Slip Op. 06–141

SICHUAN CHANGHONG ELECTRIC CO., LTD., Plaintiff, and PHILIPS ELECTRONICS NORTH AMERICA CORP., APEX DIGITAL INC., PHILIPS CONSUMER ELECTRONICS CO. OF SUZHOU LTD., TCL CORP., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, FIVE RIVERS ELECTRONICS INNOVATION, LLC, KONKA GROUP CO., LTD., INDUSTRIAL DIVISION OF THE COMMUNICATION WORKERS OF AMERICA, PRIMA TECHNOLOGY, INC. Deft.-Intervenors

Richard K. Eaton, Judge
Consol. Court No. 04–00265
Public Version

[United States Department of Commerce's Final Determination sustained in part, remanded in part.]

Dated: September 14, 2006

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McDermott, Will & Emery, LLC (*Raymond Paul Paretzky*), for plaintiff-intervenor TCL Corp.

O'Melveny & Myers, LLP (*Veronique Lanthier*), for plaintiff-intervenor Apex Digital.

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Kelley Drye Collier, Shannon PLLC, (*Mary Tuck Staley*), for defendant-intervenors Five Rivers Electronics Innovation, LLC; International Brotherhood of Electrical Workers; Industrial Division of the Communication Workers of America.

White & Case LLP, (*Adams Chi-Peng Lee*), for defendant-intervenor Konka Group Co., Ltd.

Willkie, Farr & Gallagher, LLP, (*Daniel Lewis Porter*), for defendant-intervenor Prima Technology, Inc.

OPINION

Eaton, Judge: Before the court is a consolidated action for judgment upon the agency record.[1] Plaintiff Sichuan Changhong Electric Co., Ltd., ("Changhong" or "plaintiff"), and defendant-intervenor International Brotherhood of Electrical Workers, ("IBEW" or "defendant-intervenors") et. al., challenge aspects of the United States Department of Commerce's ("Commerce" or "the Department") Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Color Television Receivers From the People's Republic of China. *See* Certain Color Televisions from the People's Republic of China, 69 Fed. Reg. 20,594 (Apr. 16, 2004) ("Final Determination"), *as amended by* Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Color Television Receivers from the People's Republic of China, 69 Fed. Reg. 28,879 (May 19, 2004) ("Amended Final Determination"). The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2000) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). For the following reasons, the court sustains the Final Determination in part, and remands it in part.

BACKGROUND

On May 2, 2003, petitioners IBEW, Industrial Division of the Communication Workers of America ("IUE–CWA"), and Five Rivers Electronics Innovation LLC ("Five Rivers LLC"), filed an antidumping duty petition with Commerce alleging that imports of color television receivers ("CTRs") from the People's Republic of China ("PRC") were, or were likely to be sold at less than fair value in the United States. *See* Pet. for the Imposition of Antidumping Duties (ITA May 2, 2003). On May 29, 2003, Commerce initiated an antidumping investigation. *See* Notice of Initiation of Antidumping Duty Investigations: Certain Color Television Receivers from Malaysia[2] and the People's Republic of China, 68 Fed. Reg. 32,013 (May 29, 2003). The period of investigation ("POI") was October 1, 2002 through March 31, 2003.[3] *Id.*

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[1] On September 19, 2005, the court ordered the consolidation of *Sichuan Changhong Electric Co., Ltd., et. al., v. United States*, number 04–00265 and *IBEW v. United States*, number 04–00270 under the lead case, *Sichuan Changhong Electric Co., Ltd., et. al., v. United States*, consolidated court number 04–00265.

Prior to consolidation, IBEW, Industrial Division of the Communication Workers of America, and Five-Rivers Electronics Innovation, LLC, were plaintiffs to the action, *IBEW v. United States*, number 04–00270. Upon consolidation, however, the original plaintiff-parties were designated as defendant-intervenors.

[2] Although part of the initial investigation, merchandise from Malaysia is not the subject of this consolidated action.

[3] Pursuant to 19 C.F.R. § 351.204(b)(1)(2005), the POI for an investigation involving merchandise from a nonmarket economy is the two most recent fiscal quarters prior to the month of the filing of the petition, i.e., May 2002.

On June 16, 2003, Commerce issued antidumping questionnaires to multiple Chinese companies and the Chinese Ministry of Commerce. Because of the substantial number of respondents, Commerce thereafter chose to limit its investigation to the four largest ("the mandatory respondents"): Changhong; Konka Group Company, Ltd.; Philips Consumer Electronics Co. of Suzhou Ltd. ("Philips"); TCL Holding Company Ltd.; and Xiamen Overseas Chinese Electronic Co., Ltd. *See generally* 19 U.S.C. § 1677f–1(c)(2) ("If it is not practicable to make individual weighted average dumping margin determinations . . . because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to . . . exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined."). Petitioners thereafter filed their "Critical Circumstances Allegations" with Commerce, alleging that critical circumstances[4] existed with respect to imports of CTRs from Malaysia[5] and the PRC. *See* Letter from Mary T. Staley to Lou Apple, et. al. of Oct. 16, 2003.

On November 28, 2003, Commerce published its affirmative preliminary determination. *See* Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Affirmative Preliminary Determination of Critical Circumstances: Certain Color Television Receivers from the People's Republic of China, 68 Fed. Reg. 66,800 (ITA Nov. 28, 2003) ("Preliminary Determination"). On April 16, 2004, Commerce published its Final Determination. *See* Final Determination, 69 Fed. Reg. 20,594. In its Final Determination, Commerce reaffirmed its finding that all of the Chinese respondents had sold merchandise in the United States at less than fair value. *Id*. Commerce also found, however, that "for purposes of the final determination, critical circumstances do not exist with regard to imports of CTVs from the PRC." *See Id*. at 20,596.

STANDARD OF REVIEW

When reviewing a final determination in an antidumping or countervailing duty investigation, "[t]he court shall hold unlawful

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[4] A finding of critical circumstances pursuant to 19 U.S.C. § 1673b(e), is an emergency measure to "provide promptrelief to domestic industries suffering from large volumes of, or a surge over a short period of imports." H.R. Rep. No. 96–317 at 63 (1979). It is designed to deter "exporters whose merchandise is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between initiation of an investigation and a preliminary determination by [Commerce]." *Id; see Coalition for the Preservation of Am. Brake Drum and Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 112 n.38, 44 F. Supp. 2d 229, 252 n.38 (1999) (quoting S. Rep. No. 103–412) (1994).

[5] On April 16, 2004, Commerce terminated its investigation with respect to Malaysia.

any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. . . ." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). "Substantial evidence is more than a mere scintilla." *Consol. Edison*, 305 U.S. at 229. The existence of substantial evidence is determined "by considering the record as a whole, including evidence that supports as well as evidence that 'fairly detracts from the substantiality of the evidence.' " *Huaiyin*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)).

DISCUSSION

I. Plaintiff Changhong's Challenges

A. Commerce's Selection of Infodriveindia Data to Derive Surrogate Value for Certain Inputs

The first issue presented for review concerns the valuation of 25-inch Curved Picture Tubes ("CPTs"), and television Speakers ("Speakers"). With the exception of these two inputs, Commerce valued respondents' factors of production, using import statistics published in the Monthly Statistics of the Foreign Trade of India ("MSFTI"), and the World Trade Atlas Trade Information System ("World Trade Atlas").[6] Although noting that import data from MSFTI was the Department's usual source of surrogate value data, Commerce valued the CPTs and the Speakers using data obtained from Infodriveindia, a fee-based website reporting Indian customs data. Changhong contests Commerce's use of this data.[7]

a. Relevant Law

In an antidumping investigation, Commerce must determine whether the subject merchandise is being, or is likely to be sold, at less than fair value in the United States by comparing the export

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[6] These sources compile and disseminate official import statistics collected by the Government of India. The MSFTI is published by the Directorate General of Commercial Intelligence and Statistics of the Ministry of Commerce and Industry by the Government of India, and is available in the World Trade Atlas. *See* http://www.gtis.com/wta.htm (last visited August 18, 2006).

[7] As a producer and exporter of CTRs covered by the antidumping duty order, Changhong is an "interested party" within the meaning of 19 U.S.C. § 1677(9)(A), and is thus entitled to challenge Commerce's determination. *See* 19 U.S.C. § 1516a(a)(2).

price,[8] with the normal value ("NV") of the merchandise. *See* 19 U.S.C. 1677b(a). The NV of subject merchandise is "the price at which the foreign like product is first sold . . . for consumption . . . in the usual commercial quantities and in the ordinary course of trade . . . at the same level of trade as the export price. . . ." *See* § 1677b(a)(1)(B)(i). It is usually determined by examining sales of the subject merchandise in the exporter's home market, or in a third country. *Id.*

In cases involving exports from a nonmarket economy country ("NME"),[9] however, where "available information does not permit" the calculation of NV using prices paid for factors of production, 19 U.S.C. § 1677b(c) instructs Commerce to determine normal value "on the basis of the value of the factors of production[10] utilized in producing the merchandise. . . ."[11] § 1677b(c)(1). In most investigations involving NMEs, the factors of production are valued using surrogate values from a market economy country. *See Shakeproof Assembly Components, Div. Of Ill. Tool Works, Inc. v. United States*, 268 F.3d 1376, 1381 (Fed. Cir. 2001). The Federal Circuit, however, has recognized that surrogate country values are "at best, an estimate" of "what a non-market economy manufacturer might pay in a market-economy setting." *See id.* at 1382 (citing *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1445–46 (Fed. Cir. 1994)).

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[8] The statute defines export price as:

> the price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation by the producer or exporter of the subject merchandise outside of the United States to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States, as adjusted by subsection (c) of this section."

19 U.S.C. § 1677a(a).

[9] 19 U.S.C. § 1677(18)(A) defines a nonmarket economy country as "any foreign country that the administering authority determines does not operate on market principles of cost or pricing structure, so that sales of merchandise in such country do not reflect the fair value of the merchandise."

In a market economy, prices are generally the result of competitive forces of supply and demand. In a nonmarket economy, however, supply and demand forces do not influence producers' business decisions to the same extent. Costs, prices and allocation of resources are frequently determined by government-controlled entities, without regard to market forces. As a result, NME prices do not reflect the fair value of the merchandise. *See Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1315 (Fed. Cir. 1986).

[10] The factors of production used in producing the subject merchandise include, but are not limited to: (1) hours of labor required; (2) quantities of raw materials employed; (3) amounts of energy and other utilities consumed; and (4) representative capital cost. *See* § 1677b(c)(3). Subsection 1677b(c)(1) further directs Commerce to add to this value, an amount for general expenses and profit plus the cost of containers, coverings, and other expenses. *See* § 1677(b)(c)(1).

[11] Commerce has treated the PRC as an NME in all past antidumping investigations. *See, e.g.,* Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China, 68 Fed. Reg. 61,395, 61,396 (ITA Oct. 28, 2003). A country's designation as an NME remains in effect until it is revoked by the Department. *See* 19 U.S.C. § 1677(18)(c)(i).

Section 1677(b)(c) further requires that the valuation of factors of production "be based on the best available information regarding the values of such factors in a market economy country. . . ." § 1677(b)(c)(1). The words "best available information" are not statutorily defined. *See Allied Pac. Food (Dalian) Co., Ltd. v. United States*, 30 CIT ___ , ___ , 435 F. Supp. 2d 1295, 1313 (2006) ("Congress did not define the term "best available information" . . . [however,] [t]he Department's exercise of discretion . . . must be guided by the larger purpose of the antidumping law. The [Tariff] Act sets forth procedures in an effort to determine margins as accurately as possible.") (internal citations and quotations omitted). Commerce's exercise of discretion is, of course, subject to judicial review. Where a question arises concerning the time period from which surrogate prices have been obtained, this Court has found:

> While accuracy is of utmost importance, 19 U.S.C. § 1677b(c) fails to indicate the time periods from which surrogate values are supposed to be taken. This court, however, has repeatedly recognized that Commerce's practice is to use surrogate prices from a period contemporaneous with the period of investigation. Accordingly, while the standard of review precludes the court from determining whether Department's choice of surrogate values was the best available on an absolute scale, the court may determine the reasonableness of Commerce's selection of surrogate prices.

See Citic Trading Co. Ltd. v. United States, 27 CIT ___ , ___ , slip op. 03–23 at 16 (Mar. 4, 2003) (not published in the Federal Supplement)(footnotes omitted).

b. Commerce's Valuation of 25-inch CPTs

As an initial matter, Changhong argues that Commerce has "explicitly rejected the use of Infodriveindia as a source of information" in other investigations. Br. Pl. Sichuan Changhong Electronic Co., Ltd. Supp. Rule 56.2 Mot. J. Ag. Rec. ("Pl.'s Br.") at 8. In response, the Department insists that "simply because Commerce determines not to use a particular data source in one administrative proceeding does not preclude it from using that same data source in another administrative proceeding involving a different product and a different administrative record." Def.'s Mem. Opp. Mot. For J. Ag. Rec. ("Def.'s Resp.") at 15. Commerce further maintains that "selection of a data source in a particular determination" does not "constitute[] a 'practice' forever binding Commerce to use that data source or requiring explanation to justify use of any other data source." *Id.* at 15.

Here, plaintiff has produced no evidence demonstrating that Commerce has an established practice of not using Infodriveindia data. *See Ranchers-Cattlemen Action Legal Fund v. United States*, 23 CIT 861, 884–85 74 F. Supp. 1253, 1374 (1999)("An action . . . becomes an

'agency practice' when a uniform and established procedure exists that would lead a party, in the absence of notification of change, reasonably to expect adherence to the established practice or procedure."). Therefore, while Commerce may have passed up opportunities to use Infodriveindia information in the past, this alone is not a bar to its use to value CPTs in this case.

Next, Changhong argues that Commerce erred in its use of the Infodriveindia data because there is "no sound reason" for Commerce's departure from, what Changhong characterizes as, its "past practice of using official [MSFTI] import statistics as the basis for surrogate values for 25-inch CPTs." Pl.'s Br. at 7. In support of its position, Changhong contends that not only has Commerce consistently used MSFTI data in past determinations, but it has used these statistics "even where the import categories involved were basket categories containing a range of items." *Id.* at 9–10. It further argues that Commerce should have valued all CPTs using a single value derived from merchandise imported under Indian HTS number 8540.11.00, which it claims is "not even truly a basket category as it contained only color picture tubes," and is therefore specific to the input to the 25-inch CPTs. Pl.'s Br. at 11. The court finds Changhong's contentions unconvincing.

As an initial matter, despite Changhong's arguments to the contrary, information on the record indicates that Indian HTS category 8540.11.00 includes not only 25-inch curved CPTs, but also other types of picture tubes in other sizes. *See* Pet.'s Addt'l Factual Info. ("IBEW Submission") at 24. A review of MSFTI data indicates that reported within category 8540.11.00, are values reflecting curved and flat-screened, 14, 21, 24, 28, and 29-inch CPTs, none of which are within the scope of this investigation. *See id.* at Attachment 3 (listing CPT import data for category 8540.11.00). Indeed, an examination of this data reveals that the majority of imports under HTS number 8540.11.00 are of 14-inch and 21-inch CPTs. *Id.* Thus, Changhong's proposed source is not specific to the merchandise at issue.

The Infodriveindia data, on the other hand, was disaggregated into individual imports of specific size and type of color picture tube. *See* Factors Valuation Mem. at Attachment 3 (displaying size-specific and type-specific examples of Infodriveindia data for 29-inch flat CTRs). Commerce explained that the product specificity of the data for this input was particularly important in its source selection "because, as Changhong concedes, color picture tubes . . . are important parts of color televisions, and they constitute a [significant] percent of the total value of materials used to produce televisions." Def.'s Resp. at 18 (citing Pl.'s Br. at 8.).

In addition, although the Department maintains preferences for using particular data sources, courts have held that no one source will always provide the best available information. *See Peer Bearing*

Co. v. United States, 22 CIT 472, 480, 12 F. Supp. 2d 445, 455 (1998) ("Although Commerce expresses a strong preference for obtaining all factor values from a single surrogate source, both case law and Commerce's determinations are filled with instances in which Commerce used a blend of sources and surrogates to determine FMV."). Thus, Commerce is not bound by its preference for a particular source, rather its charge is to use the best available information. Based on the foregoing, the court finds reasonable Commerce's preference for Infodriveindia data because that information was more product and size specific than that preferred by plaintiff.

Next, Changhong contends that the Infodriveindia data "was unreliable because Commerce lacked such basic information as: where Infodriveindia obtained the underlying data; how the information was collected; what was included and what was left out," *inter alia*. *See* Pl.'s Br. at 14.

Plaintiff's contentions lack merit. First, to verify the reliability of the data collection and the authenticity of the information,[12] Commerce contacted Infodrive India Pvt. Ltd., the company responsible for maintaining the Infodriveindia website. Following this inquiry, the Department placed on the record, e-mail correspondence between one of its analysts and a representative from Infodriveindia, reflecting that the company: "(1) obtains the information in question from official Indian customs data; (2) receives daily customs data transmitted each month from the Indian customs department; and (3) presents the Indian customs data exactly as it is received, without additions or deletions." *See* Issues & Decision Mem. at 43.[13] Plaintiff has made no showing that seriously calls these representations into question. Thus, the court finds that Commerce has adequately addressed Changhong's initial allegations of unreliability.

Plaintiff next objects to what it calls the "unreliability of the Infodriveindia data . . . [that] is highlighted by the mystery regarding the country of origin of the tubes in question. For 25″ curved

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[12] After a petitioner [[ ]] submitted a proposal to use import statistics from Infodriveindia to derive surrogate values, Changhong argued that the source was unreliable. *See* IBEW Oct. 6, 2003 Submission at 4, 10; Changhong Nov. 6, 2003 Submission at 9.

[13] An example of the content of these emails is as follows:

> 1) Does the information on infodriveindia consist of any other source besides official import statistics from the Indian government (i.e., customs)? . . .
>
> No this covers only official source. . . .
>
> 2) Do you delete/omit any information from the data you receive from Indian customs before making it available on your website? . . .
>
> We don't delete and add any information which Indian Gov't Publishes, we relicate [sic] exactly the same information.

Memo to File regarding "Placing Information on the Record Regarding Infodriveindia in the Antidumping Duty Investigation on Color Television Receivers from the People's Republic of China" ("Infodriveindia Verification Letter) at 1–2.

tubes . . . 538 of the 858 units reported by Infodriveindia were shown as coming from Austria and France. Yet . . . there was no production of curved picture tubes in either . . . countr[y]." Pl.'s Br. at 14. Commerce, however, insists that the country of origin is not relevant to its inquiry. Rather, what matters for Commerce is that the CPTs were the subject of a market economy sale. The Department cites 19 C.F.R. § 351.408 to bolster its argument. *See* 19 C.F.R. § 351.408(c)(1) ("[W]here a factor is purchased from a market economy supplier and paid for in market economy currency, the Secretary normally will use the price paid to the market economy supplier."). Thus, for Commerce, § 351.408(c)(1) directs the use of prices derived from market economy transactions, not that the merchandise be produced in a market economy country. *See Polyethylene Retail Carrier Bag Comm. v. United States*, 29 CIT ___ , ___ , slip. op. 05–157 at 47 (Dec. 13, 2005) (not published in the Federal Supplement) ("In past cases, Commerce has interpreted 19 C.F.R. § 351.408(c)(1) as not disqualifying transactions based on the goods' country of origin."). On this record it is reasonable to assume that any price anomaly resulting from a sale by a nonmarket economy producer in its home country has been corrected by the subsequent market economy sale. Commerce was, therefore, within its discretion in finding that even if Austria and France did not produce CPTs, because they are market economy countries, imports into the United States that have been the subject of a sale in these countries are legitimate sources of surrogate value data. Issues & Dec. Mem. at 51.

Changhong further contests the reliability of the Infodriveindia data claiming that "none [of it] concerned imports during the [POI]," and that the "imports reported by Infodriveindia entered India up to eight months before the beginning of the investigation." Pl.'s Br. at 16 ("All of the information upon which Commerce relied for surrogate values for 25″ curved picture tubes was dated before the period of investigation.").

In defense of its findings, Commerce states that it considered it sufficient that the Infodriveindia data was "contemporaneous," or from "a period very close to the beginning or end of the [period of investigation]. . . ." Def.'s Resp. at 21 (citing to Issues & Decision Mem. at 51). Specifically, Commerce states that "the Infodriveindia data reflected data beginning six months[14] before the start of the [POI], but ending one month before the close of the POI."

Although the Department states that there was near contemporaneity between the POI and the data contained in Infodriveindia,

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[14] Defendant itself is unclear as to whether the data is six, seven, or eight months before the POI. While in its response defendant claims that the data is six months before the POI, Commerce, in its Issues and Decision Memorandum, indicates that the data is seven months before the POI. Neither document provides any citation establishing the actual dates for the information.

it does not point to any record evidence supporting its claim – nor has the court found any. In order for the court to assess Commerce's statements as to contemporaneity, it must examine record evidence supporting them. Here, so far as can be determined, absent from the record is any evidence indicating if the Infodriveindia data fell within, or near the POI. On remand, Commerce must provide record evidence indicating when the imports reported in the Infodriveindia data entered India. If indeed the imports entered before the beginning of the POI, and Commerce wishes to continue to rely on these values, it must explain how this information is most contemporaneous with the POI, or why the non-contemporaneity is outweighed by other aspects of the data making it the best available information. *See Int'l Imaging Materials, Inc. v. United States*, 30 CIT ___ , ___ , slip op. 06–11 at 13 (Jan. 23, 2006) (not published in the Federal Supplement) ("[An] agency must explain its rationale . . . such that a court may follow and review its line of analysis, its reasonable assumptions, and other relevant considerations.")(quoting *Allegheny Ludlum Corp. v. United States*, 29 CIT ___ , ___ 358 F. Supp. 2d 1334, 1344) (2005) (alterations in original)) .

Changhong also contends that the Infodriveindia data did not reflect "usable commercially significant entries," and thus was unreliable. Pl.'s Br. at 15. The Infodriveindia data at issue consisted of four entries, comprised of sales of 858 units. *See* Prelim. Factors Mem. at Attachment 6. In response to plaintiff's assertions, Commerce's sole argument is that "there is no information on the record . . . to show that the quantities shown in the Infodriveindiadata do not represent commercial quantities." Issues & Decision Mem. at 51.

The Court has previously found that Commerce can rely on import statistics as a basis for surrogate values only "after [reasonably] concluding that [the import statistics] are based on commercially and statistically significant quantities." *Polyethylene*, 29 CIT at 43 (internal quotations and citations omitted). While Commerce has stated its conclusion, it has neither explained why its conclusion is reasonable, nor supported its conclusion with record evidence. In order to rely on the Infodriveindia statistics, on remand, Commerce must point to record evidence supporting its conclusion that the quantities shown in the Infodriveindia data represent commercial quantities, and explain why its conclusion is valid. *See, e.g., Shanghai Foreign Trade Enters. Co. v. United States*, 28 CIT ___ , ___ , 318 F. Supp. 2d 1339, 1352–53 (2004).

c. Commerce's Valuation of Speakers

Changhong also contests Commerce's valuation of Speakers using the Infodriveindia data. In reaching its determination, Commerce placed on the record surrogate value information for Speakers obtained from Infodriveindia for September 2002 and April 2003 ("March 17th Infodriveindia data"). Commerce invited, and Chang-

hong submitted, comments on the use of this information. See Issues & Decision Mem. at 57. Changhong and other Chinese producers subsequently placed four invoices for purchases of Speakers by television producers in India on the record. *See* Issues & Decision Mem. at 57–58. Changhong urged Commerce to rely upon its January 2003 invoice submission as the best available information as to price. In an ancillary argument, plaintiff further insists that the invoice is the best available information because the January 2003 invoice is within the POI. *See* Pl.'s Br. at 19–20. This invoice reflected the sale of 100,000 speakers[15] by an Indian company, Woodstock Electronics, to Philips, a producer of color televisions in both India and China in a purchase unrelated to the present investigation. *See* Pl.'s Br. at 18 (citing Changhong Final PAI Submission, at 5 and Exhibit 5). The date of the invoice was January 8, 2003; within the October 1, 2002 – March 31, 2002 POI. *Id*.

In its Final Determination, Commerce considered Changhong's alternative data source, but concluded that it has a "clear preference to use publicly-available prices, as opposed to specific price quotes (or invoices), unless there is evidence on the record of the [specific price quotes/invoices] demonstrating that the input used in the production of subject merchandise is of a specific type, which would not be accurately represented by the more public data." Issues & Decision Mem. at 62 (citing PVA from the PRC at Comment 5). The Department then stated that it relied upon the Infodriveindia data because it was "publicly-available, representative of a range of prices, non-export values, and tax-exclusive." *Id*. Commerce concluded that "this data represents the best information available for speakers," and further found "no persuasive evidence on the record demonstrating that the speakers shown on Changhong's invoices are more representative of the speakers used by the respondents than those referenced in the Infodriveindia data." *Id*. at 63, 62. Commerce also considered Changhong's POI argument, weighed this aspect of the proposed data source, but found it outweighed by the fact that it was not publicly available and not indicative of the industry as a whole.

In its response, Commerce reiterates its preference for publicly-available prices by referencing the following language contained in 19 C.F.R. § 351.408(c)(1): "The Secretary normally will use publicly available information to value its factors." The next sentence of this provision further provides: "However, where a factor is purchased from a market economy supplier and paid for in a market economy currency, the Secretary normally will use the price paid to the market economy supplier." 19 C.F.R. § 351.408(c)(1). The import of this provision is that, when a respondent itself makes a market economy

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[15] According to plaintiff, the largest quantity of units reported in Infodriveindia was 9,000 units. During the POI, Changhong produced [[ ]] units of the subject CTVs for export to the United States alone. *See* Pl.'s Br. at 20.

purchase of an actual input, that price is to be preferred as the best available information. Here, however, Changhong merely placed upon the record a non-public invoice for a market economy purchase consummated between strangers to plaintiff's transactions.

The Court has consistently sustained Commerce's preference for publicly-available information representative of the industry norm. *See Zhejiang Native Produce & Animal By-Products Imp. & Exp. Corp. v. United States*, 28 CIT ___, ___, slip. op. 04–109 at 12, (Aug. 20, 2004) (not published in the Federal Supplement) (affirming Commerce's selection of surrogate data because it represented, *inter alia*, published, publicly-available data); *see also Peer Bearing Co.*, 25 CIT at 1217, 182 F. Supp. 2d at 1307 ("Commerce's goal is to use surrogate values that represent the industry norm of the surrogate country, not company-specific surrogate values. . . ."). The invoice submitted by Changhong is representative only of the price paid by a single producer, and has not been shown to be indicative of the entire industry. *See Zhejiang*, 28 CIT at ___, slip. op. at 12 (sustaining Commerce's decision to "reject the . . . price calculated from [the processor's] financial statement, on the grounds that the value for [the subject merchandise] represents the value . . . as experienced by a single processor [of the subject merchandise] in a particular region of India."). Commerce was, therefore, justified in not considering plaintiff's proffered data as sufficient to constitute the best available information, when it had available public information representing a range of prices and transactions. *See, e.g., See Polyethylene Retail Carrier Bag Comm. v. United States*, 30 CIT ___, ___, slip. op. 06–94 at 8–9 (June 21, 2006) (not published in the Federal Supplement).

B. Commerce's Determination to Disregard Certain Market Economy Purchases from Korea and Thailand

The next issue before the court is whether Commerce erred in disregarding Changhong's market economy purchases of certain inputs used in the production of its CTVs. In Changhong's Third Supplemental Response, it stated that it had purchased numerous inputs from the market economy countries of Korea and Thailand, and that therefore, prices paid for these inputs should be used to value the factors of production. *See* Pl.'s Br. at 24 (citing Supplemental Response, at Exhibit SD3–1). Although Commerce may rely on surrogate values, its regulations provide that values based on actual purchases made by a respondent from market-economy suppliers, paid for in market economy currency, are to be preferred in valuing the factors of production. *See* 19 C.F.R. § 351.408(c)(1). Thus, in its Preliminary Determination, Commerce indicated that, in valuing inputs purchased from market economy suppliers, in most circumstances, it would use the actual price paid for these inputs. *See* Preliminary Determination, 68 Fed. Reg. 66,807–08. Commerce also stated, how-

ever, that where it has reason to believe or suspect that the price of an input is subsidized, it would select a surrogate value rather than use a price that might be distorted. *See* 19 U.S.C. § 1677b. As a result, in its calculations, the Department declined to use Changhong's market economy purchase prices for inputs purchased from Korea and Thailand because it found that those countries maintained broadly-available, non-industry specific subsidies. *See* Issues & Decision Mem. at 36–37. In its Final Determination, Commerce affirmed its position. *See id.* at 38 (stating that Commerce will disregard market economy purchases where they were made from "countries [that] maintain broadly-available, non-industry-specific subsidies which may benefit all exports to all export markets.").

Changhong argues that in declining to use its purchases from the market economy countries of Korea and Thailand in the calculation of normal value, Commerce did not act in accordance with the precedent of this Court, or Commerce's own practices. *See* Pl.'s Br. at 25–27. Specifically, Changhong argues that Commerce may disregard purchases made in market economy countries only if there is "particularized evidence showing that the prices paid . . . have been distorted by subsidies," and that the record did not support such findings in this case. *Id.* at 25. In support of this claim, plaintiff cites *Fuyao Glass Industrial Group Co., Ltd. v. United States*, 27 CIT ___ , ___ , slip op. 03–113 (Dec. 18, 2003) (not published in the Federal Supplement)("*Fuyao I*"), and *Fuyao Glass Industrial Group Co. v. United States*, 30 CIT ___ , ___ slip op. 05–06 (Jan. 25, 2005) (not published in the Federal Supplement) ("*Fuyao II*"). *Id.* at 25–28.

The "reason to believe or suspect" standard first appeared in the legislative history for 19 U.S.C. § 1677b, which states that "in valuing such [nonmarket economy] factors, [Commerce] shall avoid using any prices which it has reason to believe or suspect may be dumped or subsidized prices." *See* Omnibus Trade and Competitiveness Act of 1988, H.R. Conf. Rep. No. 100–576 at 590 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623.

In *Fuyao II*, the Court found that Commerce has a reason to believe or suspect that an input may be subsidized if it can demonstrate by specific and objective evidence that:

> (1) subsidies of the industry in question existed in the supplier countries during the period of investigation ("POI"); (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier to not have taken advantage of such subsidies.

Fuyao II, 29 CIT at ___ , slip op. 05–6 at 10. Commerce purported to apply this three-prong test in declining to use Changhong's market economy purchases. *See* Def.'s Resp. at 26 ("[I]n accordance with *Fuyao*, Commerce placed upon the record 'particular, specific, and

objective evidence' of generally-available non-specific export subsidies that the Thai [and] Korean . . . governments provide all exporters, regardless of the product.").

Commerce's justification[16] for excluding the market economy purchases consists of selected portions of the *Fuyao Glass* Remand Determination listing the export subsidy programs it found to be available in Korea and Thailand: "For Korea the identified programs include: Duty Drawback, Export Credit and Short-Term Export Financing programs. For Thailand, the identified programs include: Export Packing Credits, Duty Exemption for Raw Materials, and Tax Certificate for Exporters subsidy programs." *See* Def.'s Resp. at 37 (citing *Fuyao Glass* Remand Redetermination at 29–32)(indicating that "[b]ecause this list equally applies here, we have placed it on the record of the instant investigation.") (internal citations omitted). A corresponding memorandum is also referenced, in which Commerce provided a brief description of each of the listed programs. *See, e.g.*, Memorandum from Elizabeth Eastwood, Placing Information on the Record Regarding Subsidy Programs In the Investigation of Certain Color Television Receivers from the People's Republic of China (Apr. 12, 2004) (P.R. 544) ("Eastwood Memorandum") at 29.[17]

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[16] Commerce also relied upon what it calls its general policy, and a supporting memorandum, for disregarding subsidized factor input prices from Korea and Thailand. *See* Issues & Decision Mem. at 36–37; *see also* Def.'s Resp. at 25–27. In its Issues and Decision Memorandum, Commerce stated that it has a general policy of not including prices paid for inputs from Korea and Thailand because it has reason to believe or suspect that those countries maintain subsidy programs which distort export price. *See* Issues & Decision Mem. at 36. As a basis for this, Commerce pointed to a February 2002, memorandum entitled, "NME Investigations: procedures for disregarding subsidized factor input prices." *Id*. Therein, Commerce stated the policy advising that for "all non-market economy investigations, factor input prices from Korea, [and] Thailand . . . should be disregarded. . . . Each of these countries maintain broadly available, non-industry specific export subsidies. In prior decisions, we have found that the existence of these subsidies provides sufficient reason to believe or suspect that export prices from these countries are distorted." *Id*. The policy relied upon by Commerce includes general findings regarding broadly available, non-industry specific export subsidies in the countries, but does not explain the findings in any way.

The court notes that Commerce's reliance on this general policy in the context of a lawsuit is misplaced. This "general policy" does not provide the court with the specific and *objective* evidence necessary for Commerce to meet its burden. Indeed, Commerce's findings based on its policy appear to suffer from the infirmities identified in *Fuyao. See e.g., Fuyao II*, 29 CIT at _____ , slip op. 05–6 at 22.

[17] An example of the information provided in Commerce's memorandum regarding the Korean subsidy program is presented in full:

1) Korea

Among the many Korean subsidy programs listed were Duty Drawback on Non-Physically Incorporated Items and Excessive Loss Rates ("Duty Drawback"), Export Credit Financing from the Export Import Bank of Korea ("Korean Export Credit"), and Short-Term Export Financing.

The Duty Drawback subsidy program is described in part, as: "The Government of Korea establishes an authorized loss rate for raw materials used in the manufacture of ex-

Assuming that Commerce is able, on remand, to satisfy prong-1 of the *Fuyao* test, the court finds that Commerce has provided sufficient evidence to meet prong-2 of the test, i.e., "the supplier in question is a member of the industry or otherwise could have taken advantage of any available subsidies." *See Fuyao II*, 29 CIT at ___, slip op. 05–6 at 10.

In the Eastwood Memorandum, Commerce pointed to record evidence indicating that the programs listed were non-product specific and non-industry specific. *See* Eastwood Mem. at 31, 32 ("None of these programs in any of these three countries are specific to any particular type of product. . . . Further, each of these programs are available to any company engaged in export activities."). The contents of the memorandum, i.e., the listed subsidy programs and their description and corresponding explanation, are sufficient to demonstrate that the supplier in question could have taken advantage of available subsidies. In other words, because the described subsidy programs were non-industry specific, they fulfill the requirements of prong-two.

Although being generally available and non-industry specific provides some support of Commerce's reasonable belief or suspicion that the inputs may be subsidized in the instant matter, this information alone is insufficient to demonstrate the specific and objective evidence that the inputs may have been subsidized.

First, Commerce has failed to show that the subsidies existed in the supplier countries during the period of investigation, as is demanded by prong one. Instead, Commerce has established the existence, at some point in time, of the subsidy programs in the subject countries. With respect to Korea, Commerce indicated only that certain of the subsidy programs were established prior to the POI. *See, e.g., id.* at 30 ("The National Investment Fund (NIF) . . . was established by the Government of Korea in 1973. . . ."). No date informa-

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ported goods. . . . The Government of Korea reduces the amount of duty drawback received on the exported product to account for the sales of by-products produced from the excess raw materials used in the production of exported goods."

The Export Credit program is described, in part, as: "The National Investment Fund (NIF), which was established by the Government of Korea in 1973, is a source of funds for banks to loan. NIF funds are used to finance development or to finance exports on a deferred payment basis . . . Because the loans are contingent upon export and the rates of interest charged are less than that on comparable financing, these loans confer benefits which constitute export subsidies."

The Short-term Export Financing program is described, in part, as: "Under Article 16 of the Tax Exemption and Reduction Control Act (TERCL), a domestic person engaged in a foreign currency earning business can establish a reserve amounting to the lesser of one percent of foreign exchange earnings or 50 percent of net income for the respective tax year. . . . This program constitutes an export subsidy because the use of the program is contingent upon export performance.

See Eastwood Mem. at 29–30 (omissions in original). Similar descriptions were also included for Thailand. *See id.* at 30–32.

tion at all was provided as to Thailand. *Id.* It is simply not reasonable to assume that subsidy programs, once established, exist in perpetuity. Because Commerce failed to indicate that the subsidies existed during the October 1, 2002 – March 31, 2003 POI, it did not provide the specific and objective evidence required under prong-one of the *Fuyao* test.

Second, the court finds that Commerce failed to establish the third-prong of the *Fuyao* test. The third prong requires a relatively minimal showing by Commerce, i.e., that it "would have been unnatural for a supplier not to have taken advantage of any available subsidies." *See Fuyao II*, 29 CIT at ___, slip op. 05–6 at 10. Previously, this Court has found this prong satisfied by a showing of "the competitive nature of market economy countries." *Id.* at 24. Contrary to Commerce's insistence, however, the burden with respect to this finding is not on plaintiff. *See* Def.'s Resp. at 25 ("[T]he burden shifts to the respondent to demonstrate that the supplier did not take advantage of those subsidies."). Indeed, prong three of the *Fuyao* test specifically requires that "Commerce must demonstrate by specific and objective evidence that . . . it would have been unnatural for a supplier to not have taken advantage of such subsidies." *Fuyao II*, 29 CIT at ___, slip op. 05–06 at 10. In the instant matter, Commerce has failed to do so.

Accordingly, the court finds that Commerce's determination not to include prices for inputs purchased by Changhong from Korea and Thailand in the calculation of normal value, was unsupported by substantial evidence. The court remands this issue to Commerce with instructions to either use the prices for inputs purchased from Korea and Thailand, or if it continues to find that it has reason to believe or suspect that these prices may be subsidized, to search the record for further probative evidence; or to re-open the record and do a literature search[18] to provide, if possible, additional evidence to support its conclusions that: (1) the generally available subsidies were in effect during the POI; and (2) it would be unnatural for a supplier not to take advantage of these subsidies.

C. Commerce's Computation of Financial Ratios

The next issue before the court involves Changhong's challenge to Commerce's calculation of the financial ratios used to determine normal value.

First, Changhong disputes Commerce's removal of "Managerial Remuneration" from the calculation of one of its relied upon finan-

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[18] Commerce is not required to conduct a full-scale investigation to determine that prices are subsidized. *See Peer Bearing Corp. v. United States*, 27 CIT ____, ____ 298 F. Supp. 2d 1328, 1337 (2003)("[T]he statute does not require Commerce to conduct a formal investigation."). Indeed, Commerce need only conduct a search using the reference materials available to it.

cial ratios. *See* Pl.'s Br. at 39. As previously discussed, in constructing normal value in the NME context, Commerce typically employs surrogate values. *See* § 1677b(c)(1). When relying on surrogate values, Commerce calculates financial ratios for the surrogate companies for the purpose of constructing normal value.[19] *Id.* In the Final Determination, Commerce removed values for Managerial Remuneration from one of the financial ratios' denominators.[20] *See* Pl.'s Br. at 39. Changhong challenges the adjustment to Managerial Remuneration on two separate grounds. *Id.*

Plaintiff initially claims that Commerce erred by failing to refer to the source from which it derived the subtracted amount. *Id.* at 39–40 (Commerce has not indicated "where in any of the schedules the value can be found to have been reported."). It insists that Commerce's "adjustment for Managerial Remuneration does not appear in any of the schedules, the [surrogate] company's income statement, statement of cash-flows, or balance sheet. Instead, Commerce appears to have plucked the value from a table. . . ." *Id.* at 39–40.

Changhong further insists that Commerce made the adjustment but "provided no justification for why the total value . . . was subtracted from the calculation [of the financial ratio]." *Id.* at 40. In other words, Changhong maintains that Commerce provided no explanation for the amount of its adjustment.

Finally, Changhong alleges that Commerce's calculation of its financial ratios resulted in double-counting. *See id.* at 39–40. Plaintiff asserts that Commerce's calculation does not properly reflect that "gross remuneration for certain of the [surrogate] companys' management may include items such as certain managers' compensation as members of [the surrogate companys'] board of directors." *Id.* at 40. Because "at least three" of the surrogate companys' managers also sit on the board of directors, Changhong insists that "it is likely"

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[19] Once Commerce calculates these ratios, the results are used in a formula aimed at deriving normal value. Specifically, [f]inancial ratios are used to determine overhead, financial and selling, general and administrative factors ("E"). The denominator consists of the surrogate's material, labor, and energy costs ("Y"). Consequently, if (1/Y x (surrogate value)) = E, and (E + (surrogate value)) = normal value ("NV"), then the greater Y is, the smaller NV becomes.

Anshan Iron & Steel Co., Ltd. v. United States, 27 CIT ____ , slip op. 03–83 at 15 n.5 (July 16, 2003) (not published in the Federal Supplement).

[20] In its Final Determination, Commerce also removed certain values for "Sitting Fees to Directors," and "Remuneration to Directors." *See* Final Determination Factors Mem. at Attachment 5 (BPL calculation) (P.R. 545); *see also* Pl.'s Br. at 39.

Changhong, however, does not contest the source of the value used for the adjustment to Director's Remuneration. Rather, it states that "Commerce identified the removal of the line item for director's remuneration and referred to the particular schedule where the . . . value [used] was obtained." *See* Pl.'s Br. at 39. This action taken by Commerce is precisely what Changhong maintains as error with respect to managerial remuneration.

Similarly, Changhong does not dispute the adjustment to "Sitting Fees to Directors." *See id.* at 39–40.

that the value for total executive compensation used by Commerce erroneously "includes not only managerial pay, but also director's pay." *Id.* This, Changhong maintains, "represents a double counting of total executive compensation." *Id.*

Commerce's sole argument in opposition to Changhong's claims is that it is too late in raising its objections. Thus, it disagrees with plaintiff's characterization of its allegations. *See* Def.'s Resp. at 31–33. The Department contends that Changhong is not attacking its methodology, but rather is raising ministerial errors in the application of its methodology. *Id.* at 33. Commerce insists that any adjustments made (or not made) to its calculations were due to inadvertent clerical errors. *Id.* Accordingly, it maintains that, because plaintiff's claims were not raised at the agency level, they were waived. *See id.* (citing 28 U.S.C. § 2637(d))[21] ("Changhong chose not to object to the deduction of managerial remuneration from labor, or raise how managerial remuneration could overlap with directors' remuneration or sitting fees, as a ministerial error.").

A ministerial error is "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 C.F.R. § 351.224(f) (2004); *see also* 19 U.S.C. § 1671d(e). The Federal Circuit has defined the term "clerical error" to be an error that "by [its] nature [is] not [an] error in judgment but merely [an] inadvertenc[y]." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995). Were all of plaintiff's challenges related solely to ministerial error claims, they should have been raised within a reasonable time at the agency level. Any such claims not raised within a reasonble time during the investigation would be waived. *See generally IPSCO Inc. v. United States*, 965 F.2d 1056, 1062 (Fed. Cir. 1992) (citing H.R. Rep. No. 40, 100th Cong., 1st Sess., pt. 1 at 144 (1987) ("This provision allows for the correction of ministerial errors in final determinations within a limited time period after their issuance. . . . [As such, the court finds that] appellantdid not raise the alleged error within a reasonable time after the original final determination.").

To the extent that Changhong objects to Commerce's failure to provide the source from which it derived the subtracted amount, it makes a clerical, and thereby ministerial error claim. *See* 19 C.F.R. § 351.224(f). Indeed, Commerce's failure to point to the table or schedule reflecting the subtracted value is properly viewed as an inadvertency. Because Changhong did not raise this claim within a reasonable time, it was waived pursuant to 19 U.S.C. § 1671d(f).

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[21] "[T]he Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d).

Changhong, however, does not take issue solely with Commerce's clerical errors; it additionally claims that Commerce provided no rationale for excluding certain values from the ratios, and that double counting may have been included in Commerce's remuneration calculation. The court finds that both of these objections go to the methodology[22] employed by Commerce, and thus are not waived. *See Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 28 CIT ___ , ___ , slip. op. 04–88 at 18 (July 19, 2004) (not published in the Federal Supplement) ("With regard to the methodology Commerce uses to resolve an issue, the exhaustion doctrine is inapplicable where a respondent did not have the opportunity to challenge the methodology because Commerce failed to articulate the methodology. . . ."). In the first instance Changhong claims error in Commerce's failure to explain why it made the adjustments; and secondly, Changhong contests Commerce's methodology itself, i.e., why it took action that might lead to double counting. Both of these claims involve a challenge to Commerce's judgment. As such, Changhong's challenges are not to ministerial errors, but to Commerce's methodology. Because these claimed errors were first raised in its Motion for Judgment Upon Agency Record, Changhong had no opportunity to challenge them at the administrative level and so it is proper for this Court to hear them. *See Carpenter Technology Corp. v. United States*, 30 CIT ___ , slip op. 06–134 (Sept. 6, 2006) (not published in the Federal Supplement).

It is apparent that Commerce has not articulated its methodology with respect to the calculation of the financial ratios. The United States Supreme Court has "frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner." *See Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983). Accordingly, the issue of financial ratios is remanded to Commerce with instructions to clearly set forth the methodology used in the Final Results, and to justify its conclusions. *See Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001).

D. Commerce's Determination Not to Exclude Values for Small Quantities of Imports

In its Preliminary Determination, with the exception of two inputs,[23] Commerce valued respondents' factors of production, using import statistics published by the MSFTI. Following the publication of the Preliminary Determination, Changhong claimed that, in calculating the average values from the MSFTI, Commerce departed

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[22] It is possible that plaintiff's double counting claim could have been corrected as a ministerial error at the agency level. However, since Commerce makes no effort to explain its actions, the court finds that they were the result of its methodology.

[23] As has been previously discussed, Commerce valued 25-inch CPTs and Speakers using import data from Infodriveindia. *See* Preliminary Determination, 68 Fed. Reg. at 66,808.

from its long-standing practice of omitting those import values that were reported either: (1) in small quantities; and/or (2) at aberrational prices. *See* Changhong Case Brief at 27–28 ("[T]he Department should remove from its import data any aberrational unit values . . . and should remove . . . any import values that are imported in such small quantities. . . ."). In its Final Determination, Commerce stated that it is not its normal practice to "automatically exclude imports of small quantities of merchandise from the calculation of surrogate values." *See* Issues & Decision Mem. at 30. Rather, "the Department's practice is to exclude only data that is deemed to be distortive." *Id*. Thus, Commerce agreed that it should remove from its calculations data representing aberrational values, but declined to remove values "merely because certain of the underlying import quantities were small." *Id*. at 31. Commerce then reexamined the surrogate value data on the record to determine if any of the values cited by the respondents in their case briefs appeared to be aberrational. As a result of this examination the Department excluded from its calculations, certain values used in the Preliminary Determination. *See id*.

With respect to Changhong's small quantities claim, in its Issues and Decision Memorandum, Commerce stated that its practice has not been to exclude all small quantity purchases, but rather "to exclude only data that is deemed distortive." *Id*. at 30. The Department then points to several determinations illustrating its adherence to this methodology. *See Id*. at 30 (citing Notice of Final Determination of Sales at Less Than Fair Value Saccharin From the People's Republic of China, 68 Fed. Reg. 27,530, cmt. 1 (Dep't of Commerce May 20, 2003)); *see also* Issues and Decision Memorandum for the Administrative Review of Heavy Forged Hand Tools from the People's Republic of China at Comment 11, accompanying Heavy Forged Hand Tools from the People's Republic of China, 66 Fed. Reg. 48,026 (Dep't of Commerce Sept. 17, 2001)(final results). Indeed, the Court has previously approved Commerce's established practice "to disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger quantity imports of that product from other countries," and thereby distortive. *See Shakeproof Assmebly Components Div. Of IL Tool Works, Inc. v. United States*, 23 CIT 479 485, 59 F. Supp. 2d 1354, 1360 (1999) (citing Heavy Forged Hand Tools, Finished or Unfinished , With or Without Handles, from the People's Republic of China, Final Administrative Reviews, 62 Fed. Reg. 11813 (Mar. 13, 1997); Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from Romania, Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 37,194 (July 11, 1997)). While Changhong asserts that Commerce has a practice of excluding small quantity purchases from its import data, it has pointed to nothing to prove its case. Thus, it is apparent that, despite plaintiff's arguments, Commerce has not had

a longstanding practice of omitting import values merely because they were the product of a small quantity of imported goods.

In a related claim, plaintiff challenges Commerce's methodology on the basis that it was internally inconsistent with its policy with respect to actual market economy purchases. *See* Pl.'s Br. at 35. Specifically, Changhong argues that Commerce's inclusion of inputs purchased in small quantities in the calculation of surrogate values is inconsistent with its exclusion of Changhong's actual small-quantity purchases from market economies. *Id.* at 33–35. Commerce insists, however, that there is a distinction between a price obtained from a surrogate country that is used to value a factor of production, and the price actually paid by a NME producer to procure a factor of production from a market economy supplier. Commerce states that it employs a different methodology in each of these determinations, and thus, that its behavior is not internally inconsistent.

As has been previously noted, where Commerce values a factor of production using a surrogate value, it is its practice to disregard only small quantity values, that are aberrational in price. *See generally Luoyang Bearing Corp. v. United States*, 28 CIT ___, ___ 347 F. Supp. 2d 1326, 1353. Where the Department values a factor of production using actual market economy purchases, however, its practice is to disregard purchases that are not large enough to be representative of the NME producer's purchases of the input during the POI. According to defendant, such distinct treatment is reasonable because, with respect to a respondent's market economy purchases, there is greater potential for manipulation of import data by a respondent. *See* Defendant-Intervenors' Resp. Br. ("Def-Int.'s Resp.") at 34 ("Such a policy is reasonable. First, as a practical matter, in a market setting, small volume purchases would not generally reflect true commercial values . . . and therefore it is appropriate to disregard these transactions. These values for small volume purchases of self-selected market economy purchases could be manipulated by respondent.").

The court finds that Commerce's behavior is not internally inconsistent because it is based on separate methodologies, i.e., when seeking a surrogate value, Commerce disregards insignificant purchases that are distortive; when using actual prices paid it excludes small quantity purchases as possible subjects of manipulation. Moreover, these two separate methodologies are the past practice of the Department, and have each been upheld as such by the Court. *See Shakeproof Assembly Components Div. Of IL Tool Works Inc., v. United States*, 24 CIT 485, 491, 102 F. Supp. 2d 486, 492 (2000), *aff'd*, 268 F.3d 1376 (Fed. Cir. 2001).

Next, Changhong maintains that even if Commerce is allowed to include small volume imports in its surrogate analysis, it failed to revise fully its surrogates to adjust for all aberrational values. *See* Pl.'s Br. at 35–37. Specifically, Changhong objects to the inclusion of

"five transformers valued at Rs. 29,000 . . . 20 kilograms of varnish valued at Rs. 29,000" from New Zealand, and "other surrogate values," which it believes are aberrational. *Id*. at 37.

With respect to this claim, the court finds that because Changhong failed to raise its objection when alleging ministerial errors following the Final Determination it has waived its objection. *See IPSCO*, 965 F.2d at 1061–62. Changhong and other respondents specifically complained of Commerce's inclusion of aberrational small-quantity imports following the Preliminary Determination. Upon reviewing these objections, in its Final Determination, Commerce removed certain aberrational values from its calculation of several surrogate values. These revisions were published in Attachment 2 of its Final Factors Memorandum, and made available to all parties. Following the Final Determination, IBEW, TCL Corp., and Konka Group Co. Ltd., made ministerial error allegations concerning calculation of surrogate values, and where appropriate, Commerce corrected these errors. Changhong too had the opportunity to challenge the inclusion of these quantities at the administrative level, but made no objection. Indeed, Changhong itself indicates that it was aware of what it considered to be errors by Commerce following the publication of the revisions. *See* Pl.'s Br. at 37 ("[A] review of Commerce's revision reveals that . . . Commerce failed to make several required changes to its surrogate values.").

Unlike its claims with respect to Commerce's calculation of financial ratios, here, plaintiff's complaint relates to a ministerial error. That is, Changhong complains about Commerce's failure to make, what it considers to be, required changes. Thus, is alleges ministerial errors. The court finds that Changhong failed to avail itself of the opportunity to raise its objection within a reasonable time, and therefore has waived its objections. *See IPSCO*, 965 F.2d at 1061–62. Accordingly, the court will not entertain Changhong's claim that Commerce failed to fully revise its surrogates to adjust for all aberrational values.

E. Commerce's Valuation of Changhong's Electricity Utilization

The court next addresses whether substantial evidence supports Commerce's valuation of electricity. In its Preliminary Determination, Commerce valued Changhong's electricity utilization based upon data from the International Energy Agency's Key World Energy Statistics 2002 Report ("IEA Report"), adjusted[24] for the POI. *See* Preliminary Factors Valuation Mem. at 5. Following the preliminary determination, Changhong placed on the record, data obtained from the all-India average electricity rate tariff published by the

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[24] Commerce revised the reported price [[ ]] *See* Preliminary Factors Valuation Mem. at 5, & Attachment 7.

Power & Energy Division of the Government of India's Planning Commission ("P&ED Report"). *See* Changhong Jan. 28, 2004 Factor Values Submission at 6. In its case brief, Changhong argued that Commerce should rely on the P&ED Report because it: (1) was an official government source that has been published on a continuous basis for fourteen years; (2) covered the fiscal year 2001 through 2002; and (3) had beenrelied upon by Commerce in multiple recent administrative reviews and investigations. *See* Changhong Case Br. at 29. In its Final Determination, Commerce declined to use the P&ED Report average tariff because it found that "this tariff does not represent the best information available on the record of this investigation because it is not an actual consumption rate, but rather is an estimated or 'AP' (i.e., annual plan) rate." Issues & Decision Mem. at 31. Instead, Commerce based its surrogate value for electricity on the 2000–01 Revised Estimate average rate ("RE") for industrial consumption published in the IEA Report. *See id*.

Changhong argues that the Department's decision to value electricity based upon the IEA Report, instead of the P&ED Report, was flawed. *See* Pl.'s Br. at 42–43. First, Changhong insists that Commerce "failed to take into account deficiencies in the IEA Report," including that its data was not contemporaneous with the POI. *Id*. at 42, 43 ("Commerce departed from its normal practice by relying upon surrogate factors that are not contemporaneous with the period under review.").

In support of its decision to use the IEA Report, Commerce states that "[t]he Department consulted a World Bank economist with respect to the differences between 'AP' [Annual Plan Rate proposed by Plaintiff] and 'RE' [Revised Estimate]. According to the World Bank economist . . . [the IEA Report] figures tend to be closer to the actuals as they contain adjustments to AP [Annual Plan] figures [found in the P&ED Report] prepared the year before.' " *See* Placement of Information on Record Re: Surrogate Value (Apr. 12, 2004 Surrogate Value for Electricity Mem.) at ¶ IV. Based on the economist's description, the Department determined that the IEA Report 2000–01 rate was "more reliable" than the P&ED Report 2001–02 rate because it updated the estimated rate with actual usage information. *See id*. Thus, Commerce weighed the non-contemporaneity of the IEA Report data against the evidence indicating that its data was more accurate, and determined that the non-contemporaneity failed to overcome the evidence that the IEA Report was the best available information. *Id*. (citing administrative review of persulfates from the PRC, for the proposition that the revised estimate were preferable to the annual plan); *see also* Def.'s Resp. at 37 (IEA Report data is the best available information "even though the annual plan [P&ED Report data] was contemporaneous with the period of review.").

Commerce has pointed to record evidence indicating a greater accuracy of the data contained in the IEA Report, i.e., that the data

was more accurate because it updated the estimated rate with actual usage information. Because the selected information appears to be more accurate, it cannot be said that Commerce was unreasonable in choosing it over a more contemporaneous, but less accurate alternative.

Next, plaintiff maintains that the IEA Report is further flawed because Commerce "did not abide by its statutory requirements [in] utiliz[ing] a 'fully-loaded' tax-inclusive electricity price in calculating normal value for Changhong's merchandise." Pl.'s Br. at 43. Specifically, Changhong contests the use of the data on the basis that "Commerce failed to note the fact that the Indian electricity pricing that it collected from the IEA Report included various taxes and surcharges." *Id.*

In earlier determinations, Commerce has expressed a preference to use surrogate price data which is . . . tax exclusive. *See Taiyuan Heavy Mach. Imp. & Exp. Corp. v. United States*, 23 CIT 701, 711 (1999) (not published in the Federal Supplement). The Court, however, has recognized Commerce's practice to remove sales and excise taxes from its calculation of normal value *only* "when there is an *affirmative indication of their presence*." *Taiyuan*, 23 CIT at 711 (emphasis added). To supply this affirmative indication, Changhong states that "[a]ccording to Footnote (g) of the IEA printout, the electricity *for industry pricing* is tax exclusive for only Australia and the United States." *See* Pl.'s Br. at 43 (citing Preliminary Factors Mem. at Attachment 7) (emphasis added). An examination of footnote (g), however, reveals no evidence, specific or otherwise, reflecting that the IEA value for electricity is tax exclusive for Australia and the United States. Rather, any information regarding tax inclusion/exclusion is absent from the cited source. *See* Prelim. Factors Mem. at Attachment 7 (reflecting data concerning HS Codes, product description, quantity, value, AUV, [average unit value] unit, foreign port and country). As such, Changhong has failed to point to specific evidence showing an "affirmative indication" that the IEA Report surrogate values included tax. Commerce's decision not to deduct taxes from the surrogate values, therefore, is in accordance with law. *See Taiyuan*, 23 CIT at 711 ("Since plaintiff did not present information about a specific surrogate value containing excise and sales tax, Commerce's decision [not to deduct taxes from its surrogate value] is based on substantial evidence and otherwise is in accordance with law."). Accordingly, Commerce's surrogate valuation of electricity is sustained.

II. Defendant-Intervenors' Challenges

The court next turns to the issues presented for review in one of the consolidated cases, *IBEW v. United States*. In their complaint, IBEW, IUE–CWA, and Five Rivers LLC, the defendant-intervenors,

contest various aspects of Commerce's Final Determination. *See* Compl. of 07/30/04 ("Def.-Int.'s Compl.).

A. Commerce's Negative Critical Circumstances Determination

On October 16, 2003, IBEW alleged that critical circumstances existed. A finding of critical circumstances pursuant to 19 U.S.C. § 1673b(e), is an emergency measure to "provide prompt relief to domestic industries suffering from large volumes of imports, or a surge over a short period in, imports." H.R. Rep. No. 96–317 at 63 (1979). Following its investigation, Commerce published its preliminary affirmative finding that dumping had occurred, and its preliminary affirmative determination of critical circumstances. *See* Preliminary Determination, 68 Fed. Reg. 66,800, 66,808–10. Because of the affirmative critical circumstances determination, Commerce ordered Customs to "suspend liquidation of all imports of subject merchandise from the PRC entered . . . on or after 90 days prior to the date of publication of this notice in the Federal Register." *Id.* at 66,810; *see also* 19 U.S.C. § 1673b(e)(2).[25] Thus, the suspension applied retroactively to entries made from August 30, 2003 through November 27, 2003.

In the Final Determination, however, Commerce found that critical circumstances did not exist and therefore issued a negative determination on that issue. *See* Final Determination, 69 Fed. Reg. 20,594. Commerce then instructed Customs to terminate the retroactive suspension of liquidation of entries. Thereafter, defendant-intervenors filed their complaint contesting the negative critical circumstances determination. *See* Def.-Int.'s Compl. ¶¶ 9–13.

On August 30, 2004, defendant-intervenors filed a consent motion for a preliminary injunction to enjoin the liquidation of entries of CTRs produced or exported by Changhong. Defendant-intervenors did not, however, contemporaneously file a motion for a temporary restraining order ("TRO"). The next day, Changhong[26] and Wal-Mart Stores, Inc. ("Wal-Mart") each filed consent motions to intervene; which motions were granted, respectively, on September 8th and 9th, 2004. On September 2, 2004 defendant-intervenors filed an amended motion for preliminary injunction, but again made no request for a TRO. On September 9, 2004, Changhong filed its opposition to the motion for preliminary injunction. Wal-Mart filed its motion contesting the motion for preliminary injunction on September 14, 2004. On October 25, 2004, the court, *sua sponte*, issued an order

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[25] Pursuant to § 1673b(e)(2), if Commerce determines that affirmative critical circumstances exist, Commerce may order a retroactive suspension of liquidation, applicable to imports of subject merchandise, made 90 days prior to the publication of the preliminary determination.

[26] Changhong's motion was filed prior to the consolidation of the member cases addressed herein. *See generally* Order of 09/19/2005.

temporarily enjoining Customs from "making or permitting liquidation of any unliquidated entries of certain color television receivers, as defined in the scope of the United States Department of Commerce's antidumping duty order on certain color television receivers from the People's Republic of China . . . entered by Sichuan Changhong Electric Co., from August 30, 2003 through May 31, 2005. . . ." *See* TRO of 10/25/2004. On February 11, 2005, following Oral Argument, the court issued a preliminary injunction enjoining Commerce and Customs from "causing or permitting liquidation of the entries" made "on or after August 30, 2003 through May 31, 2005 . . . which remain unliquidated" as of the date of service of the order. *See* Prelim. Inj. Order of 02/11/05.

There is controversy, however, as to the effect of the injunction because the United States insists that the entries at issue were deemed liquidated by operation of law, prior to the issuance of either the TRO or the preliminary injunction. *See* Def.'s Resp. Opp. Pl.'s Mot. J. Ag. Rec. ("Def.'s 04–270 Resp.") at 18. That is, defendant claims that the suspension of liquidation occasioned by the affirmative preliminary determination of critical circumstances, ceased upon the publication of the negative final determination. As a result, Commerce contends that on October 16, 2004, six months after the April 16, 2004 Final Determination publication date, the entries were liquidated by operation of law pursuant to 19 U.S.C. § 1504(d), and that the court's October 25, 2004 TRO and February 11, 2005 preliminary injunction had no effect on the already liquidated merchandise. *See id.* at 18; *see also* Prelim. Inj. Order of 02/11/05. Thus, the Department contends that defendant-intervenors' challenge to Commerce's negative critical circumstances determination is moot. *See* Def.'s 04–270 Resp. at 17–19.

Liquidation is the "final computation or ascertainment of the duties . . . accruing on an entry." 19 C.F.R. § 159.1; *see also Juice Farms, Inc. v. United States*, 68 F.3d 1344, 1345–46 (Fed. Cir. 1995). In most circumstances, Commerce will order Customs to liquidate entries within one year of the date of entry or withdrawal of the subject merchandise. *See* 19 U.S.C. § 1504(a). There is, however, a statutory provision specifically directing deemed liquidation (liquidation by operation of law), if certain criteria are met. *See* 19 U.S.C. § 1504(d). Section 1504(d) provides that, except in circumstances not relevant here,[27]

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[27] Specifically, "unless liquidation is extended under subsection (b) [the provision allowing for extension by request, for good cause shown, by the importer of record] of this section. . . ." *See* § 1504(d).

> When a suspension [of liquidation] required by statute or court order is removed,[28] the Customs Service shall liquidate the entry . . . within 6 months after receiving notice of the removal from the Department of Commerce. . . . Any entry . . . not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty . . . at the time of entry. . . .

19 U.S.C. § 1504(d). Thus, this section directs the deemed liquidation of unliquidated entries six months after the order suspending liquidation has been removed. *Id.* For this deemed liquidation to occur, however, certain criteria must be met: "(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Koyo Corp. of U.S.A. v. United States*, 29 CIT ___, ___, 403 F. Supp. 2d 1305, 1308 (2005) (citing *Fujitsu v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002)). Pursuant to § 1504, if these criteria are met, the entry is liquidated at the entered rate six months after the suspension order is removed.[29] *See* § 1504(d) (stating that entries meeting the requirements of this subsection "shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.").

Unsurprisingly, defendant-intervenors disagree with Commerce's position that the entries were liquidated by operation of law and that their claims with respect to critical circumstances are moot. Defendant-intervenors argue that "the court has jurisdiction to hear this claim because the preliminary injunction currently in place prevented liquidation of the entries regardless of whether the liquidation would be through actual liquidation or liquidation by operation of law." Pl.'s Reply Br. Supp. Pl.'s R. 56.2 Mot. J. Ag. Rec. ("Def.-Int.'s Reply") at 2. Thus they contend that "the court-ordered injunction prevents the liquidation of these entries regardless of the type of liquidation. That is, the injunction prevents the actual liquidation of these entries and prevents liquidation of these entries by operation of law." Def.-Int.'s Reply at 4. The court finds defendant-intervenors' argument unconvincing.

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[28] Pursuant to 19 U.S.C. § 1671d(c)(2)(A), if Commerce's final determination is negative, Commerce must terminate the suspension of liquidation required by § 1671b(d)(2).

[29] At oral argument, counsel for defendant-intervenors argued that if this court finds that the subject entries are deemed liquidated, the court should, nonetheless, order liquidation at "the bonding rate of 57 percent." Oral Arg. Trans. at 58. The court finds that, having found the entries to be deemed liquidated, § 1504(d) clearly directs that the entries be liquidated at the "rate of duty . . . asserted at the time of entry by the importer of record." § 1504(d).

The TRO issued on October 25, 2004, halted the liquidation of unliquidated entries from that date forward. In like manner, the preliminary injunction entered on February 11, 2005, by its terms, had no effect on entries liquidated before the date of its issuance. *See* Prelim. Inj. Order of 02/11/2005 ("This Order applies to any and all of the following entries. (1) Entries . . . that were; (2) entered . . . on or after August 30, 2003 through May 31, 2005; and (3) *remain unliquidated* . . . after the date on which this order is . . . served.") (emphasis added). This is the case whether liquidation is made by action of the Customs Service or by operation of law. Because defendant-intervenors did not make an application for a TRO when they filed their motion for a preliminary injunction, no order was entered to stop the impending deemed liquidation. Therefore, on October 16, 2004, pursuant to § 1504(d), the entries were deemed liquidated – not by some action of the Customs Service, but rather by statute.[30] *See Gerdau Ameristeel Corp. v. United States*, 30 CIT ___ , ___ , ___ F. Supp. 2d ___ , ___ , slip. op. 04–00608 at 4 (August 10, 2006) (finding that "without an injunction [covering the unliquidated entries] liquidation means an interested party will forever lose its statutory right to challenge an administrative review.") (internal citations and quotations omitted).

The preliminary injunction, upon which defendant-intervenors rely, cannot undo the deemed liquidation of the subject entries. Once liquidation occurs, it moots the underlying agency decision because "the statutory scheme does not authorize this court to order a reliquidation of entries once they are liquidated. . . ." *Chr. Bjelland Seafoods A/S v. United States*, 19 CIT 35, 46 slip. op. 95–5 (Jan. 18 1995)(not published in the Federal Supplement). Indeed, "the statutory scheme has no provision permitting reliquidation and once liquidation occurs, a subsequent decision by the trial court on the merits . . . can have no effect on the dumping duties assessed on [subject] entries." *Mitsubishi Elecs. Am. v. United States*, 18 CIT 167, 180, 848 F. Supp. 193, 203 (1994)(citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983))(internal quotations omitted).

In the instant matter, the entries at issue meet the requirements of § 1504(d) and therefore, were liquidated by operation of law. The April 16, 2004 publication of Commerce's negative final determina-

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[30] The TRO enjoining liquidation was not issued until after the expiration of this date, i.e., on October 25, 2004, and was entered *sua sponte*. *See* TRO. This TRO was a measure taken by the court, and covered all "unliquidated" entries. *Id*. At the time of issuance, however, the entries at issue here had been liquidated by operation of law, and thus were outside the purview of the order.

Although the entries are deemed liquidated by operation of law as of October 16, 2004, pursuant to the preliminary injunction, the United States has not performed the ministerial functions related to that liquidation. Nonetheless, the entries have been deemed liquidated.

tion removed the suspension of liquidation resulting from the preliminary affirmative determination. *See* Final Determination 69 Fed. Reg. at 20,597 ("[B]ecause we find that critical circumstances do not exist . . . we will instruct the CBP [Customs & Border Protection] to terminate the retroactive suspension of liquidation . . . instituted due to the preliminary affirmative critical circumstances finding."); *see also Int'l Trading Co v. United States*, 412 F.3d 1303, 1308 (Fed. Cir. 2005) ("[t]he date of publication provides an unambiguous and public starting point for the six-month liquidation period. . . ."). During this six-month period, Customs did not liquidate the entries at issue. Accordingly, this court finds that the entries at issue were liquidated by operation of law on October 16, 2004, six months from the date of publication of the notice of removal of the suspension of liquidation order.

Because of this deemed liquidation, the court concludes that any dispute over Commerce's negative critical circumstances determination is moot. *See Gerdau Ameristeel*, 30 CIT at ___ , ___ F. Supp. 2d at ___ , slip. op. 04–00608 at 2 (Aug. 10, 2006) ("Because all of the subject entries at issue have been liquidated this Court lacks jurisdiction to hear this matter."). Mootness has been described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980) (internal quotations and citations omitted). "Simply stated, a case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969) (internal quotation marks omitted).

This Court has held that "liquidation renders moot any pending court challenge to the underlying agency determinations regarding those entries. . . ." *Chr. Bjelland Seafoods*, 19 CIT at 46. It has long been settled that a federal court has no authority "to give opinions upon moot questions. . . ." *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992); *see also Mills v. Green*, 159 U.S. 651, 653 (1895). Accordingly, defendant-intervenors' challenge to Commerce's negative critical circumstances determination in its Final Determination is dismissed as moot.

B. Valuation of 29-inch CPTs

In its Preliminary Determination, Commerce valued Changhong's production of 29-inch CPTs using import data reported on Infodriveindia. *See* Preliminary Determination, 68 Fed. Reg. 66,808. In its Final Determination, however, Commerce found that it was no longer appropriate to value CPTs using this data based on its examination of information relating to Changhong's market economy purchases of CPT's. *See* Issues & Decision Mem. at 52, 56. At verification, Commerce confirmed that Changhong purchased a significant

quantity of CPTs from Mexico, a market economy country, approximately three weeks after the POI. Thus, in the Final Determination, Commerce valued the 29-inch CPTs using Changhong's market economy purchases. *Id. at 56.*

Defendant-intervenors contend that in the Final Determination, the "Department inexplicably amended the value assigned to Changhong's consumption of 29-inch, curved color picture tubes in the preliminary determination. *See* Def.-Int.'s Mem. at 28. They argue that the Department committed error in relying on post-POI purchases and, in doing so, deviated from "Commerce's longstanding policy of not relying on . . . purchases . . . that occur outside of the POI.[31] *Id.*

Plaintiffs' contentions are without merit. First, unlike Changhong's claims concerning contemporaneity, *infra*, here there is no question as to the actual dates of the transactions. In addition, while preferring information that is contemporaneous with the POI, Commerce also has a longstanding preference for using prices paid by NME producers for inputs purchased from a market economy country. *See* Sparklers from the People's Republic of China, 56 Fed. Reg. 20,588, 20,590 (ITA May 6, 1991)(final determination)(listing in preferential order, information used to value factors of production in NME cases: "(1) prices paid by the NME manufacturer for items imported from a market economy; (2) prices in the primary surrogate country of domestically produces or imported materials. . . ."); *see also Oscillating Fans and Ceiling Fans from the People's Republic of China*, 56 Fed. Reg. 55,271 (1991) (final determination) ("Where an input was sourced from a market economy country and paid for in a market economy currency, we have used the actual price paid for the input in calculating FMV."). Indeed, when valuing factors of production in an NME country, like China, "[t]he cost for raw materials from a market economy supplier, paid in convertible currencies, provides Commerce with the closest approximation of the cost of producing the goods in a market economy country." *Lasko Metal Prods. v. United States*, 16 CIT 1079, 1081, 810 F. Supp. 314, 317 (1992).

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[31] In its reply, defendant-intervenors contend that the "Department has an established practice of not relying on an NME producer's purchases from market economy suppliers that occur outside of the POI. . . ." Def.-Int.'s Reply at 16. Although defendant-intervenors maintain that Commerce "has discussed this approach and applied it in numerous cases," they point to only one example: Certain Automotive Replacement Glass Windshields from the People's Republic of China, 67 Fed. Reg. 6482, 6485 (Dep't Commerce Feb. 12, 2002)(final determination). *Id.* This determination is not on point. Although, in that investigation, Commerce indicated that "consistent with its practice," it would continue not to use market economy inputs "if they are insignificant or purchased outside of the period of investigation" the matter itself did not involve pre- or post-POI inputs. 67 Fed. Reg. at 6485. Instead, the issue there was whether the purchase of market economy inputs was "meaningful." *See e.g., Shakeproof Assembly Components Div. of Ill. Tool Works Inc. v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001) (recognizing that the "factors of production for domestically purchased merchandise may be obtained by extrapolating the market economy import price only when a 'meaningful amount of merchandise is imported.").

In determining which value to base its final determination upon, Commerce had two options: (1) value factors of production using surrogate import values during the POI; or (2) value factors based upon actual market economy purchases made by respondent approximately three weeks outside of the POI. In its Issues and Decision Memorandum, Commerce explained why it no longer found it appropriate to base the value for 29-inch CPT's on data from Infodriveindia. *See* Issues & Decision Mem. at 56. Commerce indicated that "at verification we examined information related to Changhong's market-economy purchases of this input from Thomson Mexico." *Id*. As a result, the Department determined that the market economy purchases represented "a significant quantity of Changhong's overall purchases of this input, and thus found that they were significant" and consequently "meaningful" as is required by law, and the Department's practice. *See* Issues and Decision Mem. at 56; *accord Shakeproof*, 268 F3d at 1382. Thus, Commerce took into account the circumstances of the purchases, i.e.,: (1) the volume of the purchase; (2) that the supplier was a market economy entity; and (3) that the purchase was in market economy currency. *See id*. at 55. Given Commerce's justifiable preference for market economy purchases, it determined that these aspects overcame the fact that purchases were modestly outside of the POI.

It is apparent that no fault can be found with the Department's choice of market prices when valuing 29-inch CPTs. Commerce properly preferred the post-POI, market economy purchases over NME import data within the POI. That these purchases were slightly outside the POI cannot be said to materially diminish their reliability.

CONCLUSION

In accordance with the foregoing, the court sustains in part, and remands in part, Commerce's Final Results. Commerce's remand results are due on December 13, 2006, comments are due on January 12, 2007, and replies to such comments are due on January 23, 2007.

Slip Op. 06–150

KYONG TRUONG, Plaintiff, v. UNITED STATES SEC'Y OF AGRICULTURE, Defendant.

Before: Pogue, Judge
Ct. No. 05–00419

[Remanded for consideration of Plaintiff's claim for equitable tolling; Defendant's motion to dismiss denied.]

Dated: October 12 ,2006

Williams Mullen (*Jimmie V. Reyna* and *Francisco J. Orellana*) for Plaintiff;[1]

Peter D. Keisler, Assistant Attorney General; David M. Cohen, Director, *Patricia McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Elizabeth Thomas*, Trial Attorney) for Defendant United States Secretary of Agriculture.

MEMORANDUM OPINION

Pogue, Judge: On November 30, 2004, the Secretary of Agriculture (hereinafter, "the Secretary" or "the government") recertified Texas shrimpers for trade adjustment assistance under the Trade Adjustment Assistance Reform Act of 2002, Pub. L. 107–210, Title 1, Subtitle C, § 141, 116 Stat. 933, 946 (2002), *as codified* 19 U.S.C. § 2401(e) (West Supp. 2005). *See Trade Adjustment Assistance for Farmers*, 69 Fed. Reg. 69,582, 69,582 (USDA Nov. 30, 2004) (notice). From the date of this notice, the Trade Act of 2002 required eligible shrimpers to file an application by February 28, 2005 to qualify for benefits. *See id*. *See generally* 19 U.S.C. § 2401e(a)(1); 7 C.F.R. § 1580.301(b); 7 C.F.R. § 1580.102. Plaintiff, Kyong Truong, filed for benefits on March 21, 2005 – some 21 days after the deadline. Citing the untimeliness of her application, the United States Department of Agriculture's Farm Service Agency ("FSA"), on May 3, 2005, denied Mrs. Truong's application.

Mrs. Truong brought suit before the court claiming that the FSA did not properly provide her notice of the recertification of benefits as required under 19 U.S.C. § 2401d. Therefore, Mrs. Truong contends that the filing deadline should be equitably tolled. Mrs. Truong did not raise an adequacy of notice defense before the FSA. As such, the FSA has not had an opportunity to consider this claim.

Before the court are Mrs. Truong's motion for judgment on the agency record and the government's motion to dismiss. For the reasons set forth below the court remands this matter to the FSA to consider Mrs. Truong's claim for equitable tolling and denies the government's motion to dismiss.

DISCUSSION

The court must uphold the Secretary's determination unless it is unsupported by substantial evidence on the record or otherwise not in accordance with law. *See* 19 U.S.C. § 2395(b).[2] *See Lady Kelly*,

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[1] The court would like to express its appreciation to Williams Mullen for representing plaintiff *pro bono*.

[2] That provision provides:

> The findings of fact by the Secretary of Labor, the Secretary of Commerce, or the Secretary of Agriculture, as the case may be, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to such Secretary

Inc. v. U.S. Sec'y of Agric., 30 CIT ___ , ___ , 427 F. Supp. 2d 1171, 1176 (2006). There is no exception from this rule when reviewing an agency decision not to equitably toll its deadline. *See id.*; *see also Mahmood v. Gonzales*, 427 F.3d 248, 252–53 (3rd Cir. 2005); *Singh v. Gonzales*, 416 F.3d 1006, 1015 (9th Cir. 2005); *Sprint Commcn's Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996); *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1339 (6th Cir. 1995). *Cf. Johnston v. Office of Pers. Mgmt.*, 413 F.3d 1339, 1343 (Fed. Cir. 2005) (holding that, under a theory of waiver, whether claimant received sufficient notice so as to excuse a late filing must be resolved by the agency). Accordingly, where, as here, the agency has not had the opportunity to consider a question, the court's review is limited. *See generally INS v. Ventura*, 537 U.S. 12, 16 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands."). The court may only resolve the matter itself if "the outcome is clear as a matter of law." *Mahmood*, 427 F.3d at 253.

In accordance with the court's prior decisions, the government has conceded (for purposes of this motion) that the deadline specified in 19 U.S.C. § 2401e is subject to equitable tolling. *See Lady Kelly, Inc.*, 30 CIT at ___ , 427 F. Supp. 2d at 1175; *Ingman v. U.S. Sec'y of Agric.*, 29 CIT ___ , ___ , Slip Op. 05–119 at 11 (Sept. 2, 2005).[3] Nevertheless, the government claims that Mrs. Truong's assertion of equitable tolling is insufficient as a matter of law and fact.

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to take further evidence, and such Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

[3] The government claims that there exists tension between the Court of Appeals for the Federal Circuit's decisions in *Autoalliance Int'l, Inc. v. United States*, 357 F.3d 1290, 1294 (Fed. Cir. 2004) (rejecting tolling of 2636(a) because "[i]n suits against the United States, jurisdictional statutory requirements cannot be waived or subjected to excuse or remedy based on equitable principles." (quoting *Mitsubishi Elecs. Am, Inc. v. United States*, 18 CIT 929, 932, 865 F. Supp. 877, 880 (1994)), and *Former Employees of Sonoco Prods. Co. v Chao*, 372 F.3d 1291, 1298 (Fed Cir. 2004) (finding claims for equitable tolling valid under 2636(d), although ultimately finding the claim unmeritorious). The Federal Circuit adheres to the rule that a prior precedent governs unless and until it is overturned *en banc* or by the Supreme Court. *See, e.g., El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1352 (Fed. Cir. 2004). As such, even though the language in *Autoalliance Int'l* appears clearly irreconcilable with *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990), because *Autoalliance Int'l* was decided prior to *Former Employees of Sonoco Prods Co.*, it must prevail. With that said, it is not clear to the court that the cited language from *Autoalliance Int'l* was intended to sweep so broadly. Moreover, *Autoalliance Int'l* involved a plaintiff missing the court's filing deadline; in contrast, Mrs. Truong missed the agency's filing deadline. Only the former could implicate the court's subject matter jurisdiction. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393–94 (1984) (distinguishing agency filing deadlines from jurisdictional deadlines and noting that the former was subject to "waiver, estoppel, and equitable tolling"). Because even a broad reading of *Autoalliance Int'l* would not apply to non-jurisdictional statutory requirements, the court finds equitable tolling permissible under *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990).

A. EXHAUSTION

Before proceeding with the substantive analysis, the court must decide the threshold issue of exhaustion. Here, Mrs. Truong is contesting a final determination of the FSA denying benefits; as noted above, this determination is reviewable under 19 U.S.C. § 2395(a).

However, besides timely contesting a reviewable determination, the court's founding statute also requires that "[i]n any civil action not specified in this section, the Court of International Trade shall, *where appropriate*, require the *exhaustion of administrative remedies*." 28 U.S.C. § 2637(d) (2000) (emphasis added).[4] This exhaustion requirement mandates that "courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against the objection made at the time appropriate under its practice. Woodford v. Ngo*, 548 U.S. ___ , No. 05–416, Slip Op. at 8 (June 22, 2006) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)) (emphasis in original). This "requir[es] proper exhaustion of administrative remedies, which 'means using all steps that the agency holds out, and doing so *properly* (so that the agency addresses the issues on the merits.)' " *Woodford*, Slip Op. at 8 (quoting *Pozo v. McCaughtry*, 286 F.3d 1022, 1024 (7th Cir. 2002)) (emphasis in original).

Although the equitable tolling claim was not presented to the FSA, the FSA has not demonstrated that it has a procedure to consider such claims. Indeed, neither its application form nor its regulations specify means of asserting an equitable tolling claim.[5] *See Ingman*, 29 CIT at ___ , Slip Op. 05–119 at 8. As such, Mrs. Truong has properly exhausted all the steps the agency held out. *Id.* at 8.

Because the court finds that Mrs. Truong timely contested a determination by the FSA within the meaning of 19 U.S.C. § 2395, and that she properly exhausted available administrative remedies, the court may consider Mrs. Truong's claim.

B. ADEQUACY OF LEGAL CLAIM FOR EQUITABLE TOLLING

Mrs. Truong alleges that the Secretary (a) failed to mail notice of benefits and (b) failed to adequately publish the availability thereof

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[4] The FSA has not challenged this requirement here. Therefore, unless construed as a jurisdictional requirement, this claim may be waived. *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 300 (Fed. Cir. 1986) ("Exhaustion of administrative remedies is not strictly speaking a jurisdictional requirement and hence the court may waive that requirement and reach the merits of the complaint."); *cf. Mathews v. Eldridge*, 424 U.S. 319, 330 (1976) (finding that a statutory exhaustion requirement was waiveable). Nonetheless, *assuming for the purposes of argument only* that this inquiry is jurisdictional in nature, *cf. Ingman*, 29 CIT at ____ , Slip Op. 05–119 at 7 n.3, the court raises this issue *sua sponte.*

[5] This is not to say, however, that the agency could not invoke it's regulation at 7 C.F.R. § 1580.501 to consider Ms. Truong's claim.

in a local newspaper. Therefore, Mrs. Truong claims, the deadline should be tolled. The FSA argues that, even assuming the FSA did not provide Mrs. Truong notice of the availability of benefits, Mrs. Truong's complaint does not sufficiently allege a basis for equitable tolling. The court disagrees.

The United States Supreme Court defined the legal contours of equitable tolling claims against the government in *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990). Rejecting the notion that the U.S. government is exempt from equitable tolling defenses, the Court held that "[o]nce Congress has made such a waiver [of sovereign immunity], we think that making the rule of equitable tolling applicable to suits against the Government, *in the same way that it is applicable to private suits*, amounts to little, if any, broadening of the congressional waiver." *Id.* at 95 (emphasis added). In private suits, the Court continued:

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984).

Id. at 96. In this discussion, the Court cited *Baldwin County Welcome Ctr. v. Brown* which, itself, provided further examples of where equitable tolling may be granted.[6] Within that list, the *Baldwin* Court mentioned cases where "a claimant has received inadequate notice[.]" *Baldwin County Welcome Ctr.*, 466 U.S. at 151. For this proposition the Court cited the Ninth Circuit's decision in *Gates v. Georgia-Pac. Corp.*, 492 F.2d 292 (9th Cir. 1974).

In *Gates*, the appellee failed to timely appeal a decision of the Equal Employment Opportunity Commission ("Commission"). *Gates*, 492 F.2d at 295. The Commission's regulations required the Commission to inform interested parties of its decision and to notify the aggrieved party that he or she had 30 days to contest that determination in a district court. Although the Commission informed the appellee "that the Commission was closing her case for lack of jurisdiction, it did not advise [her] that she could commence an action in the District Court within 30 days." *Id.* The *Gates* court found that be-

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[6] Contrary to the FSA's averments, the two examples listed in *Irwin* are not the exclusive grounds on which equitable tolling may be claimed. *See Young v. United States*, 535 U.S. 43, 50 (2002) ("We have acknowledged, however, that tolling might be appropriate in other cases" than those recited in *Irwin*) (citing *Baldwin County Welcome Ctr.*, 466 U.S. at 151).

cause "of the Commission's error, appellee was confused and, under the circumstances, acted with all the diligence and promptness which could be expected." *Id.* Consequently, the Ninth Circuit sustained appellee's equitable tolling claim.

This line of analysis is similar to decisions of the Court of Appeals for the Federal Circuit excepting claimants from filing deadlines (albeit not necessarily relying on the doctrine of equitable tolling). *See, e.g., Johnston*, 413 F.3d at 1343 (finding tolling appropriate under a theory of waiver); *Brush v. Office of Pers. Mgmt.*, 982 F.2d 1554, 1560–61 (Fed. Cir. 1992)(same). *See also Decca Hospitality Furnishings, LLC v. United States*, 29 CIT ___ , 391 F. Supp. 2d 1298 (2005) (finding that an agency cannot impose a deadline for which it does not adequately inform parties). In all these cases courts have concluded that a failure of an agency to provide notice as required by its governing statutes or regulations tolled a filing deadline.

That these equitable principles should be applied here is evidenced by the intent behind the Trade Adjustment Assistance Reform Act of 2002. *Cf. Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 427 (1965) ("the basic inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in a given circumstance."). Specifically, 19 U.S.C. § 2401d provides:

> (b) Notice of benefits.
>
> (1) In general. The Secretary shall mail writtennotice of the benefits available under this chapter [19 U.S.C. §§ 2401 *et seq*.] to each agricultural commodity producer that the Secretary has reason to believe is covered by a certification made under this chapter [19 U.S.C. §§ 2401 *et seq*.].
>
> (2) Other notice. The Secretary shall publish noticeof the benefits available under this chapter [19 U.S.C. §§ 2401 *et seq*.] to agricultural commodity producers that are covered by each certification made under this chapter [19 U.S.C. §§ 2401 *et seq*.] in newspapers of general circulation in the areas in which such producers reside.

Section 2401d expresses a Congressional determination that agriculture commodity producers need assistance in learning about their eligibility for benefits above that which would otherwise be required. *See* S. Rep. 107–134 ("Section 296 requires the Secretary of Agriculture to make outreach efforts in order to assure that eligible agricultural producers are given an opportunity to apply for and receive benefits under this title."). *Cf.* 19 U.S.C. § 2401b(b) (requiring publication of certification in the Federal Register); *accord Guangzhou Maria Yee Furnishings, Ltd. v. United States*, 29 CIT ___ , 412 F. Supp. 2d 1301, 1306 (2005) (finding that agency regulations requiring notice could not be ignored because those requirements furthered substantial interests). This protection would be rendered

nugatory if the court were to find that a failure to provide notice was insufficient to toll the filing deadline.

To be sure, equitable tolling is not available any time a party fails to *receive* notice that is due. *See, e.g.*, *Irwin*, 498 U.S. at 95–96 (rejecting such a claim); *Ingman*, 29 CIT at ___ , Slip Op. 05–119 at 11 (dismissing equitable tolling claim where lack of notice was not attributed to agency error); *cf. Jones v. Flowers*, 546 U.S. ___ , No. 04–1477, Slip Op. at 9 (2006) (the adequacy of "a particular notice procedure is assessed *ex ante*, not *post hoc*"); *Dusenbery v. United States*, 534 U.S. 161, 170 (2002) (noting that actual receipt of notice is not necessary to satisfy Due Process). Rather, "[e]quitable tolling focuses primarily on *the plaintiff's* excusable ignorance of the limitations period." *Lehman v. United States*, 154 F.3d 1010, 1016 (9th Cir. 1998)(emphasis in original); *accord Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (Posner, J.). Nonetheless, where, as here, the Defendant has an obligation to provide Plaintiff notice of the existence of his or her claim, and has failed to do so, equitable tolling may be appropriate. *Accord Former Employees of Sonoco Prods. Co.*, 372 F.3d at 1299–1300 ("Appellants cannot now blame Fail's late filing on a government agency that was unaware of Fail's intention to appeal or of her need to be made aware of the decision in a timely manner.").

The court is also satisfied that Mrs. Truong has alleged the requisite level of diligence. Whether premised on (1) radiations from the Due Process Clause of the United States Constitution, *see e.g.*, *Stieberger v. Apfel*, 134 F.3d 37, 40 (2d Cir. 1997); *cf. Vargas–Garcia v. INS*, 287 F.3d 882, 886 (9th Cir. 2002); (2) the fact that statutory or regulatory notice requirements evidence a legislative judgment regarding what may be reasonably expected or required of claimants, *see e.g.*, *Johnston*, 413 F.3d at 1342; *Guangzhou Maria Yee Furnishings, Ltd.*, 29 CIT at ___ , 412 F. Supp. 2d at 1306; or (3) the understanding that claimants may reasonably rely on agencies to discharge their duties, *see, e.g.*, *City of New York v. N.Y., N. H. & Hartford R. Co.*, 344 U.S. 293, 297 (1953); *Decca Hospitality Furnishings, LLC*, 29 CIT at ___ , 391 F. Supp. 2d at 1314–16, courts have generally found excusable ignorance results where a defendant fails to provide the plaintiff proper notice of his or her claim, *see, e.g.*, *Griffin v. Rogers*, 399 F.3d 626, 637 (6th Cir. 2005) (holding tolling applied where claimant provided inadequate notice); *Veltri v. Bldg. Serv. 32B–J Pension Fund*, 393 F.3d 318, 325–26 (2d Cir. 2004) (finding inadequate notice tolled deadline where party did not have actual notice of the deadline); *Gates*, 492 F.2d at 292. *Accord Jones*, 546 U.S. at ___ , No. 04–1477, Slip Op. at 11 (rejecting inquiry notice defense); *Decca Hospitality Furnishings, LLC*, 29 CIT at ___ ,

391 F. Supp. 2d at 1314–16 (same).[7] If the FSA has failed to properly discharge its statutory duty, then it is certainly understandable why a person would remain justifiably ignorant of his or her claim.

Therefore, as alleged, the court finds that Mrs. Truong does state a case for equitable tolling.

B) INSUFFICIENCY OF FACTUAL CLAIM

The government argues that, even assuming the above analysis, Mrs. Truong has failed to satisfy her burden in showing the propriety of equitable tolling. Specifically, the government contends that (a) the FSA did comply with section 2401d by sending Mrs. Truong a letter informing her of the recertification, (b) that she had actual notice of the recertification, and (c) that she failed to allege due diligence after receiving actual notice. The record, however, is silent regarding any factual findings by the agency on these questions. As these questions are, at the very least, mixed questions of law and fact, the court will not weigh in on these questions without first ascertaining the FSA's views. *Cf. Johnston*, 413 F.3d at 1343 (remanding to agency for further fact-finding on whether notice was provided); *Bayer v. U.S. Dep't of Treasury*, 956 F.2d 330, 333–35 (D.C. Cir. 1992) (same).

CONCLUSION

For the foregoing reasons, the court remands this matter for further consideration consistent with this opinion. The government shall have until November 13, 2006, to provide a remand determination. Plaintiff shall submit comments on the government's remand determination no later than December 4, 2006, and the government shall submit rebuttal comments no later than December 26, 2006. The government's motion to dismiss is denied.

SO ORDERED.

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[7] The FSA has not alleged any prejudice to itself as a result of Mrs. Truong's late filing. *Cf. Baldwin County Welcome Center*, 466 U.S. at 152 ("[a]lthough absence of prejudice is a factor to be considered in determining whether the doctrine of equitable tolling should apply once a factor that might justify such tolling is identified, it is not an independent basis for invoking the doctrine. . . .").

Slip Op. 06–151

CARIBBEAN ISPAT LIMITED, Plaintiff, v. UNITED STATES, Defendant.

Court No. 02–00756
Before: Senior Judge Aquilino

ORDER

The mandate of the United States Court of Appeals for the Federal Circuit having now issued in conjunction with its opinion and judgment reported at 450 F.3d 1336 (2006) that this court's underlying slip opinion 05–37, 29 CIT ___ , 366 F.Supp.2d 1300 (2005), be vacated and the case remanded; Now therefore, in compliance therewith, it is hereby

ORDERED that the defendant United States International Trade "Commission . . . make a specific causation determination and in that connection . . . directly address whether [other LTFV imports and/or fairly traded imports] would have replaced [Trinidad and Tobago's] imports without any beneficial effect on domestic producers", 450 F.3d at 1341, quoting from *Bratsk Aluminum Smelter v. United States*, 444 F.3d 1369, 1375 (Fed.Cir. 2006); and it is further hereby

ORDERED that the defendant have until January 12, 2007 to make that determination and report the result thereof to the other parties and this court, whereupon those parties may have until February 2, 2007 to comment thereon.

Slip Op. 06–152

TEMBEC, INC., Plaintiff, and GOVERNMENT OF CANADA, GOUVERNEMENT DU QUEBEC, GOVERNMENT OF ONTARIO, GOVERNMENT OF ALBERTA, GOVERNMENT OF BRITISH COLUMBIA, CANADIAN LUMBER TRADE ALLIANCE, and ABITIBI-CONSOLIDATED, INC., Plaintiff-Intervenors, v. UNITED STATES, Defendant, and COALITION FOR FAIR LUMBER IMPORTS EXECUTIVE COMMITTEE, Defendant-Intervenor.

Before: Jane A. Restani, Chief Judge,
Judith M. Barzilay & Richard K. Eaton,
Judges
Consol. Court No. 05–00028

[Cash deposits on entries of softwood lumber from Canada, the liquidation of which is suspended, refunded to Plaintiffs.]

Decided: October 13, 2006

Baker & Hostetler, LLP (*Elliot Jay Feldman, Bryan Jay Brown, John Burke, Robert Lewis LaFrankie*) for Plaintiff Tembec, Inc.

Arnold & Porter, LLP (*Michael Tod Shor*) for Plaintiff-Intervenor Abitibi-Consolidated, Inc.

Steptoe & Johnson, LLP (*Mark Astley Moran, Alice Alexandra Kipel, Sheldon E. Hochberg, Michael Thomas Gershberg*) for Plaintiff-Intervenor Canadian Lumber Trade Alliance Executive Committee.

Arent Fox Kintner Plotkin & Kahn, PLLC (*Matthew J. Clark, Keith Richard Marino*) for Plaintiff-Intervenor Gouvernement du Quebec.

Hogan & Hartson, LLP (*Mark S. McConnell, Craig Anderson Lewis, Harold Deen Kaplan, Jonathan Thomas Stoel*) for Plaintiff-Intervenor Government of Ontario.

Akin, Gump, Strauss, Hauer & Feld, LLP (*Spencer Stewart Griffith, Bernd G. Janzen, Anne K. Cusick, Jason Alexander Park*) for Plaintiff-Intervenor Government of British Columbia.

Weil, Gotshal & Manges, LLP (*M. Jean Anderson, Amy Tross Dixon, Gregory Husisian, Jahna Hartwig, John Michael Ryan, J. Sloane Strickler*); *Wilmer, Cutler, Pickering, Hale & Dorr, LLP* (*Randolph Daniel Moss*) for Plaintiff-Intervenor Government of Canada.

Arnold & Porter, LLP (*Claire Elizabeth Reade*) for Plaintiff-Intervenor Government of Alberta.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; (*Jeanne E. Davidson*), Deputy Director; (*Stephen Carl Tosini*), Commercial Litigation Branch, Civil Division, United States Department of Justice; *Dean Pinkert*, Senior Attorney, Office of the Chief Counsel for Import Administration, United States Department of Commerce; *Theodore R. Posner*, Associate General Counsel, Office of the United States Trade Representative for Defendant United States.

Dewey Ballantine, LLP (*Kevin M. Dempsey*, *Alan William Wolff, Harry Lewis Clark*, *David Adrian Bentley*) for Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee.

OPINION

Per Curiam: On July 21, 2006, the court issued its opinion in *Tembec, Inc. v. United States*, 30 CIT ___ , 441 F. Supp. 2d 1302 (2006) ("*Tembec I*"), in which it found invalid the action of the United States Trade Representative ("USTR") ordering the implementation[1] of a United States International Trade Commission ("ITC") affirmative threat of material injury determination arising from imports of Canadian softwood lumber into the United States. In that opinion, the court reserved decision on the remedy to be imposed, i.e., the extent to which cash deposits made on the importation of the Canadian merchandise must be refunded. This opinion addresses the remedy issue.

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[1] The parties and the court use the term "implement" to indicate action taken by the United States Department of Commerce to "give domestic legal effect" to a determination by Commerce or the United States International Trade Commission. *See Tembec I*, 30 CIT at ____ , 441 F. Supp. 2d at 1310, n.10.

Plaintiff Tembec, Inc. ("Tembec"), Plaintiff-Intervenors Canadian Lumber Trade Alliance ("CLTA"), and the Governments of Canada[2] (collectively "Plaintiffs"); Defendant United States, and Defendant-Intervenor Coalition for Fair Lumber Imports Executive Committee ("CFLI") (collectively "Defendants"); and the court all agree that the deposits made on merchandise that entered the United States after the publication of the *Timken* notice[3] must be refunded. In its analysis, the court now concludes that because liquidation is suspended for most of the entries made on or prior to the *Timken* notice, they are preserved for liquidation in accordance with the final decision of the North American Free Trade Agreement ("NAFTA") panel.[4] The court, therefore, finds that the refund of the deposits on such entries is required as well. As we explained in *Tembec I*, the court has jurisdiction to grant this relief.

I. Background

The history of this case is set out in the court's opinion in *Tembec I*. What follows is as much of that history as is necessary here. On May 16, 2002, the ITC reached its amended final determination that the United States softwood lumber industry was threatened with material injury by reason of imports from Canada. *See Softwood Lumber from Canada*, Inv. Nos. 701–TA–414, 731–TA–928 (Final) USITC Pub. 3509 (May 2002). The United States Department of Commerce ("Commerce") implemented the ITC's determination by issuing the antidumping ("AD") and countervailing duty ("CVD") orders incorporating it. Those orders were effective upon publication in the Federal Register on May 22, 2002. *See Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,068 (Dep't Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and notice of antidumping order); *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 36,070 (Dep't Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order) (collectively "May 22, 2002 orders"). That publication served as notice to the Bureau of Customs and Border Protection ("Customs") that it was henceforth to collect cash deposits for the subject merchandise

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[2] In this opinion, "Governments of Canada" refers to the Government of Canada and the Governments of Alberta, British Columbia, Ontario, and Quebec.

[3] In *Timken Co. v. United States*, 893 F.2d 337, 340 (Fed. Cir. 1990), the United States Court of Appeals for the Federal Circuit held that Commerce must publish notice of a decision of this Court that is "not in harmony" with the Commerce's previously issued final results. *See* 19 U.S.C. § 1516a(c)(1) (2000). This is also true for a NAFTA panel decision "not in harmony" with the results of an ITC threat of injury determination. *See generally* 19 U.S.C. § 1516a(g).

[4] Parties to NAFTA may opt to replace judicial review of certain final determinations with review by a NAFTA arbitral panel. *See Feldspar Corp. v. United States*, 16 CIT 1067, 1068, 809 F. Supp. 971, 973 (1992).

equal to the amended weighted average AD margin[5] and net subsidy rate.[6] *See Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. at 36,068; *Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. at 36,070. The deposits largely remain in the United States treasury.[7]

The ITC's affirmative determination was appealed to a NAFTA panel pursuant to Article 1904 of the NAFTA. On September 10, 2004, at the direction of the panel, the ITC issued a negative threat of injury determination. *See Softwood Lumber from Canada*, Inv. Nos. 701–TA–414, 731–TA–928 (Final) (Third Remand), USITC Pub. 3815, Views on Remand (Sept. 10, 2004) at 13–14. On October 12, 2004, the NAFTA panel affirmed the ITC's negative threat of injury determination, and the NAFTA Secretariat issued a Notice of Final Panel Action. *See Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Panel Decision (Oct. 12, 2004) ("final panel decision"). Commerce thereafter published the *Timken* notice, reflecting that the final panel decision was "not in harmony" with the ITC's original injury determination of May 2002 and suspending liquidation of the entries of the subject merchandise. *See Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 69,584, 69,585 (Dep't Commerce Nov. 30, 2004). The effective date of the *Timken* notice was November 4, 2004.[8]

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[5] 19 U.S.C. § 1677(35)(A) defines "dumping margin" as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Subsection (35)(B) defines "weighted average dumping margin" as the "percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." 19 U.S.C. § 1677(35)(B).

[6] A countervailable subsidy is present when a government or related authority provides a financial contribution to an entity and a benefit is thereby conferred. The statute defines "financial contribution" as: (i) the direct transfer of funds; (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income; (iii) providing goods or services, other than general infrastructure; or (iv) purchasing goods. *See* 19 U.S.C. § 1677(5)(D).

[7] The United States has collected over $4 billion in estimated duties under the AD/CVD orders. As of October 1, 2005, Customs held $1,291,632,917.84 in AD cash deposits under case number A–122–838 and $2,898,194,521.75 in CVD cash deposits under case number C–122–839. *See* FY 2005 Annual Disbursement Report: Section III (Nov. 29, 2005), *available at* http://www.customs.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_05/fy_2005_annual_report/ (last visited Sept. 25, 2006).

[8] Pursuant to § 1516a(g)(5)(B), notice of the final decision was to be published within ten days of the issuance of the NAFTA panel decision, or by November 4, 2004. In fact, publication was not made until November 30, 2004. *See* 69 Fed. Reg. at 65,585. The notice set forth that "the Department must publish notice of decision . . . which is 'not in harmony' with the Department's results. . . . Publication of this notice fulfills [this] obligation. . . . [T]his notice will serve to suspend liquidation of entries [made] on or after November 4, 2004, i.e., 10 days from the issuance of the Notice of Final Action." *Id.* Thus, the court and the parties treat November 4, 2004 as the effective date, as it was the last lawful day that notice of an adverse decision could be published.

Periodic reviews[9] of the May 22, 2002 AD/CVD orders have been requested. The results of these reviews have been appealed to NAFTA panels or this Court.

II. Analysis

At issue is the disposition of the cash deposits made on or before the publication of the *Timken* notice. Specifically, the court must determine if 19 U.S.C. § 1516a(g)(5)(B) controls liquidation of the pre-*Timken* notice entries. Should that be the case, entries made on and before November 4, 2004 would be liquidated in accordance with the May 22, 2002 orders incorporating the May 16, 2002 ITC affirmative determination, rather than the subsequent negative determination upheld by the NAFTA panel. In other words, the court must determine whether the unfair trade laws: (1) require that entries made on or before November 4, 2004, the liquidation of which has been suspended, are to be liquidated in accordance with the May 22, 2002 affirmative unfair trade orders, even though those orders have been invalidated; or (2) call for the liquidation of all unliquidated entries in accordance with the ITC's Negative Remand Determination. *See Certain Softwood Lumber Products from Canada*, USA–CDA–2002–1904–07, Panel Decision (Oct. 12, 2004).

Review of AD/CVD determinations involving merchandise from free trade area countries,[10] such as softwood lumber imported into the United States from Canada under NAFTA, is governed by 19 U.S.C. § 1516a(g). According to Defendants, where a NAFTA panel review of an ITC final determination is requested, § 1516a(g)(5)(B) controls the liquidation of merchandise subject to the panel's review:

> In the case of a determination for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement,[11] entries of merchandise covered by such determination shall be liquidated in accordance with the determination of the administering authority [Commerce] or the Commission [ITC], if they are entered, or withdrawn from warehouse, for consumption on or before the date of publication in the Federal Register by the administering authority of notice [the *Timken* notice] of a final decision of a binational panel, or

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[9] *See* 19 U.S.C. § 1675.

[10] Section 1516a(f)(10) defines "free trade area country" as:

(A) Canada for such time as the NAFTA is in force with respect to, and the United States applies the NAFTA to, Canada. (B) Mexico for such time as the NAFTA is in force. . . . (C) Canada for such time as – (i) it is not a free trade area country under subparagraph (A); and (ii) the Agreement [United States-Canada Free-Trade Agreement] is in force with respect to, and the United States applies the Agreement to, Canada.

[11] The "Agreement" refers to the United States-Canada Free-Trade Agreement. *See* 19 U.S.C. § 1516a(f).

> of an extraordinary challenge committee, not in harmony with that determination.

19 U.S.C. § 1516a(g)(5)(B). Defendants maintain that despite the ITC's ultimate determination that there was no injury or threat of injury, Plaintiffs are not entitled to refunds of AD/CVD deposits made on merchandise entered on or before November 4, 2004. *See* Def.'s Mem. 35; Def.-Int.'s Reply 46. Defendants base this argument primarily on what they insist is the plain meaning of § 1516a(g)(5)(B): that the pre-*Timken* notice entries must be liquidated "in accordance with the [original] determination of the . . . Commission." *See* Def.'s Reply 42 (characterizing the rule in § 1516a(g)(5)(B) as "the unambiguous text of the controlling statute"); *see also* Def.-Int.'s Reply 46.

We agree with Defendants that, were § 1516(a)(g)(5)(B) to control, entries made on or before the date of publication of the *Timken* notice would be liquidated in accordance with the order incorporating the ITC's initial affirmative determination, even though the ITC reversed that determination in response to the NAFTA panel decision. We further agree that any entries made after the date of publication of the *Timken* notice would be liquidated in accordance with Commerce's order reflecting the final decision of the NAFTA panel. Accordingly, were the court to find that § 1516(a)(g)(5)(B) governs here, entries of softwood lumber made on or before November 4, 2004 would be liquidated in accordance with the May 22, 2002 orders, which incorporate the ITC's May 16, 2002 affirmative threat of injury determination. Those entries made after November 4, 2004, however, would be liquidated in accordance with the final NAFTA panel decision affirming the ITC's September 10, 2004 negative determination.

The issue, then, is whether § 1516a(g)(5)(B) is the controlling statute under the facts of this case. Plaintiffs claim that it is not. According to Plaintiffs, § 1516a(g)(5)(B) must be read together with § 1516a(g)(5)(C), and that such reading requires the refund of deposits for entries made before, on, and after November 4, 2004. Pl.-GOC's Mem. 39 ("The United States must refund all cash deposits on softwood lumber . . . pursuant to the AD/CVD orders."). They contend that all entries of the subject merchandise, the liquidation of which remains suspended by virtue of § 1516a(g)(5)(C), must be liquidated in accordance with the October 12, 2004 final NAFTA panel decision reversing the ITC affirmative determination. Plaintiffs insist that, having prevailed on the merits in the NAFTA review, they must receive the full benefit of their victory. They further assert that such result is consistent with the statutory scheme as a whole and the legislative history of the relevant provisions. The court agrees with Plaintiffs and finds that the provisions of § 1516a(g)(5)(B) do not apply to entries, the liquidation of which continues to be suspended under § 1516a(g)(5)(C).

Subsection 1516a(g)(5)(C), entitled "Suspension of Liquidation," provides:

> (i) In general
>
> Notwithstanding the provisions of subparagraph (B), in the case of a determination described in clause (iii) [§ 1675 administrative review] or (vi) [scope determination] of subsection (a)(2)(B) of this section for which binational panel review is requested pursuant to article 1904 of the NAFTA or of the Agreement, the administering authority [Commerce], upon request of an interested party who was a party to the proceeding in connection with which the matter arises and who is a participant in this binational panel review, *shall order the continued suspension of liquidation* of those entries of merchandise covered by the determination that are involved in the review pending the final disposition of the review.

19 U.S.C. § 1516a(g)(5)(C) (emphasis added). Central to the court's conclusion is its finding that the "continued" suspension of liquidation provided for in § 1516a(g)(5)(C) acts as the equivalent of an injunction against liquidation and thus halts liquidation until the suspension expires. In reaching its result, the court recognizes that liquidation of most pre-November 4, 2004 entries has been suspended through the following steps.[12] Pursuant to 19 U.S.C. §§ 1671b(d)(2) and 1673b(d)(2), when Commerce issues an affirmative preliminary determination, it must order the suspension of liquidation of all entries made on or after the determination's date of publication. When the final determination is also affirmative, the suspension remains in place. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (Fed. Cir. 2002) (citing 19 U.S.C. § 1673b(d) (1988)); *see also Fijutsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1380 (Fed. Cir. 2002).[13] Notice of this suspension is given pur-

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[12] There were three adjustments to the ongoing suspension of liquidation. In its final determination, the ITC found threat of injury rather than material injury. Consequently, pursuant to 19 U.S.C. §§ 1671e(b)(2) and 1673e(b)(2), the suspension of liquidation was removed for entries from the date of publication of the preliminary Commerce determinations to the date of publication of the final ITC determination, and no duties should have been assessed on those entries. Prior to the issuance of the final determination, the suspensions of liquidation in both the AD and the CVD investigations were discontinued pursuant to the last paragraphs of §§ 1671b(d)(2) and 1673b(d)(2) because the permitted period for a preliminary suspension of liquidation had expired. Suspension resumed upon completion of the proceedings in May 2002.

[13] Sections 1671b(d) and 1673b(d) authorize Commerce to order Customs to collect "provisional measures" upon a preliminary finding of material injury to the domestic industry. As discussed in Tembec I, duties collected pursuant to a provisional measure are to be refunded if the ITC's final determination finds either no injury, or, under certain circumstances, merely a threat of material injury to the domestic industry. The suspension following a preliminary determination under §§ 1671b(d) and 1673b(d) is intended to ensure that entries are not liquidated until after the final determination has been made.

suant to 19 C.F.R. § 159.58 (2006), which states that: "[u]pon receipt of notification from the Commissioner, each port director shall suspend liquidation . . . on or after the date of publication of . . . [a] Notice of Final Affirmative Antidumping Determination." 19 C.F.R. § 159.58(a) (internal quotations omitted). This suspension stays in place until the period to request a periodic review[14] has expired. *See generally id.*; 19 U.S.C. § 1673b(d)(2). Suspension is further extended upon a request for a periodic review pursuant to § 1675 for entries subject to such review. *See generally* 19 U.S.C. § 1675(a); *OKI Elec. Indus. Co. v. United States*, 11 CIT 624, 627, 669 F. Supp. 480, 483 (1987). Thereafter, if the results of a periodic review are appealed to a NAFTA panel, at a party's request, the suspension of liquidation continues pending the outcome of the appeal. *See* 19 U.S.C. § 1516a(g)(5)(C).

As to the subject merchandise, the parties agree that liquidation continues to be suspended for a large majority of the entries.[15] *See* Private-Party Pl.'s Resp. Remedy Questions 6 ("Periodic reviews have been requested, and liquidation has been suspended or enjoined, for entries from May 22, 2002 through November 4, 2004."); Def.'s Resp. Ct.'s July 21, 2006 Order 6 ("Once periodic administrative reviews were requested, the liquidation of pre-November 4, 2004 entries could be suspended only as a consequence of the conduct of those reviews and subsequent suspensions. . . ."); Def.-Int.'s Resp. Ct.'s July 21, 2006 Order 4 ("To the extent that . . . periodic reviews have been requested in this case . . . liquidation of those entries remain suspended pending the outcome of the binational panel review."); Resp. Pl. Gov't of Canada, Pl.-Int. Canadian Provincial Gov'ts Ct.'s Remedy Questions 4 ("[R]espondents have requested administrative reviews and liquidation of entries covered by those reviews remains suspended. . . .").

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[14] The purpose of a periodic review is to provide an opportunity to make adjustments to the duties provided for in AD/CVD orders, based on actual experience. "Unlike systems of some other countries, the United States uses a 'retrospective' assessment system under which final liability for antidumping and countervailing duties is determined after merchandise is imported." 19 C.F.R. § 351.212. "If Commerce finds that dumping or subsidization has occurred, and the ITC finds that dumping or subsidization causes, or threatens to cause, material injury to a domestic industry, interested parties, may, each year, upon the anniversary of the original findings, request a [periodic review] to adjust the dumping or countervailing duty in light of the importers' actual current conduct." *Ontario Forest Indus. Ass'n v. United States*, 30 CIT ____, ____, 444 F. Supp. 2d 1309, 1311 (2006) (citing 19 U.S.C. § 1675.). Indeed, in a " '[periodic] review, Commerce recalculates the relevant variables to determine whether a foreign country is continuing the practice of dumping, i.e., selling its merchandise in the United States for less than a foreign like product in its home market.' " *Decca Hospitality Furnishings, LLC v. United States*, 30 CIT ____, ____, 427 F. Supp. 2d 1249, 1251 (2006) (quoting *NTN Bearing Corp. v. United States*, 295 F.3d 1263, 1266 (Fed. Cir. 2002)).

[15] Those few pre-November 4, 2004 entries for which periodic reviews were not requested have been liquidated through active or deemed liquidation. *See generally* 19 U.S.C. § 1504.

Defendants do not quarrel with the timing or duration of the suspension of liquidation. They agree that a suspension of liquidation has been in place for most of the entries from the publication of the ITC final determination forward. *See* Def.'s Reply 43; Def.'s Resp. Ct.'s July 21, 2006 Order 8. Rather, they argue that the continued suspension of liquidation provided for in § 1516a(g)(5)(C), which results from the appeal of a final determination in a periodic review, does not allow for what they describe as "retroactive" relief. Thus, Defendants contend that this suspension of liquidation does not have the same effect as an injunction entered by this Court. *See* Def.-Int.'s Resp. Ct.'s July 21, 2006 Order 2 ("[T]he liquidation rule of § 1516a(g)(5)(B) must continue to apply even if liquidation is suspended. . . ."); *see also* Def.'s Reply 43 ("Canada's interpretation ignores the express language of the statute by superimposing upon the statute the concept that the effective date established in 19 U.S.C. § 1516a(g)(5)(B) applies only to the extent that any entries have not been suspended in a subsequent review. Indeed, acceptance of that interpretation would grant parties what the statute specifically precludes — a retroactive effective date for a panel decision concerning an investigation determination as a consequence of a subsequent administrative suspension.").[16]

Despite Defendants' contentions, a review of the legislative history for subsections 1516a(g)(5)(B) and (C) confirms that they were enacted to achieve the goals of prompt liquidation of uncontested entries and the ultimate liquidation of contested entries in accordance with final litigation results. Viewed in the context of the law as it existed when the subsections were drafted, it becomes apparent that § 1516a(g)(5)(B) operates more narrowly than Defendants argue, and that the operation of § 1516a(g)(5)(C) is necessarily broader.

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[16] It should be noted that in at least one past investigation, Commerce ordered a full refund of cash deposits in response to an adverse NAFTA panel decision. *See, e.g., Fresh Chilled and Frozen Pork from Canada*, 56 Fed. Reg. 29,464 (Dep't Commerce June 27, 1991) (revocation of countervailing duty order and termination of administrative review). In *Fresh Chilled and Frozen Pork from Canada*, Commerce ordered the refund of all estimated duties on unliquidated entries following an adverse final NAFTA panel decision, notwithstanding § 1516a(g)(5)(B). There, the ITC originally rendered an affirmative threat of injury determination, and issued a countervailing duty order. Canadian respondents subsequently appealed the determination to a NAFTA panel. The panel reviewing the threat of injury determination remanded to the ITC, and pursuant to that remand, the ITC rendered a negative threat of injury determination. An Extraordinary Challenge Committee later affirmed the panel's negative determination. Thereafter, Commerce revoked the countervailing duty order and instructed Customs "to proceed with liquidation of all unliquidated merchandise without regard to countervailing duties and to refund all cash deposits and release all securities posted to cover estimated countervailing duties." *Id.*

The drafters of § 1516a(g)(5)(B)[17] and of the simultaneously enacted § 1516a(g)(5)(C) intended that a suspension of liquidation, continued by the appeal of a periodic review[18] to a NAFTA panel, was to act as would an injunction against liquidation issued by this Court under the same circumstances.

Subsections 1516a(g)(5)(B) and (C), first appeared in the United States-Canada Free-Trade Agreement Implementation Act of 1988 ("CAFTA"). *See* Pub. L. No. 100–449, 102 Stat. 1851 (1988). CAFTA's Statement of Administrative Action ("US–CFTA SAA") explains that 19 U.S.C. § 1516a(g) was enacted to reflect the law relating to appeals to this Court as it existed at that time:

> Article 1904(15)(d) of the Agreement requires that the United States and Canada amend their respective laws in order to ensure that existing procedures concerning the refund, with interest, of duties operate to give effect to a final binational panel decision.

US–CFTA SAA at 265–66. Congress thus intended that decisions by the newly created binational panels would result in the same relief with respect to refunds, as would decisions of this Court.

More particularly, the US–CFTA SAA explains that:

> In order to enable a successful plaintiff to reap the fruits of its victory . . . the statute authorizes the CIT [United States Court of International Trade] to enjoin the liquidation of entries of merchandise covered by certain types of challenged AD/CVD determinations upon request for such relief and a proper showing that the relief should be granted under the circumstances. 19 U.S.C. 1516a(c)(2).[19] Under existing caselaw, injunctive re-

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[17] While the court need not identify every instance in which subsection 1516a(g)(5)(B), rather than (C), may control, one example is useful. Where: (1) the original order is negative (e.g., reflects a final determination of no injury to the domestic industry); (2) that order is found to be "not in harmony" with a NAFTA panel decision following an appeal; and (3) no periodic review is requested; § 1516a(g)(5)(B) would appear to control and the subject merchandise entered before publication of the *Timken* notice would thus be liquidated without AD/CV duties.

[18] Prior to 1984, periodic reviews were automatic. Under current law, however, they must be requested. *See Sonco Steel Tube Div., Ferrum , Inc. v. United States*, 12 CIT 990, 992, 698 F. Supp. 927, 928 (1988) ("Congress amended the law in 1984 to make annual reviews optional.").

[19] 19 U.S.C. § 1516a(c)(2) provides:

> (2) Injunctive relief
>
> In the case of a determination described in paragraph (2) of subsection (a) of this section ["Review of determination"] by the Secretary, the administering authority, or the Commission, the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the Secretary, the administering authority, or the Commission, upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.

> lief is granted automatically upon request in cases involving challenges to AD/CVD determinations made during the assessment stage of an AD/CVD proceeding. *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983). However, injunctive relief is rarely, if ever, granted in cases involving challenges to AD/CVD determinations made during the initial investigation stage of an AD/CVD proceeding. *See, e.g.*, *American Spring Wire Corp. v. United States*, 578 F. Supp. 1405 (Ct. Int'l Trade 1984).

Id. at 265. The legislative history, therefore, indicates that Congress intended subsections 1516a(g)(5)(B) and (C) to provide for the same liquidation results when appeals were taken to a NAFTA panel, as when appeals of final determinations were taken to this Court. Because a NAFTA panel would have no equity powers,[20] however, the device used to achieve this result was an injunction-like suspension of liquidation. Hence, because injunctions were "rarely, if ever, granted"[21] when appeals were taken to this Court following final determinations at the initial investigation stage, i.e., the process leading to an AD/CVD order, § 1516a(g)(5)(B) makes no provision for a suspension of liquidation when such final determinations are appealed to NAFTA panels. On the other hand, because injunctions were viewed by Congress as automatic when requested following the appeal of a periodic review to this Court, § 1516a(g)(5)(C) makes the

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19 U.S.C. § 1516a(e) then makes court decisions applicable to enjoined entries as follows:

> (e) Liquidation in accordance with final decision
>
> If the cause of action is sustained in whole or in part by a decision of the United States Court of International Trade or of the United States Court of Appeals for the Federal Circuit–
>
> (1) entries of merchandise of the character covered by the published determination of the Secretary, the administering authority, or the Commission, which is entered, or withdrawn from warehouse, for consumption after the date of publication in the Federal Register by the Secretary or the administering authority of a notice of the court decision, and
>
> (2) entries, the liquidation of which was enjoined under subsection (c)(2) of this section,
>
> shall be liquidated in accordance w ith the final court decision in the action. Such notice of the court decision shall be published within ten days from the date of the issuance of the court decision.

[20] Congress specifically chose not to provide such authority, as demonstrated by its instruction that "panels will not have equity powers" and that "the injunctive remedy provided by section [1516a(c)(2)] will not be available to prevent liquidation." US–CFTA SAA at 266.

[21] Such injunctions were rare because of the legal standard requiring proof of "irreparable harm." Because foreign exporters' and importers' interests in upsetting unfair trade orders were protected by the administrative suspension of liquidation, they did not need injunctive relief at the investigative stage. The domestic industry, which would be opposed to the nonexistence of such orders, could obtain relief going forward and, bearing no duty obligation, likewise could not show irreparable harm in connection with the investigative stage. *See Am. Spring Wire Corp.*, 7 CIT at 6, 578 F. Supp. at 1408.

"continued" suspension of liquidation automatic when these results are appealed to a NAFTA panel.

Thus, the purpose of the subsections was to codify Congress's understanding of the law. Subsequent judicial developments with respect to matters appealed to this Court cannot, of course, change the meaning of the subsections' words with respect to matters appealed to NAFTA panels. An examination of contemporaneous judicial decisions, though, can serve to clarify how they apply to the facts of this case. When the subsections were drafted, there was no disagreement[22] that if a periodic review were requested and an injunction granted, all unliquidated merchandise would be liquidated in accordance with the ultimate determination of: (1) the appeal of the periodic review; or (2) the appeal of the underlying AD duty order. *See Sonco Steel Tube Div., Ferrum, Inc. v. United States*, 12 CIT 990, 993, 698 F. Supp. 927, 930 (1988) ("Apparently, there is agreement that where requested annual reviews have not been completed before a court decision finding an affirmative antidumping determination invalid there is no basis for liquidation with antidumping duties. Therefore, a court order totally invalidating an [agency's] original determination, which order occurs in the midst of an annual review, will result in the suspended entries being liquidated with no antidumping duties, even though they were entered prior to the court's decision."); *see also Asociacion Colombiana de Exportadores de Flores v. United States*, 916 F.2d 1571, 1575 (Fed. Cir. 1990). Once the first periodic review of an AD/CVD order was completed, an ap-

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[22] In response to the court's questions, Defendants have acknowledged that "section 1516a(g)(5)(C) reflects the Government's prior view that a request for an administrative review was necessary to obtain suspension of liquidation, pursuant to 19 U.S.C. § 1516a(c)(2) [providing for injunction of liquidation upon request of an interested party in the context of an appeal to this Court] even if a plaintiff sought review of an issue solely involving the original investigation." Def.'s Resp. Ct.'s July 21, 2006 Order 3. The other parties agree with this conclusion. *See* Def.-Int. Resp. Ct.'s July 21, 2006 Order 3 ("That the Congress . . . provided for a statutory equivalent to court-ordered injunction against liquidation only in the case of binational panel reviews of periodic reviews . . . does appear to reflect the U.S. Government's view of the circumstances under which injunctions against liquidation were properly granted. . . ."); Private-Party Pl.'s Resp. 3 (stating that a party "could ensure its right to a full refund by obtaining a continued suspension of liquidation through the periodic review process . . . by requesting a review"); Resp. Pl. Gov't of Canada, Pl.-Int. Canadian Provincial Gov'ts Ct.'s Remedy Questions 3 ("19 U.S.C. § 1516a(g)(5)(c) reflects . . . that it was necessary for a plaintiff seeking review of an investigation determination to request an administrative review to obtain continued suspension of liquidation."). While the Government's view was the subject of several divergent opinions in this Court between 1984 and 1998, this position was eventually rejected by the Court of Appeals for the Federal Circuit in *Asociacion Colombiana de Ex portadores de Flores v. United States*, which found that an injunction could be sought to halt liquidation where only the findings resulting in the antidumping duty order were challenged. 916 F.2d 1571, 1575 (Fed. Cir. 1990) ("The government, however, seeks to liquidate the entries for the initial review period at the original, and now erroneous, level of 4.4 percent, solely because [appellant] failed to request an annual review, in which it could not have litigated the validity of that original dumping margin, to permit the government to do so would be unfair to [appellant]. Nothing in the statute suggests that Congress intended to produce such an inequitable result.").

peal of the review determination to this Court would result in the entry of an injunction against liquidation. This injunction would protect unliquidated entries from premature liquidation and ensure the victor the fruits of its victory resulting from its appeals. Under the facts of this case, there can be little doubt that Congress intended that the suspension of liquidation found in § 1516a(g)(5)(C), which substituted for a court-ordered injunction, would serve to prevent premature liquidation of pre-*Timken* notice entries. While Defendants may characterize this as retroactive relief, it is the result that would have obtained upon the entry of a court-ordered injunction at the time §§ 1516a(g)(5)(B) and (C) were enacted. It necessarily follows that Congress, having intended parallel remedies, intended that the suspension of liquidation provided for in § 1516a(g)(5)(C) would provide the same result following a NAFTA panel decision, as would an injunction issued by this Court.

The absence of any language in § 1516a(g)(5)(C) explicitly allowing for an order of liquidation during, or following the appeal process, further demonstrates that Congress expected liquidation of all entries subject to a suspension of liquidation to occur in accordance with a NAFTA panel's final determination. In those situations where no periodic review is requested following the entry of an unfair trade order, the suspension of liquidation ceases, and the liquidation instructions of § 1516a(g)(5)(B) govern. When a periodic review has been requested, however, § 1516a(g)(5)(C) provides no corresponding authority for Commerce to order liquidation. The absence of a liquidation provision in § 1516a(g)(5)(C) was not meant to prevent liquidation altogether. All parties agree that the authority to order liquidation is necessarily implied at the conclusion of an appeal of a periodic review, and that all suspended entries are to be liquidated in accordance with the final results of that litigation. *See* Def.'s Resp. Ct.'s July 21, 2006 Order 3 ("We agree that, even though 19 U.S.C. § 1516a(g)(5)(C) lacks a provision expressly governing the liquidation of entries following issuance of a NAFTA panel report concerning a periodic administrative review, liquidation of those entries is governed by the panel report, *provided* that the entries are subject to an administrative suspension pursuant to 19 U.S.C. § 1516a(g)(5)(C).") (emphasis in original).

Yet, having conceded the existence of a suspension following a request for a periodic review, and having agreed that a final determination of a NAFTA panel in a periodic review necessarily provides authority for Commerce to order liquidation of reviewed entries, Defendants nonetheless argue that the decision of the NAFTA panel would not apply to all of the suspended entries. *See* Def.'s Reply 43. Thus, Defendants claim that the suspension of liquidation found in § 1516a(g)(5)(C) is effective for some purposes, but not for others. That is, Defendant maintains that despite the absence of express liquidation language, § 1516a(g)(5)(C) contemplates liquidation in ac-

cordance with the decision as to matters raised by a periodic review, but not as to issues that impact the underlying AD/CVD order. The court rejects this argument as inconsistent with the statute, which does not make such a differentiation. The argument is also inconsistent with the intent of Congress that there be the same results with respect to refunds whether an appeal is taken to a NAFTA panel or this Court. As the Government of Canada points out, "[t]he absence of an express liquidation provision in 19 U.S.C. § 1516a(g)(5)(C) demonstrates that, in implementing Chapter 19 of NAFTA into U.S. law, Congress relied upon the principle that a final appellate decision applies to all entries of subject merchandise for which liquidation has been suspended." Resp. Pl. Gov't of Canada, Pl.-Int. Canadian Provincial Gov'ts Ct.'s Remedy Questions 1.

The foregoing analysis confirms that Congress established a system to account for NAFTA determinations that is both fair and in accord with the goal of enabling "a successful plaintiff to reap the fruits of its victory." US–CFTA SAA at 265. If an unfair trade order falls because the underpinning provided by the ITC injury determination fails, there is no basis for assessing duties to offset unfair trading practices. *See Asociacion Colombiana de Exportadores de Flores*, 916 F.2d at 1577 n.21 ("The flaw in the government's argument is that without a valid antidumping determination in the original order, there can be no valid determination in a later annual review."). Entries, the liquidation of which has been suspended, cannot, then, be liquidated with AD/CV duties under these conditions. The legislative history makes it clear that Congress did not set up a system to retain duties that are not owed. Rather, Congress provided for a suspension of liquidation to keep entries available for liquidation in accordance with law.

III. Conclusion

In applying the foregoing analysis to the facts of this case, the court holds that liquidation of a majority of the subject entries is suspended. As a result, none of these suspended entries can be liquidated except in accordance with the results of the final litigation decision. Section 1516a(g)(5)(C) controls, and § 1516a(g)(5)(B) is, therefore, inapplicable. Accordingly, all of Plaintiffs' unliquidated entries, including those entered before, on, and after November 4, 2004, must be liquidated in accordance with the final negative decision of the NAFTA panel. Judgment shall be entered accordingly.

Slip Op. 06–153

SHIMA AMERICAN CORP., Plaintiff, v. UNITED STATES, defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 01–00966

OPINION

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

Dated: October 17, 2006

Barnes, Richardson, & Colburn (*Brian Francis Walsh, Christine Henry Martinez, Kazumune V. Kano*) for Plaintiff Shima American Corp.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*James A. Curley*), for Defendant United States.

GOLDBERG, Senior Judge: In this action reviewing a denial of a protest under 19 U.S.C. § 1515, Plaintiff Shima American Corp. (**"Shima"**) moves the court, under USCIT Rule 56, to enter summary judgment in its favor, and to order the Defendant U.S. Customs and Border Protection (**"Customs"**) to reliquidate the entries at issue and to refund the excess duties paid by Shima. Shima bases its motion on the "deemed liquidation" provision of 19 U.S.C. § 1504(d), as amended in 1993. Customs also moves for summary judgment, contending that while some of Shima's entries are subject to deemed liquidation, the rest are not.[1]

The Court concludes that the merchandise that Shima imported between April 1, 1986 and March 31, 1987 is not deemed liquidated by operation of law. *See* 19 U.S.C. § 1504(d) (Supp. V 1984). Because Customs properly liquidated these entries on August 25, 2000, the Court grants Customs' summary judgment motion and enters judgment in its favor.

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[1] Shima made entries through the Port of Chicago (**"the Chicago entries"**) between the review period of April 1, 1996 to March 31, 1997. *See* Pl.'s Mot. Mem. Supp. Summ. J. 3 (**"Pl.'s Br."**); Def.'s Br. Partial Opp'n Pl.'s Mot. Summ. J. Supp. Cross-Mot.Summ. J. 2 (**"Def.'s Br."**). Customs concedes that the Chicago entries were not liquidated within six months after Commerce's publication in the *Federal Register* of the final results of the administrative review. Def.'s Br. 4. Customs further concedes that these entries are deemed liquidated by operation of law in accordance with 19 U.S.C. § 1504(d) (1994). Therefore, any excess antidumping duties and interest assessed upon liquidation of these entries should be refunded to Shima with interest on the refund as provided by law. *Id*. The Court agrees, and a judgment order shall be entered accordingly.

I. *BACKGROUND*

Shima imports roller chain from Japan into the United States. Between April 1, 1986 and March 31, 1987, Shima made entries of roller chain through the Port of San Francisco (**"the San Francisco entries"**). These entries were the subject of an antidumping duty administrative review by the U.S. Department of Commerce (**"Commerce"**). Liquidation of the entries was suspended pending the final results of the administrative review. The final results were published in the *Federal Register* on November 4, 1991. Commerce revised and republished the final results on April 13, 1992. *See Roller Chain, Other than Bicycle, from Japan*, 57 Fed. Reg. 12,800 (Dep't of Commerce Apr. 13, 1992) (amended final admin. review). Subsequently, Commerce issued liquidation instructions on November 30, 2000, and Customs liquidated the entries and assessed antidumping duties on December 29, 2000.

After Customs liquidated the San Francisco entries, Shima filed a protest under 19 U.S.C. § 1514 claiming that the entries should have been liquidated at the cash deposit rate because they were "deemed liquidated" under 19 U.S.C. § 1504(d). Customs denied the protest, which prompted Shima to commence this action pursuant to 19 U.S.C. § 1515.

II. *JURISDICTION*

The Court has exclusive jurisdiction over "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." 28 U.S.C. § 1581(a) (2000). This action is timely and jurisdiction is proper under 28 U.S.C. § 1581(a).

III. *STANDARD OF REVIEW*

This Court reviews protest denials de novo. *See* 28 U.S.C. § 2640(a)(1) (2000) ("The Court of International Trade shall make its determinations upon the basis of the record made before the court in . . . [c]ivil actions contesting the denial of a protest."); *see also Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456, 951 F. Supp. 241, 246 (1996), *aff'd* 160 F.3d 1357 (Fed. Cir. 1998).

A motion for summary judgment shall be granted if "the pleadings [and discovery materials] 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). In ruling on cross-motions for summary judgment, if no genuine issue of material fact exists, the court must determine whether a judgment as a matter of law is appropriate for either party. *See Sea-Land Serv., Inc. v. United States*, 23 CIT 679, 684, 69 F. Supp. 2d 1371, 1375 (1999), *aff'd* 239 F.3d 1366 (Fed. Cir. 2001). Summary judgment is proper in this case because there are no genuine issues of material fact.

IV. *DISCUSSION*

A. Application of the 1993 Amendment to the San Francisco Entries

This case turns on which version of 19 U.S.C. § 1504(d) is applicable to the San Francisco entries. 19 U.S.C. § 1504 describes the circumstances under which entries will be "deemed liquidated" at the rate asserted by the importer at the time of entry. If merchandise is not liquidated within one year of entry, § 1504(a) provides that it will be "deemed liquidated." *See* 19 U.S.C. § 1504(a) (2000). If liquidation is suspended, different time limits apply. In 1984, the statute provided as follows:

> (d) Limitation – Any entry of merchandise not liquidated at the expiration of four years from the applicable date specified in subsection (a) of this section, shall be deemed liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record, unless liquidation continues to be suspended as required by statute or court order. When such a suspension of liquidation is removed, the entry shall be liquidated within 90 days therefrom.

19 U.S.C. § 1504(d) (Supp. V 1984). The ninety-day requirement in the last sentence of this section is directory, not mandatory. *See Am. Permac, Inc. v. United States*, 191 F.3d 1380, 1382 (Fed. Cir. 1999) (*citing Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989)). As a result, entries that are not liquidated within ninety days of removal of suspension are not deemed liquidated. *See id*. According to the 1984 version of the statute, Customs had an "unlimited amount of time in which to liquidate entries" if removal of suspension occurred after the four-year time limit. *Koyo Corp. of U.S.A. v. United States*, 29 CIT ___ , ___ , 403 F. Supp. 2d 1305, 1308 (2005).

Section 1504(d) was amended by the 1993 North American Free Trade Agreement Implementation Act. *See* Pub. L. No. 103–182, § 641, 107 Stat. 2057, 2204–05 (1993). The 1993 version provides as follows:

> (d) Removal of Suspension – When a suspension required by statute or court order is removed, *the Customs Service shall liquidate the entry within 6 months after receiving notice of the removal from the Department of Commerce*, other agency, or a court with jurisdiction over the entry. Any entry not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted at the time of entry by the importer of record.

19 U.S.C. § 1504(d) (Supp. V 1993) (emphasis added). The 1993 amendment removed both the four-year time limit and ninety-day "directory" time limit. Instead, if liquidation of entries is suspended, Customs must liquidate those entries within six months after it receives notice that suspension was removed.

Shima argues that the 1993 amendment applies in this case. If Shima is correct, the San Francisco entries would be deemed liquidated under § 1504(d) because Customs failed to liquidate them within six months after Commerce lifted the suspension of liquidation. However, the 1993 version of § 1504(d) would have an impermissible retroactive effect if it is applied when the (1) notice of the removal of suspension, (2) the running of the six month period, and (3) the date of liquidation by operation of law all have occurred prior to the effective date of the 1993 amendment. *See Am. Int'l Chem., Inc., v. United States*, 29 CIT ___ , ___ , 387 F. Supp. 2d 1258, 1265 (2005) (*citing Am. Permac*, 191 F.3d 1380); *accord U.S. Tsubaki, Inc. v. United States*, 30 CIT ___ , ___ , Slip Op. 06–148 at 15 (Oct. 10, 2006).

In this case, suspension of liquidation of the San Francisco entries was removed on April 13, 1992, when Commerce published the revised final results of the administrative review. *See Int'l Trading Co. v. United States*, 281 F.3d 1268, 1277 (Fed. Cir. 2002). This is the same day Customs received notice of the removal.[2] *See id.* Additionally, the running of the six-month period and the date of deemed liquidation (pursuant to the 1993 amendment) occurred before the effective date of the 1993 amendment, which was December 8, 1993. Therefore, the application of the 1993 version of 19 U.S.C. § 1504(d) would have an impermissible retroactive effect in this case.[3]

B. Application of the 1984 Version of 19 U.S.C. § 1504(d) to the San Francisco Entries

The San Francisco entries were more than four years old when Commerce removed the suspension of liquidation by publishing the

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[2] Shima alternatively argues that Customs received notice in 2000 when Commerce sent an e-mail concerning liquidation of the San Francisco entries. This claim is without merit. Customs received notice of the removal of suspension when Commerce published the results of its final administrative review in the *Federal Register* on April 13, 1992. In *American International*, which Shima cites to support its argument, Commerce did not publish the results of the final administrative review in the *Federal Register* until September 10, 2001, which was after the date that Customs received the e-mail notice. *See* 29 CIT at ____ , 387 F. Supp. 2d at 1262. In the case at bar, it is irrelevant that Commerce may have sent an e-mail to Customs regarding liquidation instructions because Customs had already received notice of removal of suspension before the enactment of the 1993 amendment.

[3] For a more in-depth discussion of the retroactivity analysis concerning the 1993 version of 19 U.S.C. § 1504(d), see *U.S. Tsubaki, Inc. v. United States*, 30 CIT at ____ , Slip Op. 06–148 at 8–15. The parties in *Tsubaki* made nearly identical arguments to those made in this case, and each argument is addressed in more detail in that opinion.

revised final results of the administrative review on April 13, 1992. As discussed in Part IV.A., according to the 1984 version of § 1504(d), deemed liquidation is not available to entries that are more than four years old at the time suspension of liquidation is removed. In line with the Federal Circuit's holdings in *American Permac* and *Canadian Fur Trappers*, the Court finds that the San Francisco entries are not entitled to deemed liquidation under 19 U.S.C. § 1504(d) as amended in 1984. *See Am. Permac*, 191 F.3d at 1382; *Canadian Fur Trappers*, 884 F.2d at 566.

V. *CONCLUSIONS*

For the foregoing reasons, the Court denies in part Shima's motion for summary judgment and grants Customs' cross-motion for summary judgment. A judgment order will be issued in accordance with these conclusions.

Slip Op. 06–154

TRUSTEES IN BANKRUPTCY OF NORTH AMERICAN RUBBER THREAD CO., INC., FILMAX SDN. BHD., HEVEAFIL SDN. BHD., and HEVEAFIL USA, INC., Plaintiffs, v. UNITED STATES, Defendant.

Before: Richard W. Goldberg,
Senior Judge
Consol. Court No. 05–00539

[Motion to dismiss denied.]

Date: October 18, 2006

Miller & Chevalier Chartered (*Peter J. Koenig*) for Plaintiff Trustees in Bankruptcy of North American Rubber Thread Co.,Inc.

White & Case, LLP (*Emily Lawson*) for Plaintiffs Filmax Sdn. Bhd., Heveafil Sdn. Bhd., and Heveafil USA, Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Stephen C. Tosini*) for Defendant United States.

OPINION

Goldberg, Senior Judge: This case, which seeks judicial review of a refusal by the U.S. Department of Commerce (**"Commerce"**) to initiate a changed circumstances review of an antidumping duty order, is before the Court on a motion to dismiss for lack of subject matter jurisdiction.

I. *BACKGROUND*

A. The Antidumping Duty Order and Administrative Review

On October 7, 1992, Commerce published an antidumping duty order on extruded rubber thread from Malaysia (the **"subject imports"**). *See Extruded Rubber Thread from Malaysia*, 57 Fed. Reg. 46150 (Dep't Commerce Oct. 7, 1992) (antidumping duty order and amended final determination) (the **"Order"**). By its terms, the Order applied to Plaintiffs Filmax Sdn. Bhd., Heveafil Sdn. Bhd., and Heveafil USA, Inc. (collectively, **"Heveafil"**). *Id.*

Approximately six years later and at Heveafil's request, Commerce completed a periodic administrative review[1] of the Order for the period of October 1, 1995 through September 30, 1996. *See Extruded Rubber Thread from Malaysia*, 63 Fed. Reg. 12752 (Dep't Commerce Mar. 16, 1998) (final results of administrative review). The results of that administrative review were largely unfavorable to Heveafil.[2] *Id.*

B. The First Request for Changed Circumstances Review

Dissatisfied with the results of the administrative review and noting dramatic changes in the makeup of the domestic industry in 2004, Heveafil requested that Commerce conduct a changed circumstances review.[3] The basis for this request was Heveafil's observation that North American Rubber Thread Co., Inc. (**"NART"**),[4] the sole manufacturer of the domestic like product, had filed for bankruptcy and ceased operations. Commerce granted Heveafil's request and initiated a changed circumstances review of the Order (the **"First Changed Circumstances Review"**). *See Extruded Rubber Thread from Malaysia*, 69 Fed. Reg. 10980 (Dep't Commerce Mar. 9, 2004) (notice of changed circumstances review, preliminary results, and notice of intent to revoke).

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[1] A periodic review is an administrative process whereby Commerce, upon request by an interested party, must review an existing antidumping duty order and determine the appropriate amount of duty (if any) that should continue to apply to the imports under review. *See* 19 U.S.C. § 1675(a)(1) (2000). When requested, Commerce must conduct at least one administrative review during each 12-month period beginning on the anniversary of the date of publication of the antidumping duty order. *Id.*

[2] Heveafil challenged those results before this Court and then the U.S. Court of Appeals for the Federal Circuit (**"Federal Circuit"**), which remanded the case back to this Court. That case has been stayed pending the outcome of this case.

[3] A changed circumstances review is a statutorily required administrative process whereby Commerce, upon request, must review a final affirmative determination resulting in an antidumping duty order if an interested party has demonstrated the existence of changed circumstances sufficient to warrant review. *See* 19 U.S.C. § 1675(b)(1) (2000).

[4] References to NART herein also encompass, where applicable, Plaintiff Trustees in Bankruptcy of North American Rubber Thread Co., Inc., the successor-in-interest to the now bankrupt domestic petitioner.

Commerce preliminarily found that changed circumstances warranted revocation of the Order effective October 1, 2003, the first day of the then most recent period of administrative review and the only period for which an administrative review had not been completed. *Id*. at 10981. For its part, NART agreed with this conclusion, reasoning that the changed circumstances should only apply to unliquidated entries of the subject imports which had not already been evaluated under an administrative review. *See* Issues and Decision Memorandum for the Changed Circumstances Review of Extruded Rubber Thread from Malaysia, Inv. No. A–557–805 (Dep't Commerce Aug. 11, 2004), *available at* http://ia.ita.doc.gov/frn/summary/ malaysia/E4-1895-1.pdf, at 5–7. In contrast, Heveafil argued that Commerce should revoke the Order effective as of October 1, 1995, a much earlier date which would cover all unliquidated entries of the subject imports, including those which previously had been under administrative review. *Id*. at 2–5.

Commerce ultimately determined to revoke the Order at the later effective date of October 1, 2003. *See Extruded Rubber Thread from Malaysia*, 69 Fed. Reg. 51989, 51989 (Dep't Commerce Aug. 24, 2004) (final results of changed circumstances review).[5]

C. The Second Request for Changed Circumstances Review

Notwithstanding its participation in the First Changed Circumstances Review and its support for the results of that review, on February 18, 2005, NART requested that Commerce initiate an additional changed circumstances review (the **"Second Changed Circumstances Review"**). *See* Compl. dated Dec. 6, 2005, Ex. 2 (NART's Request for Changed Circumstances Review dated Feb. 18, 2005) 1. In this request, NART sought retroactive revocation of the Order to October 1, 1995 – the effective date requested by Heveafil (and opposed by NART) in the First Changed Circumstances Review. *Id*. The basis for this request was NART's representation that it no longer possessed an interest in the enforcement or existence of the Order as of that earlier date. *Id*.

On June 15, 2005, Commerce notified NART by letter ruling of its refusal to initiate the requested Second Changed Circumstances Review. *See* Compl. dated Dec. 6, 2005, Ex. 1 (Commerce's Response to Request for Changed Circumstances Review dated June 15, 2005) 1. Commerce explained that it could not conduct the requested review because "1) all administrative reviews of [the subject imports] have been completed; and 2) there is no existing order for which to initiate a changed circumstances review. . . ." *Id*.

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[5] Heveafil appealed the results of the First Changed Circumstances Review to this Court. That appeal has been stayed pending the outcome of this case.

D. The Instant Action

On October 3, 2005 and December 6, 2005, NART and Heveafil respectively commenced separate actions in this Court, both challenging Commerce's refusal to initiate the Second Changed Circumstances Review. *See* Compl. dated Oct. 3, 2005; Compl. dated Dec. 6, 2005. Those actions were consolidated into the instant action, which seeks to invoke the Court's jurisdiction pursuant to 28 U.S.C. § 1581(i).

On March 3, 2006, Defendant the United States filed a motion to dismiss for lack of subject matter jurisdiction under USCIT Rule 12(b)(1) (**"Def.'s Mot."**). NART and Heveafil timely filed responses thereafter (respectively, **"NART's Resp."** and **"Heveafil's Resp."**), followed by a reply brief from Defendant (**"Def.'s Reply"**). This motion is thus now properly before the Court.

II. *DISCUSSION*

A. Guiding Principles for Exercise of Subject Matter Jurisdiction under 28 U.S.C. § 1581(i)

Like the rest of the Federal judiciary, the U.S. Court of International Trade (**"CIT"**) is a court of limited jurisdiction and, as such, has the perpetual obligation to "determine that the matter brought before it remains within the metes and bounds of such delimitation." *Agro Dutch Indus. Ltd. v. United States*, 29 CIT ___ , ___ , 358 F. Supp. 2d 1293, 1294 (2005). The CIT's principal jurisdictional statute is 28 U.S.C. § 1581. Subsections (a) through (h) of this statute grant the CIT jurisdiction over specific types of commonly-occurring disputes involving import transactions. Subsection (i) – the so-called "residual" grant of jurisdiction – is a

> general grant of jurisdiction for any civil action against the United States, its agencies, or its officers, that arises out of any law of the United States providing for, *inter alia*, "tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue . . . [or the] administration and enforcement with respect to the matters referred to in [section 1581]."

Duferco Steel, Inc. v. United States, 29 CIT ___ , ___ , 403 F. Supp. 2d 1281, 1284–85 (2005) (*quoting* 28 U.S.C. § 1581(i) (2000)).

Recognizing section 1581(i)'s broad jurisdictional grant, this Court recently noted that "[t]he breadth of the residual jurisdiction could, if not interpreted restrictively, threaten to strip subsections (a) through (h) of any operative force." *Id.* at ___ , 403 F. Supp. 2d at 1285. Consequently, courts construing this statute have repeatedly held that " '[s]ection 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 *is or could have been available*, unless the remedy provided under that other subsection

would be manifestly inadequate.' " *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356, 359 (Fed. Cir. 1992) (*quoting Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987)). Thus, access to the CIT's residual jurisdiction requires the exhaustion of all adequate administrative remedies that could have resulted in a cause of action arising under subsections (a) through (h) of 28 U.S.C. § 1581.[6] *See id.* The plaintiff has the burden of proving that the assertion of the CIT's residual jurisdiction is proper when a defendant moves to dismiss an action under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction. *See United States v. Gold Mountain Coffee, Ltd.*, 8 CIT 247, 248–49, 597 F. Supp. 510, 513 (1984).

B. Availability of Jurisdiction under 28 U.S.C. § 1581(i)

In light of these guiding principles, the Court next considers Defendant's motion to dismiss, which questions whether NART and Heveafil have properly invoked the CIT's residual jurisdiction in order to gain judicial review of Commerce's refusal to initiate the Second Changed Circumstances Review.

1. Analysis of Underlying Statutory/Regulatory Framework

The answer to this question first requires an understanding of the underlying statutory/regulatory framework. Pursuant to 19 U.S.C. § 1675(d)(1), Commerce may revoke an antidumping duty order (in

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[6] Access to the CIT's residual jurisdiction also quite obviously requires the satisfaction of all constitutional requirements for bringing an action before a Federal court established under Article III of the U.S. Constitution. *See* U.S. Const. art. III, § 2, cl. 1; *cf.* 28 U.S.C. § 251 (2000) (establishing the CIT as an Article III court). One such requirement is that an action must be a "case" or "controversy" within the meaning of that constitutional provision. U.S. Const. art. III, § 2, cl. 1. Among other things, this requirement calls for a plaintiff to have standing to raise its claim to the court. Here, it is dubious that NART has the requisite constitutional standing to bring this claim, as the papers currently before the Court do not establish that NART has suffered some injury-in-fact caused by Defendant's refusal to initiate the Second Changed Circumstances Review. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (describing three-part injury-in-fact test for Article III standing); Compl. dated Oct. 3, 2005 at 2 (alleging NART's standing solely on basis of participation in administrative proceedings as interested party); *KERM, Inc. v. FCC*, 353 F.3d 57, 59 (D.C. Cir. 2004) ("That a petitioner participated in administrative proceedings before an agency does not establish that the petitioner has constitutional standing to challenge those proceedings in federal court."). However, the Court need not dismiss one plaintiff for lack ofconstitutional standing where another plaintiff seeking the same relief has standing sufficient to satisfy Article III's case-or-controversy requirement. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 548 U.S. ____ , ____ , 126 S. Ct. 1297, 1303 (2006); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986). Here, Heveafil undeniably has the requisite constitutional standing to bring this claim. Heveafil has been "adversely affected or aggrieved by [Commerce's] refusal to conduct a changed circumstances review of [the Order]" which, if not improperly withheld as alleged by Heveafil, could have resulted in revocation of the Order and "refund [of] the antidumping cash deposits made by Heveafil" for entries covered by the Order. Compl. dated Dec. 6, 2005 ¶ 3; *see also Ont. Forest Indus. Ass'n v. United States*, 30 CIT ____ , Slip Op. 06–123, at 28–29 (Aug. 2, 2006) (identifying economic injury from, *inter alia*, failure to receive tariff refund as basis for standing). As such, the Court need not consider the standing issue as to NART.

whole or in part) based on a review of the underlying antidumping determination under 19 U.S.C. § 1675(b)(1) – i.e., a changed circumstances review. This latter provision requires Commerce to perform a changed circumstances review upon receipt of a request which shows changed circumstances sufficient to warrant such a review.[7] Congress expressly provided for judicial review by the CIT of the substantive changed circumstances determination by Commerce. *See* 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000); 28 U.S.C. § 1581(c) (2000). However, it is not clear whether there is a grant of judicial review for a decision by Commerce not to initiate a changed circumstances review in the first place. This type of decision by Commerce was previously expressly listed as a reviewable determination pursuant to 19 U.S.C. § 1516a(a)(1), but was deleted from that statute by an amendment in 1984. *See* Pub. L. No. 98–573, § 623(a)(1), 98 Stat. 2948, 3040 (1984) (the **"1984 Amendment"**).

The parties disagree as to whether the 1984 Amendment was intended to work as a prohibition on judicial review of all of Commerce's refusals to initiate changed circumstances review. This issue was previously taken up briefly in *AOC International v. United States*, 17 CIT 1412, 1415 (1993) (Restani, J.), where the court made the following observation in *dicta*:

> The court cannot say definitively that every Commerce decision not to initiate a changed circumstances review is exempt from 28 U.S.C. § 1581(i) review, but it seems fairly clear that Congress intended to insulate all but the most extraordinary decisions of this type from review on more than an annual basis. . . . The court finds that in view of the statutory change enacted by Congress, 28 U.S.C. § 1581(i) jurisdiction should attach, if at all, only upon a particularly strong showing that adequate remedies are unavailable.

A more definitive interpretation of the effect of the 1984 Amendment was not required in *AOC*. The *AOC* court went on to find that the availability of adequate prospective relief for plaintiffs – in the form of a periodic review by Commerce or a changed circumstances review

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[7] In its regulations, Commerce has elaborated on the type of circumstances that would warrant review under this statutory provision. These regulations state that Commerce will conduct a changed circumstances review of an antidumping duty determination and may revoke a resulting order (in whole or in part) pursuant to such review if, *inter alia*, Commerce determines that "[p]roducers accounting for substantially all of the production of the domestic like product to which the order . . . pertains have expressed a lack of interest in the order, in whole or in part. . . ." 19 C.F.R. § 351.222(g)(1)(i) (2005); *see also id.* § 351.216. The Federal Circuit has held that Commerce is authorized to revoke an antidumping duty order on these grounds. *See Or. Steel Mills Inc. v. United States*, 862 F.2d 1541, 1542 (Fed. Cir. 1988).

by the U.S. International Trade Commission (**"ITC"**)[8] – would serve as a bar to invocation of the CIT's residual jurisdiction even without the additional complication of the 1984 Amendment. *Id.* at 1416.

2. Analysis of Available Prospective Relief

Unlike *AOC*, here there is no possibility of prospective relief available for plaintiffs. There are no subsequent, statutorily required administrative reviews of the underlying antidumping determination (from which an appeal to the CIT would clearly lie pursuant to 28 U.S.C. § 1581(c)). It is perhaps possible that NART or Heveafil could petition Commerce for another discretionary changed circumstances review, but there is no reason to believe that such a request would meet with a fate different from that of the Second Changed Circumstances Review at issue here. Also, NART and Heveafil could not separately seek redress from the ITC in this case, as only Commerce is vested with the authority to determine the effective date for revocation of the Order based on changed circumstances. *See supra* note 8. In short, on a prospective basis, NART and Heveafil are seeking safe harbor in what indeed appears to be their "port of last resort." *Duferco*, 29 CIT at ___ , 403 F. Supp. 2d at 1285.

3. Analysis of Formerly Available Relief

However, on a retrospective basis, the question remains whether NART and Heveafil could have sought the more certain shelter of one of the CIT's specific grants of jurisdiction through better maneuvering of the relevant administrative channels. "A plaintiff waives its right to invoke section 1581(i)'s 'manifest inadequacy' safe harbor if jurisdiction under another subsection of section 1581 could have

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[8] Like Commerce, the ITC has the authority to reconsider its antidumping determinations based on changed circumstances. *See* 19 U.S.C. § 1675(b)(1) (2000). One ITC determination subject to changed circumstances review involves a finding of material injury or threat of material injury to a domestic industry as a result of dumped imports. *See id.* § 1673(2). If, for example, an injured domestic industry ceased to exist, then this could constitute changed circumstances warranting reconsideration of the ITC's injury determination. If the ITC chose to reverse its injury determination based on these changed circumstances, then the underlying antidumping duty order would be revoked. *See id.* § 1675(d)(1); *see also* 19 C.F.R. § 351.222(h) (2005).

It is noteworthy that, as demonstrated by *AOC* and this case, the same result could be achieved by petitioning Commerce for a changed circumstances review, since Commerce may reconsider one of its own antidumping determinations if there are no longer any interested parties. *See supra* note 7. This overlap of authority between Commerce and the ITC is unusual. A significant difference between these two administrative remedies is that Congress expressly made the ITC's decision not to initiate a changed circumstances review subject to judicial review by the CIT. *See* 19 U.S.C. § 1516a(a)(1)(B) (2000); 28 U.S.C. § 1581(c) (2000). However, regardless of whether Commerce or the ITC makes the changed circumstances determination resulting in revocation of an antidumping duty order (which is not a transition order), Commerce is the sole agency charged with effectuating that revocation. *See* 19 U.S.C. § 1675(d)(1) (2000). Although largely a ministerial role, Commerce's exclusive authority includes establishing the effective date of revocation. *See id.* § 1675(d)(3); *Okaya (USA), Inc. v. United States*, 27 CIT ____ , ____ , Slip Op. 03–130 at 4 (Oct. 3, 2003).

been available but no longer is available." *Id.* at ___ , 403 F. Supp. 2d at 1286. The *AOC* court also noted this point, finding that the CIT's residual jurisdiction was further precluded in that case by the past availability of an adequate (if not ideal) administrative remedy subject to judicial review.[9] *AOC*, 17 CIT at 1415–16. To this point, Defendant argues that "not only could [P]laintiffs have availed themselves of the same remedy pursuant to 28 U.S.C. § 1581(c), but Heveafil has availed itself of that remedy." Def.'s Mot. 9. That is, the First Changed Circumstances Review squarely addressed what Defendant characterizes as the substantive issue in this case: the appropriate effective date for revocation of the Order. In Defendant's view, that proceeding afforded the parties an adequate forum to make their arguments to Commerce and provided an assured vehicle to appeal the substantive issue to the CIT. *Id.* Defendant contends that NART should have supported the earlier effective date advocated by Heveafil during the First Changed Circumstances Review in order to properly invoke the CIT's jurisdiction. *Id.* NART and Heveafil counter that the First Changed Circumstances Review and resulting appeal by Heveafil were (and will continue to be) inadequate remedies because it was not temporally possible for either of these proceedings to take into consideration the critical changed circumstance and true substantive issue in this case: the effect of NART's subsequent decision to no longer support the Order from October 1, 1995 onward. *See* NART's Resp. 9–11; Heveafil's Resp. 5–10.

In virtually every other context imaginable, a sudden volte-face by a party would not render inadequate a previous opportunity to challenge agency action. For example, a party that at first acquiesces to an agency determination involving an import transaction, thereby foregoing an appeal pursuant to 28 U.S.C. 1581(a)–(h), would be summarily denied later judicial review under the CIT's residual jurisdiction if it were sought solely on the basis of a change of heart about the wisdom of that acquiescence. *See, e.g., Siaca v. United States*, 754 F.2d 988, 991–92 (Fed. Cir. 1985) (defendant estopped from arguing equitable claim against customs officials for failure to subject issue to available administrative procedures).

However, this case is unique because a change of heart by the domestic industry is a well-established reason for revisiting an antidumping determination through the changed circumstances review process. *See, e.g.*, 19 C.F.R. § 351.222(g) (2005) (regulation governing Commerce changed circumstances review); *Porcelain-on-Steel*

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[9] The adequate alternative remedy identified in *AOC* was the plaintiff's ability to challenge the standing of the petitioner as a representative of the domestic industry in the most recent annual administrative review. *AOC*, 17 CIT at 1416. The court noted that "[i]f the question of standing to pursue the administrative review had been resolved in plaintiff's favor, it would have led to a request for revocation based on lack of interested parties or lack of injury. . . ." *Id.* Such a challenge would not have been possible in this case because NART's bankruptcy took place after the last annual administrative review of the Order.

Cookware from Mexico, 67 Fed. Reg. 19553, 19554 (Dep't Commerce Apr. 22, 2002) (final results of changed circumstances review based on industry change of heart); *Or. Steel Mills*, 862 F.2d at 1545 (upholding final results of changed circumstances review based on industry change of heart). Importantly, neither the statute nor any of these sources places limits on when that change of heart must occur, or how often. *See Okaya (USA)*, 27 CIT at ___ , Slip Op. 03–130 at 3 (noting that request for changed circumstances review "may be made at any time").

Viewed in this light, Defendant's argument that NART had only one opportunity to request or participate in changed circumstances review based on reconsideration of its support of the Order must fail. Put simply, nothing in the statutory or regulatory framework requires the domestic industry to speak once and then forever hold its peace. The First Changed Circumstances Review antedated NART's latest change of heart – a change of heart which NART was entitled to make (and seek agency review based on) at any time. Because of this timing, the First Changed Circumstances Review (and any subsequent case brought under 28 U.S.C. § 1581(c) reviewing that determination) was a manifestly inadequate remedial forum for NART and Heveafil to seek review of the substantive issue at the core of this case: the appropriate effective date for revocation of the Order *in light of* the domestic industry's newfound lack of support for the Order. The request for the Second Changed Circumstances Review was therefore the earliest opportunity for NART and Heveafil to seek Commerce's review of this issue. NART and Heveafil dutifully exhausted this administrative remedy before attempting to invoke the CIT's residual jurisdiction. Under these circumstances, another subsection of section 1581 was not, and could not have been, available.[10]

4. Analysis of the Effect of the 1984 Amendment

In light of the foregoing, the Court provisionally concludes that Heveafil and NART have properly invoked the CIT's residual jurisdiction in this case. Consequently, the final issue squarely before the Court is whether this judicial review has been otherwise foreclosed

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[10] The Court additionally notes that, because Commerce did not publish its refusal to initiate the Second Changed Circumstances Review in the *Federal Register*, there is also no current basis for jurisdiction under 28 U.S.C. § 1581(c). *See* 19 U.S.C. § 1516a(a)(2)(B)(iii) (specifying certain final determinations made in connection with changed circumstances review as reviewable determinations under 28 U.S.C. § 1581(c)); *id*. § 1516a(a)(2)(A)(i)(I) (2000) (authorizing commencement of 28 U.S.C. § 1581(c) action within thirty days of *Federal Register* publication of notice of relevant agency action); *accord AOC*, 17 CIT at 1414. Neither NART nor Heveafil has requested that the Court order Commerce to publish its decision not to initiate the Second Changed Circumstances Review.

by the 1984 Amendment. Defendant contends that the 1984 Amendment evinces Congress' intent to foreclose judicial review of Commerce's refusals to initiate changed circumstances review. Def.'s Mot. 5–6. As in *AOC*, Defendant argues that, by deleting this type of agency action from among those within the CIT's specific jurisdiction, Congress clearly intended to make these refusals "purely discretionary" and "always nonreviewable." *AOC*, 17 CIT at 1414.

Congress typically communicates its intent to foreclose judicial review in one of two ways: (1) through the divestiture of federal subject matter jurisdiction or (2) through the preclusion of a specific cause of action. *See Whitman v. DOT*, 547 U.S. ___, ___, 126 S. Ct. 2014, 2015 (2006) (framing the question as whether the relevant statute removes jurisdiction given to a federal court or otherwise precludes a class of litigants from pursuing remedies beyond those listed in the statute).

By bringing its motion to dismiss under USCIT Rule 12(b)(1), Defendant has alleged congressional foreclosure of judicial review of the first variety: that the 1984 Amendment divested the CIT of federal subject matter jurisdiction. However, the 1984 Amendment did not directly alter the CIT's principal jurisdictional statute, 28 U.S.C. § 1581. Rather, the 1984 Amendment modified the text of 19 U.S.C. § 1516a, a statute which enumerates the various agency determinations reviewable by the CIT under subsection (c) of 28 U.S.C. § 1581. *See* 28 U.S.C. § 1581(c) (2000). An agency determination identified in 19 U.S.C. § 1516a as reviewable under subsection (c) is not reviewable under subsection (i). *See id.* § 1581(i). Accordingly, a change to the determinations listed in 19 U.S.C. § 1516a may affect the CIT's residual jurisdiction by either expanding or contracting the types of actions potentially reviewable under subsections (c) and (i). Here, the 1984 Amendment removed a determination from 19 U.S.C. § 1516a, thereby rendering the determination unreviewable under subsection (c) but potentially reviewable under subsection (i).

What the foregoing discussion reveals is that the relationship between 19 U.S.C. § 1516a and 28 U.S.C. § 1581 is certainly close – but not particularly unusual in the Federal judicial system. It mirrors the familiar relationship which exists between 28 U.S.C. § 1331, the statute conferring federal question jurisdiction to district courts, and numerous Federal statutes giving rise to civil actions reviewable under that broad grant of jurisdiction. When Congress restricts the scope of one of these latter statutes, the district courts are not divested, in whole or in part, of federal question jurisdiction. *See Burks v. Lasker*, 441 U.S. 471, 476 n.5 (1979) (noting that "whether a cause of action exists is not a question of jurisdiction"). From this perspective, the Court views 19 U.S.C. § 1516a as a statute that creates causes of action reviewable under the CIT's ju-

risdictional statute.[11] It follows that, when Congress adjusts the scope of 19 U.S.C. § 1516a, the CIT is not divested of its subject matter jurisdiction; rather, Congress makes a change to the causes of action subject to review under that jurisdiction.

The Court therefore understands Defendant's argument as alleging the preclusion of a specific cause of action (i.e., the review of Commerce's refusal to initiate changed circumstances review), rather than the divestiture of subject matter jurisdiction, and will analyze the remainder of Defendant's motion as such.[12]

Although this type of agency determination no longer gives rise to a cause of action under 19 U.S.C. § 1516a, another statute – the Administrative Procedure Act (**"APA"**) – creates a cause of action for review of "final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704 (2000). However, even the APA's general cause of action is unavailable where "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." *Id.* § 701(a) (2000).[13] Under Defendant's theory, 19

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[11] This conclusion also finds support in a number of other sources. *See, e.g.*, 19 U.S.C. § 1516a(e) (2000) (ordering liquidation in accordance with final court decision "[i]f the *cause of action* is sustained") (emphasis added); *Co-Steel Raritan, Inc. v. ITC*, 357 F.3d 1294, 1304 (Fed. Cir. 2004) (characterizing determinations listed in 19 U.S.C. § 1516a as causes of action); *Fujitsu Ten Corp. of Am. v. United States*, 21 CIT 104, 109, 957 F. Supp. 245, 249–50 (1997) (same), *aff'd sub nom. Sandvik Steel Co. v. United States*, 164 F.3d 596 (Fed. Cir. 1998); H.R. Rep. No. 96–1235, at 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3759 (noting 28 U.S.C. § 1581(i) was never intended to create new causes of action).

[12] Because the standards of review for motions to dismiss for lack of subject matter jurisdiction (USCIT Rule 12(b)(1)) and motions to dismiss for failure to state a claim (USCIT Rule12(b)(5)) may differ, courts must be mindful of the important procedural due process interests of litigants to be able to respond to arguments. *Cf. Thoen v. United States*, 765 F.2d 1110, 1114–15 (Fed. Cir. 1985) (discussing the due process implications of converting a motion to dismiss under Rule12(b)(6) of the federal rules into a motion for summary judgment under Rule 56). How a court characterizes a motion to dismiss may affect the litigants' substantial rights. A dismissal for failure to state a claim goes to the merits of an action, and will have preclusive effect and serve as a bar to future litigation. However, when converting a Rule12(b)(1) motion into a Rule 12(b)(5) motion does not deprive a litigant of the opportunity to defend itself or its claim, notice of conversion is unnecessary. *Accord Less v. Lurie*, 789 F.2d 624, 625 n.1 (8th Cir. 1986). Such is the case here. Defendant has made a facial challenge to the Court's jurisdiction. A facial challenge addresses the sufficiency of the pleadings, does not require fact-finding by the judge, and applies the same standard of review as a challenge to the the underlying cause of action. *See Morrison v. Amway Corp.*, 323 F.3d 920, 925 n.5 (11th Cir. 2003); *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987). Further, the jurisdictional question and the cause of action question, in this case, are simply two iterations of the same fundamental question: does the 1984 amendment impliedly preclude the asserted APA action? In such circumstances, there is no unfair surprise to NART and Heveafil. Accordingly, the Court will proceed with its analysis of the remainder of Defendant's motion by assuming "all well-pled factual allegations are true" and construing "all reasonable inferences in favor of the nonmovant" to determine whether the complaint sets forth facts sufficient to support a claim. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (discussing standard of review for motion to dismiss for failure to state a claim).

[13] As Heveafil notes, an APA cause of action has previously been found to lie in "cases of agency inactivity" resulting from a refusal to perform a requested review. Heveafil's Resp. 5 (*citing Viraj Forgings Ltd. v. United States*, 26 CIT 513, 206 F. Supp. 2d 1288 (2002) (re-

U.S.C. § 1516a, as modified by the 1984 Amendment, should be construed as a statute precluding judicial review of Commerce's refusals to initiate changed circumstances review under the APA.[14] If so, even with the CIT's residual jurisdiction having been properly invoked, the Court would be unable to entertain NART and Heveafil's claim. *Accord Am. Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 296, 515 F. Supp. 47, 51 (1981) ("Although the [CIT] may have subject matter jurisdiction, there remains the possibility that a particular complaint may not state a cause of action upon which relief may be granted.").

"Whether and to what extent a particular statute precludes judicial review is determined not only from its express language, but also from the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action in-

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viewing Commerce refusal to initiate a requested periodic administrative review based on allegedly improper review request)). The *Viraj* court found it appropriate to review that APA cause of action under the CIT's residual jurisdiction. *Id.* at 519, 206 F. Supp. 2d at 1294. However, unlike this case, the *Viraj* court was not confronted with the question of whether review of that particular APA cause of action was precluded by another statute. As such, *Viraj* is of limited relevance to this case, standing simply for the principle (conceded by Defendant) that the APA typically provides the cause of action in 28 U.S.C. § 1581(i) cases. *See* Def.'s Reply 6. Whether an APA cause of action may actually lie in a case invoking the CIT's residual jurisdiction depends on an analysis of the two factors in 5 U.S.C. § 701(a) (unless waived, as in *Viraj*).

[14] In its reply brief, Defendant also argues that this case is exempt from review as an APA cause of action because it involves a matter "committed to agency discretion" by law. Def.'s Reply 6 (*quoting* 5 U.S.C. § 701(a)(2)). Specifically, Defendant notes that "an agency's refusal to reopen a closed case is generally committed to agency discretion. . . ." *Id.* (*quoting Your Home Visiting Nurse Servs. v. Shalala*, 525 U.S.449, 455 (1999)). Defendant characterizes the underlying administrative proceedings as closed because "the [O]rder had already been revoked when [NART] requested a changed circumstances review. . . ." *Id.* As such, Defendant argues that Commerce was "simply exercis[ing] its wide discretion to refuse to reopen closed proceedings." *Id.*

Setting aside the important question of procedural fairness raised by Defendant's presentation of this argument for the first time in its reply brief, *see Novosteel SA v. United States*, 284 F.3d 1261, 1274 (Fed. Cir. 2002), the Court observes that the propriety of judicial review of an agency's refusal to reopen a closed case based on changed circumstances is well established. *See Interstate Commerce Comm'n v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 278 (1987) ("[A]ll of our cases entertaining review of a refusal to reopen appear to have involved petitions alleging 'new evidence' or 'changed circumstances' that rendered the agency's original order inappropriate."). In other words, agency discretion is curtailed in the face of changed circumstances. Defendant attempts to distinguish this case from *Interstate Commerce Comm'n* on the grounds that this case involves "*changed changed* circumstances." Def.'s Reply 7. However, Defendant cites no statutory or regulatory support for this distinction, and the Court is likewise aware of none. Further, the Court questions whether there is even factual support for this distinction. The First Changed Circumstances Review was requested by *Heveafil* to address the issue of the *domestic industry's bankruptcy*. The Second Changed Circumstances Review was requested by *NART* to address the issue of the *domestic industry's lack of interest in the Order*. As such, the two requests for changed circumstances review were made by different parties and had different triggering events. It is not clear how these facts lead to the characterization of "changed changed circumstances" proposed by Defendant. For these reasons, the Court rejects Defendant's belated argument that an APA cause of action is foreclosed in this case due to agency discretion with respect to reopening closed cases.

volved." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 345 (1984); *see also United States v. Fausto*, 484 U.S. 439, 444 (1988) (noting that courts examine "the purpose of the [relevant law], the entirety of its text, and the structure of review that it establishes"); *Bowen v. Mich. Acad. Of Family Physicians*, 476 U.S. 667, 672–73 (1986). When a court considers the potential preclusion of an APA action in light of the factors enumerated in *Block*, it must be remembered that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In *Abbott Laboratories*, the Supreme Court stated further that "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review."[15] *Id.* at 141 (quotation marks omitted). Like all presumptions, this presumption "may be overcome by, *inter alia*, specific language or specific legislative history that is a reliable indicator of congressional intent, or a specific congressional intent to preclude judicial review that is fairly discernible in the detail of the legislative scheme." *Bowen*, 476 U.S. at 673 (quotation marks omitted).

Block instructs courts to look to the express language of the statute and the structure of the statutory scheme. The Court agrees with the plaintiffs' contention that there is no express language of the statute specifically precluding judicial review of Commerce decisions not to initiate changed circumstances reviews. *See* Heveafil's Resp. 7; NART's Resp. 4. However, the statutory scheme does provide important context. 19 U.S.C. § 1516a lists determinations made by Commerce and the ITC in the course of antidumping and countervailing duty proceedings that Congress has expressly subjected to judicial review. Both parties agree that the current version of 19 U.S.C. § 1516a cannot be construed to include Commerce's refusal to initiate changed circumstances review as an agency determination subject to such review.[16] The absence of the Commerce refusal to initiate from the list gives rise to a negative inference that Congress may have intended to preclude judicial review of that determination. The Supreme Court has recognized the "longstanding principle that a statute whose provisions are finely wrought may support the preclusion of judicial review, even though that preclu-

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[15] The "clear and convincing evidence" standard is not meant in the strict evidentiary sense, *see Block*, 467 U.S. at 350–51,but rather serves as a reminder that courts should decline to review a cause of action only where Congress has clearly exhibited its intent to preclude that cause of action.

[16] *See* Def.'s Mot. 5 ("Congress specifically amended 19 U.S.C. § 1516a to remove judicial review of a determination by Commerce not to initiate a changed circumstances review."); Heveafil's Resp. 4–5 ("19 U.S.C. § 1516a(a)(2)(B) . . . does not provide an avenue for parties to challenge [Commerce's] failure to initiate a changed circumstances review determination."); NART's Resp. 4 ("[T]his appeal is not specifically covered by § 1581(a)–(h).").

sion is only by negative implication." *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 34 n.3 (2000) (*citing Fausto*, 484 U.S. at 452; *Block*, 467 U.S. at 351; *Switchmen's Union of N. Am. v. Nat'l Mediation Bd.*, 320 U.S. 297, 305–06 (1943)).

This negative inference is supported by the fact that the omission was not the result of congressional inadvertence, but was instead the intended product of the 1984 Amendment. Before Congress amended 19 U.S.C. § 1516a in 1984, that statute had expressly permitted CIT review of "a determination by *the administering authority* or the Commission . . . not to review an agreement or a determination based upon changed circumstances. . . ." 19 U.S.C. § 1516a(a)(1)(B) (1982). The 1984 Amendment deleted reference to the administering authority (i.e., Commerce) – thereby deliberately removing Commerce's refusal to initiate changed circumstances review from the list of expressly reviewable determinations. Congress acted with precision when revising 19 U.S.C. § 1516a to exclude this particular agency determination, and this exactitude suggests that Congress may have meant to remove all possibility of judicial review of this agency determination, rather than shift the locus of judicial review from section 1516a to the APA.

Moreover, it is noteworthy that Congress did not similarly excise a refusal to initiate changed circumstances review by *the ITC* from 19 U.S.C. § 1516a's list of reviewable determinations. This agency decision remains an expressly reviewable determination even after the 1984 Amendment. *See* 19 U.S.C. § 1516a(a)(1)(B) (2000). Congress carefully drew a deliberate distinction between the two categories of refusals to initiate changed circumstances review arising under the antidumping duty statute. One category (ITC refusals) gives rise to an express cause of action; the other category (Commerce refusals) does not. Thus, the "structure of the statutory scheme," *Block*, 467 U.S. at 345, lends some support to Defendant's contention that Congress intended to preclude this case.

Block also instructs courts to examine the legislative history of the relevant statute. The legislative history of the 1984 Amendment provides no explanation for the disparate treatment of ITC and Commerce refusals to initiate changed circumstances review, but does shed some light on Congress' general motivation. The U.S. House of Representatives Ways and Means Committee report described the change to 19 U.S.C. § 1516a as "prohibit[ing] interlocutory appeals of determinations made during an annual review proceeding under section 751. Such appeals would instead occur after a final determination has been made by [Commerce] or the ITC." H.R. Rep. No. 98–725, at 46–47 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5127, 5173–74. The Committee noted further that "[t]he purpose of eliminating interlocutory judicial review is to eliminate costly and time-consuming legal action where the issue can be resolved just as equi-

tably at the conclusion of the administrative proceedings." *Id.* at 47, 1984 U.S.C.C.A.N. at 5174.

The congressional record itself similarly demonstrates that the animating purpose of the 1984 amendment was Congress' concern with interlocutory appeals of determinations during administrative review proceedings. *See* 1984 Amendment (entitled "Elimination of Interlocutory Appeals"). When 19 U.S.C. § 1516a was expanded in 1979 to authorize judicial review of interlocutory orders, Congress hoped that the appeals would help refine and perfect the record, leading to better final determinations with fewer errors. *See* H.R. Rep. No. 98–725, at 47, 1984 U.S.C.C.A.N. at 5174. However, by 1984 Congress had determined that the apparatus for administrative-judicial review of antidumping and countervailing duty determinations was collapsing under the weight of endless appeals of intermediate determinations. *See id.* Domestic and importing interests alike lamented that "the many interlocutory appeals [were] costly and unnecessary[,]" *id.*, and Congress endeavored to address their concerns.

To best understand this legislative history, it is necessary to revisit the underlying administrative framework. Congress was correct that the vast majority of refusals to initiate changed circumstances review constitute intermediate agency action. In all but the rarest of cases, a request for changed circumstances review may be followed by an administrative review. An administrative review (1) may be requested every twelve months by an interested party, (2) must be initiated by Commerce upon proper request, and (3) must conclude in a final determination reviewable by the CIT. *See* 19 U.S.C. § 1675(a)(1) (2000); *id.* § 1516a(a)(2)(B)(iii); 28 U.S.C. § 1581(c) (2000). As a result, the substance of a request initially refused by Commerce in the context of a stand-alone changed circumstances review will normally be considered by the agency in the context of the next annual administrative review. The matter as to which Commerce refuses to initiate a changed circumstances review, then, will be subsumed in the final determination.

However, as this case demonstrates, a refusal to initiate changed circumstances review is not always an intermediate agency action. Here, there is no subsequent annual administrative review, or any other compulsory review, envisioned by the statute. *See supra* Part II.B.2. Commerce's refusal to initiate the Second Changed Circumstances Review constitutes final agency action. Thus, the asserted APA cause of action in this case is wholly unconnected to Congress' concern for eliminating interlocutory appeals.

Recognizing that Commerce's refusals to initiate changed circumstances review may constitute either interlocutory or final agency action, there appear to be two possible ways to view the legislative history of the 1984 Amendment. Under the first view (which is most favorable to NART and Heveafil), the legislative history indicates

that Congress was focused on Commerce's refusals to initiate changed circumstances review constituting interlocutory agency decisions. If Congress had only the limited goal of economizing judicial review with respect to these *intermediate* agency decisions, then this bolsters NART and Heveafil's argument that Congress did not intend to preclude review of *final* refusals to initiate. Instead, Congress intended to precisely adjust the statutory scheme to achieve its limited goal of eliminating judicial review of interlocutory refusals to initiate. That is, by removing this agency decision from the list of causes of action reviewable under the CIT's specific jurisdiction, Congress intended to eliminate only review of interlocutory refusals to initiate, recognizing that the APA[17] (or some other statutory provision[18]) would provide a reviewable cause of action for final refusals to initiate.

Under the second view (which is most favorable to Defendant), Congress intended to eliminate review of all Commerce refusals to initiate changed circumstances review and was simply indifferent to the fact that some refusals to initiate could constitute final agency action unreviewable by the CIT. On this view, Congress intended to legislate with a broad brush and sweep away an entire category of causes of action, even if in so doing it precluded rights of action that were unrelated to its legislative purpose: i.e., eliminating interlocutory appeals.

After careful analysis of the statute's structural ambiguity and the legislative history pertaining to the 1984 Amendment, the Court finds the first of the scenarios described above is more plausible. It is true that the statutory scheme, standing alone, could support a finding that Congress intended to foreclose judicial review in this case by

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[17] The Court notes that only those refusals to initiate changed circumstances review constituting final agency action could possibly give rise to an APA cause of action reviewable under the CIT's residual jurisdiction. That this must be so is demonstrated by the Court's analysis *supra* at Part II.B.2. As noted therein, the availability of adequate prospective relief in the form of final agency action by Commerce is an absolute bar to accessing the CIT's residual jurisdiction. It would therefore be entirely consistent with the expressed intent in the House Ways and Means Committee report had Congress considered that the excision of refusals to initiate changed circumstances review from 19 U.S.C. § 1516a(a)(1)(B) was the most economical mode of removing the interlocutory appeal from the CIT's jurisdiction, but preserving the APA cause of action for cases such as this.

[18] As observed *supra* at note 10, 19 U.S.C. § 1516a(a)(2)(B)(iii) provides for judicial review of a "final determination, other than a determination reviewable under paragraph (1), by [Commerce] or the Commission under [19 U.S.C. § 1675]". 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000). It appears to the Court that this statutory provision could be construed as encompassing a Commerce refusal to initiate changed circumstances review constituting a final agency decision, as this type of final determination technically arises under 19 U.S.C. § 1675. If so, then judicial review of this agency determination would be available upon Commerce's publication of its refusal to initiate in the *Federal Register*. The Court expresses no opinion on the likelihood of success of this possible 19 U.S.C. § 1516a claim, which has not been properly raised in this action by NART or Heveafil (who would first have had to seek a writ of mandamus compelling publication of the refusal to initiate the Second Changed Circumstances Review).

negative implication. The legislative history, however, demonstrates that Congress' legislative purpose in effectuating the 1984 amendment would not be served by precluding the asserted APA cause of action in this case. Put another way, the presumption against implied preclusion of judicial review has not been overcome. In this case, it is not appropriate to find implied preclusion by accident; the inquiry must remain focused on Congress' intent, and in the light of the cited legislative history the Court is unable to find that Congress intended to eliminate judicial review over this exceedingly rare type of case.

III. *CONCLUSION*

For the foregoing reasons, the Court denies Defendant's motion to dismiss.

Slip Op. 06–155

UNITED STATES, Plaintiff, v. ROCKWELL AUTOMATION INC., Defendant.

Before: Pogue, Judge
Court No. 04–00549

[Plaintiff's motion for partial summary judgment granted; Defendant's motions to dismiss and for summary judgment denied.]

Dated: October 18, 2006

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael D. Panzera*), *Edward Greenwald*, Bureau of Customs and Border Protection, of counsel, for the Plaintiff.

Neville Peterson, LLP (*John M. Peterson* and *Curtis W. Knauss*) for the Defendant.

OPINION

Pogue, Judge: In this action, the United States Bureau of Customs and Border Protection ("Customs") seeks civil penalties from Rockwell Automation Incorporated ("Rockwell") because of Rockwell's alleged improper entry of merchandise into the U.S. Immediately before the court is Customs' motion for partial summary judgment; in response, Rockwell seeks dismissal, or, in the alternative, summary judgment in its favor. The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1582 and 19 U.S.C. § 1592. For the reasons explained below, the court grants Customs' motion for partial summary judgment and denies Rockwell's motion to dismiss and for summary judgment.

BACKGROUND

"For two centuries the standard liquidation and protest method characterized Customs practice. Under that system goods were evaluated by a Customs officer prior to release into the stream of commerce." *Brother Int'l Corp. v. United States*, 27 CIT ___ , ___ , 246 F.Supp.2d 1318, 1326 (2003) (citing *United States v. G. Falk & Brother*, 204 U.S. 143 (1907)). Over the past twenty years, in order to expedite and streamline the liquidation of entries, "Customs has moved away from this labor intensive method towards one of 'automatic bypass' where [qualifying] goods are liquidated 'as entered' by the importer." *Brother Int'l.*, 27 CIT at ___ , 246 F. Supp. 2d at 1326. This system is designed to save both Customs, and qualifying importers, time and money in the process of liquidating entries. *See G & R Produce Co. v. United States*, 27 CIT ___ , ___ , 281 F. Supp. 2d 1323, 1334 (2003).

To qualify for the automatic bypass system, importers must first submit entry summaries to Customs. Upon review of these summaries, import specialists at Customs designate the classification of the merchandise and approve the merchandise for immediate liquidation processing. *Id*. at 1333. Once the merchandise has been approved for the automatic bypass system, "Customs port directors may liquidate the goods as declared, without inspecting the goods or otherwise independently determining the proper duty to be paid." *Motorola, Inc. v. United States*, 436 F.3d 1357, 1362 (Fed. Cir. 2006). Nevertheless, to ensure the integrity of this process, Customs conducts periodic audits of importers' entries. *See Brother Int'l Corp.*, 27 CIT at ___ , 246 F.Supp.2d at 1326.

Defendant, Rockwell Automation, Inc. ("Rockwell") is a manufacturer, importer and exporter of electrical equipment and supplies who has utilized the automatic by-pass for numerous years. In addition to other products, Rockwell imports short body electric timing relays ("relays"). In 1991, in response to Rockwell's request, Customs issued a ruling classifying the relays. *See* Customs Letter Ruling, PC 861139 (April 9, 1991), App. Pl.'s Resp. Mot. Summ. J., Docs. 13 ("Pl.'s App. Docs."). Upon examination of Rockwell's description of its merchandise (but never examining a sample of the merchandise), Customs found that Rockwell's 700 HR, 700 HS and 700 HT series of relays were properly classifiable under subheading 8536.49.0075 of the Harmonized Tariff Schedule of the United States ("HTSUS"). The following year, the Customs Area Director at the New York Seaport issued an amended ruling reclassifying the series 700 HR and 700 HT relays under subheading 9107.00.8000, HTSUS. *See* NY 861139 (May 21, 1991), Pl.'s App. Docs. 14, 19 ("May ruling").

Displeased with the May ruling, Rockwell contacted Customs to discuss the classification rulings. Believing its May ruling to be correct, Customs informed Rockwell via telephone in 1991 "that the May ruling was final and binding." Pl.'s Mot. Partial Summ. J. 4;

Record of Telephone Conversation, Pl.'s App. Docs. 21. Six years later, in October 1997, Rockwell submitted a request for reconsideration regarding the classification of the relays. Finding its prior decision to be correct, Customs reaffirmed the May ruling. *See* HQ 962138 (July 28, 1999)(*available at* http://rulings.cbp.gov). In November 2000, Rockwell again repeated its request for Customs to reconsider the classification of its relays, and Customs again sustained its prior ruling. HQ 964656 (July 23, 2002)(*available at* http://rulings.cbp.gov). Despite its displeasure with Customs classification of its 700 HR and 700 HT relays, Rockwell did not protest (in accordance with 19 U.S.C. § 1514) the classification until 2001.

Meanwhile, following issuance of the May ruling, Rockwell began importing 700 HR and 700 HT relays. During the years in question in this proceeding, Rockwell maintained computerized classification databases which it would submit to its Customhouse broker. Rockwell's Customshouse broker would, in turn, use the information provided therein to complete entry procedures on Rockwell's behalf. Although Rockwell claims that it successfully implemented Customs' pre-entry classification ruling (as amended by the May ruling) for all other products (including 700 HS relays), Rockwell did not implement the May ruling for its 700 HR and 700 HT relays.

In 2000–2001, Customs performed a Customs Compliance Audit of Rockwell. During that audit, Customs discovered that Rockwell had designated that certain 700 HR and 700 HT series relays were classifiable under subheadings 8536.49, 8536.41 and 8538.90, HTSUS (rather than subheading 9107.00.80, HTSUS – the subheading set-forth in Customs' May ruling) in entry documents covering 166 entries between April 16, 1996 and January 13, 2000. In addition, Customs discovered that Rockwell did not reference or include a copy of the May ruling with all but two of these entries. During the relevant time periods, the tariff rate of the subheading set forth in the May ruling was higher than the subheadings Rockwell indicated on its entry documents.

Believing that Rockwell's actions violated its entry procedures, Customs initiated administrative proceedings against Rockwell for payment of withheld duties. On August 20, 2002, finding its suspicions confirmed, Customs issued a Penalty Notice to Rockwell. Subsequently, Customs filed a complaint in this court alleging Rockwell violated § 592(a)(1) of the Tariff Act of 1930, *as codified* 19 U.S.C. § 1592(a)(1). Customs claims that Rockwell was grossly negligent or, in the alternative, negligent in its completion of Customs' entry procedures.

Discussion

In order for Customs "to properly estimate customs duties and otherwise enforce the customs law," the Tariff Act of 1930 ("the Statute") requires importers to disclose certain information upon im-

portation of merchandise into the Commerce of the United States. *United States v. R.I.T.A. Organics Inc.*, 487 F. Supp. 75, 76 (N.D. Ill. 1980); *see, e.g.*, 19 U.S.C. §§ 1481, 1484–87, 1490 (2000); 19 C.F.R. pts. 141–42 (1996).[1] "[T]o encourage the accurate completion of the entry documents upon which Customs must rely to assess duties and administer other customs laws," *United States v. F.A.G. Bearings, Ltd.*, 8 CIT 294, 296, 598 F. Supp. 401, 403–04 (1984) (quoting S. Rep. No. 778, 95th Cong., 2d Sess. 17, *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2229), the Statute imposes a duty on importers to present true and correct information at entry. *See United States v. Ford Motor Co.*, 29 CIT ___ , ___ , 387 F.Supp.2d 1305, 1321 (2005) (citing 19 U.S.C. § 1484(a) & 1485 (1988)). In the event that Customs believes an importer failed to meet its obligations under the Statute, Customs may seek civil penalties under Section 592 of the Statute, as codified at 19 U.S.C. § 1592 (2000) ("Section 592").

Specifically, Section 592 entitles Customs to commence a civil penalty action against any importer who, by "fraud, gross negligence, or negligence,"

> [e]nter[s], introduce[s], or attempt[s] to enter or introduce any merchandise into the commerce of the United States by means of –
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> (i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or
>
> (ii) any omission which is material . . .

19 U.S.C. § 1592(a)(1)–(a)(1)(A); *see also United States v. Pentax Corp.*, 23 CIT 668, 670 n.6, 69 F. Supp. 2d 1361, 1364 n.6 (1999). If an importer is found to violate the Statute, Customs may recoup the difference between the duties paid and the "lawful duties, taxes, and fees." 19 U.S.C. § 1592(d). In addition, the court may award additional penalties depending on the level of scienter (fraud, gross negligence or negligence) proved, but not to exceed the domestic value of the merchandise, the amount Customs seeks in its initial pleadings, or the amount the court deems proper and just. *See* 19 U.S.C. § 1592(c); 28 U.S.C. 2643(e).

Here, the government alleges that Rockwell (a) made false statements in its entry papers and (b) omitted the pre-entry classification ruling it was required to attach on its entry papers. To establish the former count, the government must prove five elements: (1) that Rockwell is among the class of persons subject to liability under section 592; (2) that Rockwell entered, introduced or attempted to introduce merchandise into the commerce of the United States; (3) that

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[1] All references to the Code of Federal Regulations are to the 1996 edition.

Rockwell made a "false" statement when entering, introducing or attempting to introduce such merchandise into the commerce of the United States; (4) this statement was "material"; and (5) some level of scienter.[2] To prove the latter count, the government must prove: (i) that Rockwell is among the class of persons subject to liability under section 592; (ii) that Rockwell entered, introduced or attempted to introduce merchandise into the commerce of the United States; (iii) that Rockwell omitted information when entering, introducing or attempting to introduce such merchandise into the commerce of the United States; (iv) that the omission was "material"; and (v) some level of scienter. *See United States v. Pan Pac. Textile Group, Inc.*, 29 CIT ___ , ___ , 395 F.Supp.2d 1244, 1250 (2005).

In its motion for partial summary judgment, Customs requests the court to find that (1) Rockwell made "false" statements on its entry documents, (2) omitted required information on its entry documents, and (3) these statements and omissions were "material." Def.'s Mot. Partial Summ. J. 1. As noted above, Rockwell responds to Customs' motion, asking that this matter be dismissed; alternatively, Rockwell seeks summary judgment averring that its errors were clerical in nature and, therefore, exempted from civil penalty actions. The court will address each in turn.

(A) Has the Government Proven as a Matter of Law that Rockwell Introduced Merchandise into the Commerce of the United States By Means of False Statements or Acts?

Section 592 does not define the term "false" and this court has not specifically addressed the meaning of the term "false" in the Statute. Therefore, "false" must be defined according to its common and ordinary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979). Black's Law Dictionary defines "false" as something "untrue" or "[n]ot genuine; inauthentic." *Black's Law Dictionary* 635 (8th ed. 2004); *cf. Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1571 n.9 (Fed. Cir. 1994) (using dictionaries to determine the common meaning of a term). This definition is necessarily contextual, i.e., the inquiry necessarily depends on the facts and circumstances under which a statement is made.

In this case, Customs alleges that Rockwell made "false" statements on entry documents. The entry of merchandise into the United States is, of course, extensively regulated under U.S. law. As is relevant here, Congress has explicitly delegated to Customs the authority to appraise merchandise, fix the final classification, and

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[2] Section 592(e)(2)–(4) of the Statute assigns the burden on proving scienter depending on the type of scienter being alleged. The government has the burden for all counts alleging fraud or gross negligence; in contrast, for counts alleging negligence, once the government has established the first four elements, the Defendant has "the burden of proof that the act or omission did not occur as a result of negligence." 19 U.S.C. § 1592(e)(4).

determine the amount of duty owed. 19 U.S.C. § 1500 (2000). In carrying out its responsibilities, "the Secretary of the Treasury is authorized to make such rules and regulations as may be necessary to carry out the provisions of [the Act]." 19 U.S.C. § 1624 (2000); *see also* 19 U.S.C. § 1484(a)(2)(A) ("The documentation or information required . . . with respect to any imported merchandise shall be filed or transmitted in such manner and within such time periods as the Secretary shall by regulation prescribe."); 19 U.S.C. § 1502 ("The Secretary of the Treasury shall establish and promulgate such rules and regulations . . . as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon. . . .").

Under the force of this authority, Customs requires importers to specify the appropriate classification for their merchandise on entry documents. When, as here, an importer receives a classification ruling including a pre-entry classification ruling, Customs' regulations further require the importer to "set forth such classification[s] in the documents or information filed in connection with any subsequent entry of that merchandise. . . ." 19 C.F.R. § 177.8(a)(2). Therefore, in circumstances where Customs has issued a pre-entry classification ruling, the question that importers are answering on entry documents is: "What has Customs told you the classification of the merchandise is?" In light of the question posed by Customs, any answer other than that specified in a pre-entry classification ruling must by consequence be "false".[3]

In this case, Rockwell received a pre-entry classification ruling specifying that all 700 HR and HT relays must be classified under subheading 9107.00.80, HTSUS. However, Rockwell stated in its entry documents that the relays were classified under subheading 8536.41, 8536.49 or 8538.69 HTSUS. This response, when read in light of Customs' regulation, essentially asserted that Customs had approved use of subheadings 8536.49, 8536.41 and 8538.90, HTSUS to classify the merchandise – a patently "false" statement. Accordingly, these statements are assuredly "false" within the plain meaning of that term.

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[3] When so framed, on the question of liability under section 592, there can be no debate concerning the "correct" classification of the goods. Therefore, even if Customs were to have specified that the relays should be classified under subheading 9801.00.50, HTSUS (covering an "[e]xhibition in connection with any circus or menagerie"), specifying anything other on the entry documents would assuredly be "false." *See, e.g., United States v. Golden Ship Trading Co.*, 25 CIT 40, 45–46 (2001) (finding defendant's reasons for mismarking the country of origin of merchandise on Customs entry papers irrelevant to the false statement inquiry under § 1592). That is not to say, however, that the question of the appropriateness of Customs' classification cannot be considered by the court on the question of the level of the penalty to be imposed. *See United States v. Complex Mach. Works Co.*, 23 CIT 942, 949–50, 83 F.Supp.2d 1307, 1315 (1999) (listing fourteen factors relevant to the imposition of civil penalties, including "the gravity of the violation . . .").

Faced with the plain language of section 592 and Customs' regulation, Rockwell nevertheless maintains (1) that importers are not bound to make entry of goods in accordance with Customs' rulings (either regular rulings or pre-entry classification rulings); (2) the letter in this case is not a valid pre-entry classification ruling letter; and (3) that even if the ruling is valid, it does not cover the merchandise at issue here. None of these defenses is persuasive.

First, Rockwell asserts that under Customs law, only Customs officials are bound by pre-entry classification decisions. Therefore, it asserts, it was not required to set forth such classification in its entry documents. However, as earlier mentioned, Customs' regulations require:

> Any person engaging in a Customs transaction with respect to which *a binding tariff classification ruling letter* (*including pre-entry classification decisions*) has been issued under this part shall ascertain that a copy of the ruling letter is attached to the documents filed with the appropriate Customs Service office in connection with that transaction, or shall otherwise indicate with the information filed for that transaction that a ruling has been received. *Any person* receiving a ruling setting forth the tariff classification of merchandise shall set forth such classification in the documents or information filed in connection with any subsequent entry of that merchandise; the failure to do so may result in a rejection of the entry and the *imposition of such penalties* as may be appropriate.

19 C.F.R. § 177.8(a)(2) (emphasis added). Generally, a "person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. Rockwell is most certainly a "person" within the meaning of the regulation. Therefore, 19 C.F.R. § 177.8(a)(2) clearly extends to Rockwell's conduct at issue here. As such, even if it were a general principle of Customs law that only Customs officials are "bound" by a pre-entry classification decision, that principle does not absolve Rockwell from complying with section 177.8(a)(2) when setting forth the classification of its imports on entry documents.[4]

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[4] At oral argument, Rockwell claimed that the opportunity provided by Customs' regulations, at 19 C.F.R. § 143.36(c), limits Rockwell's obligation under section 177.8(a)(2). Section 143.36(c), in relevant part, however, merely permits importers to use the ruling number to limit their presentation of invoice data. It does not limit their obligation under section 177.8(a)(2). Rockwell further argued that because section 177.8(a)(2) was promulgated in 1980, the term "pre-entry classification ruling" was not meant to apply to preclassification rulings, such as the one Rockwell received, that were issued pursuant to the program which went into effect on January 1, 1989. A brief review of section 177.8(a)(2), as promulgated in 1980, however, shows that the term "pre-entry classification ruling" was not included in the regulation at that time. 19 C.F.R. § 177.8(a)(2) (1980) ("Any person engaging in a Customs transaction with respect to which a ruling letter has been issued by the Headquarters Office shall ascertain that a copy of the ruling letter is attached to the docu-

Next, Rockwell argues that Customs has not issued a "pre-entry classification ruling" for its relays. As noted above, section 177.8(a)(2) requires importers subject to certain rulings to set forth those classifications in their entry documents; among the list of rulings are "pre-entry classification rulings." A pre-entry classification ruling letter "is a letter from Customs to an importer advising the importer of the tariff classifications for certain of the importer's goods before the importer brings them into the country." *Motorola*, 436 F.3d at 1362; *see* 19 C.F.R. §§ 177.1, 177.2(a), 177.2(b)(2)(ii). Customs defines a "ruling" as a written statement "that interprets and applies the provisions of the Customs and related laws to a *specific* set of facts." 19 C.F.R. § 177.1(d)(1) (emphasis added). Rockwell claims that the pre-entry classification ruling at issue here was not "specific" enough to constitute a "pre-entry classification decision"; in particular, Rockwell avers that the pre-entry classification ruling described only a family of merchandise, i.e., "700 HR" and "700 HT," and that there are factual variations within this family of relays. Rockwell further contends that Customs issued the May ruling without ever viewing an actual sample of the merchandise. Therefore, Rockwell concludes the ruling letter is not "specific" enough to constitute a ruling letter as identified by section 177.8(a)(2). Def.'s Resp. Pl.'s Mot. Summ. J. 15–16 (citing *Pac Fung Feather Co. v. United States*, 19 CIT 1451, 1456 n.6 (1995) and *Pagoda Trading Co. v. United States*, 6 CIT 296, 297–98, 577 F. Supp. 2d. 22, 23–24 (1983)). This argument is unavailing.

The specificity requirement of 19 C.F.R. § 177.1(d)(1), and of the cases Rockwell cites, is meant to distinguish rulings letters, on one hand, from regulations and guidelines on the other. *Cf.* 19 C.F.R. § 177.8(b) (defining other rulings"). Customs' regulations make clear that "rulings" "appl[y] . . . with respect to transactions involving [i] articles identical to the sample submitted with the ruling request or [ii] to *articles whose description is identical to the description set forth in the ruling letter*." 19 C.F.R. § 177.9(b)(2) (emphasis added). Clearly then, a "description," is plainly sufficient to satisfy the "specificity" requirement. Moreover, when Customs sets forth a "description" of the merchandise, imported articles need not be identical to a "sample", but rather, to a "description."[5]

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ments filed in connection with that transaction with the appropriate Customs Service field office."). Consequently, the court finds Rockwell's argument disingenuous at best.

[5] Because there will invariably be some factual differences between various articles an importer imports, whenever Customs issues a pre-entry classification ruling, it must necessarily paint at some level of generality. In determining the proper level of generality, Customs must judge what distinctions between merchandise are material, i.e., what distinctions are relevant to determining the proper classification of the merchandise. This inquiry will necessarily depend on how Customs interprets the competing tariff provisions. To the extent an importer disagrees with Customs' assessment, it may challenge Customs' decision either pre- or post-importation, *see* 19 U.S.C. § 1514, and seek judicial review of that deci-

Applying these principles, and the definition of "ruling," here, Customs (a) issued PC 861139 upon Rockwell's request; (b) addressed particular merchandise imported by a specific importer; (c) reviewed (if even just in a cursory manner) the facts and descriptions concerning that merchandise; (d) did not purport to extend the ruling beyond either those products or to other importers; and (e) clearly set forth the classification of all 700 HR and HT relays. *Cf. Pagoda Trading*, 6 CIT at 297, 577 F. Supp. at 23 ("The administrative decision complained of did not rule specifically on the merchandise which plaintiff intends to import."); *see generally* 19 C.F.R. § 177.9(b)(1) ("Each ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect."). These factors clearly demonstrate that Customs had issued Rockwell a pre-entry classification ruling.

Nor can Rockwell maintain that it was not put on notice that it had received a pre-entry classification ruling. The pre-entry classification decision is clearly labeled a "Pre-entry Classification," refers to itself as a "ruling," and advises Rockwell that "[a]s the importer, you agree to enter [merchandise] according to this advice." *See* Pl.'s App. Docs. 13, PC 861139 (referring to itself as "Pre-entry Classification," and advising the importer of its agreement "to enter according to this advice."); *see also* Pl.'s App. Docs. 14, NY 861139 (referring to PC 861139 as a "preclassification ruling letter."). Customs issued this letter in response to Rockwell's request for a "pre-entry classification" ruling. Furthermore, Rockwell admits to having received the ruling.

Last, Rockwell claims that Customs has not offered samples of the merchandise to prove that they are "identical to the description" set forth in PC 861139. It is certainly true that the ruling letter applies to 700 HR and 700 HT relays as opposed to 800 HR and 800 HT relays (if such relays exist), and therefore, such proof is an element of the government's case. Here, Customs points to entry documents in which *Rockwell* identifies the merchandise at entry as 700 HR and 700 HT relays. *See* Pl.'s Reply Def.'s Resp. Pl.'s Mot. Partial Summ. J. & Pl.'s Resp. Def.'s Mot. Dismiss 10(Pl.'s Reply & Resp.); Attach. A to Pl.'s Reply & Resp. This uncontested evidence, essentially an admission by a party opponent, more than carries Customs' burden. Because Rockwell has failed to offer a scintilla of evidence challenging the identity of the merchandise, summary judgment on this question is appropriate. *Cf. Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1368–69 (Fed. Cir. 2006).

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sion. *See* 19 U.S.C. § 1515; 28 U.S.C. § 1581(a) & (h).

Accordingly, for the foregoing reasons, the court finds that, as a matter of law, Rockwell made false statements, and, therefore, Customs is entitled to summary judgment on this question.

(B) Did Rockwell "omit" information?

As noted above, 19 C.F.R. § 177.8(a)(2) requires that an importer either (a) attach a ruling letter or otherwise (b) indicate that a ruling letter has been received regarding the transaction.

Customs contends that Rockwell did not attach or otherwise indicate that a pre-entry classification decision had issued with respect to the imports at issue. This omission, Customs claims, is made more glaring by the fact that "the ruling number appear[ed] on two entries, but not on the other 164 entries at issue." Attach A to Plt.'s Reply & Resp. 16 (citing Attach A to Plt.'s Reply & Resp.). Rockwell challenges Customs' claims averring that it did "attach" the pre-entry classification ruling by loading the ruling into its database – a database to which Customs officials had access. This, it avers, satisfies its obligations under section 177.8(a)(2).

For summary judgment to be appropriate, Customs – which is not only the moving party but the party who has the burden of proof, *see* 19 U.S.C. § 1592(e)(3)–(4) – "must . . . satisfy its burden by showing that it is entitled to judgment as a matter of law even in the absence of an adequate response by the nonmovant." *Saab Cars USA*, 434 F.3d at 1368 (quoting 11 James Wm. Moore et. al., *Moore's Federal Practice* ¶ 56.13[1] (3d ed. 2005). Here, Customs has met its burden by providing entry documents in which Rockwell did not reference the pre-entry classification ruling. Therefore, as the non-movant, Rockwell is required to provide opposing evidence under Rule 56(e). *See Saab Cars*; *see also* USCIT R. 56(e), which states in relevant part that,

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

USCIT R. 56(e). Despite its burden, Rockwell has failed to offer any evidence that, for these entries, it loaded the ruling into its database or otherwise made the ruling letter accessible to Customs officials. Having failed to provide any evidence to support its alternative theory, Rockwell has failed to demonstrate a genuine issue of material fact. Accordingly, summary judgment on this question is appropriate.

(C) Were the "statements" and "omissions" "material"?

An act, statement, or omission is "material," within meaning of section 592, "if it has the natural tendency to influence or is capable of influencing agency action." *Pan Pac. Textile Group*, 29 CIT at ___ , 395 F.Supp.2d at 1250 (quoting 19 C.F.R. pt. 171, App. B(B)); *United States v. Rockwell Int'l. Corp.*, 10 CIT 38, 42, 628 F. Supp. 206, 210 (1986) (citations omitted); *see generally Kungys v. United States*, 485 U.S. 759, 770 (1988). As an objective test, materiality is determined without regard to whether the importer's false statement, false act, or omission actually misled Customs, or whether Customs actually relied on the false statement, false act, or omission. *See United States v. Nippon Miniature Bearing Corp.*, 25 CIT 638, 641, 155 F. Supp. 2d 701, 705 (2001); *see also TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). Furthermore, materiality is a mixed question of law and fact. Consequently, only when an act, statement or omission is " 'so obviously important to [Customs], that reasonable minds cannot differ on the question of materiality' [is the] ultimate issue of materiality appropriately resolved 'as a matter of law' by summary judgment." *Id.* (quoting *Johns Hopkins Univ. v. Hutton*, 422 F. 2d 1124, 1129 (4th Cir. 1970)); *see also United States v. Tri-State Hosp. Supply Corp.*, 23 CIT 736, 74 F. Supp. 2d 1311 (1999). *See generally Burlington N. & Santa Fe Ry. v. White*, 548 U.S. ___ , ___ , 126 S. Ct. 2405, 2416–18 (2006); *United States v. Gaudin*, 515 U.S. 506 (1995); *M'Lanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 188–189, 191 (1828).

The relevant facts are undisputed. Rockwell does not contest that it specified subheadings 8536.49, 8536.41 and 8538.90, HTSUS (and not subheading 9107.00.80, HTSUS) on its entry documents. It is also uncontroverted that Customs liquidated the relays under the automatic bypass method. Under this system, Customs liquidated the merchandise "as entered" by Rockwell in their entry documents. Finally, it is also uncontroverted that the liquidation value depends, in part, on the tariff rate corresponding to the proper classification of the merchandise. Because Customs may not review the entries, or conduct a search of its databases to determine the veracity of statements made on entry documents, Rockwell's submissions may have been determinative of the liquidation of its entries. By consequence, the tariff classifications Rockwell submitted would have a natural tendency to (improperly) influence the classification, tariff assessment, of its merchandise (even if, in rare occasions, Customs affirmatively scrutinized the entry of those imports), with a resulting in a reduction in duty. For the same reason, Rockwell's failure to attach the ruling letter was likewise material. With this analysis in mind, the court finds that reasonable minds cannot differ on the question of materiality and, accordingly, grants Customs summary judgment on this question.

(D) Is Rockwell Entitled to Summary Judgment that its Errors were Clerical in Nature and Therefore Exempt from Civil Penalty Actions?

Under section 592(a)(2), "[c]lerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct. The mere nonintentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct." 19 U.S.C. § 1592(a)(2). Thus, if the entry Rockwell made in its database was a clerical error which was unintentionally propagated by its computers, Rockwell would not be liable under section 592(a)(1) for the false statements and omissions of material fact alleged by Customs.

On this issue, the parties differ most significantly over the inference to be drawn from circumstantial evidence in the record. Rockwell, conceding that its evidence is entirely circumstantial, nonetheless argues that uncontested facts support the conclusion that the incorrect classification in their database is the result of a clerical error. Rockwell admits that "[a]t all times relevant to this case, the Rockwell parts database showed the classification of '700 HR', '700 HS' and '700HT' series short body timing relays as being HTS subheading 8536.41, and its Customhouse broker entered these products accordingly." Def.'s Rule 56(I) [sic] Statement Supp. Cross-Mot. Summ. J. ¶ 18. However, Rockwell claims that "[w]ith the exception of the 700 HR and 700 HT series short body timing relays, the tariff classifications shown in the IPM database matched the classifications assigned by Customs in the Preclassification Ruling and Supplement." *Id.* at ¶ 28.

To further support its argument, Rockwell points to deposition testimony and company policy as circumstantial evidence that a clerical error is the only explanation for the incorrect classification. *Id.* at ¶ 25 (*citing* Sarauer Dep. & Reuter Dep.) Customs cites the same deposition testimony as evidence that Ms. Sarauer was *not* responsible for loading results into the database, and argues that the evidence supports a conclusion that no attempt was made to load the correct data into the system. Pl.'s Resp. Def.'s Mot. Summ. J. 11–12. Customs' brief rightly points out that there are various conclusions that can be drawn from the evidence proffered by Rockwell.

For purposes of summary judgment, the court draws all inferences against Rockwell, the moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Consequently, the evidence submitted does not support a finding that, as a matter of law, the mis-classification of entries was a clerical error. The absence of the correct classification from Rockwell's database permits two diametrically opposite inferences; on the one hand, a responsible person could have ordered the correct information omitted; on the other hand, the omission could have been the result of a clerical error. Accordingly, the court

concludes that the circumstantial evidence upon which Rockwell relies does not entitle it to summary judgment on this issue.

CONCLUSION

For the foregoing reasons, the court **grants** Plaintiff's motion for partial summary judgment and **denies** Defendant's motions to dismiss and for summary judgment. IT IS SO ORDERED.

The parties shall consult with each other and shall, by November 15, 2006, file a proposed order governing preparation for trial.