUS") and determine the relationship between Chapters 95 and 71 of the HTSUS.

For the reasons that follow, the Court finds in favor of the plaintiff and grants plaintiff's motion for summary judgment. Defendant's cross-motion for summary judgment is denied. The Court exercises jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994).

I. BACKGROUND

Russ Berrie & Company, Inc. ("Russ Berrie") imports consumer gift products. The subject merchandise at issue in this case consists of three varieties of earrings and one set of pins. All of the items involved depict holiday symbols; the pins and two of the earring sets contain Christmas themes, the remaining earring set contains Halloween themes. The items were advertised in seasonal Russ Berrie catalogues, and were distributed to be displayed and sold for the appropriate holiday season.

The items in question entered the United States between April 1998 and July 1998. The U.S. Customs Service[1] ("Customs") classified the items at liquidation under heading 7117, HTSUS (under subheadings 7117.19.90 or 7117.90.90, HTSUS) as "imitation jewelry" at a duty rate of 11 percent ad valorem. Russ Berrie protests Customs' classification, contending that the subject merchandise should be classified under heading 9505, HTSUS (under subheadings 9505.10.2500 and 9505.90.6000, HTSUS) as "festive, carnival or other entertainment articles . . .," for which there is no duty.

II. STANDARD OF REVIEW

A. Summary Judgment and Presumption of Correctness

"Summary judgment is proper 'if the pleadings show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56). However, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party," summary judgment will not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). All inferences will be drawn in favor of the party opposing the motion for summary judgment. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970).

Customs' tariff classifications are given a presumption of correctness; an importer before the court has the burden of refuting any disputed classification. See 28 U.S.C. § 2639(a)(1) (1994). In analyzing the viability of such a challenge, the initial Customs classification must be evaluated "both independently and in comparison with the importers' proposed alternative." Anval Nyby Powder AB v. United States, 20 CIT 608, 611, 927 F. Supp. 463, 467 (1996) (quoting Jarvis Clark Co. v. United States, 733 F.2d 873, 878, reh'g denied, 739 F.2d 628 (Fed. Cir. 1984)).

B. Judicial deference to Customs' classification rulings

Customs argues that its interpretation of headings 7117 and 9505, HTSUS in Headquarters Ruling Letters ("HRL") 961913 and 961933 is entitled to judicial respect proportional to its power to persuade. See Skidmore v. Swift & Co., 323 U.S. 134 (1944). In accordance with Skidmore, the Supreme Court has held that a classification ruling by Customs may be granted deference on the basis of "its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." United States v. Mead Corp., 533 U.S. 218, 235 (2001).

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[1] It has since become the U.S. Bureau of Customs and Border Protection per the Homeland Security Act of 2002, § 1502, Pub. L. No. 107–296, 116 Stat. 2135, 2308–09 (Nov. 25, 2002), and the Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. 108–32, p. 4 (Feb. 4, 2003).

Applying these factors to the subject merchandise in the instant case, the Court finds that Customs' classification rulings are not entitled to Skidmore deference. First, it is debatable whether Customs gave sufficiently thorough consideration to HRL 961913 and HRL 961933. Customs does not claim that the classification rulings were adopted pursuant to a deliberative notice-and-comment rulemaking process. This is certainly not dispositive insofar as Skidmore deference is concerned, but nonetheless may be considered by the Court. In addition, Customs' classification rulings lack thoroughness and valid reasoning. Neither ruling addresses the operation of relevant chapter notes in Chapters 71 and 95 pursuant to the General Rules of Interpretation ("GRI"). As discussed infra, operation of Chapter 71 Note 3(n) and Chapter 95 Note 2 is pivotal to the classification of the articles in question. Despite a number of letters submitted to the plaintiff during the ruling process, Customs' classification rulings fail even to make note of this line of reasoning. Furthermore, classification of festive articles has long been the subject of controversy, as demonstrated by Customs' repeated efforts to narrow the scope of Chapter 95. See Plaintiff's Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment, 21–22 ("Pl.'s Mem."). The Court recognizes that "Customs can bring the benefit of specialized experience to bear on the subtle questions" that are present in the instant case. Mead, 533 U.S. at 234. However, for the aforementioned reasons, Customs' classification rulings lack the requisite persuasive power to warrant Skidmore deference.

III. DISCUSSION

A. Customs' classification as "imitation jewelry" under heading 7117, HTSUS

Customs classified the subject merchandise under heading 7117 as "imitation jewelry." Customs argues that this heading is appropriate because it incorporates any small objects of personal adornment that do not contain pearls, precious metals, or precious or semiprecious stones. Memorandum in Support of Defendant's Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment, 4, 14–15 ("Def.'s Opp.").

Plaintiff does not dispute that the subject merchandise falls within the meaning and scope of the statutory definition of "imitation jewelry" as defined in Notes 9(a) and 11 to Chapter 71. See Defendant's Additional Statement of Material Facts Not In Dispute; Plaintiff's Response to Defendant's Additional Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried, ¶¶2, 3.

B. Classification as "festive articles" under heading 9505, HTSUS

Customs interprets the decisions in Midwest of Cannon Falls, Inc.

v. United States to hold that heading 9505 only applies to "articles used for amusement and merriment," or articles used to decorate the home during holiday festivities. Def.'s Opp. at 28; see Midwest of Cannon Falls, Inc. v. United States, 20 CIT 123 (1996) ("Midwest I") aff'd in part, rev'd in part, 122 F.3d 1423 (Fed. Cir 1997) ("Midwest II"). Customs argues that since the court in Midwest I noted that the articles in question under heading 9505 were, "principally, if not exclusively, used only during the holiday season for the specific purpose of decorating or ornamenting the home or Christmas tree," only like merchandise can fit under the same heading. Def.'s Opp. at 27; see also Midwest I, 20 CIT at 129. Therefore, according to Customs, because the merchandise at issue is jewelry, which is used for personal adornment, and not "entertainment" articles or home decorations, it is not prima facie classifiable under heading 9505. Def.'s Opp. at 20, 28.

The Court rejects Customs' argument. In an effort to maintain consumer flexibility and not limit heading 9505 to traditional subjects, courts have been hesitant to impose "extraneous limitations that are not based on the actual language of the [heading]." Midwest II, 122 F.3d at 1428. Furthermore, Customs mistakenly intimates that "personal adornment" and "amusement and merriment" are mutually exclusive labels. Def.'s Opp. at 28. This is simply untrue, as there is no reason why an individual item cannot be construed as both. Midwest II, 122 F.3d at 1427 ("[A]ll of the items at issue are used in celebration of and for entertainment on a joyous holiday, and they are all prima facie classifiable as 'festive articles' under heading 9505.").

There are two requirements for finding a prima facie classification under heading 9505. The merchandise must be (1) "closely associated" with the applicable holiday, and (2) displayed and used only during that holiday. Midwest II, 122 F.3d at 1429.

An item is "closely associated" if "the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant." Park B. Smith, Ltd. v. United States, 25 CIT ___, Slip Op. 01–63, 6 (May 29, 2001); see also Brookside Veneers, Ltd. v. United States, 6 Fed. Cir. (T) 121, 125, 847 F.2d 786, 789 (1988). An item may be deemed closely associated if it incorporates traditional festive symbols, such as a jack-o'-lantern for Halloween. Midwest II, 122 F.3d at 1429; see also Springwater Cookie & Confections, Inc. v. United States, 20 CIT 1192, 1196 (1996) (wax candles embellished with holly sprigs were considered festive articles linked with Christmas). Another characteristic indicative of close association is color schemes or patterns in accordance with the respective holiday. Smith, 25 CIT at ___, Slip Op. 01–63 at 8 (for example, a cloth design labeled "Christmas Highland" was deemed closely associated with Christmas, despite no dis-

play of Christmas symbols, primarily because "the colors green and red in combination are closely associated with the festive association of Christmas.").

The items in question are closely associated with their respective holidays. Item # 19005, "Kringle Cuties," consists of three earring sets, two with Santa Claus designs and one of a snowman decorated with holly. The former designs incorporate Santa Claus, the preeminent modern commercial Christmas symbol. The latter design is similar to the candles in Springwater in that they both display hollies, except that the items in this case additionally display a snowman. Item # 17347, "Li'l Frightful Friends," consists of four earring sets representing ghosts, jack-o'-lanterns, witches' heads, and monsters' heads. All of these representations bear a strong traditional linkage to Halloween. Items # 19054 and # 19055, "Jolly Jingles," consist of jingle bell earrings in red, green, and gold balls, decorated with red or green ribbons. Jingle bells are symbolic of Christmas. In addition, the color combinations and patterns of the "Jolly Jingles" earring sets clearly resonate as Christmas-like. Smith, 25 CIT at , Slip Op. 01–63 at 8.

The second requirement for a prima facie classification under heading 9505 is that the items be displayed and used only during the holiday with which they are associated. Midwest II, 122 F.3d at 1429. This analysis mandates balancing two distinct, but coinciding factors. First, the item in question must be linked to the respective holiday to such an extent that it would be unlikely to be displayed at other points during the calendar year. Smith, 25 CIT at ___ , Slip Op. 01–63 at 8 (this component was met because "the design and the colors are so closely associated with the festive occasion . . . that the design would likely not be used by a consumer during any other time of the year."). Essentially, this element is satisfied if the "close association" requirement has been met, as has been found in the instant case. The second factor is that the merchandise in question must be only marketed and sold during the applicable season. Id. ("[the subject merchandise] was also shown to have been designed, marketed and sold for use during festive occasions and was in fact displayed and used by consumers only during festive occasions."). As in Midwest II, the items in the instant case were designed, marketed, and sold only during their particular holidays. Midwest II, 122 F.3d at 1429. "Krinkle Cuties" and "Jolly Jingles" were displayed and available for sale only in the Russ Berrie Christmas 1998 catalog, and "Li'l Frightful Friends" was displayed in the 1998 Thanksgiving-Halloween catalog. They were all entered into the United States to be distributed in time for their respective holiday seasons. Pl.'s Mem. at 5–7.

Accordingly, because all of the items in question were closely associated with the applicable holiday and were only displayed and used

during that holiday, the imports are prima facie classifiable under heading 9505, HTSUS.

C. Operation of Chapter 71, Note 3(n), HTSUS

The Court holds that Customs' classification of the earrings and pins under heading 7117 as imitation jewelry is prima facie correct, and holds that Russ Berrie's proposed classification under heading 9505 as festive articles is also prima facie correct. To resolve the classification conflict, the Court looks to the relevant notes in Chapters 71 and 95.

GRI 1 dictates that "for all legal purposes, classification shall be determined according to the terms of the headings and any relevant section or chapter notes." Chapter 71 Note 11 defines "imitation jewelry" as "articles of jewelry . . . not incorporating natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed), precious metal or metal clad with precious metal." As noted supra, the subject merchandise shares the characteristics of imitation jewelry as defined in Chapter 71. However, the Court finds that Chapter 71 Note 3(n) excludes the subject merchandise that is prima facie classifiable under heading 9505 and referenced in Chapter 95 Note 2. Note 3(n) to Chapter 71 states that the chapter does not cover "Articles covered in note 2 to chapter 95." Note 2 to Chapter 95 provides: "This chapter includes articles in which natural or cultured pearls, precious or semiprecious stones (natural, synthetic or reconstructed), precious metal or metal clad with precious metal constitute only minor constituents." The parties agree that the articles at issue consist of earrings and pins which do not incorporate natural or cultured pearls, precious or semiprecious stones, or precious metal or metal clad with precious metals. See Plaintiff's Statement of Material Facts as to Which There Is No Genuine Issue To Be Tried ("Pl.'s Statement") and Defendant's Response to Pl.'s Statement, ¶¶15, 16. Customs contends that since the earrings and pins at issue do not contain the elements listed in Chapter 95 Note 2 as minor constituents, they are not covered by Chapter 95 Note 2 and thus cannot be excluded from classification under heading 7117 by operation of Chapter 71 Note 3(n). The Court rejects this argument as it is clear that articles of jewelry having no precious stones are not necessarily classifiable in Chapter 71. The operation of the chapter notes in the instant case parallels the Federal Circuit's analysis of Note 2(ij) to Chapter 95 in Midwest II. See 122 F. 3d at 1429. Accordingly, the Court finds the subject merchandise is properly classified under heading 9505 by operation of Note 3(n) to Chapter 71, which excludes articles covered by Note 2 to Chapter 95.

III. CONCLUSION

For the aforementioned reasons, Customs erred in its classification of the merchandise incorporating festive symbols, color

schemes, and patterns because operation of Chapter 71, Note 3(n), HTSUS compels Customs to classify these items as festive articles under heading 9505, HTSUS.

Accordingly, plaintiff's motion for summary judgment is granted and defendant's cross-motion for summary judgment is denied. Judgment for the plaintiff will be entered accordingly.

Richard W. Goldberg
Senior Judge

Date: September 17, 2003
New York, New York

SLIP OP. 03–123

BEFORE: RICHARD K. EATON, JUDGE

SARA FERNANDEZ, MARISELA QUINTERO & ROSA SCHMIDT, FORMER EMPLOYEES OF CONNOLLY NORTH AMERICA, PLAINTIFFS, v. ELAINE CHAO, SECRETARY OF LABOR, DEFENDANT.

COURT NO. 02–00183

[Plaintiffs' motion to amend complaint denied; defendant's motion to dismiss granted.]

Dated: September 17, 2003

Texas Rural Legal Aid, Inc. (*Carmen E. Rodriguez*), for plaintiffs.

Peter D. Keisler, Assistant Attorney General, United States Department of Justice; *David M. Cohen*, Director, Commercial Division, Civil Division; *Patricia M. McCarthy*, Assistant Director, International Trade Section (*Delfa Castillo*); *Gary E. Bernstecker*, Office of the Solicitor, Division of Employment & Training Legal Services, United States Department of Labor, of counsel, for defendant.

MEMORANDUM OPINION

EATON, *Judge*: Before the court are Sara Fernandez, Marisela Quintero, and Rosa Schmidt's ("Plaintiffs") Motion for Leave to File Second Amended Complaint ("Mot. Leave File") and, on behalf of the United States Department of Labor ("Labor"), the United States' ("Government") Motion to Dismiss ("Mot. Dismiss"). By their motion Plaintiffs seek to amend the Complaint filed with this court on February 22, 2002, to include allegations relating to events that occurred subsequent to its filing. Specifically, Plaintiffs seek to include the determination contained in the Notice of Negative Determina-

tion Regarding Application for Reconsideration, Pub. R. at 32 ("Negative Determination Regarding Application for Reconsideration"), by which Labor denied reconsideration of its Negative Determination Regarding Eligibility To Apply for NAFTA-Transitional Adjustment Assistance, Pub. R. at 21 ("Negative Determination"). In the Negative Determination Labor found Plaintiffs to be ineligible for North American Free Trade Agreement Transitional Adjustment Assistance ("NAFTA–TAA") benefits.[1] By its motion the Government asks that this matter be dismissed for lack of subject matter jurisdiction. The court has jurisdiction to review Labor's final determinations with respect to eligibility for NAFTA–TAA benefits pursuant to 28 U.S.C. § 1581(d)(1) (2000) and 19 U.S.C. § 2395(a) (2000).[2] For the reasons set forth below, the court denies Plaintiffs motion to amend the Complaint and grants the Government's motion to dismiss.

BACKGROUND

Plaintiffs are former employees of Connolly North America, LLC ("Connolly"), who were employed by that firm at a plant in El Paso, Texas (the "El Paso plant"), to make leather products for automobiles. *See* Pet. NAFTA–TAA, Pub. R. at 2.[3] On or about September 7, 2001, Connolly closed the El Paso plant and Plaintiffs were separated from their employment. *See id.*

On September 18, 2001, Plaintiffs, proceeding *pro se*, petitioned Labor seeking certification of eligibility for NAFTA–TAA benefits.

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[1] Attached to the Complaint are copies of Plaintiffs' petitions for Trade Adjustment Assistance ("TAA") benefits and NAFTA–TAA benefits. *See* Compl. Attach.; *see also* Neg. Determination, Pub. R. at 22 ("A petition for Trade Adjustment Assistance has been filed on behalf of workers at the subject firm (TA–W–40,121)."). Labor denied Plaintiffs' TAA petition on December 18, 2001. *See* Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, 66 Fed. Reg. 65,220, 65,220 (Dep't Labor, Dec. 18, 2001) (notice). By their filings in the instant action Plaintiffs nowhere allege that they requested administrative review of the negative TAA determination, or that they are now requesting judicial review of that determination. *See* Compl. ¶1 ("This action is brought to appeal . . . Labor's determination denying eligibility to apply for NAFTA–TAA worker adjustment assistance.").

[2] At the time Plaintiffs filed their initial petition for certification of benefits in early October 2001, the governing statute was 19 U.S.C. § 2331 (2000). This statute has since been repealed and reenacted as part of the TAA statute by the "Trade Adjustment Assistance Reform Act of 2002." *See* Trade Act of 2002, Pub. L. 107–210, 116 Stat. 993 (Aug. 6, 2002); *Former Employees of Rohm & Haas Co. v. Chao*, 27 CIT ____ , ____ n.1, 246 F. Supp. 2d 1339, 1342 n.1 (2003). The provisions of the amended trade act became effective on November 4, 2002. *See Rohm & Hass*, 27 CIT at ____ n.1, 246 F. Supp. 2d at 1342 n.1 (citing Trade Act of 2002 § 151). Here, as Plaintiffs filed their petition for NAFTA–TAA benefits prior to the effective date of the Trade Adjustment Assistance Reform Act of 2002, 19 U.S.C. § 2331 controls this matter. *See id.*, 27 CIT at ____ n.1, 246 F. Supp. 2d at 1342 n.1 ("Because the plaintiffs' petition antecedes November 4, 2002, the effective date of this amendment, they cannot benefit from the more generous terms of the revised statute." (citation omitted)).

[3] According to the record, the El Paso plant was established at the request of a "major customer" specifically to provide services for that customer. *See* Conf. R. at 14.

See Pet. NAFTA–TAA, Pub. R. at 2. On November 6, Labor gave notice that it was commencing an investigation of Plaintiffs' petition. *See* Investigations Regarding Certifications of Eligibility To Apply for NAFTA Transitional Adjustment Assistance, 66 Fed. Reg. 56,127 (Dep't Labor Nov. 6, 2001) (notice). At the conclusion of its investigation, Labor determined that Plaintiffs did not meet the eligibility requirements to receive NAFTA–TAA benefits. *See* Neg. Determination, Pub. R. at 22 (finding that although "[s]ales, production and employment at the subject firm declined during the relevant period," Connolly "did not shift production to Mexico or Canada, nor did it increase imports from Canada or Mexico of leather and leather products."). Plaintiffs were informed of Labor's determination by letter dated November 21, and Labor published notice of its decision in the Federal Register on November 30. See letters from Labor to Plaintiffs of 11/21/01, Pub. R. at 26–29; Notice of Determinations Regarding Eligibility To Apply for Worker Adjustment Assistance and NAFTA Transitional Adjustment Assistance, 66 Fed. Reg. 59,816, 59,817 (Dep't Labor Nov. 30, 2001) (notice). By regulation, Plaintiffs then had thirty days from publication of the Notice of Negative Determination, or until December 30, to file a request for administrative reconsideration of the Negative Determination with Labor. *See* 29 C.F.R. § 90.18(a) (2001).

On December 4, Plaintiffs, continuing to proceed *pro se*, timely filed for administrative reconsideration of the Negative Determination by mailing an application for reconsideration to Labor. *See* letter from Plaintiffs to Labor of 12/4/01, Pub. R. at 30 ("Application for Reconsideration"). Plaintiffs' request for reconsideration was based on their allegation that "a major customer . . . switch[ed its] purchases of leather and leather products from the subject firm in favor of producing the products at the customer's affiliated location in Mexico." Eng. Trans. of Application for Recons., Pub. R. at 31.

At some point after mailing the Application for Reconsideration, Plaintiffs obtained counsel. See Pls.' Resp. Sec'y Labor's Mot. Dismiss ("Pls.' Resp.") ¶3; Mot. Appear *Pro Hac Vice* (Feb. 22, 2002). On February 22, 2002, prior to Labor issuing the Negative Determination Regarding Application for Reconsideration, Plaintiffs, with the assistance of counsel, filed the Complaint. *See generally* Compl. By their Complaint, Plaintiffs asked this Court to review the Negative Determination even though the administrative review of that determination, requested by Plaintiffs, was still pending. *See id*. at 1.

Thereafter, on March 20, Plaintiffs, by their counsel, sought to amend the Complaint solely for the purpose of correcting the caption. *See* Mot. Leave File ¶5. The amendment was made in accordance with the Clerk of the Court's instructions. *See id*.

On April 15, some 132 days following Plaintiffs' mailing of the Application for Reconsideration, and at least 68 days after Labor received it, Labor denied Plaintiffs' application, finding no error or

misinterpretation of the law or facts that would justify reconsideration of the Negative Determination. *See* Neg. Determination Regarding Application for Recons., Pub. R. at 32.[4] In support of its determination Labor stated that

> [the] petitioner requested administrative reconsideration based on a major customer switching their purchases of leather and leather products from the subject firm in favor of producing the products at the customer's affiliated location in Mexico.
>
> Based on data supplied during the initial investigation, the allegation by the petitioner is consistent with [the information] the subject firm provided. The loss of a customer and the decision by the customer to produce the leather and leather products in Mexico and the further processing of these products into car seat components in Mexico does not meet the eligibility requirements of the group eligibility requirements of paragraph (a)(1) of [19 U.S.C. § 2331].

Id., Pub. R. at 33. In addition, Labor determined that the El Paso plant was not a "secondarily impacted" company. *See* Neg. Finding Regarding Qualification as a Secondary Firm Pursuant to the Statement of Admin. Action Accompanying the N. Am. Free Trade Agreement (NAFTA) Implementation Act, Pub. R. at 36; *see* Connolly N. Am., El Paso, Tx., 67 Fed. Reg. 35,157 (Dep't Labor May 17, 2002) (negative finding of secondary firm) ("Secondary Determination") (citing Statement of Admin. Action accompanying the North Am. Free Trade Agreement (NAFTA) Implementation Act, H.R. Doc. No. 103–159 at 225 (1993) ("SAA")).[5]

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[4] By regulation, Labor is to make a determination on an application for reconsideration within fifteen days of receiving it. The regulation provides, in pertinent part, that "[n]ot later than fifteen (15) days after receipt of the application for reconsideration, the certifying officer shall make and issue a determination granting or denying reconsideration." 29 C.F.R. § 90.18(c). Furthermore, in the event of a negative determination, "the certifying officer shall issue a negative determination regarding the application and shall promptly publish in the FEDERAL REGISTER a summary of the determination, including the reasons therefore." *Id*. § 90.18(e). Here, however, although Plaintiffs mailed the Application for Reconsideration in early December 2001, apparently Labor did not come into possession of it until February 6, 2002.

[5] According to Labor, the SAA authorizes it to determine whether a firm is "secondarily impacted." *See* Secondary Determination, 67 Fed. Reg. at 35,157; *see also* SAA at 225 ("Assistance to Workers in Secondary Firms"). Labor states that, to be secondarily impacted, a firm must meet the following criteria:

> (1) The subject firm must be a supplier of a firm that is directly affected by imports from Mexico or Canada or shifts in production to those countries; or
>
> (2) The subject firm must assemble or finish products made by a directly-impacted firm; and
>
> (3) The loss of business with the directly-affected firm must have contributed importantly to worker separations at the subject firm.

In late April, each Plaintiff received written notice of Labor's determination on the Application for Reconsideration. *See* Mot. Leave File ¶6 ("On or about April 25, 2002, the plaintiffs received a notice of negative determination regarding their request for reconsideration submitted [in] December. . . ."); *see also* Def.'s Mem. Supp. Mot. Dismiss ("Def.'s Mem.") App. at 5–8 (letters from Labor to Plaintiffs of 05/01/02). Each of these letters stated:

> This is to advise you that the Department of Labor has issued a notice of negative determination regarding application for reconsideration with respect to the [Negative Determination]. Enclosed is a copy that will be published in the *Federal Register*.
>
> Interested parties have 60 days from the date this decision is published in the *Federal Register* to file for judicial review of the Department's negative determination. Petitions for judicial review must be filed with the U.S. Court of International Trade, 1 Federal Plaza, New York, New York. . . . Further information regarding procedures or instituting an action in the U.S. Court of International Trade may be obtained from the Office of the Clerk at the above address. The phone number for the clerk of the Court is (212) 264–7090.

Def.'s Mem. App. at 5–8. Labor published notice of the Negative Determination Regarding Application for Reconsideration in the Federal Register on May 17. *See* Connolly N. Am., El Paso, Tx., 67 Fed. Reg. 35,157 (Dep't Labor May 17, 2002) (notice of negative determination). Thus, by statute, Plaintiffs had sixty days—or until July 16, 2002—to commence an action for judicial review of the Negative Determination Regarding Application for Reconsideration. *See* 28 U.S.C. § 2636(d); 19 U.S.C. § 2395; 29 C.F.R. § 90.19(a); *see also* 29 C.F.R. § 90.36. During this period, neither Plaintiffs nor their counsel sought to withdraw the Complaint and start an action contesting the Negative Determination Regarding Application for Reconsideration, or to amend the Complaint to include allegations with respect to the Negative Determination Regarding Application for Reconsideration.

Secondary Determination, 67 Fed. Reg. at 35,157; *see* SAA at 225. Here, Labor determined that the El Paso plant did not meet either of the first two criteria and, thus, it issued a negative determination. *See id*. By the proposed Second Amended Complaint, Plaintiffs request judicial review of Labor's negative determination in this regard. *See* proposed Second Am. Compl. ¶14 ("Plaintiffs request this Court review Defendant DOL's . . . negative finding regarding qualification as secondary firm."). However, because Plaintiffs have not established that the court has subject matter jurisdiction over the cause of action contained in the proposed Second Amended Complaint, *see infra* Part III, the court also finds that it does not have subject matter jurisdiction to review Labor's negative determination that the El Paso plant was not a secondarily impacted firm.

On June 7, the Government, without objection, timely moved for an extension of time within which to answer the Complaint. *See* Def.'s Mot. Extension Time Answer Pls.' Compl. (June 7, 2002) ("[C]ounsel for plaintiffs [ ] has informed [the Government's counsel] that she does not object to our request for an extension of time."). In support of this motion the Government's counsel stated that she had

> experienced a delay in receiving plaintiffs' initial amended complaint. . . . The amended complaint was received through interoffice mail approximately the first week of May. . . .
>
> [Counsel for plaintiffs] has stated that she intends to file a second amended complaint in a week or two.

Id. Prior to the expiration of the time within which to file an answer, the Government, with Plaintiffs' consent, again moved for an extension of time. *See* Def.'s Mot. Extension Time Answer Pls.' Compl. (July 5, 2002). By this motion the Government requested an additional seven days—or until July 12—to file its answer. *Id*. On July 12, the Government did file the Answer.

Thereafter, by letter dated August 12—twenty-five days past the sixty provided for by statute for commencing an action for judicial review of the Negative Determination Regarding Application for Reconsideration—Plaintiffs sought the Government's consent to amend the Complaint a second time. *See* Def.'s Mem. at 4. Plaintiffs sought this leave so that the Complaint would "include[ ] a reference to all of the administrative determinations and decisions, including the ones issued after the [filing of the Complaint on February 22]." Mot. Leave File ¶9. In other words, Plaintiffs sought to amend the Complaint to include judicial review of Labor's determination contained in the Negative Determination Regarding Application for Reconsideration. The Government, however, "declined to consent [to Plaintiffs' amendment] on the basis of untimeliness." Def.'s Mem. at 4.

Finally, the parties filed the motions that are now before the court. These motions were deemed to be filed on December 18, 2002.[6]

After reviewing the parties' moving papers, the court, on its own motion, issued an order inviting the parties to submit affidavits. *See* court Order of May 22, 2003 (the "Order"). In particular, the court sought clarification of the assertion found in Plaintiffs' response to the Government's Motion to Dismiss that "they did not know and were unable to confirm that the request for reconsideration [of the Negative Determination] was still pending." *See* Pls.' Resp. ¶3. In addition, by its Order the court asked Plaintiffs to "set forth any ac-

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[6] The parties' papers were filed concurrently in conformance with the scheduling order. *See* Scheduling Order of Dec. 13, 2002 ¶1 ("Defendant will have until December 18, 2002, to file a Motion to Dismiss plaintiffs' case for lack of jurisdiction. Simultaneously, plaintiffs may file a motion to supplement their complaint and/or addressing their claimed bases of jurisdiction.").

tions taken to ascertain the status of Plaintiffs' application for reconsideration of their petition . . . prior to the filing of the Complaint. . . ." Order at 1. In response, Plaintiffs stated the following:

> 5. I sought assistance from a workers' organization, Asociacion de Trabajadores Fronterizos, ATF (Border Workers Association). They helped two other co-workers and myself file a request for certification of eligibility to apply for NAFTA–TAA on September 18, 2001.
>
> 6. On or about November 25, 2001 I received a letter . . . by mail informing me that the Dept. of Labor had issued a denial of eligibility to apply for NAFTA–TAA assistance with a copy Negative Determination notice.
>
> 7. I took this letter and notice to the ATF office and asked whether this determination could be appealed. ATF prepared a request for reconsideration and on December 4, 2001 six other co-workers and I signed it. It was to be mailed to [Labor] by ATF.
>
> 8. I expected to receive an answer in the mail after a few weeks, but I did not receive anything. We went to the ATF office and let them know we had not received a response. ATF tried to find out the status but was unable to do so. We could not tell if the Dept of Labor had received our request because ATF did not send the request by certified mail.

Pls.' Resp. Ct's Order (July 7, 2003), Ex. A ¶¶5–8 (Aff. of Maricela Quintero) ("Quintero Affidavit"); *id.*, Ex. B ¶¶5–8 (Aff. of Sara Fernandez (identical language)). The court also asked the Government to "detail[ ] any government official's knowledge that Plaintiffs . . . were attempting to contact [Labor] to ascertain the status of the Application for Reconsideration and the day or dates of such contacts. . . ." Order at 1. In response, a Labor official stated she had circulated a message via electronic mail to various other officials soliciting the information requested by the court. The result of that electronic mailing was as follows:

> Neither the recipients of the email nor I recall receiving any inquiry from anyone requesting information about the petition or the request for administrative reconsideration filed on behalf of the workers of Connolly North America. Neither the recipients nor I recall providing any advice or recommendations to anyone concerning the requests for reconsideration filed on behalf of the workers of Connolly North America.

Def.'s Notice Filing Decl. Linda G. Poole (July 7, 2003), Attach. ¶4 ("Poole Aff."). The court also asked the Government to provide information as to "the reason or reasons why the United States Department of Labor did not promptly act upon the Application for Recon-

sideration within the fifteen day deadline set out by [regulation]. . . ." Order at 2. In response, Labor stated:

> The request for reconsideration of the negative determination for Connolly North America was dated and postmarked December 4, 2001. However, the Division of Trade Adjustment Assistance did not receive the request until February 6, 2002. It appears that this delay was due to the U.S. Department of Labor's policy instituted after the anthrax scare to send all mail to be irradiated before distribution to Departmental offices. Once the Division of Trade Adjustment Assistance received the request for reconsideration, any delay prior to the issuance [of the] negative determination regarding the request for reconsideration can be attributed to the increase in caseload and volume of reconsideration requests. As a result of this increase and insufficient staff to address the increased caseload, requests for reconsideration were processed in the order in which the requests were received.

Poole Aff. ¶5.

DISCUSSION

It is incumbent upon a party seeking to invoke the court's subject matter jurisdiction to plead the requisite facts sufficient to prove that the court has jurisdiction over a cause of action. *Former Employees of AST Research, Inc. v. United States Dep't of Labor*, 25 CIT ___, ___, Slip Op. 01–150 at 4 (Dec. 20, 2001) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)). By its motion, the Government presents several arguments why Plaintiffs have not satisfied their burden. The Government argues that: (1) Plaintiffs failed to properly exhaust their administrative remedies prior to filing the Complaint seeking judicial review of the Negative Determination[7]; (2) Plaintiffs' request for judicial review of the Negative Determination was time barred[8]; and (3) Plaintiffs' request for judicial review of the Negative Determination Regarding Application for Reconsideration by amending the Complaint was time barred.[9] The court examines each argument in turn.

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[7] In other words, by seeking to commence an action with respect to the Negative Determination prior to the issuance of an administrative determination with respect to the Application for Reconsideration, Plaintiffs failed to exhaust their administrative remedies and, thus, their suit was prematurely filed.

[8] Under this theory Plaintiffs should have filed a complaint making allegations with respect to the Negative Determination no later than sixty days after publication of the notice of that determination in the Federal Register on November 30, 2001.

[9] Under this theory any amendment to the Complaint making allegations with regard to the Negative Determination Regarding Application for Reconsideration should have been

I. *Exhaustion of administrative remedies*

The Government argues that, as to the Negative Determination, this court does not have subject matter jurisdiction to review Labor's determination because "the 'exhaustion of administrative remedies' doctrine bars [Plaintiffs'] action. . . ." Def.'s. Mem. at 4; *see* 28 U.S.C. § 2637(d) ("In any civil action not specified in this section, the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies."). In other words, the Government is arguing that the court does not have subject matter jurisdiction to review the allegations set out in the Complaint, which relate solely to the Negative Determination, due to the sequence of events in this action. Specifically, the Government is arguing that Plaintiffs, having invoked the administrative review process by mailing the Application for Reconsideration to Labor on December 4, 2001, were bound to allow that process to run its full course even though (1) no determination was forthcoming within the fifteen day period following Labor's receipt of the application, and (2) even though the Negative Determination Regarding Application for Reconsideration was not issued until April 15, 2002.

In response, Plaintiffs state that

> there are ". . . three broad sets of circumstances in which the interests of the individuals weigh heavily against requiring administrative exhaustion: when the requirement occasions undue prejudice to subsequent assertion of a court action; where the agency is not empowered to grant effective relief; and when there are clear indicia of agency bias or taint."

Pls.' Mem. at 3–4 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 146–148 (1992) (quotation as in Pl.'s Mem.)). Plaintiffs argue that "[t]he first exception is clearly applicable. If Defendant's delays . . . are condoned and Labor's position accepted, Plaintiffs' rights to judicial review would not only be prejudiced, but also effectively eliminated." *Id.* at 4.

By statute, this court is vested with jurisdiction to review Labor's "final determinations" in NAFTA–TAA cases. *See* 28 U.S.C. § 1581(d)(1); 19 U.S.C. § 2395(a); 29 C.F.R. § 90.19(a). Although the term "final determination" is not defined by statute, Commerce's regulations provide, *inter alia*, that

> [u]pon reaching a determination that an application for reconsideration does not meet the requirements of [29 C.F.R. § 90.18(c)], the certifying officer shall issue a negative determination regarding the application and shall promptly publish in

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filed no later than sixty days after the publication of the notice of that determination in the Federal Register on May 17, 2002.

> the FEDERAL REGISTER a summary of the determination including the reasons therefore. Such a summary shall constitute a Notice of Negative Determination Regarding Application for Reconsideration. A determination issued pursuant to this paragraph shall constitute a final determination for purposes of judicial review pursuant to . . . 19 U.S.C. 2395, and [29 C.F.R.] § 90.19(a).

29 C.F.R. § 90.18(e); *see AST*, 25 CIT at ___, Slip Op. 01–150 at 5 (citing 29 C.F.R. § 90.18(e); 29 C.F.R. § 90.19(a)) ("A 'final determination' includes a negative determination on an application for reconsideration."). Thus, while the Negative Determination may have provided a basis to invoke this court's jurisdiction had Plaintiffs not requested administrative reconsideration, during the pendency of the requested review no final determination existed from which to seek relief. Plaintiffs nowhere present any argument or explanation as to why the Negative Determination should provide a basis for jurisdiction at the time the Complaint was filed on February 22, 2002. Plaintiffs merely state that they "requested a reconsideration of [Labor's] determination. No further information or notices have been received from [Labor] in response to Plaintiffs' request for reconsideration." First Am. Compl. ¶¶10–11. However, because Plaintiffs had invoked the administrative process for reconsideration of the Negative Determination on December 4, 2001, on February 22, 2002, there was no "final determination" for the court to review.[10]

Furthermore, Plaintiffs fail adequately to explain how their "rights to judicial review would not only be prejudiced, but also effectively eliminated" by requiring the exhaustion of administrative remedies as to the Negative Determination. While there may well be hardships to Plaintiffs resulting from a delay in receiving benefits to

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[10] While the record shows that Labor took more than the fifteen days provided by regulation to make a determination it cannot be said that as a result of the passage of time Labor lost the authority to make a determination with respect to the Application for Reconsideration. As the Government points out,

> [t]he failure to meet the fifteen day time requirement of 29 C.F.R. § 90.18(c) can be likened to the failure to meet the statutory time limit of sixty days to issue a final determination regarding certification of eligibility that is contained in 19 U.S.C. § 2273(a). Neither triggers judicial review if Labor, regardless of its best efforts, can not meet the time deadlines.

Def.'s Reply Pls.' Mot. Leave File Second Am. Compl. & Second Am. Compl. at 3 (citing *Kelly v. Sec'y Labor*, 812 F.2d 1378, 1380 n.3 (Fed. Cir. 1987); *Katunich v. Sec'y of Labor*, 8 CIT 156, 162, 594 F. Supp. 744, 749–50 (1984)); *see Nichimen Am., Inc. v. United States*, 13 CIT 683, 687, 719 F. Supp. 1106, 1109 (1989), *aff'd in part and rev'd in part on other grounds by Nichimen Am., Inc. v. United States*, 938 F.2d 1286 (Fed. Cir. 1991) (citing *Usery v. Whitin Mach. Works, Inc.*, 554 F.2d 498, 501 (1st Cir. 1977)) ("[T]he United States Court of Appeals for the First Circuit determined that nothing in the statutes covering trade adjustment assistance suggested that a time limitation upon the Secretary of Labor was designed to be jurisdictional and that absent clear indication that Congress intended such time limits to be strictly enforced, the court would refrain from doing so.").

which they might otherwise be entitled, it is difficult to see how exceeding the fifteen day time frame set out by the regulations translates into eliminating judicial review. Although much delayed, a final determination was, in fact, made and Plaintiffs received both actual and constructive notice of their right to judicial review of the matters contained in the Negative Determination Regarding Application for Reconsideration at that time.

II. *Judicial review of the Negative Determination*

The Government next argues that this court would not have subject matter jurisdiction to conduct judicial review of the Negative Determination in any event, because Plaintiffs "challenged Labor's . . . [Negative Determination] [by filing the Complaint on February 22, 2002,] twenty-four days beyond the statutorily-prescribed sixty-day filing period. Their complaint, therefore, should be dismissed for untimeliness." Def.'s Mem. at 5 (citing 28 U.S.C. § 2636(d)).

For their, part Plaintiffs counter that Labor's delay in acting on their request for reconsideration should be taken into account. Plaintiffs state that they

> waited for more than 50 days to receive a response or acknowledgement [sic] that the request for reconsideration would be investigated; that it would be acted upon, or that it was still pending. When Plaintiffs consulted legal counsel, they did not know and *were unable to confirm* that the request for reconsideration was still pending. Rather than allow more time to pass after Labor's official denial, they opted for appealing that denial to this Court and filed the original complaint on February 22, 2002.

Pls.' Resp. ¶3 (emphasis added).[11] By their papers Plaintiffs appear to be arguing that the doctrine of equitable tolling should apply to judicial review of the Negative Determination. Specifically, Plaintiffs seem to contend that Labor's apparent inaction in making a determi-

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[11] By their Complaint Plaintiffs also state that there was "good cause for failing to appeal [the Negative Determination] within 60 days of notice in that the notice contains no information about their appeal rights and Plaintiffs were not represented by legal counsel at the time they received the notice of determination." First Am. Compl. ¶12. An examination of the copy of the Negative Determination Plaintiffs submitted in conjunction with the Complaint confirms that there is no information about what further course of action Plaintiffs could take as to their request for NAFTA–TAA benefits. *See* First Am. Compl., Ex. B (copy of Neg. Determination sent to Marisela Quintero). However, although Plaintiffs may not have been "represented by legal counsel" and may not have received actual notice of their "appeal rights" this is not to say that they were incapable of ascertaining what their rights were or did not, in fact, do so. Specifically, Plaintiffs state that, having received notice of Labor's determination in late November 2001, they "took this letter and notice to the ATF office and asked whether this determination could be appealed. ATF prepared a request for reconsideration and on December 4, 2001 six other co-workers and I signed it." Quintero Aff. ¶7.

nation on the Application for Reconsideration, and the inquiries Plaintiffs made with respect thereto, should provide a basis for extending their time to file a complaint contesting the Negative Determination itself.

In general, "[t]he United States is immune from suit except as it consents to be sued." *Former Employees of Quality Fabricating, Inc. v. United States Sec'y Labor*, 27 CIT ___, ___, 259 F. Supp. 2d 1282, 1285 (2003) (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980); *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). By statute, the United States provides for a civil cause of action to contest Labor's NAFTA–TAA determinations. *See* 28 U.S.C. § 1581(d)(1). Furthermore, "[t]he timeliness of actions brought under 28 U.S.C. § 1581(d)(1) is governed by 28 U.S.C. § 2636." *AST*, 25 CIT at ___, Slip Op. 01–150 at 4–5 (citing 28 U.S.C. § 2636 (1994); *Former Employees of ITT v. Sec'y Labor*, 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 that "[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), *quoted in AST*, 25 CIT at ___, Slip Op. 01–150 at 5; *see also* 19 U.S.C. § 2395(a); 29 C.F.R. § 90.19(a)). In general, this statutory sixty-day time period is strictly construed. *See Former Employees of Malapai Res. Co. v. Sec'y Labor*, 15 CIT 25, 27 (1990) (citing *Kelley*, 812 F.2d at 1378); *Former Employees of Rocky Mountain Region Office of Terra Res., Inc., v. United States*, 13 CIT 427, 429, 713 F. Supp. 1433, 1435 (1989) (citing *Kelley*, 812 F.2d at 1378); *Former Employees of Suttle Apparatus Corp. v. United States Sec'y of Labor*, 13 CIT 511, 512 (1989) (citing *Kelley*, 812 F.2d at 1378); *Former Employees of ITT v. Sec'y Labor*, 12 CIT 823, 824 (1988)). However, this Court has held that the doctrine of equitable tolling applies to trade adjustment benefits cases. *See Quality Fabricating*, 27 CIT at ___, 259 F. Supp. 2d at 1285 (citing *Former Employees of Siemens Info. Communication Networks, Inc. v. Sec'y Labor*, 24 CIT 1201, 1204, 120 F. Supp. 2d 1107, 1113–14 (2000)). This Court has stated, however, that "[e]quitable tolling is not available where the plaintiff failed to exercise due diligence," *Siemens*, 24 CIT at 1208, 120 F. Supp. 2d at 1114 (citing *Irwin v. Dep't Veterans Affairs*, 498 U.S. 89, 96 (1990)), and "[w]hether a plaintiff has acted with due diligence is a fact-specific inquiry, guided by reference to the hypothetical reasonable person." *Id.* (citing *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 350 (2d Cir. 1993); *Valerde v. Stinson*, 224 F.3d 129, 134 & n.4 (2d Cir. 2000)).

Here, the court cannot find that Plaintiffs have sustained their burden of proof that the court has subject matter jurisdiction to conduct judicial review of the Negative Determination through the ac-

tion of equitable tolling. Specifically, neither Plaintiffs nor their counsel allege that they actually contacted Labor about the status of the reconsideration of the Negative Determination or that Labor did, in fact, make any representations to them about the status of the Application for Reconsideration. Plaintiffs merely state that they "went to the ATF office and let them know we had not received a response. ATF tried to find out the status but was unable to do so. We could not tell if the Dept of Labor had received our request because ATF did not send the request by certified mail." Quintero Aff. ¶8[12]; *see also* Poole Aff. ¶4 ("Neither the recipients of the email nor I recall receiving any inquiry from anyone requesting information about the petition or the request for administrative reconsideration filed on behalf of [Plaintiffs]. Neither the recipients nor I recall providing any advice or recommendations to anyone concerning the request for reconsideration filed on behalf of [Plaintiffs]."). Furthermore, Plaintiffs point to no colorable action on the part of Labor that "induced" them to file the Complaint after the deadline for contesting the Negative Determination passed. *See Irwin*, 498 U.S. at 96[13]; *Quality Fabricating*, 27 CIT at ___, 259 F. Supp. 2d at 1285 (citing *Irwin*, 498 U.S. at 95–96) ("The Supreme Court in *Irwin* stated that equitable tolling was generally allowed where a complainant was 'induced' by his adversary's misconduct into allowing the filing deadline to pass."); *Siemens*, 24 CIT at 1208, 120 F. Supp. 2d at 1114 (citing *Irwin*, 498 U.S. at 96). In order for the doctrine of equitable tolling to attach, Plaintiffs must make a reasonable effort to ascertain the status of the proceeding, and here they have not done so. *See Irwin*, 498 U.S. at 96. Therefore, in addition to Plaintiffs' actions with respect to contesting the Negative Determination being barred by the doctrine of exhaustion of administrative remedies, they are also unable to claim that their Complaint was timely filed through the action of equitable tolling. As such, Plaintiffs have not sustained their burden of proof that the court has subject matter jurisdiction for judicial review of the Negative Determination.

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[12] There is no indication that ATF is affiliated with any federal, state, or local government. *See, e.g.*, Internet homepage of Asociación de Trabajadores Fronterizos, *available at* www.atfelpaso.org.

[13] In fuller context, the Supreme Court in *Irwin* stated:

> [A]n examination of the cases in which we have applied the equitable tolling doctrine as between private litigants affords petitioner little help. Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin, 498 U.S. at 96 (footnotes omitted; citing *Baldwin County Welcome Ctr. v. Brown*, 416 U.S. 147, 151 (1984)).

III. *Judicial review of the Negative Determination Regarding Application for Reconsideration*

Finally, the Government argues that "Labor's [Negative Determination Regarding Application for Reconsideration] became the appealable decision and [Plaintiffs] did not propose challenging that decision until twenty-seven days beyond the statutorily-prescribed sixty-day time period. . . . Thus, any challenge to the [Negative Determination Regarding Application for Reconsideration] would . . . be untimely." Def.'s Mem. at 5.

Plaintiffs contend that

> [i]t is manifestly unfair for Defendant Secretary to raise the issue of timeliness against Plaintiffs' appeal of the [Negative Determination Regarding Application for Reconsideration] because Defendant was in a position to control the triggering of the timing requirements. After Plaintiffs filed their lawsuit on February 22, 2001 [sic], Defendant was in a position of accepting or not, Plaintiffs' request for reconsideration. If Labor had not accepted the request for reconsideration, the initial determination would be in effect and Plaintiffs would be invoking good cause. . . . Moreover, after the reconsideration determination was issued on April 15, 2001 [sic] Defendant waited 8 months, or well after the 60 day appeal window to file their motion to dismiss.

Pls.' Resp. at 3 (footnote omitted). Again, Plaintiffs have not sustained their burden. First, it was Plaintiffs themselves who continued the administrative process by filing the Application for Reconsideration, which Labor was required to accept and act on. 29 C.F.R. § 90.18(a) ("Any worker . . . aggrieved by a determination issued pursuant to [19 U.S.C. § 2331] and [29 C.F.R.] § . . . 90.16(f) . . . may file an application for reconsideration of the determination with the Office of Trade Adjustment Assistance, Employment and Training Administration, U.S. Department of Labor. . . ."). Second, Plaintiffs were given adequate notice and an opportunity to request judicial review of the Negative Determination Regarding Application for Reconsideration. Specifically, the record shows that: (1) Labor did come to a determination on the Application for Reconsideration, *see* Negative Determination Regarding Application for Reconsideration; (2) Plaintiffs received actual written notice from Labor that they had sixty days from the date of publication of notice of the Negative Determination Regarding Application for Reconsideration in the Federal Register within which to file for judicial review of that determination, *see* Mot. Leave File ¶6; Def.'s Mem. App. at 5–8; (3) Labor published notice of its determination in the Federal Register on May 17, 2002, thus beginning the sixty-day period within which to file for judicial review of the Negative Determination Regarding Application

for Reconsideration, *see* Connolly N. Am., El Paso, Tx., 67 Fed. Reg. at 35,157; (4) at the time the notice of Negative Determination Regarding Application for Reconsideration was published in the Federal Register Plaintiffs were represented by counsel, *see* Pls.' Resp. ¶3 at 2; Mot. Appear *Pro Hac Vice*; (5) the statutory sixty-day period for filing for judicial review of the Negative Determination Regarding Application for Reconsideration expired on July 16, 2002, *see* 28 U.S.C. § 2636(d); and (6) Plaintiffs sought the Government's consent to file the proposed Second Amended Complaint on August 12, 2002. Thus, Plaintiffs were provided with actual notice that the Negative Determination Regarding Application for Reconsideration was to be published in the Federal Register and that they had sixty days after publication within which to request judicial review, yet they failed to do so. As such, Plaintiffs have not sustained their burden of proof as to the court's subject matter jurisdiction for judicial review of the Negative Determination Regarding Application for Reconsideration.[14]

CONCLUSION

Because Plaintiffs have not sustained their burden of proof that the court has subject matter jurisdiction for judicial review of the Negative Determination, and because Plaintiffs have not sustained their burden of proof that the court has subject matter jurisdiction for judicial review of the Negative Determination Regarding Application for Reconsideration, the court hereby grants the Government's motion to dismiss this action and denies Plaintiffs' motion for leave to file a Second Amended Complaint. Judgment shall enter accordingly.

Richard K. Eaton

Dated: September 17, 2003
New York, New York

[14] Although Plaintiffs seem to generally indicate that the doctrine of equitable tolling may be appropriate as to the Negative Determination Regarding Application for Reconsideration, *see* Pls.' Resp. at 4 ("Another possibility would be for the Court to grant leave to file the Second Amended Complaint and to consider that it was timely filed by tolling the 60 day requirement."), they make no argument as to how equitable tolling would be applicable to that determination. Indeed, Plaintiffs were apparently prepared to file their proposed Second Amended Complaint in advance of the expiration of the sixty-day time period, *see* Def.'s Mot. Extension Time Answer Pls.' Compl. (June 7, 2002) (stating Plaintiffs indicated that they would file the proposed Second Amended Complaint "in a week or two."), but present no further argument with respect to their satisfying the requirements of due diligence or any argument that they were induced by Labor into seeking consent to amend that document twenty-seven days past the expiration of the deadline.