Decisions of the United States Court of International Trade

ANNOUNCEMENT

Chief Judge Jane A. Restani has announced the call of the 13th Judicial Conference of the United States Court of International Trade. The Conference is scheduled for Monday, November 8, 2004 at the Grand Hyatt, Park Avenue at Grand Central Station, New York, New York and will commence promptly at 8:30 a.m.

The theme of the Conference is: **"The Court in a New Age of Trade, Ethics and Automation."**

The Conference will be attended by the Judges of the United States Court of International Trade, officials from the International Trade Commission, the Bureau of Customs and Border Protection, the Departments of Justice, Commerce and Treasury; members of the Bar of the Court; and other distinguished guests.

All interested persons are invited to attend. The Conference program, registration forms and additional information may be obtained through the Judicial Conference page on the Court's Website, **www.cit.uscourts.gov** or by contacting the Clerk's Office at 212–264–2800.

LEO M. GORDON,
Clerk of the Court.

September 29, 2004

Financial Hardship Policy

The U.S. Court of International Trade offers a discount of 15% off the conference/course fee to law students attending an accredited law school, solo attorneys admitted to the bar less than two years, government attorneys whose agencies/departments are not funding their attendance, attorneys who work for non-profit or legal services organizations, and unemployed attorneys. To qualify for the discount, submit a letter on your firm/agency/personal letterhead outlining how you qualify for the discount, along with a check in the amount of $140.25 and a completed registration form to the address listed above. Students must submit a copy of their current and valid Student ID card.

Slip Op. 04–122

CALIFORNIA INDUSTRIAL PRODUCTS, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 98–04–01087
PUBLIC VERSION

[Plaintiff's Motion for Summary Judgment is Granted. Defendant's Motion for Summary Judgment is Denied]

Decided: September 22, 2004

Collier Shannon Scott, (*Mark L. Austrian*, *Robin H. Gilbert* and *John M. Herrmann*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Acting Attorney in Charge; *Harry A. Valetk*, Trial Attorney, Civil Division, Commercial Litigation Branch, U.S. Department of Justice; *Chi S. Choy*, Of Counsel, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, for Defendant.

WALLACH, Judge:

OPINION

I
Introduction

This matter is before the court on cross-motions for summary judgment, pursuant to USCIT R. 56, by Plaintiff, California Industrial Products, Inc., ("CIP") and Defendant, United States. At issue, is the United States Customs Service's[1] ("Customs") decision that certain of CIP's substitution manufacturing drawback claims were not eligible for drawback pursuant to 19 U.S.C. § 1313(b) (1999).[2] The court has jurisdiction over this matter pursuant to 28 U.S.C.

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[1] Now the United States Bureau of Customs and Border Protection.

[2] Under 19 U.S.C. § 1313(b) (1999), substitution for drawback purposes,

> if imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, there shall be allowed upon the exportation, or destruction under customs supervision, of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported, but only if those articles have not been used prior to such exportation or destruction; but the total amount of drawback allowed upon the exportation or destruction under customs supervision of such articles, together with the total amount of drawback allowed in respect of such imported merchandise under any other provision of law, shall not exceed 99 per centum of the duty paid on such imported merchandise.

§ 1581(a) (1999). For the following reasons, Plaintiff's Motion for Summary Judgment is granted and Defendant's Cross-Motion for Summary Judgment is denied.

II
Background

At issue in this case are two claims for substitution manufacturing drawback made by the Plaintiff pursuant to 19 U.S.C. § 1313(b) and Treasury Decision ("T.D.") 81–74.[3] On February 16, 1994, CIP submitted to Customs a notice of intention to claim drawback, pursuant to 19 U.S.C. § 1313(b), for substitution manufacturing drawback involving articles manufactured using steel and stated that it intended to comply with T.D. 81–74. CIP did not reference scrap or synonyms for scrap in its original February 16, 1994, letter. Customs approved Plaintiff's request that it be permitted to claim drawback on exports of steel, based on the terms of a general drawback contract, T.D. 81–74. The terms of the contract were set forth in a letter issued by Customs in 1981 and those terms were accepted by CIP's February 16, 1994, letter, subject to providing certain additional information that was required by the Regional Commissioner of Customs in Chicago. On or about April 7, 1994, Customs sent Plaintiff an acknowledgment of Plaintiff's acceptance of the general contract.

In a letter dated October 25, 1995, Plaintiff contacted Customs to revise its original letter of intent.[4] The letter expressed CIP's "revised intention to adhere to and comply with the conditions of drawback contract 81–74 under 19 U.S.C. § 1313(b), articles manufactured using steel;" it did not mention scrap or synonymous terms for scrap.[5] Letter from Richard M. Kilbane, Vice President, Finance, California Industrial Products, Inc., to Ms. Sylvia Pfeffer, U.S. Customs Service (Oct. 25, 1995). Customs acknowledged the receipt of CIP's October 25, 1995, letter in a letter dated January 12, 1996, and indicated that CIP's October 25, 1995, letter superceded CIP's prior

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[3] This treasury decision is a general drawback contract, the former name for drawback rulings, for articles manufactured using steel. It provides for the allowance of drawback on imported

> "[s]teel of one general class, e.g. an ingot", where the "merchandise * * * which will be used in the manufacture of the exported products" is "[s]teel of the same general class, specification and grade as the [subject imported] steel[.]" The steel used in the manufacture of the exported products on which drawback is sought must be "used to manufacture new and different articles, having distinctive names, characters and uses."

Precision Specialty Metals, Inc. v. United States, 24 CIT 1016, 1017–18 (2000) ("*Precision I*") (citing T.D. 81–74). The decision also provides that " 'no drawback is payable on any waste which results from the manufacturing operation.' " *Id.* at 1018.

[4] There are no further facts on the record as to the substance of the revision.

[5] In its letter, CIP described the type of steel as "carbon steel coils, ASTM A569, A366, AISI 1006, 1008, 1010, 1020, 1050, 1070, 1075, 10B50."

letter of intent, dated February 16, 1994, and Customs' acknowledgment letter dated April 7, 1994, without prejudice to any existing claims before the Port of Chicago.

Plaintiff retained Appel-Revoir, Inc. ("Appel-Revoir"), a drawback consulting firm, to assist it in preparing, filing and processing its drawback claims. Between December 2, 1995, and March 7, 2002, CIP made 26 drawback entries.[6] The first entry at issue, entry number RM5–0000052–9, was entered on December 2, 1995. The description that appeared on its bill of lading, which was filed with Customs, stated: Carbon Steel, AISI 1050; AISI 1070, Iron and Steel Scrap. Agreed Statement of Facts at 2 ¶7. The second entry number at issue is RM5–0000053–7, entered on December 6, 1995. The description that appeared on its bill of lading that was filed with Customs, stated: Carbon Steel, AISI 1050; AISI 1070, Iron and Steel Scrap for Remelting only. *Id*.

CIP received accelerated payment[7] for 13 claims of the 26 claims it had filed seeking drawback.[8] Customs also granted one claim because it did not involve steel scrap. Customs did not give CIP a decision regarding its eligibility for drawback on the 13 claims of steel scrap at the time of accelerated payment. Two of these claims were subsequently liquidated on January 2, 1998, without drawback. Customs then demanded the return of the accelerated payments on the two claims at issue in this case. The remaining 11 claims were liquidated on April 11, 2003.[9]

Plaintiff received two Notices of Action pursuant to Customs Form 29 dated January 2, 1998, saying that two of its drawback entries were denied based on Customs' determination that CIP impermissi-

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[6] Both of the claims at issue in this action were prepared by Appel-Revoir.

[7] Accelerated payment eligibility, under 19 C.F.R. § 191.72(a) (1997), provides that "[a] drawback claimant not delinquent or otherwise remiss in transactions with Customs is eligible . . . for accelerated payment of drawback on claims which are properly prepared and fully completed," in accordance with the regulation. Eligibility for accelerated payment is determined at liquidation. 19 C.F.R. § 191.71. After liquidation, the drawback office certified payment of any amount due or demands a refund of excess amounts paid. 19 C.F.R. § 191.72(c).

[8] The drawback claims prepared by Appel-Revoir for CIP included a request for accelerated payment of drawback and were filed with the Port of Chicago between December 2, 1995 and May 13, 1996.

[9] Plaintiff states that

> [t]he remaining 11 claims for which CIP received accelerated payment - totaling [$230, 878.32] - had been placed in a suspended status pursuant to an agreement between CIP and Customs, as reflected in correspondence between CIP and Customs dated September 22, 1998, October 2, 1998, and November 13, 1998. Those claims were subsequently liquidated by Customs on April 11, 2003. CIP timely protested those liquidations, and Customs has agreed with CIP to take no action on those protests pending the outcome of this litigation.

Plaintiff's Motion for Summary Judgment Pursuant to United States Court of International Trade Rule 56 ("Plaintiff's Motion") at 6.

bly claimed drawback on scrap. Customs said that its Headquarters Ruling Letter 210988, issued on October 29, 1979, stated Customs' position that drawback is not allowed on valuable waste, including steel scrap. Customs denied duties on an accelerated basis.[10] CIP requested further review of its protests, which was granted by the Customs' Drawback Office at the Port of Chicago, Illinois. However, Customs denied CIP's protest concerning the two entries at issue based on the analysis contained in the Customs Headquarters Ruling Letter 227375, dated October 10, 1997 ("HQ 227375"). Agreed Statement of Facts at 2 ¶10.

III
Arguments

Plaintiff argues that Customs' interpretation of 19 U.S.C. § 1625(c)(2) and the Customs Modification Act ("Mod Act") is contrary to the law. Defendant claims that "[s]ince CIP's contract did not specify that steel scrap would be exported, steel scrap is not eligible for drawback under 19 U.S.C. § 1313(b)." Defendant's Memorandum in Support of Defendant's Cross-Motion For Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 1 ("Defendant's Cross-Motion") at 1. Defendant also argues that Plaintiff may not claim that it is eligible for a "treatment" under 19 U.S.C. § 1625(c)(2)[11] because of the similar "treatment" Customs' accorded to another importer's transactions. *See id.* at 5.

IV
Applicable Legal Standards

The court reviews Customs' denial of a protest *de novo. See Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456 (1996), *aff'd*, 160 F.3d 1357 (Fed. Cir. 1998). It grants summary judgment where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is

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[10] Plaintiff has paid all liquidated duties with respect to the protested entries at issue in this action and thus exhausted its administrated remedies, consistent with 28 U.S.C. § 2637(a). CIP also timely filed its Summons and Complaint with the court.

[11] 19 USC § 1625(c)(2) provides in relevant part:

A proposed interpretive ruling or decision which would —

(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transaction;

shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30-day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.

no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c) (2004); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In a motion for summary judgment, the movant bears the burden of producing evidence showing the lack of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *see also Precision Specialty Metals, Inc. v. United States*, 182 F. Supp. 2d 1314, 1318 (CIT 2001) ("*Precision II*"). In determining if a party has met its burden the court does not "weigh the evidence and determine the truth of the matter," but rather the court determines "whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249. It views the evidence in the light most favorable to the non-moving party and draws all inferences in the nonmovant's favor. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 8 L. Ed. 2d 176 (1962).

VI
Discussion

A
Customs' Interpretation of 19 U.S.C. § 1625 is Not Afforded Deference by the Court

The court does not afford deference to Customs' interpretation of 19 U.S.C. § 1625 on the grounds that (1) HQ 227375 was an inconsistent treatment of Plaintiff's claim for drawback, and (2) Customs' attempts to retroactively apply its statute and regulations is contrary to law.

1
Customs Ruling Letter 227375 is Not Afforded Deference by the Court

Defendant argues that the court should afford HQ 227375 deference.

When Congress grants authority to an agency to promulgate regulations necessary for the administration of programs it oversees, that authority permits the agency to fill gaps left in the statutory scheme. *See Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000). The Supreme Court's decision in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 394, 119 S. Ct. 1392, 143 L. Ed. 2d 480 (1999) makes clear that the court must give *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), deference to those valid agency regulations interpreting a statute. The Supreme Court held in *United States v. Mead Corp.*, 533 U.S. 218, 234–35, 150 L. Ed. 2d 292, 121 S. Ct. 2164 (2001), that Customs classification rulings, while not afforded *Chevron* deference may be entitled to *Skidmore v. Swift & Co.*, 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944), deference. Under the *Skidmore* standard,

"[a] classification ruling . . . may . . . at least seek a respect proportional to its 'power to persuade.' " *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). Mead teaches that whether *Skidmore* deference is applicable to a Customs classification ruling varies depends on "its writer's thoroughness, logic, and expertness, its fit with prior interpretations, and any other sources of weight." *Id.*; *see also Structural Indus. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004).

In this case, HQ 227375 will not be granted deference. While Customs may change a view it believes to have been grounded upon a mistaken legal interpretation,[12] the consistency and predictability of an agency's position is a factor in assessing the weight that position is due. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993) (citing *Automobile Club of Mich. v. Commissioner*, 353 U.S. 180, 180–83, 77 S. Ct. 707, 1 L. Ed. 2d 746 (1957)). "*An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view*." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448, n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) (emphasis added) (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981)). "How much weight should be given to the agency's views in such a situation, and in particular where its shifts might have resulted from intervening and possibly erroneous judicial decisions and its current position . . . will depend on the facts of individual cases." *Good Samaritan Hosp.*, 508 U.S. at 417.

Here, the ruling letter at issue is not entitled to *Skidmore* deference. Customs has not demonstrated that it followed a consistent pattern of rulings in granting drawback on steel scrap; it granted drawback on substantially similar product during the same time period that CIP submitted its drawback claims. Plaintiff's Motion at 3, 6.

2
Defendant's Argument that 19 U.S.C. § 1625 Merits *Chevron* Deference is Erroneous Because Defendant Cannot Retroactively Apply Its Regulations

Defendant claims that, because 19 U.S.C. § 1625(c)(2) is silent as to whether Customs must grant the same "treatment" to other importers, a recently promulgated Customs regulation, 19 C.F.R.

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[12] Indeed, "an administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision. . . ." *Good Samaritan Hosp.*, 508 U.S. at 417 (citing *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge*, 434 U.S. 335, 351, 98 S. Ct. 651, 54 L. Ed. 2d 586 (1978)); *see also NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, 110 S. Ct. 1542, 108 L. Ed. 2d 801 (1990); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 265–66, 95 S. Ct. 959, 43 L. Ed. 2d 171 (1975)).

§ 177.12(c) (2002), interpreting 19 U.S.C. § 1625(c), is entitled to deference. Defendant's Cross-Motion at 8. Defendant states that previously "Customs did not have the proper regulations in place to interpret 19 U.S.C. § 1625 as amended by the Customs Modernization Act of 1993. . . ." *Id.* at 9.

Plaintiff claims that "no deference can be given to Customs' interpretation of Section 1625(c)(2), as amended, because 'the agency has simply not interpreted the new statute [19 U.S.C. § 1625].' " Plaintiff's Motion at 7 (citing *Am. Bayridge Corp. v. United States*, 22 CIT 1129, 1151 (1998), *vacated on other grounds*, 217 F.3d 857 (Fed. Cir. 1999)).

Defendant claims that "[c]ourts have never made deference to an agency's interpretation dependant on the effective date of a regulation." Defendant's Cross-Motion at 10.[13] Defendant's claim that "Customs *did not have the proper regulations* in place to interpret 19 U.S.C. § 1625 as amended by the Customs Modernization Act . . . ," *Id.* at 9 (emphasis added), misses the crucial point that Customs did not in fact have *any interpretation, position, or policy in place* regarding the statute during the time when both that case and this matter arose. *See Am. Bayridge*, 22 CIT at 1145–46 (stating that Customs cannot continue to use its old regulations to implement the new statute nor can it legitimately attempt to reconcile its new regulations with the new statute as the recently promulgated regulations conflict with the clear words of 19 U.S.C. § 1625(c)). As stated in the Agreed Statement of Facts that the parties submitted, Plaintiff's drawback claims were denied on the basis of the analysis made in the 1997 HQ 227375. Subsequent to both denial of CIPs claims of drawback and this court's decision in *Am. Bayridge*, Customs promulgated 19 C.F.R. § 177.12(c), formalizing an interpretation of 19 U.S.C. § 1625(c), on August 16, 2002. *Administrative Rulings*, 67 Fed. Reg. 53,483 (Aug. 16, 2002).

Defendant's argument that, because 19 U.S.C. § 1625(c)(2) is silent on whether Customs must grant the same "treatment" to other importers, the recently promulgated Customs regulation, 19 C.F.R. § 177.12(c), is entitled to deference, is fundamentally inconsistent with principles of statutory interpretation. As a general rule, a

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[13] Defendant's reliance on *Smiley v. Citibank*, 517 U.S. 735, 739–41, 116 S. Ct. 1730, 135 L. Ed. 2d 25 (1996) and *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1360–1361 (Fed. Cir. 2000), for this proposition is misplaced. In both *Smiley* and *Princess Cruises*, an administrative agency had legitimately interpreted a statute or had a valid position or policy in place before they made a decision against the opposing party. That position or policy was the basis for the decision. The agency then codified its position either during or before the opposing party filed suit challenging the agency's decision. *Smiley*, 517 U.S. at 739–41. *Smiley* held that neither an agency's delay in promulgating a regulation nor the fact that "it was litigation which disclosed the need for the regulation" affects the court's deference to the agency's interpretation of an ambiguous statute as embodied in such regulations. *Id.* at 741; *see also Princess Cruises*, 201 F.3d at 1360–61. Thus, what was challenged in both cases was the decision based on the agency's promulgated position or policy.

statutory grant of legislative rulemaking authority will not encompass the power to promulgate retroactive rules unless that power is expressly conveyed by Congress. *Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v. United States*, 102 F. Supp. 2d 486, 493 (CIT 2000); *see Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988); *see also Brimstone R. & Canal Co. v. United States*, 276 U.S. 104, 122, 48 S. Ct. 282, 72 L. Ed. 487 (1928). Thus, "an administrative regulation will not be construed to have retroactive effect unless the language requires such a result." *Rhone Poulenc, Inc. v. United States*, 14 CIT 364, 365 (1990). There is no indication in the legislative history of 19 U.S.C. § 1625 that Congress intended to afford to Customs the power to regulate retroactively. *See Am. Bayridge*, 22 CIT at 1150. Therefore, the court will not afford any deference to Customs' new statutory interpretation embodied in regulations made subsequent to Customs' denial of drawback for Plaintiff's entries.

B
CIP May Claim a "Treatment" Similar to that Afforded to a Third Party

1
The Precision Cases are Directly Applicable to the Case at Hand and Support CIP's Claim of Drawback

Defendant argues that Plaintiff may not claim a "treatment" under 19 U.S.C. § 1625(c)(2) because of the duty drawback Customs accorded to the transactions of another importer. Defendant here stated in its brief that "Customs had specifically, inadvertently, and erroneously granted drawback for 69 of Precision Specialty Metals' own claims involving exported steel scrap." Defendant's Cross-Motion at 7. During oral argument on May 12, 2004, Defendant explained that the government was taking the position in this case that the grant of drawback in the Precision Specialty Metals[14] (hereinafter *Precision I* and *Precision II* are referred to collectively as "the *Precision* cases") cases was erroneous.

Plaintiff claims that 19 U.S.C. § 1625(c)(2) requires Customs to grant its drawback claims involving exported steel scrap and relies on the court's decisions in the *Precision* cases for the proposition. It claims that the facts in the *Precision* cases are the same as in the

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[14] *Precision I*, 24 CIT at 1016, and *Precision II*, 182 F. Supp. 2d at 1314, are related cases where the court initially denied the plaintiff's motion for summary judgment and ordered that the case be set for trial. After reviewing the memoranda submitted by the parties, the court determined that the issues presented were almost entirely legal and ruled on the motions for summary judgment. *Precision II*, 182 F. Supp. 2d at 1314. By order dated February 21, 2001, the court vacated its order for a trial, and directed the parties to submit the case for resolution on motions for summary judgment. *Id.* at 1314.

case at hand, and thus the court should similarly grant CIP's claim of drawback.

The *Precision* cases, as Plaintiff argues, do indeed provide persuasive reasoning to support Plaintiff's claimed drawback. In the *Precision* cases, a manufacturer challenged Customs' denial of substitution manufacturing drawback on steel trim and scrap the manufacturer had imported. Customs had initially granted drawback to five claimants, Calstrip, Combined Metals of Chicago, Precision Specialty Metals, Thypin and Ulbrich (hereinafter "drawback claimants"), whose claims involved steel scrap. Customs subsequently denied drawback, claiming that the entries were ineligible "waste" and not articles "manufactured or produced" as required by the duty exemption.[15] *Precision II*, 182 F. Supp. 2d at 1316.

The court in *Precision II* rejected the defendant's argument based on the plain language and legislative history of 19 U.S.C. § 1625(c)(2) and explained that the defendant had erroneously equated a "position" an agency has taken with a "treatment." *Id*. at 1325. The court explained that " 'the use of the word 'treatment,' rather than 'position', represent[ed] a Congressional departure from the language of the apparent source text of [19 C.F.R.] § 177.10."[16] *Id*. (citing *Precision I*, 24 CIT at 1043). The court said that 19 C.F.R. § 177.9 is the "apparent source text from which the term 'treatment' was grafted onto § 177.10." *Id*. at 1326. The court explained that

> It appears that a 'treatment' may be found where a 'position' might not — that the definition of 'treatment' does not require publication or liquidation among many ports over many years.

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[15] The manufacturer had initially submitted a letter expressing its intent to comply with T.D. 81–74 and claim drawback on various steel products, which "included 'stainless steel coils, sheets and trim' of various chemistries identified by industry standards." *Precision II*, 182 F. Supp. 2d at 1317. It filed 116 drawback entries under T.D. 81–74 between December 11, 1991, and May 13, 1996, and Customs liquidated 69 of those entries with the full benefit of drawback. *Id*. In June 1996, the manufacturer received a Notice of Action informing it that "38 of its drawback entries were being liquidated without the benefit of drawback in full or in part, on the basis that 'scrap was shown on the export bill(s) of lading' and that 'drawback is not available upon exports of valuable waste.' " *Id*. at 1318.

[16] 19 C.F.R. § 177.10 (a) & (c), publication of decisions, provide that

> (a) Generally. Within 90 days after issuing any interpretive decision under the Tariff Act of 1930, as amended, relating to any Customs transaction (prospective, current, or completed), the Customs Service shall publish the decision in the Customs Bulletin or otherwise make it available for public inspection. For purposes of this paragraph an interpretive decision includes any ruling letter, internal advice memorandum, or protest review decision. Disclosure is governed by 31 CFR part 1, 19 CFR part 103, and 19 CFR 177.8(a)(3).
>
> (c) Changes of practice. Before the publication of a ruling which has the effect of changing an established and uniform practice and which results in the assessment of a higher rate of duty within the meaning of 19 U.S.C. 1315(d), notice that the practice (or prior ruling on which that practice was based) is under review will be published in the Federal Register and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change.

> The term 'treatment' looks to the actions of Customs, rather than its 'position' or policy. It is also distinct from the terms 'ruling' and 'decision,' which are governed by § 1625(c)(2). This construction would recognize that importers may order their actions based not only on Customs' formal policy, 'position,' 'ruling' or 'decision,' but on its prior actions. This construction furthers the stated legislative intent underlying § 1625(c).

Precision I, 24 CIT at 1043–44 (internal footnotes omitted). It held that the government had "failed to point to anything in the language or the legislative history of, or the regulatory scheme surrounding, § 1625(c)(2) which persuades the court that its earlier holding — that 'the term "treatment" looks to the actions of Customs, rather than its "position" or policy . . .' " in *Precision I* was erroneous. *Precision II*, 182 F. Supp. 2d at 1328. Thus, the court stated in *Precision II*, that "the only proof needed to establish a treatment is a description of the transactions; the only intent referenced by the regulation is that of the **importer**, in arranging its affairs in reliance on the treatment."[17] *Id.* at 1326 (emphasis in original).

The facts before the court indicate that like the parties in the *Precision* cases, CIP submitted to Customs its intention to claim drawback under 19 U.S.C. § 1313(b) for substitution manufacturing drawback involving steel articles. The merchandise at issue in the *Precision* cases was "liquidated with the benefit of drawback between June 5, 1992 and November 28, 1997 [and] is substantially identical to the merchandise at issue in the two claims at issue in this litigation for which drawback was denied." Plaintiff's Statement of Facts as to Which There is No Genuine Issue to be Tried at 3 ¶19; Defendant's Response to Plaintiff's Statement of Additional Material Facts Not in Dispute at 4 ¶19. Plaintiff here, in its letter dated February 16, 1994, stated that it would comply with the terms and conditions of T.D. 81–74 and made 26 drawback entries between December 2, 1995, and March 7, 2002. However, unlike the plaintiff in the *Precision* cases, Customs did not grant drawback to any of CIP's entries involving scrap, but rather denied them.

The court does not find persuasive Defendant's argument that a ruling letter denying drawback to an importer may be the basis for denial of another importer's drawback claim for similar goods, while at the same time Customs grant of drawback to another company may *not* be the basis for a similar grant. *See Precision II*, 182 F. Supp. 2d at 1329. Defendant is arguing that CIP should follow a

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[17] Furthermore, the court described how "[s]ection 7361(c) of the Anti-Drug Abuse Amendments Act of 1988 (Title VI, Pub. L. 100–690) requires the Secretary of the Treasury to promulgate **regulations to provide for nationwide uniformity of certain decisions made by U.S. Customs Service officers** and to establish procedures by which certain parties affected by the lack of such uniformity may have the alleged inconsistencies resolved." *Id.* at 1326 (emphasis in original).

standard that Customs itself did not follow. *Id.* Plaintiff here agreed to abide by the terms of T.D. 81–74 and claimed drawback on steel scrap similar to the claim by the plaintiffs in the *Precision* cases. Agreed Statement of Facts ¶¶2, 6. Customs however denied CIP's drawback claims. *Id.* Customs' disparate decisions in this case and the *Precision* cases, are indicative of the fact that eligibility for drawback on steel scrap[18] continues to be a gray area. *See Precision II*, 182 F. Supp. 2d at 1329. Given these circumstances, this court does not find that Customs' actions altering its "treatment" of CIP's claims for drawback is consistent and reasonable in light of the *Precision* cases.

2
Section 1625(c)(2) Entitles CIP to the Same "Treatment" Afforded Other Importers of Substantially Similar Merchandise

Plaintiff contends that, under the plain language of 19 U.S.C. § 1625(c)(2), it is entitled to the same "treatment" Customs afforded to the parties in the *Precision* cases. In its supplemental briefing materials,[19] Plaintiff stated that when 19 U.S.C. § 1625 was amended, "Congress specifically removed from Customs any discretion to alter the effective date of any change in a prior "treatment" until after the notice and comment period."[20] Plaintiff's Supplemental Memorandum in Support of its Motion for Summary Judgment and Response in Opposition to Defendant's Cross-Motion ("Plaintiff's Supplemental Brief") at 1.

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[18] The *Precision* cases covered steel scrap described as "stainless steel," "metal scrap," "scrap steel for remelting purposes only," and "steel scrap sabot." *Precision II*, 182 F. Supp. 2d 1317.

[19] During the May 12, 2004, oral argument, the court ordered supplemental briefing and requested that the parties further address the legislative history of 19 U.S.C. § 1625(c)(2).

[20] Section 625 of the Tariff Act of 1930, codified at 19 U.S.C. § 1625, was amended by section 623 of Title VI, the Customs Modernization ("Mod Act") provision of the North American Free Trade Agreements Implementation Act ("NAFTA"). NAFTA, Pub. L. No. 103–182, 107 Stat. 2057, 2186. Prior to enactment of the Mod Act, 19 U.S.C. § 1625 was silent as to the effective date of a new treatment. Customs promulgated a series of regulations prior to the Mod Act that provided that the circumstances under which Customs would delay the effective date of a change to a treatment previously accorded by Customs. These regulations applied to the recipient of the ruling letter and unspecified "other parties," and provided that:

> The Customs Service will from time to time issue a ruling letter covering a transaction or issue not previously the subject of a ruling letter and which has the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions of either the recipient of the ruling letter or other parties. Although such a ruling letter will generally be effective on the date it is issued, the Customs Service may, upon application by an affected party, delay the effective date of the ruling letter, and continue the treatment previously accorded the substantially identical transaction, for a period of up to 90 days from the date the ruling letter is issued.

19 C.F.R. § 177.9(e)(l) (1993).

Plaintiff further argues that, in its regulations, Customs reserved for itself discretion to determine when an importer could apply a prior "treatment." *Id.* at 2–3. However, Plaintiff points out that Congress did not grant any discretion to Customs in determining when an importer qualifies for a prior "treatment" when it drafted and enacted the new 19 U.S.C. § 1625(c). *Id.*; *see also Am. Bayridge*, 22 CIT at 1151. According to Plaintiff, Customs' regulations state that an importer has to " 'demonstrate to the satisfaction of the Customs Service' " that the prior treatments were 'sufficiently consistent and continuous' and that the importer 'reasonably relied' on the treatment in arranging its future transactions" to be eligible for a similar "treatment." Plaintiff's Supplemental Brief at 2 (referring to 19 C.F.R. § 177.9(e)(2)).

Plaintiff claims that Congress could have adopted language from the old Customs regulations; it could have limited the application of the new treatment statute to treatments within the preceding two years, to prior recipients of a ruling letter or treatment, and only to those who reasonably relied, but chose not to. Plaintiff points out that when Congress enacts a law, it is presumed to know the existing law. *Id.* at 3 (citing *Am. Bayridge*, 22 CIT at 1150). CIP argues that Congress did not expressly grant Customs discretion to either limit or modify the effective date of a new interpretive ruling or decision or change the effective date for a new interpretation to a specific category of persons. *Id.* Furthermore, Plaintiff argues that this limitation cannot mean that Congress intended to deny the agency's discretion to both interpret and fill gaps in the new statute: it only means, as stated in *Am. Bayridge*, that Congress's "failure to carry over the discretionary language of the old regulations into the new statute provides further support for the conclusion that Congress did not intend the statute to be a discretionary grant to Customs." *Id.* at 3 (quoting *Am. Bayridge*, 22 CIT at 1149). Plaintiff claims that "Customs may not now exercise any discretion to alter the effective date of a new treatment by making it retroactive to a particular class of importer - such as importers who did not receive the prior treatment, or who did not rely upon it to Customs' satisfaction. *Id.* at 1.

Defendant states that "[t]here is no dispute that the purpose of 19 U.S.C. § 1625 is to provide predictability for importers in structuring their business while also retaining flexibility for Customs in the exercise of its administrative authority." Defendant's Cross-Motion at 12. However, it claims that the facts and reasoning of the *Precision* decisions are inapposite to the facts of this case. Defendant states that "CIP nevertheless contends that, under the plain language of § 1625(c)(2), it is entitled to the same treatment Customs accorded to other claimants who had previously received drawback for exported stainless steel scrap." *Id.* at 8. However, Defendant argues that "not only do the *Precision* cases not aid CIP, but CIP does not explain which portion of the statutory language in § 1625(c)(2)

expressly requires that Customs must take the treatment given to one party and apply it to another party." *Id*.

Defendant argues that its actions were reasonable and consistent with established law. Defendant's Supplemental Memorandum in Support of Its Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Supplemental Brief") at 1. Defendant claims that there is nothing in the legislative history that suggests that Congress intended 19 U.S.C. § 1625(c) to limit Customs' discretion and judgment on how best to administer the Customs laws, nor any indication which would establish the statutory right for a third party to rely on a "treatment" provided to another importer. *Id*. at 1–2. Defendant's main argument continues to be that although it did not have the proper regulations to interpret 19 U.S.C. § 1625 as amended by the Mod Act, it had implemented regulatory amendments to 19 U.S.C.§ 1625, specifically addressing whether a party may claim the "treatment" of another for itself. Thus, it claims that since the implementing regulations specifically state that Customs need not apply the benefit of a "treatment" provided to another importer, and because CIP was not accorded any prior "treatment" to its own importations, the Court must give deference to Customs' valid interpretations of the statute. *Id*. at 4 (citing *Haggar Apparel Co.*, 526 U.S. at 392; *Chevron*, 467 U.S. at 837).

Defendant failed to follow the procedures specified by Congress in 19 U.S.C. § 1625 to alter a "treatment" previously granted. As the court explained in *Precision I*, the lack of specific legislative history regarding Congress's interpretation of 19 U.S.C. § 1625(c) does not eliminate the court's duty to employ the plain meaning of the language that the Congress adopted. 24 CIT at 1040; *see United States v. Bornstein*, 423 U.S. 303, 310, 96 S. Ct. 523, 46 L. Ed. 2d 514 (1976). The court is required to assume that the legislative purpose of a statute is expressed by the ordinary meaning of the words it uses. *See Richard v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962).

In *Precision I*, the court explained that 19 U.S.C. § 1625(c)(2) is violated when: "(1) an interpretive ruling or decision (2) effectively modifies (3) a "treatment" previously accorded by Customs to (4) "substantially identical transactions", and (5) that interpretive ruling or decision has not been subjected to the notice-and-comment process outlined in § 1625(c)(2)." 24 CIT at 1040; *see* 19 C.F.R. § 177.9(a) (2001). Accordingly, in order to succeed in its claim of a "treatment" afforded by Customs, Plaintiff must show that Customs' denial of Plaintiff's protest was a ruling, and that it changed a "treatment" previously accorded by Customs to substantially identical transactions. *Precision I*, 24 CIT at 1040.

Customs current interpretation of a "treatment" pursuant to 19 U.S.C. § 1625(c) and 19 C.F.R. § 177 is not relevant to the court's

analysis in this instance because Customs did not deny drawback based on its current statutory interpretation or regulation when it made its decision. Defendant may not now claim an interpretation on a basis different from the one it used when it made its denial: "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that [agency's] action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S. Ct. 454, 87 L. Ed. 626 (1943). Furthermore, there is no indication in the legislative history of 19 U.S.C. § 1625 that Congress intended to afford to Customs the power to regulate retroactively. *See Am. Bayridge*, 22 CIT at 1150–51. The Federal Circuit has explained that:

> Section 1625(c) mandates that Customs provide notice and comment under specific circumstances. First, § 1625(c) only applies to a "proposed interpretive ruling or decision" by Customs. Second, the proposed interpretive ruling or decision must either modify or revoke a prior ruling or decision or have the effect of modifying Customs' previous treatment of "substantially identical transactions." Section 1625(c) requires that, before Customs issues such an interpretative ruling or decision, it publish it and allow interested parties an opportunity to comment on its correctness. The statute instructs Customs to consider the comments it receives. Section 1625(c) then provides that the final ruling or decision will become effective 60 days after its publication.

Sea-Land Serv. v. United States, 239 F.3d 1366, 1372 (Fed. Cir. 2001).

As stated in *Precision II*, this court's understanding of 19 U.S.C. § 1625(c)(2) is consistent with, and furthers, the legislative history underlying the Mod Act, which substantially amended 19 U.S.C. § 1625:

> The guiding principle in our discussions with the trade community is that of "shared responsibility." Customs must do a better job of informing the trade community of how Customs does business; and the trade community must do a better job to assure compliance with U.S. trade rules
>
> . . .
>
> As a general statement, Customs supports the JIG concept of "informed compliance." Importers have the right to be informed about Customs rules and regulations, and its interpretive rulings and directives, and to expect certainty that the ground rules would not be unilaterally changed by Customs without the proper notice and opportunity to respond.

Precision II, 182 F. Supp. 2d at 1328 (citing Customs Modernization and Informed Compliance Act: Hearing on H.R. 3935 Before the

House Comm. on Ways and Means, Subcomm. On Trade, 102nd Cong. 91 (1992) (statement of Commissioner Carol Hallett, United States Customs Service)); *see also* S. Rep. No. 103–189 at 64 (1993). Similar to the circumstances in the *Precision* cases, the government once again has failed to point to any contravening legislative history or other authority to justify its disparate treatment of substantially similar goods.

Application of the rule set forth in 19 U.S.C. § 1625(c)(2) requires the government to comply with a statutorily mandated notice-and-comment process before implementing a ruling or decision that changes an earlier "treatment." *Precision II*, 182 F. Supp. 2d at 1329. So long as Customs chooses not to follow this process, it is bound by its earlier "treatment." *Id.* CIP followed the "treatment" afforded by Customs to other importers of similar goods. As a result, if Customs wishes to alter the "treatment" afforded to importers of similar goods, it may do so at any time by following the notice and comment procedures set forth in 19 U.S.C. § 1625, and thus impose a new ruling or decision, consistent with the statute, denying drawback on steel scrap or trim. *See id.* at 1329. This process, "as Congress and Customs alike evidently intended, provides importers with some predictability in structuring their business, while retaining for Customs flexibility in the exercise of its administrative authority." *Id.*

The court finds that given the unique facts and circumstances of this case, Customs is bound by and subject to its earlier treatment of steel scrap as eligible for drawback. This ruling is limited to the facts of this case and should not be deemed precedential for claims of drawback on steel scrap filed subsequent to the publication of this opinion.

VII
Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment is granted and the Defendant's Cross-Motion for Summary Judgment is denied.

Slip Op. 04–127

XEROX CORPORATION, Plaintiff, *v.* THE UNITED STATES, Defendant.

Before: MUSGRAVE, JUDGE
Court No. 02–00111

[Plaintiff brought this action pursuant to 28 U.S.C. § 1581(a) contesting the denial of a protest. In its protest, Plaintiff claimed, for the first time, that the merchandise in question was eligible for duty-free entry pursuant to the North American Free Trade

Agreement ("NAFTA"). Defendant moved to dismiss on the grounds that there was no protestable decision since Plaintiff had failed to claim the NAFTA preference either at the time of entry or within one year from the date of entry. Plaintiff filed a cross motion for summary judgment. **Held:** The Court agrees that Customs never made a protestable decision whether to grant the NAFTA preference; therefore jurisdiction does not lie under 28 U.S.C. § 1581(a). Defendant's motion is granted and Plaintiff's motion is denied as moot.]

Decided: October 7, 2004

Neville Peterson, LLP (*John M. Peterson* and *Maria E. Cellis*) for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams,* Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Amy M. Rubin*); *Sheryl A. French*, Office of Assistant Chief Counsel, U.S. Customs and Border Protection, of counsel, for Defendant.

OPINION

Xerox Corporation brings this action seeking preferential, duty-free, tariff treatment pursuant to the North American Free Trade Agreement ("NAFTA") for 21 entries of electrostatic photocopiers and wire harnesses. Between January and March of 1998 Xerox made 22 entries at the port of Laredo, Texas and claimed classification under HTSUS 9009.12 (photocopiers) and 8544.41 (wire harnesses). Xerox did not claim duty-free treatment at the time of entry because it did not possess the certificates of origin required by 19 C.F.R. § 181.21. The United States Custom Service liquidated these entries "as entered" in December 1998 and January 1999. On March 2, 1999 Xerox filed a timely protest under 19 U.S.C. § 1514(a)(2), asserting for the first time that the entries were entitled to the NAFTA preference. The certificates of origin were submitted with the protest.

Customs treated Xerox's protest as a petition for NAFTA treatment under 19 U.S.C. § 1520(d),[1] which Customs interprets as the only means by which an importer can claim post-liquidation NAFTA treatment. A claim under § 1520(d) must be brought within one year of the date of importation. This limitation period had expired with

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[1] 19 U.S.C. § 1520(d) provides:

> Notwithstanding the fact that a valid protest was not filed, the Customs Service may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to refund any excess duties paid on a good qualifying under the rules of origin set out in section 3332 of this title for which no claim for preferential treatment was made at the time of importation if the importer, within 1 year after the date of importation, files, in accordance with those regulations, a claim that includes—
>
> (1) a written declaration that the good qualified under those rules at the time of importation;
> (2) copies of all applicable NAFTA Certificates of Origin (as defined in section 1508(b)(1) of this title); and
> (3) such other documentation relating to the importation of the goods as the Customs Service may require.

respect to all but one of Xerox's 22 entries at the time the protest was filed. On September 28, 2001 Customs reliquidated the one entry for which the limitation period had not run, granting a refund based on the NAFTA preference. On November 6, 2001 Customs denied the protest as untimely with respect to the other entries. Xerox subsequently brought this action pursuant to 28 U.S.C. § 1581(a) contesting the denial of its protest.

Presently before the Court is a motion by Customs to dismiss this action for lack of subject matter jurisdiction and a motion by Xerox for summary judgment. For the reasons set forth below, Customs' motion is granted and Xerox's motion is denied as moot.

Arguments

Customs' motion to dismiss is based on its contention that there was no protestable decision made regarding the NAFTA preference. Customs argues that in order for the Court to have subject matter jurisdiction under 28 U.S.C. § 1581(a) the plaintiff must protest a decision described in 19 U.S.C. § 1514(a). Mem. in Supp. of Def.'s Mot. to Dismiss for Lack of Subject Matter Jurisdiction ("Def.'s Br.") at 5 (citing *Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973, 975–76 (Fed. Cir. 1994) (other citations omitted)). Customs regulations require an importer claiming a NAFTA preference to "make a written declaration that the good qualifies for [preferential NAFTA] treatment . . . based on a complete and properly executed original Certificate of Origin . . . in the possession of the importer." 19 C.F.R. § 181.21(a). An importer may amend its entry pursuant to 19 C.F.R. § 181.31 and claim the NAFTA preference so long as the liquidation of the entry has not become final. Once an entry has liquidated, 19 U.S.C. § 1520(d) permits an importer to petition for preferential treatment provided that it is within one year of the date of importation. Because Xerox failed to avail itself of the regulatory and statutory means by which a NAFTA claim can be made, Customs asserts that the matter was never placed before it for decision. Def.'s Br. at 6. Customs maintains that it "is entitled to rely on the information provided in the entry documents, including any importer's declaration regarding 'the declared value, classification and rate of duty applicable to the merchandise' " and therefore, "when [it] liquidates an entry 'as entered' in reliance on the information provided by the importer, the liquidation is correct as a matter of law." Def.'s Br. at 7 (citing 19 U.S.C. § 1484).

When the jurisdiction of the court is challenged, the burden is on the plaintiff to prove that jurisdiction exists. *See Lowa Ltd. v. United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983). Xerox argues that "the filing of a protest under 19 U.S.C. § 1514(a)(2) in order to challenge the 'rate and amount of duties chargeable', as determined by Customs in the liquidation of an entry, remains a viable and statutorily authorized method for asserting the importer's right to a lower

rate of duty, including a preferential rate of duty under NAFTA." Mem. of Points and Authorities in Opp'n to Def.'s Mot. to Dismiss and in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Br.") at 2. Xerox notes that 19 U.S.C. § 1500(b) requires Customs to "fix the final classification and rate of duty applicable to such merchandise." In this instance, Xerox contends that Customs made a decision to assess Column 1 "Most Favored Nation" rates of duty. Pl.'s Br. at 8. Xerox also notes the principle that all decisions of the Customs official merge in the liquidation of the entry and argues that this is true regardless of whether the decisions are the result of active consideration or a decision to liquidate the entry "as entered." Pl.'s Br. at 8–9 (citing *G&R Produce Company v. United States*, 281 F. Supp. 2d 1323, 1334 (CIT 2003); *LG Electronics U.S.A. v. United States*, 21 CIT 1421, 1425 (1997)). Therefore, Customs concludes that the liquidation of the entries at issue here was a protestable decision regarding the rate of duty to be imposed.

Xerox also contends that § 1520(d) does not provide the exclusive basis for asserting a post-entry claim for NAFTA treatment. Xerox argues that neither § 1520(d) not the *North American Free Trade Agreement Implementation Act*, Pub. L. No. 103–182, § 1(a), 107 Stat. 2057 (Dec. 8, 1993), revoke or diminish the right of an importer to file a timely protest to challenge the rate of duty determined by Customs upon liquidation. On this point, Xerox notes that the first line in § 1520(d) says "notwithstanding the fact that a valid protest was not filed . . . " and argues that this language indicates that an importer may file a "valid protest" or, as an alternative, may request reliquidation under § 1520(d).

Xerox argues that the remedy set out by § 1520(d) is intended to supplement, not replace, the protest remedy established by § 1514(a)(2). Xerox notes that when NAFTA initially went into effect, Customs employed a 90 day liquidation cycle, meaning that an entry could be liquidated and the time for filing a protest expire 180 days from the date of entry. Under these circumstances, § 1520(d) provided a longer period (one year form entry) during which an importer could claim NAFTA treatment. Xerox asserts that in the first years after NAFTA went into effect, Customs processed § 1514 protests and reached the merits of those claims, even when a request for reliquidation under § 1520 had not been filed. However, in 1997 when Customs replaced its 90 day liquidation cycle with a 314 day liquidation cycle, meaning that the typical time for filing a protest would extend beyond a year from the date of entry, it also adopted the position that a § 1520(d) petition was the exclusive way to assert a post-entry NAFTA claim. Although Customs has taken this position, Xerox reasserts that Congress did not expressly limit or eliminate the right of protest in the *North American Free Trade Agreement Implementation Act*.

Finally, Xerox argues that Customs' position violates the canons of statutory construction. Specifically, Xerox notes the principle that a reviewing court should try to interpret the different provisions of a statute in order to reconcile and give meaning to each. Furthermore, Xerox notes that when Congress enacts legislation it must be assumed that it is aware of the laws it has previously enacted. For these reasons, Xerox concludes that the Court should hold that § 1520(d) and § 1514(a) are alternative means of claiming a NAFTA preference post-liquidation.

Analysis

It is apparent from the text of the statutes that § 1520(d) and § 1520(a) are complementary statutes addressing different factual circumstances. The parties do not dispute that a protest under § 1514(a) is predicated on a decision by Customs, and § 1520(d) states that it applies when "no claim for preferential treatment was made at the time of importation." Thus, the dispositive issue before the Court is whether Customs made a decision to deny the NAFTA preference.

The Court holds that Customs did not make a protestable decision to deny Xerox's entries NAFTA treatment. As previously noted, 19 C.F.R. § 181.21 requires an importer to "make a written declaration that the good qualifies for [preferential NAFTA] treatment . . . based on a complete and properly executed original Certificate of Origin . . . in the possession of the importer." Plainly, the burden is on the importer to claim and substantiate its entitlement to the NAFTA preference. In the absence of such a claim, it is too much of a reach to construe Customs' decision to assess Column 1 duties as a negative decision regarding preferential NAFTA treatment.[2] In the present case, the issue of whether the subject merchandise was eligible for the NAFTA preference was simply never before Customs. It is also noteworthy that Customs classified the merchandise under the tariff subheading claimed by Xerox, the correctness of which is undisputed, and in the absence of a substantiated NAFTA claim, Customs was correct in assessing Column 1 duties. Therefore, Xerox's protest was invalid and does not give rise to this Court's jurisdiction under 28 U.S.C. § 1581(a).

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[2] In *Corrpro Companis, Inc. v. United States*, Slip Op. 04–116 (Sept. 10, 2004), the court held that Customs made a decision regarding NAFTA treatment by issuing a Headquarters Ruling Letter which required the importer to classify the merchandise in question under a tariff heading that was not NAFTA eligible. Thus the plaintiff was permitted to raise its claim for NAFTA treatment for the first time via a protest against the tariff classification. In that decision, as well as here, the key inquiry was whether the protest was based on a Customs decision.

Conclusion

For the foregoing reasons, Customs' motion to dismiss for lack of subject matter jurisdiction is granted and Xerox's motion for summary judgment is denied as moot.

ERRATUM

Please make the following change to *Xerox Corp. v. United States*, Slip Op. 04–127, October 7, 2004, Court No. 02–00111:

On pages 2–8 the header should be corrected by replacing "Court No. 03–00123" with "Court No. 02–00111".

October 8, 2004

Slip Op. 04–128

AN GIANG AGRICULTURE AND FOOD IMPORT EXPORT COMPANY, ET AL., *Plaintiffs*, v. UNITED STATES, *Defendant*, and CATFISH FARMERS OF AMERICA, *Defendant-Intervenor.*

Court No. 03–00563

[Plaintiffs' motion for stay of action pending issuance of decision in another action is granted.]

Dated: October 8, 2004

White & Case LLP (*Walter J. Spak, Edmund W. Sim, Albert Lo, Adams C. Lee, Robert G. Gosselink* and *Emily Lawson*), for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David S. Silverbrand*); *David Richardson*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Akin Gump Strauss Hauer & Feld LLP (*Valerie A. Slater, Karen Bland Toliver, Thea D.R. Kendler* and *Jason A. Park*), for Defendant-Intervenor.

OPINION

RIDGWAY, Judge:

In this action, plaintiffs An Giang Agriculture and Food Import Company *et al.*[1] (collectively "An Giang") challenge the Final Deter-

[1] Plaintiffs in this action include An Giang Agriculture and Food Import Export Company, An Giang Fisheries Import Export Joint Stock Company, Can Tho Agricultural and

mination of the U.S. Department of Commerce ("Commerce") in *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, published as *Notice of Final Antidumping Duty Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 37,116 (June 23, 2003).[2] Now before the Court is An Giang's Motion for Stay of Further Proceedings, which seeks to hold this matter in abeyance pending a determination in another action before the Court, *Anshan Iron & Steel Co. v. United States*, Consolidated Court No. 02–00088.

An Giang's primary argument in this case raises an issue of Commerce's authority under the antidumping statute. According to An Giang, Commerce lacks the statutory authority, in calculating normal value in antidumping investigations involving non-market economies ("NMEs"), to deviate (as it did in this case) from its standard practice of valuing the actual, original factors of production that a foreign producer uses to produce its self-produced intermediate inputs, by instead directly valuing those intermediate inputs themselves. *See* Tape of Oral Argument on Motion for Stay ("Tape") at 10:19–11:28. An Giang argues that *Anshan* raises "the same main issue" of Commerce's statutory authority. *See* Motion for Stay at 2. As An Giang notes, last year the *Anshan* Court remanded that matter to Commerce, instructing the agency to "reconsider its factors of production analysis by either providing an adequate explanation for its deviation from [its] previous practice, or . . . [by valuing the] factors of production . . . [that Anshan used to produce] its self-produced intermediate inputs." *Anshan*, 27 CIT ___ , ___ , 2003 WL 22018898, at *16 (July 16, 2003); Tape at 10:39–11:13.

Emphasizing the relatively advanced stage of the *Anshan* proceedings, the Motion for Stay asserts that, if the *Anshan* Court were to affirm the remand results that Commerce filed in that action, "that [affirmance] would have a significant impact on the instant proceeding, possibly obviating the need for further action in this proceeding." An Giang therefore concludes that, "because a final decision . . . in [*Anshan*] will have a direct bearing on this proceeding, the interest of conserving judicial resources as well as the parties' resources warrants a stay of this proceeding." *See generally* Motion for Stay at 2–3.

Both the Government and Defendant-Intervenor, the Catfish Farmers of America ("Domestic Catfish Farmers"), oppose the re-

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Animal Products Import Export Company, Can Tho Animal Fishery Products Processing Export Enterprise, Da Nang Seaproducts Import-Export Corporation, Mekongfish Company, Nam Viet Company Limited, QVD Food Company Limited, Viet Hai Seafood Company Limited, Vinh Hoan Company Limited, and Vinh Long Import-Export Company.

[2] The resulting antidumping order was published as *Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Aug. 12, 2003).

quested stay. *See generally* Defendant's Response to Plaintiffs' Motion for Stay of Further Proceedings; Defendant-Intervenor's Response to Plaintiffs' Motion for Stay of Further Proceedings.

As discussed more fully below, a stay *pendente lite* of limited duration may result in the voluntary dismissal of this action. At the very least, it can be expected to clarify the issues here, and to streamline these proceedings. Moreover, the record is devoid of evidence that such a stay will work any real hardship on Commerce or the Domestic Catfish Farmers, or on any other party with a cognizable interest. An Giang's motion is therefore granted, and further proceedings in this action are stayed until 15 days following the issuance of the public version of the *Anshan* Court's post-remand opinion.

I. *Analysis*

The Government and the Domestic Catfish Farmers argue that a stay is justified only where the movant "make[s] a strong showing" of necessity – a showing that they contend An Giang has here failed to make. *See* Defendant's Response at 3 (*quoting Tak Fat Trading Co. v. United States*, 24 CIT 1376, 1377 (2000)); Defendant-Intervenor's Response at 2–3 (*quoting Neenah Foundry v. United States*, 24 CIT 202, 203 (2000)). *See also* Tape at 21:10, 32:32. But, in fact, *Landis* – the seminal case on stays *pendente lite*, relied on in *Tak Fat* and *Neenah Foundry*, and invoked by all parties here – makes it clear that "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward" with litigation (*i.e.*, a "strong showing" of need for a stay) only where "there is . . . a fair possibility that the stay . . . will work damage to some one else." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936) (Cardozo, J.). *See* Tape at 15:02.

As An Giang correctly observes, neither the Government nor the Domestic Catfish Farmers has adduced evidence to make out a case that there is even "a fair possibility" that they (or anyone else with a cognizable interest) will suffer harm as a result of the requested stay. *See* Tape at 15:33, 13:52. Indeed, the Government's response is entirely silent on the subject; and the Domestic Catfish Farmers' response asserts simply that "some harm is inherent in any denial of the right to proceed." Defendant-Intervenor's Response at 3 (*quoting Neenah Foundry*, 24 CIT at 205).[3]

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[3] None of the cases cited by the parties here expressly holds that the party status of the movant (*i.e.*, plaintiff or defendant) may be a relevant factor in evaluating a request for a stay *pendente lite*. However, underpinning much of the case law – implicitly, if not explicitly – is a concern for the rights of assertedly aggrieved plaintiffs to seek redress in the courts.

Thus, for example, in *Landis* (analyzed in greater detail below), the Court was motivated by the effect of delay on the *Landis plaintiffs*: "Already the proceedings in [the other case] have continued more than a year. With the possibility of an intermediate appeal to the Circuit Court of Appeals, a second year or even more may go by before this court will be able to

In the course of oral argument on the Motion for Stay, the Government and the Domestic Catfish Farmers were pressed to articulate any potential harm they might suffer, giving them "a second bite at

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[finally resolve the case]." 299 U.S. at 256. So, too, in *Klein v. Adams & Peck* (discussed in greater detail below), where the trial court's stay permanently and unconditionally barred *the plaintiff* from proceeding with many of his court actions, the Court was driven by a conviction that the plaintiff's "right to proceed in court should not be denied except under the most extreme circumstances." *Klein v. Adams & Peck*, 436 F.2d 337, 339 (2d Cir. 1971). The right of assertedly aggrieved plaintiffs to seek redress through access to the courts is perhaps most evident in *CFTC*, where (as explained in greater detail below) the Court struck down a stay entered in that case that enjoined the prosecution of *other* actions brought by individual plaintiffs who were not parties to *CFTC*. *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477 (10th Cir. 1983). The Court there noted, for example, that the plaintiffs "included seven persons over seventy years of age and several other persons who had retired before age sixty-five due to serious medical problems, such as coronary bypass surgery." 713 F.2d at 1486 n.8.

Equally compelling is *Cherokee Nation* – on which the Government here relies – where the Court of Appeals for the Federal Circuit condemned a stay entered by the trial court that precluded the Native American plaintiffs from pursuing their case against the United States pending the outcome of other litigation yet to be instituted by the federal government. *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413 (Fed. Cir. 1997) (*quoted* in Defendant's Response at 2). The Court of Appeals emphasized that the stay entered by the trial court effectively sounded the death knell for the plaintiffs' case:

> *[T]he trial court's stay seriously impairs the Tribes' access to court.* For almost 100 years, the United States has been trustee for the Tribes, but the United States has yet to take any legal action to preserve the Tribes' lands. Since 1970, the United States allegedly has been in various stages of preparing to file quiet title suits on behalf of the Tribes. Yet, it has filed none. Even now, eight years after the Tribes filed this suit, the United States has yet to take such action on behalf of its beneficiary.
>
> Even when filed, the quiet title actions will take years to complete. *To stay the Tribes' suit* pending these speculative and protracted events *is to place the Tribes effectively out of court. See Hines v. D'Artois*, 531 F.2d 726, 730 (5th Cir. 1976) ("Effective death [of a suit] should be understood to comprehend any state of suspended animation."). . . . *The Tribes, therefore, have a significant interest in avoiding the stay to preserve their access to the court.*

124 F.3d at 1418 (emphasis added). The Court of Appeals therefore concluded that "the Tribes [had] a compelling interest in proceeding with their suit without delay." *Id. See also Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983) (*cited with approval in Cherokee Nation*, 124 F.3d at 1416) (vacating stay that trial court had entered in favor of defendants in asbestos-related litigation, and noting that "[t]he realities of the hardship of a stay on the plaintiffs, many of whom allege that they are dying from asbestosis, [are] substantial and, in some instances, permanent. The grim reaper has called while judgment waits. Just as obviously, the bankruptcy proceedings are not likely to conclude in the immediate future. A stay hinged on the completion of those proceedings is manifestly 'indefinite.' ").

Research has disclosed no cases where the court's analysis evinces comparable concern for the rights of defendants. This is not to suggest that defendants have no cognizable interest in the speedy disposition of litigation (whether that litigation is likely to result in their vindication, or not) – although it is worth noting that it is typically *defendants* who seek to use delay to their tactical advantage. Nonetheless, the common law historically has recognized the unique status of the plaintiff in litigation. Thus, as the Court noted in *Neenah Foundry* and *Tak Fat*, it is "a long- and still-standing principle of Anglo-American jurisprudence . . . that a party plaintiff is the master of its complaint." *Neenah Foundry*, 24 CIT at 203 (*citing, inter alia, City of Chicago v. Int'l College of Surgeons*, 522 U.S. 156, 164 (1997) *and The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913) (Holmes, J.)); *Tak Fat*, 24 CIT at 1376–77 (citations omitted). *See also, e.g., McDonald v. Piedmont Aviation, Inc.*, 625 F. Supp. 762, 767 (S.D.N.Y. 1986) (denying defendant's motion to stay action pend-

the apple." Still, their claims of potential damage were vague and generalized, at best.

The Government first asserted generally that a stay would leave Commerce "in limbo" as to liquidation and future administrative reviews *vis-a-vis* frozen catfish fillets from Vietnam. *See* Tape at 22:00.[4] However, those effects are attendant to litigation generally. At most, a stay would (to some extent) prolong them. Even more importantly, as An Giang emphasizes, it has not sought to enjoin liquidation in this case to date. *See* Tape at 33:50, 34:13. There is thus very little substance to those claims of potential harm.

The Government also complained that the requested stay would permit An Giang to take a "wait and see" approach to litigation, asserting with some indignation that An Giang can be expected to attempt to distinguish *Anshan* if it finds the Court's decision in that case to be unhelpful. *See* Tape at 19:50, 27:06. *See also* Tape at 32:16 (Domestic Catfish Farmers harbor same concern). The Government seemed to imply that such a course of action would be somehow unfair, but failed to explain precisely why.[5] To the extent that the Government's point is that the effect of a stay might be to narrow and

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ing outcome of another case, court "upholds *plaintiff's right to chart the course of his own litigation* and to prosecute his claims in the manner of his choice") (emphasis added).

It is therefore arguably anomalous that, in this case, it is the *defendant-intervenor* – the Domestic Catfish Farmers – that has asserted that it is inherently harmed by "any denial of the right to proceed." *See* Defendant-Intervenor's Response at 3. In any event, it does not suffice for any party – plaintiff, defendant, or otherwise – to assert such an inherent right and rest its case on that bald, abstract proposition, without articulating in concrete terms the practical, real-life effects of the potential deprivation of that right under the circumstances of the particular case at bar.

Finally, as to the existence and extent of any "inherent harm" associated with a stay *pendente lite*, it is worth noting that, with some regularity, the Government consents to – and sometimes even itself seeks – such stays. *See, e.g., Georgetown Steel Co. v. United States*, 27 CIT ____ , 259 F. Supp. 2d 1344 (2003) (denying Government's motion for stay of action challenging antidumping determination pending decision by Court of Appeals for Federal Circuit in related case); Order of March 4, 2003, *Wilton Indus. v. United States*, No. 00–00528 (CIT filed Nov. 21, 2000) (granting Government's motion for stay of action pending decision by Court of Appeals for Federal Circuit in unrelated case).

[4] The Government also seemed to suggest that it would be harmed by uncertainty as to the amount of revenue, if any, that might be forthcoming for the federal coffers as a result of the antidumping order at issue. However, when pressed, it was unable to spell out the precise nature of that harm. *See* Tape at 22:50. In any event, as explained above, such uncertainty is an unavoidable side-effect of this type of litigation, stay request or no. It is entirely unclear that the Government suffers any harm even if the typical period of uncertainty is extended (to some degree) by a stay. It is particularly difficult to understand the Government's claim of harm in light of the facts of this case, where – to date – liquidation has not been enjoined.

[5] The Government cannot paint this as a case where the effect of the requested stay would be to "compel[ ] [it] to stand aside while a litigant in another [case] settles the rule of law that will define the rights of both," because it is a party to both *Anshan* and this case. *See Neenah Foundry*, 24 CIT at 205 (*quoting Landis*, 299 U.S. at 255). *See CMAX, Inc. v. Hall*, 300 F.2d 265, 269 n.8 (9th Cir. 1962) (flatly rejecting a plaintiff's attempt to invoke the above-quoted statement from *Landis* in opposition to a request for a stay of litigation pending the outcome of administrative proceedings, stating "[T]hat observation [from *Landis*] is not applicable in the case [at bar] . . . because [the plaintiff] is a litigant in the

sharpen the issues in this action by permitting *all* parties to more carefully tailor their arguments in light of the outcome in *Anshan*, that point counsels entry – not denial – of the stay. *See generally CMAX, Inc. v. Hall*, 300 F.2d at 265, 269 (9th Cir. 1962).[6]

The Domestic Catfish Farmers' presentation in oral argument added little to the Government's case on harm. Indeed, they candidly conceded that they could point to no specific harm (particularly if the stay were of relatively short duration), except to the extent that a stay would constitute a "cloud" over the antidumping order at issue. The Domestic Catfish Farmers asserted broadly that unnecessary delays may result in legal and financial complications for the domestic industry. Tape at 32:43. Again, however, the instant litigation itself constitutes a "cloud" over the antidumping order at issue; and the Domestic Catfish Farmers have failed to identify – much less attempt to quantify – any specific legal and financial complications that might flow from the requested stay in particular.

In sum, even given a "second bite at the apple," the Government and the Domestic Catfish Farmers advanced only vague and generalized claims of potential harm to support their opposition to the requested stay. Moreover, they failed to quantify or substantiate those claims in any fashion. The extent of any potential harm they may suffer is thus entirely unclear – if, indeed, there is any potential for harm at all.[7]

[administrative] proceedings and will have its say before administrative findings and conclusions are entered.").

Moreover, like the Government, the Domestic Catfish Farmers are arguing that *Anshan* bears no relationship to the instant case. They would thus be logically estopped from invoking the above-quoted observation from *Landis* and arguing that their absence as a party to *Anshan* should preclude entry of the stay. *See also* Tape at 15:45–16:17 (An Giang addresses relevance of *Landis* observation).

[6] In *CMAX*, the Court of Appeals upheld the decision of the district court staying its proceedings – over the objections of plaintiff – pending a determination in a proceeding before the Civil Aeronautics Board ("CAB").

Rejecting the line of reasoning that the Government seemingly advances here, the Court of Appeals acknowledged in *CMAX* that "[i]t may be that [plaintiff, who opposed the stay] will be prejudiced by the delay [associated with the stay] in the sense that evidence will be obtained, or rulings made, as a result of the [CAB] proceedings, which will adversely affect the claims which [plaintiff] asserts in the district court. But this is not the kind of prejudice which should move a court to deny a [stay]. If [plaintiff] is prejudiced by such an eventuality it will be because the [CAB] proceedings demonstrate a weakness in its case. And if its case is weak, justice will be served by having that fact revealed prior to the district court trial." 300 F.2d at 269.

[7] Any conceivable potential for harm to other parties was further diminished by An Giang's clarification, in the course of oral argument, of the duration of the requested stay.

Initially, An Giang sought to stay this action "pending the resolution of an appeal in a separate matter by the Court of International Trade . . . in Consolidated Court No. 02–00088 [*i.e., Anshan*]." *See* Motion for Stay at 2. In a letter sent to all parties before oral argument, the Court noted the possibility that the *Anshan* Court's post-remand decision conceivably might result in a second remand to Commerce, and that – in any event – the *Anshan* Court's ultimate decision could be appealed to the Court of Appeals for the Federal Circuit. Accordingly, An Giang was asked to be prepared in the course of oral argument to

Absent a showing that there is at least "a fair possibility that the stay . . . will work damage to some one else," there is no requirement that An Giang "make a strong showing of necessity" or establish a "clear case of hardship or inequity" to warrant the granting of the requested stay. *See CFTC*, 713 F.2d at 1484 (articulating standard of "strong showing of necessity"); *Landis*, 299 U.S. at 255 (articulating standard of "clear case of hardship or inequity"). Nevertheless, An Giang has made out the requisite case, explaining that the time and resources of all parties (including the Court) could be wasted if a stay were not granted. *See* Tape at 12:41, 14:55; Motion for Stay at 2, 3.[8]

An Giang emphasizes that the central issues in both *Anshan* and the instant proceeding are "very inter-related," and that the *Anshan* Court's post-remand decision "could have a major impact on whether or not [An Giang] chooses to pursue" this litigation. *See* Tape at 12:29. Indeed, An Giang states that – if the Court's post-remand opinion in *Anshan* holds that Commerce in fact has the statutory authority to deviate from its standard practice in NME cases, by valuing intermediate inputs that were self-produced by the foreign producer – that decision will have "critical precedential value" in this

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propose more precise language for the duration of the requested stay, to eliminate any potential ambiguity (or, if it was not possible to propose more precise language, to be prepared to explain the precise meaning of the language proposed in the Motion for Stay).

During oral argument, An Giang narrowed its request for relief, seeking a stay only until issuance of the *Anshan* Court's post-remand decision. *See* Tape at 13:12. An Giang further advised that it would not oppose a stay framed to expire on a date certain, if there were concerns that a post-remand decision in *Anshan* might be delayed. *See* Tape at 14:07. In fact, a confidential version of the *Anshan* Court's post-remand decision has just issued. *See Anshan Iron & Steel Co. v. United States*, Slip Op. 04–121 (September 22, 2004) (Confidential).

[8] Citing *Tak Fat* and *Neenah Foundry*, the Government and the Domestic Catfish Farmers assert that, in evaluating an application for a stay, a court "must weigh [the] competing interests and maintain an even balance," taking into account the interests of all parties, the public, and even the Court itself. *Tak Fat*, 24 CIT at 1377 (*quoting Landis*, 299 U.S. at 254–55); *Neenah Foundry*, 24 CIT at 203 (same). *See* Defendant's Response at 2–3; Defendant-Intervenor's Response at 2. *See also* Tape at 15:20–15:32 (An Giang endorses "balancing" of competing interests).

It is less than clear, however, that An Giang's request for a stay of relatively limited duration is governed by the "balancing test" to which the Government and the Domestic Catfish Farmers point. *See generally Cherokee Nation*, 124 F.3d at 1416 (discussing *Landis*, and suggesting that "balancing test" governs cases where stay sought is "of indefinite duration"). In any event, even assuming that the "balancing test" is applicable here, it does not tip in favor of the Government and the Domestic Catfish Farmers. As detailed above, they have not demonstrated that they will suffer any real harm as a result of the requested stay. There is thus little, if anything, to "balance" against the considerations weighing in favor of the stay, which are discussed more fully below.

proceeding,[9] and An Giang may voluntarily dismiss this case.[10] *See* Tape at 11:28, 12:18.

The Government and the Domestic Catfish Farmers maintain that the *Anshan* Court's first opinion (remanding the matter to Commerce) already has held that Commerce has the discretion under the statute to deviate from the standard practice at issue, and that the remaining issues are simply whether – under the circumstances of that case – Commerce properly exercised its discretion and adequately explained the reasons for its deviation. *See* Tape at 19:05–19:37, 29:35–30:44, 30:58– 31:42. Thus, in the words of the Domestic Catfish Farmers, not only is it impossible for the *Anshan* Court's post-remand decision to establish precedent that controls this case, in fact that opinion could "have no bearing" whatsoever here. *See* Tape at 29:19, 30:44–30:58.

On this score, it suffices to state the obvious. The parties to this action have two critically different interpretations of the *Anshan* Court's initial opinion, remanding that matter to Commerce. *See Anshan*, 27 CIT ___, 2003 WL 22018898, at *1. That opinion can

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[9] As the Government correctly pointed out, the opinion of one judge of this Court does not bind the other judges of the Court. Thus, the Court's post-remand decision in *Anshan* could not – in the strict, legal sense of the word – have truly "precedential" effect in this action. *See* Tape at 18:38–19:04, 19:37–19:44; *American Silicon Techs. v. United States*, 261 F.3d 1371, 1381 (Fed. Cir. 2001).

Nevertheless, a case may properly be stayed pending the outcome of another case (the "lead" case) even where the "lead" case may not be potentially dispositive of the case sought to be stayed – *i.e.*, even where the "lead" case may, at most, streamline the issues in the case sought to be stayed. *See, e.g.*, *Landis*, 299 U.S. at 256 (noting that, even though "every question of fact and law" in the case sought to be stayed might not be decided in the "lead" case, "in all likelihood [the "lead" case] will settle many and simplify them all"); *CMAX*, 300 F.2d at 268 (in evaluating request for stay, court is to weigh the potential effect on "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay"); *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–64 (9th Cir. 1979) (stay pending outcome of another case is appropriate even where the other proceedings are not "necessarily controlling of the action" that is stayed).

The Government has also emphasized that, although both *Anshan* and the case at bar "concern Commerce's valuation of self-produced factors of production," the two cases "concern two completely different products, steel and catfish," as well as "two different nations, the Peoples Republic of China and the Socialist Republic of Vietnam." Defendant's Response at 3–4; Tape at 24:48–26:05. However, those *factual* differences are not relevant to An Giang's request for a stay, which is predicated on the existence of a common *legal* issue – *i.e.*, whether Commerce has the statutory authority to deviate from its standard practice in NME cases of valuing foreign producers' actual factors of production, by instead valuing intermediate inputs that were self-produced by the foreign producers. *See* Tape at 14:18–14:45.

[10] An Giang notes that, although this action raises issues other than Commerce's authority under the statute to deviate from its standard practice, those other issues "relate mostly to . . . whether certain companies might be excluded from the antidumping order if Commerce's normal value calculation methodology is deemed invalid. Thus, if Commerce's valuation of intermediate inputs is, in fact, in accordance with law, then the remaining issues are not quite as important." *See* Tape at 12:52–13:11.

reasonably be read (as the Government and the Domestic Catfish Farmers read it) as implicitly ruling that Commerce has the discretion under the statute – in an appropriate case, and with adequate justification – to deviate from the standard practice at issue. On the other hand, it is also possible to construe the opinion as an exercise in judicial restraint (as An Giang apparently does) – that is, as an attempt to divine whether Commerce in that case had an adequate basis for deviating from its standard practice, assuming (without deciding) that the statute accords Commerce the discretion to deviate from that standard practice in an appropriate case. It is undisputed that at least one of the parties to *Anshan* – the plaintiffs – share An Giang's reading of the *Anshan* Court's first opinion, and anticipate that the issue of Commerce's statutory authority may be clarified by the Court's post-remand decision in that case. *See* Tape at 10:42 (counsel to An Giang is also counsel to Anshan); 35:04 (counsel to An Giang anticipates that post-remand decision of *Anshan* Court may definitively resolve the issue of Commerce's authority under the statute). In short, contrary to the claims of the Government and the Domestic Catfish Farmers, the initial opinion in *Anshan* remanding that action to Commerce does not squarely hold that Commerce has the authority under the statute to deviate from its standard practice in NME cases of valuing a foreign producer's actual factors of production, by instead valuing intermediate inputs that were self-produced by the foreign producer.

The Government and the Domestic Catfish Farmers also highlight the fact that An Giang has made no firm commitment to dismiss this action if the post-remand decision in *Anshan* holds that Commerce has the statutory authority to deviate from standard practice, as it did in this case. *See* Tape at 21:14, 26:54, 31:57. *See also* Defendant-Intervenor's Response at 2–3 (arguing that An Giang "offer[s] no facts or argument indicating that a stay will necessarily preclude further action if a particular result is reached, only that it may 'possibly' obviate further action"). However, as discussed in note 9 above, a stay may be warranted even where the other litigation would only clarify or simplify the issues in the action sought to be stayed. The outcome of the other case need not be potentially dispositive. Accordingly, An Giang's reluctance to give the unequivocal, ironclad assurances that the Government and the Domestic Catfish Farmers seek is of no great moment.

In their oppositions, the Government and the Domestic Catfish Farmers rely heavily on two cases from this Court, denying requests for stays pending the outcome of other litigation – *Tak Fat*, 24 CIT 1376, and *Neenah Foundry*, 24 CIT 202. However, as An Giang has observed, those cases can be readily distinguished from the case at bar.

Tak Fat involved a challenge to a determination by Commerce as to the scope of an antidumping order covering preserved mushrooms from China. The plaintiffs there sought to stay that action pending the outcome of a separate action challenging Customs' tariff classification of the subject merchandise. However, as the Court noted in *Tak Fat*, it is well settled that tariff classifications do not govern an antidumping determination regarding class or kind: "It is the responsibility of [Commerce] to interpret the term class or kind in such a way as to comply with the mandates of the antidumping laws, not the classification statutes. A product's tariff classification is merely of peripheral interest to suggest the general nature of a good." *Tak Fat*, 24 CIT at 1379 (*quoting Torrington Co. v. United States*, 14 CIT 507, 512–13, 745 F. Supp. 718, 722 (1990), *aff'd*, 938 F.2d 1276 (Fed. Cir. 1991)). In short, a stay was not justified in *Tak Fat*, because – unlike the situation here – there was, as a matter of law, no prospect whatsoever that the outcome of the other case (there, the classification case) could have any real effect on the case sought to be stayed. *See generally* Tape at 7:58–8:42.

Neenah Foundry is similarly inapposite. The plaintiffs there were contesting the final determination of the International Trade Commission ("ITC") in a sunset review of a countervailing duty order, in which the ITC found that revocation of the order at issue would not likely result in material injury to the domestic industry. The plaintiffs sought to stay that action pending the outcome of another action they had previously filed challenging Commerce's final determination in the same sunset review. The plaintiffs argued that – if they prevailed in their challenge to Commerce's determination – the countervailing duty rates calculated by Commerce on remand *could* be significantly higher, which in turn *could* cause a change of one commissioner's vote from negative to affirmative, and thus *could* result in a continuation of the countervailing duty order, and *could* essentially moot their case against the ITC. *Neenah Foundry*, 24 CIT at 204. In short, a stay was not justified in *Neenah Foundry*, because there – in contrast to the situation here – the potential effect of the second case (that is, the plaintiffs' case against Commerce) on the case sought to be stayed was much too speculative and attenuated. *Neenah Foundry*, 24 CIT at 204–05. *See generally* Tape at 8:44–9:59.

Moreover, although the Government pointedly observes that the three primary cases that underpin *Tak Fat* and *Neenah Foundry* – *Landis*, *Klein* and *CFTC* – ruled *against* stays (*see* Tape at 20:50), those cases do not require the same result here. *See Landis*, 299 U.S. 248; *Klein*, 436 F.2d 337; *CFTC*, 713 F.2d 1477.

Indeed, *Landis* did not even rule out the entry of a stay in *that* case. Instead, the Supreme Court there held only that the stay entered by the trial court was "immoderate" in its duration, because it would hold the trial court's proceedings in abeyance (at the request

of the federal defendants) "until the validity of [certain legislation, the enforcement of which the *Landis* plaintiffs sought to enjoin] ha[d] been determined *by the Supreme Court of the United States*" through a separate action brought by the federal government in another jurisdiction involving other parties (not the *Landis* plaintiffs). *Landis*, 299 U.S. at 251 (emphasis added). Specifically, the Court held that the trial court abused its discretion by entering a stay which would "continue in effect *after* the decision by the District Court in [the action brought by the federal government in another jurisdiction], and *until* the determination by [the Supreme Court] of any appeal therefrom." *Id.* at 256 (emphasis added). The Supreme Court expressly left open the possibility of a stay of shorter duration – *i.e.*, "a stay [of the trial court's proceedings in *Landis*] to continue until the decision by the *District Judge* [in the action brought by the federal government in the other jurisdiction], and then ending automatically." *Id.* at 258 (emphasis added). An Giang here seeks a stay that is even less extensive in scope than that which the Supreme Court left open in *Landis*.

The stay at issue in *Klein* wasn't even a stay pending the outcome of other litigation. Moreover, like *Landis*, *Klein* too involved a stay which was deemed to be too extreme and which is clearly distinguishable from this case. Specifically, the stay entered by the trial court in *Klein* enjoined the litigious plaintiff from proceeding further with the cases in which the stay was sought until the plaintiff had posted a bond for security and attorneys' fees. In addition, the stay unconditionally and permanently barred the plaintiff from prosecuting any of his many other actions pending in the court (with the exception of a single case). *Klein*, 436 F.2d at 338–39. No such sweeping terms are at issue in the case here at bar.

CFTC is similarly distinguishable. *CFTC* was an action brought by the federal regulatory agency against certain commodities brokers alleged to be running a "Ponzi" scheme. The *CFTC* trial court granted the equity receiver's application to stay *other* actions brought by investors against the brokers in *other* state and federal courts, on the grounds (*inter alia*) that the investors' prosecution of those other suits would interfere with the prosecution of a separate, ancillary action brought by the receiver, and that a stay would serve the interests of judicial economy and conserve all litigants' resources. Reversing the stay, the appellate court in *CFTC* found that any potential for interference could be minimized. In addition, the appellate court emphasized that – given the differences in the nature of the claims and the relief sought in *CFTC* and the other actions – there was no chance whatsoever that the receiver's action would preclude the need for the investors to go forward with their actions. *See generally CFTC*, 713 F.2d 1477. As the appellate court put it, "[The investors'] suits are thus merely being delayed, but not

obviated. Hence the conservation of judicial efforts by delaying the investors' suits will likely be negligible." *Id.* at 1485.[11]

In contrast, in the instant case, An Giang – the plaintiff – has represented that voluntary dismissal of this action is likely if the *Anshan* Court's post-remand opinion holds that Commerce in fact has the statutory authority to deviate from its standard practice in NME cases, as it did in the case at bar. Granting the requested stay thus may result in substantial savings for An Giang and the opposing parties alike, as well as the Court. Even if An Giang does not seek to dismiss this action as a result of the Court's post-remand decision in *Anshan*, that opinion will likely streamline and clarify the issues in this case. And staying this action pending the *Anshan* opinion will spare the parties here the time and expense of supplemental briefing to address the opinion. The bottom line is that, as An Giang puts it, no party will be harmed by reading the *Anshan* opinion. *See* Tape at 13:47, 16:19. Particularly in light of the absence of any showing of real harm associated with it, entry of the requested stay will serve both the interests of judicial economy and the interests of the parties as well.

II. *Conclusion*

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254. For the reasons set forth above, the relatively modest stay requested by An Giang here will promote judicial economy, conserve the resources of the parties, and ultimately advance the interests of justice. Indeed, the requested stay may dispose of this action entirely.

An Giang's motion is therefore granted, and further proceedings in this action are stayed until 15 days following the issuance of the public version of the Anshan Court's post-remand opinion.

A separate order will enter accordingly.

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[11] As discussed in note 3 above, the party status of the movant (*i.e.*, plaintiff or defendant) may be a factor in evaluating a request for a stay *pendente lite*. *See also American Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) (case for stay is clearest "where the parties and the issues are the same" in the two cases). *CFTC* highlights some of the other potentially significant factors, which are glossed over or ignored in much of the relevant case law.

For example, *CFTC* notes the significance of the action that the movant seeks to stay, distinguishing between those cases where the relief sought is the stay of another proceeding versus those cases where "the relief sought is only a stay of the case in which the motion is made." *CFTC*, 713 F.2d at 1484. Similarly, *CFTC* emphasizes the relevance of the identity of the courts potentially affected by the requested stay. Specifically, *CFTC* recognizes that special considerations (such as comity) are implicated where the action sought to be stayed is pending in another court – and, in particular, that the power of a federal court to stay actions in the state courts is specifically constrained by federal statute. 713 F.2d at 1484 & n.5.

Slip Op. 04–129

NORSK HYDRO CANADA INC., Plaintiff, v. UNITED STATES, Defendant, and U.S. MAGNESIUM, LLC, Defendant-Intervenor.

Before: Pogue, Judge
Court No. 03–00828

[Defendant's Motion to Dismiss denied.]

Decided: October 12, 2004

Steptoe & Johnson LLC (*Eric C. Emerson*, *Gregory S. McCue*, *Meredith A. Rathbone*) for Plaintiff Norsk Hydro Canada Inc.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, *Stephen C. Tosini*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jonathan J. Engler*, Attorney-Advisor, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel, for Defendant.

King & Spalding, LLP (*Stephen A. Jones*, *Joseph W. Dorn*, *Jeffrey M. Telep*) for Defendant-Intervenor U.S. Magnesium, LLC.

OPINION

POGUE, Judge: This is a dispute over the calculation and collection of countervailing duties on pure and alloy magnesium that Plaintiff imported into the United States. The Defendant United States Department of Commerce ("Commerce") declined, during an administrative review of Plaintiff's entries of pure and alloy magnesium, to recognize Plaintiff's overpayment of countervailing duties. Plaintiff brings this action under 19 U.S.C. § 1581(c) (2000), challenging Commerce's decision as not in accordance with law. Specifically, Plaintiff claims that 19 U.S.C. § 1671(a) requires Commerce to recognize and offset Plaintiff's overpayment so that the total duties imposed over time equal the net countervailable subsidy. Defendant moves to dismiss Plaintiff's complaint for lack of subject matter jurisdiction under USCIT R. 12(b)(1) and for failure to state a claim upon which relief can be granted pursuant to USCIT R. 12(b)(5). Def.'s Mot. Dismiss at 5. Because jurisdiction is proper under § 1581(c) and Plaintiff has properly alleged that Commerce acted not in accordance with law, the Court denies Defendant's motion.

BACKGROUND[1]

In 1992, the government of the United States determined that Plaintiff, Norsk Hydro Canada Inc., ("NHCI"), received two non- recurring countervailable grants from Canada; the grants created a

[1] For purposes of its motion to dismiss, the government accepts the facts as alleged in paragraphs four through ten of Plaintiff's complaint. Def.'s Mot. Dismiss at 3.

fixed total net subsidy amount to be countervailed. *Pure Magnesium and Alloy Magnesium From Canada*, 57 Fed. Reg. 39,392 (Dep't Commerce Aug. 31, 1992) (countervailing duty orders); Compl. of NHCI at para 4. Commerce amortized the non-recurring grants over a fourteen year period and calculated an amount to be countervailed each year. Compl. of NHCI at para 4. Commerce has conducted annual administrative reviews of the amount of the countervailing duty. *See* 19 U.S.C. 1675(a).[2]

Throughout 1997, Plaintiff imported pure and alloy magnesium that was subject to various countervailing duty (CVD) cash deposit rates, depending on the date of each entry. Compl. at para. 5.[3] On September 8, 1999, Commerce published the Final Results of its administrative review covering the 1997 entries. *Pure Magnesium and Alloy Magnesium From Canada*, 64 Fed. Reg. 48,805 (Dep't Commerce Sept. 8, 1999) (final results of countervailing duty administrative reviews). The results of the administrative review determined that countervailing duties should be assessed at 2.02% on Plaintiff's 1997 entries of pure and alloy magnesium. *Id.* at 48,806. Commerce then issued instructions to the United States Bureau of Customs and Border Protection ("Customs")[4] to that effect. Compl. of NHCI at para. 5. Customs sent an e-mail to all Customs ports of entry containing Commerce's liquidation instructions. *Id.*; Customs Message No. 9342201, Pl.'s Ex. 3 (Dec. 8, 1999). However, in September 2000 and February 2001, Customs officials at Port Huron issued a notice

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[2] The text of 19 U.S.C. § 1675(a) states, in relevant part:

(a) Periodic review of amount of duty

(1) In general

At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this subtitle or under section 1303 of this title, an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall—

(A) review and determine the amount of any net countervailable subsidy,
(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and
(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net countervailable subsidy or dumping margin involved in the agreement,

and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

19 U.S.C. § 1675(a).

[3] These rates varied from 3.18% to 7.61%. *See* Compl. Of NHCI at para. 5.

[4] Effective March 1, 2003, the United States Customs Service was renamed the United States Bureau of Customs and Border Protection. *See* Homeland Security Act of 2002, Pub. L. No. 107–296 § 1502, 2002 U.S.C.C.A.N. (116 Stat.) 2135, 2308; Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003).

of liquidation for Plaintiff's 1997 entries, advising that liquidation had occurred at the higher cash deposit rates rather than at the 2.02% final assessment rate.[5] Compl. of NHCI at para. 6; *see also* Liquidation Notices, Attach. 1 to Pl.'s Resp. to Ct. Order ("Pl.'s Supp. Br.").

During the administrative review of Plaintiff's 2001 entries, Plaintiff provided a spreadsheet listing of each 1997 entry wrongfully liquidated by Customs, and calculated the amount of excess countervailing duties, plus interest, retained by the U.S. government as of the date of the spreadsheet.[6] Compl. of NHCI at para. 7. Plaintiff requested that Commerce adjust its 2001 countervailing duty final results to account for this over imposition of countervailing duties. *Id.* However, Commerce claimed that the issue was not properly before it for review and that it lacked the authority to address this issue, asserting that Customs' erroneous liquidation should have been protested to Customs. *Pure Magnesium and Alloy Magnesium from Canada*, 68 Fed. Reg. 25,339, 25,340 (Dep't Commerce May 12, 2003) (preliminary results of countervailing duty administrative reviews).

Plaintiff responded by claiming that it was unable to protest the treatment of its entries to Customs because liquidation occurred by operation of law, and was therefore not statutorily protestable. *See* Compl. of NHCI at para 9. Plaintiff moreover claimed that under 19 U.S.C. § 1671(a)[7] Commerce was required to offset its 2001 payments to ensure that the amount of countervailing duties imposed over the entire amortization period equals the net countervailable subsidy received. Compl. of NHCI at para. 9. Commerce again rejected Plaintiff's argument. Compl. of NHCI at para. 10.

In the instant claim, Plaintiff asks the Court to hold unlawful

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[5] NHCI states that it received courtesy copies of the liquidation notices by mail at most a few weeks after the notices' issuance in September 2000 and February 2001. See Pl.'s Response to Court Order at 2 ("Pl.'s Supp. Br."). The notices themselves are unclear as to whether they constitute only a late acknowledgment that liquidation by operation of law had taken place or whether they mean to convey Customs' intention to actively re-liquidate the entries, but at the same rate at which they had liquidated by operation of law. For further discussion of this issue, *see infra* pp. 9–14.

[6] Commerce conducted a 2000 administrative review of which the final results were published in the Federal Register on September 10, 2002. Pure Magnesium and Alloy Magnesium From Canada; 67 Fed. Reg. 57,394 (Dep't Commerce, Sept. 10, 2002) (preliminary results of countervailing duty administrative reviews). Plaintiff did not challenge the liquidation of the 1997 entries during this administrative review.

[7] 19 U.S.C. § 1671(a) states, in relevant part:

> If [Commerce] determines that . . . 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 . . . 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).

Commerce's refusal to offset the excess countervailing duties imposed on Plaintiff's past entries of pure and alloy magnesium, as encompassed by the final results of the administrative review. Compl. of NHCI at 10 (prayer for relief). Defendant moves to dismiss Plaintiff's complaint for lack of subject matter jurisdiction under USCIT R. 12(b)(1) and for failure to state a claim upon which relief can be granted under USCIT R. 12(b)(5). Def.'s Mot. Dismiss at 5.

STANDARD OF REVIEW

The two issues before this Court are whether this court has subject matter jurisdiction and whether, assuming that the court does have subject matter jurisdiction over Plaintiff's complaint, Plaintiff has failed to state a claim upon which relief can be granted. Where jurisdiction is challenged, "because Plaintiff is seeking to invoke the Court's jurisdiction, it has the burden to establish the basis for jurisdiction." *See Former Employees of Sonoco Prods. Co. v. United States Sec'y of Labor*, 27 CIT ___ , ___ , 273 F. Supp. 2d. 1336, 1338 (2003) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). At the same time, "the Court assumes 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.' " *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047, 1051 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

To the extent that this case properly arises under 28 U.S.C. § 1581(c), this Court reviews the actions of the government in countervailing subsidy proceedings to determine whether they are "in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Accordingly, in order to determine whether Plaintiff's complaint states a claim upon which relief can be granted, the Court must decide whether or not Plaintiff has properly alleged that Commerce, in denying its requested adjustment, acted in a manner not "in accordance with law."

DISCUSSION

This opinion will first discuss subject matter jurisdiction, and second, Defendant's argument regarding failure to state a claim upon which relief can be granted. In evaluating the argument that Plaintiff has failed to state a claim, the Court will focus on the question of whether Plaintiff has properly alleged that Commerce failed to act in accordance with law under 19 U.S.C. § 1671(a) by refusing to offset the duties imposed on Plaintiff's past entries.

A. *Subject Matter Jurisdiction under 28 U.S.C. § 1581(c)*

Commerce argues that 28 U.S.C. § 1581(c) is not the proper vehicle for bringing Plaintiff's claim. Specifically, Commerce argues that Plaintiff should have exhausted administrative remedies under 28 U.S.C. § 1581(a) before bringing a claim against Commerce. The

Court will first address whether § 1581(c) provides jurisdiction over Plaintiff's claim. Then, the Court will address the question of whether, even if § 1581(c) does provide jurisdiction, Plaintiff should nonetheless be required to exhaust remedies under § 1581(a).

I. *Section 1581(c) provides jurisdiction for a claim challenging Commerce's 2001 administrative review determination.*

Section 1581(c) provides for judicial review of certain "reviewable determinations" outlined in 19 U.S.C. § 1516a(a)(2)(B). *See* 28 U.S.C. § 1581(c); 19 U.S.C. § 1516a. If not outlined in this statute, an action by Commerce cannot be categorized as a "reviewable determination" and thus, the Court will not possess jurisdiction under § 1581(c). *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004). Under § 1516a(a)(2)(B), a reviewable determination refers to, among other things, "a final determination . . . by the administering authority or the Commission under section 1675 of this title." *See* 19 U.S.C. § 1516a(a)(2)(B)(iii).

Title 19 U.S.C. § 1675 provides for annual administrative reviews of the amount of countervailing duties. *See* 19 U.S.C. § 1675. Determinations stemming from annual administrative reviews are therefore reviewable determinations under 19 U.S.C. § 1516a, and 28 U.S.C. § 1581(c) provides the Court with subject matter jurisdiction to hear challenges to such determinations. As Plaintiff here challenges Commerce's 2001 administrative review determination as not in accordance with law, jurisdiction exists over this "reviewable determination" pursuant to 28 U.S.C. § 1581(c).

ii. *Exhaustion of Remedies under § 1581(a) is not required.*

Commerce's argues that there is no jurisdiction under § 1581(c) because (1) all other administrative remedies should be exhausted before a § 1581(c) claim may be brought and (2) Plaintiff had available administrative remedies under § 1581(a). Def.'s Mot. Dismiss at 10. The Court will first discuss whether Plaintiff had any remedies available under 28 U.S.C. § 1581(a). To the extent that such remedies existed, the Court will then discuss whether jurisdiction here depends on their exhaustion.

a. *Plaintiff had an available remedy under § 1581(a).*

Title 28 U.S.C. § 1581(a) provides this Court jurisdiction over protests against Customs' decisions. *See* 28 U.S.C. § 1581(a), 19 U.S.C. §§ 1514, 1515. However, Plaintiff claims that its entries liquidated by operation of law pursuant to 19 U.S.C. § 1504(d), and that as such liquidation involves no "decision" by Customs, it was therefore unable to protest the liquidation under § 1581(a). Pl.'s Opp'n to Mot. Dismiss at 21 ("Pl.'s Br."). Section 1504(d) states that liquidation by operation of law occurs if six months after having received notice of the removal of suspension of liquidation, Customs has not liquidated

the entries. See 19 U.S.C. § 1504(d).[8] Notice of the removal of suspension occurs when the final results of an investigation or review are published in the Federal Register. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1277 (Fed. Cir. 2002) (holding that publication of the final results provides notice to Customs of the correct liquidation amount, thereby beginning the six months until liquidation occurs by operation of law). Thus, entries are deemed liquidated within six months of the Federal Register notice of the final results. *Id*.[9] The 1997 countervailing duty final results were published in the Federal Register on September 8, 1999. Compl. of NHCI at para. 5. Thus, because Customs made no intervening attempt to liquidate, the entries at issue were all deemed liquidated by operation of law by March 8, 2000.

Case law is divided on the matter of whether an importer can protest a deemed liquidation. Section 1514(a) indicates that only Customs "decisions" may be protested. The Court has explained that:

> [T]ypically, 'decisions' of Customs [under 1514(a)] are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. U.S. Shoe Corp. v. United States, 114

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[8] The text of § 1504(d) is as follows:

> Except as provided in section 1675(a)(3) of this title, when a suspension required by statute or court order is removed, the Customs Service shall liquidate the entry, unless liquidation is extended under subsection (b) of this section, within 6 months after receiving notice of the removal from the Department of Commerce, other agency, or a court with jurisdiction over the entry. Any entry (other than an entry with respect to which liquidation has been extended under subsection (b)) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d).

[9] The Court recently addressed a claim that the first clause of § 1504(d), which refers to 19 U.S.C. § 1675(a)(3), invalidates liquidation by operation of law for any entries previously subject to an administrative review. See Int'l Trading Co. v. United States, slip op. 04–01 at 7–13 (CIT Jan. 2, 2004). Title 19 U.S.C. § 1675(a)(3) states in part:

> [I]f the administering authority orders any liquidation of entries pursuant to a review under [section 1675(a)(1)], such liquidation shall be made promptly and, to the greatest extent practicable, within 90 days after the instructions to Customs are issued. In any case in which liquidation has not occurred within that 90-day period, the Secretary of the Treasury shall, upon the request of the affected party, provide an explanation thereof.

19 U.S.C. § 1675(a)(3)(B). In *Int'l Trading Co.*, the government argued that where Commerce ordered liquidation of entries that had been subject to suspension during an administrative review, § 1504(d) did not apply; rather, Customs could take as long as it desired to liquidate entries, so long as it could provide an explanation upon request. The Court found this argument unpersuasive. Among other things, the Court found that given that § 1504(d) applies, by its terms, to "any entry," even entries that had been under administrative review were subject to liquidation by operation of law within six months of the Federal Register notice of the final results. See Int'l Trading Co. v. United States, slip op. 04–01 at 7–8 (CIT Jan. 2, 2004). Therefore, the entries at issue here were subject to deemed liquidation under § 1504(d), although the question would be mooted were it clear that Customs had re-liquidated the goods. *See supra* note 5.

> F.3d 1564, 1569 (Fed. Cir. 1997), aff'd, 523 U.S. 360 (1998). Customs does not make a decision in order to effect a deemed liquidation.

Fujitsu Gen. Am., Inc. v. United States, 24 CIT 733, 739, 110 F. Supp. 2d 1061, 1069 (2000), aff'd, 283 F.3d 1364 (Fed. Cir. 2002).[10] A more recent decision of the Court, however, states that "[i]f a deemed liquidation or any liquidation is adverse to an importer, it has its protest remedies under 19 U.S.C. § 1514 and access to judicial review under 28 U.S.C. § 1581(a)." Cemex, S.A. v. United States, 27 CIT ___, ___, 279 F. Supp. 2d 1357, 1362 (2003), aff'd, Court Nos. 04–1058, 04–1080 (Fed. Cir. Sept. 28, 2004).

However, regardless of whether a deemed liquidation is protestable or not, Plaintiff was not necessarily without a Customs remedy. If Customs' September 1999 and March 2000 notices of liquidation were evidence of an active reliquidation of NHCI's entries, that reliquidation would clearly have been protestable as a decision of the Customs Service under 19 U.S.C. § 1581(a). If, on the other hand, Customs' September 1999 and March 2000 notices of liquidation were merely belated indications that deemed liquidation had occurred, then it is possible that an avenue of relief existed under 19 U.S.C. § 1520(c). Title 19 U.S.C. § 1520(c) allows for challenges of mistakes of fact, clerical errors, or other inadvertences within one year of liquidation.[11] Although Customs' failure to liquidate entries in accordance with Commerce's instructions cannot be categorized as a mistake of fact or a clerical error,[12] a liquidation by operation of law may result from inadvertence. Inadvertence has been defined as "an oversight or involuntary accident, or the result of inattention or carelessness, and even as a type of mistake. It is thus language broader in scope than mistake." *See Hambro Automotive Corp. v.*

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[10] The Court notes that this decision had not been issued by the time that Plaintiff received the notices of liquidation regarding its entries. However, the groundwork for *Fujitsu Gen. Am.*'s holding that deemed liquidations were not subject to protest had already been laid by *U.S. Shoe Corp.*, cited above, which stated that a Customs decision involved application of law to facts; even before the specific holding in *Fujitsu Gen. Am.*, it was apparent that no "decision" was involved in liquidation by operation of law. However, as this Court's decision in the instant case does not rest on finding that there was no protestable decision by the Customs Service, the point is moot.

[11] The text of 19 U.S.C. § 1520(c) is as follows:

> Notwithstanding a valid protest was not filed, the Customs Service may . . . reliquidate an entry or reconciliation to correct—
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> (1) a clerical error, mistake of fact, or other inadvertence . . . adverse to the importer and manifest from the record or established by documentary evidence in any entry . . . when the error, mistake or inadvertence is brought to the attention of the Customs Service within one year after the date of liquidation or exaction.

19 U.S.C. § 1520(c).

[12] Commerce concedes that if deemed liquidation occurred, it occurred inadvertently. Def.'s Mot. Dismiss at 11.

United States, 66 C.C.P.A. 113, 118, 603 F.2d 850, 854 (1979) (citing C.J. *Tower & Sons of Buffalo, Inc. v. United States*, 68 Cust. Ct. 17, 22, 336 F. Supp. 1395, 1399 (1972) (internal citation omitted). Therefore, to the extent liquidation by operation of law occurred as a result of Customs' inattention or carelessness, this occurrence could have been challenged as an inadvertence under § 1520(c).[13]

Accordingly, it appears that whether Plaintiff's entries liquidated by operation of law, or whether, having allowed the entries to liquidate by operation of law, Customs actively re- liquidated them in a manner inconsistent with Commerce's instructions, Plaintiff did have a Customs remedy available. The Court therefore moves on to consider whether exhausting such a remedy should have been prerequisite to filing the claim here.

b. *Exhaustion of the § 1581(a) Remedy Was Neither Required, Nor Appropriate.*

There are two statutes that this Court must consider in deciding whether jurisdiction here depends on Plaintiff's exhaustion of its available Customs remedy. First, the Court will examine whether 28 U.S.C. § 1581, which comprises the various grants of jurisdiction to this Court, contains such a requirement of exhaustion. Second, the Court will consider 28 U.S.C. § 2637(d), which gives this Court discretion to require exhaustion of administrative remedies where there is not otherwise a statutory requirement of exhaustion.

Title 28 U.S.C. § 1581(a)[14] provides jurisdiction for this Court to review the denial of Customs protests under § 1514, or refusal to correct an error, mistake or inadvertance under § 1520(c). Title 28 U.S.C. 1581(c)[15] provides jurisdiction for this Court to review certain determinations of the Department of Commerce. Neither section refers to the other. Each grant of jurisdiction stands alone, providing separate and distinct avenues of relief. The language of these statutes, therefore, does not appear to require exhaustion of Customs remedies in order to bring a ripe claim against Commerce.[16,17] How-

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[13] Refusal to correct a mistake, clerical error, or inadvertence would itself be a "decision" of Customs, and therefore protestable 28 U.S.C. § 1581(a).

[14] The text of 28 U.S.C. § 1581(a) is as follows:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

[15] The text of 28 U.S.C. § 1581(c) is as follows:

> The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516(A) of the Tariff Act of 1930.

[16] Moreover, *Omni U.S.A., Inc. v. United States*, 840 F.2d 912 (Fed. Cir. 1988), a "parallel" case cited by Commerce as requiring Plaintiff to protest under § 1520(c) in a situation such as this, is inapposite to the case before this Court. Because the plaintiff in *Omni U.S.A.* missed the opportunity to protest under § 1520(c) and § 1581(a), Plaintiff was pre-

ever, although § 1581(c) on its own terms does not appear to require exhaustion of Customs remedies, it remains within this Court's discretion to require such exhaustion under a separate statute, 28 U.S.C. § 2637(d). Title 28 U.S.C. § 2637(d) states that "[i]n any [§ 1581(c)] action . . . , the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). "Administrative remedies," as the phrase is used in 28 U.S.C. § 2637(d), presumably includes all remedies that could or would have been available, including Customs remedies. Accordingly, this Court must determine whether it is appropriate to require that Plaintiff have exhausted its Customs remedies in this case.

There is a factor counseling for the exhaustion requirement; i.e., Plaintiff appears to have allowed the filing period on its Customs remedy to run out before bringing its claim to Commerce's attention. This laxity invites the speculation that Plaintiff slept on its rights. Nonetheless, the Court is persuaded that such tardiness cannot preclude relief where Congress created independent remedies with different agencies. Even where statutes overlap in their remedial effect, courts do not hold that one must be favored over another absent Congressional language to that effect. *See*, *e.g.*, *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 90–92 & n.5 (1991); *Brooks v. United States*, 337 U.S. 49, 53 (1948). There is no such limiting language here. Moreover, as noted above, none of the statutes that could provide a cause of action in this case refer to each other in any way that this Court could reasonably construe as requiring a prospective Plaintiff to exhaust remedies with one agency before proceeding against another.

Furthermore, Congress appears to have acquiesced in the possibility that a prospective Plaintiff would have a choice of pursuing a remedy with Customs or Commerce, in light of this Court's holding in *Serampore Indus. Pvt. Ltd. v. United States Dep't of Commerce*, 11 CIT 866, 675 F. Supp. 1354 (1987) ("*Serampore*"). In *Serampore*, the Court upheld Commerce's interpretation of the word "imposed," as used in 19 U.S.C. § 1677(a), to mean "assessed." *Serampore*, 11 CIT at 871–73, 675 F. Supp. at 1359. This definition applies to other uses

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cluded from asserting all claims under § 1581(i) jurisdiction. This is because "[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another section of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). However, in the present case as mentioned above, because Plaintiff is seeking to establish § 1581(c) jurisdiction, and not (i), even if a possible remedy existed under § 1520(c), it does not preclude § 1581(c) jurisdiction.

[17] The Court also notes that the statutes providing for the causes of action that Plaintiff could possibly have proceeded under, 19 U.S.C. § 1514(a) (Customs protest either of wrongful active liquidation or refusal to correct wrongful inadvertent liquidation), 19 U.S.C. § 1520(c) (Customs mistake) and 19 U.S.C. § 1671(a) (requiring that only duties equal to the net countervailable subsidy are imposed) do not refer to one another in any way.

of the word "imposed" in the countervailing duty statutes,[18] including the word's use in 19 U.S.C. § 1671(a). Title 19 U.S.C. § 1671(a) requires that the duties imposed be equal to the net countervailable subsidy. Because it is Customs that carries out the actual assessment of duties, through liquidation procedures, *see* 19 U.S.C. § 1500, this gives Commerce some responsibility for Customs' liquidation of entries subject to countervailing duty orders, inasmuch as Commerce must correctly calculate the duties so that Customs will assess the correct amount of duties. Since the *Serampore* decision was issued, Congress presumably has been aware that both Commerce and Customs are involved in the "imposition" of countervailing duties, and that both agencies may be called upon to remedy a defect in such imposition.[19] Given that the trade statutes, including the provisions regarding countervailing duties, have been subject to numerous revisions since 1987, especially with regard to the Uruguay Round, Congress' failure to indicate that it favored remedies against one agency as opposed to another supports the notion that Congress intended that where either agency is capable of remedying the wrong, Plaintiffs have their choice of remedy. *See Gen. Dynamics Land Sys. v. Cline*, 124 S. Ct. 1236, 1245 (2004) (Congress' failure to amend longstanding judicial construction of the Age Discrimination

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[18] Any term used in multiple places in a single statute is presumed to carry the same meaning throughout. *See RHP Bearings Ltd. v. United States*, 288 F.3d 1334, 1347 (Fed. Cir. 2002); *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382–83 (Fed. Cir. 2001). Moreover, in the instant case, Commerce has indicated no disagreement with interpreting "imposed," as used in 19 U.S.C. § 1677(a), to mean the actual assessment of duties by Customs.

[19] There appears to be no disagreement, on the facts here, that it is Customs that, through liquidation procedures, imposes duties. However, the Court notes that Commerce recently elected to change its interpretation of "imposed," so that countervailing duties are "imposed" not when Customs actually assesses the duties, but when Commerce publishes the results of an administrative review in the Federal Register. *Dupont Teijin Films USA, LP v. United States*, 27 CIT _____ , 297 F. Supp. 2d 1367 (2003). Where Congress has left a gap for an agency to fill, as it appears to have done with regard to the meaning of the word "imposed" throughout the countervailing duty statutes, the agency is at liberty to change its interpretation, so long as its new interpretation is reasonable. Commerce's new interpretation was granted deference by the Court. *Id.*

Although *Dupont Teijin Films USA, LP* dealt with a different provision than that at issue here, where a word is used multiple times over the course of a statute, courts presume that the term maintains the same meaning throughout. Therefore, it would appear that "imposed," does not mean "assessed," at least after the end of 2003. This action arose, of course, before the end of 2003, and the actions complained of also occurred before Commerce's new interpretation of "imposed" was approved by the Court. Moreover, Commerce does not advocate for this new interpretation in its submissions here.

Nevertheless, the Court notes that in future cases, given this new interpretation of the word "imposed," the result here may not obtain. Where duties are imposed at the time of Federal Register publication, Commerce would presumably need not take into account Customs particular liquidations of previous years' entries. Rather, Commerce's duty would only be to annually publish a duty rate in the Federal Register which conformed to its overall plan for amortizing the overall subsidy. In such a case, it would appear that wrongful acts or errors occurring at liquidation could then only be corrected through Customs protests.

in Employment Act amounted to Congressional acquiescence to the judicial interpretation).

Finally, although Plaintiff did wait approximately two years from the time that Customs issued notices of the improper deemed liquidation, or improper active liquidation, to bring its claim to Commerce, and did not raise this issue in the administrative review for the year 2000, such a delay is not particularly prejudicial to Commerce or to the administration of justice in this matter. It is agreed that, in the instant case, Commerce amortized the duties owed over a fourteen year period. Nor is there any statutory requirement that an issue be brought to Commerce within a certain time. It therefore appears to the Court that so long as Plaintiff brought the matter of the overpayment to Commerce's attention at a time when it was still feasible for Commerce to adjust the amortization schedule or otherwise offset the payment so that the administrative reviews would result in Customs' overall assessment of duties equal to the net countervailable subsidy, there is no prejudice to Commerce.

Therefore, the Court finds that while an administrative remedy before Customs was available to Plaintiff, Plaintiff was not statutorily required to exhaust that remedy before bringing its claim against Commerce. Moreover, given the particular statutes involved and Congress' presumed decision to allow certain judicial constructions thereof to remain unchanged, it would be inappropriate for the Court to require such exhaustion. The Court will therefore now discuss whether Plaintiff has stated a claim upon which relief can be granted.

B. *Plaintiff States a Claim Upon Which Relief Can Be Granted*

As noted above, Plaintiff brings this case to challenge Commerce's determination during the 2001 administrative review not to offset Plaintiff's overpayment of duties on its 1997 entries. Plaintiff contends that Commerce is obligated to offset the amount owed by Plaintiff for its 1997 entries in future years so that the final amount of countervailing duties imposed on Plaintiff will equal the net countervailable subsidy under 19 U.S.C. § 1671(a).

First, the Court will discuss what duties Commerce is charged with under 1671(a) and whether Plaintiff properly states a claim that Commerce acted not in accordance with law. Second, this Court will address Commerce's argument that Plaintiff's claim fails because Commerce does not have the statutory authority to offset Plaintiff's overpayment of countervailing duties.

First, Plaintiff argues that Commerce's obligation under § 1671(a) is to calculate the amount of duties that Customs will impose on importers. *See* Pl.'s Br. at 10. Plaintiff argues that though Commerce might have initially calculated the 1997 duties correctly, Commerce, by failing to take into account the overpayment resulting from Customs' actions or inadvertences, has not properly calculated the 2001

countervailing duty assessment rate. *See id*. Because Customs itself has no authority to collect countervailing duty moneys except in accordance with Commerce's instructions, Commerce's refusal to offset the overpayment will result in Customs' imposition, over the amortization period, of duties in excess of the net countervailable subsidy. Although Commerce was not the original source of error, Commerce will have knowingly violated § 1671(a) by not correctly instructing Customs in a manner that results, over the amortization period, in the collection of duties equal to the net subsidy.[20] *See* Pl.'s Br. at 11–12. Accordingly, Plaintiff's claim alleges that Commerce's determination during the 2001 review not to offset Plaintiff's overpayment was not in accordance with law. Plaintiff's claim therefore properly states a cause of action before this Court.

Second, while Commerce appears to admit that it is responsible for correctly calculating duties so as to result in the overall imposition, by Customs, of duties equal to the net countervailable subsidy, Commerce argues that it lacks authority to offset the 1997 error during the 2001 review because 19 U.S.C. § 1675, the statute providing for administrative reviews, refers to a "12-month period beginning on the anniversary date of the publication of a countervailing duty order." Because each administrative review may only concern itself with what occurred during the "period of review," under Commerce's interpretation of § 1671(a) and § 1675, Plaintiff has no claim for relief because the 2001 administrative review cannot take into account anything that happened with regard to 1997 entries. Def.'s Mot. Dismiss at 8. As there is no indication within § 1671(a) as to how the "period of review" should be applied in this situation, the Court must decide whether to defer to Commerce's interpretation of the interplay between § 1671(a) and § 1675.[21]

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[20] The Court finds the language of 19 U.S.C. § 1675(a), providing for annual administrative reviews of antidumping and countervailing duty orders, revealing. With regard to countervailing duty reviews, this statute states:

> At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order . . . [Commerce] . . . shall—
>
> (A) review and determine the amount of any net countervailable subsidy.

19 U.S.C. § 1675(a).

It is unclear to the Court how Commerce can recalculate the amount of the "net countervailable subsidy," if it does not take into account that which has already been paid, i.e., those moneys that no longer form part of the net countervailable subsidy. Title 19 U.S.C. § 1675(a) and 19 U.S.C. § 1671 thereby complement one another, reinforcing the notion that Commerce must take into account an overpayment from a previous year in further years' recalculations of the "net countervailable subsidy." *But see* 19 U.S.C. § 1514.

[21] In general, the determination of whether the agency's statutory interpretation is in accordance with law follows the two-step analysis formulated in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). The first step is to investigate as a matter of law "whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Steel Auth. of India, Ltd. v. United States*, 25 CIT 472, 476, 146 F. Supp. 2d 900, 906 (2001) (quoting *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998)). If, after employing the first prong of *Chevron*, a court concludes that the statute

Here, Commerce argues that because 19 U.S.C. § 1675(a)(1) refers to a "12-month period beginning on the anniversary date of the publication of a countervailing duty order," jurisdiction pursuant to 28 U.S.C. § 1581(c) does not extend to entries made before the period of review. Def.'s Mot. Dismiss at 8. Commerce claims that § 1671(a) cannot apply in this case because Plaintiff's 1997 entries are outside the scope of the twelve-month "periodic review of duties" for Plaintiff's 2001 entries. However, the Court will not defer to this interpretation because it would altogether nullify the meaning and purpose of § 1671(a) with regard to one-time, non-recurring subsidies.

As established above, by applying Commerce's then current interpretation of "imposed," the language of § 1671(a) clearly indicates that Commerce should calculate the countervailing duties so that ultimately, the amount of countervailing duties that Customs imposes on an importer is equal to the net countervailable subsidy. Yet, by accepting Commerce's proposed interpretation regarding the twelve months of the period of review, Commerce would never be able to correctly calculate the amount of countervailing duties owed over an amortization period if a mistake is made by Customs in the liquidation of the entries. This is because Customs does not assess duties on or liquidate the entries until after the "period of review" regarding those entries is completed and Commerce has published its findings in the Federal Register. *See* 19 U.S.C. § 1675(a). In effect, any errors or incorrect liquidations made by Customs are with regard to entries belonging to a "period of review" long past. Therefore, if this Court were to accept Commerce's interpretation, and strictly enforce the period of review so that any incorrect liquidation made with regard to entries dating from before the twelve-month period of review cannot be considered, Commerce would not be able to fulfill its obligation to calculate countervailing duties correctly under § 1671(a). This would render the language and meaning of § 1671(a) void with regard to amortized countervailed subsidies, as it would invalidate the mandate to properly calculate countervailing duties so as to equal the net countervailable subsidy.

Plaintiff here, for example, is protesting a mistake that occurred in the 2000 and 2001 liquidation of its 1997 entries.[22] If this Court

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is silent or ambiguous with respect to the specific issue, as is the case here, the court proceeds to the second step. *See Chevron*, 467 U.S. at 842–43. In the second step of the *Chevron* analysis, the narrow legal question is whether the agency's statutory interpretation is a permissible construction of the statute. *See id.* If so, the court must defer to Commerce's reasonable interpretation. *Steel Auth. of India, Ltd.*, 25 CIT 472, 476, 146 F. Supp. 2d 900, 906 (2001) (citing *Koyo Seiko., Ltd. v. United States*, 36 F.3d 1565, 1573 (Fed. Cir. 1994)).

[22] The Court notes that while Commerce argues that it cannot address the Customs errors because the errors were made with regard to entries from 1997, and Plaintiff brought the errors up in the 2001 review, Commerce does not make the somewhat more subtle argument that, if deemed liquidation occurred without any other action by Customs, the deemed liquidation took place in March 2000 and that, therefore, the error itself took place outside the period of review, and had Plaintiff desired to see this error remedied, it should have re-

were to accept Commerce's interpretation of the statute, it would require Plaintiff to have made its 1581(c) challenge in 1997, before Customs wrongly liquidated the entries at issue. This would mean that Plaintiff would never have been able to challenge Commerce's non-compliance with § 1671(a). Accordingly, Commerce's interpretation of § 1671(a) results in an unreasonable interpretation of the

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quested an administrative review for the year 2000. Assuming that active liquidations were made by Customs, one batch in September 2000 and one in February 2001, then only the second batch of liquidations occurred within the period of review. Such arguments might hold more weight were this case not dealing with a subsidy which Commerce itself had amortized over fourteen years. It appears somewhat disingenuous for Commerce to refuse to consider anything occurring outside the immediate period of review when Commerce itself has linked each period together through a fourteen-year amortization.

Rather, as Plaintiff points out in its brief, because Commerce is subject to the requirement under § 1671(a) to ensure that the amount countervailed is equal to the net subsidy received, in each period of review Commerce explicitly reviews the total amount of the non-recurring subsidy benefit and the amount allocated over each of the fourteen periods of review. Pl.'s Br. at 16. The chart issued by Commerce in connection with the Final Results for the 2001 Administrative Review which features the amount to be countervailed in each year of the fourteen-year amortization period, further demonstrates that Commerce views the periods of review as joined by the universal goal of assessing the total amount of benefit conferred overtime. *See* Memorandum to The File, from Melanie Brown, Import Compliance Analyst, AD/CVD Enforcement, Group I, Office I, *Re: Tenth (2001) Countervailing Duty Administrative Reviews of Pure Magnesium and Alloy Magnesium from Canada, Calculation of Final Results*, Pl.'s Ex. 13 at 3 (Sept. 9, 2003). Therefore, in the case where a countervailing duty is imposed on a non-recurring subsidy, because it is amortized over a period of years, Commerce should have the capacity to offset the excess countervailing duties imposed on Plaintiff's past entries.

Moreover, Commerce has previously recognized its authority to make an adjustment similar to the one requested here, so as to maintain the equality of the countervailing duties imposed with the amount of a non-recurring subsidy. Pl.'s Br. at 13. In the Issues and Decision Memorandum accompanying *Certain Pasta from Italy*, 66 Fed. Reg. 64,214, 64,215 (Dep't Commerce, Dec. 12, 2001) (final results of the fourth countervailing duty administrative review), though a recurring subsidy was at issue, Commerce explained:

> If Delverde were, for example, repaying a non-recurring grant that it received prior to the period of review, we would agree that any portion of that grant that had not already been countervailed should be reduced by the amount repaid. (We would do this without regard to the offset provision because, as Delverde argues, the repayment would be a reduction in the financial contribution and benefit.)

Memorandum to Bernard Carreau, Acting Assistant Sec'y for Imp. Admin., from Richard W. Moreland, Deputy Assistant Sec'y, Group I, Imp. Admin., *Issues and Decision Memorandum: Final Results of the 1999 Countervailing Duty Administrative Review of Certain Pasta from Italy*, Pl.'s Ex. 12 at Comment 7 (Dec. 4, 2001); *Certain Pasta from Italy*, 66 Fed. Reg. 64,214, 64,215 (Dec. 12, 2001) (incorporating the above-mentioned memorandum by reference).

Finally, this Court rejects Commerce's argument that the amortization schedule of a non-recurring subsidy is so analogous to federal tax laws concerning the depreciation of capital assets that the statute of limitations for amending prior years' income tax returns should apply here. Commerce argues that the logic of federal income tax law, where the fact that an asset depreciates over the course of a number of years does not allow a taxpayer to receive the benefit of one year's allocated depreciation in a later tax year, should be applied to the present situation. Def.'s Reply, at 11–12. However, the federal income tax rules exist so the taxpayer may not benefit from failure to file taxes, or otherwise improperly benefit. Yet, in the present situation, a mistake was made on the government's part that resulted in Plaintiff paying more than it owed. Therefore, to follow Commerce's analogy would force Plaintiff to pay for a mistake that it did not make.

statute, and *Chevron* deference will not be given to Commerce's interpretation.

Therefore, although Commerce argues that it lacks the statutory authority to provide a remedy in this situation, its own interpretation of the Congressional purpose of § 1671(a) does not support its claim.[23] Commerce's attempt at reconciling § 1675's period of review with the requirements of § 1671(a) will not be granted deference, as the interpretation renders § 1671(a) null and void with regard to administrative reviews of countervailing duty orders relating to one-time, non-recurring subsidies which are amortized over a period of years.

CONCLUSION

Because Plaintiff was not statutorily required to exhaust its extant Customs remedy, because the Court finds that it is not appropriate to require such exhaustion in this case, and because Commerce has the authority under § 1671(a) to ensure that the amount of the countervailing duty imposed is equal to the amount of the net countervailable subsidy, the Court denies Defendant's motion to dismiss. It is so ordered.

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[23] Liquidation does not prevent Commerce from remedying this situation. *Asociacion Colombiana de Exportadores v. United States*, 916 F.2d 1571, 1573 (Fed. Cir. 1990), *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1346 (Fed. Cir. 1995), and *United States v. A.N. Deringer, Inc.*, 66 C.C.P.A. 50, 52 & 55–56, 593 F.2d 1015, 1017 & 1020–21 (1979), cases cited by Commerce as precluding Plaintiff's relief because the entries were already liquidated, are inapposite. *Juice Farms* and *A.N. Deringer* were not brought under § 1581(c) and stand merely for the proposition that there is no § 1581(a) jurisdiction over untimely filed Customs protests. While it is true that *Asociacion Colombiana de Exportadores* may be cited for the proposition that liquidation is final, and no moneys may thereafter be recovered, Plaintiff here does not seek Customs' disgorgement of its overpayment. Rather, it seeks to have the amortization schedule maintained by Commerce adjusted to reflect this overpayment. Customs is in no way involved in such a remedy, and such remedy does not seek to undo the liquidation of the 1997 entries. The finality of the liquidation of the 1997 entries under 19 U.S.C. § 1514 is thereby not contested. Nor does Commerce's adjustment of the amortization schedule result in a "reconciliation" regarding the 1997 entries; rather than affecting those entries, the adjustment simply takes into account the fact of the particular amount of subsidy left to be amortized, and adjusts accordingly.

ABSTRACTED CLASSIFICATION DECISIONS

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/38 7/12/04 Barzilay, J.	Church & Dwight Co.	03–00176	3824.90.40 4.6%	3823.19.20 2.3%	Agreed statement of facts	New Orleans Palm fatty acid distillate
C04/39 7/12/04 Barzilay, J.	Church & Dwight Co.	03–00831	3824.90.40 4.6%	3823.19.20 2.3%	Agreed statement of facts	New Orleans Palm fatty acid distillate
C04/40 7/12/04 Eaton, J.	Avecia, Inc.	03–00197	3204.14.30 10.8% 3204.14.50 13.2% or 11.9%	3215.11.00 1.8% 3215.19.00 1.8%	Agreed statement of facts	New York Black-colored merchandise, etc.
C04/41 7/15/04 Carman, J.	Church & Dwight Co.	02–00763	3824.90.40 4.6%	3823.19.20 2.3%	Agreed statement of facts	New Orleans Palm fatty acid distillate
C04/42 07/27/04 Barzilay, J.	Raritan Computer, Inc.	01–00823	Note stated	8544.41.40 Not stated	Agreed statement of facts	New York Telecommunication wiring harness
C04/43 08/05/04 Tsoucalas, J.	Midwest Micro Corp.	03–00402	8518.21.00 4.9%	8473.30.10 Free of duty	Agreed statement of facts	Chicago Computer motherboards
C04/44 08/11/04 Musgrave, J.	Cutter & Buck, Inc.	02–00438	6211.33.00 16.4% or 16.3%	6201.93.30 7.3% or 7.2%	Agreed statement of facts	Seattle V-neck short sleeved pullover
C04/45 8/24/04 Musgrave, J.	Simon Mktg., Inc.	99–11–00701	7326.20.0050 4.3%	9503.90.00 0%	Agreed statement of facts	Baltimore “Tomagotchi” style plastic toys, etc.
C04/46 8/30/04 Tsoucalas, J.	General Binding Corp.	01–00809	8472.90.95 1.8% 7326.90.85 2.9%	8441.10.00 Free of duty	Agreed statement of facts	Los Angeles Paper cutters and paper trimmers

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/47 9/9/04 Eaton, J.	E.T.I.C., Inc.	01–00548	2002.10.00 100% pursuant to subheading 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%, etc.	Agreed statement of facts	Seattle Canned tomato sauce preparation
C04/48 9/8/04 Eaton, J.	E.T.I.C., Inc.	01–11–00541	2002.10.00 100% pursuant to subheading 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%, etc.	Agreed statement of facts	New York Canned tomato sauce preparation
C04/49 9/9/04 Eaton, J.	E.T.I.C., Inc.	00–06–00303	2002.10.00 100% pursuant to subheading 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%, etc.	Agreed statement of facts	New York Canned tomato sauce preparation
C04/50 9/9/04 Eaton, J.	Guido Imp. & Wholesaler, Inc.	00–04–00149	2002.10.00 100% pursuant to subheading 9903.23.17	2103.90.60 or 2103.90.90 7.5%, 7.3%, 7.1%, etc.	Agreed statement of facts	New York Peeled tomatoes
C04/51 9/10/04 Carman, J.	A.D. Sutton & Sons	96–01–00014	4202.92.45 4202.99.90 20%	3924.10.50 3.4%	Agreed statement of facts	Newark PVC Travel Bag Cooler Bag
C04/52 9/10/04 Carman, J.	A.D. Sutton & Sons	96–07–01724	4202.92.45 4202.99.90 20%	3924.10.50 3.4%	Agreed statement of facts	Newark PVC Travel Bag Cooler Bag
C04/53 9/10/04 Carman, J.	A.D. Sutton & Sons	96–12–02848	4202.92.45 4202.99.90 20%	3924.10.50 3.4%	Agreed statement of facts	Newark PVC Cooler, etc.
C04/54 9/10/04 Carman, J.	A.D. Sutton & Sons	97–07–01172	4202.92.45 20% 4202.99.90 19.5%	3924.10.50 3.4%	Agreed statement of facts	Newark PVC Cooler Bag, etc.
C04/55 9/10/04 Carman, J.	A.D. Sutton & Sons	97–10–01878	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	Newark PVC Cooler Bag, etc.

DECISION NO./DATE JUDGE	*PLAINTIFF*	*COURT NO.*	*ASSESSED*	*HELD*	*BASIS*	*PORT OF ENTRY & MERCHANDISE*
C04/56 9/10/04 Carman, J.	A.D. Sutton & Sons	98–10–02947	4202.92.45 20%	3924.10.50 3.4%	Agreed statement of facts	Chicago PVC Fridge Pack
C04/57 9/10/04 Eaton, J.	Costco Wholesale	01–01043	6307.90.99 7%	3924.10.50 3.4%	Agreed statement of facts	Baltimore 26Qt./40 Can Double Cooler, etc.
C04/58 9/10/04 Eaton, J.	Costco Wholesale	02–00639	6307.90.99 7%	3924/101/50 3.4%	Agreed statement of facts	Los Angeles Golf Gear Bag/w 17″ PVC Cooler
C04/59 9/10/04 Eaton, J.	Costco Wholesale	02–00375	6307.90.99 7%	3924.10.50 3.4%	Agreed statement of facts	Tacoma Bike Cooler Golf Gear Bag w/17″ Cooler
C04/60 9/14/04 Eaton, J.	Nachi Robotic Sys.	01–00425 01–00842 02–00109 02–00384	8479.50.00 3%, 2.7% or 2.5% 8479.50.00 (robot bodies) 2.5% 8537.10.90 2.7% (matched robot controllers)	8479.50.00 3%, etc. (general robots) 8515.21.00 0.8%, etc. (resistance welding robotbs) 8515.31.00 1.8%, etc. (arc welding robots) 8428.90.00 0.8%, etc. (material handling robots) 8460.90.40 4.4%, etc. (deburring robots)	Agreed statement of facts	Los Angeles Detroit Industrial robots: general, deburring, resistance welding, arc welding, and material handling robots
C04/61 9/27/04 Carman, J.	A.D. Sutton & Sons	94–07–00407	4202.92.45 4202.92.90 20%	3924.10.50 3.4%	Agreed statement of facts	Newark Vinyl PVC Diaper Bag
C04/62 9/27/04 Carman, J.	A.D. Sutton & Sons	95–01–00024	4202.92.90 20%	3924.10.50 3.4%	Agreed statement of facts	Newark PVC Vinyl Lunch Tote Bag
C04/63 9/27/04 Carman, J.	A.D. Sutton & Sons	99–03–00164	4202.92.45 4202.92.90 20%	3924.10.50 3.4%	Agreed statement of facts	Newark PVC Cooler Bag