Slip Op. 07–12

TOKYO KIKAI SEISAKUSHO, LTD., and TKS (U.S.A.), INC., Plaintiffs, and MITSUBISHI HEAVY INDUSTRIES, LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and GOSS INTERNATIONAL CORPORATION, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00078
Public Version

OPINION

[Plaintiffs' motion for judgment on the agency record is granted in part and denied in part; Plaintiff-Intervenor's motion for judgment on the agency record is granted; and Defendant-Intervenor's motion for judgment on the agency record is denied.]

Dated: January 24, 2007

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I. Introduction

This case consolidates various challenges to the Department of Commerce's ("Commerce" or "Department") antidumping ("AD") determination *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Final Results of Changed Circumstances Review*, 71 Fed. Reg. 11,590–01

(Dep't Commerce Mar. 8, 2006) ("*Final Results*"). *See also Issues and Decision Memorandum for the Changed Circumstances Review of Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, A–588–837 (Dep't Commerce Mar. 8, 2006), http://ia.ita.doc.gov/frn/summary/Japan/E6–3295–1.pdf ("*I&D Memo.*"). Plaintiffs Tokyo Kikai Seisakusho, Ltd., and TKS (U.S.A.), Inc., (collectively "TKS" or "Plaintiffs") challenge 1) Commerce's authority to initiate and conduct the changed circumstances review that led to the *Final Results*, 2) the Department's determination to reinstate the AD order in question with respect to TKS for the period from September 1, 2000 through September 3, 2001, and 3) Commerce's determination to reopen for reconsideration the sunset review that resulted in the complete revocation of the AD order. Plaintiff-Intervenor Mitsubishi Heavy Industries, Ltd. ("MHI"), also contests the Department's determination to reopen for reconsideration the sunset review. Lastly, Plaintiff/Defendant-Intervenor Goss International Corporation ("Goss") challenges Commerce's conclusion that the record compiled in the changed circumstances review supported a finding that TKS did not intentionally withhold information relevant to the 1998–1999 and 1999–2000 reviews, and the resulting determination not to apply adverse facts available ("AFA") in those reviews. For the reasons given below the *Final Results* are affirmed in part and overturned in part.

II. Procedural History

On September 4, 1996, the Commerce Department issued an amended final determination and AD order on large newspaper printing presses ("LNPPs") from Japan, which covered TKS and MHI.[1] *Notice of Antidumping Duty Order and Amended Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan*, 61 Fed. Reg. 46,621–01 (Dep't Commerce Sept. 4, 1996). Over subsequent years, Commerce conducted three administrative reviews of TKS pursuant to 19 U.S.C. § 1675(a), covering the periods 1) from September 1, 1997 to August 31, 1998; 2) from September 1, 1998 to August 31, 1999; and 3) from September 1, 1999 to August 31, 2000. *See Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Initiation of Changed Circumstances Review*, 70 Fed. Reg. 24,514–01, 24,514 (Dep't Commerce May 10, 2005) ("*Changed Circumstances Review Initiation*"). TKS received a zero margin in each investigation, *see id.*, which led the Department, on January 16, 2002, to revoke the AD order with respect to TKS pursuant to 19 C.F.R. § 351.222(b)(2). *Large Newspaper Printing Presses and Com-*

[1] Goss was the domestic petitioner in the proceeding.

ponents Thereof, Whether Assembled or Unassembled, from Japan: Final Results of Antidumping Duty Administrative Review and Revocation in Part, 67 Fed. Reg. 2190–01 (Dep't Commerce Jan. 16, 2002) ("*Partial Revocation Determination*"). Barely over a month later, Commerce revoked the AD order entirely during a five-year sunset review pursuant to 19 U.S.C. § 1675(c)(3)(A).[2] *Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan (A–588–837) and Germany (A–428–821): Notice of Final Results of Five-Year Sunset Reviews and Revocation of Antidumping Duty Orders*, 67 Fed. Reg. 8522–01 (Dep't Commerce Feb. 25, 2002) ("*Full Revocation Determination*").[3]

After learning of information arising from a recent federal court decision that found TKS provided false information to the government about their 1997–1998 sales,[4] the Department self-initiated a changed circumstances review of the AD order[5] with respect to the firms pursuant to 19 U.S.C. § 1675(b)(1). *Changed Circumstances Review Initiation*, 70 Fed. Reg. at 24,515; *accord I&D Memo.* at 4–5; *see also Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 321 F. Supp. 2d 1039 (N.D. Iowa 2004), *aff'd sub nom. Goss Int'l Corp. v. Man Roland Druckmaschinen Aktiengesellschaft*, 434 F.3d 1081 (8th Cir. 2006), *cert. denied sub nom. Tokyo Kikai Seisakusho, Ltd. v. Goss Int'l Corp.*, 126 S. Ct. 2363 (2006). In its preliminary results, Commerce found that

> TKS granted [the Dallas Morning News] a $1 million rebate and credits for spare parts tied to the sale reviewed, yet it did not disclose this information in its questionnaire responses submitted in the 1997–1998 administrative review. TKS was specifically asked in the questionnaire issued in the 1997–1998 ad-

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[2] In relevant part, 19 U.S.C. § 1675(c)(3)(A) provides for the revocation of an AD order if no domestic manufacturer or producer of a product like that within the scope of the order responds to the notice of initiation of a five-year review. *See* 19 U.S.C. § 1675(c)(3)(A); *see also id.* § 1677(9)(C)–(G) (defining "interested party" with respect to 19 U.S.C. § 1675(c)(3)(A)).

[3] Commerce merged the sunset reviews of LNPPs from Japan and Germany because each review's analysis turned on "the adequacy of the domestic interested party response. . . . [T]he domestic interested party [was] the same in both cases." *Large Newspaper Printing Presses and Components from Germany and Japan: Extension of Time Limit for Preliminary and Final Results of Five-Year Sunset Reviews*, 66 Fed. Reg. 58,713–01, 58,713 (Dep't Commerce Nov. 23, 2001); *see also* 19 U.S.C. § 1675(c)(3)(A).

[4] TKS and the Dallas Morning News engaged in a fraudulent price increase and secret rebate scheme that made the sale of LNPPs to the latter appear as if they were not dumped on the domestic market. *See Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 321 F. Supp. 2d 1039, 1045 (N.D. Iowa 2004). This one sale constituted the sole transaction covered in Commerce's 1997–1998 administrative review of TKS.

[5] Although Commerce proffers that it engaged in a review of the AD order in general, *see, e.g.*, Def. Mem. 4, a careful reading of the *Final Results* and *I&D Memo.* reveals that the agency in fact reconsidered the three administrative reviews of TKS and the resulting *Full Revocation Determination. See, e.g., Final Results*, 71 Fed. Reg. at 11,590–92; *I&D Memo.* at 6–18.

> ministrative review whether it had granted any discounts or rebates in connection with the subject sale. TKS unequivocally stated that "TKS did not provide any discounts to the contract price" and "TKS did not provide any rebates to the contract price."

Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan: Preliminary Results of Changed Circumstances Review, 70 Fed. Reg. 54,019–01, 54,021 (Dep't Commerce Sept. 13, 2005) (citations omitted) ("*Preliminary Results*"). Consequently, Commerce preliminarily determined that TKS' actions warranted application of an AFA rate of 59.67 percent in the 1997–1998 administrative review. *See id.* at 54,022. It also decided that this change, which meant that TKS no longer enjoyed a rate of zero for three consecutive administrative reviews, necessitated a recision of the revocation of the AD order with respect to TKS. *See id.* at 54,023; *see also Partial Revocation Determination*, 67 Fed. Reg. 2190–01. This TKS-specific recision would reinstate the order with respect to TKS from September 1, 2000 through September 3, 2001. Finally, the Department determined that if the *Preliminary Results* were affirmed, the agency would reconsider the sunset review that fully revoked the AD order. *See Preliminary Results*, 70 Fed. Reg. at 54,023; *see also Full Revocation Determination*, 67 Fed. Reg. 8522–01.

On March 8, 2006, Commerce affirmed the *Preliminary Results* in their entirety. *Final Results*, 71 Fed. Reg. at 11,590. Plaintiffs then brought suit in this Court.

III. Jurisdiction & Standard of Review

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c). The court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)) (quotations omitted). "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Id.* (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)) (quotations omitted). The court therefore "affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus., Inc. v. United States*,

22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). It may not "substitut[e] its judgment for that of the agency." *Hangzhou Spring Washer Co. v. United States*, 29 CIT ___ , ___ , 387 F. Supp. 2d 1236, 1251 (2005) (citing *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994)).

When the court examines the lawfulness of Commerce's statutory interpretations and regulations, it must employ the two-step test established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984). *See Pesquera Mares Australes Ltda. v. United States*, 266 F.3d 1372, 1380 (Fed. Cir. 2001). First, the court must examine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc.*, 467 U.S. at 842. If it has, the agency and the court must comply with the clear intent of Congress, *see id.* at 842–43; if it has not, "the court must defer to [the Department's] construction of the statute so long as it is permissible." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 121 (2000).

III. Discussion

A. The Department's Authority to Initiate & Conduct the Changed Circumstances Review

TKS assert that the Commerce Department had neither the inherent nor statutory authority to initiate and conduct the changed circumstances review at issue. Mem. P. & A. Supp. Mot. Pls. TKS J. A.R. 8 ("Pls. Mem."). TKS contest the Department's claim to inherent authority to conduct changed circumstances reviews "to reconsider decisions that may have been based on false or misleading information." Pls. Mem. 18. They state that "[a] central tenet of administrative law is that an agency is limited to the exercise of powers that are expressly delegated" to it, since "an administrative agency 'is entirely a creature of Congress and the determinative question is not what [the agency] thinks it should do but what Congress has said it can do.' " Pls. Mem. 19 (quoting *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 322 (1961)) (second brackets in original). " '[A]n agency literally has no power to act . . . unless and until Congress confers power upon it. . . .' " Pls. Mem. 19 (quoting *FAG Italia S.p.A. v. United States*, 291 F.3d 806, 816 (Fed. Cir. 2002) (citation omitted)) (first ellipses in original). Furthermore, even if Congress vested the Department with this inherent authority, "Commerce cannot exercise whatever inherent authority it may have in a manner that is contrary to the express language of the statute [19 U.S.C. § 1675(b)(1)]."[6] Pls. Mem. 21.

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[6] 19 U.S.C. § 1675(b)(1), which grants Commerce authority to conduct changed circumstances reviews, in relevant part states that:

While their broad statements are indisputable, the court disagrees with Plaintiffs' restrictive interpretation of the agency's powers at issue here. Before proceeding, however, the court emphasizes that "[w]henever a question concerning administrative . . . reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching that [which], ultimately, appears to be the right result on the other." *Civil Aeronautics Bd.*, 367 U.S. at 321; *accord Macktal v. Sec'y of Labor*, 286 F.3d 822, 826 (5th Cir. 2002); *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995); *see Alta. Gas Chems., Ltd v. Celanese Corp.*, 650 F.2d 9, 13 (2d Cir. 1981); *see also ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324 n.10 (1994). As explained below, the presence of fraud and its compounded effects upon Commerce's administrative reviews and the *Partial Revocation Determination* tilt the balance toward the latter.

As the Department insists, an agency may act "pursuant to its inherent authority" to protect the integrity of its proceedings from fraud. Def. Mem. 10; *accord Elkem Metals Co. v. United States*, 26 CIT 234, 240 & n.6, 193 F. Supp. 2d 1314, 1321 & n.6 (2002); *see* Def. Mem. 11–12; *cf. Macktal*, 286 F.3d at 825–26; *Alta. Gas Chems., Ltd.*, 650 F.2d at 13 ("It is a well established principle that an administrative agency may reconsider its own decisions. 'The power to reconsider is inherent in the power to decide.' ") (quoting *United States v. Sioux Tribe*, 616 F.2d 485, 493 (Ct. Cl. 1980)) (quotations omitted); *Elkem Metals Co.*, 26 CIT at 239–41, 193 F. Supp. 2d at 1320–22; *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972). In fact, "[i]t is hard to imagine a clearer case for exercising this inherent power than when a fraud has been perpetrated on the tribunal." *Alta. Gas Chems., Ltd.*, 650 F.2d at 13; *accord Elkem Metals Co.*, 26 CIT at 240, 193 F. Supp. 2d at 1321.

"False testimony in a formal proceeding is intolerable," and "[w]e must neither reward nor condone such a 'flagrant affront' to the truth-seeking function of adversary proceedings." *ABF Freight Sys., Inc.*, 510 U.S. at 323; *see Elkem Metals Co.*, 26 CIT at 240 n.6, 193 F.

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(1) In general

Whenever the administering authority [Commerce] . . . receives information concerning . . .

(A) a final affirmative determination that resulted in an antidumping duty order under this subtitle or a finding under the Antidumping Act, 1921, or in a countervailing duty order under this subtitle or section 1303 of this title,

(B) a suspension agreement accepted under section 1671c or 1673c of this title, or

(C) a final affirmative determination resulting from an investigation continued pursuant to section 1671c(g) or 1673c(g) of this title,

which shows changed circumstances sufficient to warrant a review of such determination or agreement, the administering authority . . . shall conduct a review of the determination or agreement after publishing notice of the review in the Federal Register.

19 U.S.C. § 1675(b)(1).

Supp. 2d at 1321 n.6. "In any proceeding, whether judicial or administrative, deliberate falsehoods," such as those TKS submitted to Commerce during the 1997–1998 administrative review, "well may affect the dearest concerns of the parties before a tribunal and may put the factfinder and parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross examination, by extraneous investigation or other collateral means." *ABF Freight Sys., Inc.*, 510 U.S. at 323(internal citations & quotations omitted). By providing Commerce with fraudulent information in the 1997–1998 administrative review, TKS compromised the accuracy of the proceedings and frustrated the Department's ability to best effectuate Congress' policy goals. *See id.* at 323–24. Under such circumstances, Commerce has the inherent authority to self-initiate a review of its prior determinations to purge them of fraudulent data. *Accord Alta. Gas Chems., Ltd.*, 650 F.2d at 12–13 (" 'The inherent power of a federal court to investigate whether a judgment was obtained by fraud, [sic] is beyond question,' *Universal Oil Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946),. . . . This universally accepted rule has been applied to proceedings before federal administrative agencies."); *see Greene County Planning Bd. v. Fed. Power Comm'n*, 559 F.2d 1227, 1233 (2d Cir. 1976); *see also Alta. Gas Chems., Ltd.*, 650 F.2d at 12 ("[T]he [agency] will certainly be in a far better position than the . . . court to determine whether it would have reached a different conclusion but for the [fraud]."); *cf. SEC v. Chenery Corp.*, 332 U.S. 194, 202–03 (1947) ("Not every principle essential to the effective administration of a statute can or should be cast immediately into the mold of a general rule. . . . [P]roblems may arise . . . which the administrative agency could not reasonably foresee. . . . In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective."); *Elkem Metals Co.*, 26 CIT at 239, 193 F. Supp. 2d at 1320.

Given the severe fraud perpetrated by TKS during the 1997–1998 administrative review, as well as other incidents of fraud alleged by Goss in the two successive administrative reviews, Commerce acted lawfully when it initiated and conducted reviews of those determinations. *See Goss Int'l Corp.*, 321 F. Supp. 2d at 1045; *I&D Memo.* at 4–5. Likewise, the Department reasonably initiated and conducted a review of its determination to revoke the AD order with respect to TKS since the basis of that decision rested upon the results of the tainted administrative reviews. *See* 19 C.F.R. § 351.222(b)(2); *Partial Revocation Determination*, 67 Fed. Reg. at 2191–92. Consequently, the court holds that Commerce possessed the authority to initiate and conduct these reviews.[7]

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[7] Plaintiffs argue that the concise language of 19 U.S.C. § 1675(b)(1) does not grant Commerce the power to initiate changed circumstances reviews of administrative reviews and determinations to partially revoke AD orders. Because the court holds that the Depart-

B. Commerce's Determination to Reinstate the AD Order with Respect to TKS

Plaintiffs also contest Commerce's decision to reinstate the AD order with respect to them from September 1, 2000 through September 3, 2001. They contend that "Commerce had no authority to reinstate the antidumping duty order . . . because there is no antidumping duty order on LNPPs from Japan. The order was revoked with respect to all Japanese producers and exporters on February 25, 2002." Pls. Mem. 15. TKS claim that the Department's regulations permit the agency to reinstate orders revoked with respect to a specific company "only 'as long as *any* exporter or producer is subject to the order.' " Pls. Mem. 15 (citing 19 C.F.R. § 351.222(b)(2)(i)(B)). Plaintiffs further contend that Commerce has recognized this policy in practice, citing the agency's statement in *Sebacic Acid from China*[8] that " 'unless all exporters are revoked from the order, the order continues to exist, and thus the potential for reinstatement.' " Pls. Mem. 15–16 (quoting *Issues and Decisions Memorandum for the Changed Circumstances Review and Reinstatement of the Antidumping Duty Order on Sebacic Acid from the People's Republic of China*, A–570–825 (Dep't Commerce Mar. 23, 2005), at 8, http://www.ia.ita.doc.gov/frn/summary/prc/E5–1401–1.pdf. Therefore, according to TKS, once the order no longer exists, neither does the "potential for reinstatement."

TKS' argument fails. This interpretation of Commerce's regulations and past determinations distorts their meaning and leads to absurd results. Commerce rightly objects to TKS' analysis when it notes that the Department " 'regularly conducts reviews for a segment of time in the past when [a given] order existed even if the order no longer exists at the time of initiation of that review.' " Def. Mem. 15 (quoting *I&D Memo.* at 7); *see, e.g., Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part*, 66 Fed. Reg. 36,551–01 (Dep't Commerce July 12, 2001). Contrary to Plaintiffs' claims, Commerce acts in accordance with its regulations when it performs such reviews. 19 C.F.R. § 351.222(b)(2)(i)[9] sets forth three criteria for the agency to evaluate when determining whether to revoke an AD order partially:

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ment has the inherent authority to review the determinations in question due to fraud, the court need not reach this issue.

[8] *Sebacic Acid from the People's Republic of China: Final Results of Antidumping Duty Changed Circumstances Review and Reinstatement of the Antidumping Duty Order*, 70 Fed. Reg. 16,218 (Dep't Commerce Mar. 30, 2005).

[9] Congress did not establish specific guidelines for the partial revocation of orders. As the court finds that Commerce's regulation permissibly effectuates Congress' intent, the court must afford it *Chevron* deference. *See Chevron, U.S.A., Inc.*, 467 U.S. at 842–43.

> (A) Whether one or more exporters or producers covered by the order have sold the merchandise at not less than normal value for a period of at least three consecutive years;
> (B) Whether, for any exporter or producer that the Secretary previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, *as long as any exporter or producer is subject to the order*, if the Secretary concludes that the exporter or producer, subsequent to the revocation, *sold* the subject merchandise at less than normal value; and
> (C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

19 C.F.R. § 351.222(b)(2)(i)(A)–(C) (emphasis added). From the regulation's text, it is clear that the clause "as long as any exporter or producer is subject to the order" refers to the period of time which a reinstated AD order may cover – not when Commerce may perform the reinstatement. *Id.* § 351.222(b)(2)(i)(B). This restriction serves to ensure that the Department cannot reinstate an order for an individual party covering a time period contemporaneous with a time period when the order was already fully revoked. It does not prohibit Commerce from reinstating a partially revoked order with respect to a party that fraudulently concealed its dumping simply because the Department discovered the fraud after the AD order no longer existed.

Once Commerce made the determination that TKS fraudulently manipulated their response to the Department's questionnaire and applied AFA to TKS' 1997–1998 administrative review dumping margin pursuant to 19 U.S.C. § 1677e(b), TKS lost their "three consecutive years" of zero-margin administrative reviews upon which Commerce based the *Partial Revocation Determination*. Consequently, the Department appropriately reinstated the AD order with respect to TKS pursuant to 19 C.F.R. § 351.222(b)(2)(i) from the period between September 1, 2000 and September 3, 2001. *See Jia Farn Mfg. Co. v. Sec'y of Commerce*, 17 CIT 187, 192, 817 F. Supp. 969, 973 (1993) ("[T]he exclusion of a firm from [an] order applies only when the firm acts in the same capacity as it was excluded from the order."); *I&D Memo.* at 6–7. September 1, 2000 marked the date that Commerce revoked the AD order with respect to TKS. *See Partial Revocation Determination*, 67 Fed. Reg. at 2192. September 3, 2001 was the final day before the Department revoked the AD order in its entirety. *See Full Revocation Determination*, 67 Fed. Reg. at 8523. The reinstatement of the AD order for TKS was supported by substantial evidence and in accordance with law, and therefore is affirmed.

C. Commerce's Determination to Reopen the Sunset Review for Reconsideration

1. Plaintiffs & Plaintiff-Intervenor's Contentions

TKS and MHI challenge Commerce's determination in the *Final Results* to reconsider the *Full Revocation Determination*. First, they maintain that the Department has no authority to conduct a sunset review on an already completely revoked order. *See* Pls. Mem. 16–17; Br. MHI Supp. R. 56.2 Mot. J. A.R. 22 ("Pl.-Int. Mem."). According to TKS, 19 U.S.C. § 1675(c)(1) establishes specific criteria under which a sunset review must occur:

> (1) In general
> Notwithstanding subsection (b) of this section [which concerns reviews based on changed circumstances] . . . , 5 years after the date of publication of—
> (A) . . . an antidumping duty order . . . the administering authority . . . shall conduct a review to determine, in accordance with section 1675a of this title, whether revocation of the . . . antidumping duty order . . . would be likely to lead to continuation or recurrence of dumping. . . .

19 U.S.C. § 1675(c)(1). In particular, "[t]he statute obviously contemplates that an antidumping duty order must be in effect if the Department is to determine the potential effect of revocation of the order." Pls. Mem. 17. In this case, however, Commerce revoked the order more than four years before it decided to initiate the changed circumstances review. Therefore, according to TKS, "to conduct the proposed sunset review the Department would have to 'create' the antidumping order that is the legal predicate for the review. There is no legal or factual basis for the conduct of such a fictional exercise." Pls. Mem. 17; *accord* Pl.-Int. Mem. 22–24, 30–31.

In addition, TKS and MHI believe that Commerce's attempt to conduct the sunset review stems from the agency's desire "to punish TKS for allegedly making false statements in the 1997–1998 administrative review." Pls. Mem. 17; *accord* Pl.-Int. Mem. 29. The parties highlight that antidumping laws serve a remedial purpose, so the Department cannot employ them in a punitive manner. *See* Pls. Mem. 17–18; Pl.-Int. Mem. 28–30. MHI specifically points to the Department's failure to reopen the sunset review with respect to the AD order on LNPPs from Germany despite the fact that Commerce revoked that order and the one on Japanese LNPPs for identical reasons in the same determination. *See* Pl.-Int. Mem. 30–31.

Furthermore, MHI claims that in Commerce's brief, the agency impermissibly justifies its decision to reconsider the sunset review by citing to the fraudulent information that TKS submitted to the Department during the 1997–1998 administrative review – a motive that conflicts with Commerce's previously stated reasoning 1) for

fully revoking the AD order, *see Full Revocation Determination*, 67 Fed. Reg. at 8522–23, and 2) for deciding to reopen the sunset review. *See* Pl.–Int. Mem. 18–19 (citing *I&D Memo.* at 12–13, 14). In the *Full Revocation Determination*, the Department revoked the AD orders on LNPPs from Japan *and* Germany because there was no longer a domestic producer (Goss) to protect from material injury. *See Full Revocation Determination*, 67 Fed. Reg. at 8523. According to MHI, the discovery of TKS' fraudulent behavior in the 1997–1998 review therefore can have no bearing on the results of the *Full Revocation Determination*, even if Commerce could somehow demonstrate that Goss's withdrawal from the domestic market resulted from the Department's "erroneous preliminary determination revoking the order with respect to TKS." Pl.-Int. Mem. 10 (quoting *I&D Memo.* at 13); *see* Pl.-Int. Mem. 9–12, 15, 19–20. "Goss's withdrawal from the sunset review was not a 'decision[ ] . . . [that] may have been based on false information,' but was instead an inevitable step by a bankrupt U.S. company that could not legally continue to participate in the sunset review." Pl.-Int. Mem. 16 (quoting *I&D Memo.* at 13) (brackets & ellipses in original); *see* Pl.-Int. Mem. 12–15 (listing comments by Goss demonstrating its departure from U.S. domestic market as LNPP producer). "[T]he Departments' [sic] basic rationale for reopening the settled sunset review – to give Goss the opportunity to decide whether or not to participate in the sunset review after TKS' fraud is identified and corrected – is entirely flawed, is based on no evidence whatsoever, and cannot be sustained." Pl.-Int. Mem. 16–17.

2. Defendant and Defendant-Intervenor's Contentions

The Commerce Department and Goss characterize TKS and MHI's challenges to the Department's determination to reopen the *Full Revocation Determination* for reconsideration as a premature attack on a non-final agency decision. "Essentially, TKS and MHI challenge future action that Commerce has indicated that it may undertake in a separate proceeding." Def. Mem. 21; *accord* Def. Mem. 23, 24 ("In essence, TKS and MHI both seek a permanent injunction that would bar Commerce from even reconsidering the sunset review and, in so doing, they are attempting to obtain an advisory opinion from this Court."). Moreover, Goss believes that TKS and MHI's argument that Commerce is employing the antidumping laws in a punitive manner is also unripe for decision, and therefore of no avail to their argument. The allegedly punitive nature of the reopening will not be known until completion of the review. *See* Resp. Br. Goss 27 ("Def.-Int. Br.").

3. Analysis

The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative poli-

cies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Tung Mung Dev. Co. v. United States*, 25 CIT 752, 792 (2001) (not reported in F. Supp.). According to the Supreme Court, a case is ripe for judicial action if it can fulfill the following two-part test: "First, the court must determine . . . whether there is a present case or controversy between the parties," and "[s]econd, . . . whether withholding judicial decision would work undue hardship on the parties." *Allegheny Ludlum Corp. v. United States*, 24 CIT 1424, 1448, 215 F. Supp. 2d 1322, 1344 (2000) (citing *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 506 (1972)). The court finds that Plaintiffs' challenge fulfills these criteria.

The Department's decision to reopen the sunset review for reconsideration did not arise in a vacuum; the agency formally made this determination after extensive research and analysis, and affirmed it in the *Final Results*. *See Final Results*, 71 Fed. Reg. at 11,591–92; *I&D Memo.* at 14. In this manner, it is no different than other Commerce determinations at issue and qualifies as a final determination by the agency. *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 239–40 (discussing various agency actions qualifying as final). In fact, if TKS and MHI presently cannot seek judicial review of this aspect of the *Final Results*, they will have no other chance in the future. *See Ja Farn Mfg. Co.*, 17 CIT at 189, 817 F. Supp. at 971 ("[Commerce]'s decision to initiate the administrative review is not a preliminary decision which will be superseded by a final determination, nor is it a decision related to methodology or procedure which may be reviewed by the court following the agency's final determination.") (quoting *Asociacion Colombiana de Exportadores de Flores v. United States*, 13 CIT 584, 587, 717 F. Supp. 847, 850 (1989), *aff'd* 903 F.2d 1555 (Fed. Cir. 1990)) (quotations omitted) (brackets in original); *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 424, 795 F. Supp. 428, 434 (1992) ("[J]urisdiction exists to hear challenges to the validity of antidumping proceedings prior to their completion if the opportunity for full relief may be lost by awaiting the final determination."); *cf. Trs. in Bankr. of N. Am. Rubber Thread Co. v. United States*, Slip Op. 06–154 at 13 (CIT Oct. 18, 2006) (not reported in F. Supp.).[10] A challenge to this determination's validity therefore presents a live case or controversy between the parties. *See U.S. Ass'n of Imps. of Textiles & Apparel v. Dep't of Commerce*, 413 F.3d 1344, 1348 (Fed. Cir. 2005); *see also Columbia Broad. Sys. v. United States*, 316 U.S. 407, 417–18 (1942) (holding that agency decision to promulgate contested regulation ripe for review even though agency has not

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[10] The court grants Goss' motion for leave to file a response to TKS' November 22, 2006 letter, which concerns this case.

enforced it because regulation formed definitive statement of agency position).

Likewise, TKS and MHI will face undue hardship if compelled to endure yet another round of administrative proceedings. Aside from devoting the time and resources to participate in the review, TKS and MHI will face significant, continuing commercial uncertainty with respect to their LNPP sales in the United States. *See Asociacion Colombiana de Exportadores de Flores*, 13 CIT at 586, 717 F. Supp. at 850 (recognizing party's desire to "be spared the considerable time, effort and money normally required of participants in [administrative] reviews" as legitimate burden). As discussed below, these hardships outweigh any benefit the Department or Goss could glean from an additional review. This issue is ripe for judicial review.

In the *Full Revocation Determination*, Commerce revoked the AD order on LNPPs from Japan and Germany, as law required, because "no domestic interested party responded to the notice of initiation" of that review. *Full Revocation Determination*, 67 Fed. Reg. at 8523; *see* 19 C.F.R. §§ 351.218(d)(1)(iii)(B), 351.222(i)(1). The Department now attempts to characterize this decision as tainted by fraud and therefore requiring reconsideration. *See, e.g.*, *Preliminary Results*, 70 Fed. Reg. at 54,019 ("[I]t is appropriate to take the following course of action in order to protect the integrity of the Department's proceedings: . . . (3) reconsider the revocation of the order under the sunset review provision. . . . If these preliminary results are confirmed in the final results, the Department will . . . initiate a new sunset review to reconsider the revocation of this order."); *I&D Memo.* at 12–13; *see also Final Results*, 71 Fed. Reg. 11,590–01 (affirming *Preliminary Results*).

As discussed earlier, agencies possess inherent authority to protect the integrity of their proceedings from fraud. However, even if reconsideration of the sunset review could demonstrate that TKS' misconduct in the 1997–1998 administrative review led Goss to withdraw from participation in the initial sunset review and thereby corrupted the *Full Revocation Determination*,[11] the Department could not alter the determination's ultimate results. First, as manifest in the language of 19 U.S.C. § 1675(c)(1), which outlines sunset review procedures, a review cannot occur without an existing order.

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[11] It is worth noting that the inquiry into whether Goss suffered material injury due to TKS' actions lies outside of Commerce's expertise, as the Department itself acknowledges. *See* 19 U.S.C. § 1673 (delegating to Commerce authority to discern presence of dumping and delegating to International Trade Commission ("ITC") authority to conduct injury determinations); *Co-Steel Raritan, Inc. v. ITC*, 357 F.3d 1294, 1297–98 (Fed. Cir. 2004); *Timken U.S. Corp. v. United States*, 28 CIT ____, ____, 310 F. Supp. 2d 1327, 1342 (2004); *see also* 19 C.F.R. § 351.218(a)–(b) (delegating to Commerce authority to determine if AD order revocation would lead to reoccurrence of dumping and delegating to ITC authority to determine if revocation would again lead to material injury); *I&D Memo.* at 7–8. *But see I&D Memo.* at 14 (declaring that reconsideration of sunset review will allow Commerce to analyze nature of material injury that Goss suffered).

Commerce, though, fully revoked the order it hopes to review on September 4, 2001, and it lacks the power to resurrect a revoked order. *See Full Revocation Determination*, 67 Fed. Reg. at 8523.

> [T]he revocation determination of Commerce quashes the effect of an antidumping duty order. . . . Imposition of antidumping duties must have the support of two affirmative findings: a finding of dumping by Commerce and a separate finding by the ITC that this dumping materially injures the domestic industry. . . . It is an impermissible proposition that Commerce will impose antidumping duties based on a finding of dumping alone, without the requisite additional injury finding by the ITC.

Asahi Chem. Indus. Co. v. United States, 13 CIT 987, 990, 727 F. Supp. 625, 627 (1989); *accord* 19 U.S.C. § 1673; *I&D Memo.* at 7–8 ("[T]he Department by itself cannot order a continuation of an antidumping order without an affirmative injury finding by the ITC."). Furthermore, irrespective of whether TKS' egregious behavior forced Goss to quit the domestic market, the fact remains that there no longer exists a domestic producer of LNPPs. In the absence of a domestic producer during a sunset review, statute and regulations require Commerce to revoke the outstanding AD order. *See* 19 U.S.C. § 1675(c)(1) & (d)(1)–(2); 19 C.F.R. §§ 351.218(d)(1)(iii)(B) ("If no domestic interested party files a notice of intent to participate in the sunset review, the Secretary will . . . (3) . . . issue a final determination revoking the order. . . .") & (e)(1)(i)(C), 351.222(i)(1) ("In the case of a sunset review . . . , the Secretary will revoke an order . . . : (i) . . . where no domestic interested party files a Notice of Intent to Participate in the sunset review . . . , or where the Secretary determines . . . that domestic interested parties have provided inadequate response to the Notice of Initiation. . . ."); *see also Trs. in Bankr. of N. Am. Rubber Thread Co.*, Slip Op. 6–154 at 11 n.8. Finally, punitive action has already been taken with regard to TKS by virtue of the judgment against them in *Goss Int'l Corp.* in excess of $35 million. No such action is warranted with respect to the other respondent. Although the court does not condone TKS' fraudulent misrepresentations in the 1997–1998 review, Congress wrote the sunset review statute in such a way that it precludes the action the Department of Commerce proposes, and therefore Commerce's decision to reconsider the sunset review cannot be sustained by the court.

D. Commerce's Determination Not to Apply Adverse Facts Available to TKS' 1998–1999 & 1999–2000 Administrative Reviews

In its separate motion for judgment on the agency record, Goss challenges Commerce's determination

> that Tokyo Kikai Seisakusho, Ltd. did not intentionally withhold and/or misrepresent information in the 1998–1999 and 1999–2000 administrative reviews of the antidumping order on large newspaper printing presses from Japan, and [Commerce's] subsequent failure to apply adverse facts available to Tokyo Kikai Seiskakusho [sic], Ltd. for those review periods.

Goss's R. 56.2 Mot. J. A.R. 1 ("Goss J. A.R."). Goss asserts that TKS' fraudulent behavior in the 1997–1998 administrative review continued into the following two review periods and that by withholding information, TKS obstructed the compilation of a full and complete administrative record. *See* Goss J. A.R. 4, 5–10 (listing alleged withholdings by TKS of information that Commerce requested and criticizing Commerce's discussion of why alleged withholdings did not warrant application of AFA), 12–15 (same), 20–26 (same). Consequently, Goss maintains that Commerce should have adhered to its supposed "prior practice" and used AFA in the latter two reviews. Goss J. A.R. 4; *see* Goss J. A.R. 17–20 (citing *Fresh Crawfish Tail Meat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Review*, 68 Fed. Reg. 19,504–01 (Dep't Commerce Apr. 21, 2003) ("*Crawfish*"); *Heavy Forged Hand Tools from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke in Part*, 66 Fed. Reg. 48,026–01 (Dep't Commerce Sept. 17, 2001) ("*Heavy Forged Hand Tools*"); *Certain Cased Pencils from the People's Republic of China; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 66 Fed. Reg. 37,638–02 (Dep't Commerce July 19, 2001)). In essence, Goss believes that the only valid test to determine whether the Department should apply AFA to TKS is whether TKS "act[ed] to the best of its ability to comply with the Department's requests" and that TKS fails this test. Goss J. A.R. 10 (quotations & footnote omitted).

Goss misunderstands the laws governing Commerce's application of AFA and the ample discretion these laws grant to the agency. "Neither the statute[governing the application of AFA, 19 U.S.C. § 1677e,][12] nor its legislative history obligates [Commerce] to make adverse inferences. . . . [T]he [agency] is given the discretion to make

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[12] Commerce may apply AFA pursuant to 19 U.S.C. § 1677e(b), which in relevant part states that

> (b) Adverse inferences
> If the administering authority . . . finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority . . . , the administering authority . . . , may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.
> . . . .

19 U.S.C. § 1677e(b) (emphasis added).

such inferences. Furthermore, [Commerce] is not required to make identical determinations in every review . . . , but rather must consider . . . the circumstances of each investigations as *sui generis*." *Timken U.S. Corp. v. United States*, 28 CIT ___ , ___ , 310 F. Supp. 2d 1294, 1346 (2004); *accord Elkem Metals Co.*, 27 CIT 838, 851, 276 F. Supp. 2d 1296, 1308 (2003) (holding that agency has "discretion in deciding whether or not to draw an adverse inference with respect to injury based upon a party's failure to participate in the administrative proceeding" and that "the decision in either event must be based upon a sound rationale") (citations & quotations omitted); *Allegheny Ludlum Corp.*, 24 CIT at 1447, 215 F. Supp. 2d at 1343 (underscoring Commerce's "particularly great" discretion when applying AFA) (quotations & citation omitted).

In the present case, Commerce correctly maintains that it

> has the inherent authority to reconsider past decisions when "after-discovered fraud" is presented to it. This does not mean, however, that disputes between parties relating to the interpretation to subjective issues, such as the date of sale, rise to the level of "after-discovered fraud." Nor does it mean that, because TKS purposefully misled Commerce during the 1997–1998 administrative review, that a presumption of intentional misconduct applies to other Commerce reviews.

Def. Mem. 25. Rather,

> [t]he deficient response must be analyzed in light of the respondent's overall conduct, the importance of the information, the particular time pressures of the investigation, and any other information that bears on the issue of whether the deficiency was an excusable inadvertence or a demonstration of a lack of regard for its responsibilities in the investigation.

Allegheny Ludlum Corp., 24 CIT at 1445, 215 F. Supp. 2d at 1341.

In its analysis of the information provided, the Department "determined that there existed no clear and convincing evidence that TKS intentionally provided false and misleading information during the 1998–1999 and 1999–2000 administrative reviews to a level[ ] which warranted recalculation of the margins."[13] Def. Mem. 26; *accord I&D Memo.* at 15–16; *see AK Steel Corp. v. United States*, 28 CIT ___ , ___ , 346 F. Supp. 2d 1348, 1354–56 (2004) (affirming Commerce's decision not to apply AFA to party because party provided reasonable explanations for inability to produce all requested infor-

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[13] By contrast, when Commerce reconsidered the 1997–1998 administrative review and decided to apply AFA, it "found clear and compelling evidence on the record of this changed circumstances review that TKS intentionally provided false and incomplete information." Def. Mem. 26 (quoting *I&D Memo.* at 16).

mation); *see also Timken U.S. Corp.*, 310 F. Supp. 2d at 1340 ("Regardless of whether each piece of specific evidence is discussed, [Commerce] is presumed to have considered all the evidence in the record.") (quotations & citation omitted); *Elkem Metals Co.*, 27 CIT at 859, 276 F. Supp. 2d at 1315 (holding that agency cannot apply AFA to investigation periods when obstructionist behavior by party did not occur). Though Commerce often applies AFA to parties who do not cooperate fully with its investigations, *see, e.g.*, *Crawfish*, 68 Fed. Reg. at 19,505–08; *Heavy Forged Hand Tools*, 66 Fed. Reg. at 48,027–29, in this case the Department has presented reasonable, substantiated explanations as to why it did not treat TKS' submission deficiencies in the 1998–1999 and 1999–2000 administrative reviews as fraudulent and therefore did not apply AFA to the reconsidered determinations. *See generally I&D Memo.* at 16–18. Goss's challenge to Commerce's determination amounts to a demand that the court re-weigh the significance of the evidence that appeared before the Department during the administrative proceedings, and this the court cannot do. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1355–58 (Fed. Cir. 2006). Consequently, Commerce's determinations not to employ AFA in the 1998–1999 and 1999–2000 administrative reviews are affirmed.

IV. Conclusion

For the aforementioned reasons, TKS' motion for judgment on the agency record is granted in part and denied in part; MHI's motion for judgment on the agency record is granted; and Goss's motion for judgment on the agency record is denied. Correspondingly, the court affirms the Department of Commerce's ability to initiate and conduct the changed circumstances reviews for the 1997–1998, 1998–1999, and 1999–2000 administrative reviews and the *Partial Revocation Determination*. Commerce's decision to rescind the revocation of the antidumping order with respect to TKS from September 1, 2000 through September 3, 2001 is also affirmed. However, the court finds the Department's determination to reopen for reconsideration the *Full Revocation Determination* contravenes the statute and is therefore not in accordance with law. Finally, Commerce's determination not to apply adverse facts available to the 1998–1999 and 1999–2000 administrative reviews is affirmed.

TOKYO KIKAI SEISAKUSHO, LTD., and TKS (U.S.A.), INC., Plaintiffs, and MITSUBISHI HEAVY INDUSTRIES, LTD., Plaintiff-Intervenor, v. UNITED STATES, Defendant, and GOSS INTERNATIONAL CORPORATION, Defendant-Intervenor.

Before: Judith M. Barzilay, Judge
Consol. Court No. 06–00078

JUDGMENT

This case having been duly submitted for decision, and the court, reading all briefs submitted and after due deliberation, having rendered decisions herein;

Now, in conformity with those decisions, it is hereby

ORDERED that Plaintiffs' motion for judgment on the agency record challenging the Department of Commerce's ability to initiate and conduct changed circumstances reviews for the 1997–1998, 1998–1999, and 1999–2000 administrative reviews and the Partial Revocation Determination is hereby DENIED. The court affirms these actions taken by the Department of Commerce; it is further

ORDERED that Plaintiffs' and Plaintiff-Intervenor's motions challenging the Department of Commerce's determination to reopen for reconsideration the Full Revocation Determination (sunset review) is hereby GRANTED. The court overrules the Department of Commerce's decision and ORDERS it to discontinue any action in regard to a reconsideration of the Full Revocation of the antidumping order revoked on February 25, 2002; and it is further

ORDERED that Defendant-Intervenor's motion challenging the Department of Commerce's decision not to use adverse facts available with respect to Plaintiffs during the 1998–1999 and 1999–2000 administrative reviews is DENIED.

Slip Op. 07–13

DANIEL ATTEBERRY, *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 02–00647

[Defendant's Motion to Withdraw Its Motion to Dismiss, To Amend Its Answer, and For Judgment on the Pleadings in favor of Plaintiff granted.]

Decided: January 25, 2007

Daniel Atteberry, Plaintiff *Pro Se*.

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 (*Jack S. Rockafellow*); *Yelena Slepak*, Office of Assis-

tant Chief Counsel, International Trade Litigation, Bureau of Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

In this action, *pro se* plaintiff Daniel Atteberry contests the decision of the U.S. Customs Service ("Customs")[1] re-classifying for tariff purposes certain merchandise which he describes as "bike[s]/kart[s]/scooter[s]," imported from the Netherlands through the Port of Seattle in May 2001. Customs liquidated most of the merchandise under various subheadings of Chapter 87 of the Harmonized Tariff Schedule of the United States (2001) ("HTSUS") (which covers "Vehicles Other Than Railway or Tramway Rolling-Stock, and Parts and Accessories Thereof"), and assessed duties (depending on the item) at rates of up to 10% *ad valorem*. *See* Customs Summons and Protest Information Report (attached to Def.'s Letter Memorandum (Jan. 9, 2004)). Plaintiff contends that the merchandise instead is properly classifiable as entered, under HTSUS subheading 9501 ("Wheeled toys designed to be ridden by children . . . "), duty-free. *See id.*; Complaint (with attachments).

The history of this litigation can be traced through the three opinions it has spawned to date – *Atteberry v. United States*, 27 CIT 751, 267 F. Supp. 1364 (2003) (denying motion to dismiss pursuant to 28 U.S.C. § 2636(a)(1), which argued that action was not filed within 180 days of "date of mailing" of notice of denial of protest) ("*Atteberry I*"); 27 CIT 1051 (2003) (denying motion for reconsideration of *Atteberry I*) ("*Atteberry II*"); and 27 CIT 1070 (2003) (denying motion to dismiss pursuant to 28 U.S.C. § 2637(a) (2000),[2] which was based on Plaintiff's failure to pay all duties before commencing action) ("*Atteberry III*").

Now pending before the Court is Defendant's Motion to Withdraw Its Motion to Dismiss, To Amend Its Answer, and For Judgment on the Pleadings, and its brief in support thereof. *See generally* Defendant's Memorandum in Support of Its Motion to Withdraw Its Motion to Dismiss, To Amend Its Answer, and For Judgment on the Pleadings ("Def.'s Brief"); *see also* Letter to Court from Counsel for Defendant (March 4, 2005) (Def.'s Supp. Brief").

In sum and substance, the Government's motion seeks to bring this litigation to a pragmatic close. The Government emphasizes that the duties at stake total less than $600 – a figure that will

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[1] The Customs Service was reorganized in 2003, and is now the Bureau of Customs and Border Protection of the U.S. Department of Homeland Security.

[2] All statutory references herein are to the 2000 edition of the United States Code.

Similarly, all references to regulations are to the 2001 edition of the Code of Federal Regulations. The pertinent text of the provisions cited remained the same at all times relevant here.

quickly be dwarfed by the "substantial economic impact" that "the parties and the judicial system as a whole" will face as a result of "discovery, motions, trial, and *the very real risk of appeal and retrial*" if the action proceeds. *See* Def.'s Brief at 2 (emphasis added). The Government therefore seeks to withdraw its Motion to Dismiss,[3] to amend Defendant's Answer to "admit[ ] that the imported merchandise is classifiable as entered by plaintiff," and to have judgment on the pleadings entered in Plaintiff's favor. *See* Def.'s Brief at 2, 12–13.

For reasons that are somewhat difficult to understand (and personal to himself), Plaintiff opposes the motion. *See generally* Plaintiff's Response to All the Defendant's Memorandum . . . Motions (punctuation in the original) ("Pl.'s Brief"); Plaintiff's Response to Amended Answer; Plaintiff's Response to Judge Delissa A. Ridgway, and Resubmission of Evidence Appearing to Show the Government Has Been Lying to Me and the Court All Throughout This Case ("Pl.'s Supp. Brief").

Because it will confer on Plaintiff all the relief prayed for in his Complaint, and because – as detailed below – it is otherwise manifestly "in the interests of justice," Defendant's Motion is granted.

I. *Background*

The material facts of this case are relatively straightforward, and not in dispute.[4] In late May 2001, a shipment of "bike[s]/kart[s]/scooter[s]" from the Netherlands was entered duty-free through the port of Seattle by plaintiff importer, Daniel Atteberry. Mr. Atteberry is a relative novice at importing, with only one prior experience, in October 1999 – when, importing apparently the same type of merchandise (albeit through a different port), the goods were liquidated as entered, duty-free. Thus, before the events that gave rise to this case, Plaintiff had no prior experience with Customs' protest process, and no experience with filing an action in this Court to challenge Customs' denial of a protest.

Based on his experience in his first foray into the world of importing, Plaintiff was apparently surprised when Customs began inquiring into his second entry of the same type of merchandise. He nevertheless responded promptly to Customs' two Requests for Information, which were conveyed to him through his broker. On his responses, he printed his telephone number in the appropriate box on the Customs form.

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[3] Concurrent with its proposed withdrawal of its Motion to Dismiss, the Government requests vacatur of *Atteberry III*, which was addressed to that motion. *See* Def.'s Motion at 1–3, 6, 9; *Atteberry III*, 27 CIT 1070.

[4] The facts summarized in this section are largely drawn from *Atteberry III*, 27 CIT 1070.

In late August 2001, a Customs Import Specialist telephoned Plaintiff, requesting certain additional information, which he supplied in a letter sent several days later. By Notice of Action dated September 5, 2001 and mailed to Plaintiff at his Kenmore, Washington address, Customs formally notified Plaintiff of its proposed reclassification of his merchandise, which would result in a "rate advance" (effectively assessing duties on merchandise which he had entered duty-free).

As a result of Customs' Notice of Proposed Rate Advance, further telephone and e-mail communications between Customs and Plaintiff ensued. Although he filed a timely response to the Notice of Proposed Rate Advance, Plaintiff did not prevail. By Notice of Action dated September 25, 2001 and mailed to Plaintiff's Kenmore, Washington address, Customs formally notified him that it had taken "rate advance" action on his merchandise "as proposed," and that "an increase in duties" would result.

A couple of weeks later, in mid-October 2001, Plaintiff moved from his Kenmore, Washington address. His next contact with Customs was on December 20, 2001, when he filed a timely Protest. His letter of Protest advised the agency that he had "No [mailing] Address at present," and provided his e-mail address (the same e-mail address that Customs had used to contact him once before, in September 2001).

In the meantime, the merchandise at issue had been liquidated. At about the same time, Customs issued its first bill to Plaintiff for the duties and interest owed as a result of the rate advance. That bill – dated October 19, 2001 and sent to the Kenmore, Washington address – never reached Plaintiff, who had moved from the address some days before. Indeed, the bill was eventually returned to Customs as undeliverable, on December 26, 2001. That same day, Customs received Plaintiff's Protest, which stated that he was no longer at the Kenmore address but could still be reached via e-mail. Customs nevertheless sent at least one more bill to the Kenmore address, for a total of four bills – the last on February 3, 2002. Plaintiff maintains that he received none of the four bills; and there is no evidence to suggest otherwise.

On April 3, 2002, Customs denied Plaintiff's Protest. That same day, a Customs representative sent Plaintiff an e-mail message at the e-mail address provided on his Protest. The Customs representative explained that a decision had been reached on the Protest, and asked that Plaintiff provide his "current mailing address" so that a copy of the agency's decision could be sent to him. Plaintiff responded via e-mail, and Customs' decision on the Protest was dispatched to him via U.S. Mail on April 9, 2003, at the "current mailing address" he provided to Customs, in Vashon, Washington.

A handwritten notation the face of Customs' Notice of Denial referred Plaintiff to a highlighted passage on a Customs form attached to the document, which stated:

> NOTE: If your protest is denied, in whole or in part, and you wish to CONTEST the denial, you may do so by bringing a civil action in the U.S. Court of International Trade *within* 180 days after the date of mailing of Notice of Denial. You may obtain further information concerning the institution of an action by writing the Clerk of U.S. Court of International Trade, One Federal Plaza, New York, NY 10007 (212–264–2800).

(Emphasis added.) The Notice of Denial made no mention of the assessment of duties and interest, much less the amount of the assessment. Nor was the amount of the assessment communicated in any of Customs' other telephone and e-mail communications with Plaintiff, either before or after the denial.

In the 180 days that followed Customs' mailing of the Notice of Denial, Plaintiff evinced his continued interest in challenging Customs' action through a course of correspondence with the Office of the Clerk of the Court. Eventually, Plaintiff completed and submitted a Summons, together with a two-page letter dated October 3, 2002 (deemed his Complaint), which were received at the Court and filed on Monday, October 7, 2002.

Because that day was the first business day after October 6, which was – in turn – the 181st day following the mailing of Customs' Notice of Denial, Plaintiff satisfied the first of two applicable jurisdictional requirements. 28 U.S.C. § 2636(a)(1). *See Atteberry I*, 27 CIT 751, 267 F. Supp. 2d 1364.[5] It is, however, undisputed that Plaintiff did not pay "all liquidated duties, charges, or exactions" before this action was filed.[6] The Government therefore sought to dismiss this action for lack of subject matter jurisdiction, based on Plaintiff's failure to comply with 28 U.S.C. § 2637(a).

The Government's motion was denied in *Atteberry III*, which reasoned that "28 U.S.C. § 2637(a) clearly contemplates that an importer will be on notice of the sum to be paid," and that – where Customs was on actual notice of Plaintiff's "current mailing address" (and, in fact, mailed the denial of protest to him at that address), but failed to send even a single bill to Plaintiff at any address during the

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[5] The Government initially sought to dismiss this action on the grounds that it was commenced outside the 180-day window. The Government asserted that the Notice of Denial was mailed April 3, 2002 (and, indeed, filed the sworn statement of a Customs official to that effect). That motion to dismiss was denied, however, after Plaintiff produced the "smoking gun" – the envelope that Customs used to mail the Notice of Denial, postmarked April 9, 2002. *See Atteberry I*, 27 CIT 751, 267 F. Supp. 2d 1364.

[6] Plaintiff paid Customs the sum of $542 by personal check in April 2003, after a letter from counsel for Defendant specified the amount owed. *See Atteberry III*, 27 CIT at 1080 & n.31.

critical 180-day period for commencement of an action in this court – Plaintiff's failure to pre-pay the assessed duties did not deprive the court of jurisdiction. *See generally Atteberry III*, 27 CIT at 1095.

Experienced litigators know that, with the meter running, there are some cases you can't even afford to *win*. Cognizant that the resources expended on litigation had already outstripped the relatively modest sum in dispute (and would continue to mount rapidly), the Government expressed an interest in an amicable resolution of this matter.[7]

Shortly after *Atteberry III* issued, the Court convened a teleconference with the parties to discuss future proceedings in the case, and to encourage the parties to explore some sort of compromise. In the course of that teleconference, the Court walked the parties through a basic litigation cost/benefit analysis.

The Court explained to Plaintiff that – although he had prevailed on both jurisdictional challenges raised by the Government – he might still lose on the merits of the case, either at the trial level or on appeal. Plaintiff was also advised that, although the Court had ruled in his favor on both jurisdictional challenges, both of those rulings were extensions of the existing law and could be subject to appeal as well. In other words, Plaintiff was warned that, even if he were to prevail on the merits of the case, ultimately he could still lose the case on appeal on purely jurisdictional grounds.

The Government expressed concerns about the impact of *Atteberry III*, and signaled its tentative interest in appealing that ruling (if possible) at the appropriate time in the future. Following the teleconference, the Court appointed a second lawyer to represent Plaintiff, and counsel for both parties began settlement negotiations. Although the parties were unable to reach agreement on their own, counsels' mutual request for a settlement conference with the court suggested that an amicable resolution might be possible. In papers filed in anticipation of the settlement conference, Plaintiff's counsel explained:

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[7] *Pro se* litigants are relatively insensitive to the typical economic incentives that drive the conduct of most parties vis-a-vis legal proceedings. In an August 6, 2003 teleconference in this case, the Court reminded the parties that the amount in dispute – although a significant sum for Plaintiff – is, objectively, a relatively modest sum; and the Court noted that, if Plaintiff were paying counsel to represent him (at the rate of $100 or $200 an hour, or more), he would have had a clear financial incentive to settle long before.

As the Supreme Court has observed, "[*p*]*ro se* petitioners have a greater capacity than most to disrupt the fair allocation of judicial resources because they are not subject to the financial considerations – filing fees and attorney's fees – that deter other litigants from filing frivolous petitions." *In re Anderson*, 511 U.S. 364, 365–66 (1994) (quotation omitted).

To date, Plaintiff's conduct of this litigation could not be deemed "frivolous." But it is no exaggeration to say that the case has consumed a disproportionate share of the resources (and occasionally strained the patience) of the Court and counsel for the Government, as well as the two lawyers who were successively appointed to represent him on a *pro bono* basis (and whom he discharged). In any event, no plaintiff – *pro se* or not – is entitled to pursue litigation beyond all reason.

> Although [the parties] do disagree about the classification of the goods in question, for purposes of a possible settlement, that has not been a significant issue. Instead, the significant issues are the extent of the Court's powers regarding classification for future importations and under what circumstances, if any, the Court should or would be willing to withdraw any prior decisions in this case.

See Letter to Court from Counsel for Plaintiff (Dec. 16, 2003). That assessment was confirmed by counsel for the Government:

> [T]he most significant issues separating the parties seem to be twofold. The first concerns the extent of the Court's power to effect classification for future importations of substantially similar merchandise. . . . The second significant issue concerns whether the Court should or would be willing to withdraw [*Atteberry III*], and if so, under what circumstances.

See Letter to Court from Counsel for Defendant (Jan. 9, 2004). Plaintiff[8] and counsel for the Government subsequently participated in a settlement conference with another judge of the court. However, no agreement resulted.

The Government persevered in an effort to come to some understanding with Plaintiff. The parties filed multiple submissions, conferred with one another, and participated in another teleconference with the Court in an effort to reach an agreement. Regrettably, those efforts once again came to naught, and the Government "felt constrained" to file the motion here at issue. *See* Letter to Court from Counsel for Defendant (May 21, 2004).

II. *Analysis*

Granting the Government's motion will – in the words of USCIT Rule 1 – "secure the just, speedy, and inexpensive determination" of this action. Granting the motion will spare the Government the need

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[8] In early January 2004, Plaintiff's second appointed counsel filed a Notice of Withdrawal. The letter transmitting that Notice advised that the withdrawal was "at the request of Plaintiff" and "against [counsel's] advice," but declined to provide further details, citing attorney-client privilege. *See* Letter to Court from Counsel for Plaintiff (dated Jan. 8, 2004). *See also* Plaintiff's Response to Judge Delissa A. Ridgway Order (dated Jan. 5, 2004) (filed by Plaintiff *pro se*, advising that he had dismissed his attorney); Order (Jan. 16, 2004) (acknowledging Notice of Withdrawal, as well as Plaintiff's notice, and granting leave to withdraw appearance).

The first lawyer appointed to represent Plaintiff withdrew under similar circumstances. Apparently dissatisfied because the lawyer had declined to file with the Court certain papers that Plaintiff himself had drafted, Plaintiff filed a Motion to Dismiss Attorney of Record (dated May 12, 2003). *See* Plaintiff's Request That The Court Reconsider Court Rejection of Plaintiff's Motion in Response to Motion for Summary Judgment, and Denial of Defendant's Motion to Dismiss (dated May 12, 2003). His counsel filed a Notice of Withdrawal about a week later, indicating that the action was "at the request of Plaintiff."

to soldier on with this litigation for the sole purpose of preserving its potential future right to appeal *Atteberry III*. Although the Government's reading of *Atteberry III* seems to be overly broad and its fears about the potential implications of the decision appear unwarranted, the bases for the opinion are obviated if the Government's Motion to Dismiss is withdrawn. The Government's proposal thus reflects a creative, constructive, and eminently practical (if unusual) means of resolving its own concerns on the jurisdictional issue, while at the same time protecting the interests of other parties.

Further, granting the Government's motion will afford Plaintiff the full measure of relief to which he would be entitled, even assuming that he were to eventually prevail on the merits of his classification claim before this Court. Indeed, to the extent that the Government has signaled its interest in a possible future appeal of *Atteberry III*, granting the Government's motion actually affords Plaintiff *greater relief* than he could be accorded even if he prevailed on his classification claim on summary judgment or at trial before this Court, because granting the Government's motion obviates the possibility of Plaintiff's loss on appeal.[9]

Finally, contrary to Plaintiff's belief, even if this action were to proceed and he were to prevail on the merits of his classification claim on summary judgment or at trial, such a determination would have no *res judicata* effect as to any future importations. Thus, Plaintiff could not achieve the type of "victory" that he seeks even if the Government's motion were denied.

In short, as discussed in greater detail below, granting the Government's motion is manifestly "in the interests of justice," and Plaintiff's objections to the motion are unfounded.

A. *Withdrawal of the Government's Motion to Dismiss*

At various points, the Government has suggested that – notwithstanding its general inclination to reach some amicable resolution of this matter – it might feel compelled to press on with this litigation for the sole purpose of preserving its potential right to appeal *Atteberry III*. *See*, e.g., Def.'s Brief at 6; Letter to Court from Defendant (May 21, 2004); Def.'s Letter Memorandum (Feb. 2, 2004) at 2.[10]

As a threshold matter, the Government expresses concern that "at the least, . . . the record underlying [*Atteberry III*] was not fully de-

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[9] Granting the Government's motion not only protects Plaintiff against potential loss on appeal on jurisdictional grounds, it protects him against potential loss on appeal on the merits of his classification claim as well.

[10] The Government apparently evaluated various avenues of appeal, tentatively concluding that *Atteberry III* could not appealed on an interlocutory basis, and that – depending on how the case is resolved on the merits – the decision might not be appealable at the end of the case. *See*, *e.g.*, Def.'s Letter Memorandum (Jan. 22, 2004) at 4; Def.'s Letter Memorandum (Feb. 2, 2004) at 2; Def.'s Brief at 2, 6; Letter to Court from Defendant (May 21, 2004).

veloped," and indicates that the decision in *Atteberry III* took the Government by surprise. *See* Def.'s Brief at 1–2.[11] However, in response to the Government's Motion to Dismiss, Plaintiff argued that the "Customs Service at no time has told me/mentioned/or tried to inform me [that] I owed them the amount of $ 542," and that "I never received a Bill . . . from Customs that I owed duties. . . . My defense to the Government claim is simple[;] I was never billed, nor asked to pay duties." *See* Plaintiff's Response to Defendant's Memorandum in Response to Motion for Summary Judgment and Denial of Defendant's Motion to Dismiss (dated April 24, 2003); Plaintiff's Response to Judge Delissa A. Ridgway (dated March 31, 2003) at 2.

Particularly in light of the relatively relaxed standards applied in construing the submissions of *pro se* litigants, the quoted language seems more than sufficient to put both the Court and the Government on notice of the gravamen of Plaintiff's jurisdictional argument – *i.e.*, that he never received a bill for the outstanding duties.[12] Moreover, to the extent that the Government believes that it would have been better to have a more complete factual record as a basis for its Motion to Dismiss and the Court's decision thereon, it has only itself to blame. The Government voluntarily chose to file its motion at the outset of the case, in lieu of an Answer and before seeking discovery. Even after the Court began inquiring into Customs' billing practices and obligations, the Government did not seek to withdraw its Motion to Dismiss, or to defer action on the motion pending discovery.[13] Any claim of ambush thus has a hollow ring.

The Government also suggests that *Atteberry III* absolves Plaintiff of all responsibility, and asserts that "it is unfair to Customs – both to the field officers and to the managers responsible for them – to ef-

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[11] *See also* Def.'s Letter Memorandum (Jan. 22, 2004) at 5–6 (arguing that *Atteberry III* was "essentially grounded . . . on disputed factual matters as to which the Government never had an opportunity for . . . discovery," stating that "the Court in effect wrote [*Atteberry III*] concerning a novel area of jurisdictional jurisprudence without the Government's even having the opportunity to submit any brief on the issue," and asserting that "[Plaintiff] did not raise the jurisdictional grounds relied on by the Judge; the Court acted *sua sponte*").

[12] In addition to Plaintiff's submissions, the Government was also on the receiving end of several letters from the Court that put the parties on notice that, *inter alia*, the Court was analyzing Customs' billing practices and obligations under its regulations vis-a-vis Plaintiff's claim that he was never billed. *See generally* Letter to Parties from the Court (May 23, 2003); Letter to Plaintiff from the Court (June 3, 2003). Those letters made it clear to any reader that the Court viewed this action as something other than a straightforward "garden variety" case of a prospective plaintiff's failure to pre-pay outstanding duties (as the Government sought to portray it).

Indeed, even before *Atteberry III* issued, the Government staked out its position, taking exception to the Court's inquiries into Customs' billing practice and similar matters. *See* Def.'s Letter Memorandum (June 12, 2003). The Government thus obviously appreciated (and, moreover, affirmatively objected to) the fact that, in considering the Government's then-pending Motion to Dismiss, the Court was looking beyond the conceded fact of Plaintiff's failure to pay the outstanding duties before filing this action.

[13] Nor did the Government seek reconsideration of *Atteberry III* after the fact.

fectively excuse Atteberry from taking care of business." *See generally* Def.'s Brief at 3–4. The Government emphasizes that there was "a three or four month window between October 21, 2001 and early February 2002, during which Customs had virtually no new mailing address for [Plaintiff] and sent out four bills to his address of record." *See* Def.'s Brief at 3. While those facts are true, they are also largely irrelevant to the narrow holding in *Atteberry III*, which focused on a different (and, for purposes of subject matter jurisdiction, much more critical) timeframe – the 180-day period after Customs' mailing of the denial of the protest, during which time Plaintiff had to act to perfect jurisdiction in this Court, and during which time the agency admits that it sent no bills to Plaintiff at any address. *See Atteberry III*, 27 CIT at 1082, 1085 n.36, 1094–95.[14]

Distilled to its essence, *Atteberry III* held that – in the unusual circumstances of this case – because 28 U.S.C. § 2637(a) clearly contemplates that importer will be on notice of amount of duties to be paid, where Customs failed to send Plaintiff even a single bill within the 180-day period during which Plaintiff had to perfect jurisdiction in this court, Plaintiff's failure to pre-pay the duties did not deprive the court of jurisdiction. In so holding, *Atteberry III* addressed two inter-related arguments advanced by the Government, relating to Customs' recordkeeping and billing practices..

First, the Government argued that – notwithstanding 19 C.F.R. § 24.3a(d)(1) – Customs was not required to continue sending Plaintiff monthly bills, because Plaintiff had no "address of record" on file with the agency. Second, according to the Government, Plaintiff had no "address of record" on file with the agency because changes to an importer's "address of record" can be made only by submitting a Customs Form CF 5106, "Notification of Importer's Number or Application for Importer's Number, or Notice of Change of Name or Address" ("CF 5106"); thus, the Government argued, Plaintiff's e-mail to Cus-

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[14] Indeed, *Atteberry III* expressly disclaimed any need to reach the issue of Customs' actions prior to April 2002, when the notice of denial of Plaintiff's protest was mailed to him. *See Atteberry III*, 27 CIT at 1085 n.36.

The Government notes that "though plaintiff was required to pay [Customs'] bills within 30 days, he did not," and argues that "[i]t is unfair to hold someone in [Plaintiff's] shoes faultless." *See* Def.'s Brief at 4.

As discussed above, the time period before the mailing of the notice of denial of Plaintiff's protest is essentially irrelevant for purposes of jurisdiction. But that is not to say that no consequences attached to Plaintiff's conduct. As a result of his actions and omissions during that period (and beyond) – including, for example, his failure to file a notice of change of address with the U.S. Postal Service, and his failure to ensure that Customs had on file an up-to-date address for him – Plaintiff apparently failed to receive any of the four bills that Customs sent him. In effect, Plaintiff's actions and omissions operated to deprive him of the opportunity to minimize the amount owed by paying Customs' assessment promptly. Interest on the assessed duties therefore continued to accrue, ensuring that the Government would be made whole notwithstanding Plaintiff's delay in payment. Thus, nothing in *Atteberry III* held Plaintiff "faultless," and nothing exempted him from the accrual of interest on the principal owed, much less the payment of the duties assessed.

toms in early April 2002 – which provided his "current mailing address," in response to the agency's request – could not constitute an official notice of change of his "address of record."[15]

In its pending motion, the Government explains that *Atteberry III* poses potential operational problems for Customs, as to both recordkeeping and billing. According to the Government, those operational concerns – as well as concerns about the precedential effect of the opinion – would weigh in favor of appealing *Atteberry III* (if possible) at the conclusion of this case on the merits.

1. *Concerns About Implications for Customs' Recordkeeping Practices*

The Government intimates that *Atteberry III* makes it "incumbent on a Customs field officer to attempt to make changes to an importer's permanent records without proper authorization from that individual." *See generally* Def.'s Brief at 2, 4–6; Def.'s Supp. Brief at 1–4. The Government cautions that such a requirement "could well lead to more mistakes, rather than fewer, being made in [Customs'] processing and communication of information required by importers." Def.'s Brief at 2.[16]

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[15] Both the Government and the Court have referred frequently to the concept of an importer's "address of record." It is worth noting, however, that the term does not appear either in Customs' billing regulations (for example, 19 C.F.R. § 24.3a(d)(1)) or in 19 C.F.R. § 24.5(a), the regulation that the Government cites as authority for the proposition that changes to importers' "addresses of record" can be made only by submitting a CF 5106. Nor does it appear on CF 5106 itself.

[16] In its brief, the Government describes the events of April 2002 relevant to this case:

> [The Customs Entry Specialist who contacted Plaintiff in early April 2002] had a job to do, and that was to mail a protest decision to plaintiff. Since the protest stated "No Address at present," she wrote to [Plaintiff] at the e-mail address he had put on the Protest in December 2001. In an e-mail reply, [Plaintiff] sent her his "current" mailing address. Presumably he wanted to know if his protest prevailed. Period. Did he ask whether *she* could make the same change to his permanent mailing address? No. Did he ask how *he* might make the same change to his permanent mailing address? No. Did he inform [the Customs Entry Specialist] that this address should be treated by Customs as his permanent mailing address? No. Did [the Customs Entry Specialist] have any authority to assume that [Plaintiff] wanted the address to be recorded by Customs as his permanent address, particularly where there was nothing in writing to that effect? No. What are her responsibilities at this point? None.

Def.'s Brief at 5. But this line of argument is too facile, for several reasons. Just as the term "address of record" is not used in the relevant Customs regulations or on CF 5106, so too those regulations and the form make no mention of "permanent mailing address." And it is far from clear that Customs can insist that an importer employ some specific linguistic formulation in such a situation, particularly where (as here) the importer in question is not required by the terms of 19 C.F.R. § 24.5(a) to use CF 5106 to make a change of address.

Most telling, however, is the Declaration of Arthur Versich, proffered by the Government to establish that CF 5106 is the sole means of giving notice of change of address. The Versich Declaration *itself* refers to an importer's address as reflected in ACS as the importer's "current mailing address" – the exact same verbiage that the Customs Entry Specialist employed in her April 2002 e-mail exchange with Plaintiff (but which the Government

The "rub" here is the Government's continued insistence that Plaintiff was required to give notice of his change of address on Customs Form CF 5106, and that any other form of notice had no effect. *See generally* Def.'s Brief at 4–6; Def.'s Supp. Brief at 3–4. As *Atteberry III* explained, the authority that the Government cites for that proposition simply does not support it.

In its brief in support of the motion at bar, the Government reiterated its claim that 19 C.F.R. § 24.5(a) required Plaintiff to submit an official written change of address on CF 5106. *See* Def.'s Brief at 6. However, by its terms, that regulation requires only that an individual file a CF 5106 "with the first formal entry which is submitted or the first request for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection." 19 C.F.R. § 24.5(a). And, as *Atteberry III* observed, "it seems clear that [Plaintiff] did nothing after mid-October 2001 which would trigger any obligations under [§ 24.5(a)]. Certainly he did not 'submit[ ]' a 'formal entry' after that time. Nor does it appear that, during that period, he made a 'request for services that [would] result in the issuance of a bill or a refund check.' " *Atteberry III*, 27 CIT at 1083.[17]

Pressed to explain its position, the Government finally (albeit grudgingly) conceded in supplemental briefing on the instant motion that 19 C.F.R. §24.5 "does not expressly state that an importer must file a CF 5106 to report a change of address," and, moreover, that "there is no regulation directly on point." *See* Def.'s Supp. Brief at

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claims is something entirely different from an importer's "address of record" and/or "permanent mailing address"). *Compare* Declaration of Arthur Versich (attached to Def.'s Supp. Brief) ¶ 10 *with Atteberry III*, 27 CIT at 1078–79 & n.27 (*citing* April 3, 2002 e-mail from Customs Entry Specialist to Plaintiff, requesting his "current mailing address"). Either "current mailing address" actually is a proper term of art for the importer address in the ACS database, or it is not but the Government is seeking to hold Plaintiff and other importers to a level of linguistic precision that even Customs officials themselves do not meet. In either case, the Versich Declaration lends great credence to the view that the language of the April 2002 e-mail exchange between Plaintiff and the Customs Entry Specialist should have been understood by Customs as a reference to an "address of record" for purposes of Customs' database (or, at the very least, it should have triggered some further inquiry from someone at Customs).

Finally (and more generally), the series of rhetorical questions posed by the Government (quoted above) is difficult to reconcile with the Government's assertion elsewhere that "if an importer were to write Customs a letter giving notice of an address change, then Customs would send that importer a blank CF 5106 . . . so that the address change can be properly documented in Customs records." *See* Def.'s Supp. Brief at 2. In the case at bar, Plaintiff wrote Customs a letter (actually, an e-mail message) giving notice of an address change. (Since – according to his letter of Protest – Plaintiff had "No Address at present" in December 2001, the "current mailing address" he provided to Customs in April 2002 constituted "notice of an address change.") The Government fails to explain why, in light of these facts, "Customs [did not] send that importer [*i.e.*, Plaintiff] a blank CF 5106" in April 2002, "so that the address change [could] be properly documented in Customs records."

[17] *Atteberry III* thus did not hold that 19 C.F.R. § 24.5(a) imposes no obligation on importers to file CF 5106s. Indeed, as the opinion notes, the regulation specifies certain events which trigger an obligation to file. In Plaintiff's case, however, none of those events occurred. *See generally Atteberry III*, 27 CIT at 1083.

2–3.[18] But the Government apparently nevertheless still maintains that Plaintiff was obligated to use the form, and that any other means of notice was of no effect. As authority for its position, the Government now points to the Notice of Proposed Rulemaking published when § 24.5 was being promulgated. *See* Def.'s Supp. Brief at 3 (*citing* 31 Fed. Reg. 11,394 (Aug. 27, 1966)). The Notice of Proposed Rulemaking stated:

> Customs Form 5106, Notification of or Application for Importer's Number or Notice of Change of Name or Address . . . , is a new form which will be required to be filed by each importer on the first importation. . . . *Further filing will be required only* (1) *for a change in name or the address of the party filing the form*, or (2) under certain circumstances when no transaction has been filed with customs under an importer's number within the last preceding 12 months.

31 Fed. Reg. 11,394 (emphasis added).

According to the Government, the "language in the Notice of Proposed Rulemaking along with the title of CF 5106 clearly indicate *Customs' intent* that the form be used to report a change of name or address by an importer." *See* Def.'s Brief at 3 (emphasis added). But it is a longstanding and well-established principle of statutory construction that, where the language of a statute is clear, there is no recourse to legislative history. *See* 2a Norman J. Singer, Sutherland on Statutes and Statutory Construction § 46:04 (6th ed. 2000) (stating "courts are bound to give effect to the literal meaning without consulting other indicia of intent or meaning when the meaning of the *statutory* text itself is "plain" or "clear and unambiguous") (citations omitted)). That principle applies with equal force to regulations and their history.

Whatever Customs' intent may have been in promulgating 19 C.F.R. § 24.5, the bottom line is that – as the Government itself has now admitted – the regulation itself "does not expressly state that an importer must file a CF 5106 to report a change of address" under the circumstances presented here. *See* Def.'s Supp. Brief at 2–3; *Atteberry III*, 27 CIT at 1083 ("Whatever may have been the intent behind [§ 24.5(a)], nothing on its face applied to Mr. Atteberry.").[19]

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[18] *See also* Def.'s Supp. Brief at 4 (admitting that "[t]here is no regulation other than 19 C.F.R. §24.5 requiring importers to use a specific form to file a change of address.").

[19] In the alternative, the Government attempts to invoke 19 U.S.C. § 66. *See* Def.'s Supp. Brief at 3–4. However, that statute is inapposite. It is merely a broad grant of authority to the agency to promulgate rules and regulations, including those requiring the use of specific forms for particular purposes. Whether or not Customs *could have* promulgated a regulation requiring importers such as Plaintiff to use CF 5106 to report changes of address in the circumstances of this case, the point is that – without regard to the agency's intent – Customs in fact never did promulgate such a regulation. *But see Atteberry III*, 27 CIT at 1083 (questioning whether Customs can, by regulation, mandate the use of a particular

It would seem to be a relatively straightforward matter for Customs to amend 19 C.F.R. § 24.5, to address the gap in the regulation highlighted by the events of this case and to ensure that the language of the regulation itself fully reflects Customs' intent. *See, e.g.*, Def.'s Supp. Brief at 3 (*citing* Notice of Proposed Rulemaking for 19 C.F.R. § 24.5, and emphasizing that – in promulgating the regulation – agency intended to require importers to file CF 5106 whenever there was a "change in name or the address of the party filing the form").[20] Any such amendment would, of course, be irrelevant to the case at bar.[21] And, in any event, granting the Government's pending motion will moot this issue as to Plaintiff and the facts of this case.

2. *Concerns About Implications for Customs' Billing Practices*

The second basic operational issue raised by the Government concerns Customs' billing practices and compliance with 19 C.F.R. § 24.3a(d)(1), which – in general – mandates that the agency continue sending monthly bills to an importer's address of record "until the bill is paid or otherwise closed." 19 C.F.R. § 24.3a(d)(1).[22] *See generally Atteberry III*, 27 CIT at 1072–74 (summarizing Customs' billing regulations). The Government asserts that *Atteberry III* implicitly holds that "Customs has a duty under [19 C.F.R. § 24.3a(d)(1)] to be more pro-active in billing importers – using the phone, available e-mail addresses, and so forth – rather than assuming that Customs can simply bill to the importer's address of record." *See generally* Def.'s Brief at 6.

The Government misreads *Atteberry III*. Nothing in that opinion should be understood to suggest that § 24.3a(d)(1) requires Customs

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form for changes of address) (*citing Intercargo Ins. Co. v. United States*, 83 F.3d 391, 395 (Fed. Cir. 1996).

The Government's expansive reading of 19 C.F.R. § 24.5(a) is particularly difficult to square with the explicit language of 19 C.F.R. § 111.30, which unequivocally imposes on *customs brokers* an obligation to "immediately give written notice of [a] new address to each director of a port that is affected by the change of address." *See* 19 C.F.R. § 111.30. The existence and clarity of § 111.30 demonstrate that Customs knows how to write a regulation that – on its face – affirmatively and unambiguously imposes an obligation to immediately file changes of address with the agency. And it effectively casts in sharp relief the inadequacies in the drafting of § 24.5(a).

[20] Note, however, that – even where a regulation expressly requires the use of a specific form for a particular purpose – notice given in some other fashion is not necessarily invalid. *See, e.g., Intercargo Ins. Co. v. United States*, 83 F.3d 391, 395 (Fed. Cir. 1996) (*cited in Atteberry III*, 27 CIT at 1083).

[21] As of the date of its Supplemental Brief, the Government advised that no relevant changes to Customs' regulations were "presently under consideration." *See* Def.'s Supp. Brief at 6.

[22] As *Atteberry III* explains, "under Customs' regulations, it is not the act of liquidation – but, rather, the bill for supplemental duties and interest – that triggers the importers' obligation to pay." *See generally Atteberry III*, 27 CIT at 1090 n.43 (citations omitted). "Moreover, billing is mandatory under the statutory and regulatory scheme. It is no mere 'courtesy' or formality." *Id.* (citations omitted).

to do anything more than send regular monthly bills to an importer's "address of record" – although, to be sure, one of the central issues addressed in the opinion is what an importer's "address of record" is, and how that address can be changed.

In the case at bar, however, Customs sent four bills to Plaintiff's "address of record," then simply ceased billing entirely. If (as the Government acknowledges) § 24.3a(d)(1) requires Customs to continue sending monthly bills to an importer's "address of record," and if – according to the Government – Plaintiff never properly changed that "address of record" – it is unclear why Customs ceased sending bills to that address.[23]

As *Atteberry III* observed, "Logically, it would seem that an importer's 'address of record' should – like a 'last known address' – remain his 'address of record' until replaced by a new 'address of record.' " *Atteberry III*, 27 CIT at 1082 n.33. "Customs cannot have it both ways. If, by Customs' logic, the Kenmore address remained [Plaintiff's] 'address of record' until [it was] changed via some particular form or procedure, then – by Customs' logic – the agency should have continued to send bills to that address." *Id*.

The Government states that Customs stopped sending bills to Plaintiff's "address of record" because the first bill (sent on or about October 21, 2001) was returned to Customs as undeliverable, in late December 2001. According to the Government, "[h]aving received the notification that the addressee was not at the address of record, Customs discontinued the mailing of the bills to that address." *See* Def.'s Supp. Brief at 5.[24] But there is some inconsistency inherent in that explanation.

First, Customs in fact did not cease billing promptly upon the return of the first bill in late December 2001. At least one more bill was sent thereafter – the bill sent on or about February 3, 2002. *See Atteberry III*, 27 CIT at 1078 n.26.

Second, since (as discussed above) Customs' theory of "addresses of record" would seem to require that an importer's "address of record" remain his "address of record" until he formally and officially changes it via submission of a CF 5106, it is unclear in the case at bar what address (if any) Customs viewed as Plaintiff's "address of record" after the first bill was returned in December 2001.[25]

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[23] The related question – why Customs failed to send bills starting in April 2002 to the address that Plaintiff supplied to Customs when asked for his "current mailing address" – is addressed in Section II.A.1, above.

[24] Significantly, the Government does not suggest that Customs' decision to stop sending bills to Plaintiff's "address of record" was based on Plaintiff's notation on his December 26, 2001 letter of Protest – "No Address at present."

[25] Indeed, in its supplemental brief, even the Government itself refers to Plaintiff as having an "address of record" in April 2002, which the Government claims was not supplanted by the "current mailing address" that Plaintiff supplied to Customs for purposes of mailing the notice of denial of his protest. *See* Def.'s Supp. Brief at 5. That language suggests that –

Third, the very fact that – in the case at bar – Customs apparently did alter (*i.e.*, delete)[26] Plaintiff's "address of record" in the agency's database *without* receiving any sort of formal or official notice from Plaintiff (much less a CF 5106) would seem to significantly undercut any claim that, as a matter of fundamental policy, Customs makes no changes to its database of importers' "addresses of record" absent formal submission of a CF 5106. *See, e.g.* Def.'s Supp. Brief at 4 (CF 5106 "has been consistently required by Customs to be filed by importers to report changes of address"), 5 ("without a CF 5106, Customs had no authority to substitute the address of record contained in ACS . . . [with] the 'current mailing address' provided by [Plaintiff] for purposes of receiving the denial of his protest").[27] It is more than passing strange to claim that Customs *had* the authority to unilaterally delete from the agency's database Plaintiff's "address of record" absent the submission of a CF 5106 and based solely on the return of a single piece of correspondence,[28] while – at the same time – claiming that Customs *lacked* the authority to enter into its database as Plaintiff's "address of record" an address that Plaintiff himself supplied to Customs when asked by an agency official for his "current mailing address."

Finally, it bears emphasizing that the circumstances surrounding Customs' deletion of Plaintiff's "address of record" from its database are difficult to reconcile with the Government's representations about the agency's professed concern for the integrity of that database. *See, e.g.*, Def.'s Brief at 2 (referring to the "imperative that procedures function to deliver services without endangering the reliability of information going into [Customs'] databases").

As *Atteberry III* explains, when Customs' original bill was returned to the agency in late December 2001, "there was a handwritten notation on the envelope in which the bill was enclosed: 'not @

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metaphysically speaking – the Government understands the concept of "address of record" to mean that an importer's "address of record" continues to be his "address of record" *until replaced by a new "address of record"* (and, thus, that an importer cannot have no "address of record").

[26] For the sake of clarity, the term "delete" is used herein. However, Customs' ACS database apparently maintains a history of all changes made to importers' names and addresses in the database. *See generally* Declaration of Arthur Versich (attached to Def.'s Supp. Brief) ¶¶ 9–10, 12. It therefore would probably be more accurate to say that Customs "invalidated" Plaintiff's "address of record" in its database, after the October 2001 bill was returned to the agency as "undeliverable" in late December of that year.

[27] *See also Atteberry III*, 27 CIT at 1084 (*quoting* Def.'s Letter Memorandum (June 12, 2003) ¶ 23 ("without [a CF 5106 change of address form], no address changes are authorized to be made by Customs in ACS"; "Customs officials had no authority to input an address change into ACS without a CF 5106")).

[28] As indicated in note 24 above, the Government does not claim that Customs stopped sending bills to Plaintiff's "address of record" based on the notation on his December 2001 letter of Protest that he had "No Address at present." The Government thus does not claim that Plaintiff's "address of record" was deleted from the Customs database based on any affirmative authorization from Plaintiff.

this address.' There is no indication in the record who made that notation. Nor is there any indication where the October 2001 bill languished for more than two months." *See Atteberry III*, 27 CIT at 1078 n.25. Moreover, none of the other three bills was ever returned to the agency. *Id*.[29] Customs thus made the decision to delete an importer's "address of record" from its database – without a CF 5106 or any other form of authorization from the importer – based solely on the strength of a *single* envelope, returned *months* later, bearing a *handwritten* notation.

To be sure, as the Government emphasizes, Customs is a "vast and complex" organization confronted with the daunting task of "routinely send[ing] bills, refunds and various notices to *thousands* of importers *daily*." *See* Def.'s Brief at 2; Def.'s Supp. Brief at 10. And it is beyond cavil that "the function of how changes should be made to Customs' database are best handled administratively, . . . rather than judicially." *See* Def.'s Brief at 2, 6.

In any event, as noted above, the issues at the heart of *Atteberry III* are not Customs' billing practices *per se*, but – rather – the closely related questions of what an importer's "address of record" is, and how that address can be changed. To the extent that Customs' billing practices are implicated in that opinion, granting the Government's pending motion will effectively moot the issue.

3. *Concerns About Precedential Effect*

Apart from its concerns about the impact of *Atteberry III* on Customs' day-to-day recordkeeping and billing operations, the Government also expresses concern about the precedential effect of the opinion. According to the Government, it is "highly likely" that the Government would pursue an appeal, if possible, at the conclusion of this case on the merits, "due to the far-reaching effect of the deci-

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[29] The Government indicates that *Atteberry III* requires "Customs to send bills to an importer's address of record after being notified by the post office that the importer is no longer at his address of record." *See* Def.'s Supp. Brief at 10. Those are emphatically not the facts of this case.

As outlined above, the envelope here (which was returned to Customs in late December 2001) was not the subject of any official U.S. Postal Service notice, and it bore no official return labels or stamps. Instead, there was only a handwritten notation: "not @ this address," with no indication who made the notation or where the envelope had been for more than two months (from the time it was mailed till the time it was returned to Customs). *See Atteberry III*, 27 CIT at 1078 & n.25. Nor is there any indication what became of the other three bills that Customs sent, which were never returned to the agency. *Id*.

Atteberry III outlined in some detail the various risks inherent in assuming (as Customs apparently does) that, simply because a single piece of mail is returned as "undeliverable," future mailings to that address will necessarily be futile. *See generally Atteberry III*, 27 CIT at 1082 n.33.

As noted there, "one of the inherent virtues of a regulatory scheme of monthly billing is that, even if one properly-addressed bill is somehow waylaid or lost in the mails, subsequent bills will reach their destination. Thus, in such a scheme, notice is not entirely dependent on one single bill." *Atteberry III*, 27 CIT at 1083 n.33.

sion." *See* Def.'s Brief at 6; *see also* Def.'s Letter Memorandum (Jan. 22, 2004) at 3–4; Def.'s Supp. Brief at 9–10; Def.'s Letter to the Court (May 21, 2004); Def.'s Letter Memorandum (Feb. 2, 2004) at 2.

It remains unclear why the Government finds *Atteberry III* so unsettling. The holding was intentionally drawn to be relatively narrow, and limited to the specific facts of the case – and, as the Government has acknowledged, those facts appear to be unique. *See* Def.'s Supp. Brief at 10. Indeed, the language of the opinion itself emphasizes that it "represents no grand assault on the citadel of sovereign immunity." *Atteberry III*, 27 CIT at 1094. Rather, "[t]he holding . . . is very limited indeed" – *i.e.*, limited to cases where Customs not only (1) "was on actual notice of an importer's current mailing address," and (2) "in fact, used that [current mailing] address to mail its Notice of Denial of Protest to him," but also nevertheless (3) "failed . . . to send the importer even a single bill at that address during the critical 180-day period that followed." *Id*.

The Government has nevertheless voiced fears that *Atteberry III* could prove to be the proverbial "camel's nose under the tent" – that is, that "while the facts of this case appear to be unique, [*Atteberry III*] may be interpreted and cited for the proposition that, contrary to 28 U.S.C. § 2637(a) and the well-established judicial precedent, liquidated duties do not always have to be paid in order to commence a court action under 28 U.S.C. § 1581(a). Plaintiffs may argue that the principles of [*Atteberry III*] apply to other factual scenarios where liquidated duties were not paid for some reason." *See* Def.'s Supp. Brief at 9.[30]

Initially, the Government even forecast a potential "flood[ ]" of "new litigation." *See* Def.'s Letter Memorandum (Jan. 22, 2004) at 4. Fortunately, that dire prediction has not been borne out by time. All signs indicate that the members of the customs and international trade community read the opinion as narrowly as it was written. *Atteberry III* thus has not triggered an avalanche of cases.

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[30] The Government worries that, notwithstanding the unique facts of the case and the narrow holding of the opinion, *Atteberry III* may "undermine[ ] the long-standing and well-established legal principle that the payment of liquidated duties at the time of the commencement of a court action pursuant to 28 U.S.C. § 1581(a) is a condition precedent to invoking the jurisdiction of the Court of International Trade, which has been strictly construed by the courts." *See* Def.'s Supp. Brief at 9 (*citing Glamorise Foundations, Inc. v. United States*, 11 CIT 394, 661 F. Supp. 630 (1987); *Am. Air Parcel Forwarding Co. v. United States*, 6 CIT 146, 573 F. Supp. 117 (1983); *Melco Clothing Co. v. United States*, 16 CIT 889, 804 F. Supp. 369 (1992)).

But *Atteberry III* clearly distinguished this case from the line of cases that the Government cites. *See Atteberry III*, 27 CIT at 1081 & n.32. As *Atteberry III* explained, unlike the case at bar, none of those cases "involved a claim that Customs had failed to notify the importer of the duties and interest owed." *Id*.

4. *Withdrawal of the Motion to Dismiss and Vacatur of Atteberry III*

In short, the Government's concerns about the reach of *Atteberry III* may well be exaggerated. On the other hand, there is more than a kernel of truth in the adage that "hard cases make bad law" – and, in many ways, this is indeed a "hard case," both on the facts and the law.

As the Government aptly observes, "even in a context of continuing disagreement over the relative saliency of the facts, surely it is in the interests of justice for this case to end." *See* Def.'s Brief at 1; *see also* Def.'s Brief at 6 ("At this point, this is not an appeal and we are not asking for a reversal. . . . [W[e believe that it is less important to the fair and efficient resolution of this case that we are right, than the fact that reasonable minds could differ, and that due to the far-reaching effect of [*Atteberry III*], it is highly likely the Government would pursue an appeal."). Particularly in light of the *sui generis* nature of the case and the relatively modest amount in dispute, it makes little sense to require the Government to persevere in this litigation simply to preserve its potential right to appeal *Atteberry III* at some point in the future. And, if the Government's Motion to Dismiss is withdrawn, the grounds for that opinion are obviated.

Plaintiff objects to allowing the Government to withdraw its Motion to Dismiss, and to vacating *Atteberry III*. According to Plaintiff: "They [the Government] have whined insistently about what a burden this ruling will have on Customs and it must be changed. Changing the Ruling would Settle the case in the Government's favor." *See* Pl.'s Supp. Brief at 2. The general thrust of Plaintiff's objection thus appears to be that vacatur of *Atteberry III* will somehow diminish his victory over the Government. *See* Pl.'s Brief at 1 ("All other things my time limits and paying the Cost have been ruled upon. It is now time for Summary Judgment on the part of Plaintiff."). However, as explained elsewhere herein, the result of granting the Government's motion is to award Plaintiff the full measure of relief to which he would be entitled if he were to prevail on every issue at every stage of litigation, and the case went all the way to the U.S. Supreme Court.[31]

Moreover, contrary to Plaintiff's implications, there is there nothing questionable or improper about the Government's proposal. *See, e.g.*, Plaintiff's submission captioned Mailing Address Notice, Phone and Email, Fax (undated, served Jan. 16, 2004) ("[A]s for [*Atteberry III*] being revised, I think this is for the appeal courts, if the Defen-

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[31] In any event, as the Government points out, granting the pending motion will not make *Atteberry III* simply disappear (as Plaintiff seems to fear). Plaintiff will still be able to point to the opinion "on the books." As the Government puts it, "the underlying rationale" of the decision is "still . . . 'out there' as a model, its persuasiveness commensurate with the interest taken in it." *See* Def.'s Brief at 3.

dant doesn't like it. Not to reargue it in front of the Judge cause they don't like it. I've never seen it work that way without someone screaming injustice."). The Government correctly observes that a trial court "always ha[s] the power to modify earlier orders in a pending case." *See* Def.'s Brief at 9 (and cases cited there) (q*uoting, inter alia, Kapco Mfg. Co. v. C&O Enterprises, Inc.*, 773 F.2d 151, 154 (7th Cir. 1985)); *see also* Def.'s Brief at 7 (court "has the inherent power to dismiss, modify or vacate . . . an interlocutory order, prior to the entry of final judgment").

In the circumstances of this case, it is clear that the exercise of the Court's inherent power will serve the interests of justice, and will work to secure "the just, speedy, and inexpensive determination" of this action. *See* USCIT Rule 1. The Government's Motion to Withdraw Defendant's Motion to Dismiss is therefore granted, and *Atteberry III* is vacated.

B. *Amendment of the Answer*

In addition to seeking to withdraw its Motion to Dismiss, the Government also requests leave to amend its Answer to admit that Plaintiff's merchandise is classifiable as entered. *See* Def.'s Brief at 10, 12. Plaintiff opposes the Government's request – apparently because it is conditioned on the granting of the Government's motion to withdraw its Motion to Dismiss and the vacatur of *Atteberry III*. *See* Pl.'s Response to Amended Answer ("Its either amended or its not, Plaintiff won't except [accept] conditions . . . Plaintiff will accept the Defendants admitting that The Karts are as he Claims without conditions.").

Under the Rules of the Court, a party may amend its pleading in the circumstances presented here only with the written consent of the opposing party, or by leave of the Court. However, "leave shall be freely given when justice so requires." USCIT Rule 15(a). As detailed herein, granting the pending motion will afford Plaintiff the full measure of relief to which he could be found entitled in this action, and will further "the just, speedy, and inexpensive determination" of the case, in accordance with the Rules of the Court. *See* USCIT Rule 1.

Justice therefore requires that the Government be granted leave to amend its Answer.

C. *Entry of Judgment on the Pleadings*

The Government's final request for relief seeks the entry of judgment on the pleadings. Pursuant to Rule 12(c) of the Rules of the Court, any party may move for judgment on the pleadings, provided that the pleadings are closed and that the motion will not delay trial. *See* USCIT Rule 12(c). Such a motion is "designed to dispose of cases where the material facts are not in dispute and a judgment on the

merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts." *Forest Labs., Inc. v. United States*, 29 CIT ___ , ___ , 403 F. Supp. 2d 1348, 1349 (2005), *aff'd*, ___ F.3d ___ , 2007 WL 150438 (Fed. Cir. Jan. 23, 2007) (*citing Hebert Abstract Co. v. Touchstone Properties, Ltd.*, 914 F.2d 74, 76 (5th Cir. 1990)). *See generally* 12 James Wm. Moore *et al.*, Moore's Federal Practice § 12.38 (3d ed. 1999).

As the Government points out, however, this is no typical motion for judgment on the pleadings. *See* Def.'s Brief at 11 (contrasting the case at bar with *Chang v. United States*, 859 F.2d 893, 894 (Fed. Cir. 1983)). In the usual case, a defendant seeks judgment dismissing a plaintiff's complaint because there is no state of facts that plaintiff could prove that would entitle him to relief. Thus, in general, entry of judgment on the pleadings is limited to situations "where 'it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of his claims.' " *Owen v. United States*, 851 F.2d 1404, 1407 (Fed. Cir. 1988) (citations omitted).

In contrast to the conventional case, the Government here seeks to have judgment entered *against Defendant* and *in favor of Plaintiff*, granting Plaintiff all relief to which he is legally entitled under his Complaint. *See* Def.'s Brief at 11. But Plaintiff opposes the entry of judgment in its favor, and seeks trial (or summary judgment) instead. *See* Pl.'s Brief at 1 (Plaintiff is entitled to ruling either through trial or Summary Judgment . . . Defendants know that they will lose the classification issue. And they want to Cut Their [losses].").

Apparently, Plaintiff is resisting the Government's offer of judgment on the pleadings and insisting on his "day in court" because he believes that a decision on the merits of his classification claim will serve as *res judicata* as to future imports. *See* Pl.'s Brief at 1 ("Plaintiff wants a ruling from the Court finding that the Karts are Classified at the time of import. As it sets Plaintiff on equal footing when Plaintiff imports the Karts again. Plaintiff wants a ruling on the Classification issue . . . ").[32]

Even if this case were to be decided on the merits, and even if Plaintiff prevailed (both here and on appeal), the relief that Plaintiff seeks would elude him. As discussed in the Court's March 18, 2004 teleconference with the parties (and as summarized in Defendant's Letter Memorandum of January 22, 2004), the Supreme Court has held that, in customs classification cases, a determination of fact or

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[32] *See also* Pl.'s Letter Memorandum (Dec. 16, 2003) (noting that one of the two significant issues frustrating settlement discussions is "the extent of the Court's powers regarding classification for future importations"); Def.'s Letter Memorandum (Jan. 9, 2004) (noting parties' disagreement as to "the extent of the Court's power to effect classification for future importations of substantially similar merchandise").

law with respect to one importation is "not *res judicata* in respect of a subsequent importation involving the same issue of fact and the same question of law." *United States v. Stone & Downer Co.*, 274 U.S. 225, 233–37 (1927). *See also Avenues in Leather, Inc. v. United States*, 317 F.3d 1399 (Fed. Cir. 2003); *3V, Inc. v. United States*, 23 CIT 1047, 83 F. Supp. 2d 1351 (1999); *cf. Daimler Chrysler Corp. v. United States*, 442 F.3d 1313, 1321 (Fed. Cir. 2006); *Avenues in Leather, Inc. v. United States*, 423 F.3d 1326, 1330–31 (Fed. Cir. 2005); *Outlet Book Co. v. United States*, 14 CIT 458, 465, 743 F. Supp. 881, 888 (1990); *Schott Optical Glass, Inc. v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984). *See generally* Def.'s Letter Memorandum (Jan. 22, 2004) at 1–2.

The effect of the admissions in Defendant's Amended Answer, together with its Motion for Judgment on the Pleadings in favor of Plaintiff, thus is to grant Plaintiff all the relief to which he could be legally entitled – classification (and reliquidation) of his merchandise, duty-free, as it was entered. Plaintiff has nothing more to gain (and, indeed, potentially much to lose) by proceeding with litigation.

Deposit Guaranty National Bank v. Roper, 445 U.S. 326 (1980), presented the question whether a plaintiff who is offered all the relief he demands may refuse that offer and insist on a trial instead. The answer is no. According to *Roper*, a party "who receives all that he has sought generally is not aggrieved by the judgment affording that relief and cannot appeal from it." *Roper*, 445 U.S. at 333. Indeed, the Court suggested that the same principle would likely apply to a plaintiff who was offered all he sought before trial. *See also 3V, Inc. v. United States*, 23 CIT 1047, 83 F. Supp. 2d 1351.[33]

Where – as here – the Government is willing to provide all the relief legally available to Plaintiff by reliquidating Plaintiff's merchandise as entered, duty-free, there is no longer a case or controversy between the parties, and the Government's Motion for Judgment on the Pleadings in favor of Plaintiff must be granted.

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[33] In *3V, Inc*, the plaintiff challenged Customs' classification of its imported merchandise in one duty-free provision of the HTSUS, arguing that the merchandise was properly classifiable in another duty-free provision. The court granted the Government's motion to dismiss the action for lack of a justiciable controversy, holding that it did not present a live case or controversy as required by Article III of the U.S. Constitution. *3V, Inc. v. United States*, 23 CIT at 1049, 83 F. Supp. 2d at 1353. The court there explained:

> The only possible interest Plaintiff has is in the effect of a classification determination on future cases. . . . [D]eclaratory relief sought to affect the outcome of future entries is not available for § 1581(a) classification cases.

3V, Inc., 23 CIT at 1050, 83 F. Supp. 2d at 1353 (citation omitted). The court concluded that – because neither party had an interest or stake in the outcome of the case – the classification decision was moot. 23 CIT at 1049, 83 F. Supp. 2d at 1353. *See also Vanderhoof Specialty Wood Prods., Inc. v. United States*, 28 CIT ____ , ____ , 2004 WL 483164 at * 2 (and cases cited there) (2004).

III. *Conclusion*

For all the reasons set forth above, Defendant's Motion to Withdraw Its Motion to Dismiss, To Amend Its Answer, and For Judgment on the Pleadings in favor of Plaintiff must be granted. Judgment will enter accordingly.

DANIEL ATTEBERRY, *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 02–00647

JUDGMENT

In accordance with Slip Opinion 07–13 issued this date in this matter,

NOW, therefore, in conformity with said decision, it is hereby

ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Withdraw Its Motion to Dismiss is granted; and it is further

ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Dismiss Plaintiff's Action for Lack of Subject Matter Jurisdiction (dated February 14, 2003) is deemed withdrawn as of this date; and it is further

ORDERED, ADJUDGED, and DECREED that *Atteberry v. United States*, 27 CIT 1070 (2003) is vacated; and it is further

ORDERED, ADJUDGED, and DECREED that Defendant's Motion to Amend its Answer, to admit therein the implied allegation in Plaintiff's Complaint (Plaintiff's letter to the Court of October 3, 2002) that the imported merchandise at issue in this action is classifiable as entered by Plaintiff, and to deny all other allegations in the Complaint or to deny having knowledge or information sufficient to form a belief as to the truth of those allegations, is granted; and it is further

ORDERED, ADJUDGED, and DECREED that Defendant's Amended Answer is deemed filed as of this date; and it is further

ORDERED, ADJUDGED, and DECREED that Defendant's Motion for Judgment on the Pleadings against Defendant and in favor of Plaintiff pursuant to the admissions in the Amended Answer is granted; and it is further

ORDERED, ADJUDGED, and DECREED that, in accordance with Defendant's Amended Answer and its Motion for Judgment on the Pleadings in favor of Plaintiff, the imported merchandise covered by Entry No. 603–1048306–4 made at the Port of Seattle, Washington, on or about May 23 or May 24, 2001, shall be classified as entered by Plaintiff; and it is further

ORDERED, ADJUDGED, and DECREED that the Bureau of Customs and Border Protection of the U.S. Department of Homeland Se-

curity shall reliquidate Entry No. 603–1048306–4 as entered by Plaintiff Daniel Atteberry, and shall refund to Plaintiff any excess duties paid, together with interest thereon as provided by law.

Slip Op. 07–14

TARGET STORES, DIV. OF TARGET CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court No.: 03–00932

[Defendant's Motion for Rehearing, Modification, and/or Reconsideration is DENIED.]

Dated: January 26, 2007

Neville Peterson, LLP, (*Margaret R. Polito*), for Plaintiff Target Stores, Div. of Target Corporation.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, U.S. Department of Justice, Civil Division, Commercial Litigation Branch, International Trade Field Office (*Marcella Powell*); and *Beth Brotman*, U.S. Customs and Border Protection, International Trade Litigation, Office of Assistant Chief Counsel, of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I
Introduction

Defendant United States moves for reconsideration of this court's Amended Order in *Target Stores, Div. of Target Corp. v. United States*, Court No. 03–00932 (CIT August 28, 2006) ("Order"), denying both Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, and directing the parties to prepare for a trial on the merits.

Defendant requests that the court grant its Motion for Rehearing, Modification, and/or Reconsideration ("Defendant's Motion") and its Cross-Motion for Summary Judgment ("Cross-Motion"), thereby sustaining U.S. Customs and Border Protection's ("Customs") decision to use the price paid by the importer, and the assessment of duty thereunder, as the appraisement value of the subject merchandise. The court denies Defendant's request for reconsideration because the Government has not raised any new matters in its Motion, and this case cannot be decided on a burden of proof argument because there

is a genuine issue of material fact for trial. Accordingly, the court directs the parties to prepare for trial on the merits.

II
Background

In 2006, the parties submitted cross-motions for summary judgment to the court concerning the proper appraisement value of shoes imported by Target Stores, Div. of Target Corporation ("Target") into the United States. Upon importation, Customs valued the subject merchandise based on the price the importer, Target, paid to the middleman, Kenth, Ltd. ("Kenth"), the wholly owned subsidiary of Kenneth Cole Productions, Inc. ("Kenneth Cole"). In its Motion for Summary Judgment, Plaintiff contested Customs' decision to use this price as the transaction value for the basis of appraisement, arguing that the proper transaction value was the price paid by Kenth from the First Seller (an unrelated Taiwanese company) because that transaction constituted a bona fide sale for export to the United States, pursuant to 19 U.S.C. § 1401a(b)(1)[1] and *Nissho Iwai American Corp. v. United States*, 982 F.2d 505 (Fed. Cir. 1992).

The court issued an Amended Order on August 28, 2006, denying both parties' motions and directing them to prepare for trial on the merits. Thereafter, Defendant filed its motion for reconsideration of the court's Order, essentially arguing that because Plaintiff failed to satisfy its burden of proof, summary judgment in Defendant's favor is proper.

III
Standard of Review

USCIT R. 59(a)(2) permits a rehearing for any of the reasons for which rehearings have been granted in suits in equity in United States courts. In deciding whether to grant or deny a motion for rehearing, the court may use its discretion. *Xerox Corp. v. United States*, 20 CIT 823, 823 (1996). The purpose of a rehearing is not relitigate the merits of the case. *Intercargo Ins. Co. v. United States*, 20 CIT 951, 952, 936 F. Supp. 1049 (1996). A court will grant a rehearing only in limited circumstances, including 1) an error or irregularity, 2) a serious evidentiary flaw, 3) the discovery of new evidence which even a diligent party could not have discovered in time, or 4) an accident, unpredictable surprise or unavoidable mistake which impaired a party's ability to adequately present its case. *Kerr-McGee Chem. Corp. v. United States*, 14 CIT 582, 583 (1990).

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[1] The statute that governs the valuation of imported merchandise for purposes of appraisal by Customs is 19 U.S.C. § 1401a.

IV
Defendant's Arguments in its Motion for Reconsideration

Defendant argues that reconsideration is necessary to correct clear error in the court's prior Amended Order. Defendant's Motion at 2 (citing *Sierra Club v. Chem. Handling Corp.*, 824 F. Supp. 195, 196 (D.Colo. 1993)). Specifically, Defendant claims that the court's Order incorrectly found the Government had a burden of proof. Defendant's Motion at 2. Defendant cites to a heading in the court's Order as support for its argument that judgment for the Government is proper, referencing the heading entitled "Neither Plaintiff nor Defendant Has Adequately Borne the Burden of Proof to Warrant Granting Its Respective Motion for Summary Judgment." Defendant's Motion at 9. However, as this court previously stated in *NSK Ltd. v. United States*, Slip Op. 06–157 n. 1, 2006 Ct. Int'l Trade LEXIS 164 (CIT October 23, 2006), a section heading within a court order is not authority of any sort. Specifically,

> [N]o heading within an opinion may be interpreted in a vacuum. Dicta are '[w]ords of an opinion entirely unnecessary for the decision of the case.' Black's Law Dictionary 1072 (6th ed. 1990). . . . [T]he headings demarcating separate sections within an opinion are dicta and not binding under the doctrine of *stare decisis*. Dictum is not part of the holding of a decision, and is not binding on courts that are obligated to follow the precedent decision. *See e.g.*, *Dow Jones & Co. Inc. v. Department of Justice*, 908 F.2d 1006, 1011 n.4 (D.C. Cir. 1990) (dictum is not binding); *Cf. Bhd. of R.R. Trainmen v. Balt. & O.R. Co. et al.*, 331 U.S. 519, 528–29, 67 S. Ct. 1387, 91 L. Ed. 1646 (1947) ('[h]eadings and titles are not meant to take the place of the detailed provisions of the text . . . the title of a statute and the heading of a section cannot limit the plain meaning of the text.'). '[This is] a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.' C*ohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400, 5 L. Ed. 257 (1821).

NSK Ltd. v. United States, Slip Op. 06–157, 2006 Ct. Int'l Trade LEXIS 164, *10, n.1. Similarly, the court has made no findings in its headings here and the substance of the Order must be read to learn its meaning.

Defendant further argues that it demonstrated in its Cross-Motion for Summary Judgment that Target alone had the burden of proof to show that its "alternative valuation theory" was correct because the Government may "simply . . . rely on [its] presumption of correctness." Defendant's Motion at 3. Customs' valuation of the subject merchandise must be affirmed as a matter of law, Defendant insists, because Target failed to carry its burden since it has not submitted documentation concerning transactions between the manufacturer

and the First Seller, as well as information regarding formation of a contract between Kenth and the First Seller. *Id.* at 3. Therefore, the Government alleges that the only dispute is the "legal issue" as to whether Target's evidence is sufficient. *Id.* at 4.

Defendant also argues that language in the court's Order stating that "a factual dispute [exists] as to the basis for Customs' valuation for Target's imported footwear" reflects material errors because 1) of the presumption of correctness afforded Customs, 2) the Government bears no burden of proof in this action, 3) there are no disputed factual issues, 4) the parties' disagreement about the legal sufficiency of Target's evidence does not create a factual dispute, and 5) the basis for Customs' valuation of Target's goods has never been at issue.[2] *Id.* In its reconsideration motion, the Government cites *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359 (Fed. Cir. 2006) and *Celotex Corp v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), at length in support of its argument that the Government's decisions are presumed correct, which places the burden of proof on the moving party.

Plaintiff counters that Defendant does not enjoy any presumption of correctness because the dispute is legal, or in the alternative, such a presumption has been rebutted by the evidence it has presented. Plaintiff's Response in Opposition to Defendant's Motion for Rehearing ("Plaintiff's Response") at 1–2. Plaintiff further states that it is ready for trial. *Id.* Plaintiff also argues that contrary to Defendant's contention, Plaintiff need not prove Customs' valuation is not viable. *Id.* at 5.

The Government's burden of proof argument alone does not entitle it to judgment as a matter of law. Defendant's interpretation of *Saab* is correct that when a moving party's evidentiary showing fails to meet the preponderance of the evidence standard, the non-moving party is not required to submit opposing evidence. *Saab*, 434 F.3d at 1369. However, in its Order, this court did not conclude that Plaintiff's evidentiary showing was inadequate to demonstrate that it should prevail as a matter of law. Rather, the court directed the parties to prepare for trial, as it does again now, to resolve the material issue of fact regarding whether Plaintiff can establish by a preponderance of the evidence that its proffered transaction value is correct. And while Defendant alleges that Plaintiff must submit "purchase orders, contracts, or other written communication," Memorandum in Support of Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motion for Summary Judgment at 3, to demonstrate its proffered appraisement value is correct, Plaintiff accurately points out that "Customs' statutes and regulations do not require an importer to prove its case by submit-

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[2] The court acknowledges its typographical error on page 1 of its Amended Order, in which it summarized Customs' position, but incorrectly labeled it as Target's argument.

ting specific documentation." Plaintiff's Response at 4 (quoting *Merck, Sharp & Dohme Int'l v. United States*, 20 CIT 137, 139, 915 F. Supp. 405 (1996)).

The Supreme Court in *Celotex* also explained that *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970), should not be construed to impose an additional burden on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, or to negate the non-moving party's claim. *Celotex*, 477 U.S. at 323. In addition, the Supreme Court discussed, as Defendant cites in its Motion for Reconsideration, that one of the principal purposes of summary judgment is to dispose of factually unsupported claims or defenses. *Id.* 477 U.S. at 327. However, when there is a genuine issue of material fact, summary judgment is improper. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Further,

> [it] is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Id. at 250 (quoting *First National Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288–89, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968).

Further, Defendant's argument concerning the presumption of correctness accorded to Customs is incorrect. According to clear Federal Circuit precedent, no presumption exists when there is a legal issue; the presumption exists only when there is a factual issue. The proper appraisement value, or transaction value which must be used pursuant to the statute is a legal issue, as determined by § 1401a(b)(1), *Nissho Iwai*, and *E.C. McAfee Co. v. United States*, 842 F.2d 314 (Fed. Cir. 1988). *The factual issue, which still must be addressed at a trial, is whether Plaintiff's evidence supports its contention that the price between the First Seller and Kenth is the proper transaction value under the statute.* The Federal Circuit has illuminated this area of the law in a few cases directly on point. In *Nissho Iwai*, the Federal Circuit held that in a three-tiered transaction in which both the manufacturer's price and the middleman's price *may* serve as the basis for transaction value, only one price is legally proper. *Nissho Iwai*, 982 F.2d at 510; *see McAfee*, 842 F.2d 314; *see* § 1401a(b)(1). The court based its decision on the Federal Circuit's decision concerning a similar situation in *McAfee*, stating, "[t]hat case is not only applicable here, it is dispositive." *Nissho Iwai*, 982 F.2d at 511. Accordingly, it is the duty of this court to find the correct result by making the necessary findings of fact at a trial. *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

> The purpose of a petition for rehearing under the Rules is:
>
> to direct the Court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result.

Agro Dutch Industries Limited v. United States, Slip Op. 05–28, 2005 Ct. Int'l Trade LEXIS 30, *3 (CIT February 28, 2005), *rev'd on other grounds*, 2006 U.S. App. LEXIS 3552 (Fed. Cir. February 10, 2006). In its Motion, the Government has not raised any new matters. The matters having been considered before by the court, and pursuant to authority, Defendant's Motion is denied on these grounds.

V
Conclusion

Defendant's Motion for Reconsideration is denied because there is a genuine issue of fact for trial. The parties are hereby directed to prepare for trial on the merits.

Slip Op. 07–15

ZHEJIANG MACHINERY IMPORT & EXPORT CORP., *Plaintiff*, v. UNITED STATES, *Defendant*, and THE TIMKEN COMPANY, *Defendant-Intervenor*.

Court No. 02–00792

[Plaintiff's Motion for Judgment on the Agency Record is denied; U.S. Department of Commerce's Final Results of Redetermination Pursuant to Remand are sustained.]

Decided: January 29, 2007

Hume & Associates PC (*Robert T. Hume* and *Stephen M. De Luca*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Jeanne E. Davidson*, Deputy Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Claudia Burke* and *Stefan Shaibani*); *Hardeep Josan* and *Amanda L. Blaurock*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Stewart and Stewart (*Terence P. Stewart* and *Wesley K. Caine*), for Defendant-Intervenor.

OPINION

RIDGWAY, Judge:

In this action, Plaintiff Zhejiang Machinery Import & Export Corporation ("ZMC"), a Chinese exporter of tapered roller bearings

("TRBs"), contests the Final Results of Redetermination Pursuant to Remand in the U.S. Department of Commerce's 14th administrative review of the antidumping duty order on TRBs from China ("TRB XIV").[1] ZMC challenges both the Commerce Department's "subsidy suspicion" policy in general, and its application to ZMC in the administrative review at issue. Pursuant to that policy, the agency calculated ZMC's dumping margin using surrogate prices for steel inputs, rather than the actual prices that ZMC paid to its supplier, which is located in a market economy country. *See* Memorandum of Points and Authorities in Support of Motion of Plaintiff Zhejiang Machinery Import & Export Corp. for Judgment on the Agency Record ("Pl.'s Brief") at 5–6; Comments of Plaintiff on Final Results Pursuant to Remand ("Pl.'s Remand Comments") at 14–15.

Pending before the Court is Plaintiff's Motion for Judgment on the Agency Record, in which ZMC urges that this matter be remanded to the agency with instructions to recalculate ZMC's dumping margin using the actual prices that ZMC paid its market-economy steel supplier. *See generally* Pl.'s Brief; Pl.'s Remand Comments; Plaintiff's Comments on Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Pl.'s Reply Brief"); Plaintiff's Supplemental Brief ("Pl.'s Supp. Brief").

ZMC's motion is opposed by the Government and by Defendant-Intervenor, The Timken Company, who maintain that the Commerce Department's determination is supported by substantial evidence and is otherwise in accordance with law, and therefore should be sustained in all respects. *See generally* Defendant's Memorandum in Opposition to Plaintiff's Rule 56.2 Motion for Judgment Upon the Agency Record ("Def.'s Brief"); Defendant's Supplemental Brief ("Def.'s Supp. Brief"); Opposition of the Timken Company, Defendant-Intervenor, to the Motion of Zhejiang Machinery Import & Export Corp., Plaintiff, for Judgment upon the Agency Record ("Def.-Int.'s Brief"); The Timken Company's Supplemental Brief ("Def.-Int.'s Supp. Brief").

Jurisdiction lies under 28 U.S.C. § 1581(c) (2000).[2] For the reasons set forth below, ZMC's Motion for Judgment on the Agency

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[1] *See* Final Results of Redetermination Pursuant to Remand ("Remand Results"); *see also* Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2000–2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part, 67 Fed. Reg. 68,990 (Nov. 6, 2002) ("Final Results"); Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Amended Final Results of 2000–2001 Administrative Review, 67 Fed. Reg. 72,149 (Dec. 4, 2002).

[2] All statutory citations herein are to the 2000 edition of the U.S. Code.

Similarly, all citations to regulations are to the 2001 edition of the Code of Federal Regulations. The pertinent text of the provision cited remained the same at all times relevant here.

Record is denied, and the Final Results of Redetermination Pursuant to Remand are sustained.

I. *Background*

This case involves the 14th administrative review of the antidumping order covering TRBs from China ("TRBs XIV"),[3] in which the Department of Commerce reviewed, *inter alia*, ZMC's sale of TRBs for export to the United States. *See* Pl.'s Brief at 4.

In the administrative review, Commerce treated China as a nonmarket economy ("NME"),[4] and selected India as its surrogate market-economy country.[5] *See* Pl.'s Brief at 9; Def.'s Brief at 3; Def.-Int.'s Brief at 4–5. No party objected to Commerce's choice of India as the surrogate.

In the course of the proceedings, ZMC informed Commerce that it had purchased certain steel inputs at market price from a company located in a market economy. *See* Pl.'s Brief at 3–4; Def.-Int.'s Brief at 5. However, when Commerce issued its preliminary results, it used surrogate data, rather than the market-price-steel-input data provided by ZMC. Commerce justified its rejection of ZMC's market prices based on the agency's "subsidy suspicion policy," finding that there was "reason to believe or suspect" that the prices for the input in question may have been subsidized. *See* Pl.'s Brief at 4–5; Def.'s Brief at 4–6; Def.-Int.'s Brief at 8. Although ZMC objected to the use of surrogate prices in lieu of the market prices paid the inputs in question, Commerce made no change in the Final Results. *See* Pl.'s Brief at 4; Final Results; Def.'s Brief at 4–6.[6]

ZMC timely filed this action in the Court "challenging Commerce's determination to reject actual market-economy prices for steel used to make TRBs." Pl.'s Brief at 5; Complaint ¶6. In light of developments in litigation involving the 13th administrative review of TRBs from China ("TRBs XIII"), the Government sought – and the Court granted – a voluntary remand to allow agency "to provide a more thorough explanation of its determination" in the proceeding at issue here. Following the filing of Commerce's Remand Results, and full briefing by the parties, this matter is ripe for review.

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[3] Commerce's antidumping order on TRBs from China dates back to 1987. *See* Tapered Roller Bearings from the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 52 Fed. Reg. 19,748 (May 27, 1987). The 14th administrative review covers sales from June 1, 2000 through May 31, 2001. *See* Final Results.

[4] A NME country is "any foreign country that [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (1999).

[5] The statute directs Commerce on how to determine NV for a NME country. *See* 19 U.S.C. § 1677b(c). As part of this process Commerce selects an appropriate surrogate country to aid it in calculating NV. *Id.*

[6] The Final Results were subsequently amended to correct ministerial errors. However, those changes are irrelevant here.

II. *Analysis*

ZMC advances two primary claims in this action. ZMC first mounts a full frontal attack on the Commerce Department's "subsidy suspicion" policy, alleging that it is inconsistent with the applicable statute and regulation. In addition to that challenge to the policy in principle, ZMC also disputes Commerce's application of the policy to the facts of this case. Specifically, ZMC contends that Commerce erred in rejecting the prices it paid to its market economy supplier of steel. In addition to its two main issues, ZMC also raises a handful of other arguments. As discussed in greater detail below, however, ZMC's claims are unavailing.

A. *The Policy's Consistency With The Applicable Statute and Regulations*

The antidumping statute requires Commerce to use "the best available information" on the values for factors of production from a market economy in calculating the Normal Value ("NV") for products exported from an NME country. 19 U.S.C. § 1677b(c)(1). ZMC contends that the statutory mandate to use the best available information requires the agency to value factors of production using actual prices paid to market economy suppliers, whenever available. *See generally* Pl.'s Brief at 8–10.

To support its position, ZMC invokes *Lasko*, which concluded that – where it can be determined that an NME producer's input prices are market determined – "accuracy, fairness, and predictability are enhanced by using those prices. Therefore, using surrogate values when market-based values are available would, in fact, be contrary to the intent of the law." *See* Pl.'s Brief at 11 (*quoting Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994)). ZMC's reliance on *Lasko* is misplaced.

Contrary to ZMC's implication, *Lasko* does not mandate the use of market prices. Instead, it simply sustained Commerce's use of market prices under the specific circumstances of that case, where the agency found market prices to be the best available information. As *Lasko* emphasized, Commerce's overarching duty under the antidumping statute is "to determine margins as accurately as possible, and to use the best information available to it in doing so." *Lasko*, 43 F.3d at 1443. The statute "simply does not say – anywhere – that the factors of production must be ascertained in a single fashion." *Lasko*, 43 F.3d at 1446. *See generally* Def.'s Brief at 10–12; Def.-Int.'s Brief at 5–7, 16–18.

In short, nothing about Commerce's subsidy suspicion policy is inherently incompatible with the antidumping statute. Indeed, the policy is designed to further the purposes of the statute, by ascertaining dumping margins as accurately as possible. *See generally Luoyang Bearing Corp., et al v. United States*, 28 CIT ___, ___,

2004 WL 1146101 *10–11 (2004); *Fuyao Glass Indus. Group Co., et al. v United States*, 27 CIT 1892,1901 (2003) ("*Fuyao I*"); *Peer Bearing Co.-Changshan v. United States*, 27 CIT 1763, 1769–71, 298 F. Supp. 2d 1328,1334–36 (2003); *China Nat'l Mach. Import & Export Co. v. United States*, 27 CIT 255, 261–63, 264 F. Supp. 2d 1229,1236 (2003) ("*China Nat'l I*") (all rejecting argument that subsidy suspicion policy is inconsistent with statute).

ZMC also contends that the Commerce Department's subsidy suspicion policy contravenes the agency's own regulations, which – according to ZMC – compel the use of actual market prices over surrogate values. ZMC points to 19 C.F.R. § 351.408(c)(1), which provides that "where a factor is purchased from a market economy supplier and paid for in a market economy currency, [the Commerce Department] normally will use the price paid to the market economy supplier." *See* Pl.'s Brief at 9–10.

The language of § 351.408(c)(1) itself refutes ZMC's claim. The regulation merely states a general rule; the word "normally" hedges the text, and indicates that there are exceptions to the general principle set forth there. In effect, ZMC would read the word "normally" right out of the text. *See generally* Def.'s Brief at 17–21; Def.-Int's Brief at 17. Thus, as other "subsidy suspicion" cases have confirmed, nothing about the subsidy suspicion policy conflicts with § 351.408(c)(1). *See generally China Nat'l I*, 27 CIT at 264–65, 264 F. Supp. 2d at 1237; *Peer Bearing*, 27 CIT 1769–71, 298 F. Supp. 2d at 1334–36 (all rejecting argument that subsidy suspicion policy conflicts with regulation).

Indeed, Commerce forged its subsidy suspicion policy as an exception to (or a departure from) the "normal" rule set forth in § 351.408(c)(1), for the express purpose of conforming to Congressional intent as reflected in the legislative history of the antidumping statute. Specifically, the legislative history of 19 U.S.C. § 1677b(c) directs the Commerce Department to avoid using – in its NME "normal value" calculations – "any prices" which the agency "has reason to believe or suspect may be dumped or subsidized prices." *See* H.R. Rep. 100–576, Vol. 4, at 590–91 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1623–24 ("Conference Report"). *See generally* Def.'s Brief at 15–16; Def.-Int's Brief at 17–18.

ZMC takes strong exception to Commerce's reliance on the Conference Report. ZMC correctly notes that, read in context, the quoted language refers to the use of surrogate values to determine NV in the NME context, and does not address the selection of surrogate values over market prices. *See* Pl.'s Brief at 20–21. As *Fuyao* I notes, however, that "does not, in turn, mean that Congress's *instructions* . . . cannot be used by Commerce when constructing its methodology with respect to market economy purchases. . . . Commerce is fully justified in relying on those instructions to establish the reasonableness of its methodology in an NME situation." *Fuyao*

I, 27 CIT at 1900 (rejecting same argument advanced by ZMC here). "[T]he use of suspect prices to calculate NV, even when paid to a market-economy supplier, would be contrary to Congress' intent." *Peer Bearing*, 27 CIT at 1769, 298 F. Supp. 2d at 1334. *See also China Nat'l I*, 27 CIT at 265, 264 F. Supp. 2d at 1237–38; *Fuyao I*, 27 CIT at 1899–1901 (all recognizing Conference Report as justification for subsidy suspicion policy).

B. *The Application of the Policy to the Facts of This Case*

Besides challenging Commerce's subsidy suspicion challenge in principle, ZMC also contests the application of the policy to ZMC in the administrative review at issue here. *See generally* Pl.'s Brief at 1–2; *see also* Pl's Brief at 16–19; Pl.'s Remand Comments at 3; Pl.'s Reply at 4–7.

Contrary to ZMC's claims, however, there is ample record evidence to support Commerce's conclusion that there is "reason to believe or suspect that ZMC's supplier may have benefitted" from subsidies, as set forth more fully below. *See* Remand Results at 15; *see generally* Def.'s Brief at 26–36; Def.-Int.'s Brief at 19–25.

Commerce based its conclusion principally on its analyses of a number of recent countervailing duty cases in which it investigated a wide variety of steel products produced in the country where ZMC's supplier is located. *See* Remand Results at 5–6 (listing subsidy programs).[7] Commerce's analyses of those cases ("the 1999–

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[7] In addition to the records of the various countervailing duty cases, Commerce also relied on the so-called "Market Economy Steel Memo" (dated November 6, 2002), a January 2001 memorandum on Allegations of Unfair Steel Prices, and a February 2002 Office of Policy Memorandum. *See* Remand Results at 9–10 & n14 & App. I.

The Market Economy Steel Memo simply transmits into the record of this case the memo on Allegations of Unfair Steel Prices. That memo, in turn, reflects an analysis of subsidies provided by the government at issue to producers of certain steel products in that country, prepared by Commerce in the course of the TRBs XII proceeding. The memo summarizes Commerce's rationale for its conclusion that some of the determinations may have greater implications, providing reason to believe or suspect that the government subsidizes steel products in addition to those expressly covered by the determinations:

> Although the most recent findings do not cover the specific products we need to value, these findings may have broader implications for steel products produced in [the country in question], as discussed in the Issues and Decision Memo in this review. . . .
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> * * * *
>
> The subsidies investigated in these three cases can be divided into two groups: general subsidies that appear to be available to and used by more than one steel producer and company-specific subsidies. . . .

Referring to the subsidies generally available to steel producers, the memo continues:

> Because these subsidies do not appear to be company-specific and because they have been calculated using recent information, we recommend finding that there is reason to believe or suspect that the prices for steel produced by [a certain producer] are subsidized.

Memorandum on Allegations of Unfair Steel Prices. Commerce followed the memo's recom-

2002 cases") determined that the government in question maintains a range of both (steel) industry-specific subsidy programs and non-industry specific export subsidy programs. *See* Remand Results at 6–7, 10–13.[8] Commerce further determined that both the industry-specific subsidy programs and the export subsidy programs were in fact actually being used by steel producers, and were available to all in the industry. *See* Remand Results at 11.[9] Thus, the programs were not limited to certain steel companies, or to particular types of steel. *See* Remand Results at 11–12. And Commerce found no record evidence from which it might infer that ZMC's supplier would not be eligible to participate in the various subsidy programs. *See* Remand Results at 13.

Based on its analyses of both the various industry-specific programs and the various export subsidy programs, Commerce found that ZMC's supplier had a range of subsidies available to it, and that there were a number of them from which the supplier – as an exporter and as a member of the subsidized industry – could have benefitted. *See* Remand Results at 7–8.

Moreover, based on its review, Commerce found it reasonable to infer that "a market company operating under normal market principles would take advantage of those benefits," and further, that "given the competitive environment in which ZMC's supplier operates, it is reasonable to infer that it would have taken advantage of these programs." *See* Remand Results at 8, 12. Certainly there is no affirmative evidence in the record to establish that ZMC's supplier did not avail itself of any of the various subsidies.

As Timken observes, the record in this proceeding "contain[s] much of the same evidence" included in the record in TRBs XIII. *See*

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mendation in TRBs XII, and relied on it once again in TRBs XIII. *See* Def.-Int.'s Brief at 20–21; *China Nat'l Mach. Import & Export Corp. v. United States*, 27 CIT1553, 1555, 293 F. Supp. 2d 1334, 1336–37 (2003) ("*China Nat'l II*"), *aff'd*, 104 Fed. Appx. 183 (not cited for precedent) (noting Commerce's reliance on Market Economy Steel Memo/Memo on Allegations of Unfair Steel Prices in TRBs XIII). Commerce's analysis in the case at bar included two additional CVD cases published since the Market Economy Steel Memo. *See* Remand Results at 10.

The more recent Office of Policy Memorandum advises that, for all non-market economy investigations, factor input prices from three countries (including the country in which ZMC's supplier is located) should be disregarded – whether they are market economy purchases or import statistics into the surrogate country – due to the fact that those countries maintain broadly available, non-industry specific export subsidies. *See* Remand Results at 9–10 & App. I; *China Nat'l II*, 27 CIT at 1555, 293 F. Supp. 2d at 1336, *aff'd*, 104 Fed. Appx. 183 (not cited for precedent) (noting Commerce's reliance on Office of Policy Memorandum, post-remand, in TRBs XIII).

[8] In its analysis, Commerce specifically excluded all company-specific and regional subsidy programs. *See* Remand Results at 11–12.

[9] Indeed, Commerce found that the export subsidy programs at issue were "broadly available and not industry specific" nor limited to particular types of merchandise, but were instead "contingent on a company's export performance." *See* Remand Results at 11–13.

Def.-Int.'s Brief at 24–25. ZMC offers no sound reason why the same result should not obtain here:

> Commerce's actions [in rejecting ZMC's price data in favor of surrogate values] are reasonable because a company like [ZMC's] supplier may have benefitted from a generally available subsidy program given the competitive nature of the industry and by virtue of having engaged in foreign trade. Commerce specifically found that such . . . program[s] existed and companies like [ZMC's] supplier did indeed utilize the program[s]. Given the level of deference owed to the agency and the low threshold established by the "reason to believe or suspect standard," . . . [Commerce's Remand Results must be sustained].

See China Nat'l II, 27 CIT at 1558–59, 293 F. Supp. 2d at 1339, *aff'd*, 104 Fed. Appx. 183 (not cited for precedent) (sustaining Commerce's application of subsidy suspicion policy in TRBs XIII); *see also Peer Bearing*, 27 CIT at 1771–73, 298 F. Supp. 2d at 1336–38 (sustaining agency's application of subsidy suspicion policy in TRBs New Shipper Review for 2000–2001); *Luoyang*, 28 CIT ___ , 2004 WL 1146101 at *12 (sustaining agency's application of subsidy suspicion policy in TRBs XII).[10]

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[10] In *Fuyao II*, the court advanced a three-prong test for Commerce's invocation of the subsidy suspicion policy. Specifically, *Fuyao II* would require that the agency "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." *See Fuyao Glass Indus. Group Co., et al. v. United States*, 29 CIT ____ , 2005 WL 280437 *4 (2005) ("*Fuyao II*").

In its supplemental brief in this action, ZMC seeks to apply the *Fuyao II* test to the record here. *See generally* Pl.'s Supp. Brief at 5–8. As a threshold matter, *Fuyao II* postdates the close of the record in this action. Commerce therefore had no opportunity to develop and frame the evidence in the record of this case in terms of the three prongs of the *Fuyao II* test. It is similarly noteworthy that the test has generated some controversy, which has yet to be resolved. *See generally Fuyao Glass Indus. Group Co., et al. v. United States*, 30 CIT ____ , 2006 WL 345004 ("*Fuyao III*").

Most important here, however, is the fact that ZMC never objected to Commerce's analysis in this case on the grounds reflected in the *Fuyao II* test – either at the administrative level or in this litigation – until ZMC filed supplemental brief. In particular, for example, although ZMC had previously argued that certain subsidy programs had been terminated (and therefore should not be relied upon by Commerce), ZMC had never before argued that Commerce could rely only on "subsidies . . . during the period of investigation" at issue. ZMC's eleventh hour attempt to inject this new issue into this action effectively ambushes the other parties, and is therefore likely barred by the doctrine of exhaustion of administrative remedies.

Even if ZMC's argument were not barred, it appears that it would fail. ZMC's only arguments vis-a-vis the second and third prongs of *Fuyao II* are – respectively – its claims that Commerce never investigated its supplier or the product at issue, and its claim that one of the cases that Commerce cites yielded a negative finding as to one producer. *See* Pl.'s Supp. Brief at 7–8. Those arguments lack merit, for reasons detailed elsewhere below.

As to the first prong, ZMC asserts that Commerce "heavily relies on

As discussed below, none of ZMC's arguments casts doubt on either the correctness of Commerce's decision to apply its subsidy suspicion policy here, or the existence of substantial evidence in the record to support that decision.

ZMC first charges that the administrative record lacks "particularized evidence" that its supplier's prices were subsidized, and dismisses the Commerce Department's case as purely "circumstantial."

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many . . . [d]eterminations that do not correspond to the period of review," and contends that – when those determinations are excluded – all that remains is "information contained in two Federal Register Notices" of the results of recent countervailing duty investigations. As to that information, ZMC asserts simply that it does not "reach the threshold set in *Fuyao* and should be discarded." *See* Pl.'s Supp. Brief at 6–7.

First, it is far from clear that ZMC's characterization of the temporality of the countervailing duty determinations (other than the Federal Register notices) is fully accurate. It is not clear, for example, that ZMC considered the extent to which those other determinations may contain evidence of a continuing stream of benefits. *Cf.* n.11, *infra* (explaining that even the *termination* of a subsidy program does not necessarily stop the flow of benefits).

But, even assuming *arguendo* that the other determinations offer not even a scintilla of evidence on which Commerce could rely under the *Fuyao II* test, the two Federal Register notices still remain; and they cannot be rejected as dismissively as ZMC suggests. ZMC notably does not state – much less prove – that the information contained therein is unreliable. ZMC doesn't even explain what *Fuyao* threshold it is referring to, or in what specific way it believes the information to be deficient. And even the two Federal Register notices alone could suffice to establish the existence of subsidies sufficient to justify Commerce's invocation of the subsidy suspicion policy.

Finally, apart from the issue of the *Fuyao II* test discussed above, it is important to note more generally that the evidence on which Commerce relied here was quantitatively and qualitatively different – stronger – than the evidence found lacking in *Fuyao*. As Timken notes, the subsidies documented in this case "are comparable to the ones that the [*Fuyao*] Court approved after the first remand, and are unlike the ones the [*Fuyao*] Court found insufficient" to justify application of Commerce's subsidy suspicion policy. *See* Def.-Int.'s Supp. Brief at 8–9. Specifically, Timken explains:

> Here, Commerce looked to published notices of Countervailing Duty Orders applicable to the steel industry in the market country in question, and those Orders in turn were supported by findings in the administrative reviews that steel producers in that country in fact received the subsidies in question. . . . That evidence contrastswith the evidence rejected in *Fuyao Glass*. . . .
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> . . . *Fuyao Glass* sustained Commerce when it was satisfied that the agency had relied on the same basic kind of evidence found acceptable in [*China Nat'l II*] – *that is, the same basic kind of evidence that Commerce relied on in the instant case*. Specifically Commerce here relied on evidence indicating that the country in question subsidized its *steel industry and the country's exports of steel*. . . . Commerce then applied common sense and formulated a belief or suspicion that the steel exporter(s) involved in this case may have taken advantage of the existing programs – as had other steel producers. As the agency stated in the Final Results of the Redetermination Pursuant to Court Remand . . . :
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> > Through these CVD proceedings [relied upon for the suspicion or belief], the Department established the existence of broadly-available export subsidies and industry-specific subsidies from which ZMC's supplier, an exporter and member of the subsidized industry, could have benefitted.
>
> [Remand Results at 7.] This language is nearly identical to the language in the [*China Nat'l*] Redetermination, which the Court approved in [*China Nat'l II*], and which the Court adopted in *Fuyao II*.

Def.-Int.'s Brief at 8–10.

See, e.g., Pl.'s Brief at 1–2; Pl.'s Remand Comments at 6–7. ZMC emphasizes that the agency has proffered no proof that ZMC's supplier actually received any subsidy. *See* Pl.'s Remand Comments at 6–7; Pl.'s Reply Brief at 4. Nor has Commerce identified a specific subsidy program from which it believes ZMC's supplier benefitted. *See* Pl.'s Brief at 5; Pl.'s Remand Comments at 4; Pl.'s Reply Brief at 3. ZMC also seeks to make much of the fact that neither its supplier nor the product at issue is the subject of an order. *See* Pl.'s Brief at 5, 11; Pl.'s Remand Comments at 4; Pl.'s Reply Brief at 3. Moreover, neither its supplier nor the product at issue has been investigated. *See* Pl.'s Brief at 1–2, 15, 17–18. ZMC maintains that without "particularized," objective evidence that its supplier's prices may be subsidized, Commerce is obligated to use market prices rather than surrogate values in its calculations. *See, e.g.*, Pl.'s Brief at 6, 11, 14, 18–19; Pl.'s Remand Comments at 3–4.

ZMC's arguments are a thinly-veiled collateral attack on the fundamental premise of the subsidy suspicion policy. In effect, ZMC contends that the "reason to believe or suspect" standard is satisfied only when there is conclusive evidence that a supplier's merchandise is, in fact, subsidized. But any such claim is refuted by the legislative history of the statute, which makes it clear that Congress did not intend to require Commerce to conduct formal investigations in situations like this, and did not intend Commerce to definitively determine whether prices actually *are* subsidized. *See* Conference Report (stating that, in valuing factors of production, Commerce is to "avoid using any prices which it has reason to believe or suspect may be dumped or subsidized," and emphasizing that "the conferees do not intend for Commerce to conduct a formal investigation to ensure that . . . prices are not dumped or subsidized, but rather intend that Commerce base its decision on information generally available to it at that time").

The "reason to believe or suspect" standard is thus a relatively "low threshold" – less demanding than ZMC suggests, and clearly less rigorous than required for an actual finding of subsidies in fact. *See China Nat'l II*, 27 CIT at 1558–59, 293 F. Supp. 2d at 1338–39, *aff'd*, 104 Fed. Appx. 183 (not cite for precedent) (noting "the low threshold established by the 'reason to believe or suspect' standard" and that it is "a lower threshold than what is required to support a firm conclusion"); Remand Results at 4, 19–20. *See also China Nat'l II*, 27 CIT at 1555–57, 1559, 293 F. Supp. 2d at 1336–37, 1339, *aff'd*, 104 Fed. Appx. 183 (not cited for precedent) (sustaining application of subsidy suspicion policy, even though "neither the subject merchandise in question, nor [respondent's] supplier was ever specifically investigated" and even though "the level of distortion, if any, in the price of [the product at issue] by reason of subsidies was never determined"); *China Nat'l I*, 27 CIT at 267–68, 264 F. Supp. 2d at 1240 (acknowledging respondent's claim that "there are no current

or prior countervailing duty orders . . . on the material input in question"); *Peer Bearing*, 27 CIT at 1772 n.4, 298 F. Supp. 2d at 1337 n.4.; *Luoyang*, 28 CIT ___ , 2004 WL 1146101 at *11–13.

ZMC also tries to undermine the theoretical underpinnings for the application of the subsidy suspicion policy in this case, by pointing out that, in one recent investigation of a steel product in the country at issue, Commerce made a negative final determination. ZMC intimates that this negative determination weighs heavily against the premise that there are industry-wide subsidies conferring benefits on all manufacturers of steel products in the subject country. *See* Pl.'s Brief at 1–2, 11–12, 14–15; Pl.'s Remand Comments at 2–3; *see also China Nat'l I*, 27 CIT at 268, 264 F. Supp. 2d at 1240–41. However, as the Remand Results here note (and as *China Nat'l II* recognized), the determination on which ZMC relies is anomalous – readily explained, and "immaterial" to application of the subsidy suspicion policy to the country in question. *See* Remand Results at 13–14; *China Nat'l II*, 27 CIT at 1555–57, 293 F. Supp. 2d at 1336–38, *aff'd*, 104 Fed. Appx. 183 (not cited for precedent); Def.'s Brief at 38–39; Def.-Int.'s Brief at 30–31.

ZMC fares no better on its claim that many of the countervailing duty determinations cited by Commerce found only *de minimis* levels of subsidization, and therefore (according to ZMC) cannot be used to justify application of the subsidy suspicion policy here. *See generally* Pl.'s Brief at 1–2, 5, 13,16–18; Pl.'s Remand Comments at 2–4, 7–10; Pl.'s Reply Brief at 3; *but see* Remand Results at 13–15, 20–21 (responding to ZMC's claim). "The statute does not specify a particular level of subsidization at which actual market prices may be discarded." *China Nat'l II*, 27 CIT at 1554–59, 293 F. Supp. 2d at 1336–39, *aff'd*, 104 Fed. Appx. 183 (not cited for precedent).

It is thus well-settled that "[t]he level of subsidization does not prevent Commerce from determining that it has 'reason to believe or suspect' that prices paid are subsidized. *Any level of subsidization* found in the exporting country is enough evidence to support a determination that Commerce has 'reason to believe or suspect' that prices are distorted." *Peer Bearings*, 27 CIT at 1771–72, 298 F. Supp. 2d at 1337 (emphasis added); *see also China Nat'l II*, 27 CIT at 1554–59, 293 F. Supp. 2d at 1336–39, *aff'd*, 104 Fed. Appx. 183 (not cited for precedent); *Fuyao II*, 29 CIT at ___ , 2005 WL 280437 at *7–9 (*quoting Peer Bearing*).[11]

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[11] ZMC similarly claims that certain subsidy programs cited by Commerce have been "terminated" or "discontinued." *See* Pl.'s Brief at 1–2, 16–17. As Timken notes, however, there is no indication that ZMC put that information on the record of this proceeding. *See generally* Def.-Int.'s Brief at 30–31. In any event, the termination of a program does not necessarily stop the flow of all benefits. *Id*. Indeed, according to Timken, information available elsewhere indicates that at least some of the assertedly terminated programs were still conferring benefits during the Period of Investigation at issue here, and – moreover – that benefits from at least one of those programs may continue to flow years into the future. *Id*.

C. *ZMC's Remaining Arguments*

ZMC's few remaining arguments make short work.

ZMC criticizes the Commerce Department's subsidy suspicion policy as opaque, and asserts that the agency is obligated to issue "memorialized guidance" or to promulgate a regulation on the subject for the benefit of the trade community. *See*, *e.g.*, Pl.'s Brief at 20; Pl.'s Remand Comments at 3, 14; Pl.'s Reply Brief at 3, 8; *see also* Remand Results at 21 (*quoting* question posed by ZMC in its comments on the Draft Remand Results). According to ZMC, "[t]he failure to articulate a clear standard for finding a reason to believe or suspect prices may be dumped or subsidized . . . has led to confusion for respondents in NME antidumping cases and thus denies them fundamental fairness and predictability." Pl.'s Brief at 20, 22.

ZMC emphasizes that Commerce promulgated a regulation expressing its preference for market prices a decade ago (19 C.F.R. § 351.408(c)(1)), and observes that Commerce also has "a policy statement on the standard for finding reason to believe or suspect a respondent's prices may be sold below the cost of production and thus provide the basis for conducting a cost of production ('COP') inquiry." ZMC maintains that something similar is required to document the agency's subsidy suspicion policy and its "reason to believe or suspect" standard. *See* Pl.'s Brief at 20 n.68 (*citing* Import Administration Policy Bulletin No. 94.1, Cost of Production – Standards for Initiation of Inquiry (March 25, 1994)); Pl.'s Remand Comments at 14; Pl.'s Reply Brief at 3, 8.

However, ZMC cites no legal authority for its claim that Commerce is required to promulgate a regulation. And, as the Government notes, the absence of such a regulation or guidance in no way undermines Commerce's reading of 19 U.S.C. § 1677b(c) and 19 C.F.R. § 351.408(c)(1) "as not requiring a finding of subsidies in fact in order for Commerce to have reason to believe or suspect that market prices may be subsidized." *See* Def.'s Brief at 42.

Indeed, as the Government points out, Commerce has construed the relevant statute and regulation in its February 2002 Office of Policy Memorandum (discussed in note 7 above), "which neither requires Commerce to conduct a formal investigation nor obligates Commerce to uncover subsidies in fact in order to have reason to believe or suspect that a particular supplier's prices may be subsidized." *See* Def.'s Brief at 42–43. The Government concludes that – contrary to ZMC's assertions – both Commerce's interpretation and its implementation of its subsidy suspicion policy are reasonable and fully consistent with the express language and history of the statute, as well as the regulation. *See* Def.'s Brief at 19–20.

ZMC also characterizes the subsidy suspicion policy as "arbitrary and capricious," complaining that Commerce has "created a nearly impossible standard for respondents to meet in order to refute any suspicion that their suppliers' prices may be subsidized." *See* Pl.'s

Brief at 6, 22–24; Pl.'s Remand Comments at 5. ZMC explains that, in another antidumping investigation involving China, Commerce found that respondents overcame any suspicion that their suppliers' prices were subsidized, because those suppliers had been previously investigated by Commerce and had been found not to be receiving subsidies above a *de minimis* levels. *See* Pl.'s Brief at 6. ZMC asserts that, because its supplier has never been investigated, ZMC cannot prove that it does not benefit from subsidies. *Id*.; *see also* Pl.'s Remand Comments at 10 ("absent being 'cleansed' through an investigation, Commerce provides no explicit means for an interested party to show its market economy supplier received no subsidy"). Contrary to ZMC's claim, however, Commerce has expressly recognized that, other than being the subject of an investigation, "there may be additional means of rebutting the presumption" that a supplier's prices are subsidized or dumped. *See* Remand Results at 20. "[W]here there is evidence which counters the Department's presumption parties may bring it to the Department's attention." *Id*. Such evidence might include proof "that the prices paid were market-determined, for example," or "credible evidence that the supplier did not participate in any subsidies programs." *Peer Bearing*, 27 CIT at 1772 n.5, 298 F. Supp. 2d at 1337 n.5. Optimally, the evidence would include "financial data" and "other information indicating that the supplier's prices were not subsidized." *Peer Bearing*, 27 CIT at 1772–73, 298 F. Supp. 2d at 1337.

Indeed, in the instant case, ZMC had an opportunity during the administrative review to rebut the presumption that its supplier was subsidized by the subject government. ZMC could have proffered evidence to establish that its supplier's steel is not subsidized. Commerce would have accepted and considered it. But ZMC elected not to avail itself of the opportunity, and therefore cannot now be heard to complain. *See generally* Def.'s Brief at 41–42.

D. *ZMC's Challenge to the Validity of Surrogate Values for "Scrap"*

ZMC quite belatedly attempts to inject one final issue into this litigation, unrelated to its challenge to the Commerce Department's use of the subsidy suspicion policy to reject the actual prices that ZMC paid for steel inputs to its market economy supplier (discussed above). In its comments to Commerce on the Draft Remand Results, ZMC – for the very first time – questioned the validity of the *surrogate values* for *scrap* used in the agency's calculations. *See* Remand Results at 18–19 (*quoting* questions posed by ZMC in its comments on Draft Remand Results).

Cloaked as an issue of the "selective application" of the subsidy suspicion policy, ZMC argues that Commerce applies the subsidy suspicion policy to some countries, but not others. ZMC apparently faults Commerce in this case for not rejecting certain values of U.S.

exports to India which were allegedly subsidized. *See generally* Pl.'s Remand Comments at 10–12 ; Pl.'s Reply Brief at 2–3, 4–7.

As ZMC concedes, however, Commerce did not consider this issue in TRBs XIV because no one involved in the administrative review at the agency level – including ZMC itself – questioned the integrity of the Indian statistics. *See* Pl.'s Remand Comments at 11. Neither the selection of India as the surrogate nor the Indian import values themselves were timely challenged, even in this litigation (much less at the agency level). It is clearly too late to raise such an issue at this advanced stage. *See generally* Def.'s Supp. Brief at 3–6; Def.-Int.'s Supp. Brief at 11–17.

ZMC failed to raise the issue in the underlying administrative proceeding. Nor was the issue included either in the Complaint it filed to commence this action, or in its Motion for Judgment on the Agency Record. As discussed above, the issue first surfaced in ZMC's comments to Commerce on the Draft Remand Results. *See* Remand Results at 18–19 (*quoting* questions posed by ZMC in its comments on Draft Remand Results).[12] And, incredibly, ZMC asserted for the first time in its Reply Brief that the Court should order a remand and instruct Commerce to recalculate the surrogate value for "scrap" used in the agency's NV calculations. *See* Pl.'s Reply Brief at 9 (requesting that the Court instruct Commerce "to disregard [in its calculations] any price for which there is a CVD order from that country that determined there were 'industry specific' and/or 'broadly available, non-industry specific export subsidies'").

Because ZMC failed to raise in a timely fashion the validity of the statistics used to calculate the surrogate values for "scrap," its attempts to argue the issue now are barred by the doctrine of exhaustion of administrative remedies. *See generally* Def.'s Supp. Brief at 3–8; Def.-Int.'s Supp. Brief at 12–16.[13]

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[12] There can be no argument that the issue was properly raised in the course of the remand proceeding. The remand was limited in scope to allowing Commerce to further explain its decision to use surrogate values, rather than ZMC's market prices, for steel inputs – *not* to allow Commerce to investigate the validity of the surrogate value used for "scrap." To the extent that ZMC raised the issue before Commerce in the course of the remand proceeding, it exceeded the scope of the remand order. Commerce properly declined to address the matter. *See generally* Remand Results at 18–19; Def.'s Supp. Brief at 5; Def.-Int.'s Supp. Brief at 14–16. In contrast, the issue was timely raised in *Shandong Huarong*. *See* Def.-Int.'s Supp. Brief at 10–11; *Shandong Huarong Mach. Co. v. United States*, 29 CIT ____ , 2005 WL 1105110 *9 (2005).

[13] The Government and Timken note that – even if ZMC's argument were not barred due to ZMC's failure to exhaust its administrative remedies – ZMC's argument would still fail for lack of support in the record of this case. *See generally* Def.-Int.'s Supp. Brief at 16–17; Def.'s Brief at 40–41.

According to Timken, "[b]oth Commerce and the Court have stressed that only *some* subsidy programs can form the basis for formulating suspicions that input values were subsidized. Commerce made this very clear in, for example, its memorandum entitled "Allegations of Unfair Steel Prices". . . . The Court also made this clear in, *e.g.*, the *Fuyao Glass* litigation. . . . Therefore, it is not enough [for ZMC] merely to cite outstanding CVD orders.

IV. *Conclusion*

For all the reasons set forth above, Plaintiff's Motion for Judgment on the Agency Record is denied, and Commerce's Final Results of Redetermination Pursuant to Remand are sustained.

Judgment will enter accordingly.

ZHEJIANG MACHINERY IMPORT & EXPORT CORP., *Plaintiff*, v. UNITED STATES, *Defendant*, and THE TIMKEN COMPANY, *Defendant-Intervenor*.

Court No. 02–00792

JUDGMENT

This case having been duly submitted for decision; and the Court, after due deliberation, having a rendered a decision herein;

Now, therefore, in conformity with said decision, it is hereby

ORDERED, ADJUDGED, and DECREED that the U.S. Department of Commerce's /s/ Final Results of Redetermination Pursuant to Remand be, and hereby are, sustained.

Slip Op. 07–17

VALUE VINYLS, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 01–00896

Opinion

[Upon cross-motions as to classification of certain plastic-coated textiles, summary judgment for the plaintiff.]

Decided: January 30, 2007

Givens & Johnston PLLC (*Robert T. Givens* and *Rayburn Berry*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Divi-

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It is necessary to identify programs claimed to be bases for formulating suspicions and demonstrate their application, and to demonstrate their relevance to the claim at hand." *See* Def.-Int.'s Supp. Brief at 16.

Timken observes that, here, "plaintiff has completely failed to provide any predicate for its position that any foreign subsidy program taints Commerce's value for scrap. . . . Thus, even when viewing the question on the merits, plaintiff has failed in its burden of proof. There is no basis beyond speculation that Commerce erred by ignoring facts or otherwise acted contrary to law in determining the value for scrap." *See* Def.-Int.'s Supp. Brief at 17.

sion, U.S. Department ofJustice (*James A. Curley*); and Office of Assistant Chief Counsel, International Trade Litigation, U.S. Bureau of Customs and Border Protection (*Beth C. Brotman*), of counsel, for the defendant.

AQUILINO, Senior Judge: Courts are to interpret the language of statutes so as to give effect to the intent of Congress. *E.g., Minor v. Mechanics Bank of Alexandria*, 26 U.S. 46, 64 (1828); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542 (1940). Sometimes they yield to the legislative intent even when "it appears that a literal interpretation of the statute involved would produce a result contrary to the apparent legislative intent". *Procter & Gamble Mfg. Co. v. United States*, 19 CCPA 415, 419, T.D. 45578 (1932).

> . . . All rules of construction must yield if the legislative intent is shown to be counter to the apparent intent indicated by such rule. The master rule in the construction of statutes is to so interpret them as to carry out the legislative intent.

Brecht Corp. v. United States, 25 CCPA 9, 13, T.D. 48977 (1937)(citations omitted), quoting from *United States v. Clay Adams Co.*, 20 CCPA 285, 288, T.D. 46078 (1932).

The "starting point for interpreting a statute is the language of the statute itself." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). And "where Congress has clearly stated its intent in the language of a statute, a court should not inquire further into the meaning of the statute." *Pillowtex Corp. v. United States*, 171 F.3d 1370, 1373 (Fed.Cir. 1999). However, when that is not the case, courts resort to legislative history for assistance in interpreting the meaning. *See, e.g., Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631 (2005).

I

The parties to this action, which was commenced pursuant to 28 U.S.C. §1581(a) and has been designated a test case pursuant to USCIT Rule 84(b), have called these principles of the law into account via cross-motions for summary judgment as to the correct classification of imported goods that are described in plaintiff's complaint, paragraph 1, as

> in sheet form of woven textile fabric, of a single polyester manmade fiber, coated or laminated such that it is completely encased or covered on both sides with compact polyvinyl chloride (PVC) non-cellular plastic (vinyl coated or laminated articles of such textile composition are commonly known as "supported" vinyls).

The complaint contests their classification by the U.S. Customs Service, as it was still known during the times of their entry, under subheading 3921.90.1950 of the Harmonized Tariff Schedule of the United States ("HTSUS").

Protests of this approach (in lieu of plaintiff's preferred classification under subheading 3921.90.11) precipitated Service denial thereof per ruling HQ 963747 (June 25, 2001)[1], which concluded that the decision in *Semperit Indus. Prods., Inc. v. United States*, 18 CIT 578, 855 F.Supp. 1292 (1994),

> is applicable to the subject products. The court interpreted the statement "predominate by weight over any other single textile fiber" in regard to the HTSUS. The court determined that "the term 'predominate' . . . clearly refers to man-made fibers which, in terms of weight and relative to any other single textile fiber, constitute the stronger, main, or leading element, or hold advantage in numbers or quantity." . . . 18 CIT at 585; 855 F.Supp. at 1298. Thus, pursuant to *Semperit*, in order for subheading 3921.90.11, HTSUS, to be applicable, the subject merchandise would have to be comprised of man-made fiber and another textile fiber. Because the products at issue are made up of only man-made fiber, subheading 3921.90.11, HTSUS, is not the correct tariff provision.[2]

The court had rendered its decision after determining that there was no clear legislative intent.

HQ 963747 refers, among other things, to findings by Customs that plaintiff's merchandise weighed less than 1.492 kilograms per square meter, was 82 percent plastic and 18 percent textile by weight, and consisted of "tarpaulin type material"[3] used in making truck covers and similar barrier coverings, dividers, upholstery and signs and barriers.

A

There is no controversy over these findings of fact – or over any other fact material to resolution of this case save the genesis and meaning of the competing tariff provisions, which, of course, are fundamentally issues of law. *Compare* Plaintiff's Statement of Material Facts as to Which There are No Genuine Issues to be Tried *with* Defendant's Response to Plaintiff's Statement of Material Facts *and* Defendant's Statement of Material Facts Not in Dispute. In short, this matter is ripe for adjudication via summary judgment. *Cf. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–49 (1986).

The parties agree that plaintiff's entries at issue landed under HTSUS heading 3921 ("Other plates, sheets, film, foil and strip, of

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[1] Plaintiff's Memorandum of Law, Exhibit 1 and Defendant's Brief, Exhibit A.

[2] *Id.* at 5.

[3] *Id.* at 1.

plastics"). Their dispute focuses on subheading .90.11 versus .90.19 which were set forth in the HTSUS (1998), for example, as follows:

3921.90	Other:		
	Combined with textile materials andweighing not more than 1.492 kg/m^2:		
	Products with textile components in which man-made fibers predominate by weight over any other single textile fiber:		
3921.90.11	Over 70 percent by weightof plastics	m^2	4.2%
		kg	
3921.90.15	Other	m^2	6.9%
		kg	
3921.90.19	Other		5.3%

Plaintiff's position herein, however, draws upon the Tariff Schedules of the United States ("TSUS") that preceded the adoption of the HTSUS, in particular item 355.81 located in Schedule 3 ("Textile Fibers and Textile Products"), Part 4 ("Fabrics of Special Construction or For Special Purposes . . ."") (1988), to wit:

	Woven or knit fabrics (except pile or tufted fabrics), of textile materials, coated or filled with rubber or plastics material, or laminated with sheet rubber or plastics:		
	* * *		
	Of man-made fibers:		
355.81	Over 70 percent by weight of rubber or plastics	Sq. yd.	4.2% ad val.
355.82	Other		8.5% ad val.
	* * *		
355.85	Other	Sq. yd.	5.3% ad val.

See Plaintiff's Brief in Reply, Exhibit B. The court does not read the parties' cross-motion papers as in disagreement that this TSUS item is the predecessor of HTSUS subheading 3921.90.11, *supra*. *See*, *e.g.*, Plaintiff's Memorandum of Law, Exhibit 2, second page (*Conversion of the Tariff Schedules of the Unites States Annotated Into the Nomenclature Structure of the Harmonized System*, Annex III: *Cross-Reference From Converted Tariff Schedule to Present TSUSA*, p. 288, USITC Pub. 1400 (June 1983)). And the court could conclude that,

were TSUS item 355.81 still in effect[4], plaintiff's merchandise would be correctly classifiable thereunder. *See Spradling Int'l, Inc. v. United States*, 17 CIT 40, 811 F.Supp. 687 (1993).

To be sure, such a conclusion would not directly govern this case, although the plaintiff points back to that item in vigorously pressing that "there is in fact very considerable legislative history demonstrating that Congress did intend [HTSUS 3921.90.11] to include plastic coated textiles consisting of a single man-made fiber." Motion for Summary Judgment, p. 3. (boldface and underscoring deleted). That history includes a presidential request that the U.S. International Trade Commission ("USITC"), in preparing for the conversion of the TSUS into HTSUS, "avoid, to the extent practicable and consonant with sound nomenclature principles, changes in rates of duty on individual products." USITC, *Institution of Investigation for the Conversion of the Tariff Schedules of the United States into the Nomenclature Structure of the Harmonized System*, 46 Fed.Reg. 47,897 (Sept. 30, 1981). And, at the time of adoption of the HTSUS, a congressional report stated that the "conferees believe that the HTS fairly reflects existing tariff and quota treatment and that the conversion is essentially revenue-neutral." H.R. Rep. No. 100–576, p. 548 (1988). *See generally* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107.

Annex I to USITC Publication 1400, page 39–10 (June 1983), contained a version of subheading 3921.90.11 with the language "in which the textile material is in chief value of man-made fibers". Chief-value is defined by General Legal Note 8(e) to that publication to mean when "such material exceeds in value each other single component material of the article". That deviation from the defined term "of", meaning "wholly or in chief value" in TSUS 355.81, to direct use of "chief value", and in omitting the words "wholly or" in that 1983 possible conversion, could be of concern but for Annex III to USITC Publication 1400, which reflects the precise intent of the conversion.

Annex III served the purpose of equating items in the TSUS to subheadings in the new HTSUS in the planned conversion. As evidenced by the schedules, HTSUS subheading 3921.90.11 is clearly the successor to TSUS item 355.81 while HTSUS 3921.90.19 has its own, multiple predecessors, ranging from items 355.15 to 355.85, non-inclusive and, notably, excluding 355.81. Although the differing language of the provisions could indicate change in meaning, given the demonstrated executive and legislative intent to leave the tariff provisions intact to the extent possible, this court can conclude that the U.S. government intended that HTSUS subheading 3921.90.11

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[4] TSUS General Headnote and Rule of Interpretation 9(f)(i) (1988) defined "of" when used between the description of an article and a material to mean the "article is wholly or in chief value of the named material".

apply to supported textiles of the kind now at bar, supplanting precedent TSUS item 355.81.

The Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948, altered Schedule 3 of the TSUS with the intent that such amendment provide for imports to be included in items 355.65 to 355.85 "regardless of the relative value of the contained textile fibers, rubber, and plastics" and, additionally, restored the classification of "many products previously classified in schedule 3".[5] Following Congress's corrective elimination of relative value as a determinative element in the TSUS, the Office of the U.S. Trade Representative published the *Proposed United States Tariff Schedule Annotated in the Harmonized System Nomenclature* (July 1987), replacing the 1983 language of proposed HTSUS subheading 3921.90.11, "textile material is in chief value of man-made fibers", with "textile components in which man-made fibers predominate by weight over any other single textile fiber", the latter being the language now under consideration herein. On its face, that change eliminated the previously-defined term "chief value" and replaced it with similar albeit undefined, comparative language with respect to weight rather than value.

B

Whatever the precise presidential and congressional intent, defendant's position now is that "the operative language of 3921.90.11 . . . brought about a change in meaning in that provision when compared to item 355.81, TSUS." Defendant's Brief, p. 4. It prays for this court's deference to HQ 963747, which is "eligible to claim respect" per *United States v. Mead Corp.*, 533 U.S. 218, 221 (2001), to the extent of

> the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

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[5] S. Rep. No. 98–308, p. 6 (1983). *See also* H.R. Conf. Rep. No. 98–1156, p. 5 (1984). That Senate Report states:

> As a result of two recent decisions . . . [in] *United States v. Canadian Vinyl Industries*, 64 CC.P.A. 97 (1977), and *United States v. Elbe Products Corp.*, [68 CCPA 72] (1981), that ruled against the government's position on classification, many products previously classified in schedule 3 are now entering lower duty rates under schedule 7. The committee is convinced that the court erred in interpreting the law and Congressional intent with respect to the proper classification of these coated fabrics. The purpose of section 111 is to reverse the court's decisions and to restore the proper classification of these fabrics to that understood by the Customs Service and Congress prior to the decisions.

In acknowledging that it is a "primary function of the courts to determine legislative intent"[6], HQ 963747 merely states that, in regard to the applicability of *Semperit*, *supra*, "[n]o contrary legislative intent was found" and that the "protestant's argument and exhaustive presentation of the legislative history of tariff treatment of man-made textile articles [are] not persua[sive]."[7]

As indicated, this court is not so unconvinced, but it clearly understands defendant's adherence to and reliance on *Semperit Indus. Prods., Inc. v. United States*, 18 CIT 578, 855 F.Supp. 1292 (1994). In fact, in that case the defendant had urged the court to follow its interpretation of "[w]ith textile components in which man-made fibers predominate by weight over any other single textile fiber" that it

> does *not* require the presence of more than one "class of" textile fiber in order for man-made fibers "to predominate by weight over any other single textile fiber."
>
> Defendant maintains "the common meaning of the term 'predominates' does not require the physical presence of another entity for comparison." . . . In addition, defendant asserts "[e]ven if a comparison is indicated by definition or use [of the term 'predominate,'] neither the definitions or use of the term in the HTSUS require the actual physical presence of another entity (*e.g.*, textile fibers other than man-made fibers), rather than the complete **absence** of any other entity, for comparison." . . . Defendant also claims the use of the term "predominate" in subheading 4010.91.15 "merely requires that man-made fibers be superior in weight * * * or dominate over 'any other single textile fiber.' " . . . In sum, according to defendant, "[t]he fact that the statute provides instructions for situations where other textile fibers **may** be present with man-made fibers does not mean that articles in which **only** man-made fibers are present are precluded from classification under HTSUS subheading 4010.91.15."

18 CIT at 582–83, 855 F.Supp. at 1296 (emphasis in original; citations omitted). That language was found in a different chapter of the HTSUS, 40, and under a different heading, 4010, encompassing much different merchandise than that at bar, namely, industrial conveyor belts produced from a combination of vulcanized rubber and textile material. Be those differences as they were, the plaintiff in *Semperit*, much like Value Vinyls, Inc. now, asserted that

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[6] *Supra* n. 1, p. 3.

[7] *Id.* at 4.

> Customs' classification d[id] not accord with cross-reference tables found in the ITC Report which correlate former TSUS items with HTSUS subheadings. . . .

18 CIT at 582, 855 F.Supp. at 1296 (citations omitted). The court concurred.

The court disagreed not only with the defendant's interpretation of the meaning of "predominate"[8], it held a differing view[9] of the USITC's cross-reference tables:

> The ITC Report cited by plaintiff further supports the Court's conclusions in this case. As noted above, the Report correlates the TSUS provision under which Customs formerly classified the belts, item 358.16, to HTSUS subheading 4010.91.19, the provision upon which plaintiff relies, and to two other subheadings that are immaterial to this action. . . . Notably, the Report does not pair the former TSUS provision with the HTSUS subheading upon which defendant relies, 4010.91.15. Similarly, the Report matches defendant's claimed provision, subheading 4010.91.15, to item 358.14, TSUS, a provision that Customs did not apply to the subject merchandise. . . . Although the ITC Report is not entitled to "great weight," it is nevertheless "clearly relevant to the Court's inquiry" as it provides some indication of the intended relationship between the former provisions under the TSUS and the new provisions under the HTSUS. *Beloit Corp. v. United States*, 18 CIT 67, 81, 843 F.Supp. 1489, 1499, 1500 (1994). As a result, the Court finds the ITC Report supplies additional support for the conclusion that Customs incorrectly classified the subject merchandise under subheading 4010.91.15 rather than under subheading 4010.91.19.

18 CIT at 588, 855 F.Supp. at 1300 (USITC citations omitted). *Cf. Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1483 84 (Fed.Cir. 1997).

Given the legislative history, including the expectation that the conversion from TSUS to HTSUS be revenue neutral, this court need not have inquired further into the meaning of the statute. *Cf. Pillowtex Corp. v. United States*, *supra*.

II

In view of the foregoing, plaintiff's motion for summary judgment should be granted and defendant's cross-motion denied. Final judgment will enter accordingly.

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[8] *See* 18 CIT at 585–86, 855 F.Supp. at 1298–99.

[9] *Cf.* 18 CIT at 583–84, 855 F.Supp. at 1300.

JUDGEMENT

THomas J. Aquilino, Jr., Senior Judge

VALUE VINYLS, INC., Plaintiff, v. UNITED STATES, Defendant.

Court No. 01–00896

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; Now therefore, in conformity with said decision, it is

ORDERED, ADJUDGED and DECREED that plaintiff's motion for summary judgment be, and it hereby is, granted; and it is further hereby

ORDERED, ADJUDGED and DECREED that the merchandise that underlies this case is correctly classifiable under subheading 3921.90.11 of the Harmonized Tariff Schedule of the United States; and it is further hereby

ORDERED that Customs and Border Protection, United States Department of Homeland Security, reliquidate any entries of said merchandise that have not been liquidated under the aforesaid HTSUS subheading and refund to the plaintiff any excess duties paid, together with interest thereon as provided by law.

Slip Op. 07–18

CARPENTER TECHNOLOGY CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 04–00508

OPINION

[Plaintiff's motion for judgment on the agency record denied; Commerce's administrative review results sustained.]

Dated: January 31, 2007

Kelley Drye Collier Shannon (*Robin H. Gilbert*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Michael Panzera*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (Ada E. Bosque), of counsel, for the defendant.

Gordon, Judge: Plaintiff Carpenter Technology Corporation moves for judgment upon the agency record pursuant to USCIT R. 56.2, challenging a decision by the U.S. Department of Commerce ("Commerce") to partially revoke the antidumping duty order covering stainless steel bar from India. *See Stainless Steel Bar from India*, 69 Fed. Reg. 55,409, 55,411 (Dep't of Commerce Sept. 14, 2004) (final results admin. review) ("*2004 Administrative Review*"). The court has jurisdiction pursuant to Section 516a(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2000),[1] and 28 U.S.C. § 1581(c) (2000).

Commerce's decision to partially revoke the antidumping order is supported by substantial evidence and is otherwise in accordance with law. The court therefore sustains Commerce's administrative review final results and denies Plaintiff's motion for judgment on the agency record.[2]

I. Background

The Viraj Group is a collection of affiliated Indian exporters/producers of stainless steel bar that includes Viraj Alloys, Ltd., Viraj Forgings, Ltd., and Viraj ImpoExpo, Ltd. In two consecutive prior administrative reviews the Viraj Group received zero or *de minimis* margins. *Stainless Steel Bar From India*, 67 Fed. Reg. 53,336 (Dep't of Commerce Aug. 15, 2002) (amended final results of administrative review) ("*2002 Administrative Review*"); and *Stainless Steel Bar From India*, 68 Fed. Reg. 47,543 (Dep't of Commerce Aug. 11, 2003) (final results of administrative review) ("*2003 Administrative Review*"). Anticipating a third consecutive zero or *de minimis* margin for the *2004 Administrative Review* (meeting the revocation requirement under 19 C.F.R. § 351.222 (2004) that merchandise not be sold at less than normal value for a period of at least three consecutive years), the Viraj Group requested partial revocation of the antidumping duty order.

Opposing this request, Plaintiff argued to Commerce that revocation was impermissible because there had been no final determination of Viraj's dumping margins in the two consecutive prior reviews. Petitioner's Public Case Brief at 5 (Pub. R. Doc. No. 219, Pl.'s Br. App. 3). Specifically, Plaintiff noted that it had challenged the results of the two prior administrative reviews, and that one of the issues challenged, collapsing the Viraj Group for the dumping analy-

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[1] All further citations to the Tariff Act of 1930 are to the relevant provision in Title 19 of the U.S. Code, 2000 edition.

[2] In its motion for judgment on the agency record, Plaintiff also challenged Commerce's decision to collapse three foreign exporters/producers into a single entity for the dumping analysis. In a separate opinion the court sustained Commerce's collapsing decision, holding that Plaintiff failed to exhaust its administrative remedies on this issue. *Carpenter Tech. Corp. v. United States*, 30 CIT ____ , Slip Op. 06–147 (Oct. 5, 2006).

sis, would likely be reversed, potentially requiring Commerce to reverse its previous findings of no dumping. *Id.* at 2–4. Plaintiff also noted that the Court of International Trade had remanded the collapsing issue to Commerce twice, and each time required Commerce to provide additional justification for collapsing the Viraj Group. *Id.*

Plaintiff argued that the revocation regulation, 19 C.F.R. § 351.222 (2004), prohibits Commerce from revoking an order "if there are claims or challenges directly affecting the basis for revocation that have not been resolved with finality." *Id.* at 5. Plaintiff also cited *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada,* 65 Fed. Reg. 9,243, 9244–45 (Dept. of Commerce Feb. 24, 2000) (final results admin. review) ("*Carbon Steel*"), an administrative proceeding in which Commerce declined to revoke an antidumping duty order because of a pending anti-circumvention investigation.

In the final results Commerce calculated a third consecutive zero/*de minimis* dumping margin for the Viraj Group and partially revoked the antidumping duty order. *2004 Administrative Review*, 69 Fed. Reg. at 55,411. Commerce addressed Plaintiff's revocation arguments as follows:

> We disagree with the petitioners that this action cannot be taken before the litigation in previous segments has been concluded. It is not the Department's policy to delay granting revocation because of pending court appeals. [*See, e.g., Certain Fresh Cut Flowers From Colombia*, 59 Fed. Reg. 15,159, 15,166 (Dept. of Commerce Mar. 31, 1994) (final results admin review); *Color Television Receivers from the Republic of Korea*; 61 Fed. Reg. 4,408, 4,414 (Dept. of Commerce Feb. 6, 1996) (final results admin review)]. While we acknowledge that the CIT has remanded a portion of one of our prior decisions, it has not yet issued a ruling on our most recent remand redetermination. Moreover, our position in that litigation remains unchanged – namely that the final results were supported by substantial evidence and are fully in accordance with U.S. antidumping law. We note that, even after the remand redetermination, Viraj's margin remains *de minimis. See Final Results of Redetermination Pursuant to Remand: Slater Steels Corporation v. United States, Slip Op. 04–22 (CIT March 8, 2004),* (May 7, 2004). In any event, as the CIT has not rendered a final opinion in the cases under litigation that reverses the Department's decisions, we have continued to rely on the margins determined in the segments at issue because we consider them to be valid and reliable.
>
> We also disagree with the petitioners that the circumstances here are similar to those involving pending anti-circumvention claims. As part of its revocation analysis under 19 CFR

> 351.222(b)(2)(i), the Department must determine whether the continued application of the antidumping order is otherwise necessary to offset dumping. It is entirely reasonable for the Department to consider a company's commercial behavior under the existing antidumping order (and any attempts to evade that antidumping order) in the context of this analysis. In contrast, here we have found that Viraj exported subject merchandise to the United States in commercial quantities for three years, and no party to the proceeding has alleged that Viraj has attempted to circumvent the antidumping order. Thus, we have no reason before us to question that Viraj's past commercial behavior will not be an accurate reflection of its future experience, and we have made our revocation decision accordingly.

2004 Administrative Review Decision Memorandum at 17, A–533–810, AR: 2/1/02–1/31/03 (Sept. 14, 2004), available at *http://ia.ita.doc.gov/frn/summary/india/E4–2188–1.pdf* ("Decision Memorandum").

In its opening brief before this court, Plaintiff effectively challenges Commerce's revocation decision as not being in accordance with law, arguing that the applicable regulation, 19 C.F.R. § 351.222 (2004), prohibits revocation while there is pending litigation involving prior administrative reviews that form the basis for the revocation. Pl's. Br. at 11. In its reply brief, however, Plaintiff appears to shift the basis for its challenge and instead argues that Commerce's revocation decision is not supported by substantial evidence. Plaintiff contends that "Commerce has not shown that it was reasonable, given this record, to forge ahead to revoke the order, when there was a likely possibility that Viraj's dumping margins would increase from zero or *de minimis*, and thereby preclude granting the Viraj Group's revocation request." Pl.'s Reply Br. at 6.

II. Standard of Review

Generally, the court sustains Commerce's determinations, findings, or conclusions unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing Commerce's interpretation of its regulations, the court must give substantial deference to Commerce's interpretation, *Torrington Co. v. U.S.*, 156 F.3d 1361, 1363–64 (Fed. Cir. 1998), according it "'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citations omitted). And when reviewing whether Commerce's partial revocation decision for the Viraj Group is 'unsupported by substantial evidence,' the Court assesses whether the agency's determination, finding, or conclusion is "unreasonable." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1351 (Fed. Cir. 2006).

III. Discussion

The antidumping statute authorizes Commerce to "revoke, in whole or in part, . . . an antidumping duty order . . . after [an administrative review]." 19 U.S.C. § 1675(d)(1). By regulation, 19 C.F.R. § 351.222(b)(2) (2004), Commerce has defined the criteria for partial revocation of an antidumping duty order. One requirement is that the exporter or producer has sold the merchandise at not less than normal value for a period of at least three consecutive years. 19 C.F.R. § 351.222(b)(2)(i)(A) (2004). Another is that the continued application of the antidumping order is not otherwise necessary to offset dumping. 19 C.F.R. § 351.222(b)(2)(C) (2004).

Commerce's interpretation of the revocation regulation, which is supported by administrative precedent, allows the agency to consider revocation requests even when there is pending litigation involving prior reviews. Commerce stated in its Decision Memorandum that it did not agree with Plaintiff's proposed interpretation of the regulation, which would prohibit the consideration of revocation requests until pending litigation became final. The problem for Plaintiff is that nothing in 19 C.F.R. § 351.222 (2004) suggests that Commerce's interpretation is incorrect, let alone " 'plainly erroneous or inconsistent with the regulation.' " *Thomas Jefferson Univ.*, 512 U.S. at 512. Plaintiff all but concedes this point in its reply brief by choosing not to address this standard. Instead, Plaintiff changes its focus to an issue that it raises for the first time in its reply brief: whether Commerce's revocation decision is reasonable given the record—that is—whether it is supported by substantial evidence. Pl.'s Reply Br. at 6.

On the substantial evidence issue, Plaintiff incorrectly states that "Commerce has not explained why the facts of this case did not warrant a reasonable delay in deciding the revocation issue." *Id.* Commerce explained in its Decision Memorandum why Commerce continued to rely on the margin calculations from the prior reviews despite the pending litigation:

> While we acknowledge that the CIT has remanded a portion of one of our prior decisions, it has not yet issued a ruling on our most recent remand redetermination. Moreover, our position in that litigation remains unchanged – namely that the final results were supported by substantial evidence and are fully in accordance with U.S. antidumping law. We note that, even after the remand redetermination, Viraj's margin remains *de minimis*. *See* Final Results of Redetermination Pursuant to Remand: *Slater Steels Corporation v. United States, Slip Op. 04–22 (CIT March 8, 2004)*, (May 7, 2004). In any event, as the CIT has not rendered a final opinion in the cases under litigation that reverses the Department's decisions, we have contin-

> ued to rely on the margins determined in the segments at issue because we consider them to be valid and reliable.

Decision Memorandum at 17.

In reviewing the reasonableness of Commerce's conclusion that the prior review margin calculations were valid and reliable despite the pending *Slater* litigation, the court does not review Commerce's conclusion based on how the *Slater* litigation ultimately unfolded *after* the *2004 Administrative Review*. Instead, the court considers the posture of the *Slater* litigation as it existed at the time of Commerce's decision in the *2004 Administrative Review*. *See* 28 U.S.C. § 2640(b) (2000); 19 U.S.C. § 1516a(b)(2); *cf. Co-Steel Raritan, Inc. v. ITC* 357 F.3d 1294, 1316 (Fed. Cir. 2004) (noting that agency's decision has to be judged by the information available to the agency at the time of the agency's decision). At the time of the *2004 Administrative Review*, the *Slater* court had issued two remands on the issue of collapsing the Viraj Group, but the dumping margins for the Viraj Group were still *de minimis*. Commerce noted there had been no discernible effect on the Viraj Group's margins. Additionally, multiple remands in and of themselves do not necessarily implicate a change to a dumping margin. *See, e.g., Böwe Passat Reinigungs-Und Wäschereitechnik GmbH v. U.S.*, 21 CIT 604, 604–05, 980 F. Supp. 1262, 1263 (1997) (sustaining third remand determination with no change to original dumping margin). Based on its experience conducting three administrative reviews with the Viraj Group, Commerce concluded that the *Slater* litigation would not affect the margin calculation for the Viraj Group in the prior administrative reviews. Such fact-finding by Commerce was reasonable on this administrative record.

Finally, Plaintiff contends that Commerce's decision in *Carbon Steel* (where Commerce declined to revoke an antidumping order because of pending anti-circumvention litigation) and the *2004 Administrative Review* are inconsistent. Specifically, Plaintiff alleges that Commerce has "not explained in any meaningful way why it is justified in deferring revocation when anti-circumvention claims are pending, but not to defer revocation when a fundamental finding of fact on which revocation depends (i.e., the lack of dumping for three years) may well change because of a court challenge." Pl.'s Reply Br. at 6–7. Here again Plaintiff is incorrect because Commerce did explain in its Decision Memorandum why the two proceedings were different and why the outcomes were consistent:

> We also disagree with the petitioners that the circumstances here are similar to those involving pending anti-circumvention claims. As part of its revocation analysis under 19 CFR 351.222(b)(2)(i), the Department must determine whether the continued application of the antidumping order is otherwise necessary to offset dumping. It is entirely reasonable for the

> Department to consider a company's commercial behavior under the existing antidumping order (and any attempts to evade that antidumping order) in the context of this analysis. In contrast, here we have found that Viraj exported subject merchandise to the United States in commercial quantities for three years, and no party to the proceeding has alleged that Viraj has attempted to circumvent the antidumping order. Thus, we have no reason before us to question that Viraj's past commercial behavior will not be an accurate reflection of its future experience, and we have made our revocation decision accordingly.

Decision Memorandum at 17. Commerce concluded that the commercial behavior of the Viraj Group manifested in three consecutive administrative reviews demonstrated to Commerce that continued application of the antidumping order was not necessary to offset dumping with respect to the Viraj Group, whereas the conduct of the exporter/producer in *Carbon Steel*, who was mired in an anti-circumvention proceeding, led Commerce to conclude that continued application of the antidumping order was necessary to offset dumping.

IV. Conclusion

Commerce's decision to partially revoke the antidumping order for the Viraj Group is supported by substantial evidence and is otherwise in accordance with law. The court denies Plaintiff's motion for judgment on the agency record and will enter judgment in favor of defendant sustaining Commerce's administrative review final results.

CARPENTER TECHNOLOGY CORPORATION, Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Court No. 04–00508

JUDGMENT

This case having been submitted for decision, and the court, after due deliberation, having rendered opinions; now in conformity with those opinions, it is hereby

ORDERED that Plaintiff's motion for judgment on the agency record is denied; and it is further

ORDERED that judgment is entered for the Defendant.