Slip Op. 06–103

PS CHEZ SIDNEY, L.L.C., Plaintiff, v. UNITED STATES INTERNATIONAL TRADE COMMISSION, and UNITED STATES CUSTOMS SERVICE, Defendants, and CRAWFISH PROCESSORS ALLIANCE, *et al.*, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 02–00635

[Plaintiff's Motion for Summary Judgment is Partially Granted and Partially Denied; Defendant's Counter Motion for Summary Judgment is Partially Granted.]

Dated: July 13, 2006

Wolff Ardis, P.C., (*William E. Brown*) for Plaintiff, PS Chez Sidney, L.L.C.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Jeanne E. Davidson*, Deputy Director; *David S. Silverbrand* and *Paul D. Kovac*, Trial Attorneys, U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Michael Diehl*, Attorney-Advisor, Office of the General Counsel, United States International Trade Commission; for Defendant, United States.

Adduci, Mastriani & Schaumberg, LLP, (*Will E. Leonard*), for Defendant-Intervenors, Crawfish Processors Alliance, Bob Odom, Commissioner, the Louisiana Department of Agriculture and Forestry.

Sonnenschein, Nath & Rosenthal, (*Michael A. Bamberger*), for Amicus INA USA Corporation. *Arnold & Porter, LLP*, (*Michael T. Shor* and *Claire E. Reade*), for Amicus Giorgio Foods Inc. *Collier, Shannon, Scott, PLLC* (*David A. Hartquist*), for Amicus Committee to Support U.S. Trade Laws.

OPINION

Wallach, Judge:

I
Introduction

This case arises out of an effort by Plaintiff, PS Chez Sidney, L.L.C., ("Chez Sidney") a Louisiana seafood producer, to be included

in payments to the domestic crawfish industry under the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA").[1]

The court here considers[2] the constitutionality[3] of the CDSOA, which requires the government to pay moneys collected as anti-

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[1] The Byrd Amendment, Pub. L. No. 106–387, § 1003, 114 Stat. 1549, 1623 (2000), codified at 19 U.S.C. § 1675c.

[2] The parties have raised a number of other issues in their competing motions. Plaintiff initially filed a Motion For Preliminary Injunction which it then incorporated into a Motion For Summary Judgment. Both sought to compel the U.S. International Trade Commission ("ITC") and the U.S. Customs Service ("Customs") to add Plaintiff to the group of affected domestic producers potentially eligible for distribution of collected duties, and to enjoin Customs from distributing the duties. Defendant filed a Counter Motion for Summary Judgment pursuant to USCIT R. 56.1. In its initial Motion and during discussions with the court, Plaintiff's counsel raised the issue of its First Amendment Claim. Complaint ¶ 27. The court requested further briefing on that issue, and eventually, also sought the filing of amicus briefs. This Opinion disposes of all issues raised by the parties in those motions.

[3] Plaintiff's other grounds, briefed in its pending Motion for Summary Judgment, lack sufficient support pursuant to USCIT R. 56. There remain no other grounds for determining its Motion than the First Amendment claims stated in its Complaint. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343–44, 119 S. Ct. 765, 142 L. Ed. 2d 797 (1999) ("[I]f a case can be decided on either of two grounds, one involving a constitutional, the other a question of statutory construction or general law, the Court will decide only the latter.") (citing *Ashwandes v. TVA*, 297 U.S. 288, 347, 56 S. Ct. 466, 80 L. Ed 688 (1936)).

Plaintiff raised two non-constitutional arguments in its initial Motion For Summary Judgment: 1) that the ITC's reliance on the final questionnaire response was arbitrary and capricious "because the final questionnaire response was not signed, was not certified by an authorized official as complete and correct, did not contain the 'name of the establishment(s) covered by this questionnaire,' did not indicate that the 'x' in the 'Take no position' box was ever authorized or submitted by Chez Sidney Seafood," and 2) that "the ITC misinterpreted the Byrd Amendment by determining that "the initial 1996 questionnaire response did not satisfy the support requirement.

Its first argument fails for waiver because the issue was never raised at the administrative level. The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for consideration before raising them to the court. *Timken Co. v. United States*, 24 CIT 434, 459, 201 F. Supp. 2d 1316 (2002). The court may nonetheless excuse parties from exhausting their administrative remedies in cases where certain exceptions are found. *FAG Kugelfischer Georg Schafer AG v. United States*, 25 CIT 74, 82, 131 F. Supp. 2d 104 (2001) (internal citations omitted). Chez Sidney, however, has not argued that any of them apply. As it stands, its factual claim must fail because it has consistently represented that it, or its predecessor, Chez Sidney Seafood, Inc., did in fact submit the final questionnaire. In the proceedings related to Chez Sidney's Motion for Preliminary Injunction, Chez Sidney affirmatively indicated that it has submitted the questionnaire and that it had checked the box marked "Take no position." Specifically, Chez Sidney stated: "[T]he USITC records show that PS Chez Sidney's predecessor submitted two questionnaire responses, one with the box checked 'Support' and one with the box checked 'Take No Position.' " Motion for Preliminary Injunction at 6. Chez Sidney further affirmed that "[t]he questionnaire shows that Chez Sidney checked the box marked 'Take no position' instead of the box marked 'Support.' " Motion for Preliminary Injunction at 2, 6. Chez Sidney's Complaint also affirms that it marked the "Take No Position" box and submitted the final questionnaire. Complaint at ¶21 (stating that "[Chez Sidney] . . . had no knowledge or information that checking the "Take no position" box instead of the "Support" box in the May 5, 1997 Questionnaire would result in denial of eligibility for a distribution of antidumping duties.") These admissions authoritatively refute Chez Sidney's present claim that the final questionnaire response was somehow an unauthorized expression of its position.

As to Plaintiff's second argument, the ITC attempted to resolve the factual question of whether Chez Sidney indicated support for the subject petition. In doing so, it looked to the

dumping duties to any affected U.S. domestic producer, a status defined, in part, as "a petitioner or interested party in support of the petition with respect to which" an antidumping or countervailing duty order has been entered. 19 U.S.C. § 1675c(b)(1)(a) (2000) ("support provision"). At issue is nonpayment to a member of the domestic industry which declined to support the petition.[4]

The court must decide whether the Plaintiff has standing to raise this constitutional challenge to the Government's refusal to pay it a *pro rata* share of antidumping duties collected as a result of the final affirmative injury determination for the dumping of freshwater crawfish tail meat from China. *Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 41,347 (August 1, 1997) as amended by *Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 48,218 (September 15, 1997) ("*Final Determination*"). The Government initially argued that Plaintiff lacked standing to challenge the support provision's constitutionality because Chez Sidney declined to support the petition three years before the CDSOA was enacted. Defendant United States Customs Service Supplemental Brief in Support of the Constitutionality of the [CDSOA] ("Customs Supplemental Brief") at 11. At oral argument, the Government abandoned that position, but continued to maintain Plaintiff lacked standing as to all future injury that might occur as a result of additional distributions or sunset reviews.[5]

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two questionnaires and gave weight to Chez Sidney's latest expressed position during the investigation. As in *Armstrong Bros. Tool Co. v. United States*, 84 Cust. Ct. 102, 489 F. Supp. 269 (1980), Chez Sidney here "essentially challenge[s] discretionary findings by the [ITC]." *Id.* at 113. In *Armstrong Bros.*, the Customs Court stated: [I]t is not the function of the court in reviewing an injury determination of the Commission under the Antidumping Act to weigh the evidence or substitute its judgment for that of the Commission." *Id.*

[4] Plaintiff also challenges the determination on a factual basis, alleging that it should be permitted to reopen the administrative record to submit evidence questioning the validity of the determination that the questionnaire response here at issue constituted a withdrawal of support. Because it fails to allege any of the bases available to permit such supplementation, that portion of Plaintiff's Motion for Summary Judgment must be denied. *Bergeron's Seafood v. U.S. Int'l Trade Comm'n*, 306 F. Supp. 2d 1353 (CIT 2004).

[5] Sunset reviews are five-year reviews pursuant to 19 U.S.C. § 1675(c). They are defined as:

> (c) Five-year review.
>
> (1) In general. Notwithstanding subsection (b) and except in the case of a transition order defined in paragraph (6), 5 years after the date of publication of–
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> (A) a countervailing duty order (other than a countervailing duty order to which subparagraph (B) applies or which was issued without an affirmative determination of injury by the Commission under section 303), an antidumping duty order, or a notice of suspension of an investigation, described in subsection (a)(1),
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> * * *

Given even the limited concession of standing , the court must determine the constitutionality of the support provision. Plaintiff has argued constitutional violations under both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment.[6] Finally, if the court determines that a constitutional violation exists, it must find whether the offending portion of the statute is severable from its remaining provisions.

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i). For the reasons set out below, the court has found a violation of the First Amendment, and severability. In sum, however, the court finds that when, as part of an Act of Congress, the Government distributed benefits that are conditioned on what effectively amounts to political support by an otherwise qualified recipient for governmental action, that support requirement is subject to strict scrutiny under the Constitution. Where, as here, the provision fails that scrutiny, Supreme Court authority renders the requirement facially invalid.

II
The Uncontested Facts of this Case

In 1996, members of the domestic crawfish tail meat industry, represented by the Crawfish Processors Alliance ("CPA") filed an antidumping petition before the U.S. International Trade Commission ("ITC"), alleging that imports of freshwater crawfish tail meat from the People's Republic of China ("PRC") were being sold in the United States at less than fair value and were materially injuring, or threatening material injury to the domestic crawfish industry. *Freshwater Crawfish Tail Meat From the People's Republic of China: Initiation of Antidumping Investigation*, 61 Fed. Reg. 54,154, 54,155 (October 17, 1996).[7]

The ITC initiated an antidumping investigation and issued questionnaires to domestic crawfish producers at both the preliminary and final phases of its investigation.[8] The questionnaires required

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> the administering authority and the Commission shall conduct a review to determine, in accordance with section 752 [19 U.S.C. § 1675a], whether revocation of the countervailing or antidumping duty order or termination of the investigation suspended under section 704 or 734 [19 U.S.C. § 1671c or 1673c] would be likely to lead to continuation or recurrence of dumping or a countervailable subsidy (as the case may be) and of material injury.

[6] Chez Sidney has not formally abandoned its Equal Protection argument but agreed at oral argument that it was entirely subsumed within, and based on, its First Amendment claim.

[7] Chez Sidney Seafood, Inc. (PS Chez Sidney's predecessor) was not a petitioner.

[8] Article 5.4 of the WTO Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("GATT") Antidumping Agreement ("AD Agreement") provides that:

> An investigation shall not be initiated . . . unless the authorities have determined, on the basis of an examination of the degree of *support for*, or *opposition to*, the application ex-

domestic producers to check a box indicating whether they "Support," "Oppose," or "Take No Position" regarding the antidumping petition. Administrative Record ("AR"), Document 65. Chez Sidney checked the box showing its "Support" for the CPA's petition in its October 7, 1996 response to the initial questionnaire. Customs Supplemental Brief at 9–10. On March 26, 1997, the Department of Commerce ("Commerce" or "the Department") published its preliminary determination finding affirmative material injury in its investigation in *Notice of Preliminary Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China*, 62 Fed. Reg. 14,392 (March 26, 1997) ("*Preliminary Determination*").

During the final phase of its injury investigation, the ITC issued a second ITC questionnaire. In its May 5, 1997 response, Chez Sidney answered "Take No Position" to the ITC's support question.[9] Commerce issued its amended Final Determination on September 15, 1997, affirming its findings in the Preliminary Determination. *Final Determination*.

In the interim, the CDSOA was enacted on October 28, 2000. *See* Discussion of CDSOA under Section V *infra*. The parties agree that the primary purpose of providing distributions to affected domestic producers is to remedy effects of injurious dumping and restore free trade.

The ITC took the position that pursuant to the CDSOA, only those producers who check "[s]upport" are considered "affected domestic producers" and are subsequently eligible to file for certification to receive offset distributions under the CDSOA. 19 U.S.C. § 1675c(a)(6) *repealed by* Pub. L. 109–171, Title VII, § 7601(a), 120 Stat. 154 (February 8, 2006).[10] It provided Customs with a list of affected domestic

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pressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is *supported by* those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either *support for* or *opposition to* the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry. (emphasis added).

[9] In its Reply, Plaintiff argued that it actually supported the petition because it had been harmed by the dumped imports of crawfish tail meat. Plaintiff's Reply Brief on First Amendment Issue ("Plaintiff's Reply") at 8.

[10] The United States has taken the position before a World Trade Organization ("WTO") Panel in a dispute settlement proceeding regarding the CDSOA that the CDSOA does not require producers to show injury from dumping or subsidization to receive distributions, that the distribution amount is unconnected to actual injury, and that CDSOA payments can outlast an existing anti-dumping order. Report of Panel WT/DS217/R, WT/DS234/R, September 16, 2002 at ¶ 4.515. While WTO proceedings are neither binding upon nor dispositive for this court, *see Corus Staal BV v. Dep't of Commerce*, 395 F. 3d 1343, 1348 (Fed. Cir. 2005) (citing *Timken Co. v. United States*, 354 F.3d 1334, 1344 (Fed. Cir. 2004)),

producers who could then seek certification for offset distributions for fiscal year 2002. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 67 Fed. Reg. 44,722 (July 3, 2002). The only entity listed in the "Petitioners/Supporters" column for the crawfish antidumping duty order was the CPA. *Id.* at 44,735. Similarly during the previous year on August 3, 2001, Customs published a list of domestic producers which indicated support for the investigation on the ITC questionnaires. *Distribution of Continued Dumping and Subsidy Offset to Affected Domestic Producers*, 66 Fed. Reg. 40,782 (August 3, 2001). Chez Sidney was not included in this list either. *Id.* at 40,796.

On August 19, 2002, Chez Sidney sent a letter to the ITC requesting an offset distribution and status as an affected domestic producer, but was denied because "[t]he final questionnaire response filed by [Chez Sidney] in the original investigation does not indicate support for the petition." Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Defendant's Opposition") at 7 (citing Custom' Appendix at 3,4).

On September 6, 2002, Chez Sidney requested reconsideration for certification as an "affected domestic producer," arguing that its "[s]upport" response in the initial questionnaire satisfied the CDSOA's requirement that a crawfish producer "be an interested party in support of the petition." Defendant's Opposition at 7 (citing Custom's Appendix at 5). The request was denied on September 12, 2002, by the ITC based on Plaintiff's "conflicting statements" regarding support for the petition and because "[t]ake no position" was its "last expressed position during the investigation." *Id.* (citing *Id.* at 6). The ITC "determined that Chez Sidney did not show the requisite support for the petition and declined to add Chez Sidney's name to the list of potential 'affected domestic producers' " and Customs then denied Chez Sidney's certification for offset distributions." Supplemental Brief at 10 (citing Defendant's Appendix at 6, 7).[11]

III
The Procedural Posture of Case

On October 2, 2002, Chez Sidney commenced this action before this court and subsequently filed a Motion For a Preliminary Injunction to enjoin Customs from distributing what Chez Sidney claimed

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positions taken by the United States regarding application of the CDSOA are relevant evidence of facts.

[11] There are a number of contested facts but none seem relevant to disposition of this issue. Defendant claims in its Supplemental Brief at 5 that "the indication of support or non-support for the petition is requested only once during the initial ITC investigation," and again during a five-year sunset review. Later, however, it concedes that Chez Sidney checked the "support" "box in its October 7, 1996 "response to the preliminary phase questionnaire" and checked the "Take no position" box in its May 5, 1997, response "to the ITC's final questionnaire. . . ." *Id.* at 9–10.

was its share of the distribution. On October 31, 2002, Chez Sidney submitted a letter to the clerk of the court requesting that various non-record documents be added to the record. On November 6, 2002, the ITC filed a Motion to Strike the non-record documents, explaining that the statute requires that support for the petition be determined based on indications of support "by letter or through questionnaire response" that are in the record of the ITC. The ITC also noted that the non-record documents proposed by Chez Sidney were created after the filing of the present action, and thus were not before the ITC during the administrative proceeding.

On November 7, 2002, this court heard argument on Chez Sidney's Motion for Preliminary Injunction and the ITC's Motion to Strike. The court orally granted a motion to intervene filed by the CPA and the Louisiana Department of Agriculture and Forestry and Bob Odom, Commissioner. The court denied the Motion to Strike, but ruled from the bench that the case would be based on the administrative record, and that it would disregard the non-record documents. The court denied Chez Sidney's Motion finding it failed to demonstrate irreparable harm. *PS Chez Sidney v. USITC & Customs,* Court No. 02–00635 (November 8, 2002) The court also ordered Chez Sidney to supplement its Motion For Summary Judgment and ordered Defendant to respond within 45 days thereafter.

On November 13, 2002, Chez Sidney moved for an injunction pending resolution of an interlocutory appeal to the Federal Circuit of this court's denial of a preliminary injunction. The Federal Circuit denied the motion. *PS Chez Sidney v. USITC & Customs*, Court No. 03–1071 (Fed. Cir. Dec. 5, 2002) (Order denying Motion to Reconsider Denial of Motion for Injunction). Chez Sidney subsequently filed for re-consideration at the Federal Circuit.[12] On February 27, 2003, the Federal Circuit issued an order granting Chez Sidney's motion to voluntarily dismiss its appeal before the Federal Circuit as moot. *PS Chez Sidney v. USITC & Customs*, Court No. 03–1071 (Fed. Cir. Feb. 27, 2003) (Order granting Motion of PS Chez Sidney, L.L.C. to voluntarily dismiss its appeal as moot).

On January 24, 2003, and January 27, 2003, respectively, the ITC and Customs filed Motions for Judgment Upon the Agency Record. Because the court determined that Chez Sidney's Motion For Summary Judgment and the ITC's and Customs' Motions were integrally intertwined, with the same administrative decisions at the heart of all the briefs before the court, oral argument was set for both motions at the same time.

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[12] Chez Sidney simultaneously filed a motion for an injunction pending appeal with this court. This court denied the motion. *See PS Chez Sidney v. USITC & Customs*, Court No. 02–00635 (December 13, 2002) (Order denying Plaintiff's Motion for Injunction Pending Appeal).

IV
The Relevance of Questionnaires To Antidumping Law

19 U.S.C. § 1671a(b)(1) and 19 U.S.C. § 1673a(b)(1) mandate that countervailing duty and antidumping proceedings be initiated whenever an interested party "files a petition with the administering authority, on behalf of an industry. . . ." *Id.* To demonstrate that the petition is "on behalf" of the domestic industry, both require establishment of minimum levels of support. 19 U.S.C. § 1671a(c)(4)(A) and U.S.C. § 1673a(c)(4)(A) (domestic producers or workers who support the petition must account for at least 25 percent of total production of the total like product and more than 50 percent of the production of the portion of the industry that expressed support or opposition to the petition).[13]

Commerce may issue an antidumping order imposing duties on the imported merchandise. Antidumping orders may be issued when (1) an investigation by Commerce reveals that "a class or kind of merchandise is being, or likely to be" dumped in the United States; and (2) an additional investigation by the ITC determines that "an industry in the United States" is "materially injured" or "threatened with material injury," or "the establishment of an industry in the United States is materially retarded" by imports of that merchandise or sales of that merchandise for import. 19 U.S.C. § 1673. Determination of injury or its threat in a fair and objective manner is a substantial portion of the ITC's mission.[14]

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[13] Whether a petition is brought on behalf of U.S. industry is decided by Commerce, but the ITC data is used by Commerce to decide whether it needs to further poll to determine support. *See* Import Administration, Antidumping Manual, Chapter 1 at 9–10 (1997) http://ia.ita.doc.gov/admanual/admanual (last visited July 12, 2006); *see also* U.S. International Trade Commission, Antidumping and Countervailing Duty Handbook at I–6 (January 2005) ("Handbook"), http://www.usitc.gov/publications/webpubs.htm (last visited July 12, 2006).

The first paragraph of the Uruguay Round Agreements Act Statement of Administrative Action states "[this] bill approves and makes statutory changes required or appropriate to implement the Uruguay Round agreements." Uruguay Round Agreements. Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Rep. No. 103–316, at 807, 810–12 (1994) *as reprinted in* 1994 U.S.C.C.A.N. 4040, 4153–55 ("SAA") at 656 that "[t]he administration intends that Commerce will amend its regulations as necessary to implement the requirements of Article 5.2 of the Antidumping Agreement . . . ," and the Act that it amends 19 U.S.C. § 1673(c) in "a manner consistent with the Agreements." *Id.* at 861–62.

After the implementation of the SAA, 19 U.S.C. § 1673a(c) was amended to include subsection (4), which provides guidelines for a determination of industry support. Now, for an antidumping investigation to be initiated, 1) the producers of workers who support the petition account for at least 25% of the total production of the domestic like product and, 2) those producers and workers that make up at least that 25% must account for more than half of the production of the domestic like product. 19 U.S.C. § 1673a(c)(4)(A)(i) and (ii).

[14] Part of the mission of the ITC is to "administer U.S. trade remedy laws within its mandate in a fair and objective manner." *See* Mission Statement to ITC Strategic Plan (2003–2008); *see also* Transcript of Oral Argument, ("TR") March 12, 2004, at 11. That mandate includes antidumping investigations which must be administered in "a fair and impartial manner." TR at 12.

The ITC conducts a preliminary investigation to determine whether "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded. . . ." 19 U.S.C. § 1673b(a)(1)(A). Following an affirmative finding of harm, Commerce makes a preliminary determination of whether there is a reasonable basis to believe that injury has occurred. *Cf. Jeannette Sheet Glass Corp. v. United States*, 11 CIT 10, 654 F. Supp. 179 (1987).[15]

To make an injury determination, the ITC first defines one or more domestic like products that correspond to the dumped or subsidized imports identified by Commerce and, in turn, identifies the industry or industries producing these like products. *See* 19 U.S.C. § 1671d(b) (countervailing duties); 19 U.S.C. § 1673d(b) (dumped merchandise); *see also Timken Co. v. United States*, 20 CIT 76, 79, 913 F. Supp. 580 (1996) ("[I]n determining whether an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission must first define the 'like product' in order to determine the relevant 'industry.' "). A "domestic like product" is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." 19 U.S.C. § 1677(10). The relevant "industry," in turn, is defined as the "producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product." 19 U.S.C. § 1677(4)(A); *see generally, Caribbean Ispat Ltd. v. United States*, 2006 U.S. App. LEXIS 11065 (Fed. Cir. 2006).

Having identified those classes of products, the ITC then determines whether imports of products falling within the classes identified have caused material injury to the domestic industry which produces those products. 19 U.S.C. § 1673(2); 19 U.S.C. § 1673b(a)(1); 19 U.S.C. § 1677(7).

As one step in determining whether domestic industry is injured, the Government conducts what is in essence a survey among members of the domestic industry. The parties are at odds because the Government views the results of that survey as a fact and not a statement of opinion. Plaintiff, however, argues that the support, or non-support, or take no position questions on the survey invite a statement of opinion. The problem faced by the Government is that whenever members of the public are asked for their opinion they have a constitutional right to hold that view for a myriad of reasons,

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[15] In its Antidumping and Countervailing Duty Handbook, Commerce notes that "[i]f the petition does not establish support of domestic producers or workers accounting for more than 50 per cent of the total production of the domestic like product, Commerce must poll the industry or rely on other information to determine if the required level of support for the petition exists." Handbook at I–6.

only one of which is congruent with the Government's position. The Government and *Amici's* forceful arguments amount to a belief that economic reality indicates industry respondents will act only as rational economic beings. The Government concedes, however, that a respondent might reasonably support or oppose on other bases. That reasonable possibility is enough to render the support provision unconstitutional.

If the Government had only to demonstrate a rational basis for the support provision it could do so. It is rational to believe that there may be some correlation, indeed, quite possibly a high one, between expression of support for a dumping petition and injury to the responder. A higher level of review applies, however, to the expression of a particular point of view, because the distribution of funds is based upon the answer to what is inherently a public policy question.

Thus, the support question in the ITC Questionnaire is itself absolutely necessary to serve a compelling government interest[16] as defined by the WTO Agreement. Its use, however, for determining who receives distribution of government funds is not. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). There are a number of other ways in which the Government might, without more effort than that to which it is already required to go, determine which members of the domestic industry claim they are harmed by foreign dumping or subsidies.

V
The Continued Dumping and Subsidy Offset Act of 2000

The CDSOA was adopted by a House-Senate Conference Committee as an Amendment to a Department of Agriculture appropriations bill.[17]

The parties and *amici*[18] all seem to agree that the CDSOA's legislative history expresses Congressional intent to assist domestic U.S.

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[16] The Government certainly has a compelling interest in determining whether an antidumping investigation complies with the requirements of the WTO agreement.

[17] The CDSOA was enacted as Title X of P.L. 106–387, § 1002, 114 Stat. 1549 (October 28, 2000) codified at 19 U.S.C. § 1675c (2000), and provided, *inter alia*, that Congress found that "actionable subsidies which cause injury to domestic industries must be effectively neutralized . . . " that "small businesses . . . may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable" and that "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." *Id.*

[18] The *amici* to this proceeding are INA USA Corporation ("INA"), Giorgio Foods Inc. ("Giorgio"), and the Committee to Support U.S. Trade Laws ("CSUSTL").

industries injured by foreign dumping and subsidization.[19] Where they differ is in how the remedy is applied, and is, in part, expressed in CSUSTL's argument:

> The CDSOA's legislative history demonstrates that the class of persons Congress intended as the law's beneficiaries were those domestic producers that perceived themselves as harmed *and were concerned enough to want a remedy against dumped and subsidized imports, but had seen that remedy frustrated by continued dumped and subsidized imports.*

Brief of *Amicus Curiae*, The Committee to Support U.S. Trade Laws ("CSUSTL Amicus Brief") at 9 (emphasis added).[20]

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[19] 19 U.S.C. § 1675c (2000) states:

(a) In general

Duties assessed pursuant to a countervailing duty order, an antidumping duty order, or a finding under the Antidumping Act of 1921 shall be distributed on an annual basis under this section to the affected domestic producers for qualifying expenditures. Such distribution shall be known as the "continued dumping and subsidy offset."

(b) Definitions

As used in this section:

(1) Affected domestic producer

The term "affected domestic producer" means any manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that—

(A) was a petitioner or interested party in support of the petition with respect to which an antidumping duty order, a finding under the Antidumping Act of 1921, or a countervailing duty order has been entered, and

(B) remains in operation.

Companies, businesses, or persons that have ceased the production of the product covered by the order or finding or who have been acquired by a company or business that is related to a company that opposed the investigation shall not be an affected domestic producer.

* * *

(d) Parties eligible for distribution of antidumping and countervailing duties assessed

(1) List of affected domestic producers

The Commission shall forward to the Commissioner within 60 days after the effective date of this section in the case of orders or findings in effect on January 1, 1999, or thereafter, or in any other case, within 60 days after the date an antidumping or countervailing duty order or finding is issued, a list of petitioners and persons with respect to each order and finding and a list of persons that indicate support of the petition by letter or through questionnaire response. In those cases in which a determination of injury was not required or the Commission's records do not permit an identification of those in support of a petition, the Commission shall consult with the administering authority to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews conducted by the administering authority under section 1675 of this title.

[20] CSUSTL, for example, quotes Sen. DeWine of Ohio, "[t]hese foreign practices have reduced the ability of *our injured domestic industries* to [compete]. . . " CSUSTL Amicus Brief at 11 (citing 145 CONG. REC. S497 (daily ed. January 19, 1999) (statement of Sen. DeWine)

INA argues that, in fact, the Government has taken the position in appearances before the World Trade Organization that the CDSOA does not require producers to show they were injured to receive distributions. *Amicus Brief* of INA USA Corp. as to First Amendment Issues ("INA Amicus Brief") at 4.[21]

VI
The Issues Currently Before The Court

As will be discussed in depth below, Defendant, at oral argument, at least partially conceded[22] Plaintiff's standing to raise the arguments here discussed. Plaintiff conceded its argument under the Equal Protection Clause. What remain for discussion here, accordingly, are the following questions:

First, has Plaintiff asserted a viable claim that the CDSOA violates the First Amendment? As part of the answer to that question

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(emphasis added); Sen. Byrd of West Virginia, "[c]ontinued foreign dumping and subsidy practices have reduced the ability of *our injured domestic industries* to [compete]. . . " *Id*. (citing 146 CONG. REC. S10697 (daily ed. October 18, 2000) (statement of Sen. Byrd) (emphasis added); and Rep. Nancy Johnson of Connecticut, "[t]he amendment . . . would reduce the adverse effect of continued dumping or subsidization by *distributing the monies finally assessed to the injured industry. Id*. (citing ___ CONG. REC. H9708 (daily ed. October 11, 2000) (statement of Rep. Nancy Johnson) (emphasis added).

Nothing cited by CSUSTL in the legislative history actually stands for the proposition emphasized above. Rather, it seems to indicate that Congress expressed its concern with assisting injured domestic industry. It does *not* express any legislative rationale for distinguishing among harmed members of industries on the basis of whether they wanted a remedy but had seen it frustrated.

[21] In late 2000, one of the final acts of the outgoing 106th U.S. Congress was to pass the Agriculture Spending Bill, P. L. 106–387. Included in that bill, as amendment Title X, Senator Robert Byrd inserted the Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd Amendment"). *See* 146 CONG. REC. S10697. While the CDSOA, originally authored by Senator DeWine of Ohio, was around since early in the 106th Congress, it had failed to gather support. *See* 145 CONG. REC. S497; *see also* 144 CONG. REC. S7883–84 (July 9, 1998) (statement of Sen. DeWine) (introducing the bill). Senator Byrd added the amendment as an unrelated "rider," Title X, to the critical agricultural appropriations bill, instead of handling it through the Ways and Means Committee in the House and the Finance Committee in the Senate, through which subsidies and dumping matters usually travel. *See* 146 CONG. REC. S10697. Thus, the bill was approved without any significant Congressional debate or analysis, resulting in minimal legislative history, save a statement by Senator Nickles questioning why the bill did not go through the normal procedures. *See* 146 CONG. REC. S10732–01 (daily ed. Oct. 18, 2000).

Interestingly, INA, which is a bearing producer, complains in its Amicus Brief, that the CDSOA payments have distorted competition within the domestic industry by providing massive government subsidies to one domestic ball bearing and cylindrical roller bearing producer, which it alleges received 99 per cent of CDSOA payments made to the industry in 2001 and 2002. INA Amicus Brief at 5–6. That company, Timken, is headquartered in Canton, Ohio. *Id*. According to INA, it received the payments through acquisition of the original petitioner the Torrington Company and of MPB. *Id*. at 6, n.5. The Torrington Company is headquartered in Torrington, Connecticut. *Id*.

[22] Defendants still contests Plaintiff's standing as to future standing. The questions has been largely mooted by the repeal of the CDSOA. *See* P.L. 109–171, Title VII, Subtitle F, § 7601(a), 120 Stat. 154 (February 8, 2006).

the court must consider any possible alternative which does not implicate constitutional invalidity of a Congressional act.

Second, is any violative section severable from the entire scheme, or must it fail *in toto*?

Third, in light of the questions above what remedy is available to Plaintiff for any violation found?

The second and third questions need only be reached on ultimate determination of the constitutionality of the CDSOA.[23]

The Parties' arguments on issues related to constitutionality are set forth below.

VII
The Parties' Arguments Regarding Constitutionality

The question of validity of the CDSOA under a First Amendment challenge was extensively briefed both by the parties, and, at the invitation of the court by *amici curiae*.[24] *Amici* INA[25] and Giorgio[26] (collectively referred to as "the Challenging *Amici*"), challenged First Amendment validity but took differing views on severability. Their views were representative of domestic producers which might benefit from a finding that the support requirement was invalid. *Amicus*

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[23] As is indicated in the Conclusion of this Opinion, the court intends to certify the issues raised for appeal by the parties. Upon resolution by the Court of Appeals, it will decide, if necessary, the issues of severability and remedy.

[24] The *Amicus Curiae* briefs were submitted in response to a question posed by the court to potential amici:

> Whether sections 1675c(b)(1)(A) and 1675c(d)(1) of the Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c, violate a party's First Amendment right to free speech where these sections condition eligibility for offset distribution benefits based on an expression of that party's support for an antidumping petition.

Order dated June 18, 2003, instructing INA, Giorgio, and CSUSTL to file Amicus Briefs. The *Amici* have raised several factual assertions *dehors* the record. The court has not considered those assertions as anything other than illustrative of arguments.

[25] INA, according to its Request To File Amicus Brief, dated May 29, 2003, is one of approximately 36 firms in the United States which produce roller bearings and their parts, and of at least 15 firms that produce cylindrical roller bearings. *Id.* at 2. Of those companies only three are eligible to receive ball bearing disbursements, and two to receive cylindrical roller bearing disbursements under the CDSOA. *Id.* All other members of the domestic industry did not express support for the original antidumping and countervailing duty petition in their industry, and are ineligible to receive disbursements. *Id.* INA asserts the distributions have given a competitive advantage to recipients over their domestic competitors who declined to support the petition. *Id.* at 3.

[26] Giorgio's Motion for Leave to File Brief as Amicus Curiae, dated May 29, 2003, asserts that it is the largest U.S. domestic producer of preserved mushrooms. *Id.* at 2. Giorgio was deemed ineligible to receive CDSOA distributions from dumped preserved mushroom imports, it says, because it "did not, check off a box indicating it supported the petitions, even though Giorgio supported the petitions in other ways at the time, and subsequently explicitly advised the ITC of its support for the petitions." *Id.* at 2–3. Thus, asserts Giorgio, it is being denied a government benefit based solely on the viewpoint of its speech before a government agency. *Id.*

the CSUSTL represents domestic entities with an interest in maintaining the constitutional validity of the CDSOA.

A
Arguments Challenging Constitutionality of the CDSOA

Plaintiff and the Challenging *Amici* raised several points attacking the constitutional validity of the CDSOA. They include arguments that the support requirement amounts to compelled speech burdened by unconstitutional conditions, that it involves imposition of a viewpoint-based eligibility requirement for a government subsidy, and that it is an over-broad burden on speech in a limited public forum.

1
Compelled Speech Burdened by Unconstitutional Conditions

Plaintiff and *Amicus* INA argues from a line of Supreme Court cases that the CDSOA constitutes governmentally compelled speech burdened by unconstitutional conditions.

INA begins with the Justice Sutherland's proposition in *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id*. INA cites a number of cases applying that principle to prohibition of government enforced messages.[27] INA identifies as the guiding principle in compelled speech cases the proposition of *Wooley v. Maynard*, 430 U.S. at 714–15. (1977), that the government may not hammer an individual into "an instrument for fostering public adherence to an ideological point of view he finds unacceptable," and that includes "the right to refrain from speaking at all." *Id*.

INA then argues that compelled speech principles apply when the government offers a gratuitous benefit conditioned on the surrender of free speech. Again, INA begins its analysis with Justice Sutherland. In *Frost & Frost Trucking Co. v. Railroad Comm'n of*

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[27] *See, e.g., Elrod v. Burns*, 427 U.S. 347, 355, 965 S. Ct. 2673, 49 L. Ed. 2d 547 (1976) (First Amendment prohibits government discharge of public employee who did not support a political party); *Wooley v. Maynard*, 430 U.S. 705, 713, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977) (unconstitutional to force display of New Hampshire state motto on license plates); and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 576–77, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995) (First Amendment prohibits state forced inclusion in parade of marchers with message with which organizers disagreed).

Calif., 271 U.S. 583, 593, 46 S. Ct. 605, 70 L. Ed. 1101 (1926), INA says, he stated the parameters of the unconstitutional conditions doctrine: "as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights." *Id.* at 593.[28] INA says the Court's view on conditioning benefits on particular speech crystalized in *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972) ("even though the government may deny [a person a valuable government benefit] for any number of reasons . . . [it] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests— especially, his interest in freedom of speech." *Id*[29]

INA draws three "overriding principles" from the unconstitutional conditions cases. INA *Amicus* Brief at 13–14. It says 1) government cannot accomplish indirectly with benefits what it cannot command directly, 2) regulations permitting government discrimination based on content or viewpoint are unconstitutional, and 3) that government could deny the benefit altogether is irrelevant when benefits are conditioned upon relinquishment of First Amendment rights. *Id.*

Thus, concludes INA, because the CDSOA "clearly burdens political speech,"[30] and "is not viewpoint neutral"[31] it must be analyzed under a strict scrutiny analysis (restriction must be narrowly tai-

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[28] INA identifies three decisions following *Frost & Frost* as "firmly establish[ing] the unconstitutional conditions doctrine." *Spieser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (tax exemption limited to veterans signing loyalty oath unconstitutional); *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) (denial of unemployment benefits for refusal to work Sundays unconstitutional); and *Shapiro v. Thompson*, 394 U.S. 618, 89 S. Ct. 1322, 22 L. Ed. 2d 600 (1969) (welfare benefits limited by length of residence requirement penalize right to travel).

[29] INA cites three more recent cases saying they support the unconstitutional conditions analysis of the CDSOA. *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 107 S. Ct. 1722, 95 L. Ed. 2d 209 (1987) (sales tax exemption for certain magazines unconstitutionally conditioned tax status on content discriminating among messages); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990) (conditions of public employment on political affiliations violated First Amendment); and *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001) (government could not condition subsidization of legal aid attorneys on limitation from making of particular arguments).

[30] INA argues, *inter alia*, that "taking a position on the appropriateness of imposing antidumping or countervailing duties on imports potentially involves . . . political issues of the highest order," including protectionism vs. free trade, belief in efficiency of competition, fear of retaliatory trade measures, reduction of marketplace choice, and access to the imports at issue. INA Amicus Brief at 15.

[31] Citing chiefly *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (First Amendment prohibits regulation of speech based on substantive content and government may not favor one speaker over another in private speech). *See also* discussion *infra* Section VII A 2.

lored to serve a compelling governmental interest in the least restrictive manner possible). INA *Amicus* Brief at 15–16 (citing *Republican Party of Minnesota v. White*, 536 U.S. 765, 774–75, 122 S. Ct. 2528, 153 L. Ed. 2d 694 (2002)).[32]

2
Imposition of a Viewpoint-Based Eligibility Requirement For A Government Subsidy

Plaintiff and *Amicus* Giorgio argue that CDSOA distributions constitute a government subsidy, and conditioning eligibility for that subsidy on adherence to a particular viewpoint violates the First Amendment.

Giorgio cites *Perry v. Sindermann*, *supra* and *Rosenberger*, *supra*, for the proposition that "unconstitutional targeting of particular viewpoints is known as 'viewpoint discrimination' and is presumptively unconstitutional." *Amicus Curiae* Brief of Giorgio Foods Inc. ("Giorgio *Amicus* Brief") at 10. Giorgio argues that "viewpoint discrimination is so insidious that it is presumptively invalid," even without application of strict scrutiny. Giorgio Amicus Brief at 11 (citing *Rosenberger*, 515 U.S. at 828–29; *Velazquez*, 531 U.S. at 533; *Baird v. State Bar of Ariz.*, 401 U.S. 1, 7, 91 S. Ct. 702, 27 L. Ed. 2d 639 (1971) (". . . a State may not inquire about a man's views or associations solely for the purpose of withholding a right or benefit because of what he believes.").[33]

Because an exception allows the government to impose its viewpoint when it is the speaker or private parties are promoting the government's message, *Velazquez*, 531 U.S. at 541, Giorgio also argues the exception is inapplicable because the CDSOA targets private speech only and does not provide for any sort of governmental message. Giorgio *Amicus* Brief at 15–16 (citing *Rust v. Sullivan*, 500 U.S. 173, 196 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)).

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[32] Plaintiff argues that the Court in *Rosenberger* and *Velazquez* did not engage in strict scrutiny analysis, and appears to have established a principle that "viewpoint discrimination in awarding subsidies violates the First Amendment without consideration [of strict scrutiny standards]." Brief on First Amendment Issue by Plaintiff PS Chez Sidney, LLC ("Plaintiff's First Amendment Brief") at 7. While the proposition might be considered arguable, this court sees no need to break new ground with that analysis and declines to apply it.

[33] Giorgio claims the CDSOA ties eligibility for distributions "to speech and to one particular viewpoint." Giorgio Amicus Brief at 13. Thus, it says, domestic producers who believe in free trade, those who believe injury is caused by non-import factors, those with overseas interests, and those who wish to keep their views private would all be denied subsidies "solely based on the viewpoint (or absence of viewpoint) of their speech." *Id.* at 14.

3
Overbroad Burden on Speech in a Limited Public Forum

Amicus Giorgio also argues that the ITC investigative process necessarily creates a limited public forum[34] for political speech. Giorgio *Amicus* Brief at 17. This is necessarily so, Giorgio says, because "[t]he ability of individual domestic producers to speak freely, without fear of a governmental penalty . . . is crucial to the ability of [ITC and Commerce] to carry out their statutory functions." *Id.* Although the government needs not create or maintain such a forum, once it does so, Giorgio argues, the government may not impose its own viewpoint or any content based restriction[35] on speech unless it is narrowly drawn to effectuate a compelling state interest. *Id.* (citing *Rosenberger*, 515 U.S. at 829).

Giorgio claims that by creating a direct financial incentive for petition support, the CDSOA distorts viewpoints received by the ITC on an important issue of public policy, and uses the forum created "in an unconventional way to suppress speech inherent in the nature of the medium. . . ." Giorgio Amicus Brief at 20 (citing *Velazquez*, 531 U.S. at 543). The support requirement, Giorgio says, is not narrowly tailored to further a compelling government interest, because its expressed objective is to compensate domestic industry and workers for economic injury, an objective which could be attained without reference to support or opposition to a political question.[36] Giorgio *Amicus* Brief at 21–22.

B
Arguments Supporting Constitutionality of the CDSOA[37]

Defendant United States and *Amicus* CSUSTL attempt to both refute the arguments of Plaintiff and its supporting *Amici*, and raise

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[34] A "limited public forum," Giorgio says, "consists of public property which the state has opened for use by the public as a place for expressive activity." Giorgio Amicus Brief at 17 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)).

[35] Giorgio concedes that content discrimination may be permissible if it preserves the purpose of the limited forum, as opposed to viewpoint discrimination which is presumed impermissible. Giorgio Amicus Brief at 18 (citing *Rosenberger*, 515 U.S. at 830).

[36] Giorgio also argues that the support requirement is unconstitutional regardless of whether the response was made before or after the CDSOA became law. Giorgio Amicus Brief at 23. It cites, *inter alia*, *Baird*, 401 U.S. at 8, for the proposition that the First Amendment generally prohibits inquiry into past views and beliefs to determine current government benefits.

[37] The Government initially raised an argument that Plaintiff lacked standing to assert a First Amendment challenge because the CDSOA was signed into law in 2000, and allegedly had no impact on Chez Sidney's expression in its May 5, 1997 questionnaire response. Supplemental Brief at 11, *et seq.* It abandoned that argument at oral argument, at least as to past damages, although it continued to maintain its claim regarding future harm. *Id.* at 15, *et seq.*

additional arguments in support of their proposition that the CDSOA meets constitutional muster. Those arguments are discussed in summary below.

1
The Spending Clause Endows Congress With Broad Authority In Federal Assistance Programs

The Government and *Amicus* CSUSTL argue that under the Constitution's Spending Clause,[38] Congress is given broad authority to condition receipt of federal funds in order to further policy objectives. Supplemental Brief at 19 (citing *United States v. American Library Assoc., Inc., et al.*, 539 U.S. 194, 203, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003)); CSUSTL Amicus Brief at 26. They say that broad authority was clarified in *United States v. Butler*, 297 U.S. 1, 56 S. Ct. 312, 80 L. Ed. 497 (1936), and incident to it Congress may attach conditions on the receipt of federal funds. Supplemental Brief at 20 (citing *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 171 (1987)); CSUSTL *Amicus* Brief at 26. Accordingly, they claim, the CDSOA's support requirement meets constitutional muster.

The CDSOA proponents then argue that the support requirement has ". . . an important non-speech purpose of . . . designating a class of beneficiaries . . . affected by foreign dumping and subsidization and who actively supported the imposition of antidumping duties."[39] Supplemental Brief at 23. They argue that nothing in the CDSOA prohibits someone from indicating support on the questionnaire while advocating publicly against it.[40] *Id.* at 23–24

Finally, says the Government, the CDSOA is not subject to strict scrutiny, *Regan v. Taxation With Representation of Washington*, 461

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[38] U.S. Const. Art. I, § 8, cl. 1 empowers the Congress to spend money ". . . to provide for the common Defence and general Welfare of the United States."

[39] The CSUSTL also argues, without citation to specific supporting authority, that the Government "has an interest in using funds to support fair trade to mitigate the harms of those who have reinvested despite ongoing unfair trade practices." CSUSTL Amicus Brief at 15. CSUSTL does not explain how the interest differs between harmed domestic industries which have reinvested and supported a petition, and harmed domestic industries which have reinvested and for some reason opposed or did not support a petition.

[40] The Government does concede there are limitations on Congress' discretion to impose conditions under the Spending Clause. Supplemental Brief at 24. And that two of those are "the condition must be related 'to the federal interest in particular national projects or programs,' " and "Congress may not 'induce' the recipient 'to engage in activities that would themselves be unconstitutional." *Id.* (citing *South Dakota v. Dole* at 210).

The Government argues the first condition is met because the "requirement is an efficient and accurate method for the ITC to identify those parties that are most affected by dumping and subsidization. . ." and the second because the support requirement "has nothing to do with the regulation of speech or any other private conduct." *Id.* at 25–26. "By this condition," the Government argues "Congress is simply providing an efficient and accurate avenue to assess those domestic producers most likely affected by foreign dumping and subsidization." *Id.* at 26.

U.S. 540, 547, 103 S. Ct. 1997, 76 L. Ed. 2d 129 (1983), because it does not "burden a fundamental right." Supplemental Brief at 28. It bases that proposition on its arguments above, and those following that it is neither "viewpoint discrimination" nor an "unconstitutional condition." *Id.* Thus, it says, the support requirement need only be "rationally related to a legitimate government interest; a standard "easily satisfied," because it is a "reasonable and rationale[sic] way to select the members of the domestic industry most affected by foreign dumping and subsidization" *Id.* at 28.

2
The Support Requirement Is Not Viewpoint Discrimination

The Government argues Congress may selectively fund domestic producers affected by unfair trade and may define the program's limits. Supplemental Brief at 30 (citing *Rust v. Sullivan*, 500 U.S. at 194). It rests that argument on the proposition that "Congress rationally assumed that domestic producers who did not support the imposition of antidumping duties had no need to share in the total duties collected as a result of the antidumping duty order." Supplemental Brief at 31.[41]

3
The Support Requirement Does Not Burden Speech in A Public Forum

Defendant and CSUSTL both cite *American Library*, 539 U.S. at 204, for the proposition that public forum principles are out of place here because, it says, there is no forum at issue in this case because the ITC questionnaire is exclusively a mechanism for presentation of views to the government. Supplemental Brief at 33; CSUSTL Amicus Brief at 18–19. A designated public forum, says the Government, is created only when it, by fiat, makes an affirmative choice to open up its property for use as a public forum. Supplemental Brief at 34 (citing *Perry Educ. Assn*, 460 U.S. at 46). Because questionnaire responses are afforded proprietary treatment by the ITC, says Defendant, there is simply no forum at issue. *Id.* at 35. CSUSTL, in discussing the same point, argues that "[t]he underlying purpose of the ITC's investigation is not to *facilitate* the expression of diverse views but, rather, to make a discrete inquiry based on record evi-

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[41] Defendant argues that "in determining whether a viewpoint-based restriction exists, the Court must consider the overall purpose of the funding program, specifically whether the Government is expending funds to promote a particular message." Supplemental Brief at 31 (citing *American Library*, 539 U.S. at 213 n.7). Thus, says the Government, since the CDSOA is not attempting to restrict or facilitate certain ideas in public discourse, it could not be engaged in viewpoint discrimination. Supplemental Brief at 32.

dence and pursuant to statutory criteria. CSUSTL *Amicus* Brief at 19 (emphasis in original).[42]

The lack of a forum distinguishes this case from *Rosenberger*, says Defendant, because the CDSOA was not designed to facilitate any kind of speech. Supplemental Brief at 35. Since the spending here is not "aimed at the suppression of dangerous ideas," says the Government, its power to encourage actions in the public interest is far broader.[43] *Id.* at 36 (citing *Regan* 461 U.S. at 550).

The essence, at least, of CSUSTL's *Amicus* Brief on this issue may be found in a footnote. There, CSUSTL argues:

> . . . INA is factually incorrect in arguing that the "support" requirement "penalizes" CDSOA recipients by requiring them to "surrender" or relinquish" their constitutional rights. The CDSOA does not *require* recipients to do *anything—it is simply a spending program wherein Congress has chosen to provide funds to those producers that indicate concern with perceived unfairly traded imports.*

CSUSTL *Amicus* Brief at 23 n.65 (italicized emphasis in original, underlined emphasis added) (internal citations omitted).

4
The Support Requirement Does Not Implicate Political Speech

The Government finds misplaced Plaintiff's and *Amici's* argument that the support requirement extracts political speech from the domestic industry. Political speech, Defendant says, is limited to "speech in connection with the electoral process." Supplemental Brief at 37 (citing *Mills v. Alabama*, 384 U.S. 214, 218–219, 86 S. Ct. 1434, 16 L. Ed. 2d 484 (1966)). Defendant says political speech includes

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[42] At a later point, *amicus* CSUSTL also argues that "the ITC's role, by its very nature, is to reach a determination that advances Government policy, not to debate that policy." CSUSTL Amicus Brief at 22. CSUSTL supports that proposition with no citation to anything other than a naked statutory citation.

[43] The Government here makes an argument the court finds most enlightening in its analysis:

> The CDSOA is not aimed at suppression of dangerous ideas. If Congress sent questionnaires to areas damaged by floods and asked the residents to identify whether they were hurt by the flooding and express support for flood relief by checking "yes," "no," or "take no position," no one would seriously contend that the Government was discriminating on the basis of viewpoint by providing relief only to those persons who checked "yes."

Supplemental Brief at 36.

Defendant does not indicate in its example whether the flood area residents would be asked separate questions as to whether they were hurt, and whether they supported the concept of flood relief. Nor does it explain how the Government would react in its hypothetical if a resident drew an arrow to the yes box to show she was harmed but a no box as to whether she thought flood relief was a good idea.

"discussion of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political process." *Id.* (quoting *Id*). It cites no authority for the proposition that political speech does not include antidumping policy.[44]

5
The Support Requirement Does Not Impose An Unconstitutional Condition On Receipt of Federal Funds

Finally, Defendant and CSUSTL argue no unconstitutional condition arises from the support requirement because "unconstitutional conditions jurisprudence is implicated only when the Government is expending funds to encourage or facilitate views from private speakers. Supplemental Brief at 38 (citing *American Library*, 539 U.S. at 213 n.7); CSUSTL Amicus Brief at 26 *et seq.* Defendant agrees that under the doctrine government may not deny a benefit on a basis that infringes a person's constitutionally protected speech even if he has no entitlement to the benefit. Supplemental Brief at 38 (citing *Board of County Comm'rs v. Umbehr*, 518 U.S. 668, 674, 116 S. Ct. 2342, 135 l. Ed. 2d 843 (1996), but argues its inapplicability based on distinguishing *Speiser*, 357 U.S. at 521; *Perry v. Sindermann*, 408 U.S. at 597; and *Velazquez*, 531 U.S. at 247–48.

The Government finds them inapplicable because, it says, the doctrine is not implicated where the program expends funds to encourage a diversity of views from private speakers. Supplemental Brief at 40 (citing *American Library*, 539 U.S. at 213, n.7).[45] And, it says, because the CDSOA is not designed to encourage such a diversity of views or advance any message. In addition, Defendant says, since unconstitutional conditions cases involve situations where imposed conditions effectively prohibit the recipient from engaging in protected conduct outside the federally funded program, the doctrine does not apply because the CDSOA does not prohibit recipients from freely rejecting in public the statement they made in the questionnaire response. Supplemental Brief at 42 (citing *Rust*, 500 U.S. at 197). CSUSTL makes essentially this same argument stating "[t]he CDSOA's "support" requirement merely affirms the limits of the *program's* scope by allocating funds to affected domestic producers who express a need for relief, no more and no less. CSUSTL Amicus Brief at 30 (emphasis in original).[46]

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[44] Nor, indeed, does it cite authority that the CDSOA and its peculiar approach to assisting harmed industries was not in itself a result of the political process.

[45] CSUSTL rejects Giorgio's argument that the Government's lack of speech is dispositive on this issue as "simply mistaken." CSUSTL Amicus Brief at 28 (citing *American Library* 539 U.S. at 213 n.7).

[46] CSUSTL cites no specific authority for that proposition, apparently relying on its previously stated arguments. It does not point to a specific manner in which, for example, in-

VIII
The Standard By Which Plaintiff's Motion for Summary Judgment Must be Judged

The Court of International Trade will grant a party summary judgment when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In its evaluation and analysis of the motions, "[t]he Court may not resolve or try factual issues." *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048 (1988), *aff'd*, 867 F.2d 1404 (Fed. Cir. 1989). In order to determine whether there exists a genuine issue of material fact, the court reviews the proffered evidence "in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent." *Dow Agro Scis. LLC v. Crompton Corp.*, Appeal No. 2005–1524, 2006 U.S. App. LEXIS 11320 at *10–11 (Fed. Cir. May 5, 2006) (quoting *Chiuminatta Concrete Concepts v. Cardinal Indus.*, 145 F.3d 1303, 1307 (Fed. Cir. 1998)) (quotations omitted). Absent a finding of any "disputes over facts that might affect the outcome of the suit under the governing law," summary judgment will be entered for the moving party. *Anderson*, 477 U.S. at 248.

IX
Discussion

As discussed above, Chez Sidney's only remaining claim for relief must survive or fail on its argument that the CDSOA unconstitutionally violates its First Amendment rights to free speech. The discussion which follows deals only with that issue and the standing of Plaintiff to raise it. It is with the standing issue that the court must first begin, although it is one easily determined, given the concessions of Defendant at oral argument.

A
Chez Sidney Has Standing to Makes Its Claim Under the First Amendment

In its Supplemental Brief, the Government argued strenuously that Chez Sidney lacked standing to raise a First Amendment argument. Its initial standing argument centered on the position that:

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quiring of a domestic producer if it takes no position on an investigation, reasonably informs that producer the ITC is actually interested in whether the producer believes it has been harmed.

> The timing of events is the fundamental flaw with Chez Sidney's First Amendment challenge. The alleged injury - that is, the freedom to express a position on the May 5, 1997 questionnaire - occurred more than three years prior to the enactment of the CDSOA. Pub. L. No. 106–387 at § 1002. Given the timing of these events, Chez Sidney cannot plausibly claim that its freedom of speech was restrained or suppressed when the source of this alleged injury was not even enacted when the expression was made. At the time it answered the questionnaire, Chez Sidney had the choice to express any position it desired, without fear of Government penalty, coercion, or the denial of benefits. Thus, because no injury to the right of free speech occurred at the time the expression was made, Chez Sidney has no standing to assert a claim under the First Amendment.

Supplemental Brief at 13.

At oral argument, the Government abandoned its standing argument to the extent Chez Sidney was seeking already existent damages.[47] The Government continued to argue, however, that Plaintiff lacked standing as to claims of a "chilling effect" on First Amendment rights of expression since the CDSOA was passed after Plaintiff asserted its positions in response to the ITC questionnaires.

The Government's argument, however, may ignore the point that, under American law, after the fact punishment for the exercise of free speech is every bit as pernicious as any form of prior restraint. *Sec'y of State of Md. v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 969, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984). It is, in any case, apparently mooted by the 2006 repeal of the CDSOA. 109 Pub. L. No. 171, 1120 Stat. 4 (February 8, 2006). Plaintiff simply does not, in the future, need to worry about harm accruing to it from any response to an ITC questionnaire; there will be no payments given or withheld as a result of any answer it makes.

Accordingly, given the Government's concession and the discussion above, an analysis of the merits of Plaintiff's claims is required.

B
First Amendment Analysis

1
The General First Amendment Background To Cases Involving Statements Of Opinion

The essence of this case is crystalized in the Government's statement that "the ITC determined that Chez Sidney did not show *the*

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[47] "At oral argument, we conceded that [P]laintiff has standing to assert First Amendment challenges based upon viewpoint discrimination and unconstitutional conditions. . . ." Defendant's Post-Argument Submission, dated March 19, 2004, at 7 n.6.

requisite support for the petition. . . ." Supplemental Brief at 10 (emphasis added). At the core of this nation's version of democracy is the ability to speak about proposed government actions on pressing public ′issues without fear of government retribution and without the requirement that a particular position be supported. Quite arguably the true American Revolution began not in the 1770's, but in 1735 at the trial of John Peter Zenger, when we began to diverge[48] from the British law of seditious libel. The jury summation by Andrew Hamilton still speaks to the Government's position in this case:

> [I]t is natural, it is a privilege, I will go farther, it is a right, which all free men claim, that they are entitled to complain when they are hurt. They have a right publicly to remonstrate

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[48] As the Sixth Circuit has explained the divergence:

> The problem of using licensing to control distribution of printed expression by booksellers and publishers has a long history. Milton's *Areopagitica* remains the classic argument against the licensing of speech. Writing in 1644, just after the revolution, in response to a parliamentary law reestablishing the use of licensing to control books, Milton takes as his "task . . . to show that no . . . well instituted state, if they valued books at all, did ever use" "this authentic Spanish policy of licensing books." He argues instead that "the timeliest and most effectual remedy" is subsequent evaluation and seizure if necessary. Among his many arguments, Milton advances the danger to truth and beauty because they are difficult to distinguish from falsity and ugliness (however "much we thus expel of sin, so much we expel of virtue, for the matter of them both is the same") and the problem of the "quality which ought to be in every licenser" ("he who is made judge to sit upon the birth and death of books . . . had need to be a man above the common measure, both studious, learned, and judicious". Yet, "there cannot be a more tedious and unchosen journeywork . . . than to be made the perpetual reader of unchosen books and pamphlets"). Licensing speech discourages new ideas ("I found and visited the famous Galileo, grown old, a prisoner to the Inquisition, for thinking in astronomy otherwise than the Franciscan and Dominican licensers thought"); undermines expression as a value in itself ("give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties"); and raises the prospect of manipulation and misinformation when we "pretend to bind books to their good behavior" ("for what magistrate may not be misinformed, and much the sooner, if liberty of printing be reduced into the power of a few?").

City of Paducah v. Investment Ent't, Inc., 791 F.2d 463, 465–66 (6th Cir. 1986), *cert. denied* 479 U.S. 915, 107 S. Ct. 316, 93 L. Ed. 2d 290 (1986).

By the late Eighteenth Century, Milton's view against licensing had become the English common law rule against prior restraint, as reflected in Blackstone's Commentaries:

> The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications. . . . To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points of learning, religion, and government.

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK THE FOURTH 151–52 (William S. Hein & Co., 1st Ed. 1992).

The British common law against licensing publishers and booksellers was part of the foundation for the First Amendment's guarantee of freedom of the press. *See* ZECHARIAH, CHAFEE, FREE SPEECH IN THE UNITED STATES 10–12 (Harvard Univ. Press 1942) (arguing that the Blackstonian view of freedom of the press—freedom from prior restraint—was part, but only part, of the freedom that the first amendment had come to guarantee).

> against the abuses of power in the strongest terms, to put their neighbors upon their guard against the craft or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings heaven can bestow.

John Peter Zenger Trial, A Brief Narrative of the Case and Trial of John Peter Zenger, TRIAL RECORD, http://www.law.umkc.edu/faculty/projects/ftrials/zenger/zengerrecord.html (last visited on July 9, 2006).

This nation is committed to a robust debate on public issues. *New York Times v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). Accordingly, "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *FCC v. League of Women Voters*, 468 U.S. 364, 414, 104 S. Ct. 3106, 82 L. Ed. 2d. 278 (1984) (Stevens J. dissenting). The court must determine whether those First Amendment limitations apply when government regulates speech directed at the core of one of the most contentious issues now debated among nations, and whether the government may avoid those limits through payment to persons who express a favored viewpoint.

While *New York Times v. Sullivan* dealt with a libel claim by a public official, its discussion of the general freedom of expression accorded under the Constitution speaks squarely to the key issues here at stake:

> The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. "The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system." *Stromberg v. California*, 283 U.S. 359, 369, 51 S. Ct. 532, 75 L. Ed. 1117. "It is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions," *Bridges v. California*, 314 U.S. 252, 270, 62 S. Ct. 190, 197, 86 L. Ed. 192, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion." *N.A.A.C.P. v. Button*, 371 U.S. 415, 429, 83 S. Ct. 328, 9 L. Ed. 2d 405. The First Amendment, said Judge

> Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375–76, 47 S. Ct. 641, 648, 71 L. Ed. 1095, gave the principle its classic formulation:
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> * * *
>
> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.
>
> *Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . .*

New York Times v. Sullivan, 376 U.S. at 269–71 (emphasis added).

As stated by Justice Sutherland in *West Virginia State Board of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

In *Hurley*, 515 U.S. at 573, the Court notes that "*the fundamental rule of protection under the First Amendment [is] that a speaker has the autonomy to chose the content of his own message*." *Id.* (emphasis added). The Court goes on to note that outside the context of commercial advertising the State "may not compel affirmance of a belief with which the speaker disagrees . . . [n]or is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of

all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. *Id.* (citations omitted).

* * *

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Id. at 579.

The Government's argument that domestic industry's First Amendment Rights are not implicated seems to be answered by the Court's statement in *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n. of Cal.* 475 U.S. 1, 16, 106 S. Ct. 903, 89 L. Ed. 2d 1 (1986) that:

> That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster. For corporations as for individuals, the choice to speak includes within it the choice of what not to say. And we have held that speech does not lose its protection because of the corporate identity of the speaker. *Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next.*

Id. (emphasis added) (citations omitted).

Despite those strictures, however, there do exist circumstances in which governmental authorities may impose limits on the free expression of political ideas and positions. Given the articulated value of such expression to our political system, however, they are bound by stringent limitations, and in some cases, strict judicial review. In essence, if "the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919) (Holmes, J., dissenting), then the worst way to determine whether a petition for government action has public approval is to pay supporters of only one side. *Id.*

2
In Some Circumstances The Government May Legitimately Reward or Penalize Otherwise Protected Speech

The Supreme Court has carved out a clear area in which the nature of speech is such that government may limit expression through

indirect means. Government may also, in other more circumscribed ways, limit speech in a direct fashion when its interest reaches a sufficiently high plateau.

a

Under The *American Library* Doctrine, A Government Funding Program May Refuse To Fund Protected Activity If It Does Not Impose A Penalty On That Act

One core of the Government's argument is that, based on *American Library*, under the Constitution's Spending Clause, Congress is given broad authority to condition receipt of federal funds in order to further policy objectives. Supplemental Brief at 2. The Court has provided guidance and distinguishing circumstances in which Congress may use funding programs for legitimate governmental aims from those in which it actually penalizes protected activity. *See American Library*, 539 U.S. at 203; *see also Rumsfeld v. Forum for Academic & Institutional Rights*, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006).

In *American Library*, the Court held that requiring public libraries receiving federal funds to install Internet filters did not force them to violate patrons' First Amendment rights, and was a valid exercise of Congressional spending power because in a funding program intended to help public libraries fulfill traditional roles of obtaining appropriate quality material for educational and informational purposes, Congress could insist that the public funds be spent for the purposes for which they were authorized. *Id.* at 204–09. The Court noted, citing *South Dakota v. Dole*, 483 U.S. at 206, that "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *American Library*, 539 U.S. at 203.

Chief Justice Rehnquist, writing for the majority, distinguished *Rosenberger v. Rector*, *supra*, noting:

> In Rosenberger, we considered the "Student Activity Fund" established by the University of Virginia that subsidized all manner of student publications except those based on religion. We held that the fund had created a limited public forum by giving public money to student groups who wished to publish and therefore could not discriminate on the basis of viewpoint.
>
> The situation here is very different. A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of the books to speak. *It provides Internet access, not to "encourage a diversity of views from private speakers," but for the same reasons it offers other library resources: to facilitate research, learn-*

> *ing and recreational pursuits by furnishing materials of requisite and appropriate quality.*

Id. at 206. (emphasis added) (internal citations omitted).

What distinguishes *American Library* from *Rosenberger*, is what, with even more force, distinguishes the case here from *American Library.* As is demonstrated below, in order to receive CDSOA funds, members of an affected domestic industry must not only publicly[49] support a particular viewpoint, *they are required by law to give their honest opinion even if it adversely affects their ability to receive CDSOA funds.*[50] Thus, not only does the Government have to determine, in a neutral fashion,[51] whether members of domestic industry support a petition, it must also provide the forum in which to do so, and require participants to honestly state their views.[52]

In *Rumsfeld*, the Court held that Congress could properly deny federal funding to an institution of higher education which denied the military access for recruiting purposes. 126 S. Ct. at 1297. The Court noted that in *American Library* it held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit," but that because Congress could directly impose such requirements it could do so indirectly through a funding mechanism. *Id.* at 1307. The Court noted, however, that:

> The [military access] Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. As a general matter, the Solomon Amendment

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[49] While questionnaire response are confidential, the Government must, by law, publish a list of CDSOA distribution recipients allowing determination not only of supporters (who must be to make the list) but also a reasonable presumption of those in the domestic industry who did not support, by virtue of their absence. 19 U.S.C. § 1675c(d); 19 C.F.R. § 159.63(b).

[50] See discussion in Section IX(A)(3), *supra.*

[51] See discussion of requirements of SAA and 19 U.S.C. §1673a(c) at Section IX(A)(3), *infra.*

[52] Indeed, as Chief Justice Rehnquist noted in his dissent in *FCC v. League of Women Voters*:

> This is not to say that the Government may attach any condition to its largess; it is only to say that when the Government is simply exercising its power to allocate its own public funds, we need only find that the condition imposed has a rational relationship to Congress' purpose in providing the subsidy and that it is not primarily "aimed at the suppression of dangerous ideas."

468 U.S. at 407 (internal citations omitted).

Because the strictures of the CDSOA mandate a strict scrutiny test, the court need not determine here, outside of *dicta*, whether a rational relationship would be satisfied, although, as discussed below, it may well be.

> regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may *say*.

Rumsfeld 126 S. Ct. at 1307 (emphasis in original) (internal citations omitted).[53]

The Court's rationale in *Rumsfeld* is strongly distinguishable from the position of a questionnaire responding member of domestic industry. As discussed below, if they answer a questionnaire at all,[54] not only must that responder honestly state their opinion, it appears they would be subject to criminal prosecution for doing otherwise.[55]

Thus, the Spending Clause cases upon which the Government relies are inapposite to the CDSOA. Without that exception, it is to the standard by which the CDSOA's speech restriction must be judged that this analysis must now turn.

b
Where A Funding Exception Is Inapplicable, Governmental Restrictions On Political Speech Are Subject To Stringent Judicial Review

If *American Library* is inapplicable, the CDSOA must satisfy a very high standard of review. It fails that test, and as a result its application[56] is fatal to the Government's arguments.

> As Justice Scalia noted in his dissent in *Arkansas Writers' Project, Inc. v. Ragland*,
>
> The reason that denial of participation in a tax exemption or other subsidy scheme does not necessarily "infringe" a fundamental right is that — unlike direct restriction or prohibition – such a denial does not, as a general rule, have any significant coercive effect. It may, of course, be manipulated so as to do so, in which case the courts will be available to provide relief. But that is not remotely the case here. It is implausible that the 4% sales tax, generally applicable to all sales in the State with the

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[53] In support of that proposition, the Court cites the concession of the Solicitor General that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests." *Rumsfeld* 126 S. Ct. at 1307. The concession is a stark contrast from the statement at oral argument, discussed below, of counsel for the United States that members of domestic industry were required by law to state their honest opinion as to whether they supported or opposed a Petition.

[54] And the language of the questionnaire appears to make a response mandatory. *See* Supplemental Brief at 5 (citing Defendant's Appendix at 1); *see also* Plaintiff's First Amendment Brief at 3 (citing Plaintiff's Exhibit A).

[55] *See* Section IX(A)(3), *infra*.

[56] "To survive strict scrutiny, however, a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199, 112 S. Ct. 1846, 119 L. Ed. 2d. 5 (1992).

> few enumerated exceptions, was meant to inhibit, or had the effect of inhibiting, this appellant's publication.
>
> Perhaps a more stringent, prophylactic rule is appropriate, and can consistently be applied, when the subsidy *pertains to the expression of a particular viewpoint on a matter of political concern – a tax exemption, for example, that is expressly available only to publications that take a particular point of view on a controversial issue of foreign policy.* Political speech has been accorded special protection elsewhere.

481 U.S. at 221 (emphasis added).

Justice Scalia has precisely described the situation which must be analyzed here . . . the need for a more stringent, prophylactic rule where a government payment rewards a particular view on a controversial issue of public policy.

"Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest." *Consol. Edison Co. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 540, 100 S. Ct. 2326, 2333, 65 L. Ed. 2d 319 (1980).

It is clear from the discussion above, under *American Library* and *Rumsfeld*, that compelled speech principles apply when government offers a gratuitous benefit conditioned on surrender of free speech.[57]

In *Perry v. Sindermann*, 408 U.S. 593, the Supreme Court found that the failure to renew a non-tenured professor's contract at a state university based on his public criticism of the university violated his right of free speech. The Court stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable governmental benefit and *even though the government may deny him the benefit for any number of reasons, . . . [the government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests especially, his interest in freedom of speech*. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

Id. at 597 (internal citations omitted); *see also Arkansas Writers' Project*, 481 U.S. at 221 (sales tax exemption for certain magazines unconstitutionally conditioned tax status on content discriminating among messages); *Rutan*, 497 U.S. at 62 (conditions of public em-

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[57] *See* Footnote 26, *supra*.

ployment on political affiliations violated First Amendment); and *Velazquez*, 531 U.S. at 533 (government could not condition subsidization of legal aid attorneys on limitation of making of particular arguments).

When speech is burdened by government regulation because of its content, including by the denial of a benefit of a constitutionally protected interest that regulation is subject to strict scrutiny unless it falls within the exemptions previously discussed. *See Perry v. Sindermann*, 408 U.S. at 597; *see also Rumsfeld*, 126 S. Ct. at 1307. Under the strict scrutiny standard, the government must show that the burden it imposes is "necessary to serve a compelling state interest," and that it is "narrowly drawn to achieve that end." *R.A.V. v. City of St. Paul*, 505 U.S. at 403 (quoting *Simon & Schuster v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 118, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991).

> [T]he "danger of censorship" presented by a facially content-based statute, requires that that weapon be employed only where it is "*necessary* to serve the asserted [compelling] interest." The existence of adequate content-neutral alternatives thus "undercuts significantly" and defense of such a statute. . . . The dispositive question in this case therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases this singled out. That is precisely what the First Amendment forbids. The politicians of St. Paul are entitled to express that hostility – but not through the means of imposing unique limitations upon speakers who (however benightedly) disagree.

Id. at 395 (internal citations omitted).

The support requirement simply cannot meet that standard. To the extent that the Government seeks, and is required to seek, accurate information about the level of support for an antidumping or subsidy petition it can, and indeed must, make the inquiry at issue. To the extent, however, that it conditions the payment of benefits to those who answer the inquiry upon the content of their opinion, it may no more do so than it may base the condition upon the color of their skin.

In the case of the CDSOA, the underlying motive articulated by Congress, assistance to members of domestic industry injured by foreign dumping and subsidies, could be achieved by a narrower inquiry; was the questionnaire respondent *injured* by the imports at issue? Where, as here, the respondent is required by law to provide an honest answer regarding support or non-support for the petition, and the Government is required to seek it; where the response is

burdened for opposing, or not supporting the "correct" side of a public policy question, and where a narrower and more accurate alternative exists, the strict scrutiny test is simply not met.

3
Members of Domestic Industry Must, by Law, Honestly Inform the ITC Whether They Support, Oppose, or Take No Position on an Investigation Even If They Otherwise Believe They Have Been Harmed by Dumping

The crux in determining this case lies in the disagreement of the parties regarding the effect of an answer to an ITC domestic industry questionnaire. As one step in determining whether domestic industry is, in fact, harmed, the Government conducts what is effectively a survey among members of the domestic industry. The Parties are at odds because the Government views the answers to that survey and not just its results, as a fact and not a statement of opinion. Plaintiff, however, argues, that the Support or Non-Support or Take No Position questions on the survey invite a statement of opinion. The problem faced by the Government is that whenever members of the public are asked for their opinion implicating issues of political, philosophical or international policy, they have a constitutional right to hold that view for a myriad of reasons, only one of which is congruent with the Government's position here. The Government and *Amici's* forceful arguments amount to a belief that economic reality indicates industry respondents will act only as rational economic beings. The Government concedes, however, that a respondent might reasonably support or oppose on other bases. That reasonable possibility is enough to render the support provision unconstitutional.

At oral argument the following colloquy occurred between the court and counsel for the United States:

> The court: "So, if it doesn't support the petition, it is not, as a matter of law, permitted to lie and check the box that says, "I support the petition?"
>
> Counsel: "I would not advise anyone to do that."
>
> The court: "Well, as a matter of law, it would be a violation of law, would it not?
>
> Counsel: "I believe so."

TR. at 22.

The Government's questionnaire asks not for a fact but for an opinion. For the Government to say otherwise is disingenuous. It would be a fact that a number of members of a domestic industry take a particular position, and there is, indeed, a rational basis for arguing that the fact that a member of the industry supports a peti-

tion probably indicates that member perceives or itself, as having been harmed by the dumping at issue, but the one does not *necessarily* follow from the other, and opposition to the petition does not *necessarily* indicate the respondent does not perceive himself or itself as having sustained harm from foreign dumping or subsidies.

If the Government had only to demonstrate a rational basis for the support provision of the CDSOA it might be able to do so. It is not irrational to believe that there may be some correlation, indeed, quite possibly a high one, between expression of support for a dumping petition and harm to the responder. A higher level of review applies, however, to the expression of a particular point of view, because the distribution of funds is based upon the answer to what is inherently a political question.

The Statement of Administrative Action for the Uruguay Round Agreements Act makes it clear that this change is designed to implement changes required under the SAA at 807, 810–12; *see also* 19 U.S.C. § 3512(d).

Thus, the support question, in the ITC Questionnaire, is itself absolutely necessary to serve a compelling government interest as defined by the WTO Agreement. *Its use, however, for determining who receives distribution of government funds is not. See R.A.V. v. City of St. Paul*, 505 U.S. at 377. There are a number of other ways in which the Government might, without more effort than that which is already required, determine which members of the domestic industry claim they are harmed by foreign dumping or subsidies.[58]

Of particular note here, is the Court's discussion of the reasoning of *Schaumberg v. Citizens for Better Env.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) in *Munson*:

> Although the Court in *Schaumburg* recognized that the Village had legitimate interests in protecting the public from fraud, crime, and undue annoyance, it rejected the limitation because it was not a precisely tailored means of accommodating those interests. The Village's asserted interests were only peripherally promoted by the limitation and could be served by measures less intrusive than a direct prohibition on solicitation.
>
> In particular, although the Village's primary interest was in preventing fraud, the Court concluded that the limitation was simply too imprecise an instrument to accomplish that purpose. The justification for the limitation was an assumption that any organization using more than 25% of its receipts on fundraising, salaries, and overhead was not charitable, but was a com-

[58] Not the least of which would be to simply add a question to the questionnaire inquiring whether the respondent was harmed by the dumping or subsidy at issue.

> mercial, for-profit enterprise. Any such enterprise that represented itself as a charity thus was fraudulent.
>
> The flaw in the Village's assumption, as the Court recognized, was that there is *no necessary connection* between fraud and high solicitation and administrative costs. A number of other factors may result in high costs; the most important of these is that charities often are combining solicitation with dissemination of information, discussion, and advocacy of public issues, an activity clearly protected by the First Amendment and as to which the Village had asserted no legitimate interest in prohibiting. In light of the fact that the interest in protecting against fraud can be accommodated by measures less intrusive than a direct prohibition on solicitation, the Court concluded that the limitation was insufficiently related to the governmental interests asserted to justify its interference with protected speech.

Munson, 467 U.S. at 961–62 (emphasis added).

The same logic applies here. There is no necessary connection between support for a petition and harm to a domestic producer.[59] Ac-

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[59] Given the CDSOA's failure to meet strict scrutiny, there is no need to discuss Plaintiff's arguments regarding over and under inclusiveness of the statute. "Substantial overbreadth" is a criterion the Court has invoked to avoid striking down a statute on its face simply because of the possibility that it might be applied in an unconstitutional manner. It is appropriate in cases where, despite some possibly impermissible application, the " 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . ." *USCSC v. Letter Carriers*, 413 U.S. 548, 580–581, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973). "The short of the matter is this: In Minnesota, a candidate for judicial office may not say "I think it is constitutional for the legislature to prohibit same-sex marriages." He may say the very same thing, however, up until the very day before he declares himself a candidate, and may say it repeatedly (until litigation is pending) after he is elected. As a means of pursuing the objective of open-mindedness that respondents now articulate, the announce clause is so woefully underinclusive as to render belief in that purpose a challenge to the credulous. *See City of Ladue v. Gilleo*, 512 U.S. 43, 52–53, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994) (noting that underinclusiveness "diminish[es] the credibility of the government's rationale for restricting speech"); *Florida Star v. B.J. F.*, 491 U.S. 524, 541–542, 109 S. Ct. 2603, 105 L. Ed. 2d 443 (1989) (Scalia, J., concurring in judgment) ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." (internal quotation marks and citation omitted)). *See Republican Party of Minnesota v. White*, 536 U.S. 765.

It is worth mentioning, however, that it seems that here, the support requirement is simultaneously over and underinclusive. According to the Government:

> The primary purpose of providing "offset distributions" to affected domestic producers is to remedy the effects of injurious dumping in the domestic market and restore conditions of free trade. *See* Byrd Amendment, Pub. L. No. 106–387, § 1003, 114 Stat. 1549 at 1549–72; *Huaiyin Foreign Trade Corp. v. United States*, 322 F.3d 1369 (Fed. Cir. 2003).

Supplemental Brief at 4.

As written, however, the support requirement does both more and less than remedy the effects of injurious dumping. Under its terms it includes as an affected domestic producer any petitioner or interested party which supports the Petition. It does not inquire whether an affected domestic producer has, in fact, been harmed. Nor does it seek to determine whether a domestic producer which might have opposed the petition for other reasons, is

cordingly, the support requirement of the CDSOA must fail the strict scrutiny required by the First Amendment.

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Conclusion

Except for its First Amendment claim, and the issues of severability and damages, upon which the court reserves decision, Plaintiff's Motions are denied and the Defendant's Motion is granted.

It is both axiomatic, and the core basis for our political system, that government derives its just powers from the consent of the governed. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The validity of that consent depends, at least in part, upon its grant by the populace unforced by fear or favor. Imposition by law of a penalty for failure to support a particular governmental policy, must of necessity derogate from that consent and thus affect the very foundation of legitimacy of government. As to Plaintiff's First Amendment claim, therefore, the CDSOA's support requirement, having failed to meet strict scrutiny, is in violation of the Constitution.

Given the importance of the matter decided, the court has decided that there is no just reason for delay to give the parties an opportunity to present this issue to the Court of Appeals.

Slip Op. 06–104

CANADIAN LUMBER TRADE ALLIANCE *et al.*, Plaintiffs, v. THE UNITED STATES *et al.*, Defendants.

Before: Pogue, Judge
Consol. Ct. No. 05–00324

Steptoe & Johnson, LLP (*Mark A. Moran*, *Matthew S. Yeo*, and *Michael T. Gershberg*) for Plaintiff Canadian Lumber Trade Alliance;

Steptoe & Johnson, LLP (*Gregory S. McCue*) for Plaintiff Norsk Hydro Canada, LLC;

Steptoe & Johnson, LLP (*Edward J. Krauland*, *Joel D. Kaufman*, and *Thomas R. Best*) for Plaintiff Canadian Wheat Board;

Sidley Austin LLP (*Neil R. Ellis*, *Andrew W. Shoyer*, *Carter G. Phillips*, *Lawrence R. Walders*, and *Richard D. Bernstein*) for Plaintiff Government of Canada;

Baker & Hostetler, LLP (*Elliot J. Feldman*, *John Burke*, *Michael S. Snarr*, and *Bryan J. Brown*) for Plaintiffs Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and The Free Trade Lumber Council;

Stuart E. Schiffer, Deputy Assistant Attorney General; *David M. Cohen*, Director, *Jean E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division,

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nevertheless harmed by the conduct at issue. Thus, it manages to potentially both include unharmed domestic producers and exclude harmed ones.

U.S. Department of Justice (*Kenneth M. Dintzer*, Senior Trial Counsel, and *David S. Silverbrand*, Trial Attorney) for Defendant United States;

Dewey Ballantine LLP (*Bradford L. Ward*, *Harry L. Clark*, *Linda A. Andros*, *Mayur R. Patel*, and *Rory F. Quirk*) for Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee;

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

Skadden Arps Slate Meagher & Flom, LLP (*John J. Mangan*, *Jeffrey D. Gerrish*, and *Robert E. Lighthizer*) for Defendant-Intervenor United States Steel Corporation;

Collier, Shannon, Scott, PLLC (*Michael R. Kershow*, *Mary T. Staley*, *Paul C. Rosenthal*, and *Robin H. Gilbert*) for Defendant-Intervenors Neenah Foundry Company, Municipal Castings, Incorporated, LeBaron Foundry Incorporated, East Jordan Iron Works, Incorporated, Allegheny Ludlum Corporation, and AK Steel Corporation;

Pillsbury, Winthrop, Shaw, Pittman, LLP (*Stephan E. Becker*, *Sanjay J. Mullick*, and *Joshua D. Fitzhugh*) for Amicus Curiae Government of Mexico.

[Declaratory and injunctive relief granted; request for disgorgement denied. Judgment entered accordingly.]

OPINION

In *Canadian Lumber Trade Alliance v. United States*, 30 CIT ___ , 425 F. Supp. 2d 1321 (2006) this court found that certain producers/exporters of goods from Canada to the United States, Plaintiffs in this proceeding, had standing and a cause of action to challenge the application of the Continued Dumping and Subsidy Offset Act of 2000 (commonly known, and referred to herein, as the "Byrd Amendment"), and that Plaintiffs' actions were not barred by the political question doctrine. The court further found that the Defendant Bureau of Customs and Border Protection ("Customs") was improperly applying the Byrd Amendment to goods from Canada and Mexico ("NAFTA parties") in violation of section 408 of the North American Free Trade Agreement Act ("NAFTA Implementation Act").[1] At the end of that decision, and in light of the court's holdings, the court ordered the parties to meet and confer with respect to the appropriate remedy/remedies; if the parties failed to agree on remedies, the court further ordered the parties to submit recommendations as to the appropriate remedy and scope of such remedy.

The parties have now reported to the court that they were unable to reach agreement on remedies and have accordingly submitted their recommendations. Upon consideration of the parties' comments, and for the reasons set forth below, the court awards both declaratory and injunctive relief.

DISCUSSION

The court's authority to grant relief is defined by 28 U.S.C. §§ 1585 and 2643. Section 2643 states, in relevant part,

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

> Except as provided in paragraphs (2), (3), (4), and (5) of this subsection, the Court of International Trade may, in addition to the orders specified in subsections (a) and (b) of this section, order any other form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

28 U.S.C. § 2643(c)(1). The authority provided by Section 2643 complements 28 U.S.C. § 1585 which specifies that "[t]he Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." The legislative history of these provisions supports a broad reading of the court's remedial authority. *See Borlem S.A.-Empreedimentos Industriais v. United States*, 913 F.2d 933, 937 (Fed. Cir. 1990) ("[T]he legislative history of 28 U.S.C. § 1585 (1980) provides the Court of International Trade 'with all the necessary remedial powers in law and equity possessed by other federal courts established under Article III of the Constitution.' ") (footnote omitted) (quoting *Rhone Poulenc, Inc. v. United States*, 880 F.2d 401, 402 (Fed. Cir. 1989)); *see also Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004); *United States v. Hanover Ins. Co.*, 82 F.3d 1052, 1054 (Fed. Cir. 1996) ("Like district courts, the Court of International Trade has the inherent power to determine the effect of its judgments and issue injunctions to protect against attempts to attack or evade those judgments." (citations omitted)).

Plaintiffs here have asked the court to use its authority to grant three types of relief: (1) a declaratory judgment; (2) a permanent injunction enjoining all future Byrd distributions collected on Plaintiffs' goods; and (3) disgorgement of prior past distributions. Defendant and Defendant-Intervenors contest this relief, albeit in varying degrees, and with sometimes similar and sometimes different concerns. The court will address in turn each aspect of the requested relief.

(1) Declaratory Relief

Pursuant to the Declaratory Judgment Act,

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986 [26 U.S.C. § 7428], a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930 [19 U.S.C. § 1516a(f)(10)]),[2] as determined

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[2] No party contends that this case involves an antidumping or countervailing duty proceeding within the meaning of Section 2201(a).

> by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought*. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2201(a) (emphasis added). *See also* USCIT R. 57; 28 U.S.C. § 2202.

The Supreme Court has explained that "[w]hile the courts should not be reluctant" to grant relief in appropriate cases, *Public Serv. Comm'n of Utah v. Wycoff Co.*, 344 U.S. 237, 243 (1952), the declaratory judgment statute "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant," *id.* at 241. *See also Green v. Mansour*, 474 U.S. 64, 72 (1985); *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995) ("By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court's quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants."). Accordingly, "declaratory relief in a particular case will depend upon a circumspect sense of its fitness informed by the teachings and experience concerning the functions and extent of federal judicial power." *Wycoff*, 344 U.S. at 243. *See also Green*, 474 U.S. at 72 (noting the court's authority is bound in "equitable considerations"); *Samuels v. Mackell*, 401 U.S. 66, 70–73 (1971).

In its prior decision, this court determined that there exists a "case of actual controversy" between the parties, that is within the court's jurisdiction. The court also concluded that Customs is violating the Plaintiffs' "legal rights." *See Canadian Lumber Trade Alliance v. United States*, 30 CIT ___, 425 F. Supp. 2d 1321, 1373 (2006). Moreover, the court found that future injury to Plaintiffs from Defendant's conduct is certain. *Id.* at 1348–49; *cf. Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 71 n.15 (1978) ("While the Declaratory Judgment Act does not expandour jurisdiction, it expands the scope of available remedies. Here it allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained.").

Although neither Defendant or Defendant-Intervenors consent to declaratory relief,[3] neither offers any justification for why it should not issue. Because Plaintiffs have satisfied the requirements for declaratory relief, and defendants have failed to show good cause for why it should not issue, the court finds declaratory relief appropriate. Therefore, in conformity with the requirements of USCIT R. 57,

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[3] At oral argument, the government appeared to soften its position on this issue, though the court could not divine the government's precise intent.

and as requested by Plaintiffs, the court grants the Plaintiffs declaratory relief as set forth in the judgment issued concurrent with this opinion.

(2) Injunctive Relief

Next, Plaintiffs seek a *permanent* injunction barring future distributions. Although Defendant concedes that an injunction should issue, it questions whether Plaintiffs have satisfied parts of the test for an injunction; Defendant-Intervenors contend that an injunction should not issue. The court agrees with Plaintiffs and Defendant that an injunction should issue.

To be sure, "[a]n injunctive order is an extraordinary writ, enforceable by the power of contempt." *Gunn v. Univ. Comm. to End the War in Viet Nam*, 399 U.S. 383, 389 (1970). Because of the force behind an injunction, and because injunctive relief is an exception to the rule that "courts have no general supervising power over the proceedings and action of the various administrative departments of the government," *Keim v. United States*, 177 U.S. 290, 292 (1900), permanent injunctions do not "issue[ ] as of course," *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982) (quoting *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337–338 (1933)). Rather, "the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and [ ] such discretion must be exercised consistent with traditional principles of equity. . . ." *eBay Inc. v. MercExchange, L.L.C.*, ___ U.S. ___ , 126 S. Ct. 1837, 1841 (2006).

As the Supreme Court recently stated in *eBay*:

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction. The decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion.

Id. at 1839 (citations omitted). All parties agree, as they must, that the "four-factor test" is a balancing test. *See, e.g.*, *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 & 546 n.12 (1987). However, the parties, to some degree, dispute elements of each factor. The court will address each in turn.

(i) Irreparable Harm & Lack of Alternative Remedies[4]

Here, by providing cash to Plaintiffs' domestic competitors, Customs alters the balance of trade preserved by the NAFTA Implementation Act and enhances the competitive position of Plaintiffs' domestic competitors, resulting in a loss of trade over time. *Canadian Lumber Trade Alliance*, 30 CIT at ___ , 344 F. Supp. 2d at 1345–49. Such a harm is cognizable. *See, e.g.*, *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. (2 Black) 545, 551 (1863) (noting that a "recurring grievance" which causes "the loss of trade" counsels in favor of an equitable remedy). The only question is whether the harm to Plaintiffs is more than "merely trifling." *Consol. Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 (1900) (citing *Parker*, 67 U.S. (2 Black) at 552).

In *Canadian Lumber Trade Alliance*, 30 CIT at ___ , 425 F. Supp. 2d at 1345–49, this court held that although the extent of Plaintiffs' injury may be disputed, there was no question Plaintiffs had sufficiently demonstrated injury to satisfy the very "generous test" for standing. Similarly here, the court is again cautious to speculate on the extent of Plaintiffs' injury. Nonetheless, upon consideration of the testimony adduced at trial and various government reports entered into evidence, together with Customs' failure to publish notice of an intent to comply with the court's order, the court concludes that Plaintiffs have sufficiently shown that their injury is more than "merely trifling." The record demonstrates that Customs has used the Byrd Amendment to provide significant support to Plaintiffs' domestic competitors in violation of section 408. The court must conclude that, absent an order by this court, this violation will continue. *Id.*; *cf. United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953) ("The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs." (citing *Swift & Co. v. United States*, 276 U.S. 311, 326 (1928)).

The court also finds that this harm is "irreparable." Given that the United States, and the agencies thereof, are cloaked in sovereign immunity, a party may only sue the United States for monetary dam-

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[4] Although stated as two separate prongs by the Court in *eBay*, whether something is "irreparable" requires, to a certain extent, a lack of alternative remedies. Moreover, the *eBay* Court based the test on "well-established principles of equity." *Id.* at 1839. Under traditional principles of equity, "irreparable injury is not an independent requirement for obtaining a permanent injunction; it is only one basis for showing the inadequacy of a legal remedy." 11A Arthur Wright et al., *Federal Practice and Procedure* § 2944 (1995) (at page 94). *See also* Dan B. Dobbs, *Law of Remedies* 50 (2d ed. 1993); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 Harv. L. Rev. 687 (1990). As Judge Friendly explained,

> A plaintiff asking [for] an injunction because of the defendant's violation of a statute is not required to show that otherwise rigor mortis will set in forthwith; all that 'irreparable injury' means in this context is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired.

Studebaker Corp. v. Gittlin, 360 F.2d 692, 698 (2d Cir. 1966).

ages when Congress has affirmatively waived the government's immunity. *See, e.g., Lane v. Pena*, 518 U.S. 187, 192 (1996); *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Here, Plaintiffs have raised their claims under the Administrative Procedure Act ("APA"). Although the APA generally waives the United States' immunity from suit, it does not permit claims for monetary damages. *See* 5 U.S.C. § 702; *Lane*, 518 U.S. at 196. Nor is there any other basis for Plaintiffs to seek relief. Accordingly, the harm is irreparable. *See, e.g., Ohio Oil Co. v. Conway*, 279 U.S. 813, 815 (1929); *Kan. Health Care Ass'n, Inc. v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543 (10th Cir. 1994) (a state's Eleventh Amendment immunity rendered harm irreparable); *Temple Univ. v. White*, 941 F.2d 201, 215 (3rd Cir. 1991); *Zenith Radio Corp. v. United States*, 710 F.2d 806, 811 (Fed. Cir. 1983); *Brendsel v. Office of Fed. Hous. Enter. Oversight*, 339 F. Supp. 2d 52, 66 (D.D.C. 2004); *cf. Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987) (noting that a harm is irreparable when money damages cannot generally compensate for it).

Despite the apparent lack of alternative remedies, Defendant argues that the court could continue to allow Customs to make distributions which Customs then *may* (with unreviewable discretion according to Customs) decide to recoup from the recipients (if it so elects), pursuant to Customs' own regulation. *See* 19 C.F.R. § 159.64(3). This disgorgement, Customs claims, is an alternative remedy making the harm to Plaintiffs reparable.

Defendant's argument is entirely unpersuasive. First, to the extent Customs does recoup erroneously distributed monies, this "alternative" remedy is little different than an injunction — Customs would be giving out money only to immediately recollect it.[5] Indeed, the only difference between Defendant's alternative and an injunction is that an injunction will not require the administrative cost and inconvenience of Customs' proposal.

Customs correctly notes that disgorgement is an equitable remedy. *See Tull v. United States*, 481 U.S. 412, 424 (1987); *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006); *United States v. Philip Morris, Inc.*, 273 F. Supp. 2d 3, 8–9 (D.D.C. 2002). Courts must, of course, grant legal remedies if they are available and adequate. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 292 (1997) (O'Connor J., concurring); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 509 (1959) ("in the federal courts equity has always

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[5] Customs does not appear to fully recognize that the issue here regards the propriety of a *permanent injunction*, rather than a *preliminary injunction*. The court considers a *permanent injunction*, after having *already* concluded that the Defendant has committed an unlawful act; therefore, when the distribution is made, there is no issue awaiting judicial resolution regarding the unlawfulness of the distribution. *See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 314–15 (1999). While a party certainly may appeal this court's decision, the permanent injunction inquiry operates under the assumption that the court's conclusions are correct.

acted only when legal remedies were inadequate"). But where, as here, there is no available legal remedy, the court has broad discretion to choose the *appropriate* equitable remedy. *See, e.g.*, Dan B. Dobbs, *Law of Remedies* 82 (2d ed. 1993). As Defendant's alternative remedy is more burdensome than an injunction, the court does not find that disgorgement is an alternative. *See Beacon Theatres*, 359 U.S. at 507 ("Inadequacy of remedy and irreparable harm are practical terms, however."); *Boyce's Ex'rs v. Grundy*, 28 U.S. (3 Pet.) 210, 214 (1830) ("It is not enough that there is a remedy at law; it must be plain and adequate, or, in other words, as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.").

But even more fundamentally, Customs has not stated that it *must* recoup any erroneously distributed monies; rather, it claims, any recoupment will depend on its unreviewable discretion. Just as the possibility that a defendant may voluntarily cease its illegal conduct does not moot the need for an injunction, the fact that the Defendant *may* later take voluntary action to "make things right" does not negate the need for an injunction either. *Cf. Allee v. Medrano*, 416 U.S. 802, 811–12 (1974) ("It is settled that an action for an injunction does not become moot merely because the conduct complained of has terminated, if there is a possibility of recurrence, since otherwise the defendants 'would be free to return to [their] old ways.' ") (quoting *Gray v. Sanders*, 372 U.S. 368, 376 (1963)); *Goshen Mfg. Co. v. Hubert A. Myers Mfg. Co.*, 242 U.S. 202, 208 (1916) (enjoining a patent infringement was proper because "further infringement was in effect threatened and could be reasonably apprehended."). Indeed, the entire purpose of an injunction is to take away defendant's discretion not to obey the law. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund*, 527 U.S. 308, 315 (1999) ("The final injunction establishes that the defendant *should not have been engaging in the conduct that was enjoined*." (emphasis in original)). To wit, a cognizable alternative remedy must rest on more than the whim or discretion of a defendant.

Therefore, the court finds both that, in the absence of relief here, the Plaintiffs will suffer irreparable harm and that there are no available legal remedies for that harm.

(ii) Balance of Hardships

Having established that the Plaintiffs will be irreparably harmed in the absence of an injunction, the court must consider the effect on other parties. Defendant, to its credit, has acknowledged it will not be harmed by an injunction. Defendant-Intervenors, however, claim that they will be harmed because they will not get Byrd Distributions. Given the purpose of the Byrd Amendment, i.e., to strengthen U.S. industry, Defendant-Intervenors claim that the balance of hardships tips in their favor. The court disagrees.

In the context of a permanent injunction, because a defendant "will always suffer a hardship if he must comply with his contract when it has become expensive or if he must cease operating a factory that earns profits but also pollutes" only "hardship to the defendant [that] is not an inseparable part of the plaintiff's right" is cognizable. Dan B. Dobbs, *Law of Remedies* 80 (2d ed. 1993); *cf. Am. Hosp. Supply Corp. v. Hosp. Prods., Ltd.*, 780 F.2d 589, 596–97 (7th Cir. 1985) (Posner, J.). Here Defendant-Intervenors' claimed injury is entirely coextensive with Plaintiffs' rights. Accordingly, Defendant-Intervenors' claim is not separable from Plaintiffs' right. Therefore, Defendant-Intervenors' argument must be rejected. Because Plaintiffs have demonstrated harm to their interests, and opposing parties do not identify any cognizable harm to themselves, this factor tips in Plaintiffs' favor.

(iii) Public Interest

Last, the court must consider whether the public interest favors an injunction. In balancing the public interest, courts have traditionally looked to the underlying statutory purposes at issue. *See, e.g., Amoco Production Co. v. Gambell*, 480 U.S. 531, 544–46 (1987); *TVA v. Hill*, 437 U.S. 153, 194 (1978); *Hecht Co. v. Bowles*, 321 U.S. 321, 331 (1944). Here, as expressed by the court in its discussion of prudential standing, section 408 of the NAFTA Implementation Act limits the applicability of any subsequent amendment to Title VII of the Tariff Act of 1930 with respect to how those laws relate to the importation of goods from NAFTA parties (in the absence of an express statement by Congress to the contrary). *See Canadian Lumber Trade Alliance*, 30 CIT at ___ , 425 F. Supp. 2d at 1373. As such, the language of section 408 indicates that Congress meant to place the interests of respecting NAFTA above the salutary purposes of future amendments to Title VII of the Tariff Act of 1930 (absent an express statement from Congress). Any other conclusion would render section 408 nugatory. *Id.*

Defendant-Intervenors correctly note that the court may consider public interest factors outside those implicated by the statutory provisions. Defendant-Intervenors point to the need to stop dumping and subsidization as counseling in favor of denying an injunction. This interest, however, as explained above, was resolved by Congress against the Defendant-Intervenors through its adoption of section 408. *Cf. Hill*, 437 U.S. at 194 (finding that because it determined that Congress afforded endangered species "the highest priorities," the balance of interests favored injunctive relief); *Hecht*, 321 U.S. at 331. Moreover, Defendant-Intervenors neglect to mention or consider other public interests at stake namely, protecting the public treasury or recognizing that certain U.S. exports to Canada face retaliatory measures commensurate with the outlay of Byrd Distributions. Clearly then, this argument must be rejected, and the court con-

cludes that the public interest in the enforcement of the law weighs in favor of issuance of an injunction.

(iv) Balancing the Prongs

As all prongs lean in the Plaintiffs' favor, the court finds injunctive relief appropriate. In doing so, the court acknowledges that a large balance of the unlawful Byrd distributions remain to be completed. Nonetheless, because all the other factors weigh decisively in Plaintiffs' favor, even were the court to have found that Plaintiffs failed to demonstrate substantial economic harm, nonetheless the remaining harm to Plaintiffs' rights could not be remedied without an injunction, and the balance of equities would still warrant injunctive relief here. Therefore, the court would still find that an injunction should issue. Accordingly, in conformity with USCIT R. 65(d), the court grants Plaintiffs injunctive relief as set forth in the judgment issued concurrent with this opinion.

(3) Disgorgement

Last, Plaintiffs request an order directing Customs to disgorge monies that Customs has improperly disbursed in Fiscal Years 2004 and 2005. *See* 19 C.F.R. § 159.64(b)(3). If declaratory relief is an "arrow in the court's quiver," and injunctive relief is an "extraordinary remedy," disgorgement is a landmine. *Cf. Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314–15, 329 (1999) (referring to a *Mareva* injunction as the "nuclear weapon of law").

When the government grants or distributes money to parties, those parties have some right to rely on that money they receive. *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. . . ."). If there were the constant threat of disgorgement, recipients might be loath to expand money for the purpose for which it was given (fearing that they could not repay the money in the event of a court order). This, in turn, would frustrate Congressional intent in granting money.

To be sure, as demonstrated here, there are times when agencies violate congressional intent in granting money. Nevertheless, where recipients do not bring an action challenging the distribution of such money at the time the money is initially granted, public policy ordinarily requires that recipients should be allowed to expend such money without fear that it will later be recollected until the distribution of the money is called into question.[6] *See Laskowski v. Spellings*, 443 F.3d 930, 936(7th Cir. 2006); *cf. EEOC v. Sears, Roebuck & Co.*,

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[6] This applies, of course, only when the recipient's conduct is innocent.

650 F.2d 14, 17 (2d Cir. 1981) (discussing the principles behind the *de facto* officer doctrine). In this case, the Plaintiffs filed their complaints in April 2005. Therefore, recipients were not placed on notice until that time that the money they received could be recouped. Consequently, the interests of equity would not be served by ordering Customs to disgorge any of the money for the period prior to the filing of the complaint.

The court further finds that equity would not be served by ordering Customs to disgorge money distributed after recipients were placed on notice of this action. Customs correctly notes that the administrative costs of recoupment are high. Moreover, in light of the other relief the court grants here today, and because the money already distributed represents a fraction of what is being held for distribution, the interest in recouping distributions already made does not warrant the high administrative costs of a court ordered recoupment.

Accordingly, the court denies Plaintiffs' request for an order directing Customs to disgorge any funds already distributed.[7]

Slip Op. 06–105

METCHEM, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 04–00238

OPINION

[Judgment for plaintiff in tariff classification action.]

Dated: July 14, 2006

Fitch, King and Caffentzis (*James Caffentzis*) for plaintiff.

Peter D. Keisler, Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*); *Michael W. Heydrich*, Office of the Assistant Chief Counsel, United States Bureau of Customs and Border Protection, of counsel, for defendant.

Restani, Chief Judge: This matter is before the court following trial. Plaintiff MetChem, Inc. ("MetChem") challenges the classification for tariff purposes of its imported product. The United States Bureau of Customs and Border Protection ("Customs") classified the

[7] The court does not reach the issues as to whether Customs is prohibited or allowed to seek disgorgement on its own initiative.

imported product as nickel carbonate under Harmonized Tariff Schedule of the United States ("HTSUS") subheading 2836.99.50.[1] Plaintiff asserts that the proper classification is under subheading 750l.20.00, i.e., nickel oxide sinters and *other intermediate products of nickel metallurgy.*[2]

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction under 28 U.S.C. § 1581(a) (2000) (protest denial jurisdiction). The proper construction of a tariff provision is an issue of law. *Carl Zeiss, Inc. v. United States*, 195 F.3d 1375, 1378 (Fed. Cir. 1999). Determination of the nature of a good, in order to place it in the proper tariff category, is an issue of fact. *Id.* Both determinations are made *de novo* in the trial court. *Nat'l Advanced Sys. v. United States*, 26 F. 3d 1107, 1109 (Fed. Cir. 1994).

BACKGROUND

The entries of the imported merchandise at issue were made on March 13, 2003 (Entry No. 336–4250617–6), and March 28, 2003 (Entry No. 336–4251340–4). An earlier entry, which the parties seem to agree was identical in all relevant respects to the entries at issue, was analyzed by the Customs and Border Protection Laboratory. *See Customs Laboratory Report*, Pl.'s Exhibit ("P. Ex.") 5. The report describes the merchandise as basic nickel carbonate, represented by the formula ($xNiCO_3 * yNi(OH)_2 * zH_2O$), which is essentially a mixture of nickel carbonate, nickel hydroxide, and bound water. *Id.* Nickel carbonate ($NiCO_3$) invariably contains 49.5% nickel due to

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[1] The relevant portion of the HTSUS Chapter 28 reads as follows:

2836	Carbonates; peroxocarbonates (percarbonates); commercial ammonium carbonate containing ammonium carbamate:
	. . .
	Other:
	. . .
2836.99	Other:
	. . .
2836.99.50	Other . . .

[2] The relevant portion of the HTSUS Chapter 75 reads as follows:

7501	Nickel mattes, nickel oxide sinters and other intermediate products of nickel metallurgy:
	. . .
7501.20.00	Nickel oxide sinters and other intermediate products of nickel metallurgy . . .

the requirements of its molecular structure. *Id.* According to the report, the merchandise at issue contains somewhere in the range of 52% to 55% nickel, while dehydrated basic nickel carbonate can contain up to 57.9% nickel.[3] *Id.* The report states that "[t]he product is used as an intermediate in the production of nickel metal," and that it "cannot be sold as nickel carbonate." *Id.* A laboratory report for other later entries, also not before the court, and which resulted in a Customs ruling adverse to plaintiff,[4] states that the product is basic nickel carbonate, but also states that the material is identical with nickel carbonate (basic) and nickel hydroxide tetrahydrate. Def.'s Exhibit ("D. Ex.") C.

The parties are in agreement that commercially and as invoiced, the product at issue is known as basic nickel carbonate and is represented by P. Ex. 1, a clumpy greenish powder. *See* Pl.'s Post-Trial Brief (P. Br.) at 4; Def.'s Post-Trial Brief (D. Br.) at 3. The parties also do not dispute that the imported product is drawn directly from an intermediate step in the Caron process, a hydro-metallurgical process for producing nickel oxide sinter, a product used in specialty steel production. P. Br. at 2; D. Br. at 3. While it is clear that the imported product is not a metal or metal alloy, it is a product with higher nickel content than pure nickel carbonate, and the Caron process is used to create this higher nickel content product. R. 38–9; D. Ex. H, col. 1, lines 19–22 (Patent for Caron process).

DISCUSSION

For a proper classification of merchandise entering the United States, the court turns to the General Rules of Interpretation ("GRIs") of the HTSUS. *See Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). "The structure of the GRI controls the point at which each rule comes into play." *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1374 (Fed. Cir. 1999). Under GRI 1, HTSUS, "classification shall be determined according to the terms of the headings and any relevant section or chapter notes," while the other GRI provisions may be consulted only if the headings and

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[3] The report described the sample of basic nickel carbonate as containing 54% nickel and approximately 33% moisture. *Id.*

[4] HQ Ruling 966405 (Nov. 3, 2003) describes the basic nickel carbonate as ($NiCO_3$ * $2Ni(OH)_2$ * $4H_2O$), which appears to be a mixture of two salts and water. (D. Ex. D). The ruling's discussion as to how one obtains pure nickel carbonate would seem to add no support to its conclusion that this mixture is classified as a carbonate. HQ Ruling 965780 (Oct. 2, 2002) is also less than illuminating and merely states that basic nickel carbonate is a chemical compound without relating it to the definition of the Chapter Explanatory Notes with respect to compounds, or any chemical dictionary definition of compound. (D. Ex. E); *see, e.g., Hawley's Condensed Chemical Dictionary* 289 (14th ed. 2001) (defining "compound" as "[a] substance composed of atoms or ions of two or more elements in chemical combination . . . where the elements have definite proportions by weight and are represented by a chemical formula").

notes "do not otherwise require" a particular classification. Pursuant to GRI 3(a), HTSUS, "[w]hen . . . goods are, *prima facie*, classifiable under two or more headings . . . [t]he heading which provides the most specific description shall be preferred to headings providing a more general description."

Thus, the court first considers whether the basic nickel carbonate at issue is *prima facie* classifiable under HTSUS heading 2836 and/or 7501. As to heading 7501, there is no dispute that in the common sense of the term, the basic nickel carbonate at issue is an "intermediate product of metallurgy."[5] One of defendant's arguments seems to be despite the ordinary meaning of this term, basic nickel carbonate is excluded from heading 7501 because it is not a nickel oxide. Presumably, this view is based on Explanatory Note 75.01, which describes intermediate products of nickel metallurgy to include impure nickel oxides, impure ferro-nickel, and nickel speiss, but does not refer to basic nickel carbonate. World Customs Organization, *Harmonized Commodity Description & Coding System Explanatory Notes*, Explanatory Note 75.01, 1302 (3d ed. 2002) ("Explanatory Notes"). This is a rather weak argument based on the principle of *inclusio unius est exclusio alterius*, applied not to the words of a statute, but to a non-binding Explanatory Note.[6] The argument is further weakened because the product at issue is removed during a process that results in nickel oxide sinters, which are specifically included in heading 7501, HTSUS, and are for steel-making purposes. Thus, it is very difficult to say that the product at issue is not an intermediate product of metallurgy, even provided that Explanatory Note 75.01 does not refer to basic nickel carbonate.

Defendant's real argument is that even if the product at issue is described in heading 7501, it is also described in heading 2836 because it is a carbonate, and that this is the more specific heading. The problem with this argument is that it relies on GRI 3(a) analysis of relative specificity when GRI 1 analysis is not exhausted. *See Cummins Inc. v. United States*, 377 F. Supp. 2d 1365, 1371 (CIT 2005) (stating that subsequent GRIs may only be applied after GRI 1 is exhausted). Generally, the HTSUS is not designed so that the headings overlap; therefore, a GRI 1 analysis should be a searching one. The court does not reach Rule 3(a) unless it is satisfied that headings 7501 and 2836 both cover the article. *Orlando Food*, 140 F.3d at 1440. Thus, under a GRI 1 analysis, the court gives careful

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[5] Metallurgy generally is the science of extracting metal or metal products from ores. *Webster's Third New Int'l Dictionary* 1420 (3d ed. 1981); *see also* R. 49 (stating that "metallurgy is the processing of mineral ores to produce metal products").

[6] "Although the Explanatory Notes are not legally binding or dispositive, they may be consulted for guidance and are generally indicative of the proper interpretation of the various HTSUS provisions." *See North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001).

consideration to whether the basic nickel carbonate at issue is *prima facie* classifiable as a "carbonate" under HTSUS 2836.

Defendant contends that the tariff term "carbonate" is an *eo nomine* term, and normally should cover all forms of carbonates, unless there are HTSUS section or chapter notes that limit the scope of that term, or the tariff description itself clearly limits the scope of the term. *See Carl Zeiss*, 195 F.3d at 1379. Defendant argues that the record shows unequivocally that the subject merchandise is a basic nickel carbonate, which falls within the scope of the term "carbonate" for the purpose of HTSUS 2836. To the contrary, the court concludes that under a GRI 1 analysis the basic nickel carbonate at issue is not classifiable as a carbonate under heading 2836 because the term "carbonate" in Chapter 28 is limited by the chapter notes.

Pursuant to Chapter Note 1(a) to Chapter 28, HTSUS, Chapter 28 applies only to "[s]eparate chemical elements and separate chemically defined compounds, whether or not containing impurities," unless the context otherwise requires. In the instant case, it is apparent that the basic nickel carbonate at issue is not a "separate chemical element." The parties may have assumed, however, that the basic nickel carbonate at issue is a "separate chemically defined compound" without giving proper consideration to the meaning of the term.[7] *See* R. 42 (stating that basic nickel carbonate "could be considered a chemical compound," keeping in mind that "there's a whole range of basic nickel carbonates") (testimony of plaintiff's witness John Reid). The court concludes that the basic nickel carbonate at issue is not a "separate chemically defined compound" within the meaning of Chapter Note 1(a).

Under the HTSUS, the court construes terms "according to their common and commercial meanings, which are presumed to be the same absent contrary legislative intent." *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1309 (Fed. Cir. 2003). Further, "the court may rely on its own understanding of the term as well as upon lexicographic and scientific authorities," and "[t]he court may also refer to the Explanatory Notes accompanying a tariff subheading." *Id*. Here, in construing the term "separate chemically defined compound," the court looks to the Explanatory Notes to Chapter 28, which provide a definition as follows:

> A separate chemically defined compound is a substance which consists of one molecular species (e.g., covalent or ionic) whose composition is defined by a constant ratio of elements and can be represented by a definitive structural diagram. In a

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[7] The parties did not brief this issue or focus on it at trial. Both parties are obliged to alert the court to relevant law, even if it is unfavorable to their position. The court must find the proper classification. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). The parties must aid the court in this endeavor.

> crystal lattice, the molecular species corresponds to the repeating unit cell.
>
> The elements of a separate chemically defined compound combine in a specific characteristic proportion determined by the valency and the bonding requirements of the individual atoms. The proportion of each element is constant and specific to each compound and it is therefore said to be stoichiometric.

Explanatory Notes, General Explanatory Note to Chapter 28, 260. This definition is consistent with lexicographic authorities on the subject. *See USR Optonix, Inc. v. United States*, 362 F. Supp. 2d 1365, 1370 n.3 (CIT 2005) (defining the HTSUS terms "chemical compound" and "separate chemically defined compound" narrowly to refer to "a substance composed chemically of two or more elements in definite proportions (as opposed to a *mixture*)") (citing *Oxford English Dictionary* 629, vol. III (2d ed. 1989)); *see also Hawley's Condensed Chemical Dictionary* 289 (14th ed. 2001). Thus, relying on the Explanatory Notes, lexicographic authorities, and the court's understanding of the term, we recognize that for the purpose of Chapter 28 a "separate chemically defined compound" is a substance composed chemically of two or more elements in definite proportions.

In the instant case, the basic nickel carbonate at issue does not meet this definition of "separate chemically defined compound." Whereas chemical compounds nickel carbonate ($NiCO_3$), nickel hydroxide ($Ni(OH)_2$), and water (H_2O) each possess a constant ratio of elements, the basic nickel carbonate at issue is a variable mixture of nickel carbonate, nickel hydroxide, and water, which may be represented by a broad range of chemical formulas. *See* D. Ex. F at 7 (stating that the most common forms of basic nickel carbonate "range from $2NiCO_3 \times 3Ni(OH)_2 \times XH_2O$ to $NiCO_3 \times Ni(OH)_3 \times XH_2O$"). Basic nickel carbonate will always have at least one ($NiCO_3$) and one ($Ni(OH)_2$), although potentially more than one of each. R. 43. If it is hydrated, the basic nickel carbonate will also contain at least one (H_2O). *Id.* Such a mixture of compounds does not fall within the definition of "separate chemically defined compound." *See USR Optonix*, 362 F. Supp. 2d at 1374 (concluding that a mixture of "yttrium oxide containing an indeterminate amount of europium," represented by the formula Y[2]O[3]: Eu, "does not conform to the Explanatory Note definition of 'separate chemically defined compound' ").

Moreover, the variable components are not classifiable as allowable impurities for the purpose of Chapter 28.[8] MetChem manufac-

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[8] Chapter Notes 1(a) and (b) to Chapter 28, HTSUS, allow for products of this chapter to be dissolved in water and to contain certain impurities. The Explanatory Note (A) to Chapter Note 1 to Chapter 28 provides that:

> The term "impurities" applies exclusively to substances whose presence in the single chemical compound results solely and directly from the manufacturing process (includ-

tures basic nickel carbonate with the intent to increase the nickel content of the substance and decrease the amount of impurities. *See* R. 38–39 (Plaintiff's main expert, John Reid, Ph.D. (metallurgy), explained the production advantages to the metallurgical process of higher nickel content and a lower level of impurities.); R. 64–66 (Plaintiff's president and trial witness, Thomas Cirigliano, also noted the higher nickel content of this product, and $Ni(OH)_2$ (nickel hydroxide) as a normal part of the product.). As defendant itself observes, nickel hydroxide will be part of the higher nickel content product. D. Br. at 3; R. 43. The nickel hydroxide is deliberately left in the product, and therefore does not satisfy the Explanatory Note definition of impurity. Moreover, plaintiff's witness John Reid described the impurities that Metchem sought to minimize as cobalt, manganese, and sulphur. *See* R. 39 (Defendant's counsel helped the witness list the impurities, and surely would have suggested "nickel hydroxide" or "nickel hydroxide tetrahydrate" if they were allowable impurities.).

Finally, this is not a case in which "the circumstances otherwise require" the subject merchandise at issue to fall under Chapter 28. The Explanatory Note (C) to Chapter 28 states that "[t]here are certain exceptions to the rule that this Chapter is limited to separate chemical elements and separate chemically defined compounds." *Explanatory Notes*, Explanatory Note (C) to Chapter 28, 262. The Explanatory Note lists the mixtures (as opposed to compounds) that are specifically permitted as exceptions to the general statutory provision permitting only elements and compounds in Chapter 28. *Id.* at 262–63; *see also USR Optonix*, 362 F. Supp. 2d at 1375 n.7 (holding that even though the mixture of yttrium oxide and europium is not a "separate chemically defined compound," heading 2846 provides an exception for "Compounds, inorganic or organic, of rare-earth metals, of yttrium or of scandium or of mixtures of these metals"). Listed for heading 2836 is "Commercial ammonium carbonate containing ammonium carbamate." *Explanatory Notes*, Explanatory Note (C) to Chapter 28, 263. Commercial or basic nickel carbonate is not listed as a permitted mixture. *Id.*

In sum, there was no evidence cited to the court that the mixture at issue was really a compound or simply a compound with impurities, or that the context requires classification of this non-compound in Chapter 28. In fact, the parties agreed that the basic nickel carbonate could take various forms. *See* R. 42–4. Therefore, it cannot be a "chemical compound" with a constant ratio of elements, as required

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ing purification). . . . When . . . substances are deliberately left in the product with a view to rendering it particularly suitable for a specific use rather than for general use, they are *not* regarded as permissible impurities.

Explanatory Notes, Explanatory Note (A) to Chapter Note 1 to Chapter 28, 261.

by the HTSUS Chapter 28. Thus, the product at issue must be classified for what it was proved to be – a mixture of salts and water, not classifiable under heading 2836.

CONCLUSION

The imported product is an intermediate product of nickel metallurgy. It is covered by heading 7501, HTSUS, and described by subheading 7501.20.00, HTSUS, because it is an intermediate product of nickel metallurgy. It is not covered by heading 2836, HTSUS.

Judgment will enter for plaintiff.

Slip Op. 06–106

OMKAR HARAK, Plaintiff, v. UNITED STATES, Defendant.

Before: Judge Judith M. Barzilay
Court No. 05–00365

OPINION

[Plaintiff's Motion for Judgment upon the Agency Record denied; Defendant's Motion for Judgment upon the Agency Record granted.]

Dated: July 18, 2006

Pietragallo Bosick & Gordon, LLP (*Albert Nicholas Peterlin*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; (*Barbara S. Williams*), Attorney in Charge, International Trade Field Office; (*Aimee Lee*), U.S. Department of Justice, Civil Division, Commercial Litigation Branch; *Louritha Green*, Office of Associate Chief Counsel, United States Customs & Border Protection, of counsel, for the defendant.

BARZILAY, JUDGE: Plaintiff moves for Judgment upon the Agency Record pursuant to USCIT Rule 56.1, seeking review of the denial of his application for a customs broker's license, which was based on his failure to achieve a passing score of 75% on the requisite examination. Specifically, Plaintiff petitions this court for reversal of the Department of Homeland Security's Assistant Secretary for Policy and Planning's ("Assistant Secretary") denial upon administrative review of credit for nine answers to exam questions initially scored as incorrect. Defendant has filed a cross-motion in opposition, seeking that the court uphold the Assistant Secretary's decision. For the reasons stated below, Plaintiff's motion is denied, and the case is dismissed.

BACKGROUND

Plaintiff Omkar Harak ("Plaintiff" or "Harak") sat for the April 5, 2004, administration of the Customs Broker License Examination.[1] A.R.[2] Ex. A at [1]. In a letter dated May 14, 2004, U.S. Customs and Border Protection ("Customs") advised Plaintiff of his score of 65% and that 75% or higher was required to achieve a passing score.[3] A.R. Ex. A at [1]. The letter further prescribed the procedure for challenging the score, notified Plaintiff of the next scheduled examination, and provided contact information for the relevant authorities. A.R. Ex. A at [1]. Included with Customs' letter was a copy of Plaintiff's answer sheet, examination booklet, and answer key. A.R. Ex. A at [2–26]. Failure to achieve a passing score does not preclude an examinee from retaking the examination at a later date. 19 C.F.R. § 111.13(e). The record does not reflect whether Plaintiff has retaken or plans to retake the examination.

Plaintiff sent a letter requesting an appeal of his score and challenging thirteen exam questions.[4] *See* A.R. Ex. B at [28]. In a letter dated August 19, 2004, Customs granted credit for four of those questions, but denied credit for the remainder. A.R. Ex. B at [28]. Of the challenged questions, credit was granted for Plaintiff's answers to questions 12, 16, 25, and 80. A.R. Ex. B. at [28]. The record does not reflect any reasoning for granting credit for these four answers, only that credit was granted. A.R. Ex. B at [28]. Credit was denied for his answers to questions 8, 14, 15, 19, 36, 38, 44, 73, 74. A.R. Ex. B at [28]. The decision to grant credit for those four questions raised Plaintiff's score to 70%, which was still four correct answers shy of a passing score. In its letter, Customs included several pages explaining the single correct and several incorrect answers for every question that Plaintiff was denied credit. A.R. Ex. B at [30–38].

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[1] The examination is prepared, administered, and graded semiannually by U.S. Customs and Border Protection pursuant to its statutory authority under 19 U.S.C. § 1641(b)(2) (2000). The examination aims to test an individual's "knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters necessary to render valuable service to importers and exporters." 19 C.F.R. § 111.13(a) (2003). The exam consists of 80 multiple choice questions; the minimum passing score is 75%. A.R. Ex. A at [4]. As one of the criteria of obtaining a broker's license, the examinee must correctly answer at least 60 questions. *See* 19 C.F.R. § 111.11(4).

[2] "A.R." represents the Administrative Record in this case, which is composed of exhibits. For the sake of convenience, the record was paginated starting on the first page of Exhibit A; page numbers are bracketed in the citations to the record.

[3] The April 2004 examination was not the first time Plaintiff failed to achieve a passing score. Plaintiff explained in his letter of February 7, 2005, that he did not pass the April 2003 administration of the examination and "accepted the results" despite his discontent. Letter from Plaintiff to Secretary of the Treasury (Feb. 7, 2005).

[4] The Administrative Record filed by the Government does not include a copy of this appeal. However, the August 19, 2004, letter from Customs refers to Plaintiff's appeal in the first paragraph. A.R. Ex. B at [28].

In a letter dated September 20, 2004, Plaintiff then petitioned the Department of Homeland Security, Border and Transportation Security Directorate ("Directorate") for further review of the nine contested questions for which he was denied credit. A.R. Ex. C at [40]. Plaintiff also submitted an addendum in which he dedicated one page to challenging each of the nine questions. A.R. Ex. C at [41–49].

Upon the determination that Customs had the authority to decide the disposition of Plaintiff's petition, the Office of the Executive Secretariat, Transportation Security Administration ("Secretariat") redirected Plaintiff's petition to Customs on October 20, 2004.[5] A.R. Ex. D at [52]. The Secretariat declared its intent to send Plaintiff a copy of this letter as notification of the transfer, though the administrative record does not reveal Plaintiff's receipt of any communication. A.R. Ex. D at [52]. Plaintiff's petition was then faxed by Customs to Plaintiff's original addressee at the Directorate. A.R. Ex. D at [54]. Customs followed up in a letter dated November 24, 2004, informing Plaintiff that his appeal petition had been "inadvertently misrouted [sic]," that it would be considered timely, and that the Department of Homeland Security would send written notification detailing the results of the appeal. A.R. Ex. F at [56].

The Assistant Secretary informed Plaintiff of its determination to affirm the denial of credit for the nine contested questions by letter dated January 31, 2005. A.R. Ex. G at [58]. The brief letter does not offer information regarding the option of further appeal. A.R. Ex. G at [58]. Finally, Plaintiff wrote to the Secretary of the Treasury requesting further administrative review.[6] Plaintiff's Letter to Secretary of the Treasury (Feb. 7, 2005); *see* A.R. at [ii]. Customs replied on April 20, 2005, advising Plaintiff that the Secretary of the Treasury no longer decides appeals of this nature and that his options for administrative review were exhausted. Customs Letter to Plaintiff (Apr. 20, 2005); *see* A.R. at [ii]. The letter further advises Plaintiff that he is entitled to pursue an appeal with this Court and of the date of the next Customs Broker License Examination. A.R. at [ii]; *see* 19 U.S.C. § 1641(e)(1); 19 C.F.R. § 111.17(c).

This action arises out of Plaintiff's petition to this Court by letter dated May 10, 2005 pursuant to 19 U.S.C. § 1641(e)(1).

JURISDICTION AND STANDARD OF REVIEW

The court has exclusive jurisdiction over this case pursuant to 28 U.S.C. § 1581(g)(1) (2000). The Secretary of the Treasury ("Trea-

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[5] This transfer was ultimately incorrect. The erroneous "misdirect[ion]" was remedied, and Plaintiff was notified by letter dated November 24, 2004. *See* Def.'s Br. 3.

[6] The Administrative Record does not include any documents after the Assistant Secretary's letter of January 31, 2005. The reason given is that the subsequent four letters were not considered by the Department of Homeland Security in rendering its final administrative review . . . , in this case." A.R. at [ii].

sury")[7] possesses broad powers over the licensing of customs brokers. *See Dunn-Heiser v. United States*, 29 CIT ___, ___, 374 F. Supp. 2d 1276, 1279 (2005). "The findings of the Secretary [of the Treasury] as to the facts, if supported by substantial evidence, shall be conclusive." 19 U.S.C. § 1641(e)(3). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Because the relevant statutes are silent regarding the proper standard of review in considering the legal questions in customs broker's license denial cases, the court is guided by the Administrative Procedure Act ("APA"). *O'Quinn v. United States*, 24 CIT 324, 325, 100 F. Supp. 2d 1136, 1137 (2000). Under the standard laid out in the APA, the court will uphold the final administrative decision of the Assistant Secretary, unless the decision was " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' " *Id.* (quoting 5 U.S.C. § 706(2)(A)). "[T]he arbitrary and capricious test

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[7] Effective March 1, 2003, Customs was renamed the Bureau of Customs and Border Protection and is now part of the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1502, 116 Stat. 2135, 2308 (2002); Reorganization Plan Modification for the Department of Homeland Security, H.R. Doc. No. 108–32, at 4 (2003). The relevant administrative appeal process for challenging examination scores is as follows:

> If an examinee fails to attain a passing grade on the examination . . . , the examinee may challenge that result by filing a written appeal with [Customs]. . . . Customs will provide to the examinee written notice of the decision on the appeal. If the Customs decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by writing to the Secretary of the Treasury. . . .

19 C.F.R. § 111.13(f) (2004). On May 15, 2003, the Treasury Department issued an order delegating from the Secretary of the Treasury to the Secretary of Homeland Security "general authority over Customs revenue functions vested in the Secretary of the Treasury as set forth in the Homeland Security Act of 2002." *Delegation of Authority to the Secretary of Homeland Security*, 68 Fed. Reg. 28,322–01, 28,322 (May 23, 2003). It should be noted that although the language of the order does not specify that Customs decisions are appealed by writing to the Secretary of Homeland Security, the government's brief postulates that the Secretary of the Treasury delegated authority to decide customs cases to the Department of Homeland Security per its order published in 68 Fed. Reg. 28,322. Def.'s Br. 1 (stating that "[o]n November 12, 2003, authority to decide administrative appeals of customs broker licensing examination results was delegated to the Department of Homeland Security's Assistant Secretary for Policy and Planning."). Plaintiff does not challenge this transfer of authorities. See also 19 U.S.C. § 1641 (Supp. 2003), stating:

> Transfer of Functions
>
> For transfer of functions, personnel, assets, and liabilities of the United States Customs Service of the Department of the Treasury, including the functions of the Secretary of the Treasury relating thereto, to the Secretary of Homeland Security, and for treatment of related references, see sections 203(1), 551(d), 552(d) and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under 6 U.S.C.A. § 542.

19 U.S.C. § 1641. Given that the Secretary of the Treasury has the statutorily mandated power to delegate its functions related to Customs' work, and Congress' anticipation that functions would be transferred, the court will substitute the Secretary of the Treasury with the Secretary for Homeland Security where appropriate in relevant statutes.

requires that the agency engage in reasoned decision-making in grading the exam." *Id.* (citing 2 Kenneth Culp Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 11.4, at 203 (3d ed. 1994)).

> Regarding the review of exam questions, the Federal Circuit explained:
>
> Underpinning a decision to deny a license arising from an applicant's failure to pass the licensing examination are factual determinations grounded in examination administration issues-such as . . . the allowance of credit for answers other than the official answer-which are subject to limited judicial review. . . .

Kenny v. Snow, 401 F.3d 1359, 1361 (Fed. Cir. 2005). Although this Court reviews each exam question, "[p]arties should not conclude from the court's detailed examination of the test answers that the court is some kind of final reviewer of the [exam]." *Di Iorio v. United States*, 14 CIT 746, 752 (1990) (not reported in F. Supp.). In this case, the Assistant Secretary's decision rested on an analysis of Plaintiff's exam results. The court, therefore, "will not substitute its own judgment on the merits of the Customs examination, but will examine decisions made in connection therewith on a reasonableness standard." *Id.* at 747.

DISCUSSION

"Among the lawful grounds for denying a license is the failure to pass the licensing examination." *Kenny v. Snow*, 401 F.3d at 1361; *see* 19 U.S.C. § 1641(b)(2) ("the Secretary may conduct an examination to determine the applicant's knowledge of customs and related laws"); 19 C.F.R. § 111.11(a) ("to obtain a broker's license, an individual must . . . [have] attain[ed] a passing (75 percent or higher) grade on a written examination"); 19 C.F.R. § 111.16(b)(2) ("grounds sufficient to justify denial of an application for a license include . . . the failure to meet any requirement set forth in [19 C.F.R.] § 111.11").[8] In reviewing the Assistant Secretary's decision to deny the license, the court "necessarily conduct[s] some inquiry into plaintiff's arguments and defendant's responses concerning each" of the questions. *Di Iorio*, 14 CIT at 747. In addition to challenging the Assistant Secretary's decision to deny him credit for the nine ques-

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[8] The relevant regulations also provide:

> If an examinee fails to attain a passing grade on the examination . . . , the examinee may challenge that result by filing a written appeal with [Customs]. . . . Customs will provide to the examinee written notice of the decision on the appeal. If the Customs [sic] decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by writing to the Secretary of the Treasury. . . .

19 C.F.R. § 111.13(f).

tions, Harak also takes issue with the Assistant Secretary's explanation for the denial of his appeal. First, the court will address Plaintiff's specific challenges regarding the nine test questions, and then turn to Plaintiff's argument regarding the adequacy of the explanation.

1. The Contested Questions

Question 8

Defendant states that Question 8 requires an examinee to classify merchandise under the Harmonized Tariff Schedule of the United States (2004) ("HTSUS"), 19 U.S.C. § 1202. Def.'s Br. 10. The question asks:

> 8. What is the correct **CLASSIFICATION** for assembled multifunctional all-in-one office equipment consisting of a copier, facsimile, scanner, and laser printer—including a media transport, control and print mechanism—that is capable of no more than 20 black and white pages per minute?
> A. 8471.60.51
> B. 8471.60.52
> C. 8471.60.62
> D. 8471.60.61
> E. 9008.40.00

To answer the question correctly, an examinee must recognize the difference between a subheading that states a specific attribute of a printer unit and the residual subheading "Other." The official correct answer is choice B, which reflects subheading 8471.60.52: an "[a]ssembled printer unit incorporating at least the media transport, control and print mechanisms: Laser: . . . Other." Def.'s Br. 11. In accord with the official correct answer, the equipment in the question is properly classifiable under subheading 8471.60.52 since it falls outside the parameters set forth in 8471.60.51, i.e. it is not capable of producing more than 20 pages per minute. 8471.60.51, HTSUS.

Plaintiff does not explicitly dispute that choice B is correct, but claims that his answer, choice C, was also a proper response to the question. Pl.'s Br. 8. In support of his argument, Plaintiff states that choice C otherwise "satisfies the requirements set forth in the question," except that there is a "stark absence of reference to the printer being unassembled in [8471.60.62]." Pl.'s Br. 8. Subheading 8471.60.62 is a residual subheading that encompasses laser printer units other than "[a]ssembled units incorporating at least the media transport, control and print mechanisms" and other than those capable of producing more than 20 pages per minute. 8471.60.62, HTSUS. Simply, it is the proper classification for unassembled laser printer units lacking one or more of the named mechanisms and ca-

pable of producing no more than 20 color or black and white pages per minute.

In *Brother Int'l Corp. v. United States*, this Court agreed with a tariff classification ruling related to a " 'multi-function machine in one common housing that can perform, [sic] printing, copying, scanning, fax and PC fax functions' " capable of printing six pages per minute.[9] 29 CIT ___ , ___ , 368 F. Supp. 2d 1345, 1348 (2005) (quoting NY B87982 (Aug. 4, 1997), *available at* 1997 WL 564809). In that ruling, Customs found that the principal function of that machine was its printing function and that "[i]n its imported condition . . . [the MFC[10] was] not an 'assembled' printer since it [did] not contain the print mechanism." NY B87982 at *1. Based on these findings, Customs determined that the printer was properly classifiable under subheading 8471.60.62. *Id.* Thus, the equipment described in the question is not properly classifiable under subheading 8471.60.62, and choice C therefore is an incorrect answer.

Plaintiff's complaint appears to be with the HTSUS itself rather than with question 8 and its corresponding answer choices. As the question was designed to test an understanding of the structure of the HTSUS and its usage of "Other" subheadings, the court is not convinced by Plaintiff's objections. Accordingly, the court finds that Defendant reasonably denied Plaintiff's appeal with respect to this question.

Question 14

Question 14 also requires an examinee to classify goods under the applicable HTSUS heading and subheading. The question states:

14. What is the correct **CLASSIFICATION** for chilled cocktail onions not over 16mm in diameter and preserved in vinegar?
A. 0703.10.3000
B. 0703.10.4000
C. 0711.90.5000
D. 0712.20.4000
E. 2001.90.3400

To select the proper classification subheading, the examinee must sort through several identifiers, avoid red herrings, and recognize

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[9] That case involved an undisputed misclassification by a customs broker. The legal question was "whether a mistake of fact or mistake of law caused the misclassification of the MFCs," and as such the holding itself does not apply in this action. *Brother Int'l Corp.*, 368 F. Supp. 2d at 1347; *see id* at 1352 (holding that "the broker's application of GRI principles to determine proper tariff classification of merchandise [was] tantamount to the construction of a law" and so "the broker's result amounted to an error in the construction of a law").

[10] MFC is a proprietary acronym describing a "Multi-Function Center" manufactured by Brother International. Brother International, http://www.brother-usa.com/mfc/ (last visited June 28, 2006).

the pivotal fact that the onions are preserved in vinegar. The official correct answer is choice E, subheading 2001.90.34, which refers to "Vegetables, fruits, nuts, and other edible parts of plants, prepared or preserved by vinegar or acetic acid: . . . Other: . . . Onions."[11] Def.'s Br. 12 (citing 2001.90.34, HTSUS.). Plaintiff argues that since subheading 2001.90.34 does not reference a limitation in diameter, choice E is invalid. Pl.'s Br. 9. The diameter limitation is a red herring; since subheading 2001.90.34 does not reference a size limitation, it is the correct classification for onions preserved by vinegar or acetic acid of whatever size. 2001.90.3400, HTSUS.

Plaintiff argues that subheading 0703.10.4000 under Chapter 7 of the HTSUS ("Edible Vegetables and Certain Roots and Tubers") is the proper classification, which is reflected by his answer, choice B. Pl.'s Br. 9. As Defendant notes, the Achilles' heel in answer choice B is that contrary to the characterization of the goods in the question, 0703.10.4000 is the subheading for onions and shallots *over* 16mm in diameter. Def.'s Br. 12. Furthermore, like the other answer choices derived from Chapter 7, "it does not account for [the onions] being 'preserved in vinegar.' "[12] Def.'s Br. 12. Therefore, Defendant reasonably denied Plaintiff's appeal of this question.

Question 15

Question 15 requires the examinee to apply Customs' procedures for merchandise entered under bond under chapter 98, subchapter XIII, HTSUS, to a factual scenario. The question states:

15. Goods arrive at the port of Philadelphia and are entered temporarily into the U.S. under Chapter 98, Subchapter XIII of the Harmonized Tariff Schedule of the United States. Nine months later, the goods are in Los Angeles and the importer wants them to remain in the U.S. for four more months. What action should the importer take?

A. File a consumption entry
B. File a written application for an extension on Customs Form 3173 with the Commissioner of Customs
C. File a written application for an extension on Customs Form 3173 with the director of the port of Philadelphia
D. File a written application for an extension on Customs Form 3173 with the director of the port of Los Angeles

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[11] In 2004, Customs ruled upon request that the proper classification of onions preserved in vinegar (Borretane Onions in Balsamic vinegar) was 2001.90.3400. NY K83413 (May 7, 2004), *available at* 2004 WL 1182548.

[12] As supplemental support for its response to Plaintiff, Defendant cites the Explanatory Notes to Chapter 7 of the HTSUS, which provide that vegetables that "have been prepared or preserved otherwise than as provided for in the headings of this Chapter," as the onions in question 14, "are . . . excluded." Def.'s Br. 13.

E. Do nothing, because a Temporary Importation Bond already covers the goods.

To answer correctly, the examinee must recognize that the goods are entered temporarily under bond, and that those goods are allowed to remain in the United States for an aggregate period in excess of the one year allowed by U.S. Note 1(a), chapter 98, subchapter XIII, HTSUS.[13] Def.'s Br. 15. Pursuant to 19 C.F.R. § 10.37, after the first year of initial entry under bond, the importer may request an extension of time for exportation of goods for up to two additional years, or such shorter period as may be appropriate.[14] Def.'s Br. 15. Defendant identifies the correct answer as choice C, because the question clearly identifies Philadelphia as the port of entry. Def.'s Br. 14.

Plaintiff argues without explanation that his answer, choice D, should be credited. Pl.'s Br. 17. Under the scenario in question 15, 19 C.F.R. § 10.37 permits the director of the port at Philadelphia, where the entry was filed, to grant extensions upon receipt of a written application on Customs Form 3173, as reflected by the official correct answer. Choice D is an incorrect answer since it states that the importer should apply for an extension in Los Angeles, which was not the port where the entry was filed.

Plaintiff argues that the absence of regulatory language in choice C, which sets forth situations in which extensions may not be granted, renders the question unfairly confusing.[15] Pl.'s Br. 16–17. If an examination question does not contain sufficient information to choose an answer, it may be considered faulty in its drafting and disposed of accordingly. *See O'Quinn*, 24 CIT at 328. However, the facts presented in the question do not reflect that any of the events refer-

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[13] U.S. Note 1(a), chapter 98, subchapter XIII, HTSUS ("Articles Admitted Temporarily Free of Duty Under Bond") provides in relevant part:

> The articles described in the provisions of this subchapter, when not imported for sale or for sale on approval, may be admitted into the United States without payment of duty, under bond for their exportation within 1 year from the date of importation, which period, in the discretion of the Secretary of the Treasury, may be extended, upon application, for one or more further periods which, when added to the initial 1 year, shall not exceed a total of 3 years. . . .

[14] That section provides:

> The period of time during which merchandise entered under bond under chapter 98, subchapter XIII, Harmonized Tariff Schedule of the United States (19 U.S.C. [§] 1202), may remain in the Customs territory of the United States, may be extended for not more than two further periods of 1 year each, or such shorter period as may be appropriate. Extensions may be granted by the *director of the port where the entry was filed* upon written application on Customs Form 3173, provided the articles have not been exported or destroyed before the receipt of the application, and liquidated damages have not been assessed under the bond before receipt of the application. . . .

19 C.F.R. § 10.37 (2003) (emphasis added).

[15] The excluded text is: "provided the articles have not been exported or destroyed before the receipt of the application, and liquidated damages have not been assessed under the bond before receipt of the application. . . ." 19 C.F.R. § 10.37 (2003).

enced in the absent language have occurred. Therefore, even though that particular language is absent, the question contains sufficient information for an examinee to select the correct answer choice C.

Plaintiff's argument that 19 C.F.R. § 10.38 suggests additional options for articles admitted temporarily free of duty under bond is unpersuasive.[16] Pl.'s Br. 17. The question, designed to test knowledge of the procedures of filing an extension for exportation, does not require the examinee to contemplate the eventual exportation of the goods at issue. Therefore, the question does not implicate 19 C.F.R. § 10.38.

Defendant was reasonable in its determination that inclusion of the phrase was not necessary to the examinee's ability to correctly answer the question. *See Di Iorio*, 14 CIT at 750. The question was not ambiguous or otherwise unfair, and the Assistant Secretary's decision to deny credit for answer choice D was reasonable. *See Dunn-Heiser*, 374 F. Supp. 2d at 1280.

Question 19

Question 19 aims to test an examinee's understanding of 19 C.F.R. § 141.89, which details the information required on invoices for fur products and furs imported into the United States.[17] Def.'s Br. 16. The question states:

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[16] That regulation provides:

> (a) Articles entered under chapter 98, subchapter XIII, Harmonized Tariff Schedule of the United States (HTSUS) (19 U.S.C. [§] 1202) may be exported at the port of entry or at another port. An application on Customs Form 3495 shall be filed in duplicate with the port director of a sufficient length of time in advance of exportation. . . . .
>
> . . .
>
> (c) If exportation is to be made at a port other than the one at which the merchandise was entered, the application on Customs Form 3495 shall be filed in triplicate. . . .

19 C.F.R. § 10.38 (2003).

[17] That regulation sets forth:

> (a) Invoices for the following classes of merchandise, classifiable under the Harmonized Tariff Schedule of the United States (HTSUS), shall set forth the additional information specified:
>
> . . . .
>
> Fur products and furs (T.D. 53064) — (1) Name or names (as set forth in the Fur Products Name Guide (16 CFR [§] 301.0) of the animal or animals that produced the fur, and such qualifying statements *as may be required* pursuant to § 7(c) of the Fur Products Labeling Act (15 U.S.C. [§] 69e(c)); (2) A statement that the fur product contains or is composed of used fur, when such is the fact; (3) A statement that [sic] fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact; (4) A statement that the fur product is composed wholly or in substantial part of paws, tails, bellies, or waste fur, when such is the fact; (5) Name and address of the manufacturer of the fur product; (6) Name of the country of origin of the furs or those contained in the fur product.

19 C.F.R. § 141.89 (2003) (emphasis added).

19. Which is **NOT** required on invoices for furs and fur products imported into the U.S.?

A. The names of the animals that produced the fur
B. The manufacturers' names and addresses
C. The countries of origin
D. A statement that the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact
E. A statement that the fur product is not composed wholly or in substantial part of paws, tails, bellies, or waste fur

The question compels the examinee to identify which of the five answer choices contains information not required by the regulation. Defendant certifies the correct answer as choice E. Def.'s Br. 17. In support, Defendant accurately specifies that 19 C.F.R. § 141.89(a)(4) does not require a statement that the fur product *is not* "composed wholly or in substantial part of paws, tails, bellies, or waste fur," but rather requires affirmative disclosure only where the fur product *is* composed of such materials. Def.'s Br. 17. Choices B and C reflect the requirements of 19 C.F.R §§ 141.89(a)(5) and (6), respectively, and are therefore incorrect. Plaintiff's answer, choice D, is taken verbatim from § 141.89(a)(3) and therefore was reasonably deemed incorrect by Customs.

Plaintiff argues that the word "may" in 19 C.F.R. § 141.89(a)(1) implies that the requirements of the regulation are flexible, thus rendering the question unfairly confusing. Pl.'s Br. 17–18. This argument is a flawed understanding of the regulation. The addition of the regulatory phrase, "and such qualifying statements as may be required pursuant to § 7(c) of the Fur Products Labeling Act (15 U.S.C. § 69e(c))" is merely a reference to the possibility that in addition to the name or names of the animal that produced the fur, information may be required under the Fur Products Labeling Act in certain circumstances. 19 C.F.R. § 141.89(a). Such additional requirements have no bearing whatsoever on the minimal requirement that the name or names of the animals that produced the fur be included on an invoice of imported goods under 19 C.F.R. § 141.89(a)(1). The absence of such language does not render choice A any less correct and does not support the conclusion that the question is unfairly confusing or ambiguously drafted. *See Di Iorio*, 14 CIT at 750; *O'Quinn*, 24 CIT at 328, 100 F. Supp. 2d. at 1140. For these reasons, the Assistant Secretary engaged in reasoned decision-making in its denial of credit for Plaintiff's answer to this question.

Question 36

According to Defendant, Question 36 was designed to examine knowledge of the hierarchy of the methods for appraisement of im-

ported merchandise as set forth in 19 C.F.R. § 152.101(b).[18] Def.'s Br. 18. The question states:

36. Which statement about the order of appraisement of imported merchandise as stipulated in the Trade Agreements Act of 1979 is correct?

A. If the value cannot be determined, minimum value can be used as a basis of appraisement
B. The importer can choose to use computed value in lieu of deductive value
C. The importer can choose to use deductive value before transaction value
D. Transaction value of similar merchandise is the last basis of appraisement
E. If computed value cannot be determined, the transaction value may not be reasonably adjusted to arrive at a value.

The official correct answer is choice B, for which Defendant cites 19 C.F.R. §§ 152.101(b)(5) and 152.101(c) as support.[19] Def.'s Br. 18.

Plaintiff's response, choice E, was deemed incorrect. Def.'s Br. 19. A reading of the regulation reveals the reasoning behind the Assistant Secretary's denial of Plaintiff's appeal with respect to this question. Where the computed value cannot be determined, Defendant correctly points to the reference in 19 C.F.R. § 152.101(b)(6) to § 152.107(1) as providing an alternative method "derived from the methods set forth in §§ 152.103 through 152.106, reasonably adjusted to the extent necessary to arrive at a value." 19 C.F.R.

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[18] The regulation provides in part:

(b) Methods. Imported merchandise will be appraised on the basis, and in the order, of the following:

(1) The transaction value provided for in § 152.103;

(2) The transaction value of identical merchandise provided for in § 152.104, if the transaction value cannot be determined, or can be determined but cannot be used because of the limitations provided for in § 152.103(j);

(3) The transaction value of similar merchandise provided for in § 152.104, if the transaction value of identical merchandise cannot be determined;

(4) The deductive value provided for in § 152.105, if the transaction value of similar merchandise cannot be determined;

(5) The computed value provided for in § 152.106, if the deductive value cannot be determined; or

(6) The value provided for in § 152.107, if the computed value cannot be determined.

19 C.F.R. § 152.101(b) (2003).

[19] 19 C.F.R. § 152.101(c) provides in part:

(c) Importer's option. The importer may request the application of the computed value method before the deductive value method. The request must be made at the time the entry summary for the merchandise is filed with the port director (see § 141.0a(b) of this chapter). . . .

§ 152.107(a). Therefore, Plaintiff's answer was found to be incorrect and credit was denied.

On appeal, Plaintiff insists that choice E is a proper response, based on several arguments. First, "the question fails to identify pertinent information relating to the referenced act" – meaning that instead of referring to the Tariff Act of 1930, 19 U.S.C. § 1401, the question refers to the Trade Agreements Act of 1979, which amended the Tariff Act of 1930. Pl.'s Br. 12. Second, Plaintiff states that 19 C.F.R. § 152.101(b) lists in order various parts of 19 C.F.R. § 152 and that none of these parts are listed as options. Pl.'s Br. 12. Third, Harak correctly states that option B refers the examinee to 19 C.F.R. § 152.101(c), which allows that an importer "may request" the application of the computed value method "before" the deductive value method. Harak argues that choice B misreads § 152.101(c) because it uses the word "in lieu" as opposed to "before," changing the meaning of the regulation. Furthermore, he argues that choice B is incorrect because it provides that the importer "can choose to use computed value before transaction value," whereas § 152.101(c) merely allows the importer to request the reversal of the procedure set out in § 152.101(b). Pl.'s Br. 11–12. Finally, he argues that 19 C.F.R. § 152.101(c) sets forth time requirements for making such a request, which do not appear in option B.

The government retorts that these arguments are unavailing for reasons that the court finds persuasive. First, the question's use of "Trade Agreements Act of 1979" is not misleading because section 201 of that act actually amended the relevant statute, 19 U.S.C. § 1401a.[20] As the government explained, "the use of either [act] provides the applicant with a level of specificity sufficient to answer the question and apply the relevant regulations." Def.'s Br. 19. Regarding Plaintiff's second argument, the question does not need to explicitly mention the regulations when it tests knowledge of their content. Obviously, what is tested is the future broker's knowledge of law, not his mere ability to read regulations.[21] Plaintiff's third argument is also without merit: 19 C.F.R. § 152.101(c) allows an importer to choose to use computed value before deductive value as long as the importer makes the request at the time the entry sum-

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[20] The section of the regulation that is pertinent to identifying the relevant law sets forth:

(a) Effective date. The value for appraisement of merchandise exported to the United States on or after July 1, 1980, or, for articles classified under subheading 6401.10.00 Harmonized Tariff Schedule of the United States (19 U.S.C. [§] 1202), on or after July 1, 1981, will be determined in accordance with section 402, Tariff Act of 1930 (19 U.S.C. [§]1401a), as amended by section 201, Trade Agreements Act of 1979.

19 C.F.R. § 152.101(a) (2003).

[21] The exam is open book. A.R. Ex. A at [4] (stating that examinee is responsible for having Harmonized Tariff Schedule of the United States (2004) and Title 19, Code of Federal Regulations).

mary is filed. The language in § 152.101(c) does not contradict the statement in choice B because the importer's ability to choose ("can choose") is implied by the subsection. Finally, the substitution of the words "in lieu of" for "before" does not make the question unfairly confusing. *See Di Iorio*, 14 CIT at 748–49.

The court has also considered Plaintiff's remaining arguments and has found them to be without merit. Therefore, Defendant has shown that it engaged in reasoned decision-making in its denial of Plaintiff's appeal of this question.

Question 38

Question 38 aims to assess a test-taker's understanding of the administration of quotas. Def.'s Br. 20. It states:

38. Which is true regarding quota?
A. An entry for consumption for merchandise that has arrived within the Customs territory of the United States may not be submitted for preliminary review without deposit of estimated duties within a time frame approved by the port director
B. When it is anticipated that a quota will be filled at the opening of the quota period, entry summaries for consumption, with estimated duties attached, shall be presented before 12 noon Eastern Standard Time
C. Special arrangements shall not be made so that all entry summaries for consumption for quota merchandise may be presented at the exact moment of the opening of the quota in all time zones
D. In the event a quota is prorated, entry summaries for consumption shall be returned to the importer for adjustment
E. Merchandise imported in excess of a filled quota can only be exported

The question requires an examinee to identify an accurately stated requirement of the regulation from a list of five potential answer choices. Defendant points to choice D as the correct answer, citing the regulation outlining the procedure on the opening of potentially filled quotas, as codified in 19 C.F.R. § 132.12(c)(2).[22] Def.'s Br. 20. Plaintiff's answer, choice B, was deemed incorrect due to the presence of the solitary, yet crucial word "not," which made choice B an affirmative mandate and the converse of the prohibition in 19 C.F.R.

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[22] The relevant part of that regulation stipulates, "In the event a quota is prorated, entry summaries for consumption, or withdrawals for consumption, with estimated duties attached, shall be returned to the importer for adjustment. . . ." 19 C.F.R. § 132.12(c)(2) (2003).

§ 132.12(a).[23] Defendant was therefore reasonable in denying credit for that answer.

Plaintiff next argues that due to the question's omission of "pertinent language," the official correct answer, choice D, is "ambiguous at best and incorrect at worse [sic]." Pl.'s Br. 13. As with other such objections in this action, Defendant responds that the omission of "with estimated duties attached" is not fatal to the accuracy of the statement in choice D. Def.'s Br. 20. As the court has stated elsewhere in this opinion, if a question is ambiguously drafted or does not contain sufficient information to choose an answer, it may be considered faulty. *See Carrier v. United States*, 20 CIT 227, 232 (1996) (not reported in F. Supp.); *O'Quinn*, 24 CIT at 328, 100 F. Supp. 2d at 1140. However, a question or answer choice need not reflect the precise wording of the regulation in order to be valid. *See Di Iorio*, 14 CIT at 750. The phrase "with estimated duties attached" is generally present where entry summaries or withdrawals are referenced. *See, e.g.*, 19 C.F.R. § 132.1(d)(1) (2003). If choice D had affirmatively stated that no such attachment was necessary, it would have been an incorrect answer. However, it would have been a leap of logic unacceptable in a multiple choice examination to assume in the absence of such a statement that estimated duties were not required. Though the question is not a perfect reflection of the regulation's language, it is not inadequate. *See Di Iorio*, 14 CIT at 748–49.

Question 73

Defendant states that Question 73 was designed to test an examinee's knowledge of 19 C.F.R. § 152.103(e)(1), which relates to the classification and appraisement of merchandise.[24] Specifically, the regulation details the procedure for apportionment of the value of an assist when determining the value of imported merchandise. The question states:

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[23] That section provides:

> (a) Preliminary review before opening. When it is anticipated that a quota will be filled at the opening of the quota period, entry summaries for consumption, or withdrawals for consumption, with estimated duties attached, *shall not be* presented before 12 noon Eastern Standard Time in all time zones. However, an entry summary for consumption, or withdrawal for consumption, for merchandise which has arrived within the Customs territory of the United States may be submitted for preliminary review without deposit of estimated duties within a time period before the opening approved by the port director. Submission of these documents before opening will not accord the merchandise quota priority or status.

19 C.F.R. § 132.12(a) (2003) (emphasis added).

[24] In his letter dated May 10, 2005, petitioning judicial review, Mr. Harak pointed out that Defendant incorrectly cited 19 C.F.R. § 152.103(d)(2)(e) as the relevant section in its answer key and 19 C.F.R. § 152.103(e)(2), the interpretive note, in its response to his initial appeal. A.R. Ex. A at [26]; A.R. Ex. B at [37]. These mistakes are acknowledged by Defendant, Def.'s Br. 24, and not challenged by Plaintiff before the court.

73. Which **ONE** of the following is **NOT** a correct statement regarding the apportionment method of the value of an assist to imported merchandise?

A. The importer may request to use any reasonable method of apportionment in accordance with generally accepted accounting principles
B. If the assist will be used only in the production of merchandise exported to the U.S., the total value of the assist may be apportioned over the first shipment
C. If the assist will be used only in the production of merchandise exported to the U.S., the total value of the assist may be apportioned over the number of units produced up to the time of the first shipment
D. If the assist will be used only in the production of merchandise exported to the U.S., the total value of the assist may be apportioned over the entire anticipated production
E. If the assist is used in several countries, the method of apportionment of the value of the assist will depend on documentation submitted by the exporter.

The question requires the examinee to determine which of the five choices is *not* a correct statement. A.R. Ex. A at [22]. Defendant maintains that the only acceptable answer is E. Def.'s Br. 25. Plaintiff asserts without explanation that his answer, D, is acceptable. Pl.'s Br. 13–15. Without discussing why answer choice E is wrong, Plaintiff argues that the other answers omit pertinent language, creating ambiguity and rendering the entire question "unfairly confusing." Pl.'s Br. 13–15.

If a question is ambiguous due to faulty drafting, this Court has held that credit must be granted or the question must be voided. *Carrier*, 20 CIT at 232 (holding that ambiguous official answer could not be considered more correct than plaintiff's response). However, it is not necessary that a correct answer mirror the exact language of the statute it is based upon. *See Di Iorio*, 14 CIT at 750.

Referencing choice A, Plaintiff argues that the disparity between the regulation language, "reasonable manner appropriate to the circumstances," and the examination language, "reasonable method," is ambiguous.[25] Pl.'s Br. 14. Plaintiff insists that the latter phrase is a more permissive standard than the former. Pl.'s Br. 14. The court is

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[25] The relevant section provides:

> The apportionment of the value of assists to imported merchandise will be made in a *reasonable manner appropriate to the circumstances* and in accordance with generally accepted accounting principles. The method of apportionment actually accepted by Customs will depend upon the documentation submitted by the importer. . . . In addition to these three methods, the importer may request some other method of apportionment in accordance with generally accepted accounting principles. . . .

19 C.F.R. § 152.103(e)(1) (emphasis added).

not convinced by this argument. Moreover, the last sentence of the interpretive note at 19 C.F.R. § 152.103(e)(2) vitiates any charged ambiguity in choice A.[26] Turning to choice B, Plaintiff contends that the omitted phrase, "if the importer wishes to pay duty on the entire value at once," is a condition precedent or concurrent to any apportionment made over the first shipment.[27] Pl.'s Br. 14–15. The relevant words are more reasonably an explanatory phrase, clarifying the outcome of a decision by an importer to request apportionment over the first shipment. The absence of this language "in no way renders the excerpted material any less correct." *Di Iorio*, 14 CIT at 750. Choices C and D are taken verbatim from the regulations and as such are correct statements.[28] Choice E substitutes a requirement that the exporter submit documentation where the regulation requires such documentation to be submitted to Customs by the importer.[29] Def.'s Br. 25. Thus, choice E is not a correct statement regarding the apportionment method of the value of an assist.

For the foregoing reasons, the Assistant Secretary's affirmance of Customs' denial of Plaintiff's appeal for credit for his answer to question 73 was not arbitrary, capricious, or otherwise contrary to law.

Question 74

Question 74 is designed to determine an examinee's knowledge of the procedure set forth in 19 C.F.R. § 171.1, which relates to petitions for the remission or mitigation of a fine, penalty, or forfeiture incurred under any law administered by Customs. Def.'s Br. 25–26. Specifically, the examinee must analyze a list of potential answer

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[26] The relevant section provides:

> Interpretative note. An importer provides the producer with a mold to be used in the production of the imported merchandise and contracts to buy 10,000 units. By the time of arrival of the first shipment of 1,000 units, the producer has already produced 4,000 units. The importer may request Customs to apportion the value of the mold over 1,000, 4,000, 10,000 units, or any other figure which is in accordance with generally accepted accounting principles.

19 C.F.R. § 152.103(e)(2).

[27] The relevant section provides, "If the entire anticipated production using the assist is for exportation to the United States, the total value may be apportioned over (i) the first shipment, if the importer wishes to pay duty on the entire value at once. . . ." 19 C.F.R. § 152.103(e)(1).

[28] The relevant section provides, "If the entire anticipated production using the assist is for exportation to the United States, the total value may be apportioned over . . . (ii) the number of units produced up to the time of the first shipment, or (iii) the entire anticipated production. . . ." 19 C.F.R. § 152.103(e)(1).

[29] The relevant section provides, "If the anticipated production is only partially for exportation to the United States, or if the assist is used in several countries, the method of apportionment will depend upon the documentation submitted by the *importer*." 19 C.F.R. § 152.103(e)(1) (2003) (emphasis added).

choices and determine which choice is an incorrect statement regarding such a petition.[30] The question asks:

74. Which statement about a petition for relief of a seizure is **INCORRECT**?
A. The petition must include proof of a petitionable interest in the seized property
B. The petition must include a description of the property involved in the seizure
C. The petition must be filed within 60 days from the date of mailing of the notice of seizure
D. The petition must include the date and place of the seizure
E. The petition must include the facts and circumstances relied upon by the petitioner to justify remission or mitigation.

In support of its identification of choice C as the correct answer, Defendant juxtaposes the regulatory provision that petitions must be filed within 30 days with the artificial construction reflected in the question allowing 60 days. Def.'s Br. 26. Plaintiff argues without further explanation that his answer, choice D, should also be considered a correct response. Pl.'s Br. 15. However, since the language of choice D is taken verbatim from the statute, it is not an incorrect statement and therefore is an incorrect answer. *See* 19 C.F.R. § 171.1(c)(2); Def.'s Br. 26.

Plaintiff next argues that the question is unfairly confusing. Pl.'s Br. 16. He bases his argument entirely on an incongruity between the regulatory language "relief *from* seizures" and the wording of the question, which references a relief "of" a seizure. 19 C.F.R. § 171.2(b); Pl.'s Br. 15–16. Defendant responds that the important words are "petition for relief" and "seizure" and that "[r]egardless if the wording is 'from' or 'of" a seizure, the question conveys enough information [for the examinee] to be able to determine and apply the relevant regulations." Def.'s Br. 26.

The court finds Plaintiff's arguments to be unpersuasive. All necessary information for Plaintiff to correctly answer the question was

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[30] The relevant regulation stipulates the information requirements of this type of petition:

(c) Form. . . . The petition must set forth the following:

(1) A description of the property involved (if a seizure);

(2) The date and place of the violation or seizure;

(3) The facts and circumstances relied upon by the petitioner to justify remission or mitigation; and

(4) If a seizure case, proof of a petitionable interest in the seized property.

19 C.F.R. § 171.1(c). The regulation also sets forth time restrictions for filing a petition: "(b) When filed — (1) Seizures. Petitions for relief from seizures must be filed within *30 days* from the date of mailing of the notice of seizure. . . ." 19 C.F.R. § 171.2(b) (emphasis added).

available, and the question was not drafted ambiguously. *See O'Quinn*, 24 CIT at 328, 100 F. Supp. 2d at 1140 (holding that where examination question does not contain sufficient information to choose answer, it may be deemed ambiguous and therefore faulty). Plaintiff's linguistic quibble is not only irrelevant, but is a transparent and labored justification for an incorrect answer.

Question 44

Question 44 was designed to evaluate an examinee's understanding of 19 C.F.R. § 163.12.[31] Def.'s Br. 22–23. That regulation sets forth the prerequisites for certification of a recordkeeper in the Recordkeeping Compliance Program. The examinee must choose which of five answer choices is not required by the regulation. The question states:

44. To be a certified recordkeeper in the Recordkeeping Compliance Program, the recordkeeper does **NOT** need to have:

A. A designated officer to be responsible for recordkeeping compliance
B. An understanding of the legal requirements for recordkeeping
C. Procedures in place regarding the preparation and maintenance of required records and the production of such records to Customs
D. A record maintenance procedure acceptable to Customs for original records
E. Procedures in place to explain the recordkeeping requirements to those employees who are involved in the preparation, maintenance and production of required records

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[31] That regulation stipulates in relevant part:

(3) Certification requirements. . . . In order to be certified, a recordkeeper must meet the applicable requirements set forth in the Customs Recordkeeping Compliance Handbook and must be able to demonstrate that it:

(i) Understands the legal requirements for recordkeeping, including the nature of the records required to be maintained and produced and the time periods relating thereto;

(ii) Has in place procedures to explain the recordkeeping requirements to those employees who are involved in the preparation, maintenance and production of required records;

(iii) Has in place procedures regarding the preparation and maintenance of required records, and the production of such records to Customs;

(iv) Has designated a dependable individual or individuals to be responsible for recordkeeping compliance under the program and whose duties include maintaining familiarity with the recordkeeping requirements of Customs;

(v) Has a record maintenance procedure acceptable to Customs for original records or has an alternative records maintenance procedure adopted in accordance with § 163.5(b);. . . .

19 C.F.R. § 163.12(b)(3).

Defendant cites the correct answer as A by eliminating the other four potential answers. Def.'s Br. 23. Plaintiff's answer, choice E, is a direct quote from 19 C.F.R. § 163.12(b)(3)(ii) and, as such, is an explicit regulatory requirement and an incorrect answer. Therefore, Defendant was reasonable in its conclusion that choice E was "clearly disposed of by [that] section." Def.'s Br. 23. Plaintiff asserts that his answer is proper without any explanation and argues that the question is unfairly confusing. Pl.'s Br. 11.

To answer correctly, the examinee must draw a sharp distinction between choice A's usage of "designated officer" and the regulation's usage of "dependable individual." According to grammatical canons of construction, "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 711 n.9 (2004) (quotations & citation omitted). In a regulation found in the same Part 163 - Recordkeeping, the term "officer" is used to signify an officer of a company. 19 C.F.R. § 163.7(c)(ii) (stating that Customs' summons must be served "by delivery to an officer, managing or general agent, or any other agent authorized by appointment of law to receive service of process"). In accordance with the canons of statutory construction, in the regulation at issue here, the term "individual" has a distinct meaning and is more expansive than the term "officer." *See* 19 C.F.R. § 163.12(b)(3)(iv). Plaintiff offers an evaluation of the characteristics of company officers and their inherent dependability in an attempt to show that this distinction is meaningless. Pl.'s Br. 10–11. The court finds that though, as Plaintiff claims, "an officer could be a dependable individual and vice versa," the regulation uses specific language requiring only that a "dependable individual" be designated and does not require that the individual be an "officer." 19 C.F.R. § 163.12(b)(3)(iv); Pl.'s Br 10–11. Therefore, choice A is reasonably cited as the correct answer.

Plaintiff's next argument is essentially that there is more than one correct answer to the question since choices B and D "omitted material [regulatory] language." Pl.'s Br. 11. Defendant cites the relevant regulatory sections and responds that the answer choices need not mirror the regulation to be acceptable and that the omitted language is not "necessary or relevant to determining the correct answer."[32] Def.'s Br. 23. Choice B does omit regulatory language, but that language merely elaborates on the requirement that a

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[32] The section relevant to Choice B requires that a recordkeeper "[u]nderstands the legal requirements for recordkeeping, including the nature of the records required to be maintained and produced and the time periods relating thereto." 19 C.F.R. § 163.12(b)(3)(I) (2003). The section relevant to Choice D requires that a recordkeeper "[h]as a record maintenance procedure acceptable to Customs for original records or has an alternative records maintenance procedure adopted in accordance with § 163.5(b)." 19 C.F.R § 163.12(b)(3)(v).

recordkeeper understand the legal requirements for recordkeeping and does not alter the prerequisite that a recordkeeper have such an understanding prior to certification. *See Di Iorio*, 14 CIT at 750. Choice D, however, omits an alternative to the requirement that a recordkeeper have a record maintenance procedure acceptable to Customs for original records. The availability of this alternative records maintenance procedure, subject to the provisions of 19 C.F.R. § 163.5(b),[33] allows a recordkeeper to elect to "maintain any records, other than records required to be maintained as original records . . . in an alternative format, provided that the person gives advance written notification [to the relevant authority]." 19 C.F.R. § 163.5(b)(i). For a recordkeeper to have a maintenance procedure acceptable to Customs for original records is not the only way to meet the requirements of the regulation; answer choice D suggests that it is. *See Carrier*, 20 CIT at 232 (striking down question that falsely suggested compulsion of marking requirements not present in regulation). Thus, answer D could also be a correct answer to question 44.[34]

A similar issue arose in *O'Quinn*, which involved a Plaintiff who failed to pass the customs broker's license examination by a single correct answer. 24 CIT at 325, 100 F. Supp. 2d at 1137. The Plaintiff in that case initiated action in this Court, challenging the legal basis of the Assistant Secretary's decision to deny his application for a customs broker's license. *Id.* at 325, 100 F. Supp. 2d at 1138. The Court determined that the first of two contested questions did not contain sufficient information to choose an answer, and therefore remanded with instructions that " '[P]laintiff's answer must be considered correct or the question must be voided.' "[35] *Id.* at 328, 100 F. Supp. 2d at 1140 (quoting *Carrier*, 20 CIT at 232) (brackets in original). The im-

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[33] The relevant part of that regulation provides:

> (b) Alternative method of storage — (1) General. Any of the persons listed in § 163.2 may maintain any records, other than records required to be maintained as original records under laws and regulations administered by other Federal government agencies, in an alternative format, provided that the person gives advance written notification of such alternative storage method to the [relevant authority] and provided further that the [authority] does not instruct the person in writing as provided herein that certain described records may not be maintained in an alternative format. . . .

19 C.F.R. § 163.5(b).

[34] The statutory language of 19 C.F.R. § 163.5 is not clear in its usage of the construction "other than." The statute could conceivably be understood as allowing records additional and supplemental to those required to be maintained in original or as allowing alternative formats of certain documents typically required to be maintained as original records.

[35] With reference to that question, the court held that all cited lexicographic authorities required a named point to follow the "FOB" term supplied in the question. The absence of such a named point in the question was the basis of the court's holding that "[g]iven the question's incorrect use of the delivery term 'FOB,' it was unreasonable for the Assistant Secretary to affirm Customs' denial of Plaintiff's appeal of this question." *O'Quinn*, 24 CIT at 328, 100 F. Supp. 2d at 1140.

mediate relevancy of *O'Quinn* to this action involves the second contested question in that case, which was remanded to the Assistant Secretary "for reconsideration to determine the appropriate disposition of a question that, although answered incorrectly by the test-taker in any event, contains more than one correct answer."[36] *Id.* at 331–32, 100 F. Supp. 2d at 1143. The Court concluded with instructions that if the disposition of the first contested question resulted in a passing grade for Plaintiff, it was not necessary for the Assistant Secretary to address the second contested question. *Id.* at 332, 100 F. Supp. 2d at 1143; *see also Carrier*, 20 CIT at 233.

Like the second contested question in *O'Quinn*, question 44 technically has two correct answers. *See O'Quinn*, 24 CIT at 332, 100 F. Supp. 2d at 1143. Unlike *O'Quinn*, to find that the denial of Plaintiff's application to be licensed as a customs broker was arbitrary, capricious, or otherwise not in accordance with law, the court must find that the Assistant Secretary's decision to deny a minimum of four of Plaintiff's contested questions was unreasonable. *See id.* at 325, 100F. Supp. 2d at 1137–38. That minimum threshold is not met by Plaintiff in this action.

The court also reviews the Assistant Secretary's decision to deny Plaintiff's application for a customs broker's license itself. 28 U.S.C. § 1581(g)(1); *see Di Iorio*, 14 CIT at 747. Though the court must necessarily conduct some inquiry into the respective arguments and responses, "the allowance of credit for answers other than the official answer . . . [is] subject to limited judicial review." *Kenny*, 401 F.3d at 1361; *see Di Iorio*, 14 CIT at 747. Because allowance or denial of credit for a contested question is not dispositive to the court's review of the denial of a customs broker's license, it is not necessary in this case to remand a question for further determination.

2. The Adequacy of the Assistant Secretary's Explanation

Plaintiff claims that the Secretary's letter of January 31, 2005, informing Plaintiff of the Secretary's review and subsequent decision to uphold Customs' denial of his appeal was a "blanket 'rubber-stamp' affirmation" of the denial of his appeal, without providing adequate explanation. Pl.'s Br. 7.; A.R. Ex. G. at [58]. Plaintiff relies solely on this Court's decision in *Bell v. United States*, 17 CIT 1220, 839 F. Supp. 874 (1993). In that case, the plaintiff passed the customs license broker's examination. *Id.* at 1221, 839 F. Supp. at 875.

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[36] That question tested knowledge of record retention requirements and required the examinee to identify which of five answer choices was not required by the relevant regulations. *O'Quinn*, 24 CIT at 328, 100 F. Supp. 2d at 1140. The Court determined that at least two of the answer choices were "technically correct" since "pursuant to § 111.23(a)(1) & (e)" certain documents were not necessarily required to be retained by the broker at her place of business, i.e. there was a valid alternative not contemplated by the question. *Id.* at 331, 100 F. Supp 2d at 1142.

Customs thereafter denied his application for a license based upon "derogatory information" disclosed in a background investigation, but failed to set forth "pertinent facts" that were the basis of its determination. *Id.* at 1221–22, 839 F. Supp. at 876. Upon appeal, Customs cited 19 C.F.R. § 111.16(b)(3), (4), and (6)[37] as the basis of its ultimate denial, but still did not discuss supporting facts. *Id.* at 1222, 839 F. Supp. at 876–77. In subsequent levels of administrative review, neither Customs nor the Secretary of the Treasury discussed the factual basis or reasoning underlying the determination to deny Plaintiff's license. *Id.* at 1226–27, 839 F. Supp. at 880. The Court remanded the case with instructions to Customs to articulate a thorough explanation of its reasons for granting or denying Bell's license application. *Id.* at 1228, 839 F. Supp. at 881.

The court agrees with Defendant that reliance on *Bell* is simply inapposite. Def.'s Br. 8. In the present case, the basis for Customs' denial was not 19 C.F.R. § 111.16(b)(3), (4), or (6) as in *Bell*, but rather 19 C.F.R. § 111.16(b)(2) and 19 C.F.R. § 111.11(a)(4)[38]. Plaintiff was denied a customs broker's license due to his failure to achieve a passing score on the requisite examination, not due to a factual finding alleging unethical behavior as in *Bell*.

Furthermore, Plaintiff's extension of *Bell* in his argument that he was not given sufficient explanation for why his answers were incorrect is also without merit. Customs enclosed an answer key with its initial letter of May 14, 2004, and dedicated nine pages to accurately, even if not perfectly, respond to each individual contested question

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[37] The regulation states:

> (b) Grounds for denial. The grounds sufficient to justify denial of an application for a license include, but need not be limited to:
>
> (1) Any cause which would justify suspension or revocation of the license of a broker under the provisions of § 111.53;
>
> (2) The failure to meet any requirement set forth in § 111.11;
>
> (3) A failure to establish the business integrity and good character of the applicant;
>
> (4) Any willful misstatement of pertinent facts in the application for the license;
>
> (5) Any conduct which would be deemed unfair in commercial transactions by accepted standards; or
>
> (6) A reputation imputing to the applicant criminal, dishonest, or unethical conduct, or a record of that conduct.

19 C.F.R. § 111.16(b).

[38] The section of that regulation dispositive to this case stipulates that in order to obtain a broker's license, an individual must

> [h]ave established, by attaining a passing (75 percent or higher) grade on a written examination taken within the 3-year period before submission of the application referred to in § 111.12(a), that he has sufficient knowledge of customs and related laws, regulations and procedures, bookkeeping, accounting, and all other appropriate matters to render valuable service to importers and exporters.

19 C.F.R. § 111.11(a)(4).

on appeal. A.R. Ex. A at [25–26]; A.R. Ex. B at [30–38]. It was not necessary for the Secretary's letter of January 31, 2005, to reiterate the reasoning articulated by Customs since it merely affirmed the determinations by Customs without modification. A.R. Ex. G at [58]. The court finds that Customs provided an adequate explanation of the reasoning underlying its decision to deny Plaintiff's application for a customs broker's license.

CONCLUSION

The Assistant Secretary's decision not to grant Harak the customs broker's license was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See* 5 U.S.C. § 706(2)(A). For all the foregoing reasons, the court denies Plaintiff's motion for judgment on the administrative record, grants defendant's cross-motion and dismisses this case.

Judgment will be entered accordingly.

Slip Op. 06–107

AMERICAN NATIONAL FIRE INSURANCE COMPANY, Plaintiff, v. UNITED STATES, Defendant.

Before: Judith M. Barzilay, Judge
Court No. 00–00022

OPINION

[Plaintiff's motion for summary judgment is denied, and Defendant's motion for summary judgment is granted.]

Dated: July 18, 2006

Law Offices of Barry M. Boren (*Barry M. Boren*) for Plaintiff American National Fire Insurance Co.

Peter D. Keisler, Assistant Attorney General; (*James A. Curley*), Civil Division, Commercial Litigation Branch; (*Barbara S. Williams*), Attorney in Charge, International Trade Field Office; Aimee Lee, International Trade Field Office; *John J. Mahon*, International Trade Field Office, United States Department of Justice; *Yelena Slepak*, Office of Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, of counsel, for Defendant United States.

BARZILAY, JUDGE: This case recites the unhappy history of a small American importer and its surety while it attempted to grow its business by importing a product it had never imported before to serve what it hoped would be an increasing market. Instead, it found the transaction subject to the confusing interactions of three government agencies regulating international trade. Unfortunately, the im-

porter's efforts ran afoul of an unusually complicated antidumping case - one whose order was ultimately revoked by the Department of Commerce ("Commerce") because of the criminal behavior of some United States industry executives.

This relatively simply matter could have been resolved at several points in the administrative proceedings leading up to the filing of the summons and complaint in this Court. Plaintiff surety and its lawyer valiantly attempted to get action from a number of Customs bureaucrats at the United States Customs Service ("Customs"),[1] both at the relevant port and at Customs Headquarters, to no avail. The court strongly suggested a settlement, which the parties were unable to reach. As a result, the Government has unjustly enriched itself at the expense of the surety, and the court cannot undo the damage, as will be explained.

Plaintiff American National Fire Insurance Company ("ANF") has filed suit against Customs' denial of its timely-filed protest against Customs' assessment of antidumping ("AD") duties on a shipment of ferrosilicon from the People's Republic of China ("China"). *See* Pl.'s Br. 1. ANF was the surety for Amlon Metals, Inc. ("Amlon"), the firm that imported the ferrosilicon at issue. ANF asserts that it is not liable for the AD duties because Customs improperly denied its timely-filed protest. Customs asserts that its denial was proper. Both parties have filed for summary judgment. For the reasons discussed below, the court must grant Defendant's motion for summary judgment and deny Plaintiff's motion for summary judgment.

Procedural History

On January 21, 1993, Commerce issued a final determination that ferrosilicon from China was being sold below fair value. *Final Determination of Sales at Less Than Fair Value: Ferrosilicon from the People's Republic of China*, 58 Fed. Reg. 5,356–03 (Dep't of Commerce Jan. 21, 1993). On March 11, 1993, Commerce issued an AD order on imports of ferrosilicon from China, with an accompanying AD duty rate of 137.73% *ad valorem*. *Antidumping Duty Order: Ferrosilicon from the People's Republic of China*, 58 Fed. Reg. 13,448–01 (Dep't of Commerce Mar. 11, 1993).

On November 17, 1997, Amlon's ferrosilicon purchase from China was entered at the port of Seattle. *See* Pl.'s Ex. B. The Entry Summary form described the product as "Ferroalloys, Other" and classified it under the corresponding Harmonized Tariff Schedule of the United States ("HTSUS") subheading 7202.29.0050. *See* Pl.'s Ex. B. Ferrosilicon classified under this provision was subject to the March

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[1] Effective March 1, 2003, the United States Customs Service was renamed the Bureau of Customs and Border Protection of the United States Department of Homeland Security.

11, 1993, AD order. For reasons that are unclear, Customs did not assess the 137.73% duty at the time of entry. *See* Pl.'s Ex. B.

Customs faxed a Request for Information to Amlon on March 3, 1998, asking for supporting documents to verify the classification of the merchandise. *See* Pl.'s Ex. M. It appears that Customs sent the fax after attempts to contact Amlon through the mail failed because Customs had an incorrect, older address for Amlon on file. *See* Pl.'s Br. 7; Def.'s Br. 36. Amlon moved to its current address in July 1995, more than two years before events surrounding the instant case began.[2] On March 21, 1998, Customs sent Amlon and ANF notice that liquidation of the entry was being suspended. Customs' records show that it mailed Amlon's notice again to the outdated address, though it mailed ANF's notice to the correct address. *See* Def.'s Ex. 1. Amlon claims that it never received the notice of suspension. *See* Pl.'s Br. 18. On March 23, 1998, Amlon replied to Customs' March 3, 1998, Request for Information. *See* Pl.'s Ex. N.

On September 14, 1998, Commerce issued instructions to Customs to liquidate entries of ferrosilicon from China that entered the United States between March 1, 1997, and February 28, 1998, in accordance with the AD order. Dep't of Commerce Message No. 8257111; Def.'s Ex. 2. Nine days later, Customs issued a Notice of Action[3] to Amlon demanding that Amlon submit a statement certifying that Amlon had not been reimbursed for any antidumping duties pursuant to 19 C.F.R. § 351.402(f)(2). Customs sent this notice to Amlon, but again used the incorrect address. *See* Pl.'s Ex. R. While it is unclear whether Amlon or ANF received the Notice of Action, Customs cancelled the Notice on October 26, 1998, before Amlon or ANF took any action. *See* Pl.'s Br. 8; Pl.'s Ex. R. Customs provided no explanation for cancelling the Notice and did not issue any other Notice of Action to Amlon or ANF. Per Commerce's September 14, 1998, liquidation instructions, Customs liquidated Amlon's entry with a

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[2] Customs asserts that Amlon did not give notice of an address change until February 4, 1999, when Amlon and ANF executed a Rider to Customs Bond Form C.F. 301. *See* Def.'s Br. 36; Pl.'s Ex. P. ANF alleges that Customs had actual notice of Amlon's correct address as early as 1996, when ANF filed the original Customs bond with Customs, and because Amlon's correspondence with Customs used Amlon's correct address, as did the Entry Summary form for the entry at issue. *See* Pl.'s Br. 7–8; Pl.'s Ex. G.

[3] The Notice of Action was a Customs Form 29. 19 C.F.R. § 152.2 states that notification to importers of increased duties shall be sent using Customs Form 29 and reads in pertinent part:

> If the port director believes that the entered rate or value of any merchandise is too low . . . and the estimated aggregate of the increase in duties on that entry exceeds $15, he shall promptly notify the importer on Customs Form 29, specifying the nature of the difference on the notice. Liquidation shall be made promptly and shall not be withheld for a period of more than 20 days from the date of mailing of such notice unless in the judgment of the port director there are compelling reasons that would warrant such action.

19 C.F.R. § 152.2.

duty rate of 137.73% *ad valorem* on November 20, 1998. *See* Def.'s Br. 1.

On March 19, 1999, Customs made a demand on ANF to pay the AD duties assessed against the entry. *See* Def.'s Br. 2. On April 27, 1999, ANF filed a timely protest against this demand for payment, claiming that the liquidation, suspension, and classification of the merchandise were improper. *See* Pl.'s Ex. Q. ANF asserts that it had an oral follow-up discussion with Customs on June 29, 1999, about an International Trade Commission ("ITC") investigation into the original AD order on ferrosilicon from China. *See* Pl.'s Br. 11–12. In its brief, ANF claims that it discussed the liquidation and classification claims and asked Jerry Malmo, the Seattle Import Specialist, to withhold a decision on the protest because it appeared that the ITC had set a date to resolve the investigation. *See* Pl.'s Br. 11–12; Pl.'s Ex. X.

Despite ANF's efforts, on July 9, 1999, Customs denied ANF's application for further review of its original protest, asserting that the merchandise was properly liquidated per Commerce's instructions. *See* Pl.'s Ex. AA.[4] Following this denial, on July 22, 1999, ANF continued its efforts by sending Customs a supplement to its protest. *See* Pl.'s Ex. BB. On August 4, 1999, Customs sent ANF a letter rejecting the supplement as untimely. *See* Pl.'s Ex. Z. This letter explicitly informed Plaintiff that its protest had been denied.

Meanwhile, the ITC decided to reexamine its original injury determination and issued a notice on May 20, 1998, requesting comments for a review of AD duties on imports of ferrosilicon in light of the "revelation of a nationwide ferrosilicon price-fixing conspiracy maintained by major U.S. ferrosilicon producers." *Ferrosilicon from Brazil, China, Kazakstan, Russia, Ukraine, and Venezuela*, 63 Fed. Reg. 27,747–01, 27,747 (Int'l Trade Comm'n May 20, 1998). During the investigation, Commerce directed Customs to continue liquidation of entries of ferrosilicon imports under the original AD order. *See* Dep't of Commerce Message No. 8257111; Def.'s Ex. 2.

Commerce finally rescinded the AD order on ferrosilicon from China on September 21, 1999. *See Ferrosilicon from Brazil, Kazakhstan, People's Republic of China, Russia, Ukraine, and Venezuela*, 64 Fed. Reg. 51,097–01 (Dep't of Commerce Sept. 21, 1999). Commerce rescinded the order *ab initio*, stating that "rescission of these [AD] orders are effective from the date of their original issuance." *Id.* at 51,098. Following the August 4, 1999, denial letter from Customs and Commerce's rescission of the AD duties, ANF contacted Stuart Seidel, then the Assistant Commissioner of Customs of Regulations and Rulings, to discuss ANF's options in pursuing its protest.

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[4] The Government claims that it denied the protest itself on July 9, 1999. However, the form returned to Plaintiff had only the box labeled "application for further review" checked as denied.

See Pl.'s Br. 14–15. Per Mr. Seidel's recommendation, ANF sent documents to various Customs officials on September 28, October 25, and November 9, 1999, to continue its attempt to have Customs reconsider the assessed AD duties. *See* Pl.'s Br. 39; Pl.'s Exs. FF, GG, HH. In December 1999, Mr. Seidel informed ANF that Customs would not change its denial of ANF's protest and that ANF should seek recourse in this Court. *See* Pl.'s Br. 15. On January 4, 2000, ANF filed a summons before this Court and filed its complaint on January 26, 2000.

Standard of Review

Both parties have filed for summary judgment. Under USCIT Rule 56(c), summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Parties moving for summary judgment bear the burden of demonstrating that there are no genuine issues of material fact in dispute. *Avia Group Int'l, Inc. v. L.A. Gear Cal., Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). The court must " 'determine whether there are any factual disputes that are material to resolution of the action. The court may not resolve or try factual issues on a motion for summary judgment.' " *Sea-Land Serv., Inc. v. United States*, 23 CIT 679, 684, 69 F. Supp. 2d 1371, 1375 (1999) (quoting *Phone-Mate, Inc., v. United States*, 12 CIT, 575, 577, 690 F. Supp. 1048, 1050 (1988)), *aff'd*, 239 F.3d 1366 (Fed. Cir. 2001).

Plaintiff's Claim

ANF contests Customs' denial of its April 27, 1999, protest[5] and asserts jurisdiction for all claims under 28 U.S.C. § 1581(a).[6] *See* Compl. ¶ 1. For this Court to exercise jurisdiction over a claim under § 1581(a), the party filing suit must have filed a valid protest against Customs in a timely manner. *See U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1568 (Fed. Cir. 1997), *aff'd*, 523 U.S. 360 (1998); *Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345–46 (Fed. Cir. 1995); *Atari Caribe, Inc. v. United States*, 16 CIT 588, 592, 799 F. Supp. 99, 104 (1992). To qualify as valid, a

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[5] Neither party disputes that the protest was filed in a timely manner.

[6] Section 1581(a) grants this Court jurisdiction over valid protests to Customs and reads, "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a).

> protest must set forth distinctly and specifically – (A) each decision described in subsection (a) of this section as to which protest is made; (B) each category of merchandise affected by each decision set forth under paragraph (1); (C) the nature of each objection and the reasons therefor; and (D) any other matter required by the Secretary by regulation.

19 U.S.C. § 1514(c)(1). In addition, the protest must

> contain the following information:
> (1) The name and address of the protestant . . . and the name and address of his agent or attorney if signed by one of these;
> (2) The importer number of the protestant. . . ;
> (3) The number and date of the entry;
> (4) The date of liquidation of the entry . . . ;
> (5) A specific description of the merchandise affected . . . ;
> (6) The nature of, and justification for the objection set forth distinctly and specifically with respect to each category, payment, claim, decision, or refusal;
> (7) The date of receipt and protest number of any protest previously filed that is the subject of a pending application for further review pursuant to Subpart C of this part and that is alleged to involve the same merchandise and the same issues . . . ;
> (8) If another party has not filed a timely protest, the surety's protest shall certify that the protest is not being filed collusively to extend another authorized person's time to protest; and
> (9) A declaration, to the best of the protestant's knowledge, as to whether the entry is the subject of drawback, or whether the entry has been referenced on a certificate of delivery or certificate of manufacture and delivery so as to enable a party to make such entry the subject of drawback. . . .

19 C.F.R. § 174.13(a). While the specific information necessary for each protest depends on the facts, a valid protest must, at a minimum, give "some information within the protest . . . that was reasonably calculated to direct the mind of Customs to the full nature of a specific claim." *Koike Aronson, Inc. v. United States*, 21 CIT 1056, 1057, 976 F. Supp. 1035, 1037 (1997), *aff'd*, 165 F.3d 906 (Fed. Cir. 1991).

ANF first claims that Customs improperly assessed AD duties because Customs liquidated the entry despite ANF's requests to delay liquidation pending the outcome of the ITC investigation into the original AD order. *See* Compl. ¶¶ 13–29; Pl's. Br. 38–39. Secondly, ANF claims that Customs' liquidation was improper because Customs did not provide Amlon with actual notice of a suspension, as re-

quired by 19 C.F.R. § 159.12(c).[7] *See* Compl. ¶¶ 40–43; Pl.'s Br. 16–24. ANF also claims that Customs improperly classified the subject merchandise. *See* Compl. ¶¶ 31–38; Pl.'s Br. 25–31. Finally, ANF claims that it is not liable for the payment of interest accrued on the AD duties. *See* Compl. ¶ 48.

Discussion

Subject matter jurisdiction is "the legal authority of a court to hear and decide a particular type of case." Erwin Chemerinsky, *Federal Jurisdiction* 259 (4th ed. 2003). A court must have subject matter jurisdiction over a claim "because it involves a court's power to hear a case, [and] can never be forfeited or waived." *United States v. Cotton*, 535 U.S. 625, 630 (2002). Moreover, courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." *Arbaugh v. Y&H Corp.*, 126 S.Ct. 1235, 1244 (2006) (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)). Under USCIT Rule 12(h)(3), "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." USCIT R. 12(h)(3).[8]

A. The Antidumping Claim

American National Fire asserts that this Court has jurisdiction over its antidumping claim pursuant to 28 U.S.C. § 1581(a) because the claim is a protest pursuant to 19 U.S.C. § 1514(a)(2) and (3). *See* Pl.'s Br. 38. For this court to have jurisdiction pursuant to 28 U.S.C. § 1581(a), there must be a valid protest filed against a decision of Customs at the administrative level. *See Juice Farms, Inc.*, 68 F.3d at 1345–46. The vague language in Plaintiff's complaint leaves the exact nature of the AD claim unclear and could be interpreted as either a challenge to the calculation of duties or, alternatively, as a challenge to the collection of duties.[9] Plaintiff's Complaint asserts

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[7] Notice of suspension. If the liquidation of an entry is suspended as required by statute or court order, as provided in paragraph (a)(2) of this section, the port director promptly shall notify the importer or the consignee and his agent and surety on Customs Form 4333–A, appropriately modified, of the suspension.

19 C.F.R. § 159.12(c).

[8] Because Plaintiff filed its summons on January 4, 2000, and complaint on January 26, 2000, the Court can have no jurisdiction to hear its claims under 28 U.S.C. § 1581(i). *See* 28 U.S.C. §§ 1581, 2632(a)–(c); USCIT R. 3(a); *Autoalliance Int'l, Inc. v. United States*, 29 CIT ____ , 398 F. Supp. 2d 1326 (2005).

[9] The imprecise use of the word "assessment" by the parties throughout this case causes confusion with respect to the nature of the AD claim. Plaintiff states in its complaint that it is protesting "Customs' decision to assess antidumping duties" in light of the ITC's investigation into the original AD orders. Compl. ¶ 22. Plaintiff argues that this Court has jurisdiction to hear the AD claim because Plaintiff protests the "rate and amount of duties chargeable" and "all charges or exactions of whatever character within the jurisdiction of

that ANF filed a timely protest against the "payment of antidumping duties assessed against Amlon" and that ANF is not responsible for the duties since "the ITC was reconsidering its assessment of antidumping duties on ferrosilicon imports from China." Compl. ¶¶ 11, 26. The former interpretation results in an invalid protest because calculation of duties in an AD context is performed by Commerce and involves no decision by Customs. The latter interpretation results in an invalid protest because the Customs' action ANF objects to is not protestable by statute. In either case, this court lacks subject matter jurisdiction over the claim.

1. The Antidumping Claim as a Complaint Against the Calculation of AD Duties

Defendant equates ANF's use of the phrase "assessment" of AD duties with "calculation" of AD duties.[10] *See* Def.'s Br. 11–12. A challenge to the calculation of AD duties is an issue for Commerce, not Customs, since calculation of such duties is a function reserved for Commerce. *See* 19 U.S.C. § 1673e(a)(1);[11] *U.S. Shoe Corp.*, 114 F.3d at 1570; *see also Nichimen Am., Inc. v. United States*, 938 F.2d 1286, 1290 (Fed. Cir. 1991). If the antidumping claim were a complaint against the calculation of antidumping duties, this Court could have jurisdiction pursuant to 28 U.S.C. § 1581(c)[12] because § 1581(c) grants this Court jurisdiction over final determinations by Commerce in antidumping procedures, which includes the calculation of

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the Secretary of the Treasury." Pl.'s Br. 38. Plaintiff's complaint and brief imply that it is protesting the *collection* of AD duties. However, Defendant in its brief interprets Plaintiff's use of the word "assessment" to mean *calculation* of AD duties. *See* Def.'s Br. 11–12.

The confusion is compounded by the use of the word in statute and case law. 19 U.S.C. § 1673e addresses the assessment of duties and states that Commerce "directs customs officers to assess" in the sense that "assessment" means collection. *See Mitsubishi Elecs. Am., Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994) (describing § 1673e(a)(1): "Commerce conducts the antidumping duty investigation, calculates the antidumping margin, and issues the antidumping duty order. Commerce then directs Customs to collect the estimated duties."). However, to assess is defined as "to calculate the rate and amount" in Black's Dictionary. Deluxe Black's Law Dictionary 116 (6th ed. 1997). Defendant's characterization of Plaintiff's claim as a protest against the calculation of duties seems to be based on the dictionary meaning of "assess." Meanwhile, Plaintiff uses "assess" in its statutory meaning. Either interpretation leaves Plaintiff without jurisdiction in this Court.

[10] ANF's AD protest to Customs read, "IMPROPER APPRAISEMENT: We protest the appraisement and duty assessment on all merchandise involved in the subject entry. The merchandise should have been appraised at the invoiced unit values or at values less than the liquidated values in accordance with the appraisement statutes and regulations." Pl.'s Ex. Q.

[11] In relevant part, 19 U.S.C. § 1673e(a)(1) states that Commerce "directs customs officers to assess . . . antidumping dut[ies]." 19 U.S.C. § 1673e(a)(1); *see also Mitsubishi Elecs. Am., Inc.*, 44 F.3d at 976 (describing § 1673e(a)(1): "Commerce conducts the antidumping duty investigation, calculates the antidumping margin, and issues the antidumping duty order. Commerce then directs Customs to collect the estimated duties.")

[12] "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]." 28 U.S.C. § 1581(c).

AD duties. *See* 19 U.S.C. § 1516a(a)(2)(B); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1304 (Fed. Cir. 2004).

Therefore, to challenge the imposition of AD duties, a party must direct a request for administrative review to the Department of Commerce pursuant to 19 U.S.C. § 1675. *See* 19 U.S.C. § 1675. ANF could not incorporate this challenge in its protest to Customs. The court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1581(c) as ANF never requested such review. Furthermore, since this type of calculation by Customs is not included in the protestable decisions under 19 U.S.C. § 1514(a), this Court does not have jurisdiction over this issue under 28 U.S.C. § 1581(a).

2. The Antidumping Claim as an Objection Against the Collection of Duties

Plaintiff's AD claim may refer instead to Customs' liquidation of the ferrosilicon entry, which affected the collection of the AD duties. *See* Pl.'s Br. 38–39. Unlike a determination with regard to the amount of imposition of AD duties pursuant to an AD order, liquidation of entries is a function that belongs to Customs. *See Mitsubishi Elecs. Am., Inc.*, 44 F.3d at 976–77. However, while entry liquidation is a Customs *function*, it is not always a Customs *decision*. *Id.*; *see U.S. Shoe Corp.*, 114 F.3d at 1569 (" '[D]ecisions' of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts. . . . Customs must engage in some sort of decision-making process in order for there to be a protestable decision."). Thus, for the Court to have jurisdiction under 28 U.S.C. § 1581(a), ANF must have protested a "decision" made by Customs under 19 U.S.C. § 1514. 19 U.S.C. § 1514(a) lists the scope of Customs "decisions" that a protestant can challenge.[13] The seven categories listed in § 1514(a) are exclusive, and if "Customs' underlying de-

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[13] The relevant language from § 1514(a) states:

> [A]ny clerical error, mistake of fact, or other inadvertence . . . adverse to the importer, in any entry, liquidation, or reliquidation, and, decisions of the Customs Service . . . as to –
> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof, including the liquidation of an entry, pursuant to either section 1500 or section 1504 of this title;
> (6) the refusal to pay a claim for drawback; or
> (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;
>
> shall be final and conclusive upon all persons (including the United States and any officer thereof) unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade. . . .

cision does not relate to any of these seven categories, the court may not exercise § 1581(a) jurisdiction over an action contesting Customs' denial of a protest filed against that decision." *Playhouse Imp. & Exp., Inc.*, 18 CIT 41, 44, 843 F. Supp. 716, 719 (1994).

Plaintiff contests the "decisions of Customs as to the 'rate and amount of duties chargeable' and 'all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury' " under 19 U.S.C. § 1514(a)(2) and (3). Pl.'s Br. 38. Customs' role in liquidating entries subject to AD orders is "merely ministerial," and those actions do not amount to antidumping "decisions" under 19 U.S.C. § 1514. *See Mitsubishi Elecs. Am., Inc.*, 44 F.3d at 977; *LG Elecs. U.S.A., Inc. v. United States*, 21 CIT 1421, 1425, 991 F. Supp. 668, 673 (1997). Customs liquidates an entry to collect antidumping duties per Commerce's instructions, it possesses no discretion in the matter. *See Hynix Semiconductor Am., Inc. v. United States*, 30 CIT ___ , ___ , 414 F. Supp. 2d 1317, 1327 (2006) (citing *Mitsubishi Elecs. Am., Inc.*, 44 F.3d at 977). In fact, "title 19 makes clear that Customs does not make any section 1514 antidumping 'decisions,' " and without a section 1514 decision, this court lacks jurisdiction under 28 U.S.C. § 1581(a). *Mitsubishi Elecs. Am., Inc.* 44 F.3d at 977. This court is without jurisdiction to hear Plaintiff's AD claim, regardless of how it is construed.[14]

B. THE LIQUIDATION CLAIM

ANF claims that Customs improperly liquidated the entry because Customs sent the notice of suspension to an incorrect address for Amlon.[15] The entry should, therefore, be deemed liquidated at a duty-free rate.[16] *See* Pl.'s Br. 16–17. Plaintiff's brief sets forth multiple theories to support its argument. ANF argues that improper no-

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19 U.S.C. § 1514(a).

[14] ANF also claims that follow up letters it sent to Customs on September 28, October 25, and November 9, 1999, constitute 19 U.S.C. § 1520(c) petitions to protest "a mistake of fact on the part of the ITC." *See* Pl.'s Br. 39. Section 1520(c), now repealed, referred to mistakes of fact made by Customs or the importer. *See G&R Produce Co. v. United States*, 381 F.3d 1328, 1332 (Fed. Cir. 2004). However, because assessment of AD duties does not fall under Customs' purview, § 1520(c) does not apply as a valid form of protest, and ANF's petition fails.

[15] ANF stated in its original protest to Customs at the administrative level that the surety did not receive notice. However, ANF's complaint and brief before this court aver that Amlon, the importer, did not receive notice. *See* Compl. ¶ 43, Pl.'s Br. 17–25, Pl.'s Ex. Q. This inconsistency does not make the protest invalid since a protest need only give "some information within the protest . . . that was reasonably calculated to direct the mind of Customs to the full nature of a specific claim" to meet specificity requirements in 19 U.S.C. § 1514(c). *Koike Aronson, Inc.*, 21 CIT at 1057; *see also* 19 U.S.C. § 1514(c); 19 C.F.R. § 174.13(a).

[16] A protest concerning Customs' adherence to 19 U.S.C. § 1504 (Customs' limitations on liquidation including sending notices of suspension) constitutes a recognized category of protests under 19 U.S.C. § 1514(a)(5). Therefore, the court has jurisdiction under 28 U.S.C. § 1581(a) over the liquidation claim.

tice to Amlon invalidated the suspension and that Customs' failure to correctly carry out its statutorily-mandated notice of suspension should in itself render the liquidation invalid. Likewise, ANF argues that Customs abused its discretion by liquidating the entry despite an ongoing ITC investigation into the original AD determination. For reasons set forth below, both theories fail to invalidate Customs' liquidation of the entry.

1. Imperfect Notice to Amlon Resulted in Harmless Error

ANF claims that Customs' suspension was invalid either because Amlon did not receive notice or because as a matter of law, Customs failed to adhere to statutory mandates for notice.[17] *See* Pl.'s Br. 16–17; *see also* 19 U.S.C. § 1504(c). However, failure to give notice of a suspension does not necessarily vitiate a suspension. *See LG Elecs. U.S.A., Inc.*, 21 CIT at 1429. 19 C.F.R. § 159.12(c) addresses the notice provision for suspensions and states that "[i]f the liquidation of an entry is suspended as required by statute or court order, . . . the port director promptly shall notify the importer . . . and his agent and surety . . . of the suspension." 19 C.F.R. § 159.12(c); *see also* 19 U.S.C. 1504(c). " '[S]uspensions' occur as soon as the appropriate Commerce determination is made" and do not require subsequent action by Customs to occur because they occur by operation of law or court order.[18] *LG Elecs. U.S.A., Inc.*, 21 CIT at 1429 n.15.

Once a suspension occurs, the statute requires Customs to send suspension notices to importers and sureties pursuant to 19 C.F.R. § 159.12 and 19 U.S.C. § 1504(c). *See Frontier Ins. Co. v. United States*, 25 CIT 717, 724–25, 155 F. Supp. 2d 779, 786–87 (2001); *Hanover Ins. Co. v. United States*, 25 CIT 447, 456 (2001) (not reported in F. Supp.). However, the Court has not held that courts must reverse agency actions if procedural missteps occur. *See Guangdong Chems. Imp. & Exp. Corp. v. United States*, CIT Slip Op. 06–13 (Jan. 25, 2006); *Atteberry v. United States*, 27 CIT ___ , ___ , 2003 WL 21748674, at *8–11 (2003) (not reported in F. Supp.).

Procedural errors by Customs are harmless unless the errors are "prejudicial to the party seeking to have the action declared invalid." *Sea-Land Serv., Inc. v. United States*, 14 CIT 253, 257, 735 F. Supp. 1059, 1063 (1990) (stating that Customs' failure to include provisions

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[17] Notice of suspension

> If the liquidation of any entry is suspended, the Secretary shall by regulation require that notice of the suspension be provided, in such manner as the Secretary considers appropriate, to the importer of record or drawback claimant, as the case may be, and to any authorized agent and surety of such importer of record or drawback claimant.

19 U.S.C. § 1504(c).

[18] Suspensions occur "only when provided by law or regulation, or when directed by the Commissioner of Customs" or when required by court order. 19 C.F.R. § 159.51; *see* § 159.12(a)(2). In contrast, extensions do not occur until Customs takes action by giving notice per 19 C.F.R. § 159.12(a) and (b). *See also LG Elecs. U.S.A.*, 21 CIT at 1429 n.15.

required by law in denial letter to plaintiff was still harmless error because plaintiff did not plead any prejudice) (quotations & citation ommitted), *aff'd and adopted*, 923 F.2d 838 (Fed. Cir. 1991); *see also Intercargo Ins. Co. v. United States*, 83 F.3d 391, 394–95 (Fed. Cir. 1996) ("rule of prejudicial error" applies to defective notice of extension to plaintiff).

ANF does not state with any particularity what prejudice it suffered. *See* Pl.'s Br. 18. ANF provides no evidence to support its claim that imperfect notice to Amlon resulted in prejudice to either Amlon or itself. Therefore, Customs' imperfect notice to Amlon amounts to harmless error because ANF has shown no prejudicial harm suffered by Amlon or itself as a result of Customs' procedural misstep. *See Sea-Land Serv.*, 14 CIT at 257.

2. Abuse of Discretion by Customs in Liquidating the Entry

ANF also contends that Customs should not have liquidated the entry given the ongoing ITC investigation into the original AD determination on ferrosilicon imports from China. *See* Pl.'s Br. 5–6, 10–15, 38–39, 44–45. While it is true that the original AD determination was under investigation by the ITC when Commerce issued its instructions to Customs to liquidate the entry, Customs did not abuse its discretion in liquidating the entry on November 20, 1998, because it had no discretion in the matter. Customs' liquidation role is "merely ministerial." *See Mitsubishi Elecs. Am., Inc.*, 44 F.3d at 977. "Commerce conducts the antidumping duty investigation, calculates the antidumping margin, and issues the antidumping duty order. Commerce then directs Customs to collect the estimated duties." *Id.* at 976 (citing 19 U.S.C. § 1673e(a)(1)).

In this case, Commerce instructed Customs to liquidate the entry in accordance with 19 C.F.R. § 351.212(c), which calls for automatic liquidation of AD duties if no interested party requests a review. *See* 19 C.F.R. § 351.212(c); Dep't of Commerce Message No. 8257111; Def.'s Ex. 2. Customs merely followed Commerce's September 14, 1998, instructions. ANF has not presented a valid claim that Customs abused its discretion by liquidating the entry.

C. THE CLASSIFICATION CLAIM

_____ American National Fire also contends that Customs incorrectly classified the subject merchandise as ferrosilicon and should have classified the merchandise under another category which enjoys duty-free treatment.[19] *See Compl.* ¶¶ 31–38; Pl.'s Br. 25–31. To bring a classification claim before this Court, a claimant must have "inform[ed] Customs of the nature of the objections to the classifica-

[19] A classification protest qualifies as a valid category of protests against Customs' actions under 19 U.S.C. § 1514(a)(2).

tion" at the administrative level in a protest. *See Koike Aronson, Inc.*, 21 CIT at 1057. This requirement aims

> to: compel [the importer] to disclose the grounds of his objection at the time when he makes his protest. . . . Technical precision is not required; but the objections must be so distinct and specific, as, when fairly construed, to show that the objection taken at the trial was at the time in the mind of the importer, and that it was sufficient to notify the collector of its true nature and character to the end that he might ascertain the precise facts, and have an opportunity to correct the mistake and cure the defect, if it was one which could be obviated.

Wash. Intern. Ins. Co. v. United States, 16 CIT 599, 602 (1992) (citing *Davies v. Arthur*, 96 U.S. 148, 151 (1878)) (brackets & ellipses in original) (not reported in F. Supp.). More specifically, a valid protest must have "distinctly and specifically" set forth the decision as to which the protest is made, the category of merchandise affected by the decision, and the nature and reason of the objection. 19 U.S.C. § 1514(c).

ANF's classification claim in its original protest stated: "IMPROPER CLASSIFICATION: We protest the classification of all imported merchandise. It should be classified as entered." Pl.'s Ex. Q. Plaintiff claims that these two sentences "put classification into play so it could either amend or supplement its initial classification choice (as entered) in accordance with 19 C.F.R. § 174.14 and 19 C.F.R. § 174.28." Pl.'s Br. 37. This skeletal protest, though, does not meet the statutory requirements. It does not specify what Customs classification is being protested; in fact, the claim seems to argue that the original Customs classification was correct because it asserts that the merchandise "should be classified as entered." It fails to set forth any reason for the objection or to state the nature of the objection. There is also no statement about what Harmonized Tariff number ANF objects to or what the alleged correct classification number should be. Because the protest does not meet the requirements in § 1514(c), the protest, by itself, is not valid. Consequently, ANF states that the court should consider its July 22, 1999, letter to Customs a supplement or, alternatively, an amendment that cures the defects in its original classification protest.[20] *See* Pl.'s Br. 37.

1. The Letter as a Supplement Under 19 C.F.R. § 174.28

_____ ANF argues that it perfected its classification protest pursuant to 19 C.F.R. § 174.28 when it supplemented its protest to Customs with a letter dated July 22, 1999. *See* Pl.'s Br. 37. Section

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[20] While both parties refer to the July 22, 1998, letter interchangeably as a supplement or amendment, the court will refer to it as a "supplement" when discussing it under 19 C.F.R. § 174.28 and an "amendment" when discussing it under 19 C.F.R. § 174.14.

174.28 allows for consideration of additional arguments, through supplements, in the review and disposition of valid protests. The section reads:

> In determining whether to allow or deny a protest filed within the time allowed, a reviewing officer *may* consider alternative claims and additional grounds or arguments submitted in writing by the protesting party with respect to any decision which is the subject of a *valid* protest at any time prior to disposition of the protest. . . .

19 C.F.R. § 174.28 (emphasis added). Since ANF's original classification protest did not meet the statutory requirements for a valid protest, the letter - or any other claimed supplement for that matter[21] - cannot serve as a supplement. Under these circumstances, the court cannot exercise subject matter jurisdiction over the classification claim.

2. The Letter as an Amendment Filed Under 19 C.F.R. § 174.14

In the alternative, ANF attempts to cure the defects in its initial classification protest by stating that it amended the original claim with the letter pursuant to 19 C.F.R. § 174.14. *See* Pl.'s Br. 37. Under 19 C.F.R. § 174.14(a), a protest "may be amended at any time prior to the expiration of the 90-day period within which such protest may be filed determined in accordance with § 174.12(e)." 19 C.F.R. § 174.14(a). Section 174.12(e) reads in pertinent part, "[p]rotests shall be filed . . . within 90 days after . . . [t]he date of mailing of notice of demand for payment against a bond in the case of a surety which has an unsatisfied legal claim under a bond written by the surety." *Id*. § 174.12(e).

Since Customs sent ANF a demand for payment on March 19, 1999, the 90-day period began on that date, making June 17, 1999, the end of the 90-day period. ANF's July 22, 1999, letter thus fails as an amendment to the protest because ANF submitted the letter after the 90-day period. Without a valid amendment to perfect the faulty April 27,1999, classification protest this Court has no jurisdiction to hear the claim.

3. Equitable Tolling to Allow the July 22, 1999, Letter as an Amendment Under 19 C.F.R. § 174.14

American National Fire also asks the court to equitably toll the 90-day period under 19 C.F.R. § 174.14 so that its letter from July

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[21] E.g., ANF claims that an oral argument it made to Customs on June 29, 1999, counts as a supplement. *See* Pl.'s Br. 37.

22, 1999, may count as a valid amendment.[22] Pl.'s Br. 36. ANF argues that the start date of the 90-day period in which to file and amend the protest should be tolled to May 12, 1999, because on that date, it received sufficient information from Customs to perfect its protest. *See* Pl.'s Br. 33–34. However, as Plaintiff correctly notes, equitable tolling is not the norm, and courts allow it only in rare instances. *See Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 96 (1990).

With respect to suits against the Government, the time limits imposed "involve a waiver of sovereign immunity," but remain subject to the same equitable tolling limitations for private parties. *Id.* ANF cites cases illustrating that courts rarely employ equitable tolling, and most of the cases it cites actually hold equitable tolling inapplicable. *See id.* at 97 (holding equitable tolling does not extend to "garden variety" excusable neglect); *Weddel v. Sec'y of HHS*, 100 F.3d 929, 931 (Fed. Cir. 1996) (stating that equitable tolling does not apply to statutes of repose because they cut off cause of action irrespective of time of accrual, and that equitable tolling is usually available unless statute indicates contrary intent by establishing outer date for bringing action); *U.S. JVC Corp. v. United States*, 22 CIT 687, 697, 15 F. Supp. 2d 906, 915 (1998) (finding "presumption that the ninety-day period for filing a protest imposed by 19 U.S.C. § 1514(3) contains an equitable tolling exception has been rebutted by the language, structure, and purpose of 19 U.S.C. § 1514"), *aff'd*, 184 F.3d 1362 (Fed. Cir. 1999).

ANF cites one case that supports its position. In *Farrell Lines, Inc. v. United States*, the court equitably tolled the 90-day period within which the plaintiff had to file a protest. 69 C.C.P.A. 1, 6 (1981). However, while not explicitly overruled, the holding in *Farrell Lines* has been questioned. *See U.S. JVC Corp*, 22 CIT at 691 n.7. More significantly, the majority in *Farrell Lines* did not discuss the purpose underlying the 90-day period or its jurisdictional ramifications. *Id.* The court in *U.S. JVC Corp.* noted that courts faced with *Farrell Lines* have sought to clarify, limit, or find inapposite its holding. *Id.* (citations omitted).

Given the high legal threshold to sustain an equitable tolling claim, ANF must demonstrate with specificity the facts that warrant resorting to this unorthodox measure. *See Irwin*, 498 U.S. at 96. ANF provided only the cover sheet to Customs' communication with it on May 12, 1999, as evidence for equitably tolling to this date. That cover sheet indicates that the document which Customs pro-

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[22] Plaintiff states that it is "not asking the Court to toll the time to extent [sic] the jurisdictional requirement of filing a Protest in 90 days, but rather to toll the time in which it had to provide the specifics Customs claims was missing in the initial Protest." Pl.'s Br. 35. It is unclear what "specifics" Plaintiff refers to since nothing on the record demonstrates that Customs asked for missing information after ANF submitted its protest. The court assumes Plaintiff wants the court to toll the time ANF had to file an amendment.

vided was three pages long and entitled "Liquidation Instructions for dumping case A–570–819–000 Ferrisolicon [sic] from China (PRC)."[23] Pl.'s Ex. S.

ANF has not demonstrated how it needed this communication to perfect its classification protest. None of the documents that ANF referenced in its July 22, 1999, letter fell exclusively within Customs' control. The classification claim in the letter referenced the HTSUS, a mill test certificate, a product invoice, and a letter from the end purchaser stating that the product could not be used for its intended purchase and was disposed of by landfill. *See* Pl.'s Ex. BB. Because neither the letter nor Plaintiff's brief demonstrate why Plaintiff needed Customs' May 12, 1999, communication to perfect its classification protest, ANF fails to make its case for equitable tolling. In addition, assuming *arguendo* that ANF required the May 12, 1999, documents from Customs to perfect its protest, ANF still had 36 days before the June 17, 1999, deadline to submit the amendment. Thus, the court finds no reason for equitable tolling to apply to the classification claim. Because the classification protest is invalid under 19 U.S.C. § 1514(a), the court lacks subject matter jurisdiction over the issue. *See* 28 U.S.C. § 1581(a).

D. INTEREST PAYMENTS

Without support, American National Fire alleges that it "is not responsible for the payment of any interest resulting from the liquidation of the subject entry at a value higher than asserted at the time of entry which may be owed to the Defendant." Compl. ¶ 48. As Defendant points out, the terms of ANF's continuous bond do not exclude interest. *See* Def.'s Br. 43; Def.'s Ex. 11. Under 28 U.S.C. § 2637(a), a claimant must pay "all liquidated duties, charges, or exactions" at the time an action in this Court is commenced. 28 U.S.C. § 2637(a). Furthermore, charges and exactions under § 2637(a) "include the assessment of interest on the late payment of liquidated duties." *Syva Co. v. United States*, 12 CIT 199, 205, 681 F. Supp. 885, 890 (1988); *see Can. Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989). Thus, payment of interest is a prerequisite to invoke this Court's jurisdiction, *see* 28 U.S.C. § 2637(a), and Plaintiff's interest payment claim is without merit.

Conclusion

Although the court is left without recourse to address ANF's complaints, the court is nevertheless troubled by Customs' behavior throughout the administrative phase of this case. The facts of this

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[23] The court believes that the fax cover sheet from Customs refers to Message No. 8257111 from Commerce, which provided liquidation instructions for ferrosilicon from China. This document is three pages long and included as Exhibit K in Plaintiff's brief.

case are a textbook example of why careful attention to importer's claims at the administrative level are good policy. ANF's attorney contacted Customs throughout the administrative review process to get guidance on filing its claims and received only poorly written responses, which added to ANF's confusion before it finally sought recourse in this Court.[24] Nevertheless, mandatory jurisdictional requirements dictate that this Court grant the Government's motion for summary judgment and deny Plaintiff's motion. A judgment will be issued accordingly.

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[24] There is also the confusing *ab initio* nature of the antidumping rescission order from Commerce. It is unclear why Commerce even made an *ab initio* determination if only unliquidated entries would be affected since the result is no different from a normal rescission. For Commerce to order the liquidation of entries while at the same time investigating an enormous price-fixing conspiracy concerning these entries leaves businesses such as the Plaintiff to conclude the Government unjustly enriches itself to the detriment of its citizens.