Slip Op. 05-98

DIXON TICONDEROGA COMPANY, Plaintiff, v. UNITED STATES CUSTOMS AND BORDER PROTECTION and ROBERT C. BONNER, Defendants.

Court No. 04-00027
Before: Judith M. Barzilay, Judge

[Defendants' USCIT R. 59 Motion for Rehearing denied.]

Decided: August 18, 2005

Gray Robinson, P.A. (*A. Anthony Giovanoli*), *Guy S. Haggard* for Plaintiff.
Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Jeanne E. Davidson*), Deputy Director; (*David S. Silverbrand*), Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Charles Steuart*, Office of Chief Counsel, United States Customs & Border Protection, of counsel, for Defendant.

MEMORANDUM ORDER

BARZILAY, JUDGE:

On April 4, 2005, this court entered a Judgment Order granting plaintiff Dixon Ticonderoga Co.'s ("Dixon's") Motion for Judgment on the Agency Record. *Dixon Ticonderoga Co. v. United States Customs and Border Protection*, Slip Op. 2005-46.[1] Now defendants, United States Customs and Border Protection and Robert C. Bonner (collectively "Defendant") ask this court to reconsider the above-mentioned judgment and opinion, to grant a rehearing, and to dismiss Dixon's cause of action pursuant to USCIT Rule 59(a)(2). After having considered Defendant's arguments to the contrary, the court finds no fundamental or significant mistake resulting in manifest error. Therefore, Defendant's motion is denied.

Rule 59(a)(2) allows this Court to order a rehearing in an action finally determined, for any of the reasons that United States courts have granted rehearings in suits in equity. The granting or denying of a motion for rehearing rests within the sound discretion of the

[1] Familiarity with this prior opinion is presumed.

court. *See Ammex, Inc. v. United States*, 201 F. Supp. 2d 1374, 1375 (CIT 2002); *Mitsubishi Heavy Indus., Ltd. v. United States*, 112 F. Supp. 2d 1170, 1171 (CIT 2000). Reconsideration is appropriate when meant to rectify a fundamental or significant flaw in the original proceeding that results in a manifest error. *Mitsubishi*, 112 F. Supp. 2d at 1171 (citations and quotations omitted).

Defendant argues in this motion, as it did in opposition to Dixon's Motion for Judgment on the Agency Record, that Dixon was not substantially prejudiced by Defendant's late published notice. As Defendant points out, prejudice means injury to an interest that the statute, regulation, or rule in question was designed to protect. *Deft.'s R. 59 Mot. for Rehearing* at 5 (citing *Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394 (Fed. Cir. 1996) (quotations omitted)). As explained in the opinion, Dixon, being a domestic pencil manufacturer, had an interest in applying for and receiving a distribution pursuant to the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA"), also known as the Byrd Amendment. Both the CDSOA and the Customs regulation at issue, 19 C.F.R. § 159.62(a), were designed to protect this interest.

Furthermore, none of the cases Defendant cites in its motion shed any new light on the matter at hand. In *Cathedral Candle Co., et. al. v. United States International Trade Comm'n, et. al.*, 400 F.3d 1352 (Fed. Cir. 2005), the Federal Circuit considered a case where Customs complied with 19 C.F.R. § 159.62(a) and provide timely notice. In that case Customs granted discretion to the International Trade Commission's ("ITC") resolution of a conflict between the confidentiality requirements of 19 U.S.C. § 1677f and the notice requirements of the Byrd Amendment, 19 U.S.C. § 1675c. Therefore, the Court held that where the plaintiffs did not waive the confidentiality they had originally opted for, the timely published notice did not violate the Byrd Amendment when it failed to include plaintiffs on the list of affected domestic producers.[2] *Cathedral Candle*, 400 F.3d at 1367, 1372.

Also distinguishable is this Court's recent opinion in *Candle Artisans, Inc. v. United States International Trade Comm'n, et. al.*, 29 CIT ___ , 362 F. Supp. 2d 1352 (2005). Similar to the facts of *Cathedral Candle*[3] and in contrast to those presented in this case, Customs published timely notice of its intent to distribute, but did not include plaintiffs' names on the list because they had not waived

---

[2] Although not relevant to the issues at hand, integral to the Federal Circuit's holding in *Cathedral Candle* were the additional determinations that section 4 of the Administrative Procedure Act ("APA") was not applicable to the facts in that case, and that the ITC was not required under section 3 of the APA to publish Federal Register notice indicating that it was only submitting the names of those persons that indicated public support for the petition. 400 F.3d at 1369, 1371-72.

[3] As noted by the Court in *Candle Artisans*, 326 F. Supp. 2d at ____ , n.1.

confidentiality. In both *Cathedral Candle* and *Candle Artisans*, the plaintiffs' inability to obtain notice was not due to any fault or omission on the part of Customs. Rather, Customs was held to have made a reasonable interpretation of two seemingly conflicting statutes, and its decision not to publish the names of domestic producers who had not waived confidentiality was accorded deference by the Courts. In the present case, Customs failed to abide by its own regulations by failing to provide timely notice to all affected domestic producers of the CDSOA distribution for fiscal year 2003.

As explained in the court's earlier opinion, Slip Op. 2005-46, because the Customs regulations at issue in this matter were found to be merely procedural aids, Dixon could prevail on its claim only if it demonstrated substantial prejudice. *Id*. at 9 (citing *Kemira Fibres Oy v. United States*, 61 F.3d 866 (Fed. Cir. 1995) (citations omitted)). Because it was one of the petitioners in *Certain Cased Pencils from the People's Republic of China*, 59 Fed. Reg. 66909 (Dec. 28, 1994), Dixon was an intended beneficiary of the CDSOA and its accompanying regulations, including 19 C.F.R. § 159.62(a). Therefore, Dixon was substantially prejudiced by Customs' late published notice. Unlike the plaintiff in *Intercargo Insurance Co. v. United States*, 83 F.3d 391 (1996), Dixon does not complain of a technical defect which, if disregarded, would deprive Dixon of relief. Rather, Dixon's interest in receiving its share of the distribution, as an intended beneficiary of the CDSOA, was injured by Customs' failure to provide timely notice. *Cf. Intercargo*, 83 F.3d at 396 ("Prejudice means injury to an interest that the statute, regulation or rule in question was designed to protect."). In other words, Dixon was squarely within the interest intended to be protected by both the statute involved and the timing regulations implicated in this case, and was prejudiced when Customs failed to properly administer that statute and accompanying regulation. *Cf. Kemira*, 61 F.3d at 875-76.

On April 29, 2005, the parties submitted a joint status report pursuant to the court's order directing the parties to confer regarding a remedy and to advise the court of this proposed remedy. In this status report, the parties indicated their agreement that, "if after all opportunities for rehearing and/or appeal have been exhausted, [this court's April 4, 2005 opinion] is the final court decision upon this action, Dixon would be entitled to distribution from Customs of $618,896.03 in CDSOA funds for fiscal year 2003." Thus, the court orders Customs to take appropriate action to the extent authorized by law and to effect a distribution of $618,896.03 to Dixon. Furthermore, the court notes that because the only interest available pursuant to 19 U.S.C. § 1675c(d)(3) is statutory interest charged on antidumping and countervailing duties at liquidation, the sum to be distributed to Dixon does not include interest accrued. *See* 19 C.F.R. § 159.74(e). Accordingly, it is hereby

ORDERED that defendant's USCIT R. 59 motion for rehearing is denied; and it is further

ORDERED that defendant will effect a distribution of $618,896.03 to plaintiff in CDSOA funds for fiscal year 2003.

Slip Op. 05–99

DIXON TICONDEROGA COMPANY, Plaintiff, v. UNITED STATES CUSTOMS AND BORDER PROTECTION and ROBERT C. BONNER, Defendants.

Court No. 04–00027
Before: Judith M. Barzilay, Judge

[Proposed Defendant-Intervenors' Motion to Intervene granted.]

Decided: August 19, 2005

Gray Robinson, P.A. (*A. Anthony Giovanoli*), *Guy S. Haggard* for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Jeanne E. Davidson*), Deputy Director; (*David S. Silverbrand*), Trial Attorney, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Charles Steuart*, Office of Chief Counsel, United States Customs & Border Protection, of counsel, for Defendant.

MEMORANDUM ORDER

BARZILAY, JUDGE:

Proposed defendant-intervenors, Musgrave Pencil Company, RoseMoon Pencil Company and General Pencil Company (collectively "movants") seek leave to intervene as defendants in this case. Plaintiff Dixon Ticonderoga ("Dixon") opposes this motion and defendants, United States Customs and Border Protection and Robert C. Bonner (collectively "defendant") consent.

On April 4, 2005, this court issued Slip Opinion 05–46, holding that Customs' denial of Dixon's application for distributions under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA") as untimely, was arbitrary and capricious.[1] The court then ordered the parties to confer with one another regarding a remedy to be entered at a later date. Also pending before this court is defendant's USCIT Rule 59 motion to reconsider its April 4, 2005 decision.

Movants argue that they have satisfied the requirements for intervention as of right, namely that they have asserted an interest in the subject matter of the primary litigation, that their interest is likely to be impaired by disposition of the suit, that their interest is not ad-

[1] Familiarity with this prior opinion is presumed.

equately represented by the existing parties to the suit, and that this application is timely filed. Plaintiff primarily disputes the timeliness of this motion.

> USCIT Rule 24(a) governs intervention of right. It provides the following:
>
> Upon timely application anyone shall be permitted to intervene in an action:
>
> . . .
>
> (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

USCIT R. 24(a). Furthermore, the case law sets out the following four-factor test for intervention as of right. First, the application for intervention must assert an interest in the subject matter of the primary litigation; second, it must appear that the applicant's interest will be impaired by disposition of the suit; third, the applicant's interest must not be adequately represented by the existing parties to the suit; and finally, the application for intervention must be timely filed. *See, e.g. Edmonson v. Nebraska*, 383 F.2d 123 (8th Cir. 1967); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967).

It is clear that movants assert an interest in the subject matter of the underlying issue in this case, and that these interests may be impaired if intervention is not permitted. Movants are domestic pencil manufacturers that did receive CDSOA distributions for FY 2003. As movants argue, if this court were to enter judgment regarding a remedy which permits Customs to demand or collect funds from movants for the purpose of distributing Dixon's share, there exists a possibility that, pursuant to 19 C.F.R. § 159.64(b)(3), such funds would be drawn from distributions already received by movants for FY 2003. In such a circumstance, it is also clear that movants' interests and those of the defendant would not be aligned, as movants are likely to protest such a collection of funds in order to provide Dixon with its CDSOA distribution for FY 2003.

It is not, however, clear that the instant motion is timely. When considering timeliness, the court makes determinations on a case-by-case basis, according to the court's consideration of all facts of the case. *Nevilles v. EOC*, 511 F.2d 303 (8th Cir. 1975). In certain cases, intervention may be proper after judgment has been entered. *Id*. Furthermore, factors to be considered in assessing timeliness include the stage of the litigation at which intervention is sought, the purposes of the statute under which the action is brought, and the relative harm to the parties which would result from a decision to permit or deny intervention. *Romasanta v. United Airlines, Inc.*, 537

F.2d 915 (7th Cir.), *aff'd*, 432 U.S. 385 (1977). Where, as here, an application for intervention is made after the court has entered judgment, the court must consider how soon after judgment the motion to intervene was filed. *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395–96 (1977). Movants argue that neither plaintiff nor defendant provided notice of the underlying action, although they admit that neither party was required to do so. Movants also argue that neither Dixon nor Customs took any action to preserve the status quo *pendente lite*, such as seeking a temporary restraining order, preliminary injunction, or other interlocutory order restraining Customs from distributing CDSOA funds to the movants. Finally, movants argue that neither party sought to join movants as parties to this action. The court notes that just as neither party was under any obligation to provide movants with notice of the instant case, neither party was under any obligation to perform any of these other actions.

The relative prejudice to existing parties to the litigation, however, is "perhaps the most important factor in determining timeliness of [an application] to intervene as of right." *Silver Reed America, Inc. v. United States*, 9 CIT 1, 5, 600 F. Supp. 852, 856 (1985) (*citing Sumitomo Metal Industries, Ltd. v. Babcock & Wilcox Co.*, 69 C.C.P.A. 75, 669 F.2d 703 (CCPA 1981). Moreover, the timeliness requirement for intervention is not intended to punish an applicant for not acting more promptly, but rather is designed to insure that the original parties are not prejudiced by the delay. *Id.* (citing *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065 (5th Cir. 1970)). Plaintiff argues that granting intervention will unnecessarily confuse, complicate and unduly delay the resolution of this case and its receipt of its 2003 CDSOA distribution. Dixon essentially argues that it has been, and continues to be, prejudiced by the fact that movants have gained an unfair commercial advantage over Dixon because Dixon has lost "the rightful use of its money." *Pl's Opp. to Mot. for Leave to Intervene*, at 8. Plaintiff also argues that the proposed intervention would interject new parties and new issues post-judgment, causing significant delay. Movants argue, as discussed above, that their already-received CDSOA distributions are in danger of being recalled by Customs, should the court provide for such a remedy to Dixon. In such an instance, movants have indicated their opposition to the application of 19 C.F.R. § 159.64(b)(3) on constitutional grounds as violative of their due process rights. As movants point out, if the court denies movants' application to intervene, then they will have no choice but to challenge the regulation at such time as Customs may invoke the regulation to collect funds awarded to Dixon by virtue of a final judgment in this action. This, in turn, would raise the prospect that movants will need to raise a permissible collateral attack on the final judgment in this action, and that defendant may find itself subject to conflicting orders issued in different actions. The court

agrees that this would not only prejudice movants but also the defendant. It would also add further delay to a process that may result in Dixon's receiving its relief.

Defendant has indicated its intention to appeal this court's April 4, 2005 decision and its subsequent decision to deny rehearing.[2] The court notes that movants filed the instant motion on May 19, 2005, very soon after publication of the court's April 2005 opinion. In consideration of this fact, as well as the potential for prejudice to both defendant and to movants relative to plaintiff, the court grants movants' post-judgment motion to intervene, for purposes of participating in any appeals that defendant may pursue. *See United Airlines*, 432 U.S. at 395–96 ("Our conclusion is consistent with several decisions of the federal courts permitting post-judgment intervention for the purpose of appeal. The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment.") (citations omitted). Accordingly, it is hereby

ORDERED that the motion for leave to intervene is hereby granted to allow movants to participate in any appeal of this action.

Slip Op. 05–100

DECCA HOSPITALITY FURNISHINGS, LLC, Plaintiff, MARIA YEE INC., *ET AL.*, Plaintiff-Intervenors, v. UNITED STATES, Defendant, AMERICAN FURNITURE MANUFACTURERS COMMITTEE FOR FAIR TRADE, *ET AL.*, Defendant-Intervenors.

Before: Pogue, Judge

Court No. 05–00002

[Department of Commerce's determination remanded.]

Dated: August 23, 2005

Dewey Ballantine LLP (*Harry L. Clark*, *David A. Yocis*, and *Mayur R. Patel*) for the plaintiff;

Arent Fox PLLC (*Nancy A. Noonan* and *Patricia P. Yeh*) for plaintiff-intervenors;

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*); *Rachel Wenthold*, Attorney, Of Counsel, Of-

[2] The court notes that defendant has not yet filed for appeal in this case. *Compare, Belton Industries, Inc. v. United States*, 16 CIT 555, 797 F. Supp. 1000 (1992) (denying intervention and holding that upon filing of a Notice of Appeal by a party, the case falls within the jurisdiction of the Court of Appeals).

fice of Chief Counsel for Import Administration, U.S. Department of Commerce, for the defendant;

King & Spalding LLP (*Joseph W. Dorn*, *Stephen A. Jones*, and *Jeffrey M. Telep*) for defendant-intervenors.

OPINION

Pogue, Judge: This case involves a challenge by Decca Hospitality Furnishings, LLC ("Decca") to the Department of Commerce's ("Commerce" or "Defendant" or "Department") determination in *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 67,313, 67,315 (Dep't Commerce Nov. 17, 2004) (final determination of sales at less than fair value) ("*Final Determination*"). Decca asserts that, in the *Final Determination*, Commerce denied Decca separate rate status because Commerce improperly rejected its evidence as untimely. Commerce avers that Decca failed to timely submit a response to Commerce's Section A Questionnaire which it required to qualify for a separate rate. Because the court agrees that Commerce impermissibly rejected Decca's evidence, it remands this case for further consideration consistent with this opinion.[1]

BACKGROUND

A.

Commerce considers the PRC to have a non-market economy ("NME"). In dumping investigations of NME economies, Commerce presumes that all companies operating in a NME are state-controlled. *See Silicon Carbide from the People's Republic of China*, 59 Fed. Reg. 22,585, 22,586, 22,589 (Dep't Commerce May 2, 1994) (notice of final determination of sales at less than fair value); *Sparklers from the People's Republic of China*, 56 Fed. Reg. 20,588, 20,589 (Dep't Commerce May 6, 1991) (final determination of sales at less than fair value) ("*Sparklers*"). Commerce further presumes that all state-controlled companies are part of a single entity. Consequently, Commerce establishes a single rate for all state-controlled companies. While Commerce presumes that all companies are under state-control, a company may rebut this presumption, and therefore qualify for an antidumping duty rate separate from the PRC-wide rate, if it demonstrates *de jure* and *de facto* independence from government control.

---

[1] Decca moved for, and was granted, expedited consideration on Counts I and II of its complaint. Order Granting Mot. Expedited Consideration, Mar. 16, 2005. Because the court is remanding this case for further consideration, and the results of Commerce's redetermination may alter the need to address the remaining counts of Decca's complaint, the court reserves judgment on those counts.

Despite considering the PRC to be a NME, Commerce recognizes that companies organized outside of China are *per se* independent from the control of the PRC government. Once a party demonstrates that it is foreign owned, Commerce accords that company a rate separate from the PRC-wide rate. Furthermore, Hong Kong is considered to be fully autonomous from China for economic and trade matters. 22 U.S.C. § 5713(3)(2000). Accordingly, if a company doing business in the PRC demonstrates that it is organized under the laws of Hong Kong, Commerce exempts that company from the PRC-wide rate. *Fresh Garlic from the People's Republic of China*, 67 Fed. Reg. 51,822, 51,823 (Dep't Commerce Aug. 9, 2002) ("*Garlic*") (preliminary results of antidumping duty administrative review, partial rescission of administrative review, and intent to rescind administrative review in part). In large investigations, like this one, Commerce will assign individualized separate rates to certain participants in the investigation, i.e., the mandatory respondents, but will assign all other qualifying companies a rate equal to the "weighted-average margin based on the rates [Commerce] calculate[s] for the [ ] mandatory respondents, excluding any rates that are zero, *de minimis*, or based entirely on adverse facts available." *Wooden Bedroom Furniture from the People's Republic of China*, 69 Fed. Reg. 35,312, 32,323 (Dep't Commerce June 24, 2004) (notice of preliminary determination and postponement of final determination) ("*Preliminary Determination*").

The presumption of state-control has met with judicial approval because respondents have "the best access to information pertinent to the 'state-control' issue," *Sigma Corp. v. United States*, 117 F.3rd 1401, 1406 (Fed. Cir. 1997), and a significant percentage of the companies in the PRC are controlled by the PRC government.

B.

On December 17, 2003, Commerce began an investigation of exporters/producers of wooden bedroom furniture from the PRC in response to a petition filed by the domestic industry. *See Wooden Bedroom Furniture from the People's Republic of China*, 68 Fed. Reg. 70,228 (Dep't Commerce Dec. 17, 2003) (initiation of antidumping duty investigation) ("*Notice of Initiation*"). In its *Notice of Initiation*, Commerce specified that it would follow its statutory and regulatory time limits. *Notice of Initiation*, 68 Fed. Reg. at 70,231. The Department's regulations are stated in *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,323 (Dep't Commerce May 19, 1997) ("*Preamble*"), which announced and explained Commerce's current rules as promulgated in the Code of Federal Regulations. The *Notice of Initiation* also included contact information for parties interested in seeking "further information." *Id.* at 70,228.

During the early stages of this investigation, Commerce asked for information, in the form of two questionnaires,[2] from exporters/producers of furniture that were within the scope of the investigation. On December 30, 2003, Commerce sent the first questionnaire, a quantity and value questionnaire ("Q&V Questionnaire"), to the Chinese Ministry of Commerce ("MOFCOM")[3] *and* 211 known producers of wooden bedroom furniture in the PRC. *Preliminary Determination*, 69 Fed. Reg. at 35,313; Def.'s Mem. Opp'n Pl.'s R. 56.2 Mot. J. Agency R. 3 ("Def's Mem."). In its letter to MOFCOM, Commerce sought MOFCOM's "support in identifying and transmitting [its] request for information to any Chinese producer and/or exporter of wooden bedroom furniture that exported wooden bedroom furniture for sale to the United States during the [period of investigation]." Letter from Edward Yang, Office Director, AD/CVD Enforcement Group III to Liu Danyang, Director, Bureau of Fair Trade for Imports and Exports, Re: *Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China*, P.R. Doc. 140, Pl.'s Ex. 3 at 1 (Dec. 30, 2003). Additionally, the letter stated in bold print:

> Please be advised that receipt of the quantity and value questionnaire by producers/exporters of the subject merchandise does not indicate that they will be chosen as a mandatory respondent or guaranteed separate rates status in this antidumping duty investigation.

Id. at 2.

The letters sent to individual producers and exporters had a virtually verbatim disclaimer noting that respondents would not be guaranteed a separate rate status by responding to the questionnaire. Letter from Robert A. Bolling, Program Manager Group III, Office IX, to All Interested Parties, P.R. Doc 139, Pl.'s Ex. 4 (Dec. 30, 2003). Commerce received 137 responses to this initial questionnaire. *Preliminary Determination*, 69 Fed. Reg. at 35,313. However, Commerce "did not receive any type of communication from the Government of the PRC in response to" its letter to MOFCOM. *Id.*

---

[2] Commerce sent out more than two questionnaires during the course of the investigation. However, as is relevant here, the court will limit its discussion to just these two questionnaires.

[3] One of MOFCOM's self-described "main mandate[s]" is "[t]o formulate . . . guidelines and policies of domestic and foreign trade and international economic cooperation." Ministry of Commerce of the People's Republic of China Website, MISSION (2005), http://english.mofcom.gov.cn/mission/mission.html. As part of its mandate, MOFCOM is responsible for guiding and coordinating "domestic efforts in responding to foreign antidumping, countervailing, and safeguard investigations and other issues concerned." *Id.*

Commerce sent the second questionnaire, a Section A Questionnaire,[4] on February 2, 2004. Unlike the Q&V Questionnaire, Commerce sent the Section A Questionnaire only to (a) MOFCOM and (b) seven companies it deemed to be mandatory respondents. The February 2, 2004 letter to MOFCOM specified that "[a]ll parties are requested to respond to section A (General Information) of the Non Market Economy ("NME") questionnaire by *February 23, 2004*." Letter from Robert Bolling, Program Manager AD/CVD Enforcement III to Liu Danyang, Director Bureau of Fair Trade for Imports and Exports, Pl.'s Ex. 5, P.R. Doc. 297 at 2 (emphasis in original). A generic Section A Questionnaire was also available on Commerce's website. The Section A Questionnaire itself informed parties that "[a]ll companies requesting a separate rate must respond to the following questions." Section A Questionnaire, P.R. Doc. 297 at A–1. Commerce received 126 Section A responses from parties. *Preliminary Determination*, 69 Fed. Reg. at 35,313–14. The PRC did not respond to this questionnaire either. *Id.* at 35,321.

In its preliminary determination issued on June 24, 2004, Commerce assigned a separate rate to respondent companies who timely submitted responses to the Section A Questionnaire and who demonstrated sufficient independence, i.e., both *de jure* and *de facto* independence from government control. *Preliminary Determination*, 69 Fed. Reg. 35,312, 35,319–20. All companies (other than the mandatory respondents), which sufficiently demonstrated that they were organized under the laws of Hong Kong, were granted a separate rate of 6.65%. *Wooden Bedroom Furniture from China*, 70 Fed. Reg. 329, 300 (Dep't Commerce Jan. 4, 2005) (notice of amended final determination of sales at less than fair market value and antidumping duty order). Commerce assigned all other parties a rate of 198.08%. *Final Determination*, 69 Fed. Reg. at 67,316.

---

[4] According to Commerce, "Section A of the questionnaire requests general information concerning a company's corporate structure and business practices, the merchandise under investigation that it sells, and the manner in which it sells that merchandise in all of its markets. Section B requests a complete listing of all home market sales, or, if the home market is not viable, of sales in the most appropriate third-country market (this section is not applicable to respondents in non-market economy (NME) cases). Section C requests a complete listing of U.S. sales. Section D requests information on the factors of production (FOP) of the subject merchandise under investigation. Section E requests information on further manufacturing." *Certain Ball Bearings and Parts Thereof from the People's Republic of China*, 67 Fed. Reg. 63,609, 63,609 n.2 (Dep't Commerce Oct. 15, 2002) (notice of preliminary determination of sales at less than fair value and postponement of final determination); *see also Preamble*, 62 Fed. Reg. at 27,334.

C.

Plaintiff, Decca, asserts that it is a Hong Kong based producer and exporter of wooden bedroom furniture.[5] Although Decca was not specifically mentioned in the *Notice of Initiation* Commerce sent it a Q&V Questionnaire. Letter from Edward Yang, Office Director, AD/CVD Enforcement Group III to Liu Danyang, Director, Bureau of Fair Trade for Imports and Exports, Re: *Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China*, P.R. Doc. 140, Pl.'s Ex. 3 at 1 (Dec. 30, 2003).

Although Decca claims it did not receive the Q&V Questionnaire directly from Commerce or MOFCOM, Decca, operating *pro se*, timely submitted a response to the Q&V Questionnaire on January 8, 2004.[6] Decca also claims it never received the Section A Questionnaire, or information regarding the deadline for submitting responses to the Section A Questionnaire.[7] According to Decca, after submitting its response to the Q&V Questionnaire, it did not hear from Commerce until after March 2, 2004 when it received a letter from Commerce rejecting its response because of filing deficiencies.[8] In Commerce's letter to Decca explaining its rejection of Decca's Q&V Questionnaire response, Commerce informed Decca that "the rejection d[id] not prevent parties from filing additional information in this investigation." Letter from Robert Bolling, Program Manager, Enforcement Group III, Office 9, to Spiro Kwan, Decca Furniture Ltd., P.R. Doc. 448, Pl.'s Ex. 6 at 3 (Feb. 26, 2004). Commerce mailed

---

[5] Accordingly, the court will assume that Decca can state a case for asserting that Hong Kong is its place of incorporation, and that therefore, Commerce must enter a finding of fact on this question. Commerce is, of course, free on remand, after considering Decca's evidence, to conclude that Decca is not a Hong Kong based corporation.

[6] Commerce rejected Decca's Q&V Questionnaire submission. However, one of Commerce's purported reasons for rejecting Decca's submission was that it was "submitted after the January 9, 2004 deadline." Letter from Robert Bolling, Program Manager Enforcement Group III, Office 9, to Spiro Kwan, Decca Furniture Ltd., P.R. Doc. 448, Pl.'s Ex. 6 at 1 (Feb. 26, 2004); *cf.* Def.'s Supp. at 3. However, Commerce also acknowledged that the response was submitted on January 8, 2004, *id.*, Dep't of Commerce Mem. from Jeffrey May, Deputy Assistant. Sec'y for Imp. Admin. to James J. Jochum, Assistant. Sec'y for Imp. Admin., Re: *Wooden Bedroom Furniture from the People's Republic of China: Untimely Section A Questionnaire Submission of Decca Furniture Ltd.*, P.R. Doc. 1763, Pl.'s Ex. 14 at 2 (Sept. 16, 2004) ("Decision Memo"), which would have made Decca's submission timely, i.e., submitted before the January 9, 2004 deadline, Letter from Robert A. Bolling, Program Manager, Group III, Office IX, to All Interested Parties, P.R. Doc 139, Pl.'s Ex. 4 (Dec. 30, 2003).

[7] In its determination, Commerce insisted that it only needed to take reasonable steps in providing notice, that the steps it took were reasonable, and therefore, consideration of whether Decca received actual and timely notice was unnecessary. Consequently, it did not make any factual findings on this question. Accordingly, the court will assume that MOFCOM never sent Decca the Section A Questionnaire. Commerce is free on remand, after considering the evidence, to conclude that Decca received the Questionnaire, or actual and timely notice thereof (through some means not stated in its determination or brief).

[8] Decca avers that it did not receive this notification. Because this fact is unnecessary in resolving this case in its current posture, the court expresses no view on this matter.

the rejection letter after the February 24 deadline for submitting Section A responses. Decca attempted to refile its Q&V Questionnaire on June 8, 2004 and, in early July, attempted to submit other information pertaining to its status as a Hong Kong based company. Decision Memo, P.R. Doc. 1763, Pl.'s Ex. 14 at 2.

Commerce asserts that Decca missed the filing deadline for the Section A Questionnaire. Accordingly, pursuant to its presumptions, Commerce set Decca's antidumping duty rate at the PRC-wide rate. Plaintiff protests that determination, *inter alia*, claiming that Commerce failed to provide it with sufficient notice of both the requisite filing requirement for proving its entitlement to a separate rate, and the deadline for such a filing, and thereby improperly excluded the evidence Decca attempted to proffer establishing that it is entitled to a separate rate.[9]

Decca timely protested Commerce's determination. After consideration, Commerce denied Decca's request. Letter from Office to Dewey Ballentine, P.R. Doc. No. 1802 (Sept. 30, 2004). Decca sought timely review of Commerce's finding and properly invoked this court's jurisdiction under 28 U.S.C. 1581(c).

The court must sustain Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B). The court must defer to an agency's reasonable construction of an ambiguous statute. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–843 (1984). Likewise, the court may defer to an agency's interpretation of an *ambiguous* regulation, so long as that interpretation is not plainly erroneous or inconsistent with the regulation, does not fail to reflect the "agency's fair and considered judgment on the matter in question," *Auer v. Robbins*, 519 U.S. 452, 462 (1997), *Cathedral Candle Co. v. United States ITC*, 400 F.3d 1352, 1364 (Fed. Cir. 2005); *but cf. Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 1997) (Posner, J.), *Satellite Broad. Co. v. F.C.C.*, 824 F.2d 1, 3–4 (D.C. Cir. 1987) (where notice is at issue, a party cannot be faulted for relying on an alternative reasonable construction of the regulation), John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655–60, 678–81 (1996), or, if adopted, does not render the regulation unrea-

---

[9] Decca also argues that Commerce has its mailing address in the record and that this is substantial evidence that Decca is a Hong Kong based company. The court agrees with Commerce that this evidence, by itself, is insufficient to overcome Commerce's presumption. Companies may have multiple mailing addresses (or keep multiple mailing addresses for the purposes of securing separate rates). Nor does simply having a Hong Kong address mean that a company is incorporated under the laws of Hong Kong. So long as Commerce provides a sufficient opportunity to submit other relevant information, Commerce may require more than a mailing address before finding an interested party qualifies for a separate rate. *Cf. Sigma*, 117 F.3d at 1406–07 (allowing Commerce discretion to determine what evidence is sufficient to overcome the presumption of state-control).

sonable or otherwise not in accordance with law, *Chevron*, 467 U.S. at 842–843 (1984).

In this case, if Commerce improperly rejected Decca's submissions, thereby improperly presuming Decca's place of incorporation (not to be Hong Kong), then Commerce's findings are unsupported by substantial evidence and the case must be remanded for Commerce to enter a factual finding.

DISCUSSION
I.

In *Transcom, Inc. v. United States*, 294 F.3d 1371, 1380 (Fed. Cir. 2002) ("*Transcom II*"), the court considered whether Commerce appropriately found that parties operating in China had failed to rebut the presumption of state-control where the importer had not received a questionnaire from Commerce and offered no evidence to rebut Commerce's presumption. The court found that, in light of the evidentiary requirements established by Commerce's substantive rules, a reasonable party would have known that it had to offer *some evidence* during the course of an investigation to rebut the presumption of state-control. *Id.* at 1381–82. Because the parties had failed to offer any evidence, the court concluded that it was appropriate for Commerce to presume that the parties were state-controlled. *Id.*

This case begins where *Transcom II* left off. Here, Decca did attempt to submit some evidence during the course of the investigation. Therefore, the question presented is whether Commerce appropriately rejected Decca's evidence. To resolve this question, the court must turn to fundamental principles of administrative law.

The court begins with the observation that it is axiomatic that agencies have authority to "fashion their own rules of procedure," even when a statute does not specify what process to use. *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 544 (1978). But this power is not unlimited. Rather, an agency's rules of procedure must be reasonable,[10] an agency must follow its stated rules of procedure,[11] and must provide sufficient notice of its rules of procedure.[12] Indeed, substantial evidence review (on the

---

[10] *Chevron USA Inc. v. United States*, 467 U.S. 837, 842–43 (1984); *cf. Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

[11] *Bennett v. Spear*, 520 U.S. 154, 172 (1997); *Morton v. Ruiz*, 415 U.S. 199, 235 (1974), *Kemira Fibres Oy v. United States*, 61 F.3d 866, 871 (Fed. Cir. 1995); *cf. Ariz. Grocery Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389 (1938) (agencies cannot retroactively modify regulations through adjudications), Breyer *et al.*, ADMINISTRATIVE LAW AND REGULATORY POLICY 601–02 (5th ed. 2002).

[12] *City of W. Covina v. Perkins*, 525 U.S. 234, 241–42 (1999); *Morton v. Ruiz*, 415 U.S. at 232; *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978); *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296–97 (1953); *Satellite Broad. Co. v. F.C.C.*, 824 F.2D 1, 3–4 (D.C. Cir. 1987); Freedom of Information Act, 5 U.S.C. § 552(a)(1); *cf.* 1 William Blackstone, COMMENTARIES 46 (William S. Hein & Co., Inc. 1992).

record) would not be a meaningful exercise if the "evidence" that comprised the record was obtained through an arbitrary procedure.

Furthermore, because regulations define the expected course of agency conduct, such regulations define the reasonable expectations of interested parties and the reasonable efforts they must undertake to vindicate their rights in an investigation. *See NEC Corp. v. United States*, 151 F.3d 1361, 1371 (Fed. Cir. 1998) ("there inheres in a statutory scheme such as this an expectation that those charged with its administration will act fairly and honestly."); *Shikoku Chems. Corp. v. United States*, 16 CIT 382, 388, 795 F. Supp. 417, 421 (1992) ("Commerce is required to administer the antidumping laws fairly."); *cf. Transcom, Inc. v. United States*, 182 F.3rd 876, 879 (Fed. Cir. 1999) ("*Transcom I*") ("But the fact that a party agrees to abide by the results of an administrative determination does not mean that the party has no right to complain of irregularities in the proceeding leading to that determination.").

According to its governing statute, Commerce is required to investigate allegations of dumping by foreign producers/exporters. 19 U.S.C. § 1671a. To this end, Commerce's regulations state that it "obtains most of its factual information in antidumping and countervailing duty proceedings from submissions made by interested parties during the course of the proceeding." 19 C.F.R. § 351.301(a) (2004). In this case, Commerce specifically noted in its *Notice of Initiation* that it would follow the rules and procedures as specified in its *regulations*. *Notice of Initiation*, 68 Fed. Reg. at 70,231.

Commerce's regulations, however, do not establish precise deadlines for submitting questionnaire responses; nor do they specify which questionnaire response is necessary to request a separate rate. Rather, Commerce's regulations specify two possible deadlines: (1) a deadline in which a "submission of factual information is due no later than . . . seven days before the date of verification of any person is scheduled to commence," 19 C.F.R. § 351.301(b)(2); and (2) a specific deadline which is established by "the Secretary's written request to [each] interested party," 19 C.F.R. § 351.301(c)(2)(ii); *Preamble*, 62 Fed. Reg. (stating that the Secretary will provide notice to each interested party).[13] Additionally, when Commerce invokes 19

---

[13] Annex III to the *Preamble* also provides "[d]eadlines for parties in antidumping investigations." *Preamble*, 62 Fed. Reg. at 27,418. Among the deadlines stated is a deadline for Section A responses (which is 51 days from the date of initiation.) *Id.* at 27,418–419. However, the Annex also states that "[m]ost of the deadlines shown here are approximate. The actual deadline in any particular segment of a proceeding may depend on the date of an earlier event or be established by the Secretary." *Id.* at 27,419. Further, the Q&V Questionnaire is not mentioned in the Annex (an event precedent to the Section A Questionnaire in this case). In this case, the deadline for Section A responses specified in Annex III would have been February 6, 2004 — well before the actual deadline of February 23, 2004.

C.F.R. § 351.301 (c)(2)(ii), its regulations further provide that the Secretary must state in such written request:

> [T]he information to be provided; the form and manner in which the interested party must submit the information; and that failure to submit requested information in the requested form and manner by the date specified may result in use of the facts available under section 776 of the Act and § 351.308.

19 C.F.R. § 351.301(c)(2)(ii). In its Federal Register notice accompanying this rule Commerce explained: "Section 351.301(c)(2) deals with questionnaire responses and other submissions on request. Section 351.301(c)(2)(ii) provides that the Department *must* give notice of certain requirements to *each* interested party from whom the Department requests information." *Preamble*, 62 Fed. Reg. at 27,323 (emphasis added).

In this case, Commerce relied upon Section 351.301(c)(2)(ii) and applied a specific deadline of February 24, 2004 for its Section A Questionnaire. As noted above, however, Section 351.301(c)(2)(ii) requires notice be given to "each interested party." The antidumping laws define the term "interested party" to include "a foreign manufacturer, producer, or exporter, or the United States importer, of subject merchandise." 19 U.S.C. § 1677(9)(A); *see also* 19 C.F.R. § 353.2(k). Decca is a foreign manufacturer and exporter of the subject merchandise. Moreover, according to Commerce, it was mandatory that Decca respond to the Section A Questionnaire to secure a separate rate. Therefore, Decca is an "interested party." However, despite the fact that Commerce appears to be required under these circumstances to give notice to each interested party of filing deadlines, the requested information, and the consequences for a party's failure to submit the requested information, Commerce did not send Decca a written request with such required information. Accordingly, Commerce appears to have violated its own stated procedure. As such, Commerce's actions would not be in accordance with law.

Commerce challenges this assertion in four ways: (A) that Decca was not, at the time Commerce issued the Section A Questionnaire, an interested party and therefore Commerce was not required to send it a questionnaire; (B) MOFCOM was a reliable means of transmitting the questionnaire to interested parties; (C) Commerce's consistent practice of requiring Section A submissions provided notice to parties; and (D) Decca was required to inquire of Commerce's procedures. Each point will be addressed in turn.

A.

First, Commerce argues that because it presumes that all companies operating in the PRC are state-controlled, a party does not become an interested party unless and until it rebuts the presumption

of state-control.[14] Def.'s Supplemental Br. 1–3 ("Def.'s Supp."). As in *Transcom I*, 182 F.3d at 884, Commerce's argument overstates the effect of its own presumption. That Commerce creates a *rebuttable* presumption of state-control merely creates a burden of proof; it does not, in and of itself, create any actual agency relationship between MOFCOM and companies operating in the PRC. When, as it is alleged here, there exists no actual agency relationship between MOFCOM and the interested party, by only sending the questionnaires to MOFCOM, Commerce does not provide any notice to the interested party on how to rebut the presumption. *See Schwarz v. Thomas*, 222 F.2d 305, 308 (D.C. Cir. 1955) ("any agent who accepts service must be shown to have been authorized to bind his principal by the acceptance of process"), *United States v. Marple Cmty. Record, Inc.*, 335 F. Supp. 95, 101 (E.D. Penn. 1971) ("[f]or service of process to be valid upon an agent, it must be shown that he was actually appointed by the defendant for the specific purpose of receiving process."). Consequently, Commerce's proffered construction of its regulation is inconsistent with the stated purpose of its rule: to "give notice of certain requirements to *each* interested party from whom the Department requests information." *Preamble*, 62 Fed. Reg. at 27,333 (emphasis added). Furthermore, because Commerce does not have any other stated policies for how parties may rebut the presumption of state-control, Commerce's reading of its regulation would not provide parties with a meaningful opportunity to rebut its presumption; rather, Commerce's interpretation would convert what is just a rebuttable presumption into a self-fulfilling, though baseless, "fact." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917) ("great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact."); compare *Transcom I*, 182 F.3d at 883 ("we recognized that the presumption is rebuttable, and that a party that is subject to the presumption has a right to attempt to rebut it.") with *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 471 (2000) ("predictions about the outcome of hypothesized litigation cannot substitute for the actual opportunity to defend that due process affords every party against whom a claim is stated."). Such a result would render the presumption arbitrary, and accordingly, not in accordance with law.

Moreover, sending information on how to rebut the presumption of state-control only to MOFCOM, then treating the non-responsiveness of companies that did not receive the request for information as proof that they are state-controlled, is not a reasonable means of obtaining the sought after information. Companies that are not state-controlled are the least likely to have any relationship with

---

[14] This does not appear to be the rationale adopted by Commerce in its determination. *See* Decision Memo, P.R. Doc. 1763, Pl.'s Ex. 14 at 4.

MOFCOM. Therefore, equating non-responsiveness with being under the authority of MOFCOM makes little sense.

Furthermore, judicial acceptance of Commerce's presumption rests, in part, on the notion that the parties themselves will have the best information to disprove state-control. *See Sigma Corp. v. United States*, 117 F.3rd 1401, 1406 (Fed. Cir. 1997). Therefore, the companies, not MOFCOM, would be in the best position to proffer this evidence. However, Commerce's method does not seek this information from the parties by directly notifying them of this information request. Consequently, Commerce's proposed method of notifying parties would be contrary to a key justification for the presumption.

Nor is Commerce's interpretation consistent with its past practice. *Cf. Marseilles Land & Water Co. v. FERC*, 345 F.3rd 916, 920 (D.C. Cir. 2003). In only three determinations cited by Commerce and Defendant-Intervenor has Commerce exclusively relied upon MOFCOM to inform parties of the Section A Questionnaire; in all other instances, Commerce has explicitly noted that it sent the questionnaires to all parties for whom it had information.[15] In at least

---

[15] Compare *Polyethylene Retail Carrier Bags from the People's Republic of China*, 69 Fed. Reg. 3,544, 3,545 (Dep't Commerce Jan. 26, 2004) (notice of preliminary determination of sales at less than fair value) ("*Retail Carrier Bags*")(noting that Section A Questionnaires were sent "to all of the producers/exporters named in the petition and to the exporters who comprise the top 80 percent of exporters in terms of quantity imported" and resending letters to parties that did not respond); *Certain Color Television Receivers from the People's Republic of China*, 68 Fed. Reg. 66,800, 66,801 (Dep't Commerce Nov. 28 2003) (notice of preliminary determination of sales at less than fair value, postponement of final determination, and affirmative preliminary determination of critical circumstances) (noting that Commerce sent questionnaires to MOFCOM requesting it forward the questionnaires on, and courtesy copies to the Chinese Chamber of Commerce, "to all companies identified in U.S. customs data as exporters of the subject merchandise during the POI with shipments in commercial quantities," *and* companies identified by domestic industry in the petition); *Garlic*, 67 Fed. Reg. at 51,823 (noting that Commerce would deem non-Hong Kong companies non-responsive because they had failed to reply to the questionnaire even though they had received questionnaires); *Certain Automatize Replacement Glass Windshields from the People's Republic of China*, 66 Fed. Reg. 48,233, 48,233 (Dep't Commerce Sept. 19, 2001) (notice of preliminary determination of sales at less than fair value) ("*Windshields*") ("the Department issued a questionnaire requesting volume and value of U.S. sales information to the Embassy of the PRC and to the Ministry of Foreign Trade and Economic Development, and sent courtesy copiesto the following known producers/exporters of subject merchandise identified in the petition . . . and notified the PRC Government that it was responsible" for other companies for whom Commerce did not have information); *Certain Folding Gift Boxes from the People's Republic of China*, 66 Fed. Reg. 40,973, 40,975 (Dep't Commerce Aug. 6, 2001) (notice of preliminary determination of sales at less than fair value) (noting questionnaires had been sent to all producers/exporters listed in the petition *and* the Chinese Government and further requested assistance in delivering the questionnaires); *Certain Preserved Mushrooms from the People's Republic of China*, 63 Fed. Reg. 41,794, 41,794 (Dep't Commerce Aug. 5, 1998) (notice of preliminary determination of sales at less than fair value and postponement of final determination) (sending questionnaires to the Chinese Chamber of Commerce, the Ministry of Foreign Trade and Economic Cooperation ("MOFTEC") (MOFCOM's predecessor), *and* a courtesy copies to producers/exporters); *Freshwater Crawfish Tail Meat from the People's Republic of China*, 62 Fed. Reg. 14,392, 14,392 (Dep't Commerce March 26, 1997) (notice of preliminary determination of sales at less than fair value) (noting a) the non-responsiveness of MOFTEC; b) that questionnaires

one case, Commerce specifically cited the fact that the interested party had received the questionnaire before faulting the party for failing to timely respond. *See Garlic*, 67 Fed. Reg. at 51,823.

Commerce's position is further undermined by its own practice *in this case*. Commerce sent the initial Q&V Questionnaires, and the Section A Questionnaires intended for the mandatory respondents, directly to the parties notwithstanding Commerce's presumption. Significantly, Commerce addressed the letter accompanying the Q&V Questionnaire "to all interested parties." Letter from Robert A. Bolling, Program Manager, Group III, Office IX, to All Interested Parties, P.R. Doc 139, Pl.'s Ex. 4 (Dec. 30, 2003); *see also* Letter from Robert Bolling, Program Manager Enforcement Group III, Office 9, to Spiro Kwan, Decca Furniture Ltd., P.R. Doc. 448, Pl.'s Ex. 6 at 1 (Feb. 26, 2004) ("It is the Department's goal to make every effort to ensure that *all interested parties* have an opportunity to respond. . . .") (emphasis added). Such practices are inconsistent with viewing MOFCOM as the spokesperson or agent of all companies operating in China. Rather, these practices evidence the fact that Commerce has recognized that parties qualify as interested parties, and act outside of the control of the Chinese government, before these parties have submitted information to rebut the presumption of state-control.[16]

---

were sent to MOFTEC and all parties for which it had addresses; and c) that Commerce included instructions to MOFCOM to forward the questionnaire); with *Certain Ball Bearings and Parts Thereof from the People's Republic of China*, 67 Fed. Reg. 63,609, 63,609 (Dep't Commerce Oct. 15, 2002) (notice of preliminary determination of sales at less than fair value and postponement of final determination) (which may have relied upon MOFTEC to send questionnaires); *Certain Non-Frozen Apple Juice Concentrate from the People's Republic of China*, 64 Fed. Reg. 65,675, 65,676 (Dep't Commerce Nov. 23, 1999) (notice of preliminary determination of sales at less than fair value) ("*Apple Juice*") (sending questionnaires to "identified producers/exporters through their counsel or through the China Chamber (with copies to MOFTEC and the Embassy of the PRC), and requested that they assist in distributing it to all exporters who might request separate rates."); *Bicycles from the People's Republic of China*, 60 Fed. Reg. 56,567, 56,567 (Dep't Commerce Nov. 9, 1995) (notice of preliminary determination of sales at less than fair value) ("*Bicycles*") (sending original questionnaires to MOFTEC, and two Chambers of Commerce). The court should note that *Bicycles* pre-dated Commerce's current rules. The court further notes that foreign governments are separately stated as being interested parties to antidumping duty investigations. 19 U.S.C. § 1677(9)(B). Additionally, the court notes that the myriad difficult approaches demonstrate that Commerce has not deemed its determinations to have precedential effect as to whom questionnaires should be sent. Last the court notes that these are just the determination cited by Commerce and Defendant-Intervenor.

[16] To the extent Commerce's reading of Decca's status is correct, Commerce's position would be even more problematic. Given that Decca would not have been an "interested party," 19 C.F.R. § 351.301(c)(2)(ii) would not apply. Therefore, only 19 C.F.R. § 351.301(b) would be the appropriate method of submitting this information. Any procedural rule requiring parties to request a Section A Questionnaire from Commerce, or MOFCOM, is not a possible reading of the 19 C.F.R. § 351.301(c)(2)(ii) requirement that the Secretary provide a written request for said information. Therefore, any such required procedure would have to be separately stated in the Federal Register to have any force or effect (even if it is a consistent policy of Commerce). Freedom of Information Act, 5 U.S.C. § 552(a)(1).

Accordingly, the court that finds that Decca is an "interested party" within meaning of Section 351.301(c)(2)(ii).

B.

Alternatively, Commerce alleges that its reliance on MOFCOM to redirect the Section A Questionnaires to interested parties was reasonable. More specifically, Commerce alleges that MOFCOM has been reliable in the past, and that some parties in this case responded to the questionnaire even though they did not receive it directly from Commerce,[17] and therefore relying on MOFCOM to deliver the questionnaires was reasonable. Decision Memo, P.R. Doc. 1763, Pl.'s Ex. 14 at 4; *but see, e.g., Preliminary Determination*, 69 Fed. Reg. at 35,313, 35,321 (noting that the government of China was non-responsive); *Saccharin From the People's Republic of China*, 67 Fed. Reg. 79,049, 79,050 (Dep't Commerce Dec. 27, 2002) (notice of preliminary determination of sales at less than fair value) (same); *Certain Cased Pencils from the People's Republic of China*, 67 Fed. Reg. 2402, 2403 n.1 (Dep't Commerce Jan, 17, 2002) (preliminary results and recision in part of antidumping duty administrative review) (noting frustration with the Chinese government's lack of cooperation).

Commerce's regulations, however, require it to send written requests *to* interested parties. Although this language may not require Commerce to provide actual notice of a request for information, *Dusenbery v. United States*, 534 U.S. 161, 166, 170 (2002) (interpreting a similarly worded statutory provision coextensive with the Due Process Clause), *but cf.* Freedom of Information Act, 5 U.S.C. 552(a)(1), *Static Random Access Memory Semiconductors from Taiwan*, 63 Fed. Reg. 8909, 8919 (Dep't Commerce Feb. 23, 1998) (notice of final determination of sales at less than fair value) ("*Taiwan Semiconductors*"), the means Commerce employs must nonetheless be reasonably calculated under the circumstances to provide actual notice, *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296–97 (1953); *cf. Memphis Light, Gas & Water Div. v. Craft* , 436 U.S. 1, 13 (1978) (citing *Mullane v. Central Hanover Bank*, 339 U.S. 306, 314 (1952)).

---

[17] Neither Commerce nor Defendant-Intervenor offer a single citation indicating that this is a relevant factor; indeed, this argument has been implicitly rejected in all the cases cited by the court. To the extent that such a factor could be relevant, probabilities, rather than raw numbers, would be the relevant figures. *Cf. Dusenbery v. United States*, 534 U.S. 161, 179 (2002) (Ginsberg J. dissenting); *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.). Commerce has failed to substantiate why it deems MOFCOM to be reliable. Courts do "not defer to the agency's conclusory or unsupported suppositions." *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004) (citing *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), especially where the Supreme Court has found that such means of providing notice, where other means are available, is facially unreasonable.

In this case, Commerce's method of notice was not reasonably calculated to provide parties with actual notice of the filing requirements. Commerce relied on an organ of the Chinese government to notify parties, i.e., MOFCOM. The Supreme Court has held that reliance on government instrumentalities to provide notice to interested parties, where the government instrumentality is not required to retransmit notice onto the interested parties, does not create a reasonable probability of providing actual notice. *Wuchter v. Pizzutti*, 276 U.S. 13, 24–25 (1928), *Koster v. Automark Indus., Inc.*, 640 F.2d 77, 81 n.3 (7th Cir. 1981) ("a statutory provision is not reasonably calculated to provide notice unless its terms relating to the sending of notice are mandatory"); *cf. Howard v. Jenny's Country Kitchen, Inc.*, 223 F.R.D. 559, 565–66 (D. Kan. 2004) (canvassing extensive authority on this question). This rule has been consistently applied even where the service occurs in a foreign country. *See Koster*, 640 F.2d at 81 n.3, *De la Mata v. Am. Life Ins. Co.*, 771 F. Supp. 1375, 1386–87 (D. Del. 1991), *aff'd* 961 F.2d 208 (3rd Cir. 1992) (unpublished table decision), *Boivin v. Talcott*, 102 F. Supp. 979, 80–81 (N.D. Ohio 1951); *cf. Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 709–10 (1989) (Brennan, J. concurring), *Ma v. Continental Bank N.A.*, 905 F.2d 1073, 1076 (7th Cir. 1990). As the court in *Koster v. Automark* explained, "[t]hat the [foreign government] as a matter of practice may exercise its discretion to serve process in some reasonable manner is not dispositive, since '[t]he right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion.' " *Koster v. Automark Industries, Inc.*, 640 F.2d at 81 n.3 (quoting *Roller v. Holly*, 176 U.S. 398, 409 (1900)); *cf. Pencils*, 67 Fed. Reg. at 2402 n.1. Accordingly, Commerce's reliance on MOFCOM as its method of providing notice is not supported by established jurisprudence.

In addition, it is axiomatic that Commerce may not exercise its authority in an arbitrary or capricious manner. *See, e.g., Tung Mung Dev. Co. v. United States*, 354 F.3d 1371, 1378 (Fed. Cir. 2004). This is especially true where Commerce itself has stated that it *must* do something. *Preamble*, 62 Fed. Reg. at 27,333, *Taiwan Semiconductors*, 63 Fed Reg. at 8,919 (explaining Commerce's questionnaire policy). This principle is clearly broad enough to apply when Commerce requests other parties to act on its behalf. Consequently, if Commerce's method of notice relied on no more than MOFCOM's "favor or discretion," Commerce's actions here cannot be in accordance with law. Just as "[i]t is rudimentary administrative law that [agency] discretion as to substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking," *Bennett v. Spear*, 520 U.S. 154, 174 (1997), it is also rudimentary that discretion as to substance does not license an agency to adopt an arbitrary or capricious procedure.

In this case, MOFCOM does not appear to have acceded to any responsibilities in retransmitting the information onto Hong Kong corporations. Nor did Commerce even request MOFCOM to forward the Section A Questionnaire on to third parties. *Cf. supra* at note 15. Consequently, Commerce's method of providing notice in this case was not more than a "mere gesture . . . [not] one desirous of actually informing the" party of its procedural rules. *Mullane v. Central Bank of Hanover*, 339 U.S. 306, 315 (1950); *cf. Pencils*, 67 Fed. Reg. at 2403 n.1.

Consequently, the court finds that Commerce's reliance on MOFCOM as a means of getting questionnaires to interested parties was not reasonable. Accordingly, Commerce's actions did not comply with its own regulations.

C.

Commerce argues, as a fallback position, that even if Decca was not provided notice by MOFCOM, it still should have known of the Section A Questionnaire because previous determinations have made reference to Section A Questionnaires. *Cf. City of West Covina v. Perkins*, 525 U.S. 234, 237 (1999). Commerce's argument is not that the Section A requirement is stated or implied by its regulations, but rather, that Decca was required to deduce the Section A requirement through recourse to Commerce's prior determinations. This argument is unpersuasive.

First, in light of Commerce's unambiguously declared policy to provide direct notice, it is at best unclear why a party should have felt any need to canvass through Commerce's prior determinations. *Cf. Parsons v. United States*, 670 F.2d 164, 166 (Ct. Cl. 1982) ("It is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with law and *governing regulations*. . . .") (emphasis added); *Marseilles Land & Water Co. v. FERC*, 345 F.3d 916, 920 (D.C. Cir. 2003).[18] Nor did Commerce's letter accompanying the Q&V Ques-

---

[18] Furthermore, the Freedom of Information Act, 5 U.S.C. § 552(a)(1)(C) requires agencies to either *separately state* their *rules of procedure* in the Federal Register or provide parties with actual and timely notice of such rules. *United States v. Aarons*, 310 F.2d 341, 348 (2d Cir. 1965); *Hoenig Plywood Corp. v. United States*, 51 Cust. Ct. 336, 347 (1963) *Neighborhood Legal Servs, Inc. v. Legal Servs., Corp.*, 466 F. Supp. 1148, 1153–54 (D. Conn. 1979) (discussing the Freedom of Information Act's amendments to 5 U.S.C. § 552(a)(1)). According to the legislative history:

> Since the [APA] leaves wide latitude for each agency to frame its own procedures, this subsection requiring agencies to state their organization and procedures in the form of rules is essential for the information of the public. The publication must be kept up to date. The enumerated classes of informational rules must also be separately stated so that, for example, rules of procedure will be separate from rules of substance, interpretation or policy. . . . The requirement that no one shall 'in any manner' be required to resort to unpublished organization or procedure protects the public from being required to pursue remedies that are not generally known.

tionnaire provide notice that something more than a Q&V Questionnaire response was required. The letter stated that submitting a Q&V Questionnaire did not "guarantee[ ] [Decca] a separate rate status." Letter from Edward Yang, Office Director, AD/CVD Enforcement Group III to Liu Danyang, Director, Bureau of Fair Trade for Imports and Exports, Re: *Antidumping Duty Investigation of Wooden Bedroom Furniture from the People's Republic of China*, P.R. Doc. 140, Pl.'s Ex. 3 at 1 (Dec. 30, 2003). Commerce reads this language as placing parties on notice that they had to fill out different forms to qualify for a separate rate. This is, perhaps, a reading of this language. However, a better reading is that Commerce was reserving the right to request additional information. After all, the disclaimer also noted that parties would not necessarily be chosen as mandatory respondents — that language did not suggest, however, that parties *could* not be so chosen, and, in fact, some parties were chosen; likewise, the disclaimer did not state that the Q&V Questionnaire submission could not be sufficient for an interested party to qualify for a separate rate. Especially where Commerce requested Q&V Questionnaire responses directly from the parties, there is no apparent reason why a party should have felt that it must undertake the responsibility for determining what additional information was required without receiving direction from Commerce. *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296–97 (1953).

Second, the cited determinations do not undermine Decca's reasonable expectation that Commerce would follow its declared policies. In all but three determinations cited by Commerce and Defendant-Intervenor, Commerce took efforts to send questionnaires *directly* to the parties. *See supra* at note 15.

Third, although Commerce claims that the Section A Questionnaire is required to qualify for a separate rate, Commerce concedes that its "determinations do not specifically state that Section As are required in all future cases, but reflect the standard presumption that the PRC rate will apply unless a party presents sufficient *evidence* to rebut that presumption." Def.'s Supp. at 10. In fact, the determinations cited by Commerce have little information on how foreign owned companies qualify for separate rates. This is problematic for Commerce's argument, especially because "no separate rate analysis is required for these exporters." *Bicycles*, 61 Fed. Reg. at 19,027. Furthermore, Commerce has relied upon information other than Section A Questionnaires to determine which parties qualify for

---

S. Rep. No. 752 at 198 (Nov. 19, 1945); *see also id*. ("The section has been drawn [based] upon the theory that administrative operations and procedures are public property which the general public, rather than a few specialists or lobbyists, is entitled to know or to have the ready means of knowing with *definiteness* and *assurance*.") (emphasis added); *see also* U.S. Dep't of Labor, Office of Administrative Law Judges, ATTORNEY ENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947) (2005), *http://www.oalj.dol.gov/public/apa/refrnc/ag02.htm* (Section 3(a)).

separate rates. *See, e.g.*, *Garlic*, 67 Fed. Reg. at 51,823 (Dep't Commerce Aug. 9, 2002) ("*Garlic*")(relying, in large measure, on a Q&V questionnaire to determine separate rate status); *Saccharin From the People's Republic of China*, 67 Fed. Reg. 79,049, 79,050 (Dep't Commerce Dec. 27, 2002) (referring to a company's, Kaifeng's, response to its Section A Questionnaire as "unsolicited"); *Apple Juice*, 64 Fed. Reg. at 65,676 (relying on a "questionnaire concerning quantity and value of sales of [apple juice], and company structure, ownership, and affiliations ('separate rates questionnaire[.]')"); *cf. Petroleum Wax Candles From the People's Republic of China*, 68 Fed. Reg. 53,109, 53,109 (Sept. 9, 2003) (notice of preliminary partial rescission of antidumping administrative review) ("*Wax Candles*") (requiring both Section A and Q&V questionnaire responses to be eligible for a separate rate); *Windshields*, 66 Fed. Reg. at 48,235 (faulting parties for failing to respond to Commerce's quantity and volume questionnaire in deeming them nonresponsive and granting a Canadian company a separate rate because "it has provided information indicating that its PRC supplier does not have knowledge that its sales to TCGI are destined for the United States.").[19]

In fact, in *Garlic*, it appears that Commerce found that a Hong Kong company qualified for a separate rate on the sole basis of its mailing address even though the party had failed to respond to Commerce's questionnaire. *Garlic*, 67 Fed. Reg. at 51,823; Decision Memo, P.R. Doc. 1763, Pl.'s Ex. 14 at 2.[20] Indeed, Commerce has

---

[19] In *Wax Candles*, it is unclear what method of notice Commerce used to inform interested parties of the Section A Questionnaire. The determination makes explicit that it provided individual notice of its Q&V Questionnaire to parties listed in the notice of initiation. *Wax Candles*, 68 Fed. Reg. at 53,109.

[20] Commerce and Defendant-Intervenor attempt to distinguish *Garlic*. They argue that Commerce in *Garlic* applied the PRC-wide rate to Hong Kong companies who failed to respond to Commerce's questionnaire.

Commerce appears to employ a two-prong test in assigning a separate rate. First, Commerce determines whether an interested party is state-controlled. If Commerce finds that an interested party is not state-controlled, Commerce then must decide what its rate should be. *See Transcom II*, 294 F.3d at 1382.

Applying this approach in *Garlic*, Commerce first found that non-responsive companies with Hong Kong mailing addresses qualified for a separate rate. *Garlic*, 67 Fed. Reg. at 51,823 ("Wo Hing (H.K.) Trading Co. (Wo Hing) has an address in Hong Kong and did not respond to our January 8, 2002, request for information. Without any information concerning its corporate ownership, we presume that it is a Hong Kong entity. Thus, we determine that it qualifies for a company-specific rate."); *see also id.* at 51,825. Next, Commerce had to choose a rate. Because "[t]he only rate that has ever been assigned in this proceeding is 376.67 percent . . . we preliminarily determine that the rate of 376.67 percent should be used as the adverse facts available for the preliminary results of review for Golden Light, Phil-Sino, and Wo Hing." *Id.* According to the approach in *Garlic*, Commerce should have found that Decca qualified for a separate rate and then decided what the rate should have been. In this case, Commerce did not do this. Of, and to the extent, Commerce attempts to equate its presumption of state-control with an adverse facts determination, the court must note that this Court has repeatedly held "that a party must be given a reasonable opportunity to respond to Commerce's requests." *Shandong Huarong Mach. Co. v. United States*, 29 CIT ____ , Slip Op 05–54, at 8 (May 2, 2005).

maintained throughout these proceedings that its practice is "discretionary." Def.'s Supp. at 6. Accordingly, there is no reason to conclude that Decca should have known of the Section A requirement during the stage of the investigation at issue here.

D.

Finally, Defendant-Intervenor and Commerce, to a lesser extent, argue that Decca was required to make inquiries of Commerce's procedures if it did not know what was required of it. Specifically, Defendant-Intervenor cites to the *Notice of Initiation* which provides contact information for inquires relating to the investigation. Therefore, the Defendant-Intervenor asserts that Decca was required to inquire of Commerce's procedures in order to later complain of a procedural irregularity. This argument is problematic.

First, this analysis implies that Commerce may ignore its own procedural rules, and, so as long as a party does not make an inquiry, that party cannot later complain of procedural defects. This result would only create perverse incentives for Commerce and run counter to basic notions of due process, i.e., that agencies must follow their rules. Moreover, such an approach would also require parties to persistently inquire of Commerce regarding its procedures lest Commerce change its procedures mid-investigation or depart from its regulations, and the party be without recourse because it failed to inquire. Commerce could not possibly want this result. *Cf. Az. Grocery v. Atchison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 389–90 (1931); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 665–68, 678–80 (1996).

Second, this requirement is counter to federal policy. The Freedom of Information Act ("FOIA") requires the publication of agency rules of procedure in the Federal Register. 5 U.S.C. § 552(a)(1).[21] Those

---

That this was a preliminary determination is irrelevant as the final determination incorporated by reference this finding. *Fresh Garlic from the People's Republic of China*, 68 Fed. Reg. 4,758, 4,758–59 (Dep't Commerce Jan. 30, 2003) (final results of antidumping duty administrative review and rescission of administrative review in part) ("We have not received any information since the issuance of the Preliminary Results that provides a basis for reconsideration of these determinations.").

[21] Although Commerce may claim exemption from certain generally applicable administrative laws, 19 U.S.C. § 1677c (exempting "hearings" from the requirements of the Administrative Procedure Act), there is no indication that Commerce has an exemption from the FOIA requirements that Commerce promulgate or publish it rules and procedures. *See Hoenig Plywood Corp. v. United States*, 51 Cust. Ct. 336, 347 (1963). This is especially true when Commerce expects parties to come forward to challenge a presumption on their own initiative in a specific manner and at a specific time. Even if the FOIA is not directly binding upon Commerce, is does evidence the reasonably feasible and customary alternatives. *Goldhofer Fahrzeugrwerk GmbH & Co. v. United States*, 885 F.2d 858, 860 (Fed. Cir. 1989). Contrary to Decca's claim, however, any effort Commerce has made to rectify its failure to publish such a rule, since its determination in this case, by itself, is not relevant. *See Dusenbery*, 534 U.S. at 172. However, the court does note for the sake of posterity that Com-

rules must be *separately stated*, i.e., not part of determinations. *Id*. Under the FOIA, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not *in any manner be required to resort to*, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id*. (emphasis added). Requiring parties to resort (unless explicitly directed) to contacting Commerce would violate the express terms of the Act. Although Decca may not have been as diligent as Defendant-Intervenor claims it should have been, Commerce has failed to comply with (or publish) notice of its rules in the Federal Register. In weighing who should bear liability as between an agency or an interested party in such a situation, Congress has determined that the agency must bear liability. *Cf. Morton v. Ruiz*, 415 U.S. 199, 232 (1974) ("The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations."). Accordingly, Defendant-Intervenor's argument must fail.

Third, requiring Decca to inquire would also be counter to the Supreme Court's holding in *New York v. New York, N. H. & H. R. Co.*, 344 U.S. 293, 296 (1953). In that case, New York City complained that its liens on certain properties were improperly destroyed in a Federal bankruptcy proceeding. The governing statute required the bankruptcy judge to provide "reasonable notice" of any filing deadlines. Although the bankruptcy court alerted some parties by direct mail of the deadline, it informed other known parties, including New York City, through publication in newspapers. New York, unaware of the filing deadlines, missed its opportunity to protect its liens. Although New York City had actual knowledge of the bankruptcy proceedings, the Court held:

> Nor can the bar order against New York be sustained because of the city's knowledge that reorganization of the railroad was taking place in the court. The argument is that such knowledge puts a duty on creditors to inquire for themselves about possible court orders limiting the time for filing claims. But even creditors who have knowledge of a reorganization have a right to assume that the statutory "reasonable notice" will be given them before their claims are forever barred. When the judge ordered notice by mail to be given the appearing creditors, New York City acted reasonably in waiting to receive the same treatment.

---

merce has now published a protocol: *Separate Rates and Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries*, 70 Fed. Reg. 17,233 (Dep't Commerce Apr. 5, 2005).

Id. at 297. In this case, not only did Commerce mail the Q&V Questionnaires directly to the parties, Commerce was required to do more than provide "reasonable notice" — it was required to send written requests *to* the parties. Accordingly, it was certainly not inappropriate for Decca to rely on Commerce to follow its published rules of procedure. *Cf. Transcom, Inc. v. United States*, 24 CIT 1333, 1343, 123 F. Supp. 2d 1372, 1381 (2000) ("Indeed, it would be anomalous to expect a member of the industry to inquire whether the agency is aware of the applicable statutes, regulations and pertinent case law, or whether the agency actually meant to make the unambiguous statement it made."). That the *statute* in *New York, N. H. & H. R. R. Co.* required "reasonable notice," as opposed to Commerce's *regulation* in this case, is of no consequence. As courts have long held, "[i]t is well established that there is a presumption that public officers perform their duties correctly, fairly, in good faith, and in *accordance with law and governing regulations*[.]" *Parsons v. United States*, 670 F.2d 164, 166 (Cl. Ct. 1982) (emphasis added), *Transcom I*, 182 F.3d at 882; *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3–4 (D.C. Cir. 1987); *see also infra* at note 11.[22]

Last, in this case, Commerce imposed a February 23, 2004 deadline for all Section A Questionnaires. This deadline was well in advance of the deadline for the completion of the preliminary investigation and before Commerce even sent its rejection letter to Decca regarding Decca's Q&V Questionnaire submission. Therefore, no reason existed why, in February, Decca should have felt it was necessary to inquire of Commerce regarding Commerce's procedures. Moreover, this argument misses a crucial purpose of Section 351.301(c)(2)(ii) other than providing notice of the deadlines and required forms: to inform parties of the consequences for their failure to proffer the sought after information.

* * *

The court appreciates the difficulty Commerce faces in identifying, and corresponding with, companies in non-market economies. But these difficulties do not justify Commerce's decision to reject Decca's submissions in the posture of this case. First, Commerce cannot claim that it could not locate Decca; Commerce did have Decca's contact information on file before it sent the Section A Questionnaires. *Cf. Dusenbery*, 534 U.S. at 177 (Ginsburg, J. dissenting) (citing cases); *Schroeder v. City of New York*, 371 U.S. 208, 212–13 (1962) ("The general rule that emerges from the *Mullane* case is that notice

---

[22] Nor does this court's decision in *Cathedral Candle*, 27 CIT ____ , 285 F. Supp. 2d 1371, 1378 (2003), counsel anything to the contrary. In that case, the "Defendants were not required by either [the governing statute] or any other law to personally notify [affected parties] of the [law] and its effects." *Id.* In contrast, in this case, Commerce's regulations required it to provide notice to each interested party.

by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question."). Second, Commerce has voluntarily assumed the obligation to send questionnaires to all interested parties. *Cf. Transcom I*, 182 F.3d at 882–83 (holding that due process, by itself, does not require Commerce to provide notice to every party so long as Commerce follows its clearly stated rules on where and when it will provide notice); *Goldhofer*, 885 F.2d at 860 (same). As an alternative, Commerce could have established deadlines, and identified the requisite submissions, through publication in the Federal Register. The publication of precise deadlines would limit Commerce's flexibility; however, Commerce would also not be required to send individual notice. In choosing to provide individual notice, Commerce has traded convenience for flexibility — it must take the bitter with the sweet in this trade-off. Third, interested parties are not divested entirely of responsibility should an error in transmitting a questionnaire occur. As the court held in *Transcom II*, a party must submit something before the close of the investigation to secure its right to complain of a procedural irregularity. *Transcom II*, 294 F.3d at 1379–80. This rule provides the necessary safety valve so that Commerce can make a final conclusive determination without being perpetually bombarded by new parties claiming that they were not properly noticed of procedural requirements, while, at the same time, recognizing the interests of parties to be informed of the procedural rules. Fourth, as a balance of equities, Commerce has not maintained that it would be unreasonable, or unfair, to require it to consider Decca's evidence in light of the circumstances of this case. Memo from Holly Kuga, Acting Deputy Assistant Sec'y, Group II, Imp. Admin., to Troy H. Cribb, Acting Assistant Sec'y for Imp. Admin., Re: *Issues and Decision Memorandum for the Sixth Administrative Review of Steel Wire Rope from Korea*, (Aug. 7 2000) *available at* http://ia.ita.doc.gov/frn/summary/korea-south/00–20556–1.txt (because of available personnel at Commerce, allowing respondent an opportunity to submit an untimely questionnaire response when the party had changed address and therefore had not received the questionnaire).

CONCLUSION

For the foregoing reasons the court remands this case to Commerce for reconsideration consistent with this decision. In its remand determination Commerce may reopen the record and may find a) that Decca received actual and timely notice of the Section A Questionnaire requirement, b) that the evidence Decca presented does not satisfy the evidentiary requirements for a separate rate, or c) that Decca is entitled to a separate rate. Commerce shall have until October 21, 2005 to issue a remand determination. Parties' com-

ments shall be due by November 7, 2005. Rebuttal comments shall be due by November 21, 2005.

IT IS SO ORDERED.

Slip Op. 05-101

BEFORE: SENIOR JUDGE NICHOLAS TSOUCALAS

CARGILL CITRO-AMERICA, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 03-00348

[Plaintiff's motion for summary judgment is granted. Defendant's cross-motion for summary judgment is denied.]

Dated: August 23, 2005

Neville Peterson LLP (*John M. Peterson*) for Cargill Citro-America, Inc., plaintiff.
Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney-in-Charge, International Trade Field Office, *Mikki Graves Walser*, Commercial Litigation Branch, Civil Division, United States Department of Justice; of counsel: *Chi S. Choy*, Office of the Assistant Chief Counsel, Bureau of Customs and Border Protection, for the United States, defendant.

OPINION

TSOUCALAS, Senior Judge: Plaintiff, Cargill Citro-America, Inc. ("Cargill") moves pursuant to USCIT R. 56 for summary judgment on the ground that there is no genuine issue as to any material facts. Cargill argues that its claim for substitution unused merchandise drawback with respect to certain exported frozen concentrated orange juice for manufacturing ("FCOJM") should be granted. The Bureau of Customs and Border Protection ("Customs")[1] cross-moves for summary judgment seeking an order dismissing the case. Customs argues that the drawback claim was properly denied.

JURISDICTION

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

---

[1] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See Homeland Security Act of 2002*, Pub. L. No. 107-296, § 1502, 116 Stat. 2135 (2002); *Reorganization Plan for the Department of Homeland Security*, H.R. Doc. No. 108-32 (2003).

STANDARD OF REVIEW

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

DISCUSSION

I. Factual Background

Cargill is a United States importer, producer, and exporter of citrus products, including FCOJM. *See* Compl. ¶ 5. On May 30, 1997, Cargill filed a claim for substitution unused merchandise drawback, pursuant to 19 U.S.C. § 1313(j)(2) (1994), with the Customs Drawback Center in San Francisco. *See* Compl. ¶ 6. The claim covered 8,422,861 single strength liters ("SSL") of FCOJM which Cargill exported to China, South Korea and Japan between December 31, 1996, and April 30, 1997. *See* Compl. ¶ 7. A portion of the drawback claim, 3,733,072 SSL, was based on FCOJM imported by The Coca Cola Company under Consumption Entry No. 032-0197172-2, on September 8, 1994. *See* Def.'s Opp'n Pl.'s Mot. Summ. J. Cross- Mot. Summ. J. ("Customs' Mem.") Ex. 2. On March 7, 1997, Cargill received from The Minute Maid Company ("Minute Maid"), a division of The Coca Cola Company, the 3,733,072 SSL of FCOJM. *See* Pl.'s R. 56(i) Statement Material Facts Not Dispute ("Cargill's Facts") ¶ 5. The delivery of this FCOJM was documented by a certificate of delivery issued by Minute Maid on September 8, 1997 ("Minute Maid CD"). *See* Customs' Mem. Ex. 2. The 3,733,072 SSL of FCOJM was not the same merchandise which had been imported on September 8, 1994. *See* Cargill's Facts ¶ 8; Customs' Mem. Ex. 2.

On August 31, 1999, San Francisco Customs requested information and records from Minute Maid with respect to the Minute Maid CD. *See* Customs' Mem. Ex. 2. In response, Minute Maid submitted documents showing that it had transferred commercially interchangeable FCOJM imported in 1997 to Cargill along with drawback rights originating from FCOJM it had imported in 1994. *See id*. San Francisco Customs believed that a "'double substitution' occurred when Cargill subsequently exported its domestic substituted FCOJM and designated the 1994 imports listed in the certificate of delivery." Customs Mem. Ex. 3. Accordingly, San Francisco Customs sought internal advice from Customs Headquarters because it be-

lieved that substitution occurred at the time Minute Maid delivered the FCOJM to Cargill in March 1997. *See id.*

On February 12, 2002, Customs Headquarters issued Headquarter's Ruling Letter ("HQ") 228706 directing the San Francisco Port Director to deny Cargill's drawback claim. *See* Cargill's Facts Ex. B. On February 27, 2002, the drawback claim at issue was liquidated and drawback with respect to the duty-paid on the 3,733,072 SSL of FCOJM was denied. *See* Compl. ¶ 11. Cargill timely filed a protest claiming that it could perfect its drawback claim. *See* Compl. ¶ 12. In May 2003, Customs denied Cargill's protest and Cargill commenced the present action. *See* Compl.

II. Statutory Background

Under the relevant drawback statute, Customs will fully repay, less one percent, the amount of duties paid upon goods previously imported into the United States and used in the manufacture or production of "commercially interchangeable" merchandise which is subsequently exported or destroyed. *See* 19 U.S.C. § 1313(j)(2). Prior to exportation or destruction, however, the merchandise may not be used within the United States and such merchandise must be in the possession of the party claiming a drawback. *See* 19 U.S.C. § 1313(j)(2)(C). Moreover, the drawback claimant must have "received from the person who imported and paid any duty due on the imported merchandise a certificate of delivery transferring to the party the imported merchandise, commercially interchangeable merchandise, or any combination of imported or commercially interchangeable merchandise. . . ." Id.

To be eligible for drawback, the claimant must demonstrate compliance with 19 C.F.R. pt. 191 (1997), which sets forth provisions applicable to all drawback claims. A "drawback claim" is defined under Customs' regulations as "the drawback entry and related documents required by [the] regulations which together constitute the request for drawback payment." 19 C.F.R. § 191.2(i). Pursuant to Customs' regulations, a party seeking to export merchandise with drawback rights under 19 U.S.C. § 1313(j) must file a completed entry summary. *See* 19 C.F.R. § 191.141(b). The claimant must identify the import entry, as well as the date and port of entry. *See id.* The claimant is also required to certify that the merchandise was in the same condition as when it was imported and not used within the United States prior to exportation or destruction. *See id.* Transfers of the merchandise "shall be documented by certificates of delivery (see § 191.65)." *Id.* A claimant must file Customs Form 331 ("CF 331"), entitled "Manufacturing Drawback Entry and/or Certificate," when the merchandise exported or destroyed was not imported by the drawback claimant. *See* 19 C.F.R. § 191.65(a). In such instances, the drawback claimant's CF 331 "must describe the merchandise delivered, tracing it from the custody of the importer to the custody of the

manufacturer." *Id*. Furthermore, "[i]f the merchandise was not delivered directly from the importer to the manufacture, each intermediate transfer shall be described on" the CF 331. 19 C.F.R. § 191.65(b).

On April 6, 1998, new regulations took effect with respect to the transfer of imported merchandise on which duty had been paid. *See* 19 C.F.R. § 191.10 (1998). Under the new regulations, if the importer, pursuant to 19 U.S.C. § 1313(j)(2), transfers to another party imported merchandise, commercially interchangeable merchandise or any combination thereof, then the transferor must record the transfer by issuing to the transferee a certificate of delivery covering the transferred merchandise. *See* 19 C.F.R. § 191.34(b). Moreover, the certificate of delivery "must expressly state that it is prepared pursuant to 19 U.S.C. § 1313(j)(2)." *Id*. The regulations provide that each transfer of the imported merchandise, commercially interchangeable merchandise, or combination thereof "must be documented by its own certificate of delivery." *Id*. The certificate of delivery must, *inter alia*, include the import entry number and provide a description of the merchandise delivered to the party asserting a drawback claim. *See* 19 C.F.R. § 191.10. The regulations state that the certificate of delivery documents the transfer of the merchandise, identifies "such merchandise or article as being that to which a potential drawback exists." *Id*. Furthermore, the certificate of delivery documents the assignment of such right to the transferee. *See id*.

III. Contentions of the Parties

A. Cargill's Contentions

Cargill contends that Customs, in HQ 228706, improperly denied its substitution unused drawback claim. *See* Pl.'s Mem. P. & A. Supp. Mot. Summ. J. ("Cargill's Mem.") at 12-21. Cargill asserts that HQ 228706 denied its drawback claim because the Minute Maid CD did not contain an endorsement required by 19 C.F.R. § 191.34 (1998), indicating that the certificate of delivery was prepared pursuant to 19 U.S.C. § 1313(j)(2). *See id*. at 12; *see also* Pl.'s Mem. P. & A. Opp'n Def.'s Cross-Mot. Summ. J. ("Cargill's Reply") at 2. Cargill maintains that its drawback claim was not denied because of a failure to establish the chain of custody of the merchandise cited in the certificate of delivery. *See* Cargill's Reply at 6-7. Cargill argues that the requirement imposed by 19 C.F.R. § 191.34 is inapplicable because the regulation becameeffective on April 6, 1998, after Cargill filed the drawback claim presently at issue. *See* Cargill's Mem. at 12. Cargill maintains that "[i]t is well established that a substantive regulatory requirement of general applicability cannot be imposed until rulemaking proceedings have been conducted and completed pursuant to the Administrative Procedure Act. . . ." *Id*. at 13. The 1998 regulation does not state that it will be applied retroactively and does not provide for its retroactive application. *See id*. at 14. The endorsement required by the 1998 regulation, Cargill argues, cannot

be required of a certificate of delivery issued prior to the promulgation of the regulation. *See id.* Cargill further asserts that HQ 228706 is not entitled to any deference because "it does not take into consideration the fact that the Minute Maid CD and the drawback claim at bar were filed in 1997, nearly a year before . . . 19 C.F.R. § 191.34 entered into force." *Id.* at 20 (emphasis omitted).

Cargill maintains that its drawback claim must be assessed under the law that existed when it was filed and when the underlying documents were issued. Here, the Minute Maid CD and the drawback claim were events completed before 19 C.F.R. § 191.34 was enacted. *See id.* at 17-18. Cargill argues that imposing the endorsement requirement of 19 C.F.R. § 191.34 retroactively would deprive it of the benefit of the claim it had filed before the new regulation was enacted. *See id.* at 18. Cargill also notes that in a response to San Francisco Customs' inquiry, Minute Maid provided information and documents indicating that the certificate of delivery was provided to Cargill pursuant to 19 U.S.C. § 1313(j)(2). *See id.* at 18-19. Accordingly, Customs was aware that the merchandise Minute Maid delivered was commercially interchangeable with the merchandise in the designated import entries listed on the certificate of delivery. *See id.*

In the alternative, Cargill argues that if 19 C.F.R. § 191.34 did apply to its drawback claim, then Cargill satisfied Customs' regulations by submitting an application for "perfection" in accordance with 19 C.F.R. § 191.52(b)(4) (2002). *See* Cargill's Mem. at 21-25. Cargill submitted an amended certificate of delivery from Minute Maid which was identical to the previously submitted certificate except that it also contained the endorsement required by 19 C.F.R. § 191.34. *See id.* at 21. Cargill maintains that the amended certificate of delivery did not constitute an amendment of the claim. *See id.* at 22. Rather, the amended certificate was "a timely perfection which may properly be submitted beyond the time for filing the [drawback] claim itself." *Id.* at 22.

Cargill also argues that it was not required to provide Customs with "intermediate certificates of delivery documenting the entire chain of custody of the imported merchandise designated in the claim." Cargill's Reply at 9. Customs never requested that Cargill provide any certificates of delivery other than the Minute Maid CD. *See id.* at 9. Cargill contends that a certificate of delivery does not necessarily demonstrate the entire chain of custody because "[i]f the issuer of the [certificate of delivery] received the imported merchandise from another person who paid the duty, it is not required to provide copies of earlier [certificates of delivery]." *Id.* at 11. Moreover, a certificate of delivery does not necessarily document the transfer of the imported merchandise. *See id.* at 12. Under 19 U.S.C. § 1313(j)(2), the merchandise transferred may be commercially in-

terchangeable with the imported merchandise designated on the certificate. *See id.*

Cargill asserts that any issues that arise from the Minute Maid CD are "the government's own making, and results from Customs' shoddy administration of the drawback statute." Cargill's Reply at 14. Congress amended the substitution unused merchandise drawback statute, effective December 8, 1993, yet Customs failed to amend its regulations to conform with those changes until more than four years later. *See id.* Under the applicable regulations, Cargill asserts that it was not required to file the Minute Maid CD as part of its drawback claim, but rather it was furnished by Cargill upon a request by Customs. *See id.* at 16-17. Accordingly, Cargill contends that it adhered to the 1997 regulations and cooperated with Customs once its drawback claim had been submitted. *See id.*

B. Customs' Contentions

Customs first responds that HQ 228706 is entitled to deference because it was consistent with the drawback statute and Customs' regulations. *See* Customs' Mem. at 7. Customs also contends that Cargill's assertion, that its drawback claim was denied because the Minute Maid CD lacked an endorsement, pursuant to 19 C.F.R. § 191.34 (1998), is irrelevant. *See id.* at 9-10. Rather, Customs argues that the drawback claim "was denied because the certificate of delivery misrepresented the merchandise that was delivered to Cargill by Minute Maid." *Id.* at 10. Accordingly, Customs maintains that Cargill's drawback claim with respect to 3,733,072 of FCOJM was properly denied. *See id.* at 10-13.

Customs asserts that under 19 U.S.C. § 1313(j)(2), Cargill was required to have "a certificate of delivery documenting the transfer of either the imported duty-paid merchandise or the commercially interchangeable merchandise." Def.'s Reply Pl.'s Mem. Opp'n Def.'s Cross-Mot. Summ. J. ("Customs' Reply") at 3 (emphasis omitted). Customs maintains that the Minute Maid CD certified that the FCOJM imported in 1994 was delivered to Cargill in 1997, although the merchandise which was actually delivered to Cargill was imported in 1997. *See* Customs' Mem. at 10. Customs argues that the central purpose of the certificate of delivery "is to demonstrate the chain of custody of the merchandise identified thereunder." *Id.* The regulations, according to Customs, have "consistently explained that the certificate of delivery must describe the imported merchandise and trace its custody from the importer to the manufacturer, including all intermediate transfers." *Id.* at 6. Customs argues that Cargill failed to submit a certificate of delivery that properly documented the chain of custody. *See id.* Furthermore, Customs maintains that pursuant to 19 U.S.C. § 1313(j)(2), "the merchandise identified in the certificate of delivery was required to be exported or destroyed." Customs' Reply at 4. Here, the merchandise Cargill exported was not

the merchandise received from Minute Maid; rather, it was other domestically produced FCOJM. *See id.* Accordingly, Customs contends that Cargill's drawback claim was properly denied because the certificate of delivery was fatally inaccurate. *See id.* at 4- 7.

III. HQ 228706 is Not Entitled to *Skidmore* Respect

As a preliminary matter, the Court finds that HQ 228706 is not entitled to *Skidmore* respect. In *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), the Supreme Court set forth the factors a reviewing court is to consider in determining how much weight an agency's decision is to be afforded. The amount of respect an agency's decision is afforded by a court "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Id.* The power to persuade of each Customs' ruling may vary depending on the *Skidmore* factors articulated in *United States v. Mead*, 533 U.S. 218 (2001). *See Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1370 (Fed. Cir. 2004).

Applying these factors to the case at bar, the Court finds that HQ 228706 fails to exhibit a thorough, well reasoned and consistent pronouncement of the Customs laws and regulations applicable at the time Cargill submitted its drawback claim. Specifically, HQ 228706 fails to properly apply the regulations applicable at the time Cargill filed its drawback claim. The analysis Customs offered in HQ 228706 solely applies Customs regulations which were enacted subsequent to Cargill's submission of the claim at issue. *See* Cargill's Facts Ex. B. The 1998 regulations, however, do not indicate that they were to be applied retroactively. *See* 19 C.F.R. pt. 191 (1998). Customs argues that "inasmuch as Cargill's drawback claim was not denied because of a lack of 'endorsement,' [which the 1998 regulations require,] these arguments are irrelevant. . . ." Customs' Mem. at 9-10. The Court, however, finds the denial of Cargill's drawback claim, because it lacked an endorsement pursuant to 19 C.F.R. § 191.34, highly relevant. HQ 228706 fails to demonstrate how the law cited applies to Cargill's drawback claim, which was filed before the regulations took effect. The 1998 regulations took effect April 6, 1998, and, therefore, are inapplicable to Cargill's drawback claim, which was filed on May 10, 1997. *See* Compl. ¶ 6.

Customs' regulations will not be given retroactive effect unless such treatment is called for in the language of the regulation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). The general rule disfavoring retroactivity applies to administrative regulations. *See Shakeproof Assembly Components Div. of Ill. Tool Works, Inc. v.*

United States, 24 CIT 485, 492, 102 F. Supp. 2d 486, 492, 493 (2000). The Court recognizes that Customs has specialized experience which can aid the Court in its review of issue at hand, *see Mead*, 533 U.S. at 234, and that such rulings are entitled to "a respect proportional to [their] 'power to persuade.'" *Mead*, 533 U.S. at 235 (quoting *Skidmore*, 323 U.S. at 140). In the case at bar, the Court finds that HQ 228706 lacks those qualities which would give it the power to persuade. The Court has an independent responsibility to apply the law when rulings, such as HQ 228706, lack thoroughness of consideration and valid reasoning. Accordingly, the Court finds that, contrary to Customs' contention, HQ 228706 is not entitled to *Skidmore* respect.

IV. Customs Improperly Denied Cargill's Substitution Unused Merchandise Drawback Claim

The Court finds that Cargill's substitution unused drawback claim was improperly denied by Customs. Pursuant to 19 U.S.C. § 1313(j)(2)(C), a drawback claimant must have imported merchandise or have received from the importer, who paid any duty on the imported merchandise, a certificate of delivery transferring to the claimant the imported merchandise, commercially interchangeable merchandise, or any combination thereof. The transferred merchandise is treated as the imported merchandise and, upon exportation or destruction of such merchandise, drawback shall be refunded. *See id*. To qualify for drawback, Cargill was required to receive from Minute Maid a certificate of delivery documenting the transfer of the merchandise, commercially interchangeable merchandise or a combination thereof. *See id*. Furthermore, Cargill was required under the 1997 regulations to submit a certificate of delivery recording the transfer of merchandise between Minute Maid and Cargill. *See* 19 C.F.R. § 191.141(b). The Court finds that Cargill fulfilled its statutory and regulatory obligations and, therefore, is entitled to substitution unused merchandise drawback.

Customs concedes that Cargill followed its statutory and regulatory obligations to timely submit a certificate of delivery with its drawback claim. *See* Customs' Mem. at 10. Customs argues, however, that Cargill's drawback claim was fundamentally flawed because the certificate "misrepresented the merchandise that was delivered to Cargill by Minute Maid." *Id*. Customs maintains that 19 U.S.C. § 1313(j)(2)(C)(ii)(II) required the Minute Maid CD to document the transfer of either the imported duty-paid merchandise or the commercially interchangeable merchandise. *See* Customs' Reply at 3. The Court finds, however, that Customs arguments are flawed and without merit. The Minute Maid CD identifies FCOJM imported in 1994 under Consumption Entry No. 032-0197172-2 by the parent company of Minute Maid. *See* Customs' Mem. Ex. 2. The merchandise transferred by Minute Maid to Cargill was commercially inter-

changeable merchandise that had been imported in 1997. *See id*. The statute provides that a party claiming drawback pursuant to 19 U.S.C. § 1313(j)(2) does not have to receive, from the issuer of the certificate of delivery, the merchandise identified in the certificate of delivery. Rather, a claimant may receive commercially interchangeable merchandise or a combination of the imported merchandise and commercially interchangeable merchandise. *See* 19 U.S.C. § 1313(j)(2).

The certificate of delivery reflects the transfer of imported merchandise or commercially interchangeable merchandise or a combination thereof. *See id*. Under the 1997 regulations, the certificate of delivery had to identify the imported merchandise because the commercially interchangeable merchandise did not have drawback rights independently of the imported merchandise. Consequently, failing to identify the imported merchandise on the certificate of delivery would cause Customs to reject a drawback claim because there would be no indication from which merchandise drawback rights arose. If Cargill's drawback claim solely identified the 1997 merchandise it received from Minute Maid, then Cargill would not have been entitled to unused substitution merchandise drawback. The merchandise imported in 1994 and not in 1997 had drawback rights attached thereto. Consequently, Cargill could not have pursued a drawback claim with respect to the 1997 imported merchandise. If the certificate of delivery had not identified the 1994 merchandise, then Customs would have denied drawback. The Court finds that the 1997 regulations and 19 U.S.C. § 1313(j)(2) did not require Cargill to identify the 1997 merchandise on the Minute Maid CD.

The present case exemplifies the situation whereby Customs failed to update its regulations subsequent to the amendment of a statute. In 1993, 19 U.S.C. § 1313 was amended to allow for substitution drawback. Customs, however, failed to amend its regulations to conform with the 1993 statutory amendments until after Cargill's drawback claim was filed with Customs. *See* 19 C.F.R. § 191.34 (1998). The regulations in place at the time of Cargill's claim did not require Cargill to identify the commercially interchangeable merchandise which had been substituted for the imported merchandise.[2] The statute required Cargill to receive from the person who paid duties on the imported merchandise a certificate of delivery for the imported merchandise or commercially interchangeable merchandise. Here,

---

[2] The Court notes that Customs amended CF 331 in 2001, subsequent to Cargill's drawback claim, to allow the issuer of the certificate of delivery to indicate that commercially interchangeable merchandise and not the imported merchandise had been delivered to another party. *See* Cargill's Reply Ex. B. Prior to the amended CF 331, the issuer of the certificate of delivery was unable to indicate that, pursuant to 19 U.S.C. § 1313)j)(2), the merchandise delivered was not the imported, duty-paid merchandise but rather commercially interchangeable merchandise. *See* Customs' Mem. Ex 2.

the Court finds that the certificate of delivery was valid because it identified the imported merchandise which formed the basis of Cargill's drawback claim.

Customs argues that the Minute Maid CD misrepresented that the merchandise transferred to Cargill was commercially interchangeable merchandise imported in 1997 and not the merchandise imported in 1994. *See* Customs' Mem. at 10. A drawback claim, however, does not solely consist of a certificate of delivery. Rather, a "drawback claim" consists of "the drawback entry and related documents required by [the] regulations which together constitute the request for drawback payment." 19 C.F.R. § 191.2(i). Here, Customs may not convincingly assert that it did not know that the merchandise delivered to Cargill was commercially interchangeable merchandise imported in 1997. On August 31, 1999, Customs requested information from Minute Maid relating to the Minute Maid CD. *See* Customs' Mem. Ex. 1. In its response dated November 24, 1999, Minute Maid provided Customs with the requested information and documents. *See* Customs' Mem. Ex. 2. The documents indicate that the FCOJM delivered to Cargill was not merchandise imported in 1994 but rather was commercially interchangeable merchandise imported in 1997. *See id*. Accordingly, Customs knew that the merchandise identified on the Minute Maid CD was commercially interchangeable merchandise and not the 1994 FCOJM. The Court finds that Customs improperly relied on the 1998 regulations in denying Cargill's drawback claim and that the Minute Maid CD was not improperly completed. Consequently, Cargill is entitled to duty drawback on 3,733,072 SSL of FCOJM imported under the cover of Consumption Entry No. 032-0197172-2.

CONCLUSION

The Court finds that Customs improperly denied Cargill's drawback claim with respect to 3,733,072 SSL of FCOJM. HQ 228706 is not entitled to *Skidmore* respect because it lacks the power to persuade. The Court finds that the neither the statute nor Customs regulations required Cargill to identify the 1997 merchandise on the Minute Maid CD because such merchandise did not form the basis for its claim. Accordingly, the Court concludes that Cargill's drawback claim was not fatally inaccurate and should have been granted. Cargill's motion for summary judgment is granted and Customs' cross-motion for summary judgement is denied.

Slip Op. 05-102

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

Before: Pogue, Judge
Court No. 03-00828

JUDGMENT

In *Norsk Hydro Canada, Inc. v. United States*, 29 CIT___ , Slip Op. 05-58 (May 17, 2005), this court remanded Commerce's determination in *Pure Magnesium and Alloy Magnesium from Canada*, 68 Fed. Reg. 53,962 (Dep't Commerce Sept. 15, 2003) (final results of countervailing duty administrative review) to " 'review and determine the amount of any net countervailable subsidy,' and specifically [to] 'ensure that the amount of the countervailing duty imposed is equal to the amount of the countervailable subsidy." ' *Norsk Hydro Canada, Inc.*, 29 CIT at ___ , Slip Op. 05-58 at 2 (quoting 19 U.S.C. § 1675(a) and *Norsk Hydro Canada, Inc. v. United States*, 28 CIT ___ , 350 F. Supp. 2d 1172, 1864 (2005)). On July 18, 2005, Commerce issued a remand determination complying with the court's instructions.

After reviewing Commerce's remand determination, the parties' comments and the rebuttals thereto, and all other papers on file herein, and good cause appearing therefore, it is hereby

ORDERED that the Department of Commerce's remand determination is sustained.